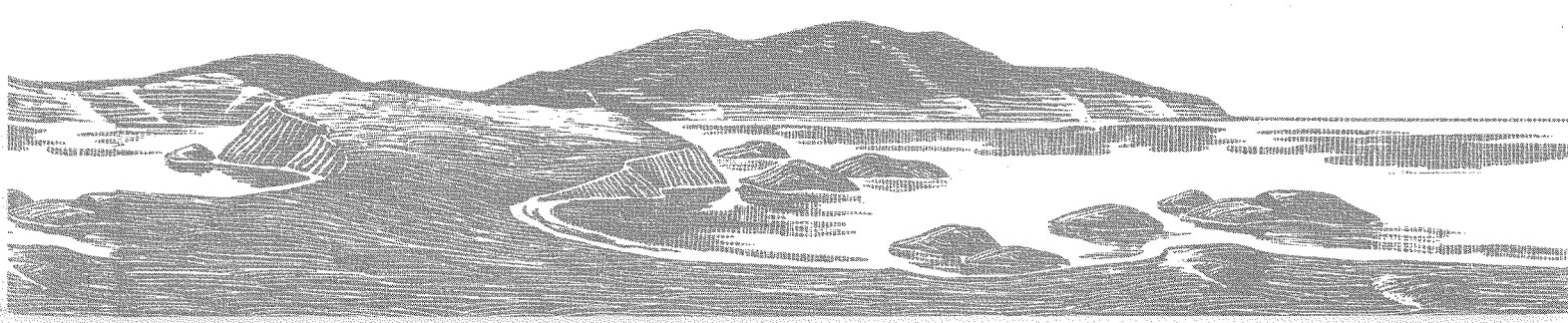
Kaitiaki o Kaimoana

Treaty of Waitangi
(Fisheries Claims)
Settlement Regulations

A DISCUSSION PAPER

MINISTRY OF AGRICULTURE AND FISHERIES
TE MANATU AHUWHENUA AHUMOANA
MAF

Contents



Introduction

1. This discussion paper identifies two of the areas of customary fishing rights provided for in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the obligations of the Crown in those areas under the Deed of Settlement and that Act.

   The paper also identifies the key issues which will need to be addressed to develop a set of regulations that will implement successfully the intent of those documents to make better provision for Maori non-commercial traditional and customary fishing rights and interests.

How do you become involved in developing the regulations

2. This paper will be widely circulated amongst marae, runanga and interested parties. Tangata whenua may make submissions on this paper to:

   Mandy Cassidy or Terry Lynch
   MAF Policy (Fisheries)
   PO Box 2526
   WELLINGTON
   Phone (04) 472-0367
   Fax (04) 474-4114

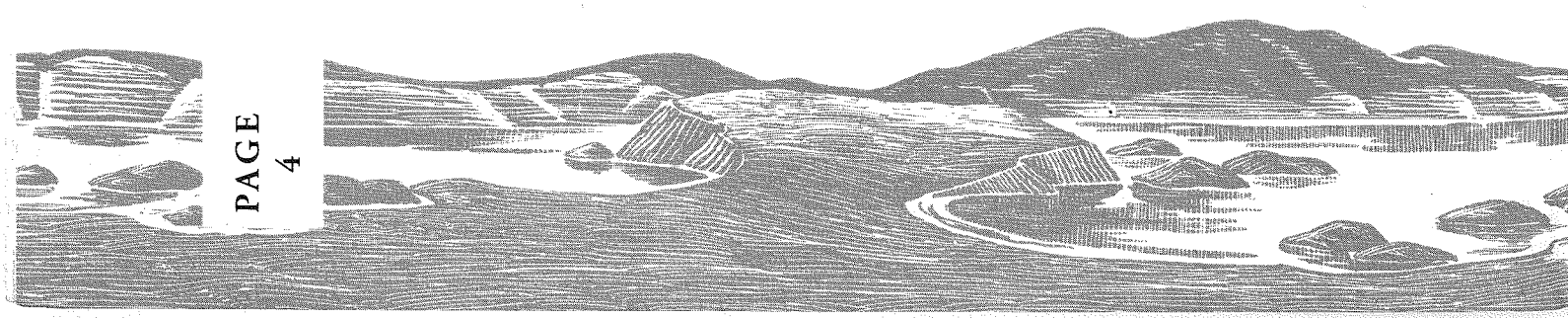
   by 1 November 1993.

   If you choose you may also contact the Ministry of Agriculture and Fisheries to convene hui in your region to receive your comments and explain the discussion paper.

3. A revised paper will then be developed in conjunction with the Treaty of Waitangi Fisheries Commission incorporating the views from the submissions. This paper will be sent back to tangata whenua and other users detailing how their submissions have been addressed in the drafting of new regulations.

Working group programme

4. It is proposed that a working group composed of officials from the Ministry of Agriculture and Fisheries, Ministry for the Environment, Office of Prime Minister and Cabinet, Crown Law Office, Te Puni Kokiri, Department of Conservation and nominees of the Treaty of Waitangi Fisheries Commission, will, in consultation with



other relevant departments, refine these concepts further and develop a set of indicative regulations for the approval of the Ministers of Justice and Fisheries. The parameters of those regulations will be set by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 ("the Act"), and associated legislation, and the Deed of Settlement ("the Deed"). The regulations will then be promulgated and forwarded to the Governor-General.

Background

5. The development of the settlement had its genesis in the case of Tom Te Weehi. The court found that Mr Te Weehi had a non-exclusive right to take kaimoana for personal and community needs based on the common law doctrine of aboriginal title and that such a Maori fishing right was exempted from the constraints of the Fisheries Act 1983 by s.88(2) of that Act. The nature and extent of the Maori claim to fisheries was further clarified by the Waitangi Tribunal in its findings on the Muriwhenua and Ngai Tahu fisheries claims.

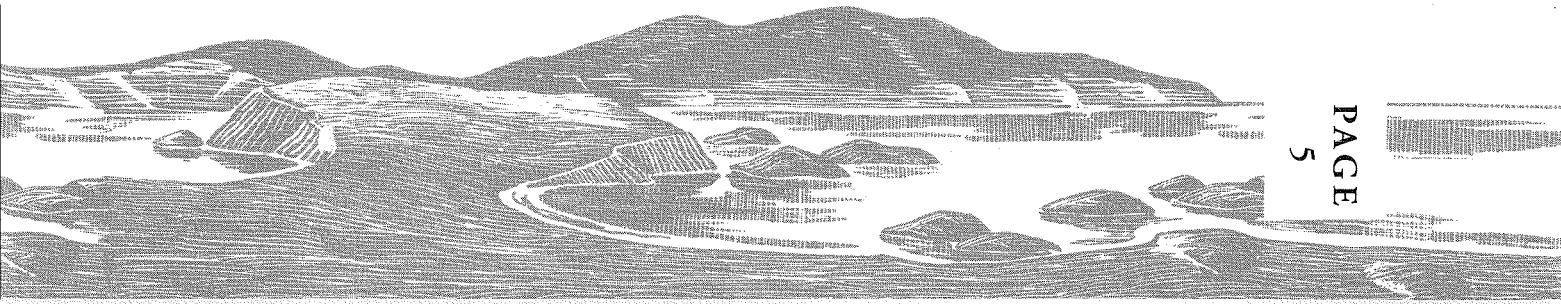
   A chronology of events in the settlement is identified in the Preamble to the Act attached as Appendix I.

The Deed and the Act

6. The sections of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 detailing the Crown's responsibilities in respect of Maori non-commercial rights and interests are attached as Appendix II.

7. The Deed provides, in respect of non-commercial fishing rights, that:
   - they are not extinguished;
   - their status changes so that they no longer give rise to *legal* rights and obligations and no longer have legislative recognition;
   - they continue to be subject to the principles of the Treaty and give rise to Treaty obligations on the Crown;
   - they could give rise to requests by Maori 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 non-commercial customary fishing rights.

8. The Deed recognised that these provisions would be given effect by legislation which:
   - repealed s.88(2) of the Fisheries Act;
   - provides for the making of the regulations discussed in this paper, and;
   - continues the right of Maori to take matters related to their non-commercial customary fishing interests to the Waitangi Tribunal for a hearing.



9. The Deed also recognises that ***such provisions will be limited to activities that are neither commercial in any way nor for pecuniary gain or trade.***

10. In short, what the Deed contemplates and the Act provides for, is that the current common law rights and the legislated protection of s.88(2) for the exercise of non-commercial customary fishing rights will be replaced by:
    - an (ongoing) obligation on the Minister of Fisheries (in consultation with tangata whenua) to develop policies to help recognise use and management practices of Maori in the exercise of non-commercial fishing rights (s.10(b) of the Act);
    - regulations which specify the rights that could be exercised by tangata whenua ***and*** which provide a mechanism for tangata whenua to exercise a ***greater degree of tino rangatiratanga*** over areas of special customary significance (s.10(c) and s.34).

