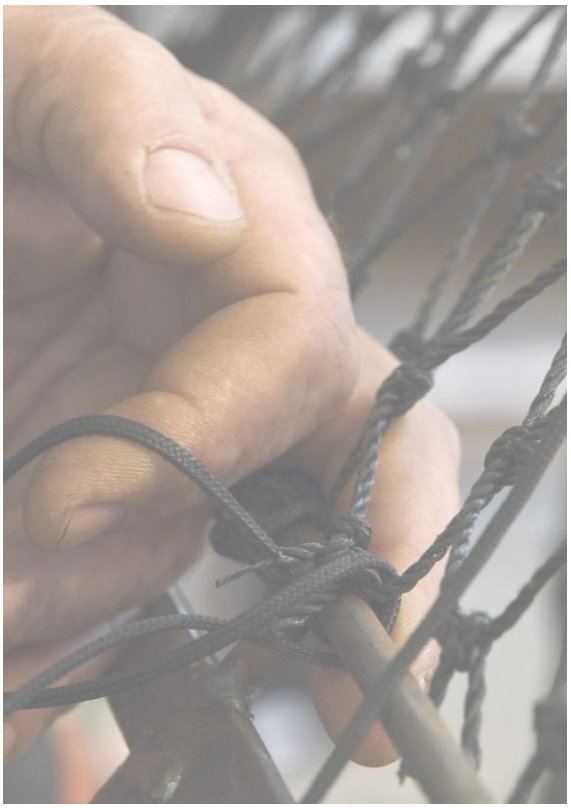
TE OHU KAIMOANA

MĀORI FISHERIES TRUST

Weaving together our common interests in fishing

Advancing a Kaimoana Strategy



Draft Working Paper
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Tena koutou katoa

Over the past twenty or so years, iwi organisations have spent a great deal of time and effort on setting up mechanisms for the stewardship of commercial fisheries assets.

The Fisheries Settlement in 1992 (the Sealord deal) began a process. Agreeing a method for distributing the benefits of the settlement took considerable effort and patience, but resulted in legislation that set out the recognition of 57 iwi and organisations to represent them provided they met a series of mandating requirements. These are complex requirements. No one involved would suggest that the legislative requirements for showing and maintaining a mandate from an iwi is simple.

The iwi was required to show solid evidence of support. They needed to develop registers for members based on a minimum number of people identifying themselves with that iwi in the 2001 census. They needed to design and adopt constitutional documents for the planned Mandated Iwi Organisation and its Asset Holding Company. They needed to hold an iwi-wide ballot to show that the registered membership supported these organisations and their constitutions. Any of these requirements is full of complexity, setting up obstacles to trip the iwi on its way.

While all this work was being done, the non-commercial fisheries regime went into effect. Many iwi organisations found that the Ministry of Fisheries was busy recognising kaitiaki in their areas. It was as if customary non-commercial fishing had nothing to do with the fishery as a whole.

The requirements on the iwi organisation and its leadership are exacting and demanding. They deserve, at the very least, to be the first point of call in the process of determining any other features of the local fishery. The work of the iwi organisation is needlessly complicated if the kaitiaki process is treated as a completely separate effort.

The people involved in commercial and non-commercial fishing would be only too happy to work together; and thankfully in many cases they do. After all, the goal of both is to act in the interests of iwi members. Where parties do not co-operate as they might, there is much to be repaired.

The government did not intend for the two regimes – customary non-commercial regulations and commercial fisheries – to be in opposition. Indeed, they ought to support one another. The fisheries are the same fisheries.

Too much success in one area can deplete the stocks required for the other. Restrictions to access in one area can have detrimental effects on the other.

And yet, there is conflict, one interest set against another. This discussion document is designed to promote discussion on solutions to that conflict. And when I say solutions, I don't mean 'the Government should do something!' We should do something. We have the most to lose and the most to gain. We are more capable than we were ten or fifteen years ago. We should be impatient for results.

Read this document and tell us what you think.

Are we going to be caught in a perpetual problem?

Are we going to wait for a government official to repair a model, listen as we tell them what's wrong with it, redesign it, and then go round the circle again?

Or are we going to lead the way, owning our own problems, and designing our own solutions

Kia kaha

Peter Douglas
Chief Executive

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Introduction

The purpose of this paper is to promote discussion about the way we manage our fishing interests, and to find ways to resolve conflicts that have been emerging between our commercial and non-commercial fishing interests, and ultimately between our iwi and hapu. We hope that, by talking openly about these issues, hapu and iwi will be able to find ways to work together effectively to better manage fishing, both regionally, and nationally.

As an organisation that is owned by iwi, Te Ohu Kaimoana would like to be part of the solution. We hope that as a result of this discussion, iwi and hapu will begin to resolve some of the challenges they face in managing their fishing interests, and give us guidance on how we can support the process.

What are we wrestling with?

People talk about the "customary" sector, the "commercial" sector, or the "recreational sector", and in doing so appear to forget that Maori have interests across all three. And let's not forget that fish are fish: they are not labelled as "commercial", "customary" or "recreational" fish.

Maori customary rights to harvest fish contained commercial and non-commercial elements – both protected by Article II of the Treaty of Waitangi. Maori claims to the full bundle of these rights were settled through the 1992 Fisheries Settlement. The Crown compensated Maori for the commercial aspect of these rights, and undertook to ensure that the remaining non-commercial aspects would be given expression through regulations. However the process and timing that produced the design of the Fisheries Settlement has encouraged us to act in a similarly divided way when pursuing our fishing interests. Different parts of the settlement refer to "iwi", "hapu", "whanau" and "tangata whenua". In some instances these groups have been treated as though they are unrelated and autonomous, rather than as part of a web of tribal relationships.

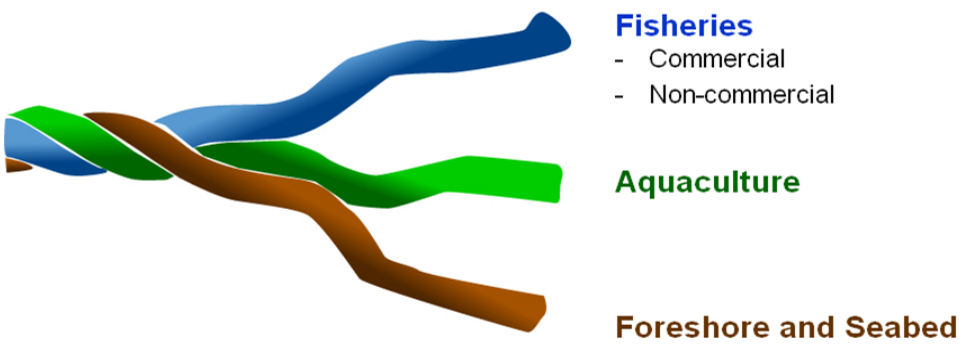
The discussion that follows is intended to explore the nature of this division, the kinds of tensions that are being played out, the consequences it has for our tribal structures and processes and ultimately for our ability to manage our common interests in fishing.

Where have we come from?

Maori customary rights in Takutai Moana

Maori customary fishing rights are part of a bundle of Maori customary rights in the Takutai Moana. Together these rights are like strands in a rope. They include the right to manage, the right to control access and the right to use and to develop related resources, such as fisheries, coastal waters that cover the foreshore and seabed, marine plants and minerals, or other components of the substrata (see figure 1).

