TE OHU KAIMOANA

MĀORI FISHERIES TRUST

Te Ohu Kaimoana's preliminary comments on the Government's consultation document

"A New Marine Protected Areas Act"

January 2016

Contents

Introduction

1. The Government's discussion document "A New Marine Protected Areas Act" has been released for consultation. Submissions on the document are due by 5pm 11 March 2016.

2. Brief responses to the main aspects of the document are set out in Section A below. These have not been discussed outside Te Ohu Kaimoana (Te Ohu) and should be seen as preliminary.

3. Our preliminary analysis is being made available to iwi to assist their consideration of the proposals. More detailed background including Te Ohu's general position on protected areas is also included in Section B of these comments. A summary of Te Ohu's analysis of the Kermadec Ocean sanctuary is attached as Section C. We will use these sections as the basis for a more comprehensive submission following feedback from iwi.

A: The Government's proposals

The need for a new approach to marine protection

4. The document notes that the current approach to marine protection incrementally allocates areas for differing purposes, rather than creating a representative and adaptable network of MPAs. It lists a number of shortcomings with this ad-hoc approach including:
   - lack of coordination
   - lack of ability to consider a range of tools for marine protection and to consider proposals in a way that minimises costs for all parties involved
   - the location of protected areas is not considered in a way that maximises economic and environmental benefits for NZ and consideration of the effects on existing and future uses and values is inadequate, potentially limiting the sustainable growth of the marine economy
   - provision for Maori involvement in the development and management of marine protected areas is inconsistent and often inadequate
   - It does not address recreational amenity values including those of recreational fishers in high demand areas
   - It does not enable the creation of representative and adaptable network of protected areas across the territorial sea
   - It doesn't provide a dynamic approach for changing or improving protection as new information becomes available or as new threats emerge.

5. Te Ohu agrees with many of these statements. However they are only part of a broader problem: we do not have an integrated system for managing the effects of multiple activities on the marine environment. There is no over-arching framework that sets out goals for the marine environment, or that assigns acceptable ranges of impacts of various activities that can then be addressed through the different statutes.

6. Marine "protection" needs to be seen in the broader context of marine management and in light of threats and risks to marine biodiversity. The use of marine protection tools needs to be based on a sound assessment of the risks to marine biodiversity.

7. The lack of a framework means there is no comprehensive system for monitoring (or sharing the results of monitoring) the effects of activities carried out by different sectors. Consequently the

cumulative risks to marine biodiversity are not identified and monitored systematically. If a cumulative picture was available from monitoring, management responses could be made, based on the assessment of risks and their likely causes.

8. Te Ohu considers that, where the risk arises from a single sector, management action to address risks should be taken using the statutes that manage the activities that create those risks, to the greatest extent possible. However where the risks are cross-sector or the degree of protection exceeds that needed for sustainability of the marine biodiversity, the most appropriate cross-sector management approach should be used to manage those risks to marine biodiversity to the level desired, while recognising and offsetting the impacts of those mechanisms on lawful sustainable activity. The most appropriate response may or may not involve one of the tools proposed in the draft MPA policy.

9. It is appropriate that sectors like fishing operate under their own statutes, such as the Fisheries Act. That Act contains tools to manage any risks from fishing, including adverse effects on the aquatic environment. Section 9 of the Fisheries Act sets out environmental principles that decision-makers must take into account, including maintenance of the biological diversity of the aquatic environment. The Act also provides a range of measures to enable decision–makers to do so. Te Ohu is of the strong view that, where fishing is the only stressor on the marine environment (including the ecosystems that support target fisheries), Fisheries Act measures must be the mechanism used to maintain biodiversity. If sustainability is ensured by measures applied under the Fisheries Act but society wants greater levels of conservation, these additional restraints are plainly not sustainability measures.

10. Te Ohu also considers that the allocation of access to fisheries resources between fishing sectors is a matter for the Fisheries Act. This applies whether the decision is about sharing the Total Allowable Catch between the sectors or spatial separation that aims in particular places to restrict access by one or more fishing sectors while allowing it for others.

