

I te Kōti Matua o Aotearoa | In the High Court of New Zealand
Te Whanganui-a-Tara Rohe | Wellington Registry
CIV-2024-485-

under the Judicial Review Procedure Act 2016 and Part 30 of
the High Court Rules

in the matter of an application for judicial review

between

THE ENVIRONMENTAL LAW INITIATIVE

a charitable trust board incorporated under the Charitable
Trusts Act 1957 having the incorporation number 50014881,
and with its registered office at 75 Taranaki Street, Te Aro,
Wellington
Applicant

and

THE MINISTER FOR OCEANS AND FISHERIES

First Respondent

and

STATEMENT OF CLAIM

26 June 2024

ASSIGNED JUDICIAL OFFICER:

-

NEXT EVENT DATE:

-

LeeSalmonLong

Barristers and Solicitors

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**THE DIRECTOR-GENERAL OF THE MINISTRY OF
PRIMARY INDUSTRIES**

Second Respondent

and

THE ATTORNEY-GENERAL OF NEW ZEALAND

Third Respondent

STATEMENT OF CLAIM

PART 1: GENERAL

Parties

1. The applicant (**ELI**) is an incorporated charitable trust with charitable purposes including the preservation, conservation, protection, and enhancement of natural and cultural resources in order to prevent their harm, misuse, depletion, unsustainable use, and destruction.
2. ELI's main activities are researching and reviewing environmental legislation and policy and funding scientific research, and its specialist areas include law and policy affecting New Zealand's marine environment and the sustainability of fisheries.
3. The first respondent is the Minister for Oceans and Fisheries, being the Minister as that term is defined in section 2 of the Fisheries Act 1996 (**Fisheries Act**).
4. The second respondent is the Director-General of the Ministry of Primary Industries, being the department responsible for the administration of the Fisheries Act.
5. The third respondent is the senior law officer of the Crown, named as a respondent as a representative of the Crown including on behalf of the Business Unit of MPI known as Fisheries New Zealand (**FNZ**).

PART 2: ALLOCATION OF LEVIES TO THE CROWN AND INDUSTRY

Overview of the Fisheries Act framework

Imposition of levies

6. Section 264(1) of the Fisheries Act provides that the Governor-General may, by Order in Council made on the recommendation of the Minister, impose levies for the purpose of Part 14 of the Fisheries Act.
7. The purpose of Part 14 is to enable the Crown to recover its costs in respect of the provision of conservation services and fisheries services (s 261).
 - (a) "Conservation services" is defined in s 2 of the Fisheries Act as:

outputs produced in relation to the adverse effects of commercial fishing on protected species ... including –

 - (a) research relating to those effects on protected species:
 - (b) research on measures to mitigate the adverse effects of commercial fishing on protected species:
 - (c) the development of population management plans under the Wildlife Act 1953 and the Marine Mammals Protection Act 1978.
 - (b) "Protected species" is defined in s 2 of the Fisheries Act as:

- (a) any marine wildlife as defined in section 2 of the Wildlife Act 1953 that is absolutely protected under section 3 of that Act:
- (b) any marine mammal as defined in section 2(1) of the Marine Mammals Protection Act 1978.
- (c) “Marine wildlife” is defined in s 2 the Wildlife Act 1953 as:

any marine species, or individual of a species, defined as wildlife under this Act.
- (d) “Wildlife” is defined in s 2 of the Wildlife Act as:

any animal that is living in a wild state; and includes any such animal or egg or offspring of any such animal held or hatched or born in captivity, whether pursuant to an authority granted under this Act or otherwise; but does not include any animals of any species specified in Schedule 6 (being animals that are wild animals subject to the Wild Animals Control Act 1977).
- (e) “Marine mammal” is defined in s 2 of the Marine Mammals Protection Act (**MMPA**) as including:

(a) any mammal which is morphologically adapted to, or which primarily inhabits, any marine environment; and

(b) all species of seal (*Pinnipedia*), whale, dolphin, and porpoise (*Cetacea*), and dugong and manatee (*Sirenia*).
- (f) “Fisheries services” is defined in s 2 of the Fisheries Act as including:

(a) the management of fisheries resources, fishing and fish farming;

(b) the enforcement of provisions relating to fisheries resources, fishing, and fish farming;

(c) research relating to fisheries resources, fishing, and fish farming, including stock assessment and the effects of fishing and fish farming on the aquatic environment.

8. Section 264(2) of the Fisheries Act provides that the Minister must not make a recommendation under s 264(1) unless the Minister is satisfied that the proposed order to which the recommendation relates is consistent with rules in force under s 263.

Rules relating to the imposition of levies

9. Under s 263(1), the Governor-General may, by Order in Council made on the recommendation of the Minister, make rules relating to the imposition of levies.
10. Section 263(2) of the Fisheries Act provides that rules made under s 263(1) may:
 - (a) prescribe the proportion of costs of conservation services and fisheries services to be recovered as levies;
 - (b) prescribe who must pay levies; and
 - (c) prescribe how the costs are to be apportioned between the persons who must pay the levies.

