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Recreational Fishing Rights Working Group
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WELLINGTON

Treaty of Waitangi Fisheries Commission (Te Ohu Kai Moana) Submission On The 'Soundings' Discussion Document Reviewing The Management Of Recreational Fishing In New Zealand

Overview of Submission

1. The Treaty Of Waitangi Fisheries Commission (Te Ohu Kai Moana) is pleased to respond to this review. Though our conclusions vary in parts from those set out in the discussion document, this should not be interpreted to question the need for reform, rather the manner that reform is best progressed.
2. New Zealand has, compared with many other jurisdictions, a sound base framework for fisheries management. It is time however to grow that framework into a new stage of maturity with substantive involvement of all fishers. This reform provides one of the critical elements needed to assist the new stage to occur.
3. Te Ohu Kai Moana's vision for the management of our marine environment is that it will promote sustainable development: growth that builds economic, social and cultural strength while maintaining ecological integrity and health. We consider that this requires us to build a more integrated approach to management at both national and local levels founded in a clearer specification of the rights of all stakeholders. We agree with the review's concern that competition amongst fishers (and between fishers and other users) has and will continue to increase, and that clarity of entitlement and management processes need to improve to cope effectively with this increased competition. Thus, we support the discussion document's objectives of more clearly specifying the relationship between customary, commercial and recreational entitlements; encouraging greater management responsibility by recreational fishers; developing better tools for spatial management (particularly of inshore waters); and improving the information on recreational harvest.
4. Te Ohu Kai Moana also has an additional and fundamental concern with protecting and enhancing the rights of Maori as recognised and guaranteed by the Treaty: 'te tino rangatiratanga o ...o ratau taonga katoa' or 'the full exclusive and undisturbed possession of their ..fisheries', as expressed in the Maori Fisheries Act (1989), the Treaty of Waitangi (Fisheries Claims) Settlement Act (1992), the Deed of Settlement (1992) and the customary fisheries regulations. Thus, while we share the concerns expressed by the review our choice among the suggested solutions is governed by our obligation to protect and enhance Maori Treaty rights in fisheries.

Summary of Submission

5. ***Submission: Te Ohu Kai Moana acknowledges the need for fishers to work co-operatively on solutions. To provide the conditions for this each party needs to have clarity of its rights and those of others and incentives to work together. Te Ohu Kai Moana rejects the status quo option as it does not provide either clarity or incentives. Te Ohu Kai Moana supports a priority, unconstrained share for customary harvest with second priority being accorded to commercial rights. This means that TAC reductions would be taken firstly from the recreational allowance unless there was a buy back of commercial quota. However, in situations where fishers are working co-operatively on solutions, it will likely mean that Maori will agree to changes that are more evenly***

distributed where they believe this will foster long-sighted, co-operative approaches that enhance the sustainable management of fishstocks.

6. ***Submission: 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 for 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. Te Ohu Kai Moana recommends an improved dispute resolution process that has clear legislative tests and a process that encourages voluntary agreements but where there is any disputed decision, it is able to be reviewed on both substance and process considerations.***
7. ***Submission: The Commission agrees that recreational management and overall fisheries management would be enhanced by an increased responsibility for management by recreational fishing groups in order to increase the efficacy and legitimacy of the sustainability measures put in place. The Commission also acknowledges that, given the difficulties involved, a pragmatic progressive approach will be required.***
8. ***Submission: That the review be extended to consider the status of charter-boat operators, with the first step being the provision of improved information and a longer-term option being to progressively move them into a commercial regime.***

Options One and Two: Determining Shares in the TAC : discretionary, proportional or priority share for recreational rights

