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## GENERAL REASONS FOR THE DECISIONS ON APPEALS HAKE INSHORE TRAWL SECTOR

### 1. Introduction

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The general reasons for the assessments of the appeals in the Hake Inshore Trawl (“HIST”) sector by the Minister of Environmental Affairs and Tourism (“the Minister”) are set out in this document, which will be referred to as the “*Appeals GPR*”.

The delegated authority prepared a report on each appeal submitted in the sector, as required by Regulation 5(3) of the General Regulations (“the R5(3) reports”), promulgated in terms of the Marine Living Resources Act 18 of 1998 (“the MLRA”) as GN 1111 in Government Gazette 19205 of 2 September 1998. The R5(3) reports deal with specific arguments made by appellants for an increase of their own scores. This Appeals GPR is concerned with complaints of a more systemic nature and with appellants’ complaints about the scores given to others in the HIST sector. Given the large volume of complaints and submissions received during the appeals process, it is not possible to deal with each and every contention. Complaints that clearly have no merit are not dealt with in this GPR. .

Each applicant in the sector will receive the following documents by e-mail:

- The notification letter, if the applicant appealed, informing the appellant of the Minister’s decision on the appeal together with the reason for that decision;
- The Appeals GPR; and
- Copies of the Regulation 5(3) reports to record the assessment of each appeal in the sector and copies of the score sheets of all the applicants in the sector after appeals.

The Minister approved the R5(3) reports. The reasons for the Minister’s decisions are accordingly contained in the R5(3) reports, the score sheets, this Appeals GPR and the notification letter. The Minister also considered legal memoranda and legal opinions. The contents of these documents are confidential and

privileged and will not be released without the consent of the Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management (“the Department”) and the Minister.

## **2. Appeals process**

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The decisions in the Hake Inshore Trawl sector were announced on 16 January 2006. Appeals had to be submitted by 14 March 2006. A total of 26 appeals were submitted in the sector.

Thereafter, on 31 March 2006, all the appeals submitted in the sector were made available for comment in terms of section 80(3) of the MLRA. The appeals were available in the Department’s Access to Information Centre (“ATIC”) on 2<sup>nd</sup> Floor, Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town from 31 March 2006 to 6 April 2006. Comments on the appeals had to be submitted by 13 April 2006.

Access was also granted to the original applications of all the applicants in the sector, unless the applicant objected to the release of specific parts of its application. In terms of the notification letter sent to the applicants, such objections had to be lodged by 20 January 2006. If the objection was lodged after this date, it was only taken into account in respect of subsequent applications for access to information. No access was granted to documentation contained in the confidential folder. Requests for access to the confidential folder or for access to parts objected to were dealt with in terms of the Promotion of Access to Information Act 2 of 2000.

The Minister was assisted by the Delegated Authority, legal advisors; the RVU; IT specialists; and administrative and project management specialists.

## **3. Changes to Criteria, Weightings, the Scoring System and the Quantum Allocation Mechanism**

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Changes were made to the criteria, weightings, scoring systems and the quantum allocation mechanism when it was decided that an Appellant’s submissions had merit or after considering the advice of the Department’s legal advisors and external legal advice, the advice of the project management team and the IT specialists.

The **exclusionary criteria** were not changed in the Cluster A fisheries, but, after considering legal advice, the Minister decided that the failure to sign the declaration and to have it attested to by the authorised representative of the applicant, and if applicable, the authorised representative of the Holding Company, the Sister Company or the JV Partner(s), could be cured on appeal. The same decision was taken in respect of the failure to provide an audit report.

In the HIST sector, the **comparative balancing criteria and weightings for medium term right holders** were changed in the following ways:

- 3.1 Financial Performance disregarded: It became clear that some applicants provided ratios in their responses in different categories instead of percentages. Not all the affected applicants provided the correct figures on appeal. The Minister decided that these applicants should not be penalised as the instructions relating to this part of the form were not clear enough. The Minister decided that financial performance was, in any event, not an appropriate criterion to use in the allocation process as it was dependent on many factors not relevant to the objectives of the allocation process. The Minister therefore decided to disregard the financial performance scores.
- 3.2 Use of medians instead of means: The Minister instructed the project manager to use “medians” where “means” were previously used. The former was regarded to be a safer assessment tool than the latter.

The **comparative balancing criteria for new entrants** were not changed in the HIST sector.