Figure 1 – Maori Customary Rights in Takutai Moana



While the exercise of tribal authority over these rights was guaranteed to Maori by the Crown under Article II of the Treaty of Waitangi, history has demonstrated otherwise. The challenge facing us today is to evolve tribal structures and modes of working that enable us to manage these rights in an effective, balanced and integrated way.

Maori fishing rights and the exercise of tribal authority

In its report on the Muriwhenua Fishing enquiry, the Waitangi Tribunal explored the nature of Maori customary fishing rights, how they were held and what the Treaty guaranteed. The key issues they identified that are relevant to our discussion include:

- the existence of a development right within the Maori fishing rights protected by the Treaty of Waitangi, and
- the protection of the tribal base within which Maori fishing rights were exercised.

The Tribunal states that in broad terms:

> "Maori ceded sovereignty to the Crown (Article I) and in return gained protection of their persons, properties and tribal status (Article II), and individually the rights and privileges of British subjects (Article III)"[1].

The Tribunal comments that "there was a commercial component to Maori fisheries" and that there is "compelling evidence that Maori eagerly pursued new forms of trade".[2] Indeed, they note that "the Crown's duty to protect requires that it take all necessary steps to assist Maori in their fishing and to develop their fisheries[3]"

While fisheries explicitly form part of the properties that are protected, the Tribunal also emphasised that the Treaty protected Maori in the retention of their tribal base. [4] "Fisheries at 1840 were tribally owned" and "individual use rights were subject to and flowed from the tribal over-right".[5] The Tribunal notes that the "tribal over-right was customarily unstructured" and that "long-held family rights were recognised. Rules were simply known. Individual use rights were based on kinship and marriage and not merely on boundaries".[6]

On the question of regulation, the Tribunal also notes:

> There was no evidence that either party to the Treaty sought to exclude the other from fisheries. In 1840, no-one saw the need to define fishing rights or to make regulations for conservation[7].

However, where such regulation might be needed, they added that:

> It is consistent with the Treaty that the Crown and the tribes should consult and assist one another in devising arrangements for tribal control of its treaty fishing interests, that they should aid one another in enforcing them and that the tribes should furnish the Crown with all proper returns[8].

Commenting on the modern context, the Tribunal concludes that:

> the right of regulation has become a duty in our time, to protect the resource and to bring certainty to the law. This is now required through population and other changes. It is also contrary to the public interest when Maori purporting to exercise customary fishing rights cannot be made bound to their own tribal rules.[9]

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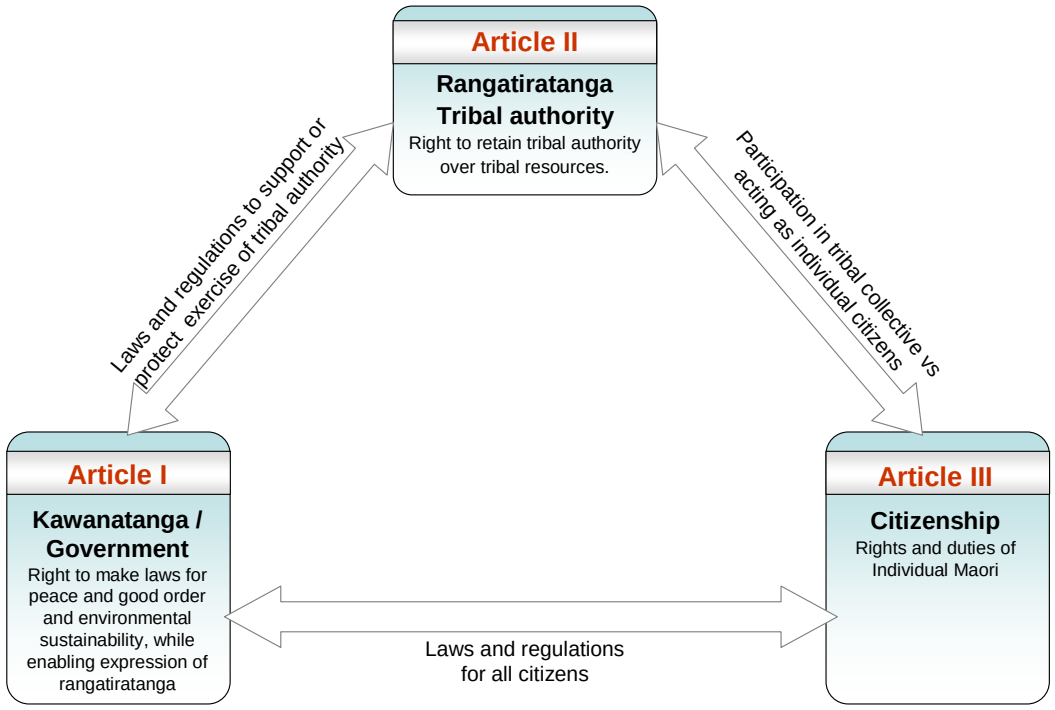
[1] Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (1988) , s 10.5.2, paragraph 5
[2] Ibid, s 11.6.6, ss (a) and (b).
[3] Ibid, ss (j).
[4] Ibid, s10.5.4, paragraph 4
[5] Ibid, s11.6.1 (a) (i)
[6] Ibid, s11.6.1 (a) (iii)
[7] Ibid, s11.2.9 (d)
[8] Ibid, s11.6.1 (a) (x).
[9] Ibid, s 11.6.1, ss (a) (v).

This comment acknowledges that today, the state of our fisheries is vastly different to what existed in 1840, and that, consistent with the agreements set out in the Treaty, further agreement between the Crown and Maori would be needed about how the use of fisheries might best be regulated.

The Tribunal's findings suggest that the Treaty's three Articles are in constant tension, and that in particular, the relationship between the exercise of "kawanatanga" by the Crown, and its effect on the exercise of rangatiratanga by tribes – needs to be kept in constant check (see Figure 2).

Figure 2
Treaty Articles in tension



While the ceding of sovereignty to the Crown meant that the Crown took on the responsibility for enforcing the law, in designing laws and regulations, it still needs to consider their effects on Article II rights and ensure they intrude on those rights to the minimum extent possible. For instance when the Crown determines that laws need to be made or amended to ensure environmental sustainability, it needs to ensure that the ability of tribes to exercise authority over their resources is retained. This would require a process of dialogue to identify the tribal interest and the appropriate means of protecting it. Ultimately it might require a specific provision to be inserted into the law that

ensures that government decision-makers act in a way that recognises the tribal interest in an appropriate way. At the same time, there exists a tension for Maori individuals between their identity as tribal members – and all the associated rights and duties - and their rights as individual citizens.

Both elements of the Fisheries Settlement have provided us with some of the building blocks needed to strengthen our authority over customary fishing rights. However their design (and implementation) has created some unhelpful tensions between iwi, hapu and whanau, and between the collective of iwi and the Crown. It is timely to have a fresh look at how they might be put into balance.

Settling Maori claims to fisheries

To echo the comments of the Waitangi Tribunal - while there may have been little need for regulation of fisheries in the 1840s - the situation by the 1980s was vastly different. By then the fishing industry was overcapitalised and catches of the most important species showed a marked decline. The government recognised the need to set limits on catches to encourage greater efficiency in the fishing industry and to create ongoing incentives to manage the fisheries sustainably.

By the 1980s, the Crown's failure to recognise tribal authority and property in fisheries had to a large extent undermined the ability of Maori to develop effective ways to exercise their authority or protect their rights in a modern context. At the same time, Maori concerns about removal of their ability to participate and lack of recognition of their fishing rights came to a head when the Quota Management System was introduced and Individual Transferrable Quota allocated to private interests as a means of preventing further degradation of fisheries.

