PĀUA INDUSTRYCOUNCIL

NZ ROCK LOBSTER INDUSTRY COUNCIL

Submission to the Primary Production Committee on the Fisheries Amendment Bill

17 June 2022

Summary

The NZ Rock Lobster Industry Council (NZRLIC) and the Pāua Industry Council (PIC) have a particular interest in four aspects of the Bill – i.e., the provisions for:

- Pre-set decision rules;
- The new regime regulating landings and returns to the sea;
- Offences and penalties; and
- Adjusting management settings for recreational fishing using an instrument.

Pre-set decision rules

NZRLIC and PIC support the original policy intent of the provisions, which is to facilitate the use of harvest control rules (HCRs)[1] for adjusting catch limits in a more certain and responsive manner. However, we consider that the drafting of the Bill does not achieve this policy intent. Our specific concerns are that:

- Enabling the Minister to make a decision within an 'approved range or limits' creates uncertainty because it does not specify how the decision will be made; and
- The Bill provides the Minister with too much discretion to depart from a pre-set decision rule without consultation, and this further undermines the certainty and effectiveness of decision rules.

We therefore recommend that pre-set decision rules should:

- Include an 'approved methodology' and the Minister should be required to make a decision that is in accordance with the pre-set decision rule (and not simply within an approved range or limits);
- Always operate at the level of the TAC (not the TACC) and should include rules about how

[1] HCRs are rules which specify a pre-agreed set of responses to a change in the health of a stock, including use of agreed data sources and analyses, and achievement of agreed management targets.

the TAC will be allocated among fishing sectors;
- Reflect all relevant statutory requirements of the sections of the Act under which the rule will operate (rather than requiring the Minister to consider such matters separately each time the rule is applied); and
- Not be able to be revoked by the Minister unless consultation has occurred.

Landings and returns

NZRLIC and PIC support the framework for the new landings and discards regime. However, the Bill's transitional provisions are unworkable because they do not preserve current management settings and practices for the return of legal sized rock lobster and pāua to the sea in circumstances where they are likely to survive. Preventing the return of legal sized rock lobster and pāua serves no useful fisheries management purpose and will significantly reduce the value that can be obtained for the fishing industry, iwi and other fisheries stakeholders. We therefore recommend that:

- Preferred solution: an instrument should come into effect at the same time as the Bill to provide for the return of rock lobsters and pāua to the sea as currently provided for in commercial fishing regulations and (for rock lobster) in Schedule 6 of the Fisheries Act; or
- Second best solution: the current ability to return QMS species to the sea under Schedule 6 should continue to apply during the transition until relevant instruments are made; and
- As part of both the above solutions, the long-standing anomaly whereby legal sized pāua cannot be legally returned to the sea should be corrected.

We also recommend an amendment to the wording of the third criteria for exceptions to the landings requirement (for biological, fisheries management and ecosystem purposes).

Offences and penalties

NZRLIC and PIC support the intent of the proposed new offences and penalties regime, which is to create a more graduated and proportionate regime. However, some elements of the new regime are inconsistent with that intent and impose very severe sanctions and facilitate convictions rather than recognising the features of the new environment for landings and returns. For other elements of the regime (infringement offences and demerit points), it is very unclear how the new powers will be applied and we are concerned that the Bill devolves important decisions to secondary legislation with insufficient guidance and oversight from Parliament. We recommend a number of changes to address these risks.

Recreational management settings

NZRLIC and PIC support the ability of the Minister to set and adjust management settings for recreational fishing using an instrument (rather than regulations) but recommend one minor technical amendment to the Bill.

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Introduction

1. The New Zealand Rock Lobster Industry Council (NZRLIC) and the Pāua Industry Council (PIC) represent the interests of quota owners, harvesters and associated industry personnel in the rock lobster and pāua fisheries. Rock lobster and pāua are both highly valued inshore fisheries that make significant contributions to New Zealand's export earnings and support important customary and recreational fisheries. NZRLIC and PIC have a strong interest in ensuring that the Fisheries Act continues to provide for the sustainable utilisation of pāua and rock lobster fisheries. We therefore welcome the opportunity to submit on the Fisheries Amendment Bill (**the Bill**).

2. NZRLIC and PIC have a particular interest in the following four issues that are addressed by the Bill:

    - **Pre-set decision rules** – harvest control rules (a form of pre-set decision rule) have been used successfully for more than twenty years in the management of rock lobster fisheries and are currently in development for pāua fisheries. They have been used to rebuild many rock lobster stocks, provide management that is responsive to new information on a fishery, and have substantially reduced the time and effort needed to make decisions. NZRLIC and PIC seek to ensure that the Bill's provisions for pre-set decision rules are workable in fisheries such as rock lobster and pāua which are shared between customary, commercial and recreational fishers;
    - **The new regime regulating landings and returns to the sea** – rock lobster and pāua are harvested by methods that are deliberately intended to keep the shellfish alive and both species are routinely returned to the sea with high survivability. NZRLIC and PIC seek to ensure that current practices for returning live rock lobster and pāua to the sea are able to continue, including during any transition period;
    - **Offences and penalties** – NZRLIC and PIC seek a more graduated and proportionate regime for offences and penalties than that provided in the Bill, and greater clarity about the combinations of sanctions that persons operating in the regime will be subject to; and
    - **Adjusting management settings for recreational fishing** – the sustainability of rock lobster and pāua fisheries relies on the catch of all fishing sectors being constrained to their share of the Total Allowable Catch (TAC). NZRLIC and PIC therefore support amendments to enable management settings for recreational fishing to be adjusted in a more responsive manner.

3. Our submission addresses these four key issues. For each issue we provide a general overview of our position and rationale and, where possible, more detailed recommendations for solutions. The recommended drafting solutions are indicative only and we note that there may be alternative ways of addressing the identified concerns.

4. NZRLIC and PIC wish to be heard in support of this submission. As the issues we raise in our submission are complex, we would appreciate extra time to explain our concerns and proposed solutions to the Committee. Contact details are provided at the end of the submission.