The **scoring system** for both medium term right holders and new entrants in the HIST sector was changed in the following ways:

- 3.3 In the first round of allocations, applicants that did not respond to a section were not assessed in terms of the “comparatively balancing method” against other applicants. For example, if there were 17 applicants and only 10 provided a response to a section, then the 7 were excluded and the 10 were ranked. The Minister instructed the project manager to revise the system. If an applicant did not provide a response, the value was assumed to be zero or the response least favourable to such an applicant. In the above example, it means that all 17 applicants would be assessed against one another even though all of them did not provide a response.
- 3.4 In the first round of allocations, the default database calculation of “percent ranks” was used. This meant that in the default database calculation, where tied values existed, the percent rank was calculated at the first occurrence of the value, and then all applicants with this value were placed at the lowest value. This meant, for example, that if there were a large number of applicants that were 100% black owned in any particular sector, the first occurrence of this value would fall below the top percentile. The Minister decided that this calculation method did not meaningfully give effect to the criteria and weightings. The calculation has been revised as follows:
  - Any applicant(s) whose assessed response for the section is the minimum of all the applicants’ responses is allocated a percent rank score of 0.

- Any applicant(s) whose assessed response for the section is the maximum of all applicants' responses is allocated a percent rank score of 100.
  - Other applicants (whose assessed responses for the section are greater than the minimum and less than the maximum of all applicants' responses) are allocated a percent rank score between 0 and 100.
- 3.5 One of the criteria, percentage training budget spent on black employees between 2001 and 2004, was not scored. This error has been corrected and the criterion is now scored.

The **quantum allocation mechanism** was changed by reducing the contributions to the first pool to 3% from 10%.

## **4. Systemic complaints not accepted**

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This part of the Appeals GPR deals with some of the systemic complaints that were not accepted and that, accordingly, did not result in a change of the criteria, weighting, scoring system or quantum allocation mechanism.

### **Access to information**

- 4.1 **Complaint:** For the appellant to determine whether or not its application has been properly balanced and scored as against other applicants, the appellants need to have access to copies of at least all the successful applicants. The appellant should also be able to determine whether the exclusionary criteria have been properly and consistently applied to all applicants. It is not possible to verify whether the score allocated is correct since the department did not supply the spreadsheet and the formula as a whole reflecting the ranking used for all applicants.
- 4.2 **Response:** There is no merit in complaint. Formulae and data were made available. All applications were made available by the Department, except those parts of the applications that applicants considered to be confidential. See the approach to access to information described above.

### **Comparative scoring system unfair to smaller entities**

- 4.3 **Complaint:** It's a policy objective to affirm right holders with smaller allocations in this fishery that are transformed and have performed well. In terms of section 2(j) of the MLRA it is an objective to have regard to the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry. "Equity" is not defined in the Act but it is submitted that it includes fairness and balance.

The General policy describes the intended approach to interpret and give effect to the principle enunciated in the Act. There was no logical basis established as to why it was considered appropriate to compare the scores of companies in the industry with one another and to favour those falling above an arbitrary proportion or percentile usually the 40<sup>th</sup> or 50<sup>th</sup> pursuant to that evaluation one of the most remarkable features of the HIST long term rights allocation process is that it both rejected the insights and guidelines of the BBBEE Act and furthermore elected to set no level of ownership as envisaged under its own general policy. It can hardly be expected of smaller right holders to create the same sort of value adding activities as larger players have been able to develop such as processing, packaging and marketing. Thus comparing smaller companies against larger ones in relation to jobs is a case of comparing the proverbial apples with pears. The weightings have the hallmarks of having been gerrymandered to produce a result that would approximate an intended one and in this regard the weighting and scoring of certain categories amounts to no more than tokenism. For example to score safety at 1,5% is tantamount to saying that it is irrelevant and similar criticism can be levelled at financial performance. Even when a substantial weight is attached to certain categories such as Investment, one finds that arbitrary and irrelevant criteria are utilised. The most controversial category and the one most subject to criticism is the criterion of Transformation. Female ownership is accorded a weighting of 5% and employee ownership 2%. The point is that it is unreasonable and impracticable to require a score above the 75<sup>th</sup> percentile when a company that has improved its black ownership 37,5% gets a score placing in the range of the 25<sup>th</sup> to 50<sup>th</sup> percentile. A further aspect of the scoring mechanism that is unfair and inequitable is the method by which the redistribution pool was sourced. This was done by taking 75t from each applicant and this would be unobjectionable if all applicants received the same rights. The actual tonnage awarded to the appellant is simply uneconomically small. An advisory committee member suited to the task for which they were employed would have appreciated this. The advisory committee should have contained the names of persons having sufficient in-depth knowledge of the sector. The persons listed are not recognised as well known in this connection. One would have expected that the adjudication of fishing rights of such importance would involve persons of stature and experience.

