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## Tena koutou

### MINISTRY OF FISHERIES (MFISH) TREATY STRATEGY - BUILDING BETTER INPUT AND PARTICIPATION PROCESSES

MFish has been working with tangata whenua to develop ways to better provide for their participation in fisheries sustainability processes. We would like to talk to you about options that have been developed as a result of the discussions we have had together. These discussions are part of MFish's ongoing Treaty Strategy work. The Treaty Strategy aims to deliver on the Crown's specific fisheries obligations, within the broader goal of building a strong working relationship with tangata whenua.<sup>2</sup>

It has been some time now since 2002, when MFish talked to tangata whenua around the country about the processes for MFish – tangata whenua engagement on fisheries management issues. Those discussions, which resulted in the establishment of iwi regional forums and the appointment of associated MFish staff, have been in progress since 2004/05. Since 2004 there have been a number of changes in legislation and fisheries management policy. These make it timely to take stock of where we are, compared to where we want to be.

MFish comes to these discussions with an open mind. We would like your response to the question 'what would a good participation process look like?'. We also believe that we can learn from what we're doing currently. The attached paper discusses what we think is working, what's not, and how we can provide better processes for tangata whenua input and participation in fisheries sustainability processes.

In the discussion paper, MFish proposes a response to the question 'what would a good input and participation process look like?'. Some of the characteristics we propose are necessary in order for the Minister of Fisheries to meet the input and participation obligation set down in s12 of the Fisheries Act 1996. These characteristics are fixed, for the time being, although the best way of achieving them is a central part of the discussion. Some of the other proposed features are part of good fisheries management, and we believe there are compelling reasons for their

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<sup>1</sup> The updates in October 2008 reflect the extension of the consultation period, and developments in the Foreshore and Seabed, and aquaculture areas.

<sup>2</sup> A diagram setting out the elements of the Treaty Strategy work are included in appendix 1 of the paper. A summary of the obligations are set out in appendix 2 of this paper.

inclusion. However, we are open to suggestions on the most effective way of achieving good input and participation. We would like to hear your views on:

- What would a good input and participation process look like;
- What's working and what's not working in current processes;
- How can we move forward and make most effective use of the resources available to carry out this work.

Frequently, we hear the complaint that the work to be done is too great for the available resources. Like any Crown agency, MFish needs to work within its means. However, there is some flexibility on the deployment of both personnel and financial resources. We would like to discuss how resources are currently used and whether this is the most effective use to achieve good input and participation by iwi.

We are currently in the process of scheduling hui across the country to discuss these issues with representatives of iwi and hapu who have a mandate to speak on fisheries matters. The hui are taking place over the period August 2008-March 2009. As details of the hui are confirmed with local iwi these will also be posted on the MFish website. (More details can also be obtained by emailing [mfish.policy@fish.govt.nz](mailto:mfish.policy@fish.govt.nz)). Individuals interested in participating in the consultation process should contact their local iwi.

The hui will focus on tangata whenua (as the recipients of the obligation to provide for input and participation), although we will be informing other stakeholder organisations. We will also consult with other groups who have a particular interest in the proposals, such as Te Ohu Kaimoana.

After each hui, we will prepare a summary of issues raised, and return them to participants for their comment. We will also accept written submissions on the matters raised in this paper. The closing date for written submissions is 31 March 2009.

Following the consultation MFish will consider both the ideas discussed in the current paper and any new proposals. Decisions will be mailed to those who receive this paper and posted on the website. We expect this to happen by June 2009.

We look forward to meeting with you to discuss ways to better support your participation in fisheries management.

nga mihi nui ki a koutou

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Fisheries Policy

Ministry of Fisheries

# **Discussion Paper: Building better input and participation processes**

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## **1 Treaty Strategy Vision and Crown Obligations**

The vision for the MFish Treaty Strategy work is:

The Crown and tangata whenua working in partnership to provide for the utilisation of fisheries resources while ensuring sustainability:

- having particular regard to Kaitiakitanga;
- with the Crown fully meeting its legislative and Treaty obligations.

The Crown's fisheries obligations to Māori relate to:

- customary non-commercial fishing;
- customary commercial fishing;<sup>3</sup>
- the aquaculture settlement;
- providing for input and participation in fisheries management;
- having regard to Kaitiakitanga;
- Treaty of Waitangi settlements with individual iwi and hapu; and
- Foreshore and Seabed negotiations with individual iwi.

The Crown's fisheries obligations are being delivered in a number of ways. This discussion paper is primarily concerned with the Minister of Fisheries' obligation to provide for the input and participation of tangata whenua and have particular regard to Kaitiakitanga before making sustainable utilisation decisions (Fisheries Act 1996 s12 (1) (b)). The aim of this paper is to continue the discussion with tangata whenua about:

1. the characteristics of a good input and participation process;
2. progress and problems in building good input and participation processes, and
3. options for moving forward.

We would like your views on these issues. We believe, however, that they are best considered against the backdrop of the vision - your vision - for fisheries management, for the Crown-tangata whenua relationship, and for tangata whenua involvement in fisheries. Thus, we are also interested in hearing about your goals for involvement in fisheries management processes.<sup>4</sup>

## **2 Delivering on the obligation to provide for input and participation – what would a good process look like?**

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<sup>3</sup> The term 'customary commercial' is used to describe those commercial rights that were transferred to Māori received as a result of the 1992 Deed of Settlement. These commercial fishing rights were transferred in recognition of the customary rights guaranteed to Māori under the Treaty of Waitangi.

<sup>4</sup> The discussion on this paper is separate from the engagement the Ministry will be having with iwi on progress and options for delivering on the Crown's obligations under the Māori Commercial Aquaculture Claims Settlement Act 2004. These discussions, which will target Iwi Aquaculture Organisations and Mandated Iwi Organisations, will also occur in the latter half of 2008.

The obligations in the Fisheries Act 1996, the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, the Deed of Settlement and the Principles of the Treaty of Waitangi do not set out a detailed process for involving tangata whenua in fisheries management. Rather, they suggest some principles that can be used to design input and participation processes. We have used these principles to propose a list of characteristics of a good input and participation process. Some of the characteristics should be part of any fisheries management process, such as efficient use of resources and monitoring of results. Others are specific to engagement with tangata whenua.

*We would like to discuss with you whether you believe this list captures the important characteristics of a good input and participation process, which characteristics are most important, and what other features you would include on the list.*

**MFish proposes that a good input and participation process should:**

- 1. bring together mandated representatives of hapu and iwi;**
- 2. integrate all tangata whenua fisheries interests, and particularly customary non-commercial and customary commercial;**
- 3. build tangata whenua capacity to manage their customary non-commercial fisheries and participate in multi-stakeholder management processes proactively and early (at the time of defining the questions, rather than answering them);**
- 4. provide opportunities for tangata whenua to express the meaning of Kaitiakitanga, and build the capacity of MFish to advise the Minister so he/she can have particular regard for Kaitiakitanga;**
- 5. build an effective and efficient working relationship between tangata whenua and MFish;**
- 6. incorporate monitoring and review of the process, including discussion between tangata whenua and MFish on how the process should be developed over time.**

Below, the paper explains why each of these characteristics has been included in the list. It goes on to consider how far current processes display these characteristics, what problems exist, and what options there are for addressing these problems and moving forward.

## **2.1 Bringing together mandated representatives of hapu and iwi**

In the Fisheries Act, the Minister of Fisheries has an obligation to provide opportunities for the input and participation of tangata whenua. In the Act, tangata whenua are defined as the hapu and iwi who hold mana whenua in a particular area (s2). This means that MFish processes to work with tangata whenua should be open to both hapu and their iwi. In order to get sensible outcomes, and to use resources efficiently, hapu and iwi should be involved together, in the same process. In

addition, in working and reaching agreements with tangata whenua, MFish needs to be clear that the individuals they are working with have the mandate to speak for hapu and iwi on fisheries matters (and the scope of that mandate).<sup>5</sup>

## **2.2 Integrating all tangata whenua fisheries interests, and particularly customary non-commercial and customary commercial**

Traditionally, Maori fishers did not distinguish between commercial, customary and recreational uses. The contemporary rights framework, however, divides these rights into separate management categories. This separation was agreed by Māori and the Crown in the 1992 Fisheries Settlement, to assist settlement of Māori claims under the Treaty of Waitangi. Māori customary rights were split into commercial and non-commercial components. In addition to the rights arising from the 1992 Settlement, individual members of iwi and hapu continue to have rights to fish recreationally. With the passing of the Maori Commercial Aquaculture Claims Settlement Act 2004, an increasing number of iwi will also hold rights relating to aquaculture.