Pre-set decision rules

Overview of position and rationale

5. NZRLIC and PIC support the original policy intent of the provisions in the Bill that enable the use of pre-set decision rules (**clauses 5-12**), but the drafting of the Bill does not reflect the original policy intent.

6. Clause 5(1)(a) enables the Minister to:

> *make rules that specify **an approved range or limits** within which any sustainability measure for 1 or more stocks or areas may be set or varied (the pre-set decision rules).*

7. The Explanatory Note states that:[2]

> *The pre-set decision **rules will specify an approved range or limit** within which a sustainability measure for a particular stock or stocks could be set or varied over an approved period.*

8. The requirement to set a sustainability measure within 'an approved range or limits' differs significantly from the original policy intent of these provisions, as expressed by Fisheries New Zealand (FNZ) during public consultation in 2019 and in the Bill's Regulatory Impact Statement (RIS).[3] The original policy intent was to facilitate greater use of Harvest Control Rules (HCRs) in order to streamline fisheries management processes and – importantly – to improve certainty. The proposal was described in FNZ's consultation document as follows:[4]

> *Fisheries New Zealand proposes allowing for **harvest control rules (HCRs), also known as decision rules**, to adjust catch limits. HCRs are a **pre-agreed set of responses** to a change in the health of the stock, and work by translating our science into a recommended catch limit…*

9. An HCR does <u>not</u> specify an 'approved range or limits' as provided in the Bill, but instead describes an agreed methodology for adjusting management responses using pre-agreed information sources and analyses so as to achieve management targets that are also specified in the rule.[5] The development of pre-agreed methodologies and inputs helps fisheries stakeholders to reach agreement about how a fishery will be managed and increases certainty for everyone by de-politicising and streamlining annual decisions made under the HCR.

10. The RIS indicates that, as a result of feedback received during consultation, FNZ renamed the HCR proposal 'pre-set decision rules' because:

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[2] Explanatory Note, page 3 and page 5.
[3] MPI, October 2021. Regulatory Impact Statement Fisheries Amendment Bill: Strengthening fishing rules and policies: landings and discards (mpi.govt.nz)
[4] Fisheries New Zealand (2019). Your Fisheries Your Say here
[5] The RIS correctly describes HCRs as follows: *HCRs would ensure a pre-agreed set of responses to changes in the status of a stock based on pre-agreed information sources and analyses. A HCR specifies the relationship between the inferred abundance of the stock and a management response, such as a catch limit. In this context, stock abundance is inferred by monitoring agreed fishery indicators using specified analyses that have been rigorously tested for their ability to accurately reflect the abundance of the stock, or by modelling the abundance of the stock (a "stock assessment") using agreed inputs and assumptions.*

This better describes the mechanism, provides greater flexibility, and aligns it with existing terminology. The change to pre-set decision rules is also required to provide greater flexibility for the type of intervention the rule controls, including other sustainability measures.

11. There is no indication in the RIS or elsewhere than FNZ intended the 'renaming' of the proposal to signal a major policy shift away from the well-recognised benefits of using HCRs. Nevertheless, that is precisely what the drafting of the Bill has achieved.

12. NZRLIC and PIC do not support the open-ended ability provided in the Bill for the Minister to adjust a TAC or other sustainability measure within an approved range or limits without consultation and without reference to an agreed methodology such as an HCR. The ability to set a sustainability measure within an approved range reduces transparency and decision-maker accountability and undermines the certainty that HCRs are supposed to provide (see example scenario below). Agreement on how a decision will be made is equally important (perhaps more important) than agreement about the range of potential outcomes of a decision.

Scenario illustrating how the provisions in the Bill could operate: In this scenario, a pre-set decision rule is developed for a 100 tonne pāua fishery that is well utilised by commercial, customary and recreational fishers. The Minister has approved a pre-set decision rule that specifies that the TAC may be set in the range of 70 to 120 tonnes (new s.11AAA(1)). Having approved the decision rule, the Minister is free to set a TAC anywhere within this range, without the need to undertake further consultation. The Minister also has full discretion to allocate or reallocate the TAC among commercial, customary and recreational fishers under s.21 without the need to consult (see new s.20(6)(c)). It is obvious from this scenario that the use of a pre-set decision rule, as provided under the Bill, will be:

- highly uncertain – stakeholders will not be able to predict how the TAC might change over time, or how their share of the TAC might be changed at the Minister's discretion;
- highly politicised – stakeholders will lobby the Minister because there is no certainty about how TAC decisions will be made or how the TAC will be allocated among fishing sectors;
- lacking in transparency and accountability – the Minister is not required to justify his or her annual decisions; and
- unsatisfactory for all fisheries stakeholders – stakeholders will lose confidence in the sustainable management of the fishery.

13. We therefore strongly recommend that Bill's provisions for pre-set decision rules should be refocused on the approval of an agreed methodology for adjusting sustainability measures (including but not limited to TACs), consistent with the original policy intent.

14. Our experience in rock lobster fisheries shows that pre-set decision rules become central components of the management regimes for the fisheries in which they apply. It is therefore absolutely critical that decision rules are secure and stable. Having made a decision rule, it would be inappropriate for the Minister to:

- depart from the management response indicated by the decision rule (for example, as a consequence of considering additional criteria);
- allocate the TAC in a way that differs from the specifications in a decision rule; or
- unilaterally revoke a decision rule

without consulting quota owners and others who have participated in the development of the rule and whose businesses, settlement rights, and non-commercial fishing interests are reliant on the ongoing application of the rule. Any discretion that enables decisions that are inconsistent with a decision rule will undermine the benefits of using a pre-set decision rule, including the benefits of certainty and reduced politicisation of decision-making for TACs and total allowable commercial catches (TACCs). There are three circumstances in which we consider the Bill enables decisions that are inconsistent with a pre-set decision rule.

15. The first is that when a decision rule is used to adjust a TAC under s.13, clause 9 new s.13(aaa) requires the Minister to have regard to the interdependence of stocks and the stock management objective[6] when adjusting the TAC. The implication is that the Minister may, after considering the two criteria, make a decision that differs from the decision rule (or why else would the criteria be mentioned?).[7] NZRLIC and PIC recommend that a pre-set decision rule should incorporate all relevant statutory requirements within the rule itself.

