# TĀIA KIA MATARIKI

## Make sure the net is closely woven

**INDEPENDENT REVIEW OF MAORI COMMERCIAL FISHERIES STRUCTURES UNDER THE MAORI FISHERIES ACT 2004**

Tim Castle, Barrister
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# HE KUPU WHAKATAKI

E ngā iwi o te motu tēnā koutou katoa, me ō tātou aitua. I mihia e te iti me te rahi te Whakatau mō ngā Whāinga Tika ki ngā Tauranga Ika a te Iwi Māori i raro i te Tiriti o Waitangi o te tau 1992. I puta mai tēnei whakatau e whitu tau noa iho i muri i te whakahoutanga o te Ture mō te Tiriti o Waitangi 1975 e te Pāremata. Nā tēnei whakahoutanga i āhei ai te iwi Māori ki te kōkiri i ngā take tawhito i raro i Te Tiriti mō ngā hē a te Karauna, hoki rā anō ki te tau 1840. I mua atu i taua menemana o te tau 1985, heoi anō nei te whānui o te mana o Te Rōpū Whakamana he mana whakarongo ki ngā kerēme kua ara mai i ngā tau mai i te tīmatanga o te Ture i te tau 1975.

I ngā tau i muri mai ka puta te kerēme mō Muriwhenua, ā, i muri ko ngā kerēme mō ngā tauranga ika a Ngai Tahu i raro i te Tiriti o Waitangi, ēnei katoa i mauria kia mua i te Rōpū Whakamana kia rangona i reira. Ko tā ngā iwi o Muriwhenua, i takahi te mahi a te Karauna mai i 1840 i ngā kī taurangi mō ngā tauranga ika o te iwi Māori - ā, he hara nui i raro i ngā mātāpono o te Tiriti, me ngā rārangi kōrero tonu o te Tiriti. He pērā anō ngā kerēme a Ngāi Tahu i muri tata tonu mai. Nā ēnei mahi i tūkinotia ai te iwi Māori i tōna whenua. He horo tonu te whakatau whakaae a Te Rōpū Whakamana. Ko te pūtake tūturu o te kerēme, ko te Tiriti tonu. Ko te ngārahu i toro ai te ahi, i rere ai ēnei kerēme ki te Rōpū Whakamana me te Kōti Matua, ko te hanganga o ētahi tika tūmataiti mutunga-kore mō te Raihana Hī Ika Tauhoko Takitahi. I puta mai ēnei tika ki te ao i raro i te menemana o 1986 ki te Ture Hī Ika o 1983.

Nā te Whakatau Tauranga Ika Māori Tārewa o te tau 1989 me te Whakatau Whakamutunga o te tau 1992, ka hua ake ko tētahi whakatau torowhānui ki ngā iwi katoa - te whakatau tuatahi, (heoi anō pea te whakatau pēnei i te motu katoa ko tēnei, mai i mua ki tēnei rā). Kua oti ōna whakaritenga katoa te tuhituhi ki te kupu whakataki o te Ture o 2004, ā, koia ēnei ngā whakaritenga ka tātaritia ake nei i tēnei tirohanga hou. Ko tōna ingoa i taua wā, ā, mohoa noa nei ko te “Sealord Deal”.

I muri i ngā tau 12 tino uaua nei, ka whakamanaia tētahi tauira mō te tohanga o ngā rawa ki ngā iwi, i whakaaetia i runga i te kōrero, me te takawaenga i ngā hiahia o te katoa, e te Pāremata, i te Ture mō ngā Tauranga Ika Māori o te tau 2004. He mea tārei ēnei whakaritenga i te Tīti Whakatau o te tau 1992.

I roto i ngā ritenga o te ture o te tau 2004 ka tau te kōrero, i mua i te takanga o te tau 11 ka haere he arotake motuhake o ngā whakaritenga mana tiaki o te Ture. Ka pērātia hoki te mana pupuru taonga, me ngā tāhuhu o runga, ka āta mātaihia anō hoki aua ritenga. Ko te whāinga ia o aua whakaritenga he whakapiki, he whakapakari i ngā pānga o ngā iwi tōpū, takitahi hoki ki ngā tauranga ika, ki te mahi hao ika me ērā atu mahi e pā ana ki te mahi ika, kia tino puta ai he hua ki te iwi Māori katoa.

I tohua ko Tim Castle, rōia nō Pōneke, e ngā toki o te ao Māori māna tēnei arotake hei kawe. Koinei tēnei tāna Pūrongo.

Kia pai ai tāna tārei i te kaupapa o te Pūrongo, i huri haere a Tīmoti i i ngā moutere e rua, whakawhiti atu ki Wharekauri ki te whakawhitiwhiti kōrero ki ngā iwi, otirā ki a Ngāi Māori, ki a Ngāi Pākehā hoki, e aronui nei ki tēnei pakihi, ki ēnei mahi hoki o te hao ika. Ko tana hiahia kia whāngaia mai ā rātou kitenga, māramatanga hoki mō te ahunga o te huarahi whakamua mō te iwi Māori, hei tāngata whiwhi painga i raro i te Tīti Whakatau o 1992.

Inā rā ngā whakaaro matua mō Tīm, mō roto i tana Arotake, me titiro whakamua: kāore he tino hua o te tirotiro whakamuri. Ahakoa he mea nui te noho mārama ki ō mua āhuatanga me ngā kaupapa tuku iho, kāore e pai kia herea te titiro, me te wareware ki te whakatika i te huarahi whakamua. He tino whāinga wāhi tēnei Arotake me tēnei Pūrongo hei tautoko i te ora me te whāinga rawa o ngā Iwi, otira o ngāi Māori katoa, mō ngā rā kei te tū mai. Kei tēnei pūrongo hoki aua moemoeā; me te wawata kia haere tahi ēnei mahi hei wāhi matua o ngā mahi ōhanga o Aotearoa, hei painga mō te motu katoa.

Mā pango mā whero ka rapa te whai.

Ehara i te mea kotahi, engari mā te katoa.

# PREFACE

The 1992 Maori Fisheries Treaty of Waitangi Settlement was a triumph. It came but seven short years after Parliament changed the provisions of the Treaty of Waitangi Act 1975 facilitating the presentation to the Waitangi Tribunal by Maori of claims against the Crown under the Treaty from 1840. Up until that 1985 amendment, the jurisdiction of the Waitangi Tribunal was only in respect of claims which had arisen after the commencement of that Act in 1975.

In the years that followed, first the Muriwhenua fisheries claim and subsequently the Ngai Tahu fisheries claims pursuant to the Treaty of Waitangi were brought before the Waitangi Tribunal for formal inquiry. The tribes of Muriwhenua and, later, Ngai Tahu contended that Crown conduct since 1840 in relation to fisheries – taonga - was inconsistent with the principles of the Treaty (including the provisions of the Treaty itself) in a manner which had caused prejudice to Maori. The Waitangi Tribunal had no difficulty reaching an affirmative conclusion. The genesis of the claim was the Treaty; the spark which ignited these claims to the Tribunal later also to the High Court was the introduction of perpetual property rights in the form of Individual Transferable Quota under the 1986 amendment to the 1983 Fisheries Act.

The interim Maori Fisheries Settlement of 1989 and the final Settlement of 1992, the details of which are captured in the preamble in the 2004 Act, now the subject of this review, manifested in a Pan-Maori Treaty settlement – the first, and still (arguably), the only one of its kind. It was known then, and still is, as the "Sealord Deal".

After 12 difficult years, a compromise model for the allocation to Iwi of the assets secured in the triumphant 1992 Deed of Settlement gained Parliamentary sanction in the Maori Fisheries Act 2004.

The 2004 legislation provided that before the end of the 11th year there would be an independent statutory review of the Act's governance arrangements, ownership and superstructure, whereby the collective and individual interests of iwi in fisheries, fishing and fisheries related activities would be promoted in a manner which was to be, ultimately, for the benefit of all Maori.

Wellington barrister, Tim Castle, was appointed by Maori decision makers to undertake this Review. This is his Report.

To provide a robust foundation for the Report Tim travelled the motu to consult with Iwi Maori and interested and knowledgeable Maori and Pakeha engaged in the business and activity of Maori fishing in order to have the benefit of their insights and observations on the desirable design of the pathway forward for Maori as the beneficiaries of the 1992 Deed of Settlement.

Philosophically, Tim determined that the Review would be forward looking: no useful purpose would be served by looking back. It is important to understand the past, but defence of what has occurred in the past must necessarily give way to building on it for the future. The Review and this Report represent an opportunity to contribute to the economic development and benefit of Iwi and indeed all Maori into the future. It carries with it that aspiration; and by reason of it, also, the hope of consequential benefit to the economic development of Aotearoa New Zealand.

Through the efforts of the people and their leaders the project will succeed.

It will not be decided by individual(s), rather, by all of the people.

# EXECUTIVE SUMMARY INCORPORATING 13 FEBRUARY 2015 PRESENTATIONS

## Introduction

1. Upon my review of the structural framework of the entities, established under the Maori Fisheries Act 2004 with the objective of achieving the purposes of the Act, I have concluded that there should be, and now is the right the time for, major change to that framework.

2. This is yet another watershed time in the evolution of delivery to Maori of the agreements and benefits of the 1992 Treaty Fisheries Deed of Settlement – itself a triumph by any assessment. That Treaty Settlement represented, as Sir Tipene O'Regan so aptly described in 1995 was "… one of the greatest single asset transfers in New Zealand history".

3. I have approached this important brief as necessarily a forward looking review. I agree that understanding the past is an essential foundation for preparing for the future, ie in the context of this Review, for the sound design and construction of the future. Defence of the past must necessarily give way to building on it for the future. I urge Iwi to build on the remarkable achievements including those by TOKMTL of "all-but" allocation to Iwi of the Settlement assets; and I urge TOKMTL, as an obvious incident of its stewardship of the Settlement now – 2015 – to fully support Iwi aspirations. With such support, iwi can provide the new leadership required to facilitate this next phase of the continued development of the collective and individual interests of Iwi in fisheries in a manner that is ultimately for the benefit of all Maori.

4. I have measured the findings to which I have been drawn and the changes I recommend, against the express purposes of the Act which are:

> ***Part 1***
> ***Purposes of Act, key concepts, and key Iwi organisations***
>
> ***Subpart 1 – Purposes, outline, and Interpretation***
>
> *3. Purposes*
>
> *(1) The purposes of this Act are to –*
>
> *(a) implement the agreements made in the Deed of Settlement dated 23 September 1992; and*
>
> *(b) provide for the development of the collective and individual interests of iwi in fisheries, fishing, and fisheries-related activities in a manner that is ultimately for the benefit of all Maori.*
>
> *(2) To achieve the purposes of this Act, provision is made to establish a framework for the allocation and management of settlement assets through-*
>
> *(a) the allocation and transfer of specified settlement assets to iwi as provided for by or under this Act; and*
>
> *(b ) the central management of the remainder of those settlement assets.*

5. Perhaps the single most significant finding and recommendation I make is that TOKMTL can and should now be wound-up – an outcome, I hasten to add which, if Iwi so resolve, will necessarily take some time to effect.

6. In making my findings and recommendations for significant change, I make it clear that I do not belittle any entity or any person or persons who have been an essential part to date of delivering the fisheries Settlement under the 2004 Act.

7. On the contrary, I acknowledge and respect the professionalism, energy and expertise of the persons engaged at all levels of the entities in the Act's architecture over the past eleven years. The success which has been achieved primarily by TOKMTL and its dedicated boards, management and staff is most profoundly demonstrated by the fact (as advised by TOKMTL) that:

   - as at the end of January 2015 it has distributed to Iwi 98% of the fisheries Settlement population assets by value; and
   - 86% of the coastline assets by value.

8. In aggregate TOKMTL has distributed 94% of the assets, by value, that it held at the commencement of the Maori Fisheries Act 2004. These figures do not include any aquaculture assets, funds held as a result of disputes relating to the ACE rounds, and subsequent dividends received by AFL or Matcs attached to those dividends relating to Iwi that have yet to be mandated. The numbers also do not include any earnings that may have accrued to any of the assets. Values are all stated at the values applying as at 29 November 2005.

9. Put in equally clear language, as indeed is confirmed in **Te Tini a Tangaroa** published at the end of 2014, TOKMTL has, since 2005, transferred to Iwi fisheries Settlement assets to the value of $543 million. By any "performance" measure, this is worthy of recognition and celebration.

10. In fact I consider that it is partly because of this very success in achievement of both its purpose and of the principal objective of TOKMTL under the Act that I conclude that it can now be wound up and its assets be transferred to Iwi in accordance with the Act. I recommend accordingly.

11. The Act requires that upon TOKMTL being wound-up, its assets shall be distributed back to Iwi. These assets total $172m as follows:

| | $('000) |
|---|---|
| Investment portfolio | 66,739 |
| AFL shares | 82,543 |
| RPS | 20,000 |
| Other | 3,604 |
| **Total** | **172,886** |

TOKMTL tells me that, in essence, the "Other" represents working capital. Income generating assets are the investment portfolio and the income shares in AFL. I was helpfully provided with a summary Te Ohu Kai Moana balance sheet verifying these figures. I am advised they agree to the 2014 Annual Report which was released by TOKMTL in December last year.

12. I recognise that if this recommendation is accepted by Iwi, considerable work will be required to transition the change. For one thing, TOKMTL has continuing statutory responsibilities to a different set of beneficiaries under the Maori Commercial Aquaculture (Claims Settlement) Act 2004. New structural arrangements for the continuing discharge by, doubtless, a like central management body, of allocation obligations under that legislation will be necessary.

13. In addition, the last vestiges of MIO recognition and Settlement assets allocation are expected to take yet a little more time. The onset of sunset for TOKMTL in respect of its Maori Fisheries Act responsibilities will, I expect, if accepted by Iwi, act as an incentive to both TOKMTL and the Iwi concerned to finalise all required steps for completion. Prompt finalisation is already part of the TOKMTL Annual Plan 2014-2015 now published. Such issues (affecting final transfer of assets goals) as are already before, or to be brought before, the Maori Land Court should now be prosecuted with urgency.

14. Some submissions I received advocated the retention of a significantly restructured (and likely downsized it seems to me) TOKMTL "look-alike" entity to undertake advocacy and policy development and advice for Iwi on, for instance, nationally important (Maori and industry) fisheries issues. I allow for that, but do not recommend it without a change to a new funding model, absent the retention by TOKMTL of 20% of Iwi income shares in AFL. I see the prospect of an Iwi levy-based funding model (Perhaps the Challenger Scallop Enhancement Company is a model deserving of study for such purpose). It will be for Iwi to decide on the shape, nature and funding of such a new body, if my recommendation to wind up TOKMTL is accepted by Iwi.

15. I also recognise that respect for the mana and the position of management and staff at TOKMTL confronted with the prospect of such a change - if Iwi resolve to make it – requires that proper time and attention (consistent with the obligations of employers of good faith and reasonableness) be taken and given to transition arrangements necessary for such purpose.

16. I have tried to undertake a "bottom-up" review (rather than "top down"). My approach has been to identify and examine the "critical few" (versus "important many") issues. I have undertaken that examination against the backdrop of the "Maori Fisheries Story". That story, for all relevant purposes, had its birth with the Treaty in 1840. It probably had only reached adolescence in the 1990s, but it has certainly now reached adulthood. From birth to adolescence and now to adulthood it evidences a vibrant saga with a subtle interplay of dynamic forces – cultural, customary, commercial, economic, legal and social. Its colossal issues are of national significance.

# SUMMARY OF FINDINGS, RECOMMENDATIONS AND REASONS

17. The governance arrangements under the Act are coherent in that they are all linked to delivery of benefits provided by the Settlement and by the Act; and thereby linked also to the achievement of the purposes of the Act. While the purposes of the Act remain constant, the nature of the desirable benefits of the Settlement through the evolution and progress over the last 10 years – a maturation process – refine and change to meet changing circumstances. In most things, context is everything; and so it is in the phases for the delivery of the benefits of the Settlement.

18. "Benefits" as that word is used in the Act, and the ToR, are not cast in stone. Now that allocation has occurred, the challenges of both efficient ownership and use of the assets informs the nature of benefits Iwi now seek for the way ahead. I find, and wish to emphasise, that the changes as I recommend must (and do) properly reflect the evolution of Iwi "groupings" from the position of "notional" owners of the Settlement assets in 2004, to, now, 2015, significantly more experienced, informed and capable mandated and accountable Iwi organisations with the capacity and the wish to exercise in full those rights of ownership. With the exercise of such rights, including of director appointments and of the other incidents of rights holding, come responsibilities. I completely accept that Iwi are well able to remain cognisant of those responsibilities – the commercial success of their investment in fisheries is in part dependent upon that being and remaining so.

19. The temporal context against which Iwi now consider what benefits are important for the future, given the express purposes of the Act, warrant a bundling of the para.3 features of the ToR for evaluation in this Review. I do not interpret the ToR as requiring an analysis of the entities' performance and ability in any other context. Indeed, it would be artificial to do so.

20. Accordingly, with due deference to the ToR and for reasons just expressed, I have bundled together some of the ToR topics. The first matter to review under para.3 is:

## Terms of Reference

*(1) The entities to be reviewed under these Terms of Reference are the four entities referred to in s.114(4) of the Maori Fisheries Act 2004 ("the Act"), namely:*

*a. Te Ohu Kai Moana Trustee Limited;*

*b. Aotearoa Fisheries Limited;*

*c. Te Putea Whakatupu Trustee Limited;*

*d. Te Wai Maori Trustee Limited;*

*and, to the extent included by the definition of "governance arrangements" in s.122(2) of the Act, the procedures and criteria to appoint the members and alternate members of Te Kawai Taumata.*

*(2) The review of those entities is to consider and report on the following topics.*

*(3) The effect on those entities of the governance arrangements provided for by or under the Act as those arrangements relate to:*

*a. The performance of those entities in achieving their duties and functions;*

*b. The ability of those entities to deliver benefits to their beneficiaries;*

*c. The ability of those entities to contribute to achieving the purposes of the Act.*

21. Accordingly, I consider, together, the effect on the entities of the governance arrangements provided by the Act as they relate to their performance in achieving their duties and functions; their ability to deliver benefits to their beneficiaries; and their ability to contribute to achieving the purposes of the Act.

22. The "governance arrangements" under the Act (s.122(2)) are comprehensive in definition:

***122. governance arrangements include –***

*a. the procedures and criteria to appoint –*

*i. the directors of Te Ohu Kai Moana Trustee Limited, Aotearoa Fisheries Limited, Te Putea Whakatupu Trustee Limited, and Te Wai Maori Trustee Limited; and*

*ii. the members and alternate members of Te Kawai Taumata; and*

*b. the ownership structure of each Entity, including the shareholding structure of Aotearoa Fisheries Limited; and*

*c. the procedural requirements that enable the beneficiaries of an Entity to hold directors accountable for management performance; and*

*d. the provisions required by this Act for the constitution and the trust deed (if any) of an Entity.*

23. For TOKMTL, I draw attention to ss.31 and 32 of the Act:

***31. Te Ohu Kai Moana to be established***

*(1) The Treaty of Waitangi Fisheries Commission must, before the appointed day, establish by trust deed a trust called Te Ohu Kai Moana.*

***32. Purpose of Te Ohu Kai Moana***

*The purpose of Te Ohu Kai Moana 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.*

24. I next draw attention to the Duties and Functions prescriptions under the act at ss.33-35 inclusive as below:

***33. Trustee of Te Ohu Kai Moana***

*(1) Te Ohu Kai Moana must have only 1 trustee.*

*(2) The trustee of Te Ohu Kai Moana must be a company formed under the Companies Act 1993 with the name Te Ohu Kai Moana Trustee Limited.*

*(3). Duties and functions of trustee*

***34. Duties of Te Ohu Kai Moana Trustee Limited***

*Te Ohu Kai Moana Trustee Limited must administer the settlement assets in accordance with the purposes of this Act and the purpose of Te Ohu Kai Moana, including performing the following duties:*

*…*

*c. to allocate and transfer the settlement assets; and*

*d. to manage on a transitional basis, collectively or separately as Te Ohu Kai Moana Trustee Limited considers appropriate, the settlement assets to be allocated to an iwi, until they are transferred to the mandated iwi organisation of the iwi; and*

*e. to determine the coastline entitlements of iwi under section 11 and Schedule 6;*

*…*

*i. To assist recognised iwi organisations to establish a register of iwi members that includes the contact details and date of birth for every person included in that register; and*

*j. to assist iwi to meet the requirements of sections 14, 17, and 130(3); and*

*k. where the lack of mandated iwi organisation for an iwi prevents the mandated iwi organisation of another iwi from making its coastline claims under clause 3 of Schedule 6, Te Ohu Kai Moana Trustee Limited must give priority to assisting the iwi that does not have a mandated iwi organisation, as provided for in paragraph (j);*

*…*

***35. Functions of Te Ohu Kai Moana Trustee Limited***

*(1) As a means to further the purpose of Te Ohu Kai Moana, Te Ohu Kai Moana Trustee Limited may –*

*…*

*b. in relation to fisheries, fishing and fisheries-related activities, act to protect and enhance the interests of iwi and Maori in those activities:*

*…*

*e. in accordance with the provisions of Part 4, acquire or dispose of income shares, settlement quota, and quota other than settlement quota, and sell annual catch entitlement generated by settlement quota or by quota other than settlement quota:*

*f. perform the functions of the voting shareholder of Aotearoa Fisheries Limited:*

*g. apply the funds of the trust by way of payments to –*

*i. mandated iwi organisations;*

*ii. Te Putea Whakatupu Trustee Limited and Te Wai Maori Trustee Limited as specified in sections 90(5) and 103(6) respectively:*

*f. grant assistance, as permitted by or under this Act, to -*

*iii. mandated iwi organisation;*

*iv. individual Maori and groups of Maori:*

25. The ToR (which suddenly seem rather "wooden" as I attempt to write the compelling case for change in the Settlement architecture for the future) demand, it seems to me, a broad but robust evaluation of a central question: is the current structure prescribed by the Act the most suitable (optimum) for this next phase in the development of collective and individual Iwi interests in successful fisheries, fishing and fisheries related activities? Benefits for, and development of, iwi in fishing are the touchstones.

26. Put another way. Is there a better structural framework which will more sensitively respond to the wishes of the owners (individually and collectively) and more effectively facilitate their aspirations for commercial success in a manner which is of benefit to all Maori.

27. Alongside the purpose, duties and functions of TOKMTL it is instructive to lay out similar imperatives for the other entities under Review, and similarly bundle the para.3 ToR considerations together for all of them.

28. I invite reference to the diagram I have included in this Summary. It is not much different from many others but my intention for its inclusion here is to try and graphically demonstrate the one incongruent feature of the superstructure. It occurs at the third layer of the architecture which horizontally identifies Te Wai Maori Trustee Limited, Aotearoa Fisheries Limited and Te Putea Whakatupu Trustee Limited all below the TOKMTL layer one level above.

29. These three entities are distinctly different. Two trusts with very different kaupapa and purpose; and one(also very different) commercial fishing entity.

30. Whilst likely expeditious in 2004, such is the developmental circumstance of each since, I find that it is not efficient, nor sufficiently responsive to the reasonable needs of the "communities" of beneficiaries (defined in respect of each entity in s.122 (see below) for 2015, that the one board, that of TOKMTL, appoint the directors, and supervise those three distinctively different entities. I recommend changes to address this situation.

***122. Beneficiary of an entity means –***

*a. in the case of Te Ohu Kai Moana Trustee Limited, the beneficiaries of the Deed of Settlement; and*

*b. in the case of Aotearoa Fisheries Limited, its income shareholders; and*

*c. in the case of Te Putea Whakatupu Trustee Limited and Te Wai Maori Trustee Limited, those individuals and groups entitled to apply for distributions provided for under the distribution policy of the relevant trust deed."*

31. I deal first with AFL. Its duty, and complementary constitutional requirements, are set out in ss.61 and 62 of the Act:

***"61. Duty of Aotearoa Fisheries***

*AFL must manage its assets in a commercial manner.*

***62. Requirements for constitution***

*Aotearoa Fisheries Limited must have a constitution that includes:*

*…*

*g. a requirement that Aotearoa Fisheries Limited use its best endeavours to work co-operatively with iwi on commercial matters; and*

*h. requirements that Aotearoa Fisheries Limited –*

*i. establish a process for the disposal of income shares in accordance with the provisions of sections 69 and 72; and*

*ii. maintain a register that records –*

*(A) All income shareholders; and*

*(B) All transfers of income shares; and*

*iii. record transfers of shares in the register if, and only if, the transfers comply with the requirements of sections 69 and 72; and*

*i. a requirement that if Aotearoa Fisheries Limited is put into liquidation, distributions must be made to the income shareholders in proportion to their shareholding at the time of liquidation; and*

*j. a provision that the constitution must not be amended in a way that affects the rights or entitlements of the income shareholders, unless the shareholders of at least 75% of the income shares approve; and*

*k. a provision enabling Aotearoa Fisheries Limited –*

*i. to issue additional income shares; and*

*ii. to establish subcompanies; and*

*l. provisions for any other matters that are required by this Act.*

*…"*

32. I emphasise s.61 and s.62(g) in particular.

33. The duty of AFL is to manage its assets in a commercial manner. Several submissions to this Review have expressed concern about the commercial performance of AFL, particularly the financial performance of its 50% owned joint venture, Sealord. The recent Te Putea Whakatupu Trust Report records the fact that there is increasing debt in the AFL Group and little evident growth in Iwi equity. Of real concern, however, is the ongoing weakness in free cash flow generated by Sealord and AFL. It is clear from submissions to me that free cash flow is the most relevant measure of commercial performance to Iwi. Strong free cash flow secures both ongoing control of Settlement assets as well as providing the means to fund a diverse range of Settlement benefits.

34. The facts about the level or past trends of AFL financial performance are not, in themselves, enough to indicate that a change to AFL governance arrangements is required. The current trends and signs for AFL and Sealord financial performance are much improved. Relevant material will be attached to the full Report. However, I have formed the view that change is essential if AFL is to successfully work cooperatively with Iwi on commercial matters. I observe that there is little point in AFL using its "best endeavours" in that regard if its structure contains barriers or disincentives to that cooperation; cooperation that would otherwise be to the commercial advantage of Iwi owners and Settlement beneficiaries.

35. AFL must be focused on its role to add value to the taonga asset in the catching, processing and marketing of product. Ideally, it would operate as a specialist in quota use as distinct from quota ownership. It is of concern that AFL effectively competes with Iwi in the business and activity of commercial fishing. The "best endeavours" imperative imposed on AFL under the Act is soundly based, it seems to me, given that Iwi are the owners. AFL is required to act commercially, strategically, and successfully. However, this must not be, in my view, at the expense of Iwi owners. The obligation to use "best endeavours" cannot be relegated to an "all care/no responsibility" approach: not that I am suggesting that this is, actually, currently, AFL's approach. I find that the requirement to use "best endeavours" to work co-operatively with Iwi on commercial matters certainly means that AFL must not compete with Iwi in the business and activity of commercial fishing. If there is even a risk that it will compete with Iwi, it is incumbent upon the governors of AFL to design strategies whereby it does not.

36. I am entirely satisfied that for the better achievement of the purposes of the Act and for the better delivery of benefits to Iwi owners, there must be, now, a much more direct connection between Iwi owners of AFL and AFL managers. This, I find, is best achieved by now eliminating the two layers of governance (TKT and TOKMTL) between Iwi and AFL. I recommend 100% of the voting (control) shares, and the balance of 20% income shares, held effectively by TOKMTL as trustee for Iwi, be allocated out to Iwi.

37. There are a number of options for mechanism selection to effect such an allocation. The voting shares could, for instance, be allocated on the same basis as the income shares were allocated. That would effect a merger or "collapse" of the current two classes of shares into one class of shares, the same rights attaching to all. There are variations to that arrangement which are possible.

38. Iwi should decide, in my view, and I so find and recommend.

39. Reducing or shortening the distance between Iwi owners and the managers/governors of AFL will, in my view, significantly increase the very desirable prospect of developing successful synergies between those owners and managers. Transferring voting shares and the balance of the income shares in AFL held by TOKMTL to Iwi will remove the TOKMTL layer and its costs.

40. There is no doubt in my mind that there are commercially savvy people in Maoridom, many already engaged in Iwi commercial activities, who can add value and constructively influence the strategic decisions and positioning of the commercial fishing entity – AFL – that Iwi own. I have observed sophisticated skills in Asset Holding Companies and Mandated Iwi Organisations throughout the country. In my view it is timely now that those Iwi skills – the skills reposed in the owners – are applied to their AFL business. Iwi should be fully involved, assuming (and this is an important pre-condition) they wish to be.

41. This will not, of itself, contrary to what I understand to be AFL's position, provide a complete answer to the concern that AFL, as quota owner, is still in competition with Iwi. Incuded in this Report is an additional diagram which seeks to demonstrate that Iwi v. AFL quota use competition remains an open question; a live issue. I consider more work is required to tease out the way in which the "best endeavours" non-competition imperative (which I consider it to be) as between AFL and Iwi owners could work effectively. I recommend Iwi and AFL work together to address this issue urgently. They are both incentivised to do so given direct ownership by Iwi in AFL (as I recommend should occur and assuming Iwi resolve later this year accordingly).

42. I find further that any residual fears that some Iwi may have (and as some expressed to me during consultation) that those with a smaller shareholding stake may be "at the mercy" of those Iwi with a bigger stake can be very adequately addressed in a variety of ways. Contrary to what I took from the TOKMTL report to me on this point, I find that a "central trustee", of the nature of TOKMTL, holding (and be able to exercise) voting shares in AFL (on behalf of Iwi) is not necessary now (even if it was at an earlier time) to protect smaller Iwi from bigger Iwi. Iwi do not actually seek that kind of protection. It is not necessary on the pretext that it protects the durability of the Settlement for all Maori. New Zealand company law, shareholder (inter se) agreements requiring consensus and imposing principles and disciplines on shareholder behaviour (most especially those based upon and informed by the values of Te Ao Maori: see for instance the Iwi Collective Partnership protocol in this respect), are adequate protections in my view. So they should be; Iwi are, collectively, the owners and have responsibilities to each other.

43. Of course it is also correct that those Iwi who have the bigger stake(s) in AFL also have thereby a bigger investment at risk. In theory, they should have a more influential say. It would be, in my view, a most unusual circumstance if, as shareholders collectively in AFL, what was good for a big Iwi (or group) was automatically and unavoidably bad for a smaller Iwi (or group).

44. I return to my central thesis. The "beneficiaries of the Settlement" are, by law, Iwi, and, through Iwi, ultimately all Maori. See s.5 of the Act. It could not have been contemplated by the designers and architects in the allocation model in ***"He Kawai Amokura: A model for allocation of the Fisheries Settlement Assets, Report to the Minister of Fisheries"*** in 2003 that some Maori could benefit at the expense of other Maori. It clearly was not Parliament's intention either in passing the 2004 Act. It would be axiomatic that the very purpose of the Act would be defeated if such an outcome was said to be legitimised by the statute.

45. Elsewhere in this Report I make observations about contemporary corporate practices adopting ethical policies in formal protocols outlawing shareholder conduct prejudicial to other shareholders. I find that what appears to be a TOKMTL appeal to me to preserve its power to vote its control shares in AFL on the basis that it is a necessary safeguard against overbearing Iwi behaviour at the expense of benefits "to all Maori" to not be valid.

46. Still with AFL, I also find that the capital structure flexibility sought by the company is likely to be more readily facilitated by the departure of TOKMTL which must, under the Act, hold 20% of the income shares and is able currently to exercise the rights attaching to its voting shares without reference to Iwi owners (on whose behalf they are held).

47. If the voting and income shares presently held by TOKMTL are transferred to Iwi, as I recommend, the shape and purpose of TOKMTL changes irrevocably. A further change which I find is called for now is that it should be for Iwi to directly appoint the directors of AFL. The process by which Iwi appoint the AFL Board is, ultimately, for Iwi to decide and design. Iwi could, for instance, decide upon a representative body which might look like, at first glance, TKT (or even a mirror image (structurally) of the CoR, albeit charged with different responsibilities.) In my view, that Iwi now make these appointment decisions by a process Iwi determine as efficient and efficacious for the task, is consistent with the contemporary position of Iwi as owners of the Settlement assets TOKMTL has successfully transferred. It flows from corollary findings and recommendations I make in respect of the desirability and appropriateness now of the allocation of the balance of the 20% of the income shares in AFL together with 100% of the voting shares in AFL from TOKMTL to Iwi.

48. Merit appointments to all surviving entity boards including AFL must be the objective and become the norm. In my view, there is currently not enough operational experience evident in the Board members of AFL (or Sealord) notwithstanding a broad range of other very desirable skills in existence across Board members. I recommend that Iwi and AFL address that issue promptly and after full consideration reach a conclusion on the point (and agree a process to remedy if it is considered valid).

49. Next I return to the ToR paras.7, 8 and 9:

> *7. Whether, without creating an inconsistency with the purposes of the Act or with the purpose of Te Ohu Kai Moana, the interests of the beneficiaries of the Deed of Settlement would be better served by changes to:*
>
> *a. The governance arrangement of the entities;*
>
> *b. The restrictions on the disposal of settlement assets.*
>
> *8. The consideration of and reporting on 3 and 7 above would include an assessment of the extent to which the voting shares in the shareholding structure of Aotearoa Fisheries Limited affect its ability:*
>
> *a. To perform its duties and functions;*
>
> *b. To deliver benefits to its income shareholders;*
>
> *c. To contribute to achieving the purpose of the Act.*
>
> *9. Whether, without creating an inconsistency with the purposes of the Act or with the purpose of Te Ohu Kai Moana, the interests of the income shareholders of Aotearoa Fisheries Limited would be better served by changes to:*
>
> *a. its voting shares;*
>
> *b. its divisions, subsidiaries and associates;*
>
> *c. its structural configuration, including its allocation of its assets and debts;*
>
> *and if so, the nature of those changes.*

50. They are appropriately bundled together because, as elsewhere, at their core are the key themes of:

- The best interests of the beneficiaries of the Deed of Settlement (Iwi and through Iwi, all Maori);
- The desire and importance to consider changes in voting and income shareholding, and governance arrangements generally, without outcomes which are inconsistent with the purpose of the Act, or the purpose of the Te Ohu Kai Moana (Trust).

51. Specifically, I find that the changes I have recommended to voting and income shareholdings of TOKMTL, in particular their transfer to Iwi is – in 2015 – significantly more consistent with the purpose both of the Act and Te Ohu Kai Moana. The time has been reached, along the Maori Fisheries continuum, and as was always contemplated would be reached at some time, where the key overarching purposes as defined and benefit delivery to Iwi will be better achieved in the future by the changes to voting shareholding, direct AFL director appointments by Iwi and corollary changes to the governance architecture in the manner I recommend.

52. I turn now to the two other entities which are architecturally situate at the same level as AFL. This is the level in the framework where the delivery of benefits to Iwi occurs, or is intended to occur.

53. First I deal with Te Putea Whakatupu Trustee Limited. I had a most constructive hui with Richard Jeffries, Chairman of TPWTL and his fellow director Rikirangi Gage, in Rotorua on 27 January 2015 as part of my Review consultation programme. I also met with John Tamihere and Willie Jackson in Auckland on 18 September last year. I recognise their individual and collective commitment and determination for TPWTL to deliver the benefits for which it was established.

54. I received particularly focused submissions from NUMA, NZ Maori Council and FOMA. In the report from TOKMTL to me on the Review, the position of TPWTL was addressed. I forwarded the relevant passages to Richard Jeffries and Rikirangi Gage for consideration prior to our discussion and, along with the material noted below from NUMU, NZMC and FOMA I invited responses to that material.

55. NUMA seeks that:

a. The legislation better confirm that urban Maori are the primary beneficiaries of TWPT and governance arrangements be set in line with achieving that purpose;

b. A reinforced requirement of consultation with NUMA on appointment of directors of TPWT;

c. All directors of TPWT must have knowledge of and skills directly relevant to urban Maori;

d. Governance arrangements include proxy rights approved directly by NUMA to avoid quorum collapses as in the past;

e. NUMA have direct input into new governance structures in line with the above proposals before they are finalised.

56. NZMC submits:

    a. TPWT should continue but have its governance arrangements reformed;

    b. Those from the independent Maori communities should constitute all or at least the majority of the director-trustees of TPWT. For example, NZMC would support the appointment of all director trustees of TPWT by NUMA;

    c. An inclusive approach is urged whereby the TPWT reaches (and reaches out) more effectively to independent Maori communities irrespective of traditional tribe affiliation and without the debate descending into and Iwi versus Urban scenario.

57. FOMA observes:

    a. That the governance arrangements of TPWT which require presence of all 3 of 3 directors are flawed in so far as the operations of the trust can thereby be held to ransom by 1 director;

    b. There must be a clearer strategy and action plan by which TPWT achieves its purposes and the purposes under the Act.

58. These submissions and observations are unsurprising.

59. In its report to me, TOKMTL noted the continuing difficulty arising from the fact that the quorum requirement (3) to transact TPWTL business is the same number as the full director compliment (3) so the absence of one director precludes the transaction of business.

60. Having regard to duties and functions imposed in the Act on TPWTL, benefits that are to be derived from its activities and the ability of TPWTL to achieve or to contribute to the achievement of the purposes of the Act, I have reached the conclusion that the governance arrangements presently in place and instituted under the Act, have significantly hindered TPWTL to perform its duties and functions; has restricted TPWTL's ability to deliver benefits; and constrained TPWTL to contribute to achieving the purposes of the Act in a manner which remains most unsatisfactory.

61. In reaching this conclusion, I have particular regard to the fact that as long ago as the 2008 Audit Report completed in accordance with the provisions of the Act, auditors noted their concern that on occasions the board of TPWTL had been unable to meet because of its inability to provide a quorum of three members and that "for a substantial period, Te Putea Whakatupu was in a state of limbo and that some fairly urgent remedial action was required". That view in 2008 was reiterated in the Audit Report under the Act in 2012.

62. Without foreclosing on the proposition that there may have been other reasons why earlier action could not have been taken, it seems to me that TOKMTL should have more actively addressed the problems identified in 2008 reiterated in 2012.

63. The problems identified now over the last six years arising out of the apparent lack of willingness on the part of all directors to work together for the purposes of achieving the objectives of TPWTL is an issue which would ideally have been confronted much earlier. The problem was identified early. There would ideally have been a robust development of options for overcoming the key problem or problems with cooperation to find a resolution being essential in order that the entity discharge its obligations under the Act and for that matter its responsibilities to the beneficiaries of the Settlement.

64. In my view, in the absence of a significantly more focussed strategy to address the problems identified in 2008, the ability of the trust to deliver benefits to its beneficiaries has been hindered by the fact that the one share in TPWTL has been held by the board of Te Ohu Kai Moana Trustee Limited and there has been neither sufficient action nor direction to management to address the problems identified a number of years earlier.

65. It is put to me by TOKMTL that "NUMA has a view that it should control Te Putua Whakatupu because of its involvement in the allocation debates in the 1990s and early 2000s which resulted in Court action". In fact, that proposition is not advanced by NUMA to me. Its submission and the recommendation it seeks are considerably more measured than is the proposition attributed to it – that NUMA simply wants control.

66. I conclude this part of the summary with these recommendations:

    i. That Te Putea Whakatupu Trust not be wound-up.

    ii. That there be a new statutory corporate trustee appointed to manage that trust.

    iii. That that new statutory corporate trustee continue to be called Te Putea Whakatupu Trustee Limited.

    iv. That that trustee company be owned by at least FOMA, NZMC, Maori Women's Welfare League and NUMA (allowing also for others of the Schedule 5 Entities) and iwi.

    v. That the Schedule 5 organisations who wish to participate each have one share with no distribution rights and that those shares be held by the boards from time to time of those organisations; and that Iwi design a representative body to hold between three and five shares also without distribution rights.

    vi. That those shareholding organisations by a majority vote shall appoint five directors of Te Putea Whakatupu Trustee Limited who must each have knowledge of and are able to represent the interests of Maori who reside in urban areas of New Zealand and otherwise have skills, knowledge and experience directly relevant to urban Maori.

    vii. That a quorum of directors to transact business be three.

67. Te Wai Maori Trustee Limited (TWMTL), like TPWTL, is said by TOKMTL to be delivering benefits. However, both are also said by TOKMTL to have encountered problems achieving their objective because of directors difficulty in working together and gaining a quorum when they meet. For TWMTL (as with TPWTL) the quorum required under the Act is equivalent to the full number of directors. TOKMTL note that problems which have arisen have either been addressed, or can be addressed, within the existing governance arrangements, although in relation to both TPWTL and TWMTL, legislative change is necessary to provide that the number of directors of each, sufficient to achieve a quorum for the transaction of business , be reduced to ensure the number required for a quorum is less than the number of appointed directors.

68. I had a searching and very informative discussion in December last year about the future worth and direction of TWMT with its chair, Ken Mair, and the dedicated staff of the TWMTL unit in TOKMTL.

69. I detected a strong and dedicated commitment to the important kaupapa of TPWTL respectively by those persons responsible for achievement of their purpose.

70. If Iwi resolve in accordance with my findings and recommendations, both TPWTL and TWMTL will have to be self-funding; and I envisage both would be well served by a secretariat unit without high administration costs.

