

REGULATORY MEASURES RELATING TO PROCEDURES FOR WEIGHING FISH PACKED AND FROZEN AT SEA - FINAL ADVICE

Executive Summary

- 1 This paper provides final advice on your decision whether or not to implement some form of standardised weighing procedure for fish packed and frozen at sea. Should you decide to implement a weighing procedure you are asked to make a further decision on the preferred method of formalising such a procedure.
- 2 Current legislation is not prescriptive about how either fishers or the Ministry of Fisheries (MFish) determine the weight of fish processed and frozen at sea. The lack of prescription means the fishing industry (Industry) has concerns about the absence of a level playing field between operators while MFish has concerns about inaccuracies in reported catch. The existence of a formalised weighing procedure would provide certainty to both the fishing industry and MFish in relation to calculating the greenweight of fish that has been processed and frozen at sea.
- 3 The initial position paper (IPP), released on 12 March 2008 as part of the October 2008 regulatory round, presented the status quo (Option 1) as well as three options for formalising a weighing procedure. The options proposed for your consideration in this final advice paper (FAP) remain unchanged from those presented in the IPP.
- 4 The proposals presented in the IPP and in this paper arose as a result of a joint MFish/Industry working group that was established in 2004/2005 to address issues surrounding the determination of greenweight of fish packed and frozen at sea. MFish recommends Option 2 as being the most appropriate and cost-effective method of implementing a standardised weighing procedure. Option 2 will make a significant contribution towards the working group's aims of:
 - Enabling industry to take a consistent approach to determining the net weight of fish processed and frozen at sea;
 - Increasing certainty about the standards that need to be met to ensure catch is being reported accurately; and
 - Improving the efficiency by which MFish can determine the net weight of fish processed and frozen at sea.
- 5 The status quo (Option 1) will not address any of Industry's or MFish's concerns regarding the current situation.
- 6 Option 2, MFish's preferred option, proposes to formalise a weighing procedure by regulatory amendment. A procedure such as that contained in Schedule 1 would be added to fisheries regulations under section 297 of the Fisheries Act 1996 (the Act) and would be used or invoked only in the event

of doubt or a dispute regarding the reported weight of a product line. There would be no direct impact on either Industry or MFish.

- 7 Option 3 also proposes formalising a weighing procedure by regulatory amendment. However under this option use of the procedure would be mandatory; all parties would be required to use it when determining the weight of a product line regardless of whether existing procedures being used were adequate or not. MFish considers that this is impractical, as there are any number of methods by which fishers or licensed fish receivers (LFRs) can accurately calculate the weight of a product line; requiring just one method to be used is likely to be costly as well as ineffective for both Industry and MFish.
- 8 Option 4 proposes that a weighing procedure be imposed on MFish only via a Code of Practice. Option 4 is not MFish's preferred option because it does not go far enough in contributing to the working group's aims of creating Industry consistency as it would apply only to MFish. Additionally, a Code of Practice would not have any enhanced status when viewed by the Courts.
- 9 Two submissions were received in response to the IPP, both of which support Option 2. The submitters concurred with MFish's view that Option 2 best supports the working group's aims as set out in paragraph 4 above.
- 10 MFish proposes that the regulations formalising a weighing procedure, together with a package of related regulations, come into force on 1 December 2008.

The Issue

- 11 The rationale for the establishment of the joint MFish/Industry working group was that the current legislation was not prescriptive about how either fishers or MFish determined the weight of fish processed and frozen at sea. The working group reached an agreed position in March 2005 that formed the basis of an IPP released by MFish in April 2005. The working groups agreed position is contained in an appendix to the IPP, which is available in volume 2 of this FAP.
- 12 Feedback from Industry representatives indicated that they had significant concerns with certain aspects of MFish's April 2005 proposals. MFish agreed to review its proposals and subsequently released a revised IPP in December 2005. The IPP from December 2005 is also contained as an appendix to the IPP in volume 2 of this FAP.
- 13 An FAP was provided to you in May 2006 and you signed it off later that month. You supported a number of regulatory measures proposed by MFish relating to fish packed and frozen at sea. The measures you agreed to consisted of a number of technical proposals to support and clarify the weight determination process together with a proposal to provide regulatory support for a standard procedure to be used by fishery officers in the determination of actual weight of fish landed by commercial fishers. Again, the May 2006 FAP

can be found as an appendix to the IPP contained in volume 2 of this advice paper.

