

DECISION OF THE INDEPENDENT ADJUDICATOR IN THE MATTER OF AN OBJECTION TO THE FINAL REPORT AND DETERMINATION ON THE PROPOSED CERTIFICATION OF THE ROSS SEA ANTARCTIC TOOTHFISH LONGLINE FISHERY IN ACCORDANCE WITH THE MSC PRINCIPLES AND CRITERIA FOR SUSTAINABLE FISHING

INTRODUCTION

1. This matter comes before me as an Independent Adjudicator for the Marine Stewardship Council (“MSC”) in connection with a notice of objection filed by the Antarctic and Southern Ocean Coalition (“ASOC” or “the objector”), a coalition of non-governmental organizations concerned with the conservation of the Antarctic environment, against the proposed certification, in accordance with the MSC’s Principles and Criteria for Sustainable Fishing (“MSC Principles and Criteria”), of the Ross Sea Antarctic Toothfish Longline Fishery operating in the waters of the Ross Sea off the Antarctic shelf. The fishery is a multinational fishery that is managed by the Commission for the Conservation of Antarctic Marine Living Resources (“CCAMLR”), an international treaty organization,¹ which establishes conservation measures for the fishery on an annual basis.

2. A full assessment of the Ross Sea Antarctic Toothfish Longline Fishery was conducted by a team of experts from an accredited certification body, Moody Marine Ltd., (“MML” or “the certification body”) between November 2007 and November 2009 in accordance with the MSC’s Fisheries Certification Methodology, or “FCM” (the relevant version of the document being version 6, issued September 2006).² The final report of the certification body, which is the subject of the present objection, was issued on 9 November 2009. The report concluded that, when measured against a series of performance indicators and scoring guideposts (“PIs” or “PISGs”) established by the assessment team in accordance with the FCM, the fishery “attained a score of 80 or more against each of the MSC Principles and did not score less than 60 against any Indicators”. Accordingly the certification body determined that, subject to certain conditions set out in section 10.3 of the report (at page 40), the

¹ Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 1980, entered into force 7 April 1982, 33 UNTS 3476, TIAS No. 10240.

² As explained on its title page, the FCM is a document adopted from time to time by the MSC Technical Advisory Board (TAB). Although partly procedural in nature, the FCM are essentially statements of policy and practice containing a mixture of procedural and substantive provisions. They are not amenable to interpretation in the same way as statutes or statutory instruments, but need to be given a flexible and rational interpretation consistent with the overall objective of fishery certification against MSC Principles and Criteria. As noted in the section headed “MSC Assessment and Certification Process Overview”, the purpose of the FCM is to prescribe “the methodology that a certification body will undertake in carrying out an assessment of a fishery”. The term “shall” is used throughout to indicate that a particular requirement is mandatory, and the term “should” is used to indicate provisions that a certification body is expected to apply in the absence of express justification to the contrary.

relevant unit of the Ross Sea Antarctic Toothfish Longline Fishery should be certified as a sustainable fishery in accordance with the MSC Principles and Criteria. The particular unit of the Ross Sea Antarctic Toothfish Longline Fishery to be certified (known as the “client fishery”) is described in the final report of the certification body at section 1.1 and Appendix E. It comprises a number of vessels operated by a client group (“the Ross Sea Client Group”) consisting of a UK company, Argos Georgia Ltd., and two New Zealand companies, Sanford Ltd. And New Zealand Longline Ltd., fishing in CCAMLR Subareas 88.1 and 88.2 of the Ross Sea for Antarctic Toothfish (*Dissostichus mawsoni*) by the bottom set longline method. There are presently seven vessels, four from New Zealand and three from the UK participating in the fishery, and these are listed on page 12 of the final report.

PROCEDURAL BACKGROUND

3. In accordance with the MSC’s Objection Procedure as set out in Section 4 of the FCM and subsequently revised by TAB Directive D-023 of 12 February 2009 (hereafter referred to as “the OP”), ASOC filed a notice of objection to the final report of the certification body on 11 December 2009 (the time limit for filing an objection having been extended from 9 December 2009 by a decision of the Independent Adjudicator posted on the MSC website on 18 November 2009). Subsequently, and in accordance with the OP (§4.4.6), written representations on the matters raised in the notice of objection were received from the Center for Biological Diversity, the New Zealand Ministry of Fisheries, the Ross Sea Client Group, and a group of 39 ecosystem scientists collectively referring to themselves as the Friends of the Ross Sea Ecosystem (FORSE). The certification body provided its written response to the notice of objection on 22 January 2010 (the timeline for submission having been extended to take account of public holidays).

4. The submission of the written response of the certification body triggered the ten day consultation period under §4.6.4 of the OP. However, following consultations conducted by telephone and email with ASOC, the Ross Sea Client Group and MML, I reached the conclusion that there was no “real and imminent prospect” of reaching a negotiated solution to the issues raised in the notice of objection that would be acceptable to all parties and therefore, on 12 February 2010, I formally notified all parties of my decision to proceed to formal adjudication.

5. After further consultations, it was agreed between all parties that there would be no oral hearing of the objection. Parties would, however, be permitted to submit “additional or supplementary written representations” in accordance with §4.7.4 of the OP and such representations were in fact submitted by ASOC and MML on 29 March 2010. I also received additional correspondence from ASOC (letter dated 12 March 2010) relating to the compilation of the record of proceedings in this case, following which, on 16 March 2010, I issued a further request to MML to provide a written response to the points raised in ASOC’s letter by 19 March. Such a response was received from MML by letter dated 18 March 2010.

STANDARD OF REVIEW

6. Before dealing with the substance of the objection it is necessary to recall that the object and purpose of the OP is “to provide an orderly, structured, transparent and independent process” by which objections can be resolved. The function of the Independent Adjudicator is to examine the claims made in a notice of objection and to make a written finding as to whether the certification body made an error which “materially affected” the outcome of its determination. Only if such an error can be identified, and there is a “real possibility” that the certification body may have come to a different conclusion, may the determination be remanded back to the certification body for reconsideration. More specifically, the Independent Adjudicator is required to issue a decision in writing either confirming the determination by the certification body or remanding the determination.

7. Under §4.8.2 of the OP, a remand can only be ordered where the Independent Adjudicator determines that one or more of the following circumstances applies:

- (a) there was a serious procedural or other irregularity in the fishery assessment process that made a material difference to the fairness of the assessment; or
- (b) the score given by the certification body in relation to one or more performance indicators cannot be justified, and the effect of the score in relation to one or more of the particular performance indicators in question was material to the outcome of the Determination, because:
 - (i) the certification body made a mistake as to a material fact; or
 - (ii) the certification body failed to consider material information put forward in the assessment process by the fishery or a stakeholder; or
 - (iii) the scoring decision was arbitrary or unreasonable in the sense that no reasonable certification body could have reached such a decision on the evidence available to it; or
- (c) it is necessary to remand the Determination in order to enable the certification body to consider additional information described in Section 4.7.5(b) and described in the notice of objection. In such a case, the remand shall be limited to a request to the certification body to consider the impact of the additional information on its original Determination and to provide a response in accordance with Section 4.9.2.

§4.7.5(b) describes the category of “additional information” which may necessitate a remand as

any additional information, not forming part of the record, that is relevant to the circumstances at the date of the Determination that:

- (i) was known or should reasonably have been known to any party to the assessment process, and
- (ii) should reasonably have been made available to the certification body during the assessment process, and

- (iii) if considered, could have made a material difference to the outcome of the assessment;

8. It can be seen that the standard of review is narrow and deference to the determinations of the certification body is appropriate. Furthermore, the necessary implication of the provisions of §4.8.2 as set out above is that the Independent Adjudicator must confirm the determination unless there has been a serious procedural irregularity or the certification body has made a mistake as to a material fact, ignored material information or acted arbitrarily or unreasonably in awarding scores.

9. The review by the Independent Adjudicator is a review on the record. Thus, §§4.7.5 and 4.7.6 of the OP provide that:

4.7.5. The Independent Adjudicator shall evaluate objections solely on the basis of:

(a) the record, which shall include and be limited to:

- (i) the Final Report of the certification body and the record of oral, written and documentary evidence, submissions and reports that were provided to it during the assessment process;
- (ii) the notice of objection;
- (iii) any written representations submitted pursuant to Sections 5.4.6 and 5.6.4;
- (iv) any representations made by any party at an oral hearing pursuant to these procedures;
- (v) other clarifications required by the Independent Adjudicator;

(b) any additional information, not forming part of the record, that is relevant to the circumstances at the date of the Determination that:

- (i) was known or should reasonably have been known to any party to the assessment process, and
- (ii) should reasonably have been made available to the certification body during the assessment process, and
- (iii) if considered, could have made a material difference to the outcome of the assessment;

(c) the MSC Principles and Criteria for Sustainable Fishing; and

(d) the Fisheries Certification Methodology and the Fisheries Assessment Methodology current at the time of the assessment in question, together with Directives, Guidance and amendments thereof made by the MSC Technical Advisory Board and the Board of Trustees, any related interpretations to these documents whether or not of mandatory effect with regard to certifying body compliance made by the MSC Executive and the MSC Accreditation Manual.

4.7.6. The Independent Adjudicator may not consider issues not raised in the notice of objection, even if the Adjudicator is of the view that a particular issue should have been

raised. In no case shall the Independent Adjudicator substitute his or her own views or findings of fact for those of the certification body.