71. TPWTL was "targeted" in submissions and during some of my consultation around the motu by some Iwi with a particular interest in freshwater fisheries. It was put to me that those Iwi should have a greater role in governance of it. I understand that submission and the reasons for it, including those which date back to the time the shape of the 2004 Act was debated before promulgation.

72. In the end, I find that all Iwi likely have an interest in freshwater fisheries, albeit some more than others. Many Iwi are already developing sole or co-management protocols with the Crown as part of their historical Treaty claims settlements for freshwater resources in their rohe. This development will have an impact on freshwater fisheries management.

73. I find that the problems of the past in the work of TWMTL revolve around, like TPWTL, issues of equal quorum and director numbers. In respect of TWMTL I recommend that there be three directors appointed by Iwi directly pursuant to a process Iwi should design; and that a quorum for director meetings to transact the business of TWMTL be two.

## Asset disposal restrictions

74. Paragraphs 5 and 6 of the ToR can be bundled together:

*"5. The effect of the restrictions on the disposal of settlement assets as they relate to the ability of:*

*a. Mandated iwi organisations (and their asset holding companies and subsidiaries of the asset holding companies) to deliver benefits to the members of their iwi; and*

*b. Aotearoa Fisheries Limited to deliver benefits to its income shareholders.*

*6.The consideration of and reporting on 5 above should include an identification of the nature of those effects, and:*

*a. Subject to the limitation that any changes still need to be consistent with the purposes of the Act and Te Ohu Kai Moana, whether there should be any changes to those restrictions referred to in 5 above, and*

*b. If so, what changes would be desirable (noting, however, the limitation in s.124(2) of the Act relating to restrictions on disposal of settlement quota to mandated iwi organisations and Te Ohu Kai Moana Group).*

75. In summary, Settlement asset disposal restrictions under the Act are:

a. Income shares. The income shares in AFL may be sold or exchanged only to other MIOs or TOKMTL. The proposal must be notified to, and have the approval of, at least 75% of Iwi members voting at a general meeting or by a prescribed voting process. If Iwi approval is secured, the shares must be offered to other MIOs and TOKMTL and the selling MIO must accept the best price.

b. Quota shares. Settlement quota may be sold only to other MIOs or to an entity in the TOKMTL group. Again, the sale proposal must be notified to, and have the approval of, at least 75% of Iwi members voting at a general meeting or by a prescribed voting process. Detailed provisions prescribe how the sale must be processed (ie by offering MIOs and TOKMTL the option to bid and the treatment of the assets as a bundle or separate lots).

c. ACE. Restrictions apply if a transaction or series of transactions might result in an Iwi being disentitled for more than five years to ACE income or the control or use of ACE arising from settlement quota. In such cases, s.162 applies. That is, the transaction cannot proceed unless it has been notified to and has the approval of not less than 75% of Iwi members voting at a general meeting or by a prescribed voting process.

76. There were strong submissions to me that the restriction of sales of Settlement quota to Iwi and TOKMTL creates, not a competitive market, but actually prevents Iwi from realising the true value of the assets on an open market.

77. Settlement quota divided across MIOs through their AHCs is, of course, spread across all quota species. Many Iwi hold small parcels of every species. Uneconomic parcels of Settlement quota and fragmented ownership present, as Ngati Porou puts it, "unique challenges when it comes to using those assets and putting those assets to best use". Some care is required here, in my view. Rationalisation of quota ownership is one matter; rationalisation of quota use is another altogether and, in my view, it is the latter upon which Iwi should be focusing for the future.

78. Iwi frequently focus on making a return on their assets by selling or utilising ACE – or at least some of them do. Optimisation of ACE prices is therefore important. ACE transactions, however, are restricted to five year terms which is not long enough for those in the business and activity of commercial fishing who, not surprisingly, seek access to ACE for a much longer period than five years.

79. However, the overwhelming force of other submissions from Iwi and knowledgeable, experienced individuals is to urge upon me the retention of Settlement quota disposal restrictions allowing trade within the Maori pool only. I have considered this issue very carefully. I have reached my own conclusion whilst nevertheless giving due weight to the submissions, including competing submissions, on the point. I have full regard to the fact that quota, and therefore Settlement quota, was the currency selected for a significant part of the Treaty settlement by value negotiated between the Crown and Maori leaders in 1992. It cannot be over-emphasised that this was a Treaty settlement in respect of cherished taonga. It is essential, in my view, to retain Settlement quota disposal restrictions within the Maori pool for the purposes of protecting and ensuring the durability of the Treaty settlement down the generations and into the future. That is my finding.

80. Having made such a finding, I am not, by the Act or by any other imperative, prohibited from making a recommendation. It is my recommendation that the Settlement quota disposal restrictions enshrined in the Act be not changed. But with that recommendation, I also confirm an additional one. I find that the processes and procedures by which Iwi can transfer quota or shares within Maoridom (and only within Maoridom), need to be revisited. They are, in my view, insufficiently flexible, indeed in many respects are cumbersome and preserve the paternalistic role of TOKMTL in relation to the steps prescribed by the Act.

81. I recommend that the processes by which Iwi can quit their fisheries assets, in part or in whole, to willing buyers who wish to consolidate and/or increase their investment in the fishing industry, have easier willing-seller/willing-buyer processes available to them to achieve such objectives.

82. I would recommend that one of the tasks to be undertaken by an Iwi Working Group as I recommend be established (funded by TOKMTL – as I also recommend) post the delivery of this Report to enable Iwi to consider the detail of options for change, be to consider the distinction between rationalisation of ownership and rationalisation of use for the purposes of trying to identify most desirable or potentially productive options. But in any event, I do recognise the desirability of flexibility and freedom (and find there is a need for) on the part of Iwi to sell quota, even (but only, in my view) within the Maori pool, if strategically they consider that to be the best decision to make.

## Iwi Working Group

83. I come to my last finding for this preliminary presentation. I find that there should be a suitably sized (small) Iwi working group, funded by TOKMTL, urgently established to work through all the design work, findings and recommendations I have made.

## An opportunity for renewed Iwi leadership and enterprise

84. This is the conclusion I reach. This next chapter in the delivery of benefits to Iwi, in a manner ultimately for all Maori, is an opportunity for rigour and focused commercial, economic and cultural development. My hope is that it will be comprehensively embraced.

**Tim Castle**
**13 February 2015**

# TE MAHERE ARIA : A MIND MAP FOR THE REVIEW

## Reviewer's Approach

(1) I considered there to be 3 essential features in mapping out (conceptually) the work requirements of this project:

i. **Understanding** the landscape (or rather, "seascape");

ii. **Identification** of the **critical few issues** (as distinct from the "important many")and work streams;

iii. **Education** – identifying what the Reviewer does not know.

(2) Each of these features is informed by:

i. Economic development and benefit for all Maori;

ii. The purposes of the Maori Fisheries Act 2004 (see s.3 of the Act);

iii. The purposes for which all entities in the Act's architecture have been established to achieve the purposes of the Act.

(3) In summary, the purposes of the Act are to:

i. Implement the agreements made in the 1992 Fisheries Settlement;

ii. Provide for the development of collective and individual interests of Iwi in fisheries, fishing and fisheries-related activities in a manner that is ultimately for the benefit of all Maori.

(4) The purposes of Te Ohu Kai Moana Trustee Limited deserve particular mention. They emphasise that entity's responsibilities as **trustee** to advance the interests of Iwi individually and collectively, primarily in the development of fisheries, fishing and fisheries-related activities in order to ultimately benefit the members of Iwi and Maori generally; to further the agreements made in the Deed of Settlement; to assist the Crown to discharge its obligations under the Deed; and to contribute to the achievement of an enduring settlement of the claims settled by the Deed of Settlement.

(5) **Understanding the "Seascape/Landscape"** is an important first step.

(6) The expectation of the Reviewer is that all the entities to be reviewed will:

- Provide at the commencement of the Review all information considered relevant to the review under the Terms of Reference;
- Make contact with the Reviewer and proactively schedule meetings and other appointments for the purposes of providing the necessary information and other discussions;
- Ensure further information requested by the Reviewer is made available promptly.

(7) Secondly, the Reviewer's expectation is that identification of the work streams and issues, many of which are themselves set out in the Act and in the Terms of Reference, will be further "fleshed out" during consideration of information provided; from a planned extensive Reviewer consultation programme with Iwi Maori, Maori communities, Maori fishers, Maori engaged in the business and activity of fishing, on marae and elsewhere throughout the motu; from discussions with individuals knowledgeable and experienced in the kaupapa; and from discussions with the experienced people in the entities themselves.

(8) Finally, the **education** of the Reviewer is anticipated likely to emerge from the first two activities identified – understanding the landscape and identifying the issues.

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# APPENDICES

## WRITTEN SUBMISSIONS ON THE REVIEW

Written submissions were received from Iwi Maori (MIOs and AHCs) and Maori community organisations as follows:

- Federation of Maori Authorities
- Hokotehi Moriori Trust
- Maniopoto Fisheries Trust
- Muaupoko Iwi, Horowhenua
- National Urban Maori Authority
- New Zealand Maori Council
- Ngati Kahungunu Iwi Inc
- Ngati Kaitiaki o Ngati Kauwhata Inc
- Ngati Manu and Te Uri Karaka Hapu, Bay of Islands
- Ngati Mutunga o Wharekauri Iwi Trust
- Ngati Porou Seafoods Group
- Raukawa ki te Tonga Trust
- Taitokerau Iwi entities (Ngati Kuri Trust Board, Te Runanga o Ngaitakoto/Nga Taonga o Ngaitakoto, Te Runanga Nui o Te Aupouri, Te Runanga o Te Rarawa, Te Runganga o Whaingaroa, Te Runanga A Iwi Ngapuhi and the Ngatiwai Trust Board)
- Takitimu Iwi Collective in Tairawhiti (Ngai Tamanuhiri, Rongowhakaata, Te Aitanga a Mahaki)
- Tamatea Tarawhiti Limited
- Te Atiawa o Te Waka-a-Maui Trust
- Te Kei o Takitimu
- Te Kotahitangi o Te Arawa Waka Fisheries Trust Board
- Te Roroa Hapu/Philip Bristow-Winiana
- Te Runanga A Iwi O Ngapuhi
- Te Runanga o Ngati Whatua
- Te Runanga o Ngai Tahu
- Te Taihauauru Fisheries Forum
- Te Upokorehe Iwi
- Tuwharetoa Maori Trust Board
- Waikato-Tainui Te Kauhanganui Inc

## CONSULTATION HUI

- Port Nicholson Fisheries in Wellington, 12 September 2014 (facilitated by Joseph Thomas);
- Hui with kaumatua and key executives of Tainui Group Holdings, 17 September 2014 (facilitated by Tony Magner);
- Hui with Te Kupenga and Maniapoto, Hamilton, 17 September 2014;
- Hui with John Tamihere and Willie Jackson in Auckland, 18 September 2014;
- Hui with Te Taitokerau Iwi and Ngapuhi, Kohewhata Marae, Kaikohe, 19 September 2014 (chaired by Sonny Tau; and facilitated by Alison Thom and Kevin Robinson);
- Hui with Haurauru Electoral College, Parewahawaha Marae, Bulls, 24 September 2014 (facilitated by Ben Potaka);
- Hui with the Iwi of Te Moana o Raukawa Electoral College, Wellington Airport, 29 September 2014 (facilitated by Paia Riwaka-Herbert);
- Hui with the Iwi of Mataatua Electoral College, Whakatane, 6 October 2014 (facilitated by Materoa Dodd);
- Hui with the Te Arawa Iwi Electoral College, including Tuwharetoa, in Rotorua, 7 October 2014 (facilitated by Shane Heremaia);
- Hui with the Tainui-Waikato Electoral College, Hamilton, 10 October 2014;
- Hui with Takitimu Waka Electoral College Iwi including Ngati Kahungunu, Napier, 15 October 2014 (facilitated by Mike Paku); and kanohi ki te kanohi, at Hastings Taiwhenua with Ngahiwi Tomoana, Chairman, Ngati Kahungunu and former chairman of TOKMTL;
- Hui with Rongomaiwahine, at Kaiuku Marae, Mahia, 15 October 2014;
- Hui with Tairawhiti Takitimu Waka Iwi, Gisborne, 16 October 2014 (facilitated by Mike Paku);
- Hui with Te Horipo Karaitiana of Federation of Maori Authorities in Wellington, 30 October 2014;
- Hui with Raukawa ki te Tonga AHC Limited – Toa Pomare, Colin Knox, Te Kenehi Taylor, TOKM, 31 October 2014;
- Hui with officials of Ministry of Primary Industries, Wellington, 31 October 2014;
- Hui with Kypros Kotzikas, Chairman, United Fisheries and former director Ngai Tahu Fisheries in Christchurch, 4 November 2014;
- Continuous hui on Wharekauri/Rekohu/ Chatham Islands (Ngati Mutunga o Wharekauri, and other Iwi entities/ fishers (including Pita Thomas, Waitangi Seafoods Limited at Port Hutt; Delwyne Tuanui, Chatham Island Food Co, Owenga; Danny and Dale Whaitiri at Kaingaroa) in the business and activity of fishing; and Moriori) (facilitated by Joseph Thomas), 4-7 November 2014 inclusive; telephone discussions with Shirley King, Maui Solomon, Hariroa Daymond and Ann Preece; hui with Preece whanau at Waitangi;
- Hui with Maui Solomon, General Manager Hokotehi Trust (Moriori), 10 November 2014;
- Hui with Porourangi and Ngati Porou, Gisborne (facilitated by Mark Ngata); and hui with Dr Apirana Mahuika, 18 November 2014;
- Hui in Nelson with Brian Rhodes, former Chief Executive of Sealord; current Chairman of Ngai Tahu Seafoods, 24 November 2014;
- Hui with Te Runanga o Ngai Tahu at Otautahi, including Sir Tipene O'Regan and Sir Mark Solomon, 25 November 2014 (facilitated by Donna Flavell); and further discussion with Sir Tipene;
- Presentation by Reviewer to, and invitation for comment and feedback from, Iwi Chairs Forum Hui in Tauranga, 26 November 2014;
- Hui with Jeremy Fleming, former Chief Executive, Aotearoa Fisheries Limited, Auckland, 27 November 2014;
- Hui with Anthony Hannon, Director, Aotearoa Fisheries Limited, Auckland, 27 November 2014;
- Hui with the Chairs and Chief Executives of TOKMTL, AFL and Sealord together at TOKM, 1 December 2014;

- Hui with the Maori Fisheries Act Auditors (2008 and 2012), Ken Mason and Don Hunn, 1 December 2014;
- Hui with Ken Mair (TOKMTL Board member; Chairman of Te Wai Maori Trust) and Te Wai Maori Trust executives, 4 December 2014;
- Hui with Matanuku Mahuika (Chairman), Steve Yung (Chief Executive) and Gary Neill (Chief Financial Officer) of Sealord in Wellington, 5 December 2014;
- Hui with Whaimutu Dewes (Chairman) CEO, Carl Carrington and CFO, Simon Jones at AFL in Auckland, 11 December 2014 (and earlier: 3 October 2015 with CEO in Auckland; with Chairman and CEO in Wellington 8 October 2014);
- Hui with Peter Talley, Talleys Fisheries, in Wellington, 16 December 2014;
- Hui with Matiu Rei (Chairman, TOKMTL), 17 December 2014;
- Hui with Robin Hapi (former CEO of TOWFC; Chairman of AFL; Chairman of Sealord), 18 December 2014;
- Hui with Darren Coulston (experienced New Zealand (Maori) and international commercial fisher/fishing captain), 19 December 2014;
- Hui with Jamie Tuuta (Maori Trustee Board member, TOKMTL and AFL), 19 December 2014;
- Hui with Matanuka Mahuika (Chairman of Sealord), 19 December 2014;
- Hui with Hon Shane Jones (former Chairman of TOWFC), 22 January 2015;
- Hui with Sir Graeme Harrison (Nissui appointed (independent) director on Sealord), 27 January 2015;
- Hui with Peter Douglas (CEO of TOKMTL), 29 January 2015;
- Hui with Richard Jeffries (Chairman of Te Putea Whakatupu Trust) and Rikirangi Gage (director of Te Putea Whakatupu Trust and TOKMTL), Rotorua, 27 January 2015.

## INDIVIDUALS CONSULTED

Carrington, Carl
Cookson, Fred
Coulston, Darren
Daymond, Hariroa
Dewes, Whaiumutu
Douglas, Peter
Ellison, Craig
Fernando, Lal
Fleming, Jeremy
Gage, Rikirangi
Gaynor, Brian
Glavish, Naida
Gourdie, Alan
Hapi, Robin
Hannon, Anthony
Harrison, Sir Graeme
Jackson, Willie
Jeffries, Richard
Jones, Shane
Kotzikas, Kypros
Lanauze, Tom
Mahuika, Dr Apirana
Mahuika, Matanuku
Mair, Ken
McClurg, Tom
Mcleod, Rob
Morgan, Tukoroirangi
Norgate, Craig
O'Regan, Sir Tipene
Peters, Wayne
Preece, Ann
Randall, Taine
Raumati, Hinerangi
Rei, Matiu
Rhodes, Brian
Solomon, Sir Mark
Solomon, Maui
Stuart, Graham
Sutton, Keith
Talley, Peter
Tamihere, John
Tau, (Raniera) Sonny
Thomas, Pita
Todd, Sir John
Tomoana, Ngahiwi
Tuanui, Delwyne
Tuuta, Jamie
Waaka, Toro
Whaitiri, Danny and Dale

# MAORI FISHERIES REVIEW SUBMISSION ANALYSIS

(1) The degree of engagement by Iwi Maori, and Maori communities across the country in this Review process and the issues arising under it for consideration, has been significant. I have attempted to capture not only the comprehensive nature and extent of matters discussed at the consultation hui programme undertaken, in the subsequent written submissions (for which a number of the hui acted as a springboard for consideration within Iwi groups) and, following further discussion internally, in the provision of comprehensive written submissions to me.

(2) Many knowledgeable and experienced individuals who are well qualified to comment upon the issues arising in the Review, willingly provided their insights to me. In addition, I discussed with others some of the principles which I considered might provide a solid foundation for optimum governance arrangements for Maori fisheries in the future.

(3) I received a total of 17 written submissions from MIOs or AHCs, many of which were representative of greater numbers of Iwi and Iwi groupings than that figure. This collective written material frequently supplemented individual Iwi perspectives conveyed to me at hui. Many were expressly representative of Iwi groupings and Iwi organisations within the electoral colleges and other groupings identified under the Act – see for instance, Schedule 3 – such that I am satisfied that the 17 written submissions received reflect a degree of engagement from, conservatively, a minimum of 35 MIOs/AHCs of the 57 recognised under the Act. Indeed, I consider that the number of submissions which are representative in this way are of a number greater than 35.

(4) In addition, independent Maori communities, such as NUMA, New Zealand Maori Council and FOMA (see Schedule 5 of the Act) provided written submissions.

(5) Numerically, this represents a significant engagement with the Review and the Reviewer. So far as individuals are concerned, I have included a list of them by name, numbering 46, in this Report. This number includes some of those who are directors or executives, either currently or previously, of the entities under review. By any assessment, this is a very broad cross-section of a large number of knowledgeable and experienced people, either contemporaneously engaged in the business and activity of Maori fishing, or previously so engaged.

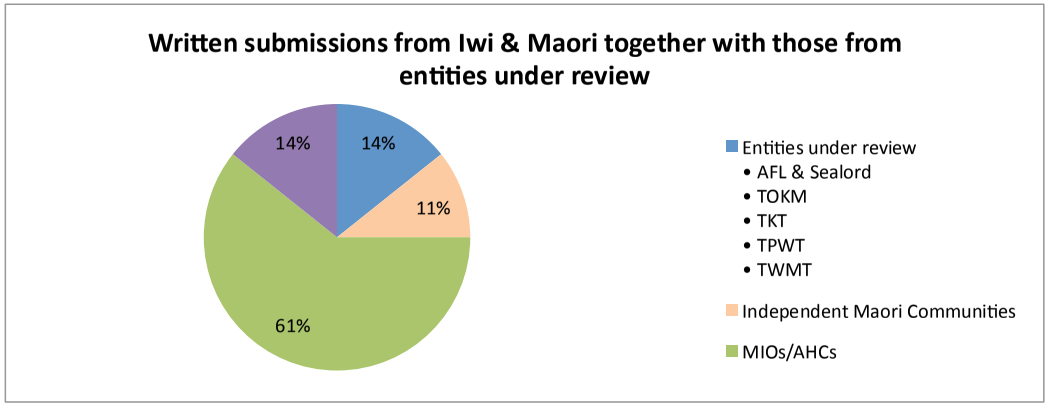
(6) I acknowledge with gratitude the considerable assistance which all those persons listed provided to me, willingly, and mostly in their own time.

(7) I record, however, that my approach to this Review to consultation and the provision of submissions, comments, both written and oral, was not, at any point, a “numbers game”. I took the view and conveyed it widely that, in order to undertake this Review, it was appropriate and important to evaluate all of the submissions received as to what force or weight they might be appropriately given for the purposes of the Review rather than simply be persuaded by force of numbers. Just as I did with the submissions received from the four Entities, so also with the submissions and other comments made to me did I consider them against the express purposes of the Act and the Terms of Reference for this Review. The latter were designed, of course, to be informed by, and reflective of, the former.

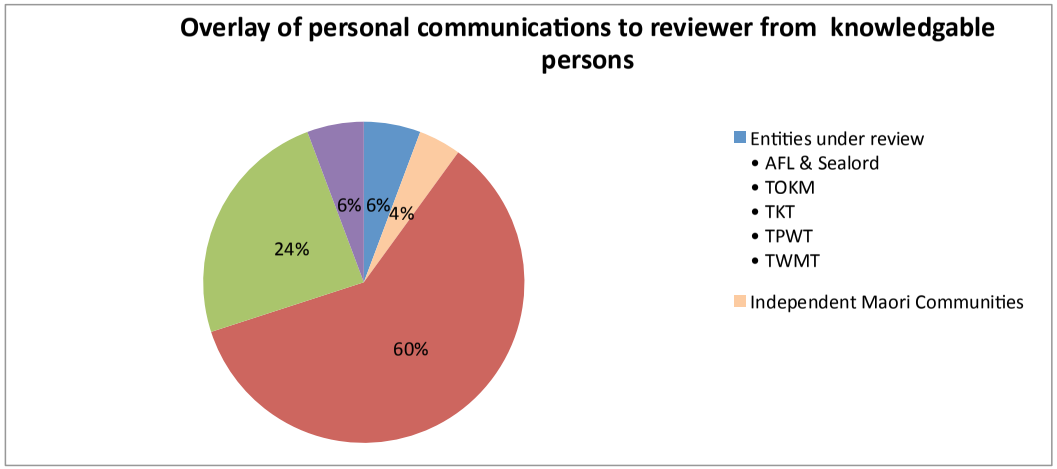
(8) I evaluated and analysed the submissions according to the key issues the submitters and commentators addressed, both at my request and of their own initiative. Numerically the submissions and commentaries were many; it was, however, the substance of them upon which I focused. In three separate graphs and charts (see below). I produced for this Report an analysis of the submissions on an issue-by-issue basis, depicting by percentage, by issue and by number, the total submissions received and my analysis of them. Those three documents for analysis conclude with the graph titled “MFA Submissions Analysis”. The dark blue graphed line against each of the issues captures the number of the written submissions I received and what they had to say to me as Reviewer on an issue-by-issue basis. The lighter blue extensions of the dark blue line reflect the individual responses numerically on the same issues.

(9) This analysis speaks for itself. The substance of the material on which it is based, following my analysis, reflects, in my view, strong support from the beneficiaries of the Settlement, for both the independent conclusions I have reached, and the recommendations I have made.

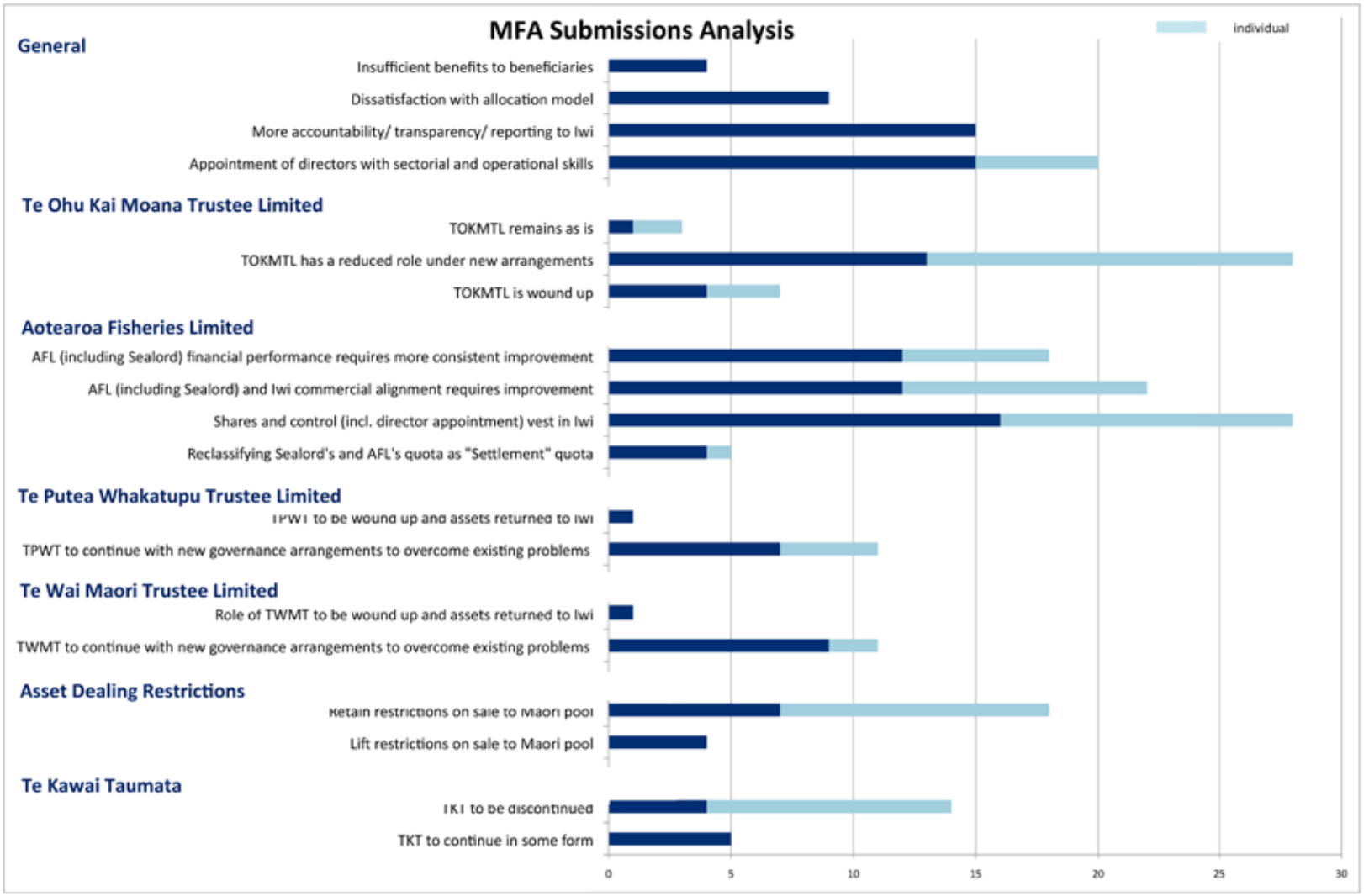
| | |
|---|---|
| Entities under review<br>• AFL & Sealord<br>• TOKM<br>• TKT<br>• TPWT<br>• TWMT | 4 |
| Independent Maori Communities | 3 |
| MIOs/AHCs | 17 |
| Other Iwi groups | 4 |
| **Total** | **28** |




| | |
|---|---|
| Entities under review<br>• AFL & Sealord<br>• TOKM<br>• TKT<br>• TPWT<br>• TWMT | 4 |
| Independent Maori Communities | 3 |
| Individual | 42 |
| MIOs/AHCs | 17 |
| Other Iwi groups | 4 |
| **Total** | **70** |



| GENERAL | | Individual |
|---|---|---|
| Insufficient benefits to beneficiaries | 4 | |
| Dissatisfaction with allocation model | 9 | |
| More accountability/ transparency/ reporting to Iwi | 15 | |
| Appointment of directors with sectorial and operational skills | 15 | 5 |
| **TOKMTL** | | |
| TOKMTL remains as is | 1 | 2 |
| TOKMTL has a reduced role under new arrangements | 13 | 15 |
| TOKMTL is wound up | 4 | 3 |
| **AFL** | | |
| AFL (including Sealord) financial performance requires more consistent improvement | 12 | 6 |
| AFL (including Sealord) and Iwi commercial alignment requires improvement | 12 | 10 |
| Shares and control (incl. director appointment) vest in Iwi | 16 | 12 |
| Reclassifying Sealord's and AFL's quota as "Settlement" quota | 4 | 1 |
| **TPWT** | | |
| TPWT to be wound up and assets returned to Iwi | 1 | |
| TPWT to continue with new governance arrangements to overcome existing problems | 7 | 4 |
| **TWMT** | | |
| Role of TWMT to be wound up and assets returned to Iwi | 1 | |
| TWMT to continue with new governance arrangements to overcome existing problems | 9 | 2 |
| **ASSET DEALING RESTRICTIONS** | | |
| Retain restrictions on sale to Maori pool | 7 | 11 |
| Lift restrictions on sale to Maori pool | 4 | |
| **TKT** | | |
| TKT to be discontinued | 4 | 10 |
| TKT to continue in some form | 5 | |


MFA Submissions Analysis
individual
General
Insufficient benefits to beneficiaries
Dissatisfaction with allocation model
More accountability/ transparency/ reporting to Iwi
Appointment of directors with sectorial and operational skills
Te Ohu Kai Moana Trustee Limited
TOKMTL remains as is
TOKMTL has a reduced role under new arrangements
TOKMTL is wound up
Aotearoa Fisheries Limited
AFL (including Sealord) financial performance requires more consistent improvement
AFL (including Sealord) and Iwi commercial alignment requires improvement
Shares and control (incl. director appointment) vest in Iwi
Reclassifying Sealord's and AFL's quota as "Settlement" quota
Te Putea Whakatupu Trustee Limited
TPWT to be wound up and assets returned to Iwi
TPWT to continue with new governance arrangements to overcome existing problems
Te Wai Maori Trustee Limited
Role of TWMT to be wound up and assets returned to Iwi
TWMT to continue with new governance arrangements to overcome existing problems
Asset Dealing Restrictions
Retain restrictions on sale to Maori pool
Lift restrictions on sale to Maori pool
Te Kawai Taumata
TKT to be discontinued
TKT to continue in some form
0
5
10
15
20
25
30

# 2015 MAORI FISHERIES REVIEW : THE ELEVEN YEAR REVIEW

## INTRODUCTION

1. The Maori Fisheries Act 2004 ("the Act" or "MFA") prescribed for a review after 11 years of the operation of the Maori fisheries Settlement assets to Iwi allocation programme, itself provided for by the Act. The review, in accordance with the provisions of the Act, is to be undertaken by an independent reviewer appointed by a Committee of Representatives comprising 11 representatives appointed by mandated Iwi organisations, registered Iwi organisations and representative Maori organisations through their respective electoral colleges also set up under the Act.

2. I was appointed to undertake that review at the end of August 2014. Having conducted the Review following a planned and notified process, this is my Report.

3. It is important not to view this report in isolation. It cannot (and is not intended to) substitute for a careful consideration of a wealth of other important material already in the public domain and essential to understanding the landscape (seascape) of the Maori fisheries kaupapa. I instance in particular the value of careful consideration by all those interested in the still evolving Maori fisheries Settlement story of the Act's Audit Reports of 2008 and 2012. It serves no useful purpose to re-state material from those Reports. I have considered their contents for the purposes of this Review as I am required to do under the Act.

4. I also invite careful study of the Annual Reports of Te Ohu Kai Moana Trustee Limited (TOKMTL) and Aotearoa Fisheries Limited (AFL) for all of the years 2005 to 2014 inclusive, all of which I have had access to and which I have attempted to absorb as background to this Review. The TOKMTL 2014 Annual Report and accompanying **"Te Tina A Tangaroa"** were issued as recently as last December so their contents are fresh. I readily appreciate that this amounts to voluminous material for consideration. However, while it is also not material which requires restatement in this Report, it is valuable for context, and for the purposes of knowledge and understanding.

5. I draw attention to the 2014 Annual Report of AFL and the **"Sealord Business Facts: January 2001 to September 2014"**, both of which are appended to this Report.

6. The entities under review presented reports and documentation for my consideration in this review. In deference to them and respecting the importance of their contents to the ultimate decision-makers under the Act – Iwi – on what is to be put in place for the future as a consequence of this Review, the reports of the entities under review are also appended to this Report. I have attempted to synthesise and summarise critical issues and submissions from the entity material and address them in the body of this Report.

7. It is important to note the next steps in the review process following release of this Report. These next steps are set out in ss.125, 126 and 127 of the Act:

### *125. Reports on review*

*(1) As soon as practicable after conducting a review under section 114, a reviewer must –*

*a. prepare a written report that includes –*

*i. the findings made in the review; and*

*ii. the recommendations of the reviewer; and*

*b. present the review report to –*

*i. the committee of representatives; and*

*ii. each entity under review.*

*(2) As soon as practicable after receiving the review report, the committee of representatives must distribute the report to–*

*a. Te Ohu Kai Moana Trustee Limited; and*

*b. all mandated iwi organisations and representative Maori organisations; and*

*c. the members and alternate members of Te Kawai Taumata.*

### *126. Consideration of review report by entity under review*

*(1) Not later than 40 working days after receiving a review report under section 125(1), the entity under review may prepare a plan specifying the actions that it intends to take to address the findings and recommendations of the reviewer.*

*(2) A plan prepared under subsection (1) must be distributed to –*

*a. Te Ohu Kai Moana Trustee Limited; and*

*b. all mandated iwi organisations and representative Maori organisations; and*

*c. the members and alternate members of Te Kawai Taumata.*

### *127. Consideration of review report*

*(1) At a general meeting of Te Ohu Kai Moana Trustee Limited convened not later than 60 working days after the distribution of a review report under section 125(2), Te Ohu Kai Moana Trustee Limited must make provision on the agenda for consideration of –*

*a. the review report; and*

*b. any plan prepared under section 126(1) by the entity under review; and*

*c. any comments from mandated iwi organisations on the review report or on any plan; and*

*d. any comments from members or alternate members of Te Kawai Taumata on the review report, as provided for in section 56(2)(d).*

*(2) At the meeting referred to in subsection (2), the mandated iwi organisations may resolve to –*

*a. Adopt all or some of the recommendations set out in the review report; or*

*b. Adopt all or part of the plan repared under section 126(1); or*

*c. Without creating an inconsistency with the purposes of this Act or the purpose of Te Ohu Kai Moana, amend, and adopt as amended, any of those recommendations.*

*(3) If 75% or more of the mandated iwi organisations, representing over 50% of the total notional iwi population, support a resolution made under subsection (2), –*

*a. the entity under review must –*

*i. within a reasonable time implement the resolutions to the extent that they are not inconsistent with this Act or any other enactment or rule of law; and*

*ii. if amendments to the Act are required, Te Ohu Kai Moana Trustee Limited must request the Minister to promote the necessary amendments.*

8. Urgent consideration by Iwi of this Report – fully assisted by TOKMTL – is, I believe, necessary so that Iwi are as fully informed and supported as possible ahead of their decision-making at the meeting for which s.127 of the Act provides. At my preliminary presentation of a summary of this Report to TOKMTL and AFL on Friday, 13 February 2015, I urged TOKMTL to ensure this happened as a function of TOKMTL's duties under the Act.

9. The narrative of this part of the Report proceeds on the assumption that readers will have already read the preceding Executive Summary incorporating the Presentation of 13 February 2015. That material appears at the front of this Report. Confidential (until the release of this full Report) copies of the Preliminary Presentation were provided to the Committee of Representatives (CoR) and representatives of the entities under review at my separate presentations to them on Friday, 13 February 2015 at the offices of TOKMTL in Wellington. In the final editing of this Report I have sought to eliminate unnecessary repetition of that preliminary material.

10. As much as I might assume that the existing governance arrangements (including ownership) of the entities which make up the architecture of the Maori fisheries set up is well known, I consider it is incumbent upon me to summarise it now.

11. The Terms of Reference (ToR) as required under s.114(4) of the Act, call for a review of four entities:

*a. Te Ohu Kai Moana Trustee Limited (TOKMTL);*

*b. Aotearoa Fisheries Limited (AFL);*

*c. Te Putea Whakatupu Trustee Limited (TPWTL); and*

*d. Te Wai Maori Trustee Limited (TWMTL);*

and to the extent included by the definition of "governance arrangements" in s.122(2) of the Act, the procedures and criteria to appoint the members and alternate members of Te Kawai Taumata (TKT).

12. For the reasons given in the 13 February Preliminary Presentation, parts of the ToR have been bundled together for efficiency of consideration, findings and recommendations. The first bundling I consider to be constructive is paras.2, 3 and 4 of the ToR which state:

*"2. The review of those entities is to consider and report on the following topics.*

*3. The effect on those entities of the governance arrangements provided for by or under the Act as those arrangements relate to:*

*(a) The performance of those entities in achieving their duties and functions;*

*(b) The ability of those entities to deliver benefits to their beneficiaries;*

*(c) The ability of those entities to contribute to achieving the purposes of the Act.*

*4. The consideration of and reporting on 3 above should include an assessment of:*

*(a) The extent to which the performance of the entities' duties and functions have been affected by their governance arrangements (including the processes for appointment of board members, financial performance and reporting, and the possible collaboration between the entities);*

*(b) Whether there are any aspects of the entities' ss.105/106 audit findings or reports or subsequent plans that are relevant to that performance issue in 4(a) above;*

*(c) If there are such aspects under 4(b) above, the reasons why they are relevant, the extent to which they are useful or instructive in answering the performance issue 4(a) above ;*

*(d) The extent to which the current ownership of shareholding in Te Putea Whakatupu Trustee Limited has affected its ability to deliver benefits to its beneficiaries in a manner similar to or comparable with the deliveries by other entities to their beneficiaries."*

13. I do not duplicate in this Full Report all the other bundling of the ToR. I do cover them all in this Report.

14. In anticipation of a comprehensive consultation programme around the country following my appointment, a diagram of the entity architecture was circulated. It was the subject of consideration and discussion at most if not all subsequent hui at which Iwi Maori and others either interested in the issues arising in the Review or otherwise actually engaged in the business and activity of fishing, discussed the issues with me in open and constructive debate.

15. I invite reference by readers when considering the narrative of this Report, the findings I make in it and the recommendations I put forward to consider the following architectural diagram.

The Owners ie. Iwi
(MIOs and AHCs)
TKT
Selected/Elected by Iwi to appoint directors of TOKMTL
TOKMTL
TPWT
Maori Communities and Urban Maori
AFL
The business and activity of commercial fishing
TWMT
Fresh Water Fisheries
MOANA PACIFIC LIMITED
PREPARED FOODS LIMITED
KURA LIMITED
PUPURI TAONGA TRUST
PACIFIC MARINE FARMS LIMITED
KIA ORA SEAFOODS
OPC
Quota supply agreement
SEALORD
50% AFL;
50% Nissui JV

16. At level 4 of this structure is the most useful place on the MFA structural framework to commence the scrutiny for this Report. The reasons for beginning there are twofold:

    - First, I have endeavoured to undertake this review of both the structures and the issues arising out of the ToR from the bottom up (rather than top down) and the identified level represents effectively the foundations for the structure above;
    - Secondly, it is by and through the entities placed at level 4 of the diagram that the benefits of the fisheries Settlement are to be delivered to the beneficiaries of the Settlement.

17. I describe that fourth layer as the "delivery arm" of and for the benefits of the Settlement to Iwi.

18. All of the entities at level 4 – plus TOKMTL – must of course contribute to achievement of the purposes of the Act. All four must likewise play their part in delivery of benefits. And, all four must perform and be seen to perform their duties, functions and responsibilities prescribed by the Act. In addition, each should have overriding accountability to the beneficiaries of the Settlement for discharge of those responsibilities.

19. In practical terms, delivery is at the door(s) of the three entities at level 4 – AFL and the two trusts. TOKMTL is to facilitate support and, in many respects, ensure the contribution of the three entities at level 4 to the achievement of their delivery obligations in accordance with the Act.

20. That said, informed by the detail included in the Preamble to the Act and more particularly by the statutory purposes of the Act – perhaps most especially that purpose which is to provide for the development of the collective and individual interests of Iwi in fisheries – I elevate the place of Iwi to the head of the framework diagram. Doing so better depicts the essence of the present governance structure and more adequately identifies the key position of Iwi as owners of Settlement assets extracted from the Crown in the 1992 Deed of Settlement.

## CORPORATE GOVERNANCE

21. As part of the scene setting for this Report, it is timely to make some specific observations about the principles of sound governance given the centrality of Maori Fisheries Act *"governance arrangements"* to this Review.