Despite the contemporary division of fishing rights, fish stocks are not neatly divided into groups in the water. The activities of one group of rights holders impacts on the activities of others. This means that trade-offs have to be made between different users if all are to achieve a reasonable benefit from the fishery. In a good fisheries management process, those who hold rights are involved in the discussions over the trade-offs between users. It is also more consistent with rangatiratanga and kaitiakitanga if hapu and their iwi decide on the trade-offs between their diverse fisheries rights, and represent this collective view in external forums.

For these reasons, MFish believes the processes for input and participation should bring together representatives from hapu and iwi who have a mandate to speak for both the non-commercial and commercial customary rights. These representatives can then discuss and represent the collective hapu and iwi interest. Ideally, these representatives would also consider interests they or their members might have in aquaculture or recreational fisheries.

## **2.3 Building tangata whenua capacity to manage their customary non-commercial fisheries and participate in multi-stakeholder management processes proactively and early (at the time of defining the questions, rather than answering them)**

Tangata whenua have rights and duties as managers of their customary non-commercial fisheries and as participants in multi-stakeholder management processes.<sup>6</sup> If tangata whenua are to exercise their rights and discharge their duties effectively, they need to do more than just respond to questions set by others. Before considering

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<sup>5</sup> The 2006 'Crown-Māori Relationships Instruments: Guidelines for Government and State Sector Agencies' directs that 'All CMRI are to include clear statements of who the parties are and who they represent, preferably with reference to their accountabilities and relationships' (p17).

<sup>6</sup> 'Multi-stakeholder' processes is used in this document to describe those management processes that bring together representative from all sectors of New Zealand society that have an interest in the sustainable utilisation of fisheries resources, including Māori/tangata whenua, the commercial sector, amateur/recreational sector and environmental groups. The Fisheries Plan Advisory Groups are an example of such processes.

questions set by others, they need to have come together to discuss and articulate their own vision, objectives and strategies, based on their own mātāwhiri, tikanga and kaupapa. This stage is essential if tangata whenua are to represent views proactively and holistically.

To develop their own fisheries vision, objectives and strategies, tangata whenua will need to have a range of resources. Some, resources they already have – such as knowledge of the local environment, fisheries resources and management practices, and processes for meeting and discussing issues. Some resources they may need to build – such as knowledge of multi-stakeholder management processes. In providing processes for tangata whenua input and participation, MFish should be mindful of the need for tangata whenua to build their capacity over time.

Where tangata whenua are participating in multi-stakeholder processes, a key difference that has been identified between input and participation and consultation, is the timing of involvement. Input and participation implies involvement at the time when the questions are being chosen, rather than when the selection is made between a list of answers. Involvement in choosing the questions also implies proactive, not reactive participation, and the need to build capacity to achieve this.<sup>7</sup>

#### **2.4 Provide opportunities for tangata whenua to express the meaning of Kaitiakitanga, and build the capacity of MFish to advise the Minister so he/she can have particular regard for Kaitiakitanga**

The Minister of Fisheries relies on MFish's advice to in order to have particular regard for Kaitiakitanga. Input and participation processes need to expose Ministry staff to the meaning of Kaitiakitanga, and those staff need to work to understand how those values and practices can be incorporated into fisheries management advice. Input and participation processes should build this capacity within MFish.

#### **2.5 Building an effective and efficient working relationship between tangata whenua and MFish.**

Good processes are effective in achieving their aims, and they are efficient - they achieve as much as possible, with the resources available. This characteristic is included in the list so that a range of process questions can be considered. Examples include how to coordinate activity (within MFish, within tangata whenua, and between the two), what is the best mix of engagement methods (large hui, small working groups, internet discussion, and/or written communication), how to ensure early involvement, and how existing processes can interact most effectively (such as iwi regional forums and fisheries plan advisory groups).

The design process also needs to consider how to avoid duplication of effort so that neither party has to constantly repeat themselves. In order not to duplicate effort, the design should consider how it can make use of the existing processes. For example, how the iwi regional forums can draw on existing iwi and hapu processes, and how the forums can interact most effectively with the Fish Plan Advisory Groups.

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<sup>7</sup> Being involved at the problem definition stage is both a capacity issue, and a process design issue.

## **2.6 Incorporating monitoring and review of the process, including discussion between tangata whenua and MFish on how the process should be developed over time.**

All management processes should be subject to periodic review to see whether they are delivering on their objectives, or whether modifications are needed. For input and participation processes, the review should involve tangata whenua. The input and participation process has to be sensible from the perspective of tangata whenua if they are going to commit their time and resources to it. This paper is intended to be part of the conversation with tangata whenua about how input and participation processes should be developed over time.

## **3 Delivering on the obligation to provide for input and participation – what have we achieved, what problems remain and what are the options for moving forward**

### **Overview of achievements to date**

In 2002, as part of its Treaty Strategy work, the Ministry talked with tangata whenua about how MFish could better provide for their participation in fisheries management. The key message received was that MFish should start by improving their underlying relationship with tangata whenua. As a consequence of these discussions, in 2004 MFish put in a bid for new funding. The funds were sought to establish regional iwi fisheries forums and employ additional staff including Pou Hononga (relationships managers), Pou Takawaenga (tangata whenua support persons) and inshore fisheries analysts.<sup>8</sup> The aim for the forums was to bring together and build a working relationship between tangata whenua and MFish staff, and to build capacity on both sides.

MFish was successful in its bid for new funds, and currently, tangata whenua from across the country are participating in forums, or are in discussions about their establishment.<sup>9</sup> Pou Hononga and Pou Takawaenga have been employed and are working closely with tangata whenua on appointing and training kaitiaki, implementing the customary regulations, and providing advice on mataitai. In some areas, work has begun on iwi rohe moana management plans.<sup>10</sup> Through the forums, a wide range of MFish staff from the inshore, spatial allocation, compliance, science and policy teams are meeting, sharing information and exchanging views with tangata whenua.

We believe that considerable progress has been made in building the underlying relationship between tangata whenua and the Ministry. We know each other better

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<sup>8</sup> The new funding also provided for additional compliance staff, mediation, a reference group for the Chief Executive, kaitiaki training, public education and signage, customary data management and administrative support positions. Details of the funding and its best use are discussed later in the paper.

<sup>9</sup> Forums are in different stages of development around the country. In some areas, formal Memorandums of Understanding have been signed between the Ministry and tangata whenua representatives recognising their status. In others, tangata whenua are still in early discussions about what a forum might do, and how it should do it. In this paper, 'forums' is used to groups at all these different stages of development. Appendix 3 sets out how a forum's activities might develop over time.

<sup>10</sup> These are discussed in more detail under characteristic 3 and in appendix 4.

and we have a venue for coming together to work. What we need to focus on now is what that work should involve.

In addition, given the time and experience that has accumulated since work began, it is sensible to check that we still have agreement on where we want to be (the vision), and how we should get there (the characteristics of a good input and participation process). Changes in management (such as the move to fisheries plans) and legislation (such as the Māori Fisheries Act 2004), may also alter the best ways of achieving our goals.

The sections below look at each input and participation characteristic in turn, considering what has been achieved, what the current problems are, and what options there are for moving forward.

### **3.1 Bringing together mandated representatives of hapu and iwi.**

To date, the effectiveness of the input and participation processes in bringing together representatives of both hapu and iwi varies from region to region. This is because the processes for establishing the mandate to represent hapu, and the process to establish the mandate to represent iwi, occur through different processes. Representatives of the customary interests of the hapu are often chosen through the process for appointing kaitiaki / tangata tiaki under the customary regulations. Representatives of the commercial fisheries interests of iwi are being established through Māori Fisheries Act 2004 processes.

In some areas, and in some forums, these parallel processes are coordinated. In other areas, they are not. Sometimes, regional forums may have kaitiaki/tangata tiaki representing hapu, but not iwi representatives. Sometimes, it is not clear who forum participants are representing.

*MFish would like to hear your views on whether it is desirable to bring together the representatives of hapu, and their iwi, in one place in order to balance and realise best value from their fisheries rights as a whole. If you believe it is desirable, we would like to discuss how we can work together to bring these representatives together.*

Because the existing situation differs between regions, so to will the best way forward. As noted above, in some regions this coordination is already happening, and business would continue as usual. In other areas, while forums may not currently have iwi representatives, the iwi organisation may have a constitution that makes it directly accountable to hapu (for example, representatives are chosen on a hapu basis). For these iwi, it should be more straight forward to coordinate hapu and iwi interests on fisheries matters (since there is reasonable agreement on who the iwi organisation is, and who the hapu are).

