THE "RACE FOR SPACE": MAINTAINING THE VALUE OF FISHERIES RIGHTS ALLOCATED TO MAORI AS PART OF TREATY SETTLEMENTS IN NEW ZEALAND

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ABSTRACT

New Zealand has settled Treaty claims to fisheries by providing for non-commercial customary fishing rights and allocating 10-20% of commercial fish stocks to tribes. While such settlements are said to be "full and final", their value has the potential to be undermined by the allocation of new use rights in the coastal marine area. This paper explores the effects of different systems for allocating new use rights on existing fisheries settlement rights and proposes improvements.

We analyse the following processes for assessing and managing the effects of new activities on fisheries settlement rights:

- *the effects on customary and commercial fishing of:*
  - *establishing new marine farming areas*
  - *establishing marine reserves*
- *the effects on commercial fishing of establishing mataitai (customary fishing areas)*
- *the effects on customary and commercial fishing of allocating rights to carry out other activities (e.g. marinas, pipelines and discharges).*

A comparison of these different processes shows that fisheries settlement rights are treated inconsistently across different systems for allocating new use rights. In some cases negotiation is required before the proponent of a new use right can displace a commercial fishing activity. In others, displacement of commercial fishing activity can occur without any negotiation or compensation. We discuss options for making these processes more consistent and equitable.

The protection of fisheries settlement assets would be strengthened by ensuring that any adverse effects on them of new use rights are avoided, remedied, or mitigated, e.g. through negotiation and compensation.

Keywords: allocation, customary fishing rights, sustainability, use rights, fisheries settlement

INTRODUCTION

This paper is concerned with the effects of spatial allocation in New Zealand's coastal marine area on rights that were granted under the 1992 Fisheries Settlement. The settlement resolved fisheries claims made by Maori under the Treaty of Waitangi. The paper proposes that processes for assessing the impact of coastal allocation decisions on fisheries settlement rights need to be strengthened and made consistent if the value of the settlement is to be protected. This discussion is timely given the

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increasing pressure on the coastal marine area –which we refer to as the "race for space" – and the development of an Oceans Policy for New Zealand.

NEW ZEALAND'S TREATY OF WAITANGI IS THE APPROPRIATE BASIS FOR ENVIRONMENTAL AND ALLOCATION DECISIONS

In 1840, the Crown and chiefs of the tribes of New Zealand signed the Treaty of Waitangi, which consisted of three "Articles".

According to Article I of the Treaty, the Crown gained the right to govern. In today's terms, this includes the right to make laws to ensure that human activity does not undermine the sustainability of natural resources and ecosystems.

Under Article II, the Crown guaranteed to protect tribal authority over tribal resources. This authority includes a 'bundle'[2] of rights including ownership and rights of access, use and management of natural resources as exercised by the collective groupings of whanau, hapu and iwi.

Under Article III, Maori as individuals are guaranteed rights of citizenship. These include the rights to be treated equitably and fairly alongside all other citizens.

The Crown must balance the rights and obligations contained within the separate Articles of the Treaty when exercising its powers. No single Article can be considered in isolation – the relationship between all three must be considered (see Figure 1).