11. Consequently "the problem" of recreational access is not an issue that should be included in these proposals. Establishing recreational fishing parks will not create no greater levels of biodiversity protection. Excluding commercial harvest from areas will result in greater effort in the remaining available area and the greater intensity in fishing pressure will put greater pressure on biodiversity in that remaining area. To minimise this outcome, reductions in catch will likely be required. As a result the impacts on commercial fishers of the exclusion and catch reduction will need to be addressed perhaps through the measures set out later in the consultation paper.

12. Importantly we note that the most robust survey of recreational harvest concluded that 530,100[1] people fished on a recreational basis in 2011-12, an average of 11.9% of the population. This compares with 88% of New Zealanders who eat fish at least once every month, with some 45% of us enjoying it at least once every week.

13. The creation of recreational reserves under a Marine Protected Areas Act is symptomatic of our inadequate policy on shared fisheries. It seems to us to be a "quick fix" to a political problem

[1] This represents the mean of between 479,400 and 581,700 people with those limits equating to between 10.8% and 13.1% of the New Zealand population at that time,

generated by strong lobbying by the recreational sector. It has nothing to do with the protection of marine biodiversity from risk. While the measures proposed to be delivered to quota owners under the policy if a recreation fishing (only) area is established are a useful and welcome recognition that the impacts on commercial fishing should be offset where additional restrictions for non-sustainability reasons are imposed, the policy nevertheless should not be under the proposed Marine Protected Areas Act but under the Fisheries Act.

14. We agree that under the current Marine Reserves Act, provision for Maori involvement is inconsistent and inadequate. It is also important to note that there is generally a failure to recognise the full range of Maori interests that may be affected by marine protection proposals. However there need to be stronger provisions in the policy and Act to protect iwi / Maori interests in the Fisheries and Aquaculture Settlements. Under the settlements, these interests are extensive and complex including commercial and non-commercial interests. It is important this is understood to ensure all affected Maori interests can participate. Where protection proposals affect commercial interest in fisheries, this will mean that those proposals in turn affect numerous iwi quota holders: e.g. there are at least 20 Iwi recognised under the Fisheries Settlement holding quota in SNA1. Protection of the settlement interests should be provided for not only through processes of participation, but also as a principle that must be given effect in decisions.

15. Any proposal needs to be clear about the problem to be addressed, and the solution that deals with the problem should be the one that is effective while having the least impact on Fisheries Settlement interests. The Kermadec Ocean Sanctuary proposal is a good example of a solution that goes far beyond what is necessary – including unduly affecting Fisheries Settlement interests unnecessarily - to achieve the desired outcome. A summary of the Te Ohu analysis of the Kermadec Ocean sanctuary is attached as Section C.

16. The existing Marine Reserves Act allows extinguishment of Maori customary non-commercial rights (that cannot be transferred elsewhere) and diminishes commercial rights by reducing the area able to be fished economically. For some sessile species (like paua and koura), it has the effect of expropriating those rights.

17. Te Ohu considers the existing requirement in the Marine Reserves Act for concurrence to be given to any reserve by the Minister responsible for fisheries should be retained and strengthened. Any new provision should make clear concurrence will only be given by the Minister if he/she considers the reserve will not have undue adverse impacts on the Fisheries Settlement (including its commercial and non-commercial aspects). This provision recognises that the Settlement was agreed on the basis that if sustainability is achieved, Maori would be able to utilise fisheries.

The proposal: a new approach to marine protection

Objectives of the policy

18. The objectives of the policy and our comments are set out below.

A representative and adaptable network of MPAs is created over time to enhance, protect and restore marine biodiversity in NZs territorial sea

19. While the focus here is on a representative network of MPAs to enhance…etc marine biodiversity within our territorial sea, the broader context of integrated marine management is missing. In practical terms the policy consists of four tools that, if properly used, could be used to manage risks to biodiversity. Their application should be based on an assessment of risks to biodiversity but only applied where other measures are insufficient to provide the levels of conservation desired and their use is justified by those remaining risks. Before any steps are taken to set aside one or more areas, investigations into the actual biodiversity in those areas should be carried out and reports on the results made available. This information should ensure that the uniqueness[2] of any proposed area can be demonstrated and the risks appropriately assessed. It is important to ensure the right type and level of intervention is applied to obtain the additional protection necessary while minimising the impacts of that intervention on other lawful activity.

