IN THE ENVIRONMENT COURT
AUCKLAND

ENV-2015-134

IN THE MATTER OF	Of the Resource Management Act 1991 and of an appeal under Clause 14 of the First Schedule of the Act
BETWEEN	MOTITI ROHE MOANA TRUST
	Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL
	Respondent

SUBMISSIONS FOR THE ATTORNEY-GENERAL

4 December 2017

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Introduction

1. This appeal relates to the inclusion of the Motiti Natural Environment Management Area (**MNEMA**) in the Bay of Plenty Regional Council's (**Council**) Proposed Regional Coastal Environment Plan (**PRCEP**).

2. The Crown acknowledges the cultural significance that relevant groups place over the area the subject of these proceedings.

3. In this case, the Crown was joined late and provided an opportunity to assist the Court with evidence on potential Fisheries Act 1996 (**Fisheries Act**) implications. With that limited involvement in mind, these submissions address the following two key issues:

   3.1 To what extent the MRMT proposals are barred by s 30(2) of the Resource Management Act (**RMA**) as interpreted by the High Court.

   3.2 Potential implications arising from the MRMT proposal for fisheries management, which are relevant for the Environment Court in determining whether to include the proposed provisions.

Summary of submissions

4. The Crown does not seek to challenge the High Court's decision in this case but rather apply it to the MRMT proposal. The Crown sees this case as significant in being the first to test the interrelationship of the two regimes following the High Court's clarification.

5. It is accepted that, on the basis of the High Court decision, the Court does have the ability under the RMA to manage the externalities of fishing not controlled under the Fisheries Act and also, to some extent, the utilisation of fisheries resources provided this is strictly necessary for maintaining indigenous biodiversity.

6. The proposal has continued to evolve throughout this process. Aspects of the current proposal (particularly rules 1 and 3) continue to offend the jurisdictional limits established by s 30(2) of the RMA.

7. Insofar as the Court considers it has jurisdiction, the Crown does not present a substantive case in opposition or support of the current proposal, having only

being joined to these proceedings to provide evidence directed to fisheries management impacts. That evidence may assist the Court in determining to what extent the proposal requires immediate inclusion in the PRCEP.

Crown's evidence

8. The Attorney-General is calling two witnesses.

9. Andrew Hill has expertise in fisheries management and policy:

   9.1 Mr Hill's evidence is that if the MNEMA proposal is included in its current form it could have flow on implications for fisheries management in the Bay of Plenty. In short, he has sought to address the topics directed by the Court in its 18 October 2017 minute:

      9.1.1 Potential implications arising from the MRMT proposal for fisheries management under the Fisheries Act in the Bay of Plenty.

      9.1.2 Potential implications arising from the MRMT proposal regime to mechanisms implementing the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (**Fisheries Settlement Act**).

10. At the request of the appellant Dr Deborah Freeman, marine ecologist, has also been called to answer questions from counsel and the Court. The appellant sought her Rena evidence be appended to her brief. Dr Freeman has read the Court minute dated 18 October 2017 and can also address the Court, to the best of her knowledge, on wider matters outlined at footnote 1 should the Court consider such issues relevant here, being: Hauraki Gulf Marine Spatial Planning documents, Goat Island Sanctuary Study, and coastal marine plans/controls for NZ offshore islands.

Can the PRCEP include MRMT's proposal?

11. The MNEMA proposal will affect commercial fishers, recreational fishers and customary activities. The MRMT proposal as presently framed appears to offend s 30(2) of the RMA. This is relevant as a council must prepare and

change any regional plan in accordance with its functions under s 30.[1] The direction to give effect to any national policy statement, or regional policy statement, is subject to that jurisdictional limit.[2]

The interface between the RMA and Fisheries Act

12. The interface between the RMA and Fisheries Act is complex. The High Court decision provides the current legal position and stands for the following propositions:

12.1 First, there is overlap in the purpose of both regimes. The policy of s 30(2) is that the RMA's purpose of sustainable management is promoted by the sustainable utilisation of the fisheries resources under the Fisheries Act.[3] Accordingly, if the particular control falls within the Fisheries Act sphere of control, it takes precedence.