- 4.4 **Response:** The comments are noted but the Minister is not persuaded that the system should be changed in the light of the comments.

#### **Weighting of Harbour and sea-based assets**

- 4.5 **Complaint:** The distinction between harbour and sea- based assets and land-based assets and the award of 3 times more points for sea and harbour based assets is arbitrary and irrational and different to the approach adopted in other sectors where no distinction was drawn. When the RVU was questioned as to the distinction between land and sea based assets and how harbour assets should be categorised, the answer was that "Applicants must classify the assets themselves. There are no hard and fast rules here" (Queries & responses Cluster A, 24 June 2005 at page 13). No suggestion was given that sea based assets would be substantially favoured and the appellant was seriously prejudiced. There is no logic to the distinction drawn between sea and harbour based assets and land based assets. An entity which happened to elect to establish its processing facility

just outside the harbour would potentially be prejudiced vis-à-vis another entity whose processing facility was established just inside a harbour.

- 4.6 **Response:** There appears to be no reason why the delegated authority could not weight assets employed more directly in the harvesting of the resource (such as harbour and sea-based assets) higher than assets used to process or transport the resource on land.

#### **First pool unfair to large quota holders**

- 4.7 **Complaint:** Appellant objects to the concept of a pool to which larger participants must contribute but from which they cannot benefit. In the medium term rights policy guidelines it is stated that “The hake longline and handline has been identified as a suitable vehicle for the promotion of HDI’s in the hake sector, more specifically small-and-medium sized enterprises”. The appellant and other participants in the HIST sector have structured themselves on the basis of these policy announcements and at no stage prior to the publication of the draft policies did the appellant contemplate that its size *per se* would be utilised as a negative factor with regard to the allocation of long term rights. A policy, which by definition excludes larger participants from the possibility of participating in the first pool runs contrary to the medium term rights policy. Appellant is not opposed to the establishment of the first pool but opposes the policy, which prohibited it from potentially participating in the first pool.

- 4.8 **Response:** The two-pool system was worked out in a manner which does not discriminate against companies purely on their size. It is, in principle, possible for a large quota holder to gain in the application of the system. It will be very difficult to implement the proposal that focusses on the size of the applicant (including, presumably, its subsidiaries and even JV partners – ie the size of the economic unit) instead of the size of the applicant’s allocation in a sector. The sector policy affords the Minister the choice whether to redistribute to small companies or to those with smaller allocations. In any event, it is not clear why large companies with small allocations in a sector should not be treated the same as small companies with small allocations in a sector.

#### **Quantum allocation mechanism unfair**

- 4.9 **Complaint:** The strict application of the criteria, weighting and the mathematical calculations to determine point scoring together with the quantum allocation mechanism has lead to the unreasonable and irrational result that the appellant in this case has been reduced in this sector. This despite the appellant being black empowered, having invested in a brand new vessel and employing crew on such vessel. The quantum allocation model distorts the prejudice by making low scoring applicants contribute more to the 10% pool and thereafter the same applicants are not able to participate in such pool based on generally (transformation and performance) the same low point scoring. They are therefore punished twice for the same reason notwithstanding the fact that the weighting and the point scoring does not effectively achieve the objectives of the policy and statutes. An example

of the unreasonableness and irrationality of the quantum allocations is the allocation to Nkunga Fishing who was granted an 263,3% increase on their allocation.

4.10 **Complaint:** The appellant does not agree with the methodology for the allocation of quantum used by the delegated authority. A pure mechanistic device was used to make the allocations. The delegated authority is obliged to weigh up all the objectives of the Act when making allocations and the method chosen does not enable him to do so. Where the scoring on any particular point was marginal, no discretion was exercised leaving any applicant's score and hence quantum open to the vagaries of the choice of cut-offs or percentile calculations used. The outcome results in certain vessels and crew being under-utilised whilst quota is allocated to companies who do not possess the means to harvest.

4.11 **Response:** The comments are noted but it is not agreed that the system is irrational.

#### **Insufficient time to complete complicated form**

4.12 **Complaint:** The following objections are raised against the process: short period of time to complete application forms; Queries & Responses lacked clarity and several responses were contradictory in nature; applicants were not made aware previously of the weighting to be assigned to various criteria and it is generally accepted by industry that the application form and the process as a whole was more complicated than previously.