22. Organisations are set up to accomplish or achieve one or more specific goals.

23. For most corporations or companies, the goal is to increase the wealth of their owners or shareholders but there are many *"not for profit"* organisations as well. Whether the goal is profit or something else, owners are vitally interested in assuring that their organisation is accomplishing its intended purpose.

> *"The system used to direct and control a corporation is referred to as corporate governance. It defines the rights and responsibilities of the key corporate participants such as the shareholders, board of directors, officers and managers, and other stakeholders, and the rules and procedures for making corporate decisions. It also typically specifies the structure through which the company sets objectives, develops plans for achieving them, and establishes procedures for monitoring performance."*[1]

1 Elali W, Trainor T, (McGill University) Advanced Corporate Finance A Practical Approach Pearson Addison Wesley (pub) Toronto, 2009 p.23

24. The challenges of corporate governance magnify as the numbers of stakeholders increase, their respective objectives become more diverse or conflicting and the activities of the corporation become more complex. As the complexity and size of a business grows, the benefits of employing staff with specialised skills also increases. This employment creates a distinction between owners and managers in an organisation and gives rise to what is called the 'principal-agent problem'.

25. An agent (manager) makes decisions that affect the interests of the principal (owner) but those decisions are also influenced by the fact that the manager has a set of personal interests of his/her own and that these interests may not always align perfectly with those of the owner. Frequently the manager enjoys an informational advantage over the owner which can make it difficult for the owner to detect a manager pursuing a different agenda. Both the practical consequences of this owner-manager tension and the costs necessary to manage it reduce the theoretical benefits available to owners.[2]

26. It is common now to observe that the issues of corporate governance are more complex than those of addressing the owner-manager problem; that the interests of other stakeholders such as non-managerial employees and customers have to be considered. In fact, describing the business entity (firm or company) as an intricate suite of contracts or stakeholder relationships does not detract from the validity of owner-manager analysis. Many attempts to align the incentives of owners and employees have been tried. Many have been found wanting because they do not adequately capture the consequences of longer term effects on wealth, reputation or sustainability. There are doubtless many examples of good corporate governance and not so good: there can be no doubt that getting it right is a significant advantage. The right people (skills) can make an imperfect governance structure work *"adequately"*; poorly skilled or insufficiently experienced directors can mean a sound (in principle) governance structure is exposed in a way which will not overcome likely poor strategic governance. The most desirable matrix is a robust principled governance structure populated by relevantly experienced and skilled people.

27. Most analysis of the owner-manager problem assumes a single organisational objective such as profit maximisation but we know that reality is not so simple. Many owners who are concerned with the aggregation of wealth are also concerned about the processes by which that wealth is generated and whether they are environmentally sustainable and ethical. Accordingly, carefully designed managerial incentive schemes are being increasingly linked to *"triple bottom line"* reporting and reinforced by codes of ethics that set out the wider expectations of owners. From a business ethics perspective, one noted commentator suggests that the effects of a proposed corporate decision should be evaluated from a number of perspectives before it is finalised:

    (1) Are the rights of any stakeholder being violated?

    (2) Does the firm have any overriding duties to any stakeholder?

    (3) Will the decision benefit any stakeholder to the detriment of another stakeholder?

    (4) If there is a detriment to any stakeholder, how should it be remedied, if at all?

    (5) What is the relationship between shareholders and other stakeholders?[3]

2 Agency theory literature is not completely new but is analysed and debated with grreater sophistication now. The seminal paper is often regarded as Jensen, Michael C, and Meckling,William H, Theory of the Firm, Managerial Behavior, Agency Costs and Ownership Structure, Journal of Financial Economics 3 (October 1976), 305-306. Armen Alchian and Harold Demsetz from UCLA were also major contributors to the field which also drew on earlier work by Nobel prize winner Ronald H Coase (Chicago University) particularly The Nature of the Firm Economica, Volume 4, Issue 16, November 1937, 386-405.

3 Cooke, Robert A, Business Ethics; A Perspective in Arthur Andersen, Cases on Business Ethics (Chicago: Arthur Andersen, September 1991), p.5.

28. Today an increasing number of firms are directly addressing the issue of ethics by establishing corporate ethics policies and requiring employee compliance with them. There are also many general codes and guidelines for corporate governance some of which are connected to stock exchange listing requirements. For example:

## Principles of Corporate Governance

(1) Directors should observe and foster high ethical standards.

(2) There should be a balance of independence, skills, knowledge, experience and perspectives amongst directors so that the board works effectively.

(3) The board should use committees where this would enhance its effectiveness in key areas while retaining board responsibility.

(4) The board should demand integrity both in financial reporting and in the timeliness and balance of disclosures on entity affairs.

(5) The remuneration of directors and executives should be transparent, fair and reasonable.

(6) The board should regularly verify that the entity has appropriate processes that identify and manage potential and relevant risks.

(7) The board should ensure the quality and independence of the external audit process.

(8) The board should foster constructive relationships with shareholders that encourage them to engage with the entity.

(9) The board should respect the interests of stakeholders within the context of the entity's type and its fundamental purpose[4].

29. A review of corporate governance literature leads to the following conclusions. Successful arrangements for corporate governance require:

a. Agreed shareholder objectives and values (that are not contradictory). This requirement is by some distance, the most important.

b. A suitable organisational structure, personnel and resources to achieve those objectives.

c. Measurable organisational performance indicators that are aligned with shareholder objectives.

d. Regular monitoring and reporting of organisational performance indicators to shareholder.

e. Incentives on managers to use their expertise to promote the achievement of shareholder objectives at all times. Incentives can be positive (e.g. financial) or negative (e.g. dismissal).

30. An organisation exists to serve the interests of the owners and its size, shape and continued existence depend upon it achieving that purpose to the satisfaction of those owners. Collectively, owners must be able to exercise control over the organisation at all times. That control may direct the organisation towards better means of achieving its purpose or

4 Securities Commission New Zealand, Corporate Governance in New Zealand Principles and Guidelines A Handbook for Directors, Executives and Advisers

towards a modified purpose. Individually, owners must have the opportunity to exercise input into the governance process (the appointment of governance agents or directors).

31. A corollary of this principle is that individual owners should have the ability (and option) over time to evaluate the alignment of their values and objectives with those of their fellow owners – and to exit from ownership by a fair process in the event of misalignment. This is only another way of saying business undertakings have more optimal chances of commercial success if all owners actually want to be owners and are collectively and energetically committed to the same objectives and values.

32. It is clear that good corporate governance cannot be guaranteed by a formulaic approach, no matter how sophisticated. It requires a mutually respectful relationship between owners and managers based upon genuinely shared strategic objectives, and values; with accompanying transparency and dynamic communication.

33. These general observations pave the way for some additional observations specific to the fisheries Settlement for the purposes of this Review.

## CORPORATE GOVERNANCE AND THE FISHERIES SETTLEMENT

34. The success and durability, or otherwise, of the Fisheries Settlement is dependent upon the performance of the corporate governance arrangements that direct and control the protection and use of Settlement assets and ensure that such use is ultimately for the benefit of all Maori. Corporate governance of these fisheries assets is unusually challenging for four reasons:

    a. The number of owners (Iwi) is relatively large.

    b. Owner expectations of Settlement benefits and values are diverse and difficult to define.

    c. Five Settlement entities (TKT, TOMKTL, TPWTL, TWMTL and AFL) have specialised roles.

    d. Current governance processes are generic, cumbersome and inflexible.

### Large number of owners

35. In 2004, there was one legal owner of Settlement assets (Te Ohu Kaimoana). Now (2015) there are 57 legal owners of Settlement assets or Mandated Iwi Organisations (MIOs) representing over 515,000 Settlement beneficiaries. Over the last decade Iwi have been transformed from notional owners to real owners. The real ownership rights of Iwi differ depending on the class of Settlement asset:

    - Iwi have full ownership and governance rights over quota and cash allocated to them (subject only to a statutory process to sell Settlement quota).
    - Iwi own 80% of the income shares in Aotearoa Fisheries Limited (AFL) but have no voting shares.
    - Iwi are the residual owner of the assets of Te Wai Maori Trust (TWMT) and Te Putea Whakatupu Trust (TPWT) but the Board of TOKMTL holds the one share in each and directors/trustees of both are appointed by TOKMTL.
    - Iwi do not have a direct role in the appointment of TOKMTL but influence this process indirectly through an electoral college structure (TKT).

36. Fifty seven owners is not an extraordinary number compared with a other corporations, e.g. publicly listed companies, but it is large enough to impose significant transaction costs

where owners have to establish common positions through negotiation, for instance where there is an absence of clear performance goals, measures or organisational values. At the same time, it is important to observe that many of these transaction costs are not recurring in that the effort to establish and document goals, performance measures and values is much lower than the costs of their periodic review and refinement.

## Poorly defined Settlement benefits and values

37. The Settlement is a compromise. It has always been burdened with expectations that outstrip the power of the assets extracted from the Crown to be realised in full. Expected Settlement benefits are economic, socio-economic, cultural and political. Iwi owners place different weight on these different types of benefit. Under existing governance arrangements, the mix of benefits, trade-offs between benefit classes and acceptable or unacceptable processes of generating Settlement "benefits" have never been agreed by owners collectively. Because of this, there are no clear key performance indicators (KPIs) that provide an agreed framework for measuring the performance of the entities responsible for Settlement performance, either at the level of its individual components or as a whole. Neither is there an adequate process by which owners can negotiate the refinement of objectives and associated performance measures over time.

38. This deficiency is not to be side-stepped merely by establishing and retaining entities which have a general(ised) focus across what are specific and special(ised) commercial, urban Maori and fresh water issues, without full opportunity for direct and effective (specific to the entities and issues) owner input (and where reasonably desirable or necessary, input from other legitimate interests).

## Five Settlement entities

39. The organisational structure of the Settlement is complex. In addition to the 57 MIOs and an equal number of asset holding companies (AHCs) there are three collective *"benefit delivery"* entities and two *"governance"* entities[5]. The *"benefit delivery"* entities are:

    a. AFL (Pan-Iwi owned vertically integrated commercial fishing company and asset holding company).

    b. TWMT (a charitable trust to advance Maori interests in fresh water fisheries).

    c. TPWT (a charitable trust to promote education, training and research, having regard for the interests of Maori who do not associate with their Iwi or do not receive benefits from a MIO).

40. The governance entities are:

    a. TKT (to appoint and *"de-appoint"* directors of TOKMTL).

    b. TOKMTL (to appoint and remove directors of AFL; to appoint/remove the directors/trustees of TPWT and TWMT; and to approve the annual plans of those Trusts).

41. Each of the three *"benefit delivery"* entities have three distinct constituencies:

    a. AFL (all Iwi – or more accurately Iwi AHCs who are the legal owners of AFL income shares).

    b. TWMT (Maori with special interest in fresh water fisheries).

5 Arguably TOKMTL, particularly in its early years, had both functions but as assets have been transferred to Iwi, the weight of its responsibilities has shifted towards its statutory governance role.

c. TPWT (Maori with special regard for *"urban Maori"* or Maori who do not associate with their Iwi).

42. Constituencies 2 and 3 are poorly defined.

## Specialisation in governance

43. The constituency of each of the three *"benefit delivery"* Settlement organisations subject to review is separate. It is also the case that the "business" of each of these organisations is distinct and specialised. It follows from this that the ideal individual and collective *"skills, knowledge, experience and perspectives*[6]*"* of directors on the three organisations should also be distinct and specialised as appropriate to each organisation. This suggests that (for reasons of both governance constituency and skill set) the organisations charged with delivering distinct and separate types of benefit under the umbrella of the Settlement would be best served by distinct and separate structures and processes for their governance.

## Generic and cumbersome governance processes

44. I include in this part of my Report, an additional contribution to the issue of organisational architecture for Maori Fisheries prepared for me by Cameron Partners Limited, leading New Zealand Investment Bank.

6 Securities Commission New Zealand. Corporate Governance in New Zealand Principles and Guidelines A Handbook for Directors, Executives and Advisers

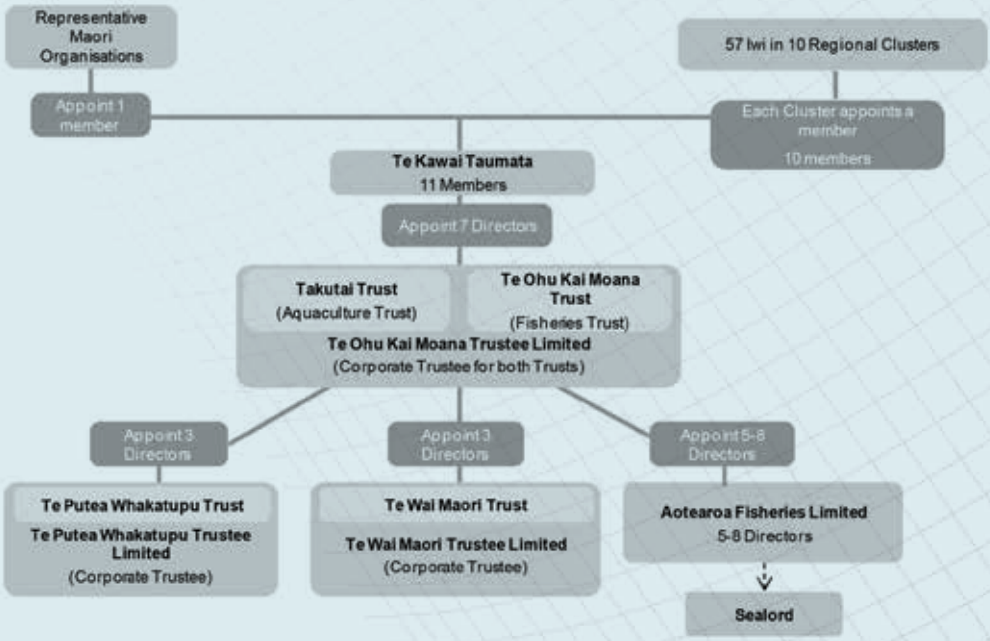
# ORGANISATIONAL ARCHITECTURE OF MAORI FISHERIES ORGANISATIONS

## CAMERON PARTNERS LIMITED

### Introduction

Cameron Partners Limited has been asked by the Reviewer to provide some high level views and observations on ownership structures. The following paper sets out Cameron Partners' framework for considering appropriate governance structures in the context of the Maori Fisheries review to assist the Reviewer in forming his own judgements and recommendations.

We acknowledge that the current Maori Fisheries' structure (see the diagram below for a summary) is complex in nature and incorporates both commercial and non commercial objectives. This paper focuses on the commercial objectives only and provides some high level analysis on the issues that arise from the current structure.




*Source: Page 10, Te Ohu Kaimoana 2015 Review: Information for the Reviewer*

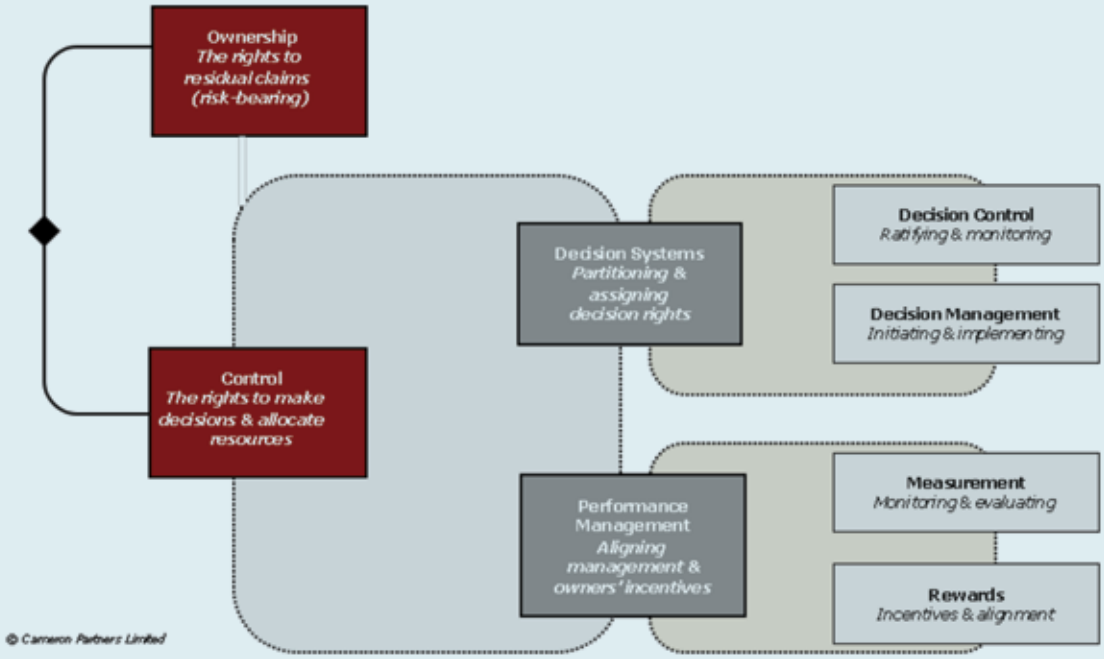
### Framework for addressing organisational architecture of Maori Fisheries and recommendations going forward

The 2004 fisheries settlement established a comprehensive (transitional) "organisational architecture" for the control, governance and allocation of economic benefits relating to assets transferred to Maori.

Organisational architecture is a broad term which describes the relationship between ownership claims and control (decision rights). There are two key issues that organisational architecture deals with:

- How to best ensure that the rights to make decisions within an organisation are allocated to the individuals who have the relevant information to best make decisions
- How to ensure that the decisions made at all levels of the organisation are aligned with the objectives of the organisation and its owners

These two key issues are relevant to all types of organisation form, including trusts, partnerships, co-operatives, proprietorships and corporations. The diagram below illustrates the sequence of options involved in the organisational architecture.




In respect of corporations, there are two broad types:

- Closed form
- Open form

The difference between these two types relates to the degree of separation between ownership and control:

- In the closed corporate form, there is significant separation between ownership and control but there is usually some meaningful overlap. The Board is the primary control mechanism and owners exert control through changing the Board (and the threat of doing so) or sale of the company. The stock market is not available as an external monitor
- In the open corporate form, there is complete separation between ownership and control, with shareholders not required to have any other role in the organisation. The primary control mechanism is through the Board supported by decision hierarchies and incentive arrangements. The stock market provides external monitoring and provides mechanisms for change of control through shareholders removing the Board or exiting their ownership interest

## Establishment of TOKM:

- TOKM was established in 2004 with the objective of preserving and protecting settlement assets
- The establishment of TOKM was set up as a temporary structure, designed to manage the transition of fishery assets to Maori. The expectation was that the assets would be transferred to iwi once they had established the appropriate structures and developed capabilities for direct ownership and control
- The organisational structure deployed was a blend of trusts and closed corporations
- In respect of the operating assets, the closed corporate form was employed to allow the existing governance of these assets to continue to function appropriately
- The particular attribute that marked this structure was the separation of economic interests and voting rights (iwi ownership and iwi control) through TOKM controlling the assets on behalf of Maori

The closed corporate form was selected as the structure for the operating assets (Sealord and Aotearoa Fisheries Limited (AFL)), because:

- Outside capabilities and expertise in senior management positions and directorships are required
- While responsibility for company performance rests with the Board, the owners (iwi) require decision rights to remove the Board of AFL in the event of underperformance. This is the ultimate mechanism which would allow owners to directly influence AFL (and through this Sealord)

In the context of Maori Fisheries, how decision rights are allocated is particularly important, as there is no market for corporate control (which transfers ownership when outside experts consider that a change of control will enhance value).

The key question for this review is whether the current structure is still appropriate or whether a more "standard" organisational form is required, that realigns the economic interests and voting rights to enable iwi to assert complete control over its economic interests.

## The separation of ownership and control:

There is a consensus among corporate finance academics and practitioners that, in general, large organisations with misaligned economic and control interests produce suboptimal outcomes (for example, US media companies that are family controlled[1]).

Particularly in the US, it is not uncommon for entrepreneurs to seek to retain control of their company while raising outside equity capital (and thereby increasing the gap between economic interests and control). Capital markets tolerate this situation when the offerings are attractive, and because they are backing the vision, strategy and capability of the entrepreneur. Nevertheless, when such companies come under competitive pressure or the strategies pursued by the entrepreneurs cease to make acceptable returns, share prices decrease to reflect the negative investor sentiment. Capital market pressure inevitably emerges for a transition to a more standard organisational architecture (i.e. better alignment of economic interests and control). Event studies of listed companies uniformly show that actions that reduce the alignment between economic and control interests (for example issuing multi class shares) lead to abnormal negative share price movements.[2]

1 Nordberg, Donald. "News and Corporate Governance: What Dow Jones and Reuters teach us about Stewardship." Private Sector Opinion 7 (2007). Accessed 8 February, 2015. http://www.ifc.org/wps/wcm/connect/5a34be004afdeefcb40eb5b94e6f4d75/GCGF%2BPSO7%2Bscreen%2B2-8-08.pdf?MOD=AJPERES

2 In 2012 the Google share price fell significantly following the company's announcement of its plan that let it issue new stock without diluting the founders; voting power. It distributed a new class of nonvoting shares to existing shareholders in what was effectively a 2-for-1 stock split

## Since the establishment of TOKM:

There have been two broad developments that enable and require a change in the current organisational architecture:

- Maori have established structures for managing assets, and developed industry expertise and broader management and governance capabilities
    - This has enabled TOKM to complete a large part of their mandate. TOKM has now distributed ownership stakes of the settlement to 57 Mandated Iwi Organisations (MIO) and has been effective at facilitating a smooth transition to Maori
- Conditions of the fishery industry have changed dramatically, requiring much more active management and control with frequent control decisions being taken. A much more flexible, dynamic approach is now needed to manage these assets effectively
    - In this environment, a more direct relationship between ownership and control of these assets is required

Iwi, as the owners, are in the best position to communicate their views to the Board of AFL, and require the decision rights to do this. It is clear from the Reviewer's engagement with iwi and an analysis of their submissions that there is overwhelming agreement that voting rights currently being held by TOKM should be reallocated to iwi in line with their economic interests.

In summary, the existing control and governance arrangements for TOKM are not appropriate for Maori's fishery assets going forward. Iwi have developed the structures and capabilities necessary to exercise decision rights over their assets, and the demands of the industry going forward will mean that better alignment of economic interest and voting control is likely to improve ownership decisions, governance arrangements and company performance.

Disclaimer

This summary is a high level overview of the organisational architecture of the Maori Fisheries organisations under review (the Review). It has been has been prepared by Cameron Partners Limited for the exclusive use of Tim Castle (the Reviewer) for the purpose of providing background information and context in relation to the organisational architecture of Maori Fisheries.

It is not an in depth analysis and does not constitute final recommendations or advice.

By receiving this summary the Reviewer acknowledges it will exercise its own judgement in considering and using this material provided by Cameron Partners Limited.

In preparing this summary, Cameron Partners Limited has relied on information which has been supplied by the Reviewer and/or third parties and has assumed the honesty and accuracy of this information.

Cameron Partners Limited takes no responsibility for assumptions disclosed or reasonably implicit in this summary, for inaccurate information which has been supplied by the Reviewer or any third party or for any failure by the Reviewer or any third party to provide relevant information.

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45. Although the three collective Settlement *"benefit delivery"* entities have very distinct business constituencies, the governance processes for all three are generic in the sense that governance responsibility resides with a single organisation (TOKMTL) and TOKMTL appointments are, in turn, made by a single entity (TKT). The three distinct entities have no effective way of differentiating themselves to provide focussed influence upon the governance processes of the "benefit delivery" entity of special interest to themselves.

46. There are several respects in which the governance arrangements over the five Fisheries Settlement entities appear to depart from best practice.

47. The steps in the appointment of AFL, TWMT or TPWT directors have no direct MIO input. This contradicts a general objective of flat and efficient communication and accountability between owners and managers. There appear to be two primary justifications for these extra governance layers: one practical, one theoretical. The practical justification is that in 2004, Iwi owners (MIOs) had not been established (in a sense of a structure, fully accountable to members) and had not received assets. Iwi were notional owners; they were not actual owners and therefore could not then exercise the rights and responsibilities of ownership. This situation was undeniable in 2004.

48. In my view, it no longer applies in 2015.

49. The theoretical justification appears to have been linked to the consequence of the allocation formula which delivered AFL shares on a population basis creating a few large shareholders and many small shareholders. The fear was that large shareholders would use their ability to dominate governance processes to disadvantage small shareholders. The protection in the 2004 Act against this possibility was to prohibit direct Iwi participation in AFL governance.

50. It is not absolutely clear what weight was put on these parallel practical and theoretical considerations in 2004. That may not, now, particularly matter. In 2015, the theoretical concern warrants closer examination as the justification for an arrangement on the face of it contrary to at least conventional corporate governance practice. First, the equitable treatment of minority shareholder interests is an issue that lends itself to a wide range of legal (Companies Act 1993), structural, constitutional and procedural solutions which have not been explored or trialled in or since the Settlement: they were made irrelevant by the 2004 approach and its legislated structures.

51. There are a number of touchstones for alternative protection mechanisms to protect against vulnerability to the theoretical concerns. One is legitimately (and logically) to have resort to the legal protections and provisions of statute law for companies in New Zealand. See for instance s.175 Companies Act 1993. Another is the adoption by shareholders of collectively developed values and principles to govern corporate activity. Distinguished New Zealander, Sir John Todd (immediate past Chairman of the highly successful family-owned Todd Corporation) urged upon me the importance of the collegially developed and implemented agreed values, purposes and strategic objectives by owners and their director appointees (managers).

52. According to **"The Economist"**, 1 November 2014, there are "important lessons to be learnt from the surprising resilience of family firms".

# THE ECONOMIST NOVEMBER 1ST 2014

## FAMILY COMPANIES

### Relative success

***There are important lessons to be learnt from the surprising resilience of family firms***

*Today real power is rarely inherited. Monarchs spend their lives cutting ribbons and attending funerals. Landed aristocrats have to climb the greasy pole if they want to wield serious influence. Even in the United States great dynasties such as the Clintons and Bushes have to go to the trouble of getting themselves elected. The one exception to this lies at the heart of the capitalist system: the family firm.*

*Leading students of capitalism have been pronouncing the death rites of family companies for decades, arguing that family firms would be marginalised by the arrival of industrial capitalism. They also insisted that the Dallas-style downsides of family ownership would become more destructive: family quarrels would tear these companies apart and the law of regression to the mean would condemn them to lousy management. Most countries have a variation of the phrase "clogs to clogs in three generations". For a long time, they appeared to be right: in both America and Europe, family firms were in retreat for much of the 20th century.*

*Yet that decline now seems to have been reversed. The proportion of Fortune 500 companies that can be described as family companies increased from 15% in 2005 to 19% today. That is largely because of the rise of emerging economies, in which family firms are more common. But even in the rich world family companies are these days holding their own. Of the American firms in the Fortune global 500, 15% are family firms – only slightly less than a decade ago. In Europe, families control 40% of big listed companies.*

*You can happily go through a day consuming nothing but the products of family concerns: reading the New York Times (or the Daily Mail), driving a BMW (or a Ford or a Fiat), making calls on your Samsung Galaxy, munching on Mars Bars and watching Fox on your Comcast cable. And the growth is likely to continue. McKinsey predicts that in 2025, family companies from the emerging world will account for 37% of all companies with annual revenues of more than $1 billion, up from 16% in 2010.*

#### *Pass the silver spoon, Dad*

*Why have family companies defied their obituarists? Many of them continue to suffer from serious problems: witness the recent debacle at Portugal's Espírito Santo. But, particularly in the West, family firms have far fewer defects than in the past, largely because they have got better at addressing their obvious weaknesses.*

*These days it is rare for a family boss to hand his job on to an obvious dud. Most family companies train future leaders by sending them to business schools and putting them through their paces in a succession of lower level jobs. A growing number (particularly in Germany) have become masters at moving family members from executive jobs to supervisory roles in the boardroom. An entire consulting industry exists to help families deal with the peculiar dynamics of their companies, such as managing personal conflicts and sidelining thick relations without hurting their feelings.*

*Family firms' strengths, meanwhile, are just as important today as they were in the early days of capitalism. They solve the "agency problem" that Adam Smith put his finger on in "The Wealth of Nations" when he argued that hired managers would never have the same "anxious vigilance" in running companies as the owners. Family managers are often parsimonious: companies such as Walmart, Koch Industries and Mars & Co are famous for running a tight ship with humble headquarters, lean management and an obsession with operational efficiency. They are good at thinking in terms of generations rather than quarterly results: Roche makes long-term bets on developing pharmaceuticals; the Murdochs and Newhouses have stuck with print media in difficult times.*

*But the emerging world is currently witnessing a battle for the soul of the family firm. Old-model family companies are sprawling conglomerates that rely on political connections to protect them from global competition and complex cross-ownership structures designed to give families maximum control for minimum cash. New-model family firms are professionally managed, transparent outfits whose owners maintain long-term vision and quality but eschew the sort of wheeling and dealing that made them rich in the first place.*

*The best way to ensure that the right side wins is to increase competition: India's great liberalisation of the late 1990s persuaded Tata and Mahindra & Mahindra to transform themselves. Emerging-world governments should also outlaw cross-ownership and strengthen the rights of non-family shareholders, as America did in the 1930s and other countries have done more recently.*

*The other great problem with family companies, which plagues the West as well as the emerging world, is that the weaker members of the breed have failed to learn from the stronger members. Too many fail to make even the most basic plans for the future: PricewaterhouseCoopers discovered that only 16% of the family firms it surveyed had put a formal succession plan in place. Too many lack the ambition to think that they can compete with the best in the world: convinced that they are a bit of an anachronism they tend to keep themselves to themselves. The remarkable record of the best family firms should remind millions of business owners, in the corporate world at least, you do not have to surrender family control in order to prosper.*

53. The principles and disciplines emphasised in the article include those of:

- Aligned goals;
- Multi-generational timeframe;
- Succession planning, talent spotting and sophisticated training opportunities;
- Lean, efficient and tight control.

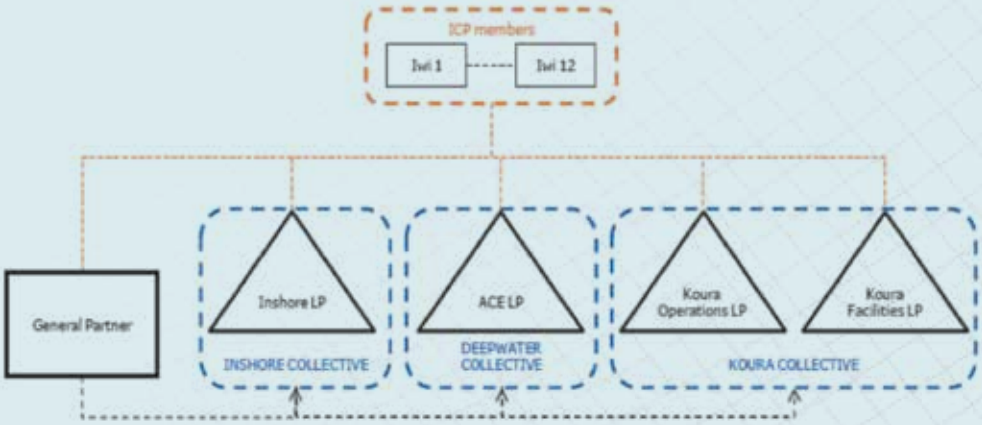
54. All of those themes are entirely consistent with Maori values. As I have observed elsewhere in this Report, they are consistent with the drivers of the modus operandii of the Iwi Collective Partnership fishing protocols provided to me by Ngati Porou Seafoods Group and appended to the Ngati Porou submission. The ICP protocols are included here.

# IWI COLLECTIVE PARTNERSHIP

*An example of how iwi can work together successfully on a commercial and tikanga basis, by pooling their resources to extract better deals from the industry as well as look at investment opportunities for growth.*

(1) Operated as an unincorporated collective of iwi fishing interests since 2007.

(2) Incorporated as a limited partnership in September 2010.




(3) Membership = 12 North Island iwi.

| | | |
|---|---|---|
| TeRarawa | Ngati TuWharetoa | Ngati Awa |
| Taranaki Iwi Trust | Te Arawa | Whakatohea |
| Ngati Ruanui | Ngati Manawa | NgaiTai ki Torere |
| Nga Rauru | Ngai te Rangi | Ngati Porou |

(4) Twelve Iwi are formal shareholders; two, Rongowhakaata and Aitanga a Mahaki iwi supply ACE through ACE agreements and are in the process of formally joining the ICP as shareholders.

(5) ICP Board = 6 directors elected and appointed by the 12 iwi shareholders. Three directors are appointed by the three largest iwi shareholders; three directors are elected by the remaining nine shareholders. This to provide security for the larger partners but also an opportunity for participation by smaller partners.

(6) Open to increasing its membership to other iwi who can add value and who accept the values of transparency, integrity, respect and trust.

(7) The ICP was formed on a desire by its iwi membership to become more active in the business of fishing. The benefits of the ICP to individual iwi membership include: Creating economies of scale through the collectivisation of iwi ACE to;

(8) Pursue optimal returns on ACE.

a. Create opportunities that build iwi member capacity, capability and participation within the fisheries sector.

b. Improve understanding and capacity to manage risk.

c. Promote kaitiakitanga and sustainable practices within fisheries.

d. Improve business performance through developing a strategic direction that is realistic, logical, and achievable.

e. Sharing of knowledge and experience amongst iwi members through tuakana – teina principles.

f. Attract fisheries investment opportunities.

g. Attract opportunities for iwi members to advance their participation within the fisheries value chain.

These goals were fundamental in developing actively participating in the industry through developing capacity and capability.

(9) The ICP's values on how we will conduct our business are based on :

a. Whanaungatanga (We are like a family). Showing mutual respect and integrity in all we do. Building lasting relationships (Kotahitanga) through trust.

b. Manaakitanga (We look after each other). Being hospitable is important. We support one another. Honest and open communication binds us and builds trust.

c. Makohakoha (Using our expertise). Consistently high levels of achievement through effective and efficient management. We recognize the expertise and efforts of our people and partners.

d. Kaitiakitanga (We are guardians). Being an influential steward of the resources is a bottom line. It is our responsibility to ensure sustenance for the present and future generations.

e. Whakaaronui (Visionary – we are part of the sea and other fisheries and they are part of us). We are visionary, creative and innovative. We will be proactive rather than reactive towards achieving our goals which requires using our initiative to promote our vision.

(10) Prior to the ICP its iwi members had individual multi-year ACE supply agreements with various fishing companies. The majority were with AFL and Sealord for a term of three years. When agreements expired in 2010 the iwi made a strategic decision to work collectively with a stronger strategic focus.

(11) The ICP members set out to find fishing partners who understood our commercial aspirations, the long-term inter-generational nature of our goals, and our responsibility to the environment as kaitiaki. We developed a business profile and began a nationwide search for compatible strategic fishing partners.

(12) The ICP separated its ACE holdings into key parcels and following a lengthy review and negotiation process, committed these parcels to strategic partners it believes would add value to its returns and potential opportunities long term.

(13) The arrangements above are our primary business partnerships and relationships where we direct our primary ACE parcels. We also have residual ACE parcels which we sell through quota brokers in order to maximise our revenue.

(14) The Inshore JV with AFL has seen profits increase by 30% over the last three years with opportunities for investment, building capability, and future growth. Few others have achieved these results consistently.

(15) The Deepwater Partnership with Sanford has seen a great relationship develop and consistent profits achieved at the high end of the market year on year which has been the bench mark with other Iwi. We have also developed scholarship programs where successful candidates have acquired permanent employment within the industry. Partners are currently looking at future long term opportunities for growth.

(16) The Port Nicholson Fisheries Partnerships is another classic example of what Iwi can do when they work together. Formerly owned by George Stravinos, a greek businessman now living in Australia, this business was acquired by the founding partners, ICP, PKW (Paraninihi ki Waitotara), and Ngati Mutunga ki Wharekauri in 2012. Since then the business has grown in strength performing extremely well in comparison to larger more established players.

Six new shareholders have been added in 2014, namely; Rongowhakaata Trust, Aitanga a Mahaki Trust, Ruamano, Ngati Koata, Te Atiawa, Ngati Toa, making the PNF Collective the largest grouping of Iwi in the Live lobster business.

(17) The ICP through its Manager also assists iwi members to manage their ACE administration and management requirements on an annual basis at no cost.

(18) So What Has The ICP Achieved:

- A scale that attracts key partners and could sustain a viable business. Partners find it easier to talk to one body versus 14 separate entities.
- Consistent and improved returns on ACE from partnerships at the highest benchmark levels.
- Ability to participate through partnerships but also individually, ie: NPSG, Te Arawa Fresh.
- Have built our capability through key scholarships and employment programs.
- Have built our capacity in terms of participation in key forums.
- Have created business growth opportunities for Iwi partners through acquisitions of Port Nicholson Fisheries and Quota Shares.

55. There is also a useful exposition of the same aspirational values in **"A Strategy for the Maori Fishing Industry"** published by Te Putea Whakatupu Trust, in 2014 and appended to this Report.

56. An additional supplementary and complementary protective mechanism option to the status quo would be provided by a corporate ethics policy of the type I have explored elsewhere in this Report. This policy would prohibit behaviour that benefited any stakeholder at the expense of another unless a remedy acceptable to the other party was agreed. Scope for suspicion and conflict would also be minimised if there were agreed stakeholder objectives, KPIs and values for each entity. Shareholder agreements can properly and comprehensively cover principles of ethics, i.e. the way shareholders are to behave generally and with/to each other.

57. As is demonstrable in the business world the relationship between owners and managers can frequently be tenuous. Take for example two principles of corporate governance championed by regulatory authorities in New Zealand:

- *The board should foster constructive relationships with shareholders that encourage them to engage with the entity;*
- *The board should respect the interests of stakeholders within the context of the entity's type and its fundamental purpose*[7]*.*

58. In the case of AFL, it is understandable that the focus of the owner-manager relationship should be with the controlling shareholder, rather than income shareholders (while these two are not the same entities), but there are some obvious costs to this process. Generally Iwi are not of the opinion that TOKMTL can understand and communicate their individual and collective views as owners of AFL to the board and executive of AFL more accurately than they can themselves. This sentiment is not easily to be dismissed. It reflects the logic that more direct lines of accountability between owners and managers, i.e. the more direct control by owners of their own destiny, promotes better alignment of interests in order to reap the commercial benefits of the business undertaking. It is the owners' business after all.

The owners are entitled to enforce accountability.

## THE ARCHITECTURE

59. Part 3 of the Act provides the machinery for the allocation and transfer of settlement assets to Iwi. Up until the point of allocation, TOKMTL, as statutory corporate trustee for Te Ohu Kai Moana Trust, held the assets. As s.3(2) provides, the framework prescribed by the Act is designed to achieve the purposes of the Act for the allocation and management of settlement assets, including allocation and transfer of specified settlement assets to Iwi and, separately, the central management of the remainder of those settlement assets by TOKMTL.

60. Working down the structural framework from Iwi, the next layer is Te Kawai Taumata (TKT). The responsibility to appoint members of TKT is vested in Iwi. I am required to consider procedures and criteria for appointment to TKT.

61. The sole function of the members (and alternate members) of TKT is to appoint and remove directors of TOKMTL in accordance with the requirements of the Act and the constitution of TOKMTL. In carrying out that function, TKT members are not subject to directions from the board of TOKMTL or any of its directors; may collectively seek advice from any source they consider appropriate; and must act in a manner that is consistent with achieving the purpose of Te Ohu Kai Moana (that is, the Trust). Members of TKT are no more than 11 and no less than six. Eligibility for appointment is set out in the Act but no member or alternate member of TKT can at the same time be a director of TOKMTL, AFL or any other subsidiary of TOKMTL, or of a sub-company, or of TPWTL or TWMTL.

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62. The independence, therefore, of the members of TKT from other governance positions is prescribed by the Act. The members and alternate members of TKT are appointed for four years and are eligible for reappointment but may hold office for no more than two consecutive terms. TKT may regulate its own procedures. It meets as necessary to appoint or remove directors of TOKMTL in accordance with the Act, according to prescribed intervals.

63. The members and alternate members of TKT are not bound by statute to make appointments according to Iwi preferences. Put another way, the wishes of the owners can be put to one side or found not persuasive by the members of TKT in exercising their statutory powers of appointment. The members and alternate members of TKT are remunerated by TOKMTL and the expenses of TKT likewise met by TOKMTL. All members and alternate members of TKT must be Maori.

64. It is obvious enough that TKT is a structural layer in the Maori fisheries architecture inserted between those to whom the benefits of the Settlement are to be allocated, in a manner ultimately, for the benefit of all Maori, i.e. Iwi (meaning the traditional tribes) on the one hand, and on the other TOKMTL as the statutory trustee for Te Ohu Kai Moana, itself a trust established under the Act, the purpose of which prescribed by the Act is to advance the interests of Iwi individually and collectively primarily in the development of fisheries etc.

65. The establishment by the Act of Te Ohu Kai Moana as a trust is deliberate as is its single statutory trustee (TOKMTL). The chosen structure represents an endeavour to capture the disciplines and principles of trust law as applicable with a corporate law overlay. This was considered appropriate in the initial design of the optimum model for allocation and the structure in order to achieve it. In this Report I have noted some relevant observations from the Courts on the importance of always considering how to interpret and apply the provisions of a statute by reference to its purpose.