16. The second situation relates to the use of decision rules in fisheries such as rock lobster and pāua which are shared between commercial, customary and recreational fishers. In shared fisheries the allocation of the TAC is of vital interest to all fishing sectors and is central to the Act's purpose of providing for utilisation while ensuring sustainability. Decision rules for adjusting TACs should therefore <u>always</u> incorporate rules describing how the TAC will be allocated between the TACC and the allowances for customary and recreational fishing.[8] However, several aspects of the drafting of the Bill imply that: (a) a decision rule could operate at the level of the TACC only; and (b) a TAC decision rule need not include rules about allocation and the Minister may exercise discretion to allocate the TAC without any requirement to consult (see example scenario above). In particular:

    - Clause 5 new s.11AAA(4) provides that, for the purposes of the new section, *sustainability measures include measures referred to in s.11 and total allowable commercial catches*. This provision enables pre-set decision rules to be made for adjusting a TACC independently from the use of a decision rule to adjust a TAC;
    - Clause 12 new s.20(6)(a) reinforces this possibility by allowing the Minister to *make an instrument that sets or varies a total allowable commercial catch… within an approved range or limits specified in pre-set decision rules*. The ability to make a decision rule for a TACC is not linked to the use of a decision rule for adjusting the TAC for the stock;

[6] The objective in s.13 is to maintain the stock at or above, or move the stock towards or above, a level that can produce the maximum sustainable yield.
[7] It is also unclear why these two particular criteria are included in new s.13(aaa) but not the other criteria that are relevant to setting a TAC under s.13 (for example, the way and rate at which a stock is moved towards its target level).
[8] And the allowance for other sources of fishing related mortality.

- Clause 12 new s.20(6)(b) envisages that the allocation of the TAC in s.21 can either be provided for in the pre-set decision rules (which we support) or can be undertaken separately by the Minister (which we oppose), and new s.20(6)(c) specifies that consultation requirements in s.21 do not apply.

17. NZRLIC and PIC therefore recommend that:

    - Decision rules should always operate at the level of the TAC (not the TACC) and the Bill should require that any decision rule adjusting a TAC should also include rules about allocating the TAC among the TACC and the allowances; and
    - There should be no ability to make a decision rule for adjusting a TACC independently of a decision rule for adjusting the TAC for that stock.

18. The third situation in which the Bill enables decisions that are inconsistent with a decision rule is that the Minister may revoke a pre-set decision rule without consultation. We assume this is intended to allow the Minister to rapidly revoke a decision rule that specifies a management response that the Minister does not support. NZRLIC and PIC consider that in these circumstances the Minister should be required to amend, replace or revoke the decision rule, in each case following the consultation requirements in s.12 of the Act. Our experience with rock lobster HCRs shows that the operationalisation of decision rules through annual sustainability processes should always provide sufficient time for consultation on alternative approaches if a decision rule proposes an unacceptable result. We also note that other equivalent revocation decisions under the Fisheries Act (e.g., the revocation of a fisheries plan under s.11A(1) or the revocation of an instrument made under new s.72A[9]) do require consultation.

Detailed recommendations

Recommendation (clause 5)

19. Amend **clause 5 new s.11AAA** to read:

(1) The Minister may
(a) make rules that specify an approved methodology and an approved range or limits within which any sustainability measure for 1 or more stocks or areas may be set or varied (the pre-set decision rules):
(b) amend, replace, or revoke any pre-set decision rules.
(2) Before making, amending, ~~or~~ replacing, or revoking pre-set decision rules (but not when ~~revoking or~~ applying pre-set decision rules), the Minister must comply with section 11(1) to (2A) as if the Minister were setting a sustainability measure for the relevant stock or area.
(2A) If a pre-set decision rule adjusts a total allowable catch the Minister must be satisfied that the rule:
(a) is consistent with the requirements of sections 13, 14, 14B and 20, as the case may be; and
(b) incorporates rules about how the total allowable commercial catch and allowances for the interests described in section 21(a) and (b) will be set.
~~(3) See section 20(6)(b) for requirements in section 21(1) that relate to the making of pre-set decision rules that enable a total allowable commercial catch to be set or varied under the rules.~~

[9] Inserted by clause 14 of the Bill.

(4) For the purposes of this section, sustainability measures include measures referred to in section 11 ~~and total allowable commercial catches~~.
(5)–(6) [as drafted]

Explanation

20. The amendment to new s.11AAA(1)(a) is necessary to ensure that an agreed methodology is approved in a pre-set decision rule, and not simply a range or limits within which a decision may be made.

21. The amendment to new s.11AAA(2) is consequential to our recommended amendment to clause 8 new s.12, as discussed below.

22. The recommended new s.11AAA(2A)(a) requires that the statutory criteria of the relevant operational sections of the Act (i.e., sections under which TACs, TACCs and allowances are set) are reflected in the development and approval of the pre-set decision rule, rather than considered separately by the Minister when applying a pre-set decision rule. We also recommend a consequential amendment to clause 9 new s.13(2)(aaa), below.

23. New s.11AAA(2A)(b) requires that a pre-set decision rule that adjusts a TAC must also include rules about the adjustment of the TACC – in other words, a single decision rule should apply to the TAC and TACC (and other allowances), and a pre-set decision rule cannot be made for adjusting only a TACC. With this clarification in place, s.11AAA(2A)(3) is redundant and can be deleted and the reference to TACCs can be removed from s.11AAA(4) (or alternatively, s.11AAA(4) can be deleted in its entirety).

24. Our proposed amendments will increase certainty, streamline decision-making processes and increase stakeholder confidence in the use of pre-set decision rules.

Recommendation (clause 6)

25. Amend **clause 6 new s.11(7)** to read:

(7) Despite subsections (1) to (5), the Minister may, without further authority than this subsection and without complying with subsections (1), (2), (2A), and (5), make an instrument that sets or varies any sustainability measure for 1 or more stocks or areas if the sustainability measure is set or varied under ~~within an approved range or limits specified in~~ pre-set decision rules.

