Our guidance on the development of Aorere ki uta Aorere ki tai – Tasman Environment Plan

Te Ohu Kaimoana

Contents

This is our guidance on the development of Aorere ki uta Aorere ki tai – Tasman Environment Plan

1. We are responding to the opportunity to provide guidance to the Tasman District Council on the development of Aorere ki uta Aorere ki tai – Tasman Environment Plan.

2. We have structured our response as follows:
    - First, we set out who we are and the reasons for our interest in development of Aorere ki uta Aorere ki tai – Tasman Environment Plan
    - Second, we describe the Te Hā o Tangaroa kia ora ai taua, as the foundation of our advice.
    - Third, we outline our guidance
    - To conclude, we provide our recommendations.

3. We do not intend our response to conflict with or override any response provided independently by Iwi, through their Mandated Iwi Organisations (MIOs), Iwi Aquaculture Organisations (IAOs) and/or Asset Holding Companies (AHCs).

We are Te Ohu Kaimoana

4. Te Ohu Kai Moana Trustee Ltd (Te Ohu Kaimoana) was established to protect and enhance the Deed of Settlement. The Deed of Settlement and the Maori Fisheries Act 2004[1] are expressions of the Crown's legal obligation to uphold Te Tiriti o Waitangi.

5. Our purpose, set out in section 32 of the Maori Fisheries Act, 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
    b) further the agreements made in the Deed of Settlement
    c) assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi
    d) contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement."

[1] Māori Fisheries Deed of Settlement 1992. The Deed is given effect to by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and the Māori Fisheries Act 2004.

6. We work on behalf of 58 mandated Iwi organisations (MIOs)[2] who represent Iwi throughout Aotearoa. Asset Holding Companies (AHCs) hold Fisheries Settlement Assets on behalf of their MIOs. The assets include Individual Transferable Quota (ITQ) and shares in Aotearoa Fisheries Limited which, in turn, owns 50% of the Sealord Group.

7. MIOs have approved our Māori Fisheries Strategy and supporting strategic plan, which has as its goal "that MIOs collectively lead the development of Aotearoa's marine and environmental policy affecting fisheries management through Te Ohu Kaimoana as their mandated agent". We play a key role in assisting MIOs to achieve that goal.

Te Ohu Kaimoana's interest

8. Our interest arises from our responsibility to protect the rights and interests of Iwi in the Deed of Settlement and assist the Crown to discharge its obligations under the Deed and the Te Tiriti o Waitangi.

9. Te Tiriti o Waitangi guaranteed Māori tino rangatiratanga over their taonga, including fisheries. Tino rangatiratanga is about Māori acting with authority and independence over their own affairs. It is practiced through living according to tikanga and mātauranga Māori, and striving wherever possible to ensure that the homes, land, and resources (including fisheries) guaranteed to Māori under Te Tiriti o Waitangi are protected for the use and enjoyment of future generations. This view endures today and is embodied within our framework Te Hā o Tangaroa kia ora ai tāua (the breath of Tangaroa sustains us).

10. The obligations under Te Tiriti o Waitangi apply to all statutory decision-makers, whether there is an explicit reference to the Treaty in the governing statute. Of particular note are the comments in the Barton-Prescott case, that "since the Treaty of Waitangi was designed to have general application, that general application must colour all matters to which it has relevance, whether public or private and…whether or not there is a reference to the treaty in the statute."[3]

[2] MIO as referred to in The Maori Fisheries Act 2004: in relation to an iwi, means an organisation recognised by Te Ohu Kai Moana Trustee Limited under section 13(1) as the representative organisation of that iwi under this Act, and a reference to a mandated iwi organisation includes a reference to a recognised iwi organisation to the extent provided for by section 27.

[3] Barton-Prescott v Director-General of Social Welfare [1997] 3 NZLR 179, 184.