- 14 In June 2006 the Cabinet Economic Development Committee agreed to your proposals and MFish started the drafting process in conjunction with Parliamentary Counsel Office (PCO). PCO drafted all of the technical regulatory amendments however it advised MFish that it considered the proposed weighing procedure to be *ultra vires* (outside the scope of the regulation-making power provided in the Act).
- 15 PCO's concern was that the proposed provision appeared to alter the usual evidential burden of the prosecuting authority by creating a refutable presumption. PCO believed that MFish's proposed regulation would presume a person to be guilty of misreporting unless he or she could prove otherwise, inconsistent with the New Zealand Bill of Rights Act 1990 (NZBORA).
- 16 In September 2006 MFish decided to put all regulatory proposals you approved in the May 2006 FAP on hold because of these concerns. Although many of the regulatory proposals had been drafted they have not yet been approved by the Cabinet Legislation Committee and are consequently not yet in force.
- 17 Giving effect to the overall aims of the working group is still considered high priority by MFish as fish packed and frozen at sea forms a significant proportion of the overall landings from New Zealand fisheries waters. Any issues that create potential inaccuracies in reported catch have the potential to undermine the integrity of the QMS.
- 18 Having a weighing procedure specified in regulation was a key part of the working group's recommendations. MFish now realises however that it is not possible to draft a regulation that contains all the elements of the weighing procedure recommended by the working group. Specifically, it is not possible for a regulation to effectively deem a statement of greenweight to be under-reported.
- 19 Having now reconsidered this issue MFish believes that it is possible for a weighing procedure to be specified in regulation that contains the most important elements of the working group's recommendation but does not introduce NZBORA issues. A procedure consisting solely of procedural matters such as specification of a sample size and deduction of legitimate allowances will still contribute to the overall aims of the working group regarding standards and certainty.
- 20 Should you decide that Option 2 is the most efficient and cost-effective method of formalising a weighing procedure that gives effect to the overall aims of the working group, MFish proposes that it takes effect on 1 December 2008. MFish also proposes that the technical regulatory measures you agreed to in May 2006, and which were approved by the Cabinet Economic Development Committee in June 2006, also take effect on that date forming a package of related regulations.

- 21 Industry has indicated that a 3-month period after the regulations are made is necessary in order to allow companies sufficient time to make the various system changes necessary to comply with the regulations. It is for this reason that MFish proposes a 1 December 2008 effective date rather than 1 October 2008.

Summary of Options

Initial Proposals

- 22 The IPP proposed the following options:
- a) *Option one*: Retain the status quo – although requiring fishers to report accurately the legislation provides no guidance on how to do so.
 - b) *Option two (MFish preferred option)*: Regulate for a weighing methodology to be used in the event of doubt or a dispute. Option two proposed that a weighing procedure be added to fisheries regulations that specified how a product line was to be weighed in the event of doubt or dispute regarding the reported weight of that product line.
 - c) *Option three*: Regulate for a weighing methodology to be imposed on all parties. Option 3 proposed amending fisheries regulations to require all parties to use a single weighing procedure regardless of the circumstances.
 - d) *Option four*: Impose a weighing methodology to be used by Ministry of Fisheries via a Code of Practice. Option 4 proposed that a weighing procedure be imposed on MFish only via a Code of Practice.

Final Proposal

23 The options from the IPP remain unchanged and MFish recommends that you either:

AGREE to:

a) Retain the status quo – the lack of prescription in legislation regarding how to weigh containers of fish that have been packed and frozen at sea will continue.

OR:

b) Amend fisheries regulations to add a weighing procedure similar to that contained in Schedule 1 that is to be used in the event of doubt or a dispute regarding the weight of a product line of fish packed and frozen at sea; AND

c) Approve consultation between MFish and representatives of the fishing industry during the process of drafting such a regulation.

(MFish preferred option)

OR:

d) Amend fisheries regulations to add a weighing procedure to be used by all parties whenever weighing a product line of fish packed and frozen at sea.

OR:

e) Require, via a Code of Practice, a specified weighing procedure to be used by MFish whenever determining the weight of a product line.

Consultation

24 MFish consulted with a wide range of stakeholders on the proposals. Should you agree to MFish's preferred option, regulations would be made under section 297 of the Act.