12.2 Second, and related to this point, in the event of any potential uncertainty or conflict, especially with respect to the utilisation of fisheries resources, the Fisheries Act occupies the field. The RMA must, in such circumstances, be read down (if necessary) to avoid conflict between the two; that is the general must give way to the specific.[4]

12.3 Third, the purpose or object of the provision objectively considered determines whether a control is within, or outside, of the Court's jurisdiction, not the motive of the council or appellant in this case.[5] That means the rules proposed must be determined objectively in light of the relevant objectives, policies and methods and evidence.

12.4 Fourth, regional councils cannot (subject to the provisos below) exercise their functions to manage the utilisation of fisheries resources *or* the effects of fishing on the biological sustainability of the aquatic

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1 Section 66(1) of the RMA.

2 Section 67(3) of the RMA.

3 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [100].

4 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [98].

5 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [89] to [90].

environment as a resource for fishing needs.[6] That is there are two limbs to the types of controls that are injuncted:

12.4.1 With respect to the first limb (managing the utilisation of fisheries resources), at a literal level[7] and a purposive level[8] this prevents regional councils from imposing direct controls over the way fishing is conducted (methods, techniques, size of fish, etc) and the rate of fishing (TAC and TACC in particular) as this is the purview of the Fisheries Act. Regional councils do not (putting to one side s 30(1)(ga)) have jurisdiction to prohibit the taking of fish as that is a control over fishing per se. This is supported by s 30(1)(d)(ii) RMA being limited to extraction of natural materials not natural resources. Section 12(1)(c),(e) and (g) also support this conclusion as they exempt from the consenting regime lawful harvest. Section 12(3) can provide for controls over natural and physical resources, but this is limited by s 30(2) and s 30(1)(ga).

12.4.2 With respect to the second limb (the effects of fishing on the biological sustainability of the aquatic environment as a resource for fishing needs), regional councils cannot control the effects of fishing if that is a control within the jurisdiction of the Fisheries Act. That means controlling the adverse effects of fishing for reasons that, objectively considered, provide for sustainable utilisation (as opposed to controls that avoid remedy or mitigate adverse effects to provide for non-utilisation purposes (i.e. permanent

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6 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [131].

7 "Utilisation" means conserving, using, enhancing and developing fisheries resources to enable people to provide for their social, economic and cultural well-being. "Utilisation" encompasses "fishing" which means the catching, taking or harvesting of fish, aquatic life, or seaweed.

"Fisheries resources" means one or more stocks or species of fish, aquatic life or seaweed. This is expansive as "aquatic life" includes any species of plant or animal life that must inhabit water whether living or dead and includes seabirds.

8 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at

protection for its own sake, such as intrinsic values of the environment)).[9]

12.5 Fifth, and as a consequence of the above, the *effects or externalities* of fishing on the environment that are not subject to Fisheries Act control can be regulated under the RMA for other purposes which may include the intrinsic values or the character of a place.[10] That is not a control over fishing per se, as that is managing the fishing and outside scope. Fundamentally to the present proposal, if the adverse effect complained of is at its heart related to biomass of fish in the water, then whether that is also stated as being for intrinsic values, natural character or landscape, it is a control subject to the Fisheries Act. In the case of overlap or uncertainty, proposition 1 and 2 apply and the Fisheries Act takes precedence and occupies the field.

13. The Court provided two provisos to the above guidance on s 30(2):

13.1 Proviso one: Regional councils cannot exercise functions in respect of matters Māori where this is inconsistent with the special provision made for Māori under the Fisheries Act.[11] The Court did not give detailed guidance on what "inconsistent" might look like.[12]

13.2 Proviso two: Regional councils may exercise functions which control fishing or the effects of fishing to ensure maintenance of indigenous biological diversity but only to the extent strictly necessary to perform that function.[13] Because the Court viewed the maintenance of biodiversity as a principle to be taken into account under the Fisheries Act and not a duty, it was not prepared to say s 30(2) would override the duty in s 30(1)(ga). However, given there is an obvious overlap on biodiversity, the Court was very clear that any rules must be strictly necessary for maintaining indigenous biological diversity. That

9 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [113] and [114].

10 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [109], [111] and [113].

11 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [118].

12 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [118].