11. ***In effect the exercise of responsibilities carried out by kaitiaki under Tikanga Maori may now be confirmed and supported in law, as they apply to non-commercial customary gathering of kaimoana***

12. This paper addresses the Minister's obligation to recommend the making of regulations that is provided for in s.10(c) of the Act. These regulations do not provide the final or only mechanism available to tangata whenua to recognise their interests. The Crown will be able to respond to requests from tangata whenua and could provide programmes for their specific needs.

13. The intent of the Deed was that non-commercial customary gathering of indigenous fish should not be affected by the settlement. The consequence of this is that ***non-commercial interests*** in eels, smelt, whitebait and other freshwater fisheries are not included under the provisions of the Deed. The non-commercial aspects of these fisheries are managed by the Department of Conservation under the Conservation Act 1987. Acclimatised sports fish such as trout and salmon are also subject to management regimes provided for under the Conservation Act and are not covered by the provisions of the Deed. Treaty rights to these fisheries have not been extinguished and may continue to have legal effect and be enforceable in civil proceedings.

14. The Crown retains its rights and obligations under Article I of the Treaty to exercise kawanatanga over all fisheries. The Crown will consequently continue to be responsible for the sustainable management of New Zealand fishery resources in the interests of all New Zealanders. That role will also enable the Crown to protect the Article II rights of tangata whenua where the actions of one group may adversely affect another. Those responsibilities will influence the giving of effect to the obligations of the Crown and the making of regulations.

15. The regulations will be in addition to the rights that all New Zealanders have to take fish for their personal use and sustenance, subject to the limitations imposed on those rights under the Fisheries Act 1983.

16. The obligations to make regulations and the regulation making power inserted into the Fisheries Act contemplates two basic types of regulations.

Crown's obligations to make regulations

17. ***The first*** of these is regulations recognising and providing for customary food gathering by tangata whenua, or persons authorised by tangata whenua, to take fish in accordance with their customary practices in any part of their rohe (noting the limitation that such food gathering must be neither commercial in any way nor for pecuniary gain or trade).

18. Similar provision currently exists in the Fisheries (Amateur Fishing) Regulations 1986 (Regulation 27 which has been amended by this Act). This provision was commonly known as the hui and tangi regulation. Regulation 27 is attached as Appendix III.

19. To give effect to the obligation of the Crown, MAF will need to develop an understanding of what tangata whenua consider is encompassed within the idea of customary food gathering, what fisheries it covers, what purposes it encompasses, what constraints were and should now be applied, and how those constraints can be recognised and given lawful effect by regulation.

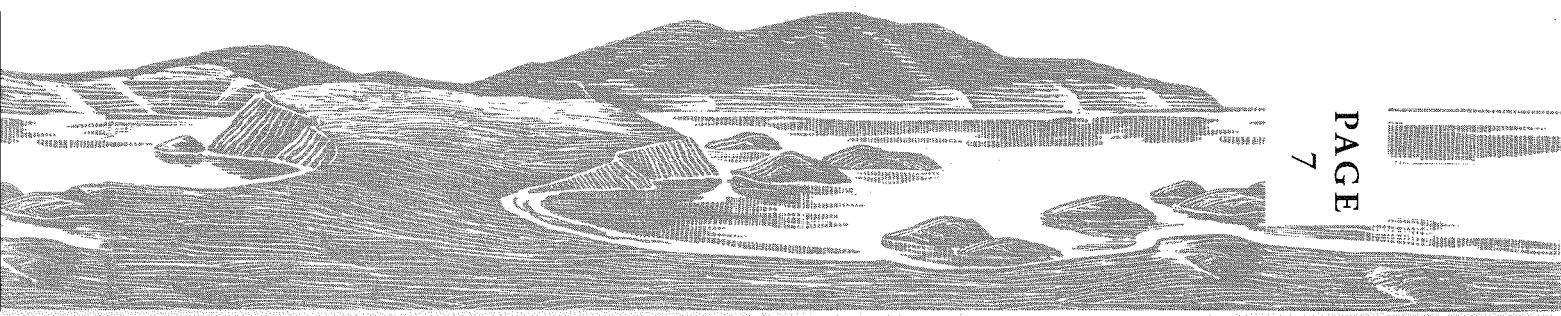
These are all matters upon which comment, information and submissions are sought from tangata whenua

20. ***The second*** type of regulation which is contemplated is that recognising and providing for the special relationship between tangata whenua and places of importance for customary food gathering. Such regulations will be site specific and will apply to the people who are the tangata whenua of the site.

21. In this context the Act provides for regulations empowering the Minister to declare ***mataitai reserves.***

22. Mataitai reserves can only be declared after consultation (by the Minister and the tangata whenua) with the local community and after having regard to the sustainable management of the fish, aquatic life and seaweed within the proposed reserve.

23. The regulations providing for the establishment of mataitai reserves can:
    - provide for such things as are necessary or desirable for the sustainable management of the fishery resources within the reserve;
    - empower a Maori Committee, marae committee or kaitiaki of the tangata whenua to make ***bylaws.***



24. Where provision is made for the making of bylaws then the following provisions apply:
    - every restriction or prohibition imposed on fishing must apply equally to all individuals;
    - the bylaws must be approved by the Minister and be gazetted in the ***Gazette.***

25. Notwithstanding that the Act provides that restrictions and prohibitions must be of general application, if the management committee of the reserve introduces a bylaw closing the area to harvest by individuals it may still be empowered to allow the taking of fish, aquatic life or seaweed to continue for purposes which sustain the functions of the marae.

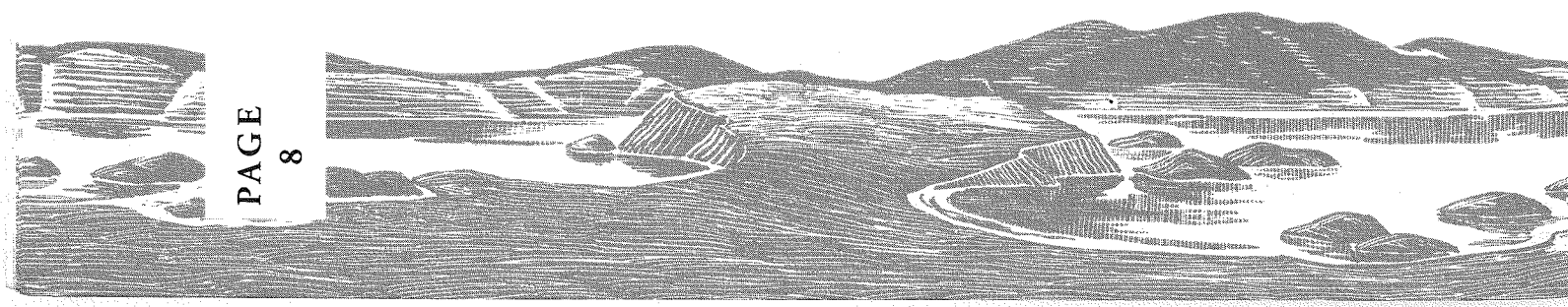
26. These provisions will enable the tangata whenua of the area to exercise a greater degree of tino rangatiratanga over those places which are of special significance or importance to them as customary food gathering places. For example if such regulations are made, the body empowered to make bylaws could prohibit fishing by any person (whether for commercial or non-commercial purposes) at all times or any time, prohibit commercial fishing, establish seasons or place limitations on the number or size of fish that could be taken. The exercise of control would however need to be carried out in a manner which was consistent with the sustainability of the fishery in the area.

27. Similarly no regulation or bylaw made under the Act shall be invalid because it removes an area from a Quota Management Area without an Act of Parliament.

28. It should be noted that if the commercial harvest of a species is not prohibited within a reserve by a bylaw, commercial fishing may continue under the controls in the Fisheries Act 1983. Any fish taken for commercial purposes would be required to be counted against a commercial quota holding or recorded in accordance with an appropriate fishing permit. If commercial fishing was to be allowed, no restriction outside the Fisheries Act could be placed on who can fish commercially for that species in the reserve or on the activity of their fishing.

29. It will be appreciated that it will be possible for there to be a number of regulations applying to any area which is declared to be a mataitai reserve, ie, amateur fishing regulations, commercial fishing regulations, customary food gathering regulations. The Act provides that regulations providing for mataitai reserves can be made to define which regulations prevail. ***Consequently it is possible to ensure that "mataitai" regulations (and their bylaws) will prevail over other legislation in the area of the reserve.***

30. A key component of Maori customary fishing practices was the breeding and relaying of particular species to increase their abundance or to ensure a balance in the ecosystem between species. Provision to allow tangata whenua to enhance fisheries and to conduct marine farming within the areas, to promote the sustainability of the fishery and to better provide for customary use, will need to be considered.



31. Any application under the Act which provides for enhancement requiring structures to be placed on the seabed or for marine farming will be subject to the requirements of the Resource Management Act 1991, in the same manner as any other coastal permit. These matters or their effects on other users are not managed wholly by the Fisheries Act 1983. Consequently no authority beyond the scope of the Act can be transferred to Maori.

Why use regulations to manage a customary interest

32. A fundamental principle of rangatiratanga is the right of an Iwi, hapu or runanga to exercise its customary regulatory authority over its members and tauiwi who seek to take fish under the customary authority of the group.