Decisions about environmental protection and economic growth are made in a planned and integrated way, based on sound evidence, to maximise the benefits to NZ.

20. Te Ohu agrees that decisions should be made in a planned and integrated way, based on sound evidence. Protection should be seen as part of a broader conversation about environmental management – where problems are clearly identified, objectives set and the right tools applied to achieve desired outcomes without undue impacts on other activities.

Customary rights and values are recognised, ensuring the principles of the Treaty of Waitangi are met and the Crown's Treaty obligations are delivered.

21. Te Ohu agrees. It is important the Crown recognises the full extent of customary rights. The Fisheries Settlement addressed Maori claims regarding their customary fishing rights – which included commercial and non-commercial components. The Waitangi Tribunal and New Zealand courts confirmed this to be the case, including that Maori customary rights also included development rights. The effects of protection mechanisms on the full extent of these customary rights needs to be assessed and avoided, remedied or mitigated as the need arises where they go beyond what is necessary to ensure sustainability. This may include the need for compensation where rights are adversely affected.

Collaboration is supported through meaningful engagement with iwi/Maori, local communities, business and the wider public.

22. Te Ohu agrees with the objective of collaboration – but it is not clear how this will work, how a collaborative process will be initiated and what relationship it might have with other planning processes – for example coastal planning under the RMA. There should be integration between the two: in many cases the risks to biodiversity in our estuaries and nearshore ecosystems are

[2] Earlier work on land showed that rather than the 269 unique ecosystems developed by separate regional assessors, in practice when looked at nationally, these reduced to 75. Using proxies rather than real data on biodiversity is likely to over-estimate the number of different systems.

greater as a result of land use and subsequent discharges into the marine environment and other activities such as reclamation and dredging, than they are as a result of harvesting activity.

Varying levels of protection and use are provided for, including consideration of all existing and future uses and values

23. We suggest amending the second part to "– taking into account risks to biodiversity and all existing and future uses and values."

NZs international obligations in relation to the marine environment are met.

24. It should be noted that New Zealand's obligations are multi-dimensional including those arising from UNCLOS, and indigenous rights, as well as those that apply to biodiversity. We would also note that those obligations offer each nation choices on how they will meet their obligations.

Proposed four categories for marine protection

25. These include:
    i. Marine reserves
    ii. Species specific sanctuaries
    iii. Seabed reserves
    iv. Recreational fishing parks.

26. Te Ohu doesn't have a problem with the idea of the first three tools in themselves, or the idea that they might have specific case-by-case objectives within an agreed purpose, and be adaptable. The main issue is when and how they might be applied in the broader marine management regime – and ultimately – their objectives.

27. On the fourth category, as spelt out above, Te Ohu does not agree that recreational fishing parks belong in these proposals. The broader question of allocation between fisheries sectors should be dealt with under the fisheries management regime as part of a shared fisheries policy. Within that context we would note that New Zealand has a history of communities working together to reach accommodation of one another's interest. There are numerous non-regulatory agreements that restrict commercial fishing in certain areas at certain times of the year to better allow for recreational interests. In this vein, there is some good work happening between the commercial and recreational sectors in Hawke Bay where collaboration to improve harvesting information is evolving. Incentives for greater collaboration of this type is needed.

28. In addition to this, as officials will know there are substantial areas all around New Zealand where access by commercial fishers is restricted in various ways ranging from complete prohibition of all methods all year to seasonal closures by particular methods with some of the restrictions being regulated and others voluntary.

29. The management of recreational fishing needs to be improved. If the government was to press ahead with recreational fishing parks, there should be a requirement to that Government or the recreation sector must provide robust estimates of recreational harvest within these parks. Mandatory reporting of all fishing on fishing charters within the recreational park and elsewhere should also be required including appropriate observation/ investigation of the accuracy of that information. Without that information we simply will not have a good enough database from

which to base fisheries management decisions both within the recreational fishing park and in the wider QMAs.

30. Where an exclusion zone is created, the effects on the commercial sector would also need to be addressed – the ideas set out in the section '*Recognising Economic interests'* when dealing with '*fishing'* and further developed in *Part 5: Recreational Fishing Parks (Compensation for Commercial Fishers)*, is a welcome start. Te Ohu would be pleased to assist the development of such mechanisms as they could then assist change in a principled manner.

