Snapper 1 submission - Appendix 1:

SUBMISSION

on

SHARED FISHERIES

to

the Ministry of Fisheries

from

TE OHU KAIMOANA

MĀORI FISHERIES TRUST

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28 February 2007

INTRODUCTION

1. This submission is from Te Ohu Kai Moana Trustee Ltd (Te Ohu) in its role as corporate trustee of Te Ohu Kai Moana Trust. It is made in response to the Government's public discussion document entitled *Proposals for Managing New Zealand's Shared Fisheries: A public discussion document* dated November 2006.

2. Te Ohu Kai Moana trust was established under s.31 of the Maori Fisheries Act 2004. The purpose of Te Ohu Kai Moana Trust 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 Maori generally
   - further the agreements made in the Deed of Settlement and to assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi
   - contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement

3. Te Ohu therefore offers this submission on behalf the 57 Iwi recognised by Parliament to directly receive the estimated $700 million of Maori Commercial Fisheries Settlement assets on behalf of their 679,154 members.

4. As part of its preparation of this submission Te Ohu has consulted with all mandated and recognised Iwi organisations along with their Asset holding companies (AHCs) or fishing companies and with Aotearoa Fisheries Ltd (AFL) and the Seafood Industry Council (SeaFIC).

5. Our process included the circulation of an initial analysis of the Shared Fisheries proposals together with alternative solutions or suggestions for improvement prior to Christmas 2006 to all the Mandated Iwi organisations (MIOs) and Recognised Iwi organisations (RIOs) along with their Asset holding companies (AHCs) or fishing companies. It also included a hui-a Iwi held on 9 February 2007 in Wellington to discuss that initial analysis and alternative solutions. Over 60 Iwi representatives attended the hui and participated in discussions. In addition we have participated in broader industry discussions and contributed to the development of the industry submission prepared by SeaFIC and AFL. We endorse their submissions as they are consistent with many of the main themes we address in this submission.

6. It is not our intention in this submission to conflict with, or contradict, any MIO, RIO, AHC or Maori fishing company that may make independent submissions to you. Rather we see this submission as a means of conveying a collective response to a matter that we all agree in its current form will have a significant detrimental effect on achieving an enduring settlement and indeed poses a substantive threat to the integrity of the quota management system.

7. We were pleased that the Minister of Fisheries was prepared to review and improve the management of shared fisheries – and we looked forward to positive solutions. There is more work to do to further improve the

management of new Zealand's fisheries including particularly the high value fisheries critical to the viability of the Fisheries Settlement and identified in the discussion document as 'shared fisheries'.

8. However we were very disappointed with the proposals released late last year and believe that if implemented, they will subvert the management of New Zealand's fisheries and, rather than build on the Quota Management System (QMS) that has been lauded internationally, they will undermine it and with that the Maori Commercial Fisheries settlement. The proposals don't offer any substantive improvements to fisheries management, and they create greater uncertainty – particularly for Maori and the commercial sector. In this case the 'cure' is more debilitating than the 'disease'. In light of the impact on the Fisheries Settlement, this is unacceptable.

9. However we consider that options can be developed that will be acceptable to all fishers and other New Zealanders that can address the real issues that need to be resolved to take New Zealand's fisheries management forward. Our key focus in this submission has been to provide solutions that address the issues involved in shared fisheries while maintaining the integrity of the Fisheries Settlement. We endeavour to provide constructive alternatives and suggestions for improvement. We seek to ensure that the Government's final decisions:
   - protect the sustainability of the fisheries resources
   - protect the integrity of the Fisheries Settlement
   - provide incentives for sectors to work constructively together, and
   - ensure good fisheries management outcomes

10. These outcomes are all features of the Government stated direction for fisheries management in New Zealand over many years. While progress may not have been steady, our management has been evolving in a consistent direction. We have progressively been building a rights regime that when completed would enable all fishers to participate more strongly in fisheries management and in doing so take greater responsibility. The Government's Shared Fisheries proposals are an abrupt and major departure from that avowed direction and work against those outcomes.

11. Fishing has always been part of Maori life and will continue to be. The Deed of Settlement stated that this would be the case and provisions included by Parliament in the Maori Fisheries Act 2004 ensure that a significant part of commercial fisheries assets will always remain in Maori hands.

12. As Maori and Iwi are to be involved in fisheries for the long-term they want to ensure that it is sustainable. To be so requires fishers - whether commercial, customary non-commercial or recreationalists - to act responsibly so that our grandchildren can choose to exercise the same level of utility of fisheries as we do today. The Maori expression for this is kaitiakitanga – another well known expression of this is that "*we do not inherit the earth from our parents – we borrow it from our children*".

13. For fishers to act in this manner they must have ongoing and certain rights to the fishery. Maori as customary non-commercial and customary commercial (along with other commercial fishers) have those rights - we are keen to take this opportunity to begin to build long-term rights for the

recreational fishing sector.

14. We also know from experience that you cannot get durable solutions through solving one grievance by creating another. Care must be taken to build a system in which all fishers have confidence. For this, each sector must have clearly defined rights and responsibilities to manage their outcomes within agreed limits as well as an ability to participate in forging a system that can work. With rights comes responsibilities - it is acknowledged that building the capability for this will take time. Te Ohu recognises this and proposes a progressive building of capacity in the sector with increasing freedom to operate as rights-holders being dependent on demonstrated capability and accountable mandates.

15. We are concerned that the process outlined in the Shared Fisheries document suggests that the next opportunity we will have to comment on the proposals is at the Select Committee stage. We do not consider the discussion document sets out a clear policy proposal whose merits can be debated and other options compared against it in terms of maximising gains and minimising costs to all participants. It would be premature to proceed to Parliament without far greater clarity of a proposal and strong endorsement of that proposal by all fishing sectors.

16. We consider that much refinement is needed before this can be achieved and given the consequences to the Settlement, the Minister should work with all sectors to establish robust durable systems that provide ongoing incentives for sustainability and enduring relationships between sectors.

17. Accordingly we urge the Minister of Fisheries to withdraw the current proposals and using his leadership to directly work with Te Ohu, AFL, the wider seafood industry and the recreational sector to find positive and pragmatic ways forward. Elsewhere in this submission we set out our thoughts on what could be a coherent system that would meet the tests proposed. However these are not proposed as the only solution but rather as options to be tested in the fire of analysis and debate so that the solutions have the support of all fishers and Government.

18. The remainder of this submission is presented in two parts:

    Part A Outlines our vision for New Zealand leading the world in first class management of shared fisheries

    Part B Provides comment in two sections:

    - The first section deals with the generic substantive matters that need consideration when looking to improve the management of shared fisheries

    - The second section provides comments by way of a more detailed analysis of the Governments proposals and options contained in the discussion document.

Part A: Te Ohu Proposed solutions

A Vision for New Zealand leading the World in First Class Management of Shared Fisheries

Where do we want to go?

19. Te Ohu has a **vision** for the future of fisheries management in New Zealand that sets us apart on the world stage for first class management of shared fisheries. That vision is underpinned by the following principles:
    - Above all the sustainability of fisheries resources are protected
    - The integrity of the Fisheries Settlement is maintained
    - Sector rights are fully defined, integrated and protected providing incentives for all sectors to work cooperatively together to get the best possible fisheries management outcomes for each sector.

How do we get there?

20. We consider that to achieve this vision there are three essential **aims or goals** to strive towards that are required to realise the vision above. These are:
    1. Getting first class information systems in place
    2. Establishing clearly defined and integrated rights to the Total Allowable Catch and setting in place a flexible and dynamic approach to sector agreements
    3. Building fully representative mandated organisations for all sectors to represent its members

21. There is also the realisation that development and implementation of such a system will take time. There are not the same pressures in every fishery and it is unlikely to proceed at the same pace everywhere. There will be opportunity to trial systems in different fisheries and locations and learn from these approaches. As has been the experience with commercial fishers, there will be a multiplicity of solutions with some that better fit certain fisheries or geographical areas. The system must allow for local management solutions without comprising the standard of management of shared fisheries.

1. Getting first class information systems in place

22. Good fisheries management requires reliable information about not only what is going into a fishery (i.e. growth and recruitment) but also what is coming out (i.e. removals by all sectors and any incidental mortality). Therefore in addition to continually improving our scientific knowledge about fish stock dynamics we need to urgently advance our understanding of the total amount of fish that is being extracted from each fish stock.

23. All sectors therefore need to be able to account for their catch as catch reporting by sectors is essential to determine if stocks are being managed sustainably, or not. As has been shown to be the case no survey claiming to estimate catch will ever be as good as actual catch reporting.

24. Rigorous and reliable systems are currently in place for commercial fishers to report their catch.

25. A rigorous system is available for the customary sector to report their catch but the system is not fully implemented yet. This means the current catch information is not reliable. This system could be improved if the customary regulations were fully implemented and reporting systems working – but there is no incentive to implement this system if the recreational regulations are easier to use. Greater progress would also be made if enhanced reporting systems were developed and used.

26. The recreational sector does not have a system either available or in place to provide reliable catch reporting. Therefore a system is urgently needed to collect this information.

27. However, such a system must provide both:
    - Incentives for recreational fishers to report catch and see the benefits of doing so
    - Incentives for customary fishers to utilise the customary regulations where appropriate & where doing so would not be any harder than using the recreational regulations.

How do we get there?