11. Section 263(4) of the Fisheries Act provides that before making a recommendation under s 263(1), the Minister must:
- (a) be satisfied that the rules to which the recommendation relates comply with the cost recovery principles in s 262 of the Fisheries Act; and
 - (b) have regard to the extent to which conservation services or fisheries services are wholly or partly purchased or provided by persons other than the Crown.

Cost recovery principles

12. The cost recovery principles in s 262 of the Fisheries Act include:
- (a) costs of conservation services or fisheries services provided to manage or administer the harvesting or farming of fisheries resources must, so far as practicable, be attributed to the persons who benefit from harvesting or farming the resources (s 262(c));
 - (b) costs of fisheries services relating to any observer performing or exercising a function, duty, or power in accordance with the observer programme must, so far as practicable, be attributed to the persons who benefit from those services (s 262(ca)); and
 - (c) costs of conservation services or fisheries services provided to avoid, remedy, or mitigate a risk to, or an adverse effect on, the aquatic environment or the biological diversity of the aquatic environment must, so far as practicable, be attributed to the persons who caused the risk or adverse effect (s 262(d)).
13. The people who benefit from harvesting fisheries and who benefit from observer services are participants in the fishing industry.
14. The people who cause risk or adverse effects to the aquatic environment or the biological diversity of the aquatic environment are participants in the fishing industry.

Fisheries (Cost Recovery) Rules 2001

15. The Fisheries (Cost Recovery) Rules 2001 (**Rules**) have been made under s 263(1) of the Fisheries Act and have been amended from time to time.
16. Rule 5 provides that the costs to be recovered from the commercial fishing industry for the fisheries or conservation services are detailed in Schedule 2 of the Rules.
17. Schedule 2 of the Rules provides that the costs of the following services, amongst others, are to be borne by industry, at different proportions as set out in Schedule 2:
- (a) monitoring and offence detection of commercial fishing activities (item 1, Schedule 2);

- (b) research relating to protected species populations where risk to those populations by human intervention has been estimated (item 2, Schedule 2);
 - (c) research relating to protected species populations where risk to those populations by human intervention has not been estimated (item 3, Schedule 2);
 - (d) services (including research, other than deepwater benthic research) provided to avoid, remedy, or mitigate that portion of the risk to, or adverse effect on, the aquatic environment or biological diversity of the aquatic environment caused by commercial fishing (item 4, Schedule 2);
 - (e) deepwater benthic research for fisheries services (item 4A, Schedule 2);
 - (f) stock assessment research for stock for which a TAC and a TACC have been set (item 5, Schedule 2);
 - (g) stock assessment research for stock for which a TAC or a TACC has not been set (item 6, Schedule 2);
 - (h) stock assessment research across more than one stock (item 7, Schedule 2);
 - (i) the observer programme established under s 223 of the Fisheries Act (item 8, Schedule 2); and
 - (j) aquaculture services (item 11, Schedule 2).
18. "Research relating to the protected species populations" is defined at s 3 of the Rules as:
- research required or carried out in the interests of the effective management of any species that is –
- (a) protected under the Wildlife Act 1953 or the Marine Mammals Protection Act 1978; and
 - (b) taken as non-targeted species by commercial fishers.
19. "Deepwater benthic research" is defined at s 3 of the Rules as:
- research, in the exclusive economic zone, relating to –
- (a) avoiding, remedying, or mitigating the adverse effects of bottom trawling on the benthic environment and its biological diversity; or
 - (b) the benthic environment and its biological diversity when there is a general public interest in that research.
20. "Fisheries resources stock assessment research" is defined at s 3 of the Rules as:
- in relation to any stock, species, or class of fish or fish resource, means research projects that aim to produce information on the stock structure, productivity, distribution, ecology, biomass, or sustainable yields of that stock, species, class, or resource.

Misallocation of fisheries and conservation service projects

21. The Fisheries (Cost Recovery Levies for Conservation Services) Order 2023 and the Fisheries (Cost Recovery Levies for Fisheries Services) Order 2023 (**Levy Orders**) were made on 28 August 2023.
22. As part of the consultation process relating to the Levy Orders, FNZ undertook targeted consultation with industry with key response themes including “on-board cameras, the economic circumstances of the sector, and the split of cost recoverable activity”.

Particulars

- (a) Recommendation by Minister for Oceans and Fisheries that Cabinet authorise the Levy Orders.
23. Consultation with industry for the purpose of levy setting is not anticipated by the Fisheries Act.
24. FNZ produced a workbook setting out the fisheries and conservation services projects for the 2023/24 year and the cost of those projects to the Crown (**Workbook**).

