Seafood New Zealand

Submission to the Primary Production Select Committee on The Fisheries Amendment Bill 2022

17 June 2022

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1. Seafood New Zealand Ltd welcomes the opportunity to submit to the Committee on the Fisheries Amendment Bill 2022.

2. Seafood NZ is a professional organisation delivering industry-good services for the wider benefit of the seafood industry, an industry that had export earnings of $1.87 billion in 2021 and a generates $5.2 billion in total economic output. Seafood NZ plays a role in developing and presenting the seafood industry's response on legislative and regulatory proposals affecting the industry.

3. Seafood NZ works closely with several other bodies that also represent the interests of specific parts of the seafood industry: Sector Representative Entities. These include NZ Rock Lobster Industry Council, Paua Industry Council, Deepwater Group, and Fisheries Inshore New Zealand. This submission has been developed with input from those groups, and Seafood NZ supports and endorses the submissions made by those individuals organisations.

Our Submission

4. The collaborative approach to developing submissions means that this submission does not provide detailed comment on all aspects of the Bill. Rather, we emphasise key aspects and provide the most in-depth discussion on those parts of the Bill concerning Landings and Returns to the Sea, and Offences and Penalties.

5. Seafood NZ wishes to be heard by the Committee and also seeks an extended timeframe to address the Committee given the importance of the matters therein. Contact details are provided at the conclusion of this submission.

Contextual comment

6. As context for this submission, we feel it is important to emphasise two key matters that relate to fisheries. The first is pragmatism, the second is integration.

7. With regard to pragmatism, fishing and fisheries management are complex and they operate in a challenging environment. When at sea, there is only so much a fisher can control, and the

best do so with remarkable skill. Consequently, the law around some of these matters needs to maintain the requisite flexibility to deal with the unforeseen, the occasional, the unavoidable. The best features of the Bill do this and must preserve some leeway for flexibility rather than being rigid, narrow and prescriptive.

8. The second point of emphasis is integration. The Fisheries Act, and the Quota Management System (QMS) within it, are a carefully integrated suite of measures that should work cohesively to achieve the purpose of the Act (that being *to provide for the utilisation of fisheries resources while achieving sustainability*). Careless intervention in one area poses the risk of undermining other important functions of the Act.

9. We would respectfully ask that the Committee be mindful of these two contextual points in assessing the Bill.

Landing and Returning Fish to the Sea

10. We cautiously support the proposed changes to section 72 and the new section 72A as set out in clauses 13 and 14. The principal change is to revoke the current, somewhat *ad hoc*, rules regarding what can or must be returned to the sea, and to provide some principles upon which to based future decisions. These principles are expressed as exceptions to the general rule that QMS species cannot be discarded.

Acceptable likelihood of survival

11. The first of those exceptions is that a stock or species with an acceptable likelihood of survival can be returned to the sea. Seafood NZ supports and endorses the more detailed submissions made on this matter by Fisheries Inshore NZ Ltd.

12. Permitting the return of live fish to the sea makes sense from both a biological and economic perspective. An example of a situation that needs to be addressed in this Bill is where fish are brought onboard the vessel alive but for whatever reason have no market value, e.g., they may be small juveniles. At present some of these *must* be killed and landed rather than returned to Tangaroa to grow and breed. This serves neither the utilisation nor sustainability purpose of the Act.

13. While this exception provides the potential to address this issue, there is the danger that it is so narrowly interpreted and applied that it is effectively no better than the status quo. To that end, we endorse the concept of an “acceptable likelihood of survival” rather than a “high likelihood” or something more stringent.

14. We also raise some concern regarding how other aspects of these provisions will be interpreted and applied. While outside the scope of the Committee’s deliberations, fundamental questions arise that will have very significant ramifications for those expected to operate under this provision.

15. Given this uncertainty, we consider it is ***imperative*** that consultation is undertaken as the details around the exceptions in the proposed section 72A are developed.

Negative economic value

16. As with the previous exception, Seafood NZ cautiously endorses the exception proposed for a stock or species that has negative economic value.

17. Two examples are provided in the Bill, those being a stock or species would damage other fish, such as ammoniating species; or those that are damaged as a result of unavoidable circumstances, such as diseased or predated fish.

18. We agree that these are well known examples and provide some clarity about some specific circumstances where this provision should operate. We note that the language in the proposed section 72A(2)(b) provides these as examples only, not an exclusive list where the provision applies, we submit that is correct and should be retained.

19. We provide cautious support as we consider there remains significant uncertainty about how this provision will be interpreted and applied. A narrow interpretation would render the exception somewhat meaningless. We also note that exceptions apply to the stock or species and must be identified *a priori* in an instrument. This provides no avenue to dispose of, say, a diseased fish that has been caught, has no economic value, and may render other catch unusable.

Biological, fisheries management, or ecosystem purposes

20. The third exception is for a stock or species to be returned for biological, fisheries management or ecosystem purposes, and has an acceptable likelihood of survival. We endorse this exception but propose two amendments.

21. We consider this is a commonsense exception that allows for returning fish to the sea where that is a better outcome. An example is rock lobster that are in berry (i.e., ripe with eggs before spawning) that are returned to support ongoing recruitment to the stock.

22. While we support the provision, we consider it is unnecessarily narrow as drafted and can be broadened to allow for circumstances that may be currently unforeseen. We suggest two amendments.

23. The first is to replace “require” with “permit”. The use of “require” provides no discretion to the fisher. While this may be appropriate in some circumstances, it may not be in others. Should it be appropriate to *require* that stock or species to be returned to the sea, that can be specified as a condition in the instrument as per section 72A(3).

