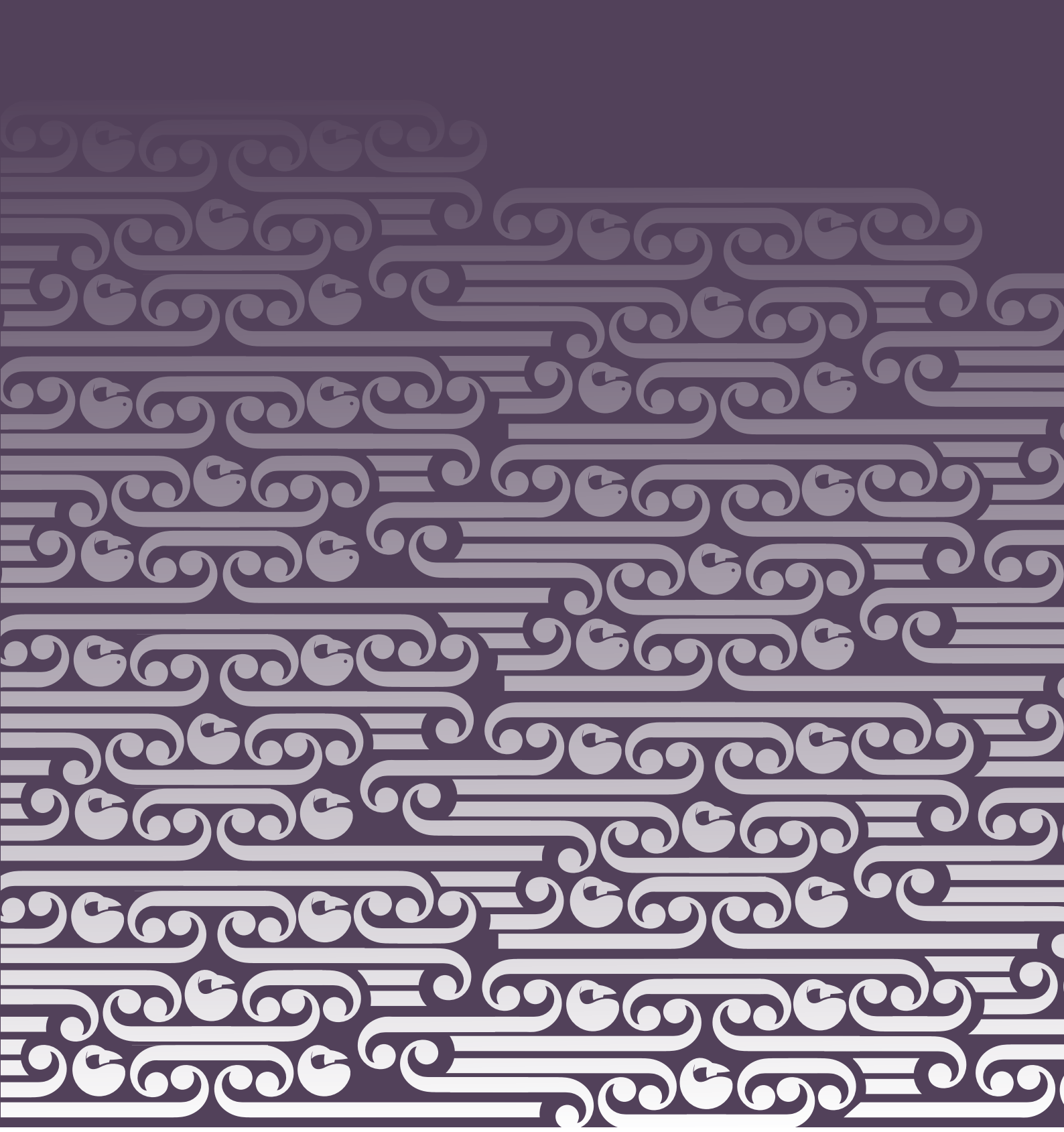

Te Ohu Kaimoana's Response to Fisheries New Zealand's 'Your fisheries your say' consultation document

Te Ohu Kaimoana

Contents

Introduction

1. Te Ohu Kaimoana welcomes the opportunity to provide a response to Fisheries New Zealand (MPI) on their consultation document "Your Fisheries – Your Say". This document represents the response from Te Ohu Kaimoana. We do not intend for this response to derogate from or override any response or feedback provided independently by Iwi, through their Mandated Iwi Organisations (MIOs) and/or Asset Holding Companies (AHCs).

About Te Ohu Kaimoana

2. Te Ohu Kaimoana was established to implement and protect the Fisheries Settlement. Its purpose, set out in section 32 of the Maori Fisheries Act 2004, is to "advance the interests of iwi, individually and collectively, primarily in the development of fisheries, fishing and fisheries-related activities, in order to:

    - ultimately benefit the members of Iwi and Māori generally; and
    - further the agreements made in the Deed of Settlement; and
    - assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi; and
    - contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement."

3. Mandated Iwi Organisations (MIOs) have approved a Māori Fisheries Strategy and three-year strategic plan for Te Ohu Kaimoana, which has as its goal "that MIOs collectively lead the development of Aotearoa's marine and environmental policy affecting fisheries management through Te Ohu Kaimoana as their mandated agent".

4. It is in the context of our statutory and non-statutory mandate that Te Ohu Kaimoana is providing feedback on the document "Your Fisheries – Your Say".