Our advice is based on Māori principles

The significance of Tangaroa to Te Ao Māori

11. The relationship Māori have with Tangaroa is intrinsic, and the ability to benefit from that relationship was and continues to be underpinned by whakapapa. Tangaroa is the son of Papatūānuku, the earth mother, and Ranginui, the sky father. When Papatūānuku and Ranginui were separated, Tangaroa went to live in the world that was created and has existed as a tipuna to Māori ever since.[4]

12. Protection of the reciprocal relationship with Tangaroa is an inherent part of the Deed of Settlement – it's an important and relevant part of modern fisheries management for Aotearoa.

We base our advice on Te Hā o Tangaroa kia ora ai tāua

13. Te Hā o Tangaroa kia ora ai tāua is an expression of the unique and lasting connection Māori have with the environment. It contains the principles we use to analyse and develop modern fisheries policy, and other policies that may affect the rights of Iwi under the Deed of Settlement. In essence, Te Hā o Tangaroa kia ora ai tāua highlights the importance of humanity's interdependent relationship with Tangaroa to ensure our mutual health and wellbeing.

14. Māori rights in fisheries can be expressed as a share of the productive potential of all aquatic life in New Zealand waters. They are not just a right to harvest, but also to use the resource in a way that provides for social, cultural and economic wellbeing.

15. Te Hā o Tangaroa kia ora ai tāua does not mean that Māori have a right to use fisheries resources to the detriment of other children of Tangaroa: rights are an extension of responsibility. It speaks to striking an appropriate balance between people and those we share the environment with.

16. In accordance with this view, "conservation" is part of "sustainable use", that is, it is carried out in order to sustainably use resources for the benefit of current and future generations. The Fisheries Act's purpose is to "to provide for the utilisation of fisheries resources while ensuring sustainability." The purpose and principles of the Act echo Te Hā o Tangaroa kia ora ai tāua.

[4] Waitangi Tribunal. "Ko Aotearoa tēnei: A report into claims concerning New Zealand law and policy affecting Māori culture and identity." Te taumata tuatahi (2011).

Our guidance on the development of Aorere ki uta Aorere ki tai – Tasman Environment Plan

17. The distribution of marine biodiversity within the Challenger Fisheries Management Area (FMA7) includes the coastal marine area for which the Tasman District Council has responsibilities under the Resource Management Act 1991. In exercising its functions, the Council has a statutory obligation under s66 of the Act to have regard to plans and strategies approved under other Acts – including the Fisheries Act 1996. It also has a statutory obligation to have regard to the regulatory framework established under the Fisheries Act 1996 to ensure sustainability. These are important obligations for the Council as they are key to achieving integrated management of the natural and physical resources in the Tasman Region.

18. Management of fisheries through the Quota Management System (QMS) is a key strategy enabled by the Fisheries Act 1996, consistent with the Deed of Settlement agreed to between the Crown and Māori in 1992. The Fisheries Act, in turn, provides for the Minister of Oceans and Fisheries to approve a range of plans that enable fine-scale management within the parameters of the QMS and the sustainability measures that support it. If this approach is properly supported by Regional and Unitary Councils taking appropriate steps to manage effects on fisheries, then ecosystem-based fisheries management (EBFM) can be achieved.

19. The management of Aotearoa's fisheries was a matter of widespread concern in the early-1980s. This concern arose from overfishing of inshore stocks for which the Crown had wrongly assumed sole responsibility following the signing of Te Tiriti o Waitangi. The initial response from the Crown to the overfishing was to introduce new legislation in the form of the Fisheries Act 1983 with a focus on central and regionally developed management plans as the means of arresting the decline in abundance of inshore stocks. It was soon recognised that a top-down planning approach would not, and could not, address the problem of overfishing and the Quota Management System (QMS) was introduced as an amendment to the Fisheries Act 1983 in 1986.

20. The subsequent debate during the mid-1980s to early 1990s was fuelled by Māori challenging the Crown's right to allocate quota in perpetuity under the 1986 amendment to the Fisheries Act 1983. The Courts ruled that the Crown could not proceed to introduce further stocks into the QMS until the challenge was resolved. The resolutions to that debate were subsequently legislated for through the Maori Fisheries Act 1989 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992[5].

[5] It was the Maori Fisheries Act 1989 that set up the first iteration of Te Ohu Kaimoana and, following agreement on an allocation model for Settlement assets, the modern-day version of Te Ohu Kaimoana was established under the Maori Fisheries Act 2004.

