

16 December 2022

Anne Weitheger  
Manager Policy  
Ministry for Primary Industries  
PO Box 10420  
Wellington

Dear Anne

Seafood New Zealand, Fisheries Inshore, the Deepwater Group and the Federation of Commercial Fishermen are presenting the attached submission on Infringements Regulations for Retention and Discarding Offences.

The above parties support the introduction of an infringement regime to address lower level offending. The absence of such a regime has been to the detriment of fisheries management.

We concur that infringement offences will be used only where the criminal standard of proof (beyond reasonable doubt). We concur that infringements should be limited only to those arising from deliberate offending or serious negligence and not arising from accidental events. We concur that re-balancing catch should be mandatory for all infringement offences and prosecutions.

We support Option 2, a flat fee, the fee being based on a flat fee to reflect an offence having occurred and the re-balancing requirement to reflect the element of harm to the sustainability of the fishstock. We do not support the flat fee of \$550 – we consider it excessive in respect of the many low value stocks and when used in combination with the need to re-balance.

We do not support Option 3, the species specific option, as we regard the fees to be applied with re-balancing to be excessive. If however the Ministry seeks to implement that option, we submit that Tier 3 stocks should be limited to those that reflect deliberate intent or have high sustainability impacts e.g. stocks individually harvested (CRA, PAU, SCC, KIN), stocks subject to international quota (tunas) or stocks subject to rebuilding plans (BNS, TAR). Tier 2 stocks would be target stocks and Tier 3 by-catch. We would like to be involved in any discussions on such details.

We would be grateful if your staff could contact us directly to arrange that conversation

Regards,



Jeremy Helson  
Seafood New Zealand



Laws Lawson  
Fisheries Inshore NZ



Aaron Irving  
Deepwater Group



Doug Saunders-Loder  
Federation of Commercial Fishermen



# COMMENTS ON INFRINGEMENTS REGULATIONS FOR RETENTION AND DISCARDING OFFENCES

MPI Discussion Paper No 2022/20

1. Thank you for the opportunity to comment on the discussion paper.
2. This submission by Seafood New Zealand (SNZ) represents the views of Seafood New Zealand (SNZ), Fisheries Inshore New Zealand Ltd (Fisheries Inshore), *the Deepwater Group and the Federation of Commercial Fishermen (the Feds)*. Collectively, these organisations represent the fishers that will be most affected by the amendments to the Fisheries Act (the Act) which require the landings of additional volumes of fish, the implementation of cameras on vessels and the introduction of infringement fees.
3. Use of the word “we” in the submission refers to these organisations.
4. In summary,
  - i. We support the introduction of an infringement regime to address lower level offending.
  - ii. We concur that infringement offences will be used only where the criminal standard of proof (beyond reasonable doubt).
  - iii. We concur that infringements should be limited only to those arising from deliberate offending or serious negligence and not arising from accidental events.
  - iv. We concur that re-balancing catch should be mandatory for all infringement offences and prosecutions.
  - v. We support Option 2, a flat fee, the fee being based on a flat fee to reflect an offence having occurred and the re-balancing requirement to reflect the element of harm to the sustainability of the fishstock. We do not support the flat fee of \$550 – we consider it excessive in respect of the many low value stocks and when used in combination with the need to re-balance.
  - vi. We do not support Option 3 , the species specific option, as we regard the fees to be applied with re-balancing to be excessive. If however the Ministry seeks to implement that option, we submit that Tier 3 stocks should be limited to those that reflect deliberate intent or have high sustainability impacts e.g.stocks individually harvested (CRA, PAU, SCC,KIN), stocks subject to international quota (tunas) or stocks subject to rebuilding plans (BNS, TAR). Tier 2 stocks would be target stocks and Tier 3 by-catch.
5. We would like to be involved in further discussion on the details of the policy. Any queries in respect of this submission or further discussions should be directed to Jeremy Helson, Seafood New Zealand, [Jeremy.Helson@seafood.org.nz](mailto:Jeremy.Helson@seafood.org.nz) , 021 272 8727.