Noho ora mai rā,

Dion Tuuta
Te Mātārae - Chief Executive
Te Ohu Kaimoana

1.0 - Guiding Princples

1.1 - Te Hā o Tangaroa kia ora ai tāua

5. Prior to the colonisation of Aotearoa by the British Crown, Māori enjoyed complete authority over their fisheries resources. Te Ao Māori's relationship with Tangaroa, and ability to benefit from that relationship, was and remains underpinned by whakapapa – descent from Ranginui, Papatūānuku and their children.

6. The signing of Te Tiriti o Waitangi in 1840 affirmed Māori tino rangatiratanga over their taonga including fisheries which was an essential affirmation of the traditional Māori world view. This world view endures in the modern day. Te Tiriti o Waitangi and the 1992 Maori Fisheries Settlement are built on a much deeper foundation of Māori whakapapa connection to and relationship with Tangaroa.

7. In the modern context, when considering or developing fisheries-related policy, Te Ohu Kaimoana is guided by the principle of 'Te Hā o Tangaroa kia ora ai tāua' - the breath of Tangaroa sustains us. In this context Tangaroa is the ocean and everything connected to and within, on and by the ocean. This connection also includes humanity, one of Tangaroa's descendants.

8. Ko 'Te hā o Tangaroa kia ora ai tāua', highlights the importance of an interdependent relationship with Tangaroa, including his breath, rhythm and bounty and how those parts individually and collectively sustain humanity. The guiding principles underpinning 'Te hā o Tangaroa kia ora ai tāua' highlight how we ensure that we foster and maintain our relationship with Tangaroa.

1.1.1 - Tangaroa

9. Tangaroa is the God of the Sea and everything that connects to the sea. He is the divinity represented through Hinemoana (the ocean), Kiwa (the guardian of the Pacific), Rona (the controller of the tides – the moon) and the connection with other personified forms of the Great Divine. For some tribes, he is also the overlord for all forms of water, including freshwater and geothermal as well as saltwater.

1.1.2 - Te Hā

10. Te Hā means, breath and to breathe. Te Hā o Tangaroa represents the breath of Tangaroa, including the roar of the ocean, the crashing of waves on the beach and rocks, the voice of the animals in and above the ocean and of the wind as it blows over the ocean, along the coast and the rocks and through the trees that stand along the shoreline. Through our whakapapa to Tangaroa, we as humanity, we as tangata whenua, are the human voice for Tangaroa.

11. When Tangaroa breathes it is recognised through the ebb and flow of tide and the magnetism of the moon. This magnetism is recognised as the kaha tuamanomano (the multitudinal rope of the heavens). Therefore, we must also be mindful of the lunar calendar when working with Tangaroa and his various modes.

1.1.3 - Purpose and Policy Principles

12. Te hā o Tangaroa ki ora ai taua provides Te Ohu Kaimoana with guidance on key principles which should underpin our consideration of modern fisheries policy.

- **Whakapapa:** Māori descend from Tangaroa and have a reciprocal relationship with our tupuna;
- **Tiaki:** To care for Tangaroa, his breath, rhythm and bounty, for the betterment of Tangaroa in order to care for humanity as relatives;
- **Hauhake:** To cultivate Tangaroa, including his bounty, for the betterment of Tangaroa (as a means of managing stocks) and for the sustenance of humanity; and
- **Kai:** To eat, enjoy and maintain the relationship with Tangaroa as humanity.

13. Whakapapa as a principle recognises that when Māori (and Te Ohu Kaimoana as an extension of Iwi Māori) are considering Tangaroa, we are considering the wellbeing of our tupuna (ancestor) – rather than a thing or inanimate object. Therefore, the obligation and responsibility of Tiaki – caring for Tangaroa – comes from our descent from our Tupuna. Similarly, the responsibility and obligation of Hauhake (cultivation) is underpinned by our Tiaki obligations to Tangaroa in order to Tiaki humanity.

14. Ultimately, humanity's right to Kai – to enjoy the benefits of our whakapapa relationship with Tangaroa – are dependent upon our ability to Tiaki and Hauhake and how we uphold the responsibility and obligation in a modern and meaningful way to maintain legitimacy through practicing Tiaki, Hauhake and Kai.

15. These principles were inherent within the Treaty of Waitangi fisheries settlement and – Te Ohu Kaimoana asserts - the quota management system, which Māori endorsed as part of that historic settlement. This underscores its ongoing relevance and importance in modern New Zealand fisheries management.

1.1.4 - Duty to act in a manner consistent with the Fisheries Settlement

16. Section 5 (b) of the Fisheries Act 1996 obliges "all persons exercising or performing functions, duties, or powers conferred or imposed by or under it" to "act in a manner consistent with the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (TOW(FC)SA)". The TOW(FC)SA implements the Deed of Settlement between Māori and the Crown, which represented a full and final settlement of Māori claims to fisheries. Section 3 of the TOW(FC)SA states:

    "It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the agreements expressed in the Deed of Settlement referred to in the preamble".

17. In light of the obligations under s 5(b) of the Fisheries Act, the Minister must ensure that any decisions that trigger 28N rights, are administered by MPI in such a way that they do not have the effect of diluting the proportional share that Iwi have in the Total Allowable Commercial Catch (TACC). If MPI fails to act in this way, it will have the effect of undermining the Fisheries Settlement.

18. It also follows that whenever the Government or a Minister considers altering policy at a legislative or operational level, including a decision to implement a sustainability measure or to provide for utilisation, they must ensure their decision furthers the agreements in the Deed of Settlement, and at a minimum must be consistent with, and does not undermine, the Settlement.