28. The quality of management of shared fisheries would be considerably enhanced if there is reporting of a significant portion of the catch. Mfish suggest that 80% of recreational catch is taken by 20% of these fishers. There is therefore no requirement to have every single fisher to report his or her catch on every occasion in order to assess the overall recreational take consistent with the accuracy of fishery models. It will not matter that the occasional fisher off the local wharf, or rocks, foreshore or from dinghies does not report.

29. It is suggested that this substantial take by the minority of fishers would most likely be those fishers using charters (with the charter operator's experience of successful fishing locations) and those amateur fishers that regularly go fishing with extensive gear including the latest technical systems - fish finders, GPS systems etc to locate runs of fish. These fishers have sometimes been referred to as the 'Haines Hunter set' – they are more likely to belong to fishing clubs. As members of Clubs these fishers regularly take part in competitions and report their catches to Clubs. All these fishers are committed to fishing and want to ensure that it is available on an ongoing basis. It is considered that these fishers would be prepared to offer catch information provided both who provided it, the location and amount of catch was held confidentially and not able to be used by others to immediately ascertain the optimal fishing locations within season.

30. Sophisticated yet simple systems and technologies are now available to more New Zealanders than has ever been the case in the past. We need to take advantage of these opportunities to capture catch information to improve our fisheries management.

Individual fisher direct reporting

31. A number of systems could be used. For example cell phone text messaging is now a widely accepted means of communication. With a little education and enhanced reporting systems these could be used to enable direct confidential individual catch reporting straight to the Ministry of Fisheries. Not only will this provide a means of reporting statistics such as number, species and size of fish caught but the cell phones can also provide reliable GPS positioning. In addition, the uptake of high-speed internet connections is continuing to put New Zealanders in a position of improved efficiency for communications. Recording catch directly into a MFish web-site is not an inconceivable proposition in this day and age.

32. Incentives for recreational fishers to use these types of technologies to record catch and improve fisheries management information should involve equally speedy feedback as to the contribution that such information will make to both overall fisheries management and the recreational sector.

33. We propose that reporting for charter boats be a requirement but reporting by individual be on a voluntary basis initially though with incentives at a regional level where the angler then identifies that his or her reporting can be accumulated to a Club.

34. It may be that stronger incentives could be tried in some situations – a number of options could be trialled that varied the bag limit for the fisher depending on whether he or she regularly reported.

Regional groupings collective reporting

35. We propose that over time the recreational sector would be represented by regional recreational fishing organisations aligned to Fisheries Management Areas (FMA's) or Quota Management Areas (QMA's). The membership with these groupings would provide incentives for fishers to act collectively to work together to sustain and enhance the fishery. Membership of a grouping or club could provide the additional benefit of seeing the overall effect of collective catch reporting for the FMA or QMA. Quarterly summaries of club members catch information going directly to government with feedback on the total extractions for all sectors balanced against the best scientific information about the stock growth and recruitment will enable these groupings to be able to more substantively participate in fisheries management. Club membership can also provide other additional incentives such as handy fishing tips or safety tips, club events etc. Such clubs could provide opportunities for members to hold office in a funded and mandated structure representing the interests of recreational fishers regionally and nationally should such a body be warranted.

2. Establishing clearly defined and integrated rights to the Total Allowable Catch

36. In an ideal rights-based world all sectors need to be in a position to responsibly manage their shares and receive benefits from doing so. To achieve this Government needs to set in place the right systems, tools and incentives for sectors to work constructively towards good fisheries

management outcomes. Over the medium to long-term the Government should then step back from direct decision-making in all aspects of fisheries management and allow those systems to operate, monitoring performance and educating, assisting and sanctioning sectors to ensure each is living up to their responsibilities. Good fisheries management does not just require information on what is being caught. It also demands managing the catch effort into that fishery so that cumulatively what is extracted is not greater than what has been determined as safe. This requires both the determination of what share of the fishery each sector has and the tools and mandate to constrain the take by that sector from the fishery consistent with those shares.

How do we get there?

37. A crucial step in this process is for the Government to finalise the initial sector shares. Te Ohu considers that the current allocations for most fisheries (acknowledging that there are some that do not have sector shares fully specified) should be used as the basis for finalising initial sector shares in the new regime.

38. If the Government agrees with the claims of some recreational fishers that the current shares were unjustifiable when they were first instituted then the Government should enter the quota market and purchase quota on a 'willing buyer willing seller' basis to satisfy what it accepts of this demand.

39. One method of doing this that could best build long-term cohesion between the sectors would be for the Minister to appoint representatives from all sectors in the particular fishery to develop an agreed fishery plan for the fishstock along with clear guidelines on the level of funding for the development of the plan and the purchase of quota. That group would then bring back a fish plan and specification of the various services required to implement it jointly. If the Minister approved the plan, purchases consistent with the plan would take place. Having resolved this matter sectors will then be free to move forward.

40. The next step in moving towards improved management is to ensure that the catch information collected from both the recreational and customary sectors (described above) are built into the new regime.

41. Te Ohu considers that the "customary non-commercial fishing right" should be provided for to the fullest extent necessary. These rights are not currently being fully exercised. As an interim step the current allocations to the customary sector should therefore stand until such time that these rights have been fully exercised and the range of need can be reliably determined. This will require the full implementation of the customary regulations which will ultimately lead to full coverage of the reporting requirements. When this information is to hand, then hapu and Iwi will be in an informed position to decide how best to manage their customary commercial and customary non-commercial interests.

42. Until fish plans are developed, whenever changes in the TAC are considered necessary to ensure sustainability, the customary non-commercial right should hold top priority and not be subject to cuts. Where reductions in take are necessary, Te Ohu considers that these should

apply to both the commercial and recreational sectors in fixed proportion of their sector shares to the TAC. Where sectors are ready to agree to Fisheries Plans these can contain variations from this proportional default. Such agreements will require sectors to demonstrate that they are capable of managing their sector's shares within the agreements before being implemented. If agreement cannot be reached and the Government wishes to adjust those proportional shares in favour of the recreational sector, that would require purchase from the commercial sector on a 'willing buyer-willing seller' basis

3. Building fully representative mandated organisations for all sectors to represent its members

43. Clearly there is a need for all sectors to:
    - be independent of Government, representative of and accountable to their constituents and self funded
    - be able to collate & report catch information and manage their sectors catch within agreed allocations
    - have the mandate to trade allocations (annually initially) on their sectors behalf
    - have capability to develop Fisheries Plans on their sectors behalf and the negotiation and implementation skills necessary to underpin the agreements contained within Fisheries Plans.

How do we get there?

44. The commercial sector has existing mandated organisations in place that are accountable to rights holders and are progressively becoming more effective participants in fisheries management, and will be more so with the development of further tools to assist this.

45. Hapu and Iwi have existing and evolving mandated structures with strong accountability measures in place to manage the customary commercial and non-commercial components of the settlement as they so determine. Te Ohu considers that Iwi are capable of taking the lead alongside kaitiaki to establish internal trade-offs as this is not a function suitable for the Government to maintain in the long-term.

46. With the recreational sector starting with the current situation of poorly developed rights, it will require the most effort and greater time to develop accepted mandated representative organisations. There are however already a number of existing club structures and representative bodies in place that could be brought together to work collaboratively towards a fully representative body for fisheries management purposes.

47. Te Ohu does not consider that it is in the Government's nor the recreational sector's interests for Government to maintain an ongoing funding role for any mandated organisation that represents the interests of recreational fishers. However the provision of initial seed funding to help establish a fully representative body for the recreational sector is urgently needed to progress this goal. In the medium-term such an organisation should be capable of developing the right incentives for members to provide independent funding.

48. We propose the ability, when approved, for regional recreational fishing organisations to undertake annual swaps and /or sales of part of the annual recreational allocation of some fishstocks for other fishstocks with the commercial sector. This would depend on:
    - Those bodies having appropriate systems of accountability to members – the bodies could be initially approved by the Minister of Fisheries or a National Trust
    - for trades to occur, any Club would need to obtain an explicit mandate from members to undertake such a trade
    - The level of trade possible would reflect the reported catch either directly by that Club over the previous 3 years or by members of the Club where they have stated that they wish their reporting to be attributed to the Club. In the initial stages the ability to trade would be constrained to only being a part of this reported level- say 33% or 50%.

    Note however that there would be no ability to trade the share on a permanent basis – any trading would initially be limited to an annual basis, but this could be increased over time where such a mandate is obtained or changed on an ongoing basis through fisheries plans.

Part B: Shared Fisheries

49. This part is in two sections. The initial section deals with generic substantive matters that need consideration when looking to improve the management of shared fisheries while the second section analyses the Government's proposals and options as set out in the discussion document in more detail.

Part B(1) Generic Substantive matters that need consideration

Approaches to fisheries management

50. There are two general approaches to fisheries management. The first - an administrative approach - involves the Government annually setting the rules for management including decisions about fishing methods, allocation and re-allocation of fishing rights to different interest groups. Under this scenario, Government decisions can be influenced by sector lobby groups. Decisions on the allocation of rights are generally politically based, and changes can be made in response to sector demands. There is very little certainty or incentive for those who wish to invest in fisheries to do so on a long-term basis. There are significant incentives to participate in behaviours that maximise short-term gain even if this is against the sustainability of the resource – it has been characterised as "a race to the bottom".