4.13 **Response:** The comments are noted, but it is not agreed that there was insufficient time, that the Q & Rs lacked clarity and that "several" were contradictory. It is not necessary to announced the weightings beforehand. There are good reasons why the system was more complicated than before.

#### **Insufficient information provided**

4.14 **Complaint:** The delegated authority has not provided sufficient information to applicants to allow them to consider the assessment of their applications and in particular their score sheets. Where applicants were scored against the "mean" the mean should have been provided and similarly the calculations for percentile placements.

4.15 **Response:** Appellants were provided with this information on 3 March 2006, prior to the closing day for appeals.

#### **Exclusion of new entrants**

4.16 **Complaint:** The delegated authority erred in deciding not to exclude any of the medium term right holders but to remove quantum from those who scored low. These low scoring applicants scored low due to their failure to transform meaningfully and to perform or invest adequately. Those low scoring medium term right holders should have been excluded according to both the General policy and the Sector policy and replaced by new entrants

such as the appellant. Rather than granting unviable rights the delegated authority should have excluded those low scoring applicants or those who did not reach the cut-off score and replaced them with new entrants.

- 4.17 In this sector the level of black ownership of the TAC has only increased by 10% to 48% which is way below the average in the fishing industry and the admission of new entrants would have notably improved the transformation profile in this sector.
- 4.18 **Complaint:** The appellant is of the opinion that its constitutional right to fair and equitable treatment has been infringed upon by the manner in which medium term right holders were scored and preferred to new entrants despite achieving a significantly lower score.
- 4.19 **Complaint:** Although black ownership of the TAC has increased, there has been no improvement in the mean black female ownership from the MTR period. The delegated authority has failed to meet the policy objectives and the admission of the appellant would enable the delegated authority to achieve the policy objective of notably improving the transformation profile of the sector.
- 4.20 **Complaint:** The resources of Mossel Bay is exploited for the benefit of creating employment in other areas and in the process Mossel Bay is denied the opportunity to sustain itself and creating employment. The ANC mayor in Mossel bay has allocated two plots in extent of 18000 square metres to Ikamva. Appellant is the only BEE Company that has endeavoured at great cost to build a plant in Mossel Bay. Decades of systematic racial discrimination cannot be eliminated without positive action being taken by the delegated authority. Appellant believes that there is an obligation on the delegated authority to take special steps to accommodate applicants from previously disadvantaged communities. A sectoral transformation profile of 52% can never be regarded as the elimination of decades of systematic racial discrimination. Sectoral policies have not been met since the delegated authority overlooked the fact that in terms of tonnages allocated, most of the TAC is still allocated to the large and previously advantaged businesses.
- 4.21 **Complaint:** Appeals against the decision not to grant rights to any new entrants. The appellant scored significantly higher than certain medium term right holders. The overall percentage black right holders in the sector did not increase significantly.
- 4.22 **Complaint:** The appellant submits that the decision of the delegated authority to refuse the application on the basis that it was precluded from granting rights to any new entrants is unreasonable/unjustifiable and therefore constitutes an infringement of the appellant's right in terms of section 33(1) of the constitution.
- 4.23 Six medium term right holders did not meet the requisite transformation targets in their applications submitted in 2001. As these transformation targets were pivotal elements which aided the delegated authority decision to grant HIST rights to the medium term right holders, the inability of these medium term right holders to meet these targets should have received the same attention for which it was intended in 2001. The GPR confirmed that 4

medium term right holders' black ownership decreased since 2001. Such decreases by applicants that have been awarded long term rights is counterproductive to the entire process. Only 4 of the 17 medium term right holders' participated in skills development initiatives while training has been identified as one of the key criteria towards addressing the high unemployment rate within SA. The Sector policy itself cites employment creation as one of the 5 core underlying allocation principles but despite this 15 medium term right holders were "pardoned" for not incorporating skills development initiatives over the MTR period.