19. These proposals are likely to have an impact on the Total Allowable Catch (TAC). To protect Māori fisheries settlement rights, the following approach should be taken when adjusting and/or allocating the TAC:

    a. the recreational allowance should not be increased above the level it was first set by the Minister when the TAC was set for any particular stock;
    b. all increases to a TAC should be allocated to the commercial sector after providing for non¬-commercial customary fishing and other fisheries-related sources of mortality;
    c. if, in order to ensure sustainability, the TAC, TACC and the recreational allowance is reduced, the allowance can be increased back to its initial level when the stock rebuilds;
    d. the customary allowance is based on customary needs and managed through kaitiaki. In some instances, customary needs may not be fully identified and there may be insufficient capacity to harvest what is needed. Therefore, there can be expected to be increases to the customary allowance over time as both needs are better identified and capacity to harvest is realised;

e. the Minister is required to allow for Māori customary fishing interests when setting the TAC, this should be applied regardless of full identification or capacity to harvest, and
f. in situations where the abundance of a stock drops, kaitiaki will respond appropriately.

20. In our view, the above approach to allocation should be adopted as the default option and apply whether the stock is at, above or below any target stock level at the time the TAC is set. Variations on this approach should only be considered by the Minister if all extractive interests reach agreement on an alternative approach.

2.0 - Linking the proposals to good practice fisheries management

21. The Minister of Fisheries and MPI have requested feedback on proposed changes to four elements that are part of a broader framework for managing fisheries. These elements relate to the operation of the Quota Management System (QMS) and so changes will impact on the commercial sector and Iwi as recipients of assets under the Deed of Settlement. Before addressing the proposals set out in the consultation document, we note that there are several areas that require clarification as set out below.

22. We are concerned about the simplification of the proposed options in the consultation document given the significant implications of the changes suggested. By way of example, the issues of sub-MLS and Sixth Schedule have been bundled up and not teased out. We think that dilutes the significance of approaches authorised through legislation (Sixth Schedule) being quite different than those authorised through a combination of regulations and Ministry direction (sub-MLS).

23. Te Ohu Kaimoana note that the lack of detail is further confounded by the interdependencies within and between options. We have therefore approached this response with reference to what MIOs consider to be a 'future state' for fisheries, which includes considerations that have not been discussed in the consultation document. Our conclusion is that the reform package should build on the success of the Quota Management System through the purpose of the Act.

24. The consultation document does not acknowledge the considerable advancements made by industry in gear innovation and fishing behaviour that both support sustainable fisheries and further mitigate environmental effects. Te Ohu Kaimoana is fully supportive of gear innovation and has shown commitment to that through funding initiatives in that area. We note the collective submission from Fisheries Inshore New Zealand and Deepwater Group provides detailed examples of progress in gear innovation and behavioural changes to date.

25. Te Ohu Kaimoana consider the Liaison Programme for mitigating protected species interactions through gear and practise modifications is also a valuable and effective approach. This kanohi ki te kanohi conservation service is proving to be a successful way to define and improve uptake of good practice methods.

26. We provide our response on the assumption that these proposals refer to stocks within the QMS, rather than species managed outside the QMS. If our interpretation of the consultation document is incorrect in this respect, we would like the opportunity to amend our response.

2.1. Role of Deemed Values

27. Deemed value settings are dynamic and intrinsically related to TAC[1] /TACC settings and any landings and returns policy. These cannot be considered in isolation but instead need be addressed as a full package in order to achieve desired outcomes.

28. The role that deemed values have to play in working alongside the TACC and broader sustainability measures to monitor the health of a fishery is not considered in the consultation document. We consider it necessary to set out how we see deemed values operating in the context of the reform package. Without establishing a basis for how deemed values will apply, it is difficult to comment on an appropriate landing and returns policy.

29. Te Ohu Kaimoana considers that the overriding purpose of deemed values is to encourage the reporting of catch, while discouraging the catch of stocks that individual fishers cannot cover with Annual Catch Entitlement (ACE). The key focus should be on encouraging transparency across the fisheries management system so that catch is reported, and the information can form an important input to the monitoring of fish stock abundance.

30. Deemed values act to encourage fishers to adhere to the TACC. However, if TACCs are set incorrectly, then the information provided through deemed value payments can be an important signal that key settings need to be reviewed. Hence there is a balance to be struck between incentives to fish with ACE (and hence within the TACC) and accurate reporting of catch (whether or not it is covered by ACE), which is fundamental to understanding fish stock abundance at any point in time. The key is to avoid any disincentive to record catch.

31. The deemed value for a particular fish stock can be set at, or scaled up to, a level that removes any profit after harvesting costs are deducted. Under these conditions a fisher is incentivised to cover the catch with ACE, or if unable to retrospectively do that then there is no disincentive to report and land it. This application of deemed values is consistent with the purpose of the Act and the Settlement and has the real potential to increase the quality of information available to support fisheries management decision-making.