33. Traditionally tangata whenua enjoyed the ability to restrict the taking of fish throughout their entire rohe by all people, through a range of practices, including rahui and tapu. These controls were enforced either temporally by the iwi or spiritually. The right to control fishing was unstructured. The rules were simply known and individual use rights were based on kinship and not merely on boundaries.

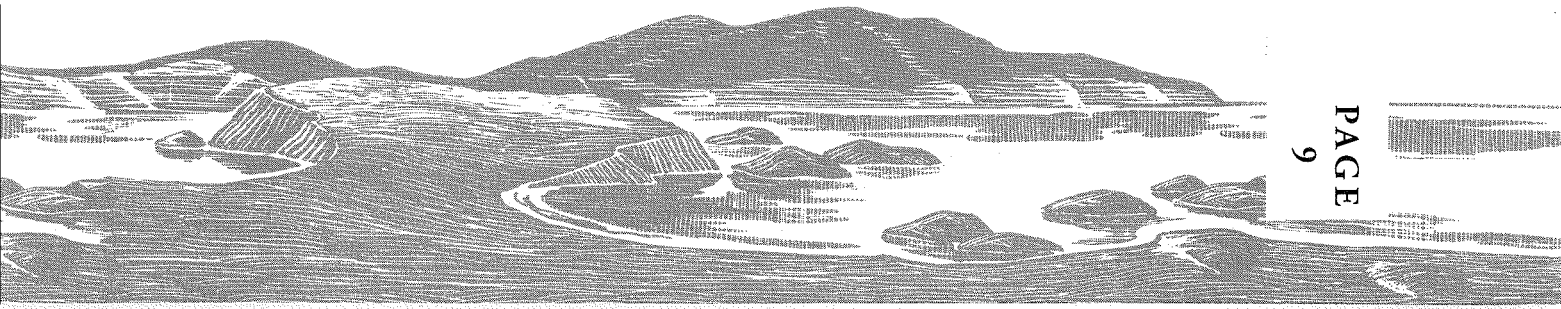
34. In the modern context these traditional sanctions alone have proved to be insufficient to prevent depletion of fisheries as they can only be applied to Iwi and tauiwi who understand and willingly adhere to traditional practices.

35. The Waitangi Tribunal found in the Muriwhenua claim that ***"the right of regulation has become a duty in our time, to protect the resource and to bring certainty to the law. It is also contrary to the public interest when Maori purporting to exercise customary fishing rights cannot be made bound to their own tribal rules."***

36. Kaitiaki will need the same tools that have been available to the Crown through legislation, to support and reinforce the authority that they hold under Tikanga Maori.

37. Tangata whenua should not look on regulations and bylaws as unnecessary and impractical words, but as tools to help to introduce the concepts of Tikanga Maori into modern fisheries management and as practical instruments to control undesirable activities and promote desirable activities to sustain and enhance their fisheries for future generations.

38. In this context it may be necessary for tangata whenua to introduce some practical controls which, while not customary in form, have the purpose of protecting customary values for the future. An example might be to require prior written approval from kaitiaki before an individual could harvest fish under tangata whenua authority to enable illegal harvesting to be quickly and easily identified.



39. In New Zealand today any enforcement of laws must be fair and offenses must be able to be prosecuted successfully through the courts if they are to be effective. When considering proposals for regulations to be made under s.89(1)(mb), tangata whenua will need to consider how much authority they need to manage and protect the fisheries that are of importance to them, and to ensure that all circumstances are provided for in legislation.

Why bylaws

40. Bylaws are rules made by an organisation which is empowered to do so by an Act of Parliament. In the case of the committees and kaitiaki their authority to make bylaws would be restricted to those matters provided for in the regulations which allow bylaws to be made "restricting and prohibiting the taking of fish, aquatic life and seaweed".

41. Bylaws are also specific to the area of authority of the organisation and would only apply in the area of the Mataitai reserve.

42. Bylaws are able to be imposed relatively quickly by notice in the ***Gazette*** to enable the committee or kaitiaki to change the controls in a reserve to meet the immediate requirements of the fishery and community.

43. Bylaws will require the approval of the Minister of Fisheries before they may be gazetted. However his consideration would be limited to determining whether the bylaw was consistent with the Act and regulations, the policies on which the reserve was approved and the sustainability of the fishery.

44. As with regulations, consultation with the local community on the content of any bylaw will be required.

Developing bylaws

45. The development of bylaws could reasonably follow a similar process as that used for regulations if regulations so specified.

46. The Crown considers that in most circumstances any bylaw proposed will not be legally complex but is more likely to provide for closures of areas, either seasonally or for a period to allow for rejuvenation or enhancement of the fishery, size and bag limits and restrictions on methods or types of fishing.

47. In most cases these types of bylaws could be negotiated between tangata whenua and regional MAF officers without the need for independent legal counsel.

48. The proposed bylaws could then be notified to the local community for comment and consultation carried out by tangata whenua and MAF to determine any adverse effects of the bylaws on the sustainability of the fishery.

49. MAF could then report to the Minister on the suitability of the bylaws in terms of the legislation. The primary issue would be the effect of the bylaws on the sustainability of the fishery.

Should there be a time limit for MAF responses to proposals for bylaws?

50. The Minister would then consider and decide on how appropriate those bylaws were in terms of the Act.

Are there additional matters in the production of bylaws, consultation, advice and drafting associated with the ongoing production of bylaws which require consideration?

Regulations relating to customary food gathering

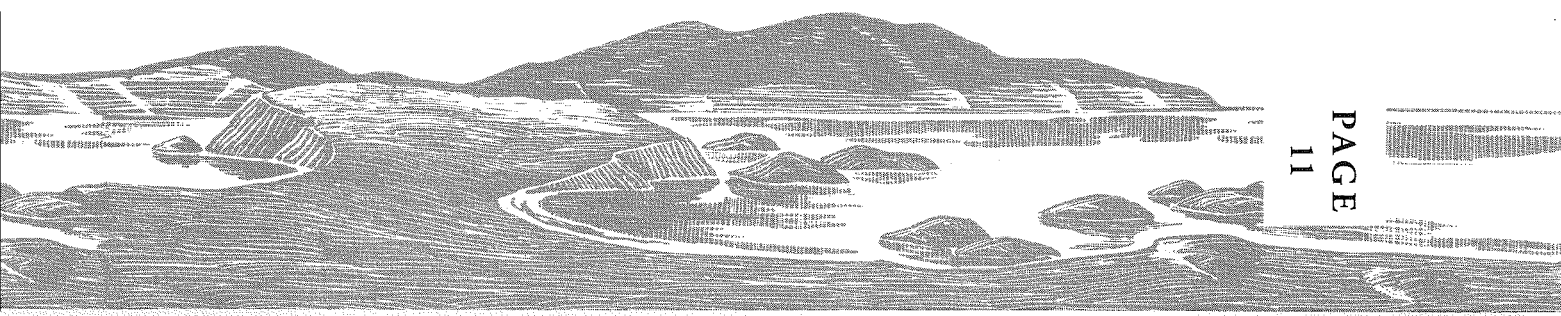
51. It is doubtful if all hapu or marae will have direct access to mataitai reserves which could meet their needs for all species of fish throughout the year. The Maori customary right to take fish for non-commercial purposes will need to be retained in regulation, subject to the sustainability of the fishery, to enable tangata whenua to have access to sufficient supplies of kaimoana to meet their needs for sustenance and to maintain the functions of the marae.

52. Tangata whenua will need to consider what powers they need, to practically control the taking of fish under their authority so as to recognise and provide for customary food gathering by Maori. They will also need to ensure there is a system to prevent illegal taking under the guise of customary harvest and that the fishery is not depleted due to the actions of the people authorised to take kaimoana by the kaitiaki.

53. To provide sufficient authority to tangata whenua to allow them to fully manage fisheries in their areas regulations could provide for:

    a) A system to transfer the authority to approve the taking of kaimoana from the Crown to the tangata whenua and to identify the proper source of authority to exercise those controls.

WHY: Tangata whenua need to have full control over the taking of fish under an Iwi customary right, subject to the sustainability of the fishery. The principles of the Treaty of Waitangi would suggest that the authority should be vested in the body representative of the tangata whenua who have rangatiratanga over the area of the rohe in which the kaimoana will be gathered.



S.30 of Te Ture Whenua Maori provides a mechanism for the Maori Land Court to give advice or make determinations as to who are the most appropriate representatives of any class or group of Maori affected by negotiations, consultations or allocations. This provision could also be used to identify who is the appropriate Maori group to manage fisheries in an area.

What, if any, alternative method would tangata whenua prefer to identify who has rangatiratanga over an area? Should the management group and their area of management be confirmed in law?

b) A definition in regulation of kaitiaki, if tangata whenua wish to have kaitiaki approve customary food gathering.

WHY: Kaitiaki could be any person or group nominated by the tangata whenua, such as traditional kaitiaki, runanga appointees or management committees. A definition of those bodies approved by Iwi would confirm their position in law and prevent challenges to their authority.