Submissions Received

25 Submissions regarding this proposal were received from:

- The New Zealand Seafood Industry Council Ltd (SeaFIC);
- Sanford Limited.

MFish Discussion

26 Submissions confirmed MFish's view that Option 2 best meets the overall aims of the working group. No alternative options were proposed.

Rationale for Management Options

Nature of weighing procedure

- 27 As noted earlier MFish is still of the view that giving effect to the working group's overall aims is a high priority. Therefore some form of standardised weighing procedure is necessary in order to achieve the working group's aim of increasing certainty about the standards Industry needs to meet in order to ensure catch is being reported accurately.
- 28 MFish considers that a procedure similar to that detailed in Schedule 1 will contribute towards that aim. It will specify: an appropriate level of deduction for non-fish components of the gross weight (for example ice glaze); what statistically appropriate sample size needs to be taken based on the total number of containers; and how greenweight is to be determined. All components of the procedure detailed in Schedule 1 were suggested by the working group and are accepted by MFish.

Method of formalising weighing procedure

- 29 The IPP presented three options for formalising a weighing procedure: i) regulate for a procedure to be used only in the event of doubt or a dispute regarding the reported weight of a product line; ii) require, via regulation, a procedure to be used by all parties whenever determining the weight of a product line and; iii) require a procedure to be used by MFish only via a Code of Practice.
- 30 The working group's initial recommendation from 2005 regarding weighing was for a regulated procedure to be used by MFish only, thus allowing Industry discretion regarding how they determined product line weights. MFish considers that Option 2 of the IPP (weighing procedure to be used only in the event of doubt or a dispute) is the option that is the most consistent with the working group's initial recommendation.
- 31 The Option 2 approach will give Industry certainty regarding how MFish will determine the weight of a product line in the event of doubt or a dispute but will continue to allow Industry discretion regarding how they determine product line weights. It will also allow MFish to carry out its usual procedure of weighing a non-random sample of cartons whilst engaged in routine inspections.
- 32 The rationale for Option 3 of the IPP, requiring a regulated procedure to be used by all parties whenever determining the weight of a product line, was that it would create a level playing field. All fishing vessel operators and LFRs would know exactly what was required to be done in order to weigh a product line. It would therefore provide the greatest certainty of the standards that need to be met to ensure catch is being reported accurately. However that certainty would come at the greatest cost to both Industry and MFish.
- 33 The rationale for Option 4 of the IPP (procedure imposed on MFish via Code of Practice) was that it would contribute towards the working group's aims regarding consistency and the standards that need to be met to ensure catch is being reported accurately. It was also consistent with the working group's initial recommendation for a procedure to be used by MFish only.

- 34 MFish's preference for a procedure to be specified in regulation as opposed to a Code of Practice is because of the additional status conferred by regulation. Having a weighing procedure contained in regulations gives a far greater degree of certainty that no other procedures will be considered. It also obviates the need for expert witnesses to attest to the robustness of the procedure. A Code of Practice would still be preferable to the status quo however.
- 35 MFish's approach in Option 2 is that the regulated procedure would be non-specific in the parties it applies to and that it would be required to be used only in the event of doubt or a dispute. The rationale for this is that it will allow Industry to have discretion regarding how they determine product line weights as well as allowing preliminary inspections to be undertaken by MFish. The procedure would only be invoked by MFish if preliminary inspections resulted in MFish having doubts as to the reported weight of a product line.
- 36 Section 297(1)(a)(xi) of the Act provides for regulations to be made "regulating the methods, equipment, and devices to be used for determining the size or weight of any fish, aquatic life, or seaweed". MFish considers a weighing procedure specified in regulation would be made under this section of the Act and could be placed within the Fisheries (Commercial Fishing) Regulations 2001.

Assessment of Management Options

Option 1 – Status Quo

Impact

- 37 The status quo, being the lack of prescriptive legislation about how fishers and MFish determine the weight of fish processed and frozen at sea, led to the establishment of the MFish/Industry working group in 2004/05. The working group was established after Industry attempts to develop a Code of Conduct to address the matter had failed.
- 38 The reasons for Industry's attempt at a Code of Conduct and the subsequent establishment of the working group were twofold; Industry had concerns about the absence of a level playing field between operators while MFish was concerned about inaccuracies in reporting catch. All concerns will continue to remain valid until such time as a solution is achieved.