13 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [134].

also means they must be for that purpose per se, and strictly confined to this object.[14]

Aspects of the proposal which give rise to jurisdictional issues

14. The following rules, objectively considered in light of all of the evidence filed, raise jurisdictional issues for the Court, as well as substantive issues to be resolved on the evidence filed:

    14.1 Rule 1, which makes taking, removal, damage or destruction of indigenous flora or fauna[15] in a wāhi tapu area a prohibited activity. This rule can only be justified if it is strictly necessary for indigenous biodiversity.

    14.2 Rule 3 – as now drafted this rule is getting closer to an RMA restriction, but considered objectively still seeks to control utilisation of the fisheries resource rather than being linked clearly to the externalities or effects of fishing.

15. Fundamentally, this proposal seeks taonga fish species recovery to provide flow on benefits to the biological functioning of these areas as well as cultural and other benefits. Biodiversity benefits from removing fishing underscore the proposal. This purpose overlaps with the sustainable utilisation purpose of the Fisheries Act. The proposal must be strictly necessary for maintaining indigenous biological diversity. The key relevant NZCPS policy is policy 11, not 13, 14 or 15.[16]

16. To the extent policies 13, 14, and 15 are at all relevant, they must be considered against the existing environment, which includes fishing, when considering what effects must be addressed. The reference to rules should not be seen to override the Court's obligation under s 32 and s 30(2). In that context, the requirement for rules can, if the context otherwise requires, be met through other mechanisms in the overall regulatory framework that deal with

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14 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [129] and [130].

15 The precise types of "flora or fauna" being referred to is not clear. The proposal frequently refers to "taonga species", which are listed in the proposed new Schedule 6A and include, for example, tamure (snapper), tarakihi, kuparu (John Dory) and karengo (seaweed). The listed taonga species are "fisheries resources" as defined in the Fisheries Act.

16 Policies 13, 14, and 15 may be incidentally addressed, but do not have operative effect on the basis of the present proposal.

fishing.[17] Reliance on other such mechanisms is consistent with the RMA direction of providing for integrated management.[18]

The issues, objects and policies

17. Issue 4A states that a key factor causing degradation to indigenous biodiversity and cultural values is the inadequate management of the effects of fishing techniques and methods on the attributes and values of the coastal environment. Management areas have therefore been introduced to manage activities to enable restoration of those values. Invasive activities including dredging and other activities involving damage to or the removal of indigenous flora and fauna need to be managed to restore areas and provide for the relationship Māori have with these areas.

18. Issue 53 sits beneath this and within the wāhi tapu provides for restoration, protection and enhancement of the Motiti Rohe Moana, through management of any activities that damage, destroy or remove the relevant values of the area. The wāhi taonga areas seek restoration of natural heritage to reinstate natural and cultural values and attributes to the area. Activities that enable the restored natural and cultural heritage state to remain self-sustaining are provided for.

19. Below that are the objectives, policies then the rules. Reference to making provision for sustainable harvest has been dropped (policy 2(f)), yet this remains a key purpose of the wāhi taonga area where less invasive activities can continue provided the area remains self-sustaining.

Rule 1 and the wāhi tapu areas

20. Rule 1 prohibits taking, removal, damage or destruction of indigenous flora or fauna. It is said this will restore, protect and enhance natural and cultural heritage through the "*management of any activities*" that would damage, destroy or

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17 Sections 43AA, and s 43AAB. Further, the NZCPS confirms this given rules is referred to as something including regulation under the Fisheries Act – refer to policy 2(f)(iii), "having regard to regulations, rules or bylaws …. such as taiapure, mahinga mataitai or other non commercial Maori customary fishing."

18 Section 7(b) and confirmed in Policy 4 NZCPS.

remove indigenous flora or fauna.[19] As Graeme Lawrence describes, prohibited status is directed "at managing all fishing activities".[20]

21. While Rule 1 does not refer to fishing expressly that is simply a matter of form. As a matter of substance this prohibition aims to prohibit all forms of fishing (and possibly other activities). As addressed above, externalities of fishing can be controlled where not subject to Fisheries Act control. This is limited therefore to addressing the effects or externalities, but not by direct controls on fishing itself, which are provided for under the Fisheries Act.

