



INDUSTRY CONSULTATION

Penalty Demerit Scheme – commercial fisheries

July 2018

NSW's commercial fisheries are carefully managed in the interests of fishers, the environment, and the people of NSW. Commercial fishers in NSW catch fish for the whole community to enjoy and make significant economic and social contributions to their communities.

The commercial fishing industry has been through significant recent reforms, aimed at making the industry sustainable for the long term. During these reforms, many commercial fishers made significant investments to secure their future in the industry.

The NSW Government recognises the importance of these investments and wants to ensure that they are protected from fishers who do not comply with the rules. These fishers undermine the reputation of the industry and the integrity of the sector's regulatory framework.

The 2017 Inquiry into Commercial Fishing in NSW heard concerns from the industry about repeated non-compliance by a minority of commercial fishers and shareholders. Many fishers called for stronger deterrence and penalties targeted at these fishers and shareholders. The Inquiry recommended that the Government introduce a Penalty Demerit Scheme (PDS) to protect our fish stocks against those who do not comply with the rules.

The NSW Government is committed to protecting the viability and integrity of commercial fisheries in NSW and will deliver on the recommendation to introduce a PDS. The proposed PDS for NSW, which is similar to those that already exist in Tasmania and South Australia, aims to drive greater voluntary compliance within the commercial fishing industry.

The NSW Department of Primary Industries (DPI), in consultation with the Ministerial Fisheries Advisory Committee and CommFish NSW, has developed the proposal for a PDS for the commercial fishing industry.

DPI invites feedback from commercial fishers and shareholders on the proposed PDS to help us achieve a workable and effective scheme for NSW.

How to provide feedback

The key elements of the proposed PDS are summarised below, with targeted questions for your feedback.

You can submit your feedback via:

- the online submissions form (www.dpi.nsw.gov.au/fishing/commercial/reform/pdsc)
- email: fisheries.compliance@dpi.nsw.gov.au, or
- mail: PO Box 179, Narooma, NSW, NSW 2546.

If your submission is by email or post, please clearly identify your name and fishing business number/s. If you do not own a fishing business but hold a NSW commercial fishing licence, please indicate this in your feedback.

Submissions, unless otherwise indicated, will be considered public documents and may be subject to the Government Information (Public Access) Act 2009 ('GIPA Act'). This means that the submission may be released in response to a request lodged under that Act.

What is a Penalty Demerit Scheme (PDS)?

A Penalty Demerit Scheme is a scheme which allocates penalty demerit points to people when they commit certain offences, in order to discourage future offending.

The PDS for commercial fisheries will work on similar principles to the one for drivers licences, which is designed to encourage safe and responsible driving. As with a drivers licence, a commercial fisher who receives too many demerit points may have their commercial fishing licence cancelled.

How will the PDS work in the commercial fishing industry?

DPI, in consultation with the Ministerial Fisheries Advisory Committee and CommFish NSW, has developed a commercial fisheries PDS. The primary objective of the PDS is to drive increased voluntary compliance in the commercial fishing industry, targeting the minority of fishers who repeatedly break the rules. Specifically, the PDS aims to:

- discourage and reject recidivist offending, and
- create greater personal deterrence.

At the commencement of the PDS, all commercial fishers will have zero demerit points on their licence. Once the scheme has commenced, commercial fishers who commit certain offences will receive demerit points on their commercial fishing licence. The demerit points will be in addition to the existing penalties for offences, such as fines.

If an offence is related to shares, demerit points will attach to both the licence of the commercial fisher who committed the offence *and* to the shares that the commercial fisher was fishing under. This will ensure that the scheme targets both the fisher who breaks the rules, and shareholders who direct or allow their nominated fishers to break the rules.

Demerit points will apply for offences dealt with through penalty notices, and if a fisher is convicted in a court for a fisheries offence.

Demerit points

The legislation will set out the key elements of the demerit point scheme for offences against the *Fisheries Management Act 1994*, the *Marine Estate Management Act 2014* and associated regulations, including share management plans.