In other areas there is no direct link between mandated iwi organisations and hapu. (This is possible because it is not a requirement of the Māori Fisheries Act that iwi organisations be explicitly accountable to hapu. The accountability required by the Act is directly to individuals.) In these regions it may be a considerable challenge to

identify the hapu and bring all their interests together at an iwi level, or for iwi to gain a mandate to speak for their hapu on all fisheries interests.

### **3.2 Integrating all tangata whenua fisheries interests, and particularly customary non-commercial and customary commercial**

This issue is closely related to the previous one because, generally, the representatives for customary interests are mandated by hapu, while the representatives for commercial interests are appointed at an iwi level. Again, what is happening currently varies across regions. In some areas forums are already bringing together commercial and non-commercial customary representatives. In others, hapu are representing the customary interest, the mandated iwi organisation is representing the commercial interest, and recreational tribal fishers are represented through recreational/amateur fishing bodies.

*We would like to know if you agree that tangata whenua should bring together and represent their aspirations for their range of fisheries rights in an integrated way. If you agree, we would like to discuss how we can do this – acknowledging that past processes have not always done so effectively.*

If we agree that non-commercial and commercial voices should be integrated, the exact process may vary depending on the task, and across regions. In some cases, it may be considered essential for representatives from hapu and iwi to work together in one forum. In other cases, hapu may be happy to delegate certain tasks to an iwi representative, or to nominate someone to talk to and bring together both iwi and hapu positions. In other situations, iwi may delegate a task to hapu representatives. What is essential is that both iwi and hapu discuss and agree how responsibilities will be shared and coordinated.

### **3.3 Building tangata whenua capacity to manage their customary non-commercial fisheries and participate in multi-stakeholder management processes proactively and early (at the time of defining the questions, rather than answering them)**

#### **Progress and problems**

Around the country, forums (or forums in-the-making) are providing a vehicle for the delivery of information and discussion of a diverse range of fisheries issues. Some of these issues are specific to customary non-commercial fishing, and some to multi-stakeholder fisheries management. Participation in these processes has greatly increased tangata whenua understanding of mainstream fisheries management and MFish understanding of tangata whenua knowledge, practices and aspirations.

Despite progress, there has been concern from some forum participants that they are being overloaded with information and requests for their views, leading to 'forum fatigue'. Because they don't have adequate time or resources, tangata whenua are being forced to respond in a fragmented and reactive manner, and in some cases, are unable to respond at all. There is a concern that forums are acting as venues for MFish to consult with tangata whenua on Ministry proposals, rather than platforms for tangata whenua to formulate their views and help set the questions for discussion.

*We would like your views on your current capacity to participate in fisheries management decisions via forums, what the key problems are, and how things could be improved.*

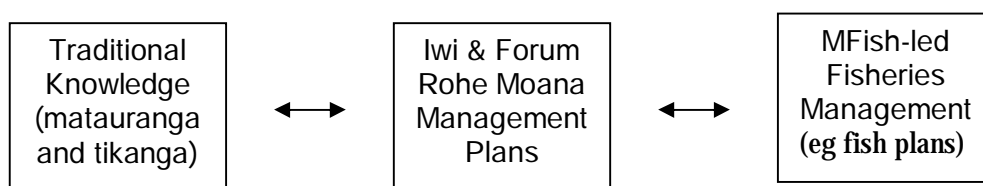
### **Options for moving forward**

We believe there are a number of possible ways of increasing tangata whenua ability to participate effectively, and MFish capacity to support participation and have regard for Kaitiakitanga. One possibility is the more systematic development of iwi rohe moana management plans. Another is to discuss whether the Crown resources being directed towards input and participation are being used in the right way.

#### *Rohe Moana Management Plans*

A number of iwi and hapu around the country are planning, have begun, or have completed work on the development of rohe moana management plans.<sup>11</sup> We are interested in discussing their more widespread use. MFish believes these can be a valuable resource for tangata whenua to manage matters under their control, and to participate in multi-stakeholder fisheries management in a proactive, holistic way. The plans would provide a context for hapu and iwi to set out and reconcile their non-commercial and commercial objectives, so they maximise the value they achieve from their fisheries rights as a whole.

Through rohe moana management plans, iwi and hapu could explain the meaning of Kaitiakitanga so the Minister can have regard to it when making decisions. The plans would strengthen the bridge between two distinct processes - the knowledge and practices which tangata whenua have traditionally used to manage their interactions with the marine environment, and the knowledge and practices which are used in MFish-led fisheries management.



**Figure 1: Rohe Moana Management Plans acting as a bridge between traditional values, knowledge and practices and MFish-led fisheries management.**

It is proposed that iwi rohe moana management plans would:

- be a contemporary expression of the Kaitiakitanga of the iwi - setting out the iwi vision for their aquatic environment based on their traditional values, knowledge, and ways of interacting with that environment;

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<sup>11</sup> A possible list of contents for the plans, which shows what they might look like, is included in appendix 4.

- provide iwi with a vehicle to set objectives which resolve tensions and realise best value from their non-commercial, commercial and other fisheries interests;
- be built up from and coordinate hapu interests;
- belong to the iwi, but be designed to feed into a coordinated forum management plan, or a forum position on particular issues;
- be a basis for tangata whenua to manage their customary non-commercial fisheries and a platform for their input and participation into multi-stakeholder fisheries management processes.<sup>12</sup>

MFish believes that, once developed, iwi rohe moana plans would allow more effective and efficient ongoing participation by tangata whenua, compared with the current issue-by-issue approach. Tangata whenua would no longer have to start from scratch with each new round of consultation, but would, in the first instance, refer officials to the relevant parts of their rohe moana plan. MFish officials would consider iwi and/or forum plans, and draw from those plans aspects relevant to their decision. They would report back to tangata whenua on their understanding of the plans and tangata whenua would check that officials' understanding was correct.

While MFish believes the plans are a worthwhile investment, they will require significant resources to develop. The sequencing and reprioritisation that would be necessary to allow their development across the county is discussed later (in #6 Incorporating monitoring and review of the process).

***We are interested to know whether you think that it would be useful for iwi and hapu to develop rohe moana management plans to support their management of customary non-commercial fisheries, and participation in multi-stakeholder fisheries management processes. We would like to know what you think about our proposal about what such plans might contain.***

*Optimal allocation of existing resources and seeking addition resources*

MFish frequently receives requests for additional resources to support the input and participation processes. MFish believes these processes are of considerable importance, and in the past year, sought additional resources through the annual bidding process. This bid was unsuccessful, and while future bids may be possible, the current reality is that an increase in one area will require a reduction in other areas. The funds gained under the 2004/05 new initiative bid and their current use is set out in a subsequent section (#6 monitoring and review of the process). Tangata whenua might also consider what resources they can secure from other sources, such as their commercial operations or other government agencies.

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<sup>12</sup> A number of iwi already have plans to manage their land based resources. Many iwi also have important freshwater fisheries interests which they will want to include in their rohe moana management plan. MFish can only provide resources for the fisheries aspects of iwi plans, but we would encourage tangata whenua to place their marine and land plans together, and to consider how Kaitiakitanga should apply to the management of their rohe as a whole.

### **3.4 Provide opportunities for tangata whenua to express the meaning of Kaitiakitanga, and build the capacity of MFish to advise the Minister so he/she can have particular regard for Kaitiakitanga**

The ability of the Minister of Fisheries to have particular regard to Kaitiakitanga is dependent on the effectiveness of the processes for input and participation. Thus, the frustrations of tangata whenua in only being able to respond in a fragmented, reactive manner are also frustrations for MFish staff wishing to advise the Minister in a consistent, proactive way. While considerable progress has been made, the capacity to advise the Minister of Fisheries to have regard to Kaitiakitanga is still variable across different issues, and across different regions. We would like to build understanding of Kaitiakitanga within MFish staff, and familiarity with the processes and documents they can use to gain more information as required.

The options for increasing tangata whenua capacity discussed above have a parallel impact on the capacity of the Ministry to advise the Minister with respect to Kaitiakitanga. For example, under the rohe moana plan proposal, tangata whenua would state that they wished the plans to be considered as part of their input to specific fisheries management decisions. MFish would need to represent the views expressed in the plan in their advice to the Minister in order to satisfy the legislative requirement to provide for input and participation and have particular regard for Kaitiakitanga.<sup>13</sup> MFish staff working with tangata whenua to develop the plans would increase their understanding of Kaitiakitanga, and the plans would be an ongoing source of information for all staff.