22. Rule 1 fails both the first and second limbs of the current High Court decision. The rule seeks, at a coarse level, to control through prohibition both the type and rate of fishing directly. The rule is therefore seeking to manage the utilisation of the fisheries resource. Regulating the state of fish stocks for the benefit of the aquatic environment is within the jurisdiction of the Fisheries Act. The rule also seeks to control the effects of fishing (through prohibiting fishing) to provide for matters subject to Fisheries Act control. The Fisheries Act enables sustainability measures to provide for ecosystem recovery through the setting of sustainability measures, quota allocation and quota management areas.

23. That does not mean the rule is not possible, but it does mean the rule as presently framed is only within the regional council's jurisdiction to the extent it is strictly necessary for maintaining indigenous biodiversity. As noted above, "strictly necessary" means the rule is necessary to maintain indigenous biodiversity *per se*, and that any rules imposed must be *strictly confined to that object.*[21]

24. In this case, over the areas where there are existing IBDA A (such as Otaiti, Motunau, and Matarehu), there would potentially be some justification for restriction on activities that damage indigenous biodiversity but only if the adverse effect is clearly linked to the values sought to be protected. This is primarily a question of evidence.

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19 Issue 53. See also Statement of Evidence of Graeme Lawrence dated 25 October 2017 at [3.12(d)]: "the policies and methods are devised to ensure the mauri is restored and not adversely affected by fishing activities, within the areas of special significance".

20 Statement of Evidence of Graeme Lawrence dated 25 October 2017 at [3.14].

21 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [129](d).

25. Necessity must also be demonstrated as a matter of proof. Relevant considerations here are:

25.1 The areas (especially Otaiti) appear to be in reasonable ecological health.[22] This goes to whether any controls are strictly necessary given there is ongoing regulation under the Fisheries Act to address a key issue in this case, being declining key predator stocks.

25.2 The recognition of these areas was made taking fishing into account as an existing activity. Therefore, there would need to be some further decline or adverse effect that, prospectively speaking, needs to be addressed considering the relevant provisions in the NZCPS.[23]

25.3 To the extent that seabirds are at issue, there is uncertainty over the degree of impact given information gaps on the significance of the issue.[24] There are also methods in place to mitigate these impacts under the Fisheries Act.[25]

26. These matters go to whether there is ultimately a gap that needs to be addressed by the RMA. If there is a gap (and the evidence of Ms Noble is that any such gap only relates to fishing), then the question is whether it is strictly necessary for the maintenance of indigenous biological diversity to control this and how that impact should be controlled where there is overlapping regulation.

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22 De Luca in cross examination by MRMT, 30-11-17. Also Statement of Evidence of Dr Phil Ross dated 26 October 2017 at [22] and [24], where he says Otaiti is in good health.

23 *Man-O-War Station Ltd v Auckland Council* [2017] NZCA at 24, [65] – [66] makes it clear that existing elements must be considered, and it is in that 'setting' that the question of whether any new activity or development would amount to an adverse effect would need to be assessed. This was applied in *Western Bay of Plenty DC v Bay of Plenty Regional Council* [2017] NZEnvC (*Matakana*), at [160] where the court noted that pre-existing uses were irrelevant to the question of whether an area should be identified as an ONFL or not. In that case, while the environment was modified it was still recognised as an ONFL, and therefore any further effects would need to be mindful of that, and the values and attributes of the recognised ONFL.

24 Dr Stirnemann in cross examination by Crown, 29-11-17.

25 Current seabird mitigation regulations in effect:

Trawl vessels >28 m, - Seabird Scaring Devices Circular 2010 (No. F517) All vessels required to carry a seabird scaring device (bird baffler, paired streamer lines or warp deflector) and it must be deployed as soon as practicable after the shooting of the net, and shall remain deployed for as long as practicable prior to the net being brought back on board the vessel.

Bottom longline vessels >7 m - Fisheries (Seabird Sustainability Measures – Bottom Longlines) Circular 2010 (No. F541) Requires all vessels to use a streamer/tori line during line setting and line weighting or night setting. Restricts offal discharge during line setting.

Surface longline vessels - Fisheries (Seabird Mitigation Measures—Surface Longlines) Circular 2014

Requires all vessels to use a streamer/tori line during line setting and line weighting or night setting. All Pursuant to the circular-making powers in regulation 58A of the Fisheries (Commercial Fishing) Regulations 2001.