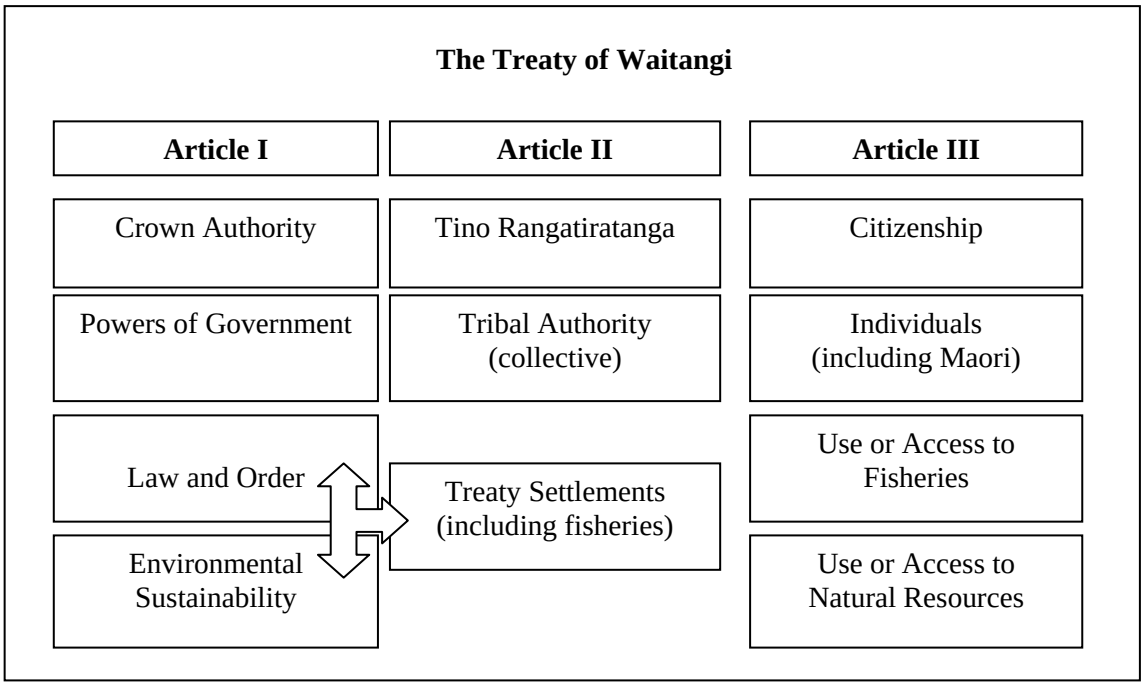


Figure. 1 Relationship between the Articles of the Treaty of Waitangi.

[2] Waitangi Tribunal, 2003, p 76

The Treaty provides an appropriate basis for analysing and managing the effects of government decisions on Maori collective rights under Article II and individual citizens rights under Article III.

It is our view that the Crown must be clear about the purpose of its decisions and be disciplined in the way it achieves that purpose, with the least infringement necessary on existing rights. For example, where a decision needs to be made to ensure ecological sustainability, the decision-making process should ensure that nature of the risks are identified, and that the management option chosen is able to address the risk while having the least possible impact on existing rights – which include Article II and III rights. This is consistent with the role of the Crown under Article I of the Treaty to make laws to ensure resources are sustained for the future.

Where the decision involves the allocation of a new right to a party to enable them to use a natural resource, the Crown has a duty to ensure that its decision-making process avoids remedies or mitigates the adverse impacts of any new activity on existing users. We consider that this is best achieved where the process provides incentives for new rights holders to address those impacts. The overall purpose should be to enable the greatest benefit to society from the use of resources, while ensuring that the effect on existing users and ecosystems is either avoided, remedied or mitigated.

Maori customary fishing rights were settled through the 1992 Fisheries Settlement

The 1992 Fisheries Settlement settled all claims to customary fishing rights made by Maori under Article II of the Treaty of Waitangi.

Prior to the Fisheries Settlement customary fishing rights were not well defined in law[3] but the settlement recognised that they included a commercial and non-commercial component. The settlement resolved claims to these rights in two ways:

- **commercial assets**: the commercial component of customary fishing rights was settled by allocating 10-20% of quota for all new species that entered the Quota Management System to iwi along with cash and shares in commercial fishing companies. Te Ohu Kaimoana is a trust that was established to allocate the resources to iwi, provide governance to subsidiary organisations and advocate on behalf of iwi. Once iwi establish mandated iwi organisations, they are eligible to receive assets.[4]
- **providing for non-commercial interests**: regulations that provide for the customary use and management practices of Maori. These regulations can be used to manage traditional fishing groups, and can be promulgated by tangata whenua (local Maori communities) who are the whanau or hapu (sub-tribes) of iwi (tribes).

Under the New Zealand Quota Management System and as a result of the Settlement, Total Allowable Catches (TACs) for fishstocks in New Zealand waters are now shared between three sectors:

[3] See section 88(2) of the Fisheries Act 1983 which has since been repealed by section 33 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.
[4] There are 57 iwi organisations, some of whom have met those requirements.

- customary non-commercial (through an allowance and local area tools)
- commercial - including fisheries settlement assets (through a Total Allowable Commercial Catch (TACC)
- recreational (through amateur fishing regulations and an allowance).