The Quota Management System was introduced on 1 October 1986. It allowed the Minister of Fisheries to set a Total Allowable Catch (TAC). In response, Maori obtained an injunction against the Government to prevent further fishstocks being introduced into the Quota Management System until the issue of ownership had been resolved.

As a result of the action taken by Maori, the courts confirmed that Maori customary fishing rights were controlled by "hapu and tribes" and that those customary rights contain <u>both</u> commercial and non-commercial elements.

Justice Grieg was satisfied that:

> "there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole of the coast of New Zealand, at least where they were living. That was divided into zones under the control and authority of hapu and tribes of the district. Each of these hapu and tribes had the dominion, perhaps the rangatiratanga, over those fisheries. Those fisheries had a commercial element and were not purely recreational or ceremonial or merely for the sustenance of local dwellers." [10]

To resolve claims and litigation involving fisheries, an interim settlement of fishing claims that acknowledged the full spectrum of Maori interests in fisheries was entered into between Maori and the Crown in 1989 and provided 10% of all fisheries then in the Quota Management System – along with some funding for administration. The Fisheries Deed of Settlement, implemented through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, was the final settlement of all Maori claims to customary fishing rights. Under the settlement, the Crown additionally:

- gave Maori funds to buy a 50% ownership stake in Sealord Products Ltd
- undertook to provide Maori with 20% of the quota for all new species brought within the Quota Management System after that time
- gave Maori positions on statutory fisheries management bodies
- restructured the then Maori Fisheries Commission into the Treaty of Waitangi Fisheries Commission to enhance its accountability to Maori; and
- agreed to make regulations to allow self-management of Maori fishing for subsistence and cultural purposes (erroneously later labelled "customary fishing" in the regulations).[11]

In return, Maori agreed:

- that the settlement settled all Maori commercial fishing rights and interests
- to accept regulations for customary non-commercial fishing
- to stop litigation (including any Tribunal claims) relating to Maori commercial fisheries
- to support legislation to give effect to the settlement, and
- to endorse the Quota Management System.

The Treaty of Waitangi Fisheries Commission was tasked with developing proposals for allocating the various assets and benefits deriving from the

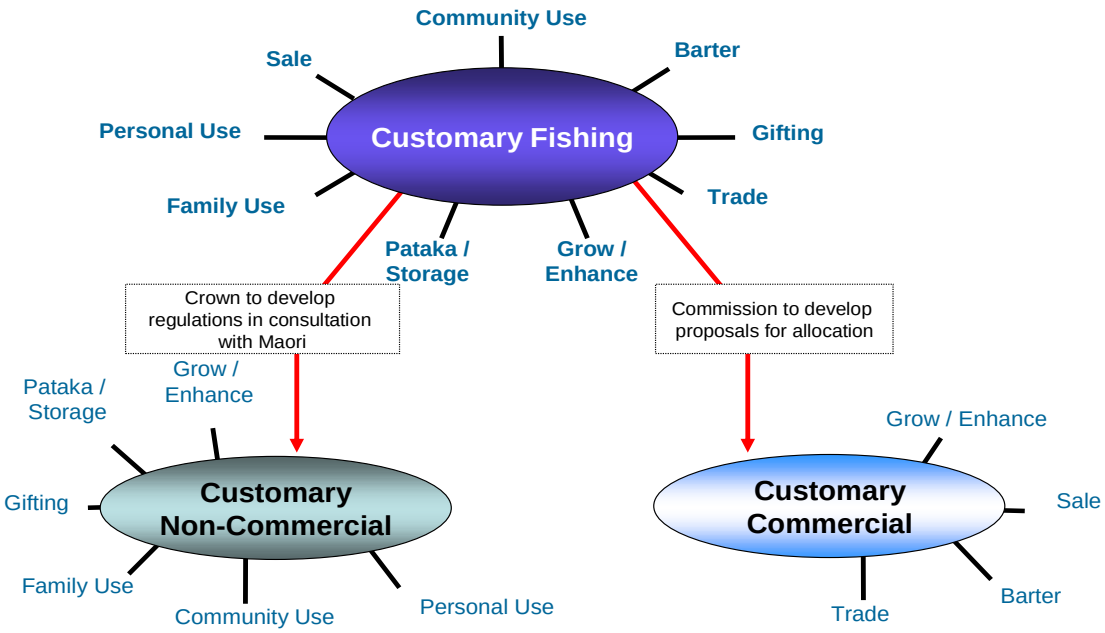
[10] NZ Maori Council & Te Runanga o Muriwhenua v Att General (unrep Nov HC, Wgn).

[11] Summarised in Treaty of Waitangi Fisheries Commission (2003), *He Kawai Amokura – Report to the Minister of Fisheries* p12

settlement in respect of commercial fisheries[12]. The Crown was tasked with consulting with Maori about, and developing policies to help recognise use and management practices of Maori in the exercise of their extant non-commercial fishing rights, following which it would promulgate regulations[13].

In practical terms, these arrangements set in train the development of two separate regimes for managing customary Maori fishing rights which has in turn created incentives for splintering tribal authority over tribal fisheries (see Figure 3).

Figure 3
The commercial and non-commercial elements of the Maori Fisheries Settlement



[12] Deed of Settlement, clause 4.5.3
[13] Ibid., clause 3.6

Where are we now?

The Maori Fisheries Act 2004, Mandated Iwi Organisations and the ownership of commercial fishing assets

For twelve years following the signing of the Fisheries Deed of Settlement, the Treaty of Waitangi Fisheries Commission facilitated debate amongst Maori as to how the Settlement's commercial fisheries assets should be allocated, taking into account that the settlement was for the benefit of all Maori. The debate focussed on three main issues:

- to whom should ownership of the assets be allocated, for instance how is an "iwi" defined and how would urban Maori be provided for?
- on what basis would the assets be managed – centrally, a mix of management by a central / national entity and individual iwi, or all to individual iwi?
- On what basis would full or beneficial ownership be allocated, for instance should it be based on the relative population of each iwi, or the extent of their coastline, or a combination of these factors?

By 2004, 96% of iwi agreed that the final allocation model should proceed into law. This is now enshrined in the Maori Fisheries Act 2004. The model identifies 57 iwi whose identity was confirmed through a formal process requiring each iwi to meet several criteria including mutual recognition, meaning that each iwi needed to be recognised by its neighbours as an iwi.

Each iwi would receive assets based on:

- satisfying strict governance and mandating provisions (see Box A)
- a mix of an iwi's population and coastline.

Once allocated and transferred to iwi, the fisheries assets of quota and AFL income shares (in Aotearoa Fisheries Ltd) for each iwi are held by an Asset Holding Company on behalf of its owner - the Mandated Iwi Organisation.

The Aquaculture Settlement mirrors the commercial aspects of the Fisheries Settlement. It delivers 20% of all new space created for aquaculture to iwi through Te Ohu Kaimoana. It also obliges the Crown to deliver an equivalent of 20% of "pre-commencement space" – which is space approved for aquaculture between September 1992 and December 2004. This settlement requires the same governance requirements of iwi, and it provides an allocation approach that is similar to the way inshore quota is allocated. The iwi organisations eligible to receive aquaculture settlement assets on behalf of their iwi can only do so if recognised as Iwi Aquaculture Organisations by Te Ohu Kaimoana. To do so, each must have achieved status as Mandated Iwi

Organisations under the Maori Fisheries Act 2004, and contain provisions in their constitutions that confirm their duties as an Iwi Aquaculture Organisation.

