Te Ohu Kaimoana's response to the Department of Conservation's document "Giving better effect to the principles of the Treaty of Waitangi"

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Executive Summary

1. We welcome the partial review of the Department of Conservation's (DOCs) general policies as a means of better reflecting the Treaty partnership and what it might mean in practical terms – especially for the way DOC exercises its functions in relation to fisheries resources and the marine environment. Ultimately, as the Conservation Act establishes DOC, section 4 applies to everything the Department does.

2. To ensure the partial review results in general policies that truly reflect section 4 of the Conservation Act, it should consider:
   a. DOC's functions in relation to fisheries resources and the marine environment, particularly its advocacy function
   b. The prospect that there will be circumstances in which conservation proposals should not go ahead where they are inconsistent with s 4
   c. Effective partnerships under te Tiriti will, amongst other things, help guide DOCs approach to conservation initiatives so that both problems and options are identified early
   d. Effective partnerships under te Tiriti are complex, and in some cases will require implementation at local and national levels. It will be important for the Options Development Groups to develop sound guidance for DOC on key characteristics of effective Treaty partnerships, and how they should be given effect in different circumstances.
   e. Partnerships with Mandated Iwi Organisations (MIOs), with the support of Te Ohu Kaimoana, are essential if DOC is to carry out its functions in relation to fisheries and marine resources consistent with section 4.

3. This response to DOC's background document is necessarily brief. It identifies the key issues at a high level but there is a great deal more we could say about some of the specific challenges we have faced in protecting the Deed of Settlement from conservation initiatives, and the kinds of policies that might be put in place to achieve that outcome.

4. We would be only too happy to discuss these with you at an appropriate time. If you have any questions please contact Kirsty Woods (kirsty.woods@teohu.maori.nz).

Ngā manaakitanga,

Dion Tuuta
Te Mātārae
TE OHU KAIMOANA

We welcome the partial review of DOC's General Policies

5. Thank you for providing us with the opportunity to comment on the review of DOC's general policies as affected by the Crown's Treaty responsibilities under section 4 of the Conservation Act.

6. We welcome this review as a means of better reflecting the Treaty partnership and what it might mean in practical terms – especially for the way DOC exercises its functions in the marine environment. Ultimately, as the Conservation Act establishes DOC, we consider that section 4 applies to everything it does.

7. We do not intend our response to conflict with or override any response provided independently by Iwi, through their Mandated Iwi Organisations (MIOs) and/or Asset Holding Companies (AHCs).

We are Te Ohu Kaimoana

8. Te Ohu Kai Moana Trustee Ltd (Te Ohu Kaimoana) was established to protect and enhance the Deed of Settlement. The Deed of Settlement and the Maori Fisheries Act 2004[1] are expressions of the Crown's legal obligation to uphold Te Tiriti o Waitangi.

9. Our purpose, set out in 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
   b) further the agreements made in the Deed of Settlement
   c) assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi
   d) contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement."

10. We work on behalf of 58 mandated Iwi organisations (MIOs)[2] who represent Iwi throughout Aotearoa. Asset Holding Companies (AHCs) hold Fisheries Settlement Assets on behalf of their MIOs. The assets include Individual Transferable Quota (ITQ) and shares in Aotearoa Fisheries Limited which, in turn, owns 50% of the Sealord Group.

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[1] Māori Fisheries Deed of Settlement 1992. The Deed is given effect to by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and the Māori Fisheries Act 2004.

[2] MIO as referred to in The Maori 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.

11. MIOs have approved our Māori Fisheries Strategy and three-year strategic plan, 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". We play a key role in assisting MIOs to achieve that goal.

Te Ohu Kaimoana's interest

12. Our interest arises from our responsibility to protect the rights and interests of Iwi under the Deed of Settlement and assist the Crown to discharge its obligations under the Deed and the Te Tiriti o Waitangi.

13. Te Tiriti o Waitangi guaranteed Māori tino rangatiratanga over their taonga, including fisheries. Tino rangatiratanga is about Māori acting with authority and independence over their own affairs. It is practiced through living according to tikanga and mātauranga Māori, and striving wherever possible to ensure that the homes, land, and resources (including fisheries) guaranteed to Māori under Te Tiriti o Waitangi are protected for the use and enjoyment of future generations. This view endures today and is embodied within our framework Te Hā o Tangaroa kia ora ai tāua (the breath of Tangaroa sustains us).

