Te Ohu Kaimoana and Te Wai Māori Trust's views on the issues and options paper of the Resource Management Review Panel

Te Ohu Kaimoana

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Chairperson, Hon Tony Randerson QC
Resource Management Review Panel
Parliament Buildings

Te Ohu Kaimoana and Te Wai Māori's Views on the 'Transforming the resource management system: Opportunities for Change' – the Issues and options paper of the Resource Management Review Panel.

1. Introduction

Te Hā o Tangaroa kia ora ai tāua
The breath of Tangaroa sustains us

1. Te Ohu Kaimoana and Te Wai Māori welcome the opportunity to comment on the Issues and Options paper for the comprehensive review of the Resource Management System. Te Ohu Kaimoana and Te Wai Māori are eager to participate in further discussions, kānohi ki te kānohi (face to face) with appropriate parties leading the review.

2. We highlight that decisions made under the Resource Management Act ('RMA') can affect Māori rights guaranteed under the Fisheries Deed of Settlement ('Deed of Settlement'). In particular;
   a. activities (including land-based activities) can adversely affect the freshwater and marine environment on which fisheries depend;
   b. activities or uses that are governed under the RMA that prevent Māori from accessing their fisheries.

3. In our view the RMA should contain an explicit requirement for decision-makers to assess the effects of their policies, plans and consent decisions on the rights protected by Treaty settlements, including the Deed of Settlement.

4. Our feedback is structured as follows:
   - First, we set out who we are and our interests in this context.
   - Second, we describe *Te Hā o Tangaroa kia ora ai tāua* as the foundation of our fisheries management principles.
   - Third, we set out our main concerns and targeted comments on the key issues and options proposed that affect our interests.

5. It is important to note from the outset that our comments do not usurp the mana of Iwi to give individual feedback. It is also not intended to override or conflict with any responses from Iwi. We offer our views as a contribution to the development of policy in relation to fisheries, aquaculture and freshwater matters without prejudice[1].

6. If you have any questions or comments, please contact Te Aomihia Walker (teaomihia.walker@teohu.Māori.nz).

[1] Our usual approach would be to seek iwi views before making a submission of this nature. Unfortunately, there was not the time to do that in advance of the submission closing date. We intend to further discuss this with mandated iwi organisations.

2. About Us

7. Te Ohu Kaimoana and Te Wai Māori Trust are representative organisations that were established through the passage of the Māori Fisheries Act 2004, to protect and enhance the Fisheries Deed of Settlement.[2]

8. Te Ohu Kaimoana's role is to protect and enhance Iwi and Māori interests in the marine environment, particularly in relation to customary and commercial fisheries as well as aquaculture.

9. Te Wai Māori's role is to advance the interests of Iwi and Māori in freshwater fisheries, including the protection and enhancement of freshwater fisheries habitat.

10. We both work on behalf of 58 Mandated Iwi Organisations (MIOs)[3]. MIOs have approved a Māori Fisheries Strategy 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 and Te Wai Māori as its mandated agents.

3. Our interest in the RMA reform

11. We have a significant interest in the resource management system, including the RMA and its relationship with the Fisheries Act and the Māori Commercial Aquaculture Claims Settlement Act 2004. We are particularly interested in how this relationship effects the full range of rights and interests arising from the both the Fisheries Settlement, including freshwater fisheries and the Aquaculture Settlement. Te Wai Māori defines freshwater fisheries to include species, habitat, surrounding land, water column, water quality and quantity.

12. As a result of the fisheries and aquaculture settlements, Māori hold rights to utilise natural resources in the coastal marine area. These resources are affected by decisions made under the RMA. Māori, for example, through Mandated Iwi Organisations (MIOs), Te Ohu Kaimoana or Māori Fishing Companies could participate in the RMA as applicants (for example for Aquaculture Management Areas or consents to establish processing facilities) or as submitters and/or objectors (for example where their interests in particular fisheries might be adversely affected by land use or discharges) as well as receiving Settlement Assets where decisions are made to authorise marine farming.