Economic value of MPAs and recognising economic interests

31. It follows that Te Ohu agrees, if recreational fishing parks are to be established, an assessment of the effect on commercial fishing and provision for compensation are necessary.

32. As we have noted earlier we do not oppose measures being imposed under marine protection where the risks are from multiple lawful activities and the controls that can be placed on lawful activities under their own management regimes are insufficient to provide the level of protection society desires for those particular species or areas of 'at-risk' biodiversity.

33. We do not however agree that quota owners should not be compensated in relation to the establishment of the other three forms of "marine protection." The document states the reason to be "because they are measures taken for the purpose of ensuring sustainability (p 20)."

34. We do not agree that these measures are about ensuring sustainability. The language used in the document around sustainability and protection is very loose. It is not clear how sustainability is being defined within the new policy.

35. "Providing for utilisation while ensuring sustainability" is the purpose of the Fisheries Act. "Ensuring sustainability is defined as:
    (a) Maintaining the potential of fisheries resources to meet the reasonably foreseeable needs of future generations; and
    (b) Avoiding, remedying, or mitigating any adverse effects of fishing on the aquatic environment.

36. Sustainability measures are defined as "any measure set or varied under Part 3 of the Act for the purpose of ensuring sustainability (s2)". The application of these measures is carried out in accordance with the purpose, principles and processes provided for under the Act. As such, there are disciplines on the way sustainability measures (which can include catch limits, method controls etc) can be applied. The concept appears to have been taken from the Fisheries Act and applied to the Marine Protected Areas policy but without the disciplines contained in the Fisheries Act.

37. Mention is made in the document of the economic benefits of MPAs, including tourism, and supporting productive fisheries (e.g. through protecting spawning and nursery habitats) and sustaining food harvesting. Intertwined within these statements is a mix of objectives including generating economic benefits. We note that support for productive fisheries is already provided for under the Fisheries Act. We would be very concerned to see a regime that enabled a re-

allocation of economic benefits from the commercial fishing sector to other sectors without compensation.

38. The Kermadec proposal – that is defined in a Cabinet paper as a sustainability measure – is a good example of a proposal that has emerged from an undisciplined process. It does not provide us with confidence that there is clear robust thinking about what a "sustainability measure" actually is in this context. The effects of fishing on the area – if considered under the Fisheries Act – would not warrant such a response.

39. We note that the document states under this heading that existing non-commercial customary fishing will be fully recognised and maintained (p20). This is stated as if it applies generally in all 4 categories. While it could be expected to apply in recreational fishing parks (with mataitai and taiapure being examples of recreational fishing parks), this statement seems at odds with Table 1 that states that no fishing (customary or otherwise) will be able to take place in Marine Reserves. The document also states that the restriction or prohibitions to fish in Species- specific sanctuaries or seabed reserves will be assessed on a case-by-case basis and only allowed where this is deemed consistent with the sanctuary. It is clear that at least in Marine Reserves existing non-commercial customary fishing will NOT be fully recognised and maintained – those rights will be extinguished.

40. We also note a major inconsistency with the proposals in respect of oil, gas and minerals – where no MPA can be established in areas where there are mining, prospecting or exploration permits under the Crown Minerals Act. This is intended to ensure the industry has certainty. The commercial fisheries sector (including those commercial interests arising from recognition of Maori customary right) also requires certainty. It would be ironic if it is deemed that foreign participants in mining can be assured that their lawful activities cannot be impaired but the Treaty partner (using the assets from a settlement to carry out activity that is much more benign than mining) would have its rights extinguished without compensation. We note this applies to both commercial and non-commercial customary rights. Non-commercial customary rights have very clear spatial dimensions and are always only able to be exercised by particular tribal groupings – usually either marae or hapu based. They are not transferable and cannot be exercised "just up the coast" –into areas that "belong" to others – ie other marae or hapu are kaitiaki in the neighbouring zones.

How will it work – a new process

41. The discussion document notes that proposals will only be advanced if they adequately describe the environment and the benefits of protection, and assess the economic impacts on current and future uses in a particular area. These requirements are welcomed however they are at a very high level and provide little detail. The MPA Act should include criteria to determine what information is required. The criteria should include a requirement to consider risks and options to address the risks using the range of tools available in the Fisheries Act, RMA, and Crown Minerals Act etc.