The 2004 Aquaculture Settlement settled Maori claims to aquaculture

In 2004, the Government reformed the law relating to the allocation and management of marine farming or aquaculture rights. The new reforms mean that aquaculture can now only take place within aquaculture management areas defined under the Resource Management Act. At the same time, the Government settled outstanding claims by Maori to marine farming rights by providing for iwi to have access to 20% of all new aquaculture management areas. The Government took the view that Aquaculture Settlement dealt with "unfinished business" that had not been dealt with by the Fisheries Settlement. Te Ohu Kaimoana has always taken the view that aquaculture is part of the future of Maori in the seafood sector. Together, the Fisheries and Aquaculture Settlements provide an opportunity for Maori to take an active part in the seafood industry and to concentrate their efforts on activities that will provide them with the greatest overall benefit.

CLEAR PRINCIPLES SHOULD BE DEVELOPED TO GUIDE DECISIONS THAT AFFECT FISHERIES SETTLEMENT RIGHTS

In light of the Treaty and the Fisheries and Aquaculture Settlements, Te Ohu Kaimoana has proposed in numerous submissions that in the allocation of new rights to use the oceans, the Crown should ensure there is a requirement that the effects of new uses on Maori and other rights holders should be avoided, remedied or mitigated.[5] In our view, a process that incorporates the following principles would provide the right incentives for that to happen:

- **identify a clear purpose:** the first is a clear purpose: is the decision intended to ensure ecological sustainability or to allocate new use rights in the coastal marine area? That purpose must be specific rather than vague - as reflected in statements such as "for the benefit of the public"; "public use and enjoyment" and "public good".

- **justify sustainability decisions:** if the purpose of a decision is to maintain the sustainability of ecosystems, any constraints on fishing rights must be based on clear reasons. There are standard risk management processes that can be applied[6].

- **apply "least cost" tools:** Any interventions must represent the "least cost" tool, i.e. have the minimum effect possible on fishing rights while achieving the overall objective of sustaining ecosystems.

- **adapt the management approach in light of new information:** in some instances decisions have to be made in the absence of complete information. It is important to implement a monitoring regime and to adjust the management response as new information comes to light.

[5] For example see 2001, (Oceans Policy) 2002, (Marine Reserves Bill); see also www.teohu.maori.nz for more information.

[6] see Standards Association of Australia, 1995

- **Assess the effects of new activities on existing users: i**f the purpose of the decision is to allocate new rights to use the coastal marine area, then the effect of that allocation on fishing rights should be assessed and the impacts identified. The process should include:
  - consultation with potentially affected parties
  - incentives for all parties to provide the best possible information on the likely effects of the decision

  Independent scrutiny of decisions, along with dispute resolution procedures can help to create incentives for parties to "come to the table". In the absence of such incentives, existing users may be able to veto a new proposal without any requirement to demonstrate an adverse effect.[7]

If the process includes the above elements, we believe there will be greater incentives for the "new users" to address any adverse effects on existing users by avoiding, remedying or mitigating those effects. This would encourage new activities to co-exist alongside existing uses where possible or for those who will cause an adverse effect to offer options such as compensation (see Figure 2).

ASSESSMENT PROCESSES CONTAINED IN EXISTING STATUTES DO NOT ADEQUATELY PROTECT FISHERIES SETTLEMENT RIGHTS

In this section, we briefly compare examples of decision-making processes that have an effect on fisheries settlement rights and conclude that in combination, these processes do not provide adequate protection.