## INDUSTRY SUPPORTS THE INTRODUCTION OF INFRINGEMENT OFFENCES

6. We have a different view of the underlying cause of illegal discarding. We do not deny that some high-grading occurs but too often the cause lies in inappropriate TACCs being set and not revised in a timely manner. TACCs need to be set consistent with abundance in the ocean and relative abundance of by-caught stock. In setting inappropriate TACCs, Fisheries New Zealand (FNZ) create untenable circumstances for fishers who cannot and should not be forced to operate in an unbalanced and poorly managed regime where FNZ seeks to impose inappropriate TACCs, trading off sound fishstock management for excessive enforcement inputs. FNZ might have a view that the TACCs are appropriately set and fishers are unwilling to fish to their allowable limits. We do not concur with that premise as the initiating cause of illegal discarding.
7. Notwithstanding the above context, industry supports the concept of having an infringement offence facility to augment the current Court prosecution provisions within the Act. The New Zealand fisheries management system has long lacked an infringement offence regime to address low level offending. The regime was based on the premise that with a low probability of detection of offences there needed to be a very heavy consequence to provide sufficient deterrence. While this is appropriate where there are serious breaches, the Court has shown on a number of occasions that the penalty regime is inappropriate for minor offences. The introduction of electronic monitoring in the inshore fleet significantly increases the prospects of detection of low-level illegal activity. The introduction of infringement offences and fees is the appropriate penalty regime to accompany the advent of electronic monitoring but needs to be done well.
8. We can see a wider application of well-designed infringement offences being appropriate in other enforcement activities and would welcome discussion with you about this.

## AMENDMENT OF CATCH REPORTS

9. It should be normal practice that where a fisher is convicted of an offence or admits to an infringement offence, the fisher should be required to re-declare, re-balance and account for their catch. It is simply not sound management not to make such a practice mandatory. We hold a strong view that all extractions must be reported and commercial extractions should be subject to the catch balancing provisions of the Act.
10. Industry would view the absence of that requirement to be “an undue enrichment” to the expense of the quota-holder to whom the Total Allowable Commercial Catch is allocated.

## FEATURES OF THE PROPOSED INFRINGEMENT REGIME

11. We have long objected to the strict liability basis for fishing activity enforcement. In paragraph 25, the consultation document identifies the motivation of the fisher – deliberate or seriously negligent – as being a factor to be taken into account as to determining the appropriate course of action for an offence. We recommend that offences being addressed by way of an infringement should be limited to those arising from deliberate offending or serious negligence and not arising from accidental events. Maintaining a pragmatic attitude to address accidental loss, not use of infringements in this circumstance, will improve the relationship between fishers and FNZ.

12. We note and endorse the MPI comment that infringement offences will be used only where the criminal standard of proof (beyond reasonable doubt) is met. We concur with that statement.
13. Permit holders served with an infringement offence must have the right to view the evidence on which the infringement is based. A basic tenet of any justice system is that the accused is shown all available evidence relating to the offence. This is particularly important where many permit holders, who are the party to receive the infringement notice, may not be present on the vessel or be otherwise unaware of the circumstances of the offence. That will mean that MPI must have available facilities across the country for fishers and permit holders to view the fisher's footage. Notwithstanding that FNZ has operated the Proof of Concept on WCNI trial for 2 years, there is currently no facility available. This is programmed with the new supplier but that won't be addressed until late in 2023.
14. An infringement offence regime has the objective of incentivising good behaviour by the fleet. The penalty regime for infringement needs to reflect both the offence and the harm caused by the offence. Infringement offences must not be viewed and executed as a revenue gathering exercise.
15. The Ministry of Justice guidelines<sup>1</sup> for the setting of infringement fees advise:

*In setting infringement fees, consideration must be given to the level of harm involved in the offending, the affordability and appropriateness of the penalty for the target group, and whether the proposed fee is commensurate with the infringement fees for other comparable infringement offences.*
16. The consultation paper refers to proportionality with a bald statement that the fee should be proportionate to the offence without any supporting discussion as to what proportional might mean. Determining the proportionality of an offence we view as being wider than the number of fish involved or the proportion of the catch that is illegally treated. In a fisheries management regime where sustainability is the key driver, proportionality must relate to the potential impact of illegal activity on the sustainability of the stock. Where a stock is managed to its sustainability limit, any illegal activity in the return of dead fish or retention of fish is of a more serious nature than similar activity where the fishery is managed to lower sustainability pressure.
17. Proportionality is most commonly reflected in a progressive structure of fees with an increasing scale of offending. Our analysis of the infringement fee structure under the Road Transport Act 1988<sup>2</sup> is based on the principle that as the level or risk of harm increases, e.g. speed, weight, the level of infringement rises rises (see Schedule 1A or 1B of the Land Transport (Offences and Penalties) Regulations 1999. This is in contrast to a failure to comply with a mandatory provision which is addressed by a flat fee (see Schedule 1 of those regulations). We endorse that principle.
18. The requirement to re-balance any agreed deficiency in catch reporting imports into the penalty regime the element of harm caused to stocks by the relative volume of the offence and takes into consideration the differing value of species and the volume of illegal activity. We endorse those principles.

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<sup>1</sup> <https://www.justice.govt.nz/assets/Documents/Publications/infringement-governance-guidelines.pdf>

<sup>2</sup> <https://www.legislation.govt.nz/act/public/1998/0110/latest/DLM433613.html>

19. MPI appears to place a high value on the simplicity of an infringement regime. While we understand their interest in reducing the transactional cost of assessing infringements, that needs to be balanced with the effectiveness and appropriateness of the overall outcome.

## THE OPTIONS

20. MPI have provided three options for consideration.

*Option 1 No Infringement Fees*

*Option 2 Infringement offence with flat fee*

*Option 3 Infringement offence with proportional fee*

21. We comment on these below. Our preferred option is Option 2 but with a reduced flat fee to import greater equity into the penalties.

*Option 1 No Infringement Fees*

22. Industry supports the concept of having an infringement offence facility to augment the current Court prosecution provisions within the Act and address lower level offending. We do not support this option.

*Option 3 Infringement offence with proportional fee*

23. In submissions, industry and others sought a regime where increased levels of offending brought more serious ramifications and a regime where the diversity in the value of fish was recognised. MPI have proposed the following as an example to meet those needs with the thresholds between the categories being defined by the annual average deemed value:

<b>Category one</b>	<b>Number of fish</b>	<b>Less than 50</b>	<b>50 - 100</b>	<b>Over 100</b>	
	<b>Fee amount</b>	<b>\$200</b>	<b>\$400</b>	<b>\$1000</b>	
<b>Category two</b>	<b>Number of fish</b>	<b>Less than 10</b>	<b>10 - 50</b>	<b>50 - 100</b>	<b>Over 100</b>
	<b>Fee amount</b>	<b>\$400</b>	<b>\$600</b>	<b>\$1200</b>	<b>\$2000</b>
<b>Category three</b>	<b>Number of fish</b>	<b>Less than 5</b>	<b>5 - 10</b>	<b>Over 10</b>	
	<b>Fee amount</b>	<b>\$600</b>	<b>\$900</b>	<b>\$2000</b>	

24. While this option provides a more equitable outcome between stocks, the imposition of mandatory catch balancing in addition to the progressively increasing fee results in an excessive penalty to Category Three stocks far in excess of the harm caused.

25. If MPI were to adopt this approach, we would recommend the stocks be reallocated between the categories to better reflect their sustainability and the value of harm.

26. In general, we would limit Category Three to be the stocks

- i. Stocks taken in single species fisheries (e.g. CRA, PAU, SUR)
- ii. Stocks subject to international catch allocations (STN 1); or
- iii. Stocks subject to rebuilding plans.

For single species stocks or stocks taken singly, illegal discarding or misreporting behaviour is more likely to be deliberate. For stocks taken that are the subject of rebuilding plans, of which all fishers are keenly aware, the level of harm of illegal take and discarding may be injurious to the recovery of the stock. For those reasons, a higher fee structure is warranted.