- 4.24 **Complaint:** In the constitutional court case of *Bato Star* the need to transform the fishing industry was emphasised. The intention of the legislature and the pronouncements of the highest court in the country makes it clear that one of the main tools of achieving transformation in the fishing industry is by the admittance of new entrants.
- 4.25 The delegated authority erred in deciding not to exclude any of the medium term rights holders but to remove quantum from those who scored low. These low scoring applicants scored low due to their failure to transform meaningfully and to perform or invest adequately. Those low scoring medium term rights holders should have been excluded according to both the General policy and the Sector policy and replaced by new entrants such as the appellant. Rather than granting unviable rights the delegated authority should have excluded those low scoring applicants or who did not reach the cut-off score and replaced by new entrants. It is not stipulated in the sector policy that no new entrants would be admitted. Why were special criteria and weighting created and why were they still invited at great cost to apply in the first place? The various high scoring applicants including the appellant should have been sufficient persuasion to the delegated authority to replace the low scoring medium term rights holders.
- 4.26 In this sector the level of black ownership of the TAC has only increased by 10% to 48% which is way below the average in the fishing industry and the admission of new entrants would have notably improved the transformation profile in this sector. The rigid approach by the delegated authority leads to inexplicable results in that no matter how high new entrants scores, very weak scoring medium term rights holders are still granted rights. This is both unfair and irrational.
- 4.27 **Response:** The Minister noted the comments but agreed with the decision of the delegated authority not to grant rights to any of the new entrant applications. The Hake Inshore Trawl sector policy (paragraph 6) provides that the hake and sole stocks are currently managed in terms of a recovery strategy and that the accommodation of new entrants in the fishery between 1992 and 2002 has resulted in significant reductions in the allocation of hake and sole to the right holders. For these reasons, the policy specified that new entrants may be admitted but that the total number of participants will not be increased. As he did not exclude any medium term right holders, the Minister was precluded from granting rights to any new entrants. The Minister was in any event not persuaded that any of the new entrant applicants should replace any of the medium term right holders.

## 5. Approach to assessment of information

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This part of the Appeals GPR deals with complaints about the assessment of information.

### **Re-apportionment of jobs and investment and re-merging of transformation data**

- 5.1 **Complaint:** If jobs and investments were not properly apportioned between joint venture partners and the members of an economic unit, and if it was not clear to the delegated authority how to correct the apportionment, the jobs creation score and the investment score of the members of the unit, were reduced to zero. The same approach was followed in respect of the failure to properly merge transformation data. Affected applicants sometimes presented a re-apportionment of jobs and investments on appeal or re-merged the transformation data. The new apportionment or merger did not always correspond to the ones presented in the application forms, but appellants nevertheless contended that it should be accepted.
- 5.2 **Response:** Every attempt to re-apportion jobs and investments or re-merged transformation data was assessed on its own merits. In many instances, the reason for the re-apportionment or re-merging was because the instructions were not understood when the forms were completed. In such instances, applicants were accommodated. The Minister instructed that attempts by appellants “to trim their sails to the wind” should not be allowed.

### **Information relating to events falling outside specified period**

- 5.3 **Complaint:** A number of Appellants argued that the Minister should recognise, for example, investments made, jobs created, learnerships provided and the like, outside of the period (mostly after the period) specified in the application form. For example, it was argued that learnerships provided in 2005 should be recognised, even though the application form required applicants to specify the number of learnerships provided during the 2004 financial year.
- 5.4 **Response:** This issue was dealt with on a case by case basis. In principle, in order to be fair, applicants had to be compared to one another at a fixed point in time or over a specified time period. However, some flexibility was needed in order to prevent the system operating unfairly to certain applicants. Events that took place after the specified date or outside the specified period were accordingly taken into consideration if this was not unfair to other applicants; if the information related to the medium term period; and if the action was not artificially taken purely for purposes of rights allocation.

## 6. Complaints about the scores of others

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This part of the Appeals GPR deals with complaints made by appellants about the scores given to others.

### **BD Oosthuizen**

6.1 **Complaint:** Unexplained errors occurred in the category “Total Less Seasonal jobs” where BD Oosthuizen was scored twice.

6.2 **Response:** This error was corrected.

### **Capensis**

6.3 **Complaint:** The correct score for Capensis Investment’s “Total including Seasonal jobs” should be 2 and not 2,4. To score 2,4 an applicant was required to have a percentile that was greater than 0,9800 and Capensis Investment’s score was exactly 0,0800.

6.4 **Response:** The percentile ranking system was amended as described in paragraph 3.4 above. The delegated authority determined at the outset (first round) that applicants that fell on the boundary between two percentile categories should be placed in the higher category, rather than the lower category. The Minister agreed with the delegated authority on this aspect.

6.5 **Complaint:** Capensis appears to have included current liabilities in its debt/equity ratios and Capensis showed a positive RONA despite making a loss.

6.6 **Response:** The scores are no longer taken into account (see above).

6.7 **Complaint:** Their turnover is R2 747 000 while their wage bill is R1 117 000 i.e. 40,1% of their turnover. Given their relatively low quota and by-catch their figure seems to be grossly exaggerated.