[1] *Te Ohu Kaimoana is of the view that the TAC is a policy construct and is not the accurate and overriding feature of the Fisheries Act that the public consultation document sets it out to be. This is evidenced by every element of the TAC (as well as the TAC itself) being able to be lawfully exceeded. In some cases the TAC is not even the primary sustainability measure set under s 11.*

32. The options posed in the consultation document highlight the need to re-evaluate the current deemed value settings[2]. For example, if all sub-MLS are balanced against ACE with no transitional change to the TACC, there could be considerable excess catch compared to ACE availability. This is particularly important as historically sub-MLS have been accounted for in the TAC under other sources of fishing-related mortality (OSFM). Deemed values need to be set in a way that encourages catch in excess of the TACC to be reported and, where appropriate, landed. However, we also acknowledge that on ongoing investment in gear and electronic technology could eliminate the catch of small fish entirely and hence the need for TACC adjustments reduced.

33. A long-standing issue in fisheries, particularly complex, inshore, shared fisheries is the lack of resources and capacity to assess and inform management decisions. We consider that deemed value payments could be a resource for assisting in this issue. Payments for deemed values can exhibit information about the nature of fisheries and assist focussing areas of research to where catch limits may not be set appropriately. Investing deemed value payments toward fisheries stock assessments would be a logical approach that aligns with the deemed value's purpose of fishing within sustainable limits.

34. A current example where deemed values are punitive and not reflecting their purpose is the KIN7 fishery. KIN7 has a low TACC and high differential deemed value. The management framework for kingfish is designed to manage the commercial catch of kingfish to unavoidable bycatch levels only. In part, this situation seems to have arisen due to a preference for recreational utilisation of this fishery. Recently, there has been an increase in abundance of kingfish in KIN7 however the TACC and deemed value rates have not been adjusted, even though the current landings are unavoidable (KIN7 was 309% overcaught in 2017/18). This unnecessarily penalises fishers for catching kingfish; deemed value payments restrict fishers from accessing other fisheries. This outcome is not consistent with the purpose of the Act. Further, the allocation of the TAC should not favour recreational over Settlement interests[3]. While the substantive issue seems to be in the setting of the TAC/TACC, in the interim deemed value rates should be set to incentivise reporting. Further, there is a strong case for the money paid for KIN7 deemed values to be redirected into research to better understand the stock status of KIN7 (to help determine whether the core of this issue is indeed increased kingfish abundance).

[2] The role of deemed values was discussed extensively in the Te Ohu Kaimoana response to the review of TACs and management controls for the 1 October 2018 fishing year. In particular we pointed out the undesirable consequences of ramping up deemed values to levels above the market value of fish in terms of destabilising the incentives to report all catch.

[3] We refer to our allocation principles set out in paragraph 19 of this response.

3.0 - Amending the commercial fishing rules that set out what fish must be brought back to port and what fish can be returned to the sea

35. We consider the following principles should be applied when approaching landings and returns policy:

- The policy needs to be consistent with the Purpose of the Fisheries Act 1996 and must move fisheries management forward in a manner that furthers the agreements in the Deed of Settlement.
- All catch should be reported, irrespective of whether it is landed or returned to the sea. In order to tiaki or care for Tangaroa and his children, we must understand, as much as possible, what we are catching in totality in order to effectively hauhake or cultivate our fisheries.
- Where a fish or shellfish can be returned to the sea and survive it does not need to be balanced against ACE. In these circumstances if it is necessary to account for a level of mortality of returned fish, then that should be reflected in OSFM.
- Where a fish or shellfish is either landed, or returned to the sea and unlikely to survive, balancing against ACE should be required, or the deemed value paid. This to be consistent with our tiaki obligation to ensure that actions which result in incidental mortality can be accounted for and assist us over time to adapt new techniques which minimise unintended catch.
- There should be no loss in the value of Settlement Quota in implementing any changes without the prior agreement of the Treaty Partner.

3.1 - Our evaluation of the proposals

3.1.1 Sub-MLS catch

36. When addressing these proposals, Te Ohu Kaimoana considered a 'future state' of fisheries that reflected Iwi values and aspirations. We can contemplate a future where sub-MLS is removed; this would mean that if fish (currently sub-MLS) are caught, and they are unlikely to survive, then they are fully utilised in some way (noting that there will likely be exceptions to this). However, removing sub-MLS requires several considerations for information gathering, implementation and enabling innovation as discussed below.

37. The main issue we have in evaluating the approaches to a landings and returns policy is the inability to demonstrate the scale at which sub-MLS fish are currently caught. We note that recent developments in regulations from electronic monitoring may assist with improving information. With the issue of landings and discards largely centring on inshore finfish, it is not accurate to suggest (as the consultation document does) that fishers have historically been required to report all catch. While the Fisheries Reporting Regulations 2017 (and the circulars below these) include the type of reporting suggested, in practice these regulations and circulars have been deferred for about 950 of the 1000 commercial fishing boats until late in 2019 when electronic reporting will have commenced across the fleet. This contrasts to current practice for 95% of the fishing fleet where reporting forms explicitly state not to report sub-MLS.

38. It has only been in recent years that, first sub-MLS snapper in 2014 and then tarakihi in November 2018 (SNX and TAX code), have been able to be reported to better understand stock dynamics and improve fishery sustainability. However, these are recent developments and there is no current information to fully determine the extent or range of sub-MLS catch.

39. Te Ohu Kaimoana considers that accurate reporting of all catch, including sub-MLS catch, is fundamental to understanding and managing our fisheries for intergenerational sustainable use. Immediate removal of the MLS would render the electronic juvenile code (Y) void and disable the recording of this vital information. It is fundamental that to get the right solution to problems you need to know both what is causing the problem and the size of it.