4. We base our advice on Te Hā o Tangaroa kia ora ai tāua

13. Iwi/Māori have a unique and lasting connection with the environment. Te Hā o Tangaroa kia ora ai tāua (the breath of Tangaroa sustains us) is an expression of this connection. It contains the principles we use to analyse and develop modern fisheries policy, and other policies that may affect the rights of Iwi under the Deed of Settlement (see Figure 1).

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[2] The Fisheries Settlement was a settlement of fisheries claims under Te Tiriti o Waitangi. It was enshrined in the Deed of Settlement, signed in 1992 and implemented through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Fisheries Act 1996 and the Māori Fisheries Act 2004.

[3] MIO as referred to in The Māori Fisheries Act 2004: in relation to an Iwi, means an organisation recognised by Te Ohu Kai Moana Trustee Limited under section 13(1) as the representative organisation of that Iwi under this Act, and a reference to a mandated Iwi organisation includes a reference to a recognised Iwi organisation to the extent provided for by section 27. Some (but not all) MIOs are also the Post Settlement Governance Entity for the particular Iwi they represent.

14. In essence, Te Hā o Tangaroa kia ora ai tāua highlights the importance of humanity's interdependent relationship with Tangaroa to ensure our mutual health and wellbeing. Tangaroa is the atua of all water, be it fresh or marine.

15. Protection of the reciprocal relationship with Tangaroa is an inherent part of the Deed of Settlement agreed by Māori and the Crown in 1992, which settled Māori fisheries claims. The purpose of the Deed of Settlement was the sustenance of Māori identity through the full range benefits that fisheries provide.

16. The Deed of Settlement is an important and relevant part of modern fisheries management for Aotearoa. As a result, Māori rights in fisheries can be expressed as a share of the productive potential of all aquatic life in New Zealand waters. Māori rights are not just a right to harvest, but also to use the resource in a way that provides for their social, cultural and economic wellbeing. These rights are exercised within the framework of the Fisheries Act 1996.

17. Te Hā o Tangaroa kia ora ai tāua does not mean that Māori have a right to use fisheries resources to the detriment of other children of Tangaroa: rights are an extension of responsibility. It speaks to striking an appropriate balance between people and those we share the environment with.

18. In accordance with this view, "conservation" is part of "sustainable use", that is, it is carried out in order to sustainably use resources for the benefit of current and future generations. The Fisheries Act's purpose is to "to provide for the utilisation of fisheries resources while ensuring sustainability." The purpose and principles of the Act echo Te Hā o Tangaroa kia ora ai tāua.

19. There has never been any disagreement by beneficiaries of the Deed of Settlement that quota rights secured under the settlement are subject to a responsibility to ensure sustainability – this requirement was a key reason for Māori and Iwi accepting the quota management system. Our ability to maintain a reciprocal relationship with Tangaroa depends in part upon appropriate implementation of the Act.

Te Ohu Kaimoana

Figure 1: Te hā o Tangaroa kia ora ai tāua

Te Ohu Kaimoana

5. Our views of the Issues and Options Paper

5.1 Our main concerns

20. **The RMA should not undermine the special provisions made for Māori interests guaranteed by the Fisheries Settlement and recognised under the Fisheries Act.**
    We would be concerned if the review sought to find ways of amending the Fisheries Act. The document explicitly states that the review will consider the potential impact and alignment of proposals for reform with other relevant legislation, including but not limited to Fisheries Act 1996 ('the Fisheries Act'). It is our role to ensure that decisions made to change the RMA do not undermine the special provisions made for Māori interests guaranteed by the Fisheries Settlement and recognised under the Fisheries Act.

21. The RMA provides protection for existing rights granted or recognised under its provisions, however, does not explicitly recognise rights granted under other legislation. For example, it is argued that the spatial extent (coastal to open ocean) rights that take the form of Individual Transferable Quota (ITQ) under the Quota Management System is unclear. This rights-based system formed the basis for part of the Māori Fisheries Settlement. If the RMA fails to recognise rights guaranteed under the Fisheries Act it can undermine the Fisheries Settlement.