Costs

- 39 The status quo does not provide Industry with the required certainty that they are meeting the standards necessary to ensure catch is reported accurately. It also potentially undermines the integrity of the QMS if catches are not being reported accurately. Because of the total amount of fish that is processed and frozen at sea inaccurate reporting of catches by only a small percentage may translate into thousands of tonnes of fish per year that is not subject to the catch balancing regime.
- 40 Many deepwater stocks (those most likely to be processed and frozen at sea) have had progressive reductions to their total allowable commercial catches (TACCs) in recent years. Operators may seek to offset the reduced TACCs by

taking advantage of the lack of standards regarding reporting in order to maximise the reduced amounts of annual catch entitlement (ACE) available to them.

- 41 Because of the difficulties in determining the true and provable weight of fish taken MFish has not taken any prosecutions regarding misreporting of fish frozen and packed at sea in recent years.

Benefits

- 42 Maintaining the status quo only benefits those vessel operators who may take advantage of the lack of certainty regarding standards necessary to ensure catch is reported accurately. For example operators may make allowances for glaze that MFish does not consider accurately reflect the actual amount of glaze on certain product types.

Option 2 – Specify in regulation a weighing methodology to be used in the event of doubt or dispute about the reported weight of a product line (MFish preferred option)

Impact

- 43 Specifying in regulation a weighing methodology that is to be used in the event of doubt or dispute regarding the reported weight of a product line will make a significant contribution to the aims of the working group, which are detailed in paragraph 4.
- 44 It will enable Industry to take a consistent approach to determining the weight of fish processed and frozen at sea because the extent of any legitimate deductions, including ice glaze and polyphosphate solutions, will be specified in regulation.
- 45 The procedure will increase certainty about the standards that need to be met to ensure catch is being reported accurately. Although Industry will not be required to use the procedure, it will know that in the event of MFish investigating the reported weight of a product line and having doubt as to that reported weight MFish will be required to use the procedure.
- 46 The procedure, in conjunction with the related technical regulatory measures approved by you in 2006 (for example additional labelling requirements), will also improve the efficiency by which MFish can determine the net weight of fish processed and frozen at sea. It will not change the current practice of allowing MFish to perform routine inspections. In the event that such inspections lead to MFish having doubts as to the reported weight, MFish will be required to use the procedure to obtain an estimate of the reported weight of that product line.
- 47 A key point about having a regulated weighing methodology that consists only of the procedural aspects of determining the weight of a product line is that there are no implications for either MFish or Industry. If invoked by MFish the regulation does not presume the resulting weight to be correct. Neither does it deem a reported weight to be incorrect if it is less than the weight obtained by using the procedure. MFish would still be required to prove that a fisher has provided an incorrect declaration of weight under the existing offence

provisions of the Fisheries (Recordkeeping) Regulations 1990 or the Fisheries (Reporting) Regulations 2001.

Costs

- 48 There are no costs to MFish resulting from implementation of a regulated weighing methodology. There may be costs to some vessel operators who may need to adjust their current practices in order to meet the standard necessary to ensure catch is reported accurately. For most operators however there should be no cost.
- 49 The disadvantage of Option 2 is that it does not require Industry to use the methodology. This has the same risks as the status quo. However MFish considers that Option 2 mitigates those risks for the reasons explained in paragraphs 45-46.

Benefits

- 50 MFish considers this option will help to achieve the key aims of the working group around consistency and standards whilst providing flexibility to both Industry and MFish regarding how product line weights are determined.

Option 3 – Impose regulated methodology on all parties

Impact

- 51 Under this option both Industry and MFish would be required to use a regulated weighing methodology to determine the weight of product lines. There would be no discretion available to either party.

Costs

- 52 A weighing procedure such as that detailed in Schedule 1 implies that the fish must be landed before following the procedure. However it may be easier for operators to weigh fish at sea using a different method. The requirement for Industry to use a single method is therefore likely to impose unnecessary costs as it does not recognise that there are many ways by which accurate weights can be obtained.
- 53 From MFish's perspective the requirement to use the methodology under all circumstances would remove the ability to undertake casual inspections. This would also likely be time-consuming and costly. For the reasons described in this and the preceding paragraphs Option 3 is not MFish's preferred option.

Benefits

- 54 The benefit of this option is that it would address the working group's concerns regarding the lack of a level playing field between operators as all parties would be required to use the regulated methodology.