Particulars

- (a) Proposed Fisheries Levies Consultation Workbook.
25. The Workbook informs the Levy Orders.
26. In making the Levy Orders, the costs of activities were wrongly allocated to the Crown instead of industry in the levy amounts set, inconsistently with Schedule 2 of the Rules and s 264(2) of the Fisheries Act.
27. Project code BYC2022-02, *Risk assessment for selected shark species*, has been allocated to the Crown at a cost of \$164,724 (being the whole cost).
 - (a) The stated objectives of this project include to map distribution, spatial risk assessment, and bycatch estimates.
 - (b) The shark species subject to this project include species protected under the Wildlife Act, such as white pointer sharks and basking sharks.
 - (c) As a portion of this project relates to the research of protected species populations, some of the costs of this project should have been allocated in accordance with either item 2 or 3 of Schedule 2 of the Rules.
28. Project code PRO2022-01, *Hoiho multi-threat risk assessment*, has been allocated to the Crown at a cost of \$31,051 (being the whole cost).
 - (a) Yellow eyed penguins (hoiho) are protected under the Wildlife Act.

- (b) The costs of this project should have been allocated in accordance with either item 2 or 3 of Schedule 2 of the Rules.
- 29. Project code PRO2023-12, *Comprehensive aerial survey for SI Hector's – population estimates NCSI*, has been allocated to the Crown at a cost of \$518,333 (being the whole cost).
 - (a) Hector's dolphins are protected under the MMPA.
 - (b) The costs of this project should have been allocated in accordance with item 2 of Schedule 2 of the Rules.
- 30. Project code PRO2023-15, *Post release survivability study for sea turtles caught in NZ waters including factors that influence survival rates*, has been allocated to the Crown at a cost of \$43,927 (being the whole cost).
 - (a) Turtles are protected under the Wildlife Act.
 - (b) The costs of this project should have been allocated in accordance with either item 2 or 3 of Schedule 2 of the Rules.
- 31. Project code AQUA2023-05, *Identifying environmental drivers of mussel spat survival and growth*, has been allocated to the Crown at a cost of \$274,541 (being the whole cost).
 - (a) This project will directly address industry needs by resourcing an industry consortium to develop a collaborative "best team" approach to identify and understand the environmental requirements of productive mussel spat nursery sites.
 - (b) This is an aquaculture service.
 - (c) The costs of this project should have been allocated in accordance with item 11 of Schedule 2 of the Rules.
- 32. Project code PRO2023-17, *Tracking tags for Southern Royal albatross*, has been allocated to the Crown at a cost of \$87,653 (being the whole cost).
 - (a) Southern Royal albatross are protected under the Wildlife Act.
 - (b) This project is to provide tracking tags to the field team monitoring the Southern Royal albatross population.
 - (c) The costs of this project should have been allocated in accordance with either item 2 or 3 of Schedule 2 of the Rules.
- 33. Project code RIS2023-02, *Hector's Maui update*, has been allocated to the Crown at a cost of \$109,816 (being the whole cost).
 - (a) Māui dolphins are protected under the MMPA.
 - (b) The costs of this project should have been allocated in accordance with item 2 of Schedule 2 of the Rules.

34. Project code INV2023-01, *Satellite Tori line detection*, has been allocated to the Crown at a cost of \$109,816 (being the whole cost).
- (a) This project is monitoring and offence detection of commercial fishing activities and so the costs of this project should have been allocated in accordance with item 1 of Schedule 2 of the Rules.
35. Project code BEN2023-01, *Mobile bottom fishing footprint - assessment and development of estimation methods using ER and GPR data*, has been allocated to the Crown at a cost of \$21,963 (being the whole cost).
- (a) This project will produce the annual benthic trawl footprint and will focus on an assessment of the effects of GPR based estimation on individual fishery footprints and develop methods to supplement them.
- (b) This project is deepwater benthic research for fisheries services and so the costs of this project should have been allocated in accordance with item 4A of Schedule 2 of the Rules.
36. Project code PSB2019-08, *Feasibility trial of the underwater baitsetter*, has been allocated to the Crown at a cost of \$67,682 (being the whole cost).
- (a) This project is a feasibility trial to determine the operational performance and effectiveness of the underwater baitsetter as a new seabird bycatch mitigation method for use in the surface longline commercial fishery in New Zealand.
- (b) This project is a service provided to avoid, remedy, or mitigate that portion of the risk to, or adverse effect on, the aquatic environment or biological diversity of the aquatic environment caused by commercial fishing and so the costs of this project should have been allocated in accordance with item 4 of Schedule 2 of the Rules.
37. Project code RIS2023-01, *Marine Mammal Risk Assessment update: including EM data and incorporate IWC/US recommendations*, has been allocated to the Crown at a cost of \$32,945 (being the whole cost).
- (a) Marine Mammals are protected species under the MMPA.
- (b) This project is research relating to protected species populations where risk to those populations by human intervention has been estimated and so the costs of this project should have been allocated in accordance with item 2 of Schedule 2 of the Rules.
38. Project code BYC2023-03, *Identification and mapping of habitats of significance for sharks*, has been allocated to the Crown at a cost of \$46,123 (being the whole cost).
- (a) This project is a service provided to avoid, remedy, or mitigate that portion of the risk to, or adverse effect on, the aquatic environment or biological diversity of the aquatic environment caused by commercial fishing and so the costs of this project should have

been allocated in accordance with item 4 of Schedule 2 of the Rules.