22. The use of a right-based system in the Fisheries Act underpins a system for which rights holders take responsibility for managing their shared resource. This is stated in the purpose of the Fisheries Act, where ensuring sustainability includes "avoiding, remedying or mitigating adverse effects of fishing on the aquatic environment."[4] This purpose of the RMA is mirrored in the Fisheries Act but more broadly states the impacts of activities rather than fishing activities and the environment rather than the aquatic environment.[5] We see the provisions for managing the effects of fishing being better managed under the Fisheries Act because of the rights and the responsibility that comes with being a right holder.

23. **If the RMA is not functioning well there will be implications for Tangaroa**
    By acting as kaitiaki, we engage in a reciprocal relationship with Tangaroa. Tangaroa sustains our mauri and in turn it is our responsibility to care for the mauri of Tangaroa and all its in habitants. It is explicit in the Fisheries Act that it is necessary to "avoid, remedy or mitigate adverse effects of fishing on the aquatic environment." We see this as part of the role of kaitiaki.
    It is in the domain of the RMA to manage activities that have a direct impact on the health of Tangaroa, for example, modification of freshwater environments, land-based activities, diversion of rivers and streams, erosion, the clearing of forests and silt, sediment and pollutants run off. If these issues are not addressed under the RMA there is a strong potential for this to impact on the productivity of Tangaroa. By not maintaining these there are direct ramifications on the Fisheries Settlement and the rights protected under that settlement.

24. **We encourage the Review Panel to consider the implications of the Motiti decision[6] carefully, particularly on Māori interests under the Fisheries Act, before proposing further changes to the RMA**

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[4] Part 2 Section 8 of the Fisheries Act
[5] Section 17 of the RMA
[6] *the Attorney-General v The Trustees of the Motiti Rohe Moana Trust & Ors*
https://www.courtsofnz.govt.nz/cases/attorney-general-v-the-trustees-of-the-motiti-rohe-moana-trust-ors

The Court of Appeal's decision on the Motiti case in effect, empowers local authorities to control fisheries resources in the exercise of its RMA section 30 functions in the coastal marine area provided it does not act for Fisheries Act purposes. The Court of Appeal also found that 'a regional council may be required to bear in mind provisions under the Fisheries Act for taiapure and customary fishing when determining whether it may control fisheries resources in the exercise of its s 30 (1) functions'. We further note that the Court did not address the question whether a regional council can exercise all of its functions under Part 2 of the RMA concerning the protection of Māori values and interests in the coastal marine area provided they are not inconsistent with the special provision made for Māori interests under the Fisheries Act.

Our concern is that the decision, in effect, empowers local authorities, when considering biodiversity values under the RMA to stray into matters that in our view are or ought to be covered by the Fisheries Act (in effect, regulating fisheries matters by a 'side wind' under the RMA). Our view is that this could have implication for the Fisheries Settlement, and in particular customary fisheries.

5.2 Key issues and options identified in the review paper

5.2.1 Allocation

Marine coastal space

25. The document suggests the Government has work underway to improve management of coastal marine space for aquaculture. We recommend that the Review Panel clarify in their final report what work is underway.

26. We are aware officials have commenced preliminary policy-thinking on an allocation regime for aquaculture space as part of its design of a management system to guide open ocean aquaculture development in New Zealand waters. We are inputting into that design work. We note that that work is explicitly limited to consideration of how best to allocate aquaculture space in the open ocean.

27. As far as we are aware, the Government does not currently have any work underway to establish an allocation regime for all coastal marine space for aquaculture. Te Ohu Kaimoana would have significant reservations about any plans to undertake such a programme of work, given both the significant occupation of coastal space that already exists and the impacts this work might have on the Aquaculture Settlement.