All offences under fisheries legislation will be categorised as either category A or category B. Category A offences are more serious matters, such as contravening quota, trafficking and fishing gear offences. Demerit points will accrue for all category A offences, and can accrue to both licences and shares. These offences are listed at the end of this paper.

Category B offences are minor or technical in nature. For example, not producing a fishing authority would be considered a category B offence. Demerit points will only apply if a fisher commits a second or further category B offence. Importantly, the offence must be the same type and have occurred within the last 10 years.

Demerit points for category B offences will not accrue to shares; they will accrue to licences only. Any offence under fisheries legislation that is not listed as a category A offence will be a category B offence.

Demerit points will have a lifespan of 10 years from the date they are accrued. After the 10 years, the demerit points expire.

Question:

1. **Do you think any other offences should be included as Category A? Please outline your reasons.**

How will demerit points be calculated?

The number of demerit points that will apply to an offence is calculated by a formula that is based on:

- the maximum penalty for convictions for that offence, or
- the dollar amount of the penalty notice for that offence.

Demerit points for convictions

The number of demerit points applied to a conviction is equal to 10% of the maximum penalty. See an example below.



If a maximum penalty is increased for second and subsequent convictions, which the *Fisheries Management Act 1994* already provides for, then the demerit points would accrue at the higher rate.

Demerit points for penalty notices

For offences that are dealt with by penalty notice, the number of points is equal to the dollar value of the fine, divided by 100 (or one point for every \$100 of the fine amount). See an example below.



Demerit points applied to an individual offence are capped at 100, irrespective of the maximum penalty. This is to prevent a fisher from being disqualified for a first offence.

The offence of trafficking does not have a monetary penalty attached, so the number of points attached to that offence is set at 100.

When a fisher commits a category A offence, demerit points will apply to the:

- commercial fishing licence of the offender, and
- to any shares that are connected with the offence (whether or not the offender owns those shares).

Shares are connected to an offence when the commercial fisher commits an offence in the share management fishery in which the shares are held. For example, if a trap and line fisher used a fish trap unlawfully, the demerit points would attach to the demersal trap shares held by the fisher as well as to that fisher's commercial fishing licence.

If the fisher does not own the shares (for instance because they are a nominated fisher for another person) points will attach to the shares held by the shareholder. This ensures fishing business owners are held responsible for the actions taken by their employees.

Consequences of accruing too many demerit points

If a commercial fishing licence accrues 200 demerit points or more the commercial fisher will be disqualified from the commercial fishing industry. Similarly, shares that accrue 200 demerit points or more will be suspended.

Commercial fishing licence

If a commercial fisher is disqualified as a result of receiving too many demerit points on their licence:

- (a) their commercial fishing licence will be cancelled;
- (b) they will not be allowed to hold a commercial fishing licence for 10 years;
- (c) any fishing boat licence they hold will be cancelled;
- (d) any fish receiver registration they hold will be cancelled;
- (e) they will not be allowed to hold a fishing boat licence, be registered as a fish receiver or work as a crew member of any fishing business for 10 years, and
- (f) they will not be allowed to acquire or hold shares in a share management fishery for 10 years.

Question:

- 2. Do you think disqualification for 10 years is the right amount of time? If not, please state what amount of time is appropriate in your view and outline your reasons.**

A person whose licence is cancelled and who is disqualified from holding a licence will be given six months to sell any shares they may hold, or surrender those shares to the Minister. If the person fails to sell or surrender the shares within that period, the Minister may order that the shares are forfeited.

Question:

- 3. Do you think six months is an appropriate length of time for a disqualified fisher to dispose of any shares they hold? Please outline your reasons.**

An associate of a disqualified person will be prohibited from acquiring any shares held by the disqualified person.

If a person transfers shares to an associate within six months prior to being disqualified, the Minister may order that the shares held by the associate are forfeited. To make such an order, the Minister must be satisfied that the reason for the transfer was to avoid the effect of the disqualification.

Shares

If shares in a single share class are suspended as a result of receiving too many demerit points:

- (a) the endorsement under those shares will not be accessible, meaning the shareholder cannot take fish, or nominate a person to take fish, in that fishery;
- (b) any quota that has been allocated to the shareholder will be forfeited;
- (c) no further quota will be allocated to those shares during the period of suspension; and
- (d) the person holding the shares will not be permitted to transfer the shares.