Should this be specific or simply provide for tangata whenua to nominate its choice to the Minister for approval? Should these positions be confirmed in law?

c) A provision to enable tangata whenua to approve the types of occasions for which permits will be given to take kaimoana under customary authority in their area.

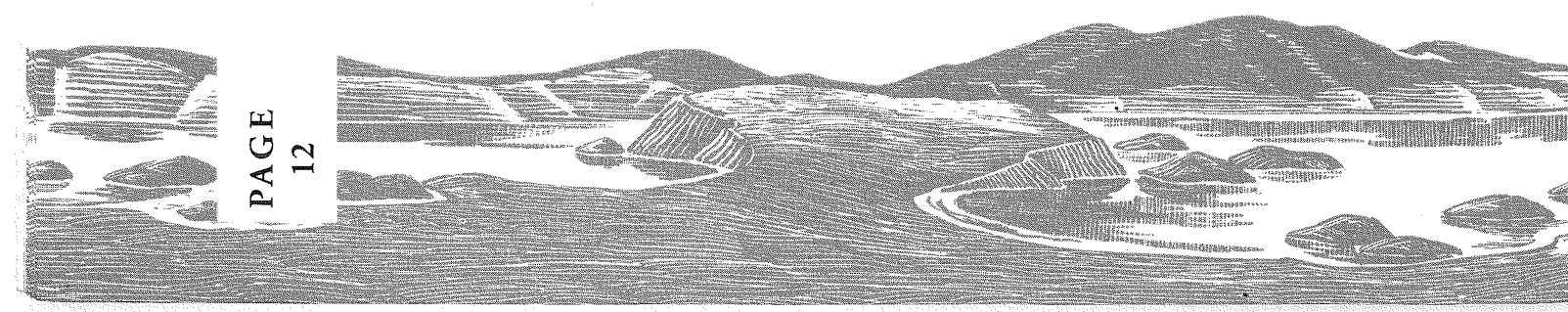
WHY: To enable kaitiaki to determine which activities are consistent with customary practice in their area, eg, hui, tangihanga, weddings, church functions, whanau subsistence needs.

Should this be nationally consistent or permissive to allow tangata whenua to determine what is appropriate for circumstances?

d) A provision to enable tangata whenua to determine harvest quantities, seasons, methods and sizes of fish to be harvested, consistent with the sustainability of the fishery in the area.

WHY: To enable tangata whenua to exercise rangatiratanga over their customary gathering and to enable them to manage that taking in a manner appropriate to their circumstances.

Where fisheries like the rock lobster fishery are under severe stress nationally, should there be provision for controls to be consistent between Iwi and Crown to protect the species and sustainably manage the fishery, as is required under general fisheries legislation?



e) A provision for permission be sought and given in each case for a person or group of persons to take kaimoana for those purposes approved by the tangata whenua of the area.

WHY: To enable kaitiaki to exercise their customary control and to ensure that each harvest is appropriate to the health of the fishery.

Should this permission be required to be given prior to harvesting and should it be required in writing to enable kaitiaki to easily identify illegal fishing?

f) A means to identify the areas over which a hapu or kaitiaki may approve the taking of kaimoana and to clearly identify those harvesters who have been given such an approval.

WHY: To confirm who has rangatiratanga over an area and who is accountable for any approvals to harvest. This is essential to enable local Maori fisheries officers and officers from MAF to determine who is legitimately exercising a right to harvest given by the kaitiaki.

g) A means to record the quantity of fish taken from an area.

WHY: a) To enable kaitiaki to better judge when an area should be rested so as to sustainably manage the fishery in an area.

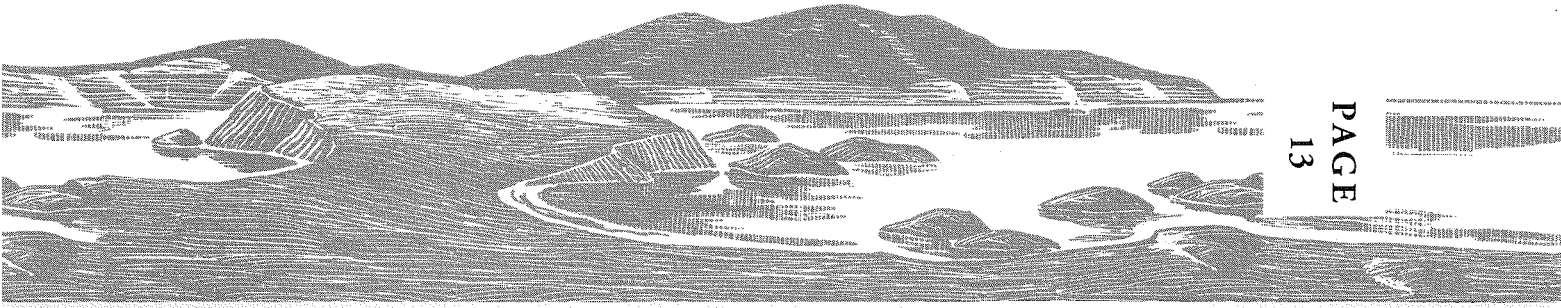
b) To enable the Crown to uphold its responsibilities to Maori to make sufficient provision for Maori non-commercial customary interests when setting the quota limits for commercial fishers. For this purpose s.28D(1)(a) of the Fisheries Act 1983 provides that when setting a total allowable commercial catch the Minister shall — after having regard to the total allowable catch for the fishery, including any total allowable catch determined under s.11 of the Territorial Sea and Exclusive Economic Zone Act 1977 — allow for non-commercial interests in the fishery.

How detailed should this information be? What should be provided to MAF and how often?

h) Provide sufficient restrictions in regulation on activities to enable local honorary fisheries officers to prevent illegal harvesting in their rohe.

WHY: Without restrictions authorised under the Fisheries Act 1983 kaitiaki will not be able to legally enforce bylaws or rahui.

What sort of restrictions do Iwi consider appropriate?



i) Provide for sufficient penalties to deter offenders.

WHY: Without reasonable and enforceable penalties, controls will be difficult to maintain.

j) That any activities or practices must have regard to the sustainability of the fishery in the area.

What provision should be made to enable tangata whenua and the Crown to consult each other on sustainability issues? When should the Crown be able to overrule tangata whenua management decisions?

k) That any approvals must not be for any commercial purpose including trade, barter, raffles, etc.

How should traditional gift exchanges like koha and utu be catered for?

l) Provide for persons nominated by the tangata whenua to be appointed as honorary fisheries officers.

WHY: Any person authorised to enforce fisheries law must hold a warrant of authority from the Director-General detailing their powers.

Who should nominate the officers? How many should be appointed? What powers should they hold? How should authority for their management be shared between MAF and Iwi?

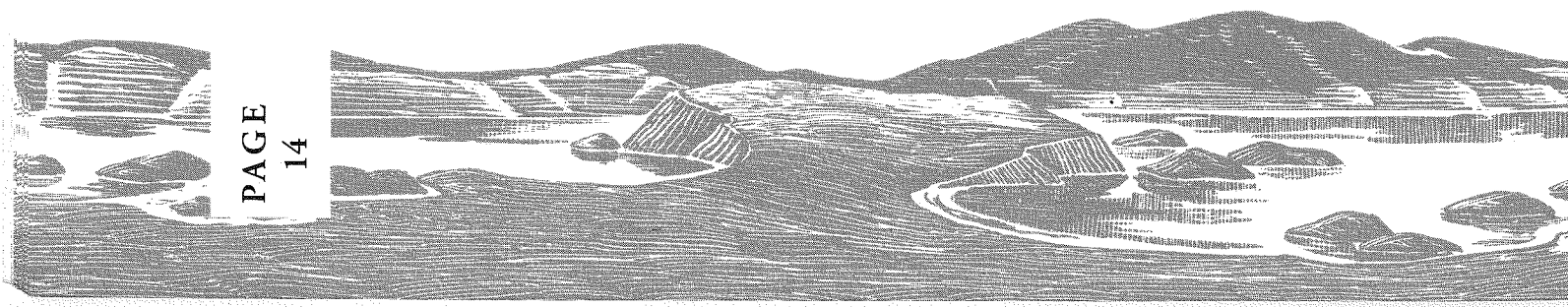
While these provisions may seem involved they are the minimum necessary to enable the tangata whenua ***in law*** to regulate the taking of kaimoana under customary title and to enable both Maori and the Crown to discharge their obligations to manage fisheries in a sustainable manner.

Regulations applying to mataitai reserves

54. In many respects any regulations which are specific to a mataitai reserve must provide for the same sorts of outcomes as those required to manage customary food gathering rights, but over a much smaller area. The additional matters that must be provided in any regulations that relate to mataitai reserves are:

a) A definition in law of what constitutes a mataitai reserve.

WHY: To define explicitly what areas of New Zealand fisheries waters may be declared as mataitai reserves to lessen challenges to any applications.



b) An authorisation to empower the Minister of Fisheries to declare mataitai reserves.

WHY: To ensure the reserve may be lawfully declared.

c) A simple, clearly defined and short application process to enable tangata whenua to apply for reserves in their area.