Freshwater

28. We are disappointed to note that the scope of this review excludes consideration of Māori rights and interests in freshwater and the findings of Wai 2358. Addressing water allocation issues (including Māori rights and interests in freshwater) was not progressed as part of Government's Essential Freshwater proposals currently being developed. The Government has noted that its focus should start with water quality before it addresses allocation. It is noted that the Waitangi Tribunal in its Wai 2358 report clearly recommended that Māori proprietary rights in freshwater be addressed.

5.2.2 Economic instruments

29. The document notes that an important aspect of the "effects-based" approach to environmental management introduced by the RMA was the intended greater use of economic instruments. The document suggests that one option to improve the use of economic instruments is to require mandatory charges for use of coastal space.

30. A coastal charging regime has the potential to be fairer across all occupiers of the coastal marine area; however, whether it is will depend largely on how such a regime is implemented. A fairer system will be heavily dependent on Council's realising that things like coastal occupation charges are clearly intended to be something different from rentals: speeches made in Parliament at the time highlight that fact.

31. There is a requirement in the RMA that the revenue collected by a Regional Council from such charges may only be used for the purpose of promoting the sustainable management of the coastal marine area. So, before we can answer the question of whether mandatory charges should be introduced, work needs to be done to consider what the 'sustainable management' issues for its coastal marine area are; what is required in order to 'promote' sustainable management and what, if any, expenditure that might require; and what, if any, coastal occupation charges are appropriate.

5.2.3 Purpose and principles of the Resource Management Act 1991

32. The purpose of the RMA "is to promote the sustainable management of natural and physical resources". The principles of the RMA are set out in sections 6,7 and 8 as matters of national importance, other matters and the Treaty of Waitangi respectively. Differing levels of weight are given to these sections.

33. The paper states that the RMA has provided insufficient protection for the natural environment despite efforts for improvement and that New Zealand's natural envrionment is now significantly more degraded then it was when the RMA was developed in 1991. In this context, the concept of "sustainable management" is thought to lack sufficient focus on improving, restoring or enhancing environmental quality. In our view, restoration and enhancement are very much an aspect of "sustainable management", that is, it is carried out in order to sustainably manage resources for the benefit of current and future generations.

34. We have concerns about how 'Te Mana o te Wai' will be defined in this legislative context and by whom. Under the proposed NPS-FM 2020, 'Te Mana o te Wai' is described as "a concept for all New Zealanders" that will be "defined by communities" at a regional level through planning processes. We recommend that the definition of 'Te Mana o te Wai' in the legislative context is clearly defined by the Treaty partners working collaboratively.

35. A more active consideration of Te Tiriti o Waitangi and other relevant matters such as section 6(e) of the Act would provide greater impetus for enhancing environmental quality. We also consider some additional provisions would support such an impetus. We recommend
    a. retaining the sustainable management purpose under s5(1),
    b. retaining the definition under s5(2)
    c. supporting the Waitangi Tribunal, Kahui Wai Māori and others recommendation that the concept of 'Te Mana o te Wai', which aligns with Te Hā o Tangaroa, is recognised in Part 2 of the RMA caveat to agreed definition between Treaty partners.

In our view, this would assist to provide a stronger obligation to respond to Māori calls for restoration and protection of fisheries habitats from activities managed under the Resource Management Act.

5.2.4 Recognising Te Tiriti o Waitangi/The Treaty of Waitangi and Te Ao Māori

36. The Waitangi Tribunal found that the resource management framework prior and post the RMA has prevented Māori, particularly Iwi and hapū, from controlling the management of their own taonga or natural resources contrary to the principles of the Treaty of Waitangi. As early as 1993, the Tribunal found that the Resource Management Act 1991 is inconsistent with the Treaty in

that it neglects any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi[7].

37. In 2011, the Wai 262 Tribunal Claim was still critical of the manner in which the RMA was implemented, and it focused on what reforms could be adopted to provide for Māori interests noting that[8]:

    The RMA regime has the potential to achieve these outcomes through provisions such as sections 33, 36B, and 188. But they have virtually never been used to delegate powers to iwi or share control with them. Where some degree of control and partnership has been achieved, this has almost always been through historical Treaty and customary rights settlements. We do not believe that iwi should have to turn to Treaty settlements to achieve what the RMA was supposed to deliver in any case.