39. Project code INT2023-01-CROWN, *East Coast South Island trawl survey*, has been allocated to the Crown at a cost of \$333,841.
- (a) This represents a 20% carve-out of the cost of the wider *East Coast South Island trawl survey*.
 - (b) The research objectives for this project are stated to be:
 - (i) to determine the relative abundance and distribution of southern inshore finfish species off the east coast of the South Island focusing on: red cod (*Pseudophycis bachus*), stargazer (*Kathetostoma giganteum*), sea perch (*Helicolenus percoides*), tarakihi (*Nemadactylus macropterus*), spiny dogfish (*Squalus acanthius*), elephantfish (*Callorhinchus milii*), red gurnard (*Chelidonichthys kumu*), and dark ghost shark (*Hydrolagus novaezelandiae*);
 - (ii) to collect the necessary data and determine the length frequency, length-weight relationship and reproductive condition of the above listed species;
 - (iii) to collect otoliths from giant stargazer, sea perch, red gurnard, red cod, and tarakihi;
 - (iv) to collect the data to determine the length frequencies and catch weight of all other quota management system species;
 - (v) to identify benthic macro-invertebrates collected during the trawl survey; and
 - (vi) "broader outcomes".
 - (c) Objectives (i)-(iv) above fall within item 7 of Schedule 2 of the Rules and so have been properly allocated to industry as part of INT2023-01.
 - (d) 20% of the cost has been carved out and allocated to Crown under INT2023-01-CROWN, on the basis that:
 - (i) objectives (v)-(iv) are to be borne by Crown; and
 - (ii) the costs of objectives (v)-(vi) represent 20% of the overall cost of the activities carried out as part of the combined projects.
 - (e) Objective (vi) is too vague to add anything of substance to the objectives or to justify the Crown bearing any portion of the cost.
 - (f) Objective (v) is a service provided to avoid, remedy, or mitigate that portion of the risk to, or adverse effect on, the aquatic

environment caused by commercial fishing, and deepwater benthic research, and stock assessment research across more than one stock, and so the costs of this project should have been allocated in accordance with item 4, 4A, or 7 of Schedule 2 of the Rules.

40. Project code MID2021-02-CROWN, *Multi-species deepwater trawl surveys*, has been allocated to the Crown at a cost of \$667,178.

- (a) This represents 20% carve-out of the cost of the wider *Multi-species deepwater trawl surveys*.
- (b) The research objectives of this project are to:
 - (i) continue a time series of relative abundance indices for hoki (*Macruronus novaezelandiae*), hake (*Merluccius australis*), and ling (*Genypterus blacodes*) in the Southland and Sub-Antarctic area;
 - (ii) continue a time series of relative abundance indices for hoki (*Macruronus novaezelandiae*), hake (*Merluccius australis*), and ling (*Genypterus blacodes*) on the Chatham Rise;
 - (iii) continue a time series of relative abundance indices for hake (*Merluccius australis*) and ling (*Genypterus blacodes*) off the west coast South Island; and
 - (iv) collect data to increase New Zealand's understanding of the wider marine ecosystem and support an ecosystem approach to fisheries management.
- (c) Objectives (i)-(iii) above fall within item 7 of Schedule 2 of the Rules and so have been properly allocated to industry as part of MID2021-02.
- (d) 20% of the cost has been carved out and allocated to Crown under MID2021-02-CROWN, on the basis that:
 - (i) objective (iv) is to be borne by Crown; and
 - (ii) the costs of objective (iv) represents 20% of the overall cost of the activities carried out as part of the combined projects.
- (e) Objective (iv) is a service provided to avoid, remedy, or mitigate that portion of the risk to, or adverse effect on, the aquatic environment or biological diversity of the aquatic environment caused by commercial fishing, and deepwater benthic research for fisheries services, and stock assessment research across more than one stock, and so the costs of this project should have been allocated in accordance with either item 4, 4A, or 7 of Schedule 2 of the Rules.

41. The total cost of the projects misallocated above is \$2,509,593.

FIRST CAUSE OF ACTION – UNLAWFUL ALLOCATION OF PROJECTS

42. The Levy Orders are unlawful because they are inconsistent with the Rules on the allocation of projects by not allocating to industry some or all of the costs of the pleaded projects.
43. In recommending the Levy Orders be made without having satisfied themselves that the Levy Orders were consistent with the Rules, the Minister breached s 264(2) of the Fisheries Act.