WHY: To ensure that reserves can be established with minimum delay.

d) A provision for the both the Minister and tangata whenua to consult with the local community and other affected parties over any proposal for a reserve.

WHY: The Act and administrative law require that adequate consultation is carried out with any affected parties with regard to the sustainability of the fishery and the effect of the reserve on their fishing, to fully inform the Minister of any adverse effects of an application.

e) Provisions to ensure the fishery in the reserve is managed in a sustainable manner and that the tangata whenua will have sufficient authority to enable them to implement their management strategies.

f) Provision to record the quantities of each species being taken from the reserve.

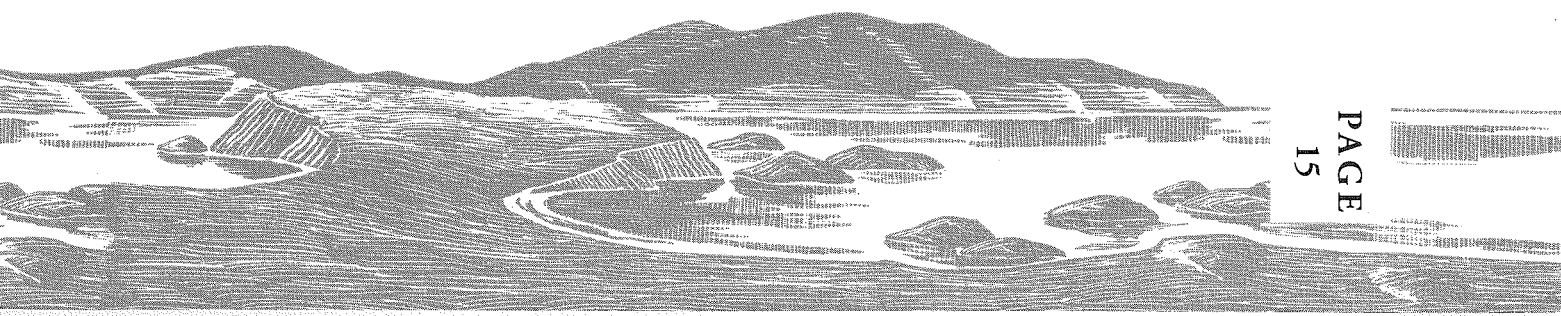
WHY: To enable tangata whenua and the Crown to meet their responsibilities to sustainably manage the fishery and to account for Maori needs when setting limits on catches of species in the general fishery.

g) Provision to provide for consultation between the tangata whenua and the Crown on the sustainability of the fishery in the reserve.

WHY: To enable both partners to share information and develop appropriate mechanisms to carry out their obligations under the Act to sustainably manage fisheries and the Minister to determine if it is necessary for the overall conservation and management of the fisheries to introduce alternative controls.

h) Provision to empower the tangata whenua to make bylaws to restrict or prohibit the taking of fish, aquatic life or seaweed.

WHY: To legally empower the kaitiaki to manage the fishery in the reserve and to ensure they have adequate authority to control fishing.



i) Provision to enable those bylaws to be Gazetted and enforced.

WHY: To enable tangata whenua and MAF to apprehend people breaking the bylaws.

j) Penalty provisions to deter offenders.

WHY: To provide a legislated deterrent to offenders, consistent with the provisions of Fisheries Act and to identify who will enforce bylaws and prosecute offenders.

k) Provision to enable the tangata whenua to allow the taking of fish, aquatic life and seaweed to continue for purposes which sustain the functions of the marae concerned when a reserve is closed to harvest by individuals.

WHY: To ensure that the functions of the marae are given a priority over other uses of the fishery resource in the reserve in times of shortage or when the reserve is closed to allow stocks to rebuild.

Mataitai reserve application process

55. It was the intent of the Crown and Maori that any application process for mataitai reserves should be uncomplicated, short and transparent. The following matters must be provided for if an application is to lessen the potential for a successful legal challenge.

a) The Minister may receive applications from the tangata whenua of the area to have any fishing ground which has been of importance to them as a site for customary food gathering to be declared a mataitai reserve.

Should the Minister use s.30 of Te Ture Whenua Maori to identify the tangata whenua of the area who have rangatiratanga over the fishing ground? What, if any, alternative disputes procedures do tangata whenua consider should be provided?

b) The area of the application needs to be identified clearly to allow the Minister to determine who is the local community which could be affected.

c) The tangata whenua will need to state their general policies to ensure the sustainability of the fishery and their proposed management practices to achieve those policies, to enable the Minister to assess the effects of the reserve.

d) The Minister may need to be able to call for further information from the applicant.

e) The Minister on receipt of the application will publicly notify the application and call for submissions from the local community within a specified time from the date of notification.

How does the Minister identify who is the local community?

f) The Minister and tangata whenua must consult with the local community.

Do tangata whenua wish to consult the local community jointly with the Crown or separately?

g) The tangata whenua and the Minister should fully inform themselves of the local community's concerns. This could be achieved through a hui or hearing held in the area. A further important reason for holding a hui is for tangata whenua and the Minister to explain to the community how any proposed reserve will affect them. Applicants and the community may wish to make compromises on the area and management to meet all parties' needs.

Alternatively the Minister could receive written submissions and make a decision without holding a hearing. With this option the process could be faster but may lead to more requests for reviews of the Minister's decisions.

Would the needs of the community with respect to consultation be met by a written submission process and no hui/hearing?

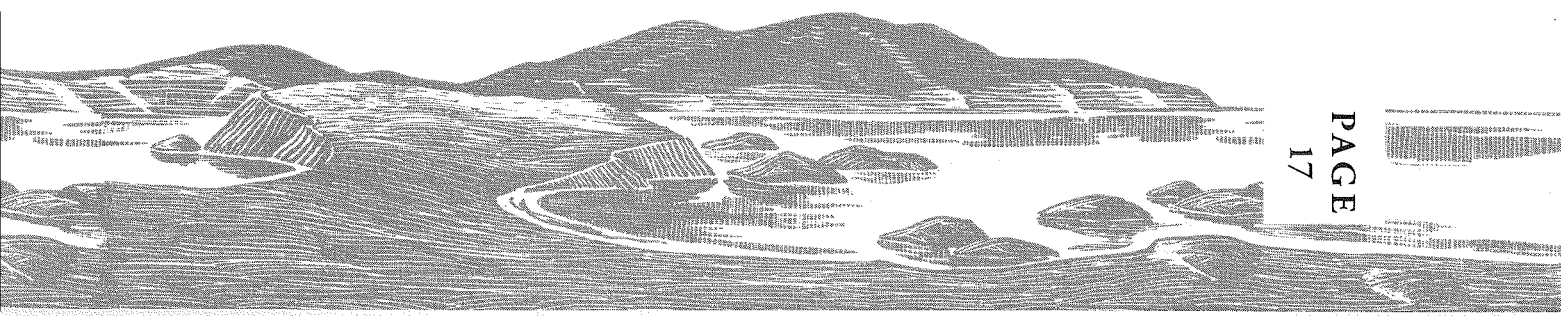
Matters for consideration by the Minister

56. The Act provides for the Minister to consult with the local community on the establishment of a mataitai reserve.

57. Provision could be made for the Minister to be fully informed of any impacts on the local community from the reserve and to receive all submissions from that community.

58. The regulations could provide for the Minister to receive and consider all submissions in respect of the sustainability of the fishery.

59. In considering the application the Minister could take into account the effect of the reserve on the local community and the sustainability of the fishery.



60. The effect of the reserve on the ability of quota holders to take their quota is a further consideration. The Act provides for the Minister to develop policies to help recognise Maori use and management practices in the exercise of non-commercial fishing rights but the size of the reserve cannot be such as to prevent quota holders from lawfully taking their quota in the area of the Quota Management Area.

61. The Minister could consider as a matter of policy, equity between Iwi or hapu to ensure that not all reserves are in rural areas. Iwi with rohe close to population centres could then benefit from the establishment of reserves and a reasonable distribution of reserves would benefit the largest number of Maori.

Should there be a time limit set for the consideration and decision on an application for a reserve?

62. Having made a decision the Minister could provide a report on the decision and how any submissions were considered in making that decision. This would be provided to the tangata whenua and those who made submissions. It would be available to all others on request.

Compliance programmes and appointment of honorary fisheries officers

63. An effective compliance programme is critical to the success of any fisheries management programme.

64. While the establishment of reserves may be the most appropriate way to recognise and provide for customary use by tangata whenua, MAF has found the creation of boundaries over water, for any purpose, is the most difficult and costly system to enforce unless the programme has the support of the whole community in an area.