Kaitiakitanga, MFish understands, is best explained with reference to tikanga and matauranga: that is, the principles that govern management based on knowledge of the resources.<sup>14</sup> Thus, it is envisaged that tikanga and matauranga would provide the foundation for rohe moana plans.<sup>15</sup> In addition to assisting the Minister to have regard to Kaitiakitanga, the plans would add to the ‘best available information’ on which decisions were based.<sup>16</sup>

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<sup>13</sup> Considering someone’s views is not the same as making decisions that give effect to those views. The Minister does not have to do what the rohe moana plan says. She/he must show that they have had regard to those views, and if she/he makes a decision that is contrary to those views, they should be able to explain why.

<sup>14</sup> “‘Kaitiakitanga’ is defined in the Fisheries Act 1996 to mean ‘the exercise of guardianship; and, in relation to any fisheries resources, includes the ethic of stewardship based on the nature of the resources, as exercised by the appropriate tangata whenua in accordance with tikanga Māori’.” [Fisheries Act 1996, section 2, Interpretation]

<sup>15</sup> MFish recognises that some areas of traditional knowledge are tapu and that it is for tangata whenua to determine what areas must remain private. It wishes to encourage tangata whenua to bring that knowledge together, however, and consider what parts can be made public to provide the foundation for their involvement in fisheries management. MFish proposes that its current customary research fund continue to be targeted at projects that assist tangata whenua bring their traditional knowledge together for this purpose. Tangata whenua will still be able to seek funds from the separate contestable pool for conventional scientific research on customary species or areas of importance to them.

<sup>16</sup> The requirement to use best available information comes from s10 in the Fisheries Act 1996. The definition of information in the Act explicitly includes customary Māori information.

### **3.5 Building an effective and efficient working relationship between tangata whenua and MFish.**

Forums have provided a much more effective platform for bringing together MFish staff and tangata whenua, than the processes that existed previously. Outstanding issues on how effectively the forums are bringing together iwi and hapu, and commercial and non-commercial customary issues, have been discussed earlier in this paper.

Since forums have begun, a number of regions have reassessed the effectiveness of carrying out work in large plenary hui. They have shifted to a two pronged approach with most of the work being done in regular meetings of small working groups, comprising both tangata whenua and MFish staff. Larger, plenary hui occur less frequently and are reserved for sharing information, gaining agreement for work to be done, and endorsement of work undertaken.

***We propose that a split of responsibilities between working groups and plenary hui should become the standard model and are interested on your views about this.***

Tangata whenua who are participating in the forums, will know that MFish is moving away from making sustainability decisions via the biannual sustainability rounds to facilitating multi-year fisheries plans. Fisheries plans seek to bring together all the stakeholders in a particular fishery so they can set objectives and design management measures which achieve the best overall value from the fishery. Work on fisheries plans is being carried out by 'Fisheries Plan Advisory Groups' (FPAGs).

***MFish is interested in discussing how tangata whenua would like to be represented on FPAGs, e.g., can one person represent the views of all tangata whenua participating in the forum, or do all iwi wish to be represented? The fisheries plan development process also makes extensive use of the internet to share information and allow discussion, and we are interested in how effective this process is for you.***

As part of the current review, we would also like to have an open discussion about whether the resources being used to provide for input and participation are being effectively spent. This question can only be meaningfully considered once we have identified the priorities for moving forward.

MFish received new funding in 2004/2005 to put towards the Treaty Strategy work and delivering on its obligations to Māori. (This was added to resources already being used for this work across the Ministry.) Consistent with the feed back we received in discussions with tangata whenua, the funds have been used to establish Pou Hononga and Pou Takawaenga positions and provide some funding for the operation of forums. Additional inshore analysts and compliance staff have also been funded from this source. The funds gained in 2004/04 and the purposes for which they were sought are set out in the table below.<sup>17</sup> We consider it critical that we discuss with you how we can best use the resources that we both bring to the table.

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<sup>17</sup> The funds are broadly being used for the purposes for which they were sought – but there may have been some reallocations at the margins.

*We are interested in whether you think we currently have the right components in the programme, and whether resources are being allocated most effectively across these components.*

It must be made clear, however, that the resources for this work are primarily people and these people have been employed to undertake particular tasks, consistent with current government priorities. Their roles cannot be changed instantly.<sup>18</sup>

**Table 1: What were the funds gained in the 2004/05 new initiative bid for?**

<b>Programme component</b>	<b>Approx annual funding (\$)</b>	<b>No.</b>	<b>Description of role /task</b>
<b>Regional forums</b>	290,080	14	Forum for tangata whenua and MFish to come together and manage fisheries
<b>Pou Hononga</b>	1,068,752	15 <sup>19</sup>	Liaison between tangata whenua and MFish; establish and service forums; assist appointment of kaitiaki/tangata tiaki
<b>Pou Takawaenga</b>	1,614,368	13	Assist tangata whenua with management of non-commercial interests and participation into multi-stakeholder processes
<b>Inshore analysts</b>	1,037,808	9	Assist with fisheries management information and advice; incorporate tangata whenua views into advice to Minister
<b>Compliance Officers</b>	225,000	2	Work with tangata whenua on compliance with customary regulations and compliance components of fisheries plans
<b>Admin Support</b>	168,750	1	For Pou Hononga group
<b>Chief Executive Reference Group</b>	63,912	na	Advise Chief Executive on effective engagement with tangata whenua
<b>Mediation</b>	199,125	na	Funds for independent mediators where boundary disputes arise in appointment of kaitiaki/tangata tiaki
<b>Kaitiaki training</b>	135,000	na	Training for kaitiaki/tangata tiaki on customary fishing regulations
<b>Public education and signage</b>	225,000	na	Funding for public education and signage on mataitai reserves
<b>Customary data management (on NABIS)</b>	28,125	na	Addition of information on customary non-commercial fishing to NABIS <sup>20</sup>

<sup>18</sup> It should also be noted that when this bid was prepared, no provision was made to maintain the real value of salaries. This is required in order to retain staff, and thus, the numbers of positions able to be funded from the money received will fall over time.

<sup>19</sup> 5 Pou Hononga were funded from existing (baseline) resources. Pou Hononga and Pou Takawaenga numbers include managers.

<sup>20</sup> NABIS – National Aquatic Biodiversity Information System

The questions discussed in this paper have implications for the way the above resources are used. For example, if iwi support the proposal to develop rohe moana management plans, Pou Takawaenga are the most likely resource to assist this work (albeit, with support from other MFish teams). If Pou Takawaenga are focusing on working with iwi on rohe moana plans, it will fall back on other MFish staff to present and seek feedback on particular issues, until the plans are developed.

In addition, if there was widespread support for the development of rohe moana management plans, MFish would have to consider how it can most effectively spread its resources across regions. Currently, staff efforts are relatively uniformly spread across the country. Rohe moana plans would be more effectively developed if the resources of Pou Takawaenga are concentrated in particular regions while plans are being developed there, and then moved into other regions over time. (This is the general approach being taken in the development of Fisheries Plans.) Over time, MFish would work with all iwi and forums who wished to develop the rohe moana plans set out in this proposal – but they wouldn't be working with all iwi at once.<sup>21</sup>

### **3.6 Incorporating monitoring and review of the process, including discussion between tangata whenua and MFish on how the process should be developed over time.**

MFish carries out considerable reporting on activities in the various regions, and by particular groups of staff, and then collates these statistics at a national level. What we have done less of to date, is systematically evaluating that information to see if we are achieving our goals at a national level. We also have yet to systematically involve tangata whenua in this reporting and evaluation.

The shift to more systematic reporting and evaluation is part of a broader move by the Ministry to develop an outcomes framework which will link high level outcomes to specific activities. The linking will occur down through policy strategies and standards, and then move back up through the monitoring of activities to see how well they are delivering on outcomes. Once we have discussed and agreed the desired Treaty outcomes and broad strategy we will be developing standards, in discussion with you, which allow us to jointly monitor progress. This monitoring should allow review of progress in how well we are achieving our goals in both the short term (e.g., annually) and over a longer period.

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<sup>21</sup> Within current resource constraints, rohe moana plans would take up to 10 years to implement across the country. Working on the basis of the 57 iwi recognised in the Māori Fisheries Act 2004, this would involve an average of 6 plans being written each year. If a staggered approach were taken criteria will need to be established to decide which regions go first. These criteria would be consistent with the agreed characteristics for good input and participation processes, e.g., priority would be given to iwi who had processes for bringing together non-commercial, commercial and other aquatic interests, the views of their hapu, and MOU or work plans agreed with MFish which conformed to Crown Relationship Instruments criteria.