51. The second "rights-based" approach involves the initial allocation by Government of property rights in the form of harvest rights to different sectors on a perpetual basis. The role of the Government is to set in place the desired management objectives, leaving it to rights holders to work out the most effective and efficient means to achieve them. Under this scenario, fisheries rights holders have a more secure basis for investing in the management and development of their share of the fisheries. For the system to have integrity while the Government would (initially until a fish plan for the fishstock agreed by all the sectors is approved by the Minister) set what the overall take would be each year. Each sector would then manage their catch within their allocation and while the system would allow for minor variations, any long-term take beyond the sector's allocation would be penalised by subsequent reductions to maintain the stock. The Government has no role in reallocating rights once they have been allocated in the first instance, leaving it to rights holders to trade their rights on a "willing-seller willing-buyer" basis.

A rights based approach is the foundation of the Fisheries Settlement

52. New Zealand began to implement a rights-based approach to fisheries management in response to declining inshore fisheries that had been managed under the administrative approach. From 1986, the government embarked on a rights-based approach to fisheries management when it introduced the Quota Management System (QMS). The QMS effectively created a property right in Individual Transferable Quota (ITQ), from which Maori were initially excluded. Maori challenged the Government's right to allocate these perpetual rights on the basis that the Crown did not own the

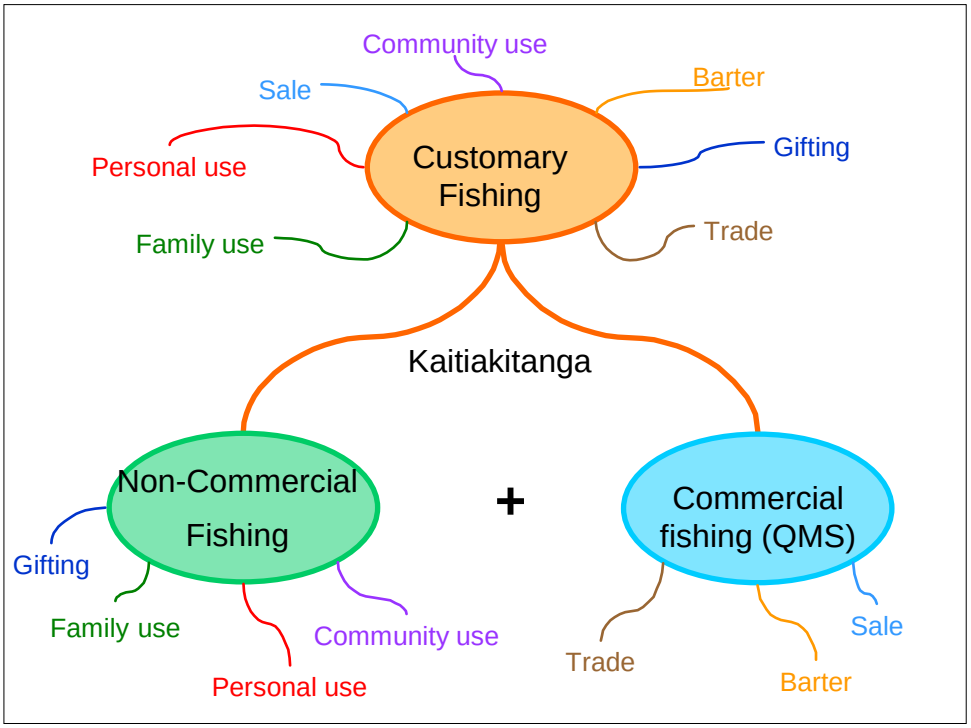
rights in the first place – as Maori had never ceded them. This claim formed the basis for negotiations between the Crown and Maori which resulted in the 1992 Fisheries Settlement.

53. In 1992 the Fisheries Settlement settled claims by Maori that their rights in fisheries, guaranteed under Article II of the Treaty, had been breached by the Crown. The Settlement contained two components of redress. Both components established more clearly defined property rights, although different in their nature and extent:

- a commercial right, delivered by the Crown in the form of quota, known as Individual Transferable Quota (ITQ). This property right achieved legitimacy through the settlement process and can be described as perpetual, transferable and subject to sustainability limits established by MFish on a periodic basis for each stock.

- a non-commercial right that takes the form of regulations that provide for the use and management practices of Maori. These regulations provide for Kaitiaki to issue authorisations for customary harvest and deliver local area management tools such as taiapure and mataitai. These property rights were also legitimised through the settlement process and can be described as collective (i.e. belonging to tangata whenua). They operate at the Quota Management Area or Fisheries Management Area scale for customary harvest allowances or at the local area management scale for taiapure and mataitai.

54. The original customary rights of Maori to fisheries contained the ability to exercise those rights in a bundle of uses and those uses were chosen as appropriate to the circumstances. In all cases the exercise of the rights was constrained within the exercise of kaitiakitanga. The Settlement however altered the manner in which the bundles of use that customary rights could be put to. This is shown in the diagram below.



55. At the time of the settlement negotiations with Maori, the Crown promoted the concept of the QMS as having the following advantages:
    - it was a means to cap total catch and therefore protect overall sustainability
    - the property rights Maori would receive in the form of ITQ would be perpetual and therefore were robust and enduring
    - an express purpose of allocating ITQ was to give security to ITQ holders which would allow them to plan and invest with greater confidence.

56. In combination these advantages provide ongoing incentives to these rights holders to manage their share of the fishery within sustainable limits. This system therefore continued the responsibility of Kaitiakitanga that had guided Maori in the use of these fishery resources and other taonga.

57. It was in this light that the Maori negotiators agreed to exchange the customary rights protected in Section 88(2) of the Fisheries Act 1983 with the perpetual rights outlined above. **Given the "full and final" nature of the settlement, they expected that the integrity of these rights would be protected.**

58. Part of the protection of the whole system and also sectoral shares will inevitably involve making changes to the level of catch of each sector reflecting the state of the fishery to ensure sustainability. This was understood by Maori. However it was understood at the time that for the system to have integrity, Maori could rely on their share of the fishery remaining constant except where:
    - changes were made between sectors during the QMS entry when initial explicit allocations were made; or
    - in response to sustainability issues where the sector causing any enduring change to stock levels would need to alter its management or have its share adjusted to maintain the stock.

59. It was noted by the Court:
    "*It is clear Maori negotiators in 1992 were aware that ITQ held by the Commission, and further ITQ to be received by the Commission and Maori, would be subject to reduction along with the TACC on biological grounds. Likewise, it might be increased. That risk and potential benefit, were known and accepted. I accept Maori did not envisage, or accept, that TACC and quota might be reduced simply to enable a greater recreational allocation of the resource. It is highly unlikely Maori would have agreed to surrender Treaty rights for the better gratification of Auckland boatmen. The thought did not cross the tangata whenua mind*."[1]

60. The Courts also noted that the QMS "*is not a system set up to be dismantled or tinkered with by a Minister as a matter of whim".* The Court also set down a series of disciplines that needed to apply if a Minister sought to make changes to sector shares. In addition to this Parliament in 1996 enacted section 308 which provided protection for the Crown from compensation for any changes to TACC where these arose from sustainability measures or the initial setting of the TACC when introducing

[1] McGechan J, High Court Snapper 1 Decision, 1997

a new stock in the QMS. There has been no deliberate re-allocation between sectors by a Fisheries Minister in the 15 years since the Deed of Settlement was signed.

61. In our view, the Government's proposals seek to explicitly remove those disciplines and systems that maintain the integrity of the system that Maori supported when they entered into the Fisheries Settlement.

What damage could such a change have?

62. During the process of gaining agreement to the proposed allocation of the Maori Commercial Fisheries Settlement, the assets were estimated to be worth over $700 million. Of this just under $300 million was in the form of quota shares that have been and are continuing to be directly allocated to the Asset Holding Companies of MIOs, and $350 million is managed by Aotearoa Fisheries Limited whose dividend stream must be to those AHCs and Te Ohu while approximately $70 million is in cash is either being allocated to MIOs, used in the transition or provided as capital for two trusts. It is worth noting that the core assets that AFL manages is quota held by its subcompanies.

63. This means that any changes to the value of quota or the ability to use it directly affects the value and integrity of the Settlement.

64. The Ministry of Fisheries has provided no detailed information concerning the impact of "Shared Fisheries" on commercial fishing businesses generally or on the Fisheries Deed of Settlement. Advice by officials to the Government suggested that there would be no negative effect on the Settlement. Te Ohu disagrees strongly with this view.

65. Te Ohu endorses the submission provided by AFL that the proposals have *"profound implications for the integrity of the Deed of Settlement"*. That submission states that:

> *"A significant portion of AFL investment sits squarely in those fish stocks that the "Shared Fisheries" paper identifies as key species for reallocation through the proposed process. "Most shared fisheries are inshore fisheries (including snapper, blue cod, kahawai, rock lobster and paua) – but they also include offshore fisheries such as game fish and freshwater fisheries such as eels[2]. These are largely iconic species to Maori and subject to customary non-commercial use and management of high cultural importance. They are also species where Maori commercial interest (directly or indirectly through AFL) is particularly strong. The fact that the 'conflict' referred to in the "Shared Fisheries" proposal has particular customary, commercial and cultural implications for Maori is important information missing from the "Shared Fisheries" document."*

[2] Shared Fisheries Document Page 3

66. AFL provides an analysis of recent information published in the newspaper[3] in combination with the quota portfolio held by AFL. This analysis suggests that:

> *"The total commercial catch in the shared fisheries species is less than the estimate for total recreational catch"* and
>
> *"the commercial importance of 'shared' fisheries is much greater than the volume of catch seems to suggest. Although they account for 4% of catch by volume, they account for 36% of the value of New Zealand's quota fisheries."*

67. These fisheries, though small in number, are a significant part of the Fisheries settlement – the ability to realise economic returns from these fisheries are critical to Iwi.