GROUNDS FOR THE OBJECTION

10. The notice of objection is lengthy and sets out a number of grounds on which the Determination is challenged, including detailed objections to the scores awarded against 36 performance indicators. First, however, it is asserted that there were a number of serious procedural and other irregularities in the way in which the assessment was carried out which made a material difference to the fairness of the assessment. It is appropriate to consider this aspect of the objection first before going on to consider objections to the scores awarded in respect of individual PISGs. It may be noted, however, that in respect of at least one of the procedural objections raised, namely that the certification body failed to consider material information that was or should have been available to it during the assessment process (i.e. §4.7.5(b) information), the assertion is made that failure to consider such information represents both a procedural irregularity and a substantive error in that had the information been considered it would have made a material difference to the scoring on some or all of the performance indicators called into question by the objectors. I propose to deal with this issue in the context of the scoring of particular PISGs rather than as a separate procedural matter.

(A) Procedural irregularities

11. Although not expressed in precisely the same way in the notice of objection, it appears to me that the primary procedural irregularities ASOC complains of may conveniently be considered as follows:

- (a) Incorrect definition of the “unit of certification” by the certification body;
- (b) Failure to consider and attach due weight to peer reviewer comments;
- (c) Failure to consider and attach due weight to stakeholder comments;
- (d) Failure to provide adequate PISGs.

I should note that in the notice of objection, under the category of “procedural irregularities” ASOC also makes a number of other assertions, including assertions that the report contains contradictory statements; in some cases incorrect information has been presented; in some cases dated scientific information has been used; and that in some cases scoring is inconsistent with the comment provided. Whilst some of these may be described as procedural errors, I consider it more appropriate to deal with these assertions also in the context of the specific performance indicators that are subject to challenge, i.e. as alleged errors of fact, failures to consider material information (either under §4.8.2(b)(ii) or §4.7.5(b)), or as evidence of arbitrariness or unreasonableness under §4.8.2(b)(iii).

(a) Incorrect definition of the unit of certification

12. As noted above, for the purposes of the present certification, the Ross Sea Antarctic Toothfish Longline Fishery – the “unit of certification” – is defined as a number of fishing vessels (named in the report) operated by the Ross Sea Client Group, which consists of a UK company, Argos Georgia Ltd., and two New Zealand companies, Sanford Ltd. And New Zealand Longline Ltd. These fishing vessels are currently fishing in CCAMLR Subareas 88.1 and 88.2 for Antarctic Toothfish (*Dissostichus mawsoni*) by the bottom set longline method.

13. ASOC contends that this is the wrong approach to the application of the MSC Principles. The unit of certification should be the entire Ross Sea Toothfish fishery. In this regard, ASOC points out that CCAMLR, as the relevant fisheries management body, has in fact approved as many as 16 vessels for participation in the Ross Sea Toothfish fishery in Subareas 88.1 and 88.2. This includes vessels from Argentina (1), Republic of Korea (4), New Zealand (4), Russia (2), Spain (1), UK (3) and Uruguay (1). By focusing only on the vessels from New Zealand and UK, the certification ignores the effect on the fish stocks of the actions of other operators in the fishery, as well as of any illegal fishers that may be operating. Furthermore, CCAMLR catch limits are set for combined species of toothfish (*D. mawsoni* and *D. eleginoides*), which means that it is very difficult in practice to distinguish between catches of each species and the effect on individual stocks of fishing activity.

14. In response, the certification body asserts that it has complied with the FCM and relevant MSC guidance by taking into account the potential effect of the activities of the entire fishery where relevant to do so (specifically in relation to Principle 1 and elements of Principle 2), but focusing specifically on the performance of Client Group vessels in relation to Principles 2 and 3.

15. Perhaps surprisingly, there is no definition of the “unit of certification” in the FCM. However, the FCM also incorporates by reference a number of mandatory documents, which include the Principles and Criteria themselves as well as TAB Directives. TAB Directives are defined as interpretations or directions from the Technical Advisory Board (TAB) in relation to the Principles and Criteria and related assessment methodological documents. The question of how to define the “unit of certification” and the effect of the definition on the assessment is dealt with in TAB D-003 (updated April 2004). The unit of certification, i.e. the unit entitled to receive an MSC certificate is described in that document as:

The fishery or fish stock (= biologically distinct unit) combined with the fishing method/gear and practice (= vessel(s)) pursuing that stock. At its simplest, a single vessel could be the unit of certification, more likely, a number of vessels in the same fishery will probably be assessed.

...

So one or a group of vessels in the same fishery (a combination of stock(s)/gear/practice) is the unit of certification. There may be other fisheries (i.e., combinations of stock(s)/gear/practice) in operation that may catch the stock or impact the same ecosystem as

the fishery seeking certification. Stocks in this context could be different species, or different “more or less isolated and self sustaining” groups within a species. There is no implication that if one stock or fishery is certified then that certification also applies to all other stocks of that species or to other fisheries taking that species.

16. The definition is generally self-explanatory. The logic of considering only a single vessel or a small group of vessels in a fishery flows from the fact that MSC certification is a client-driven process. The MSC does not choose who the applicant for certification is or how the applicant defines the subject fishery. Furthermore, the intent of MSC certification is to reward good practice, encourage continuous improvement and lead by example. In this respect TAB D-003 notes that MSC “would wish to certify fisheries that showed good practice even though other fisheries operating on the same fish stock(s) or ecosystem did not use these practices.”

17. Whilst it seems clear enough from the definition that there may be other fisheries operating outside the unit of certification which impact the same ecosystem, the extent to which the fish stock targeted by the relevant unit of certification need to be “more or less isolated and self-sustaining” is not left completely clear. Fortunately further guidance is provided in TAB D-003 as to how this concept may be applied in relation to each MSC Principle, as follows:

The Standards Council reviewed the Principles and Criteria for consistency in relation to these interpretations and situations.

Principle 1 is “A fishery must be conducted in a manner that does not lead to overfishing or depletion of the exploited populations and, for those populations that are depleted, the fishery must be conducted in a manner that demonstrably leads to their recovery.” The Standards Council agreed that Principle 1 applies to the whole of the fish stock(s) exploited by the fishery seeking certification. So a fishery could only pass if the whole fish stock(s) meet this standard, and it would not pass if the standard was not met irrespective of who (e.g., the fishery seeking certification or other fisheries) was responsible for the stock not meeting the standard.

Principle 2 is “Fishing operations should allow for the maintenance of the structure, productivity, function and diversity of the ecosystem (including habitat and associated dependent and ecologically related species) on which the fishery depends”. There was a great deal of discussion of this Principle in relation to the impact of the fishery seeking certification and the impacts of other fisheries on the ecosystem. For example the ecosystem could be interpreted to be very large so that it is likely to contain a serious impact of another fishery somewhere within it, unrelated to the activities or sustainability of the fishery seeking certification. But also some ecosystem effects are transmitted over a wide area, and so a remote fishery could cause failure with respect to Principle 2 in the local ecosystem of another fishery. The Standards Council agreed that Principle 2 applies to the fishery (a combination of stock(s)/gear/practice) seeking certification, so long as the fishery as a whole

is conducted in a way that does not substantially undermine the objectives of Principle 2 across the whole range of the fish stock(s). This was intended to allow Principle 2 to be applied across the full spatial range of the fish stock(s) involved, and the relevant ecological structure and processes, and not be limited to just the local effects of the fishery seeking certification.

Principle 3 is “The fishery is subject to an effective management system that respects local, national and international laws and standards and incorporates institutional frameworks that require use of the resource to be responsible and sustainable”. The Standards Council agreed that Principle 3 applies to the fishery (a combination of stock(s)/gear/practice) seeking certification, except where elements of Principle 3 are required to achieve Principles 1 and 2. This was intended to allow Principle 3 to be applied flexibly to achieve Principles 1 and 2.

18. The point made by the objectors in the present case is twofold: first, that other vessels from other countries also target *Dissostichus spp.* (as well, potentially, as some illegal operators) in the Ross Sea and that the effect of the activities of these vessels on the stocks need to be taken into account; and, second, the certification body made an error by defining the unit of certification by reference to the species, rather than by reference to a specific identifiable stock. In relation to the first matter, I consider that the FCM and relevant TAB Directive is clear. As long as the effects of other fishing activities on the fish stock as a whole and, where relevant, on the ecosystem, are taken into account, the objective of the certification process is not to evaluate the practices of other participants in the fishery. The second issue raised by ASOC is more difficult. In this case, the certification body was unable to use a single isolated stock as its point of reference for the unit of certification but instead defined the unit in question as a part of a potentially broader stock (i.e. the entire circumpolar population of *D. mawsoni*) confined for management purposes to a limited geographic range (i.e. CCAMLR subareas 88.1 and 88.2). The issue is whether this approach is consistent with the mandatory guidance given in TAB D-003.