## **4 Summary of questions for discussion**

- I. What is your vision for fisheries management, for the Crown-tangata whenua relationship, and for your involvement in fisheries? What do you think of the MFish Treaty Strategy vision?**
- II. What characteristics do you think good input and participation processes should display and what do you think of the MFish proposed list?**
- III. What are your views on progress, problems and options for moving forward to achieve better input and participation processes and what do you think of the options proposed by MFish?**

We are interested in discussing the following proposed list of characteristics for the input and participation process, progress and problems in achieving these characteristics, and ways of moving forward:

### **4.1 Input and participation processes should bring together mandated representatives of hapu and iwi.**

- Currently this is happening in some regions, but not in others.
- We propose that this become a universal aim and would like to discuss how it could be achieved.

### **4.2 Input and participation process should integrate all tangata whenua fisheries interests, and particularly customary non-commercial and customary commercial**

- This is currently happening in some regions, but not in others;
- We propose that this become a universal aim and would like to discuss how it could be achieved.

### **4.3 Input and participation process should build tangata whenua capacity to manage their customary non-commercial fisheries and participate in multi-stakeholder management processes, allowing them to be proactively and early (at the time of defining the questions, rather than answering them).**

- Considerable progress has been made in exchanging information and views between to tangata whenua and MFish.
- There is a concern about forum overload, leading to fragmented, reactive responses.
- We would like to discuss whether you think it would be useful to develop iwi rohe moana management plans more systematically across the country, and what they should include.

**4.4 Input and participation process should build the capacity of MFish to advise the Minister so he/she can have particular regard for Kaitiakitanga.**

- Progress, problems and options for moving forward with this issue parallel those for the previous one.

**4.5 Input and participation process should build an effective and efficient working relationship between tangata whenua and MFish.**

- Forums represent a significant advance in the relationship between MFish and tangata whenua.
- Questions remain about whether we are making most effective use of the different forms of engagement, and how to best integrate different processes.
- We would like to discuss whether we should standardise the roles of working groups and large plenary hui, and how forums can best interact with Fish Plan Advisory Groups.
- We would like to discuss whether the resources currently being used to provide for input and participation are being spent on the right things.

**4.6 Input and participation process should incorporate monitoring and review, including discussion between tangata whenua and MFish on how the process should be developed over time.**

- Considerable reporting occurs at a regional and business group level, and there is a national collation of the statistics that emerge.
- Further work is needed to evaluate, with tangata whenua, how current processes are leading to the desired outcomes.
- This paper is part of this evaluation, and once the broad strategy is confirmed, we will be developing standards to direct and monitor implementation.

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## **Appendix One: Components of the Treaty Strategy Framework**

The Treaty Strategy aims to deliver on the Crown's specific fisheries obligations within the broader Treaty partnership. The components of the Treaty Strategy Framework – obligations, outcomes, policies, standards, activities and monitoring are set out in the table on the following page. The aim of the framework is to ensure that the Ministry's Treaty obligations can be identified as a group, that work to deliver on them is coordinated, and that the outcomes associated with the obligations can be monitored as a group. More detail on the obligations is contained in appendix two.






← Treaty Strategy Framework →	<b>Treaty Strategy OBLIGATIONS</b> 	<ul style="list-style-type: none"> <li>* The Ministry's obligations arise from the legislation and other agreements that govern the Ministry's work.</li> <li>* Obligations may be of a general nature or very specific. The former require work to clarify how they should be manifest in the Ministry's day to day work.</li> <li>* Obligations relatively fixed compared with policies, standards and activities developed to deliver on the obligations.</li> </ul>	← Treaty Strategy →
	<b>Treaty Strategy OUTCOMES</b> 	<p>The Treaty Strategy vision (main outcome) is:          'The Crown and tangata whenua working in partnership to provide for the utilisation of fisheries resources while ensuring sustainability;          -having particular regard to kaitiakitanga;          -with the Crown fully meeting its legislative and Treaty obligations.'</p> <p>Other outcomes may be agreed that support this main outcome.</p>	
	<b>Treaty Strategy POLICY</b> 	<ul style="list-style-type: none"> <li>* Policy statements and principles will clarify how the Ministry understands and intends to meet its Treaty Strategy obligations.</li> <li>* Policy should consider in a systematic way how the obligations apply across the Ministry's work.</li> <li>* Policy principles should not be so detailed as to prescribe particular mechanisms.</li> <li>* Policy statements and principles are less fixed than obligations but change more slowly than implementation plans and mechanisms.</li> </ul>	
	<b>Treaty Strategy STANDARDS</b> 	<ul style="list-style-type: none"> <li>* Standards link obligations, outcomes and policy to on-the-ground activities.</li> <li>* Standards may stipulate how processes should occur or specific outcomes.</li> <li>* Standards should be measurable but if possible, should allow for flexibility in how the standard will be met.</li> <li>* Standards should be subject to medium term review (5-10 years) to ensure their ongoing effectiveness.</li> </ul>	
	<b>Treaty Strategy IMPLEMENTATION</b> 	<ul style="list-style-type: none"> <li>* Implementation includes work plans and specific mechanisms for meeting obligations and realising the Ministry's Treaty Strategy vision.</li> <li>* Outcomes may be achieved in a variety of ways and thus there is a need for public (and particularly Maori) consultation on implementation plans and specific mechanisms.</li> <li>* Plans and specific mechanisms should be subject to medium term (3-5 year) review to ensure their ongoing effectiveness.</li> </ul>	Treaty Strategy Implementation
	<b>Treaty Strategy OUTCOMES MONITORING</b>	<ul style="list-style-type: none"> <li>* The monitoring of the Treaty Strategy outcomes as a cluster will be considered in the context of the Ministry's overall outcomes monitoring project.</li> <li>* To be effective in ensuring on-the-ground activities support outcomes, monitoring must occur at each level of the hierarchy outlined in this table.</li> </ul>	Monitoring

Table 1: Components of the Ministry's Treaty Strategy Work

## **Appendix Two: Crown Treaty of Waitangi Obligations relating to fisheries and aquaculture**

The Crown has the following fisheries obligations to Māori and tangata whenua:

1. The obligation to act consistent with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (section 5b of the Fisheries Act 1996) and the Principles of the Treaty of Waitangi (s10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992);
2. Consultation, input and participation requirements (from section 12(1) of the Fisheries Act 1996);
3. Specific commercial obligations arising from the Māori Fisheries Act 1989, Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the Māori Fisheries Act 2004 (including requirement to transfer 20% of all new quota and to register settlement quota);
4. Specific customary non-commercial obligations arising from the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (to allow for customary take and make provision for customary management);
5. Specific settlement obligations arising from the Maori Commercial Aquaculture Claims Settlement Act 2004;
6. Treaty Settlement protocols with individual iwi;
7. Foreshore and Seabed obligations to individual iwi.

This appendix provides detail on these obligations.

### ***1 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Deed of Settlement (1992) and Principles of the Treaty of Waitangi***

Actions taken under the Fisheries Act 1996 need to be consistent with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The Settlement Act, in turn, refers to the Deed of Settlement (23 Sept 1992) and the principles of the Treaty of Waitangi. These links are set out below.

Section 5 of the Fisheries Act 1996 states:

#### ***5. Application of international obligations and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992***

*This Act shall be interpreted, and all persons exercising or performing functions, duties, or powers conferred or imposed by or under it shall act, in a manner consistent with—*

- (a) New Zealand's international obligations relating to fishing; and*
- (b) The provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.*

The requirement to act consistent with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 extends to all actions undertaken under the jurisdiction of the Fisheries Act 1996.

Section 10(a) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, in turn, states that:

***10. Effect of Settlement on non-commercial Maori fishing rights and interests***

*It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983—*

*(a) Shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown; and in pursuance thereto*

*(b) The Minister, acting in accordance with the principles of the Treaty of Waitangi, shall —*

*(i) Consult with tangata whenua about; and*

*(ii) Develop policies to help recognise —*

*use and management practices of Maori in the exercise of non-commercial fishing rights.*

(The Ministry's obligations to help recognise Māori management practices relating to their non-commercial rights are picked up in Part IX of the Fisheries Act 1996 and are subject to the principles of the Treaty of Waitangi.)