42. The current law allows anyone to propose a marine reserve and initiate the process. The document notes that this results in an unplanned development. However the document is unclear about who can propose MPAs in the proposed "improved" regime. In the absence of a

restriction being suggested, it must be assumed that anyone will still be able to propose a marine reserve. That inevitably means implementation of these proposals will remain ad-hoc.

43. The document notes that different Ministers would take the lead responsibility for proposals depending upon the category of MPA. While it is claimed the new process will "allow ministers to take a planned approach to designing a representative and adaptable network of MPAs" it is unclear how that will occur - how will proposals be generated that collectively provide the representative network in a planned way? Will the designed network be set out so that advocates have a clear idea of what a successful proposal will be? Or will this only be apparent in retrospect with many applications being rejected? If the latter is likely to be the path way, there is potential for political pressure to drive the process rather than a plan with clear objectives.

44. The document notes that once ministers decide to initiate a proposal, two processes can be used:
    - A collaborative process or, if consensus cannot be reached
    - A board of inquiry.

45. Collaboration will need to involve all affected parties, a number of whom (including quota owners) will not be part of the "local community." In this regard, see also the section on Maori involvement above – all interested Maori must be consulted during the process for establishing MPAs. Te Ohu Kaimoana can provide guidance on affected iwi for any area – given its role as trustee and having allocated the majority of settlement quota to almost 58 iwi around the country. For fisheries interests, this will likely stretch beyond just the manawhenua in the area – the allocation methodology for the commercial part of the Fisheries Settlement as agreed by iwi and the Crown and set out in the Maori Fisheries Act means that all iwi (through their Asset Holding Companies) have interests and are impacted by changes anywhere within the quota management area for those fisheries they hold quota for. It will be important that the full range of interests all iwi/maori interests have the ability to participate.

46. We are concerned that the process will focus predominantly on whether or not an MPA proposal should be advanced. We consider it should first focus on what the key problems / risks to biodiversity are, and then consider what the full range of tools are to effectively mitigate those risks. This could include a MPA but it may require a broader range or more appropriately tailored set of responses to be effective, without being unduly intrusive. As we have set out, we consider the key task is to identify what the problem is and then tailor effective responses to that while minimising the impact on lawful sustainable activities.

47. We note that decisions on MPAs are intended to be "aligned" and will be recognised in Regional Coastal Plans. While in-principle this seems sensible, we reiterate the wider problem that we see in the lack of an overarching framework for managing the marine environment, including common goals to which each should be aligned.

Reviewing MPAs

48. We agree that MPAs should be reviewed and should be adjusted to be fit for purpose over time. This will of course include rescinding restrictions if the level of threats to the biodiversity in question is diminished.

Improving Maori involvement

49. We support the proposal to recognise the Treaty of Waitangi and strengthen iwi/Maori involvement in marine protection processes. However we consider that this intention should be implemented in practice at every level of the decision-making process, including whether or not there is a need to establish an MPA in the first instance.

50. More specifically, we note there is an intention to maintain the integrity of rights and interests recognised under the Marine and Coastal Area Act. As we have set out earlier, Te Ohu considers the same should apply in respect of the Fisheries Settlement and the Maori Fisheries Act as well as the Maori Commercial Aquaculture Settlement (and regional aquaculture settlements). As a principle, when designing a response to a marine management objective, the solution chosen should be the effective solution that has the least impact on the settlements (see also earlier comments).

Recreational fishing parks

51. We have already commented that we do not consider recreational fishing parks to be a marine protection tool, and that the need for such measures should be considered under the Fisheries Act as part of a more developed shared fisheries policy.

52. In addition, it is not clear that it is necessary to exclude commercial fishing from each of the proposed areas to enhance recreational values. Information on commercial catches of particular species is provided on pages 28 and 31 of the discussion document. However without the complete picture, i.e. a sense of what proportion of the overall catch for each species within the proposed recreational fishing parks that these commercial amounts represent, it is unclear that commercial fishing is really a problem for the recreational fisher. For instance, the document identifies 261 tonnes of snapper is caught as commercial catch in the Hauraki Gulf. How does this compare with the recreational catch in the proposed recreational fishing park? Is commercial fishing the problem? Or is the growing number of recreational fishers in high population areas affecting the experience of individual recreational fishers?