24. We also suggest removing the requirement that returns should need to have an acceptable likelihood of survival. Many ecosystem functions can be served by returning dead fish to the sea as a food source for other animals, this is an example of a primary ecosystem purpose. If the circumstances dictate that an acceptable likelihood of survival is appropriate, that can be specified in the instrument as allowed for in section 72A(3).

25. We suggest the following amendments:

> *(c) ~~require~~ permit a stock or species to be returned to or abandoned in the sea or other waters from which it was taken if satisfied that the return or abandonment is for a biological, a fisheries management, or an ecosystem purpose and the stock or species ~~has an acceptable likelihood of survival if~~ is returned or abandoned in the manner specified by the instrument*.

A general concern

26. We raise a general concern that food safety risks are not sufficiently accommodated in the Bill. One may argue that fish that are not fit for human consumption necessarily have negative economic value and so are accommodated under the second exception in section 72A. However, all of the three provisions in section 72A(2) operate on a stock or species level, not the individual fish or fishes that may be unfit for human consumption.

27. We note in section 72(3) that it is anticipated that the legal instrument may specify sub-classes of the species by reference to size, weight or other physical characteristics. However, as drafted, it appears that the subject of those exceptions must be identified *a priori*, yet it cannot be known when damaged or decomposing fish will be landed.

28. By way of example, damaged fish may occur due to severe crushing where gut contents leach into the fish flesh itself. This causes an increased rate of spoilage but also in some scombroid species (e.g. trevally, kahawai, tuna, mackerel) increases the risk of histamine formation.

29. Other examples border on the bizarre, there have been examples of nets being brought onboard containing oil drums, large dead carcasses, or broken glass, all of which may render the entire catch unfit for consumption. We consider there needs to be some avenue to address these rare events.

30. These eventualities can be accommodated in some fisheries where observers are present onboard vessels. Section 72(5) of the Fisheries Act contains a defence for discarding fish at sea when authorised by the observer present (and those fish are accounted for within the quota system). This is a pragmatic and sensible provision that has been rightfully retained within the Act, yet no such opportunity exists to address similar issues where observers are not present.

31. To remedy this, we suggest the addition of a further defence that would allow fish, aquatic life or seaweed to be returned to the sea where it is not fit for its intended purpose. This would be subject to specified conditions and is set out on the following page.

32. We also note that Fisheries Communication Centre is not defined in the Fisheries Act but is defined as follows in the *Fisheries (Commercial Fishing) Regulations 2001*. We suggest that definition is also added to section 2 of the Act.

(bb) the fish, aquatic life, or seaweed was returned or abandoned to the sea because it was unfit for human consumption or contaminated or otherwise tainted by the presence of foreign objects or damaged or decomposing fish, seaweed or aquatic life. Provided that the following provisions were complied with, namely,—

- *(i) the commercial fisher notified the Fisheries Communication Centre of the return or abandonment of the fish, aquatic life, or seaweed; and*
- *(ii) the commercial fisher complied with any directions of the Fisheries Communication Centre; and*
- *(iii) the amount of fish, aquatic life, or seaweed was included in the returns for the appropriate period that are required to be made by the commercial fisher under this Act.*

***Fisheries Communication Centre** means the Communication Centre of the Ministry of Primary Industries in Wellington*

Offences and Penalties

New offences for discarding fish—clause 13(1) amending section 72

33. This new section would establish a two-tier offence structure whereby certain discarding would attract a lesser penalty for 50 fish or fewer, and a greater penalty for greater than 50 fish.

34. We consider this formulation to be a little blunt and somewhat arbitrary. Fifty fish doesn't reflect any sustainability risk or loss of economic value. There is no distinction between discarding of 51 pilchards, as opposed to 51 southern bluefin tuna, both having vastly different economic values. Similarly, there is no discretion to consider sustainability risks to a specific stock which may render the offence a greater risk to the sustainability provisions of the Act.

35. There are also some practical difficulties with this formulation for prosecution of offences. A prosecutor would need to identify in the charging document the number of fish. In most cases there will be evidence of how many individuals were returned. However, this will not always be the case.

36. There are two ways in which this may manifest itself, the first is when it is not clear what the parameters are for defining "one" individual. For example, what does one seaweed look like? How would this be defined? As an element of this particular offence the number of individuals would need to be proven beyond reasonable doubt.

37. Second, a difficulty arises when there is a loss of a number of individuals that can be proved, however the evidence is not sufficient as to answer the question "How many"? In the majority of cases this could be inferred from the evidence (e.g. loss of a whole catch) and the Court would likely accept that it was more than 50. But one can envisage situations where it could be more than 50 or could be less. It is not an answer to say in that case you'd just charge with the lesser offence, because that offence has as an element "fewer" than 50.

38. To remedy this, we suggest a lesser offence of returning fish or aquatic life that is subject to the quota management system (with no number limits) and a separate "aggravated" offence with a greater penalty for returns, abandons, more than 50 fish; or more than 50 animals or plants that are aquatic life.

39. It is not uncommon for more than one offence provision to be available for prosecutors to utilise.

40. This would also allow for exercise of prosecutorial discretion when the loss is of more than 50 individuals, but where the circumstances such as, offending history (i.e. first offence), economic value, species abundance, sustainability risk, total green weight, or size of the individuals e.g. pilchards vs southern bluefin tuna, all suggest charging an offence for which there is a lesser prescribed penalty is the most appropriate.

