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Tena koe Warren

**Ministry of Fisheries Internal guidelines on implementing regulations  
under section 186 of the Fisheries Act**

**Introduction**

- 1 This submission is from Te Ohu Kaimoana in its role as corporate trustee of Te Ohu Kai Moana Trust and responds to the above consultation document.
- 2 The purpose of Te Ohu Kaimoana is to:
  - .. advance the interests of iwi individually and collectively, primarily in the development of fisheries, fishing and fisheries related activities, in order to –
    - (a) ultimately benefit the members of iwi and Maori generally; and
    - (b) further the agreements made in the Deed of Settlement; and
    - (c) assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi; and
    - (d) contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement (section 32)
- 3 While making this submission in this context, Te Ohu does not seek to undermine any submission that you may have received from individual iwi or iwi collectives.

**Summary**

- 4 The Ministry of Fisheries (MFish) is consulting on a proposed set of internal guidelines for developing new regulations under section 186 of the Fisheries Act. MFish comments that there may be particular circumstances for which the Kaimoana Customary Regulations and the

South Island Customary Regulations (“the customary regulations”) made under that section of the Act do not sufficiently recognise and provide for all types of customary food gathering or the special relationship between tangata whenua and those places of customary food gathering importance. MFish states this could lead to requests by tangata whenua for new customary regulations to be promulgated under section 186 of the Act. Therefore MFish has developed draft guidelines to assist staff to respond to and address such requests.

- 5 We are aware that there are situations in which the existing customary regulations may not meet all the needs of iwi and hapu effectively. We therefore support the development of a process to identify how those needs might be better met. However, Te Ohu proposes that a more comprehensive approach be taken than that proposed by MFish.
- 6 While the development of a new regulation may be appropriate in certain circumstances, a key issue that is avoided in the proposals is the additional option of amending the existing customary regulations rather than develop new ones. For instance where issues that proponents wish to address are likely to be shared by iwi and hapu generally, amending the existing customary regulations may be a more cost effective alternative to implementing similar but separate regulations for different parts of the country. We suggest that part of any analysis for an enhanced regime should always include improvements to the general regulations.
- 7 We acknowledge that in light of the fact that the two sets of existing customary regulations were developed over a number of years, and are reflected in individual settlements (such as the Ngai Tahu Deed of Settlement), care would need to be taken to test potential changes and put forward proposed amendments to all iwi who have an interest in each set of regulations. Te Ohu can see benefit in using new s186 regulations to trial new approaches to managing customary fishing. If it is found that as a result of such a trial, iwi would benefit generally from access to that approach, proposals for implementation (including amending the existing regulations) could then be put to them for consideration.
- 8 Finally, we consider that the process needs to be implemented as part of the approach MFish is developing to deliver on its obligations to Maori. That process is intended to encourage iwi and hapu to work together to integrate their commercial and non-commercial interests in fisheries within fisheries management areas (FMAs) or quota management areas (QMAs).
- 9 These matters are further explored in the remainder of this submission.

### **Establishing the context**

- 10 As noted earlier, one of the purposes of Te Ohu is to assist the Crown discharge its obligations under the Fisheries Settlement. As you know, for many years, we have advocated to the Crown and MFish that they begin

building relationships with iwi and hapu through Mandated Iwi Organisations (MIOs). The approach that MFish has taken in the past has had the effect of fostering conflict between iwi and hapu by treating with each as though they are separate and unrelated – with the consequence that the commercial and non-commercial elements of the Fisheries Settlement have also come into conflict.

- 11 We support the new MFish approach which is intended to encourage iwi and their hapu to work together to integrate their commercial and non-commercial interests. This should discourage internal splintering of iwi and hapu and ultimately ensure that they can all benefit fully from the Fisheries Settlement.
- 12 While MFish is still firming up the process it will follow, elements will need to involve:
  - a) Working with groupings of iwi within fisheries management areas
  - b) Supporting the development of regional or “Forum Fisheries Plans/ Strategies” as a tool for iwi in the relevant management areas to decide how they will bring together their commercial and non-commercial interests. In this way, iwi would be working together at a scale that can then influence the development of national fisheries plans by MFish, and better mesh with fisheries management at a QMA level.
  - c) Supporting the development of individual Iwi Fisheries Plans to enable individual iwi to communicate their objectives for their commercial and non-commercial interests at the iwi and hapu level.
- 13 In our view, the implementation of customary regulations (whether existing, amended or new) should be considered in the context of this broad framework, and in light of objectives that have been – or have yet to be - agreed to by iwi and their hapu.