40. Te Ohu Kaimoana assumes that the incentive to reduce sub-MLS catch relies on juvenile fish not being marketable – otherwise an incentive to target sub-MLS would be created. Our solution to that implication is the adoption of a Minimum Market Size (MMS) by industry as a replacement for the MLS. Clearly, the preference is for these fish not to be caught, but to the extent that they are harvested and in a state where they are unlikely to survive then these fish need to be utilised in a different way. One option would be to process into fish meal on land or at sea. However, we acknowledge that this may not be possible for all catch due to capacity and proximity to fishmeal plants. We therefore recommend that provision be made for sub-MMS catch that will not survive be returned to the marine ecosystem and balanced against ACE or the deemed value paid. This would cater for the situation where fish meal facilities are not available.

41. The switch from an MLS to an MMS would require a transitionary period. The first element of this transition would be a period where reporting of sub-MLS catch was required. This part of the transition would occur in tandem with improvements to fishing gear design and avoidance of areas where juvenile fish were likely to be caught by particular methods.

42. As noted, a key part of the first transition period would involve support for gear innovation and better targeting of fishing grounds that reduced, or even eliminated, the catch of sub-MLS/MMS fish where possible. Discussions on this point have revealed that is often the case that the inflexibility of the current regulatory system is stifling the innovation needed to move from a current state to a future state. So this is as much an issue for MPI to first develop and adopt an enabling approach, as it is for the industry to respond to the challenge of improving practices.

43. Accurate reporting of sub-MLS/MMS catch for a period without ACE balancing would provide the necessary information to understand the effects each proposal will have on ACE, landings, deemed values and provide scope to focus management measures. This would give quota holders and the wider industry the time and resources to invest in ACE sale contracts, gear modifications to reduce unwanted catch, alternative processing/products if required and educate fishers on good fishing practice.

44. The second form of transition would be adjusting the TACC to reflect the additional catch that will need to be balanced with ACE. If this step is not taken then there is a risk of devaluing quota, including Settlement quota. One way of achieving implementation that protects the Settlement would be for the Crown and Iwi to jointly develop a transitionary arrangement that ensures the net effect on quota value is neutral. This would involve determining the adjustments required for TAC/TACCs to reflect any additional catch that needs to be balanced with ACE.

45. Finally, we note that for some species the retention of an MLS or MLW (minimum legal weight) will continue to be required. These include shellfish[4] and finfish like freshwater eels where there is a high likelihood of survival on return.

Sixth Schedule

46. Stocks that are able to be returned to the sea are authorised through the Sixth Schedule of the Fisheries Act 1996. Stocks are included in this list based on likelihood of survivability and/or economic value attributes. Generally, these returns do not need to be counted against ACE.

47. Te Ohu Kaimoana note that stocks have been carefully considered and placed on the Sixth Schedule at the time of introduction to the QMS[5], and therefore have a practical and legitimate reason for being there. We therefore support the retention and potential expansion of the Sixth Schedule, or the intent being achieved through equivalent or regulatory provisions. We also support a review of the Schedule that has close engagement and input from stakeholders to assist in the challenge of determining survivability. We consider that at this point in time there has been insufficient detail or engagement to meaningfully review the specific requirements set out in the Sixth Schedule.

48. If there are changes to the Sixth Schedule, a range of management settings would need to be adjusted in conjunction with any amendments. For example, the removal of kingfish from the Sixth Schedule despite its high survivability would further restrict fishing operations due to ACE restrictions. Thus, removal from the Sixth Schedule would require adjustments to both the TACC and deemed value settings. This example highlights that balancing all considerations within a fisheries management system requires an adaptive approach.

[4] *Examples include what the Fisheries Act defines as shellfish such as green-lipped mussels, scallops, dredge oysters and rock lobster.*

[5] *The QMS was introduced in 1986 and the Fisheries Act in 1996, so for the early introductions the policy underpinning inclusion on the Sixth Schedule may not be as readily accessible.*

Incentivising better practice

49. The QMS provides incentives for quota owners to maximise the value they receive from fisheries resources and it is important not to lose sight of this key point. However, decades of reform have resulted in a separation between the incentives that apply to quota owners as distinct from the harvesters (who can be permit holders and/or vessel masters/crew). We note that this fundamental issue is not being identified or addressed as part of the proposals, but we consider it useful for officials to avail themselves to the work being done by many quota owners, including Settlement quota holders and Māori-owned companies to improve the connectivity between ownership and harvesting. This includes placing conditions on ACE contracts to influence or require certain fishing practices. While some quota holders already implement such contracts, it is by no means industry-wide and these binding documents are a direct link to retain the incentives driven from the QMS through to the harvest of fish.

50. Te Ohu Kaimoana considers that quota owners exercising authority through ACE contracts is a legitimate tool to ensure sustainable practice incentives are transferred to fishers on the water. Improvement of the contractual relationships between quota owners and harvesters may be able to solve many of the issues relevant to this consultation. In particular, the perpetual nature of Settlement quota held by Māori is a strong and enduring incentive to retain sustainable fisheries and increase value through innovation. Implementing ACE contracts with appropriate conditions enables MIOs who do not directly fish their ACE to engrain their tikanga through to the harvest of fish.

Predated fish

51. Te Ohu Kaimoana understands that the issue of predated fish is not being addressed as part of these proposals. It appears to be that this is being dealt with as part of the moves to introduce electronic reporting (ER). However, our attempts to obtain clarity on this as part of the ER exercise have been unsuccessful. Regardless of which process is dealing with the issue of predated fish, our understanding is that generally remains of predated fish have historically been returned to the sea[6] without being reported or balanced against ACE. Accordingly, such catch has been accounted for as OSFM. We consider this policy setting should remain.