Relief sought

- (a) a declaration that the Levy Orders are unlawful;
- (b) an order quashing the Levy Orders;
- (c) such other relief as the Court thinks fit; and
- (d) costs.

PART 3: THE OBSERVER PROGRAMME

44. An observer programme has been established under s 223 of the Fisheries Act.
45. Under item 8 of Schedule 2 of the Rules, 100% of the cost of observer coverage under the observer programme established under s 223 of the Fisheries Act is to be borne by industry.
46. Pursuant to s 223(1) of the Fisheries Act, the purposes of the observer programme are to:
 - (a) collect reliable and accurate information for fisheries research, fisheries management, and fisheries enforcement;
 - (b) collect reliable and accurate information about vessel safety and employment on fishing vessels; and
 - (c) collect reliable information about compliance with maritime rules relating to pollution and the discharge of waste material from vessels.
47. FNZ determines how many observer days are allocated and the distribution of observers across fisheries.
48. Decisions for the 2023/2024 fishing year are contained in the Observer Seadays Plan 2023/24 (**Observer Day Decisions**).

Particulars

- (a) Observer Seadays Plan 2023/24.
49. The Observer Seadays Plan 2023/24 forms part of the Workbook.

50. The Observer Day Decisions inform the Levy Orders.
51. In setting the number of observer days and distribution of observers, FNZ is required to act in a way that achieves the purposes of the Fisheries Act, including the purposes of the observer programme.
52. The purpose of the Fisheries Act is to provide for the utilisation of fisheries resources while ensuring sustainability (section 8).
53. Pursuant to s 9 of the Fisheries Act, all persons exercising functions, duties, or powers under the Fisheries Act, in relation to the utilisation of fisheries resources or ensuring sustainability (i.e., to achieve the purpose of the Fisheries Act), shall take into account the following environmental principles:
- (a) associated or dependent species should be maintained above a level that ensures their long-term viability;
 - (b) biological diversity of the aquatic environment should be maintained; and
 - (c) habitat of particular significance for fisheries management should be protected.
54. Pursuant to s 10 of the Fisheries Act, all persons exercising functions, duties, or powers under the Fisheries Act, in relation to the utilisation of fisheries resources or sustainability (i.e., to achieve the purpose of the Fisheries Act), shall take into account information principles, which include that decisions should be based on the best available information.
55. As part of the consultation process for the 2023/2024 observer programme, DOC requested that FNZ allocate a specific number of observer days, across specific fisheries.

Particulars

- (a) OIA23-0600, Requested Observer Seaday 2023/24.
56. Overall, in the past three years the number of allocated observer days has been tracking downwards:

Years	Allocated observer days
2023/24	8,201 days
2022/23	10,243 days
2021/22	10,467 days

57. FNZ has not provided DOC with its requested number of observer days in high priority fisheries (for DOC) across highly migratory species, inshore, and some deepwater/middle depth fisheries.
58. Conversely, FNZ has allocated more than the requested number of observer days in what DOC advises are low priority deepwater and middle depth fisheries.

59. For fisheries explicitly noted as “high priority fisheries” by DOC the number of observer days requested by DOC in 2023/24 was 2,223 and the total approved by FNZ was 942, being a difference of 1,281. These “high priority fisheries” include habitats of protected species, including hoiho, Hector’s dolphin, Māui dolphin and leatherback turtles.
60. In setting the number of observer days, a key factor that has influenced FNZ to both under and misallocate observer days is a concern to limit the cost, and cost increases, to the fishing industry.
61. The concern to limit the cost to the fishing industry has been implemented in part by:
 - (a) the a priori assumption that observers are no longer necessary, or are generally no longer necessary, on vessels with onboard cameras; and
 - (b) an artificially limited “capacity” of the observer programme based on determining the number of observer days from the starting point of the level of cost considered appropriate to be borne by industry (by FNZ), rather than the number of observer days required to achieve the purposes and requirements of the Act (and setting levies based on those levels).

PART 4: UNDER-ALLOCATION OF OBSERVERS DUE TO UTILISATION OF CAMERAS

62. In making Observer Day Decisions, FNZ applied verification principles (**Verification Principles**) agreed to by the Deputy Director-General Fisheries New Zealand and the Deputy Director-General, Biodiversity, Heritage and Visitor (DOC) on 3 March 2023.

Particulars

- (a) Memorandum to Deputy Director-General of FNZ from Director Verifications and Operations dated 4 August 2023.
63. The Verification Principles provide, in essence, that for inshore fisheries on-board cameras will be the default verification tool and that where a task cannot be completed by a camera then observers may be considered.
64. In making Observer Day Decisions, FNZ has reduced the number of observers across a number of fisheries, on the basis that the utilisation of cameras in those fisheries makes observers no longer necessary or substantially less necessary.