Explanation

26. As currently drafted, new s.11(7) does not require the Minister to apply the methodology approved in a pre-set decision rule – it simply requires that the sustainability measure is within an approved range. This generates an unacceptable level of uncertainty, defeating the purpose of developing a pre-set decision rule. Instead, the Minister should be required to set or vary the sustainability measure under, or in accordance with, the pre-set decision rule.

27. Similar amendments are required in clause 9 and clause 12 (see below).

Recommendation (clause 8)

28. Amend **clause 8 new s.12(1)** to read:

(1) Subsection (2) applies before the Minister –
(a) [as drafted]
(b) makes, amends, ~~or~~ replaces, or revokes pre-set decision rules under section 11AAA (but not when ~~revoking or~~ applying pre-set decision rules);
(c) [as drafted]

Explanation

29. The amendment to new s.12(1) is necessary because while it is appropriate that consultation should not be required for the annual application of a pre-set decision rule, consultation should be required if the Minister wishes to revoke a rule.

Recommendation (clause 9)

30. Amend **clause 9 s.13(2) new subsection (aaa)** to read:

(1) The Minister shall set a total allowable catch that
(aaa) is in accordance with a pre-set decision rule
~~within an approved range or limits specified in pre-set decision rules, and the catch –~~
~~(i) is set having regard to the interdependence of stocks; and~~
~~(ii) is not inconsistent with the objective of maintaining the stock at or above, or moving the stock towards or above, a level that can produce the maximum sustainable yield~~; or

Explanation

31. As currently drafted, new s.13(2)(aaa) does not require the Minister to apply the methodology approved in a pre-set decision rule (e.g., an HCR) – it simply requires that the TAC is within an approved range. The Minister should be required to set the TAC in accordance with the pre-set decision rule.

32. The matters specified in new s.13(2)(aaa)(i) and (ii) can be deleted because these considerations should instead be incorporated into the approval of the decision rule, rather than considered by the Minister separately every time the decision rule is applied.

Recommendation (clause 12)

33. Delete **clause 12 new s.20(6)** and replace it with the following:

(6) Despite subsections (1) to (5), if a pre-set decision rule has been made to set or vary the total allowable catch for the stock:
(a) the Minister must set or vary the total allowable commercial catch in accordance with the pre-set decision rule; and
(b) the requirements in section 21(2) and (3) (to consult and give written reasons to, the interested persons and organisations) do not apply.

Explanation

34. The current drafting of new s.20(6) should be deleted as it contains many elements that are inconsistent with our recommendations on pre-set decision rules – i.e., it allows the Minister to make a decision rule that adjusts the TACC without reference to any decision rules for the TAC,

it omits any requirement to adjust the TACC using an agreed methodology, and it enables the Minister to reallocate the TAC among fishing sectors without consultation. Our recommended new s.20(6) reflects our position that decision rules should always operate at the level of the TAC (not the TACC) and should always include rules about how the TAC will be allocated.

35. For the avoidance of doubt, if our recommendation to amend new s.11AAA to require that a decision rule to adjust a TAC must incorporate rules about how the TAC will be allocated among the TACC and allowances is not accepted, then we recommend that new s.20(6) should be amended to (a) require the Minister to set the TACC in accordance with the relevant decision rule (rather than within the approved range or limits), and (b) include a requirement for the Minister to consult under s.21 if the decision rule does not include rules about how the TACC and allowances will be set.

Landings and returns to the sea

Overview of position and rationale

36. NZRLIC and PIC support the principles that underpin the revised regime for regulating landings and returns of QMS species to the sea – i.e.:

    - All fish that are caught, whether QMS species or not, must be reported;
    - QMS species mortality caused by commercial fishing must be accounted for within the fisheries management system; and
    - QMS species, live or dead, must be landed unless included in an instrument issued by the Minister – in which case they either may or must be returned to the sea.

37. Current management settings for the commercial harvesting of rock lobster and pāua generally align with these principles. Rock lobster and pāua are harvested using fishing methods (potting for rock lobster, hand gathering for pāua) that ensure the catch is alive when landed and can therefore be safely returned to the sea with a high likelihood of survival. Practices associated with return of rock lobster and pāua to the sea are well-developed, understood and complied with by commercial harvesters. Minimum legal sizes have been set in commercial fishing regulations for rock lobster and pāua for biological and fisheries management reasons and undersized catch must be returned to the sea. Rock lobster and pāua are included among the species deemed to meet the criteria in new s.72A that permit or require species to be returned to the sea (see Schedule 1 clause 6(1)).

38. While NZRLIC and PIC support the policy intent and the primary provisions for the landings and discarding regime in clauses 13 and 14, we are disappointed that the Bill does not include an instrument to exempt rock lobster and pāua from the requirement in new s.72(1) to land all QMS species. This omission is contrary to Cabinet's decision that species that are deemed to meet the exception criteria (including rock lobster and pāua) would be included in an exception issued by the Minister for Oceans and Fisheries with effect on enactment of the Bill on 1

October 2022.[10] The new instrument has not been drafted as expected and instead transitional provisions are provided in the Bill.

39. However, NZRLIC and PIC consider the transitional provisions in the Bill (i.e., Schedule 1 clause 5) to be unworkable as they provide only a partial exception from the landing requirement for pāua and rock lobster, and do not replicate current management settings or practices for the species. In summary, the transitional landing exceptions provided in Schedule 1 clause 5:

    - Allow the return to the sea of rock lobster and pāua that currently must be returned to the sea (i.e., because they are smaller than the minimum legal size or, for rock lobster, are in a state that requires return for biological reasons set out in commercial fishing regulations); but
    - Do not allow the return to the sea of: [11]
        - legal sized rock lobsters that currently may be returned to the sea under the Sixth Schedule of the Act; and
        - legal sized pāua that are returned to the sea for well-established fisheries management reasons.

40. Not allowing the return to the sea of rock lobster and pāua consistent with current management settings and practices serves no useful fisheries management purpose and is contrary to the purpose of the Act.