53. For the Hauraki Gulf, the document appears to be inconsistent with respect to flatfish. It suggests that commercial fishing of flatfish should be able to continue (as these fish are prolific and not heavily targeted by recreational fishers) but then states that they will be included amongst the finfish that are proposed to be exclusively non-commercial within the proposed recreational park. We also assume but it is not clear that when the document states that the finfish species will be exclusively non-commercial within the proposed recreational park, that does not include scallops as these are shellfish not finfish and are currently already managed with separate areas for commercial and non-commercial fishers, even though the document notes scallops are among the key species targeted by recreational fishers.

54. As noted earlier, we welcome the recognition that displaced commercial effort will be appropriately compensated. Te Ohu would be pleased to help develop a suitable methodology.

Monitoring

55. Monitoring is essential to assess whether any of these measures achieve their objectives and have the ability to adapt. Te Ohu welcomes the requirements for this to happen. It highlights the need for some baseline level records before the restrictions occur – these should be both within and outside relevant areas.

B: Te Ohu Kaimoana's general position on the use of protected areas

The Fisheries Settlement(s)

56. Maori took the Crown to court in 1986 after the Crown introduced the Quota Management System (QMS) and at the same time deleted s 88(2) of the Fisheries Act (1983) that had stated that nothing in the Act affected Maori customary rights to fishing. 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.

57. The New Zealand Courts heard the action and Justice Greig of the High Court in 1987 reported

> ***I am satisfied that there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole of the coast of New Zealand, at least where they were living.***
>
> ***That was divided into zones under the control and authority of hapu and tribes of the district. Each of these hapu and tribes had the dominion, perhaps the rangatiratanga, over those fisheries.***
>
> ***Those fisheries had a commercial element and were not purely recreational or ceremonial or merely for the sustenance of the local dwellers".***

58. Further the Courts noted that Article 2 in the English version of the Treaty of Waitangi sets out, in as explicit form as set down anywhere in English law, the clear ownership of fisheries by Maori. The Courts recommended to the Government that it enter into negotiations with iwi/Maori.

What was agreed to

59. The Crown agreed that customary fishing rights :
    a. included both commercial and non-commercial dimensions
    b. were not limited to historical take, using earlier technology but involved opportunities in the past, present and future with customary rights holders able to take up development opportunities as they saw fit
    c. involved genuine ability to manage all fishing activity within kaitiakitanga.

60. 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 for the long-term with greater confidence.

61. Maori and iwi accepted and endorsed the QMS because the rights were granted in perpetuity and came with them significant incentives to contribute to the sustainable management of fisheries and their supporting environment.

62. In light of their acceptance of the QMS and the agreed form of management, and in exchange for their customary fishing rights Maori were granted:
    - Quota (10% of species introduced in 1986 and up to September 1992 & 20% of species introduced after September 1992
    - Sufficient cash to buy a half share in Sealord
    - An undertaking that the Crown would provide regulations that enabled Maori to manage their non-commercial customary fishing activities; and
    - Opportunities to participate in statutory bodies and processes making decisions on fisheries management.

63. Maori accepted that, as part of the Settlement, the level of catch for any fish stock would go up or down on the tides of sustainability. Maori welcomed that having practised it as kaitiaki to protect their resources. Further they considered the perpetual rights under quota provided the incentive to manage for the longer-term. For example, if they set some fisheries to 'fallow' in the short term, they would be able to access those fisheries in the longer term when they were healthier.

64. Maori did not agree that government could then subsequently alienate or take away the fishing rights granted to them under the Settlement. They did not accept that if they were to implement measures to manage stocks within sustainable levels – either as part of the commercial or non-commercial customary sector - their rights could be transferred to other sectors, including the recreational sector or into permanent non-take reserves. In their view such a re-allocation would extinguish their Fisheries Settlement rights.

    In his High Court decision in 1997 McGechan J, noted:

    "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."

65. 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 a new stock in the QMS.

