Legal Structuring

Prepared for

Ngā Iwi i te Rohe o Te Waiariki

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OCEANLAW NEW ZEALAND

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1. Introduction

This report has been commissioned as part of Stage Three of a project to develop a business case (or series of businesses cases) for the development by Ngā Iwi i Te Rohe or Waiāriki of a sustainable, resilient and world-class aquaculture industry.

The structure(s) proposed in this report have been informed primarily by the opportunities and constraints Ngā Iwi are presented with in navigating the particular legal environment within which their aquaculture development will take place. Detailed commercial and/or taxation advice has not been sought at this point, as the precise nature of the businesses, investments and partners that will be involved are still to be determined.

In preparing this report, we have been greatly assisted by work undertaken in earlier stages of the project, including the report on available legal structures prepared by Kāhui Legal in 2020. Insight and feedback from members of the project Steering Group has been invaluable, as has the opportunity to confer with other experts, including Pénélope Gibson PhD, Peter Rice LLB/BBus/MSc and Dr Richard Meade.

Particular gratitude is owed to those Iwi, individually and collectively, who have been generous enough to share their real world experiences and expertise. These include the Whakatōhea Māori Trust Board, Te Whānau ā Apanui, the Maara Moana Group (Te Tau Ihu Iwi) and the iwi Collective Partnership.

Āku mihi mahana ki a koutou katoa, e rau rangatira mā.

Justine Inns, Partner

2. Summary

Work completed in Stage Two of this project identified that a Limited Partnership is likely to be the most appropriate primary legal vehicle for Ngā Iwi to progress their aspirations in aquaculture.

Existing investments by Waiariki Iwi in aquaculture will act as essential building blocks in the development of the sustainable, resilient and world-class aquaculture industry to which all aspire. These are currently held in several legal structures, incorporating a range of shareholders and partners.

In order to build from this existing base, Ngā Iwi have recognised that they will require scale and initiative, deployed in a manner that supports the kaitiakitanga and rangatira of Ngā Iwi, individually and collectively. It is a bottom line that the industry will be developed by Māori, for Māori, and build on ngā pou e wha: Te Pāpori (Social), Te Taiao (Environmental), Te Ahurea (Cultural) and Te Ōhanga (Economic).

The business(es) that result will be diverse, ultimately comprising involvement in every step of the value chain across a range of species. They will present a number of investment opportunities, offering different risks and returns for different partners. Settlement Assets derived from the Māori Commercial Aquaculture Claims Settlement Act 2004 come with a unique set of opportunities and challenges, from a structuring point of view.

Given these aspirations, opportunities and constraints, a set of desirable characteristics for an optimal structure can be proposed. These include the capacity for delivering excellent outcomes against ngā pou e whā, accommodating both collectively- and individually-owned assets and activities while empowering strategic governance and alignment across all, and providing for scalability and growth over time.

Lessons can be learned from other, real life, structures utilised in related sectors, particularly those through which collectives of iwi operate. The Maara Moana Group (made up of the eight iwi of Te Tau Ihu o Te Waka ā Māui) has grappled with the particular constraints on entities holding aquaculture Settlement Assets, as well as the different risk and investment appetites of iwi within a collective. Other legal structures in Te Tau Ihu provide primarily for individualised operation of assets (marine farms), while allowing for centralisation of some functions. The Iwi Collective Partnership introduces a more complex model that integrates cooperation between different iwi and joint venture partners in seafood harvesting and processing.

It is recommended that an optimal legal structure, reflecting the identified desirable characteristics would initially have three limbs: a development/investment vehicle in the form of a Limited Partnership, a trust to progress research and development and hold resulting intellectual property assets, and one or morejoint asset holding company(s) to receive and hold Settlement Assets. A Taumata, or Partners' Council, would overarch both the Limited Partnership and trust, so as to provide integrated strategic direction. Over time, it is anticipated that the Limited Partnership will develop further business opportunities and investments and foster integration between these via contracts.

The next steps to developing the proposed structure lie in Ngā Iwi making important decisions on their desire to cooperate and invest collectively, on the form in which they wish to receive aquaculture Settlement Assets, and how they will divide those assets and/or hold them jointly between themselves.