Why it is important to allow the return of legal size rock lobster and pāua to the sea

41. It is critical that the current management settings for returning legal size rock lobsters to the sea are preserved during any transitional period and in any instrument eventually made to provide an exception to the landing requirement. Legal size rock lobsters are returned to the sea in order to ensure that the commercial harvest aligns with market demands for lobsters of different sizes, which may vary throughout the year and in different markets. The ability to return legal size rock lobsters to the sea helps to maximise the value that is obtained from the commercial harvest of New Zealand's fisheries resources, without increasing sustainability risks to the stocks.

42. It is also critical that current management practices for returning legal size pāua to the sea are fully recognised and provided for. The pāua industry has voluntarily increased the minimum harvest size (MHS) of blackfoot pāua well above the minimum legal size of 125mm in many areas for sustainability and utilisation reasons. For example, at Stewart Island divers return to the sea all legal sized pāua smaller than the MHS of 140mm. Pāua in the south of the country mature at a longer length and the MHS therefore acts as a sustainability safeguard by enabling additional spawning events. It also provides additional utilisation opportunities for customary and recreational fishers who have exclusive access to legal sized pāua that are smaller than the industry's MHS.

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[10] Fisheries Amendment Bill: Strengthening fishing rules and policies: landings and discards – Cabinet paper (mpi.govt.nz)

[11] The return to the sea of legal sized rock lobsters and pāua is prevented by the requirement in Schedule 1 clause 5(2)(a) that a relevant enactment prohibits a person from taking or possessing the species.

43. The industry's use of MHS (and consequent return to the sea of legal sized pāua smaller than the MHS) is formally recognised in fisheries plans that have been approved by the Minister for Oceans and Fisheries under s.11A of the Act.[12] However, in spite of this well established and officially recognised practice, pāua is not currently listed on Schedule 6 – an oversight that has endured for many years in spite of PIC's repeated efforts to have it rectified. The return of legal size pāua to the sea is currently an offence under s.72 of the Act although fisheries officers have not enforced the requirement to land all legal size pāua, allowing the sensible management of the pāua fishery using voluntary MHS to continue. The Bill provides an opportunity to rectify the anomalous situation of pāua by formally allowing the return of legal sized pāua to the sea where they are likely to survive.

Allowing the return of legal sized rock lobster and pāua to the sea

44. NZRLIC and PIC recommend that the Minister should make an instrument under new s.72A(1) excepting rock lobster and pāua from the landing requirement in new s.72(1). The instrument should come into effect at the same time that the Bill is enacted, and could potentially be included in a Schedule to the Bill.

45. We appreciate that the drafting of instruments under new s.72A has been more complicated than anticipated,[13] primarily because of the large number of species that are currently exempt from landing requirements under commercial fishing regulations or the Sixth Schedule, and the difficulty of assessing survivability for species other than most shellfish. However, the drafting of an instrument is comparatively straightforward for rock lobster and pāua because the available science supports the survivability of these species. Practices for safely returning rock lobster and pāua to the sea are well established and the ability to return legal sized catch to the sea is essential to maintaining the value provided to New Zealand by the two fisheries.

46. Schedule 1 clause 6 enables the Minister to make an instrument under new s.72A for pāua and rock lobster *without further authority… and as if the statutory prerequisites for making the instrument had been complied with,* which allows the Minister to make an instrument without complying with the statutory consultation requirement in new s.72A(5). While we appreciate the intent of this provision, in practice we would expect FNZ to engage with industry representatives prior to drafting any instruments, particularly given the challenges and complexities that have clearly prevented FNZ from drafting the instruments, as intended, prior to the introduction of the Bill. To assist with this engagement we have provided draft text for an instrument for rock lobster and pāua (see below).

47. If our preferred solution (i.e., a new instrument, enacted upon enactment of the Bill) is <u>not</u> acceptable for any reason, NZRLIC and PIC recommend that:

    - The ability to return QMS species to the sea under Schedule 6 should continue to apply during the transitional period until relevant instruments are made; and
    - The Bill should explicitly provide for the return to the sea of legal sized pāua.

[12] Chatham Islands (PAU4) Fisheries Plan and Kaikōura/Canterbury (PAU3) Fisheries Plan

[13] In the Bill's Departmental Disclosure Statement, MPI states that *drafting the consequential amendments had proven more complex and more time-consuming than expected and risked delaying the Bill process if progressed with the Bill.*

48. We note that neither our preferred solution nor our second-best solution provides for the full range of QMS species caught in rock lobster fisheries that potentially meet the criteria in new s.72A(2) for return to the sea, including:

    - Rock lobsters with negative economic value (e.g., predated rock lobsters), which potentially meet the criteria in new s.72A(2)(b)(ii); or
    - Finfish and cartilaginous fish that enter rock lobster pots, which potentially meet the criteria in new s.72A(2)(a) for acceptable likelihood of survival.

49. NZRLIC considers that these two circumstances should be the subject of further consideration and consultation by FNZ prior to the drafting of an appropriate instrument.

Exceptions to prohibition on returning to the sea

50. As noted in paragraph 36, NZRLIC and PIC support the principles that underpin the revised regime for landings and returns of QMS species to the sea. We also support the three criteria for exceptions to the landing requirement in new s.72A(2)(a)-(c). These three exceptions, if applied sensibly and in accordance with the purpose and principles of the Act, should be able to address most situations.

51. The first exception is that a stock or species with an acceptable likelihood of survival can be returned to the sea. Permitting the return of lobster or pāua, and the live finfish bycatch of rock lobster potting, makes sense from both a biological and economic perspective. We support the current wording of 'an acceptable likelihood of survival' rather than a 'high likelihood' or something more stringent. In the case of returned live bycatch from rock lobster potting, it is not necessary for 100% of the finfish to survive so long as the predominant portion of returned fish can continue to contribute to fish populations. This approach acknowledges that rock lobster operators have, for the most part, always returned live QMS finfish, have never held Annual Catch Entitlement (ACE) to cover that catch, and the TACCs of finfish species have never taken into account that catch.

52. NZRLIC and PIC support the 'inclusive' wording of the second exception (relating to negative economic value), as currently drafted in the Bill.