Domestic tuna surface long-line – North Island southern bluefin tuna

65. 150 days were requested by DOC for the 2023/2024 fishing year, who commented that this was a high priority fishery. DOC further noted that there was risk to leatherback sea turtles (**LBT**) in this fishery and that cameras were not due to roll out until halfway through the year.

66. Cameras cannot observe all captures and only observers can collect data on post-release survivability.

67. Only 85 days were allocated by FNZ in the 2023/2024 fishing year, down from 150 allocated in the previous fishing year.

Domestic tuna surface long-line – South Island southern bluefin tuna

68. 150 days were requested by DOC for the 2023/2024 fishing year, who commented that this was a high priority fishery and noted the same points as for the North Island fishery.

69. Only 70 days were allocated by FNZ in the 2023/2024 fishing year, down from 150 allocated in the previous fishing year.

Domestic surface long-line – North Island bigeye tuna and swordfish

70. 120 days were requested by DOC for the 2023/2024 fishing year, who commented that this was a high priority fishery. DOC further noted that:

the capture of LBT is prominent in this fishery and cameras will struggle to effectively monitor these captures as they are often not brought onboard due to size. ... With the current projects looking at post-release survival of LBT, certain information and capabilities not achievable by cameras means observer coverage and assistance is essential.

71. Only 60 days were allocated by FNZ in the 2023/2024 fishing year, down from 120 allocated in the previous fishing year.

South Coast South Island set net

72. 266 days were requested by DOC for the 2023/2024 fishing year, who commented that this was a high priority fishery. DOC further noted that they

would like observers to be able to observe surroundings during setting (something that is not readily captured by cameras) ... Furthermore, knowledge about the individual hoiho is critical to knowing how it impacts the population, and the ability to record and retain the individual for scanning is only reliably done with a physical observer onboard ... Additionally, we have an interest in these fisheries for white shark bycatch.

73. Only 48 days were allocated by FNZ in the 2023/2024 fishing year, down from 266 allocated in the previous fishing year, despite FNZ noting that the requested number of days was possible, and, separately, that “the coverage focused on hoiho may align with Principle 2”.

Particulars

(a) Email from Stewart Alderson to Monique Andrew dated 6 April 2023, timed at 8:43am.

East Coast South Island set net – Otago

74. 283 days were requested by DOC for the 2023/2024 fishing year, who commented that this was a high priority fishery and noted the same points as for the South Coast South Island set net fishery.

75. Only 75 days were allocated by FNZ in the 2023/2024 fishing year, down from 283 allocated in the previous fishing year, despite FNZ noting that the requested number of days was possible, and, separately, that “the coverage focused on Hoiho may align with Principle 2”.

East Coast South Island trawl – TMP and ECSI Trawl - TAR

76. 100 days were requested by DOC for each of these fisheries (200 in total) for the 2023/2024 fishing year, who commented that these were high priority fisheries and noted that they were “very important with respect to interactions with Salvin’s albatross. Priority placement should be allocated to high-risk periods for Salvins”.
77. Interactions with trawl vessels and Salvin’s albatross (and other seabirds) include “warp strikes” where birds are hit by trawl lines.
78. The incidental catch of seabirds due to warp or cable strike is one of the main risks posed by coastal commercial trawl fisheries.
79. On-board cameras are ineffective at detecting warp strikes.

Particulars

- (a) *Electronic monitoring in the New Zealand inshore trawl fishery* (DOC, 2011).

80. In the final plan, *TAR* has been combined with *TMP*.
81. For the combined fishery, 120 days were allocated by FNZ in the 2023/2024 fishing year, down from a total of 425 allocated in the previous fishing year.

Generally

82. No proper analysis of the effect of withdrawing observers in favour of cameras has been carried out by FNZ, including no assessment against the types of information that observers are empowered to collect under s 223(4) of the Fisheries Act.
83. Cameras cannot collect the information required to fulfil the purpose of the observer programme under s 223 of the Fisheries Act to a degree sufficient to justify the withdrawal of observer days to the extent effected by the Observer Day Decisions detailed above at paragraphs [65] to [81].
84. No consideration, or inadequate consideration, has been given to how withdrawing observers in favour of cameras meets the purposes of the observer programme.
85. No consideration, or inadequate consideration, has been given to how withdrawing observers in favour of cameras meets the purpose and principles of the Fisheries Act.
86. The Observer Day Decisions detailed above at paragraphs [65] to [81] do not provide for the utilisation of fisheries resources while ensuring sustainability, as required by s 8 of the Fisheries Act.

87. The Observer Day Decisions detailed above at paragraphs [65] to [81] are not consistent with the environmental principles at s 9 of the Fisheries Act having been taken into account.
88. The Observer Day Decisions detailed above at paragraphs [65] to [81] are not consistent with the information principles at s 10 of the Fisheries Act having been taken into account.