66. Layers in any structure have accompanying costs. In respect of TKT, the obvious direct cost is in the provision under the Act for TKT remuneration and expenses to be paid by TOKMTL – no doubt paid out of the 20% of Iwi income shares it retains (after transferring up to 80% of the income shares to Iwi in accordance with s.139 of the Act). A less transparent (but real enough) cost is the impact arising from the distancing of TOKMTL from Iwi and therefore accountability to Iwi.

67. I next mention the statutory duty of TOKMTL to, among other things, appoint the directors of AFL (s.34(m)), itself a company established under Sub-Part 3 of the Act with two classes of shares – voting shares and income shares – with a duty to manage its assets in a commercial manner. Under the Act, all income and voting shares in AFL were issued to TOKMTL. TOKMTL then had a discretion to transfer up to 80% of the income shares to Iwi in accordance with s.139 of the Act. TOKMTL has been required to retain control of all of the voting shares (and must do unless a resolution that is supported under s.127(3) of the Act requires their transfer to Iwi MIOs).

68. AFL is the Iwi entity engaged in the commercial fishing industry. Sealord, an AFL 50% venture with Nippon Suisan Kaisha, Ltd (Nissui), is a significant part (in excess of 34%) of AFL's balance sheet. The TKT and TOKMTL layers in the governance architecture further distance Iwi owners from their company. The nature of the current relationship between Iwi and AFL is a product of the Act's architecture.

69. Many Iwi submissions and other observations identified frustrations arising from the separation of Iwi from AFL Group. I determined early on in the Review that this was a real issue to be addressed. I have endeavoured to get to the heart of these sentiments in two ways:

- First by addressing the existing anomaly of Iwi owners not having the full rights as shareholders to hold AFL governors directly accountable (Iwi do not have the voting

shares); and therefore have weakened influence or power if AFL acts in a manner contrary to their interests as owner (for instance, by AFL competing with Iwi in quota use); and

- Secondly, by reviewing asset disposal restrictions under the Act and working through some of the Iwi-AFL dynamics and issues which Settlement assets disposal restrictions crystallise – at least for me.

70. Whilst there is justification for criticisms of financial performance of the AFL Group (including Sealord particularly its loss in 2013 of $44m, meaning no dividend from AFL to Iwi) over the last 10 years – I consider it constructive for this Review to focus on forward thinking solutions to broad "performance" issues affecting AFL and its Iwi owners. I do so also because I have found and recommend that Iwi should now be allocated all the shares in AFL. The strategic commercial positioning of AFL will, if this recommendation comes to pass, be within the direct spheres of interest and control of Iwi.

71. So to the first of these important considerations: AFL-Iwi behaviour. Importantly for both the optimum future architecture and the underpinning philosophy and statutory responsibilities of AFL, is that at present, very sensibly, AFL's constitution, under the Act must include a requirement **"that AFL use its best endeavours to work co-operatively with Iwi on commercial matters".** See s.62(1)(g).

72. In my view, this requirement means that AFL must not compete with Iwi.

73. The *"best endeavours"* requirement to work co-operatively with Iwi could never be discharged if in fact AFL competes with Iwi in the business and activity of commercial fishing or any component of that business activity. Indeed the requirement of co-operation with Iwi can be properly seen as having the character of a directive to AFL in order to achieve consistency with the purpose of the Act, to provide for the development of the collective and individual interests of Iwi in fisheries. I have endavoured to demonstrate the point in the diagram which follows: *"Problem Identification and Solutions".*

74. Rather than be distracted by (a nevertheless quite interesting and legitimate) legal debate over statutory interpretation *("co-operation with Iwi commercially" versus "must not compete with Iwi commercially")*, I encourage AFL to urgently engage with Iwi on a differently focused take – namely, how might AFL, as an Iwi-owned company, ensure no competition with Iwi as its owners, i.e. full co-operation with Iwi, commercially, to their mutual benefit, minimising financial risk to both. The way forward, it seems to me, lies in rationalisation of quota ownership and quota use between AFL and its Iwi owners (who are likewise quota owners trying also to rationalise their quota use). This is a good challenge to have. Successful collaboration and co-ordination, commercially, between Iwi and the AFL Group (including Sealord) could lead to economic gains for both. The objective should be to fully realise the opportunities from which the combined (AFL and Iwi) capital allows – with the prospect of enhanced free cash flow to Iwi, so important to them. I have endeavoured to demonstrate the point in the diagram which follows: "Problem Identifiction and Solutions".

# PROBLEM IDENTIFICATION AND SOLUTIONS

Problem(s) with status quo:

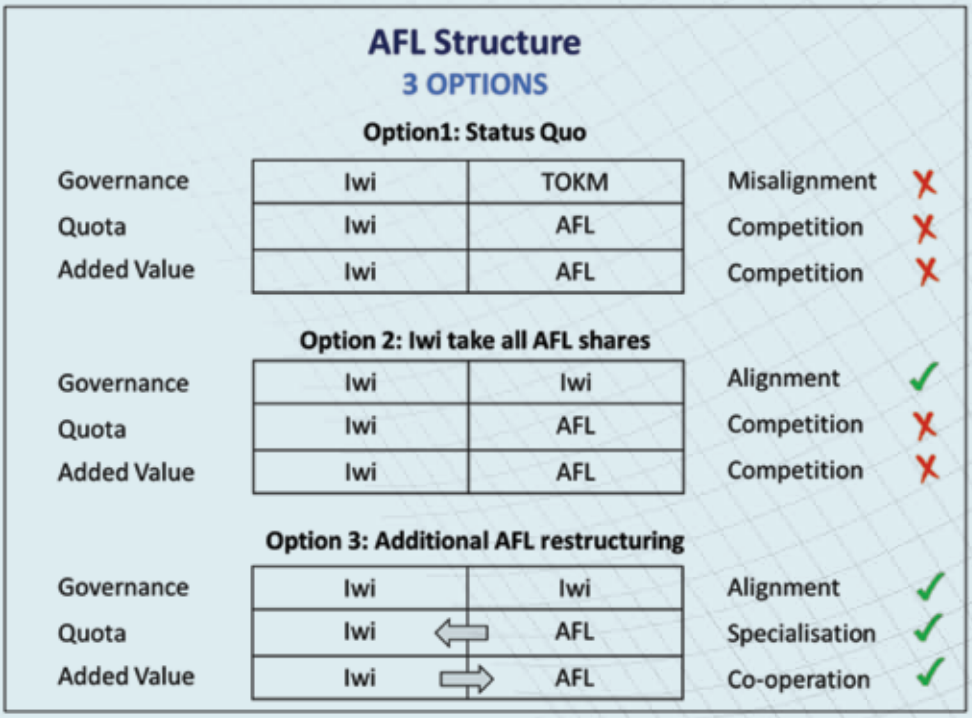
i. Separated governance structures (misalignment and tension).

ii. Business competition between "rivals" (Iwi and AFL: they both own the same or substitutable assets). This competition occurs at two levels: the business of quota ownership and the business of quota use.

Solution(s)

i. Re-align governance with concord consequence.

ii. Business co-operation ie. the co-operation in business between Iwi and AFL is based on specialisation and mutual dependence disclipined (and shaped) by voluntary trade and exchange.




Strictly speaking a 4th option to achieve specialisation and co-operation could be to transfer all quota to AFL. In my view, this would be contrary to the purpose of the Act; and no party seeks it in any event.

75. Iwi were required to accept AFL shares as part of the fisheries Settlement.

76. The two structural layers (TKT and TOKMTL) represent at least constraints, and arguably impediments, to direct owner input into both the strategic business decisions of AFL in addition to the perhaps more obvious direct responsibility to appoint the directors of AFL. TOKMTL must under the Act, unless by resolution changed (or by amendment to the Act), hold 100% of the voting shares in AFL. This circumstance relegates those to whom ultimately assets are to be transferred to a class of passive shareholders completely dependent upon dividend payments from the company without opportunity of strategic input. In 2015, this circumstance represents, in my view, a denigration of Iwi to income or distribution recipients only without rights to even contemplate practical influence on AFL especially (and even if only), to ensure high levels of co-operation in their commercial endeavours.

77. I recognise that there may be some Iwi who are content with that passive role. But it is clear to me from the consultation hui and from the submissions received that many Iwi are not content at all with the continuing prospect of passivity status. Many Iwi seek active involvement, either with or in AFL's commercial strategies including involvement in the value chain dynamics – quota use – processing – marketing. Such Iwi strategic thinking and desire to engage actively in AFL is to be welcomed as a very positive development. Furthermore, although some Iwi are, naturally enough, more ready and willing to so engage with AFL than are others, I find that it is now time to draw Iwi owners closer to AFL.

## RESTRICTION ON THE DISPOSAL OF SETTLEMENT QUOTA AND AFL SHARES

78. Sections 68 to 74 of the Maori Fisheries Act 2004 set out restrictions applying to the disposal of income shares in Aotearoa Fisheries Limited (AFL) by both Mandated Iwi Organisations (MIOs) and Te Ohu Kai Moana Trust Limited (TOKMTL). In addition, Part 4 of the Act (sections 155 to 176) is sub-titled *Settlement Quota Interest, Sales and Exchanges of Settlement Quota, Related Restrictions, and Option to Purchase.* These sections set out similar restrictions on the sale of Settlement quota by MIOs. An important question for this Review is whether these legislative provisions are still needed in their present form. (Refer s.124 of the Act).

79. In summary, Settlement asset disposal restrictions under the Act are:

i. Income shares. The income shares in AFL may be sold or exchanged only to other MIOs or TOKMTL. The proposal must be notified to, and have the approval of, at least 75% of Iwi members voting at a general meeting or by a prescribed voting process. If Iwi approval is secured, the shares must be offered to other MIOs and TOKMTL and the selling MIO must accept the best price.

ii. Quota shares. Settlement quota may be sold only to other MIOs or to an entity in the TOKMTL group. Again, the sale proposal must be notified to, and have the approval of, at least 75% of Iwi members voting at a general meeting or by a prescribed voting process. Detailed provisions prescribe how the sale must be processed (i.e. by offering MIOs and TOKMTL the option to bid and the treatment of the assets as a bundle or separate lots).

iii. ACE. Restrictions apply if a transaction or series of transactions might result in an Iwi being disentitled for more than five years to ACE income or the control or use of ACE arising from settlement quota. In such cases, s.162 applies. That is, the transaction cannot proceed unless it has been notified to and has the approval of not less than 75% of Iwi members voting at a general meeting or by a prescribed voting process.

80. Legislative provisions to restrict the disposal of Settlement Quota and AFL shares had quite strong support in 2004. Critics of these restrictions pointed out that they represented

a constraint on Iwi *rangatiratanga* and that they would potentially suppress the returns available to Iwi who wished to dispose of Settlement quota or AFL shares by restricting the size and competitiveness of the market for either class of assets. Both of these criticisms had, and have, some validity in my view in the sense that they point to the fact that restrictions on asset disposal have cost consequences, that those costs need to be outweighed by benefits, and that not all Iwi calculate those respective costs and benefits in the same way. In my discussions with Rob McLeod, former Chairman of Te Ohu Kai Moana, former AFL appointed director of Sealord and one of the principal architects of the Act including the Settlement assets dealing restrictions, we debated the "trade-offs" which the inclusion of the asset dealing restrictions represented then – and will do for so long as they remain.

81. An over-riding concern through to the 2004 Act was that the Fisheries Settlement should mark a halt to the alienation of fisheries taonga from iwi not simply be another chapter in that process. It was a *"Pouwhenua"* of a kind. There was uneasiness that the *"fragmentation"* of fisheries assets ownership through planned transfer of quota and shares from TOKMTL to MIOs might precipitate the same consequences in the 21st century as the 'fragmentation' of the ownership of Maori land in the 19th century. Those historical consequences and their causes were, I believe, well enough understood:

    a. The scale of Maori land ownership was often incompatible with the optimum economic scale of contemporary farming businesses thereby preventing effective utilisation of Maori land.

    b. Poor utilisation of Maori land meant there was insufficient free cash flow to meet the financial responsibilities of land ownership, such as the payment of rates or to deliver meaningful economic benefits to owners. These consequences have figured significantly in many historical Treaty grievance claims against, and their settlement with, the Crown – as I am very well aware, having been privileged to prosecute and negotiate them for Iwi Maori over many years.

    c. Common ownership of Maori land made decision making complex and costly. In turn, this was a barrier to negotiating new land use arrangements or accessing capital for development.

82. In many cases Maori land owners, frustrated at their inability to access benefits from land ownership on a year by year basis, opted to extract benefit from those rights by disposal.

83. These three issues, starkly illustrated in the history of Maori land ownership, are very relevant in my view to the Fisheries Settlement if it is to prove durable; if it is to endure.

84. In the Fisheries Settlement context the needs could be restated thus:

    a. The need to reconcile the scale of quota ownership with the economic scale of quota utilisation.

    b. The need to generate sufficient free cash flow from fisheries assets to meet the responsibilities of ownership and to deliver adequate benefits to owners.

    c. The need for cost effective and efficient governance structures and processes that can implement appropriate responses to the issues above in the light of changing opportunities or threats in the fisheries sector.

85. While it may be true that there are some Iwi who do not profess a particularly strong cultural attachment to fisheries assets, I have now the benefit of consulting over the last six months with a majority who clearly do wish to retain control of fisheries Settlement assets and to see them used in a way that is for the benefit of Iwi owners, and, ultimately, for the

benefit of all Maori. In practical terms this requires the emergence over time of a strong and successful Maori fishing industry. This will not happen if there is significant alienation of Settlement assets to non-Maori interests in the interim. To an important degree, the success of the Settlement can therefore be measured in terms of the extent to which the three needs above are being satisfied because those needs are pre-requisites for the realisation of the aspirations the original Maori negotiators as well as the subsequent Maori architects of the structures to deliver the fruits to Iwi, had for a Maori fishing industry. The words of, respectively, Sir Tipene O'Regan and Rob McLeod, to me during our recent discussions ring true.

86. Their objectives included:

- Quota ownership;
- Quota use through the fisheries value chain;
- Commercially competitive Maori businesses generating strong free cash flows; and
- Governance of those businesses by Iwi imbued with the values of tikanga Maori. Put another way: Maori managing their assets commercially, in a Maori way.

## Evaluation of Existing Restrictions

87. In the last decade there has been no significant loss of Maori control over fisheries Settlement assets, and *prima facie* the existing statutory restrictions have therefore achieved their purpose. A consequence for that achievement is the potential of diminished value attaching to the assets on sale. That potential was *"traded off"* against the Settlement durability imperative. However, it is apparent to me that if there are defects in other aspects of the fisheries Settlement structure and processes to meet the three needs above as well as they might, then an underlying pressure for Settlement asset sales will surface, and, arguably, already has done.

88. Concerns expressed during my consultation and discussions include:

- The ownership and governance structure of AFL restricts the Iwi stake in AFL to 80% of the income shares, which in practical terms is a right to receive a dividend that is not more than 40% of AFL NPAT x 80%. In other words, the practical economic interest of Iwi in AFL is a claim over up to 32% of its NPAT. Iwi therefore currently have a right to *"control"* less than one third of the earnings of AFL. This would explain why prudent Iwi would only be prepared to pay a price for AFL shares that represents a large discount on a full earnings valuation for AFL and a very large discount on AFL asset backing. This *"structure"* value effect is a source of likely frustration to Iwi whether or not they plan to retain or sell AFL shares.
- The fact that Iwi do not have voting (i.e. control) shares in AFL is the source of two separate causes of frustration. First, many Iwi consider that AFL has not adequately met its statutory obligation to co-operate commercially with Iwi, certainly up until the recent past (the improvement coinciding with the new Chief Executive at AFL). This has hampered the establishment and refinement of the optimal relationship between the individual Iwi ownership of Settlement quota and the collective use of Settlement quota (including Iwi quota) by AFL. In addition some Iwi expressed their disappointment at the level of free cash flow generated by AFL and attribute this result in part to an insufficient focus on this objective by AFL.

- These problems impact Iwi as quota owners, not simply as AFL shareholders. A weak free cash flow performance by AFL in its capacity of value chain operator (fish harvester, processor and marketer) means that demand from AFL for Iwi ACE will be similarly weak. A weak AFL performance delivers a double economic blow to Iwi. It reduces the benefit of AFL ownership and also reduces the potential benefit of supplying Iwi ACE to AFL. Combined with the restriction on disposal of Settlement assets, a weak AFL free cash flow therefore suppresses both the price of Iwi income shares in AFL and Settlement quota held outside AFL.

89. The analysis above indicates that the existence of restrictions on the disposal of AFL shares and Settlement quota is unlikely to have a significant negative economic impact upon MIOs or Settlement beneficiaries unless those restrictions are combined with the following circumstances:

a. Legislative restrictions on rights by Iwi to the earnings of AFL.

b. Legislative restrictions on the rights of Iwi to govern AFL efficiently.

c. Weak free cash flow by AFL.

90. If these circumstances exist then the desire by MIOs to dispose of AFL shares and Settlement quota will be elevated when the capacity of MIOs to pay full theoretical value for those assets is simultaneously depressed. Absent the existing disposal restrictions in this situation a likely result will be in elevated levels of sales of Settlement assets to non-Maori which, in turn, will weaken the opportunity for remaining Iwi to establish a strong and competitive Maori fishing industry co-operatively utilising Iwi quota. Given that all three of these circumstances currently exist, any change to sections 68-74 and 155-176 of the Maori Fisheries Act 2004 now, or in the near future, is likely to jeopardise as yet unrealised Settlement benefits.

91. In the circumstances I have reached a clear conclusion in respect of the settlement quota disposal restriction (ss.161 and 168) for the purposes of s.124(2) of the Act. I do not find that the interests of the beneficiaries of the Deed of Settlement would be better served by changes to s.l161(1) or s.168. Accordingly, there is no finding by me in this Review of the kind contemplated for inclusion in this review report under s.124(2)(a)(ii); and therefore neither s.124(2)(a)(ii) nor s.124(2)(b) nor s.114(3)(a) nor s.124(4) will kick in. For that reason, that is not making such a finding in this Review, it appears under the Act that the restrictions against disposal of settlement quota will be perpetual, I have considered the matter very carefully before reaching this conclusion.

92. If this result does not find favour it would seem that the only recourse is for the Act to be amended.

## Options for the future

93. I have sought to identify and tease out options that could significantly ameliorate the costs of the Settlement asset disposal restrictions. It is possible to identify some actions that could conceivably significantly increase the net benefits of those restrictions. Improved AFL financial performance, management and governance over the years ahead is a sound place to start in addressing the benefits disadvantages. The process to minimise concerns and frustrations with disposal restrictions could comprise the following sequential steps:

    a. Allocation of all income shares in AFL to Iwi in proportion to their existing AFL shareholding. TOKMTL, without its 20%, would require a new funding arrangement for any residual functions.

    b. Allocation of all voting shares in AFL to Iwi in proportion to their AFL income shares. Iwi shareholders would appoint directors to the AFL board.

       So far so good, so to speak. The distance between owners (Iwi) and managers (AFL) from a governance perspective is thereby reduced to the shortest most direct link. In my view full, robust engagement of Iwi as owners in AFL's business (or businesses) is essential going forward. Not only for direct Board appointments either; it is desirable that Iwi have the opportunity to constructively influence strategic decision making at the AFL governance level, with accompanying accountability back to the owners, is maximised. I see the desirability of an Iwi Shareholders Council for such purpose. But there are additional options for restructuring also. I invite careful consideration of the "McClurg Right of Reply" in this Report, and of the contents of the TPWT publication appended to this Report.

94. Additional options would include:

    a. Restructure AFL into quota owning and quota using entities with separate boards of directors appointed by Iwi as above to consolidate the position of Iwi individually and collectively as being responsibility for all strategic decisions relating to the ownership and use of Settlement quota.

    b. AFL and Iwi develop and agree a strategy for the Maori fishing industry based as far as possible upon co-operative use of Iwi-owned quota and the expression of Maori values to generate agreed Settlement benefits.

    c. Increase AFL financial performance (free cash flow) so that the AFL performance provides the benchmark for the practical realisation of economic value from New Zealand fisheries quota.

## AFL benefits to Iwi

95. On satisfying the requirements for Mandated Iwi Organisation (MIO) status, Iwi organisations can be transferred their entitlement of Settlement assets from Te Ohu Kai Moana Trust Limited (TOKMTL). These assets include income shares in AFL. In 2004, all income and voting shares in AFL were issued to TOKMTL. TOKMTL may transfer up to 80% of income shares to Iwi in accordance with s.139 of the Maori Fisheries Act 2004. It must retain control of all of the voting shares unless a resolution that is supported under s.127(3) of that Act requires their transfer to MIOs. AFL can issue more shares but it cannot buy its own shares. MIOs (who have held income shares in AFL for more than two years) and TOKMTL may sell their income shares but the market in income shares is limited to MIOs and TOKMTL.

96. In summary, Iwi are required to accept AFL shares as part of the Settlement, have no direct role in the appointment of AFL directors and those Iwi who may wish to sell AFL shares are restricted to a market of buyers limited to other MIOs or TOKMTL. The value of AFL income shares is significantly affected by these constraints. The primary benefits of AFL share ownership under current arrangements are therefore simply to receive dividends from AFL. These are limited by statutory formula to 40% of AFL's consolidated group Net Profit After Tax (NPAT). The first dividend received by Iwi was in 2010. No dividend was paid in 2013 because Group earnings were negative following the write-off of Sealord losses in Argentina.

**AFL Gross Dividends**

| | AFL Income Shares | 2010 | | | 2011 | | | 2012 | | | 2012 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Dividend | MATC's @ 19.5% | Gross Dividend | Dividend | MATC's @ 19.5% | Gross Dividend | Dividend | MATC's @ 19.5% | Gross Dividend | MATCs attached to Taxable bonus Issue |
| **TOTAL IWI** | 100,000 | 6,038,144 | 1,462,656 | 7,500,800 | 7,281,397 | 1,763,817 | 9,045,213 | 5,462,007 | 1,323,095 | 6,785,102 | 24,000,000 |
| **TE OHU** | 25,000 | 1,509,536 | 365,664 | 1,875,200 | 1,820,349 | 440,954 | 2,261,303 | 1,365,502 | 330,774 | 1,696,276 | 6,000,000 |
| **TOTAL*** | 125,000 | 7,547,680 | 1,828,320 | 9,376,000 | 9,101,746 | 2,204,771 | 11,306,517 | 6,827,509 | 1,653,869 | 8,481,378 | 30,000,000 |

Income shares on issue are now 250,000 after the bonus issue. All holdings were doubled in 2012[8]

97. In 2012, a bonus share issue was made which doubled the number of income shares in AFL to 250,000. This allowed $30m of Maori Authority Tax Credits (MATCs) to be attached to the new shares ($24m to Iwi and $6m to TOKMTL) as a one-off benefit. Excluding this event, the "business as usual" gross dividend to Iwi averaged $7,777,038 per year over the three years 2010 to 2012 (an average of $136,439 per Iwi per year. This is approximately (and a rather negligible) $11.45 per iwi affiliate9. Depending upon the capitalisation rate selected, this flow of benefits suggest that the value of the Iwi investment in AFL is worth around $100m. In comparison, the book value (value of the underlying assets) of the Iwi investment in AFL is roughly four times this amount.

98. Many Iwi have expressed a level of dissatisfaction with the level of these benefits and the financial performance of AFL generally. AFL had a five year dividend holiday: no dividends were paid during the years 2005 to 2009 (to allow the AFL business to be strengthened) but no clear improvement in Iwi wealth can be attributed to this mandatory "investment".

## Why AFL earnings matter

99. In the first instance, AFL earnings matter to iwi and Settlement beneficiaries because they are linked by formula to its dividend stream; a cash flow that can be used by MIOs to fund a wide range of potential social, economic and cultural benefits for their members. The demand for such benefits far outstrips the capability of AFL to fund, but obviously, larger AFL earnings will fund more than would otherwise be possible.

100. Second, the level of AFL earnings matters because it affects the set of

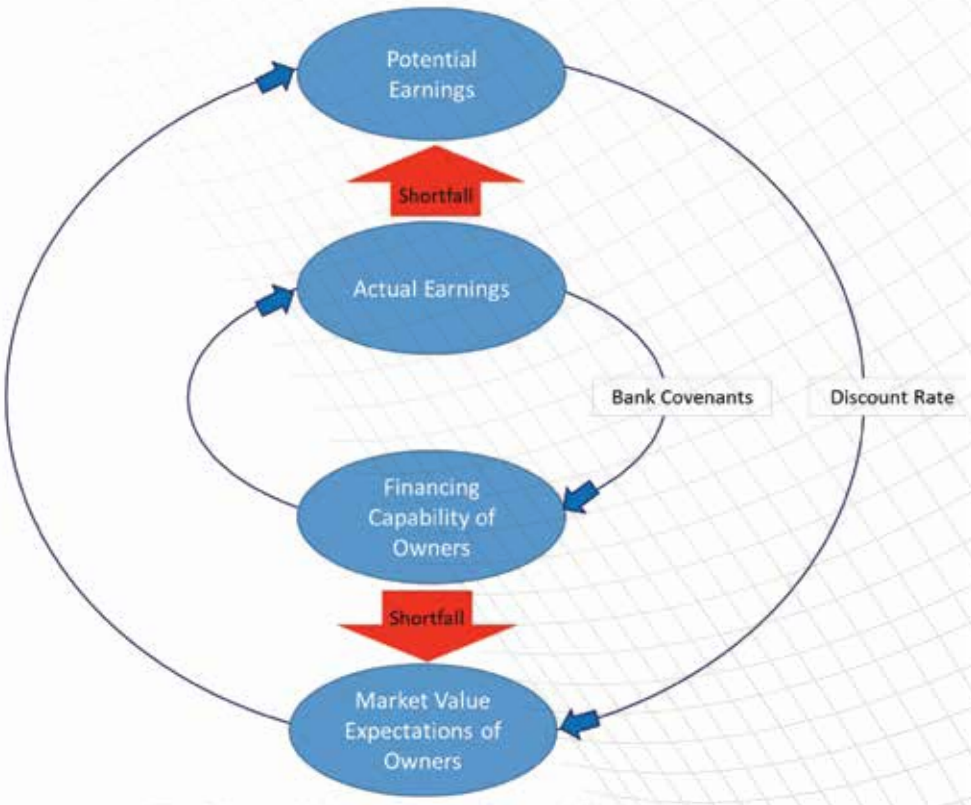
8 Source, TOKMTL

9 Based on a total notional iwi population of 679,154 (see Schedule 3 Maori Fisheries Act 2004). This number relates to Iwi affiliates that include some double counting of people who recorded more than one Iwi affiliation in the 2000 census that recorded a Maori population of approximately 515,000.

choices Iwi have about how to use their Settlement assets. Not all Iwi have the same level of attachment to those assets. It has always been anticipated that some might prefer to sell their AFL shares or quota and reinvest the proceeds of those sales in other activities. The statutory processes for the sale of Settlement assets are highly restrictive and these restrictions have, themselves, a significant effect on the value that exiting Iwi can realise for their shares. It is less realised that any shortfall between the actual free cash flow generated by AFL from its assets and the level of free cash flow the market would expect from those assets under good management also significantly affects the price that Iwi could expect to receive for the AFL shares.

101. The reason for this is that the market value of a company is usually a function of what it could (or should) earn irrespective of whether it is performing at that level under current arrangements. Buyers of an underperforming business calculate a price based upon the levels of earnings that could be achieved under new management less an allowance for the costs and risks of implementing a new management regime. These norms do not apply to AFL. Prospective Iwi buyers of AFL shares currently have no way of ensuring any change to this regime and their ability to actually fund the acquisition of new shares is also a function of current (not prospective performance).

**AFL: Share Value VS. Share Affordability**




102. In a company with a free market in its shares, the capacity of prospective share buyers to finance a share acquisition is not limited to the capacity of the company as it stands to finance such an acquisition. The value of a normal company is not determined by its current earnings (only) and the ability of prospective investors to fund investment is not affected by its current earnings either. However, for practical purposes, it is only possible for AFL share buyers to compensate exiting iwi for their shares at a value that current and anticipated dividends can support.

103. Any shortfall between actual and potential AFL free cash flow has two adverse effects on Iwi:

    a. It reduces the dividend stream (and availability of funds for new investment within AFL);

    b. It suppresses the value that Iwi who wish to disinvest from AFL can receive from remaining Iwi because the level of earnings limits their financing capacity.

104. These factors will promote dissatisfaction whether current income shareholders remain or stay. The current gulf between earnings based valuations of Iwi shares in AFL based upon capitalisation of dividend streams and the book value of AFL indicate that this shortfall is significant and is not reducing.

105. This analysis does not suggest that there should be no restriction on the market for Settlement assets. The expected benefit of those restrictions is to promote the durability of the Settlement. However, the costs associated with delivering that durability benefit will be reduced to the extent that AFL's actual earnings approach their potential.

## STATUTORY RESTRICTIONS ON REVIEW RECOMMENDATIONS

106. The Act forbids the Reviewer to recommend a change to the requirement in the trust deeds of Te Ohu Kai Moana, Te Putea Whakatupu Trust or Te Wai Maori Trust that upon termination, the trust assets or funds be distributed to Iwi in the percentages specified in column 3 of Schedule 3 to the Act.

107. If, as Reviewer, I find that the interests of the beneficiaries of the Deed of Settlement (that is, as defined in the Act itself – s.5), Iwi and, through Iwi, ultimately all Maori would be better served by changes to the provisions of the Act which restrict the disposal of settlement quota to mandated Iwi organisations and Te Ohu Kai Moana group (see ss.161(1) and 168: Sub Part 2 of Part 4 of the Act), then I must:

    a. Include such a finding in the Review Report; but

    b. Not recommend that the restrictions be changed.

    A subsequent review under the Act must be carried out not later than five years after the completion of this Review. That requirement, set out in s.124 of the Act, is reinforced by the same language provided in s.114(3)(a).

108. If I make a finding that the interests of the beneficiaries of the Deed of Settlement would be better served by changes to prescriptions which restrict the disposal of Settlement quota to mandated Iwi organisations and Te Ohu Kai Moana group, then not only am I not permitted by the Act to recommend that the restrictions be changed, but also there must be a subsequent review as provided for under s.114(3)(a) not later than five years after completion of this review. If in that subsequent review a reviewer makes like findings to those I have made, then at that point the reviewer is, it seems to me, able to make a recommendation that the restrictions be changed. In that event, mandated Iwi organisations must not amend a recommendation to achieve a change to the restriction.

109. So the conditions precedent to any change to restrictions under the Act to the disposal of Settlement quota are twofold:

    - First, I must make a finding that the interests of the beneficiaries of the Deed of Settlement would be better served by changes to the restrictions on the disposal of Settlement quota to mandated Iwi organisations and Te Ohu Kai Moana group (but without recommendation because that is prohibited); and

- Secondly, a subsequent reviewer carrying out a review under s.114(3)(a) not later than five years from now, makes like findings and recommends change;
- At which point mandated Iwi organisations must not amend the recommendation to achieve a change to the restriction;

It follows, it seems to me, that even if I were to make a finding that the interests of the beneficiaries of the Deed of Settlement would be better served by changes to the disposal of Settlement quota restrictions, that cannot happen for another five years, that is until 2020, and only then if there is a like finding in a subsequent review with an accompanying recommendation which mandated Iwi organisations would not then be able to amend.

110. This timeline is, of course, predicated on the basis that the provisions of the Maori Fisheries Act as they are right now are not, themselves, amended by Parliament in the interim. Iwi must, in my view, consider, now, whether there is any appetite for change and, if so, when, because if there is to be change to disposal of Settlement quota restrictions before 2020 at the earliest, necessary changes to the legislation to facilitate such changes earlier would, sensibly, have to be actioned now. It is for Iwi to decide in their statute-defined capacity as beneficiaries of the Deed of Settlement.

111. But there is another consequence in the various scenarios possible under s.124 of the Act. As is the position now under this current review, some MIOs have advocated for a change to the Settlement quota disposal restriction. If I do not make a finding in this Review that the interests of the beneficiaries of the Deed of Settlement (as defined) would be better served by changes to the Settlement quota disposal restrictions, Iwi who have advocated for that change now will be arguably deprived of a statutory precondition to a subsequent review making that finding and an accompanying recommendation within the next five years. For instance, in congratulating all of the entities under review for their "contribution as significant drivers of Maori development over the past 10 years", Te Arawa Fisheries the Mandated Iwi Organisation for the Iwi of Te Arawa Waka, submitted:

> *"Our view is that the past 10 years have shown us that we are capable of taking full responsibility for the management of our assets. It is time now for the restraints on our self-management to be removed so that we can take full charge of our futures … While it is acknowledged that the aim of Te Ohu Kai Moana to retain the settlement assets in the hands of Iwi was well intentioned, Iwi are at the stage of growth where such protectionism is counter-productive to our development aspirations. In particular freedom of disposal would enable us to rationalise our quota holdings according to our strategic direction. Importantly, the restrictions preclude us from raising finance under these assets inhibiting growth. Also the valuation of our settlement assets is significantly impaired by that prohibition on alienation. We acknowledge the risk of loss that accompanies the freedom to alienate. However, we are at a stage of economic development as Iwi where these restrictions are undermining our ability [to] grow and impacting negatively on the benefit to our people. … Te Arawa is of the view that the restriction on the disposal of settlement assets should be removed."*

112. Te Arawa manages its quota with 12 other Iwi through the Iwi Collective Partnership, partnering with companies such as Sanford, AFL and Pelco which has also enabled Te Arawa to invest in companies such as Port Nicholson Fisheries in Wellington. Te Arawa is the eighth largest Iwi in terms of assets under the fisheries Settlement. It is a strong Iwi call for change.

113. Ngati Porou submit to me that the restriction of sales of Settlement quota to Iwi and TOKMTL creates, not a competitive market, but actually prevents Iwi from realising the true value of the assets on an open market. Furthermore, Ngati Porou contends that income shares should be tradeable on an open market and able to be realised in that way by Iwi if that is the appropriate strategy decided upon by an Iwi.

114. Settlement quota divided across MIOs through their AHCs is, of course, spread across all quota species. Many Iwi hold small parcels of every species. Uneconomic parcels of Settlement quota and fragmented ownership presents, as Ngati Porou puts it, *"unique challenges when it comes to using those assets and putting those assets to best use".* Some care if required here, in my view. Rationalisation of quota ownership is one matter; rationalisation of quota use is another altogether and, in my view, it is the latter upon which Iwi should be focusing for the future.

115. I would recommend that part of the detail any Iwi Working Group established (funded by TOKMTL) post the delivery of this Report to enable Iwi to consider the detail of options for change, might usefully make the distinction between rationalisation of ownership and rationalisation of use for the purposes of trying to identify most desirable or potentially productive options. But in any event, I do recognise the desirability of flexibility and freedom on the part of Iwi to sell quota, even within the Maori pool, if strategically they consider that to be the best decision to make.

116. Iwi focus on making a return on their assets by selling or utilising ACE – or at least some of them do. Optimisation of ACE prices is therefore important. ACE transactions, however, are restricted to five year terms which is not long enough for those in the business and activity of commercial fishing who, not surprisingly, seek access to ACE for a much longer period than five years.

117. The key submission from Ngati Porou on this point is expressed in this way:

> *"Replacing the current restrictions on disposal with more flexible process will allow Iwi to interact more freely and to do business more collectively. The interests of the beneficiaries of the Deed of Settlement will be better served as a consequence."*

118. At this time, I do not read that submission as extending to advocate for the abandonment altogether of Settlement asset disposal restrictions, but rather for the easing of procedures and processes for the disposal of Settlement assets within the Maori pool in a way which would minimise any loss of value attributable to a restricted pool of potential buyers, but without full alienation of the Maori assets to a public pool including, but not limited, to Maori.

119. However, the overwhelming force of other submissions from Iwi and knowledgeable, experienced individuals is to urge upon me the retention of Settlement quota disposal restrictions within the Maori pool only. I have reached my own conclusion whilst nevertheless giving due weight to the submissions, including competing submissions, on the point. I have full regard to the fact that quota, and therefore Settlement quota, was the "currency" selected for a significant part of the Treaty Settlement, by value, negotiated between the Crown and Maori leaders in 1992. It cannot be over-emphasised that this was a Treaty settlement in respect of cherished taonga. It is essential, in my view, to retain Settlement quota disposal restrictions within the Maori pool for the purposes of protecting and ensuring the durability of the Treaty settlement down the generations and into the future. That is my finding.

120. Having made such a finding, I am not, by the Act or by any other imperative, prohibited from making a recommendation. It is my recommendation that the Settlement quota disposal restrictions enshrined in the Act be not changed. But with that recommendation, I also

confirm an additional one. Elsewhere in this Report I have recorded my finding that the processes and procedures by which Iwi can transfer quota or shares within Maoridom (and only within Maoridom), need to be revisited. They are, in my view, insufficiently flexible, indeed in many respects are cumbersome and preserve a paternalistic role for TOKMTL in relation to the steps prescribed by the Act.

121. I recommend that the processes by which Iwi can quit their fisheries assets, in part or in whole, to willing buyers within the Maori pool who wish to consolidate and/or increase their investment in the fishing industry, have easier willing-seller/willing-buyer processes available to them to achieve such objectives.

## A DYNAMIC ENVIRONMENT

122. In the first annual report for Te Ohu Kai Moana Trustee Limited, for the 10 months ending 30 September 2005, the Hon Shane Jones, Chairman, wrote:

> *"Te Ohu Kai Moana reports a year of significant achievement – the first Maori fisheries assets are now in Iwi hands – less than one year since the creation of the Trust. … The fisheries settlement will assist in rejuvenating the economic base for many Iwi and give them the chance to reclaim some lost opportunities … With receipt of their fisheries assets Iwi must now prepare to meet the demands of an ever changing economic and political environment and explore ways to increase the investment base to provide for the future generations of their members. Te Ohu Kai Moana management and staff will do all they can to assist Iwi achieve their roles in the fisheries sector, whatever they may be."*
>
> *– Annual report 2005, Te Ohu Kai Moana Trust and Group*

123. These sage observations are equally applicable now; arguably more so given the extent of allocation.

124. Writing in the same report, Peter Douglas, Chief Executive, said:

> *"This organisation's overriding objectives of allocation of assets to Iwi and protection and enhancement of value of the Maori commercial fisheries settlement are our primary focus. The transfer of over $92m in asset value to six Iwi organisations – Ngapuhi, Whaingaroa, Te Aitanga a Mahaki, Ngati Rarua, Ngati Mutunga and Moriori was our most public achievement this year. The country's largest Iwi, Ngapuhi, received over $60m worth of fisheries assets."*

125. Likewise these comments rightly emphasise the furure focus of TOKMTL.

126. The 2005 report notes that Ngati Mutunga and Moriori on the Chatham Islands had received their full entitlement under allocation proposals because they were able to agree on their respective shares of inshore fisheries, 25% of deep water fisheries and freshwater fisheries. Te Ohu Kai Moana developed a 10 point "road map to allocation" providing a guide to the best route for Iwi to achieve MIO status. In 2005, TOKMTL reported that that road map had been widely promoted. Templates for asset holding company constitutions and mandated Iwi organisations trustees were developed to assist Iwi Maori meeting the requirements of the Act. Formal protocols for MIO and AHC establishment were very much the thrust of TOKMTL's activity from the beginning. This much is confirmed in the 2005 report in which it was said that in the period under report, the statutory trustee had worked on three key areas including:

- Developing systems to allocate and transfer fisheries assets to Iwi;
- Assisting Iwi to meet legal requirements to receive Maori fisheries assets.

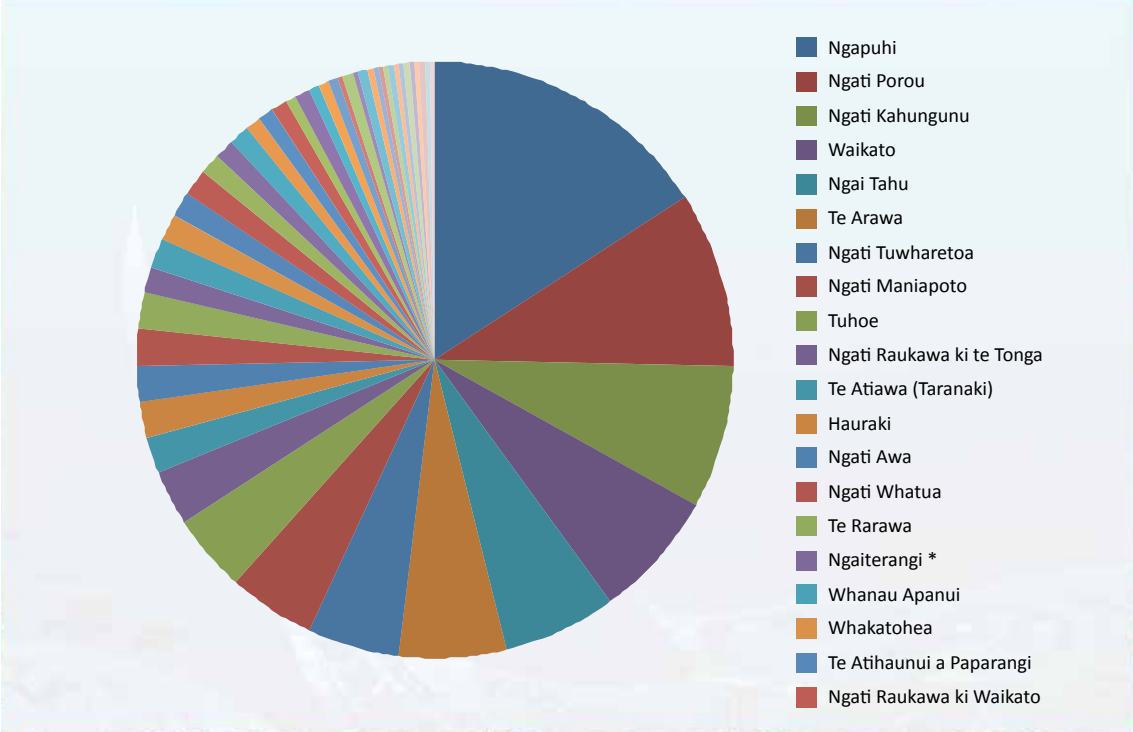
127. As was explained to me during the Review, TOKMTL "created" in the early days an environment akin to a constructive rivalry amongst Iwi in order to build a momentum in the development by Iwi of the necessary governance and accountability structures to enable Iwi to receive their fisheries assets. The six Iwi which achieved a MIO status and received assets during the 10 months to 30 September 2005 were followed by some 29 in year 2, another 12 in year 3 and eight in year 4.