6.8 **Response:** A letter was sent to Capensis. The response was assessed and the jobs and salary bill appears to be correctly claimed and apportioned.

## **Chetty's Fisheries**

- 6.9 **Complaint:** Chetty's Fisheries should be scored 7,5 for harbour and sea investments and not 9. To score 9 an applicant was required to have scored a percentile that is greater than 6300 and Chetty's Fisheries scored exactly 6300 and was therefore equal and not greater than. This principle was correctly applied where Seeheim visserye scored exactly the 40<sup>th</sup> percentile of 473.80 and were correctly scored at 2,5 as opposed to 3.
- 6.10 **Response:** The percentile ranking system was amended as described in paragraph 3.4 above. At the outset (in the first round) the delegated authority determined that applicants that fell on the boundary between two percentile categories should be placed in the higher category, rather than the lower category. The Minister agreed with the delegated authority on this aspect.
- 6.11 **Complaint:** Chetty's has been allocated a score of 0,5 instead of 0,25 for average RONA being greater than the mean.
- 6.12 **Response:** The scores for financial performance was disregarded (see above).
- 6.13 **Complaint:** Chetty's Fisheries appears to have included current liabilities in its debt/equity ratios.
- 6.14 **Response:** The scores are no longer taken into account (see above).

## **Dyer Eiland**

- 6.15 **Complaint:** Unexplained errors occurred in the category "Total Less Seasonal jobs" where Dyer Eiland, scored twice.
- 6.16 **Response:** This error was corrected.
- 6.17 **Complaint:** As can be seen from the tables 8.1.1 in both HDST and HIST, Dyer Eiland has submitted identical information in respect of the two sectors. The apportionment of jobs and salaries should have been included as an annexure 8A which has not been provided by Dyer Eiland in either their HDST or HIST applications and accordingly the IRP5 jobs calculation for Dyer Eiland in both sectors is incorrect. The salaries declared by Dyer Eiland also seem to be incorrect..
- 6.18 Dyer Eiland claims to have 118 employees (30 sea and 88 land- based). The information supplied by it does not appear to give any evidence of a land based factory and in any event they indicate that only 49,7 tons were processed on land. In no way can this tonnage sustain 88 land-based employees. Their sectoral turnover in 2004 was R997 221 yet their wage bill is indicated as R520 289 i.e. 52,5% of their turnover.

6.19 **Response:** A letter was sent to Dyer Island about this issue. In its response, it is clear that Dyer Eiland has double-claimed the 6 jobs shared between the hake deepsea and inshore sectors. This has now been apportioned by allocating 3 jobs in each sector. The apportionment of the rest of the jobs and the salaries appears to be correct.

### **Ezabantu**

6.20 **Complaint:** Ezabantu was granted points for having invested in on-board/land based processing facility while both scored zero for investment purposes. It would therefore be logical that it should also score zero for investment in on-board/land based processing facility.

6.21 **Response:** The points allocated to Ezabantu were taken away.

### **G & T**

6.22 **Complaint:** G&T scored 2,5 out of a maximum of 2 for employee ownership.

6.23 **Response:** This error was corrected.

6.24 **Complaint:** G & T was scored twice for employee ownership.

6.25 **Response:** Lorcom Thirteen was not scored for employee share scheme.

6.26 **Complaint:** Income levels score: G&T should score 4 and not 2.

6.27 **Response:** This error was corrected.

6.28 **Complaint:** Financial details of G & T Fishing do not correspond with their financial statements.

6.29 **Response:** The scores are no longer taken into account (see above).

### **Irvin & Johnson**

6.30 **Complaint:** Irvin & Johnson scored 3 out of a maximum of 1 for CSI.

- 6.31 **Response:** This has been corrected.
- 6.32 **Complaint:** I&J's IRP5 job score should be 2 and not 2,4. To have scored 2,4 an applicant was required to have a percentile that was greater than 0,0455 and I&J's score was exactly that and was therefore equal too and not greater than.
- 6.33 **Response:** The percentile ranking system was amended as described in paragraph 3.4 above. At the outset (in the first round) the delegated authority determined that applicants that fell on the boundary between two percentile categories should be placed in the higher category, rather than the lower category. The Minister agreed with the delegated authority on this aspect.
- 6.34 **Complaint:** In respect of employee ownership: I&J scored maximum points but this company has no employee scheme.
- 6.35 **Response:** I&J was not scored for employee share scheme (see in this regard its R5(3) report and the assessment of I&J claim).