Other reasons to return fish

52. The current settings, both in legislation and regulation, contain rules around the taking of fish out of a season and in certain biological states, for example it is illegal to possess rock lobster out of season in the Chatham Islands. Te Ohu Kaimoana also understands that it is a lawful requirement to return some species to the sea regardless of how, when and where they were caught and whether they are alive or dead. This rule applies to non-QMS species such as Marlin[7]. Notwithstanding our concerns about the implications for the Deed of Settlement arising from the latter situation, it seems to us that some sort of exemption will be required to authorise such returns in the future.

[6] *Examples include fish eaten out by lice in a set net, fish taken by a predator on a longline, and fish partially consumed by predators when in a trawl net.*

[7] *Not only does this requirement lead to waste but it also denies Māori the expectation to have this managed under the QMS and hence benefit from commercial sale in favour of recreational interest.*

4.0 - Ensuring effective and fair offences and penalties

4.1 - Introducing new criminal offences

Status quo and proposed options

53. Under the Fisheries Act, if a fisher is caught illegally discarding fish, they are liable to a fine not exceeding $250,000[8] regardless of the amount of fish dumped or the level of harm on the marine environment. The current approach is based on a low likelihood of detection, justifying high penalties. The courts in imposing sentences, take into account the purpose of the Fisheries Act and have regard to the difficulties inherent in detecting fisheries offences (i.e. low likelihood of detection) and the need to maintain adequate deterrents against the commission of such offences[9]. If a person has been convicted two or more times within a three-year period, they are liable for forfeiture[10]. Generally, forfeiture can include fish, proceeds from the sale of fish, illegal fishing gear, property used in the offence, quota and associated quota[11].

54. The likelihood of detection is thought to increase with the introduction of electronic monitoring. Proposals in the consultation document aim to introduce graduated offences structure that is tailored to the level of fish that are illegally discarded, and therefore the level of harm the illegal behaviour is having on the ecosystem.

55. MPI propose a penalty structure like the following:

- Illegally discarding less than 50 fish in a day would be punishable by a penalty of up to $10,000, but would not be eligible for forfeiture (gear, boat etc).
- Illegally discarding 50 or more fish in a day would be punishable by a penalty of up to $100,000 and would be liable for property forfeiture.
- Illegally discarding fish on two or more occasions within a three-year period would be punishable by a penalty of up to $250,000 and would have automatic property forfeiture.

56. MPI has also signalled an alternative variation of the option proposed above. This involves graduating offences based on a point system, for example it could be something similar to the demerit point system used for driving offences.

[8] *Fisheries Act 1996, Section 252(3)*

[9] *Fisheries Act 1996, Section 254*

[10] *Fisheries Act 1996, Section 255C*

[11] *Fisheries Act 1996, Section 255E(3)*

4.2 - Our position

57. Te Ohu Kaimoana supports a system of penalty and offences that reflects the level of harm associated with a particular indiscretion. Fishers that illegally return fish to the sea diminish the integrity of the QMS.

58. We think that at a base level the responsibility for reducing offending should include a higher level of oversight of quota owners and the development of civil systems that ensure incentives for stewardship of the resource are aligned, and we envisage this can be achieved through civil contracts. The industry's submission to the December 2015[12] call for ideas from the Ministry signalled the need for authorised management and the ability to bring in members into the collective that were not willingly operating in accordance with the industry rules. Te Ohu Kaimoana sees the merit in this approach but it is not part of this reform package.

59. We also consider that the current problem with offences and penalties may be over-stated in the public consultation document, in that it does not acknowledge the role the courts play in ensuring penalties are commensurate with the severity of an offence. It is also unclear at this point what illegally returning to the sea will be defined as. Answering this question will involve clarification as to when a fish is deemed to have been caught. Fish often fall out of nets and drop off longlines.

60. We would like to discuss with MPI how this could work, including the scaling of offences. A key consideration for us is to ensure that penalties are linked to harm to the stock or protected species and not to administrative convenience. For example, discarding of three pilchard that drop out of a net on deck and get washed over the side through scuppers would result in a different level of harm than deliberately discarding three southern bluefin tuna caught on a longline. We would also be interested to discuss the monitoring of the measurables e.g. number of fish illegally discarded in a day, would work in practice while other parts of the fisheries management system deal with weight and not numbers.

61. We note that introducing new landings and returns rules has the potential to create confusion and could incentivise misreporting and discarding. Further, we would not wish to see fishers unreasonably penalised for committing a low-level offence due to genuine confusion over new rules being put in place. We support a transitionary period where the initial focus is on education based on an analysis of reported information.

62. We do not support the automatic property forfeiture aspect of this proposal. Under the Fisheries Act, property forfeiture can include quota or associated quota. We consider that in terms of settlement quota, an individual's actions should not dictate removal of that quota from MIOs. We consider that the introduction of automatic property forfeiture is contrary to a graduated offences system. Instead, the courts should decide if this is appropriate based on the level of offence and circumstances.

[12] *See "Creating Value Beyond Sustainability" submitted to MPI on 15 December 2015.*

4.3 - Introducing infringement offences

63. MPI considers that infringement offences for low level breaches of the landings and returns rules to be a useful approach for correcting illegal behaviour. Currently, the Fisheries Act does not allow MPI to use infringement offences that involves taking or possessing fish, which could include breaking the landings and return-to-sea rules. The Act already allows for infringement offences for other offences, which can be penalised with fines up to $3000.