Box A: What do iwi organisations need to do to become mandated?

Iwi organisations need to:

- meet governance requirements, including having a representative structure and a constitution
- establish an Asset Holding Company to receive certain fisheries assets
- establish a register of iwi members that has more than the legislative minimum number of affiliates
- have the support of 75% of their registered members who vote in an election to approve the representative structure and constitution.

The 53 (out of 57) iwi organisations that have met the strict mandating requirements for Mandated Iwi Organisations have been allocated their population based fisheries assets, which include their cash, their income shares in Aotearoa Fisheries Ltd, their quota shares in highly migratory species and part of their deepwater quota. To obtain their inshore quota and remaining assets, iwi with coastline in the same Quota Management Areas must agree on their relative shares of quota, with the default entitlement based on coastline lengths. Where iwi cannot agree, they must follow a dispute resolution process set out in the Maori Fisheries Act 2004. Similar requirements apply in respect to aquaculture.

Mandated Iwi Organisations are making good progress to agree with their neighbours on coastline-based assets. The discussions they are involved in are complex. While the negotiations concern the division of commercial fishing quota, invariably the discussions turn to manawhenua, shared histories and the overlapping nature of iwi interests. Because iwi have established robust iwi organisations, it is possible for them to reach binding and final agreements under the Maori Fisheries Act 2004 in an orderly fashion.

The role of Te Ohu Kaimoana

With the enactment of the Maori Fisheries Act 2004, the structure and functions of the former Treaty of Waitangi Fisheries Commission were changed.

While its immediate priorities were to assist the transfer of the commercial fisheries assets to iwi, the Maori Fisheries Act does not restrict Te Ohu Kaimoana to protecting and enhancing only the commercial concerns about fisheries, fishing and fisheries-related activities (see Box B). Te Ohu Kaimoana is to assist protect and enhance the interests of iwi and Maori in relation to fisheries, fishing and fisheries-related activities across the full spectrum of interests. This recognises that one interest cannot be advanced without affecting others. Solutions that assist all interests are needed.

Box B: The Purpose of Te Ohu Kaimoana

The overall purpose of Te Ohu Kaimoana under section 32 of the Maori Fisheries Act is to:

…advance the interests of iwi individually and collectively, primarily in the development of fisheries, fishing and fisheries-related activities in order to -

(a) ultimately benefit the members of iwi and Maori generally; and
(b) further the agreements made in the Deed of Settlement; and
(c) assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi; and
(d) contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement.

The duties of Te Ohu Kaimoana under section 34 of the Act include the immediate priorities of recognising Mandated Iwi Organisations, the allocation and transfer of fisheries assets as well as the ongoing responsibility to appoint the directors of Aotearoa Fisheries Ltd, Te Putea Whakatupu and Wai Maori.

In addition, section 35 of the Act identifies the key function for Te Ohu Kaimoana to act to protect and enhance the interests of iwi and Maori in relation to fisheries, fishing and fisheries-related activities (section 35 (b)).

This last function recognised that subsequent to the allocation and transfer of assets, most Mandated Iwi Organisations would not gain sufficient resourcing from the Fisheries Settlement for them to employ fisheries specialists and there remained an ongoing need for a specialist body to participate in national and industry fora to protect and enhance the Settlement across all its dimensions.

Under the framework of the former Commission, commissioners were appointed by the Crown to govern the organisation and guide the development of an allocation model while ensuring the assets it held were protected. Under the new trustee framework, directors are appointed by Mandated Iwi and National Maori Organisations through Te Kawai Taumata – which is based on an electoral college process. Directors guide Te Ohu Kaimoana's work and priorities.

As an organisation owned by iwi, and guided by directors appointed through a process that is accountable to iwi, Te Ohu Kaimoana is positioned to act to protect the full range of collective interests of iwi in fisheries and aquaculture, facilitate dialogue and agreement between iwi to develop collective policy positions on issues of national significance and to provide a voice for iwi collectively where appropriate.

Regulation of customary non-commercial fishing

The non-commercial elements of the Fisheries Settlement are given effect through the promulgation of regulations:

> To recognise and provide for customary food gathering by Maori and the special relationship between tangata whenua and those places which are of customary good gathering importance (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade.[14]

The regulations that are now in place were created through different processes and timeframes from those that addressed Maori commercial fisheries assets. Not long after the enactment of the Settlement legislation, working groups representing Maori interests developed advice on the form that regulations might take. However the Crown ultimately led its own separate process of consultation, which resulted in the Fisheries (Kaimoana Customary Fishing) Regulations 1998. These apply to "any New Zealand fisheries waters except South Island Fisheries waters"[15]. Initially in parallel, a similar process was carried out for the South Island but finally, South island iwi worked to develop a separate set of regulations – resulting in the South Island Customary Regulations. [16] A summary of key elements of both sets of

[14] Section 10, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; implemented through section 186 of the Fisheries Act 1996.
[15] Regulation 3 (1))
[16] Until tangata whenua move to implement the relevant set of regulations, customary non-commercial fishing can be authorised under the interim Regulation 27A which is part of the Amateur Fishing Regulations. Those who can authorise fishing must themselves be an authorised representative of a marae committee, Maori committee, Runanga or Maori Trust

regulations is set out in Box C.

The provisions for mandating kaitiaki and implementing tools within the regulations – particularly the Fisheries (Kaimoana Customary Fishing) Regulations - do not encourage the development of applications that have taken into account the wider interests of iwi in which relevant hapu share. While the regulations do not prevent such early collaboration, they do not encourage it or provide a clear process to enable it to occur.

The process for appointing kaitiaki is therefore often ad-hoc, in that there is no requirement for neighbouring whanau, hapu or iwi to seek agreement with each other in designating their rohe moana or on how their respective kaitiaki might implement their responsibilities. The regulations contain no clear formal dispute resolution process. Once an objection is lodged, there is little incentive for the objector to reach agreement with an applicant and a stalemate can occur.

Board that represents the tangata whenua of the area to be fished. Fishing under this regulation cannot be authorised in an area that is gazetted under the customary regulations.

Box C: Elements of the customary regulations

Tangata whenua, kaitiaki and rohe moana

Tangata whenua can propose kaitiaki to authorise customary non-commercial fishing within defined rohe moana.

Under the Fisheries (Kaimoana Customary Fishing) Regulations, "tangata whenua", in relation to a particular area, means the whanau, hapu, or iwi, being Maori, that hold "manawhenua manamoana over that area". No guidance is given on the relationship between whanau, hapu and iwi and representative iwi organisations.

The South Island Customary Regulations are more explicit about the relationship between whanau, hapu and iwi and specify the nine iwi organisations existing in the late 1990s who represent the whanau, hapu and iwi who hold manawhenua. These organisations are now Mandated Iwi Organisations.

Under the regulations, the process of defining a rohe moana and appointing kaitiaki includes a public notification and objection process. Following the resolution of any disputes, the Minister of Fisheries confirms rohe moana boundaries and kaitiaki appointments, so that kaitiaki can authorise customary fishing within those boundaries.

Mataitai reserves

Under the Fisheries (Kaimoana Customary Fishing) regulations, kaitiaki can subsequently apply to the Minister of Fisheries to establish a mataitai reserve within their rohe moana (under the south Island Customary Regulations, this process can occur before the designation of rohe moana). A mataitai reserve is an "identified traditional fishing ground". Commercial fishing is generally prohibited in mataitai reserves.