### **Lorcom Thirteen**

- 6.36 **Complaint:** Lorcom Thirteen was granted points for having invested in on-board/land based processing facility while it scored zero for investment purposes. It would therefore be logical that it should also score zero for investment in on-board/land based processing facility.
- 6.37 **Response:** The points allocated to Lorcom were taken away.
- 6.38 **Complaint:** Unexplained errors occurred in the category "Total Less Seasonal jobs" where Lorcom Thirteen was scored twice.
- 6.39 **Response:** This error was corrected.
- 6.40 **Complaint:** In respect of employee ownership: Lorcom Thirteen scored the maximum points but these this company has no employee scheme.
- 6.41 **Response:** Lorcom Thirteen was not scored for employee share scheme.

- 6.42 **Complaint:** Lorcom declared no land-based processing no investments and no salary bill, yet a staff of 11 sea-based and a further 11 employees. This provides an employment of 0,16 per ton but with no salary bill and turnover derived from this fishery. This appears to be a paper quota holder.
- 6.43 **Response:** The right was granted very late (in 2004) due to litigation. On appeal the investment and job claims were recognised.

### **Nkunga**

- 6.44 **Complaint:** Nkunga fishing scored 3 out of a maximum of 2 for employee ownership.
- 6.45 **Response:** This has been corrected
- 6.46 **Complaint:** Nkunga claims to employ 113 casuals. This is totally disputed and is not possible or even sustainable. No annexure setting out this level of employment is included in the application and it therefore cannot be verified. It would be appropriate for the delegated authority to request additional information to clarify their employment situation. It would also be appropriate to request a copy of their insurance cover claimed on their vessel as this could not be verified.
- 6.47 Nkunga has no land based assets nor has any of its quota been processed on land and it only owns one vessel which is insured for R1,5 million and is certified to carry 12 crew. They cannot on this basis claim to have 113 employees for this sector.
- 6.48 It is highly improbable that Nkunga Fishing claim on jobs is correct as the company only has 4 permanent employees out of the 117 and is applying using its own information only. Nkunga's score almost the maximum points for harbour and sea-based investments [reasons given why Nkunga cannot afford its vessel]. What this illustrates is that the criteria relating to investment do not take into account any circumstances surrounding the financing of such investment or whether or not the applicant can afford such investment. It is submitted that as per the applicant declaration of the form this was material information which Nkunga should have disclosed but did not.
- 6.49 **Response** A letter was sent to Nkunga. The response was assessed and no seasonal employees were recognised.
- 6.50 **Complaint:** In respect of employee ownership: Nkunga Fishing scored twice.
- 6.51 **Response:** The scoring error was corrected.

## Seavuna

- 6.52 **Complaint:** Seavuna scored 1,75 out of a maximum of 1,5 for financial performance.
- 6.53 **Response:** This category is no longer scored
- 6.54 **Complaint:** Seavuna scored 22,6 out of a maximum of 21 for jobs.
- 6.55 **Response:** The scoring error has been corrected.
- 6.56 **Complaint:** Seavuna and Vuna essentially utilise the same harbour infrastructure in Mossel Bay. Because of uncertainty a review was physically conducted at the premises and the information was discussed with senior employees from the companies. Seavuna should be claiming approximately 180 to 200 jobs and not 613 while Vuna Fishing should only be claiming 60 to 70 jobs and not 133. It would be appropriate for the delegated authority to request additional information so as to clarify the situation.
- 6.57 **Response:** This issue of the jobs claimed by Seavuna is fully addressed in the section 80(3) comment process. There was an overclaim in respect of Seavuna, but this has been admitted and corrected.
- 6.58 **Complaint:** Seavuna has been allocated a score of 0,5 instead of 0,25 for average RONA being greater than the mean.
- 6.59 **Response:** The scores for financial performance was disregarded (see above).
- 6.60 **Complaint:** Unexplained errors occurred in the category "Total Less Seasonal jobs" where Seavuna was scored twice.
- 6.61 **Response:** This error was corrected.
- 6.62 **Complaint:** Seavuna was awarded 0,5 out of a possible 0,25 for average RONA.
- 6.63 **Response:** The scores are no longer taken into account (see above).
- 6.64 **Complaint:** Seavuna received 20 points based on the fact that their black ownership was assessed as falling between the 50<sup>th</sup> to 75<sup>th</sup> percentile and this in turn assumed that they were 56,325% black owned. Seavuna is 50% owned by Sea Harvest and 50% by Vuna Fishing(formerly Phambili). The shareholders of Sea Harvest are Tiger Brands (74%) and Brimstone (22%). The delegated authority appears to have taken the 22% into

account but what the delegated authority failed to take into consideration is that Tiger Brands had granted Brimstone a put option to sell its shares at a specified price and date ( between 8 December 2006 and 8 December 2009). Accordingly at the sole discretion of Brimstone, its entire shareholding could be sold to Tiger Brands. Brimstone's equity stake in Sea Harvest and its' equity stake in Seavuna should not have been taken into consideration when the black ownership of Sea Harvest and Seavuna are determined. The put option means that Brimstone can exit at any stage in the specified period and thus reducing any element of risk. Seavuna's black ownership needs to be recalculated.