41. If the Committee adopted this approach, an offence with a higher penalty would be available for the most serious of cases.

42. We suggest that section 72(4) be amended as follows:

S 72(4) Every person commits an offence and is liable to the applicable penalty set out in **section 252(3A), (5)(b), or (5A)** if the person, in contravention of **subsection (1)**,—

(a) returns, abandons, or retains fish, animals or plants that are aquatic life —

~~(i) 50 or fewer fish; or~~

~~(iii) 50 or fewer animals or plants that are aquatic life; or~~

(b) returns, abandons, or retains—

(i) more than 50 fish; or

(ii) more than 50 animals or plants that are aquatic life.

New defence for discarding fish—clause 13(2) amending section 72

43. We support the new defence for discarding fish to ensure the safety of a marine mammal, protected fish species or other protected species specified by the Minister. However, as discussed below, we have significant reservation about the burden of proof applying to the defendant (the reverse onus).

Suggested additional clarification

44. The regulatory landscape in fisheries is vast and complex. Within this, there are examples of regulations that *require* return of the fish to the sea. For example, Regulation 33(2) of the *Fisheries (Commercial Fishing) Regulations 2001* provides that "Commercial fishers or persons engaged in the business of fish processing must not land or begin shelling, shucking, or processing dead shellfish."

45. If fishers can't land them or return them to the sea, what can they do with them? It is highly likely there will be provisions like this in a myriad of places that won't necessarily be caught by the Instruments. As such, there is a high chance of overlooking these and setting up a regulatory conflict.

46. To remedy this, we suggest there should be a provision in section 72(5) that allows the return of fish, aquatic life or seaweed if that return is required elsewhere under the Fisheries Act 1996 or Regulations, as follows.

S 72(5)(bc) the fish, aquatic life, or seaweed was returned or abandoned pursuant to any instrument promulgated under this Act.

The reverse onus—clause 13(3) amending sections 72(7) and (8)

47. The proposed new section 72(7) is formulated as follows (underlining added):

> *72(7) In proceedings for an offence relating to a contravention of* ***subsection (4)****,—*
>
> *(a) the prosecutor need not assert in the charging document that the exceptions set out in* ***subsection (2) or (3)*** *or the defence in* ***subsection (5)(ba)*** *do not apply; and*
>
> *(b) the burden of proving that any of the exceptions set out in* ***subsection (2) or (3)*** *or the defence in* ***subsection (5)(ba)*** *applies lies on the defendant.*

48. We strongly object to this provision. Effectively, it reverses the presumption of innocence and replaces it with a presumption of criminality, whereby defendants are to be convicted of an offence unless they exculpate themselves. As such, they expose defendants to conviction for a offence without the prosecution being required, at any stage, to lead evidence which proves their guilt beyond reasonable doubt.

49. There are occasions when it may be apt to require a defendant, who may have more information about salient events than the prosecutor, to suggest reasons why he or she should not be convicted, this is a device to be used sparingly and only if the prosecution has established a *prima facie* case of wrongdoing. Even then, the desired result can usually be achieved by imposing on defendants an evidential burden to introduce defences, without requiring them to discharge the full legal burden of persuading the court on the balance of probabilities that they are innocent.

50. It is settled law that the clear language of a particular reverse-burden provision cannot be overridden by reference to the *New Zealand Bill of Rights Act 1990*. The proper approach is to uphold the legislative intention while acknowledging that the legislation is in breach of section 25(c).[1] However in principle, placing the probative (as opposed to evidential) onus upon the defendant in strict liability cases remains inconsistent with section 25(c) of the *New Zealand Bill of Rights Act 1990*, which secures to everyone charged with an offence "the right to be presumed innocent until proved guilty according to law".

51. Nonetheless, instances of strict liability have been held by the courts to be saved by section 5 of the *New Zealand Bill of Rights Act*, which permits reasonable limitations to the rights contained in the Act so long as they "can be demonstrably justified in a free and democratic society".

52. Whether a reverse burden of proof in strict liability qualifies as a reasonable limitation will depend on the context of each particular statute. It is thus an interpretive matter that varies from statute to statute.

53. The proposed reversal of onus here is different to that provided for generally by section 240 (strict liability) and section 241 (defences). Section 72(7) relates to one of the more difficult cases where the defendant's activity is not necessarily or inherently wrongful, but becomes the *actus reus* of an offence when done in a particular manner. It is about the act itself, not the intent.

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[1] Thus "until the contrary is proved", s 6(6) of the Misuse of Drugs Act 1975 unambiguously imposes a legal burden on the defendant: *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1; and *R v Phillips* [1991] 3 NZLR 175 (CA).

54. There is no obvious reason why this differs to the existing defence within the section 72(5)(a) where "*the fish, aquatic life, or seaweed was returned or abandoned to ensure the safety of the vessel or any crew member*". This provision creates an evidential onus to raise the defence, not a change in the burden of proof.

55. An additional point is that section 72(5)(ba) creates a defence, but sections 72(2) and (3) do not create a defence, but are an exception to the rule. That is if a person follows the exception, no offence has been committed, there is no *actus reus*. For example, here, returning QMS species/fish to the sea is a legitimate activity if done in accordance with the rules set out in the Act or instruments (and in fact is required is some cases by the instrument), but returning to the sea without this permission is an offence.

56. It seems a step too far to assert that a fisher ***must*** return fish to the sea e.g., undersize rock lobster, and then require that, if prosecuted for that return, the fisher prove on the balance of probabilities that he or she was following the law as they carried out that return. That is, "*we will make you do something, but we can prosecute you for doing exactly that and it's up to you to prove that is what you were doing*."