Overarching principles

Recognition of the Fisheries Settlement

66. Te Ohu and iwi accept the legitimacy of government to exercise Article 1 rights under the Treaty to establish laws and policies to manage fisheries and the environment. However the exercise of that power must be carried out in manner that adequately recognises Article 2. When considering options to address management problems, a Treaty responsive approach would lead the government to choose solutions that are effective but have the least impact on Article 2 rights. Maori know from experience that you cannot get durable solutions by solving one grievance/ issue, but create another in doing so. Care must be taken to build a system in which all participants have confidence in the durability of their rights and incentives to collaborate.

67. Exercising Article 1 rights in this manner is consistent with the Crown discharging its responsibilities to provide active protection of the Fisheries Settlement. The assets provided to Maori and their ability to participate in fisheries and related management decisions became the currency of the Settlement.

68. The current Marine Reserves Act requires the Minister of Conservation to gain the concurrence of the Minister with responsibilities for fisheries management before recommending a marine reserve to the Governor-General. The Minister, in exercising his responsibilities, needs to consider inter alia whether a marine reserve will unduly interfere with customary non-commercial and commercial fishing. This is an important safeguard for the settlement.

Other principles

69. When considering proposals that look to restrict access for ongoing fishing, Te Ohu suggests that the following principles be applied:

- **Partnership** – investigate, develop, agree and subsequently implement any protection proposals in the marine environment through an active partnership with the iwi of the region involved
- **Focus on the outcome** that the proponent/applicant/community wants to achieve, not the tool. In other words, first decide what it is you want to achieve;
- **Adopt a risk-based approach** – what risks need to be managed in order to achieve the identified objective? Measures should be targeted at and commensurate with identified risks. This of course also requires that there is detailed knowledge about what is threatened as well as the threats;
- **Choose the least cost tools that achieve the outcome** – after assessing risks, is any intervention needed? If so, look at the full range of tools that could be used and then select the one that will best achieve the agreed objective while having the least cost in terms of impacts on other lawful activities;
- **Fair process** – provide a process that enables engagement of all affected parties from planning through to implementation;

- **Monitoring** - make sure that both baseline monitoring (prior to implementation) and subsequent monitoring of the area being protected by the spatial tools occurs at regular intervals. This is essential to determine whether the agreed objective is being met. If it is not, first the goal / objective should be confirmed and once this is clarified, the tool(s) should be adjusted;
- **Spatial tools are not the only mechanisms** to achieve agreed objectives – often sustainable utilisation across a broader spatial scale can be more effective than a strict protection / utilisation dichotomy;
- **Multiple compatible uses** are preferred, where possible, over single exclusive uses of areas as they can give rise to greater benefits at less cost;
- **Keep fisheries sustainability separate** from other objectives – i.e., the QMS and Fisheries Act sustainability measures are the main tools for ensuring fish stock sustainability and managing the effects of fishing on the aquatic environment;
- **Protection of rights** – due consideration must be given to impacts on the exercise of existing fishing rights, including incentives for long-term sustainability and economic development;
- **Adjust** - Any decision that could have the effect of undermining the integrity of commercial property rights and Treaty rights should require some "**rebalancing**" of the system – e.g., through catch reductions accompanied by compensation or adjustment assistance.

C Proposed Kermadec Ocean Sanctuary

To: Iwi Leaders 3 December 2015

From: Laws Lawson, Principal Adviser, Te Ohu Kaimoana

PROPOSED KERMADEC OCEAN SANCTUARY

1 At the United Nations on 29 October 2015, the Prime Minister announced the Government's intention to establish the Kermadec Ocean Sanctuary through special legislation.

2 The proposal will prohibit mining and all fishing within FMA10 - the entire EEZ around the Kermadecs. The proposed area is twice the landmass of New Zealand and 15% of NZ's entire EEZ. It will apply not only to fisheries located solely in FMA 10 (QMA10) but also those that are part of a wider quota management area including those fishstocks that pass through, such as highly migratory species (HMS) like Southern Bluefin Tuna.