27. Outside of the recognised IBDA A, but still within the wāhi tapu areas, it becomes harder to see the evidential basis for controls, especially a complete ban on taking indigenous flora and fauna, given these areas are not recognised for the special or unique assemblages in the PRCEP. That would include the remaining wāhi tapu areas, some of which it is accepted do have significant values as ONC and ONFL areas.

28. ONFL44 is recorded in the PRCEP as being an area with fishing in place: "*The surrounding reefs, shoals, rocky outcrops are also widely used for commercial and recreational fishing and diving.*" (Page 350 of the PRCEP). This includes Otaiti and Motunau. Therefore, in terms of any assessment of the current environment, and what must be done by way of avoiding adverse effects, as per the *Matakana* decision, such existing uses are relevant and dovetail with the High Court direction ensuring controls are imposed only to the extent "strictly necessary".

29. In the present case, in addition to the prohibition being over a range of wāhi tapu that are not all recognised indigenous biodiversity areas in the PRCEP, it is also of a significant size. Some degree of proportionality is required when considering what is necessary for maintaining biodiversity, especially where there are no recognised IBDA, should the Court consider protection is warranted to give effect to the NZCPS.

30. Finally, assuming some further protection could be said to be strictly necessary for maintaining indigenous biodiversity, the prohibition on all fishing must not run counter to and undermine the special provisions dealing with Māori arising out of the Fisheries Settlement Act.[26] This is noted below, and was a proviso the High Court recognised would operate at the jurisdictional level on the Council.

Rule 3 and the wāhi taonga areas

31. On its face, rule 3 is seeking at least in part to address disturbance to the seabed. In accordance with the High Court decision this could be seen as an effect or externality of fishing activity that can be legitimately regulated under

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[26] *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [105](e). A RCP must be prepared having regard to regulations relating to taiapure, mahinga mataitai and other non commercial Maori customary fishing.

the RMA provided it is for a purpose not otherwise controlled under the Fisheries Act.[27]

32. However, objectively construed, this rule also fails the two limbs from the High Court decision as it seeks to manage the utilisation of the fisheries resource and is seeking to control the effects of fishing controlled under the Fisheries Act.

33. The purpose of this control is arguably a control of utilisation that would be injuncted by s 30(2) unless strictly necessary for maintaining indigenous biodiversity. That is because the rule is seeking to manage the utilisation of the fisheries resource (i.e. providing for current and future use), through providing a form of regulation over the types of fishing that can occur within the area, to enable sustainable harvest rather than being closely linked to the underlying adverse effects of those activities.

34. The reference to disturbance to the seabed would appear to indicate the concern or values lie with the seafloor substrate. Yet the fishing methods listed do not all impact on the seafloor – purse seining and long–lining in particular. The key areas of concern appear to remain around wāhi tapu, and potentially within those areas, specific areas such as Otaiti, Motunau Island, and Moturehu, which all contain IBDA A.

35. The evidence of the experts does not clearly indicate this is an area that has high biological diversity values, and nor is it found to have such values in the PRCEP. The exception being potentially the use of the area by seabirds, yet the evidence of Dr Stirnemann was not clear on the extent to which this area was used as opposed to wider areas, nor whether there is any adverse effect arising from fishing within the area.

36. Furthermore, indigenous seabirds are absolutely protected under the Wildlife Act 1953, and to catch alive or kill wildlife requires authority from the DG of Conservation (s 53 of the Wildlife Act). There is a lawful defence to the death

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[27] Rrules DD14 and DD15 in the PRCEP already address some of these effects/externalities insofar as they address dredging of the foreshore or seabed. As noted by Ms Hill for the Regional Council, this rule may have been developed with other forms of non-fishing dredging in mind. It presumably was also prepared on the correct assumption that the lawful harvest of plants or animals was provided for under the Fisheries Act (ss 12(1)(c), and (g) of the RMA). Lawful harvest includes all forms of fishing (commercial, recreational and customary) occurring with appropriate approval or authority under the Fisheries Act.

through fishing where incidental and the reporting requirements of s 63B were met.[28] As noted above, there are methods in place to mitigate the effects of fishing on seabirds. As Mr Hill said, this is an area that is undergoing improved reporting requirements.