53. We also endorse the third exception (relating to biological, fisheries management or ecosystem purposes), but recommend deleting the qualifier that those returns must have an *acceptable likelihood of survival*. For example, rock lobster in berry or undersize rock lobster must currently be returned to the sea for purposes covered by this exception. In almost all cases the lobsters are likely to survive, but if there are circumstances where a lobster is damaged and may not survive, it should not be a requirement to retain and land that lobster. Vessel operators are prohibited by regulation from landing lobsters that are not alive, and Licensed Fish Receivers are unable to accept dead or moribund lobsters. Clearly there needs to be able ability to legally return these lobsters to the sea, while meeting the reporting requirements.

Detailed recommendations

Recommendation (preferred solution – new instrument)

54. Make an instrument made under new s.72A that will come into effect at the same time as the Bill is enacted, with the following (or similar) wording.

Instrument made under section 72A for rock lobster and pāua

1) A commercial fisher who takes any of the following species or stocks must immediately return it to the waters from which it was taken:

   a) Pāua (*Haliotis iris* (ordinary pāua) and *Haliotis australis* (yellowfoot pāua)) that is less than the legal size specified in regulation 32(1) of the Fisheries (Commercial Fishing) Regulations 2001;

   b) Rock lobster (*Jasus edwardsii* (spiny rock lobster) and *Jasus verreauxi* (packhorse rock lobster)) that is less than the legal size specified in:
      - regulation 37(3) of the Fisheries (Commercial Fishing) Regulations 2001; or
      - regulation 14K of the Fisheries (Central Area Commercial Fishing) Regulations 1986 for male spiny rock lobster taken in accordance with that regulation; or
      - regulation 6 of the Fisheries (South-East Area Commercial Fishing) Regulations 1986 for spiny rock lobster taken in accordance with that regulation; or
      - regulation 5C of the Fisheries (Southland and Sub-Antarctic Areas Commercial Fishing) Regulations 1986 for female spiny rock lobster taken in accordance with that regulation;

   c) Rock lobster (*Jasus edwardsii* (spiny rock lobster) and *Jasus verreauxi* (packhorse rock lobster) that is in a state described in regulation 41(1) of the Fisheries (Commercial Fishing) Regulations 2001.

2) A commercial fisher who takes any rock lobster (*Jasus edwardsii* (spiny rock lobster) and *Jasus verreauxi* (packhorse rock lobster)) that is of legal size may return it to the waters from which it was taken if —

   a) that rock lobster is likely to survive on return; and
   b) the return takes place as soon as practicable after the rock lobster is taken.

3) A commercial fisher who takes any pāua (*Haliotis iris* (ordinary pāua) and *Haliotis australis* (yellowfoot pāua)) that is of legal size may return it to the waters from which it was taken if –

   a) that pāua is likely to survive on return;
   b) the return takes place as soon as practicable after the pāua is taken; and
   c) the pāua is returned to suitable pāua habitat on the seabed.

55. Consequential amendments should also be made to remove all references to rock lobster and pāua from the transitional provisions (i.e., the table following Schedule 1 clause 5(b) of the Bill).

Explanation

56. Preparing an instrument under new s.72A for rock lobster and pāua is the most efficient and effective way of preserving current management settings and practices relating to the return to

the sea of rock lobster and pāua. It enacts the new landing regime for pāua and rock lobster as originally intended, without the need for transitional provisions.

Alternative recommendation (second-best transitional solution)

57. Amend the heading of **Schedule 1 Subpart 3** to read:

Subpart 3 –<u>Schedule 6,</u> Fisheries (Commercial Fishing Regulations 2021) and associated enactments

58. Amend **Schedule 1 Subpart 3 clause 5(2)** as follows:

(2) Section 72(1) does not apply to any fish or aquatic life of a stock or species listed in the following table that is taken by a commercial fisher if –

(a) a relevant enactment prohibits a person from taking or possessing the fish or aquatic life (whether by reason of a condition, requirement, size limit, or otherwise) <u>and the fish or aquatic life is returned to or abandoned in the sea or any other waters in accordance with the relevant enactment</u>; ~~and~~ <u>or</u>

~~(b) the fish or aquatic life is returned to or abandoned in the sea or any other waters in accordance with the relevant enactment;~~

<u>(b) the fish or aquatic life is listed in Schedule 6 immediately before commencement and is returned to or abandoned in the sea or any other waters in accordance with the requirements stated in Schedule 6; or</u>

<u>(c) pāua (Haliotis iris and Haliotis australis) of legal size is returned to the seabed from which it was taken, provided the pāua is likely to survive on return and the return takes place as soon as practicable after the pāua is taken</u>.

Explanation

59. If our preferred solution is not implemented immediately upon enactment of the Bill, these alternative amendments provide a workable transitional regime for the period between enactment of the Bill and development of instruments under new s.72A by preserving the current regime for returning fish or aquatic life listed in Schedule 6 to the sea. A separate clause is necessary in order to provide for the return of legal size pāua to the sea because due to a historical anomaly pāua is not currently listed on Schedule 6.

Recommendation (criteria for exceptions)

60. Amend **clause 14** new s72A(2)(c) to read:

(c) require 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 returned or abandoned in the manner specified by the instrument~~.

Explanation

61. The recommended amendment ensures that species that must be returned to the sea for biological or fisheries management reasons (e.g., rock lobsters that are undersized or in berry) are able to be returned to the sea, irrespective of survivability.

Offences and Penalties

62. NZRLIC and PIC support the concept of a graduated and proportionate offences and penalties regime, but we consider that aspects of the Bill are inconsistent with this intent. We provide comment below on some of the provisions that are of particular concern to rock lobster and pāua fisheries, and note that further detail is contained in the Seafood New Zealand submission.

New defence

63. 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 (new s.72(5)(ba).