57. As drafted, the rules expose defendants to conviction for an offence without the prosecution being required to lead evidence to establish the elements of the offence which proves their guilt beyond reasonable doubt (in this case the *actus reus* as intention does not have to be established due to section 240). This is not appropriate when those same defendants are required by law to undertake those actions.

58. We suggest that section 72(7) be amended as follows:

> *72(7) In proceedings for an offence relating to a contravention of **subsection (4)**,—*
>
> *(a) the prosecutor need not assert in the charging document that the exceptions set out in **subsection (2) or (3)** or the defence in **subsection (5)(ba)** do not apply. ~~and~~*
>
> *~~(b) the burden of proving that any of the exceptions set out in **subsection (2) or (3)** or the defence in **subsection (5)(ba)** applies lies on the defendant.~~*

New penalties for offences—clause 20 amending section 252

59. The proposed new section 252(3A) is formulated as follows (underlining added):

> *252(3A) Every person convicted, <u>whether in the same or separate proceedings</u>, of 2 or more offences against section **72(4)(a) or (b)** (unlawfully returning, abandoning, or retaining fish or aquatic life on any day) committed within a period of 3 years is liable to a fine not exceeding $250,000 in respect of the second offence and each subsequent offence committed within that period.*

60. The reference to "*whether in the same or separate proceedings"* means that on a person's first prosecution for two or more offences, the maximum penalty of $250,000 would apply and automatic forfeiture. This would include two instances of discarding one or two fish or animals or plants that are aquatic life. The penalty for a single offence of this type is $10,000. This raises several concerns:

- The severity of the penalty may result in a fisher pleading guilty to a single charge to minimise the penalty and/or avoid forfeiture of the vessel
- Prosecutors may choose to progress multiple charges for the purposes of encouraging a defendant to plead guilty to a single representative charge
- This leaves too much discretion in the hands of the prosecutor who effectively chooses the penalty depending on how the chargers are brought. This undermines Parliament's role in prescribing penalties

Undermining accepted principles

61. It is an accepted principle of sentencing that those without previous convictions are entitled to receive credit for absence of previous convictions as a mitigating factor and that the existence of previous convictions is an aggravating feature.[2] Providing for the escalation of a penalty for multiple convictions imposed in the same proceedings undermines that principle.

62. In fisheries, many prosecutions involve multiple incidents due to the operational realities and the strict liability regime. Mistakes are repeated, in many cases this occurs without any intention to offend.

63. It is presumed that the justification for a more serious penalty for second and subsequent offences is to deter reoffending, and to allow the opportunity for reform and to avoid future offending. However, imposing a penalty for two or more convictions in the same proceedings entirely undermines that purpose, there is no opportunity reform.

Uncertainty for defendants

64. The liability to be sentenced commences when the defendant is convicted. However, by charging multiple offences in the same proceedings, the defendant has no indication about the nature of the penalty until the result of those proceedings is known. For example, someone may be charged with several offences against section 72 of discarding fish and could be liable to either a penalty of $10,000, $100,000 or $250,000 depending on how many of the charges are proven. This uncertainty is unreasonable.

Mis-calibrated penalties—clause 20 amending section 252

65. We agree with the policy intent for a graduated penalty regime, particularly given the imposition of cameras on vessels and the likely high probative value of that information.

66. It is common ground that the current provision in the Act for dumping, a fine up to $250,000, is unsuitable. However, what is proposed is the same penalty for two or more convictions in a three-year period, and as discussed above, can be sought in a single proceeding. Further, this potential penalty applies to both discarding of fewer than 50 fish, and greater than 50 fish.

67. We consider that this provision should be reserved to only those offences against section 72(4)(b) where discarding of greater than 50 fish has occurred.

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[2] See section 9, Aggravating and Mitigating Factors, *Sentencing Act 2002*.

68. This approach is consistent with the other proposed provisions in the Bill whereby discarding 50 or fewer fish attracts a fine up to $10,000 and discarding more than 50 fish attracts a fine of up to $100,000. This graduated approach is reflected in the distinction in fines but is ignored in section 252(3A) where multiple offences may have occurred. We see no rationale for this and suggest this more severe penalty should be reserved for only those offences where discarding of greater than 50 fish has occurred.

69. Consequently, we suggest that section 252(3A) be amended as follows:

> *252(3A) Every person convicted, ~~whether in the same or~~ in separate proceedings, of 2 or more offences against section **72(4)~~(a) or~~ (b)** (unlawfully returning, abandoning, or retaining fish or aquatic life on any day) committed within a period of 3 years is liable to a fine not exceeding $250,000 in respect of the second offence and each subsequent offence committed within that period.*

70. We note that the amendment proposed above to section 252(3A) would operate consistently with the proposed amendment to section 72(4) – as outlined above at paragraph 42 – where section 74(4)(a) was a general discarding offence and 74(4)(b) was an aggravated offence of discarding more than 50 fish.

Forfeiture—clause 22 amending section 255C

71. We agree with the policy intent of the Bill that forfeiture should be limited only to the most serious offences, and consequently support the removal of automatic forfeiture for discarding fish. However, forfeiture still applies to two or more convictions for discarding in any three-year period, and as discussed above, this can be in a single proceeding and apply to only one or two fish being discarded. We consider this to be unreasonable.