37. The wāhi taonga area therefore appears to operate as a further buffer to the wāhi tapu areas. The evidence heard from Mr Lawrence for MRMT confirmed this point, highlighting that an underlying purpose of the restrictions is to remove the higher yield (or industrial) forms of fishing from the MNEMA, while enabling continuation of less invasive fishing.[29] The rule itself, and the overlying policies addressed above sought by MRMT, also appear to provide for sustainable use of the wāhi taonga area, provided it is not offending core cultural values.

38. Accordingly, with those points in mind, the evidence has not clearly demonstrated the various prohibitions are strictly necessary for maintaining indigenous biodiversity.

Implications arising from MRMT's proposal

39. Assuming the Court finds jurisdiction, there are implications arising from the current proposal that are relevant for the Court to consider when assessing this proposal under ss 32/32AA of the RMA and against the purpose of the Act. The RMA recognises that the efficient use and development of natural and physical resources is important, and the NZCPS also expressly provides for integrated management.[30] With that in mind:

39.1 The proposal will have an impact on fishing and fisheries management in the Bay of Plenty, these impacts go to the effectiveness and efficiency of the proposal and potential costs.

39.2 A marine spatial mechanism should involve all key stakeholders and ensure flow on implications to fishing, cultural values and biodiversity values are considered. There are other options that currently exist in

28 Section 68B of the Wildlife Act.

29 Mr Lawrence under cross examination by the Regional Council 29-11-17.

30 Section 7(b) and NZCPS Policy 4.

the Fisheries Act that can appropriately provide for the key aspects of the current proposal.

Potential impact to fisheries management in the Bay of Plenty

40. As confirmed by the Supreme Court,[31] the Fisheries Act contains policies being "utilisation of fisheries" and "ensuring sustainability". But, s 8(1) requires that in the attribution of weight to each policy utilisation must not jeopardise sustainability. Fisheries are to be utilised, but sustainability is to be ensured.[32]

41. The Fisheries Act is not a no-take, no impact regime. Nor is it a static regime. It is constantly being reviewed and changed to reflect the best available information on the state of the aquatic environment.[33] The Fisheries Act purpose indicates Parliament's intention to enable fishing for cultural, economic and social wellbeing, provided environmental safeguards are met.[34]

42. The Fisheries Act contains a range of mechanisms to achieve this purpose, which apply both from the large scale to specific zones. The Bay of Plenty contains multiple zones established to manage and regulate the sustainability of fisheries resources and the aquatic environment.[35] This includes fisheries and quota management areas,[36] zones formed by tangata whenua[37] and marine protected areas.[38] Temporarily closed areas have also been put in place previously in the Bay of Plenty.[39]

43. The different types of zones demonstrate regulation can be carried out at a higher level (e.g., by prohibiting across the entire Bay of Plenty any trawling by vessels larger than 45 metres[40]) but also at the finer grain level in localised areas (e.g., restricting commercial taking of cockles to one harbour by hand[41]).

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31 *NZ Recreational Fishing Council Inc v Sanford* [2009] NZSC.

32 *NZ Recreational Fishing Council Inc v Sanford* [2009] NZSC at [39] to [40].

33 Section 10(a) of the Fisheries Act.

34 This includes maintaining the biological diversity of the aquatic environment (s 9(b)).

35 Brief of Evidence of Andrew Hill dated 7 November 2017 at [19].

36 Brief of Evidence of Andrew Hill dated 7 November 2017 at [20]-[21].

37 Brief of Evidence of Andrew Hill dated 7 November 2017 at [22]-[28].

38 Brief of Evidence of Andrew Hill dated 7 November 2017 at [34]-[37].

39 Brief of Evidence of Andrew Hill dated 7 November 2017 at [29]-[33].

40 Brief of Evidence of Andrew Hill dated 7 November 2017 at [43].

41 Brief of Evidence of Andrew Hill dated 7 November 2017 at [43].

44. Fisheries Act regulation in the Bay of Plenty achieves multiple outcomes, some of which may not be apparent from the plain words of the regulation.[42] Regulation is achieved through interconnected and coherent management of the fisheries resources in the region.[43] Regulations are devised to work in unison with the total allowable catch (**TAC**) and total allowable commercial catch (**TACC**) restrictions.[44] In turn this feeds into the level of fishing (recreational, commercial and customary) that can be sustained in the area.