27. Category Two stocks would consist of the primary target stocks. The sustainability of such stocks is more at risk from targeting and they warrant a higher level of protection than the by-caught stocks.
28. Category One stocks would be the non-target or by-caught stocks. These generally have no sustainability issues and as such it is the offence that is the primary compliance objective, not the harm caused by the offence.
29. We have not analysed the stocks under this regime in any detail as yet and would welcome more discussion with MPI should they prefer this option.

#### *Option 2 Infringement offence with flat fee*

30. While a flat fee is simple to administer, it is more appropriate where there is a simple binary option, e.g. an obligation was completed or not. Flat fees are less appropriate where there is harm of differing degrees in the offence.
31. We would ordinarily not support such an option as this. However as noted earlier, the import of the need to re-balance the volume of illegal activity with either ACE or deemed values provides a reflection of the degree of harm caused by the activity whereas the flat fee reflects an offence of illegal activity.
32. Much of the logic for the importation of harm discussed in the previous option equally applies to this option. The combination of fee and mandatory re-balancing would in our opinion provide an appropriate penalty structure.
33. In respect of the size of the fee however, we contend a flat fee of \$550 would be excessive, particularly for low value by-catch stocks which we expect to be the most common stocks that might be the subject of illegal activity detected by cameras and observers. The fee needs to provide a deterrent to illegal activity but at the same time needs to have some equity across the QMS fishstocks.
34. Following the example provided by MPI for a proportional fee, we would suggest a flat fee of \$250 per offence. For low value bycatch such as pilchards, we would expect the average aggregate penalty to be little more than \$250.00. With catches of pilchards being in the tens of thousands and pilchards not being considered a stock with sustainability issues, the penalty largely reflects the offence of illegal behaviour. However for higher value stocks, such as rock lobster, the aggregate penalty for say 10 fish would be nearer \$1,500 with the bulk of the penalty being the harm component to a stock with high sustainability risk. We see that as appropriate and relative to the risk caused by the offending.

#### THE COMMENCEMENT DATE

35. MPI considers that a mid 2023 implementation would be appropriate. It would coincide with the second tranche of cameras becoming operational. While we are not averse to a 2023 commencement, we are cognisant that a strong communications programme will be needed to make fishers aware of how the offences will be detected, the levels and impacts of the infringement regime and the need for them to address any illegal behaviour prior to the advent

of cameras. The FNZ system that enables the fisher (and permit holder) to view the footage must be operational prior to commencement.

36. With respect to application of the regime, we consider it axiomatic that the regime will operate in a manner where if an offence by a fisher is identified, that fisher will then have the opportunity to learn from this and any future examination of his or her activities will only be scrutinised from the time that the fisher is subject to the infringement fee and not earlier activities. We could not support infringements offences being used to penalise fishers for events that might have occurred prior to the illegal activity having been raised by Compliance.
37. We are aware that, at the same time as cameras are being implemented, the return to the sea provisions formerly under Schedule 6 and Minimum Length Size provisions will be reviewed. These will have the potential of severely disrupting fishing activity and a generous lead time using the lower levels of compliance activity under the VADE system will again be needed to provide fishers with the time to adjust to new and changed circumstances. This approach worked well in the introduction of Electronic Reporting and we look forward to engaging with FNZ on the development of an implementation process. The alternative is to defer the introduction of infringement offences until all the exceptions have been reviewed and the fisher is able to operate a comprehensive new regime, not one where incremental changes will apply to individual stocks and species and fishers might be accidentally offend unaware of newly implemented exceptions changes.

#### THE NEED FOR REVIEW

38. The introduction of an infringement offence regime is somewhat of “a venture into the unknown” for fisheries management and we would expect that its implementation and effectiveness in addressing levels of offending should be subject to monitoring and evaluation at regular intervals.
39. It may be that, as familiarity with the infringement regime as a compliance tool improves, it could be used to implement a behavioural change in other areas where low level offending occurs but the existing penalties are draconian by comparison to the harm caused by the offence.
40. We would welcome discussion with MPI about this.