A share suspension will be in effect for 10 years.

At any time during the suspension, the shareholder may choose to surrender the shares to the Minister.

During the suspension period, the Minister may re-allocate the quota from suspended shares amongst other shareholders in that fishery.

Question:

- 4. Do you think suspension for 10 years is enough? If not, please state what amount of time is appropriate in your view and outline your reasons.**

Can fishers have their disqualification, or the suspension of shares, overturned?

Licence disqualification or share suspension under the scheme will be automatic when 200 or more demerit points are accrued.

Under the scheme, the NSW Civil and Administrative Tribunal (NCAT) will not be able to review disqualifications or suspensions, made under the scheme. This is because fishers and shareholders already have the right to dispute penalty notices or have their cases heard in court, and it is not appropriate for the NCAT to reconsider those previous matters.

A person can apply to the NSW Land and Environment Court for a 'stay order' for a licence disqualification or suspension of shares. A stay order would temporarily reinstate a disqualified licence or suspended shares, subject to certain conditions.

The Land and Environment Court can make a stay order only if:

- (a) the person is a natural person (not a corporation) and the Court is satisfied that the disqualification or suspension will cause undue hardship to the person or the person's dependants, or
- (b) the Court is satisfied that, having regard to the circumstances of the case, the disqualification or suspension is manifestly unjust.

Question:

- 5. Do you agree with the proposed provisions for applying for a stay order? Please outline your reasons.**

What happens to surrendered or forfeited shares?

If shares are voluntarily surrendered or are required to be forfeited to the Minister, the Minister will be required to pay for the shares. The value of the shares will be determined considering:

- (a) the number of demerit points that had accrued against the shares and those that were still in force immediately before the surrender, and
- (b) the fact that the shares are suspended, and considering the period of suspension remaining on the shares.

The Minister may retain, cancel, reissue or sell surrendered or forfeited shares. If shares are reissued, they must be sold by public tender. The costs of the tender process, or any fees owed to DPI by the former shareholder, will be deducted from the proceeds of the sale prior to the former shareholder being paid.

If a third party has a registered interest in the surrendered or forfeited shares, the Minister may pay that third party the value of their interest before paying the former shareholder, if possible.

A former shareholder, or an associate of the former shareholder, will not be permitted to purchase the shares if sold by the Minister.

Question:

- 6. Do you agree with the proposed provisions for selling forfeited shares? Please outline your reasons.**

Registers and notification of demerit points

The Secretary of the Department will be required to notify a commercial fisher, and a shareholder if relevant, when demerit points have been accrued on a fishing licence or share class.

The Secretary will also record demerit points in the Commercial Fishing Licence Register and the Share Register (where relevant). These registers will show the number of demerit points (if any) that have accrued on licences or shares, and the expiry date of those points.

If a person has been disqualified, or shares have been suspended, the register will also show the period of the disqualification or suspension.

By displaying demerit points, disqualifications and suspension on the registers, shareholders who nominate commercial fishers to fish on their behalf can make an informed judgment about whether to employ a particular licence holder. This is important, as once the scheme begins, the actions of the fisher could cause the shares owned by the shareholder to accrue demerit points.

Question:

- 7. Do you think that access to information about demerit points on the registers should be limited to only certain people? If so, who?**

Commercial fishing licences and share transfers

The renewal of a commercial fishing licence does not affect the demerit points that were attached to the licence when it expired. Where a fishing licence expires and a new one is issued sometime later, any demerit points that were recorded against the expired fishing licence, and are still in force (i.e. within the 10 year period), will be recorded against the reissued licence.

Nominated fishers will be required to tell their shareholder of any offences committed where they are aware that proceedings are pending or have been taken against them. This means that a nominated fisher must inform their shareholder if they have been issued a penalty notice, is aware they will be issued a penalty notice or have received a Court Attendance Notice for a category A demerit point offence. Failure to notify a shareholder will be a breach of a condition of a commercial fishing licence (an offence which also carries demerit points).