128. The facts are that a total of $543m worth of fisheries assets – based on population and coastline – are in the hands of Iwi. Fifty five of the 57 recognised Iwi organisations have a MIO in place; 98% of the population-based fisheries settlement assets have been transferred. Again, I express without hesitation that by any performance measure, TOKMTL has discharged its statutory responsibilities in a highly professional and successful manner. The challenge now is to springboard from this success and design the pathway by which there can be continued and greater development of the collective and individual interests of Iwi in fisheries, fishing and fisheries-related activities in a manner that is ultimately for the benefit of all Maori.

129. At the beginning of the allocation programme, the fisheries Settlement assets were held on trust for Iwi Maori pending their capacity to receive them. This was an issue of capacity not of capability. The progressive transfer of fisheries assets to Iwi Maori was always to be an inherently evolving dynamic process. A static state was never contemplated. So the evolution continues. Iwi historical Treaty grievances are being settled apace. For some Iwi, the fisheries settlement assets were by some margin their largest assets and the dividend yield from income shares in AFL, a very significant revenue item for Iwi organisations. Whilst that may remain the same for some, the contemporary canvas is that a large number of Iwi are now in receipt of significant assets and income streams (other than from fisheries) following the resolution of their historical Treaty claims with the Crown. That circumstance is another springboard for Iwi economic development and benefit.

130. So, for example, when it is submitted to me that the continued central management role for TOKMTL is necessary in order effectively to protect Iwi from themselves or, to put it another way, indeed as it was put to me by TOKMTL, that the retention of the *("control")* voting shares in AFL by TOKMTL would ensure protection of little Iwi from overbearing big Iwi and in that way the enduring durability of the Settlement for future generations (as was always contemplated by the Treaty Settlement itself), I must consider that proposition very carefully. I have included part of the TOKMTL presentations to its Board in 2012 used to signal the prospect of a small group of Iwi wielding significant shareholder power. But I am not persuaded – for reasons I developed in my Preliminary Presentation at the front of this Report and have also identified elsewhere in this Report – that TOKMTL's retention of the voting shares is required in the cause of Iwi protection from Iwi. On the contrary, I find that position is not valid.

131. In this dynamic environment, a central question arises for consideration: has Iwi capacity with accompanying capability as well as fully accountable mandated structures required to operate in the best interests of the people of the Iwi, evolved sufficiently or to a sufficient level of maturity, sophistication and ability so much so that the rights currently held on behalf of Iwi should now be transferred to them so that they may exercise those rights in the fullest sense with all, I emphasise, accompanying responsibilities? I find Iwi capacity has most definitely so evolved.


Ngapuhi
Ngati Porou
Ngati Kahungunu
Waikato
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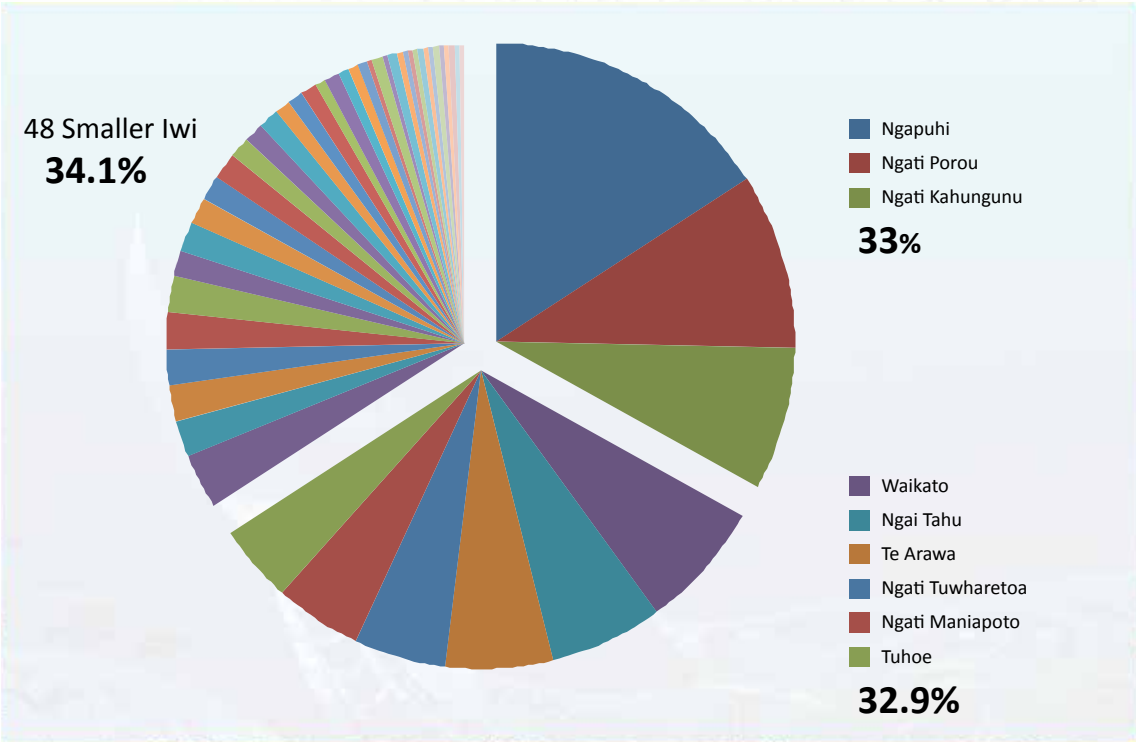
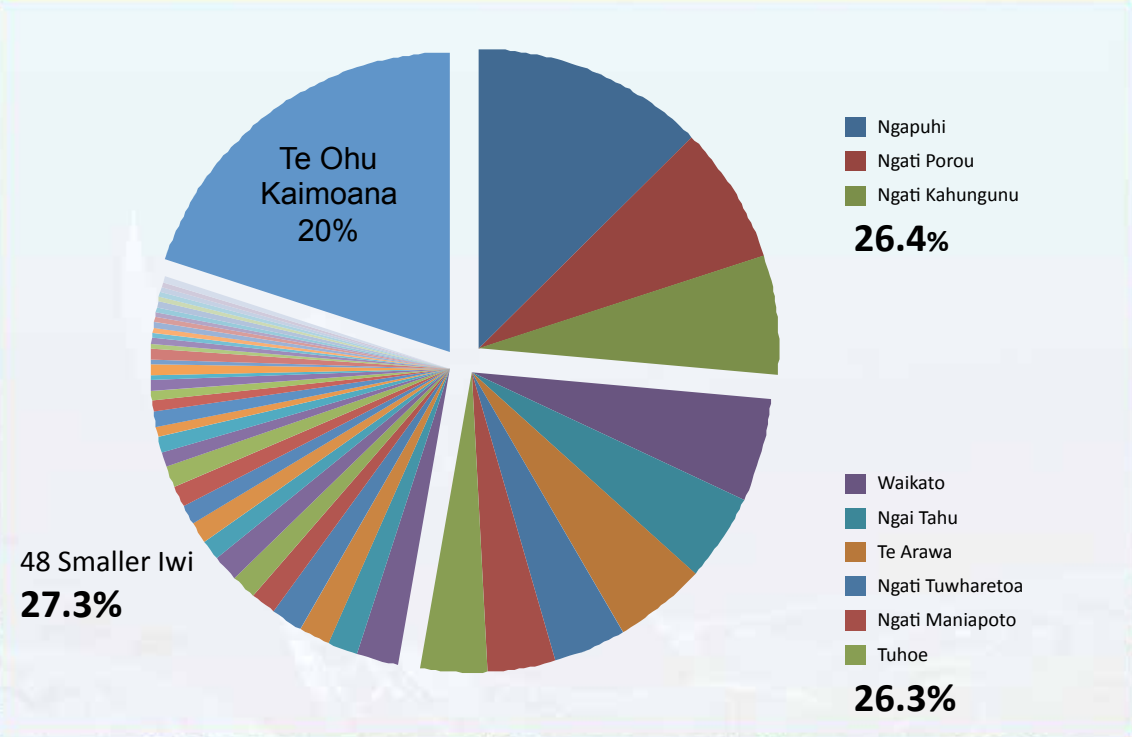
Te Arawa
Ngati Tuwharetoa
Ngati Maniapoto
Tuhoe
Ngati Raukawa ki te Tonga
Te Atiawa (Taranaki)
Hauraki
Ngati Awa
Ngati Whatua
Te Rarawa
Ngaiterangi *
Whanau Apanui
Whakatohea
Te Atihaunui a Paparangi
Ngati Raukawa ki Waikato


48 Smaller Iwi
34.1%
Ngapuhi
Ngati Porou
Ngati Kahungunu
33%
Waikato
Ngai Tahu
Te Arawa
Ngati Tuwharetoa
Ngati Maniapoto
Tuhoe
32.9%




## A PIECE OF HISTORY

132. The value of the Treaty promise in respect of fisheries was negotiated between the Treaty partners in good faith. It represented the first phase of several in the process along the contemporary continuum of Treaty rights recognition → rights reconciliation → rights integration → rights allocation, in this case in respect of fisheries for Maori, in a manner appropriate to contemporary circumstances in Aotearoa New Zealand.

133. If not the absolute first, it certainly was the first major Treaty settlement facilitated by two important statutory provisions:

    a. The residual protections for Maori fisheries contained in s.88(2) of the Fisheries Act 1983 – "Nothing in this Act shall affect any Maori fishing rights"; and

    b. The Treaty of Waitangi Amendment Act 1985 extending the jurisdiction of the Waitangi Tribunal, established in 1975, to inquire into claims by Maori of Crown conduct on or after 6 February 1840 contended to be inconsistent with the principles of the Treaty of Waitangi. Up until that 1985 amendment, the jurisdiction of the Tribunal to consider such claims that Maori had been prejudicially affected by Crown conduct was limited to Crown conduct post-1975.

134. The 1989 Maori Fisheries Interim Settlement followed negotiations between the Treaty partners as a consequence of the 1987 High Court declarations that the Crown should not continue to implement its quota management system for fisheries in New Zealand pursuant to the 1986 amendment to the 1983 Fisheries Act introducing that system. Claims of inconsistency with the Treaty of Waitangi in respect of the quota management system introduced in 1986 would have been open to inquiry by the Waitangi Tribunal under the 1975

Act as originally promulgated even without the 1985 amendment.

135. However, the extension of the jurisdiction of the Waitangi Tribunal to claims from and after the signing of the Treaty on 6 February 1840 provided additional momentum for the of recognition of historical rights and grievances of Maori under the Treaty of Waitangi. It provided an additional foundation for the inquiry by the Tribunal into the Muriwhenua fisheries claims (and later the Ngai Tahu fisheries claims) during the course of which the meaning of "Maori fishing rights" in s.88(2) of the 1983 Fisheries Act was determined as being comprehensive in nature. Customary Maori fishing rights were found to include a commercial component as well as a non-commercial component. The Tribunal's definition was adopted for the purposes of the 1992 fisheries Settlement, and since. It embraced all dimensions of customary Maori fishing rights by the definition: "the business and activity of fishing".

136. If the Settlement and its inherent extraction from the Crown of the value of the Treaty promise in respect of fisheries was Phase 1 in the process of delivery of those rights to Maori, then Phase 2 was completed by finalisation of the detail of an optimum Iwi allocation model for the assets transferred from the Crown and the passing of the 2004 Maori Fisheries Act. Phase 3 can be described as the implementation of the Settlement assets allocation objectives of that model and Act.

## NOW FOR THE NEXT PHASE: THE ENTITIES AND THEIR PURPOSE

137. The entities governing and managing the component parts of the Settlement established under the Act are:

- Te Ohu Kai Moana (the Maori Fisheries Trust) which distributes to Iwi quota and fish species provided in the Maori Fisheries Settlements of 1989 and 1992;
- Aotearoa Fisheries Limited (AFL) which manages the commercial assets provided in the settlement including the half share in Sealord Limited;
- Te Putea Whakatupu Trust which provides assistance through scholarships to Maori entering tertiary studies in the fishing industry and business; and
- Te Wai Maori Trust which provides for research in freshwater fisheries and management.

138. The purposes of the 2004 Act are expressed as follows:

a. To implement the agreements made in the Deed of Settlement dated 23 September 1992[10]; and

b. To provide for the development of the collective and individual interests of Iwi in fisheries, fishing, and fisheries-related activities, in a manner that is ultimately for the benefit of all Maori.

139. For reasons which will be clear (including from the 13 February 2015 Preliminary Presentation), the express objective captured by the words of s.3 of the Act to deliver benefits to all Maori is a most important touchstone for the consideration of all issues arising under the Terms of Reference prescribed for this Review. In accordance with the provisions and intent of the Acts Interpretation Act 1999 and authoritative decisions of the Courts, it is an accepted and compelling canon of statutory interpretation that legislation must be considered, defined and applied in a manner which best serves its purpose. This is known as the purposive approach.

10 The 1992 Deed of Settlement is an appendix to this Report

# STATUTORY INTERPRETATION: TEXT AND PURPOSE – THE KEY DRIVERS

***The following well enough known Court determinations reinforce how legislation is to be interpreted and applied.***

Commerce Commission v. Fonterra Co-Operative Group Limited, SC39/2006, [2007] NZSC 36, 30 May 2007:

> "[22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment[11] must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.[12]"

Vector Limited v. Transpower New Zealand Limited and Electricity Authority, [2014] NZHC 3411, 20 December 2014, Williams J

> "[45] … even with the purposive approach to statutory construction directed by s 5(1) of the Interpretation Act 1999, elucidated further in Commerce Commission v Fonterra Co-operative Group Ltd, I am not in a position to rewrite clause 5(a) … . I must strive of course to find consistency in the words with their statutory purpose, but I may not ignore those words to achieve that purpose except in cases of obvious error - and there is no suggestion of that here … ."

Paki v. Attorney-General, SC 7/2010, [2012] NZSC 50, 27 June 2012

> "[103](d) … In its ordinary sense, the term "navigable" describing a river naturally means a river capable of being navigated from one point to another. But in s 14 "navigable river" was a defined term. Reading the text of the definition literally, there is force in the view that, in relation to residents on the banks, s 14 referred simply to any "beneficial use" arising from the sufficient width and depth of the river. But that does not reflect the purpose of s 14, which was to provide for Crown control of the riverbed when the functions of the river so required. Read purposively,… "

11 "Enactment" means "the whole or a portion of an Act or regulations": see s 29 of the Interpretation Act 1999.
12 See generally Auckland City Council v Glucina [1997] 2 NZLR 1 at p 4 (CA) per Blanchard J for the Court, and Burrows, Statute Law in New Zealand (3rd ed, 2003), p 146 and following.

## The New Zealand Maori Council v. The Waikato River and Dams Claim Trust, The Attorney-General, The Minister of Finance and the Minister for State-Owned Enterprises, SC 98/2012, [2013] NZSC 6, 27 February 2013

> "[59] The Court of Appeal's recognition that s 9 [State-Owned Enterprises Act 1986] stated a fundamental principle guiding the interpretation of legislation which addressed issues involving the relationship of Maori with the Crown, must accordingly form the basis of the approach of New Zealand courts to any subsequent legislation requiring that the Crown act consistently with Treaty principles. The judgment gives no support to narrow approaches to the meaning of such clauses. In re-enacting the identical provision to act consistently with Treaty principles, in the mixed ownership companies legislation, Parliament's purpose is that the Treaty provisions in Part 5A carry the broad meaning, and be given the broad application reflected in the judgments of the Court of Appeal concerning s 9 in the SOE case. The Parliamentary purpose is clear: s 45Q must receive the same interpretation as s 9 of the State-Owned Enterprises Act has received, particularly from the Court of Appeal in the SOE case, and also from the Privy Council in New Zealand Maori Council v Attorney-General (Broadcasting Assets case).[13] Section 45Q brings with it the heritage of s 9 and this Court, reflecting what is the purpose of Parliament, must invest it with equivalent significance …."

## Damien Grant and Steven Khov (as liquidators of West Harbour Holdings Ltd) v. Waipareira Investments Ltd, CA60/2014, [2014] NZCA 607, 11 December 2014. Reasons of the Court delivered by White J.

> "Relevant principles of interpretation
>
> [23] The meaning of reg 22(2) is to be ascertained from its text and in the light of its purpose[14]. It is well-established that this will include consideration of the scheme of the legislation …."

13 New Zealand Maori Council v Attorney-General [1994] 1 NZLR 513 (PC) [Broadcasting Assets case (PC)] at 520

14 Interpretation Act 1999, s 5(1); Commerce Commission v. Fonterra Co-operative Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767 at [22]; Fonterra Co-operative Group Ltd v. The Grate Kiwi Cheese Company Ltd [2012] 2 NZLR 184; and JF Burrows and RI Carter Statute Law in New Zealand (4th ed, LexisNexis, Wellington, 2009) at 201

140. It follows that I draw heavily upon the Purpose(s) section of the Act to guide and govern consideration of the issues arising in this Review. I have examined submissions, propositions and reports provided to me from Iwi Maori, from individuals, from the entities under review themselves and from others with experience and expertise in Maori fisheries issues with whom I have conferred, by reference to the identified purposes of the very Act which provides for the manner in which the assets transferred to Maori in the 1992 Settlement are to be allocated to Iwi Maori in order to provide for their development in fisheries.

141. Given text and purpose are the key drivers for correct interpretation and application of the legislation it is rewarding to consider also the formal Preamble to the Act.

# PREAMBLE TO THE ACT

(1) By the Treaty of Waitangi, the Queen of England confirmed and guaranteed to the chiefs, tribes, and individual Maori the full, exclusive, and undisturbed possession of their fisheries for so long as they wished to retain them:

(2) Maori claimed in proceedings in the High Court and in various claims to the Waitangi Tribunal that the quota management system introduced by the Fisheries Amendment Act 1986 was unlawful and in breach of the principles of the Treaty of Waitangi, or had no application to Maori fisheries (including commercial fisheries):

(3) In legal proceedings, Maori obtained from the High Court and the Court of Appeal, by way of interim relief, a declaration that the Crown ought not to take further steps to bring the fisheries within the quota management system:

(4) The Maori Fisheries Act 1989 was enacted to make better provision for the recognition of Maori commercial fishing rights secured by the Treaty of Waitangi. The Act provided that the Maori Fisheries Commission was to be provided with 10% of all quota holdings then subject to the quota management system, or the equivalent value in cash as compensation for commercial fishing claims:

(5) A Deed of Settlement dated 23 September 1992 was entered into between the Crown and representatives of the New Zealand Maori Council, the National Maori Congress, and iwi:

(6) In that Deed of Settlement it was agreed that the settlement (which was ultimately for the benefit of all Maori), the implementation in legislation of the agreements made in that Deed, and the continuing relationship between the Crown and Maori, would constitute a full and final settlement of all Maori claims to commercial fishing rights:

(7) The Treaty of Waitangi (fisheries Claims) Settlement Act 1992, an Act "to give effect to the settlement of claims relating to Maori fishing rights", provided for the implementation of the Deed of Settlement through the following means:

a. reconstitution of the Maori Fisheries Commission as the Treaty of Waitangi Fisheries Commissions; and

b. payment by the Crown to the Treaty of Waitangi Fisheries Commission of a sum of $150 million to be used for the development and involvement of Maori in the New Zealand fishing industry, including participation in a joint venture with Brierley Investments Limited to acquire Sealord Products Limited, a major fishing company; and

c. provision for the allocation to the Treaty of Waitangi Fisheries Commission of 20% of quota for any new quota management stocks brought within the quota management system; and

d. provision for the making of regulations to recognise and provide for customary food gathering by Maori; and

e. empowerment of the Treaty of Waitangi Fisheries Commission to allocate the assets held by the Maori Fisheries Commission at the settlement date specified in the Deed of Settlement, after considering how best to give effect to the resolutions adopted by the Annual General Meeting of the Maori Fisheries Commission on 25 July 1992 and reporting to the Minister of Fisheries for approval of that scheme of allocation; and

f. empowerment of the Treaty of Waitangi Fisheries Commission, after full consultation with Maori, to develop and report to the Minister on proposals for a new Maori Fisheries Act that would provide –

i. a scheme for identifying the beneficiaries and their interest under the Deed of Settlement; and

ii. a procedure to allocate the assets of the Treaty of Waitangi Fisheries Commission (other than those held prior to the signing of that Deed):

(8) The Crown, through the provisions of the Fisheries Act 1996, allocates to the Treaty of Waitangi Fisheries Commission 20% of quota for any new quota management stocks brought within the quota management system;

(9) The Treaty of Waitangi Fisheries Commission, having considered its duties under the Maori Fisheries Act 1989 and the Deed of Settlement, has examined alternative methods for allocating its assets, produced discussion material, and consulted with iwi and Maori on the allocation of the assets referred to in Schedule 1A of the Maori Fisheries Act 1989;

(10) In 1998 the Treaty of Waitangi Fisheries Commission developed an "optimum model" for allocation. The bases for that model have been challenged in successive court actions and overall have been found to have been consistent with the intent of the Deed of Settlement;

(11) The Judicial Committee of the Privy Council, in *Te Waka Hi Ika a Te Arawa v. Treaty of Waitangi Fisheries Commission* [2002] 2 NZLR 17, held that the obligations of the trust imposed by the Deed of Settlement required the benefits of the settlement to be allocated to iwi, meaning the traditional tribes, for the ultimate benefit of all Maori;

(12) Subsequently, the Treaty of Waitangi Fisheries Commission considered and took into account the findings of the courts as to its duties under the Maori Fisheries Act 1989 and the Deed of Settlement. It examined alternative methods for allocating its assets, produced further consultation material, consulted with iwi and Maori, and after undertaking additional processes to reach agreement on the model considered that it had secured the maximum possible support for its allocation proposals:

(13) In May 2003, the Treaty of Waitangi Fisheries Commission reported to the Minister of Fisheries on its proposal for the allocation of the assets it held on the settlement date specified in the Deed of Settlement: *He Kawai Amokura: A model for allocation of the Fisheries Settlement Assets: Report to the Minister of Fisheries:*

(14) The Minister of Fisheries assessed the proposal of the Treaty of Waitangi Fisheries Commission, in accordance with the requirements of the Maori Fisheries Act 1989 and the Deed of Settlement, and considered the proposal to be consistent with those requirements. He therefore agreed to incorporate the proposal in legislation:

(15) The enactment of this legislation will complete implementation of the agreements in the Deed of Settlement between the Crown and Maori in respect of Maori claims to commercial fisheries, as outlined in the Preamble to that Deed and in the Preamble of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

142. Then when I consider the term *"benefit"* as that term is used in the Act (it is not separately defined in the Act although the term *"beneficiaries of the Settlement"* is defined) with reference to the Settlement of 1992 as also with reference to the entities the subject of the review (see s.122(2)), I am satisfied *"benefit"* does not restrict to those of a financial or fiscal kind. It is a word which takes its depth of meaning and breadth of definition from the purposes of the Act which specifically refer to the agreements made in the Deed of Settlement in 1992 as well as, expressly, the enhancement of collective and individual interests of Iwi in fisheries. "Benefit" embraces cultural, customary, economic and social advantage.

143. I foreshadowed that this was my view in relation to *"benefits"* itself when interviewed by the CoR in August last year ahead of their Reviewer appointment. This seemed particularly important then (and still does) in the light of the declared position of the CoR in relation to this Review that:

> *"The post of reviewer is a significant opportunity to make a contribution to Maori economic development and the effective implementation of an historic settlement for the benefit of all Maori and the wider New Zealand economy."*

144. It follows that for this Review, an early answer to the following question is also important:

> *"Who should decide upon the nature of the desirable **benefits** from the Settlement into the future?"*

145. Again, by reference to the purposes of the Act (speaking as they do of the development of the collective and individual interests of Iwi in fisheries, fishing and fisheries-related activities), the answer to that question is clear. It is for Iwi to say what benefits are wanted.

146. I do not discount or diminish the importance of the rights, position and entitlements of urban Maori which historically in the Maori fisheries matrix has been a distinct classification, discrete from Iwi Maori. The imperative under the Act is that it should provide for development of the collective and individual interests of **Iwi** in fisheries in a manner that is ultimately for the benefit of **all** Maori. The model of allocation adopted ultimately in the legislation, incidentally having been endorsed by the Courts through the course of prolonged litigation in the decade prior to the 2004 Act, is for allocation to Iwi. So it is clear in my view that it is for Iwi to determine, over the timeline of the Act's application, the benefits they want in order that the Act achieve its purpose.

147. This approach is made even more compelling by reference to s.3(2) of the Act which provides that, in order to achieve the purposes of the Act (as set out in s.3(1)), the Act establishes a framework for the allocation and management of Settlement assets through, first, the allocation and transfer of specified Settlement assets to Iwi as provided by the Act; and secondly, the central management of the remainder of those Settlement assets.

148. In one respect, s.3(2) represents the establishment of a mixed management model, one part of which is expressed as allocation and management of Settlement assets through the allocation and transfer of specified Settlement assets to Iwi and the other part of which is the allocation and management of the remainder of those settlement assets **on an interim basis** to a central management entity. That was deliberate enough, in my view, in 2004, given that under the allocation model promulgated under the Act, Iwi (meaning the traditional tribes), were the notional (only) owners of the fisheries Settlement assets pending their achievement of the prescribed structural and accountability thresholds attaching to the Iwi entities (MIOs and AHCs) after which assets would then be allocated. Pending achievement of the required status by each Iwi, assets would be held and centrally managed by an entity (TOKMTL) for and on behalf of Iwi – in the meantime. But the central management dimension of the model was never designed to prevail forever.

149. In May 2003, the Treaty of Waitangi Fisheries Commission, as it was then, presented its proposed model for the allocation of the assets it held on the settlement date specified in the Deed of Settlement – **He Kawai Amokura: A model for allocation of the fisheries settlement assets: Report to the Minister of Fisheries.** The Minister agreed to incorporate that proposal in legislation and the 2004 Act was the result. The central management entity, as one of the features of what I describe as a mixed management model, was established pursuant to s.31 of the Act, namely a trust called Te Ohu Kai Moana. It was established by trust deed, the provisions for which are set out in the Act and its purpose is precisely expressed in s.32 of the Act. The purpose of this new trust, Te Ohu Kai Moana, was to advance the interests of Iwi individually and collectively, primarily in the development of fisheries, fishing and fisheries-related activities in order to (particularly) ultimately benefit the members of Iwi and Maori generally. Again I note the incorporation of the key words "Iwi" and "benefit" in s.32(a).

# "FOR THE BENEFIT OF ALL MAORI"

## – Reviewer Comment

(1) This requirement, conceptually, deserves special attention in this Review. The allocation of assets and distribution of benefits secured under the 1992 Settlement Deed was to be undertaken in a manner ultimately for the benefit of all Maori. This was an *"overriding objective"* recognised by the Courts during the, sometimes brutal and at all times robust, litigation leading up to adoption of the model in the 2004 Act. Component parts of the Settlement included pre-settlement assets and post-settlement assets. It was clear enough from the 1992 Deed that Iwi were intended to be the principal beneficiaries with other interests being accommodated through Iwi structures. Pre-settlement assets were, under the proposed model, necessarily to be allocated to Iwi but there had not initially been any express direction that post-settlement benefits should also be distributed solely to Iwi.

(2) Whilst the litigation had been primarily focused on pre-settlement asset allocation, post-settlement asset provisions were considered carefully, including by the New Zealand Court of in 2000:

- "What is occurring is a tribal settlement – a Settlement with Maori in their tribes … "
- "It is very clear that [the Deed of Settlement] was contemplating only a distribution to Iwi but on the basis that Iwi must achieve a fair allocation among all Maori."
- "The benefits which are ultimately to be available for all Maori, are to be delivered through tribal mechanisms." 15

(3) As the Treaty of Waitangi Fisheries Commission itself recognised in its submissions to the Select Committee in 2004:

*"In these circumstances hapu, whanau and individual Maori may be acknowledged as the ultimate beneficiaries of this settlement but the law requires them to receive benefits through Iwi structures. This was considered to be consistent with Settlement being ultimately for the benefit of all Maori as was provided for in the Deed of Settlement. But as the [Judicial Committee of the] Privy Council noted while the settlement must be ultimately for the benefit of all Maori there is no need to show any immediate or demonstrable benefit for each individual Maori."* [16]

(4) These sentiments are consistent with the express purposes of the 2004 Act; as also with its underpinning philosophy. In my view, it has always been the preserve and the prerogative of Iwi (and not anyone on behalf of Iwi) to determine, in a temporal context, what is to be the nature of the "benefits" (derived from and building upon the nature of the Settlement assets themselves) Iwi seek for progressive and ultimately full delivery to them as beneficiaries of the Settlement. The right to make the choices as to desirable "benefits" and select from any number of options and alternatives vests in Iwi. The responsibility and discipline imposed upon Iwi when making these decisions and options is that they will be, demonstrably, *"for the benefit of all Maori"* in the manner the Courts decided earlier and the Act set out to capture as a result.

15 Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission [2000] 1 NZLR 285 at 370-371 (CA)
16 Treaty of Waitangi Fisheries Commission Briefing Paper on the Maori Fisheries Bill to the Fisheries and Other Sea Related Legislation Select Committee, MF61; 2004; para.28; p.7 of 21

(5) That Iwi accept this responsibility I do not doubt. It accords with tikanga and the Treaty's protection for *te tino rangatiratanga* in respect of all taonga (including, specifically, fisheries). Iwi recognise and now, in 2015, better accommodate the "Urban Maori" dimension. That this should be so is a good indicator of how experiences over time assist broader understanding and tolerance of different views.

(6) Then I find helpful the observations of the Judicial Committee of the Privy Council in 2001:

*"The concept of a trust "for the ultimate benefit of all Maori" … appears to be a public law concept using the word "trust" only by analogy with the private law concept of a trust. The concept of benefit involved is very broad, as underlined by the word "ultimate" which seems not to require any immediate and demonstrable advantage for each member of the Maori people. The encouragement of an economic enterprise among Maori may be said to be for the ultimate benefit of the Maori people, even though not all can participate in the enterprise itself or even share directly in its profits."* [17]

(7) Some earlier reminders of the challenges of accommodating modern concepts and constructs of Maori society and structures for the delivery of "benefits" to Iwi, and through Iwi to all Maori, are not out of place here. Indeed, they are part of the Maori fisheries story and arguably important to understand some of the steps along the way to where we are now. With some licence, I include my interpolations (liberally relying on learned commentaries by others) of important passages in the judgment of the Hon Justice Paterson in his 1998 High Court decision on Maori fisheries:

**"Maori Society.** *There was considerable evidence of the changes in Maori society between the time of the Treaty of Waitangi and the present. Maori society has been both fluid and dynamic. Many of the changes have arisen from Government policy over the years and there can be no doubt that Maori society today differs considerably from what it was 150 years ago. Over 80% of Maori now live in urban areas, one third live outside any tribal influence and these are often the most disadvantaged of Maori people, and 70% live outside their tribal rohe. Urbanisation of Maori, which in part, was forced on byem by Government policies, has made it very difficult for many Maori to retain active tribal links. A Maori living away from a tribal base finds it difficult to influence tribal policies from a distance and is often treated as a stranger upon returning to the marae. Difficulties of travel, the need to be present when decisions are made, the need to know the community and people of a tribal area and the discouragement of both women and youth to speak at tribal meetings, have caused in certain sections of Maoridom, a decline and interest in tribal matters. Many Maori living away from their tribal base have found support in other Maori organisations, particularly the Urban Maori Authorities."*

**"The Iwi Structures.** *It was said that the iwi structure of today is a modern construct. There is truth in this statement. In the second part of the 19th century, Government policies were aimed at weakening the tribal structure, but they often had the opposite effect. Maori, for protection, formed itself into bigger groups. Iwi gained importance as they became a response to the colonisation of the country and the land alienation through sale. Larger groups operated in relation to Government matters but political and economic functions were, and still often are, carried out at the hapu and whanau level. The Government has encouraged the iwi concept over the last 20 to 30 years but at the same time, the tribal pursuit of tino rangatiratanga has gained momentum fuelled in part but not completely by Waitangi Tribunal claims and other Government settlements. The resurgence of iwi consciousness can also be traced to the re-awakening of kinship interests on behalf of*

17 Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission [2002] 2 NZLR 17 at 18 (PC)

*Maoridom. The changes in Maori society have led to groups being formed to represent Maori, such groups being in the form of runanga, Maori trust boards, iwi authorities and other corporate and incorporated bodies. The decision making is now more from the top down rather than from the bottom up as it once was."*

(8) I strongly commend to readers of this Report their consideration of the very informative judgments of Justice Paterson (see in particular the passages *"Maori Society"* and *"Maori Commercial fishing rights"* at pp.300-310) and the Court of Appeal in *Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission*[18].



18 Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission [2000] 1 NZLR 285 (HC and CA)

150. The trust called Te Ohu Kai Moana was to have only one trustee which was to be a company formed under the Companies Act 1993 with the name Te Ohu Kai Moana Trustee Limited (TOKMTL)

151. The nature of the trust and its one statutory trustee is again a feature to which I have paid particular attention. The trust, as the central management body with TOKMTL its statutory trustee, was to hold those assets described in s.3(2)(b) of the Act on trust for the Settlement beneficiaries. I do not imagine that these propositions will be resisted. They are not controversial.

152. Next I refer to ss.34 and 35 of the Act which set out the duties and functions respectively of TOKMTL as the statutory trustee. I do so for the purposes of explaining as part of the overarching imperatives of this Review, how the prescribed purposes of the Act are to be achieved. Put another way, the purposes of the Act identify in my view a number of goals or objectives for the achievement of which the structures, including the entities I am to review, were established. It is not only the Iwi organisations the establishment of which the Act prescribes, and, as part of the process for achieving the purposes of the Act and in particular that part of the Act which requires allocation of Settlement assets to Iwi, but also the establishment of duties, responsibilities, functions and framework, by which the other part of the Act's purposes are met. The interim central management trust with its statutory trustee, manages Settlement assets on behalf of Iwi pending allocation, progressively, to Iwi.

153. This much is all reinforced by the provisions of s.34(d) of the Act. It is mandatory for TOKMTL, as statutory trustee, to administer the Settlement assets in accordance with the purposes of the Act and the purpose of the trust including performing the following specific duties:

> *"(c) To allocate and transfer the settlement assets; and*
>
> *(d) To manage on a transitional basis, collectively or separately as TOKMTL considers appropriate, the settlement assets to be allocated to an Iwi until they are transferred to the mandated Iwi or organisation of the Iwi."*

154. For completeness I refer also to s.34(j) which requires TOKMTL to assist Iwi to meet the requirements of s.14 (criteria for recognition of mandated Iwi organisation), s.17 (constitutional documents for mandated Iwi organisations and Iwi asset holding companies), and s.130(3) which establishes that Iwi must meet stated criteria before settlement assets can be transferred to it.

155. Part 3 of the Act governs the allocation and transfer of settlement assets as set out in s.129. Subpart (1) of Part 3 makes it mandatory for TOKMTL to allocate Settlement assets to Iwi as soon as it is reasonably practicable after TOKMTL is satisfied that an Iwi has met the criteria specified in s.130(3). In addition, TOKMTL as statutory trustee must transfer the allocated cash assets to the mandated Iwi organisation (MIO) of the Iwi and transfer the Settlement quota and income shares to one or more of the asset-holding companies (AHC) of the mandated Iwi organisation so long as the asset-holding companies comply with s.17(1) (already referred to).

156. It follows (and I so find) that the mixed management model was not a model intended to continue in perpetuity. On the contrary. Allocation to Iwi and the development of collective and individual Iwi interests in fisheries is a goal, the provision for which is an express purpose of the Act; and this is to be achieved in a manner which is ultimately for the benefit of all Maori. The framework for allocation and management of the Settlement assets is established specifically to achieve such purposes.

157. So it is in this broad statutory context, appropriately influential for the purposes of correctly applying the 2004 Act, that I return to the key feature of the purposes of the 2004 Act as I

have already identified it: the provision for the development of the collective and individual interests of **Iwi** in fisheries … ultimately for the **benefit** of all Maori.

158. Before I extend my consideration of what benefits are desired now, in 2015, and how those benefits should now be further delivered, which has led me to consider what changes might be made to governance arrangements in order to improve the type, quality and quantity of Settlement benefits delivered, it is informative to return to how the Treaty of Waitangi Fisheries Commission (as it then was) saw the development of collective and individual interests of Iwi in fisheries panning out in anticipation of the 2004 Act.

159. For the purposes of this Review, I sudied some of the submissions made to the Parliamentary Select Committee which considered the Maori Fisheries Bill in 2004. I was privileged to be appointed by the Clerk of the House of Representatives as the Independent Specialist Adviser to that Parliamentary Select Committee, when it considered that Bill and I provided advice to the Committee accordingly. All the submissions made to the Select Committee at that time are still available in the Parliamentary Library in Wellington. I have not reviewed all of the reports of officials, many of which dealt at that time with technical aspects of the legislation, but I have reviewed the submissions made to the Select Committee, both by TOWFC, as it then was, and by Iwi Maori and other legitimately interested parties.

160. The framework established by the Act to achieve the purposes of the Act links directly back to what I consider to be so central to the forward looking imperative for this review, namely to provide for (what I say is a continuing) development of the collective and individual interests of Iwi in fisheries in a manner that is ultimately for the benefit of all Maori. The framework prescribed by the Act, leaving aside AFL for a moment, in fact provides for the establishment of several trusts:

- Te Ohu Kai Moana established as a trust under s.31 of the Act;
- Te Putea Whakatupu Trust established in accordance of s.79 of the Act;
- Te Wai Maori Trust established in accordance with s.92 of the Act.

161. The establishment of these trusts as the framework for allocation and management of settlement assets expressly referred to in s.3(2) in order to achieve the purposes of the Act, calls to mind the observations in the Judicial Committee of the Privy Council in **Manukau Urban Maori Authority v. Treaty of Waitangi Fisheries Commission**, 2001, which provide valuable insights into the nature of the trusts established under the Maori Fisheries Act 2004. The Privy Council judgment records:

> *"Their Lordships would also observe … that the trusts for the ultimate benefit of the Maori people would appear to be a concept of public law which uses the term 'trust' only by analogy with the more familiar trust of private law. (See the discussion by McGarry V-C in Tito v. Waddell (1977) Ch 106, 210-219.) It employs a very broad concept of benefit, underlined by the use of the word 'ultimate', which would not seem to require any immediate and demonstrable advantage for each member of the Maori people. There must be many ways in which the encouragement of an economic enterprise among Maori can be said to be for the ultimate benefit of the Maori people, even though not all are able to participate in the enterprise itself or even share directly in its profits. The trust concept therefore allows much scope for the discretion of the Commission …"* [19]

19 Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Commission [2002] 2 NZLR 17 at 18 (PC)

## TE PUTEA WHAKATUPU TRUSTEE LIMITED

162. In the light of these general observations, and assisted by them, I move to consider issues arising in respect of Te Putea Whakatupu Trustee Limited.

163. The duties and functions of TPWTL, the benefits it is designed to deliver under the Act and further its ability to contribute to achievement of the purposes of the Act are all set out in the statute. I have considered the duties and functions imposed in the Act on TPWTL, benefits that are to be derived from its activities and the ability of TPWTL to achieve or to contribute to the achievement of the purposes of the Act. I have reached the conclusion that the governance arrangements presently in place and instituted under the Act, have significantly hindered TPWTL to perform its duties and functions; have restricted TPWTL's ability to deliver benefits; and have constrained TPWTL to contribute to achieving the purposes of the Act in a manner which remains most unsatisfactory.

164. I say immediately that these findings are not intended to direct criticism at any person. They represent an inherent flaw in the legislation. They likely reflect an oversight by the law drafters who drafted the 2004 Bill; by the Select Committee which considered that Bill; and by the Independent Specialist Adviser who advised the Select Committee when considering that Bill. I have regard to the fact that as long ago as the 2008 Audit Report completed in accordance with the provisions of the Act, auditors noted their concern that on occasions the board of TPWTL had been unable to meet because of its inability to provide a quorum of three members and that *"for a substantial period, Te Putea Whakatupu was in a state of limbo and that some fairly urgent remedial action was required"*. That view in 2008 was reiterated in the Audit Report under the Act in 2012. The Act provides that TOKMTL will appoint three directors to TPWTL; it also provides that the required quorum to transact TPWTL business is the same number. So if one director does not attend meetings, nothing can be decided. This very circumstance has occurred more than once, it seems over many years.