**What is envisaged by section 186 and what do the “customary regulations” provide for?**

- 14 There are two broad issues that emerge from section 186 that are relevant to this discussion. The first involves a positive duty on the Crown to provide for customary food gathering and the “*special relationship between tangata whenua and places of importance for customary food gathering ...to the extent that such food gathering is neither commercial in any way nor for pecuniary gain*” (s 186 (1)) through regulations. This duty arises from the Fisheries Deed of Settlement and section 10 (c) of the Treaty of Waitangi (Fisheries Claims) Settlement Act.
- 15 The second is the potential for such regulations to affect the interests of other parties, including the commercial interests of iwi. This is signalled by the provisions of section 186 (2) (b) that require the Minister and the tangata whenua to “consult with the local community...” before giving notice that any part of New Zealand fisheries waters is to be a mataitai

reserve.

16 While section 186 provides no detailed guidance on how these two issues should be dealt with, the customary regulations deal with them by clarifying the following questions:

- a) who will authorise customary food gathering?
- b) over what area will authority be exercised?
- c) how will individuals involved in harvesting demonstrate they are authorised to do so (given they may be harvesting within different limits than those set under the amateur regulations)
- d) how will harvest be monitored and how will that information contribute to the setting of TAC/TACCs and allowances?
- e) what measures will be put in place to provide for the special relationship between tangata whenua and places of importance for customary food gathering?
- f) How will the effects of those measures on the interests of other parties be managed?

17 The customary regulations deal with these questions by enabling “tangata whenua” to appoint kaitiaki to issue authorisations for customary fishing within defined “rohe moana” – areas that are identified by tangata whenua as being under their authority. Kaitiaki have discretion over the quantities of fish they can authorise to be taken – which can be more (or less) than bag limits allowed under the Amateur Regulations. Kaitiaki must report to MFish the amounts authorised and harvested at regular intervals. This information is an input into decisions on Total Allowable Catches/Total Allowable Commercial Catches (TAC/TACCs) and allowances within relevant QMAs.

18 The customary regulations also enable kaitiaki or the tangata whenua to apply to the Minister of Fisheries to establish mataitai reserves. For instance under regulation 23 (1) of the Fisheries (Kaimoana Customary fishing) Regulations 1998, the Minister must declare the reserve only if satisfied that:

- (a) There is a special relationship between the tangata whenua making the application and the proposed mataitai reserve
- (b) The general aims of management specified in the application under regulation 17 are consistent with the sustainable management of the fishery to which the application relates
- (c) The proposed mataitai reserve is an identified traditional fishing ground and is of a size appropriate to effective management by the tangata whenua; and
- (d) The Minister and the tangata whenua are able to agree on suitable conditions for the proposed mataitai reserve; and
- (e) The mataitai reserve will not:

- (i) unreasonably affect the ability of the local community to take fish, aquatic life, or seaweed for non-commercial purposes; or
- (ii) prevent persons with a commercial interest in a species taking their quota entitlement or annual catch entitlement (where applicable) within the quota management area for that species; or
- (iii) prevent persons with a commercial fishing permit for a non-quota management species taking fish, aquatic life or seaweed under their permit within the area for which that permit has been issued;...

(f) the proposed mataitai reserve is not a marine reserve under the Marine Reserves Act 1971.

19 If any of the above tests are triggered, the mataitai cannot be approved.

20 While Regulation 27 of the above regulations (which deals with fishing in mataitai reserves) enables non-commercial fishing (both under the customary regulations and the amateur regulations), it states that “no person may engage in commercial fishing in a mataitai reserve (regulation (27) (2))”. We know that this means that the tests outlined above must be met assuming there will be no commercial take within a mataitai, even though the applicants may intend and have discussed with industry the ability to continue with some or all commercial fishing for some stocks. We note that the policy clearly contemplates that there can be commercial fishing within a mataitai. Under regulation 27 (5) – any commercial fishing that is allowed in a mataitai reserve must be conducted under the Fisheries Act and the relevant commercial regulations applying under that Act.

21 As we discuss later in this submission, the provisions and processes as they are currently structured appear to be flawed as they do not provide for agreements that might be entered into with the commercial sector to be implemented at the time a mataitai is established. Such agreements could be based on the suitable conditions provided for under regulation 23 (1) (d) above.

22 This is particularly important because there is a further issue that is relevant for the Crown’s settlement obligations, and that is the potential cumulative effect on other parties of the establishment of multiple mataitai reserves within broader QMAs (alongside other measures such as marine reserves). Other parties that could be affected include other iwi/hapu in the same QMA who may wish to establish mataitai reserves within their rohe moana. MFish touches on this issue in information provided on their website:

The Minister will take into account other mataitai reserves within the quota or fisheries management area when the potential effects of any new application are assessed. So while the first applications for reserves within a particular area may be approved, later applications may not because of the cumulative impact of all the reserves on commercial or recreational fishing.