Demerit points are attached to shares until they expire, even if the shares are transferred. A share transfer will not delete any points nor will it prevent demerit points being applied for any offence that was committed before the transfer occurs.

A shareholder who proposes to transfer shares to another person must disclose certain information to the proposed buyer. This includes any knowledge of offences where a penalty notice or court action is being taken against the shareholder (or their nominated fisher) and that action may result in demerit points being applied to shares subject to transfer.

If a shareholder does not disclose any pending proceedings (including those of a nominated fisher) before the transfer occurs, they may be prosecuted. The receiver of the shares will also have the opportunity to apply for the cancellation of those demerit points, given they had no way of knowing that points would accrue on the shares when they chose to purchase them.

Cancelling demerit points

The Secretary of the Department will have the power to cancel demerit points in certain circumstances.

For example, if a person appeals a conviction, the Secretary must cancel any demerit points that had been accrued. However, if that appeal is unsuccessful or is abandoned, the Secretary can restore those demerit points.

There may be cases where a person buys shares, and demerit points from an offence committed by the previous owner are accrued after the transfer occurs. If the seller of the shares did not declare to the

buyer that demerit points would accrue, or did not know that they would accrue, the Secretary may cancel those demerit points on the shares.

The Secretary may also choose to cancel demerit points for other reasons.

Implementation

The scheme will likely commence in December 2018 for commercial fishing licences only. Demerit points will begin to accrue on share classes into the future.

Table of proposed category A offences

Demerit Point offence		Description
<i>Fisheries Management Act 1994</i>		
1.	Section 14 (1) or (2)	Take and possess fish contrary to fishing closures
2.	Section 16	Possessing and selling prohibited size fish
3.	Section 17 (2) or (2A)	Taking more fish than the bag limit
4.	Section 18 (2) or (2A)	Possessing more fish than the bag limit
5.	Section 19	Taking or possessing protected fish
6.	Section 20 (3) or (5)	Fish and waters protected from commercial fishing
7.	Section 20B	Shark finning
8.	Section 21B (1)	Trafficking in fish
9.	Section 24 (1)	Unlawful use of a net or trap
10.	Section 25 (1)	Possessing illegal fishing gear
11.	Section 35 (1)	Possessing fish illegally taken
12.	Section 40S	Authority holder contravenes quota
13.	Section 65 (1)	Contravening a share management plan
14.	Section 68 (6C)	Contravene condition on endorsement
15.	Section 102(1)	Take fish for sale when unlicensed
16.	Section 104(7)	Breach condition of commercial fishing licence
17.	Section 107A	Use unlicensed fishing boat for declared commercial fishing boat activity
18.	Section 108 (7)	Breach condition of fishing boat licence
19.	Section 112 (4)	Breach condition of endorsement on commercial fishing licence (restricted fishery)
20.	Section 121 (4) or (5)	Records to be made by commercial fishers
21.	Section 122 (4), (5) or (6)	Records to be made by employers of commercial fishers
22.	Section 124A	Fail to make real time report
23.	Section 124B	Make false and/or misleading real time report
24.	Section 220ZA	Harming threatened species, populations or ecological communities
25.	Section 220ZB	Buying, selling or possessing threatened species
26.	Section 220ZC	Damage to critical habitat
27.	Section 220ZD	Damage to habitat of threatened species, population or ecological community
28.	Section 247	Obstructing, impersonating, abusing, assaulting etc fisheries officers

Demerit Point offence		Description
<i>Fisheries Management Act 1994</i>		
29.	Section 279A	Master to prevent contraventions of the Act
30.	Section 282V	Use disqualified person as crew
31.	Section 288D	Provide false and misleading information

Demerit Point offence		Description
<i>Fisheries Management (General) Regulation 2010</i>		
32.	Clause 70(1) or (2)	Use dynamite and explosive substances to take or destroy fish, in any waters

Demerit Point offence		Description
<i>Marine Estate Management Act 2014</i>		
33.	Section 41	Contravene regulation designated serious offence
34.	Section 62	Contravene marine park and aquatic reserve notifications

More information

Fisheries Compliance Unit: fisheries.compliance@dpi.nsw.gov.au

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CM9 ref: OUT18/10957