19. As the final report of the certification body concedes, information on stock definition for *D. mawsoni* is limited. Indeed, a review of the scientific literature referenced as part of the record, as well as peer review comments, suggests that there is considerable controversy as to whether there are independent stocks of *D. mawsoni* within CCAMLR Subareas 88.1 and 88.2 or whether the appropriate stock unit to be considered for management purposes is the entire population of *D. mawsoni* which has a circumpolar distribution in coastal waters South of the Antarctic Polar Front. This difficulty is in fact acknowledged in the final report (Section 4) where the certification body makes reference to the most recent models and stock assessments by CCAMLR’s Fish Stock Assessment Working Group in relation to Subareas 88.1 and 88.2. In particular, reference is made to CCAMLR documents WG-FSA-07/35 and WG-FSA-07/37 (abstracted at Document R.1 in the Record), which tend to support a conclusion that the current designation of a fishery management unit of Subareas 88.1 and 88.2 is reasonable. In particular, the following conclusion by Hanchet *et al* appears relevant:

The authors' present hypothesis is that *D. mawsoni* in Subareas 88.1 and 88.2 spawn to the north of the Antarctic continental slope, mainly on the ridges and banks of the Pacific-Antarctic Ridge. The spawning appears to take place during winter and spring, and may extend over a period of several months. Depending on the exact location of spawning, eggs and larvae become entrained by the Ross Sea gyres, and may either move west settling out around the Balleny Islands and adjacent Antarctic continental shelf, south onto the Ross Sea shelf, or eastwards with the eastern Ross Sea gyre settling out along the continental slope and shelf to the east of the Ross Sea in Subarea 88.2. As the juveniles grow in size they move west back towards the Ross Sea shelf and then move out into deeper water (greater than 600 m). The fish gradually move northwards as they mature, feeding in the slope region in depths of 1 000–1 500 m, where they gain condition before moving north onto the Pacific-Antarctic ridge to start the cycle again. Spawning fish may remain in the northern area for up to 2–3 years. They then move southwards back onto the shelf and slope where productivity is higher, food is more plentiful and where they regain condition before spawning. (Documents R.1 and R.26)

20. MML's approach to the question of stock definition was entirely consistent with the hypothesis set out in Hanchet *et al.* As far as Principles 2 and 3 were concerned, the assessment team focused on the impact of the fishing activity of the client group vessels on the portion of the stocks within Subareas 88.1 and 88.2. However, with respect to Principle 1, and where appropriate, broader impacts under Principle 2, the certification body took account of information relating to the distribution of the entire circumpolar population of the species. Overall, I consider that this approach was reasonable and practical in the circumstances, on the basis of the evidence available, and is not inconsistent with the requirements of the FCM and relevant TAB Directives. I reject the objection raised on this ground and consider that the unit of certification was established in compliance with the FCM. This does not, of course, answer the question as to whether the information available relating to the status of the stocks in question was actually sufficient to support a positive assessment under Principle 1, which is one of the main issues taken by ASOC with respect to the scoring. This aspect, however, will be considered later in relation to the scoring of the particular PISGs.

(b) Failure to consider and attach due weight to peer reviewer comments

21. A second major procedural complaint raised by ASOC is that the certification body failed to give adequate consideration to the comments made by peer reviewers. The requirement for peer review is contained in the FCM at §3.7 as follows:

3.7 External peer review and Peer Review Draft Report

3.7.1 The certification body shall arrange for the Peer Review Draft Report to be reviewed by a group of experts considered to be, at a minimum, the peers of the experts comprising the assessment team. The Peer Review Draft Report shall incorporate client response and conditions (if applicable), scores, weightings and certification outcomes,

- 3.7.2 There shall be a minimum of two people retained as peer reviewers.
- 3.7.3 The certification body shall notify the MSC and stakeholders of the proposed peer reviewers and allow 10 days for stakeholders and the MSC to submit written comments and/or objections as to the selection of a proposed member of the peer review panel. The MSC shall publish the names and short CVs of the peer reviewers on the MSC website for 10 days. The certification body's decision on the choice of peer reviewers is final.
- 3.7.4 As a minimum, the peer reviewers shall satisfy the key requirements of Section 2.2.3, particularly as they relate to the fishery under assessment.
- 3.7.5 The certification body shall specify a timeframe for the peer review process and notify the MSC for publication of the timeframe on the MSC website.
- 3.7.6 Upon receipt of the peer reviewers' written comments the Assessment Team shall explicitly address the issues raised and incorporate any appropriate changes into the Public Comment Draft Report and, if appropriate, into any special conditions contained therein.

22. In the present case, two peer reviewers were selected, both of whom provided a comprehensive commentary on the draft report (reproduced at Appendix E of the final report). There is no dispute about the qualifications of the peer reviewers, or the procedure that was followed in relation to their selection, appointment and the way in which they carried out their review. Rather the complaint is that the certification body failed to "explicitly address the issues raised and incorporate any appropriate changes into" the final report. At Section 5 of the notice of objection, ASOC refers to a number of specific instances where it alleges that peer reviewer comments were either not taken into account or ignored. These include PISG 1.1.1.5., PISG 1.1.1.6, PISG 1.1.1.7, PISG 1.1.1.8, PISG 1.1.2.4., PISG 1.1.4.2, PISG 1.1.6.1, PISG 1.3.1.2, PISG 2.1.1.3, PISG 3A.3.5 and PISG 3A.6.2. The same comments are elaborated further in ASOC's supplementary submission of 29 March 2010.

23. In response, the certification body observes that peer reviewers often make comments at variance to each other and to the assessment team. It is the function of the assessment team in their capacity as experts to receive and review all the information on a fishery, including the peer review reports, discuss the fishery in relation to the performance indicators and scoring guideposts and agree on a score for each performance indicator. Discussions within the team are critical in order to reach a balanced and fully informed position on the performance of the fishery against the MSC standard and to minimize subjectivity.

24. It is important to recall the context in which peer review is required as part of the FCM. Among the principles of the FCM are the requirements of accountability and transparency. In particular, by the time that a full assessment is carried out, "external review and scrutiny" is also stated to be a "guiding principle" of the process. This implies that not only should peer review be sought as part of the process, but also that comments made by peer reviewers should be taken into account in an appropriate manner. Where serious comments are made on the basis of substantive evidence which are at variance

with the conclusions reached by the certification body it is not enough to dismiss those comments without the most careful and anxious consideration. On the other hand, it is equally important to note that decisions relating to scoring are to be made by the assessment team on the basis of all the evidence that has been gathered during the assessment process. Peer reviewers are required to comment on the draft report. They are not intended to act as additional members of the assessment team nor are they necessarily expected to conduct a full independent review of all of the evidence that forms the basis for the conclusions in the draft report.

25. The comments made by the peer reviewers, and the responses of the certification body to those comments, are helpfully reproduced in full at Appendix E of the final report. It is certainly true to say, as the objector points out, that not a single score was altered as a result of the peer reviewers' comments, even though both peer reviewers suggested that the scores on a number of performance indicators should be adjusted downwards (interestingly neither peer reviewer suggested that any score should be increased). Indeed, the only adjustments to the final report made as a result of the peer reviewer comments were a number of editorial changes and a number of instances where, in response to the comment that the text did not justify the score awarded, the text of the final report was altered to ensure that it did support the relevant score. This is significant in that there was apparently no instance of the opposite situation, where the score was amended to ensure that it was appropriate to the textual conclusion. Overall, the impression given by Appendix E is of a rather defensive attitude on the part of the assessment team, coupled with an unwillingness to change scores that had already been decided. Many of the responses given to the peer review comments are cursory, although it is fair to say that a number of important issues were clarified, including, for example, the responses in relation to stock assessment and stock status and in relation to PISG 1.1.1.3 and Principle 3 issues. The question, however, is whether this behaviour by the assessment team itself amounts to a serious procedural irregularity that made a material difference to the fairness of the assessment.

26. I am of the view that it does not. I consider that in order to succeed under this heading, it would need to be shown either that there was a procedural defect, for example, that peer review comments were not taken into account at all, or that §3.7 procedures were not followed, or that the rejection by the certification body of the peer review comments was so irrational, biased or predisposed, as to amount to unreasonableness. Notwithstanding the impression given by Appendix E, it is impossible to say that the evidence supports such a conclusion. The FCM clearly gives a substantial margin of discretion to the certification body in the way it which it treats the evidence provided to it, including peer review comments, and, most importantly, confers sole discretion on the certification body to score against performance indicators. It is not a ground of procedural error that one expert view is preferred over another. I consider that the overriding requirement of transparency is adequately met by the publication of the peer review comments in full, each of which may well form the basis for an allegation of material error in the scoring of specific performance indicators.

27. The objection on this ground is dismissed.

(c) Failure to consider and attach due weight to stakeholder comments

28. The next complaint that is made by ASOC is that concerns raised in the context of stakeholder submissions throughout the assessment process were not adequately addressed by the certification body. It is asserted on the one hand that concerns raised by a range of stakeholders in relation to the establishment of the different PISGs contained in the assessment tree were essentially ignored by the assessment team. On the other hand, it is also asserted that while information and comments submitted during and after the publishing of the public assessment report were acknowledged in the final report, they were not fully taken into account as demonstrated by the fact that the final report and the conclusions reached therein were left substantially unchanged and only three scores and seven of the performance indicator commentaries were changed as a result. Considering the specific and well-documented concerns raised by the various stakeholders and experts (many of whom had much more scientific experience in the Ross Sea than anyone on the assessment team), this is indicative of bias and predetermination on the part of the certification body, which is a serious procedural flaw.

29. In response, MML made reference to §4.1.1. of the FCM, which requires it to “review the report taking account of all the stakeholder comments and revise the report as appropriate”. It asserts that this has been done and that stakeholder comments have been reviewed in the final report; a point which the objector has in fact acknowledged in its submissions where it is said that “comments submitted during and after publishing of the public assessment report are in part “acknowledged” in the Final Report.” The certification body insists that it has reviewed and fully considered the concerns raised by stakeholders and that its evaluation of the evidence relating to these areas of concern has given rise to the scores and overall determination. For these reasons, accusations of “bias and predetermination” are not substantiated.

30. The FCM defines a “stakeholder” as

Any person, group or organisation that has an interest in, or could be affected by, the assessment; this may include fishery managers, fishers, fishing industry organisations, recreational groups, public interest and community groups, indigenous communities, research communities, and government agencies

The requirements of the FCM as far as stakeholder participation is concerned are as follows. Under the heading of “Major actions/outcomes (certification body/client)” anticipated in the full assessment process, the FCM requires that the following steps are carried out:

- An evaluation of the fishery against the MSC’s Principles and Criteria for Sustainable Fishing, including, if relevant, the drafting of measurable, outcome oriented and time-bounded conditions of certification.
- Stakeholders provided the opportunity to input to the evaluation process.
- Client given the opportunity to respond to the preliminary draft report, including any conditions, with the client’s responses taken into consideration, along with the actions

agreed between the client and certification body to address improvements required for continued certification.