68. However the Government proposals intend to apply to all fisheries not just these named species. That will mean that there will be an ability to use the systems proposed to change the allocations for all species. This will increase the uncertainty applying to all species. This will have the effect of devaluing all quota. By doing so this devalues the whole Maori Commercial Fisheries settlement.

69. Te Ohu conclude that the proposals and options in the discussion document as they currently stand pose a significant threat to devaluing the compensation provided in the Fisheries Settlement. Therefore if the proposals are pursued into law, this will result in the Crown:
    - Failing to meet its obligations to actively protect the fisheries Deed of Settlement
    - Failing to act reasonably and in good faith
    - Failing to remedy past breaches of the treaty and instead creating new grievances.

What are the real problems?

70. When the Government introduced the QMS and resolved outstanding Treaty grievances, it took a step in the right direction towards a sound fisheries management framework. However we acknowledge that improvements are still needed. These improvements relate to the need for better information, greater certainty in the relationship between the sectors, and creating greater incentives for cooperation between each.

Inadequate information means catches can't be managed within their allocation

71. Each stock managed within the QMS is managed within an overall Total Allowable Catch (TAC). Within this TAC three sectors obtain a share where:

    - the customary sector receives an allowance based on a percentage of the recreational allowance depending on the species' relative importance – which is authorised by a kaitiaki appointed by the tangata whenua

[3] Dominion Post article Friday 23 January 2007 *"Growth in Fisheries a Sign of Confidence"*

- the commercial sector receives a set Total Allowable Commercial Catch (TACC) which is divided into quota shares. Iwi receive up to 20% of these quota shares through the allocation processes well underway by Te Ohu and MIOs
- the recreational sector receives an allowance, along with daily bag limits based on national telephone and diary surveys - with specified size limits and fishing method controls

72. If a rights based fisheries management system is to function properly, all sectors need to provide robust information about their catch so that their share can be managed within its allocation. The customary sector is subject to a reporting system, although there is some way to go to fully implement that system. The commercial sector is subject to a strict system of reporting, in which information on catch is provided to the Ministry of Fisheries and used to assess the state of fish-stocks. The recreational sector is not subject to any form of reporting. Instead the government implements surveys to provide estimates of recreational catch which are acknowledged to contain high margins of error. This system of daily bag limits, lack of reporting and surveys that are not accurate means that there is no ability in real time to know whether the allowance has been caught or exceeded. This also results in no measures being taken during any season to limit catch.

73. While we support the government's proposal to require charter boats to report their catch, we don't believe that investment in further research will significantly increase our understanding of the recreational take. We believe that the charter boat sector should simply be the first off the block and that wider implementation of a reporting system should be gradually implemented.

The relationship between sectors is unclear and creates uncertainty

74. We recognise that there is debate about the relative priority that each sector should have when the TAC is allocated. In signing the Sealord deal in exchange for Maori customary fishing rights – protected by Article II of the Treaty of Waitangi – Maori expected that the value of their new rights would be protected. While primary priority should be given to the sustainability of the stock, Iwi generally accept that the next priority should be given to the customary sector. The next would be given to the commercial sector, as Maori settlement rights are also contained within that sector, followed by the recreational sector.

75. In practical terms, once a species is introduced into the QMS, we would expect the customary allowance to be established according to need, with the proportion established between the commercial and recreational sectors on the basis of their initial allocation. However rather than clarify the situation and define the recreational share as a proportion of the TAC, the Government's proposals suggest that the recreational share will have priority over the commercial share where it concludes that the recreational sector values it more highly. This only serves to increase uncertainty. From the point of view of Iwi who are now part way through the fisheries allocation process – this situation is unacceptable.

There are poor incentives for cooperation between sectors

76. As things currently stand there are few incentives for the three sectors to cooperate and identify mutually agreeable solutions to management problems or allocation concerns. Problems include:

- lack of an accountable and independently funded system of representation for the recreational sector that could handle catch information and build relationships with other sectors
- poor implementation of the customary regulations, where the Ministry of Fisheries has undermined good working relationships between Mandated Iwi Organisations and kaitiaki appointed under the customary regulations.

77. Recreational fishers are valid participants in our fisheries and need systems to allow stronger participation. Such systems will come with responsibilities such as catch reporting. Rather than improve the situation, the Government's proposals will generate greater political involvement by sectors in fisheries management rather than encourage sectors to work together. The Government is proposing to determine the way different sectors value their interests in fisheries, and then act to reallocate fisheries to those that the Government considers value them the most. This type of valuation is subjective and will be contentious as it is more 'art than science'. We believe this approach will simply create rather than reduce conflict between sectors.

Part B(2) Analysis of the *Shared Fisheries* Proposals

78. In this section, we provide comments on our concerns with each proposal or option of the ***Shared Fisheries*** paper. For ease of reading we have followed the same layout as presented in the discussion document. We conclude with suggested improvements either to one or more of the proposals or options in the order they are presented. In some instances we suggest that the status quo is the best option with some small improvements and in other instances we suggest *alternative* approaches are used. While we have provided comments and suggestion for each proposal or option in this sequence, as a completely separate exercise we have also provide a full description of our alternative approach and how it could work – in part Part A of this submission.

Section 1: Introduction to *Shared Fisheries*

79. The aim of the proposals set out in the ***Shared Fisheries*** paper is to: *"provide opportunities for New Zealanders to get the best value from the use of fisheries resources"*

80. Te Ohu agree with the general idea of getting the best value. However we propose a very different path to follow to get there which is consistent with:
    - Protecting sustainability
    - Setting and Protecting sector rights which are fully defined and integrated in a manner that provides incentives for all sectors to work cooperatively together to get the best possible fisheries management outcomes

81. To achieve this aim it states that two key ideas form the basis for the proposals and options put forward in the document.
    - *"All New Zealanders have a basic right to catch fish"*
    - *"Shared fisheries should be managed in such a way that produces the best value for New Zealand"*

82. Te Ohu can not agree with the first statement as recreational "rights" are not fully specified in a way that will provide the right incentives yet. We propose an alternative way of getting there.

83. The document defines shared fisheries as those fisheries in which all sectors (customary, commercial and recreational) have an interest. The Ministry of Fisheries (Mfish) has specifically identified shared fisheries as including:
    - inshore fisheries (e.g. Snapper, Blue Cod, Kahawai, Rock Lobster and Paua)
    - offshore fisheries (e.g. gamefish)
    - freshwater fisheries (e.g. eels).

84. Te Ohu is concerned that the proposals and options have the ability to affect more than just these fisheries in the future. Given this, it is better to do a good job of setting up the right systems at the outset.

85. The document is very short on detail, history and analysis of any implications on current fisheries management. Understanding the implications of proposed changes requires a degree of historical context and an appreciation for how fisheries are currently managed. This is provided elsewhere in this submission and in Appendix 1.

86. Shared ***Fisheries*** identifies the following key concerns:
    - effective management is currently undermined by poor information on amateur catch and uncertainty surrounding the process for allocating the available catch between commercial, customary and amateur fishers.
    - risks associated with management decisions based on poor information, the cost of ongoing contention and litigation, and the loss of value associated with inadequate incentives for all sectors to protect and improve shared fisheries.

Implications and concerns

87. Te Ohu considers that the proposals and options contained in ***Shared Fisheries*** either do not provide solutions, or where solutions are provided they do not create incentives for good fisheries management. Moreover, while ***Shared Fisheries*** signals that there is conflict between sectors in shared fisheries, there is a lack of proper description of the particular fisheries in which these conflicts have arisen. We estimate that there may only be 5 or 6 key fisheries and areas where there is a concern. Without a clearer picture of the problem, the elaborate list of proposals and options may be likened to "using a sledge hammer to crack a nut".

88. The proposals and options are presented in a simplistic way with little analysis of the implications or impact on existing fisheries interests. Without this it is difficult to determine what the cumulative implications of

the changes could be on the fisheries management system including the QMS and the Fisheries Settlement.

89. Te Ohu is unclear on the status of the discussion document. While the document was initially released late in 2006, various additions have been made to the MFish web-site in particular to the Frequently Asked Questions (FAQs). In addition to this Ministerial media statements have been made that are aimed to clarify the proposals. Given that we have been asked to provide our feedback by way of a submission to this document we can only conclude that those additional matters raised in media statements or in the FAQs have no formal status and do not as yet form part of the proposal being consulted upon.

90. Therefore we do not provide comment on any subsequent refinements on Mfish internet or Minister press releases. We consider these matters are informal only and have no formal status in Government proposals. However they are a clear indication that the discussion document is deficient.

91. The High Court provides us with a definition of consultation.[4]

> *"Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done."*

92. The High Court has also noted that consultation should be a reality, not a charade. Although there are no universal legal requirements as to form, the Court found that essential elements of genuine consultation should include:

- *"sufficient information provided to the consulted party, so that they can make intelligent and informed decisions*
- *sufficient time for both the participation of the consulted party and the consideration of the advice given, and*
- *genuine consideration to that advice, including an open mind and willingness to change"* (emphasis added).