General comments on forfeiture

72. The impact of forfeiture is acute and indiscriminate, the more so given the provisions of section 245(2), which deem the act or omission of a vessel master or crew member to be the act or omission of the company that owns the vessel.
73. The courts have gone so far as to describe the forfeiture provisions as "draconian". In *Kazakos v O'Leary*, Holland J put his view succinctly as follows:[3]

> *"The automatic forfeiture of goods following the conviction of an offence is a draconian penalty"*

74. This view was endorsed by Doogue J in *Atwill v Basile*. His Honour had particular regard to the impact on "innocent owners" and described the consequences of forfeiture in the following terms:[4]

> *"The consequences for the innocent co-owners are consequences not determined by the attitude of the Courts but by the language of the legislature in the Act. The Courts have on numerous occasions referred before to the nature of that language and the draconian consequences ..."*

[3] HC, Christchurch, AP 5/90, 02 May 1990.

[4] HC, Napier AP 56/64, & December 1994.

75. It is important to appreciate the forfeiture provisions in the Fisheries Act:

- are mandatory,
- do not take account of the circumstances of the offence, and
- do not take account of the level of culpability and the actual fine / penalty imposed.

Amendments sought

76. We consider that forfeiture should never be automatic, but only ever be at the discretion of the Court.

77. Forfeiture should only be discretionary for the most serious offences. In this case reserved only for conviction, in separate proceedings, for two or more offences in any three-year period, for discarding greater than 50 fish; or serious offending where more than 50 fish are discarded.

78. In all other instances, the fines associated with these offences remain significant and are an appropriate deterrent.

79. Consequently, we suggest that clause 22 should amend section 255C(1)(a) as follows:

> ~~*(aa) on conviction for a second or subsequent offence referred to in section 252(3A):*~~
>
> *(2A) on conviction for a second or subsequent offence referred to in section 252(3A) [as amended in paragraph 69 above], or section 252(5)(ba), the court may order that any property used in the commission of the offence is forfeit to the Crown.*

Infringements—clause 23(3) amending section 297(1)(na)

80. The proposed amendment to section 297(1)(na), reproduced below, extends the use of infringements to areas that are currently not available for this penalty (i.e. offences of taking or possession of fish by a commercial fisher). In fact, it extends this regime to apply "without limitation".

> *Section 297(1)(na) prescribing infringement offences against this Act by commercial fishers and other persons, including (<u>without limitation</u>)—*
>
> *(i) offences in respect of fishing and related activities, such as offences in respect of—*
>
> *(A) the taking, possession, return, abandonment, processing, or sorting of fish:*
>
> *(B) transportation connected with fishing:*
>
> *(C) measures to avoid, remedy, or mitigate fishing-related mortality:*
>
> *(ii) offences in respect of reporting and record-keeping requirements:*

81. We raise several concerns with the approach proposed: broadening the regime and the ramifications of that; the effect of cumulative infringements; procedural matters, and double jeopardy. We address these in turn.

Broadening the regime and its ramifications

82. We consider that the extensive use of infringements could undermine a more constructive approach to ensuring compliance. It is likely that infringements will be used when a warning or caution is more appropriate, thus setting up a more adversarial relationship between the industry and compliance officers.

Cumulative infringement offences

83. The ease with which infringement notices can be issued means that the cumulative effects of these should be carefully considered. In the context of fishing, the potential cumulative effect on individuals who may be issued multiple infringement notices, for example, as a result of applying incorrect processes or repeating the same mistake, is significant.

84. Infringement fees are generally fixed and cannot be amended to reflect the particular circumstances at hand. As such, several infringement notices may be issued to one person, or for multiple instances of the same error.

85. In the result, it is possible that the cumulative effect of these infringements may be the same or greater than if that person was prosecuted and convicted. Obviously, this is inconsistent with the intent of the regime.

86. This inconsistent outcome can be addressed by limiting the number of infringement notices that can be issued in certain circumstances.

87. Alternatively, a limit on the maximum amount that can be awarded in infringement fees in a financial year could be applied, this should not be more than any financial penalty that could be imposed as the result of a conviction. Such a regime currently exists in section 296ZI(3) in respect of civil penalties so is not inconsistent with current approaches. Should that maximum be reached, it would be more appropriate to consider prosecution.

Procedural matters

88. The Legislation Design and Advisory Committee's Legislation Guidelines (the Guidelines) provide a statement of principles regarding the appropriateness of regulation-making powers and provisions for secondary legislation.

89. As a general rule, matters of significant policy and principle should be included in an Act. Secondary legislation should generally deal with minor or technical matters of implementation and the operation of the Act.[5] Any policy developed within regulations should be at a lower level than the policy in the Act.[6]

90. We are concerned that the Bill proposes only to establish and infringement regime without any detail regarding the breadth of its application, the nature of infringement fees, or who these will apply to (e.g., crew, vessel master, permit holder, quota owner etc.)

91. Secondary legislation should also be subject to appropriate safeguards.[7] There are standard safeguards under the Legislation Act 2019,[8] but bespoke safeguards can also be included such as: [9]

    (a) requiring the instrument to be made on the recommendation of a Minister (or on the recommendation, approval, confirmation, concurrence, or consent of some other person);

    (b) the Minister may be required to consult regarding the proposed instrument;

    (c) the Minister may be required to have regard to certain matters or be satisfied that certain criteria are met;

    (d) limiting the regulation-making power to certain circumstances;

    (e) a sunset clause;

    (f) requiring reasons to be given for the exercise of the power.