14. The obligations under Te Tiriti o Waitangi apply to the Crown generally, whether there is an explicit reference to the Treaty in the governing statute, in this case the Conservation Act 1986. Of particular note are the comments in the Barton-Prescott case, that "since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and…whether or not there is a reference to the treaty in the statute."[3]

Our advice is based on Māori principles

The significance of Tangaroa to Te Ao Māori

15. The relationship Māori have with Tangaroa is intrinsic, and the ability to benefit from that relationship was and continues to be underpinned by whakapapa. Tangaroa is the son of Papatūānuku, the earth mother, and Ranginui, the sky father. When Papatūānuku and Ranginui were separated, Tangaroa went to live in the world that was created and has existed as a tipuna to Māori ever since.[4]

[3] Barton-Prescott v Director-General of Social Welfare [1997] 3 NZLR 179, 184.

[4] Waitangi Tribunal. "Ko Aotearoa tēnei: A report into claims concerning New Zealand law and policy affecting Māori culture and identity." Te taumata tuatahi (2011).

16. Protection of the reciprocal relationship with Tangaroa is an inherent part of the Deed of Settlement – it's an important and relevant part of modern fisheries management for Aotearoa.

We base our advice on Te hā o Tangaroa kia ora ai tāua

17. Te Hā o Tangaroa kia ora ai tāua is an expression of the unique and lasting connection Māori have with the environment. 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). 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.

18. Māori rights in fisheries can be expressed as a share of the productive potential of all aquatic life in New Zealand waters. They are not just a right to harvest, but also to use the resource in a way that provides for social, cultural and economic wellbeing.

19. 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.

20. 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.

Figure 1: Te hā o Tangaroa kia ora ai tāua

MATAPONO - VALUES

Tangaroa whititua, Tangaroa whitiaro, Tangaroa kopu, Tangaroa nau mai kia piri, nau mai kia tata.

RECIPROCITY

Tangaroa kai atu, Tangaroa kai mai

First fish to Tangaroa and Tangaroa provides back. An expression which relates to the reciprocal relationship between Maori and Tangaroa. Receiving is giving. Tangaroa is the god whom we give the first fish to and speaks to the long-term sustainability of Tangaroa.

POTENTIAL

He hiringa a nuku, hiringa a rangi, he hiringa tai ki te whaiao ki te ao marama

This speaks to the current and future potential of our relationship with Tangaroa for Māori and Aotearoa as a nation. The potential and energy that exists and how this can be realised in a positive way.

TE HĀ O TANGAROA KIA ORA AI TĀUA

RELATIONSHIPS

Rukutia te mouri o Tangaroa, Tangaroa tu ki uta, Tangaroa tu ki tai

Maintaining the life force of Tangaroa both inshore and out at sea. Recognises the interconnected nature of maintaining the mauri of Tangaroa and the role we play.

SUSTAINABILITY

Ka mate kai horo, ka ora kai whakatonu

The glutton perishes while those that conserve survive. This whakatauki speaks of maintaining appropriate balance and sustainability as one with Tangaroa to survive for today and into the future.

DOC's functions in the marine environment must be covered by the review

21. Most of the issues raised in the background paper focus primarily on the terrestrial environment within which DOC has extensive responsibilities for managing land and resources held under the Conservation Act. The document acknowledges that the main issues for review include "access to and use of public conservation lands, waters and resources"[5]. The document doesn't define what is meant by "public conservation waters and resources," but we would assume these are those that are formally managed by DOC under specific pieces of legislation listed in Schedule 1 of the Conservation Act, for example water bodies within National Parks. The reference could also be intended to refer to areas in the marine environment such as marine reserves. We suggest issues of definition such as this be clarified as part of the review.

22. DOC also operates as an advocate for conservation in the marine environment. The initiatives DOC advocates for often run into conflict with the purpose of conservation under other Acts such as the Fisheries Act, in which conservation supports the purpose of providing for utilisation while ensuring sustainability.

Conservation has several purposes, reflecting different values

23. Conservation is carried out for several different purposes. These different purposes are central to some of the conflicts we have experienced through DOC's marine protection approaches, which are intended to achieve a different purpose for conservation than the Fisheries Act, which is an essential support for the Deed of Settlement.

The Fisheries Act is the framework for conservation of fisheries resources

24. Under the Fisheries Act for example, conservation of fisheries resources is carried out to enable utilisation while ensuring sustainability. We have already outlined the Maori principles and values encapsulated by *Te Hā o Tangaroa Kia ora Ai Tāua* that ensures rights to use the resource go hand in hand with responsibilities to ensure sustainability.

25. The purpose and principles of the Fisheries Act 1996 echo *Te Hā o Tangaroa Kia ora Ai Tāua* in their approach to managing fisheries and the effects of fishing on biodiversity. There has never been any disagreement by beneficiaries of the Fisheries 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 QMS. Furthermore, Māori understand that the

[5] P 17

protection of biodiversity is an important subset of what sustainability means. This is clear in the way the Fisheries Act 1996 describes what it means to achieve its purpose to "provide for the utilisation of fisheries resources while ensuring sustainability". Under section 8 of the Fisheries Act 1996, utilisation means "conserving[6], using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural well-being". Ensuring sustainability means:

a. Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations
b. Avoiding, remedying or mitigating the effects of fishing on the aquatic environment.