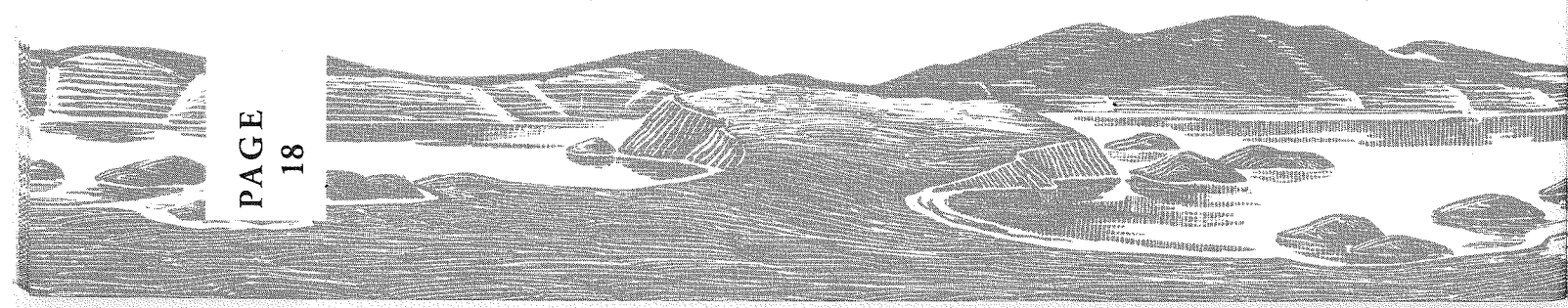
65. Compliance with any management system can be achieved in a number of ways: education; surveillance; patrols and apprehension. These functions could be carried out by local people, MAF officers or both.

66. The greater the number of reserves and the more isolated the area the greater will be the need for a locally based compliance effort.

67. Any person acting to enforce the legislation to manage mataitai reserves must be appointed as an authorised officer under the Fisheries Act. There is no other legal authority to empower any person to enforce fisheries legislation.

68. Appointees must be able to interpret the law which they seek to enforce, have appropriate training both to apprehend offenders, take evidence and present that evidence before the courts.

How should MAF best provide this type of training?



69. In many circumstances local enforcement officers will be required to apprehend and give evidence against members of their own community. Unless both the enforcement officers drawn from tangata whenua, and the local community that nominates them, seriously and fairly enforce the bylaws that the community devises, mataitai reserves will be of no purpose and will fail as a mechanism to return to tangata whenua the control over their local fisheries. The community may need to consider a simple, clear approval system that minimises the opportunity for offenders to bring pressure on fisheries officers and kaitiaki if they are caught infringing the reserves.

70. Tangata whenua need to consider the most appropriate mix of education and apprehension to ensure compliance with the bylaws in their reserve.

71. Access points to the reserve will need to be signposted to identify the area of the reserve and the bylaws applying in the area at the time.

72. They will also need to determine the number of officers they need to nominate to adequately patrol their reserves, and whether they should be based near the reserve or act as part of an Iwi team who could patrol a number of reserves and act on information from the local community.

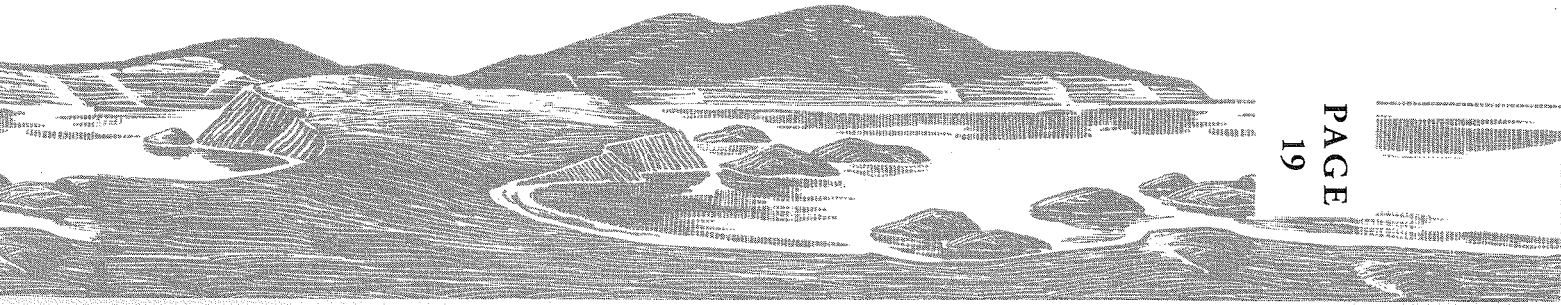
How should officers be nominated by the tangata whenua and appointed by the Minister?

73. Tangata whenua will need to assess the extent to which they can practically enforce their bylaws, eg, can they patrol out to sea at any distance effectively, can they actually identify if someone is illegally taking fish from the reserve.

74. They will need to consider the practical cost of enforcement in their area. It is envisaged that tangata whenua and the Crown would jointly enforce bylaws, with the Iwi providing honorary personnel to patrol their areas and MAF providing training, support and legal services. Tangata whenua will need to consider how the local community should provide information to Iwi fisheries officers.

75. It is proposed that while enforcement officers would need to give evidence in court, any prosecution would be taken by solicitors from MAF or local Crown Counsel, as the laws being administered by tangata whenua are still part of the Fisheries Act and the expertise to prosecute fisheries cases is often specialist in nature.

76. There will need to be a close and continuing working partnership between MAF and tangata whenua to ensure that both parties work together to ensure the availability of kaimoana to the community and the sustainability of fisheries for the future.



Mataitai reserves and their relationship to taiapure

77. Section 89(1c)(a) of the Act states that regulations made to recognise and provide for mataitai reserves may overrule general fishing regulations and those relating to taiapure-local fisheries regulations.

78. Mataitai reserves may be established in any part of New Zealand fisheries waters including within the boundaries of an existing or proposed taiapure area. Taiapure are restricted to estuarine or coastal littoral waters.

79. Where a mataitai reserve and a taiapure are established in the same area, regulations and bylaws applying within the mataitai reserve could overrule both the taiapure regulations in that area and also general fishing regulations.

Tangata whenua will need to be clear on what they wish to achieve from the management of an area, as in some circumstances taiapure or closures of an area, under existing fishing regulations may be more appropriate to achieve their goals than a mataitai reserve.

80. Mataitai reserves apply only to areas which are of importance for customary food gathering purposes. They do not apply to areas which tangata whenua want to protect for other purposes such as their spiritual associations with the people or to marine species which are not used for food, eg, rimurapa for poha. These types of areas can be provided for by taiapure.

Should these other aspects of mahinga kai be provided for in mataitai reserves?

Mataitai reserves and their relationship to other legislation

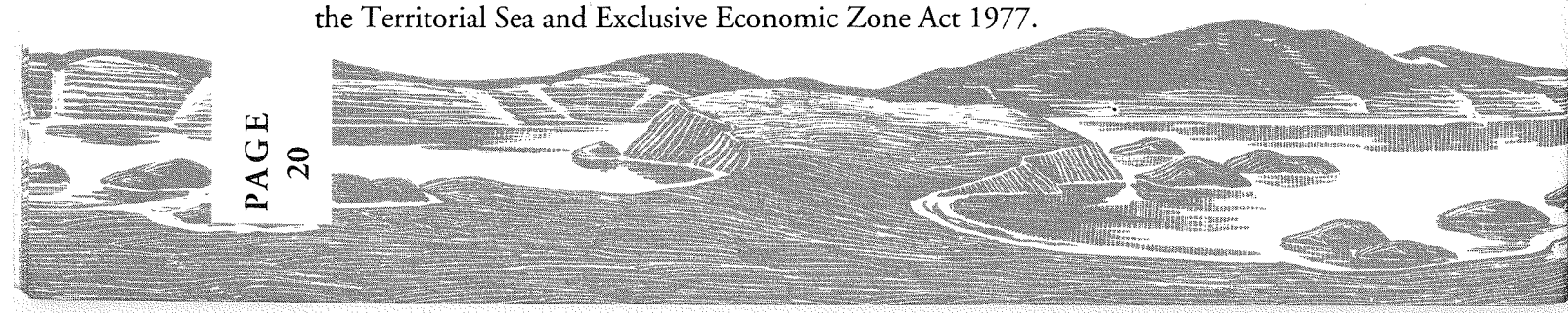
81. The Deed of Settlement and the Act relate only to those matters managed under the Fisheries Act 1983 and its regulations.

82. The Conservation Act 1987 provides for the management of the non-commercial aspects of freshwater fisheries.

83. A number of other Acts cover aspects of the marine environment or the coast. The primary legislation is the Resource Management Act 1991, and the Marine Reserves Act 1977.

84. These Acts and their responsibilities were not amended by the settlement of Maori claims to fisheries and Maori are still bound by their provisions.

85. Other legislation which is unaffected by the settlement but which could impact on some aspects of fisheries management are the Marine Mammals Protection Act 1978, the Wildlife Act 1953, the Reserves Act 1977, the Continental Shelf Act 1964 and the Territorial Sea and Exclusive Economic Zone Act 1977.



Resource Management Act 1991

86. The Resource Management Act (RMA), among other functions, provides for the management and allocation of coastal space (such as marine farms and reclamations) and the effects of activities on the coastal environment (such as discharges of contaminants into water and the effects of mining).

87. The RMA does not control the harvesting of aquatic organisms, where the purpose is to conserve, enhance, protect, allocate or manage any fishery controlled by the Fisheries Act 1983.