64. Te Ohu Kaimoana supports the introduction of infringement offences in principle. We agree that there is a missing layer of approaches due to the absence of abatement and infringement notice provisions[13]. We note that there is such a layer in relation to the recreational sector and it seems sensible to extend this to the commercial sector. The introduction of infringement offences would reduce court costs for enforcement. We note that the definition of a low-level breach needs to be determined.

4.4 - Changes to defences for returning fish to the sea

65. Currently the Fisheries Act provides defences for commercial fishers that allow fishers to return fish to the sea (or parts of fish) under specific circumstances. One of these defences is when the return of fish to the sea has been authorised by a fisheries officer or observer. This must be recorded and counted as part of a fisher's catch. MPI considers that there should be no circumstances where fisheries officers or observers need to authorise returns to the sea that are not already covered by other defences. MPI also note that there is no defence for returning fish to sea to save a protected species.

66. MPI proposes to remove the defence for returns to the sea that are approved by a fisheries officer or observer and introduce a new defence which allows fishers to lawfully return fish to the sea to save protected species. MPI considers that approving returns by a fisheries officer or observer may legitimise the returning of fish to the sea in circumstances that would otherwise be unlawful and does not incentivise good fishing practice. Introducing a defence for protected species will give protected species a better chance of being released alive, while ensuring all catch is counted for stock assessments and the TAC.

[13] These provisions are set out in the RMA for Regional and Unitary Councils to use and enable the application of a wide range of tools to ensure the consequences reflect the harm caused.

67. We consider that the defence to return fish that is authorised by a fisheries observer or officer should remain. Fishers should still be incentivised to avoid catching this fish in the first place as they will still have to balance it with ACE or pay the deemed value. We do not think this poses a sustainability risk as catch will be reported and balanced. We note that observers and fisheries officers can refuse authorisation if they wish to. If there are particular instances where MPI have concern that this defence is being taken advantage of, then these cases should be investigated separately and with particular interest to the parties involved.

68. We support the introduction of the defence to return fish to the sea to save protected species. This will incentivise and enable security for fishers to respond to interactions with protected species. However, it is unclear as to what point MPI consider fish as being caught. If fish are entrapped within a purse seine net and accompanied by a dolphin, it seems reasonable to expect the master of the vessel to pull the purse string and let all catch escape without committing an offence that requires a defence. We note that there are areas of clarification required regarding verification and estimation of the interaction.

5.0 - Streamlining the decision-making process for setting catch limits

69. We agree that the current process for evaluating stocks and adjusting TACs is not sufficient to best fulfil the purpose of the Act. We support mechanisms that respond to changes in stock abundance effectively to enable utilisation while ensuring sustainability. Responsive management is a fundamental element of exercising effective kaitiakitanga. By providing utilisation opportunities in a timely manner the agreements of the Deed of Settlement are furthered. Ensuring fisheries are enduring for future generations is at the core of Māori fishing practice; we support progress toward a more agile and stable system that supports Te hā o Tangaroa and the longevity of the fish and its related fishery.

70. To increase the number of stocks and frequency of adjusting catch limits, MPI proposes to introduce harvest control rules (HCRs) through management procedures. Application of HCRs would be through a consultation process, then provided to the Minister to approve. HCRs would then be in place to make catch limit changes annually. These would be reviewed generally every five years.

71. Te Ohu Kaimoana supports increased responsiveness to changes in fish abundance and the utilisation of management procedures in principle. However, we do not support this being achieved through a prescriptive process driven by or through MPI. We would prefer to see MPI engaging with stakeholders to develop a strategic approach to fisheries management and enable Iwi and stakeholders to work within that approach to develop finer scale management arrangements. This is the sort of approach currently being developed for the Southern Scallop Fishery.

72. We consider that stakeholder fisheries plans are the best tool to set long term fishery objectives, management procedures and, where relevant, HCRs. However, HCRs on their own are not the answer to stream-lining decision making. Invariably HCRs are one dimensional and involve only science-based inputs. At a time when global warming and ocean acidification are becoming of increasing concern, it is unwise to lock into a prescriptive approach to manage fisheries. Rather, the time is right to invest in the rights and responsibilities supported by the Fisheries Act.

73. Fisheries plans provide a platform for documenting a collaborative approach to management that works for Iwi and stakeholders; and can be developed by these parties in association with local communities. Fisheries Plans allow for the setting of clear aspirations and can empower Iwi to act as kaitiaki of their fisheries. The process described in the consultation document does not mention their use and appears to duplicate the HCR process independent of Fisheries Plans despite their potential for both commercial and shared fisheries. We consider that collective management through Fisheries Plans reinforces the incentives in the QMS for quota owner responsibility to ensure sustainable harvest. However, over the last decade MPI has supported an approach of increasing centralised control over empowering rights-holders.

74. In addition, Te Ohu Kaimoana does not support internalisation of the decision-making process to MPI in a way that would dilute the Minister's decision-making authority. We are concerned about the consultation that will occur with Iwi as Treaty partners of the Crown during both the development of the management procedures and when a procedure is 'triggered' as this is not mentioned in the document. The recent issues with the HCR in CRA4 point out why the triggering of an HCR needs to be considered alongside other relevant matters for the fishery. In CRA4 the HCR has been triggered and an increase proposed. Despite this, the observations of a key Iwi are in direct contrast with the HCR recommendation and they did not support an increase. If there is no consultation that is relevant to the specific circumstances of the fishery at that time, this denies Iwi the opportunity to act in accordance with Te hā o Tangaroa kia ora ai tāua.