165. I have had the advantage of meeting the auditors of both the 2008 and 2012 Audit Reports as well as considering those Reports.

166. I had a most constructive hui with Richard Jeffries, TPWT Chairman, and TPWT director, Rikirangi Gage, in Rotorua on 27 January 2015 as part of my Review consultation programme.

167. I have also the benefit of hindsight.

168. I have carefully considered the submissions from and on behalf of the National Urban Maori Authority, the Federation of Maori Authorities and the New Zealand Maori Council with specific reference to what I regard to be a significant flaw in the TPWTL governance arrangements resulting in an impasse in its endeavours to achieve its legislative purpose.

169. NUMA seeks that:

a. The legislation better confirm that urban Maori are the primary beneficiaries of TWPT and governance arrangements be set in line with achieving that purpose;

b. A reinforced requirement of consultation with NUMA on appointment of directors of TPWT;

c. All directors of TPWT must have knowledge of and skills directly relevant to urban Maori;

d. Governance arrangements include proxy rights approved directly by NUMA to avoid quorum collapses as in the past;

e. NUMA have direct input into new governance structures in line with the above proposals before they are finalised.

170. NZMC submits:

a. TPWT should continue but have its governance arrangements reformed;

b. Those from the independent Maori communities should constitute all or at least the majority of the director-trustees of TPWT. For example, NZMC would support the appointment of all director trustees of TPWT by NUMA;

c. An inclusive approach is urged whereby the TPWT reaches (and reaches out) more effectively to independent Maori communities irrespective of traditional tribe affiliation and without the debate descending into and Iwi versus Urban scenario.

171. FOMA observes:

a. That the governance arrangements of TPWT which require presence of all 3 of 3 directors are flawed in so far as the operations of the trust can thereby be held to ransom by 1 director;

b. There must be a clearer strategy and action plan by which TPWT achieves its purposes and the purposes under the Act.

172. Without foreclosing on the proposition that there may have been other reasons why earlier action could not have been taken, it seems to me that the owner, that is to say the shareholder of TPWTL, namely the board of TOKMTL by whom the one share of TPWTL must (under the Act) be held, should have more actively addressed the problems identified in 2008 reiterated in 2012, and still the subject of ongoing concern in the submission/report I received from TOKMTL in November last year.

173. The problems identified now over the last six years arising out of the apparent lack of willingness on the part of all directors to work together for the purposes of achieving the objectives of TPWTL is an issue which would ideally have been confronted much earlier. The problem was identified early. There would ideally have been a robust development of options for overcoming the key problem or problems with co-operation to find a resolution being essential in order that the entity discharge its obligations under the Act and for that matter its responsibilities to its beneficiaries (defined bythe Act), the beneficiaries of the Settlement. Having discussed the situation in some detail with all of the current directors of TPWTL, I do not question their strong commitment to the kaupapa of TPWTL – it is just that the stalemate continues.

174. What NUMA is seeking is a greater involvement in the work of TPWTL and a significantly strengthened requirement imposed upon TOKMTL of meaningful consultation and indeed incorporation of views sourced from NUMA on behalf of the Maori communities that association represents. It cannot be dismissed in my view just as a thinly disguised *"power grab".* The way in which TPWTL and the trust of which TPWTL is the statutory trustee, are to work in future, has to be looked at against the following touchstone or test:

> *"What is the optimum governance arrangement for the Trust established under the 2004 Act having regard to its purposes as prescribed by that Act may best deliver the desired benefits to the beneficiaries of the Settlement as was envisaged in the establishment of the trust."*

175. For its part, the New Zealand Maori Council, one of the other entities listed in Schedule 5 of the Act with particular reference of TPWTL submitted that urban Maori should have a much more active role in the governance of TPWTL.

176. My findings and recommendations in relation to the future of TPWTL are contained in my Preliminary Presentation material at the front of this Report.

## TE WAI MAORI TRUST

177. TOKMTL, under the Act, was required to establish the Te Wai Maori Trust with one trustee formed under the Companies Act 1993 with the name of Te Wai Maori Trustee Limited. The purpose of Te Wai Maori Trust is expressed in s.94 of the Act:

> *"The purpose of Te Wai Maori Trust is to hold and manage the trust funds on trust for and on behalf of the beneficiaries under the Deed of Settlement in order to advance Maori interests in freshwater fisheries. …"*

178. The function of Te Wai Maori Trustee Limited (TWMTL) is to manage the trust funds and distribute the annual trust income for activities, including:

i. Undertaking or funding research, development and education related to Maori interests in freshwater fishing;

ii. Promoting the protection and enhancement of freshwater fisheries habitat in lakes, rivers and other water bodies, particularly those that have traditionally supported Iwi and whose shores have been the location of their marae;

iii. Promoting the establishment of freshwater fisheries; and

iv. Using its resources to bring direct or indirect benefit to Maori in respect of their freshwater fishing interests.

179. There are requirements for the contents of the trust deed of Te Wai Maori Trust, a requirement that an annual plan be prepared and approved by TOKMTL and reporting obligations all set out under the Act. One share of TWMTL must be held by the Board of TOKMTL.

180. Under s.101, the criteria for appointment of directors is of importance. The constitution of TWMTL must specify that the directors of that company are all Maori who collectively:

a. Are well versed in matters of tikanga Maori;

b. Are experienced in working with Maori and Maori organisations;

c. Are experienced in fisheries management, enhancement and development;

d. Have expertise and experience in matters relevant to freshwater fisheries; and

e. Have knowledge of the special interest of Iwi in freshwater fisheries.

181. It will be seen at once that the criteria for directors for TWMTL are very prescriptive in identifying the skills, experience, expertise and knowledge required of them.

182. I had a most constructive hui with the Chairman, Ken Mair, of TWMTL and management at TOKMTL responsible for servicing the trust. I subsequently received very informative written material addressing issues discussed. In January 2015 I received an additional communication from the Chairman on issues which I raised with him relating to governance arrangements for Te Wai Maori Trust into the future. I acknowledge the very careful thought given to the contents of material to be provided to me for the purposes of this Review to assist my consideration of the issues arising in the Review in relation to Te Wai Maori Trust. I do not question the integrity of that information, the professionalism of the staff or their dedication along with the Chairman's obvious commitment to delivery of benefits to the beneficiaries of the Settlement in accordance with the Act.

183. I reach the following conclusions and findings:

i. There has been a developing sophistication in the director appointment process for TWMTL. It is considered that the board must preserve a wider perspective on issues at the heart of the objectives for Te Wai Maori Trust with a consequence that it is considered preferable not to give any particular priority of participation or appointment to a reduced number of Iwi based on the particular strengths of Iwi connections to freshwater fisheries. It was acknowledged to me that some improvements could be made to ensure more extensive communication to MIOs over vacancies in the directorate of Te Wai Maori Trust so that Iwi have a greater awareness of the opportunities in this regard. It is clear to me that more recently there has developed a strong TWMTL board possessing the skills required as set out in the Act.

ii. Stronger links with Iwi is seen as a desirable objective. It considered to be currently successfully undertaken. Understandably, my attention is drawn to the re-establishment of the Wai Ora Fund in 2012 which has supported Iwi, hapu and whanau applying to the fund to fulfil their freshwater fisheries aspirations. Some $540,000 spread across 10 different applicant groups has been contracted since re-establishment of the fund and a further $200,000 is to be made available from the 2014-2015 budget for new projects to continue to support advancing Maori interests in freshwater fisheries. This is good evidence of TWMTL delivery of benefit under the Act.

iii. Problems have arisen in relation to quorum requirements highlighted in the material in the material from Te Wai Maori Trust and by me in this Report. However, under the chairmanship of Ken Mair, the board has clearly been able to operate on a consensus basis over the last three years and although the legislative requirement for a quorum at the same number of the total director complement on the board could cause problems (and in my view is a fundamental flaw in the governance arrangements), the directors of TWMTL have not allowed that flaw to interfere with the good work of the trust.

184. Because I have recommended that TOKMTL be wound-up (and should Iwi resolve accordingly), there will need to be, necessarily, a new process for the appointment of directors to TWMTL. I find that that process for appointment should be undertaken by Iwi directly and managed by them according to a design Iwi should develop, taking advantage of the knowledge and skills that is available from the current directors of TWMTL and the dedicated staff and management at TOKMTL.

## TE KAWAI TAUMATA

185. I endeavoured to consult with the current members of Te Kawai Taumata. On 17 October 2014, I wrote to the chairperson and all members of TKT seeking to arrange a time when I could meet with the chairperson and her colleagues to discuss issues arising under the Terms of Reference and the Act in this Review.

186. I had no response from any of the recipients of my communication. I wrote again to the chairperson on 10 November 2014.

187. Coincidentally, I was able to speak with the chairperson of TKT, kanohi ki te kanohi, following my presentation to (and invitation for comment and feedback from) the Iwi Chairs Forum Hui in Tauranga, 26 November 2014. I was able to confirm my interest in the chairperson's insights into the way in which TKT had operated under the Act to date and how the chairperson considered it might usefully act going forward, especially in relation to the procedures and criteria for appointment of the members and alternate members of TKT.

188. TKT's chairperson identified that to date at least the arrangements whereby Iwi voted for appointments of members and alternate members of TKT were adequate. She noted that the meetings of TKT were infrequent depending on tenure of office for the appointments of

members of the Board of TOKMTL. In other words, TKT members (alternates) met only when necessary for appointment purposes. Going forward, the chairperson expressed the view that TKT was a usefully elected Iwi representative group which could be responsible, in the chairperson's view, for a wide range of additional appointments to positions of responsibility and governance throughout New Zealand. Obviously, extended powers of appointment beyond those contained in the Maori Fisheries Act 2004 by TKT is beyond the ambit of this review.

189. I would have preferred to meet with the esteemed members of TKT but this did not prove possible. I have had the benefit of discussions on TKT issues (among others) with one of its former chairs, Tukoroirangi Morgan.

190. Separately, I had the good fortune to meet in Gisborne on 18 November 2014 with Ngati Porou kaumatua and leader, the late Dr Apirana Mahuika. *Kua hinga te totara o te wao. E te Rangatira moe mai ra.*

191. Dr Mahuika was a member of TKT until his recent untimely passing. I sought his views and insights into the procedures and criteria for appointment of TKT and generally its role in the governance arrangements impacting upon TOKMTL obviously for the future. Dr Mahuika told me that, in his view:

- TOKMTL had by and large completed its statutory obligations set out in the Maori Fisheries Act;
- It was no longer necessary for TOKMTL to play any major role in the governance arrangements for Maori commercial fisheries into the future;
- The voting shares in AFL and the balance of the income shares in AFL held by TOKMTL should all be transferred to Iwi;
- Such appointments as were to be made to any of the structures, with their ongoing responsibility for achievement of the purposes of the Act, were to be made by Iwi;
- In the absence of any continuing or continuing major role for TOKMTL there was no need for TKT to continue.

192. It is logical, in my view, that in the scenario proposed by Dr Mahuika, there is neither need nor purpose nor function for TKT except for it to provide a possible representative model for direct Iwi appointments of the directors of AFL.

## SUBMISSIONS OF IWI MAORI

193. In the following section of this Report, I traverse key submissions made on critical issues in the Review. It is not practical to record every single submission on all of the critical issues. That I do not mention some of the submissions is not to be taken as a signal that I have not considered them. On the contrary, I have considered all submissions. I apologise in advance if, in my narrative on submissions from across Te Ao Maori, I appear to exclude any specific submission on any particular point. Some of the submissions made following the consultation hui specifically align themselves with propositions put during the course of the earlier hui by others. I have in my consideration of those submissions, housed them around other submissions on the same point. Some of the natural alignment between Iwi groups and Iwi within electoral colleges reflect exchanges of submissions (and alignment by some Iwi groupings) with others.

194. I have tried to take all views into account, where they align and where they collide, in an endeavour to reach an informed conclusion on the substance of points made to me. In the result, I have done as best as I can to treat all submissions openly, objectively and on their

merits. This is as applicable to submissions and views put to me from the entities themselves as it is to those from Iwi Maori and all others.

195. **Raukawa ki te Tonga Trust** made written submissions as a MIO for Ngati Raukawa ki te Tonga. These submissions mirrored others from the group arranged under Te Moana o Raukawa group with most if not all of whom I met at one of the consultation hui convened for the purposes of discussing the issues in the Review. Others who were there who subsequently made submissions or who were not there but who have canvassed the matters discussed with me, have since aligned themselves with the points made both at that hui and subsequently, in this case, by Raukawa ki te Tonga Trust.

196. The Raukawa Trust, like others, submitted that there was little advantage in continuing to have directors of AFL appointed by TOKMTL, an organisation which was not directly accountable to Iwi. It was submitted that the shares in AFL currently held by TOKMTL be transferred to existing Iwi shareholders of AFL on a pro rata-basis. The Raukawa Trust proposed that there be immediate discussions between AFL Iwi shareholders in order to identify a means of directly appointing and removing as required the AFL directors.

197. This is entirely consistent with the view to which I have come and mirrors also the submissions of others. The thrust of them has been compelling.

198. Similar submissions from the Raukawa Trust proposed that an Iwi group consider the purpose and direction of the two funds, Te Wai Maori Trust and Te Putea Whakatupu Trust, to ensure that, for the future, there are more focused opportunities identified for those funds to assist in the development of the Maori economy through education and research. I have made findings and recommendations which should facilitate that outcome.

199. A helpful reminder of alignment of submissions is that of the joint submissions of **Ngai Tamanuhiri, Rongowhakaata and Te Aitanga a Mahaki,** Iwi of Turanganui a Kiwa, part of the Takitimu Collective and which are MIO shareholders. Their submissions specifically refer to the submissions of Ngati Kahungunu, Ngapuhi/Ngati Whatua and Maniapoto and provide express support for the points made in those submissions. But in addition and helpfully, the submission from the Takitimu Collective Iwi in Turanganui a Kiwa, identifies their expectation that, as owners of AFL, they have an expectation that the AFL strategic planning, statement of corporate intent and other corporate documents, will be well developed, well communicated and include an opportunity for Iwi participation in their refinement prior to adoption.

200. In relation to *"Iwi expectations",* I am mindful that relatively recently and helpfully, albeit rather late in the evolution of sophisticated accountability protocols, *"Letters of Expectation"* have been developed by TOKMTL between it and the other entities in the *"delivery arm"* of the architecture (as I have described it), AFL, TWMT and TPWT. I was provided with copies the draft *"letters of expectation"*. I had in fact had an opportunity to consider this exact kind of governance mechanism during my discussions with Brian Rhodes, former Sealord CEO and now Chairman of Ngai Tahu Seafoods, and also in my discussions with the management and governors of Te Rununga o Ngai Tahu. I rather sense that the more recent TOKMTL *"Letters of Expectation"* generated by it for agreement as to terms and execution on behalf of the three entities to which TOKMTL appoints directors, are a product of new influences at the Board level of TOKMTL in the last 12-24 months. I may be wrong about that, but they seem definitely an accountability mechanism of relatively recent origin. I understand there is a high level of sophistication in these protocols in the Ngai Tahu setting.

201. But, whatever may be the timing or the manner in which they have come about, I accept that the TOKMTL initiated *"Letters of Expectation"*, designed to be an account between the entities and TOKMTL, are legitimately for the purposes of identifying, in conjunction with the Annual Plans of those entities which must be submitted to and approved by TOKMTL, what

is expected of each of the *"subsidiary"* entities and an acceptance on behalf of those entities that those expectations are reasonable; and will be met.

202. In a perfect world, these *"Letters of Expectation"* which differ not very much from the *"Owners' Guidelines",* about which the Takitimu Collective Iwi in Turanganui a Kiwa spoke at our hui and to which they referred in their subsequent submissions, would be continuously in place.

203. There are useful and successful models of governance available in Iwi experience around the country and nationally. The experience and expertise Iwi have developed over the last 10 years in relation to these accountability protocols will serve Iwi well, in my view, if Iwi resolve they wish to have a greater influence in the strategic decisions and direction of the principal entity they own (AFL) and also in the achievement of objectives of the other two trusts in which all Iwi and all Maori have a vital interest.

204. I find that the development of *"Expectation Protocols"* between TOKMTL and those entities in respect of which it has voting powers and powers of appointment (and non-distribution shareholding), has not progressed as well as it might. I am left in a state of some uncertainty as to whether any of the proposed *"Letters of Expectation"* have actually been formally signed off and agreed and recorded or minuted. They will be very useful tools in any event in the development of accountability protocols between Iwi exercising full shareholder rights and responsibilities as owners of AFL if that comes to pass. Likewise they may facilitate greater insistence on accountability as interested and affected parties in the two trusts, if Iwi decide to adopt my recommendations.

205. **Maniapoto Fisheries Trust** submits that the appointments to AFL and Searlord boards must be of people suitable to the size of the businesses and their nature and industry sector. Quite rightly, Maniapoto submits that in the appointment process, the purpose of governance practice, namely to facilitate effective entrepreneurial and prudent management that can deliver long term sustainable success of the organisation must never be lost sight of. It was put to me that the primary role of the board of each entity was to approve, oversee and determine:

- The entity's short and long term strategies;
- An effective business model; and
- Its risk appetite.

206. In making appointments to boards, the appointers must ensure that each director has the demonstrable capability to add value to the organisations in which they are involved, including critical skills, competencies and business acumen. Most significantly, Maniapoto emphasised as an imperative that two, preferably, directors on the board of the fishing companies should have a good knowledge of the commercial fishing industry and the industry's value chain activities. I agree and so find.

207. In my view, there are not enough people (men and women) with operational experience, and in particular fishing industry operation experience, on either the AFL or the Sealord boards. This is not a pejorative comment in relation to the skills and competencies that the members of those boards clearly do have. I am also mindful of the information provided to me by AFL that, at least in the last round of Board appointments to AFL, and I assume of equal application to the AFL appointments to the Sealord board, a considerably more robust process was followed, both at TOKMTL level and AFL level, including national advertising and invitations for expressions of interest, selection of a long shortlist of potential suitable appointees to be interrogated on identified issues considered crucial to establishing qualification and suitability as directors, with a shortlist generated thereafter and appointments made after interviews.

208. This sophisticated and robust appointment process is to be applauded. It will serve as a useful model for Iwi owners going forward if Iwi accept my recommendation that Iwi should become 100% owners of all shares in AFL and should accordingly appoint, directly, all directors of that company; and by various agreed protocols, influence the appropriate appointments to the Sealord joint venture company.

209. I turn to the financial position of the AFL group also at the heart of the submissions of Maniapoto. In the Maniapoto submissions, it was urged upon me that neither AFL nor Sealord have achieved adequate returns on the capital employed (ROCE) or the levels of return required by investors (ROI) in recent years. Like other Iwi submissions, my attention was drawn to the analysis and criticisms of the performance of AFL and Sealord in the return on investments in both Sealord and AFL in the Te Putea Whakatupu Trust publication **"A Strategy for the Maori Fishing Industry".** That report, appended to these submissions, is deserving of close consideration in particular, but not limited to the financial analysis contained within it. Both AFL and Sealord were invited by me to address the analysis, conclusions and propositions put forward in that material.

210. AFL took up this invitation. In addition, TOKMTL also addressed the analysis and proposals for restructuring AFL which Tom McClurg, the highly respected author of the report put forward in it.

211. In the light of the positions taken, respectively, by AFL and TOKMTL over this TPWT publication – set out in the TOKMTL and AFL reports to this Review (so not repeated here), I invited Tom McClurg to exercise a Right of Reply. The invitation was accepted and it is here published in full.

# MAORI FISHING INDUSTRY STRUCTURE: RIGHT OF REPLY

**TOM MCCLURG**

## Introduction

Both the Aotearoa Fisheries Limited (AFL) and Te Ohu Kai Moana Trust Limited (TOKMTL) submissions to the Review refer to a proposal to restructure the ownership of AFL quota by placing it in Trusts that would be owned by Iwi (in proportion to their respective interests in AFL) and also governed directly by Iwi. AFL would be restructured into an operational 'value chain' business rather being primarily a quota owning business as at present. AFL and TOKMTL oppose this proposal for similar reasons.

AFL and TOKMTL do not name the source of the proposal. This is somewhat surprising as it is the proposal contained in the Te Putea Whakatupu Report *"A Strategy for the Maori Fishing Industry"* published in March 2014[20]. That report is appended to this Review and comprises three parts:

(1) *Capturing the Gain: Innovation and Market Positioning in the New Zealand (a University of Auckland Presentation, Nga Whetu Hei Whai Conference 2012)*

(2) *An Investigation into the Icelandic Fisheries Transformation (a report by a group of fishing industry representatives led by Te Putea Whakatupu (TPW) to Iceland and Japan).*

(3) *A Strategy for the Maori Fishing Industry (a discussion paper prepared by Tom McClurg, Toroa Strategy Limited).*

The third part of the TPW report contains the structural proposal that has been summarised and then rejected by both AFL and TOKMTL in their respective submissions.

The best way of assessing the accuracy of the AFL and TOKMTL summaries of the AFL restructuring proposal, as well as the merit of the arguments advanced by AFL and TOKMTL for opposing it, is simply to compare the relevant content of the two submissions with the TPW report. To assist this process of comparison, the full text of the relevant parts of the AFL and TOKMTL submissions are set out below. Such comparison reveals that (even allowing for the effects of summarisation) the AFL and TOKMTL descriptions of the proposal are misleading in that they attribute different purposes and objectives to the proposal than those contained in the TPW report. A critical analysis of the expected consequences of implementing the proposal as they have been predicted by AFL and TOKMTL is also provided below.

## AFL Submission to the Review

*Alternative models have been proposed which would substantially change the structure of AFL and in particular the ownership or quota.*

*One particular proposal advocates transferring the entire quota package currently owned by AFL into three separate trusts (Inshore, Lobster and Paua). Under this proposal the quota trusts would be governed by separate boards appointed directly by iwi. AFL would have no automatic right to the ACE, but would compete with others for the ACE. This is different from the current situation where AFL derives ACE from the quota it owns.*

20 A Strategy for the Maori Fishing Industry, Te Putea Whakatupu Trust, March 2014, 50 pages.

*While AFL agrees that it must demonstrate that it has the capability and capacity to do an excellent job in managing the assets under its stewardship on behalf of its shareholders, to merely alter the access rights to quota utilisation will do more than the theoretical efficiency driver aimed at. It will re-orient the asset tenure toward quota owners compared with total enterprise owners. One high probability outcome, as a result of the skewed incentives is that AFL would become a toll processor and other competing companies, who retain the ability to create added integration value, would eventually take away the valuable quota bundles. That would strand the Iwi shareholders' value in AFL with no avenue to realise or rebuild it.*[21]

## TOKMTL Submission to the Review

*There have been other proposals to radically change the structure of AFL. One suggests the transfer of all quota owned by AFL to separate trusts under the collective control of iwi. These trusts would be different from the Pupuri Taonga Trust, which secures the economic use of quota for Sealord and allows Sealord to use the quota as security for debt. The proposed trusts would be governed by boards appointed directly by iwi and there would be no long-term rights of access by AFL to the use of quota. Instead it appears there would be annual or at least periodic agreements over access, subject to the highest bidder and open to other industry participants. We do not consider this structure would improve the returns generated by the quota or company and would not lead to strategic long term investment in the industry by Maori. We consider that it would create incentives for other industry participants to 'crowd out' AFL. AFL's asset base would not be sufficient to provide security to banks to provide capital to undertake developments that would enhance value across AFL's brand – whether these are improving quality, reducing footprint, providing greater transparency on provenance or developing new products. We know of no other substantial competitors that have demonstrated the success of a strategy of this type.*[22]

## A Strategy for the Maori Fishing Industry

In the TPW Report, the proposal to restructure AFL into quota owning and quota using parts emerges from a detailed analysis of the history, aspirations and performance of the Fisheries Settlement. The TPW report begins by noting that (a decade after the passage of the Maori Fisheries Act 2004) there is no formal strategy for the Maori Fishing Industry. It suggests that such a strategy should be developed that would reflect *"the Maori values underlying the Fisheries Settlement, in particular the values of:*

- *Rangatiratanga*
- *Whanaungatanga*
- *Manaakitanga*

*The vision of the Maori Fishing Industry is for the preservation of Maori identity by developing a sustainable relationship with fisheries resources that are owned by Maori, managed, harvested, processed and offered to the world in a way that expresses and exemplifies manaakitanga.*

*The future role for AFL would be to generate improved sustainable free cash flow from the harvesting, processing and marketing of iwi-owned quota in a way consistent with the values and vision of the Maori Fishing Industry.*

21 Aotearoa Fisheries Limited Maori Fisheries Act (2015) Review Comments for the Reviewer, 24 December 2014, page 10.
22 Te Ohu Kaimoana (Maori Fisheries Trust) 2015 Review: Information for the Reviewer. Paragraph 179, page 36.

*The objectives of the Māori Fishing Industry are to:*

- *Design and implement a new set of collective post-Settlement commercial structures for the effective harvesting, processing and marketing of Settlement quota in a way that ultimately generates satisfactory sustainable earnings to individual iwi.*
- *Ensure that Māori Settlement values and vision pervade the work practices and culture of those new post-Settlement commercial structures.*
- *Providing opportunities for iwi owned entities to participate in the fisheries industry in a collaborative environment.*
- *Increase Māori employment within all aspects of the post-Settlement commercial structures.*[23]

## Objective of the Proposed AFL Restructure

The objective to be achieved by the proposed AFL restructure is therefore inseparable from, and as broad as, the vision for the Fisheries Settlement itself. *"To the extent that it is a vision connected to the perpetuation of Iwi identity, it is a very long term vision indeed. The vision is not simply one of long-term asset retention but encompasses the associated benefits that may grow out of that base. These benefits include financial returns and employment but also the satisfaction of achieving international success with a distinctly Māori face (manaakitanga). There is also the prospect that the whanaungatanga underpinning that success can be broadened to include, or at least provide inspiration for, Māori co-operation in other primary sectors."*[24]

Financial returns are only a sub-set of the benefits that Iwi desire from the Settlement. It is therefore inaccurate and misleading of the AFL and TOKMTL submissions to compress the objectives of the proposal to:

(1) Aim at a theoretical economic efficiency driver (AFL)

(2) Improve the returns generated by the quota or company (TOKMTL)

Both satisfactory returns and economic efficiency are desirable and necessary but the TPW report is concerned with identifying a contemporary set of structures and governance arrangements better placed to deliver the vision above in its richness and complexity.

The fundamental analysis of the TPW report is that the realisation of this vision requires the reconciliation of two imperatives that are (at first sight) conflicting. The first is the retention of individual Iwi quota ownership. The second is the fostering of co-operation between Iwi in the use of their individually and collectively owned quota within Maori controlled value chains. The report examines the structural options for achieving a successful marriage of these imperatives:

*There is a real conflict of interest between independent quota owners and value chain operators. ACE price is revenue to quota owners and a cost to everyone else. This conflict can be avoided where iwi are the suppliers of ACE to value chain businesses that they own and (most importantly) control. In that case, all of the costs in the value chain (including the cost of ACE) become their costs and all of the revenues in the value chain become their revenues. All internal conflicts are a 'wash' and the only commercial objective remaining is to maximise profits by the most efficient integration and operation of the whole value chain from quota supply to fish product sale. The successful internalisation of this potential conflict is a key design factor in this proposed strategy for the Maori Fishing Industry.*

23 A Strategy for the Maori Fishing Industry, Te Putea Whakatupu Trust, March 2014, page 24.
24 A Strategy for the Maori Fishing Industry, Te Putea Whakatupu Trust, March 2014, page 43.

*In theory, the effective integration of quota and value chain within the Māori Fishing Industry could be achieved in two ways:*

i. *Transfer all iwi quota to AFL so that access to fisheries is no longer an annual cash cost to those businesses. Iwi income would consist solely of dividends from this Māori corporate or joint venture.*

ii. *Transfer all AFL quota to new iwi controlled quota holding entities that sit on par with existing iwi quota holding entities. Collectively, these would supply AFL with secure (but revocable) quota access in exchange for rebates linked to the quantity and type of quota supplied. Ideally all AFL returns would be returned to iwi in the form of such rebates, rather than dividends as at present.*

*There are two very powerful reasons why the first option should be rejected. The most compelling is that the transfer of iwi quota ownership would negate Settlement values associated with the fostering of iwi identity. This is an incalculable cost but it is also a cost that is unnecessary. The second reason relates to the incentives applying to AFL and Sealord executives and personnel. Ownership of quota severely weakens their incentives to exemplify the values and levels of commercial performance desired by iwi. If this were not so, AFL and Sealord performance would look radically different from what has been summarised above."*[25]

The TPW report contains a lengthy analysis of fisheries value chain dynamics, the economic attributes of quota and the particular issues confronting Maori quota owners. It specifically points to the dangers to Iwi of remaining as passive ACE sellers rather than becoming more active value chain participants. It is therefore not appropriate of AFL and TOKMTL to suggest that Iwi do not possess the knowledge and skills to make appropriate decisions about these matters in their capacities of asset owners, directors of AHCs, quota owning trusts, or indeed of AFL itself. In particular, it is a serious misrepresentation of the proposal by AFL and TOKMTL to suggest that it will somehow facilitate alienation of Maori quota from Maori value chain businesses when its explicit objective is to address the extent of current alienation between those things.

## The Context of the Proposal

A Maori Fisheries Sector Strategy is not just about the structure of AFL.

*The actions required to implement the Strategy are:*

- *Confirmation and affirmation of Maori values and principles as the underpinning to any new strategy.*
- *Structural re-organisation of Aotearoa Fisheries Limited and the establishment of new commercial relationships with iwi organisations in order to establish an integrated Māori Fishing Industry as a reality.*
- *Review of existing value chains to identify opportunities for generating improved sustainable free cash flows.*
- *Pursue value chain opportunities and fund necessary investment by Aotearoa Fisheries Limited from the rebate stream paid for the use of iwi-owned quota.*
- *Create a commercial culture of continuous improvement with a greater focus on value chain innovation supported by research and development."*[26]

The report describes the proposed structural re-organisation of AFL as follows:

25 A Strategy for the Maori Fishing Industry, Te Putea Whakatupu Trust, March 2014, page 42.
26 A Strategy for the Maori Fishing Industry, Te Putea Whakatupu Trust, March 2014, page 24.

*"Iwi, individually and collectively will own and control all Settlement quota currently owned by AFL. Boards of these quota owning entities would be elected directly by iwi shareholders (AHCs). Shareholding in the new quota owning entities that received the ex-AFL quota would be identical to AFL shareholding. Existing AFL debt could be pro-rated between AFL and the new quota holding entity. However, a preferable arrangement would be to transfer all debt to the new quota owning companies which (along with their existing sister AHCs) would clearly be the suppliers of all future capital to AFL:*

- *AFL would then be a value chain 'cost centre' for the quota entities below.*
- *All surplus returns after AFL costs (including capital charges) would be returned to the quota owning entities as a rebate linked to the supply of ACE. AFL would not pay dividends.*
- *AFL's balance sheet would contain only value chain related capital assets such as processing infrastructure, plant and brands. It could remain under the existing governance structure. A separate governance framework for quota use and quota owning entities would promote open and arm's length debate about the terms of the quota access arrangement, the structure of the rebate formula, capital investments and research and development funding to ensure the sustainable evolution of the Māori Fishing Industry.*
- *All quota from the same fish stocks supplied to AFL by iwi organisations would be eligible for the same rebate payment per kilogram. AFL would be entitled to procure ACE from non-iwi sources on flexible terms. However, the expectation would be that such procurement would not displace any available iwi ACE from use and would have a positive effect on rebates.*
- *As AFL becomes more proficient as a value chain operator, it is expected that the amount of innovation would increase, along with its appetite for risk and the capital charge on investments of this kind would be adjusted accordingly.*

## Restoring the AFL/Iwi Relationship

The TOKMTL submission expresses satisfaction with the performance of AFL and its governance arrangements. In contrast, the AFL submission acknowledges that "a major ramification of the current share structure is that there is a significant weakening of commitment to AFL, and while Iwi receive AFL dividends they essentially view AFL as a passive investment. The sentiments of alienation through disempowerment appear to be pervasive among AFL Income shareholders."[27] AFL suggests that these issues could be addressed by the transfer of control shares to Iwi. The TPW report agrees with AFL that a problem exists and that improved Iwi/AFL relations are desirable but considers that the achievement of this outcome requires additional actions to those suggested by AFL.

*The history of the Settlement since 2004 has made many iwi highly sceptical of increasing their operational ties with (and dependence on) AFL and they may favour alternative avenues for their future value chain involvement. Sadly, the review of performance to date supports this view but there are only three main alternative avenues available:*

*i. 'Go it alone'. (Vertical integration from an individual iwi quota portfolio). This has a very poor track record because of insufficient scale to achieve cost efficiencies or to support quality expertise.*

*ii. 'Rely on others'. (Notably existing non-Māori companies). This leads to a very exposed commercial position through lack of cost and price information and inability to influence value chain operations that ultimately determine the value of iwi quota.*

*iii. 'Club together'. (Work together with like-minded iwi). This is really only feasible in some specialised fisheries where economies of scale are not a significant factor. A good example is*

27 Aotearoa Fisheries Limited Maori Fisheries Act (2015) Review Comments for the Reviewer, 24 December 2014, page 3.

*Port Nicholson Fisheries (PNF), a crayfish business. However, the disadvantage is that the iwi participants in PNF (ICP, Paraninihi ki Waitotara and Ngāti Mutunga o Wharekauri) are locked into a shareholding in AFL- a business rival.*

*What is proposed above is a variant of 'club together' which recognises that all iwi already have shares in AFL. A ready-made platform exists for co-operation and rather than demolish it, AFL should be better focussed on the role that arguably it was originally intended for. The advantage of the structure above is that, while there is a presumption that AFL would be supported by iwi owned quota, it does not have a monopoly over that quota and AFL would be subject to actual or potential competition over the medium term). For instance, individual iwi would be free to support existing arrangements if they are more beneficial than the prospect of AFL rebates. The durability and scale of AFL will be a function of its future value chain performance and its ability to deliver the vision above. The advantage of the structural organisation above is that it significantly reduces the quantity of Settlement assets irrevocably locked into the success or otherwise of that performance."*[28]

Both AFL and TOKMTL respond to this analysis by suggesting that (even though it is designed to achieve the opposite) it will lead inevitably to a withdrawal of Iwi support for AFL suggesting that the interests of AFL and Iwi were not aligned. This view is disconcertingly pessimistic from AFL and its controlling shareholder. Under the proposal, any effective competition faced by AFL could only be from entities who were (in the opinion of Iwi) better at delivering the spectrum of Settlement benefits desired by them than AFL was. All that can be legitimately read into the excerpts from the TPW report above is that the values, strategies, structures and investments designed to deliver fisheries Settlement benefits through the use of ITQ should be controlled by Iwi individually and collectively and that there is no compelling need to circumscribe the choices or opportunities available to Iwi in that role. The AFL and TOKMTL submissions cannot be interpreted in any other way than as a proposition by those organisations that Iwi cannot be trusted to identify their best interests and to act accordingly. Their submissions do not provide any evidence to support this proposition.

## Financing the Maori Fishing Industry

TOKMTL assert that a consequence of the TPW proposal would be to starve AFL of capital. *"AFL's asset base would not be sufficient to provide security to banks to provide capital to undertake developments that would enhance value across AFL's brand…"*[29] This comment fails to recognise that AFL's capital is not provided by itself but by its owners (Iwi). Iwi owners fund the equity in AFL and, to the extent that AFL is funded by debt, those debt obligations are also underwritten by Iwi owners. Fortunately, this point is understood by AFL. *"Iwi shareholders hold the key to AFL's future growth through access to capital, Annual Catch Entitlement, people, ideas, and support for initiatives at national and local level on matters ranging from fisheries management to engagement with local communities."*[30] Indeed. But the issue is, of course, that Iwi do not actually hold that key under status quo AFL structural and governance arrangements.

28 A Strategy for the Maori Fishing Industry, Te Putea Whakatupu Trust, March 2014, pages 45 and 46.
29 Te Ohu Kaimoana (Maori Fisheries Trust) 2015 Review: Information for the Reviewer. Paragraph 179, page 36.
30 Aotearoa Fisheries Limited Maori Fisheries Act (2015) Review Comments for the Reviewer, 24 December 2014, page 3.

212. I conclude that the restructuring propositions in the McClurg material are well worthy of prompt and detailed consideration by Iwi as part of Iwi assessments of the burning question: where to now, from here?

213. In addition, with the very experienced and professional assistance of Cameron Partners, a series of specific questions for answer by AFL and Sealord were submitted for their response. Answers from AFL and Sealord came in their in-depth discussions with me and in the written material supplied by both companies.

214. In discussions with AFL and Sealord the prevailing gobal and New Zealand domestic fishing industry circumstances were canvassed. Again, the broad economic context in which these companies are operating here and in offshore markets is essential to full understanding and evaluation of performance, delivery of benefits and achievement of the purposes of the Act. And, the governance arrangements (as defined) for the AFL group must respond to all these influences in order to be "optimum". The Cameron Partners (Appendix 11) "Overview of the Seafood Sector" provides important features of the broad canvass to be taken into account.

215. Sealord and AFL responses – set out in summary form on the next page – capture their views and analysis of how global and domestic conditions impact upon their business. I invite readers of this Report to reflect upon boh the questions (Appendix 11) and the Sealord and AFL observations below.

216. Other very helpful information provided by AFL on Sealord follows on Page 105.

# SEALORD

## TACC Quotas/Wild catch

- TACC quotas have been a driver of business volatility historically. Sealord's biggest exposure is to the Hoki quota, followed by Orange Roughy;
- The TACC quota amounts each year can be unpredictable. Key drivers are the political landscape and estimates of the fish population. Sealord has invested in technology to help track stock numbers but this is not an exact science;
- There is potential that the historic cuts have been on the conservative side, which could have upside in the future. Globally, wild catch is in decline but New Zealand could be the "exception" to the rule. For example, although the New Zealand coastline is very large, only a small percentage of this (comparatively) is available for commercial trawling.

## Yuken venture

- Sealord entered into an Argentinean joint venture in 2001. This generated losses in 7 out of 13 years of the investment and was a significant distraction from the New Zealand core operations;
- This has been another driver of Sealord's poor historical performance;
- Yuken was sold in 2013. In total, the divestment cost in FY13 was $47m and pre 2013 impairments were $21m for a total impact of $68m.

## Other external factors

- Sealord exports a high proportion of its product, primarily to the US, Europe and Japan;
- Sealord have attributed part of the poor performance historically to a strong NZ dollar, particularly the unfavourable US/NZ exchange rate;
- High fuel costs and wages have also contributed to this;
- To address this, a focus on a volume play (which could be relied on with higher quotas and a weaker NZ dollar) has shifted to operational improvement, margin retention and better utilisation/management of fixed assets;
- Sealord believe consolidation and rationalisation is likely in the New Zealand fishing industry going forward.

## Capital structure

- Sealord targets a dividend of the greater of 40% of NPAT or $16m;
- Throughout the mid to late 2000's Sealord maintained a dividend of $16m, which was consistently higher than 40% of NPAT. No dividend was declared in 2013;
- Over the same period debt increased from around $60m to $240m. Based on Sealord's calculations, debt in 2014 would have been $70m lower if 40% of NPAT was paid out;
- The capital structure, and subsequent business decisions, has been driven by a "pension fund" mentality: The demands from shareholders have been to provide a consistent income stream, and questions will be asked if a dividend is not declared.

# AFL

## Capital constraints

- AFL has several opportunities it would like to explore or take advantage of it but the main roadblock is lack of access to capital;
- AFL believes that the current ownership structure is significantly hindering its ability to raise capital for these new ventures;
- It would like the flexibility and transparency to be able to raise capital from external sources to drive growth and shareholder return. This could be in the form of a coupon based instrument, mezzanine funding or hybrid equity/debt.

## Governance and ownership

- Historically the Board has not been as diverse or as capable as it could have been;
- This has improved in recent years but continued appointments on merit and skill would be desired
- The relationship with AFL's shareholder, TOKM could be improved, and it is questionable whether TOKM is the right vehicle to manage/ govern/direct AFL going forward;
- TOKM could be better placed as a policy and advocacy body as opposed to an asset management company.

## Business drivers

- A large proportion of AFL's business is subject to TACC quotas, the key species being crayfish and orange roughy;
- Like Sealord, the business has been affected by historic foreign exchange and TACC quota fluctuations;
- Aquaculture seen as high risk and not a priority, whereas high value inshore wild catch species are the area that AFL knows well and is likely to concentrate on;
- AFL, like Sealord, believe that consolidation and rationalisation is likely in the New Zealand fishing industry going forward.

# SEALORD GROUP LIMITED INFORMATION FOR STATUTORY 2015 REVIEW

The following information for Sealord Group Limited (Sealord) has been prepared in response to specific questions from the Reviewer. The information has been prepared from the Kura Limited financial statements and is for periods commencing after November 2004, being the incorporation date of Aotearoa Fisheries Limited.