- Stakeholders given the opportunity to comment upon the selection of peer reviewers.
- Peer review of a draft report of the fishery assessment and conditions.
- Stakeholders given the opportunity to comment upon the public comment draft report.

31. Further detail as to stakeholder participation is provided in Sections 3.1 and 3.8 as follows.

3.1 Assessment visits and information collection

3.1.1 The client and stakeholders shall be advised at least 30 days in advance of the first on-site assessment visit. The client shall be provided with a summary list of anticipated objective evidence that may be required by the assessment team.

3.1.2 Stakeholder interviews shall be conducted to ensure that the assessment team is aware of any and all concerns of relevant stakeholders. Where stakeholders do not wish to be interviewed they shall be advised that they may submit written information to the assessment team.

3.1.3 The assessment team shall ensure that all relevant information (including technical, written and anecdotal sources) is analysed prior to scoring the fishery. Where such information is not available or assembled by the client or stakeholders in time for the first assessment visit, the assessment team may require further assessment visits in order to adequately assess and analyse the evidence.

...

3.8 Public Comment Draft Report – review by stakeholders

3.8.1 Following review by the client and peer reviewers, the certification body shall make the Public Comment Draft Report available for comment by stakeholders for a period of 30 days. The Draft Report made available to stakeholders shall include the scores and weightings, and will include the recommended Determination and any conditions.

3.8.2 The Public Comment Draft Report shall contain the full comments from the unidentified peer reviewers.

3.8.3 Any comments made by stakeholders shall be documented and forwarded by the certification body to its certification decision-making entity.

3.8.4 In response to the Public Comment Draft Report, stakeholders shall be advised that they are to provide objective evidence in support of any additional claims or any claimed errors of fact.

32. Section 4 of the FCM, which deals with the form and content of the final report specifies that:

4.1 Final Report

4.1.1 The assessment team shall review the report taking account of the stakeholder comments and revise the report as appropriate. The Public Comment Draft Report of the certification body's appointed assessment team, all written comments by the unidentified peer reviewers, all written comments by stakeholders and relevant responses to stakeholder comments will be submitted to the certification body's decision-making entity.

4.1.2 The certification body will make a Determination and release a Final Report incorporating the Public Comment Draft Report (including scores, weightings and conditions), written comments by the peer reviewers, all written comments by stakeholders and relevant responses to stakeholder comments and the Determination.

4.1.3 The form and content of the Final Report shall be in accordance with Appendix 1.

33. Appendix I, which sets out the expected form and content of the final report states, *inter alia*, that:

5.5 Stakeholder comments

The comments made by stakeholders about the Public Comment Draft Report shall be incorporated into the report in accordance with Section 4.1.2.

34. In the present case, Section 8 and Appendices D and F of the final report deal with the issue of stakeholder consultation. In summary, a total of 45 stakeholders were identified and consulted during the assessment process. The final report lists stakeholder consultations held between November 2007 and November 2009, including direct e-mails to identified stakeholders, publication of relevant information on the MSC website and public and private meetings held during the assessment visits. The report goes on to list all the substantive written submissions made by stakeholders and to summaries (at pages 32 to 37) the certification body's response to the various points made by stakeholders. It is also noted that the text of the scoring commentary has been changed in a number of places to take account of stakeholder comments. The complete stakeholder comments on the public comment draft report are set out at Appendix F of the final report (the separate issue of whether stakeholder comments were taken into account in setting the performance indicators and scoring guideposts is considered below). They include comments by the Center for Biological Diversity, ASOC, WWF, the Ross Sea Client Group, FORSE, Professor Joseph T Eastman of Ohio University, Environment and Conservation Organizations of New Zealand Inc. (ECO), Greenpeace, and Professor Emeritus Donald P. Siniff of the University of Minnesota.

35. Once again, in order for the objection to succeed under this heading, it would need to be shown either that there was a procedural defect, for example, that stakeholder comments were not taken into

account at all, or that the relevant FCM procedures were not followed, or that the rejection by the certification body of the stakeholder comments was so irrational, biased or predisposed, as to amount to unreasonableness. I do not think that any of these conditions apply. There is nothing in the final report, or indeed in the notice of objection, to suggest that the procedural requirements of the FCM were not followed as far as stakeholder participation in the assessment process is concerned. It is not suggested that stakeholders were not given an adequate opportunity to participate in the process and there is no evidence that that was the case. Indeed, the impression given is the opposite. There was considerable and active stakeholder participation at all stages of the assessment. Section 8 of the final report in particular shows that serious attention was given to the stakeholder comments and that the assessment team took care to analyze the comments made and provide reasoned responses. It seems to me that the real complaint being made by the objector is that the assessment team did not agree with those comments made by stakeholders that supported the position taken by ASOC with regard to the proposal to certify the toothfish fishery. That is simply not a valid ground for pursuing a procedural objection and the objection under this heading, as it relates to consideration of stakeholder comments on the assessment, must be dismissed.

(d) Failure to provide adequate scoring guidelines

36. Similar complaints are made regarding the way in which the PISGs were developed for this assessment. It is asserted that, not only was there a lack of transparency regarding the final assessment and scoring decisions, but also that “there was inadequate development of performance indicators ... to provide a robust and transparent assessment”. This is denied by MML, which points out that the assessment tree used in this assessment mirrors several used by MML and other certification bodies prior to the release of the revised standard assessment tree.³ Furthermore, as noted above, stakeholder comments were received and considered as part of the process of developing the assessment tree. These are recorded and commented on at Section 8 of the final report.

37. It has to be recalled that under the FCMv6, it is a matter for the certification body to define the PISGs for each fishery, as well as the weighting to be applied to each PISG in scoring. There is a consultation process, involving MSC, the client fishery any other stakeholders, during which the PISGs may be revised as appropriate. FCMv6 also makes it very clear (§2.3.1.) that the performance indicators and scoring guideposts are to be “developed operationally for each fishery”, whilst §2.3.3. goes on to state that the assessment team ‘shall define, for the fishery being assessed, the scoring guideposts for each performance indicator’. Any comments or changes to the assessment tree suggested by the MSC, the client or any stakeholder are to be considered by the assessment team, and if appropriate, a revised assessment tree is to be prepared by the assessment team for use in the following stages of the assessment. It can be concluded, therefore, that the establishment of the PISGs is a matter within the

³ It must be noted that, a revised Fisheries Assessment Methodology, including a default assessment tree, has been adopted by MSC and is now in effect for all fisheries entering assessment since July 2009 (FAMv2, 31 July 2009).

discretion of the certification body, subject to the consultation procedure set out in the FCM and the overriding requirement of reasonableness in decision-making.

38. I have to say that in trying to analyze the way in which the PISGs were established, I have not found the notice of objection particularly helpful. Whilst complaints are made about a lack of transparency in the process, and failure to take account of specific comments that were made, there is a lack of specificity as to where precisely the certification body is said to have erred in law in the way in which it established any particular PISG. It is not enough to simply state that the certification body should have adopted all the proposals made by stakeholders, or that a different view was preferable. Specific instances need to be highlighted where the certification fell into serious error either by omitting to consider a relevant comment or by adopting a contrary interpretation.

39. Notwithstanding, it is clear from the record that substantive comments were made by a number of stakeholders in relation to the development of the assessment tree. All the comments that were submitted in writing are reproduced at Appendix D of the final report. Of particular relevance are a set of extensive and substantive comments made by WWF, on the proposed assessment tree and scoring guideposts (Document R.56, annex). This document takes the form of a letter, dated 5 May 2008,⁴ which makes detailed comments about the lack of precision in the general nature of the language used in setting the scoring guideposts and an annex which is a redlined version of the draft assessment tree. I will turn to the annex shortly, but the general thrust of the WWF submission was to the effect that many of the scoring guideposts were set too low, and should have been strengthened so that the 80 mark should have read as the 60 mark. In addition, WWF complained about the widespread use of very imprecise and subjective terms to define critical benchmarks such as “significant”, “substantial”, “reasonable”, “general”, “adequate”, “some” and so on. These concerns had already been made known to the certification body by a number of other commentators, including Mr. Barry Weeber, the co-chairperson of ECO NZ, in a letter dated 6 May 2008.

40. The comments on the PISGs were acknowledged by the certification body and, as I have noted, were reproduced in Appendix D of the final report.⁵ Having said that, however, I find that the annex to document R.56 is a very important document. It clearly demonstrates exactly where WWF’s concerns lay and, critically, makes very specific textual recommendations for widespread changes to the scoring guideposts in respect of Principles 2 and 3. Some comments are made in respect of the PISGs on Principle 1, but it is fair to say that these are nowhere near as substantial as the comments made in respect of Principles 2 and 3. In the case of Principle 2, WWF proposed specific language that would

⁴ In the Record, the letter bears a date of 18 November 2008. The same date appears on page 31 of the final report. Table 1, also on page 31 of the final report, states that the final PISGs were released on 26 March 2008. Since this chronology did not seem to make sense, I asked for further clarification. I have now been informed that the actual date the letter from WWF was received was 5 May 2008, whilst the final PISGs were actually released on 26 June 2008.

⁵ The annex to document R.56 was not included in the final report nor, initially, in the Record, but was provided subsequently in response to a request by me.

have resulted in rewriting and strengthening of nearly every PISG. In the case of Principle 3, concerns were expressed over PISGs 3A.6 to 3A.9 and 3B.