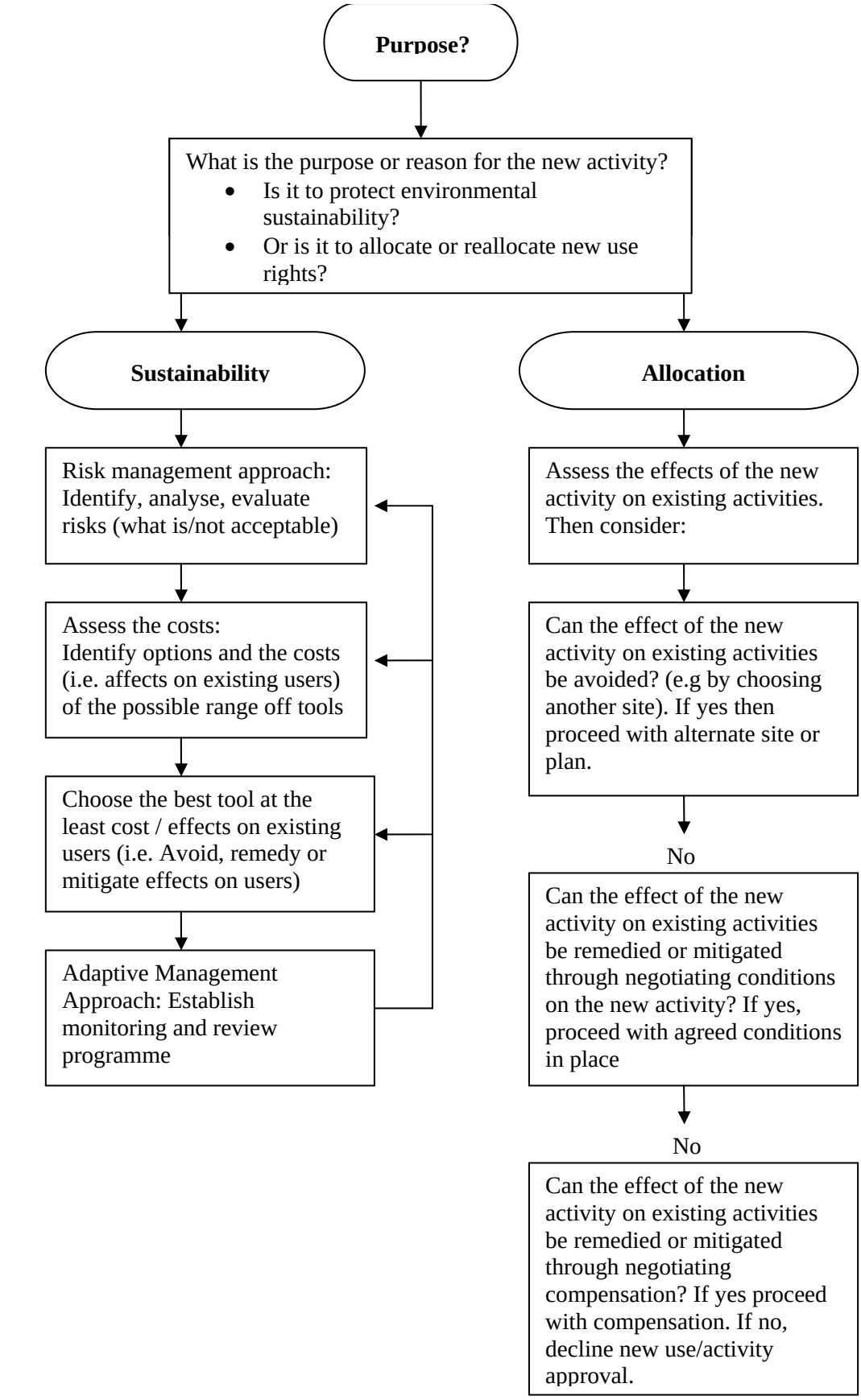
Marine conservation statutes contain unclear purposes and processes

The Marine Reserves Act 1971 and its proposed replacement – the Marine Reserves Bill - have the potential to adversely affect the value of the fisheries settlement by preventing fishing in perpetuity - without negotiation or compensation.

The purpose of the Marine Reserves Act 1971 is to "preserve, as marine reserves, for the scientific study of marine life, areas of New Zealand that contain underwater scenery, natural features, or marine life of such distinctive quality, or so typical, or beautiful or unique that their continued preservation is in the national interest." It contains a process for assessing the effects of a marine reserve proposal on fishing rights, such that the reserve "must not interfere unduly with commercial fishing". It also contains a similar test in respect of recreational fishing, where it "must not interfere unduly with or adversely affect any existing usage of the area for recreational purposes". Under the Act, the Minister of Fisheries must concur with a proposal for a marine reserve before the Minister of Conservation can approve it. As part of the process, the Minister of Fisheries considers any objections. The Minister is to uphold those objections if satisfied that there is undue interference on commercial or recreational fishing.