3 Te Ohu Kaimoana opposes the proposal in its present form. It unnecessarily undermines the Fisheries Settlement. We invite iwi leaders and advisors to work with us on a coordinated programme of engagement with Ministers and members of Parliament to set out our concerns about the Kermadec Ocean Sanctuary and seek to agree:

i. either a suitable compromise that achieves sustainability, utilisation and preservation objectives consistent with New Zealand's announcement but without detrimental effects on the Fisheries Settlement; or

ii. adequate compensation for the expropriation / extinguishment of rights by the proposal as well as agreement by Ministers on the process going forward for the proposed Marine Protected Areas bill that adequately recognises the Fisheries Settlement.

4 Our concerns with the proposal are summarised below:

The proposal undermines the Fisheries Settlement

- The proposal expropriates/extinguishes iwi customary commercial and non-commercial rights in FMA10, contrary to the Crown's duty to actively protect a settlement as part of its Treaty responsibilities. These rights include a development right. The government suggests that if we are left with the quota -even though it will not be able to be fished – it will not affect the Settlement.
- The proposal put to Cabinet states that the QMA10 quota held by Te Ohu on behalf of iwi is an "administrative quirk" and will never be used. This contradicts the process conducted by an earlier administration to analyse which fishstocks should and were introduced into the QMS for that area – in anticipation of future development.
- As a result of that process, the Maori Fisheries Act provides for Te Ohu to hold quota for QMA10 stocks until commercial catches can be assured. Once that occurs, the quota is to be allocated and transferred to all 58 iwi by population.

The sanctuary is not a sustainability measure

- The proposal claims the sanctuary is a sustainability measure needed to protect the unique biodiversity of the area. The use of the term conveniently justifies avoiding the payment of compensation to affected fisheries rights holders but with no clear grounds.
- While mining needed to be prohibited in zones where there is unique biodiversity, in practice fishing already cannot occur within the Territorial

sea around the Kermadecs as a marine reserve has been in place since 1990, or in deep water where the industry agreed to establish a Benthic Protection Area (BPA) across the whole Kermadec EEZ (the whole of FMA10) that was later put in regulation by government in 2007.

- The only fishing that can currently occur within the Kermadec EEZ (FMA10) is pelagic fishing which has no effect on the biodiversity the Sanctuary seeks to protect.

The proposal fails to identify the effect on quota rights and the quota management system

- The proposal states the impact on commercial fishing is only small as the current catch is small (<$200,000/year). Against MPI advice, it suggests the catch can be caught elsewhere in the EEZ. However the HMS species currently harvested in FMA10 are in the zone for 3 months of the year and then move out of it: the fish cannot be caught elsewhere at that time and consistent catch throughout the year is important for the high value niche markets involved.
- The proposal fails to identify the broader impact on the QMS and quota rights of dismantling a QMA. We note the Cabinet paper states the same approach will be used for marine reserves under the impending Marine Protected Areas proposal.

The proposal does not reflect the true value of FMA10

- The proposal ignores future development potential. Quota shares for 56 of the 96 species in the QMS exist within QMA10 – signalling future development potential. Te Ohu holds 840 million shares in these fisheries on behalf of iwi (see also above) and has been paying government levies on that quota.
- While the proposal suggests current catches of HMS species in FMA10 are all that can be expected, international work in the Pacific on fisheries management should lead to greater catches within this zone.
- Catches around the Kermadecs by the original joint venture fleet in the 1980s, and current activity by international fleets around the Kermadecs shows there have been and are plentiful fishstocks.

The proposal is likely to contradict international law

- While countries are free to establish no-take zones within their territorial sea it is doubtful they can do this over their entire EEZ.
- Under the United Nations Convention on the Law of the Sea (UNCLOS) New Zealand must make access available to other nations to fisheries we are not using. The ring of international fishing around the border of the Kermadec EEZ indicates a strong desire of other nations to fish in the zone.

The proposal is based on inadequate consultation

- While the government indicated it had discussions with Te Aupouri and Ngati Kuri, it did not consult more widely with iwi or Te Ohu. All 58 iwi have Fisheries Settlement interests in the Kermadec zone. While Te Aupouri and Ngati Kuri may have particular interests, they have made no claim that these negate the interests of other iwi.
- Te Ohu has had initial discussions with Hon Nick Smith (Minister for the Environment) who intends to introduce a Bill before the end of the year. He listened to our concerns but did not resile from any aspects of the proposal.