93. Our expectation is the Ministry will adhere to the Court's standards when consulting with stake holders. When dealing with something as important as maintaining the integrity of the Treaty Settlement the documents and proposals along with impacts need to be clear and accurately provide the full information needed upon which to make informed comment. From the information and observations we have made the consultation process fails to meet the standard of care needed to fulfil the requirements set out by Justice McGechan**.**

94. In addition, Te Ohu was extremely surprised to find that Cabinet's instructions (see FIN Min (01) 28/4) were completely ignored. These instructions were to:
    - "avoid the undermining of the fisheries Deed of Settlement" and
    - "recognise the legitimate rights of other fisheries stakeholders including the commercial and customary sectors"

[4] Air New Zealand Ltd v Wellington International Airport Ltd, High Court Wellington Registry, CP 403/91. McGeechan J, 6 January 1992, p8.

95. Not only are these caveats or constraints missing from the introductory material in the discussion documents and have therefore clearly been ignored during the policy development stage - but of even more "eye watering surprise" officials then go on to portray to the Minister (see letter to the Minister dated 4 October 2006 Ref: 21/4/2/13) that ***"the proposals are generally positive for Maori"*** (emphasis added). Te Ohu could not disagree more with this statement.

96. When we held a workshop in Wellington for all Iwi to discuss the proposals and options and consider the possible consequences we were accused of being "hysterical" by the Minister. Clearly there is a significant difference of opinion that the affected stakeholder group (namely Iwi, AFL and Te Ohu) wishes to bring to the attention of the Minister but which officials have clearly attempted to disregard. Te Ohu does not consider that this consultation process meets the criteria set out by J. McGechan for genuine consideration either.

97. Clearly there is a need for more work to be done to fully discuss the consequences of the proposals and options and the potential affect that these would have on the fisheries settlement. This work must be conducted in a way that is consistent with the Treaty of Waitangi Principles including:
    - Crown's duty of active protection
    - Duty to act reasonably and in good faith
    - Crown duty to remedy past breaches

98. Te Ohu remains hopeful that such work can progress without further delay and in an open manner that seeks to find resolution to the problems identified.

99. The remainder of this submission provides an analysis of the proposals and options contained in ***Shared Fisheries*** and our concerns relating to each.

Section 2: Getting better information on catch and value

100. The ***Shared Fisheries*** paper states that

> "*any effective management system depends on good information. In fisheries, this means knowing who is catching what, when and where.*"

101. It goes on to point out that both the commercial and customary sectors are required to report their catch but this is not currently the case with the recreational sector.

102. It discusses past failed attempts to get information on recreational take through surveys and the need to get more survey information through new survey methods and in addition to this:

> "*information that will ensure amateur interests are properly recognised and taken into account in effective management of shared fisheries*".

103. Three proposals are advanced for getting better information:

Proposal A More survey and monitoring work – ideas suggested include flights over specific areas to count boats, boat ramp surveys, increased use of video recording at boat ramps, seeking information through fishing clubs, adding fishing questions to the Census and the 3-yearly Household Economic Survey.

Proposal B Reporting for recreational charter operations – charter boats would be registered and operators would be required to furnish reports on catches.

Proposal C Estimating relative values for commercial and amateur fishing – effort will first be put into developing methods for providing valuation information about shared fisheries. These methods would then be used to assess relative values of the commercial and non-commercial sectors to assist in decisions on allocating or reallocating shares.

Implications and concerns

104. The proposals do not set out and analyse a full range of options. For instance they avoid having the recreational sector take responsibility for monitoring and reporting its catches. While this may be too difficult to achieve in one step because of the lack of any real capacity at present to implement such a programme, the idea should not be abandoned but could be implemented gradually. Proposing a system that elevates the status of the recreational interests through legislation but does not require the recreational sector to exercise any meaningful responsibility is clearly unjust as well as working against sustainable management of fisheries.

105. **Proposal A** - using new methods and combining these with other data sources is unlikely to provide any significant advancement on the current situation. Combining past unreliable survey results with new results of an experimental nature is not a satisfactory replacement for catch reporting. In addition it will be extremely expensive to implement with costs of obtaining and validating the results estimated to be in the millions of dollars. This money could be far better spent developing simple methods and systems for the recreational sector to improve reporting their catch on an incremental sub-sector basis – as proposed for the charter boat sub-sector.

106. The only real proposal that will provide additional valuable information is that described in **Proposal B** – charter boat reporting. Te Ohu has argued for this in the past. It should be supported as an important contribution to long-term improvement of recreational harvest reporting overall. The frequency of reporting will be important and one addition that we might suggest is that the reliability of reporting results is randomly checked through observers as is the case with commercial fishing. Overall we consider that this proposal is necessary but not sufficient to improve the management of shared fisheries in New Zealand.

107. Rather than propose to directly quantify the share of interests in fisheries for the recreational sector and then allow that sector to reach agreement with others, **Proposal C** suggests developing a proxy that estimates the nature and extent of those interests, along with those of the commercial

sector, so that the Government can determine what mix of shares represents the 'best' value.

108. We agree that the value of the share of any fishery to each sector cannot be measured in exactly the same dimensions. However, we consider that only each sector can decide its trade-off points. We do not think that it is a valid role for the Government to determine what is the optimal estimated value of fisheries to New Zealanders and then move to re-distribute shares to reflect that view on an ongoing basis.

109. Having the Government determine the trade-off point for any fishery is highly likely to result in ever-increasing uncertainty and litigation about the nature and extent of each sector's rights or entitlements.

110. Multi-dimensional valuation analysis is more an art than a science. Where Government proposed to do this in recent years there has been substantial disagreement over the methodology proposed. Even if you could develop agreement on the value to the different sectors on a particular set of shares of the TAC, the analysis is not dynamic and able to accurately predict the value for different shares of that same TAC or for different levels of TAC. The danger with the proposal is that it will be this or similar methodology with the uncertainties involved in such methodology that will be used to determine how much compulsory change will occur to the shares of any fishery in the circumstances set out in later proposals in the paper.

111. We cannot see how converting estimates of take that could have confidence bounds of plus or minus 300% can become any more reliable when converted into a valuation analysis.

112. Furthermore the papers provided to us through an Official Information Act release do not make any attempt to detect the significance of any reallocation decision for the fisheries settlement stakeholder group (namely Iwi, AFL and Te Ohu). The draft AFL submission (which we endorse) documents that the total commercial catch in shared fisheries is likely to be less than the estimates for total recreational catch. In addition the commercial importance of shared fisheries is much greater than the volume of catch suggests.

113. Te Ohu concur with AFL that "A significant proportion of AFL investment sits squarely in those fisheries stocks that the "Shared Fisheries" paper identifies and that "these are largely iconic species to Maori" the subject of "high cultural" importance. In combination Te Ohu see it as the domain of Maori not the Government to determine how they value these fisheries the most.

Suggested Improvements to Catch Reporting

Incremental Improvements to Recreational Catch Reporting

At a sector level there is a need to aim in the long-term for significantly improved catch reporting by all sectors but especially the recreational sector.

This aim may be achieved incrementally commencing with the Charter boat sub-sector then working with the other sub-sectors (i.e. fishing clubs, boat ramp managers) to develop simple ways for recreational fishers to voluntarily report their catch (eg. Cell phones and internet reporting)

We support the proposal for Charter boat operators to register their boats and report their catch. We suggest that there is a need to agree on the frequency of reporting and compliance testing.

Section 3: Setting the Total Allowable Catch

114. Both proposals in the ***Shared Fisheries*** paper aim at increasing fish size and abundance (or both) by moving the Total Allowable Catch (TAC) away from the standard practice of managing at the Maximum Sustainable Yield (MSY). MSY is the maximum biological yield that can be obtained while at the same time protecting the sustainability of the fishery (see Appendix 1). The ***Shared Fisheries*** paper states that both proposals are designed to "*better recognise the importance of amateur and customary values*".

115. The proposals are:

    Proposal A Setting the TAC for a stock target level above that which achieves MSY.

    Proposal B Setting the TAC in depleted fisheries to allow faster rebuild times.

116. The paper states that these proposals would be applied on a case-by-case basis "*if doing so would produce an increase in value obtained from the shared fishery*".

Implications and concerns

117. The overall effect of this approach will be to reduce the TAC and within that the Total Allowable Commercial Catch (TACC). Other than exceptional circumstances where the industry would get more money from fewer larger fish, this approach will go against commercial use of their current rights and result in the industry receiving less income. Te Ohu opposes any compulsory acquisition of Fisheries Settlement assets or the access to ACE arising from those assets.

118. The paper states "*all sectors might need to forego some of the catch to build and maintain a higher stock level."* The systems used to manage the commercial sector means that their catch can be restrained and shown to be so. There are no existing measures that can do this for the recreational sector and nor are any proposed. Te Ohu oppose both of these proposals unless there are to be measures that demonstrate that recreational take can and will be capped year to year to achieve the outcome proposed. In each circumstance where such proposals are to be implemented, the commercial sector including Iwi should be provided with redress and this should be done using a 'willing-seller willing-buyer' approach.

Status Quo Improvements for TAC Setting

Clarify that the sole purpose for setting the TAC is to protect sustainability

The purpose of setting a TAC should be for no reason other than to protect sustainability. The underlying sustainability of the resource must receive the highest priority when managing fisheries at MSY.

Allocation of the TAC amongst the sectors must be kept as a completely separate decision from that of protecting the underlying sustainability of the resource.

In this context the TAC should only be determined by the Maximum Sustainable Yield.

Any proposal to manage a fishery for a different goal to MSY should be agreed by the sector's in the development of a Fisheries management plan.