Before the Minister of Fisheries can declare a mataitai reserve, he/she must be satisfied of a number of things. These include that the mataitai reserve will not "prevent persons with a commercial interest in a species taking their quota entitlement or annual catch entitlement (where applicable) within the quota management area for that species" (section 23 (e) (ii)). This threshold can also have the effect of restricting later applications for mataitai from other Maori non-commercial interests within the quota management area.

After a mataitai has been established, the kaitiaki can recommend to the Minister of Fisheries that further regulations to allow commercial fishing to recommence within the mataitai be approved.

What does this all mean for the management of Maori customary fishing rights?

Clarifying the tensions

The structures created through the various processes that have implemented the Fisheries Settlement have created a number of tensions that are played out to varying degrees.

The first is a tension between Mandated Iwi Organsations/Asset Holding Companies in the management of the commercial assets on the one hand, and tangata whenua and kaitiaki in the regulation of customary fishing on the other – particularly where the latter are notified through bodies unconnected to the Mandated Iwi Organisation. Where agreed relationships and processes have not been developed between the two sets of interests, there is increased potential for conflict.

The second tension centres on the relationship between the different scales of management: fisheries management at the scale of quota management areas on the one hand, and the concern that exists at a community level about management of fisheries at a local scale. This tension is exacerbated where the different fisheries sectors - including Mandated Iwi Organisations and those who have responsibility for regulating customary non-commercial fishing - fail to work together.

Management of customary commercial and non-commercial fishing at different spatial scales

The Fisheries Settlement cleared the way for the Government to extend the Quota Management System to all New Zealand's commercial fisheries. There are currently 97 species within the Quota Management System, made up of 633 individual stocks[17]. Each stock is managed within a quota management area. While each is based primarily on the stock's biological range, some quota management areas represent less than the biological range of relevant stocks but are divided for pragmatic reasons.[18]

A Total Allowable Catch (TAC) is set for each stock, which includes a Total Allowable Commercial Catch (TACC)[19], a recreational allowance, a customary

[17] www.fish.govt.nz/en-nz/Fisheries+at+a+glance

[18] For instance, SNA2 contains two sub-stock areas, and every quota management area for paua contains multiple sub-stocks.

[19] Quota is owned as a share of the Total Allowable Commercial Catch (for instance Maori

allowance, and an allowance for "other sources of fishing related mortality" (which includes illegal harvest and research requirements). The TAC is based on an estimate of the maximum sustainable yield for that stock. This represents the maximum amount that can be harvested from the stock on an indefinite basis without changing its population size, or in other words, harvesting at the same rate that the stock replenishes itself – thus maintaining a constant biomass. This also means that the size of any stock fished after an initial "fishing down" period will be less than its unfished state, but will replenish itself faster than if it had not been fished.

This stock-wide approach to fisheries management could be said to assume that fish are evenly distributed across quota management areas, as the TAC, TACC and allowances apply across entire quota management areas. However many stocks are distributed unevenly within quota management areas so that in some cases, intensive fishing of small areas can lead to depletion of local populations even though the state of the stock overall remains sustainable. This tension between the management of stocks at the scale of quota management areas, and the effects of harvesting on populations at the local level contributes in turn to tension between the different sectors who have an interest in those stocks, including the commercial sector (in which iwi have an interest) and the non-commercial sector (which includes the non-commercial interests of iwi/hapu through tangata whenua and kaitaiki). At the same time, some commercial players (for instance paua and rocklobster fishers) also recognise that management at the scale of quota management areas is too big for day-to-day management of harvesting and that they need to manage their harvesting within smaller spatial scales.

While the allocation of quota shares to iwi takes place within quota management areas, iwi are not restricted to fishing their entitlements within their own local coastline areas – rather their entitlements can be fished anywhere within the quota management area (see Box D).

Alternatively, kaitiaki are authorised by the customary regulations to issue customary permits only within their defined rohe moana. These areas are usually subareas – or "slivers" – of quota management ares (see Box E). The most recent record of current rohe moana is set out in Figure 4.

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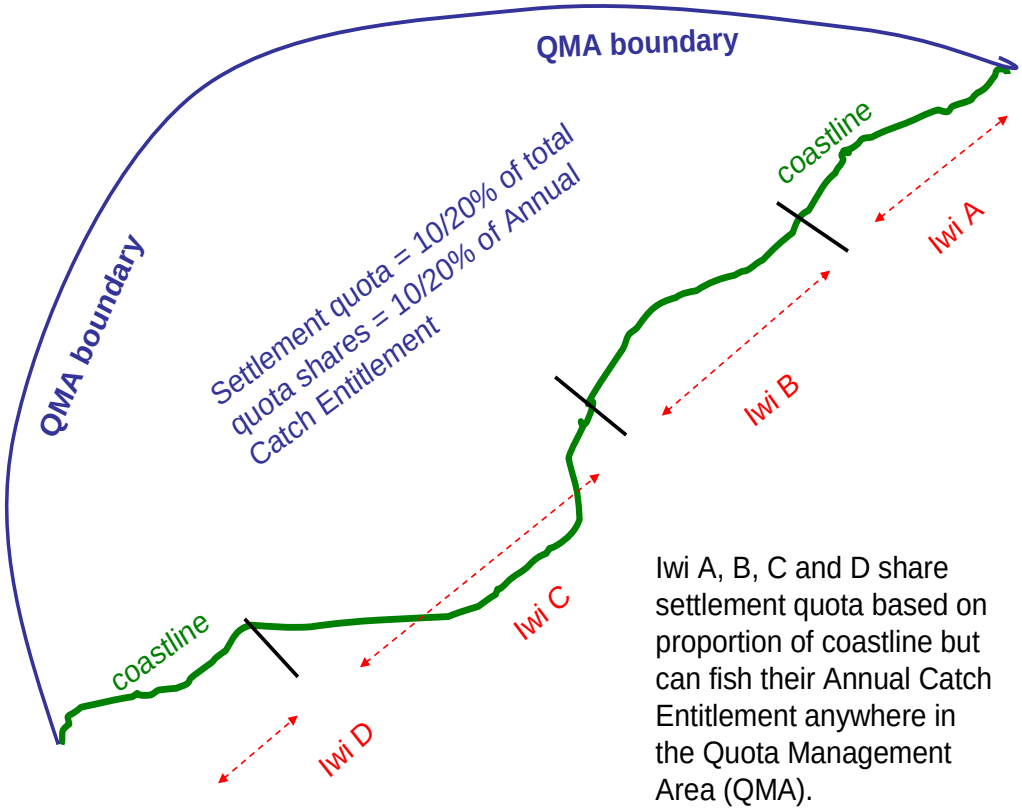
own 10% of the quota shares for paua within each quota management area). This share determines how much of the Annual Catch Entitlement quota holders are permitted to harvest.

Box D: Where can commercial fishing of an iwi's quota take place?

Species are managed within up to 10 Quota Management Areas which are bordered by one or more iwi who have a right to a share of settlement quota for that fishstock. Iwi who hold quota in the stock concerned can fish their quota anywhere within the relevant quota management area – not just directly off their own coastline.