88. The approval of a mataitai reserve does not confer rights or responsibilities to Maori under the RMA. Mataitai reserves only give exclusive management of the fishery. Exclusion of people for purposes other than fishing can only be made under the RMA.

89. Any proposal by Maori to use the area of the reserve for purposes other than fishing and the enhancement of wild fisheries, (aquaculture, mooring, etc), will also require approval under the RMA.

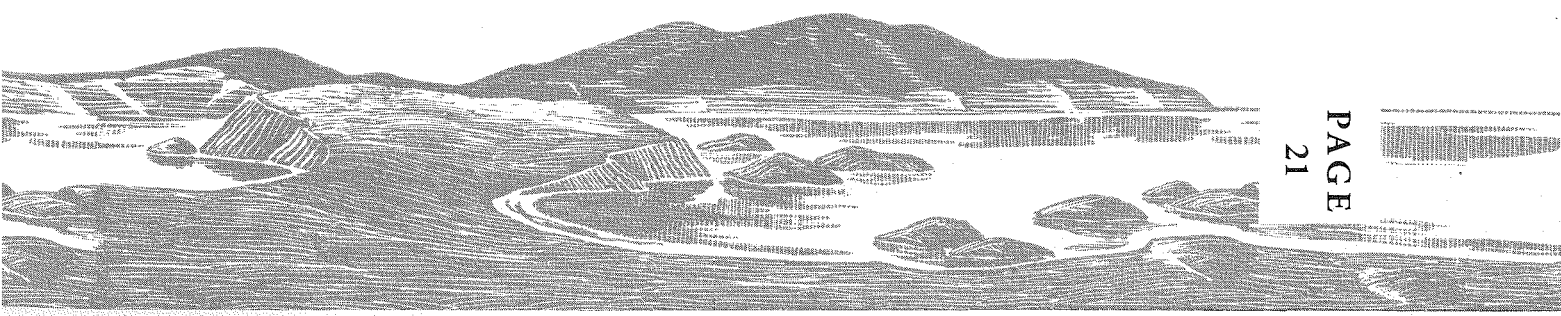
90. The establishment of a mataitai reserve will clearly identify the reserve as a mahinga mataitai in terms of the RMA in national policy statements (including the New Zealand Coastal Policy Statement) and Regional and District policies and plans. Any applications by other users for consents for non-fisheries uses within or in proximity to the reserve could then be considered in relation to the likely effects on the reserve.

Marine Reserves Act 1971

91. The Marine Reserves Act 1971 provides for the establishment of marine reserves to preserve in their natural state areas of New Zealand that contain underwater scenery, natural features or marine life, of such distinctive quality, or so typical or unique that their preservation is in the national interest for scientific study. Marine reserves are approved by the Minister of Conservation with the concurrence of the Ministers of Fisheries and Transport.

92. Marine reserves are primarily for the protection of habitat and marine life and as such the taking of fish within a reserve is generally prohibited. In some cases limited taking of fish by specific methods by non-commercial fishers may be provided.

93. Marine reserves are managed by the Department of Conservation. Where a marine reserve is in existence it is most unlikely that a mataitai reserve application could succeed as the local community of interest in the area would be adversely affected by the change of purpose of the area to allow the taking of fish.

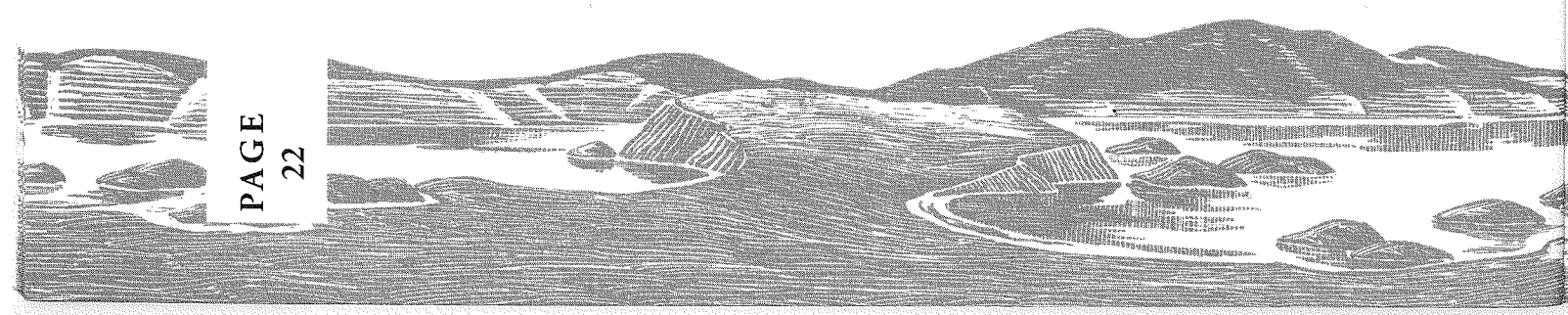


94. If a mataitai reserve was approved in the area of a marine reserve any bylaws made by tangata whenua could not overrule the provisions of the Marine Reserves Act.

95. Where the establishment of mataitai reserves and marine reserves is being proposed for the same area there is no procedure to give preference to either applicant.

96. The Minister of Conservation must however give effect to the Treaty of Waitangi under s.4 of the Conservation Act when making his decisions.

97. The Minister of Fisheries must also give his concurrence to a marine reserve in respect of matters of non-commercial fishing and public interest, which could recognise tangata whenua interests in the area.



Appendix I

Treaty of Waitangi (Fisheries Claims) Settlement 1992, No. 121

An Act

(a) To give effect to the settlement of claims relating to Maori fishing rights; and
(b) To make better provision for Maori non-commercial traditional and customary fishing rights and interests; and
(c) To make better provision for Maori participation in the management and conservation of New Zealand's fisheries. *14 December 1992*

WHEREAS

(a) By the Treaty of Waitangi the Crown confirms and guarantees of the Chiefs, tribes, and individual Maori full exclusive and undisturbed possession and te tino rangatiratanga of their fisheries; and
(b) Section 88(2) of the Fisheries Act 1983 provides that nothing in that Act shall affect any Maori fishing rights and;
(c) There has been uncertainty and dispute between the Crown and Maori as to the nature and extent of Maori fishing rights in the modern context and as to whether they derive from the Treaty or common law or both (such as by customary law or aboriginal title or otherwise) and as to the import of section 88(2) of the Fisheries Act 1983 and its predecessors; and
(d) Maori have claimed in proceedings in the High Court and in various claims to the Waitangi Tribunal that the quota management system introduced by the Fisheries Amendment Act 1986 is unlawful and in breach of the principles of the Treaty of Waitangi, or has no application to Maori fisheries (including commercial fisheries), and have obtained from the High Court and Court of Appeal, by way of interim relief, a declaration declaring that the Crown ought not take further steps to bring the fisheries within the quota management system; and
(e) At a national hui held at Wellington in June 1988 the Maori principals were given a mandate by Maori claiming rights and interests in the fisheries of New Zealand to secure a just and honourable settlement of their claims with the Crown; and
(f) The Maori Fisheries Act 1989, an Act "to make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi" (which came into force on the 20th day of December 1989) provides for the transfer from the Crown to the Maori Fisheries Commission of quota totalling 10 percent of the total allowable commercial catches for all species then subject to the quota management system (which transfer was required to be effected in instalments over the period ending with the close of the 31st day of October 1992); and

(g) On the 27th day of February 1990, the Crown and Maori agreed that there should be discussions between them to ensure that the evolution of the quota management system, including the term of quota, met both conservation requirements and the principles of the Treaty of Waitangi and further agreed that all substantive court proceedings should stand adjourned sine die to allow discussions to continue, and the Crown agreed that no further species would be brought within the quota managementsystem pending agreement or court resolution; and

(h) There remain disputes between the Crown and Maori as to the nature and extent of Maori fishing rights and interests and their status, and the litigation between the plaintiffs and the Crown is still outstanding with interim declarations in relation to squid and paua and the Crown undertaking not to bring further species within the quota management system still in force; and

(i) On the 26th and 27th days of August 1992, representatives of the Crown and Maori met to discuss their differences with a view to settling outstanding claims and Treaty grievances of Maori in relation to fisheries, and therefore, the outstanding litigation; and, on the 27th day of August 1992, agreement was reached on a proposal for settlement; and

(j) The Crown and Maori wish to resolve their disputes in relation to the fishing rights and interests and the quota management system and seek a just and honourable solution in conformity with the principles of the Treaty of Waitangi; and

(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; and

(l) A deed dated the 23rd day of September 1992 was entered into between the Crown and Sir Graham Latimer, the Honourable Matiu Rata, Richard Dargaville, Tipene O'Regan, Cletus Maanu Paul, and Whatarangi Winiata, together with other persons who have negotiated with the Crown on behalf of iwi, the New Zealand Maori Council, the National Maori Congress, and other representatives of iwi, whereby it was agreed between the parties that —

  (i) Maori would enter into a joint venture with Brierley Investments Limited to acquire Sealord Products Limited, a major fishing company; and