92. The Guidelines also state that legislation should include a requirement to consult when that is necessary to clearly ensure good decision-making practice.[10] Relevant considerations are the significance of the decision, the nature of (and controls otherwise applying to) the decision-maker, and the need for transparency and accountability in the particular context.[11]

93. Bearing this in mind, we consider that the process for making regulations that create infringement offences should be strengthened by requiring the regulations to be made on the recommendation of the Minister and the Minister to consult any persons or organisations that they consider are representative of commercial fishers or any other class of persons having an interest in the proposed regulations. This would ensure commercial fishers are consulted on the creation of any infringement offences that would affect them.

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5 Legislation Design and Advisory Committee *Legislation Guidelines* (2021 ed) at 68.

6 Ibid at 68.

7 Ibid at 74.

8 Ibid at 75.

9 Ibid at 76-77.

10 Ibid at 99.

11 Ibid at 99.

94. This requirement would provide additional assurance and certainty to commercial fishers and others who could be affected by newly-created infringement offences. It would also provide clarity about who needs to be consulted when creating such offences.

Double jeopardy

95. Please refer to the comments below on this matter regarding the proposed demerit regime as they are also relevant to infringement offences.

Consultation

96. Given the absence of detail, we consider there should be a statutory requirement to consult on any matters progressed regarding establishing the infringement regime and this should be made explicit in the Act.

A demerit point regime—clause 24, inserting section 298A

97. Section 298A proposes to authorise regulations to establish a demerit point regime. We note that this is a significant new development that has been exposed to no material discussion or analysis. In fact, MPI's Regulatory Impact Statement contains only one instance where the word "demerit" is used, there is no discussion or analysis of this regime:[12]

> *In addition to a graduated offence structure, the introduction of infringement notice and demerit points regimes are proposed to address lower-scale repeat offending. These would provide another enforcement mechanism, to reinforce to all commercial fishers that any breach of the rules is unacceptable, while providing a fair and proportionate approach to correcting illegal behaviour.*

98. We have numerous concerns about what is proposed and list these below, followed by a more detailed discussion on selected matters.

    (a) Nearly anyone can be given demerits

    (b) The number of demerits for breaches of the Act is unknown

    (c) The breaches that will result in demerits are unknown

    (d) There is no specified expiry of demerits

    (e) Penalties of up to $10,000 can be affixed to accumulated demerits (which may be triggered regularly depending on how the regime is designed)

    (f) Can result in observer placement with associated costs

    (g) Complicates the offences and penalties regime

    (h) Is potentially duplicative. What is the value in both demerits and infringements?

    (i) Can result in greater video footage being reviewed (with associated costs)

[12] Fisheries Amendment Bill: Strengthening Fishing Rules and Policies Regulatory Impact Statement, October 2021, at page 28.

Nearly anyone can be given demerits

99. Under section 298A(1)(a), any person detailed in section 189(a) to (f) and (i) and (j) can receive demerits, this includes:

- holders of fishing permits, special permits, licences, or other authorities or approvals issued or granted under this Act entitling the holder to take fish, aquatic life, or seaweed by any method for any purpose:
- owners, caveators, and mortgagees of quota, and owners and caveators of annual catch entitlements:
- owners, operators, notified users, and masters of vessels registered under this Act:
- owners and persons in charge of any premises where fish, aquatic life, or seaweed are received, purchased, stored, transported, processed, sold, or otherwise disposed of:
- persons engaged in the receiving, purchasing, transporting, processing, storage, sale, or disposal of fish, aquatic life, or seaweed:
- fish farmers and holders of spat catching permits:
- holders of high seas fishing permits issued under section 113H:
- holders of exemptions granted under section 113F.

100. This implies that the demerit point regime could be applied very broadly; yet there is no detail provided. It is also unclear what offences some of these persons or entities could commit under the Fisheries Act.

Double jeopardy

101. Given their punitive nature, civil penalties raise double jeopardy concerns. The principle against double punishment means that in principle, a statutory bar should be in place against double punishment through imposition of a civil penalty and a criminal penalty for the "same conduct".

102. Double jeopardy also protects individuals against the stress and financial burden of being pursued through the courts twice for the purpose of penalising the same conduct. Pecuniary penalty statutes should provide that, once criminal proceedings have been determined, there should be no pecuniary penalty proceedings based on the same conduct and vice versa.[13]

103. There is a danger here that demerit points could be allocated for e.g. infringement offences, or offences under the Act with consequences such as civil penalties and observer placement to follow thereby penalising the fisher twice. Given the lack of guidance in the Bill as to the application of the demerit system / civil penalties regime, this is a very real danger.

104. The law commission has recommended in the past that that there should be a statutory bar against a pecuniary penalty and a criminal penalty being imposed for the same conduct, and against several pecuniary penalties being imposed for the same conduct.[14]

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13 Law Commission (2014) NZLC R133—*Pecuniary Penalties: Guidance for Legislative Design* (ISBN: 978-1-877569-58-6 (Online)).

14 Ibid.

Significant policy

105. Promulgating a demerit point and civil penalty regime is a matter of significant policy. The demerit points and civil penalties could apply to a wide range of breaches of the Act and to a wide range of people subject to the Act. The regulations could also provide for the accumulation of demerit points that could also trigger various consequences, imposition of a civil penalty of up to $10,000, requiring observers on vessels and the review of video recordings from cameras on vessels (with associated costs).