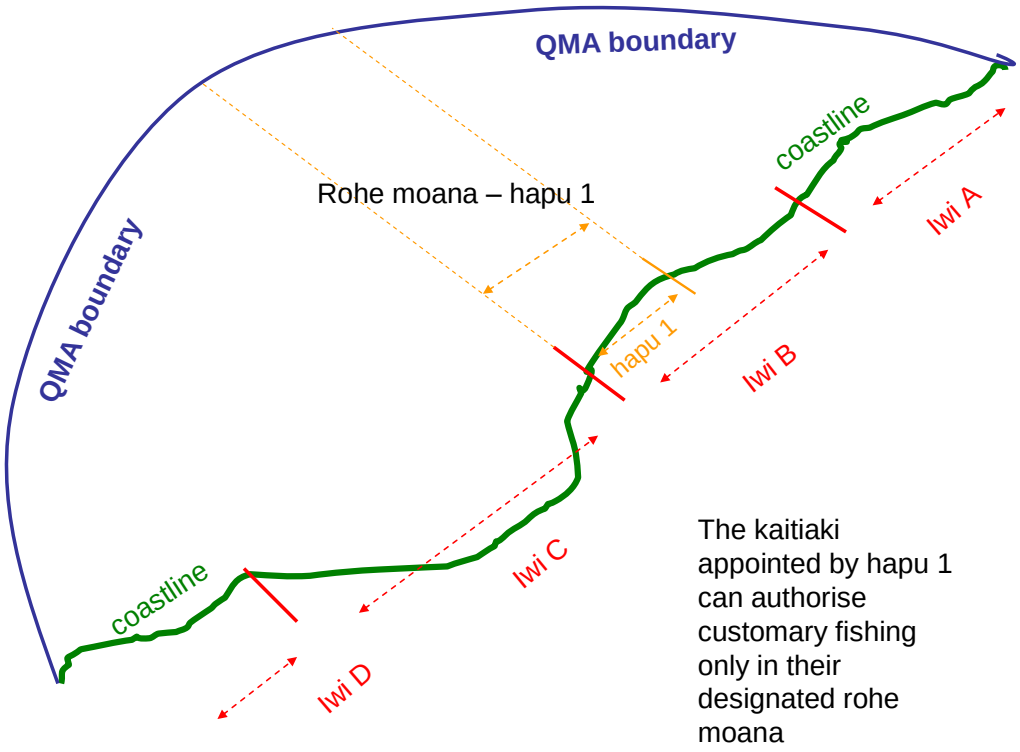
All commercial fishers are required to report their catch at the scale of quota management areas, or at the scale of smaller "statistical areas". In some fisheries such as paua and rocklobster, fishers are developing systems to report their catch at an even finer scale, so as to better understand the overall impact of their harvesting on local populations.



Iwi A, B, C and D share settlement quota based on proportion of coastline but can fish their Annual Catch Entitlement anywhere in the Quota Management Area (QMA).

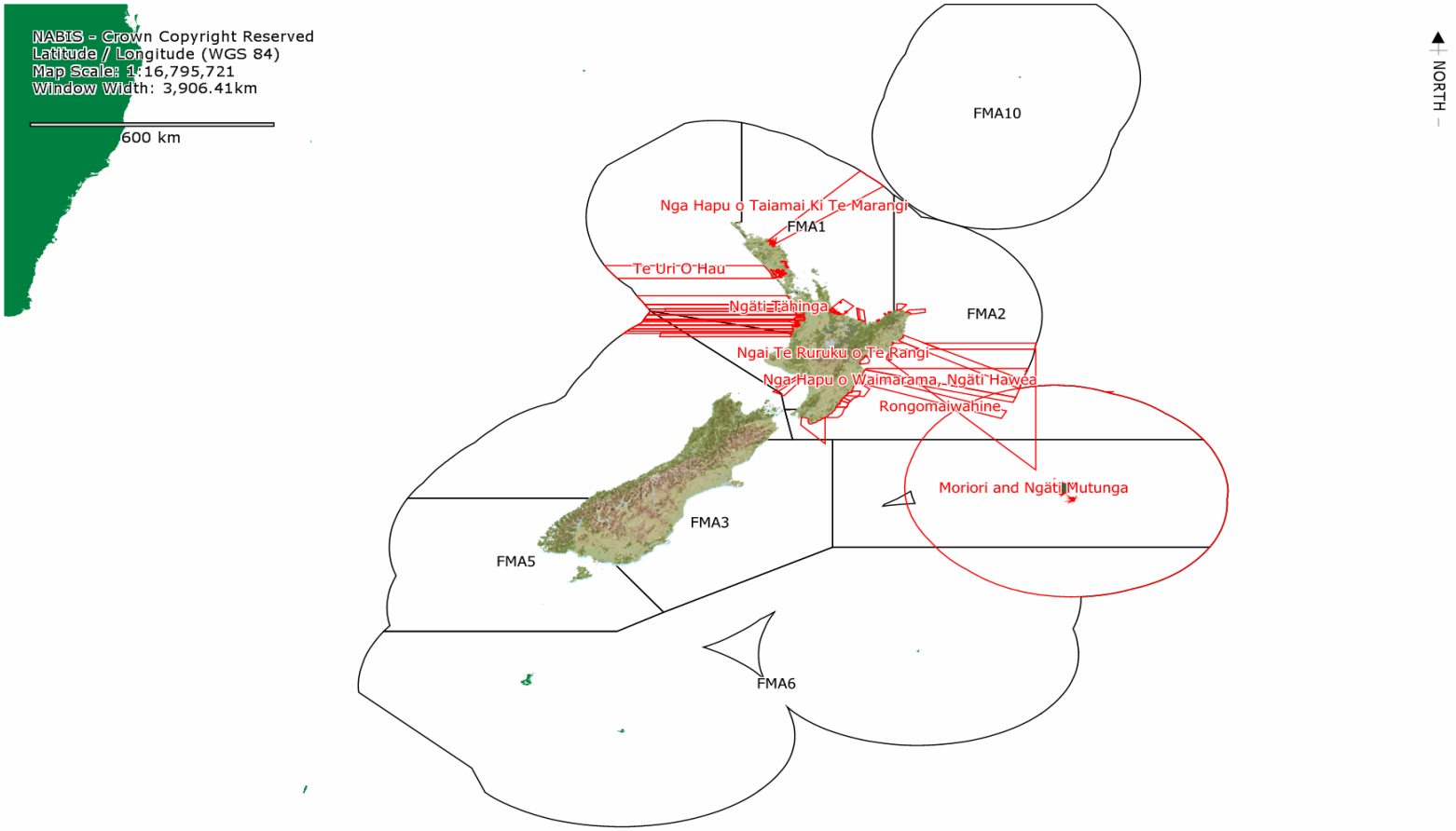
Box E: What is the purpose of a rohe moana?

A rohe moana is an area within which kaitiaki appointed under the customary regulations have the authority to authorise fishing for customary non-commercial purposes. Kaitiaki are required to report quarterly the accumulated amount that is authorised as well as the amount harvested to the Ministry of Fisheries[20] (whereas the commercial sector is required to report on a day-to-day or trip basis within quota management areas and smaller "statistical areas"). However without having information on customary harvest aggregated across whole quota management areas – it is difficult to understand the overall impact – including cumulative impacts - of fishing that takes place under customary authorisations.



[20] Note that such reporting is not required under the temporary Regulation 27.

Figure 4: Rohe Moana Boundaries and Fisheries Management Areas in New Zealand



Map generated from the National Aquatic Biodiversity Information System: see www.nabis.govt.nz

How do the tensions play out?