Section 4: Priorities for allocating the TAC

119. The ***Shared Fisheries*** paper claims that the present approach to making allocations of the TAC lacks certainty. It argues that priorities need to be established in law for recreational and customary fishing over commercial fishing. The proposals are:

> **Proposal:** Priority for amateur fishing over commercial fishing - a minimum tonnage for the amateur sector would be established in each shared fishery (perhaps to be set at 20% of the current baseline amateur allocation in each fishery). This would have priority over commercial take and would only be reduced if all commercial fishing had already ceased in the fishery and a further reduction in take was needed to ensure sustainability.
>
> **Proposal:** Clarify provisions for Maori customary take – rules would establish that "actual customary take" is to be provided for before allocation to the amateur and commercial sectors. The customary allowance would be increased when reporting showed the actual take exceeded the current allowance – subject to sustainability limits.

Implications and concerns

120. Te Ohu agrees that the current process for allocating the TAC lacks long-term certainty. When the Minister sets the TAC for any fishstock, he must make an allowance for both customary non-commercial take and recreational take. These allowances – though often arbitrary – have generally been set on the same basis for many years.

121. In recognition of the importance of providing permanent commercial property rights (and the incentives for sound fisheries management practices that arise from those) the Fisheries Act provides that the Minister cannot adjust the shares of the TAC without being liable for compensation unless those changes arise for sustainability reasons and happen when the TAC needs to be reduced.

122. Case law has set down that the current wording in the Act contains no pre-set priority among sectors when adjusting the TAC down – each case must be determined on its merits. However with change in shares possible at this time it is difficult to secure agreement amongst sectors to work together on management of a fishstock to manage and/or build a fishery.

123. The adjustment needed to complete the rights regime in a manner that would encourage cooperative management, would be to finalise initial shares for each sector and allow the sectors to make short-term (annual) trades where they want to enhance their position.

124. However the proposals do not provide for this – instead they propose to alter the legislation to set out the following priority for each sector - customary non-commercial 1st, recreational take 2nd and commercial 3rd.

125. This is a vastly different legislative regime than the negotiators and Iwi considered when deciding whether to agree to the QMS as part of the Fisheries Settlement. With this set of proposals advancing a priority for the recreational sector over the Commercial Fisheries Settlement and with no proposals in the paper to ensure that the recreational sector will manage its take within its allocation, there is a high degree of certainty that the commercial settlement will be eroded on an ongoing basis with little compensation.

126. The Fisheries Settlement acknowledged ”customary” or “aboriginal” rights to fish that were recognised and secured under the Treaty of Waitangi. The highest New Zealand courts agreed that those ownership rights continued up to the time of the introduction of the QMS and the settlement proceeded on the basis that it provided certainty to the continued priority of Iwi rights.

127. The ***Shared Fisheries*** paper proposals and options will “unpick” that agreement. The first proposal which suggests a priority baseline allocation of 20% for the recreational sector fails to acknowledge that there is no accepted basis for a recreational “right”. It is unacceptable to suggest that a priority be given to this sector ahead of the rights that were secured and guaranteed in the Fisheries Settlement simply because the sector desires or demands it.

128. In addition, there is simply no information to justify 20% as an appropriate percentage. On that basis, a fixed percentage could well be set at any level (such as 100%), also without any real justification.

129. We would support - as we have in the past - a legitimate priority for customary non-commercial fishing ahead of commercial and recreational fishing, as outlined in the second proposal. However the successful application of this proposal depends on the full implementation of the customary regulations and their reporting components. To date nearly ten years following the promulgation of the customary regulations, full implementation is far from a reality and in many cases customary non-commercial fishing is still legitimately conducted under regulation 27A which does not have a compulsory reporting requirement. If setting the customary non-commercial allowance is going to be based only on what is reported then the allowance will be set well below the actual level of legitimate need for customary non-commercial fishers. This situation must be considered and resolved before any reduction is made to the customary allowance. Further to this, there is little incentive for Maori to utilise the customary regulations if it is easier to catch fish under the recreational rules, which require no reporting. Through the combined components of the Fisheries Settlement (commercial and non-commercial) Maori carry far more stringent reporting responsibilities than do recreational fishers and this is not equitable.

Alternative - Priorities

Any priority for allocating the TAC must:

1. Protect sustainability based on MSY (as discussed in section 3 above) as the highest priority.
2. Provide for customary needs to the fullest extent necessary – this will require the full implementation of the customary regulations so that catch records
   can provide an accurate picture of the customary take/allowance needed.
3. Fully implementing the customary regulation will require the Crown providing positive incentives for Maori to utilise them.
4. Fix the remaining share between the commercial and recreational sectors as proportions of the remaining TAC based on current allowances – with any cuts required to fully satisfy the customary needs shared proportionally amongst the commercial and recreational sectors.

Section 5: Setting and adjusting amateur and commercial allocations

130. The ***Shared Fisheries*** paper argues that past allocation decisions have to be revisited because of "*perceptions that current allocations are not reasonable*". It also argues for a new process for adjusting shared fisheries in order to "*create the most value for shared fisheries*". Three options are advanced for re-setting allocations in key fisheries. These are:

    Option A Re-setting allocations following an independent assessment – this would involve a panel or person assessing evidence and submissions and making a recommendation to the Minister.

Option B Re-setting allocations following a study of value in the commercial and amateur sectors – this would involve a valuation exercise to compare commercial and non-commercial values. The aim would be to "maximise value".

Option C Re-setting allocations following a negotiation process – this would involve discussions between the sectors on a comprehensive package involving TAC, rebuilding periods and area management issues.

131. The paper also offers three options for "ongoing adjustments". These are:

Option A Proportional adjustments where allocation changes are spread between the commercial and recreational sectors with variations on this providing for proportional adjustment subject to agreed rules.

Option B Value-based adjustments – the suggestion is that this could be based on estimates of the marginal value of fish i.e. the value of the "next fish caught".

Option C Combination model – proportional adjustment would be the default but valuation information would be used to shift allocations to where they created greatest overall value.

Implications and concerns

132. The range of proposals presented in this section clearly reflects and responds positively to the recreational sector's unsubstantiated claims of historical injustice in allocating the recreational share. This claim is subjective only. With there being no reported catch by recreational fishers, it is impossible to assess whether recreational fishers either cumulatively cannot catch the allowance the Minister makes or are catching well in excess of that allowance. With no catch and catch effort information collected (as there is for the commercial sector) there is no objective analysis that can be carried out to determine the health of the fishery for the recreational sector. There can only be anecdotal information on catch effort. MFish regularly deals with such anecdotal information and has policy on it - in summary the standard process for decision-making under the Fisheries Act provides that this information is treated with caution and therefore not used to make decisions.

133. The paper suggests a number of options for adjusting the amateur allocation *"to generate greater legitimacy".* This implies that the current shares are not legitimate! This ignores the substantial work undertaken at the time of the introduction of the QMS by officials, sector representatives and the Select Committee. It is likely that the current set of participants – officials, politicians and recreational fishers' representatives did not participate in that process. The fact that recreational fishers do not agree with the outcome of the earlier process is no basis for proposing a set of changes that will substantively undermine the effectiveness of the QMS and the Fisheries Settlement.

134. All of the proposals in this section are designed to justify a means of taking quota off the commercial sector and transferring that as an increased

allowance to the recreational sector. Te Ohu opposes all these proposals. The value of the Settlement from the fisheries noted in the document – including the snapper, kahawai, kingfish, blue cod, crayfish and paua across all the fish stocks was approximately $80 million at the commencement of Te Ohu Kai Moana in November 2004. While changes may not affect every fishstock it can be seen that these proposals have the potential to seriously affect a substantive part of the Settlement.

135. In terms of resetting allocations Te Ohu could only support the general idea of option C – a negotiation process. However, that process would have to be wider than is proposed in this option including:
    - debate with the Crown on establishing the nature and extent of a recreational "right"
    - determining appropriate responsibilities that go with the right (if established)
    - establishing an organisation sufficiently capable of delivering on those responsibilities
    - negotiation on the basis of either "willing-seller willing-buyer" exploring adjustments up and down for a number of fisheries or appropriate redress agreed and provided by the Crown so that in both circumstances ensure the same value of the Settlement is maintained
    - integration of those rights into the fisheries management framework in a way that does not destroy the currency of existing legitimate rights.

136. In the proposals to make ongoing adjustments, the only proposal that would remotely resemble a viable proposition for Te Ohu is the variation on Option A – proportional adjustment equally spread between the commercial and recreational sectors subject to agreed rules. The industry position – that we have supported - is that shares should only be exchanged on a "willing-seller willing-buyer" basis. The variation on option A may provide the means for such negotiations to take place. However the package of proposals and options in the paper would create little incentive for the recreational sector to enter into negotiations.

137. Furthermore, it is unlikely that the recreational sector would be able to organise itself sufficiently for such rules to be agreed and enforceable in the short term. Effort should be directed at addressing this capacity before advancing these proposals.

Suggested Improvements to Resetting Allocations

A Fair and Transparent Negotiation Process

Any negotiation process would require a wider scope than is covered in Option C. Such a process would need to include:

a. debate with the Crown on establishing the nature and extent of a recreational "right" compatible with the current set of rights and allowances (set according to the priority approach described above)
b. determining appropriate responsibilities that go with the right (if established
c. establishing responsible organisations sufficiently capable of delivering on those responsibilities at the regional and national levels

Once the nature of the recreational "right" including its responsibilities has been clarified and an organisation capable of managing those responsibilities has been established then the Crown can step back and allow sectors to trade their annual shares of the fisheries based on a 'willing-seller willing-buyer' basis.