41. When the WWF draft is compared against the PISGs that were actually adopted and used by the certification body, it becomes very apparent that, despite its acknowledgement of the comments in Section 8 of the report, none of the comments and suggestions made by WWF (apart from a few very minor technical changes) were incorporated into the final document. In fact, it is fair to say that the proposals were rejected in their entirety.

42. By itself, this may not be unreasonable. The certification body is certainly not compelled to accept the views of stakeholders. However, where serious and substantial points are articulated by not only one, but a number of stakeholders, it is reasonable to expect the certification body at the very least to provide a cogent explanation as to why it has decided to reject the proposals made and retain its original language. The absence of such an explanation could easily give the impression that the comments were not treated with the seriousness that they deserved and that the certification body had no intention of changing its approach. On the face of the record, I am satisfied that the treatment of stakeholder comments on the draft assessment tree was substantially different to the treatment accorded to stakeholder participation in the subsequent stages of the assessment process. Given the overwhelming requirement of transparency in the MSC process, I do think that in this case, the certification body acted unreasonably in its rejection of the proposals made to it on the assessment tree and that this in itself constitutes a serious procedural error in the process. In order to justify a remand, however, more is required. It must also be demonstrated that the failure to deal with the comments made by stakeholders on the draft assessment tree made a material difference to the fairness of the assessment. This requires some qualitative assessment of the comments and proposals made by the key stakeholders with respect to the PISGs.

43. Principle 2 requires that “fishing operations should allow for the maintenance of the structure, productivity, function and diversity of the ecosystem (including habitat and associated dependent and ecologically related species) on which the fishery depends.” Principle 3 requires that “the fishery is subject to an effective management system that respects local, national and international law and standards and incorporates institutional frameworks that require use of the resource to be responsible and sustainable.” Obviously, it is important that the PISGs which are used as the basis for assessment against these Principles not only relate to the Principle in question but also provide for a meaningful measurement of whether and how a particular aspect of the Principle is satisfied. This means, *inter alia*, that for each PISG the “passing score” of 60 must be set at a level which objectively demonstrates compliance with some aspect of the relevant Principle. Clearly, if the 60 Guidepost is set too leniently then it undermines the whole purpose of assessment against the MSC Principles. Furthermore, key phrases should be used in the same way and to mean the same thing. A consistent approach should be taken to the quantification of probability and, as far as possible, objective indicators should be used.

44. It is apparent that at the heart of stakeholder comments was concern over the use of imprecise and inconsistent language to define the various thresholds and confidence levels for information

relevant to the scoring of individual PISGs under Principles 2 and 3. This is hardly surprising since both Principles 2 and 3 require the certification body to make qualitative assessments on the basis of limited direct observations and quantitative analysis, for example about the degree of likelihood of adverse environmental impacts taking place as a result of fishing activity, or about the likely effectiveness of different management options. To make these assessments requires the certification body to make judgments as to the adequacy of information or the degree of confidence that can be placed in relevant data. In the majority of instances under Principle 2, the complaint made by WWF was that the 60 guidepost could be satisfied on the basis of very little quantitative information and on a highly subjective basis. For example, in relation to PI 2.1.1.3, which assesses whether there is information on the potential for the ecosystem to recover from fishery-related impacts, the 60 guidepost requires that the “most significant elements of the functioning of the ecosystem relevant to the fishery, are identified and generally understood”, whilst the 80 guidepost requires that “the main elements of the functioning of the ecosystem relevant to the fishery have been documented and are understood”. It is not clear what the difference between “significant elements” and “main elements” is, nor is it clear what is meant by “generally understood” as opposed to “understood”. In relation to PI 2.1.2.3, which assesses whether information is available on other unobserved fishing mortality on target or other species, the complaint is that the 60 guidepost (which requires merely that “Sources of potential unobserved mortality have been identified”) is set at a such a low level as to render it virtually meaningless, and the 80 guidepost (“Information is available to allow estimates to be made of unobserved mortality”) should be substituted in its place.

45. I consider that there is substance in these comments. I find that, in general, the PISGs under Principles 2 and 3 are not expressed clearly. In some cases it is difficult to see the substantive difference between the 60 and 80 or the 80 and 100 guideposts. In other cases, the 60 guidepost can be satisfied on the basis of very little, or highly subjective, information. Widespread use of words such as “adequate”, “appropriate information”, “some information” and “reasonable”, without a glossary to define what, in a quantitative sense, these words mean, makes the application of the PISGs a highly subjective exercise. Since 2008, these problems have been largely overcome by the issuance of the revised Fisheries Assessment Methodology (FAM), which includes specific guidance on the consistent interpretation and application of key terms used in scoring against PISGs. Obviously there was no requirement to use the revised FAM when the Ross Sea Toothfish fishery entered assessment (FAMv1 became effective in July 2008), but nevertheless it would be reasonable to expect MML to be aware of the need for precision in setting PISGs during the period March to June 2008 when the PISGs for the present assessment were under consideration.

46. It is not for me to rewrite or express a view on the definition of each of the PISGs that are challenged under Principles 2 and 3. That is a function for the certification body acting within its discretion. However, I find that I am persuaded by ASOC’s argument that the certification body in this case fell into procedural error by failing to give adequate consideration to stakeholder proposals to revise the PISGs. Had adequate consideration been given to these comments, the effect may well have been to tighten some or all of the PISGs under Principles 2 and 3 (3A.6 to 3A.9 and 3B only), which

would have had a consequent impact on the scores recorded, and therefore I find that the error made a material difference to the fairness of the assessment. The result is that the determination must be **remanded** in order for the certification body to review the Principle 2 PISGs and the relevant Principle 3 PISGs identified above in light of the stakeholder comments and either modify the PISGs or provide reasoned explanations for not modifying them. Clearly, where PISGs are modified, re-scoring may be indicated on the basis of the evidence available on the record. For that reason, I do not propose at this stage to deal with the objections by ASOC to the scores currently recorded against the PISGs relating to Principles 2 and 3. Depending on the outcome of the review of the relevant PISGs, and any consequent re-scoring by the certification body, these objections will be taken up after the certification body has responded to the remand. I will, however, go on to deal with the objections to the scores against Principle 1 PISGs, since these are not affected by the remand.

(B) Errors in scoring

47. The main part of ASOC's objection is that the scores given by MML on 36 of the PISGs cannot be justified and such errors were material to the outcome of the determination. The Principle 1 PISGs that have been challenged are 1.1.1.1, 1.1.1.2, 1.1.1.3, 1.1.1.4, 1.1.1.5, 1.1.1.6, 1.1.1.7, 1.1.2.3, 1.1.2.4, 1.1.4.1, 1.1.4.2, 1.1.4.3, 1.1.6.1, 1.1.3.2. Before examining each of the scores on these performance indicators, it is worth reiterating that the OP permits the Independent Adjudicator to interfere with the score given by the certification body if the score cannot be justified for one of the reasons set out in §4.8.2(b). In particular, in the absence of a clear error of fact, or failure to consider material information, it is the prerogative of the certification body to draw inferences and make assessments as to credibility based on the evidence available to it. It is not for the adjudicator to substitute his or her own judgment for that of the certification body so long as the findings of the certification body are adequately anchored in the record of evidence. It is also important to note that it must also be demonstrated that the effect of an incorrect score in relation to one or more of the performance indicators was material to the outcome of the determination. This implies that any error in scoring needs to have been so egregious as to alter the outcome of the determination (i.e. by bringing any individual score below the baseline of 60 or bringing the weighted aggregated scores on each MSC Principle below the required level of 80), or at least to have been sufficiently serious as to warrant a remand to the certification body for further consideration. Overall on Principle 1, the fishery was awarded a score of 89, with scores of below 80 on only three PISGs.

Principle 1

48. PI 1.1.1 demands that there be sufficient information on the target species and stock separation to allow the effects on the fishery on the stock to be evaluated. Clearly this is a fundamental issue and there are objections to the scoring of all seven of the PISGs under this heading.

(1) Performance indicator 1.1.1.1. (Score awarded 100)

49. PI 1.1.1.1 asks whether the species is readily identified as juveniles and adults. A score of 100 was awarded, meaning that “the species is readily identified by fishers and by regulators and is recorded appropriately.” The findings of the assessment team were that *D. eleginoides*, the only other species with which *D. mawsoni* is likely to be confused, is caught relatively rarely and should be easily identified by the observers. Observer coverage is 100%, making gross errors unlikely. Crew are likely to learn species difference from observers rapidly, as this is the only species that that *D. mawsoni* can be confused with. An identification guide is available. The overlap between the populations of *D. mawsoni* and *D. eleginoides* is limited. The conclusion is that while there is some overlap between *D. mawsoni* and *D. eleginoides*, differences between the two species are readily picked up by fishers and observers. The species is therefore readily identified by fishers and by regulators and is recorded appropriately.

50. ASOC notes the comments made by one of the peer reviewers in respect of this PISG and notes that, whilst it may be true that crew are likely to learn the difference between the species from observers, the reviewer is not sure that this is in fact the case. It is submitted that a score of 80 would have been more appropriate (“The target species is unlikely to be confused with any other species and is recorded appropriately.” [my emphasis]). The issue is whether the findings by the assessment team justified a conclusion that the species is “readily identified” or “unlikely to be confused with any other species”. Whilst I consider on the basis of the evidence before the certification body that the scoring on this PI was generous, and that I myself may have preferred a finding that the target species is unlikely to be confused with other species, I am not persuaded that MML made a mistake as to a material fact, failed to consider material information, or acted arbitrarily or unreasonably in awarding a score of 100 on this PI in the sense that no reasonable certification body could have awarded such a score.

51. The next four PISGs are closely related in that they all depend upon a consideration of the evidence available in relation to the state of knowledge of the biology of the species.