9. Te Ohu Kai Moana is keenly aware of the need for fishers to work co-operatively on solutions to fisheries management concerns. We acknowledge that far superior management outcomes are possible in such contexts, and that superior management can enhance everyone's rights.
10. Te Ohu Kai Moana and Maori are committed to robust science based management of our fisheries. We strive to work with all groups to make a success of this, because success means that fish stocks will be maintained or enhanced, to the benefit of all parties. However, it is critical that priority of rights be clear at the outset to provide a clear framework and incentives for management, as well as clarity of outcomes.
11. While there is a need for clear shares in each fishery for certainty of management, this need is most apparent in two situations:
 - where the TAC is reduced and there must be a reduction in at least some sectors take;
 - where the TAC is increased and it is possible that there is an increase in some sectors take.
12. Maori customary and commercial rights both derive ultimately from Article 2 of the Treaty that sets out the property rights of Maori and Iwi that the Crown undertook to protect. It is unclear where the recreational interest is anchored but it is not a customary right, is subordinate to the rights that were guaranteed to Maori in the Treaty and subsequent legislation, and is currently at the discretion of the Crown. This means that both Maori customary and commercial rights are protected against any desire by recreational fishers or the Crown to enhance the recreational entitlement at the expense of Maori fisheries rights. To do so would be a breach of both the Treaty and the Deed of Settlement.

13. The current legislation does not dictate a priority for the three categories of fishing entitlement (customary, commercial and recreational). Their priority in the division of the TAC is at the discretion of the Minister of Fisheries. Te Ohu Kai Moana is arguing therefore, that the Minister of Fisheries should take into account the stated commitment of the Government to honour the Treaty of Waitangi and should, in the exercise of her or his discretion, give priority to Maori customary and commercial fishing rights, while managing the fisheries within sustainable limits.
14. Of the two expressions of Maori Treaty rights, Te Ohu Kai Moana has always argued that customary rights should take priority, within sustainable harvest constraints, and that this priority should be made explicit and entrenched. We have consistently taken this position in sustainability rounds. We consider that the Treaty rights also imply a priority for mataitai and taiapure. We strongly reject the suggestion that customary harvest is 'needs' based ['Soundings' p20] unless this assumes that tangata whenua are entitled to define their own needs (in contrast to this being decided externally). We are also concerned to avoid the entrenchment of the current low provision for customary harvest based on scanty information and still evolving management systems. These levels must not become accepted in the general mind as the full scope of the entitlement.
15. Following the allocation made for customary take, Maori commercial rights should take priority. However, given the difficulties under the QMS of distinguishing between Maori and non-Maori commercial rights, all commercial rights would effectively take second place to customary but have priority over recreational. This would mean that when the TAC was reduced, the recreational allowance would be the first to be reduced, unless the Government or recreational fishers bought back quota for recreational take. As outlined above, Te Ohu Kai Moana considers that to do otherwise would unilaterally devalue the currency of the 1992 Fisheries Settlement and as such, would be a breach of that Settlement.
16. As noted above we see great value for all parties arising from having fishers working co-operatively on solutions to fisheries management concerns. Far superior management outcomes that are more sensitive to local concerns and have sufficient flexibility to respond to changing circumstances are possible in these situations. That type of superior management can enhance everyone's rights, but is only possible by the active involvement of all. Thus, as entitlements and responsibilities are exercised over time and relationships of trust develop, the boundaries of what is possible are pushed out. This will likely mean that in specific instances - for example, where recreational fishers are organised and have shown themselves to be committed to jointly developed, long-sighted fisheries management plans- Maori will agree to changes that are more evenly distributed where those changes will enhance the ongoing management of the fishstocks. The issue of entitlement should not be separated from the issue of organisation and its commitment to take increased responsibility for management, including compliance.
17. Option one, the maintenance of the status quo, is unacceptable for reasons suggested by the review itself. It does nothing to improve the certainty, incentives and management processes that will allow co-operative, spatially based solutions to competition in inshore waters. The status quo cannot guarantee sustainable management where there are high levels of poorly monitored and controlled recreational take. We have doubts that the disputes resolution and fisheries management plans can fulfil their potential if underlying entitlements and effective recreational management issues are not addressed.
18. ***Submission: Te Ohu Kai Moana acknowledges the need for fishers to work co-operatively on solutions. To provide the conditions for this, each party needs to have clarity of its rights and those of others and incentives to work together. Te Ohu Kai Moana rejects the status quo option as it does not provide either***

clarity or incentives. Te Ohu Kai Moana supports a priority, unconstrained share for customary harvest with second priority being accorded to commercial rights. This means that TAC reductions would be taken firstly from the recreational allowance unless there was a buy back of commercial quota. However, in situations where fishers are working co-operatively on solutions, it will likely mean that Maori will agree to changes that are more evenly distributed where they believe those changes will foster long-sighted, co-operative approaches that enhance the sustainable management of fishstocks.