26. Moreover, section 9 of the Fisheries Act 1996 includes three explicit environmental principles that:
    a. associated or dependent species should be maintained above a level that ensures their long-term viability
    b. biological diversity of the aquatic environment should be maintained
    c. habitat of particular significance for fisheries management should be protected.

27. The agreements made between the Crown and Māori and documented in the 1992 Deed of Settlement support the approach of managing the effects of fishing on biodiversity as part of the fisheries management regime under the Fisheries Act 1996. However, as noted earlier, marine management initiatives advocated by DOC/Ministers of Conservation can undermine this regime by promoting conservation for different purposes – effectively re-allocating areas of the marine environment to different uses. By doing so they risk undermining the principles of the Treaty, such as active protection of Maori rights and interests under the Deed of Settlement and the principle of partnership.

The Conservation Act's purpose reflects a different set of values

28. The purpose of conservation under s 2 of the Conservation Act is to maintain the intrinsic values of natural and historic resources, providing for their appreciation and recreational enjoyment by the public, and safeguarding the options of future generations.

29. DOC's functions in achieving this purpose are set out under s 6 of the Conservation Act. They include:
    a. Management for conservation purposes of land and other natural and historic resources held under the Act

[6] Under s 2 of the Fisheries Act, **conservation** means "the maintenance or restoration of fisheries resources for their future use; and **conserving** has a corresponding meaning". **Fisheries resources** "means any 1 or more stocks or species of fish, aquatic life, or seaweed". **Aquatic life** means "any species of plant or animal life that, at any stage in its life history, must inhabit water, whether living or dead" and includes seabirds.

b. Preserve so far as is practicable all indigenous freshwater fisheries and protect recreational freshwater fisheries and freshwater fisheries habitats
c. To advocate the conservation of natural and historic resources generally.

30. These different purposes for conservation need not always conflict. However, in our experience, advocacy by DOC/the Minister of Conservation – for example for Marine Protected Areas – can have the effect of undermining Māori approaches to management, and therefore Māori fishing rights, because the protection sought goes beyond what is required under the Fisheries Act and the Department's mandate under Section 4 of the Conservation Act . The lack of any meaningful Treaty partnership in carrying out this advocacy function increases the likelihood this outcome will be achieved. Where these situations occur, DOC is not adhering to Treaty principles such as active protection, informed decision-making and partnership.

DOC's general policies must ensure decisions are based on sound evidence and information

31. It has been our experience that some decisions made by DOC/the Minister of Conservation are supported by information geared to promote a particular set of values or outcomes. This might be driven by the preferences of vocal public interest groups – both nationally and internationally - who help drive a political agenda. The danger in this situation is that the existing information is not properly analysed: alternative views and perspectives, including those of Māori, are not actively sought or seriously considered.

32. Particular examples also involve international agreements and the way they are interpreted in Aotearoa/New Zealand. International agreements are often framed in general terms, but their application is intended to be carried out by states in light of several factors, including their economies, cultural and social values, existing management regimes and most importantly their commitments to indigenous peoples.

33. Too often we are presented with a fixed view of how these agreements should be implemented without adherence to our own unique circumstances. For example, proposals for large protected areas such as the Kermadecs are promoted, without any evidence of the need for additional protection measures. Another example is New Zealand's support, through the Minister of Conservation, for the listing of school shark as an endangered species under the Convention on Migratory Species (CMS), despite overwhelming evidence that school shark is not endangered in our waters, and without considering the impacts of such a stance on the Crown's Treaty relationship with Māori.

Section 4 of the Conservation Act should not be trumped by other considerations

34. The Supreme Court made an important finding about the relationship between s 4 and the values reflected in section 6 (e) of the Conservation Act which relate to fostering the use of natural and historic resources for recreation and allowing their use for tourism to the extent that this is not inconsistent with the conservation of such resources. These comments are central to the review:

We acknowledge that s 4 does not exist in a vacuum and a number of other factors must be taken into account in making a decision on a concession application. For example, in the present case, the direction given in s 4 must be reconciled with the values of public access and enjoyment in the Reserves Act designations relating to the Motu. Those values are also reflected in s 6 (e) of the Conservation Act, which lists as one of the functions of DOC the fostering of the use of natural and historic resources for recreation and allowing their use for tourism to the extent that this is not inconsistent with the conservation of such resources. They are also a feature of s 8(e) of the HGMP [Hauraki Gulf Maritime Park] Act. This complexity is also reflected in the Auckland CMS. ***But s 4 should not be seen as being trumped by other considerations like those just mentioned. Nor should s 4 merely be part of an exercise balancing it against the other relevant considerations. What is required is a process under which the meeting of other statutory or non-statutory objectives is achieved, to the extent that this can be done consistently with s 4, in a way that best gives effect to the relevant Treaty principles[7].***

35. There are several issues arising from this finding the review should consider. First is the prospect that a conservation initiative, for example a marine protected area or marine reserve, should not go ahead if it cannot be done consistently with section 4. This scenario should be factored into operational and policy procedures. Afterall, DOC/the Minister of Conservation are only one of a collective of Crown agencies and ministers that together, have obligations under Te Tiriti o Waitangi. One agency should not press ahead with an action that might prejudice the Crown's Treaty obligations overall.