45. The area around Motiti Island and the 3nm radius around Otaiti are very popular areas for recreational fishing in the Bay of Plenty (recognised by the PRCEP and ONFL44). If such fishers are unable to fish (because an area is prohibited) they may seek to do so in another area within the region.[45] This could have potential effects in terms of the recreational take throughout the Bay of Plenty and require adjustments to the various TACs.

46. Any change to TACs would usually have consequential impacts on TACCs. A reasonable amount of commercial fishing takes place around Motiti Island and the 3nm radius around Otaiti.[46] Displaced commercial fishers would need to fish elsewhere in the Bay of Plenty to take their Annual Catch Entitlements (**ACE**) within the same Quota Management Area (**QMA**).[47] The result could be intensification within the region in other areas and may devalue quota for affected stocks (with associated economic implications).[48]

47. The Crown is aware of the complex issues concerning the overlapping cultural interests in this area. The Crown is not seeking to litigate these matters and, as noted above, does not contest the cultural significance that MRMT place over this area. The High Court decision directed that any control should not undermine the special provisions for Māori in the Fisheries Act. These matters go to whether this proposal is the most appropriate way to achieve the purpose of the Act, and objectives of the appellant, but also are relevant under Part 2.

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42 Brief of Evidence of Andrew Hill dated 7 November 2017 at [44].

43 Brief of Evidence of Andrew Hill dated 7 November 2017 at [44]-[46].

44 Brief of Evidence of Andrew Hill dated 7 November 2017 at [47].

45 Brief of Evidence of Andrew Hill dated 7 November 2017 at [63].

46 Brief of Evidence of Andrew Hill dated 7 November 2017 at [14].

47 Brief of Evidence of Andrew Hill dated 7 November 2017 at [64].

48 Brief of Evidence of Andrew Hill dated 7 November 2017 at [64].

48. There is an existing gazetted rohe moana of Ngai Te Rangi, Ngāti Ranginui and Ngāti Pukenga. The Fisheries (Kaimoana Customary Fishing) Regulations 1998 apply within the rohe moana area and significantly overlap with the current proposal. The Kaimoana Regulations were developed to give effect to s 10 of the Fisheries Settlement Act, and intend to provide more management responsibility to local iwi for their fishing practices.

49. Where non-commercial rights and interests are provided for in regulations under the Fisheries Act, this provides a defence to any person fishing in accordance with such regulations against any criminal, regulatory, or other proceeding.[49] Regulation under the RMA that seeks to prevent, regulate, or prohibit customary fishing practices could be seen as impacting this regime and be of no legal effect if enforcement proceedings were brought.[50] This is something for the Court to consider (both as a question of jurisdiction and under Part 2), in light of the evidence it receives, and has previously considered, on cultural interests in this area.

50. Both taiapure and mātaitai reserves involve consideration of other interests. In the case of taiapure, this mechanism can recognise an area of special significance for iwi or hapu, as a source of food, or for spiritual or cultural reasons. The Fisheries Act also requires the Minister to consider, among other matters, the impact on those persons having a special interest in the area.

51. Similarly, s 186A provides for closures, restrictions, or prohibitions only being imposed where the Minister is satisfied that it will recognise and make provision for the use and management practices of tangata whenua in the exercise of non-commercial fishing rights.[51]

52. These provisions highlight the careful calibration in the Fisheries Act, when it comes to providing for iwi and hapū interests. Such considerations are

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49 Section 10 provides (d) the rights or interests 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.

50 Arguably, prosecutions or enforcement proceedings could not be brought under the RMA for customary practices that are in accordance with the Fisheries Act, as this provides, by virtue of s 10 a defence to any such civil or criminal proceeding.

relevant for this Court also when considering the appropriateness of this proposal.

