New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Ministry for Primary Industries
Wellington

By email: International_Fisheries@mpi.govt.nz

Re: Public consultation on amendments to the Fisheries Act to ensure New Zealand continues to meet its international fisheries obligations

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to provide feedback on the '*Public consultation on amendments to the Fisheries Act to ensure New Zealand continues to meet its international fisheries obligations*' consultation paper (**Consultation Paper**).

2. This submission has been prepared with the assistance of the Law Society's Environmental Law Committee. The Law Society acknowledges the overall purpose of these proposed amendments, which are intended to implement New Zealand's fisheries management and compliance obligations. This submission addresses concerns in respect of three of the proposed amendments.

Requiring a High Seas Fishing Permit for fishing in other States' waters

3. The Consultation Paper indicates that the Ministry's preferred option is to amend Part 6A of the Fisheries Act 1996 (**Act**), to specify that where a person uses a New Zealand ship to fish outside New Zealand fisheries waters, including in the waters of another state, a High Seas Fishing Permit (**HSFP**) is required. The Consultation Paper states that this would meet criteria (a) and (b)[1] by strengthening, expanding, and monitoring reporting requirements that come with being issued an HSFP to include New Zealand vessels and activities in *both* the High Seas and the waters of other states.

4. There are two potential issues with the proposed amendment. First, the proposal to extend monitoring under the Act's HSFP provision to NZ vessels operating within the waters of a foreign state could potentially place the NZ operator or vessel owner and crew in the invidious position of either complying with the NZ requirements or the requirements of the foreign state. For example, the proposed amendment does not address the potential issue that some foreign states may have confidentiality provisions relating to the release of fishing information to the jurisdictions of non-state nationals. NZ itself had this kind of provision in relation to the confidentiality of fishing information, including position data, under section 66 of the Fisheries Act 1983. That provision was the subject of a number of cases relating to the protection of confidential information. The Consultation Paper proceeds on the basis

[1] Page 5, the criteria against which the Ministry has assessed each option.

that no conflict will arise. However, the assumption is questionable, absent a specific provision in the amendment that exempts compliance with its terms in the event there was such a conflict.[2]

5. Secondly, the proposed amendment may not address the policy objectives and criteria, or the proposed outcomes of the Consultation Paper. It is difficult to see how extending the HSFP provisions to include NZ vessels operating in another state's waters would provide any significant advantage to enforcement of NZ's international obligations in circumstances where the vessel had committed an offence against the foreign state' laws but had left the jurisdiction of that state before that state could appropriately respond. Even if the vessel operator and crew complied with the requirements of the HSFP but committed an offence, NZ authorities would still require the co-operation and evidence of the foreign state to establish that there had been an actual breach of the foreign state's laws relating to fishing. In other words, extension of HSFP provisions to a NZ vessel operating in a foreign state's waters may not provide an adequate base for prosecution for breaches of that state's laws under section 113A of the Act.

6. A more effective means of achieving compliance with NZ's international fishing obligations would be to amend section 113A along the lines of the Lacey Act 1900 (US). The Lacey Act focuses on the prohibition of interstate and international trafficking of protected wildlife and is frequently used by US federal prosecutors in respect of foreign wildlife "*taken, possessed, transported, or sold in violation of state, federal, or ... foreign law*". The current provisions of section 113A are less expansive than the provisions of the Lacey Act in that it only applies to the taking or transportation of fish, aquatic life or seaweed within "*the national fisheries jurisdiction of a foreign country ...*".

7. The provisions of the Lacey Act which are most relevant to the objectives of the policy paper are sections 3372(a)(1) and (2) which generally makes it unlawful to:

   - import, export, transport, sell, receive, acquire or purchase
   - wildlife, fish or plants that have been
   - taken, possessed, transported or sold in violation of a
   - state, federal, foreign, or tribal law or regulation.[3]

8. The objectives and criteria of the Consultation Paper could be better achieved by amending section 113A, by inserting a new provision similar in scope to that of the Lacey Act in respect of fish, aquatic life or seaweed "*imported, exported, transported, sold received, acquired or otherwise purchased by any New Zealand national or person using a ship that is registered under the Ship Registration 1992 or that flies the New Zealand flag that has taken, possessed, transported or sold those items in violation of the laws of a foreign fishing jurisdiction."*

9. This additional amendment would make it an offence under section 113A to:

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2 I.e., that the foreign state's laws take precedence, or that it is a defence that compliance with the HSFP would have been contrary to the foreign state's laws.