Reverse onus

64. The Fisheries Act already has a 'strict liability' regime for many types of offences (s.240). However, the provisions in new s.72(7) go much further and create a reverse burden of proof for defendants. NZRLIC and PIC consider that this conflicts with the minimum standards of criminal procedure in the Bill of Rights Act 1990 (BoRA) that a person has the right to be presumed innocent until proven guilty.[14] The concept that a defendant facing criminal charges should not be required to assist the Crown to achieve a guilty verdict is a basic feature of the onus of proof (BoRA s.25(c)) and the right to a fair trial (BoRA s.25(a)).[15] We accept that a defendant may need to submit information to support the defence/exception, but it goes too far to require a defendant to prove their defence beyond reasonable doubt. For example, how would a rock lobster fisher prove beyond reasonable doubt that the finfish returned to the sea was of the particular species, 'size, weight, or other physical characteristics' specified by the instrument? The provision exposes a defendant to conviction for a crime without the prosecution being required, at any stage, to provide evidence which proves their guilt beyond reasonable doubt. NZRLIC and PIC recommend that new s.72(7)(b) should be deleted.

Multiple offences

65. New s.252(3A) specifies penalties for a person convicted of two or more offences within three years, whether in the same or separate proceedings. On a person's first prosecution for two or more offences, they would be liable for a maximum penalty of $250,000 and forfeiture irrespective of the scale of offending – for example, these penalties could theoretically be applied to two instances of discarding one or two fish. We consider that new s.252(3A) is an excessive and severe penalty. It also potentially undermines consideration of absence of previous convictions and is inconsistent with the intent of a graduated and proportionate regime.

[14] Refer s.25 New Zealand Bill of Rights Act 1990.

[15] The circumstances of C*ommissioner of Police v Burgess* [2011] 2 NZLR 703(HC) are set out at [BC12.06(1)]. Asher J at 36.

66. NZRLIC and PIC recommend that new s.252(3A) should be amended to specify that the penalty applies where:

    - The two convictions are in separate proceedings; and
    - The two offences each involve discarding of more than 50 fish.

Forfeiture

67. The Bill provides that forfeiture is automatic for certain offences relating to illegal return of fish to the sea (see amendments to s.255C). NZRLIC and PIC consider that forfeiture should not be automatic, but should be applied at the discretion of the Court so that the circumstances of the offence can be taken into account. Forfeiture should also be limited only to the most serious offences – i.e., in relation to the offences specified in the Bill it should be available only for conviction, in separate proceedings, for two or more offences in any three-year period for discarding greater than 50 fish.

Infringement offences

68. NZRLIC and PIC support the role of infringement offences as part of a graduated penalty regime. However, new s.297(1)(na) extends the use of infringement offences '*without limitation'*.

69. We are particularly concerned about 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. The cumulative effect of multiple infringements may be the same or greater than if that person was prosecuted and convicted and such an outcome would be inconsistent with the intent of the graduated regime. We recommend that the maximum amount that can be awarded in civil penalties to a person in a financial year should be no more than could be imposed as a result of a conviction (e.g., $10,000). Should that maximum be reached, it would be more appropriate to consider prosecution. Our comments on double jeopardy (below, as they relate to the demerit points regime) are also relevant to infringement offences.

70. We are also concerned that the detail of the infringement regime (e.g., breadth of application, nature of infringement fees, who the fees will apply to) will be set out in regulations rather than in the Bill itself. As a general rule, matters of significant policy and principle should be included in an Act whereas secondary legislation should deal with minor or technical matters of implementation and the operation of the Act.[16]

71. Secondary legislation should also be subject to appropriate safeguards, including the standard safeguards under the Legislation Act 2019 and bespoke safeguards such as requiring the instrument to be made on the recommendation of a Minister and requiring the Minister to consult regarding the proposed instrument. [17] Legislative guidelines also state that legislation should include a requirement to consult when that is necessary to clearly ensure good decision-making practice.[18]

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

17 Ibid at 74-77.

18 Ibid at 99.

72. NZRLIC and PIC therefore recommend that the process for making regulations that create infringement offences should be strengthened by:

    - Requiring the regulations for infringement offences to be made on the recommendation of the Minister; and
    - Requiring the Minister to consult any persons or organisations that they consider are representative of commercial interests or any other class of persons having an interest in the proposed regulations.

Demerit **points regime**

73. New s.298A enables the making of regulations to establish a demerit points regime, but the proposal has not been discussed with the industry nor analysed in the RIS or in relevant Cabinet decisions. NZRLIC and PIC consider that critical aspects of the proposed regime are unknown or uncertain, including the following matters:

    - A very large range of persons can be given demerits under s.189(a) to (f) and (i) and (j) including permit holders, quota owners, owners and operators of vessels, persons in change of fish receiving premises. It is unclear what offences would generate demerit points for this very wide range of persons;
    - The number of demerits for breaches of the Act and their expiry is unknown;
    - Penalties of up to $10,000 can be affixed to accumulated demerits, meaning that the penalties could match the level of penalties for infringement fees and prosecutions (which is inconsistent with a graduated regime); and
    - The regime creates double jeopardy as there is potential for the imposition of civil and criminal penalties for the same conduct. Demerit points could be allocated for infringement offences or offences under the Act, with consequences such as civil penalties and observer placement to follow thereby penalising the fisher twice. 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.[19]

74. We are particularly concerned about the way the Bill links the demerit point regime to the observer programme. Demerits can result in observer placement (new s.223(3A), s.298A(1)(h)) and additional review of video footage (new s.298A(1)(i)). However, it is unclear who pays the associated costs, particularly as there is no mechanism in the Act to charge any person for an observer apart from quota owners. Observer costs should not be imposed on quota owners who have no involvement in accumulating demerits for activity that occurs at sea. Observer costs are significant – MPI currently charges quota owners *c*. $1,500 per day for an inshore observer. If an observer was required for 60 days that would amount to $90,000 which is far greater than the maximum civil penalty for demerit points ($10,000).

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

75. Furthermore, the linking of the demerits regime and the observer programme blurs the distinction between observers and fishery officers. The Act states that no fishery officer may be appointed as an observer, drawing a strict line between the two functions.[20] Placing an observer on a vessel that is the subject of accumulated demerits can only be for the purposes of monitoring compliance and is also contrary to the stated purpose of the observer programme in s.223(1).

76. There is already a demerit points and civil penalty regime under the Fisheries Act (s.296S – 296X, which applies to Approved Service Delivery Organisations) in which many of the issues noted above are addressed. In contrast, the Bill's demerit points regime leaves these issues entirely for regulation with no guidance. Many of the matters are more appropriate for primary legislation (see references to the Legislation Design and Advisory Committee's Legislation Guidelines above).