Coastal Zones with restrictions on Commercial Fishing

19. The proposal for coastal zones where preference is given to recreational fishers is clearly inconsistent with priority status for commercial harvest and is opposed by Te Ohu Kai Moana. It is also inconsistent with the need to develop co-operative, negotiated plans for the management of fisheries. It promotes confrontation and reduces the incentive for recreational fishers to work together with commercial fishers for sustainable management as is the case where they share in both the benefits of enhanced management and the costs of poor decisions.

20. Te Ohu Kai Moana supports the current position that allows for the establishment of mataitai and taiapure zones and local voluntary agreements. If a recreational proposal does not 'significantly adversely affect' commercial interests, it could be accepted as part of a voluntary agreement in the context of fisheries plans. Even in situations where proposals would have some substantive adverse effects, these might also be agreed if there are perceived to be offsetting gains elsewhere. There are already instances of commercial inshore fishers making voluntary concessions of such a priority in waters of prime interest to recreational fishers, on both a seasonal and year-round basis. Some of those concessions have been subsequently incorporated into regulation and now have the force of law. Fisheries plans would also allow consistency to develop with respect to catch methods of commercial and recreational take to ensure, for example, that the impacts of recreational take on juvenile stock are managed effectively.

21. Te Ohu Kai Moana is less sanguine than the discussion paper about the efficacy of the current disputes procedures, and notes with concern the inappropriate intervention last year by the Ministry in the Tauranga Harbour dispute. As noted above, we do not consider that fisheries management plans, can be effective without clear basic entitlements, effectively organised participants and a disputes resolution process that is based on a principled examination of the impacts of any changes on the rights and interests of all parties. Such a process could be independent of Government rather than relying on political interventions. Fisheries plans will not be effective if they operate under the shadow of Government interventions that override and negate their painstakingly negotiated outcomes.

22. In our submission on the aquaculture reforms, Te Ohu Kai Moana proposed a process there for resolving disputes between different groups of fishers. We consider that this process is equally applicable to disputes between commercial and recreational fishers. For this to be successful, in addition to the proposals set out elsewhere in this paper, two further key issues require consideration. These are:
 - the nature of the "test" in the legislation against which any adverse effect is established; and
 - the elements of the process.

23. At present for fisheries processes where there are changes to spatial access between fishers or fishers and others there are a variety of legislative tests albeit that they are similarly worded eg "undue adverse effect", "undue interference". These tests are

applied by different decision-makers in different contexts with different processes. In all cases the only opportunity for review is on process. This means that same test in the same circumstances but by different decision-makers can have vastly different decisions. There is no common methodology that looks at impacts on fishers. This provides no certainty to participants. A common methodology would allow consistency and certainty to develop. A clear set of ground rules helps develop trust between parties.

24. Te Ohu Kai Moana therefore recommends that the test in the legislation should be more specific and should possibly be linked to a list of criteria or considerations to be taken into account when determining the existence or magnitude of any effects on fishing. For example the test could be based around a requirement to avoid, remedy or mitigate any adverse effects on fishing, and considerations in relation to determining an "adverse effect" could include:

- fishstock-specific matters (e.g., the spatial extent of the particular fishery, whether the species are sessile, sedentary, demersal or pelagic);
- economic considerations (effects on income, including costs of participating in the process, and value of property rights); and
- temporal concerns (past and future improvements in a fishery that existing proportional rights holders might legitimately expect a share of; for example, enhancement activities).