**SECOND CAUSE OF ACTION (AGAINST THE THIRD RESPONDENT)
– UNLAWFUL UNDERALLOCATION OF OBSERVERS IN RELIANCE
ON THE UTILISATION OF CAMERAS**

89. The applicant repeats paragraphs [1] to [88] above and says further—
90. The Observer Day Decisions concerning the following fisheries pleaded above:

- (a) *Domestic tuna surface long-line – North Island southern bluefin tuna;*
- (b) *Domestic tuna surface long-line – South Island southern bluefin tuna;*
- (c) *Domestic surface long-line – North Island bigeye tuna and swordfish;*
- (d) *South Coast South Island set net;*
- (e) *East Coast South Island set net– Otago; and*
- (f) *East Coast South Island trawl – TMP (encompassing ECSI Trawl – TAR).*

are unlawful because:

- (i) FNZ did not apply or take into account the principles or purpose of the Fisheries Act;
- (ii) FNZ did not apply or take into account the purposes of the observer programme;
- (iii) FNZ took into account irrelevant considerations including the economic circumstances of the sector, the levy burden on industry, and a wrong view that cameras make observers unnecessary or that cameras are otherwise like-for-like (or approximately like-for-like) substitutes for observers; and
- (iv) FNZ failed to take into account relevant matters including the substitutability of cameras for observers, the limitations of the cameras, and the environmental consequences of reducing the number of observer days.

Relief sought

- (a) a declaration that the Observer Day Decisions concerning the fisheries listed at paragraph [90] are unlawful;
- (b) such other relief as the Court thinks fit; and
- (c) costs.

PART 5: ARTIFICIAL CAPACITY OF OBSERVER PROGRAMME

- 91. FNZ routinely limits the number of observer days in line with its calculation or assessment of the “capacity” of the observer programme, being the number of observer days that the current level of observers are capable of delivering.
- 92. At the same time, FNZ has made no material effort to increase the capacity of the observer programme to meet the number of observer days required to ensure sustainability.
- 93. FNZ has the ability to increase the number of observers in the observer programme and to fund that by increasing levies on industry to ensure that the observer programme is adequately resourced.
- 94. FNZ controls the capacity of the observer programme.
- 95. Instead of increasing the capacity of the observer programme, FNZ have misallocated and under-allocated observer days across a number of fisheries including for the purpose of avoiding or limiting increases in levies to the fishing industry.

<34m Mixed BLL and LIN BLL >34m

- 96. 355 days were requested by DOC for *<34m Mixed BLL* for the 2023/2024 fishing year.
- 97. DOC commented that this was a high priority fishery and further noted that “Observer coverage in *<34m BLL* is vital for verifying seabird capture and mitigation”.
- 98. Only 139 days were allocated by FNZ in the 2023/2024 fishing year. FNZ commented that “Initially more day [sic] requested, but reduced to allow about 90 seadays for LIN potting.”
- 99. 240 days were allocated by FNZ to *LIN BLL >34m* in the 2023/2024 fishing year, despite DOC only requesting 184 days and commenting that they “do not support increase. Days should not be reallocated from *<34m* Ling coverage”.

TAR 2 trawl

- 100. 207 days were requested by DOC for the 2023/2024 fishing year.

101. Only 70 days were allocated by FNZ in the 2023/2024 fishing year, despite DOC commenting “Support Science and FM request of 211+ days. There is not enough justification listed for this level of a reduction”.
102. FNZ documentation notes that:
- (a) observer days at certain fisheries, including *Tar 2 trawl*, have “a very low likelihood of being delivered”;
 - (b) in such fisheries, observer days have been reduced due to “watchkeeping issues”; and
 - (c) “full rationales for the seadays that have been reduced due to watchkeeping” has been provided.

Particulars

- (a) FNZ Leadership Team Meeting memorandum dated 8 March 2023.
103. The “full rationale” for the reduction of *Tar 2 trawl* provides no further detail on “watchkeeping issues”, but does note that:

increased observer coverage was required to continue to monitor the East Coast tarakihi rebuild. This coverage is still required for TAR 2

...

Additionally, the inshore trawl fishery, including tarahiki target fishing, is responsible for a substantial portion of risk to seabirds, particularly to black petrels (the seabird species with the greatest risk of being adversely impacted by high rates of bycatch within New Zealand’s EEZ) and flesh-footed shearwaters. The fishery also overlaps with fur seals, which are the second most at risk marine mammal.

No observer coverage means there will be a lack of independent verification of tarahiki catch reports from fishers. There is a public expectation that FNZ, as the regulator, is closely monitoring the rebuild of the East Coast tarahiki fishery. However, until Government cameras are live, observer coverage is the primary means of doing this.

104. FNZ understands the importance of observers in this fishery.
105. The concern of “watchkeeping issues” limiting capacity has not been properly analysed.
106. Any analysis of a limiting effect of “watchkeeping issues” on observer days has not been documented.
107. The number of available observers could have met the number of requested observer days for this fishery if FNZ had increased observer capacity.
108. There was no legal or factual impediment to FNZ increasing observer capacity.
109. The availability of observers is distinct from the capability of a vessel to carry an observer.