Tangata Whenua organisations should work with neighbouring Tangata Whenua and local communities on the development of their mataitai reserve applications.<sup>1</sup>

- 23 This 'first in, best dressed' approach – along with the lack of provision to alter or rescind a mataitai - signals that the current provisions are unlikely to be able to address the aspirations all iwi/hapu may have in respect of mataitai reserves. It also raises once again the need for new proposals to be considered as part of the iwi planning context that MFish is now supporting.

### **Other tools available under the Fisheries Act**

- 24 Aside from the existing customary regulations outlined above, MFish notes that other tools available under the Fisheries Act that can provide for customary food gathering include:

- a) Taiapure
- b) Temporary closures or fishing restrictions in areas under section 186A and s 186B of the Fisheries Act
- c) Regulations that manage amateur or commercial fishing, or general provisions of the Act (where they meet customary interests in some instances).

- 25 The paper does not give any detailed information about how regulations that manage amateur or commercial fishing or general provisions of the Act would meet customary needs, although we acknowledge that customary food gathering is carried out under the Amateur Regulations provided that harvesting is within relevant bag limits.

### **The existing tools are unlikely to give effect to all the solutions**

- 26 Given that the existing regulations do not appear to be able to accommodate all the different ways iwi and hapu may wish to meet their needs, the release of MFish's consultation paper is timely. However underlying the idea of developing new regulations is a broader question about why and in what circumstances the existing regulations might be inadequate.
- 27 Te Ohu is working with iwi to trial different approaches they might use to meet their customary food gathering needs and is also aware that iwi and hapu are leading such initiatives themselves. Examples include:
- a) establishment of pataka/whata (using premises of commercial fish receivers) as places to store fish caught using a commercial vessel
  - b) the development of multi hapu/iwi strategies for appointing kaitiaki, with agreement on the areas (and/or depths) each takes responsibility for

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<sup>1</sup> <http://www.fish.govt.nz/en-nz/Maori/Kaimoana/default.htm#kaimoana6>

- c) exploring the potential for agreements with the commercial sector (which also includes iwi) on how areas that are significant for customary food gathering might be better managed for the benefit of all sectors.
- 28 In some cases, the existing regulations or tools may not be able to give effect to these kinds of initiatives. For example as noted earlier, the use of agreements between all sectors on how places of significance for customary food gathering should be managed is a good example of an approach that is not well provided for within the current customary regulations.
- 29 For instance let's say that an iwi or hapu wishes to establish a mataitai reserve. Information from the commercial sector shows that it is highly likely that establishment of the mataitai will prevent quota owners of certain stocks from taking their quota entitlement or ACE within the quota management area concerned. This may be due to the extent of commercial fishing areas affected, and/or the cumulative effects of previous mataitai proposals. Ultimately, these effects on the commercial sector mean that the Minister – because of the matters set out in regulation 23 (1) (e) (ii) - will not be able to approve the establishment of the mataitai.
- 30 However following dialogue between the proponents of the reserve and the relevant quota owners/fishers as part of early consultation, an agreement might be able to be reached that commercial fishing for the stocks concerned should be able to continue subject to “conditions” provided for under regulation 23(1) (d). Under the agreement, the parties resolve that it would be appropriate for the regulations that establish the mataitai and regulation 27 (3) that allows the commercial taking of fisheries resources (subject to the agreed conditions) to be implemented simultaneously.
- 31 We understand from MFish that the staging of decisions about mataitai would not enable these kinds of agreements to be implemented in this way. Thus, a mataitai reserve must be established before kaitiaki can request regulations to be made to allow commercial fishing in the mataitai reserve. This means that to be approved, the mataitai would need to “pass” the “prevent test” in respect of commercial fishing – i.e. no commercial fishing - which means that in the example we have highlighted – it would not be established at all. Alternatively the area may need to be reduced so that it could meet the ‘prevent’ test. This situation demonstrates that the technical application of the customary regulations is at odds with the provision for suitable conditions to be developed as part of the establishment of a mataitai reserve.
- 32 Te Ohu considers there is benefit in iwi and hapu being able to reach agreements with affected parties and to be able to have these agreements implemented and enforced. Ideally, the mataitai provisions – including the various “tests” provided in the regulation – would create leverage for

iwi/hapu to encourage other parties to come to the table and agree on a management regime for places that are significant for customary food gathering that all parties can be involved in. There are risks in the mataitai application process that all parties face, and that they can manage through dialogue and agreements. For iwi or hapu, the risk is in triggering the 'prevent' test and not having their application approved – with the consequence that it could languish for many years with no final decision made. For the commercial sector, the risk involves not being able to demonstrate that the mataitai will prevent them from taking their entitlements elsewhere in the quota management area, and therefore being excluded from fishing in that area.