75. The removal of a consultation process is particularly concerning in relation to shared fisheries due to a lack of agreed criteria for allocating the TAC. Re-allocation of the TAC has the effect of devaluing the assets Māori received under the Deed of Settlement. The uncertainty generated by the lack of allocation framework has resulted in the industry seeking to take greater responsibility for managing catch within the TACC through shelving of ACE in situations where the catch needs to be reduced. This also mitigates the potential for Fisheries Settlement to be breached through the application of 28N rights.

76. Finally, in relation to the specifics of the option presented, we are wary of basing management procedures and HCRs off CPUE data in situations where it may not represent a true indicator of fish stock abundance. For example, if there is a 'choke' species or protected species in optimal fishing grounds, fishers may be forced to focus their effort in less optimal areas, which decreases CPUE. We recommend that constraints of interrelated fisheries on CPUE are identified to build portfolios of stocks that need to be evaluated simultaneously.

77. Another circumstance could be a localised depletion issue for species such as pāua and freshwater tuna. Abundance estimates and CPUE indices may not identify localised depletion and actions taken without that understanding could lead to the availability of these species for subsistence and customary non-commercial fishers being reduced to the point they cannot access the fish. As such, we think that catch limit changes require a consultation process to attain "on the water" operational information that is not available through model outputs. The Minister as decision-maker is required to take these matters into account and we consider that situation should remain and that accountability not be diluted.

Wider changes also being explored

78. Some fisheries management controls are implemented through regulations. The regulatory process and implementation is drawn out and can lag behind sustainability issues or utilisation opportunities. MPI considers that there is no clear rationale for the division of instruments for implementing management controls and suggest that this process could be simplified by using a notice in the Gazette rather than by regulation changes. MPI is proposing to allow a broader range of controls to be implemented by a final decision by the Minister of Fisheries through a notice in the Gazette.

79. We support a notice in the Gazette as the tool for setting both the recreational allowance and the associated bag limits. This would mean they can be changed whenever the TACC is varied, allowing for more responsive management. For example, it has been over two years since the Kaikoura earthquake which caused mass mortality of pāua, yet the regulation change for recreational bag limits has not been implemented. This poses a risk to sustainability and the rebuild of pāua populations. Our position is that decisions should be followed by action as soon as practicable.

6.0 Technical fisheries management changes

80. The consultation document has identified technical changes that are considered important to improving the functionality of the Fisheries Act 1996, and to ensure it is fit for purpose in light of other proposed changes. Four separate issues are defined below:

- OSFM is currently not attributed to a sector, accounting for all fishing mortality should incentivise commercial fishers to maximise value and minimise waste;
- The legislation provides for the monitoring of fish catch, but not all activities that could result in the return of catch to the sea;
- In setting or varying a TAC, the Minister must take mātaitai reserves into account around one (North) island but not the other;
- Inefficient, poorly aligned and redundant regulations.

6.1 - Our view

Proposed Option: Attributing OSFM to the commercial sector

81. There is merit to the idea of first attributing OSFM to the commercial sector, and if that mortality can be reduced or eliminated, adding that amount to the TACC. In this way the impact on the TAC would be neutral. However, it is important that the benefits from the commercial sector reducing OSFM should be assigned to the TACC and not to the recreational allowance, otherwise the incentive to reduce OSFM is greatly diluted. However, the application of this approach needs to be considered in the context of the different elements of the TAC.

Proposed Option: Extending the definition of fishing

82. The Minister of Fisheries has stated that the consideration of the role of cameras as a compliance tool for fisheries management is to be the subject of consultation later in 2019. Accordingly, we do not consider it is appropriate for the law to be changed to enable monitoring of different parts of fishing-related activity at this time. The definition change proposed does not indicate whether "fish processing" is restricted to at sea or on land and there has been no rationale provided to support this change. In addition, our view is that this proposal does not equate to a technical change. In the meantime, we note that cameras are being actively used by members of the fishing industry (including Iwi-owned fishing companies) without the need for legislative or regulatory support.

Proposed Option: Taking mātaitai into account and area closures

83. We have previously asked MPI to discuss the identified need for continuity between the North and South Islands regarding specific consideration of customary interests. However, no response has been forthcoming. Further, we are unaware of how the Minister takes the existing obligation for the North Island into account in a practical sense, especially given the constraints on establishing a mātaitai in relation to the taking of ACE. Hence it is not clear to us whether standardisation would be achieved by removing the obligation or adding it in the case of the South Island regulations. In addition, there are other matters of consistency that could equally be considered, including the role of the Minister in appointing kaitiaki.

84. Notwithstanding the issue about consistency in approach to regulatory provisions, there is also the need to consider the way in which the allowance for customary fishing is made when allocating the TAC. This has emerged as one of the key areas for review in our discussions with Iwi leading to the development of this response.

Proposed Option: Removing redundant provisions

82. Te Ohu Kaimoana supports in principle the removal of redundant provisions from the Fisheries Act 1983. Our support is based on our understanding that the sections of the Fisheries Act 1983 which are proposed to be repealed are as advised by MPI[15].

[15] *Sections 1 -3, 67R, 6 7S, 88B, 101A, 101B, 105AA, 105AB, and 107DA.*

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