106. There is already a demerit points and civil penalty regime under the Fisheries Act. Demerit points may be issued where an approved service delivery organisation fails to comply with any applicable standards or specifications; or any applicable direction under section 296Q.[15] The existing demerits scheme has a number of features prescribed by the Act:

- a clear procedure for the recording of demerits
- notice requirements[16]
- procedure of objection
- Facility for the Minister to make application to District Court for an order that the demerit points may be recorded[17]
- A limit on the maximum amount that can be awarded in civil penalties against an organisation in a financial year[18]
- Separates the conduct that would attach demerit points from conduct that is an offence under the Act[19]

107. In contrast, under the proposed regime, the procedure for recording demerit points,[20] along with provision for reviews[21] and appeals[22] of penalties for demerit points, is left entirely to regulations. There is no requirement to make any provision for reviews or appeal of penalties, as it is merely stated that the Governor-General in Council ***may*** make regulations regarding these matters. There is no statutory bar against a pecuniary penalty and a criminal penalty being imposed for the same conduct, and against several pecuniary penalties being imposed for the same conduct.

108. Making provision for the processes by which the demerit point and civil penalty regime will operate is a matter that is more appropriate for primary legislation. The details of what breaches incur demerit points, the amounts of demerit points, and civil penalties can be left

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15 Fisheries Act 1996, ss 296R-296Y, 296ZI; Fisheries (Demerit Points and Civil Penalties) Regulations 2001.

16 Section 296T.

17 Section 296V.

18 Section 296ZI(3).

19 Compare sections 296B(5) (approved service delivery organisation knowingly falsifying information): 296ZC(3)(b) (approved service delivery organisation knowingly supplying false or misleading information to the Minister): 296ZC(3)(c) (approved service delivery organisation knowingly omitting material particular in information supplied to the Minister) 296ZC(3)(a) (failure by an approved service delivery organisation to supply information to the Minister): section 296ZD(2) (failure by an approved service delivery organisation to have information audited) to section 296SDemerit points to be recorded by Minister.

20 New section 298A(1)(j)(i).

21 New section 298A(1)(f).

22 New section 298A(1)(g).

to regulations, as they are in the existing regime.[23] But the fundamentals of how the scheme will operate should not be left to regulations. As specified by Legislation Design and Advisory Committee's *Legislation Guidelines,* these are matters of policy, not matters of detail, and should be specified in the Act. The points made above at paragraphs 88-94 in relation to the infringement regime apply to this matter also.

Observer coverage—clause 18 amending section 223

109. As will be apparent from the preceding commentary, there is little clarity regarding the consequences for accumulating demerit points. One exception is the proposed amendment to section 223(3A) as set out below.

> *In deciding whether to place an observer on board a vessel and the appropriate period of observer presence on the vessel, the chief executive may—*
>
> *(a) have regard to the number of demerit points recorded against any person described in section 189(a) to (f), (i), or (j) (including the owner, master, operator, or licence holder in respect of the vessel) under regulations made under* ***section 298A****; and*
>
> *(b) fix a period of observer presence on the vessel in accordance with any regulations made under that section.*

110. With regard to this proposal, we comment on three matters: the costs and equity of observer coverage; the principle of totality in sentencing, and blurring the distinction between observers and fishery officers.

The costs and equity of observer coverage

111. First is the cost of observer coverage. We simply ask who pays for the observer? Should it be the demerit point holder as the person responsible for the act(s) that resulted in those points being accumulated? However, there is no mechanism in the Act to charge any person for an observer apart from quota owners (and in other limited cases such as upon request by the vessel operator).[24]

112. Nothing different is proposed in the Bill, so the default is that it is the quota owner who pays for the additional observer coverage. We see no rationale for that cost being imposed on multiple parties that had no involvement in accumulating demerits, and these demerits may have been received for a variety of different infractions. Further, the demerit point holder may not own any quota and so other innocent parties will be paying for his/her infringement. This cannot be considered an equitable position.

113. We note the same principle applies to increased video monitoring as a consequence of accumulating demerits.

The principle of totality in sentencing

114. Observer costs are significant, MPI currently charges quota owners *c*. $1,500 per day for an inshore observer. If an observer was required for, say, a three-month period, assuming fishing occurred 20 days per month, that would be 60 days of observer coverage at a cost of $90,000. As such, the costs imposed through this mechanism may be far greater than that

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23 See section 296ZI(1).

24 *Fisheries (Commercial Fishing) Regulations 2001*, Schedule 2, Part 4.

applying to an infringement ($3,000 under section 297(1)(nc)), or the cap proposed under the demerit point regime of $10,000 (298A(1)(e)).

115. The principle of totality in sentencing has long been applied to sentencings in criminal cases. For imprisonable offences, the *Sentencing Act 2002* provides that the sentence imposed must not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending.[25]

116. Arguably here, as Parliament would be setting a cap on the civil penalty (we accept that is not a criminal penalty, but the same considerations should apply) it is inappropriate to set up a regime that would have a monetary consequence well beyond those penalties set in the demerit system itself. One could expect a civil penalty to be set at a level appropriate to reflect the gravity of the breach. At the very least one would expect in such circumstances that Parliament would express such an intention with clear words.

Blurring the distinction between observers and fishery officers

117. The Act specifically states that no fishery officer may be appointed as an observer.[26] Thus a strict line has been drawn between the two functions. Observers have no powers to investigate offences or gather evidence of offending or to enter premises (including vessels) for that purpose.