Section 3 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 gives guidance to the interpretation of that Act. Section 3 states:

***3 Interpretation of Act generally***

*It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the agreements expressed in the Deed of Settlement referred to in the Preamble to this Act.*

The Preamble to the Deed of Settlement (23 Sept 1992) sets out the background for the Deed. The Preamble states:

*A. By the Treaty of Waitangi the Crown confirmed and guaranteed to the Chiefs, tribes and individual Maori full exclusive and undisturbed possession and te tino rangatiratanga of their fisheries.*

...

*K. The Crown recognises that traditional fisheries are of importance to Maori and that the Crown's Treaty duty is to develop policies to help recognise use and management practices and provide protection for and scope for exercise of rangatiratanga in respect of traditional fisheries.*

Section 5.2 of the Deed of Settlement records the agreement made between Maori and the Crown in relation to non-commercial fishing rights. Section 5.2 states:

***5.2 Non-Commercial Fishing Rights and Interests***

*The Crown and Maori agree that in respect of all fishing rights and interests of Maori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in criminal, regulatory or other proceedings).*

*Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of requests by Maori to the Government or initiatives by Government in consultation with Maori to develop policies to help recognise use and management practices of Maori in the exercise of their traditional rights.*

Section 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 brings an obligation to act in accordance with the Principles of the Treaty into section 12(1) (b) of the Fisheries Act 1996.

Justice Cooke raised the idea of Treaty principles in his 1987 judgement where he argued that the Treaty principle of partnership ‘creates responsibilities analogous to fiduciary duties’.<sup>22</sup> He argued that the principle of partnership includes the obligation on both parties to act reasonably, honourably and in good faith. He further argued that the duties on the Crown were not passive, but required an active protection of Māori taonga.

In 1989 the Crown set out its view on the Treaty principles it believed must guide Crown action. These included the principles of:

- Government or Kawanatanga (the Government has the right to govern and make laws);
- Self-management or Rangatiratanga (iwi have the right to organise and control their own resources, within the law);
- Equality (all New Zealanders are equal before the law);
- Reasonable Cooperation (Iwi and the Government should accord each other reasonable cooperation) and
- Redress (the Government should provide processes for the resolution of grievances).

## **2 Fisheries Act 1996 – 12(1) Consultation, input and participation**

The obligations set out in the Fisheries Act 1996, and through that, in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Deed of Settlement and principles of the Treaty of Waitangi do not prescribe a process for involving tangata whenua in fisheries management decisions. They suggest some broad principles with which the processes for involving tangata whenua should be consistent. These are discussed in the main body of the paper.

Section 12(1) of the Fisheries Act 1996 places obligations on the Minister of Fisheries to consult with representatives of Māori and provide for the input and participation of tangata whenua. Section 12(1) reads:

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<sup>22</sup> NZ Maori Council v A-G [1987] 1 NZLR 641, 664 (CA) Cooke P

## Consultation-

(1) *Before doing anything under any of sections 11(1), [11(4), 11A(1),] 13(1), 13(4), 13(7), 14(1), 14(3), 14(6), [14B(1),] 15(1), and 15(2) of this Act or recommending the making of an Order in Council under section 13(9) or section 14(8) [or section 14A(1)] of this Act, the Minister shall—*

(a) *Consult with such persons or organisations as the Minister considers are representative of those classes of persons having an interest in the stock or the effects of fishing on the aquatic environment in the area concerned, including Maori, environmental, commercial, and recreational interests; and*

(b) *Provide for the input and participation of tangata whenua having—*

(i) *A non-commercial interest in the stock concerned; or*

(ii) *An interest in the effects of fishing on the aquatic environment in the area concerned—*

*and have particular regard to Kaitiakitanga.*

The meaning of consultation has been discussed in a number of Court rulings, and the Ministry has considered that meaning in the development of its Consultation Guidelines. The essence of consultation is providing interested parties with information and opportunities to express their views on the matters under consideration, and then considering those views with an open mind. (It should be noted that consultation may be required by common and administrative law principles when making decision outside those expressly stated in s12 (1).)

The meanings of ‘provide for input and participation’ and ‘have particular regard for Kaitiakitanga’ have limited legal commentary.<sup>23</sup> The Ministry considers that the obligation to provide for input and participation is distinct from the obligation to consult. It is a more active duty and requires earlier engagement (at the option definition stage, rather than the evaluation of options). It implies a responsibility to help build the capacity of tangata whenua to participate in fisheries management processes, rather than just supplying information on those processes.

The requirement in section 12 is to provide for the input and participation of tangata whenua who have a non-commercial or environmental interest. It does not stipulate that they be restricted to expressing their views only with respect to their customary or

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<sup>23</sup> Two pieces of legislation which set out obligations with a familial similarity to input and participation are the Local Government Act 2002 and the Conservation Act 1987. The Local Government Act 2002 places the following obligations on local authorities:

81. *Contributions to decision-making processes by Maori*

(1) *A local authority must—*

(a) *establish and maintain processes to provide opportunities for Maori to contribute to the decision-making processes of the local authority; and*

(b) *consider ways in which it may foster the development of Maori capacity to contribute to the decision making processes of the local authority; and*

(c) *provide relevant information to Maori for the purposes of paragraphs (a) and (b).*

Section 48B(2) of the Conservation Act 1987 after the Ngai Tahu settlement to require regulations made under section 48B(1) to “*provide for input by Ngai Tahu and other South Island iwi into the integrated management (including control) by the Minister of Conservation of the freshwater fisheries to which the regulations apply*”.

environmental interest. Indeed, the obligation to provide for input and participation is linked in the Act to the obligation to have particular regard to Kaitiakitanga and it is consistent with Kaitiakitanga that tangata whenua take an integrated approach to their interests (that is, one that actively balances their non-commercial customary, commercial and other fisheries interests).<sup>24</sup>

The Minister, in making specified sustainability decisions, and in conjunction with providing for input and participation, needs to have particular regard to Kaitiakitanga. If MFish is to supply advice that enables the Minister to meet that obligation, it needs to find ways to enable it to understand Kaitiakitanga. Kaitiakitanga is defined in the Fisheries Act 1996 as ‘the exercise of guardianship; and, in relation to any fisheries resources, includes the ethic of stewardship based on the nature of the resources, as exercised by the appropriate tangata whenua in accordance with tikanga Māori’.

### **3 & 4 Commercial and non-commercial customary fisheries rights (Maori Fisheries Act 1989; Treaty of Waitangi (Fisheries Claims) Settlement Act 1992; Fisheries Act 1996; Māori Fisheries Act 2004)**

Commercial and non-commercial customary rights were recognised in the Māori Fisheries Act 1989 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.<sup>25</sup> The Preamble to the Māori Fisheries Act 1989 explains that its purpose is:

*“(a) To make better provision for the recognition of Māori fishing rights secured by the Treaty of Waitangi; and*

*(b) To facilitate the entry of Māori into, and the development by Māori of, the business and activity of fishing and*

*(c) To make better provision for the conservation and management of the rock lobster fishery”*

The Act established the Treaty of Waitangi Fisheries Commission (originally the Māori Fisheries Commission) to manage settlement quota and to get Māori into the business and activity of fishing. The Māori Fisheries Act 1989 provided for:

- 10% of then existing total allowable commercial catches or its cash equivalent to be transferred to Māori by 31 October 1992;
- the Crown was to pay the Commission \$10 million no later than the 31<sup>st</sup> of March 1990.

On 23 September 1992 a Deed of Settlement was signed by the Crown and Māori in final resolution of their disputes in relation to fishing rights. Section 3 of the Deed of Settlement set out the obligations agreed to by the Crown (and these were carried through into Part 1 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992). These obligations were to:

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<sup>24</sup> The argument for encouraging tangata whenua to take an integrated approach to their interests as a matter of good fisheries management e.g., as promoted in Fisheries Plans, is considered ahead.

<sup>25</sup> The Māori Fisheries Act 1989, as explained ahead, was replaced by the Māori Fisheries Act 2004, with all the obligations under the 1989 Act having been met. It is included here as part of the historical record of the Crown’s obligations and to explain where the rights currently held by tangata whenua and Māori have come from.