Mandated Iwi Organisations have an obligation to act for all their members no matter where they reside. Their members therefore include tangata whenua and kaitiaki referred to in the customary regulations. Separately, under the customary regulations, kaitaiki have the power to authorise customary food gathering. They have an obligation to "meet and inform tangata whenua each year and report on the administration of the regulations."[21]

All parties have interests in the same fisheries. However in a number of situations where kaitiaki have been notified without dialogue with Mandated Iwi Organisations, practical working relationships between these parties have not been adequately developed. In these instances, Mandated Iwi Organisations are not as well-informed of the issues facing their local communities as they would wish. On the other hand, without the perspective that working at an iwi level might provide, kaitiaki can be operating in a vacuum, with no ability to do more than regulate their own members' fishing activity in discrete and sometimes overlapping rohe moana, making decisions with little direct knowledge of other impacts on the fishery. While there is clearly a desire on the part of many kaitiaki to have an effective role in managing the fishery, it is unrealistic to think that anyone can ensure adequate harvests without good information about the overall context for managing the fishery.

Tensions between Mandated Iwi Organisations and kaitiaki are often played out when kaitiaki apply for mataitai reserves. Mataitai reserves are included in the customary regulations as a tool for protecting local fisheries of significance for customary food gathering. But there is no guarantee that mataitai reserves will be able to meet the aspirations of iwi and hapu. If every hapu was to try to establish its own mataitai, the cumulative exclusions of commercial fishing would most likely trigger the "prevent" test – with the result that some, but not all, mataitai will be approved. As the Ministry of Fisheries' guidelines suggest:

> The Minister will take into account other mataitai reserves within the quota or fisheries management area when the potential effects of any new application are assessed. So while the first applications for reserves within a particular area may be approved, later applications may not because of the cumulative impact of all the reserves on commercial or recreational fishing.[22]

This means from a customary non-commercial perspective there needs to be collaboration to allow all related hapu and iwi the opportunity – but current processes do not require or facilitate that consideration.

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[21] Fisheries (Kaimoana Customary Fishing) Regulations 1998, reg 40
[22] www.fish.govt.nz/en-nz/Maori/Kaimoana/default.htm

The implications on the collective interests of iwi of using mataitai will also be of concern to Mandated Iwi Organisations and Asset Holding Companies. However although they might well be concerned about the potential effects of mataitai reserves on their iwi's commercial fishing interests, they are generally reluctant to oppose applications as they are either conscious of their constituents, are not prepared to publicly oppose them. In many cases Mandated Iwi Organisations, Asset Holding Companies and kaitiaki do not have an agreed process for discussing and resolving any potential conflicts in advance (for example by helping to find alternative and less intrusive restrictions on commercial fishing that might achieve the same objective).

The potential effectiveness of mataitai also needs to be critically assessed in light of the real problems the applicants are aiming to address. One of the concerns that many applicants express is that the local level fishery (or fisheries) covered by an application is under threat, that this results in an inability to catch kaimoana for the marae and that the main cause is commercial fishing. This is an appealing default answer but not necessarily true. There may be other factors driving the siutation, including pollution, siltation, intensive fishing by non-commercial parties or the cumulative effects of one or more of these. A mataitai reserve may not be the most effective tool for meeting the needs of local marae.

Other drivers can include a strong desire to exercise greater management control over certain areas. However as noted above, this cannot be effective in the absence of information about the whole fishery – or effective relationships with other interested parties – beginning with other hapu and iwi.

While it is possible for Mandated Iwi Organisations and tangata whenua – including kaitiaki appointed under the customary regulations – to work together (and some do), the design and implementation of the regulations to date has not encouraged such cooperation. Mandated Iwi Organisations or Asset Holding Companies who may be concerned about an application, that they may not have been aware of, are faced with having to lodge objections in a public process, which as noted earlier is not a path they generally wish to take – as it creates a win-loss climate rather than win-win, with the former being unhelpful for ongoing relationships.

The impacts of exclusion zones also flow across iwi boundaries, impacting on both commercial and non-commercial interests of other hapu and iwi.

There are also fisheries management and policy matters that have implications for regional collectives of iwi, as well as the national collective. Until recently, the establishment of regional "customary (non-commercial) forums" by the Ministry of Fisheries, which considered only customary non-

commercial fishing, served in some cases to divide the interests of iwi and their members, rather than strengthen them. The Ministry has since redesigned its approach and has signalled its intention to work with regional collectives of iwi who have developed an integrated approach to their customary fishing rights and interests and to support them to develop fisheries plans. Te Ohu Kaimoana, who promoted this more positive approach in its response to the Ministry on Ministry of Fisheries proposals on delivering its Treaty obligations, has also signalled its support in assisting the implementation of this.

What are the potential consequences of failing to work together?

Lack of coordination and good working relationships between Mandated Iwi Organisations/Asset Holding Companies on the one hand, and kaitaiki on the other can result in:

- adhoc fishing exclusions that are unrelated to how the stock as a whole is managed and that have little effect on the localised depletion they are seeking to reverse
- displaced fishing effort from closures – increasing the intensity of fishing in the remaining area
- cumulative decline in available space and access for commercial fishing
- local depletion of fish stocks throughout the relevant QMA and
- unresolved conflict within iwi (and between iwi) and poor fisheries outcomes for everyone.

Some of the consequences are:

- tribal processes of decision-making are undermined and tribal strength undermined
- the Crown is left to make decisions where there is conflict between iwi and hapu about commercial and non-commercial fishing
- the ability for Maori to have a strong voice in the management of fisheries is frustrated
- other parties (such as industry organisations) have little incentive to engage and reach agreements with iwi about fisheries management – particularly as far as customary non-commercial fishing interests are concerned
- to the extent that kaitiaki coverage is incomplete, or that mataitai have reached a threshold before other iwi and hapu have had the ability to consider possible use, some Maori could well argue that they are

disenfranchised of their customary non-commercial fishing rights.

Under the current arrangements, it might be assumed that iwi and kaitiaki (along with those who have appointed them) want quite different things from fisheries. For instance, an Asset Holding Company might be driven by sales of Annual Catch Entitlement (ACE) and a desire for a return on investment. This in turn can be driven by market demand for certain species (sometimes of a certain size) and a reliable supply.

On the other hand, the non-commercial objectives of tangata whenua and kaitiaki might be driven by a desire to:

- meet their customary obligations to supply seafood for instance for hui, tangi and other communal events
- maintain access to significant customary fishing grounds off their coast
- to pass on and encourage participation in and exercise of traditional and modern harvesting practices
- protect fisheries and habitats that are important to them as food sources for their marae.

These objectives are apparently distinct, and because they involve the same fisheries, assumed to be in competition. In fact the objectives are closely related as they are ultimately intended to benefit the same people, all of whom are beneficiaries of the Fisheries Settlement. The return that is achieved by an Asset Holding Company is intended to benefit iwi members, for instance through funding to hapu or marae, or for educational or social purposes. Non-commercial customary harvest also benefits iwi members in a more direct manner. Both objectives are complementary, and both rely on the overall sustainability of fisheries.

Where do we want to be?

Nearly 20 years on, the Fisheries Settlement challenges us to identify where we want to be.

To begin with, there is a need to understand what we are managing. Fish are fish – they do not swim with the labels "customary," "commercial" or "recreational" attached. No one sector can manage fisheries separately – all fishing activity needs to be managed together.