[7] This issue has been explored in more detail in: Gibbs, N and Woods, K, 2003,

Figure 2: Decision Making Framework



A problem in the Act is the way that "undue" is interpreted. In defining what is undue the courts have determined that a balance must be struck between the impacts on existing parties and overall benefits that flow from a marine reserve proposal[8]. This means that the Minister must consider all these factors into consideration in deciding whether or not to concur. This approach offers little protection for existing rights, including fisheries settlement rights.

The concurrence role of the Minister of Fisheries is a mechanism that can have the effect of protecting the commercial aspect of the settlement – but only as long as the adverse effect is not judged to be outweighed by wider benefits.

In September 2000, the Government commenced a review of the 1971 Act and in June 2002, introduced the Marine Reserves Bill. The purpose of the Bill is to "conserve indigenous biodiversity in New Zealand's foreshore, internal waters, territorial sea and exclusive economic zone for current and future generations by preserving and protecting", amongst other things, representative examples of marine communities and ecosystems, natural features of various types and outstanding, rare, distinctive, or internationally or nationally important marine communities and ecosystems.

The Bill contains a process the Minister of Conservation must follow that includes a requirement to be satisfied that a marine reserve proposal will have "no undue adverse effect" on a number of matters including:

- the ability of iwi or hapu who are tangata whenua, or who have customary access, to undertake customary food gathering to the extent authorised by any enactment,
- commercial and recreational fishing.

The Bill contains a reference to the principles of the Treaty of Waitangi. It also contains consultation provisions[9] that state that the proposer "must consider ways of avoiding or mitigating adverse effects on existing users". We believe that the way that the concept of "undue" is handled in the Bill removes any real consideration of these matters, as the Bill entrenches the interpretation of undue offered by the courts under the 1971 Act (see above). As such it provides that an adverse effect is not defined as undue if "the Minister is satisfied that the benefit to the public interest in establishing the marine reserve outweighs the adverse effect". This suggests that the overall purpose of the Bill – that is – whether it is designed to protect ecological sustainability or to reallocate areas for public use and enjoyment – is unclear as the term "public interest" is sufficiently broad to allow different interpretations.

In our view, the assessment process is flawed as:

- the effect on fishing is the same, regardless of the nature of any public interests or the benefits that flow from it
- it is unclear what the "public interest" represents: the sustainability of ecosystems, or provision for "public use and enjoyment" of the area concerned?

[8] In 1998, the CRA 3 rock-lobster industry association took the matter to court arguing that the Minister of Fisheries should have declined to concur with a marine reserve application. The Court upheld the Minister's decision.
[9] Section 48.

- if it is the former, there is no robust risk assessment process contained in the Bill, or a processing for assessing the appropriate tool to manage that risk
- if it is the latter, there is no effective provision for negotiation as a means of mitigating or remedying the adverse effect, for example through compensation to the affected parties.

The passage of the Bill so far has attracted widespread opposition from iwi and the seafood industry. It is not clear at this stage whether or when it will pass into law.

The Government has recently released a Marine Protected Areas policy that aims to protect a representative sample of the full range of ecosystems/habitats as well as sensitive ecosystems. There is still further work to be done to classify ecosystems and develop acceptable standards against which different management options might be assessed.

We are as yet not convinced that the approach about to be implemented is needed to provide greater protection of ecological sustainability. It appears to be biased toward a protectionist regime that will close areas to any form of fishing rather than encourage a responsible regime that manages risks and minimises impacts on existing users.

The Fisheries Act 1996 provides stronger protection but improvements are needed

The purpose of the Fisheries Act 1996 is to provide for the sustainable utilisation of fisheries resources. The Act contains processes for considering the effects of allocation decisions, such as:

- the effect of implementing new non-commercial customary management tools on commercial fishing
- the effect of marine farming on all forms of fishing.

The Act also enables the Minister of Fisheries to implement fisheries closures, method controls and catch limits. These are all reviewable in light of new information and aim to ensure the sustainability of ecosystems, which in turn provides for utilisation on a sustainable basis.

The process for establishing mataitai reserves needs to be clarified

Consistent with the fisheries settlement, the Fisheries Act enables the Minister of Fisheries to approve the establishment of reserves that provide for non-commercial customary fishing in traditional fishing grounds. There are different classes of area, including "mataitai" reserves.