(2) Performance indicator 1.1.1.2. (Score awarded 70)

52. PI 1.1.1.2 asks whether the life history of the species is understood and the spawning and nursery areas described? The assessment team found that the life history of the species was documented and generally understood, although knowledge is incomplete. Information was adequate to support an appropriate population model. The team also found that there is a working hypothesis of the life history of the species which has been documented and that information is adequate for those parts of the population contributing to the fishery to support an appropriate population model, but which includes several assumptions.

53. A score of 70 was awarded on the basis that the evidence supported a conclusion somewhere between the 60 and 80 SGs. The 60 SG required that “The basis of the life history is understood, although knowledge may be incomplete. Information is adequate to support a general population model, but some assumptions are required. There is some information on major spawning and nursery

areas.” The 80 SG required that “The life history of the species is documented and generally understood. Information is adequate to support an appropriate population model. The major spawning and nursery areas are adequately well described.”

54. In its objection, ASOC argues that there are critical gaps in scientific knowledge of the life history of the species, particularly in relation to spawning and reproductive behaviour. The scientific evidence on which the assessment team reached its conclusion justifies at most a finding that SG 60 is met since there is no direct evidence for spawning and nursery locations. Specifically, the main scientific report which is referenced in the scoring table (Hanchet *et al*, op. cit. at §19) states that “the theories [presented previously in the document] on the reproductive behaviour and fish and larval movement at present can only be inferred rather than determined by direct observation.” According to ASOC, a hypothetical model of the life history of the species such as this cannot be considered as adequate information for the purposes of the 80 SG and in fact is barely adequate to sustain a finding under SG 60.

55. In its response, MML simply notes that this issue has been fully considered in the assessment. This misses the point, which is that the information available as to the life history of the species does not support a finding that the 80 SG is met. The life history is not generally understood and the information is not adequate to support an appropriate population model.

56. The difficulty with this PI, as with many others, is the imprecise nature of the scoring guideposts. The question of what is “adequate” and what is “generally understood” as opposed to an incomplete understanding, is a highly subjective matter, which may well imply that a substantial degree of discretion should be left to the assessment team to determine whether the evidence meets the required standard. In this case, however, I do consider that the conclusion reached by the assessment team is not supported by the evidence and that the decision to award a score above the 60 SG can be described as arbitrary or unreasonable in the sense that no reasonable certification body could have awarded such a score on the evidence before it. The model in Hanchet *et al* is clearly described as hypothetical. Knowledge is incomplete and population models depend heavily on assumptions. My view is reinforced by the comments submitted by the New Zealand Ministry of Fisheries (MFish) which indicate that the thrust of research since 2006 has been on filling critical knowledge gaps and that, whilst ongoing research tends to support the assumptions made to date, this research is not yet complete. I do not think that, on the basis of the record, any reasonable certification body could have awarded a score of more than 60 on this SG and I would remand this PI for further consideration as to whether the 60 SG is met.

(3) Performance indicator 1.1.1.3. (Score awarded 90)

57. PI 1.1.1.3 asks whether the geographical range of the target stock is known and any seasonal migration described. The assessment team found that a reliable estimate of the geographic range of the target stock was available including seasonal patterns of movement and availability. Stock assessment and management units are consistent with the majority distribution of the stock. This is well

documented and kept under constant review. It based these findings on its view of an extensive tagging programme, which, together with the strong seasonality of the fishery, it felt should provide complete knowledge on the patterns of movement and availability. It noted that no tags have been reported outside Subarea 88 and considering the large number of fish tagged, it is very unlikely that there is significant exchange with other fisheries. References for these findings are indicated as documents R.19, R.26 and R.33 in the Record, together with another report (Smith, McKenzie and Tubbs (2006)), which I have not been able to locate in the Record.

58. In its objection to the score of 90 awarded against this PI, ASOC notes that the 80 SG requires there to be a reliable estimate of the geographic range of the stock, whilst the 100 SG requires there to be complete estimation of the range. In ASOC's view, on the evidence available to the certification body, the fishery should have scored less than 60 on this PI. The 60 SG requires that "A management unit approximating the stock is used with some biological justification. This is based upon a sufficiently robust estimation of the geographical range of the target stock, and taking account of uncertainties." In making this assertion, it points out that MML's statement that no tags have been reported outside Subarea 88 proves nothing, since there is no legal toothfish fishery outside Subarea 88 in which tags could be recovered. Furthermore, the tagging programme itself is beset with difficulties and should not have been used as the basis for drawing conclusions under this PI. ASOC also points to contradictory evidence contained in New Zealand stock assessment reports which indicate a much greater degree of uncertainty surrounding the state of knowledge of stock distribution. The relevant documents referred to are CCAMLR WG-FSA-06/34 and a New Zealand MFish report of 2008, neither of which are included in the Record. The latter notes in particular that stock affinity of the assessed stocks with toothfish in surrounding areas is not well understood, which is at odds with the assessment team's finding that the geographic range is well estimated.

59. Further submissions on this point were made by FORSE, which points to serious defects in the reliability of the tagging programme on which the assessment team's conclusions were based, as well as MFish, which notes that the size bias in the tagging data is understood and is compensated for so that the data are regarded by CCAMLR as sufficiently representative to allow assessment of stock status (the conclusions of the 2009 CCAMLR Scientific Committee are referred to in this regard).

60. I am concerned that, once again, the PISGs are set in such subjective terms that it is difficult to quantify what is meant by the use of terms such as "reliable" and "sufficiently robust". Nevertheless, it does seem to me that the reports cited by the assessment team support a finding that the 80 SG is met. It seems to me to be generous to award a score exceeding 80, but I am not convinced that the scoring could be described as manifestly unreasonable. A further concern, however, is that relevant documents were not fully considered, in particular the two reports referred to by ASOC. Both these documents were, or should have been, available to the certification body during the assessment and it is possible that they may have made a material difference to the assessment. I consider that it is appropriate to remand this PI to the certification body to examine the two documents referred to by ASOC and indicate whether any adjustment to the score is required. The 2006 report by Smith, McKenzie and Tubbs,

referred to in the scoring table, but not included in the Record, should also be referenced appropriately to better understand the conclusions reached.

(4) Performance indicator 1.1.1.4. (Score awarded 80)

61. PI 1.1.1.4 asks whether there is there information on fecundity and growth. A score of 80 was awarded indicating that “reliable estimates or indices are available of fecundity at size and/or weight and growth rates.” In objecting to this score, ASOC points to the same New Zealand stock assessment of 2008 as referred to above as tending to indicate a much greater degree of uncertainty particularly in relation to fecundity and sexual maturity. In its response, the certification body points out that the wording of the PI also permits reliance on indices of size and/or weight and growth rates. That is why, in its explanation of the scoring of this PISG, the assessment team had noted that “Growth data is therefore well estimated but fecundity at size is less well known, and so the score is only 80 for this Performance Indicator.”

62. I agree. On this PISG, I am not persuaded that MML made a mistake as to a material fact, failed to consider material information, or acted arbitrarily or unreasonably in awarding a score of 80. The conclusion is justified by the evidence cited.

(5) Performance indicator 1.1.1.5. (Score awarded 80)

63. PI 1.1.1.5 evaluates whether there is an understanding of the relationship of recruitment to parental stock. A score of 60 is justified if “Indices of recruitment levels and recruiting ages, and corresponding spawning stock levels are available and used as appropriate.” A score of 80 is justified if “Adequate indices of recruitment and spawning stock are estimated and used. Sufficient years of data are available to establish a general relationship between stock and recruitment.” The assessment team awarded a score of 80 on the basis that, notwithstanding deficiencies in data owing to the recent start of the fishery, the recruitment model in use was adequate to the current assessment of the stock.

64. This conclusion is strongly criticized by ASOC, which makes reference to a number of reports from 2003 and 2004 (again, not included in the Record), as well as the comments made by one of the peer reviewers, which all make the point that the limited data available to date from the fishery is simply not adequate to quantitatively estimate biological reference levels.

65. It is clear that both peer reviewers had considerable reservations about the scoring of this PI. Peer reviewer A noted, for example, that “The understanding of the relationship between recruitment and the parental stock is limited” and referred to a theoretical paper by Hanchet *et al* (2008) to support this conclusion. Peer reviewer B noted that no evidence is provided that there are “adequate indices of recruitment and spawning stock”, given that there appears to have been constancy of the spawning stock size over the period of the fishery (though this is not demonstrated) and the team considers that fluctuations in recruitment are more likely to be driven by environmental effects. This reviewer considered that it was not possible to establish a general relationship between stock and recruitment under these circumstances and suggested that a score of no more than 60 was indicated. In responding

to the peer review comments, MML conceded that it was true that in absolute terms stock recruitment “steepness” parameters cannot be estimated. However, the level of recruitment is estimated and there is reliable information that recruitment has been, so far, unaffected by the level of exploitation. In MML’s view, this constituted “some understanding, although incomplete”. The certification body then indicated that the wording had been amended to better explain the 80 score.

66. I do not consider that this is an adequate approach. MML seems to have changed the text to better justify the score, but there is no indication that it reconsidered the scoring against the guideposts in light of the comments made by the peer reviewers. Nor is there any indication that the 2008 report by Hanchet *et al* was considered. Once again, it is not in the Record and the assessment team seems to have relied on an earlier report. I consider it appropriate to remand this PI to the certification body to reconsider the scoring in light of the peer reviewer comments and to consider the impact of the 2008 report on its conclusions.