3. Objectives of this report

The key objectives of this report are to:

a) Review the legal structures within which key aquaculture assets and investments of Ngā Iwi are held currently;
b) Summarise Ngā Iwi aspirations, as they inform options for legal structuring;
c) Identify legal and other constraints on structural options;
d) Propose desirable characteristics of an optimal legal structure(s);
e) Review and assess comparable legal structures/governance models;
f) Propose an optimal legal structure(s) for development, ownership and management of waterspace and related assets/investments; and
g) Recommend a pathway to achieving the optimal legal structure, including establishment or incorporation requirements such as the development of constitutional documents and/or agreements.

Overall, therefore, the objective of the report is to identify a legal structure(s) which is the best fit for Ngā Iwi, given their stated aspirations and values, along with unavoidable practical and legal constraints.

4. Background

Some high level work on legal structuring was undertaken as part of Stage Two of the project. This included identification of the features of a range of possible legal structures, as summarised in the table below:

Feature	Limited Partnership	Company	Unincorporated Joint Venture	Trust / Incorporated Society
Tax	Flow through of loss and profits	26% tax rate	For each investor	Charitable or non-charitable?
Governance	Board of GP company	Board	Contract terms	Trustees
Commercial	Common for iwi/Maori land owning entities	Known	Subject to party agreement	Uncommon
Key documents	Limited Partnership Agreement & Constitution / Shareholders Agreement for General Partner company	Constitution / Shareholders Agreement	Joint Venture Agreement	Trust deed

Fig 1 – credit Kiri Tahana, Kāhui Legal

The Stage Two report identified a Limited Partnership (**LP**) under the Limited Partnerships Act 2008 for the following reasons:

- Flow through of losses and profits;
- Stakeholders may be charitable or have Māori tax authority status – charitable entity not suitable unless ALL are charitable;
- Objectives and values – can be embedded in the Limited Partnership Agreement;
- Liability – limited partners (investors) not liable;
- General Partner company – liability limited.

The report also recommended the development of a Memorandum of Understanding to guide the establishment of the new structure, identifying matters such as:

- Which iwi are committed to working collaboratively together?
- What is the proposed timeframe to get to a GO/NO GO point?
- What are the common values, objectives and aspirations of collaborating?
- What is each iwi considering (generally) it will contribute to any new venture?

This report builds on those recommendations and the work done in Stage Two.

5. Current Picture

Current aquaculture activities of Ngā Iwi are currently conducted through a range of legal entities, summarised below:

Eastern Sea Farms Limited (ESFL)

This company holds resource consents for marine farming over a large area of water space east of Whakatane. Use of the space is leased to Whakatōhea Mussels (Opotiki) Limited.

Shareholders in ESFL are:

- 54% Whakatohea Maori Trust Board
- 46% Whakatohea Aquaculture (Opotiki) Limited, which is, in turn owned by a range of community interests

The Constitution of ESFL includes standard pre-emptive rights over transfers of shares in favour of the company and its existing shareholders.

Whakatōhea Mussels (Opotiki) Limited (WMOL)

This company leases water space from ESFL and undertakes farming operations. It also owns the Whakatane processing facility. Construction of the facility was part-funded by a Crown investment in WMOL, which is reflected in the shareholding of the company:

- 35.40% Crown Regional Holdings Limited
- 9.64% Whakatohea Maori Trust Board

The balance of the shares in the company (in parcels ranging in size from 9.49% to 0.35%) are held by a range of community interests, including Ngāi Tai Ki Tamaki Trust (0.68%) and Te Paroa Land

Trust (39%). Standard pre-emptive rights over shares appear to have been further modified by the Share Subscription Agreement between the company and the Crown in relation to the Crown investment.

Te Huata International Limited

This company is currently engaged in raising capital to fund the development of a mussel spat hatchery.

Current shareholding:

- 85% Te Huata Charitable Trust (a registered charity for the advancement of education, relief of poverty and providing other benefits to Te Whānau o Kaiaio, Te Whānau ā Apanui and the wider community)
- 15% Aotearoa Mussel Limited

It is assumed that the capital-raising exercise could result in additional shareholders being brought into the company.

A related company, Te Huata International Research Limited, is currently wholly owned by Te Huata Charitable Trust.

In addition, each of Ngā Iwi (with the exception of Te Whānau ā Apanui) operates a Mandated Iwi Organisation and Asset-Holding Company (under the Māori Fisheries Act 2004) and an Iwi Aquaculture Organisation (**IAO**) under the Māori Commercial Aquaculture Claims Settlement Act 2004 (**MCACSA**). Many also utilise post-settlement governance entities and other representative and commercial entities.