118. In reality, placing an observer on a vessel that is the subject of accumulated demerits can only be to monitor compliance. This blurs the statutory distinction set out in section 223(5) of the Act. It is also contrary to the stated purpose of the observer programme that is set out in section 223(1) as follows:

> *The observer programme is established for the purposes of—*
>
> *(a) collecting reliable and accurate information for fisheries research, fisheries management, and fisheries enforcement:*
>
> *(b) collecting reliable and accurate information about vessel safety and employment on fishing vessels:*
>
> *(c) collecting reliable and accurate information about compliance with maritime rules relating to pollution and the discharge of waste material from vessels.*

119. The purpose of the observer programme could therefore be undermined by diverting resources to enforcement matters.

Conclusion on the demerit point regime

120. Given the above, we strongly suggest that the demerit points regime should be removed from the Bill as it serves little useful purpose in its current form over and above the proposed infringement regime. It only adds complexity and uncertainty.

121. Should a demerit system be retained rather than abandoned, the following amendments could be made.

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25 Section 85, Sentencing Act 2002.

26 See section 223(5) Fisheries Act 1996 re appointment of observers "*No fishery officer or any person with the powers of a fishery officer shall be appointed under subsection (2*) [as an observer]".

122. The Act already provides a template for the minimum requirements for procedures that should be applied to the new demerit point and civil penalty regime, with the necessary modifications in wording to reflect the subject matter of the demerits system.

123. In particular, the following matters should be included in the Act, rather than being left to regulations:

    (a) the procedure for recording demerit points, including:

        (i) the provision of notices to persons against whom demerit points are proposed to be recorded;

        (ii) the process for objecting to the recording of demerit points;

        (iii) what happens if a Minister does not accept the objection and how the disagreement will be resolved;

    (b) how civil penalties will be calculated and notified;

    (c) provision for reviews of civil penalties;

    (d) provision for appeals of civil penalties.

    (e) A statutory bar against a pecuniary penalty and a criminal penalty being imposed for the same conduct.

124. Should the demerit point regime progress—despite these procedural matters, and concerns regarding policy and equity—we recommend removing the capacity to implement observer coverage or seek additional video monitoring as a consequence of accumulating demerits.

Consultation

125. On the assumption a demerit system in progressed, and given the absence of detail, we consider there should be a statutory requirement to consult on any matters progressed regarding establishing the any demerit point regime and this should be made explicit in the Act.

Other matters

Pre-set decision rules

126. Seafood NZ supports the use of pre-set decision rules as a mechanism to provide more agile, efficient and transparent management.

127. We consider that the rationale and description of this policy that was provided by MPI in both the initial consultation and the Regulatory Impact Statement are sound. However, we are concerned that this has not been translated into the Bill in a consistent manner.

128. Seafood NZ endorses and supports the more detailed submission made on this matter by the NZ Rock Lobster Industry Council and the Paua Industry Council.

Changes to recreational management settings

129. Seafood NZ supports the ability of the Minister to set and adjust management settings for recreational fishing using a faster and more efficient process. At present there can be very significant delays in implementing the Minister's decision on recreational management which undermines our fisheries management approach.

130. Two recent examples are provided below and illustrate the need for change:

- After the earthquake in Kaikoura, the commercial paua catch was reduced on 1 October 2017. The recreational daily bag limit was not adjusted 1 December 2019.
- The CRA2 rock lobster TACC was reduced on 1 April 2018, but the recreational bag limit was not reduced until over two years later on 1 July 2020.

Definition of Fisheries Services

131. Seafood NZ notes the need to better define Fisheries Services to allow for the use of onboard cameras. We suggest one small addition to the definition to provide better specificity and align with stated policy.

132. On page four of the Explanatory Note to the Bill, it states (underline added):

> *Extending observation of fishing activities*
>
> *To improve the effectiveness of <u>on-board cameras</u>, the Bill proposes to clarify that requirements and regulations in relation to specified equipment (including electronic equipment) for observing fishing or transportation extends to the observation of fishing related activities, including sorting, processing, and discarding of fish.*

133. Similarly, on page nine, the clause-by-clause analysis notes (underline added):

> *Clause 19 amends section 227A of the principal Act to ensure that the chief executive can <u>require fishing vessels to have specified equipment to observe fishing and related activities</u> in accordance with regulations, consistent with changes made by clause 4 to the definition of fisheries services. The requirement can be applied throughout or at any time during a fishing vessel's voyage.*

134. In both of these examples, it is clear that cameras and associated equipment is to be installed on fishing vessels. We simply seek to make that accepted policy explicit in the definition of fisheries services by adding the underlined text "on fishing vessels" to clause (e) as follows:

> **fisheries services** means outputs produced for the purpose of this Act or the Fisheries Act 1983 as agreed between the Minister and the chief executive; and includes—
>
> (a) the management of fisheries resources, fishing and fish farming:
>
> (b) the enforcement of provisions relating to fisheries resources, fishing, and fish farming:
>
> (c) research relating to fisheries resources, fishing, and fish farming, including stock assessment and the effects of fishing and fish farming on the aquatic environment:
>
> (d) the performance or exercise, by the Minister or the chief executive or any other person, of a function, duty, or power conferred or imposed relating to fisheries resources, fishing, or fish farming (including any observer performing or exercising a function, duty, or power in accordance with the observer programme)
>
> (e) the provision, installation, and maintenance of electronic and other equipment <u>on fishing vessels</u> to observe fishing and related activities, including—
>
> (i) the return, abandonment, processing, or sorting of fish:
>
> (ii) transportation connected with fishing:
>
> (iii) measures to avoid, remedy, or mitigate fishing-related mortality:
>
> (f) the submission, storage, and review of electronic and other data from activities described in paragraph (e).

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