There are two approaches that can be taken to managing fishing activity. One is primarily coercive. In this case the Government makes all the decisions about who gets what and how things should be managed. Where there is conflict, they determine the outcome. The other is more collaborative – and involves the participants working together to resolve as far as possible how fisheries should be managed within the regulatory framework established by the Government.

By working within the comprehensive network of Maori tribal relationships, Maori are well placed to take a more collaborative approach, and to minimise the need for coercion by governments. To do this effectively, a key challenge for us is to exercise our customary commercial and non-commercial fishing rights in a balanced and integrated way, and within a tribal framework that meets our collective needs in a modern context.

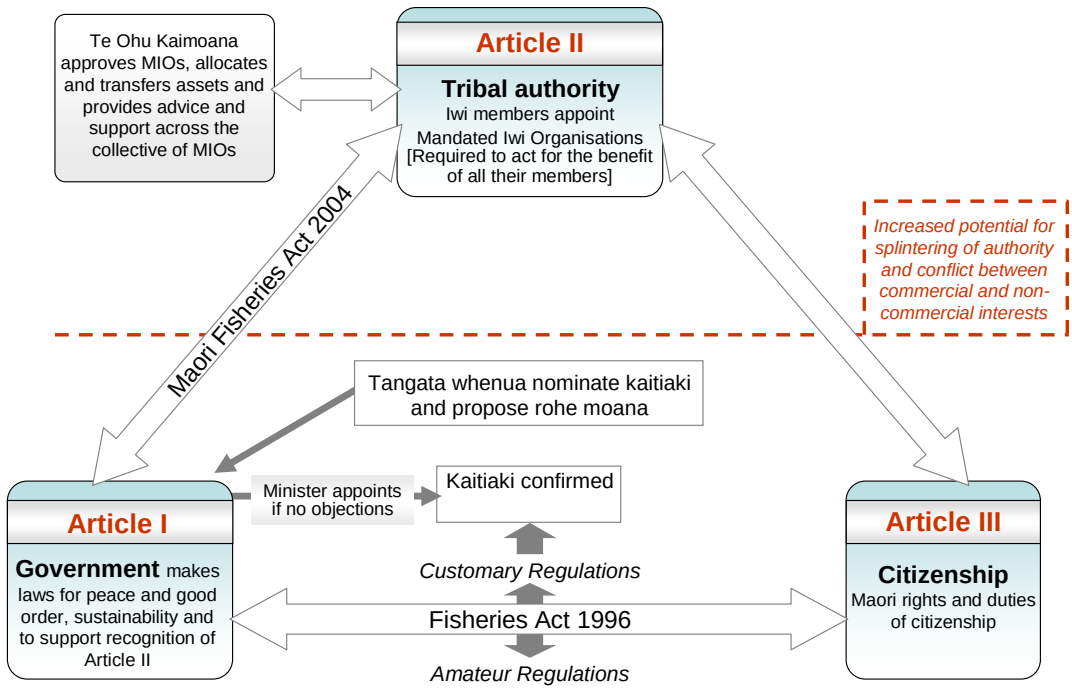
The Fisheries Settlement has helped create some of the elements that are needed. In the process of debating proposals for the allocation of commercial fishing assets, Maori agreed that it was most practical and appropriate that the assets be allocated to iwi. The 57 iwi who are eligible to receive the assets, and the Mandated Iwi Organisations that represent them, together ensure that there is a tribal framework in place that is inclusive of and accountable to all Maori.

But what about the non-commercial aspects of the Settlement? For customary non-commercial rights to be guaranteed to all Maori, entities must be in place to represent and protect those interests in a comprehensive way. It is only logical that these entities be legally recognised, properly mandated, representative and accountable to their members. However more importantly, they should mesh with the existing tribal structures in a seamless manner.

Ultimately, the tension inherent in the Treaty of Waitangi requires an ongoing negotiation of the relationships that it reflects. The guarantee of rangatiratanga under Article II leaves it to iwi, hapu and whanau to negotiate

their relationships within a tribal framework. This process has shown to be easily frustrated by a lack of integration between the elements of the settlement (see figure 5).

Figure 5
Elements of the Fisheries Settlement in isolation

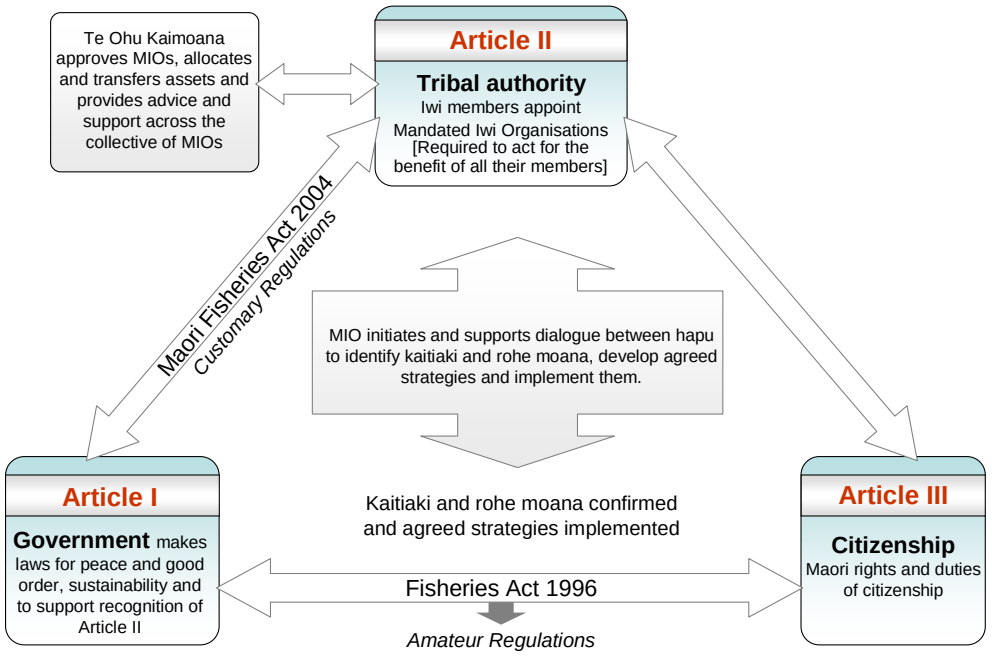


Where Mandated Iwi Organisations (MIOs) and the hapu and whanau they represent do not work together, it is too easy for others – even though it may not be their intention – to undermine their relationships. Is this where we want to be?

If Mandated Iwi Organisations or Asset Holding Companies are not aware of the needs of their members as they relate to customary non-commercial fishing, they won't know how to offer the kind of assistance that might achieve a win-win result. On the other hand, if kaitiaki only have access to information about fishing activity that they have authorised, and don't have access to accurate information about total fishing activity, they will also find it difficult to develop management responses that achieve a win-win result.

Where there is a willingness amongst all those involved, there is nothing to prevent a more collaborative approach being taken to the management of customary commercial and non-commercial fishing (see figure 6).

Figure 6
An integrated approach to the Fisheries Settlement



Within this more cooperative framework, Mandated Iwi Organisations (MIOs), Asset Holding Companies and kaitiaki can establish processes for dialogue to ensure that:

- there is comprehensive coverage of the non-commercial elements of the Fisheries Settlement that meets their members' needs, and
- they can identify the best way to manage their common fishing rights.

In that way they can agree on and jointly promote the kind of solutions that work for all their members.

Isn't this where we would rather be?

If you would like to provide feedback on this draft working paper, please contact:

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