36. Second is the kind of process DOC needs to implement to ensure its decisions as they affect fisheries and the marine environment are consistent with s 4. Such a process requires DOC to understand the perspectives and priorities of Iwi/Māori we have highlighted, including:
    a. Maori principles and values, and the way Māori might define the problems to be addressed, including potential solutions
    b. The Deed of Settlement, Māori fishing rights and their relationship with the Fisheries Act
    c. The implications of these matters for addressing the issues at hand, whether they relate to policy development or operations.

37. These matters need to be considered and analysed through effective partnerships under Te Tiriti.

[7] Ngāi Tai ki Tāmaki Tribal Trust vs Minister of Conservation [2018], NZSC 122 [14 December 2018], para 54

Implications of the Deed of Settlement for partnerships under Te Tiriti

38. Different parts of the Settlement refer to "iwi", "hapū", "whānau" and "tangata whenua". In some instances, these groups have been treated by government agencies as though they are unrelated and autonomous, rather than as part of a web of tribal relationships.

39. The settlement of Māori fisheries claims on a national basis means there is a tension between the need to protect the collective rights of iwi across the country and the right of individual iwi to exercise their rights as they see fit. DOC must always be aware of this tension and the implications of their actions for each. It is important to understand collective and individual perspectives on appropriate conservation measures – while actively protecting the underlying rights that are common to all iwi, their hapū and whānau.

40. There are 58 MIOs representing all Māori, who own the Fisheries Settlement Commercial Assets (Individual Transferrable Quota and shares in Aotearoa Fisheries Ltd (AFL)[8] which, in turn, owns 50% of Sealord Group). Around 450 kaitiaki and tangata tiaki authorise customary fishing. The Te Ohu Kaimoana Board is appointed by MIOs through an electoral college structure and has a range of statutory responsibilities under the Settlement including responsibility for the appointment of the Board of AFL.

41. We are aware of the view that the commercial elements of the Settlement including quota should be treated the same way as the commercial sector generally. However, the commercial settlement recognises that customary fishing rights contain a commercial element. The fact this is recognised through the quota management system (QMS), and iwi have a % share of the quota for each fish stock does not reduce the obligation of the Crown to ensure its policies do not undermine the integrity of the commercial as well as the non-commercial aspects of the Settlement.

42. MIOs are not necessarily responsible for managing customary fishing for an Iwi as under the customary regulations, this typically rests with hapū and marae. This situation has the potential to undermine the efforts of Iwi and the tribal structures they are working to build. For example, the process for the Minister of Fisheries to appoint kaitiaki under the Fisheries (Kaimoana Customary Fishing) Regulations 1998 is carried out with no reference to relevant MIOs, despite them being part of the same tribal structures, and having interests in the same fisheries. This has caused tensions within Iwi that need to be resolved by Iwi themselves.

43. In carrying out its functions, DOC needs to take care that it doesn't create further divisions within Iwi. Wittingly or not, Crown agencies including DOC and MPI maintain and strengthen these divisions when they fail to work through MIOs. Consequently, the collective interests of Iwi, hapū

[8] Now trading as Moana New Zealand

and whānau in fisheries are undermined leading to poor outcomes for them overall. DOC should avoid these outcomes by working through Te Ohu Kaimoana and MIOs in the development of fisheries and marine policy.

44. It will be important for the Options Development Groups to develop sound guidance for DOC on key characteristics of effective Treaty partnerships, and how they should be given effect in different circumstances.

Our recommendations

45. To ensure the partial review results in general policies that truly reflect section 4 of the Conservation Act, it should consider:
    a. DOC's functions in the marine environment, particularly its advocacy function
    b. The prospect that there will be circumstances in which conservation proposals should not go ahead where they are inconsistent with s 4
    c. Effective partnerships under te Tiriti will, amongst other things, help guide DOCs approach to conservation initiatives so that problems and potential solutions are identified early
    d. Effective partnerships under te Tiriti are complex, and in some cases will require implementation at local and national levels. It will be important for the Options Development Groups to develop sound guidance for DOC on key characteristics of effective Treaty partnerships, and how they should be given effect in different circumstances.
    e. Partnerships with MIOs, with the support of Te Ohu Kaimoana, are essential if DOC is to carry out its functions in relation to fisheries and marine resources consistent with section

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