At the time of preparing this information, the F14 results had not been finalised and approved by the Sealord Board. However it is expected that the final F14 profit for the year will be at least $24 million, and should be over Plan by at least $4 million.

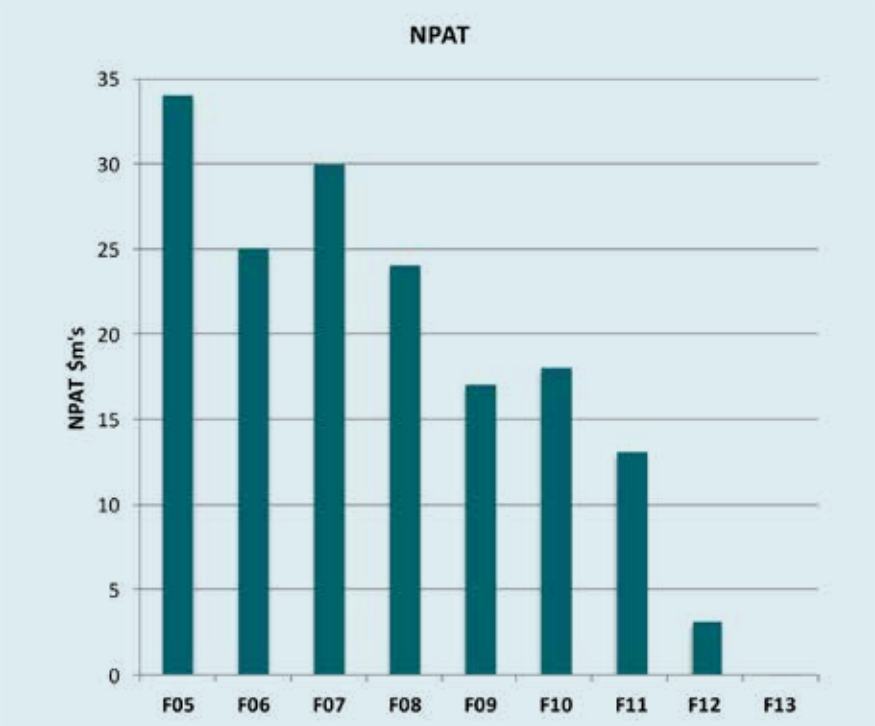
Sealord has restated its financial statements for F09, F11 and F12 years. The financial data is based on the restated financial information. Further details of the restated financial statements are included in the Appendix.

Prior to F11, Sealord financial year-end was 30 June. Sealord changed balance dates effective 30 September 2011, resulting in the F11 results being for a 15 month period.

## 1. Income Statement

| | F05 | F06 | F07 | F08 | F09 | F10 | F11 (15 mths) | F12 | F13 |
|---|---|---|---|---|---|---|---|---|---|
| | $000 | $000 | $000 | $000 | $000 | $000 | $000 | $000 | $000 |
| | | | | | Restated | | Restated | Restated | |
| Sales | 554,320 | 644,419 | 545,704 | 555,991 | 584,860 | 530,887 | 580,014 | 487,057 | 457,302 |
| **Operating Profit** | **57,133** | **41,187** | **44,968** | **31,418** | **13,632** | **21,132** | **21,014** | **21,738** | **(8,361)** |
| | *8.9%* | *6.4%* | *8.2%* | *5.7%* | *2.3%* | *4.0%* | *3.6%* | *4.5%* | *-1.8%* |
| Plus share of Associates & joint venture | 1,516 | 3,724 | 6,682 | 10,344 | (3,072) | 7,473 | 9,056 | 6,947 | 7,791 |
| | *0.2%* | *0.6%* | *1.2%* | *1.9%* | *-0.5%* | *1.4%* | *1.7%* | *1.3%* | *1.5%* |
| **Operating EBIT, inlcuding associates & JV's** | **58,649** | **44,911** | **51,650** | **41,762** | **10,560** | **28,605** | **30,070** | **28,685** | **(570)** |
| **Less Capital costs:** | | | | | | | | | |
| Impairmenert Yuken | | | | | | | | (10,000) | (37,079) |
| Impairment goodwill/quota | | | (406) | | | | | (786) | 0 |
| Impairmenet other assets | | | | (470) | (954) | | (25) | (450) | 0 |
| Loss on sale of assets | 207 | (969) | (691) | (2,025) | (2) | (2,374) | (5) | (264) | (26) |
| | **207** | **(969)** | **(1,097)** | **(2,495)** | **(956)** | **(2,374)** | **(30)** | **(11,500)** | **(37,105)** |
| **Plus Capital income:** | | | | | | | | | |
| Impairment of Quota reversed | - | | | 961 | | | | 1,445 | |
| Reversal of goodwill | | | | 7 | | | | | |
| Gain on quota swap | | | | | | | | 2,121 | |
| Profit on sale of PPE | 337 | | 324 | 69 | 2 | 4,777 | 169 | 608 | 523 |
| Reversal of impairment (sub Yuken) | | | | | 7,750 | | | | |
| Recovery of long term trade rec's | | | | | 6,100 | 815 | | | |
| Sale of Nordic | | | | | | | 3,822 | | |
| Government grant | | | | | | | 427 | | |
| Mussel farms | | | | | | | | | 3,857 |
| ETS sale of emission units | | | | | | | 2,717 | | |
| Net gain on disposal of shares | | | | | 6,446 | | | | |
| | **337** | **0** | **324** | **1,037** | **20,298** | **5,592** | **7,135** | **4,174** | **4,380** |
| **EBIT** *(op profit + Assoc & JV's capital profits - capital losse* | **59,193** | **43,942** | **50,877** | **40,304** | **29,902** | **31,823** | **37,175** | **21,359** | **(33,295)** |
| Financing costs - net | (7,447) | (7,545) | (9,088) | (11,244) | (10,963) | (9,667) | (14,757) | (12,606) | (13,895) |
| Income tax expense | (17,337) | (11,006) | (12,023) | (4,831) | (2,328) | (3,757) | (9,018) | (5,257) | 2,796 |
| **Profit for the year** | **34,409** | **25,391** | **29,766** | **24,229** | **16,611** | **18,399** | **13,400** | **3,496** | **(44,394)** |

## 2. Profitability Analysis

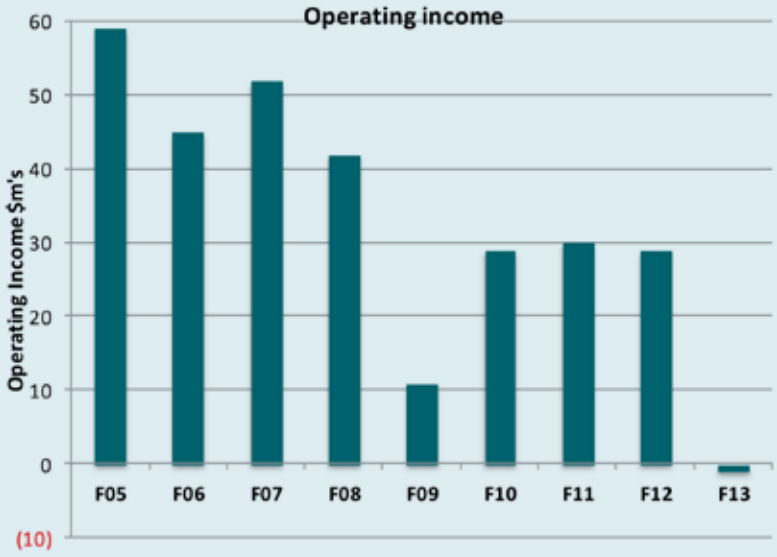



### *2.1 Profit for the Year (NPAT)*

The graph above does not show the F13 NPAT loss of $44 million.

### *2.2 Operating Income*

The operating income includes the earnings from Associates, but excludes capital gains and losses.



### *2.3 Restructuring Costs Incurred*

Sealord has incurred restructuring costs for the eight out of nine years under review, totaling $28m.

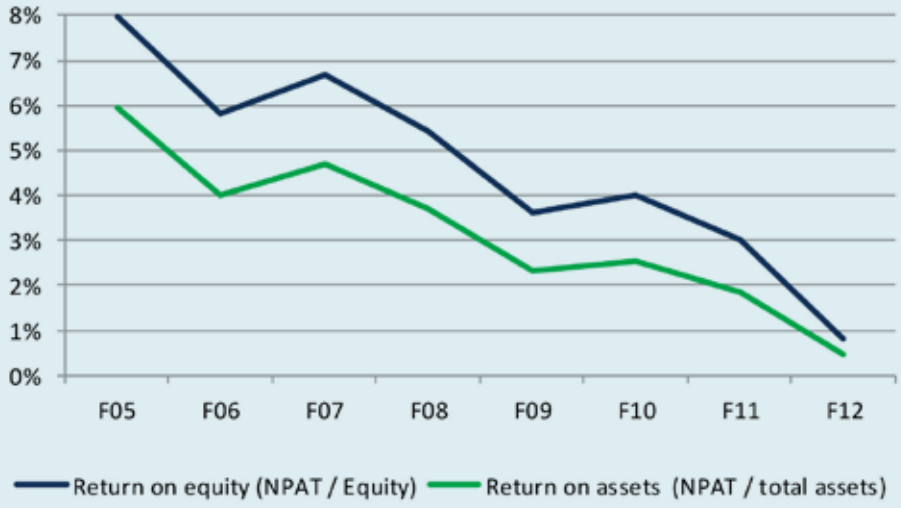
The following table shows the restructuring costs incurred each year.

| | F05 | F06 | F07 | F08 | F09 | F10 | F11 (15 mths) | F12 | F13 |
|---|---|---|---|---|---|---|---|---|---|
| | $000 | $000 | $000 | $000 | $000 | $000 | $000 | $000 | $000 |
| | | | | | Restated | | Restated | Restated | |
| Restructuring costs | 1,618 | 0 | 3,055 | 5,719 | 10,596 | 1,849 | 572 | 3,659 | 1,023 |

### *2.4 Return on Equity and Assets*

The following table and Chart shows the returns to equity and assets as illustrated in the table below.

| | F05 | F06 | F07 | F08 | F09 | F10 | F11 | F12 | F13 |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | Restated | | Restated | Restated | |
| Return on equity (NPAT / Equity) | 8% | 6% | 6.7% | 5.4% | 3.6% | 4.0% | 3.0% | 0.8% | -11.4% |
| Return on assets (NPAT / total assets) | 6% | 4% | 4.7% | 3.7% | 2.3% | 2.5% | 1.8% | 0.5% | -6.2% |



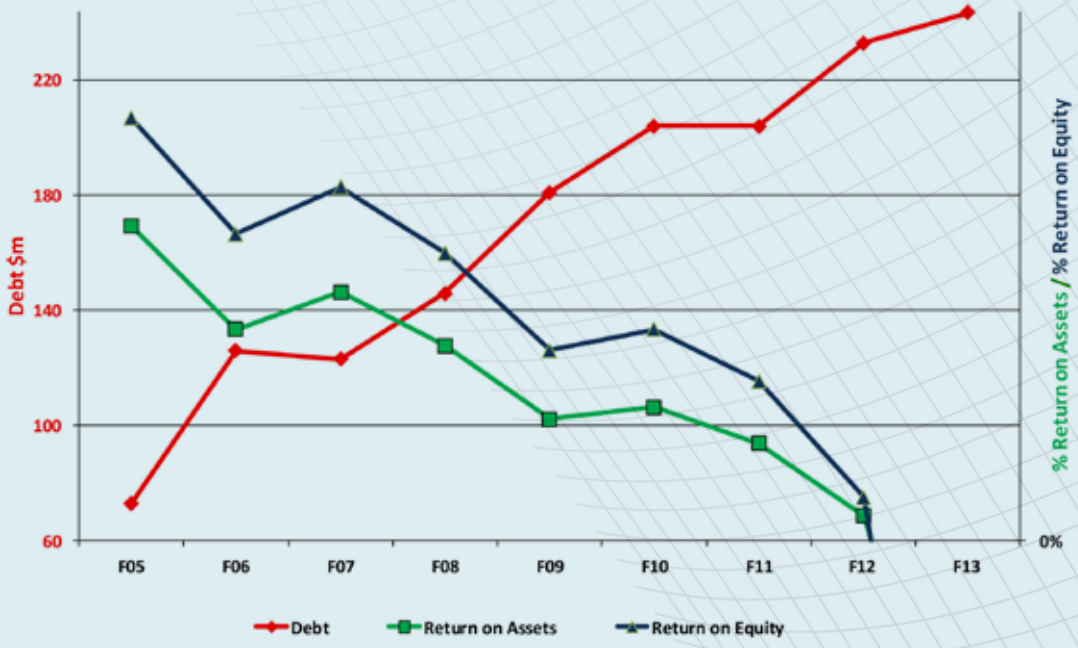

The graph does not show the negative returns for F13

## 3. Balance Sheet

| | F05 $000 | F06 $000 | F07 $000 | F08 $000 | F09 $000 | F10 $000 | F11 $000 | F12 $000 | F13 $000 |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | Restated | | Restated | Restated | |
| Current assets | 157,950 | 185,082 | 168,017 | 169,013 | 193,086 | 185,972 | 174,936 | 203,510 | 206,785 |
| Non current assets | 407,148 | 450,867 | 466,054 | 487,349 | 528,586 | 542,676 | 553,891 | 540,709 | 504,153 |
| **Total assets** | **565,098** | **635,949** | **634,071** | **656,362** | **721,672** | **728,648** | **728,827** | **744,219** | **710,938** |
| Current liabilities | 63,509 | 71,157 | 54,688 | 58,093 | 65,798 | 56,292 | 61,846 | 70,693 | 74,100 |
| Non current liabilities | 0 | 441 | 10,008 | 7,225 | 13,395 | 7,521 | 17,730 | 11,155 | 4,913 |
| Bank debt - net of cash on hand | 73,252 | 126,144 | 123,816 | 145,599 | 166,062 | 115,810 | 125,936 | 161,668 | 207,169 |
| Shareholder loans | 0 | 0 | 0 | 0 | 15,288 | 87,617 | 78,472 | 71,815 | 36,201 |
| **Total Debt** | **73,252** | **126,144** | **123,816** | **145,599** | **181,350** | **203,427** | **204,408** | **233,483** | **243,370** |
| Equity | 428,337 | 438,207 | 445,559 | 445,445 | 461,129 | 461,408 | 444,843 | 428,888 | 388,555 |
| **Total equity & liabilities** | **565,098** | **635,949** | **634,071** | **656,362** | **721,672** | **728,648** | **728,827** | **744,219** | **710,938** |

## 4. Debt

The following graph shows debt and return on assets and equity on the same chart.



## 5. Sealord Banking Facilities

Sealord refinanced its banking arrangements on 31 July 2013, where its core debt and banking syndicate was restructured.

ANZ and Bank of Tokyo Mitsubishi (BTMU) were retained and Rabobank and BNZ were replaced.

When Sealord had previously restructured its debt in 2011, HSBC was replaced as lead banker in favour of ANZ.

### *5.1 Current Facility*

The following is a summary of the current debt facility.

| Debt Facility | Amount | Provider | Maturity |
|---|---|---|---|
| Core debt Tranche A | NZ$30m | ANZ | July 2018 |
| Core debt Tranche B | NZ$60m | ANZ/BTMU (50/50) | July 2018 |
| Trade financing | NZ$ 115m | ANZ | January 2016 |
| Subordinated unsecured | US$30m | Nissui | November 2015 |
| Subordinated vessel facility | US$41m | BTMU | Amortising - July 2018 |

### *5.2 Quota Security*

SGL's quota is owned by Pupuri Taonga Trust and is leased to SGL under a Use of Quota Deed. Under the Deed, SGL has full and comprehensive rights in respect of the quota for perpetuity. The Deed allows SGL to use the quota as security against its bank borrowings.

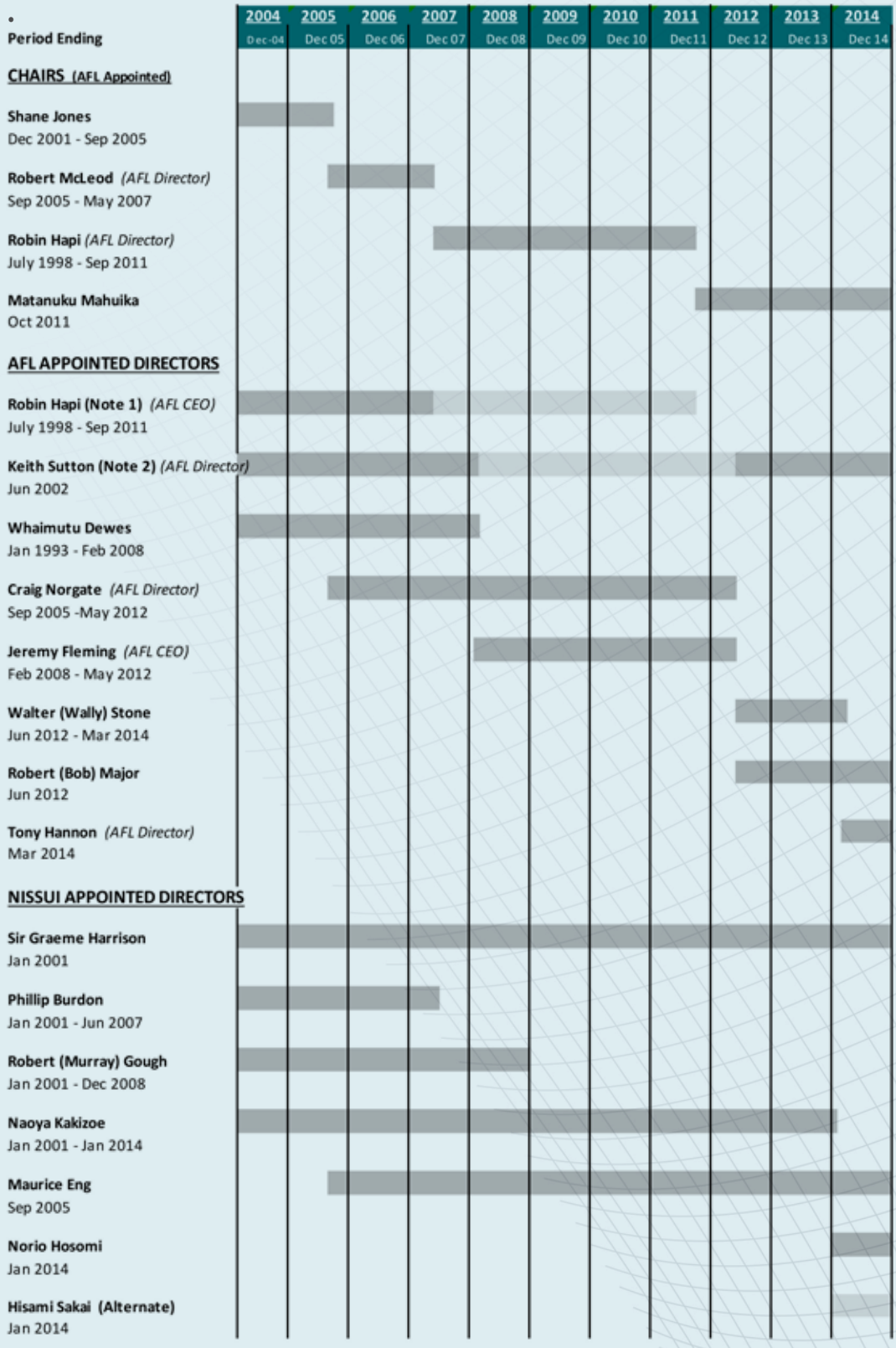
## 6. Dividends

The following shows the dividend declared each year, and the 50% amount that AFL has received.

| | F05 | F06 | F07 | F08 | F09 | F10 | F11 (15 mths) | F12 | F13 |
|---|---|---|---|---|---|---|---|---|---|
| | $000 | $000 | $000 | $000 | $000 | $000 | $000 | $000 | $000 |
| Dividend declared in relation to that financial year | 16,000 | 16,000 | 16,000 | 16,000 | 16,000 | 16,000 | 16,000 | 2,600 | - |
| AFL 50% share | 8,000 | 8,000 | 8,000 | 8,000 | 8,000 | 8,000 | 8,000 | 1,300 | - |

## 7. Board Members

The following schedule is a listing of the SGL Board members, both current and historic.




Note 1) Became Chairman June 2008
Note 2) Alternate Director Feb 2008 through May 2012

# APPENDIX - Restated Financial Statements

The information used in this analysis is from the SGL audited signed financial statements. Where the financial statements have been restated, the data from the restated financial statements has been used.

Sealord restatements have included:

Noted from the F13 Financial Statements, restating F12

- *Reduction to the F12 profit because Petuna changed balance date.*

Noted from the F12 Financial Statements, restating F11

- *Correction for depreciation error due to understatement of vessel residual values.*
- *Accounting policy change in relation to valuation of inventory.*

Noted from the F11 Financial Statements,

- *Correction for error in vessel costs at Yuken, where costs were not included in the profit and loss. This was for an error in F09, and was adjusted through opening retained earnings.*

Noted from the F10 Financial Statements, restating F09

- *Correction for error in relation to charter costs not recognised in the profit and loss.*

*Accounting policy change in relation to valuation of biological assets.*

## Ngai Tahu

217. In its submissions, the representative tribal body of Ngai Tahu whanui, Te Runanga o Ngai Tahu (Ngai Tahu), recognised that this Review has potentially far reaching consequences for the Settlement entities. Ngai Tahu point out that the review of the centralised management and control of approximately half of the assets from the fisheries Settlement was an important feature of the 2003/2004 allocation model; and point also to a passage contained in the May 2003 Report to the Minister of Fisheries:

> *"… any centralised structure should, however, include provision for review in order to ensure that the envisaged benefits remain current and to allow a change in direction, including the distribution of all assets to the Iwi beneficiaries if warranted."* [31]

218. Ngai Tahu advocates for TOKMTL to provide additional financial resourcing under s.115(1) of the Act to Iwi collectively to help inform and support their input into this "inaugural and seminal" review.

219. This submission has a familiar ring to it. It accords with equally focused submissions from Ngati Porou, Ngati Kahungunu, Waikato-Tainui, Te Arawa, Ngapuhi, and Ngati Whatua – among others. Its link with the submission from Ngati Porou Seafoods Group (on behalf of and endorsed by Te Runanganui o Ngati Porou Group as the representative entity of Ngati Porou) is particularly helpful. Ngati Porou proposes that work to refine the options for change to the entity architecture could best be done through the establishment of an **Iwi Working Group** tasked with the developing the options and presenting them for further discussion and agreement. I find this to be a sound proposition and I have recommended its urgent establishment; and I have also recommended that it be funded by TOKMTL. This is the kind of resourcing envisaged, in my view, under s.115(1) of the Act and I endorse by way of recommendation the submissions of both Ngai Tahu and Ngati Porou in this respect.

220. Ngai Tahu seeks to exercise a greater degree of *rangitiratanga* over its rohe moana and related taonga; and that there should be no externally imposed restrictions on any of Ngai Tahu's assets and shareholdings. Whilst Ngai Tahu may elect to impose restrictions upon how Ngai Tahu manages tribal assets, the external imposition of restrictions are necessarily constraining Ngai Tahu without allowing optionality and flexibility around assets and shareholdings.

221. This is a submission directed by Ngai Tahu at changes to the Settlement asset disposal restrictions. I have found that the overarching purpose of the Act and the key principle of durability of the Settlement through the generations, requires Settlement asset disposal restrictions to remain with the result that the Settlement assets may only be traded within the Maori pool. However, the principle of freedom of asset transfer, which is also embodied in my findings and recommendations, is also captured in the Ngai Tahu submission. The procedures and processes for the sale by Iwi of their settlement assets within the Maori pool should be made more flexible, user-friendly and accessible.

222. In addition, I find that there is a good case for robust examination of the AFL corporate structure as quota owner and quota user in conjunction with Iwi who are also, through their MIOs and AHCs, quota owners, managers, and users. The prospect which I consider to be a real one if there is commitment to rationalisation of quota ownership and quota use by AFL and Iwi, together, of at least minimising suppression of values of quota (still only to be sold, swapped or otherwise traded within the Maori pool), is enhanced. One option with the potential to achieve strong economic success going forward, with minimal devaluation of Settlement assets, is the rationalisation of quota use across AFL and its Iwi owners, with an accompanying streamlining of asset disposal procedures but within the Maori pool.

31 He Kawai Amokura; p.34

223. Ngai Tahu submits that TOKMTL should maintain a central policy and advocacy role on behalf of all Iwi; but that TOKMTL should be refocused and restructured. In Ngai Tahu's view, the central policy and advocacy role for TOKMTL should be kept separate and distinct from the commercial role of AFL.

224. In my view, AFL must take a leading policy and advocacy role on commercial fisheries and indeed any other fisheries issues which affect its ability to operate commercially successfully. Whilst I allow for the proposition that a restructured and refocused TOKMTL look-a-like is an option for such central policy and advocacy responsibilities as Iwi may seek, I do not recommend it. It would in any event, in my view, require at minimum, a two-step process: the first of which is for TOKMTL to be wound-up and its equity/assets be distributed back to Iwi; and secondly, for Iwi to design (and here the Iwi working group I propose be established urgently will play a key role), for the nature, purpose, governance arrangements and funding of such Iwi fisheries advocacy body. One of the options is a commodity levy stakeholder funded body of which, in the fisheries sector, there are a number of examples, not the least of which is the Challenger Scallop Enhancement Company operating in Te Tau Ihu.

225. Ngai Tahu submits that TKT should be removed as the entity which appoints the directors of TOKMTL. Any appointments should be made directly by Iwi.

226. Because I have made a finding that TOKMTL should be wound-up and I have recommended accordingly, should Iwi so resolve, TOKMTL will no longer exist. Any body which undertakes central policy and advocacy on behalf of Iwi will, in my view, most certainly suit appointments for governance purposes directly by Iwi. On that basis, TKT would have no continuing appointment role of the present nature.

227. I am also attracted to the proposition of a Shareholders' Council to be established by Iwi. This was a further submission of Ngai Tahu. It will be for Iwi to design. A representative Iwi body to undertake a shareholder council role especially for AFL makes sense to me and I so find. I recommend its consideration.

228. Ngai Tahu submits that neither Te Putea Whakatupu Trust nor Te Wai Maori Trust have achieved their respective purposes. This of course is to the contrary of the submission to me by TOKMTL.

229. I have taken the view that I must do more than simply lay the conflicting submissions alongside each other. I must make an independent evaluation of the position. I have done that. I do not find that either of these trusts should be wound-up. But I do find that their governance arrangements should be significantly restructured to ensure their efficient operation in accordance with their statutory duties and more particularly to facilitate the delivery of benefits to Iwi from both these trusts as was originally intended. Ngai Tahu seeks to extract from both these trusts the Ngai Tahu portion of the trust funds (calculated on the basis of population) because Ngai Tahu itself carries out the functions of both trusts for and on behalf of Ngai Tahu. In the alternative, Ngai Tahu submits that those trusts should be wound-up and the trust funds distributed to all Iwi on the basis of population.

230. I can see how frustrations may have arisen across broad Maori communities in relation to something of an impasse in delivery of benefits but I put the root cause of that impasse and frustration at the door of the governance arrangements themselves and that the inefficiencies of those arrangements have not been addressed promptly enough following their identification. What I propose is that there be a greater number of directors in Te Putea Whakatupu Trust, that Iwi Maori and the Act's Schedule 5 organisations have a direct say in the director appointments and in the way in which the benefits of that trust are delivered and are specifically, together, charged with responsibility under a new management governance arrangement to appoint directors to it.

231. Ngai Tahu submits that although TKT has allowed Iwi a degree of involvement in the appointment processes, TKT has not fulfilled its role as effectively as possible.

232. In respect of AFL, Ngai Tahu considers that its commercial performance has been consistently below that of Ngai Tahu Holdings and Ngai Tahu Seafood; and that Sealord has also substantially under-performed. Ngai Tahu says that it acknowledges the findings of the four yearly performance Audits undertaken pursuant to the Act and the findings that:

- Despite the tough economic climate since AFL was established in 2004, AFL has produced considerable growth but this has not translated into adequate returns to investors;
- Sealord's performance, having been mentioned throughout both audits as having a significant impact on AFL, but it was of concern to Ngai Tahu that Sealord's decision to exit the Argentinian fishing business (Yuken) resulted in AFL not paying any dividends in 2013;
- That AFL's venture with the Iwi Collective Partnership (ICP) is to be commended and is viewed as a progressive arrangement. However, despite the ACE purchasing relationship with ICP, Ngai Tahu points to criticisms regarding the difficulties Iwi face trying to enter into the AFL value chain where a good proposition exists. Special reference in that regard is made to the Kura Inc project;
- The performance of Sealord impacting on AFL's performance has been noted. Ngai Tahu takes the view that, as a 50% shareholder, AFL's governance oversight in respect of Sealord has been sub-optimal.

233. In my view, all of these concerns as to performance which impact not just on AFL but because of the governance arrangements also on TOKMTL, have substance. I find accordingly. I have recommended steps including the transfer of all voting shares and the balance of the income shares in AFL to Iwi with an accompanying new initiative to develop the means by which new synergies and new cooperation between Iwi and AFL can occur to the commercial advantage of both AFL and its Iwi owners.

234. Although I accept that for the period ending 30 September 2014, both Sealord and AFL financial performances have improved (and with a lower exchange rate and the recent increase in the TACC for hoki there seems a reasonable prospect that the performance at least of Sealord will improve further). Overall I expect the financial performance of both Sealord and AFL to likewise improve. The failure on the part of AFL to pay a dividend to its Iwi income shareholders is an entirely justified and reasonable basis for criticism and concern. Ngai Tahu, like other Iwi, has expressed dissatisfaction with the governance arrangements which does not make the managers and governors of the AFL business, on behalf of Iwi, sufficiently accountable to Iwi.

235. I make findings that the accountability imperatives which are driven by the purposes of the Act, require direct appointments and removals of directors to AFL, a greater *"watchdog"* ability through a Shareholders' Council or other like body on behalf of Iwi of AFL corporate and commercial management combined with some additional strategic restructuring proposals for at least debate and potentially implementation to enhance both performance responsibilities and accountabilities. Elsewhere I have said that the responsibilities that accompany the exercise by Iwi of these rights as shareholders are, in my view, well understood by Iwi.

## Ngapuhi and Ngati Whatua

236. I received a joint submission from the Chairman of Te Runanga-a-Iwi o Ngapuhi and the Chairperson of Te Runanga o Ngati Whatua: Raniera (Sonny) Tau and Naida Glavish respectively. This submission identified that as at the last census, over 125,600 people identified as Ngapuhi making Ngapuhi the largest Iwi in the country by a significant number. In the same census, over 14,770 Maori identified as Ngati Whatua. The submission was made on behalf of all of those affiliate as Ngapuhi and Ngati Whatua and in that capacity are beneficiaries of the Maori fisheries Settlement.

237. The co-submitters expressed the view that they believed the institutions established through the Act, including Te Kawai Taumata have served reasonably well but otherwise welcomed the opportunity to raise improvements and developments for the purposes of *"strengthening the practices of those bodies, create more transparency and ultimately deliver better outcomes in both commercial and customary fishing".*

238. The key submissions of Ngapuhi and Ngati Whatua are:

i. The role of advocacy on behalf of MIOs and Iwi fishing companies by TOKMTL is *"highly valued yet there is room for improvement in this function. Too often TOKM presents views without any discussion or consultation with Iwi. At times when views are sought it is at very short notice".* It is submitted in the Review that if practices within TOKMTL continue as at present, there will be no capacity building an Iwi fishing to understand and anticipate the contextual issues arising in the sector and directing their businesses accordingly. Additionally, it was submitted that there would be an increasing risk that TOKMTL will be out of touch with Iwi interests and not able to represent them effectively. The co-submitters observe that currently there is a disconnect between TOKMTL and MIOs with disappointment registered in respect of the expectation that TOKMTL would be proactive and timely in its engagement with Iwi.

ii. Ngapuhi and Ngati Whatua make specific reference to TOKMTL's handling of the offer to acquire Anton quota shares as an example where a higher standard of stewardship on the part of TOKMTL was expected. Iwi submit that TOKMTL had a year in advance to prepare for the offer and a legislative obligation to assist Maori through the process but in the result, timeframes were compressed, contracts were overtly complex, there was a lack of due diligence and ultimately Iwi were required to engage separate legal counsel at considerable expense to individual Iwi.

iii. TOKMTL left Iwi with a demonstrably uneven playing field with a lack of direction and/or initiative over how the income shares Iwi hold in AFL might be valued. According to Ngapuhi and Ngati Whatua, published AFL income share values ranged from $368 to $1,618 per share with consequent confusion.

iv. As to AFL, Ngapuhi and Ngati Whatua point to the company's vision to *"… be the key investment vehicle of choice for Iwi in the fishing industry and to maximise the value of Maori fisheries assets".* There is, according to Iwi, little transparency in the way that AFL operates.

239. Ngapuhi and Ngati Whatua submit that even after 10 years AFL still looks to stand alone with unclear purpose or provision of commercial benefits to Iwi. It is said:

> *"At times it appears that AFL are more competitors with the Iwi fishing companies than partners."*

Reference is made to the paper commissioned by Te Putea Whakatupu Trust **"A Strategy for the Maori Fishing Industry"** that if the quota ownership role was removed from AFL, then

AFL would be better placed to work more collaboratively with Iwi. It is recognised by Ngapuhi and Ngati Whatua that AFL appears to be willing to address the division between itself and Iwi with a more inclusive leadership style but *"… the proof will be in the output resulting from any renewed collaboration with Iwi on genuinely commercially competitive terms"*. It is said that there must be improved understanding on the part of AFL and its attitude to Iwi fishing companies in order to build effective relationships.

240. I acknowledge the force of the submissions from Ngapuhi and Ngati Whatua. I take into account that those two Iwi represent large numbers of Maori and the two of them are significantly engaged in the business and activity of fishing, in particular in respect of deep water ACE.

## Ngati Kahungunu

241. In submissions in the Review, Ngati Kahungunu, with the third largest population of Iwi in the country and accordingly the third largest Iwi shareholder in AFL, notes that recently it became only the second Iwi to commit to a long term relationship with the Sealord Group through an Ihu to Mai agreement.

242. The key submissions from Ngati Kahungunu are:

i. A greater level of transparency and accountability from TOKMTL and AFL is sought. An immediate need to improve the communication from TOKMTL and AFL to Iwi is identified. On advice, Ngati Kahungunu recently had to devalue its AFL shareholding by over $5.7m leading to the recording of an unprecedented deficit by Ngati Kahungunu for the first time since its receipt of the fisheries Settlement assets. Ngati Kahungunu considers that AFL is performing poorly; it has no confidence in the ability of AFL going forward and is frustrated at the lack of opportunities for collaboration and co-ordination with the company;

ii. Ngati Kahungunu considers that the priority setting of TOKMTL and funding decisions are not transparent or fully accountable to Iwi. The Iwi is openly critical of the recent decision by TOKMTL to appoint one of its staff as a *"customary representative"* on a national snapper inshore working group co-ordinated by the Ministry for Primary Industries. Ngati Kahungunu considers that it (and no doubt other Iwi) have customary and commercial experts within the Iwi and able to offer in-depth and experienced perspectives on such a working group accordingly but were not invited to participate;

iii. Ngati Kahungunu reserves its particular criticism for the performance of AFL. It considers the company's operations are insufficiently accountable and not sufficiently transparent. Ngati Kahungunu seeks that Iwi be replaced as voting shareholders in AFL with the power to appoint and remove the company's directors;

iv. Ngati Kahungunu also seeks major restructuring of the AFL and Sealord quota ownership portfolio. The Iwi advocates that all AFL and corresponding Sealord quota be distributed to MIOs in order to rationalise the quota ownership and quota use of quota between AFL and Iwi as its owners;

v. Specifically in relation to shareholder protections, Ngati Kahungunu confirms it is strongly committed to ensuring that the rights and interests of smaller Iwi shareholders are respected and in particular points to a desirable 75% voting threshold for shareholders in AFL in respect of significant transactions to be undertaken by the company with a proposal also that there be a shareholders' council (or similar entity) elected directly by Iwi to improve the interface, co-ordination, collaboration and strategic alignment of Iwi and AFL. Ngati Kahungunu has considered whether TKT could effectively fulfil that role but believes that a new and directly elected entity would be more

appropriate, particularly drawn from members with proven experience in the fishing industry;

vi. In relation to TWMT and TPWT, Ngati Kahungunu makes similar submissions to ensure Iwi are directly appointing trustees and that there are more effective participatory processes for Iwi in the strategic planning and priority settings for both trusts;

243. Finally in relation to restrictions on Settlement assets, Ngati Kahungunu records a high level of frustration expressed by Iwi who have *"seen AFL and Sealord dispose of quota without any effort to first offer it to Iwi".* Whilst there is accompanying frustration over insufficient flexibility and lack of options for rationalising asset ownership, Ngati Kahungunu is not in favour of lifting restrictions so as to allow Settlement quota and shares in AFL to be sold on the open market. Ngati Kahungunu would welcome a thorough consideration of the means by which sale and transfer to other Iwi or trades of Settlement quota to third parties in exchange for quota of equivalent value could be made more efficient and flexible.

## Ngati Mutunga o Wharekauri

244. Key submissions from Ngati Mutunga include that 100% of the AFL voting shares and the balance of 20% of the income shares of AFL held by TOKMTL should be transferred to MIOs on the same basis as the 80% income shares. Once the allocation of the Maori fisheries Settlement assets is completed, TOKMTL should be wound-up or refocused as an advocacy support provider for Maori fisheries issues on a user-pays basis.

245. In the submission of Ngati Mutunga, AFL has not been, and continues not to be, a proficient value chain operator as its historical performance indicates. Neither has it embraced collaborated Iwi-AFL structures and opportunities. This has resulted in poor value growth across the Maori sector with many Iwi left with no option but to simply lease the ACE (in many cases opting to align with AFL's competitors) to allow the full value chain participants to realise and retain the downstream beach management, supply, processing and marketing returns generated from Iwi ACE.

246. In addition, Ngati Mutunga submits that structures must be established that allow for Iwi to participate in as much of the full value chain as their individual risk profiles allow.

247. MIOs, as fully fledged shareholders of AFL, will appoint all directors with AFL directors then appointing their share of directors to Sealord.

248. Understandably, Ngati Mutunga pointed to the success of Port Nicholson Fisheries. This enterprise was established by Ngati Mutunga together with Parininihi ki Waitotara Inc and the Iwi Collective Partnership in April 2012. It is the fifth largest lobster processor and exporter in New Zealand behind Fiordland Lobster Company, Ngai Tahu Seafoods, AFL and Leigh Lobster. The acquisition had its genesis from a pan-Maori lobster export market research project referred to as Koura Inc which commenced in April 2010 and concluded in November 2011. Ultimately the market research recommended the formation of a single pan-Maori collaborative sales and marketing vehicle through which Koura Inc parties could participate through the full value chain and develop as well as implement a robust and scale based China market strategy.

249. In the result, AFL and Ngai Tahu Seafoods did not support the proposal. The other participants negotiated and acquired Port Nicholson Fisheries. Iwi investors are involved in all aspects of the value chain. It enjoys significant success.

250. Ngati Mutunga strongly advocates that a new and key role for AFL in the future will be to lead, facilitate and provide the foundations for collaboration between Iwi and AFL for mutual benefit.

251. This of course echoes most if not all of the Iwi submissions received in this Review. I find this to be a compelling proposition. I also find (and recommend) that there should be rationalisation between Sealord and AFL operations to avoid them competing with each other as has unfortunately occurred to date; and I see the need for further rationalisation of the number of participants in the fishing industry in New Zealand. That is the challenge ahead for Iwi Maori and the commercial entities they own (AFL and Sealord its joint venture) to engage in as soon as possible.

## Ngati Porou

252. Three principles were expressed by Ngati Porou as being of most importance in the context of this eleven year review:

i. Direct accountability to Iwi by the entities;

ii. Appointments by merit to the Boards of the entities;

iii. Iwi are capable.

253. The preferred outcomes for Ngati Porou of this review include:

a. The voting shares in AFL are transferred to TOKMTL to Iwi with Iwi having first examined and agreed the value or weight that the voting shares will carry.

b. The AFL income shares held by TOKMTL (20%) are transferred to Iwi.

c. A process is agreed for Iwi to make appointments directly to the Boards of TOKMTL (to the extent it survives), AFL, TPWT and TWNT.

d. TKT be dissolved.

e. TOKMTL's functions and operations are rationalised and it is restructured and renamed as a consequence.

f. The Maori Fisheries Act is amended, and Iwi consider amendments to their MIO and AHC constitutional documents to ease the current restrictions on the disposal of fisheries assets.

254. In my view, these submissions are soundly based. I so find. My recommendations embrace all of them.

255. I am particularly interested in the additional Ngati Porou proposition that there be established an Iwi Working Group to develop and agree on the options for realisation of these outcomes in accordance with the principles of direct accountability, appointments by merit and Iwi capability.