The overall purpose of mataitai reserves is to recognise and provide for "customary food gathering by Maori and the special relationship between tangata whenua and places of importance for customary food gathering."[10] Mataitai are managed by a committee who can make bylaws that restrict non-commercial customary or recreational fishing. Commercial fishing is assumed to be prohibited within a mataitai reserve; however it is possible for the Minister and the tangata whenua to agree on

[10] Fisheries Kaimoana (Customary Fisheries) Regulations 1998.

conditions for the mataitai to address issues raised by submissions which could include provision for commercial fishing.

The Minister of Fisheries must approve an application for a mataitai reserve if satisfied that a number of conditions are met, including that:

- there is a special relationship between the tangata whenua and the area of the proposal
- the general aims of management are consistent with the sustainable management of the fishery to which the application relates
- the proposal will not prevent persons with a commercial interest in a species taking their quota entitlement or annual catch entitlement (where applicable) within the Quota Management Area for that species.

The Ministry of Fisheries has developed process standards to clarify how these matters should be handled. However a number of concerns have been raised about the process and the way the legislation has been interpreted, including:

- the fact that comprehensive baseline information is not made available to potential applicants early so that they can fully understand the problems they are trying to manage, and the best options for dealing with them
- lack of suitable public notification and suitable consultation (meaning that potentially affected parties are not aware of the application)
- failure to notify iwi organisations that are mandated to receive commercial fisheries assets as part of the fisheries settlement – in most cases, applicants for mataitai are groups that form part of the iwi but have not considered their wider collective commercial interests
- the way the "prevent" test is carried out – application of the test is confined to "that fishing year or season" which means that the long term impacts that may result from a mataitai reserve are not considered. As a result there is a possibility that increased pressure on the remaining Quota Management Area will lead to a decline in the fishery, reduction on the Total Allowable Commercial Catch (TACC) and a reduction in value
- "persons" is interpreted to mean the majority of quota holders, not one or a few. This means while a person or company with a large quota holding may be prevented from harvesting their quota entitlement – and if iwi or Maori fishing companies find themselves in that situation, the effect may be discounted where they do not represent the majority.

We believe that the interpretation of the test needs to be revisited to promote co-existence between commercial fisheries settlement interests and non-commercial settlement interests. Applications should be handled in a way that promotes more constructive dialogue between applicants (who are usually whanau or hapu group) their iwi organisation (who holds the commercial settlement assets) and other industry interests.

The process for assessing the effects of marine farming on fishing provides strong protection but greater incentives for trade-offs may be needed

Under the Resource Management Act 1991, aquaculture activities can only be carried out within aquaculture management areas established by regional councils. As part of

the process of establishing aquaculture management areas, the Ministry of Fisheries - under the Fisheries Act - assesses the effect of a proposed aquaculture management area on fishing. If the area is identified as having an undue adverse effect on customary or recreational fishing in the opinion of the Ministry of Fisheries, it cannot be approved. This result has caused concern amongst iwi who would like to be directly involved in the decision-making and, given their interests in aquaculture, also want the opportunity to explore whether both can co-exist in some areas or whether the prospective marine farmers could propose other ways to mitigate any adverse effects[11].

If it has an undue adverse effect on commercial fishing, it is "flagged" as such, so that no aquaculture developments can proceed without the agreement of at least 90% of affected quota holders.

This process is new and some would say that it is attracting some "teething problems". For example:

- there are problems with information: most harvest information obtained by the Ministry of Fisheries is collected at the scale of a Quota Management Area or a statistical area and both are far larger than the local scale likely to be involved in an aquaculture management area. There is no requirement for potentially affected fishing interests to provide more detailed information, which they usually regard as commercially sensitive
- in the absence of complete information from the fishing sector, the burden of proof that there is no undue adverse effect rests on prospective marine farmers
- the requirement to obtain the agreement of the majority of quota holders will involve high transaction costs.

While the process is yet to be fully tested, it is possible that it contains insufficient incentive for agreements to be reached between marine farmers and affected fishing interests.

The Resource Management Act 1991 provides weak protection and should be strengthened

The purpose of the Resource Management Act is to promote the sustainable management of natural and physical resources. There is a general duty contained in the Act to "avoid, remedy or mitigate adverse effects on the environment"[12] . "Environment" is defined very broadly and includes "ecosystems and their constituent parts, including people and communities…"[13] The Act provides protection for rights granted or recognised under its provisions. The presumption is that these rights may continue undisturbed or the process should explicitly consider how to avoid, remedy or mitigate any adverse effects on the exercise of those rights.