21. Of note is that prior to the Fisheries Deed of Settlement 1992 (Deed of Settlement)[6] being signed by the Crown and Māori, the Resource Management Act 1991 was passed. In contrast, the Fisheries Act 1996 was passed following the signing of the Deed of Settlement. Related legislation associated with the active management of marine resources was amended to ensure it aligned with the framework set out under the Fisheries Act 1996.

22. This approach meant that the effects of fishing, not only on fish stocks but also on the wider marine environment, including marine biodiversity and key habitats, would be managed under the Fisheries Act, and the adverse effects on fisheries of activities managed under other Acts would be managed under those Acts. The Resource Management Act 1991 was not amended and its role in managing the effects of land-based activity on marine resources was widely understood due to the importance of establishing an integrated legislative framework that enabled EBFM.

23. Importantly, the negotiators of the Deed of Settlement recognised both the role of the QMS and the supporting framework set out in related legislation as enablers of EBFM. The Deed of Settlement expressly notes that the QMS was endorsed by Māori as the primary means for the sustainable management of all commercial fishing. The QMS has always had the potential to manage all forms of marine biodiversity.

24. The Deed of Settlement also obliged the Crown to promulgate regulations to enable tangata whenua to manage customary non-commercial fishing. These are amongst the regulations that s66 of the Resource Management Act 1991 requires the Tasman District Council to have regard to.

25. With the passage of the Fisheries Act 1996, a provision was included that required all decisions under that Act to be consistent with the law that gave effect to the Deed of Settlement. This link was not included in related legislation and hence it is important for ensuring the integrity of the Deed of Settlement that the impact of fishing is managed in accordance with the Fisheries Act 1996 and that responsibility is not devolved to associated legislation.

26. We note that the 2019 decision of the Court of Appeal in *Attorney-General v The Trustees of the Motiti Rohe Moana Trust* (the **Motiti Decision**)[7] raises some uncertainties over the management of fisheries. Most notably, regional or unitary councils may be able to impose limits under the Resource Management Act 1991 on access to fisheries resources where the underlying objective is to protect indigenous biodiversity to achieve the purpose of the Act. However, regional and unitary councils may not impose limits on access to fisheries resources for any purposes of the Fisheries Act 1996.

---

[6] The Fisheries Deed of Settlement 1992 is the predecessor to the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

[7] *Attorney-General v the Trustees of the Motiti Rohe Moana Trust & Ors* [2019] NZCA 532 [4 November 2019].

27. The Motiti Decision did not directly consider the potential impacts of Te Tiriti o Waitangi or related Settlement obligations, including the Deed of Settlement. We envisage the outcome could well have been different if it had considered these matters. We urge the Tasman District Council to give particular attention to the obligations arising from the Deed of Settlement before considering including measures within Aorere ki uta Aorere ki tai that impact on the utilisation of fisheries resources. Notwithstanding that, we support ongoing management of adverse impacts on fisheries and the provision of research related to the coastal marine area to decision-makers under the Fisheries Act 1996.

The status of fisheries within the Coastal Marine Area (CMA) of the Tasman District

28. It is the case that management of fisheries under the QMS (and the attendant regulatory frameworks that the Council must have regard to has resulted in the recovery of many of the fisheries that were overfished prior to its introduction. In broad terms, 82% of the (currently) 160 scientifically evaluated stocks have no sustainability concerns and corrective action is in place for the remaining assessed stocks. Considerable environmental gains have also been made with reduced fishing impacts on the environment resulting from extensive reduction in fishing effort and through introduction of widespread controls aimed at limiting interactions with protected species and significant habitats.

29. Within the CMA of the Tasman region there has been a spectacular recovery of finfish and elasmobranchs that migrate into the bays during the summer months. This includes snapper that come into the bays for spawning and rig that mate in the deeper waters before the females come inshore and release their pups. These two species support important customary commercial and non-commercial fisheries and also provide value to recreational fishers operating in accordance with the amateur fishing regulations.