110. The conclusion that the number of requested observer days at this fishery had “a very low likelihood of being delivered” is not supported by the information upon which the Observer Days Decisions were made.

BLL – FMA 8

111. 100 days were requested by DOC for the 2023/2024 fishing year, who noted that “we have an interest in these fisheries for white shark bycatch”.
112. Zero days were allocated by FNZ in the 2023/2024 fishing year, despite having noted that “there is a lot of uncertainty around the total number of protected species” and “observer coverage needs to be prioritised”.
113. The above comment by FNZ is part of the same “full rationales” for fisheries that have had observer days reduced due to “watchkeeping issues” noted above at paragraph [102].
114. The “full rationale” for this fishery does not mention “watchkeeping issues”.
115. FNZ understand the importance of observers in this fishery.
116. The concern of “watchkeeping issues” limiting capacity has not been properly analysed.
117. Any analysis of a limiting effect of “watchkeeping issues” on observer days has not been documented.
118. The number of available observers could have met the number of requested observer days at this fishery if FNZ had increased observer capacity.
119. There was no legal or factual impediment to FNZ increasing observer capacity.
120. The availability of observers is distinct from the capability of a vessel to carry an observer.
121. The conclusion that the number of requested observer days at this fishery had “a very low likelihood of being delivered” is not supported by the information upon which the Observer Days Decisions were made.

CRA1

122. Fishery *CRA1*, amongst other fisheries, has not been considered for observer coverage in the 2023/2024 fishing year.
123. Overfishing crayfish reduces the predation on kina, which results in the proliferation of kina.
124. Kina devastate kelp forests, leading to “kina barrens”.
125. FNZ have noted that:

CRA fisheries have received little to no observer coverage due to sea days being prioritised to higher priority fisheries. These higher priority fisheries now have cameras meaning we can focus effort on CRA fisheries that need it.

126. Observer days only need to be prioritised due to the artificial capacity of the programme that FNZ maintains.
127. CRA1, and other fisheries, could be allocated observers if FNZ increased observer capacity.

Generally

128. Failing to take steps to increase the capacity of the observer programme fails to meet the purposes of the observer programme.
129. Failing to take steps to increase the capacity of the observer programme fails to meet the purpose and principles of the Fisheries Act.
130. The Observer Day Decisions detailed above at paragraphs [96] to [127] do not provide for the utilisation of fisheries resources while ensuring sustainability, as required by s 8 of the Fisheries Act.
131. The Observer Day Decisions detailed above at paragraphs [96] to [127] are not consistent with the environmental principles at s 9 of the Fisheries Act having been taken into account.
132. The Observer Day Decisions detailed above at paragraphs [96] to [127] are not consistent with the information principles at s 10 of the Fisheries Act having been taken into account.

**THIRD CAUSE OF ACTION (AGAINST THIRD RESPONDENT) –
UNLAWFUL UNDER-ALLOCATION AND MISALLOCATION OF
OBSERVER DAYS DUE TO FNZ FAILING TO INCREASE THE
CAPACITY OF THE OBSERVER PROGRAMME**

133. The applicant repeats paragraphs [1] to [132] above and says further –
134. The Observer Day Decisions concerning the following fisheries:

- (a) <34m Mixed BLL;
- (b) LIN BLL >34m;
- (c) Tar 2 trawl;
- (d) BLL – FMA 8; and
- (e) CRA1.

are unlawful because in setting the number of planned observer days and the allocation of observer days to fisheries:

- (i) FNZ did not apply or take into account the principles or purpose of the Fisheries Act;
- (ii) FNZ did not apply or take into account the purposes of the observer programme; and

- (iii) FNZ took into account the irrelevant considerations of the economic circumstances of the sector, the levy burden on industry, an artificial view that the observer programme is “capacity” constrained, and a view that increases in costs to industry are to be avoided or limited.
- (iv) FNZ failed to take into account relevant matters including the environmental consequences of reducing the number of observer days or not allocating observer days.
- (v) FNZ unlawfully fettered its decision-making power by relying on an artificial view that the observer programme is “capacity” constrained by reference to existing observer numbers or levy settings, and a view that increases in costs to industry are to be avoided or limited.

135. For the same reasons, the Observer Seadays Plan 2023/2024 is unlawful.

Relief sought

- (a) a declaration that the Observer Day Decisions concerning the fisheries listed at paragraph [134] are unlawful;
- (b) a declaration that the Observer Seadays Plan 2023/2024 is unlawful;
- (c) such other relief as the Court thinks fit; and
- (d) costs.

This document is filed by David Bullock solicitor for the Applicant of the firm LeeSalmonLong.

Documents for the Applicant may be served at the offices of LeeSalmonLong situated on Level 34, Vero Centre, 48 Shortland Street, Auckland.