  (ii) The Crown would pay to Maori a sum of $150 million to be used for the development and involvement of Maori in the New Zealand fishing industry, including participation in the acquisition of Sealord Products Limited; and

  (iii) The Crown would introduce legislation to ensure that Maori were allocated 20 percent of all quota for species henceforth brought within the quota management system; and

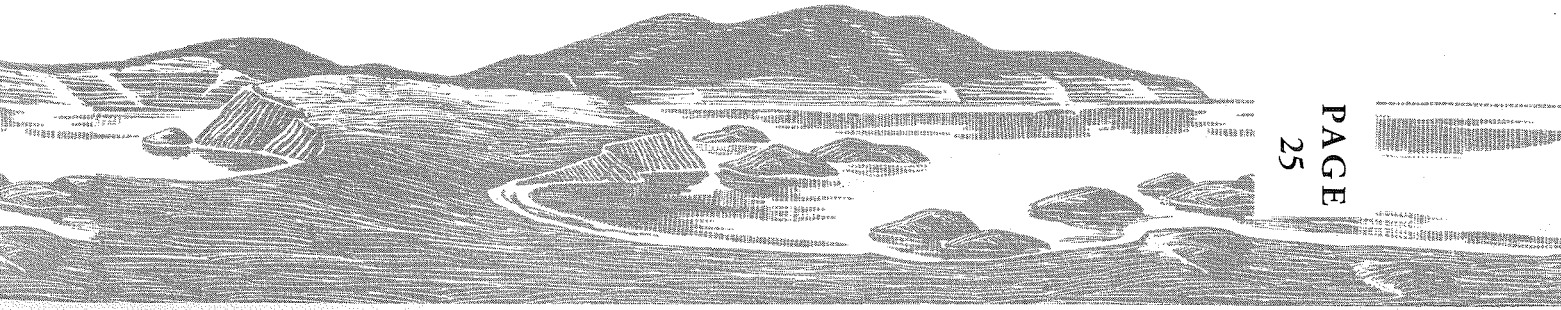
(iv) The Crown would introduce legislation empowering the making of regulations recognising and providing for customary food gathering and the special relationship between the tangata whenua and places of importance for customary food gathering (including tauranga ika and mahinga mataitai), to the extent that such food gathering is not commercial in any way nor involves commercial gain or trade; and

(v) The Crown would introduce legislation to reconstitute the Maori Fisheries Commission as the Treaty of Waitangi Fisheries Commission; and

(vi) The Treaty of Waitangi Fisheries Commission would consider the resolutions in respect of the assets held by the Commission at the settlement date specified in the deed, as adopted by the Annual General Meeting of the Commission on the 25th day of July 1992, and consider how best to give effect to the resolutions, and would be empowered to allocate those assets; and

(vii) Following consultation with Maori, the Treaty of Waitangi Fisheries Commission would devise and report to the Crown on a scheme for the distribution of the Commission's assets other than those referred to in subparagraph (vi) of this paragraph; and

(viii) The implementation of the deed through legislation and the continuing relationship between the Crown and Maori would constitute a full and final settlement of all Maori claims to commercial fishing rights and would change the status of non-commercial fishing rights so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect but would continue to be subject to the principles of the Treaty of Waitangi and give rise to Treaty obligations on the Crown:



Appendix II

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; and

(c) The Minister shall recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 to recognise and provide for customary food gathering by Maori and the special relationship between tangata 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 neither commercial in any way nor for pecuniary gain or trade; but

(d) The rights or interest of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly
  (i) Are not enforceable in civil proceedings; and
  (ii) Shall not provide a defence to any criminal, regulatory, or other proceeding, except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983.

33. Limitation of Act — Section 88 of the principal Act is hereby amended by repealing subsection (2).

34. Regulations —

(1) Section 89 (1) of the principal Act is hereby amended by inserting, after paragraph (ma) (as inserted by section 42 (4) of the Fisheries Amendment Act 1990), the following paragraph:

"(mb) Recognising and providing for customary food gathering by Maori and the special relationship between tangata whenua and places of importance for customary food gathering (including tauranga ika and mahinga mataitai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade:".

(2) Section 89 of the principal Act is hereby amended by inserting, after subsection (1B) (as inserted by section 16 (5) of the Fisheries Amendment Act (No. 2) 1992), the following subsection:

"(1c) Without limiting the generality of subsection (1) (mb) of this section, regulations made under that provision may —

"(a) Declare the relationship between such regulations and general fishing regulations made under this Act and regulations relating to taiapure-local fisheries; and declare that the first-mentioned regulations shall prevail over such other regulations:

"(b) Empower the Minister to declare any part of New Zealand fisheries waters to be a mataitai reserve, by notice in the *Gazette* given after consultation by the Minister and the tangata whenua with the local community and having regard to the sustainable management of the fish, aquatic life, and seaweed in the reserve:

"(c) Provide for such matters as may be necessary or desirable for the sustainable management of the fish, aquatic life, and seaweed in mataitai reserves, including general restrictions and prohibitions in respect of the taking of fish, aquatic life, or seaweed:

"(d) Empower any Maori Committee constituted by or under the Maori Community Development Act 1962, any marae committee, or any kaitiaki of the tangata whenua to make bylaws restricting or prohibiting the taking of fish, aquatic life, or seaweed:

"(e) Empower any such Maori Committee, marae committee, or kaitiaki to allow the taking of fish, aquatic life, or seaweed to continue for purposes which sustain the functions of the marae concerned, notwithstanding any such bylaws."

(3) Section 89 (3) (b) of the principal Act is hereby amended by inserting, before the word "fishing", the word "non-commercial"

(4) Section 89 of the principal Act is hereby amended by inserting, after subsection (3), the following subsections:

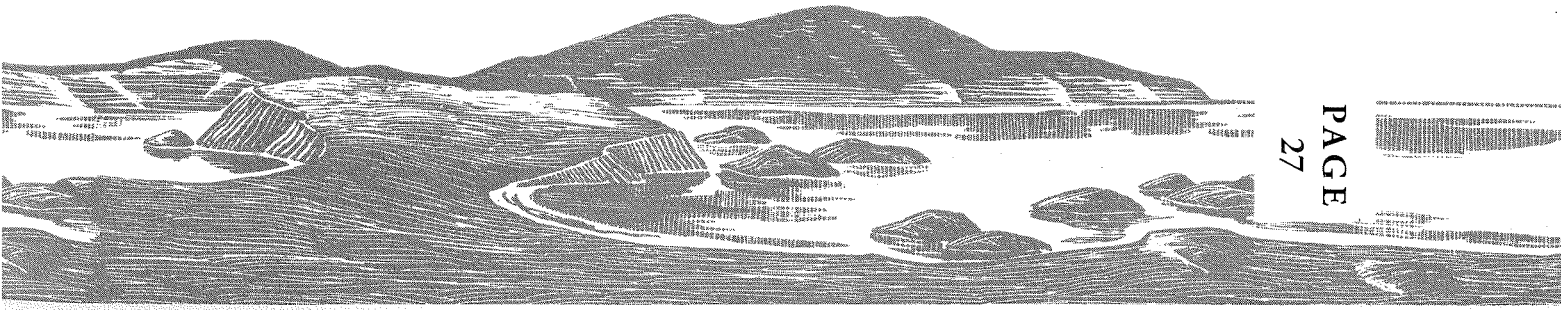
"(3A) No regulation made under subsection (1) (mb) or subsection (3) (b) of this section shall be invalid by reason only that it conflicts with section 28B (5) of this Act.

"(3B) The following provisions shall apply in respect of bylaws made under regulations made under subsection (1c) (d) of this section:

"(a) Every restriction and every prohibition imposed on individuals by such bylaws shall apply generally to all individuals:

"(b) Bylaws shall not come into force until they have been approved by the Minister and have been gazetted:

"(c) The publication in the *Gazette* of bylaws purporting to have been approved by the Minister under this subsection shall be conclusive evidence that the bylaws have been duly made and approved under this section."



Appendix III

37. Fisheries (Amateur Fishing) Regulations 1986

(1) The Fisheries (Amateur Fishing) Regulations 1986 (S.R. 1986/221) are hereby amended by revoking regulation 27, and substituting the following regulation:

"**27. Fish taken for hui, tangi, or other approved purpose** — (1) Nothing in these regulations or in any other regulations made pursuant to the Act relating to amateur fishing and imposing any restriction on the taking of fish, aquatic life, or seaweed shall apply where —

"(a) The fish, aquatic life, or seaweed is or are taken for the purposes of a hui, tangi, or traditional non-commercial fishing use approved by the Director-General; and

"(b) The fish are taken in accordance with any conditions considered by the Director-General to be necessary for the overall conservation and management of the fishery.

(2) The Director-General may, in writing, delegate to one or more of the following, namely —

"(a) Any Maori Committee constituted by or under the Maori Community Development Act 1962; or

"(b) Any marae committee that is an incorporated society under the Incorporated Societies Act 1908; or

"(c) Any kaitiaki of the tangata whenua, the power to approve a hui, tangi, or traditional non-commercial fishing use under subclause (1) (a) of this regulation."