- 6.65 **Response:** This issue is fully addressed by Sea Harvest in the section 80(3) process. The argument that this type of shareholding is normal in black economic empowerment transactions is accepted. The fact of the matter is that Brimstone did hold the shares in Sea Harvest at closing day. It is not clear why it is relevant that Brimstone can sell shares at any time at a given price.

### **Seeheim Visserye**

- 6.66 **Complaint:** The Learnership figure of Seeheim Visserye needs to be investigated by the delegated authority.

- 6.67 **Response:** A letter was sent and the claim is explained and repeated. It was accordingly recognised.

### **Umoya Fish Processors**

- 6.68 **Complaint:** Umoya Fish Processors scored 3 out of a maximum of 2 for employee ownership.

- 6.69 **Response:** This has been corrected.

- 6.70 **Complaint:** In respect of employee ownership: Nkunga Fishing, Umoya Fish Processors and G&T have all been scored twice while I&J and Lorcom Thirteen scored maximum points but these two companies have no employee scheme.

- 6.71 **Response:** The scoring error was corrected.

- 6.72 **Complaint:** The applicant advises of a land based factory in St Helena Bay but in their application they advise that their trawler operates out of Mossel Bay and delivers fish to Plettfish in Plettenberg Bay for processing and it would appear that their St Helena Bay factory plays no role in this sector and this investment should be deducted.

- 6.73 **Response:** This issue has been addressed a number of times. There was no "technical" insistence that the asset be employed full time in a sector and claims were recognised as long as there were no double claiming.

## **Vectotrade**

- 6.74 **Complaint:** The correct score for Vectotrade should be 20 and not 28. To score 28 an applicant was required to have a percentile ownership that was greater than 86.00 and Vectotrade was exactly 86.00 and therefore equal and not greater than. G&T Enterprises correct percentile score should be 12 and not 20. Dyer Eiland's score should be 4 and not 12. The ownership score granted to G&T should be amended if the information as was required is not provided to the satisfaction of the DA.
- 6.75 **Response:** The percentile ranking system was amended as described in paragraph 3.4 above. At the outset the delegated authority determined that applicants that fell on the boundary between two percentile categories should be placed in the higher category, rather than the lower category. The Minister agreed with the delegated authority on this aspect.
- 6.76 **Complaint:** Vectotrade declared no land-based assets, list 29 sea-based employees with IRP5's but only 1 vessel. However in Annexure 1A they state that they currently employ 9 permanent employees.
- 6.77 **Response:** A letter was sent to Vectotrade. Applicant did not respond. On assessment, however, the claims made were found to be legitimate and was recognised.

## **Viking Inshore**

- 6.78 **Complaint:** A proportion of Viking's employees reflected in its inshore trawl submission may in fact be engaged in the small pelagic sector and their employee figure should be reviewed.
- 6.79 **Response** The jobs claimed by Viking and the apportionment was analysed. It appears to be correct and was recognised.

## **7. The Decisions on Appeals and the Allocation of Quantum**

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The Minister decided not to allocate any additional rights on appeal, and the number of successful applicants therefore remain at 17. The Minister agreed with the quantum allocation mechanism adopted by the Delegated Authority. A spreadsheet list of the allocations made to the applicants in the sector, after the decisions made on appeal were incorporated, are annexed marked "A".

The delegated authority decided not to allocate rights to any new entrant applicants. The Minister agreed with the reasons provided by the Delegated Authority in his GPR on this aspect.

Prior to the allocation of long-term commercial fishing rights in this fishery, 37% of the Hake TAC and 46% of the Sole TAC was held by black owned (50% + 1) rights holders. After appeals, 46.3% of the Hake TAC and 44.68% of the Sole TAC is held by black owned right holders. Beneficial black ownership of the total TAC is at 46.16%.

**MCJ van Schalkwyk**

**Minister of Environmental Affairs and Tourism**