3 For further discussion see Anderson, R. S. (1995) *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking.* Public Land Law Review. 16 Pub. L. L. R. 27.

- take or transport fish in the national fish jurisdiction of a foreign country (section 113A)(1)), and
- import, export, transport, sell, receive, acquire, or purchase that fish, aquatic life or seaweed taken, possessed, or transported or sold in violation of that foreign state's laws.

10. It would effectively extend the offence provisions of section 113A beyond the scope of activities that simply took place within the national jurisdiction of the foreign state and would extend to any form of subsequent "trafficking" of that fish, aquatic life, or seaweed.

11. A further observation about the scope of section 113A may be made. As noted above, section 113A provides an offence of *taking or transporting* fish in breach national fisheries laws of a foreign country. Section 113A is narrowly framed. It would not be an offence if the action complained of was that a vessel went into closed areas, or did not maintain or provide reports and records. As section 113A only covers a specific category of offending, rather than any offending against a foreign country's fisheries laws, it is difficult to see how requiring an HSFP to cover fishing in another country's fisheries waters would assist with the stated objectives. It may be better to consider amending section 113A to include other activities associated with fishing and fishing operations, or to simply create an offence of acting in contravention of another country's fishing laws.

12. An amendment of section 113A along these lines would also meet the policy objectives of some additional aspects of the Consultation Paper, particularly those relating to sections 113H, 113F and 113N of the Act.

Increasing administrative penalties

13. The proposals relating to the extension of the administrative penalties regime appears to be appropriate but does raise an ancillary issue.

14. The current administrative penalties regime in respect of high seas fishing (and the proposed amendments) provide a sensible alternative option to costly court proceedings. That legislative objective should be extended to the broader offence provisions of the Act. The infringement offence provisions that apply to general offences under the Act are much more limited in nature and application than the administrative penalties regime set out in Part 6A of the Act. Extension of the administrative penalties regime of Part 6A to other parts of the Act would likely lead to a substantive reduction in the number of defended prosecutions and associated applications (e.g., applications for special reasons for non-forfeiture and relief) which have a significant impact on the current resources of the criminal justice system.

Enabling Detention of IUU fishing vessels in port

15. In respect of the preferred option identified at page 13 of the Consultation Paper, the following matters as to the application of Article 73 of the United Nations Law of the Sea Convention (**UNCLOS**) are noted.

16. Internationally, states do not have the right to seize and detain foreign-flagged vessels indefinitely. Instead, they must exercise any statutory power of seizure in accordance with

Article 73 of UNCLOS. Specifically, Article 73(2) provides that, "*arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security*."

17. Where it is alleged that the detaining State has not complied with the provisions of Article 73, a State Party may apply to the International Tribunal for the Law of the Sea (**ITLOS**) for the prompt release of the vessel and/or its crew upon the posting of "a reasonable bond or other security". The Act must be interpreted in a manner consistent with New Zealand's international obligations relating to fishing, including obligations arising under Article 73.

18. ITLOS has heard several 'prompt release' proceedings brought because of coastal state nations detaining foreign vessels pursuant to forfeiture provisions. In each case ITLOS has set a reasonable bond and ordered the detaining country to release the vessel. As these were preliminary matters, however, ITLOS has not yet been called on to directly address the legality or enforceability of 'permanent forfeiture' provisions, or the status of a bond paid to secure release.

19. If a vessel remains within another country's jurisdiction and becomes forfeit to, or is confiscated by that state, it is too late to invoke Articles 73 and 292 to secure the release of the vessel. However, once released under bond, neither the provisions of UNCLOS nor any decisions suggest that release is temporary and the vessel can either be called back to the relevant jurisdiction or its forfeiture enforced in another jurisdiction. The approach taken by ITLOS thus far indicates that the bond stands in place of the vessel once released, and the release is permanent.

20. The principle that bond stands in place of vessel is consistent with admiralty law. In admiralty 'bail' is the substitution of personal security for that of the property arrested. It has been suggested that bail represents the ship, and once released upon bail the ship is released from the action.

21. Consideration should be given to the status of the 'bond' provided to secure the release of the ship (if any) and specifically provided for within the proposed detention provisions.

Nāku noa, nā

Herman Visagie
Vice-President