38. **We support the Tribunal's recommendation from the Wai262 report,** that the RMA regime be reformed so that "those who have power under the Act are compelled to engage with kaitiaki in order to control, partnership, and influence where each of these is justified." The Tribunal identified the following areas for improvement on this broad recommendation which include:
    - Enhanced opportunities for the development and use of iwi management plans;
    - Improved mechanisms for delivering control to Māori;
    - A commitment to capacity-building for Māori; and
    - Greater use of the national policy statements and tools.

39. Hence, we support the options to strengthen the reference to Te Tiriti o Waitangi in s8, remove barriers to the uptake of opportunities for joint management arrangements in Part 4 s36B and transfer of powers in Part 4, s33 and provide for regular auditing of council performance in meeting Treaty requirements. Other options will require further consideration depending on the situation.

5.2.5 Strategic integration across the resource management system, institutional roles and responsibilities

40. We agree that the RMA has not responded effectively due to the lack of integration across the resource management system. Integration of management regimes is necessary to account for the connection between terrestrial, freshwater and marine environments and the connections these environments share with people. A "whole-of-catchment" approach is required to meaningfully achieve restoration and protection of entire catchments including the marine environment, or as articulated by Māori more generally – "ki uta ki tai". Ki uta ki tai is a concept that's included in many strategies and plans; however, implementation is lacking. Management decisions continue to be focused on symptoms rather than sources.

41. Part of the solution also needs to involve clarifying the roles and responsibilities of respective agencies so that the Fisheries Act and Resource Management Act work in a more integrated manner but that the statutory jurisdiction between each is clear. This process needs to

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[7] Waitangi Tribunal Ngāwha Geothermal Resource Report 1993 (Wai 304, 1993) at 154

[8] Waitangi Tribunal Ko Aotearoa Tēnei – A Report into the Claims Concerning NZ Law and Policy Affecting Māori Culture and Identity (Wai 262, 2011) vol 1 at 285-286.

concentrate regional councils' role in managing the effects of land use (including effects on freshwater) on fisheries habitats.

5.2.6 Addressing climate change and natural hazards

42. We are supportive of reducing Aotearoa's emissions and have a particular interest in how this is achieved. We encourage mechanisms to reduce emissions undertaken in a manner consistent with Te Tiriti o Waitangi and associated Settlements. Our main concern, and equally our primary responsibility, is to further the rights (and associated responsibilities) of Iwi in the Māori Fisheries Settlement.

5.2.7 National Direction

43. Although the development and implementation of national instruments[9] has improved considerably in the last decade, the suite of national direction is not yet cohesive.
    A lack of strategic direction across the national direction programme has flow-on effects for council implementation and the management of interactions between national instruments.
    This in turn compromises the ability of individual instruments to have their intended impact. We recognise that there is effort going into developing new and revised national direction, including the proposed National Policy Statement for Freshwater 2020, draft National Policy Statement Indigenous Biodiversity and Urban Development Bill that will help toward addressing the existing lack of cohesion.

44. We note the difficulties in drafting and implementing national instruments. Pitched at a high-level, these documents should be practical and provide clear guidance for users, especially consenting authorities. To improve consistency, definitions in national instruments should be standardised.

Conclusion

45. We have a significant interest in the Resource Management System, including the Resource Management Act and its relationship with the Fisheries Act and the Māori Commercial Aquaculture Claims Settlement Act 2004. This effect's a full range of rights and interests that we have as part of the Fisheries Settlement, including freshwater fisheries.

46. We are concerned about the effect of any potential changes to the Resource Management Act on the Fisheries Settlements and the capacity of officials to understand their significance without working directly with us.

47. We welcome the opportunity to engage further, kānohi ki te kānohi and offer to meet with the Panel and those leading the review to discuss our rights and interest that are affected by the resource management review.

Nāku noa, nā

Dion Tuuta
Chief Executive

[9] National instruments include national policy statement and national environmental standard