25. In situations where there is a concern about recreational access to a fishery, Te Ohu Kai Moana suggests the following process would operate:

- Negotiations between the representative bodies of commercial and recreational rights holders to reach an access arrangement, including spatial use agreements (either in the context of a fisheries plan or through an alternative mechanism);
- If agreement cannot be reached, a mediation process is entered into by the parties;
- The negotiated agreement reached under (1) or the outcome/recommendation of mediation under (2) is an input to a decision by the Minister of Fisheries (eg, approval of a fisheries plan, including access agreement);
- The "access agreement" element of the decision is able to be appealed on matters of substance to an appropriate judicial body

26. Te Ohu Kai Moana considers that the lack of an appeal body for rights-holder disputes is a significant gap in the current fisheries management framework. An appeal body:

- provides an additional incentive for rights holders to reach a negotiated agreement;
- enables a body of case law to be developed to clarify the legislative test used to measure the impact of a change on other fishers interests;
- removes the final decision from any political interference;
- could apply to a range of disputes concerning various rights and interests in the marine environment; and
- alleviates some of the current frustrations of all types of fisheries rights holders who have no real forum in which the substance of decisions can be appealed (currently decisions are subject only to judicial review of process).

27. ***Submission: Te Ohu Kai Moana opposes the erosion of commercial rights represented by the proposal for Coastal Zones which arrogate a preference for***

recreational fishers. Te Ohu Kai Moana considers that the desire by recreational and customary fishers for 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, and provided voluntary processes do not labour under the possibility of regulatory override. Te Ohu Kai Moana recommends an improved dispute resolution process that has clear legislative tests and a process that encourages voluntary agreements but where there is any disputed decision, it is able to be reviewed on both substance and process considerations.

Recreational Management

28. Te Ohu Kai Moana strongly agrees that there is a need for better management of recreational fishing and better integration with respect to customary and commercial fishing activities. Ultimately, sustainable management requires all that fishers, including recreational, take individual and collective responsibility for their activities. Collectively, recreational fishers need to be better organised to enable them to be effectively involved in fisheries management (including planning, monitoring and compliance). As a consequence of increased participation, individual recreational fishers should increase their understanding and accept the legitimacy of sustainability measures put in place. This should in turn make monitoring and compliance easier.
29. For integration of recreational interests into fisheries management, recreational fishers organisations will need to be able to show to other parties that they hold a mandate and have significant membership that agree to operate according to any agreements. This means there will need to be robust transparent processes that clearly mandate each organisation and its representatives, setting out its boundaries (in area and species) and the duties and responsibilities of its members.
30. Te Ohu Kai Moana has experience in these processes from both a commercial and Maori perspective. We do not underestimate the difficulties and likely resistance from some recreational fishers at 'being organised' but consider that, given the importance of the task, the Ministry should proceed incrementally but with the aim of obtaining full coverage within a reasonable time. (This should be thought through and a national framework provided from the outset rather than being left to emerge from the results of boundary disputes between groups arising in an ad hoc fashion.) It would also be sensible to start in those areas where inshore competition is most pressing, and where there is greatest support from recreational fishers groups for responsible involvement.
31. Te Ohu Kai Moana supports the discussion documents suggestion that some minimum Government funding might be provided for establishment and that recognised groups should then have access to self-funding options.
32. ***Submission: Te Ohu Kai Moana agrees that recreational management and overall fisheries management would be enhanced by an increased responsibility for management by recreational fishing groups in order to increase the efficacy and legitimacy of the sustainability measures put in place. Te Ohu Kai Moana also acknowledges that, given the difficulties involved, a pragmatic, progressive approach will be required.***

Charter Boat Operators

33. A further issue that we consider the review should address is the status of charter-boat operators who take recreational fishers out onto the water to fish, for a fee. We are convinced that their current operation with recreational status rather than commercial is inappropriate. Movement into a commercial regime would need to initially start with an accurate recording of the collective take from each boat. Currently these operators do not have to provide any record, in contrast with the

detailed records required of all other operators who derive commercial gain from fishing. It is also a requirement that customary fishers provide documentation of the overall take, by species, in an area based on a summation of all permits granted. Once charter vessel records have been established over a couple of seasons, there could be a translation of this historical take into some form of quota (taken out of the current recreational allowance, not the TACC). The charter operators would then be subject to the same rights and obligations as other commercial quota holders.

34. ***Submission: That the review be extended to consider the status of charter-boat operators, with the first step being improved information and a longer term process to progressively move them into a commercial regime.***