30. But the health of shellfish fisheries that exist entirely within the CMA of the Tasman region year-round is not so positive. This is most obviously evidenced by the sedentary shellfish fisheries, including cockles (regularly subject to closures due to bacterial and viral risk), scallops and dredge oysters (which both suffer from a lack of abundance due to habitat loss). These are also historically important fisheries for both commercial and non-commercial interests.

Cross sector working groups provide a good sounding board for the health of Tangaroa

31. It is often the case that the management of fisheries that fall within the CMA is supported by dedicated working groups. Such groups are most effective when both agents of the Treaty partnership work together to ensure they are properly mandated and operate in accordance with an agreed terms of reference. Two examples of this in the Tasman region are the snapper and scallop working groups. In each case both Fisheries New Zealand and Te Ohu Kaimoana are involved as the

mandated agents of the respective Treaty partners. Each working group has full access to the peer reviewed science purchased to inform fisheries management. Such access is a feature of Aotearoa's fisheries management system.

32. The snapper working group was established to support the review of the management settings in the SNA7 fishery for the current (2020/21) fishing year. The working group supported an increase in the Total Allowable Catch (TAC) and the Minister of Fisheries increased the TAC in line with that advice. The most recent decision for SNA7 reflected the increasing in abundance in the fishery that has been a feature of the fishery over the past decade. This increase has been confirmed by the science that underpins the setting of catch limits.

33. The scallop working group has been formed to advise the Minister on the reopening of the fishery should biomass levels recover to a level that can sustain fishing once again. As is the case for the snapper working group, Te Ohu Kaimoana is represented on the scallop working group – along with two representatives from the Iwi of Te Tau Ihu.

34. The initial focus of the scallop working group has been on the Marlborough Sounds section of the fishery where the remaining scallop beds are located in the outer areas of the Sounds and in parts of Queen Charlotte Sound. The most recent surveys have revealed a pattern of scallop beds being lost from the mouth of the Pelorus River through to outer Waitata Reach. The loss of beds is associated with a loss of scallop habitat within the Pelorus Sound section of the Marlborough fishery. It cannot be attributed to fishing as the surveys show the decline (and widespread loss of scallop beds) has continued, indeed accelerated, in the absence of fishing. The inescapable conclusion is that the loss of scallop beds is directly related to the deposition of silt and other contaminants derived from land-based activity.

35. The loss of scallop beds in Tasman and Golden Bays had occurred in advance of the fishery being closed, but despite that it is still not showing any signs of recovery. The once productive scallop fishery in Tasman and Golden Bays is now in its fourth year of closure. In the past the fishery has faced similar challenges and through management interventions such as seeding the beds with juvenile scallops (in accordance with an enhancement plan approved by the Minister of Fisheries) the fishery has been rebuilt.

36. However, this time round it is becoming clear to us that the recovery of the scallop (and dredge oyster) fisheries in those areas cannot be achieved by fisheries management interventions alone. More needs to be done to manage the effects of land-based activities and Te Ohu Kaimoana encourages the Tasman District Council to embrace the obligations it has been assigned under the Resource Management Act 19991 and take steps to both address the loss of habitat and actively restore it.

37. The members of the scallop working group have provided Tasman District Council with initial views on the development of the new Aorere ki uta Aorere ki tai. As a member of the working group, Te Ohu Kaimoana endorses those views.

38. Te Ohu Kaimoana has also been provided with a copy of a submission from inshore commercial fishing interests who rely on the marine environment to contribute to the communities social, economic and cultural wellbeing within the Tasman district. We also endorse the guidance provided by them in their submission.

Our recommendations

1. The Tasman District Council carefully consider obligations arising under Te Tiriti o Waitangi and the Fisheries Deed of Settlement before considering any measures that have the effect of controlling fishing within the CMA.

2. The Tasman District Council contribute to the integrated management of the CMA through increasing its focus on avoiding or mitigating the adverse effects of land-based activity.

3. The Tasman District Council contribute to physical seafloor recovery programmes through active participation in in-situ seafloor rehabilitation.

4. We invite the Tasman District Council to participate in the development of a collaborative and integrated approach to management of the marine environment in Tasman and Golden Bay.

Te Ohu
Kaimoana