77. In light of the above concerns, NZRLIC and PIC recommend that the demerit points regime should be removed from the Bill.

78. Should the provisions for a demerit points regime be retained, the following matters should be addressed in the Act as a minimum:

- The procedure for recording demerit points, including:
  - (i) the provision of notices to persons against whom demerit points are proposed to be recorded and identification of persons who will be liable for demerits;
  - (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;
- How civil penalties will be calculated and notified;
- Provision for reviews of civil penalties;
- Provision for appeals of civil penalties.
- A statutory bar against a pecuniary penalty and a criminal penalty being imposed for the same conduct;
- Removing the capacity to implement observer coverage or seek additional video monitoring; and
- A statutory requirement to consult with persons representative of commercial interests, and any other class of persons considered to have a relevant interest on any matters progressed regarding establishing any demerit points regime.

Setting and adjusting recreational fishing controls

79. NZRLIC and PIC support the ability of the Minister to set and adjust management settings for recreational fishing using a process that is more responsive, timely and provides better

[20] See s.223(5) "*No fishery officer or any person with the powers of a fishery officer shall be appointed under subsection (2*) [as an observer]".

protection and incentives for sustainable management. Recent examples from rock lobster and pāua fisheries where the time lag in the adjustment of recreational management controls has been inconsistent with the need to ensure sustainability include:

- Following the Kaikōura earthquake in November 2016, commercial catch in the Kaikōura/Canterbury pāua fishery (PAU3) was constrained immediately by ACE shelving and subsequently by a 50% TAC and TACC reduction on 1 October 2017. The recreational daily bag limit was not adjusted until three years after the earthquake, on 1 December 2019; and
- 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.

80. We support the provisions in the Bill that allow the Minister to set or vary management controls using an instrument, but recommend one technical amendment to the empowering provision.

Recommendation

81. Amend **clause 23 new s.297(1)(wa)** to provide for regulations to be made:

(wa) authorising the Minister to set or vary management controls in respect of recreational fishing, including –
(i) Daily limits, maximum legal sizes, and minimum legal sizes for any stocks, species or ~~fisheries management~~ areas; and
(ii) conditions are requirements relating to controls.

Explanation

82. Although the power in new s.297(1)(wa) is inclusive (and therefore not limiting), the current reference to 'fisheries management areas' in (wa)(i) is unnecessary and detracts from the potential scope of the empowering provision. Recreational fishing controls are frequently set for areas that are smaller than a fisheries management area[21] – for example, controls may be set at the scale of the Hauraki Gulf, a particular taiāpure, or a harbour. In the interests of clarity, the empowering provision should therefore refer simply to 'areas' rather than 'fisheries management areas'.

Definition of Fisheries Services

83. Clause 4 amends s.2 by inserting a new definition of fisheries services to allow for the use of on-board cameras. The drafting of the definition is extremely broad and includes, for example, *transportation connected with fishing.* The Explanatory Note and the clause by clause analysis make it clear that the new definition is intended to relate only to fishing vessels but the definition does not limit the scope to vessels.

Recommendation

84. NZRLIC and PIC recommend that the new definition should be amended to make it clear that it relates only to fishing vessels, as follows:

[21] Ten fisheries management areas (FMAs), which collectively cover all of New Zealand's fisheries waters, are defined in Schedule 1 of the Act.

(e) the provision, installation, and maintenance of electronic and other equipment <u>on fishing vessels</u> to observe fishing and related activities, including … [as drafted]

Summary of recommendations

Pre-set decision rules

a) Pre-set decision rules should specify an approved methodology as well as an approved range or limits;
b) The Minister should be required to set or vary sustainability measures in accordance with the pre-set decision rule (rather than simply within an approved range or limits);
c) Pre-set decision rules should be consistent with the requirements of ss.13, 14, 14B and 20 (whichever are relevant to the decision);
d) Pre-set decision rules should always operate at the level of the TAC and should include rules about allocating the TAC among the TACC and allowances (decision rules for adjusting a TACC independently of a TACC should not be permitted);
e) When revoking a decision rule, the Minister should be required to consult under s.12;

Landings and returns to the sea

f) <u>Either: (preferred solution)</u> the Minister should make an instrument under new s.72A(1) exempting rock lobster and pāua from the landing requirement in new s.72(1) and the instrument should come into effect at the same time that the Bill is enacted;
<u>Or: (alternative solution)</u> the ability to return QMS species to the sea under the Sixth Schedule should continue to apply during the transitional period until relevant instruments are made;
g) The Bill should explicitly provide for the return to the sea of legal sized pāua;
h) The criterion for returning of fish to the sea for biological, fisheries management or ecosystem purposes should not require an acceptable likelihood of survival;

Offences and penalties

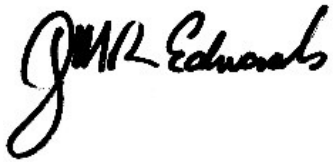
i) The return of fish to the sea in contravention of the Act and relevant instruments should not be subject to a reverse onus of proof for prosecutions;
j) Penalties for a person convicted of two or more offences within three years should apply only where the two convictions are in separate proceedings and each involves discarding of more than 50 fish;
k) In relation to landings and returns offences, forfeiture should be discretionary and reserved only for conviction, in separate proceedings, for two or more offences in any three-year period for discarding more than 50 fish;
l) The maximum amount that can be awarded in infringement fees to a person in a financial year should be limited to $10,000;
m) The Minister should be required to consult before making regulations that create infringement offences;
n) <u>Either: (preferred solution)</u> the demerit points regime should be removed from the Bill;
<u>Or: (alternative solution)</u> if a demerit system is retained, (i) the Act should specify the additional matters identified in this submission and (ii) the Minister should be required to consult before making regulations establishing a demerit points regime;

Setting and adjusting recreational fishing controls

o) Recreational fishing controls should be able to be applied to areas at any appropriate scale (not only at the scale of fisheries management areas);

Definition of fisheries services

p) The new definition of fisheries services should be amended to make it clear the definition relates to fishing vessels.



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