- 33 MFish's paper also identifies a situation in which the existing regulations do not provide sufficient flexibility to deal with the range of situations that may be faced by iwi and hapu. It comments that "the cost of the mataitai provisions' requirements (which include establishing management frameworks) may mean that mataitai are not appropriate as a means for ensuring that enough fish is available for ongoing customary use in isolated, small scale areas. If no alternative was available that could ensure ongoing customary take, new s 186 regulations could be considered" (para 18).
- 34 The paper does not provide any further detail, but there are likely to be a number of possible scenarios, such as use of the amateur regulations for managing harvest, implementation of closures for particular types of fishing or the use of pataka systems designed to meet the needs of small communities at certain times. Whatever the options however, MFish's comments raise questions about what an appropriate alternative regime would look like and what characteristics it should have.

### **Key elements of a framework that provides for customary food gathering**

- 35 In paragraph 15 of its paper, MFish states that the following factors should inform whether new s 186 regulations are appropriate:
- i) Whether customary interests can be provided for through existing tools
  - ii) Whether the proposed new s 186 regulations meet the conditions of s 186
  - iii) Whether the proposed regulations are ultra vires or consistent with fisheries legislation as well as other legal obligations (such as the Bill of Rights)
  - iv) The rights and interests of other groups; and
  - v) Resourcing and implementation issues.
- 36 These questions are relevant, however we think there are other questions that also need to be considered. For instance:

- a) why the existing customary regulations do not meet the needs of proponents
  - b) whether there is a problem with the existing regulations that might be more general in nature and warrant further analysis, and therefore whether amendments to existing regulations are an appropriate option
  - c) whether (and in what circumstances) new regulations might be more appropriate.
- 37 While there a need to identify the essential elements of any regime for managing customary non-commercial fishing, we consider that as a first step, it would be useful for proposals for new regulations be able identify where they differ from the existing regulations, for instance in relation to:
- a) who will authorise customary food gathering?
  - b) over what area that authority will be exercised and whether it will be exclusive or shared?
  - c) How will that area be defined – how might the potential interests of other iwi and hapu in that area be identified and addressed?
  - d) how individuals involved in customary food gathering will be able to demonstrate that they have been given authority to harvest?
  - e) how harvested quantities will be monitored (for input into fisheries management and for compliance monitoring)
  - f) whether and if so how fishing activity by other parties will be constrained or excluded?
- 38 Elements of the existing customary regulations provide important principles that should be reflected across any alternatives that might be considered appropriate. These include:
- a) a clear process for authorising harvest when carried on outside existing regulations (such as the customary or amateur regulations)
  - b) provision for monitoring and reporting
  - c) a clear and consistent “test” for determining what is the effect on other parties.
- 39 For instance we commented earlier that the “prevent test” that is part of the mataitai process serves not only to protect the commercial settlement interests of iwi, but also provides leverage for iwi and hapu to bring other parties to the table, share information about relevant fisheries, and provide an opportunity to reach agreements about how important customary food gathering areas might be managed. We consider there is merit in taking a consistent approach – like this – when considering requests from proponents that could have similar implications for other parties. In this way, the same kind of incentives should be created to dialogue to occur, while continuing to provide the option of “exclusion” where appropriate.
- 40 In terms of options for implementation, we acknowledge that there are likely to be circumstances in which new regulations are warranted to meet specific and potentially unique situations. However in some cases, making an amendment to the existing customary regulations may be a more

efficient and effective way of meeting the needs of iwi and hapu than the promulgation of multiple tailored regulations that – in the end - deal with the same problem in different places. In addition this option may better address problems of resourcing and implementation.

- 41 However we also acknowledge that the existing two sets of regulations were developed over a considerable number of years. Moreover the development of the South Island customary regulations was prompted through the Ngai Tahu Deed of Settlement. Any changes proposed to be made to either set of regulations would need to involve a thorough process of development involving iwi.
- 42 For this reason, Te Ohu can see benefit in an additional option that enables alternative approaches to be trialled or piloted through new s186 regulations. If - after analysis of the results – it is clear that there could be wider benefit for iwi and hapu in taking similar approaches elsewhere – then the option of amending existing customary regulations could be considered, at least by all iwi to whom the regulations apply.
- 43 Finally, we think it is important for MFish to apply the guidelines as part of the more comprehensive process they are embarking on to deliver on their obligations to Maori. Given the move to assist iwi and hapu to integrate their commercial and non-commercial customary interests in fisheries, proponents of new proposals for customary regulations should, as a minimum, be encouraged to work with their MIO. Proposals should also be considered in light of planning initiatives by iwi collectives in relevant fisheries management areas or quota management areas.

### **Concluding comments**

- 44 Thank you for the opportunity to comment on the draft guidelines, and for providing us with additional time to do so.

Naku noa, na



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