Under this scenario sectors can exchange shares in some fisheries for shares in others allowing market forces to operate revelling the true value of the fisheries to each sector. Initially this should only involve trading of some or all of the allowable catch for that sector for the next fishing year. Once experience is built in this, more long-term trades could be allowed for.

Section 6: Local area management

138. The ***Shared Fisheries*** paper suggests the need for management at scales smaller than Quota Management Areas to "help increase the value of shared fisheries, especially for customary and amateur fishers in inshore areas". It proposes three methods to achieve this, one or more of which could be implemented. These are:

Proposal A Providing for a coastal zone or areas where key species are managed for non-commercial fishing – the proposal is to extend current zones with commercial bulk-fishing exclusions to cover the whole coast out to perhaps 2km.

Proposal B Providing for sector-initiated proposals to protect or strengthen specific interests e.g. to create amateur fishing havens closed to commercial fishing or to exclude bulk-fishing methods from particular areas.

Proposal C Creating area-based fisheries plans – the idea is to develop plans to cover all shared fisheries within nominated areas such as harbours.

Implications and concerns

139. These proposals are designed to exclude commercial fishing on a local area scale. The cumulative effects of such area exclusions will result in reduced access for the commercial sector to take their legal entitlements. If areas are to be closed redress should be provided. However there is an alternative option not yet canvassed in the discussion document that would avoid the need for redress altogether.

140. The paper's authors have also not reported that there are already a number of provisions in the Fisheries Act for sector initiated proposals including section 186A as well as a considerable number of both formally closed areas and of voluntary undertakings covering areas around the coast where commercial fishers do not operate in order to enhance the amateur fishing experience. Some of the closures are seasonal – linked to holiday periods or seasonal species abundance – others are year round. These voluntary and compulsory exclusions, and the statutory powers already available need to be considered before there is any progress down the path of this proposal. Given this, Te Ohu can not provide informed comment as the document lacks sufficient detail on these important components of the current system.

141. A consequence of Options A and B is that the local area tools to be developed for the recreational sector could directly compete with the non-commercial provisions in the Fisheries Settlement namely Taiapure and Mataitai. Te Ohu raised this issue with the Government in our submission on *Soundings* in December 2000 where we submitted:

> *"The Commission opposes the erosion of commercial rights represented by the proposal for Coastal Zones that arrogate a preference for recreational fishers. The Commission considers that the desire by recreational and customary fishers to enhanced local stocks can best be dealt with through the existing mechanisms of mataitai, taiapure and management plans, once basic entitlements and organisational issues are addressed…"*

142. Te Ohu can not support the advancement of these local area tools because they will undermine both the commercial and non-commercial components of the Fisheries Settlement.

143. Proposal C provides the only viable alternative but only where the area chosen is of a sensible size for fisheries management. Te Ohu would not be able to support an area based plan where it does not include a suitable bio-geographical range for the species that are the target of management. It is highly unlikely that a harbour is of sufficient size to manage fisheries except for some shellfish stocks. Management of small areas often only results in a transferral of effort into another nearby zone – moving the problem not solving it.

Status Quo – Utilise the current tools available

Encourage recreational fishers to support the customary tools or Participate in area based fisheries plans

Recreational fishers should be encouraged to support the local area management tools already provided within the Fisheries Act including method restrictions, area closures, mataitai and taiapure.

In instances where sectors have fully tradable rights (as described in section 5 above) area based fisheries plans would provide an ideal tool to negotiate sector interests. This proposal would be improved by consideration of the bio-geographical range of the target species for management.

Section 7: Redress following adjustments in allocations or access

144. The ***Shared Fisheries*** paper suggests that if the Government proposes changes to allocations or access, any significant costs that would be imposed on the commercial sector could be assessed and the need for redress considered. It offers two options:

Option A Leave redress with the Courts – this suggests that the industry could rely on common law to seek compensation.

Option B Provide a specific process for consideration of redress to the commercial sector – an analysis would have to be provided to decision makers assessing the costs and benefits of the proposed changes. Decision makers would then decide whether to proceed with the proposed change. They could also decide to pay redress or leave Courts to consider whether redress was warranted.

Implications and concerns

145. The Fisheries Settlement is stated in legislation to be full and final. The Maori Fisheries Act 2004 contains provisions that mean that the quota involved will always be held by all Iwi. Te Ohu opposes any proposals that result in compulsory transfer of the use of ACE arising from that quota or the reduction of quota shares for any reason other than for sustainability purposes.

146. There are very few circumstances where Government now uses compulsory acquisition as the means to effect a transfer of use of property between sectors in society. Currently this is usually only applied where space is needed for public goods infrastructure. Te Ohu considers that the uses contemplated by the proposals in the ***Shared Fisheries*** paper do not meet the criteria for compulsory change and a 'willing-seller willing-buyer' approach should be followed. This is particularly important where Fisheries Settlement assets are involved.

147. The redress options in the ***Shared Fisheries*** paper provide some acknowledgement that Government can not simply confiscate property rights without considering the associated costs. The inclusion of this section in the paper is to be applauded in principle although it will need clarification and strengthening if the alternative willing-buyer willing-seller approach that we support is not followed.

148. While the options presented acknowledge that the "effects" on rights will form the basis for redress to be provided what is unclear is what is "significant level of effect".

149. A further matter that requires consideration is the size of the area from which commercial fishers may be excluded to provide for recreational zones. While the size of any single proposal may be small in some instances the effect may be big particularly where there is more than one exclusion area in an overall QMA. Also in those fisheries where in practice fish are only caught in a small portion of the overall QMA, then any restrictions that affect that portion will be much more significant than the overall ratio of areas considered. For example Paua and Crayfish are two such species that are not homogeneously distributed throughout the whole QMA. Of particular concern these are the same species for which Maori hold significant quota holdings.

150. Without further clarification and alteration to the proposals these options could assist the Government to manage risks associated with redress and not to directly offer a fair, consistent and transparent process for redress.

151. If compulsory acquisition is to be followed (against our alternative proposal) what is needed is a fully developed and agreed set of criteria. Option B needs to be strengthened by including the considerations mentioned above and made fully transparent ahead of any recreational coastal zone or reallocation taking place. We provide the components for this proposal to be strengthened (below)

Suggested Alternative Approach or Improvements to the Redress Proposals

Te Ohu advocates a willing-buyer willing-seller approach to future reallocations. In this circumstance there is no need to provide a redress proposal.

However if the redress proposal is progressed then a transparent and comprehensive redress proposal will be needed. This will send a clear message that in New Zealand property rights are valued and respected.

Te Ohu insists that the onus of proof should fall on the Crown to show that there is no impact resulting from changes ultimately resulting in the compulsory acquisition of rights

In these circumstances the Crown must provide full market compensation plus adjustment assistance unless it can demonstrate no impact

Therefore clear criteria will need to be developed that articulate:

a. what constitutes a “significant effect”.
b. what basis will be used for determining the value of compensation provided.

Agreement on these criteria and the process ahead would be needed prior to advancing any shifts in allocations or access.

Section 8: Representing amateur fishers’ interests

152. The ***Shared Fisheries*** paper argues for a greater involvement by amateur fishers in fisheries management, particularly in contributing views into the decision-making process and in the development of fisheries plans. It notes that current organisations find it difficult to generate funding and to represent all amateur interests.

153. The ***Shared Fisheries*** paper proposes the creation of an Amateur Fishing Trust, to be funded mainly by Government. The trust’s mandate would be to work with existing fishing organisations to provide professional input into fisheries management, fund projects and promote the development of a representative and funded structure for the amateur fishing sector.

Implications and concerns

154. We agree with the idea of establishing an organisation that can represent and manage the interests of the recreational sector. In our view, such an organisation should be independently funded and be accountable to its membership. Such an organisation should also have the mandate to manage catch reporting and negotiate directly with the commercial sector to resolve differences of opinion or to agree on an exchange of shares in shared fisheries on a ‘willing-seller willing-buyer’ basis.

155. However in the context of the other proposals set out in the discussion paper, the proposed Trust could be seen to be a Government funded lobby group set up to represent and promote the political interest of the sector. While Te Ohu would agree with the need for an organisation to manage the recreational sector's activities, this proposal will not achieve these needs.

Suggested Improvements to the Amateur Fishing Trust

An organisation is needed to manage the responsibilities of the recreational sector agreed upon. These responsibilities may include:

a. collating and reporting sub-sector catches at regular intervals
b. managing sub-sector catches within the overall recreational allocation
c. trading recreational sector shares with the commercial sector
d. negotiate fisheries plans with the commercial sector.

Such an organisation will need to be independent of the Government and self funding. Such funding will only be possible if the trust has the support and mandate of the recreational sector to deliver services in the sector's interests. To achieve this the recreational sector need to have positive incentives to support the trust financially. Such services might include:

a. those mentioned above
b. sector co-ordination and professional submission writing services.

Section 9: Having your say

156. We note that the proposed next step to this policy package reform is to get Government decisions on the final policy in June 2007.

157. Te Ohu considers that the number of proposals and options contained within the discussion document are of such broad reaching consequence and yet lack a full range of options for achieving the aims, pose a significant threat to the fisheries settlement and are described in insufficient detail to be able to comment fully on the potential consequences for the fisheries settlement. We do not therefore consider that the consultation process provides us with sufficient information upon which to comment.

158. Given this situation we expect that the process to be followed from this point will involve discussions with the fisheries settlement stakeholders (namely Iwi, AFL and Te Ohu) after having giving serious consideration to this submission and :

- The consultation requirements spelt out by Justice McGechan
- The Cabinet caveats provided at the outset of this policy reform and
- The Principles of the Treaty of Waitangi – all of which we have discussed in more detail at the beginning of Part C of this submission.