Option 4 – Impose procedure on MFish via Code of Practice

Impact

- 55 Under this option an internal MFish Code of Practice would require Fishery Officers to use a procedure such as that specified in Schedule 1 when conducting investigations into the weight of a product line. MFish would ensure that Industry was aware of the Code of Practice in order to achieve the working group's aims regarding consistency and certainty.

Costs

- 56 As stated earlier Codes of Practice do not have any enhanced status when viewed by the Courts. Any prosecution based on weighing procedures would still require expert witnesses from both the prosecution and defence.

Benefits

- 57 A benefit of this option is that it would contribute to the working group's aims of creating Industry consistency and improving the standards Industry needs to meet to ensure accurate reporting of catch; Industry would be aware of the approach MFish would be required to take regarding weighing a product line.

Other Management Controls

- 58 As detailed in paragraph 13 providing for a regulated weighing procedure was one of the recommendations you approved in May 2006 and one component of the regulation package subsequently approved by the Cabinet Economic Development Committee in June 2006. This FAP only relates to an amended proposal to provide for a specified weighing procedure. MFish does not intend to re-consult on the other regulatory measures, and intends that those other measures come into force on 1 December 2008. The other measures are detailed in paragraphs 59-61 below.
- 59 The Fisheries (Commercial Fishing) Regulations 2001 will be amended to require commercial fishers packing and freezing fish at sea to label the containers in which the fish is packed with:
- Species identifier (common name or scientific name or species code);
 - Landed state;
 - Packing date;
 - Net weight; and
 - A vessel identifier (the name or registration number under the Fisheries Act 1996 or the number assigned by the New Zealand Food Safety Authority to limited processing fishing vessels or vessels operating under a registered risk management programme pursuant to the Animal Products Act 1999).
- 60 The requirement above will not apply to fish that are processed at sea but frozen individually such as ling, toothfish or tunas, as there is already an established procedure for identifying and weighing such fish.

- 61 The Fisheries (Recordkeeping) Regulations 1990 will be amended to:
- Require commercial fishers packing and freezing fish at sea to keep records of packaging weights and to produce these on demand to any MFish officer;
 - Clarify that ‘naked blocks’ (blocks of fish product without any form of packaging or wrapping) are containers for the purposes of recordkeeping and labelling;
 - Require licensed fish receivers to include actual weight of fish, rather than net weight, on unloading dockets (where practicable) and purchase tax invoices;
 - Require licensed fish receivers to include container number and type on purchase tax invoices as well as unloading dockets;
 - Introduce a definition of ‘product line’ being a set of containers from the same landing, all containing the same net weight of fish and containing fish of the same species and landed state; and
 - Allow licensed fish receivers to make deductions for polyphosphate solutions as well as ice.

Statutory Considerations

- 62 Section 297(1)(a)(xi) of the Act provides for regulations to be made regulating the methods, equipment, and devices to be used for determining the size or weight of any fish, aquatic life, or seaweed.
- 63 Section 25(c) of the New Zealand Bill of Rights Act 1990 (NZBORA) protects the right of an accused to be presumed innocent until proven guilty. Regulations may not be created that are contrary to the rights and freedoms in the NZBORA unless the enabling Act specifically allows for it. The Fisheries Act 1996 contains no such enabling mechanism.
- 64 Section 25(c) therefore prevents the imposition of a reverse onus of proof in the absence of an express statutory provision imposing the burden of proof on the accused. All options, including MFish’s preferred option, are consistent with this section.
- 65 Additionally, in forming the management options the following statutory considerations have been taken into account:

Section 5(a) and (b) – Application of international obligations and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992: There is a wide range of international obligations relating to fishing (including sustainability and utilisation of fishstocks and maintaining biodiversity). MFish considers issues arising under international obligations and the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 are adequately addressed in the management options.

Section 8 – Purpose of Act: MFish considers Options 2, 3 and 4 presented in this paper provide the best options for continuing to provide for utilisation of fishstocks processed and frozen at sea while ensuring sustainability of those stocks.

Section 9 – Environmental principles: None of the proposed options have any implications for section 9 of the Act.

Section 10 – Information principles: The information principles of the Act require that decisions be based on the best available information, taking into account any uncertainty in that information, and applying caution when information is uncertain, unreliable, or inadequate. MFish considers that the procedure proposed in Schedule 1 represents the best available information in terms of accepted statistical methodology and realistic deductions for ice glaze and polyphosphate solutions.