A comprehensive spatial planning exercise for the Bay of Plenty

53. The Crown does not dispute that fishing has an impact on the aquatic environment. The evidence of Mr Hill demonstrates that impact is subject to careful ongoing management under the Fisheries Act. The High Court noted this too, when it stated that: "*Unfettered regional plan regulation of fisheries resources would jar heavily against the carefully calibrated control of fishing under a regime purpose built to achieve sustainable utilisation.*"[52]

54. There is a significant degree of regulation over fisheries stocks in the Bay of Plenty.[53] There are competing views, but the generally accepted expert opinion is there is time to properly assess the Bay of Plenty as a region for areas to provide further protection.[54] The environment, with respect to impacts from fishing under the Fisheries Act purpose of ensuring sustainability, will remain regulated in the intervening period. Indeed as Mr Hill clarified, this kind of closure will not resolve issues with stock sustainability.[55]

55. There is also a lack of baseline data about changes in abundance, ecological composition and functions in the area surrounding Motiti[56] and the specific impacts of fishing intensity will need to be quantified for its ecological impact to be properly understood.[57]

56. There are mechanisms available to achieve protection outside of the current forum, should the Court determine that this exercise can be signalled yet not fully completed under the current PRCEP. In particular:

    56.1 Regulations can be put in place to establish a Type 2 MPA (i.e., using regulations under the Fisheries Act) or more bespoke controls could be put in place.[58] For example, Fisheries Act regulations prohibiting

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51 Section 186A(2).

52 *Attorney-General v Trustees of the Motiti Rohe Moana Trust* [2017] NZHC 1429 at [98].

53 Statement of Evidence of Andrew Hill.

54 Joint Statement of Ecological Experts in Lieu of Caucusing, 26 November 2017.

55 Andrew Hill, cross examination by Ngati Makino Heritage Trust.

56 Statement of Evidence of Dr Roger Grace at [32]. See also the Statement of Evidence of Dr Phil Ross dated 26 October 2017 at [14] and [20].

57 Statement of Evidence of Vincent Kerr at [52.4].

58 Brief of Evidence of Andrew Hill dated 7 November 2017 at [59].

seabed disturbing fishing methods are the predominant form of regulation in New Zealand's Exclusive Economic Zone (**EEZ**).[59] These are referred to as Benthic Protection Areas where bottom trawling and dredging have been prohibited and cover approximately 31.5% of the EEZ.[60] Their purpose is to protect the diverse benthic habitats within the EEZ.

56.2 Mātaitai reserves can be created to enable all fishing to be regulated in those reserves[61] and/or regulations can be recommended to control fishing in taiapure-local fisheries.[62] The purpose of Part 9 (ss 175 to 185) is to provide not only for areas of special significance as food gathering areas, but also for spiritual and cultural reasons. This is directed at taonga, including wāhi tapu, protected under Article 2 of the Treaty.[63]

56.3 Temporary closure or fishing method restriction under s 186A or other regulation under s 297 to enable people to provide for their cultural well-being.

57. It is acknowledged that some of these mechanisms have not been successfully implemented for MRMT in the past (2010) for reasons that MRMT say reside with the Crown. Whatever the specifics of that situation that was seven years ago. The mechanisms exist and have been made to work in the Bay of Plenty before. The mechanisms are available in the present case. While that might require difficult negotiations and considerations, that should result in a more enduring solution through stakeholder engagement.

58. The Crown also supports the use of the MPA framework, as outlined in the evidence of Joanne Noble at paragraph [156], to assist with a regional assessment of providing marine protected areas that could use, and be consistent with, the above Fisheries Act mechanisms. Such an approach, could

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59 Brief of Evidence of Andrew Hill dated 7 November 2017 at [59].

60 Brief of Evidence of Andrew Hill dated 7 November 2017 at [60].

61 Commercial fishing is prohibited in a mataitai reserve (Fisheries (Kaimoana Customary Fishing) Regulations 1998, r 27(2). Bylaws can also be made to restrict fishing by the tangata kaitiaki/tiaki, r 28. This can be for any purpose associated with the sustainable utilisation of the fisheries resource.

62 Section 185 of the Fisheries Act. Such regulations override any other s 297 or 298 regulations (s 185(2)).

63 *Sea-Right Investments Ltd v Minister of Fisheries* 20/5/04, Ronald Young J, HC Wellington, CIV-2004-485-353.

lead to ultimately better environmental outcomes,[64] while also ensuring the Crown's obligations to Māori are met, informed by stakeholder engagement, and using the best available information.

Jeremy Prebble / Nicholai Anderson
Counsel for the Attorney-General

64 Cross examination of Ms De Luca by MRMT, 30-11-17.