(6) Performance indicator 1.1.1.6. (Score awarded 75)

67. PI 1.1.1.6 evaluates the extent to which information is collected on the abundance/density of the stock. A score of 75 was awarded on the basis that “A fishery dependent index is available on the abundance and density of the stock. Abundance is monitored through a tagging programme carried out by the commercial fishery. Uncertainties have been analysed and addressed in ways which allow trends to be determined from the indices.” In justifying its conclusion, MML noted that “Most tagging data are rejected due to unexplained differences in recaptures among fleets, so only the New Zealand data are currently used, although data from UK flagged vessels belonging to the client group are likely to be used in future analysis. The tagging data set is small. The New Zealand data have the highest recapture rates, and therefore estimate the smallest stock size. Preferential use of these data is precautionary.” It noted further that “There is currently no other strategy available for an abundance index apart from tagging. Although available, CPUE is not used as it is very variable due to ice affecting the fishing area and the lack of consistency in the fleet (gear and methods) over time. There are no trends in CPUE for the target species. Trends in CPUE are used to monitor non-target species.”

68. ASOC’s objection to the score on this PI is based on serious concerns over the adequacy of the tagging programme which is the sole source of the information on which this PI depends. It points out that only the data from New Zealand vessels are acceptable for data analysis and that there are serious concerns about data quality, which have been explicitly recognized in a number of CCAMLR reports from both 2008 and 2009. The effect is that the dataset is so small, and so unreliable, that it is impossible to conclude that there is a “high degree of confidence” in the evaluation of stock abundance trends (one of the requirements of the 80 SG). Similar concerns were expressed by FORSE, which is highly critical of the tagging programme.

69. It seems to me that in its justifications outline above, as well as in scoring less than 80 on this PI, MML recognized the deficiencies in the data. In its justification, it also went on to note that “Indices are suitable to provide some confidence in the evaluation of stock abundance trends, although there is

considerable uncertainty and concern over the accuracy and quantity of the data used. In particular, rejection of much of the tagging data undermines confidence in the tagging programme. While the response to this increased uncertainty is correct, there is a clear need to improve these data, which will become increasingly critical for monitoring the stock.” (my emphasis). On this basis, two out of three of the requirements for SG 80 were met and a score of 75 was a reasonable response.

70. I agree. It seems to me that the award of a score of 75 was well within the margin of discretion permitted to the certification body. On this PISG, I am not persuaded that MML made a mistake as to a material fact, failed to consider material information, or acted arbitrarily or unreasonably in awarding a score of 75.

(7) Performance indicator 1.1.1.7. (Score awarded 80)

71. The PI evaluates the extent to which information is available on environmental influences on the stock dynamics. A score of 80 was awarded, indicating that “There is knowledge of biological and physical factors affecting distribution, survival and year class strength (including natural mortality). Some information is sufficiently robust for use in the stock assessment process.” This is criticized on the basis that no evidence is provided to justify such a conclusion. Peer reviewer B in fact stated that “Nothing provided in the assessment suggests that the knowledge of biological and physical factors that affect distribution, survival and year class strength is other than rudimentary”, whilst the single report cited by MML (Fenaughty (2006), document R.22 in the Record) primarily refers to geographic differences rather than environmental influences.

72. In its response, MML notes that it had responded to the peer review comments to the effect that the current information on environmental influences meets the expected standard and it would be unreasonable to require the level of research and knowledge to exceed these requirements based on the current level of development of the fishery.

73. This may well be so, but in my view it misses the point. The question posed by the 80 SG is not whether it is reasonable to collect more information, but whether the information gained from such knowledge as there is of environmental influences on stock dynamics is sufficiently robust for use in the stock assessment process. This indeed seems to be the critical difference between SG 60 and SG 80. Plainly, there is considerable concern that information is not sufficiently robust and I am not convinced that MML has adequately addressed this concern in its assessment.

74. Although MML’s response to the objection on this ground could be read as conceding that a score of less than 80 is justified, I consider it more appropriate to remand this PI to the certification body in light of the peer review comments and to reconsider the scoring against the specific language of the PISGs. I am not satisfied that the current score is justified on the basis of the evidence before the certification body.

(8) Performance indicator 1.1.2.3. (Score awarded 85)

75. PI 1.1.2.3. asks whether gear selectivity is known for the fishery. A score of 85 was awarded, the assessment team concluding that “selectivities of gear types and fishing methods (the size composition of the catch) are adequately estimated by size and age (although the full size composition of the population sampled is not fully described). Sex composition is determined from tag returns and biological sampling. Information is sufficient to determine any changes in selectivity by locations and times of fishing over time.” The fishery therefore exceeded the 80 SG, which required that “Selectivities of gear types and fishing methods are well estimated by size, age and/or sex as appropriate. Information is sufficient to determine any changes in selectivity over time, if any”, but did not meet the 100 SG, which requires accurate estimation of full selectivity.

76. The objection on this ground is based on comments made by one of the peer reviewers to the effect that neither tagging nor catch composition data necessarily show that selectivity is changing. A score of 60 is therefore warranted.

77. In its response, the certification body points out that its interpretation of the PISG is different to that of the peer reviewer, but is clearly reflected in its commentary and is clearly supported by the evidence available with respect to extensive data collected by observers on gear selectivity. ASOC has not provided any new information or evidence that would indicate a different conclusion.

78. Again I consider that the score of 85 on this PISG was well within the margin of discretion permitted to the certification body. It is clear that MML provided a rational response to the peer review comments, reflecting a legitimate difference of opinion. I am not persuaded that MML made a mistake as to a material fact, failed to consider material information, or acted arbitrarily or unreasonably.

(9) Performance indicator 1.1.2.4. (Score awarded 95)

79. PI 1.1.2.4. asks whether the target species is taken in other fisheries in the area that are not subject to this certification and whether such catches are recorded or estimated. A score of 95 was awarded. ASOC objects to this score on the basis that (as suggested by peer reviewer A), greater account should have taken of information available on IUU (illegal, unreported and unregulated) catches.

80. Peer reviewer A had pointed out that there are a number of nations and companies fishing in the Ross Sea fishery. Whilst conceding that levels of IUU fishing are estimated and the available information suggested that the level of IUU fishing is lower than in other fisheries, the reviewer contended that the “toothfish fisheries in the Ross Sea are not as controlled as other toothfish fisheries” and therefore suggested that a score between 70 and 80 may have been more appropriate to reflect uncertainties in estimates of IUU catches.

81. In response to the peer reviewer, MML noted that all the information available to it indicated that IUU catches were low due to the lack of opportunity and current levels of surveillance. Therefore there appeared to be no justification for a reduced score, although if information becomes available to

suggest that IUU catches are occurring or surveillance is reduced, this could be raised during ongoing surveillance visits. In justifying the scoring in the final report, MML expanded considerably on the reasons for awarding a score of 95. It noted first that the legal fishery is very well monitored, so that even vessels that are not subject to the present certification are monitored in the same way with the same level of observer coverage. IUU fishing has been estimated and has occurred, but is thought to be rare. Furthermore, given the very short season when the area is accessible, it is difficult to carry out illegal fishing without being detected. The New Zealand air force carries out air surveillance in the area, and there is considerable activity during the summer months when there is no ice cover, so an illegal vessel is likely to be detected. Estimates of IUU catches are included in the current assessments. The certification body further noted that the situation with respect to IUU fishing may well change as the probability of detection and/or the incentive to engage in illegal behaviour changed, and so IUU activity should be subject to specific consideration in future certification surveillance audits.

82. It seems to me that this reasoning is adequate to explain the score awarded. The score of 95 on this PISG was well within the margin of discretion permitted to the certification body. MML provided a rational and reasoned response to the peer review comments and I am not persuaded that MML made a mistake as to a material fact, failed to consider material information, or acted arbitrarily or unreasonably.

(10) Performance indicator 1.1.4.1. (Score awarded 100)

83. This PI asks whether there is a mechanism in place to contain harvest as required. A score of 100 was awarded, indicating that “Mechanisms are in place to contain harvest as and when required to maintain (or allow the target stock to return to) productive levels. Measures are robust to uncertainty in data inputs or stock biology. Specific measures to demonstrate effectiveness are in place and their robustness has been examined against a wide range of uncertainties.”

84. The objection against this PI is that a score of 100 is logically impossible given the admitted uncertainties as to the size and definition of the toothfish stock in the Ross Sea. Whilst harvest control mechanisms are in place they cannot be described as robust or effective. A score of 60 is indicated (“Mechanisms are in place to monitor and (if necessary) reduce harvest, but do not fully contain harvest, or have not been tested. Measures provide a reasonable degree of confidence in stock management.”)

85. In evaluating this PI, there seems to be an inconsistency between the PI itself, which asks a simple objective question over which there appears to be little dispute – whether mechanisms are in fact in place to control harvest – and the language of the scoring guideposts, which seem to imply some qualitative assessment of the effectiveness of those harvest control measures. I consider there is substance in ASOC’s complaint that, given the admitted high degree of uncertainty over critical elements such as the size and definition of the stock, it is logically difficult to draw conclusions as to the effectiveness of the measures. Although the assessment team found that “Measures are robust to uncertainty in data inputs or stock biology through application of a precautionary decision rule. Specific measures to demonstrate effectiveness are in place and their robustness has been examined against a

wide range of uncertainties”, it appears that this conclusion was based only on the finding that observers are placed on all vessels, catches are inspected and there is feedback based on the stock assessments.

86. I do not think this reasoning adequately supports a score of 100 on this PISG. I consider it appropriate to remand this PI to the certification body to reconsider the scoring against the specific language of the PISGs, which clearly require some qualitative evaluation of the effectiveness of the harvest control measures in light of known information (or lack of information on stock status, size and definition).