[11] Iwi Aquaculture Steering Group, 2003

[12] Section 17

[13] The full definition is in section 2 of the Act is:

> (a) ecosystems and their constituent parts, including people and communities
> (b) all natural and physical resources;
> (c) amenity values; and
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters.

In the case of aquaculture management areas established under the Resource Management Act, "undue adverse effects" on fishing are assessed under the Fisheries Act (see above). The basis for this is that the Resource Management Act should not act as an allocation tool between different aspects of fishing – that is the job of the Fisheries Act.

However, the Resource Management Act does not explicitly recognise rights granted under other legislation. This 'blindness' includes rights that take the form of Individual Transferable Quota ITQ) under the Quota Management System as it is argued that the spatial extent of those is unclear. This means there is no similar Fisheries Act type assessment for other allocation decisions made under the Resource Management Act that could have adverse effects on fisheries rights (including settlement rights), such as cable protection zones or marinas. Any fisheries rights holders would need to rely on the duty to avoid, remedy or mitigate adverse effects on the environment, which is a far weaker provision as far as fisheries settlement rights are concerned.

Ultimately, the Act can allow a significant erosion of the Fisheries Settlement as it creates no responsibility for decision-makers to consider the effects of their decisions on the Fisheries Settlement. A summary and comparison of the different statutes and their treatment of fishing rights and other existing rights is contained in table 1.

CONCLUSIONS

A comparison of the effects assessment processes contained in marine statutes shows that fisheries settlement rights, along with other existing rights, are treated inconsistently.

Marine reserves legislation is unclear as to whether ecological sustainability or allocation for public use and enjoyment is the purpose of marine reserve proposals.

While the statutes acknowledge the existence of existing rights, they vary in the degree of protection offered. None refers specifically to rights granted under the Fisheries Settlement.

The legislative tests are subject to different interpretations. Some, such as the Marine Reserves legislation, take a weighting approach. Others, such as the Fisheries Act, create a threshold beyond which there is deemed to be an undue adverse effect. In the case of mataitai reserves under that Act, no consideration of the wider cumulative effects appears to be given. The Resource Management Act requires new users to avoid, remedy or mitigate adverse effects on the environment but the degree of protection offered to the Fisheries Settlement is weak.

Consultation processes need to be strengthened in some cases to generate more information and ensure all potentially affected parties are aware of proposals. The Fisheries Act mataitai provisions are an example. Overall, greater incentives are needed for parties to "come to the table" and share information.

We believe these matters should be addressed in the development of New Zealand's Oceans Policy if the value of the Fisheries Settlement is to be protected.

Table 1: Summary of processes to assess the effects of allocation decisions on fishing rights

	Acknowledges existing fishing rights?	Characteristics of decision making process	Degree of protection if effects judged to be adverse	Incentives to avoid, remedy or mitigate effects
Marine Reserves Act 1971	yes	• Unclear purpose: ecological sustainability vs public use and enjoyment? • Consultation and provision for submissions • <u>But</u> an undue adverse effect is interpreted as being outweighed by the benefits of a marine reserve.	Weak - Minister has to consider wider benefits	weak
Marine Reserves Bill	yes	• Treaty reference and consultation • Proposers need to consider ways of avoiding and remedying adverse effects • <u>But</u> - "public interest" can cancel out an undue adverse effect	Weak – can be overridden by public interest	Weak
Fisheries Act: • **Mataitai**	yes	• Consultation requirements unclear • Open to interpretation • Need for better information early in the process • Process used so far acts to undermine the relationship between hapu/whanau and their iwi organisations • Cumulative effects not considered	Strong if test triggered, however interpretation suggests it is unlikely to be triggered.	Moderate – not well structured
• **Marine farming**	yes	• Consultation requirements • Threshold approach to test • Information problems – potentially affected parties not required to provide full information	Strong	• customary non-commercial and recreational – effects must be avoided. Negotiation not practical at planning stage. • Moderate for commercial.
Resource Management Act	not directly	• Doesn't provide for effects on activities granted under other statutes	Moderate	weak

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