- pay a settlement amount for the development and involvement of Māori in the New Zealand fishing industry (including the purchase of Sealords in a joint venture with Brierley Investments Limited);
- allocate to Māori 20% of any new quota issued as a result of the extension of the QMS to fish species not included in the QMS as at the date of the Settlement;
- consult with the Māori Fisheries Commission on the management regime to apply at the time of the extension of the QMS to the new species;
- provide for Māori participation on statutory fisheries bodies to reflect the special relationship between Crown and Māori;
- establish the Treaty of Waitangi Fisheries Commission;
- introduce legislation to empower the making of regulations “recognising and providing for customary food gathering and the special relationship between the tāngata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai) to the extent that such food gathering is not commercial in any way nor involves pecuniary gain or trade”;
- promulgate the Regulations mentioned above; and
- introduce legislation to give effect to the Deed of Settlement agreements.

The customary rights acknowledged in s10 of Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 were transferred and expanded in Part IX of the Fisheries Act 1996. Part IX provides for customary regulations, mataitai, s186 closures and method restrictions, taiapure and regulation 27 authorisations. The commercial rights are provided for in various places in the Fisheries Act 1996. For example, sections 29B and 44 set out the requirement to transfer 20% of all new quota to the Commission (for further transfer to iwi).

The Māori Fisheries Act 1989 was repealed from 29 November 2004 and replaced by the Māori Fisheries Act 2004 (all legal obligations on the Crown under the 1989 Act having been met). The Ministry is responsible for administering the Māori Fisheries Act 2004. The Māori Fisheries Act 2004 explains that:

- (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.***

The Māori Fisheries Act 2004 contains a model for allocating and managing the assets transferred as a result of the 1989 and 1992 fisheries settlements. The Act places an ongoing legal obligation on the Ministry to register or remove a settlement

quota interest against quota shares, if requested by Te Ohu Kai Moana Trustee Limited and the registered owner of the quota.<sup>26</sup> (Settlement quota is subject to restrictions on its trade.)

## **5 Aquaculture (Maori Commercial Aquaculture Claims Settlement Act 2004)**

The purpose of the Maori Commercial Aquaculture Claims Settlement Act 2004 (Maori Aquaculture Settlement) (s3) is to:

*(a) provide a full and final settlement of Māori claims to commercial aquaculture on or after 21 September 1992; and*

*(b) provide for the allocation and management of aquaculture settlement assets.*

MFish is the lead Crown agency in administering the Maori Aquaculture Settlement. The settlement requires that iwi are provided with 20% of all new aquaculture space created through the establishment of aquaculture management areas (“AMAs”) from 1 January 2005. In addition, the settlement establishes the Crown’s obligation to provide iwi with the equivalent of 20% of the aquaculture space created between 21 September 1992 and 31 December 2004. This is called “pre-commencement space”. Pre-commencement space also includes any space that is approved under the old aquaculture legislation but issued after 1 January 2005. Treaty of Waitangi claims to aquaculture space before 21 September 1992 are addressed through the historical Treaty claims settlement process managed by the Office of Treaty Settlements.

The Crown’s pre-commencement space obligation for the entire country as at 1 May 2008 is 2,300 hectares.

The aquaculture settlement provides that all settlement assets which include space are transferred to the Trustee, Te Ohu Kai Moana Trustee Limited. The Trustee will transfer the settlement assets to IAOs [Iwi Aquaculture Organisation<sup>[1]</sup>] within a particular region or harbour once all the iwi within a region have attained IAO status and allocation entitlements have been determined.

Settlement assets will be allocated on a region-by-region basis, based around the jurisdictions of regional councils and unitary authorities.<sup>[2]</sup> The exceptions are those harbours identified in Schedule 2 of the Act where settlement assets will be allocated to IAOs whose rohe abut that harbour.

The Act provides the Crown with three methods of complying with its obligations relating to pre-commencement space:

- ***New space method.*** The Government has passed regulations requiring regional councils and unitary authorities to identify and transfer authorisations to the

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<sup>26</sup> Section 160 of the Māori Fisheries Act 2004

Trustee for up to an additional 20% of any new aquaculture space created from 1 January 2005. This is in addition to the 20% new space obligation.

- ***Established marine farm method.*** The Crown can purchase established marine farms from 1 January 2008 and transfer the coastal permits associated with these farms to the Trustee. The Crown may provide the Trustee with a right of first refusal to purchase the improvements associated with the farm. The Trustee can exercise this right only if it has the agreement of all the IAOs concerned.
- ***Financial equivalent method.*** Where the necessary space has not been provided to the Trustee under the other methods, the Crown can pay the financial equivalent from 1 January 2013. The amount paid to the Trustee is equivalent, in part or in full, to the value of the pre-commencement space obligation.

The Settlement Act does not require the Crown at any particular time to comply with these methods in any particular way or combinations of ways. The Crown must use its best endeavours to comply with its pre-commencement space obligations by 31 December 2014.

In July 2008 the Minister of Fisheries issued a plan (required under section 23 of the Settlement Act) that outlines options for the Crown to deliver its pre-commencement space obligations by 31 December 2014. That plan acknowledged that there is unlikely to be sufficient new space created in the relevant areas to satisfy the Crown's obligations and that the 'purchase marine farm method' is very complex.

### **Recent developments**

During 2007, iwi of Te Tau Ihu (top of South Island) approached the Minister and requested that the Crown consider an early settlement of the Crown's aquaculture pre-commencement space obligation in Marlborough and Tasman regions. In June 2008, the Minister invited all mandated iwi with interests in Marlborough and Tasman to submit a proposal for the early settlement of the Crown's pre-commencement space obligation in the region, subject to certain parameters.

All mandated iwi (including Ngāi Tahu) with interests in Marlborough and Tasman agreed to prepare a proposal for the consideration of the Minister that could achieve an early settlement of the Crown's pre-commencement space obligations for the whole of Te Wai Pounamu. Additionally the Hauraki Māori Trust Board, who represents the iwi of Hauraki with an interest in Coromandel (the east coast sub-region of the Waikato region as referred to in section 45 of the Settlement Act), approached the Minister requesting to be a party to the potential early settlement process. On the basis that Coromandel is a separate specified area in the Settlement Act with significant pre-commencement space and that the Hauraki Māori Trust Board wished to work with the iwi of Te Wai Pounamu, the Minister agreed that the Hauraki Māori Trust Board should participate in the process of presenting an early settlement proposal to him.

In September 2008 the Iwi Parties issued a proposal to the Minister to settle the Crown's pre-commencement space obligations in respect of Te Wai Pounamu and Coromandel. The responsible Ministers and the Iwi Parties met and negotiated the

terms of an agreement to settle the Crown's pre-commencement space obligations to the Iwi Parties.

### **Agreement in Principle**

An Agreement in Principle to settle the aquaculture settlement for Te Waipounamu (South Island) and Coromandel was signed between Ministers and iwi representatives at Parliament on Monday 13 October. The agreement is for a one-off cash payment of \$97 million in full and final settlement of the current Crown obligations for "pre-commencement space" obligations. The next step of the settlement process is to draft a deed of settlement to give effect to the agreement in principle. The Crown and iwi representatives are continuing to work together to finalise the settlement.

## **6 Treaty Settlement Protocols**

A Treaty settlement is an agreement between the Crown and a Maori claimant group to settle all of that claimant group's historical claims against the Crown. The Ministry's participation in individual historical settlement negotiations with iwi is not a reopening of the Fisheries settlement. The commitments contained in the individual settlements are aimed at building and extending the relationship between the claimant group and the Ministry and assisting the Minister and Ministry to meet their obligations under s 10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

Protocols with government departments are now a standard component of Treaty settlements with iwi/hapu groups. Protocols between iwi/hapū and the Ministry relate to the way the Ministry will interact with the iwi/hapū governance entity to enable them to provide input into the Ministry processes such as the development of sustainability measures, research planning, contracting for services and the employment of staff with customary non-commercial fisheries responsibilities. Protocols are legally enforceable by the iwi/hapu although damages are not available as a remedy in the event of breach. The existence of a protocol must be noted in fisheries plans under section 11A of the Fisheries Act affecting the fisheries protocol area.

As part of the settlement process, the Crown may agree to:

- appoint an iwi/hapu "governance entity" as an advisory committee to the Minister of Fisheries for fish, aquatic life and seaweed of significance to the iwi/hapu;
- prohibit certain species from commercial take, or the settlement may simply record that a prohibition already exists;
- a right of first refusal to buy Crown quota in certain fish stocks in the event the stock is brought within the quota management system;
- include proposals from the iwi/hapu to prohibit certain fishing methods in formal regulatory reviews;
- help inform fisheries stakeholders when the iwi/hapū imposes a traditional rāhui over customary fisheries.