(11) Performance indicator 1.1.4.2. (Score awarded 100)

87. PI 1.1.2.4. asks whether clear, tested decision rules are set out. A score of 100 was awarded, which requires that “Clear, documented and tested decision rules are fully implemented. They have been fully reconciled with reference points, have been periodically evaluated and shown to be robust to all major uncertainties.” In evaluating this PI, the assessment team found that the decision rules and reference points for the fishery were clear and coherent. They are based on the reference points which have been reviewed and agreed as precautionary, although they are generic. The same decision rules are used in other toothfish fisheries, where they have been shown to be appropriate.

88. It is agreed that the first part of this PISG is satisfied, as the decision rules are clear and documented. ASOC’s objection is based on the comments of one of the peer reviewers who contested the finding that the decision rules are fully tested, and suggested that a score of 80 was justified. As noted by MML in its response, this comment appears to have been more in the nature of a personal disagreement with the evaluation of the effectiveness of the decision rule, rather than a substantive complaint. The PI is measuring a specific, objective, question of whether the decision rule has been implemented and has been tested, taking into account uncertainty. I consider that the scoring falls well within the margin of discretion permitted to the certification body. The reasoning is adequate to explain the score awarded and I am not persuaded that MML made a mistake as to a material fact, failed to consider material information, or acted arbitrarily or unreasonably.

(12) Performance indicator 1.1.4.3. (Score awarded 100)

89. This PI evaluates the extent to which appropriate management tools are specified to implement decisions in terms of input and/or output controls. A score of 100 was awarded, indicating that “Management tools have been specified to implement decisions on the level of input and/or output controls. Tools are responsive, relevant and timely. Performance of the tools has been evaluated and evidence exists to show clearly that the tools are effective in achieving relevant management objectives.” In its justification of this score, MML considered and evaluated the vessel licensing system applied by CCAMLR, noted a number of risks and potential weaknesses in the system, including the possibility of IUU catches, but reached the conclusion that the current management tools meet all the criteria specified under the 100 SG.

90. ASOC's objection takes issue with the claim by MML that "no IUU vessel has been licensed", and refers to a case involving an alleged IUU vessel, *Volna*, which was granted a license, as well as two possible instances of IUU fishing in 2008. For these reasons ASOC asserts that a score of 60 is indicated ("Evidence shows that tools are effective enough to achieve the minimum level of control necessary to meet the main management objectives.")

91. I cannot accept this argument. Even if it be the case that a vessel with a history of alleged IUU fishing was granted a licence to operate in the fishery, the fact is that once it was licensed it became subject to the relevant management measures. In the event, as ASOC concedes, the vessel did not fish at all, so I fail to see how the citation of this particular incident has any bearing on the scoring on this PI. The other two instances cited by ASOC likewise seem to have little bearing on the issues identified in this PISG.

92. I consider that the scoring on this PISG falls well within the margin of discretion permitted to the certification body and that the reasoning is adequate to explain the score awarded. I am not persuaded that MML made a mistake as to a material fact, failed to consider material information, or acted arbitrarily or unreasonably.

(13) Performance indicator 1.1.6.1. (Score awarded 100)

93. PI 1.1.6.1. asks whether there is evidence that stock status is consistent with that providing long-term productivity. This requires an assessment of the probability of the stock meeting target and limit reference points. The assessment team found that "fishing mortality is currently estimated as being at or below the target level and the stock is well above the biomass limit reference point. Stock assessment model results are confirmed from simpler observations on the data. From the length frequencies, there is no evidence of any truncation of the overall length frequency distribution, and no evidence for a reduction in fish length in any SSRU over time. There is no evidence for strong variation in year class strength in the fishery, confirming results from the stock assessment" and therefore concluded that a score of 100 was justified as "the stock has a high probability of being consistently at or above its target reference levels (for example, a 81.9% probability of being above Bpa in Subarea 88.1)."

94. ASOC describes this score as "completely unjustifiable", noting that the stock assessment is based on inadequate data and that both peer reviewers had considered that there was insufficient data to make any estimates about long-term productivity. At most a score of 80 would be justified, requiring a "high probability" of the stock being "above its limit reference point and the stock is at, or fluctuating around, its target reference point."

95. MML's response is to point out that it made a clear finding, based on the CCAMLR evidence cited in the final report, that fishing mortality is currently below the target level and that the stock is well above the limit reference point. It is thus easy to conclude that there is a high probability that the stock is consistently at or above the target reference point.

96. I am not convinced that this explanation is adequate. Clearly, if the stock is above the limit reference point and fishing mortality is below target level, it is reasonable to assume that there is a high probability of being above the limit reference point (the requirement of the 80 SG), but it seems to be unduly optimistic to conclude that the stock must also be above the target reference point without a clear explanation of the uncertainties surrounding the estimates of fishing mortality. I also note that peer reviewer B (cited by ASOC) pointed to a passage in the report to the effect that “fishing mortality is currently estimated as being at or above the target level”, which directly contradicts MML’s finding that fishing mortality is below the target level. Whilst MML notes that it made corrections to the text, it is not clear to me what those corrections were, or the source of MML’s contention that fishing mortality is below target level.

97. I do not think this reasoning adequately supports a score of 100 on this PISG. I consider it appropriate to remand this PI to the certification body to reconsider the scoring against the specific language of the PISG, and to provide further justification of its conclusions based on the evidence as to the level of fishing mortality.

(14) Performance indicator 1.3.1.2. (Score awarded 80)

98. PI 1.3.1.2 asks whether information indicates any changes in stock structure that would alter reproductive capacity. A score of 80 was awarded, indicating a finding that “Evidence exists that the fishery has not caused changes in stock structure that would affect recruitment, or, potentially adverse changes in structure are clearly identified and effective remedial measures are in place to address impacts over defined timeframes.”

99. ASOC considered that a score of 60 was appropriate, based on indications in the Record that detrimental changes to the ecosystem and to the stock are taking place, including, for example, findings of the disappearance of large toothfish from the southern portion of the Ross Sea (citing Pinkerton *et al* (2007) and Devries *et al* (2008), documents R.7 and R.12 in the Record respectively).

100. Although the assessment team did not specifically refer to these two reports, it is worth noting that it referenced other relevant papers and found that evidence existed that the fishery had not caused changes in stock structure that would affect recruitment. In particular it found that length frequency data had not shown any changes over 8 years, nor had genetic work to date shown any changes.

101. The real problem with respect to this PI is the very vague manner in which the 60 and 80 SGs are defined. Whilst the 60 SG requires that “potentially adverse changes in structure are identified”, the 80 SG requires only that “potentially adverse changes in structure are clearly identified”. Similarly, the 60 SG requires “appropriate remedial measures”, whilst the 80 SG requires “effective remedial measures”. It is rather unclear to me how a measure could be regarded as appropriate without being effective and it seems to me that this particular PI could have been scored either at 60 or at 80 on exactly the same evidence. This is clearly unsatisfactory, but I note that the objection has not been made against the way in which the PI was defined, but against the score awarded. On that basis, I do not think I can interfere

with the decision of the certification body, which cannot be described as arbitrary or unreasonable. Nor is there evidence of failure to take account of relevant information.

CONCLUSION

102. Having considered the written submissions and supporting documentation of the parties, I find as follows:

(a) The certification body failed to give adequate consideration to the proposals and comments made to it with regard to the PISGs under Principles 2 and 3 (PISGs (3A.6 to 3A.9 and 3B). This amounts to a serious procedural error within the meaning of §4.8.2 and the determination must be remanded in order for the certification body to review the Principle 2 PISGs and the relevant Principle 3 PISGs identified above in light of the stakeholder comments and either modify the PISGs or provide reasoned explanations for not modifying them. Where PISGs are modified, re-scoring may be indicated on the basis of the evidence available on the record.

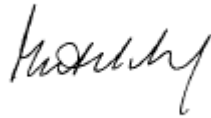
(b) With respect to the objections against the scoring of the Principle 1 performance indicators I find that:

- (i) the objections in respect of PISGs 1.1.1.1., 1.1.1.4., 1.1.1.6, 1.1.2.3., 1.1.2.4., 1.1.4.2., 1.1.4.3. and 1.3.1.2. are not made out and are dismissed;
- (ii) the scores awarded in respect of PISGs 1.1.1.2., 1.1.1.3., 1.1.1.5., 1.1.1.7., 1.1.4.1. and 1.1.6.1. cannot be justified and are remanded to the certification body for further consideration in the terms set out in the respective paragraphs above.

102. It will no doubt be observed that the effect of reducing the scores on each of the six Principle 1 indicators referred to above may not necessarily result in the overall score on this Principle falling below 80 (in fact, reducing the score to 60 on each PISG appears to result in a score between 79 and 80). There may in the end be no “material difference” on the Principle 1 issues. Nevertheless, I consider it appropriate to order a remand for two reasons. First, I consider that there is a possibility that the score on one or more PISGs under Principle may, after reconsideration, fall below 60 and, second, because it is not possible at this stage to evaluate what the outcome may be of the certification body’s reconsideration of the issues relevant to Principles 2 and 3. Further consideration will therefore be given to this issue following the remand.

103. In accordance with §4.9.2 of the OP, the certification body is required to respond in writing to the matters specified in the remand within a period of 10 days. The response “(a) shall include a statement of ‘no change’ in relation to the scoring of performance indicators; or (b) shall indicate any proposed changes to the justification for a score or indicate a change in the score in relation to any of the performance indicators, and shall give reasons for its decision under either (a) or (b).” In light of the complexity of the present case and the matters under remand, I can indicate that I shall be prepared to consider any submissions by the parties (within the ten day period referred to above and accompanied

by full reasons) with respect to extensions of time and submission of further representations on the response to the remand by the certification body and its effect on the overall assessment.



Michael Lodge
MSC Independent Adjudicator
5 May 2010