Suggested Improvements to the Consultation Process for Shared Fisheries

Te Ohu recommends that the Minister of Fisheries enter into discussions with the fisheries settlement stakeholders (including Iwi, AFL and Te Ohu) to progress proposals that are consistent with:

- The consultation requirements
- Cabinet instructions
- The Principles of the Treaty of Waitangi

Appendix 1: Overview of how fisheries are currently managed in New Zealand

How is sustainability managed?

1) Maximum Sustainable Yield (MSY) is a management target dealt with in section 13 of the Fisheries Act[5]. In population modelling terms there is no single point on a population curve where MSY can be achieved – rather there are a range of possible points from which to choose depending on circumstances. Factors affecting MSY include time and space - the longer the time period and the larger the geographical space in which you view a population model then the more fish (or yield) that can be sustainability extracted.

2) To date, the general rule has been that the Government must manage fisheries on the basis of MSY and can't change sector shares of the TAC except to accommodate sustainability concerns. Any changes in shares for reasons other than sustainability would attract compensation.

How is the TAC established and reviewed?

3) The Total Allowable Catch (TAC) is derived from the MSY. That is the maximum amount of fish that can safely be removed from a fish-stock while still leaving sufficient fish in the water to grow and breed.

4) A stock assessment is conducted that estimates the total increases in biomass (births and growth) less the total decreases (deaths through natural mortality and harvest extractions) to determine where the TAC should be set.

5) Catch information obtained from both the commercial and customary sectors forms the basis for estimating the annual extractions from these sectors. However the lack of catch reporting information of an equivalent nature from the recreational sector causes problems in obtaining a true picture of total extractions.

6) In fisheries where recreational fishers take a large or the majority of the total harvest there is no means of evaluating whether total recreational extractions are exceeding sustainable limits. This has the potential to put such stocks at risk.

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[5] Section 13 states: "(1) Subject to this section, the Minister shall, by notice in the Gazette, set in respect of the quota management area relating to each quota management stock a total allowable catch for that stock, and that total allowable catch shall continue to apply in each fishing year for that stock unless varies under this section.

The Minister shall set a total allowable catch that –

- Maintains the stock at or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks; or
- Enables the level of any stock whose current level is below that which can produce maximum sustainable yield to be altered –
    i. In a way and at a rate that will result in the stock being restored to or above a level that can produce the maximum sustainable yield, having regard to the interdependence of stocks and any environmental conditions affecting the stock; and
    (ii)Within a period appropriate to the stock and its biological characteristics; or

Enables the level of any stock whose current level is above that which can produce the maximum sustainable yield to be altered in a way and at a rate that will result in the stock moving towards or above a level that can produce a maximum sustainable yield, having regard to the interdependence of stocks…"

7) To date the Government has addressed the recreational catch reporting problem by conducting recreational surveys every five years. These surveys have proven to be extremely unreliable with as much as 300% variation in the results between them. Surveys such as this are extremely expensive to conduct in an estimated range of $1-2 million each. Despite these results the Government has persisted with this method of obtaining the recreational harvest estimates stating that it is the "best available information".

8) Managing fisheries using five year old unreliable survey information is clearly no way to manage fisheries under stress and at risk. The obvious alternative would be to implement, or progressively implement a recreational reporting requirement so that total extractions can be identified as a basis to determine sustainable levels of extractions.

Allocating shares in the TAC

9) Legislation creates no priority for any sector although it states that an allowance must be provided for customary and recreational fishers before setting the Total Allowable Commercial Catch (TACC) [6]. Indeed the 1997 Snapper court case determined that there was no priority inherent in the fisheries Act and that :

"The Minister has the discretion to allocate the TAC on a case by case basis weighing all competing demands"

10) In recent years, the Government has introduced a distinction between a "claims based model" (allocating shares of the resource based on historical patterns of use) versus a "utility model" (allocating shares based on the utility that sectors will receive from the resource) when introducing species into the QMS. MFish has been working to advance the utility model using the concept of "maximising value", so that the sector that MFish analysis suggests values the resource most will receive the greater share of the TAC for a stock when introduced. The primary question raised by this approach is: how are these values specified, and is it appropriate for the Government to determine which sector places the highest value on particular fisheries rather than direct agreement between those sectors?

11) Te Ohu's view on this has always been that besides the fundamental responsibility to protect the underlying sustainability of the resource that:

- the customary sector should receive the highest priority as there are ongoing obligations on the Government to provide for the customary use and management practices of tangata whenua
- the commercial sector should receive the next priority because it (a) forms a component of the Article II rights protected under the fisheries

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[6] Section 21 deals with Matters to be taken into account in setting or varying any total allowable commercial catch. Its states:
"(1) In setting or varying any total allowable commercial catch for any quota management stock, the Minister shall have regard to the total allowable catch for that stock and shall allow for
(a) The following non-commercial fishing interests in that stock, namely-
(i) Maori customary non-commercial fishing interests; and
(ii) Recreational interests; and
(b) All other mortality to that stock caused by fishing."

settlement and (b) forms the basis of a rights-based management system into which Maori are now locked-in

- the recreational sector should receive the last priority in this hierarchy as there interests have no clearly defined rights.

Managing catch within allocations

12) Both the commercial and the customary sectors have rigorous permitting and reporting requirements attached to them with stringent compliance regimes and penalties for non-compliance[7].

13) For example, a commercial fishing vessel must be permitted before going fishing, comply with gear and area restrictions and also record their catches following fishing then complete aggregate reports of catch on a monthly basis. The commercial sector is also required to fund management of the fisheries through levies paid to MFish based on their quota value.

14) The customary sector has to obtain a permit or authorisation prior to going fishing and in the case of the customary regulations report catch to the Kaitiaki who then must lodge quarterly aggregate reports with MFish.

15) In contrast, the recreational sector is not required to have any permits or authorisations prior to going fishing or report their catch. While there are bag limits and method controls there is little compliance effort and very little information upon which to proceed with prosecutions.

16) To date management of the recreational sector within its share has not been possible because there is no way to link the controls (i.e. bag and size limits) to the overall allowance in the absence of a reporting system.

The basis of the recreational share

17) The Minister is required to set the recreational allowance and this has been occurring since 1986. At the time of QMS introduction there was extensive input from recreational fishers (and their organisations) as to their share of the fisheries and exclusions of commercial fisheries from certain areas. As is the nature of such negotiations the recreational sector did not get all it wanted.

18) To complete the rights-based approach the nature and extent of the recreational share needs to be defined. There have been a number of attempts to initiate this over the years.

19) The "*Soundings*" discussion paper released by MFish in 2000 was an example of a recent attempt to clarify the recreational interest, although the process resulted in an unexpected response from part of the recreational sector when the "Option 4" group intervened with a mass petition to prevent any type of licensing system. Following this reaction the Government abandoned those proposals to improve management of the recreational sector – stating instead that there was "insufficient information" upon which to base management decisions. However they have not until now given an indication of what information was needed. Namely, information concerning value and maximising value.

[7] More detailed information on reporting requirements is contained in Appendix 1.

20) During the last 5 to 10 years, while there has been good progress in developing clearly specified rights and responsibilities in the commercial sector and to a lesser extent the customary sector, there has been a growing number of instances where recreational fishers have expressed their claim to a “right” to catch fish. A number of prominent examples including the Snapper Court case in 1997, the current Kahawai Court action and at a local area scale the Kaipara Harbour, the Hauraki Gulf and the Marlborough Sounds. In all of these instances conflict resulted without any tangible management changes. In one instance gun shots were fired at a fishing vessel.

Appendix 2

An outline of the permitting and catch reporting responsibilities of the commercial and customary non-commercial sectors.

The commercial and customary sectors are required to:

1. Obtain approval to harvest prior to going fishing

   Commercial fishers are required to hold a fishing permit and obtain Annual Catch Entitlement (ACE) or otherwise later pay a deemed value for any fish caught with out ACE

   Customary fishers are required to obtain a permit (under regulation 27A of the Fisheries Act) or an authorisation (under the customary regulations) from an authorised Kaitiaki indicating:
   - how much of each species may be taken under the permit or authorisation
   - from what area the fish may be taken
   - methods that may be used to harvest
   - specified purpose for which the harvesting may take place (i.e. hui, tangi or other purpose)
   - any other conditions the Kaitiaki considers necessary.

2. Follow strict reporting requirements

   Commercial fisheries are required to complete a Catch Effort Landing Return CELR or Catch Landing Return (CLR) to provide details on landed catch.

   Customary fishers are required to complete a report back to the Kaitiaki on the quantity of fish gathered under the authorisation (not required under the temporary regulation 27A requirements)

3. Follow additional aggregated reporting requirements

   Commercial fishers are required to complete Monthly Harvest Returns (MHR) to the Ministry of Fisheries with a summary of the quantity and species of fish caught in that period

   Customary fishers are required to complete quarterly catch landing returns reporting the species and quantities of fish caught in each quarter.

4. Comply with record keeping requirements

   Commercial fishers are required to keep copies of all reports and including any ACE trading and Licence Fish Receiver purchase and unloading dockets

   Customary fishers are required to keep copies of authorisations issued, quarterly reports and report the total number and quantity of fish taken under the customary framework at an AGM of the tangata whenua who appointed them.

5. Compliance proceedings for breaches of the regulatory procedures are well advanced for both the commercial and customary sectors.