The move to establish iwi regional forums was developed subsequent to the involvement of the Ministry in individual Treaty settlements.<sup>27</sup> Most of the matters covered in the protocols arising out of individual settlements are now also currently being addressed through Regional Iwi Forums, raising the question of how these two processes are best coordinated. Given the importance of fisheries redress to the Crown's ability to conclude settlements it would be difficult and inappropriate for MFish to withdraw completely from the individual treaty settlement process. As an alternative, in more recent negotiations MFish has taken the position that where an iwi is participating in a Regional Iwi Forum, protocol matters that can be appropriately be delivered through the Regional Iwi Forum, will be.

## **7 Foreshore and Seabed**

The Crown is currently in negotiation with a number of iwi over foreshore and seabed issues. Negotiations are most advanced with two East Coast iwi: Te Whānau-a-Apanui and Ngāti Porou. It is anticipated that Ngāti Porou will sign a Deed of Agreement with the Crown in October 2008, and Te Whānau-a-Apanui (as of Oct 2008) continue to work towards initialling a Deed of Agreement.

The Deed of Agreement agreed between Ngāti Porou and the Crown recognises Ngāti Porou's longstanding customary, traditional and historical associations with their rohe moana. The Deed includes a fisheries mechanism that allows for the development of new customary fisheries regulations, which will enable Ngāti Porou to manage customary fishing in their rohe moana by establishing Fisheries Management Committees that will develop fisheries management plans and provide for authorisation of customary fishing. The regulations will also enable Ngāti Porou to propose bylaws over Territorial Customary Rights areas to manage all fishing. A relationship instrument will also be established to enhance the relationship between Ngāti Porou and the Crown. This fisheries mechanism will provide for the obligations acknowledged in s10 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

Officials anticipate that the recognition offered to Te Whānau-a-Apanui Deed of Agreement will be similar to that of Ngāti Porou.

Negotiations with Ngāti Porou ki Hauraki are ongoing with parties working towards agreeing a statement of intent, which may include customary fishing matters. The Attorney-General obtained Cabinet approval in September 2007 to commence foreshore and seabed negotiations with Te Rarawa, and parties are working towards reaching an Agreement in Principle. Iwi have yet to indicate the fisheries issues they would like to discuss in these negotiations. In May 2008 the Crown and representatives of Ngāti Pahauwera agreed to Terms of Negotiation to commence combined historic Treaty Settlement and foreshore and seabed negotiations, and parties are working towards reaching an Agreement in Principle. Iwi have yet to indicate the fisheries issues they would like to discuss in these negotiations.

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<sup>27</sup> The first major settlement involving fisheries redress was with Ngāi Tahu in 1996.

## **Appendix Three: Iwi Regional Forums – Development Stages**

It is clear that Forums take time to establish, develop capacity and undertake the work required to engage effectively in fisheries management. Below is a possible description of the stages of development. It is presented not as a developmental straight jacket, but to stimulate discussion and the development of a common road map between MFish with tangata whenua.

### **1 Pre Forum / Non Forum Areas – building understanding and establishing common ground**

- The task in this phase is building the understanding of both MFish and tangata whenua.
- MFish needs to explain its obligations to tangata whenua, fisheries management processes and the proposed approach for involving tangata whenua in these processes (via forums, rohe moana plans, Fisheries Plan Advisory groups etc). It may help to use examples from other areas that have made progress.
- Tangata whenua need to explain to MFish what their expectations and aspirations are, and what the local constraints and opportunities are (including inter hapu/ inter-iwi dynamics).
- Discussion would take place at a regional collective level (the Forum level) and more locally as resources allow.
- MFish needs to set out its list of bottom lines and communicate these clearly to tangata whenua e.g., forums must be doing something on the fisheries management list (that is, it must come under the purview of the Fisheries Act 1996 and be consistent with the current priorities agreed between the Ministry and the Minister of Fisheries) otherwise it is not a Forum which the Minister is authorised to fund. Tangata whenua must have the chance to explain their bottom lines to the Ministry.
- MFish should discuss its view on the best roles for large scale hui and small working groups. (That is, that small working groups of committed and increasingly skilled tangata whenua are the best way of getting the substantive work done. These groups should meet regularly with the appropriate MFish staff. By contrast, large scale hui or plenaries would happen much less frequently, probably on an annual basis. These large hui would be the place for the working groups to report on and gain endorsement for their work. It also is proposed that they would be attended by senior level MFish managers).

### **2 Proto Forums – negotiation on and agree broad parameters for conduct and work**

- The task in this phase is negotiation and reaching agreement on the broad parameters for the relationship, ie, objectives, work areas, priorities, principles for engagement, respective roles of tangata whenua and (various) MFish staff.
- MFish needs to clarify with tangata whenua which hapu and iwi are participating, who the mandated representatives are, their appointment and

accountability processes, and the scope of matters they are mandated to speak on.

- Roles of full Forum (plenaries) and Forum Working Groups would be agreed.
- Negotiating a Memorandum of Understanding would fall in this phase.

### **3 New Forums – commencement of substantive work**

- The task in this phase is discussion of medium term and annual work plans including objectives, work areas, current priorities, roles, capacity development and monitoring/review processes. The development of work programmes is envisaged in MOUs. The programmes would be attached to the MOUs as concrete, evolving expressions of the obligations acknowledged therein.
- Substantive work would begin in line with agreed work plans, with active collaboration between tangata whenua representatives and MFish.
- Decisions would need to be made on how ad-hoc requests for input and participation should be dealt with (ie, how they will balance short-term demands for their input with implementing their own work plans).
- Individuals would be allocated specific tasks.

### **4 Mature Forums – mahia nga mahi (doing the work)**

- Mature Forums would have a good understanding of and capacity to input into fisheries management processes.
- They would have articulated their traditional fisheries practices and knowledge, their contemporary aspirations for all their fisheries interests and they would have a strategy as to how these should be incorporated into wider fisheries management. These matters would be clearly documented – in a rohe moana management plan, for example. These would be added to, and subject to periodic review.
- Mature Forums would have well developed processes for acting in a coordinated manner across their region and nationally, and across their customary, commercial and other interests.
- They would have the knowledge and have developed relationships to engage MFish expertise as required.
- They would have the knowledge and have developed relationships to work with other stakeholders as required.

## Appendix 4: Iwi Rohe Moana Management Plan: What might be in them?<sup>28</sup>

The overall aim for rohe moana plans is for a simple, but evolving document that supports tangata whenua management of their customary fisheries, and their participation in multi-stakeholder fisheries management. They are not proposed as requirements, but are presented to explain what we believe should be included in a plan if it is to assist MFish to meet its obligations to tangata whenua, and to better manage fisheries. The following are possible headings for the table of contents of an iwi rohe moana plan. MFish is in the process of refining this list of possible headings, in discussion with those iwi groups that have already begun (or completed) the process of developing such plans.

### **Introduction**

This might include the purpose of the plan; who it belongs to and how it is expected it would be used (e.g., a note to external agencies on where it should be considered).

**Rohe Moana:** Description of the iwi and its hapu and their relationship with the area (rohe whenua and rohe moana).

**Kaitiakitanga:** The principles of Kaitiakitanga that the iwi believes should govern its rohe moana. (How do you exercise Kaitiakitanga currently? What broad results would you expect to see if unrestricted Kaitiakitanga was being exercised?)

**Prohibitions:** Any general prohibitions there should be on activities in your rohe moana (e.g., sites where no or limited fishing activity should occur for any reason)

**Fisheries Management** – A description of the traditional practices/ broad principles that apply to all species (e.g., no dumping of offal; minimise disturbance of seabed).

**Spatial Management** - any (geographical) areas for which special management would be desirable;

**Species Management** – for each important species there would be a general description of the iwi use and management. The plans might include the following species information:

- maps to discuss where the species occurs, important fishing grounds (for customary, commercial and iwi recreational fishers) and areas where prohibitions should apply;
- seasons when it is fished;
- particular practises, historical use and desired contemporary non-commercial (customary) use,
- commercial importance (quota held, ACE, commercial arrangements); amateur/recreational importance to iwi members;

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<sup>28</sup> This appendix needs to be read in conjunction with the material in the main paper, which discusses the general objectives for rohe moana management plans, who would develop them, how they might be used etc.

- type of fishery they would like to see developed in the medium to long term (e.g., size, abundance, seasonality, methods);
- balance of use between different sectors (for those fisheries where there are trade-offs to be made) ; what methods are acceptable for the various sectors;
- what area, season or other restrictions should be put in place.

**Support Services** – what information, management and compliance services are needed to support the plan? What can be done by the iwi and hapu, and what by others e.g., MFish.

**Process for implementing and reviewing the plan.**