256. Dealing with the third of the principles set out above, Ngati Porou observe that Iwi already have sophisticated governance structures in place and are capable of developing their own commercial strategies as well as managing their Settlement assets free of unnecessary restrictions.

257. In my view, the submission that there be now established an Iwi Working Group (which should be funded by TOKMTL, in my view) tasked with developing the detail around options for the changes to be a sound proposition. Iwi, after all, will at a general meeting called for the specific purpose in or about the middle of this year, vote on actions, proposals, recommendations and resolutions potentially for significant change following this review Report. It has simply not been possible for the detail around a range of options for change,

particularly to respond to the identified changes sought by Iwi, in the time available since late August 2014 and now as the date by which the Review was to have been completed. The entities under review have a discretion, but in my view, should be seen as a requirement in the best interests of Iwi in accordance with the purposes of the Act, to prepare a plan specifying the actions that that entity intends to take to address the findings and recommendations of the Reviewer. That plan is to be distributed to all MIOs and RMOs as well as to TKT and TOKMTL. Then Iwi will consider at a general meeting of TOKMTL: the Review Report, any plan prepared by of one or more of the entities under review; any comments from MIOs on the review Report or on any plan and any comments from TKT. The timeframes are, to put it mildly, so tight as to almost be oppressive.

258. A significant amount of work is required. The 60 working day requirement for a general meeting of TOKMTL under s.127 of the Actis mandatory. It makes very good sense to me that there be established an Iwi working group to undertake the detailed work required: The devil is in the detail.

259. This is a watershed time. It is the preface to a new phase in delivery of the benefits of the triumphant fisheries Settlement to Iwi and thereby to all Maori. The Ngati Porou proposal for an Iwi Working Group I adopt as a specific recommendation.

## Te Arawa

260. Te Arawa complains that its influence over the process for the appointment of Board directors to TOKMTL is so indirect as to be negligible in practical terms. Te Kawai Taumata is said to add an unnecessary level of complication and disconnection between Te Arawa and TOKMTL and should be disestablished. The level of influence that Te Arawa has over the appointment of the Board of AFL is also far too removed to be effective. Te Arawa's view is that the process for the appointment of AFL Board members should be direct and by Iwi. Te Kawai Taumata and TOKMTL are said to add add a superfluous level of complication and separation between Te Arawa and the AFL Board.

261. The Mata Project together with the initial attempts to purchase Anton Seafoods present to Te Arawa as examples of instances where a lack of cooperation between AFL, TOKMTL and Sealord resulted in lost opportunities to the detriment of Iwi shareholders/beneficiaries. In the Te Arawa view, governance arrangements and agreements that facilitate cooperation between entities in the ultimate interest of Iwi shareholders/beneficiaries are necessary.

262. There is a strong case for Iwi shareholders having a greater level of influence over matters significantly affecting their investment. Not just consultation, but approval by Iwi shareholders should be a necessary condition of a shareholders' agreement where a major change event is in prospect.

## Te Taitokerau

263. Seven of the Taitokerau MIOs, representatives of whom I met at a hui with Ngapui at Kohewhata Marae in Kaikohe on 19 September 2014,later presented a comprehensive written submission to me. It was of interest to me that these seven Iwi entities had, like others, given attention to the contents of the 2013 publication by Te Putea Whakatupu Trust *"A strategy for the Maori fishing industry"*

264. The seven Te Taitokerau Iwi entities submitted that the overarching director appointment processes and other governance arrangements did not provide a direct accountability back to the eventual shareholders in the companies, the MIOs, and their beneficiaries. It was submitted that they do not provide for optimum commercial capacity among those who make appointments and scrutinise performance. The submission noted that the interests of AFL/ Sealord and MIOs suffered from a disjunction or lack of alignment described in detail in the TPWT published strategy paper. Te Taitokerau Iwi observed that the interests of quota owners

who were not involved in the full extent of the value chain (harvesting, processing, marketing) seek maximum returns through ACE prices. Those in the value chain, benefit from low ACE prices. Whilst acknowledging that determining cause and effect is difficult, Te Taitokerau Iwi entities submit that a structure in which the accountability is remote from the end beneficiaries with incentives which also may be different for decision-makers from those of MIOs can be problematic, either actually or perceivably. I accept the force of this Te Taitokerau submission.

265. Te Taitokerau Iwi observe that direct ownership of shares may only result in a limited number of shareholder powers subject to covenants to be contained in a shareholders' agreement. By and large, the direct ownership of shares (in the case of AFL both voting shares and income shares potentially are perfectly able to be held as one class of share, the voting shares currently held by TOKMTL now allocated to Iwi in accordance with the allocation model for the income shares), the principal roles are the appointment and removal of Board members or the sale of shares (shareholders voting with their feet). As Te Taitokerau Iwi point out, collective decision-making by shareholders could usefully point to the desirability of a shareholder group to undertake an overview of the company performance. Such a shareholder group, the existence of which was considered at the time the 2004 Act was before the Select Committee as a Bill, could in my view be formalised in a shareholder agreement.

266. It also follows that a group of between three and five or six Iwi could hold most of the shares on a percentage basis in AFL and together determine many outcomes. This is not unusual. Groupings of Iwi acting collectively will make decisions, no doubt, which reflect the fact that collectively they have more at stake or at risk by the company's endeavours. In my view, collective Iwi interests will likely exercise a degree of influence congruent with the size of their collective shareholding. But in any event it does not go without saying that big Iwi will simply trample upon little Iwi or collective groups of Iwi will trample on the rest: I was particularly encouraged by the strong submission from Ngati Porou which was that the values of tikanga Maori dictate that the weak are protected by the strong and the small protected by the big. That is an expression I have heard on the marae frequently enough as an exercise of *manaakitanga* itself a function of *rangitiratanga.*

267. Te Taitokerau Iwi proposed that consideration needs to be given to an ability for Iwi to trade fisheries assets on the open market in the same way as, for instance, land provided through Treaty settlements to Iwi can be sold on the open market rather than a restricted Maori pool or Iwi market. I have earlier dealt with the argument that an internal Iwi/TOKM group/Maori market is not the same as the open competitive market and values might be consequently depressed. This may be particularly so in relation to quantities of quota held by MIOs for some species which are small and uneconomic and for which ACE cannot, on its own, be easily traded. Taitokerau Iwi urge that consideration be given to an ability for Iwi to trade fisheries assets in much the same way as other Treaty assets.

268. In the result, after careful examination, I do not find this submission persuasive. I do, however, consider that there must be new processes and procedures of greater flexibility and ease to enable trading in the Maori pool along with careful consideration of other major restructuring proposals for AFL in order to eliminate as much as may be possible potential for suppression of value of quota and other fisheries assets within the Maori pool driven out of a major restructuring of AFL.

269. Iwi of Taitokerau noted with concern the fact that the declining performance of Sealord had led to its quota being used as collateral for borrowing, thereby putting it at risk. Taitokerau Iwi noted that the intent of the 1992 Treaty Settlement, after much negotiation, was to provide Iwi with 10% of the then existing quota and 20% of future quota. The Crown, however, was unable to purchase sufficient of the existing quota and the Sealord deal was a compromise resolution reached. A 50% share of Sealord was essentially a proxy for the unobtainable quota expected in the Settlement. The deal was more attractive because

Sealord held a large parcel of quota viewed by Iwi as effectively a substitute settlement quota. But for that Sealord quota held by the company at the time of the 1992 Deed, there is no statutory recognition of it as Settlement quota. The Sealord quota and for that matter AFL quota not fitting into the category of Settlement quota, can be and has been traded. This has drawn concern and criticism. The very distanced and indirect Iwi shareholder capacity as owners on the one hand and the managers on the other, exacerbate for Iwi a feeling that they are very far removed from control of their own assets.

270. So if I return momentarily to the Terms of Reference as the backdrop, touchstone and litmus test to all of the matters being considered in this Review, I do consider that the performance of the entities in terms of accountability and alignment with Iwi aspirations and objectives, is compromised by the current governance arrangements, including current voting share ownership arrangements extending to 20% of the income share ownership arrangements.

## Waikato-Tainui te Kauhanganui Inc

271. Waikato-Tainui te Kauhanganui Inc is the MIO for Waikato-Tainui. Its principal submissions are:

i. There should be a full commercial review of the capital structure of AFL to enable greater alignment and co-operation between AFL and Iwi and particularly to identify capital structure options for the future;

ii. Income shares held by TOKMTL be distributed to Iwi based on the proportion of the current holdings in AFL;

iii. Voting shares in AFL be converted in order to merge income and voting shares to full voting, income and representation shares, distributed to Iwi and with Iwi then to undertake direct appointment of directors to AFL;

iv. In the circumstances, Waikato-Tainui proposes a full review of TOKMTL and as appropriate a winding-down or reduced role and the distribution of assets be undertaken. Waikato-Tainui notes that outstanding allocations are virtually complete; the advocacy role of TOKMTL to date would now best sit with Iwi to enable Iwi to be in charge of their own destiny or alternatively that TOKMTL undertake a significantly reduced and purely an administrative statutory role accountable to all Iwi and, if necessary, a commercial advocacy role to represent those Iwi who determine it appropriate. A new funding model would be required if TOKMTL was retained for that purpose;

v. Iwi be given a more *"direct line of sight"* across the appointments for TWMT and TPWT but neither should be wound-up;

vi. Existing provisions relating to the disposal of Settlement assets should be retained. Waikato-Tainui identifies a particular concern in relation to the current status of Sealord quota and considers that a review of that status should be undertaken to ensure there are protection measures in place, as in the case of Settlement quota, to safeguard the Sealord quota for the future. Waikato-Tainui advocates that consideration should be given to reclassifying Sealord and AFL quota as *"Settlement quota"* in order to enhance its protection from loss.

## TOKMTL REPORT TO THE REVIEWER

272. TOKMTL provided a comprehensive written report for this Review. It was expressed as a paper to form the basis for discussion between the Reviewer and TOKMTL. In the course of the last six months I have had a number of detailed, robust and very helpful discussions with the CEO and CFO of TOKMTL. I have met, on more than one occasion, with the Board of TOKMTL and in particular had the benefit of a comprehensive one-on-one discussion with the Chairman of TOKMTL on 16 December 2014. More recently – 29 January 2015 – I had a lengthy discussion of all issues arising under the Review with the Chief Executive; and *"covered off"* some additional points with the Chief Financial Officer in February 2015. Throughout I have been assisted by these in discussions, as also by the provision of information through staff of TOKMTL including in-house legal counsel to TOKMTL. I have had the full co-operation of all other staff and management when seeking information relevant to the Review. I have received the utmost courtesy, support and assistance from everybody at TOKMTL and I take this opportunity to record my grateful thanks to them all.

273. The essential submissions to me from TOKMTL are:

a. Te Kawai Taumata (TKT) has appointed a good blend of directors to the Board of TOKMTL which is a testament to the success of Te Kawai Taumata in carrying out its role to ensure the Board of TOKMTL collectively possesses a set of skills to assist it to govern for the benefit of all Iwi. It is suggested by TOKMTL, however, that Iwi do not fully understand Te Kawai Taumata's role, nor the significant influence Iwi can exercise within the existing governance arrangements for TOKMTL and, through it, AFL. I am told that it is now proposed that at the first meeting of TKT in any year the executive management team of TOKMTLwill – presumably to assist TKT to decide on the skills-expertise-experience mis required for the TOKMTL Board – *"brief members on TOKMTL's medium term strategy and current work plan".*

b. In the ten years since the Act has been in place TOKMTL has transferred $543m worth of fisheries assets to Iwi. TOKMTL tells me it has placed priority on allocating the remaining assets by 2016. Most importantly, TOKMTL submits to me that it does not consider that changes to TOKMTL's current governance arrangements would, or could, have accelerated the process by which such progress has been achieved.

c. TOKMTL, as corporate trustee, points also to its discharge of its responsibilities to protect and enhance the interests of all Iwi – both large and small – in respect of the fisheries settlement. It is submitted to me by TOKMTL that the existing governance arrangements enable TOKMTL to do this as well as to continue to discharge its obligations to protect and enhance the fisheries Settlement through the income TOKMTL receives from the investment of its capital and from dividends yielded by its 20% AFL income shares.

d. TOKMTL submits that the concept of a centralised management model under an apolitical Board should not be changed; that the separation of Iwi politics from commercial governance has been largely successful. TOKMTL does submit that the performance of Sealord and its effect on AFL's bottom line has been cause for concern for Iwi and for TOKMTL. However, it is now submitted to me that both Sealord and AFL are working more closely together for mutual benefit and ultimately for the benefit of their shareholders; they are demonstrating an increase in responses to Iwi and that the performance of both Sealord and AFL has improved significantly in 2014. TOKMTL suggests there should be a significantly greater alignment between Sealord and AFL, improved accountability arrangements for Sealord with AFL; and that AFL's appointed directors on the Sealord board should be largely made up of either directors on the AFL board and/or AFL's chief executive. In particular, it is put to me, that such a change would help create better information flows and relationships.

e. Both Te Wai Maori Trust (TWMT) and Te Putea Whakatupu Trust (TPWT) are said by TOKMTL to be delivering benefits. However, as is apparent also from my discussions with the directors of TPWT in particular, both are also said by TOKMTL to have encountered problems achieving their objective because of directors difficulty in working together and gaining a quorum when they meet. The quorum required under the Act is equivalent to the full number of directors. TOKMTL note that problems which have arisen have either been addressed, or can be addressed, within the existing governance arrangements, although in relation to both TPWT and TWMT, legislative change is necessary to provide that the number of directors of each, sufficient to achieve a quorum for the transaction of business , be reduced to ensure the number required for a quorum is less than the number of appointed directors.

f. Finally, it is submitted to me by TOKMTL that current government arrangements are not *"broken"* and therefore no change is needed.

274. In light of the fact that I have appended the full Report to me from TOKMTL I do not repeat its contents here in the body of the Report. I record that at my 4 hour (plus) meeting with TOKMTL Chief Executive Peter Douglas on 29 January 2015, we robustly debated all of the issues I have covered in this Report on the basis of the preliminary views I had by that date formed. Peter Douglas engaged in a most constructive fashion with me over the issues. Differences in our respective views were revealed and canvassed; as were similarities. In the result, on matters over which we differed, I was not persuaded to a different view to those expressed in this Report.

275. From the written information provided to me in this Report and the discussions I have had with TOKMTL, I detect that TOKMTL is unfortunately rather out of step and touch with Iwi as the beneficiaries of the Settlement. In one respect this is a product of the successful allocation by TOKMTL of Settlement assets to Iwi. Iwi have moved forward and away from TOKMTL. There is less or no reliance on TOKMTL as there once was. This is simply part of the anticipated evolution.

276. In supplementary information provided for the Reviewer towards the end of 2014, TOKMTL proposed that the Review also consider the duties of TOKMTL in respect of the aquaculture settlement. I do not agree and I have not engaged in those issues. I have allowed for the fact that there are continuing statutory duties under a different statute for TOKMTL and in respect of a different set of beneficiaries established under that Act for which a reconstituted body will be required if, as I recommend TOKMTL is to be wound-up.

277. Other submissions were made by TOKMTL in respect of a number of matters including the Fisheries (Foreign Charter Vessels and Other Matters) Amendment Bill and subsequent legislation, free information flows to and from Iwi in accordance with earlier auditors' recommendations, why TOKMTL does not consider a user-pays approach would enable TOKMTL to carry out its functions, how TOKMTL has expressed its concerns to AFL about its relationships with Iwi (noting this is probably more historical than the last year or two).

278. I have taken this supplementary information into account in completing my Review.

279. Another matter I have considered for the purposes of this Review is the somewhat intricate (now historical) machinations of what is known as Project Mata put forward for approval by the AFL in 2011. TOKMTL had recourse to its 100% of the voting shares in AFL to vote down that project. The proposal involved the transfer of inshore fishing business assets (all wet fish quota predominantly snapper and tarakihi excluding paua, lobster and oyster operations) of AFL to Sealord in exchange for a 24.8% direct shareholding in Sealord. AFL would retain a 50% shareholding in Kura Limited with Nissui; Kura would hold 75.2% of an enlarged Sealord; Nissui would retain 50% control of Sealord through Kura Limited; AFL quota would be transferred into Pupuri Taonga Trust; debt associated with the Mata businesses would stay with AFL.

280. In the result, the project, after independent advice was obtained by TOKMTL, was prevented from proceeding by the exercise of TOKMTL of its voting rights.

281. I do not consider it constructive for me to now second-guess decisions made on the Mata proposal by the Board of TOKMTL. It is an historical event now. I was informed by TOKMTL that at the Hui-a-Tau that followed the decision of TOKMTL to vote down the proposal, Iwi in open meeting supported the decision that had been made.

282. In my view, it matters less whether or not the decision to vote down the project was the right or wrong one (many of those knowledgeable persons involved at the time expressed conflicting views to me). It depends upon to whom one speaks. A collision of views by experienced and well intentioned persons is, now, less important than first recognising that a judgment and decision by shareholders to approve or not approve a major transaction, either by ordinary resolution or significant majority resolution, is properly to be seen as an incident of that shareholding. In the corporate model, if the constitution so provides (by ordinary or special resolution), the shareholders decide. If Iwi Maori were holders of 100% of the voting shares in AFL and had the same rights as TOKMTL had in respect of Project Mata for voting purposes, Iwi may or may not have reached the same conclusion which TOKMTL reached. To make a decision of this kind is a responsibility which accompanies the shareholding.

283. If I was to even contemplate an in-depth analysis of the material on the basis of which the project was put forward as suitable by the parties to it, but denied ultimately by the shareholder in which the rights to approve or disapprove were vested at the time, I would necessarily have to engage in a minute very detailed examination of the pros and cons, to reach a conclusion as to whether the project was likely to achieve its commercial objectives or not – and all for what purpose? On my analysis, the decision to vote down the project by TOKMTL can be seen as a shareholder undertaking its proper responsibilities in that capacity to consider what decision it should make when voting to approve or not approve a particular transaction in accordance with the provisions of the applicable constitution.

284. I have reviewed most if not all of the documentation, exchanges of correspondence, presentations, board minutes and other material associated with Project Mata. I do not intend to reignite the controversy in relation to it. I respect that all parties to the project; the advocacy in relation to it, as well as the final decision made in respect of it, were well intentioned and positions taken because they were considered to be the proper and appropriate ones in the best interests of the beneficiaries of the Settlement.

285. I do, however, make a finding that absent the decision by the voting shareholder to vote down the Mata proposal, the position now would be that AFL's inshore fisheries assets (valued (conservatively?) for Project Mata purposes at $126m), would be beyond the direct control of Iwi.

286. I do not consider an AFL constitutional provision that voting shareholders of AFL be required only to pass an ordinary resolution for approval of major transactions to be a satisfactory approval threshold. I make a finding accordingly. I recommend that, should Iwi resolve to take full ownership of AFL that attention be given to framing AFL constitutional requirements that there be at least a two-thirds majority voting threshold for major transactions contemplated by AFL in the future.

## 2008 AND 2012 MFA AUDITORS' REPORTS

287. As required under the Act, I have considered both the 2008 and 2012 audits completed pursuant to the Act. I invite separate consideration of their reports.

288. Because of conclusions I have reached independently of the 2008 and 2012 audits on the appropriate feature of AFL at the *"delivery of benefits"* level of the Act's architecture, I do not narrate exhaustively on the earlier audits as they relate to AFL. I do not consider any of the findings in the earlier audits require different conclusions, findings or recommendations from those I have reached or made in this Review.

289. I have dealt separately, however, with the issues the auditors raised in both 2008 and 2012 in respect of Te Putea Whakatupu Trust and Te Wai Maori Trust. In my view there has been an inadequate response on the part of TOKMTL to problems which the auditors identified first in 2008 and reiterated in 2012.

290. On the more broad and equally important issue of future planning by TOKMTL, I note that in 2012 auditors recommended:

- *"TOKMTL ensure it has strategies and plans in place so that as far as possible the allocation phase is completed by 2015 and that any gaps in the current arrangements have been identified and the appropriate action taken";* and
- *"Decide how it is going to handle any outstanding allocation issues by the time of the 2015 review";* and
- TOKMTL should *"establish its ongoing role more formally"* and recommended that it *"continue its discussions with Iwi on the ongoing role of Te Ohu Kai Moana and seek agreement on how that would best advance the interests of Iwi".*

291. I have considered the responses of TOKMTL to the observations of the auditors, again as the Act enjoins. See ss.123(a) and (b) of the Act. TOKMTL restated its commitment to completing the allocation and transfer of Settlement assets as quickly as is practicable in its response to the audit report findings and recommendations. TOKMTL identified that the two (only) Iwi yet to establish MIOs as at February 2013 faced *"particular challenges"* which were delaying the establishment of their mandated Iwi organisations. It is clear that TOKMTL was aware in 2012/2013 of the desirability of completing the processes to recognise the last two mandated Iwi organisations and in addition contemplated robust measures to implement, even as a last resort, to encourage Iwi to move through the MIO approval process and minimise the delay in transferring Settlement assets. TOKMTL proposed that it would agree a timeframe with each of the remaining Iwi within which a plan would be developed to progress the establishment of a MIO. That was a plan which was contemplated as being prospectively agreed by mid-2013 along with options to be implemented to ensure neighbouring Iwi were not impeded from receiving their Settlement assets – this by the end of 2013.

292. In fact the position is that still the two Iwi concerned do not have MIOs. I fully recognise the frustration this gives rise to for TOKMTL. The expectation and confidence expressed by TOKMTL to the auditors following the 2012 audit report was not so much misplaced but simply remains unfulfilled. Probably recourse to the more robust options, some of which were identified in TOKMTL's response to the auditors, implemented earlier, may have by now yielded results. I am told, and I accept, that steps now being taken by TOKMTL to try and finesse, finally, MIO establishment and transfer of assets will be further pursued and robustly. It has led TOKMTL to say to me that it would expect those matters to be resolved not by year's end but in fact by the end of next year.

293. I am concerned that once again the timeline continues to extend out. I do not underestimate the difficulties and challenges with which TOKMTL has had to grapple and I do not second-guess decisions made, measures undertaken and to be undertaken. Because I have reached the conclusion that there is now no compelling reason for retention of TOKMTL, there is an even greater incentive on the part of both TOKMTL and the Iwi concerned to resolve outstanding issues of MIO establishment and asset transfer. The potential return of all assets to Iwi upon the winding-up of TOKMTL is surely, in itself, an incentive for these outstanding matters to be resolved considerably earlier than current TOKMTL projections for allocation finalisation.

294. Recommendation 5 from the auditors in 2012 was that TOKMTL should continue its discussions with Iwi on the ongoing role of TOKMTL and seek agreement on how that would best advance the interests of Iwi. In response, TOKMTL said it would continue to use both formal and informal opportunities (see p.20 in the bundle of papers comprising the 2012 audit report and TOKMTL response) to discuss the ongoing role of TOKMTL and obtain information on how Iwi considered it can best advance their interests in the future.

295. My consultation with Iwi Maori around New Zealand has led me to the conclusion that there has not yet been an adequate facilitation of Iwi feedback on the precise issue the subject of the 2012 audit recommendation 5. What was at the heart of that recommendation was the auditors' identification of the importance and desirability of TOKM to continue its discussions with Iwi on the ongoing role of TOKMTL (given significant success in the principal objectives of that body in the allocation of Settlement assets), and thereafter to seek agreement on how that would best advance the interests of Iwi. This Review has in fact seemingly substituted for what formal or informal opportunities there have been since 2012 to discuss openly, fully and candidly the future role of TOKMTL.

296. On balance I take the view that the Review has really given Iwi a very valuable and an additional opportunity to consider carefully their views on the very issue the auditors identified in 2012, namely the ongoing role of TOKMTL, and after caucusing within Iwi and within electoral colleges and other groupings of MIOs, Iwi have through the review process reached a confident expression of what they see, as I say, at best, a very significantly reduced role for TOKMTL in the future. So there has been, in my view, not only an opportunity to consider the issue at the heart of the auditors' recommendation in 2012 but also, through this Review, a clear statement of position by significant numbers.

297. I also had the benefit of considering the TOKMTL annual plan for 2014-15, a number of aspects of which I was able to discuss with TOKMTL senior management. Under that annual plan, which under the statute is to be approved by Iwi (it is unclear whether that has been done yet), TOKMTL set for itself the following objectives for transfer by 30 September 2015:

    i. Population-based assets to 56 Iwi;

    ii. 100% of freshwater Settlement quota to North Island Iwi;

    iii. 90% of coastline based Settlement quota to Iwi.

298. When looked at against a background of the considerable economic benefits which have been delivered to Iwi to date – $543m worth of fisheries assets – and that $49m remains to be allocated, progress can quite properly be described as very good indeed. In my view, TOKMTL has been modest in its self-assessment in that regard.

299. But the position is, and again this is an outcome of the good progress made, that the objectives TOKMTL has set for itself for the annual plan through to 30 September 2015 will see an even further reduced perceived and actual need for TOKMTL to continue. There seems no reason to think that the objectives set by TOKMTL for itself in its annual plan to 30 September 2015 cannot be achieved in accordance with that timeline.

300. The work undertaken by TOKMTL under the Aquaculture Settlement Act and the structures put in place by that Act to achieve the purposes of it, are not part of this Review. Apart from the fact that the work being undertaken by TOKMTL is separately prescribed in this separate legislation, identifies that this important work by TOKMTL is nevertheless not of itself a reason to retain TOKMTL for the purposes for which it was established under the Maori Fisheries Act 2004. Consideration will need to be given to the manner in which an appropriate statutory trustee (which could be a new TOKMTL) under the Aquaculture Settlement Act would be established pursuant to new or amending legislation coincidentally with the winding-up of TOKMTL as statutory trustee for Te Ohu Kai Moana Trust under the Maori Fisheries Act 2004.

301. Benefits identified by Iwi in the consultation round (as well as by TOKMTL) for the future include the prospect that Iwi economic wealth could be created by facilitating greater alignment between Iwi and between Iwi and AFL/Sealord and AFL. Greater integration across fisheries sectors and within the industry could evolve through greater alignment between Iwi, hapu and AFL. Increased Iwi capacity with accompanying increased self-reliance and co-operation, indeed collaboration, between Iwi could enhance the way in which Maori fisheries are managed for the potential of increased wealth creation to be realised. Major initiatives for collaboration between Iwi include the Iwi Collective Partnership (ICP), the limited partnership/general partnership model developed for Port Nicholson Fisheries, AFL initiatives with Iwi, and the more recent Sealord programme “Ihu tu Mai” – partnership.

# OPTIONS FOR LEGAL STRUCTURES FOR IWI CO-INVESTMENT

## Introduction

(1) The progressive transfer of Settlement assets from TOKMTL to Iwi has followed strict legislative requirements for the legal personality and structure for the recipient Iwi organisations of those assets. Generally, these organisations are designed as asset holding entities and many are named accordingly. However, as is now widely understood, the efficient use of those Settlement assets (especially quota) in a way that can fulfil the objectives of the Settlement requires commercial co-operation between Iwi. This has raised the issue of how best to develop suitable legal framework(s) for accommodating such commercial co-operation between Iwi, including the pooling of Iwi quota parcels in support of a Maori fishing industry value chain or value chains.

## Structural Options

(2) The structural options for Iwi commercial joint ventures in the fisheries sector are rather elusive at first blush, especially when they might embrace designs which could include participation of non-Iwi entities subject to different taxation regimes. Some examples of these structural options include:

- A limited liability company;
- A company that is a portfolio investment entity (PIE);
- A company that is a charitable entity;
- A unit trust (that can also be a charity, PIE or neither);
- A group investment fund (that can also be a charity, PIE or neither);
- An unincorporated joint venture, with an incorporated nominee company;
- An unincorporated joint partnership, with an incorporated nominee company;
- A mutual association;
- A partnership;
- A limited partnership.

## Limited Partnerships

(3) The Limited Partnerships Act 2008 came into force on 2 May 2008 (nearly four years after the Maori Fisheries Act 2004). The Act repealed the special partnership provisions of the Partnership 1908. The key features of Limited Partnerships are:

- **"Separate Legal Personality:** *Like a company, a limited partnership has a separate legal personality from its owners (the partners). This helps protect investors from losses and claims arising from the business activities of the limited partnership.*
- **Flow Through Tax Status:** *Like a general partnership, a limited partnership is transparent for tax purposes so losses and gains are attributed to partners directly, in the manner agreed between them (although the maximum loss claimable in New Zealand is the total capital contributed plus any guarantees given in favour of the limited partnership).*
- **Partners:** *A limited partnership must have at least one general partners and one limited partner at all times…*

- **General Partners:** *The general partner is responsible for the management of the limited partnership (and can broadly be likened to a director of a company). The general partner has the authority to bind the limited partner and is an agent of the limited partnership...*
- **Limited Partners:** *Limited Partners are usually passive investors in the limited partnership … Limited partners cannot take part in the management of the Limited Partnership.*
- **Registration and Limited Partnership Agreement:** *A limited partnership is formed on registration with the Registrar of Companies. On registration, the general partner must certify that the limited partnership has a written limited partnership agreement, detailing as a minimum the matters set out in the Act (which broadly cover assignment of interests, entry and exit from the limited partnership, meetings and entitlement to distributions…Because there is a requirement for each limited partnership to have a written agreement, there is plenty of scope for a limited partnership to be self-governing within the confines of the Act."*[32]

## Use of Limited Partnerships by Iwi

(4) The general features of the Limited Partnership regime have proven to be very suitable for some Iwi joint ventures. It appears an increasing number of these arrangements are being employed by Maori. The attractions are: their limitation of liability, transparency, flow through tax status, the extraordinary flexibility available to customise the Limited Partnership agreement and its applicability to any type of commercial venture. Port Nicholson Fisheries LP (PNF) is a notable example drawn to my attention and most helpfully explained to me at one of my first consultations with PNF Board and management on 12 September 2014. The structure has also been used by the Tamaki Collective and Ngai Tahu. The Iwi participants in PNF wanted to co-operate in full participation throughout the lobster value chain whilst retaining individual ownership of lobster quota.

(5) Specifically Iwi had following structural objectives for PNF:

To allow for each party to own all Settlement and non-Settlement quota within their individual holdings;

- To allow for effective, efficient and representative governance;
- To allow for new parties to be easily introduced – both Maori entities with settlement and/or non-settlement quota and other institutional investors;
- To facilitate timely quota acquisitions against strict investment criteria;
- To allow for the benefits of collective negotiation of quota acquisition opportunities in an efficient manner while providing for separate ownership of any quota that is purchased;
- To allow for the benefits of collective negotiation of debt whilst providing for the debt to be held separately;
- To be tax efficient for all parties.

(6) The Limited Partnership structure was found to be the best way of accommodating these objectives. The flexibility of the arrangement was further enhanced by splitting the business of ownership of facilities from the operating lobster business.

32 Reference: Investment made easier – the Limited Partnerships Act 2008 – publications – Chapman Tripp

302. Working with Iwi has been a challenge for TOKMTL. The TOKMTL report to me observed that the statutory trustee considers that the scope of the work it does to protect and enhance the Settlement does not appear to be well understood by Iwi. It is said that communicating their work, particularly policy work, is challenging. During my consultation round I encountered many concerns from Iwi about a disconnect (my word) between Iwi and TOKMTL. A lack of communication from TOKMTL was a frequent complaint. In my view, communication is a two way street. If one party to a key relationship (which must be an accurate description under current governance arrangements as between Iwi and TOKMTL) seems not to be communicating effectively, the other of them has an obligation, in my view, to do something about it.

303. That said, my overall view of the relationship between TOKMTL and many of the MIOs and AHCs is that it is a very distanced one. TOKMTL clearly has significant stewardship responsibilities in relation to the Settlement, but the responsibilities accompanying that stewardship must continuously evolve according to developing circumstances. The relationship between TOKMTL and Iwi must, necessarily, change after allocation of assets to Iwi from that which prevailed prior to such allocation. Once the obligation to transfer fisheries assets to Iwi had been discharged, the stewardship responsibilities of TOKMTL alter. Its primary stewardship responsibility at that point, it seems to me, is to stay very close to Iwi assisting Iwi in achieving their aspirations and objectives of rational use of the fisheries Settlement assets and to very intimately understand how TOKMTL can assist Iwi in these endeavours.

304. Taking an overarching responsibility for durability of the Settlement is a most principled approach, and I agree with it. But the question is how that is to be undertaken in practical terms over the timeline of continued Iwi development. Leadership at this time requires expressions of confidence in Iwi – putting *"wind in their sails".*

## WHAREKAURI – REKOHU – CHATHAM ISLANDS: THE CONTINUING SPECIAL CASE

305. The Act makes special provision and allocations for the Chatham Islands, more particularly the Chatham Zone which is defined under s.142 and, consequentially, imposes a particular allocation formula under that section for Chatham Iwi being Moriori Iwi and the Ngati Mutunga (Chathams) Iwi.

306. Both Ngati Mutunga o Wharekauri Iwi Trust, and Hokotehi Moriori Trust made submissions in the Review. Both submissions drew attention to the special case of the Chatham Islands, recognised in the legislation.

307. I undertook a comprehensive visit and a number of hui on the Chatham Islands in early November 2014. I inspected fishing factories and facilities at Waitangi, Kaingaroa, Owenga and Port Hutt, including some AFL (Moana Pacific) facilities which have now fallen into disuse and disrepair. There are some significant health and safety issues to which I drew AFL's attention. The response from AFL management was responsible and constructive. I recommend that AFL engage with Chatham Iwi and the Island communities on these matters.

308. I discussed a number of the important issues arising and information gleaned, on this visit with senior management of AFL. I acknowledge that AFL has taken or is taking a number of steps and initiatives to develop its support for Maori fisheries on the Chatham Islands, including, as I understand it, a Limited Partnership (LP)/General Partnership (GP) structured "investment" with Ngati Mutunga o Wharekauri and Hokotehi requiring minimal capital investment but representing enhanced co-operation between AFL and Iwi. I understand there is an agreed aspiration for this new commercial arrangement, in particular that it will overcome the problems associated with the "traditional beach competition" prevailing

on the Chathams at present. This is particularly important in the paua fishery on the Chathams but not limited to that fishery. It is an encouraging development: it impacts on the performance issues I am considering in this Review.

309. AFL/Moana Pacific owns and controls more of the Chatham Islands high value inshore quota specie (paua, rock lobster and blue cod) on the Chathams than both Moriori and Ngati Mutunga combined. Part of the history is that when the Treaty of Waitangi Fisheries Commission purchased shares in Salmon Smith Biolab in the 1990s, the assets secured including Chatham Islands assets became post-Settlement assets and were allocated accordingly on a population basis. Ngati Mutunga o Wharekauri and Moriori on Rekohu received a very small percentage of that quota. The end result is that Ngati Mutunga and Moriori have effectively had to compete with Moana Pacific/AFL in the traditional Maori/ Moriori Chatham Islands fisheries.

310. Understandably, this remains a major grievance for both Ngati Mutungu and Hokitehi on the Chatham Islands. In my view it should be addressed in the context of para.3(a)-(c) inclusive of the ToR. The constitutional (Act prescribed) requirement of AFL (through its sub-company Moana Pacific) to work co-operatively with Iwi on commercial matters ("best endeavours") arguably compels that for the special case which the Chatham Islands represent, special steps to recognise the Islands' virtually total economic dependence on fisheries, should be taken by AFL to co-operate more fully with the Chathams Iwi. I so find and recommend.

311. One of the ways in which this issue can be addressed is for AFL/Moana Pacific owned quota to be transferred to Chatham Iwi (defined in the Act). This is consistent with other propositions I have found to carry considerable force namely, that both ownership and use of quota could be rationalised in Iwi hands rather than residing only in AFL, to the commercial benefit of both. Another option is to consider the implementation of the LP/GP proposal referred to above.

312. I recommend that a dedicated AFL/Chatham Iwi taskforce be established immediately, funded by AFL, to co-operatively address options for solutions to this and all other Maori fisheries issues arising on the Chathams – including those of concern to which I drew specific attention to AFL management following my November 2014 visit to the Islands.

313. For the longer term, I recommend there be established a permanent Chatham Iwi/AFL Fisheries Roopu to actively engage in the development of Iwi (collective and individual) interests in fisheries, fishing and fisheries-related activities on the Chathams in a manner which can yield to AFL and the people of the Chathams' continuing and meaningful benefit.

## CONCLUSION

314. In this Review I have focused closely on the manner in which the phrase *"for the benefit of all Maori"* should be interpreted and applied. I have concluded that this provision in the context of s.3(1)(b) particularly, and in the context of the Act more broadly, at least enables, if not legitimately requires (and certainly justifies) that Iwi, as the principal entities to receive the allocation of the Settlement assets, have the right to identify and define the kinds of benefits they seek from the allocation model; and having done so, the next question is what is the optimum governance structure which will deliver to Iwi, collectively and individually, those Iwi defined benefits, for the best outcomes for their interests in fisheries, fishing and fisheries related activities. Indeed, this is almost precisely the proposition put to me by the Hon Shane Jones, former Chairman of Sealord and Chairman of the Treaty of Waitangi Fisheries Commission, in its earlier manifestation, and one of the architects of the allocation model in the 2004 Act. It is a sound *"litmus test"* in my opinion.

315. There is an additional overarching discipline which must be applied to full expression of Iwi wishes in order to maintain the durability and enduring value of the fisheries Settlement into the future: it is the voice of those Iwi who unconditionally declare and commit to a full and ongoing investment in Maori commercial fisheries and the fishing industry which should be listened to and delivered upon.

316. There are significant Iwi Maori success stories in commercial fisheries businesses. Total equity by Maori in commercial fisheries assets approaches, net, NZ$1B. In order to secure the best economic return from that investment Iwi must fully commit to achieving that best available return. There is little point, in my view, of having any of the Maori commercial fisheries assets held by Iwi who are either disinterested in or disenchanted by, or either unwilling or unable to fully commit to achieving the best commercial return for those fisheries. I have attempted to depict the Iwi Maori *"window on the world",* and the significant commercial opportunities it represents, in the illustration on the following page.

317. Iwi can choose. In the contemporary setting of very significant historical Treaty settlements being vested in Maori post-settlement governance entities by legislation sanctioned by Parliament, Iwi are free to choose into which of the assets they now hold they will to invest their energy. If it is not fisheries assets, then, in my view, the processes and procedures by which any Iwi which elect not to commit fully to the strongest possible commercial and economic returns from fisheries assets owned by them should be able to dispose of them, albeit, as I have determined and recorded elsewhere as appropriate, only within what I describe as "the Maori pool". Iwi should be free to quit their fisheries assets within the Maori pool if they do not wish to commit fully to the economic and financial strategic positioning by Maori of those assets for best return.

318. This next phase in the delivery of the benefits of the Fisheries Settlement of 1992 to the best advantage of all Maori represents a significant opportunity for leadership and enterprise in Maoridom. I was left in no doubt from my many hui and very constructive korero around the country that Iwi Maori fully recognise the opportunity this Review and the next phase represent. I have no doubt that Iwi Maori are ready for the challenge and within Maoridom there is the leadership and commitment to enterprise with accompanying ability, capacity and capability to achieve optimum outcomes.

319. The Maori fisheries story is generally a very successful story across the motu.

320. The question now as a preface to the next phase of development of successful outcomes in Maori fishing might be as simple as asking:

> *"Has the time arrived for Iwi Maori to now exercise all the rights and responsibilities of full ownership of their Settlement assets."*

*"Window on the World"* **illustration**

**What is the next step in the fulfilment of the aspirations & purposes for the allocation model prescribed by the Act to allocate fisheries assets to Iwi Maori for their ownership and control in a manner ultimately for the benefit of all Maori**

321. I have no difficulty answering that question in the affirmative.

322. The 1992 Fisheries Settlement re-established the relationship between the Maori people and their natural resources (in this case fisheries). The Treaty itself and the fisheries Settlement also recognised the strength and nature of the relationship between Maori people and their taonga – fisheries specifically – which is a relationship, of itself, essential for the maintenance of Iwi identity. Now that the fisheries Settlement assets secured through the pan-Maori fisheries settlement process have been (all-but fully) allocated, at least one of the questions is – is it enough that Iwi have ownership of that assets but that several of their other assets are still centrally managed? In my view, it is not enough. That much in my view is demonstrated by the way in which Iwi fishing enterprises have successfully applied those assets thus far allocated to a variety of business models for financially sound outcomes.

323. It is to full ownership which Iwi must now be able to go. Iwi can resolve accordingly, as the Act allows.

324. Then it is the use to which those assets are put which is crucial to the maintenance of the identity of Iwi, individually and collectively (whom the law has determined are to be the recipients of the benefits of the settlement in a manner ultimately for the benefit of all Maori), which is crucial to ongoing success. The question of **whether** Iwi should have the assets has already been answered – in the 2004 Act. The next question which follows logically is, when are Iwi to have the rights of control of those assets?

325. I have reached a very clear conclusion that the time is now. That is my overarching finding. The framework ushered in by the 2004 Act requires change in my view to allow the continued expression of Iwi identity and to facilitate their management of their assets as an incidence of ownership. There should be (and can be) a full expression of *te tino rangatiratanga* by a new framework still crafted so as to protect the durability of the Settlement. It is appropriate that ownership, governance and management arrangements into the future change so to maximise the influence of those whose assets they are over strategic positioning, economic development, economic management, values-based decision-making and corporate objectives for the very purposes the Act prescribes.