6. Ngā Iwi aspirations and opportunities

The overall aspiration of Ngā Iwi has been articulated as the development of a sustainable, resilient, and world class Māori aquaculture industry in the Bay of Plenty that:

- builds Māori economic development and wellbeing: *at scale* aquaculture initiatives that grow people through job creation, training, career pathways, and research and leadership opportunities; and
- empowers and exercises kaitiakitanga: maintaining and enhancing the mauri of Te Moana Nui-a-Toi.

It should be noted that this aspiration is well-aligned with the Vision set out in the Government's Aquaculture Strategy (Sept. 2019), being:

> *New Zealand is globally recognised as a world leader in sustainable and innovative aquaculture management across the value chain.*

Further thought has been given to what each of “sustainable”, “resilient” and “world class” means in this context and thus, what success will look like:

- Sustainable:-
    - Social, cultural, environmental, and economic wellbeing (ngā pou e whā) are in balance.
    - Systems thinking: the whole is greater than the sum of its parts.
    - Aquaculture pathways for Iwi upscale and amplify impact across ngā pou e whā (ripple effect).
    - A best practice sector within Te Ohanga Māori that benefits Aotearoa/New Zealand.
    - Exercising Mana Motuhake - ownership and autonomy.
    - Provision of significant long-term employment for Māori communities and connection to the marine-based economy.
    - Strengthening traditional Iwi and community relationships with the ocean.
    - Replicable, scalable, whānau and hapū-centric models with collective power.
- Resilient:-
    - Intergenerational knowledge transfer of mātauranga Māori.
    - Implementing data science and artificial intelligence to deliver adaptive management.
    - Responsive to changing risks and opportunities (including climate change) and competing demands.
    - Future-focussed, helping to drive alignment between policy/regulation to support industry growth.
    - A long-term strategic roadmap supported by partnership with the Crown.
- World-Class:-
    - Excellence and creativity in technology, people, and systems.
    - Astute commercial and scientific partnerships with a shared values base.
    - Collaboration and knowledge sharing 'mana to mana' with indigenous businesses and initiatives around the world.
    - Creating and adding value across the supply chain.
    - A world leader in intellectual property, provenance, and brand identity.

In summary, Ngā Iwi have identified a set of Guiding Principles for the project:

- Owned by and led by Māori (Iwi and hapū)
- Me mahi ngātahi tatou (collective)
- To be world class

- Our Four Pou
    - Te Pāpori (Social)
    - Te Taiao (Environmental)
    - Te Ahurea (Cultural)
    - Te Ōhanga (Economic)

Potential species

Stage two of the project identified the most promising aquaculture opportunities available to Ngā Iwi, including:

- Offshore sea-run rainbow trout for premium seafood;
- Recirculating Aquaculture Systems (RAS)/land-based rainbow trout for premium seafood;
- Offshore kingfish for premium seafood;
- Offshore seaweed (Ecklonia radiata) for agricultural feed and fertiliser/biostimulants;
- Offshore Greenshell mussel for high value nutraceuticals;
- Offshore scallop for premium seafood.

It is noted that opportunities in relation to trout are contingent on necessary law changes.

Of these options, and based on a multi-criteria analysis utilising ngā pou e whā, three primary opportunities were identified for further analysis and investigation:

- Offshore kingfish (and trout, if law changes are made) and seaweed co-culture
- RAS finfish with kingfish and trout
- Offshore Greenshell mussels with scallop co-culture

While legal structures are largely agnostic as to the kinds of opportunities and businesses that might be pursued, what is clear from this brief review is that the range and diversity of the available opportunities is such that a series of more-or-less interconnected businesses are likely to result, as opposed to a single venture.

Value Chain Model

A key component of the vision of Ngā Iwi is an intention to be engaged at every step in the aquaculture value chain, as illustrated below:

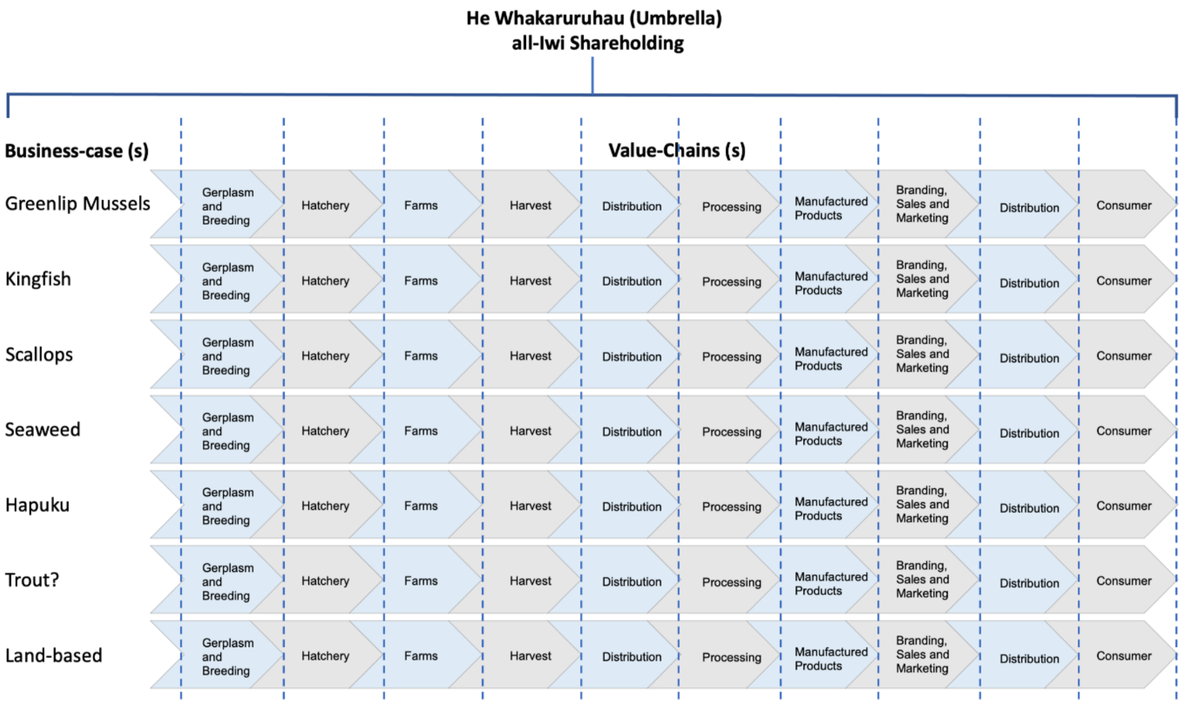

Fig 2 – credit Chris Karamea Insley

While undertaking business activities at every level is certainly possible within a single corporate entity, and such vertical integration is increasingly common within the aquaculture industry, it is clear that the business segments shown above will differ greatly in terms of factors such as risk profile, capital needs and profitability. It is likely, therefore, that opportunities to attract investment and expertise may be enhanced by structural separation of some segments, at least, coupled with strong contractual relationships between them.

Article Two and Article Three Opportunities

A unique feature of the aquaculture opportunity available to Ngā Iwi is the impact of the Māori Commercial aquaculture Claims Settlement Act 2004 (**the MCACSA**). In particular, the MCACSA creates an obligation on the Crown to deliver to Ngā Iwi assets equivalent to 20% of all new and anticipated aquaculture within the Bay of Plenty region (**Settlement Assets**). Settlement Assets can take the form of cash (the financial equivalent of the value of 20% of new and anticipated aquaculture) or authorisations conferring an exclusive right to apply for resource consents to undertake aquaculture activities.

This entitlement to Settlement Assets can be characterised as an opportunity flowing from Article Two of Te Tiriti o Waitangi, as distinct from investment opportunities Ngā Iwi share with other members of the community, consistent with Article Three of Te Tiriti. It will be important to Ngā Iwi to ensure that Settlement Assets contribute to their overall aspirations for aquaculture, noting that those aspirations extend well beyond on-water production.

7. Constraints

The particular nature of the aquaculture opportunities before Ngā Iwi do create some constraints which must be accommodated in the development of business structures. These are noted below.

Settlement Assets

Settlement Assets delivered to Ngā Iwi under the MCACSA come with particular legal constraints which must be factored into the legal structure within which assets are held. By their nature as assets derived from rights guaranteed by Article Two of Te Tiriti, it is also assumed that Ngā Iwi will want to treat Settlement Assets as inter-generational in nature, thus requiring the maximum possible legal protection from risk.

Section 5(2) of the MCACSA provides that Settlement Assets in the form of authorisations or resource consents transferred to Iwi under that Act may only be held by an Iwi Aquaculture Organisation (**IAO**) or a company wholly owned by one or more IAOs in the same region.

There is real value to Ngā Iwi in ensuring that Settlement Assets in the form of authorisations retain that status. An authorisation (technically issued under the Resource Management Act 1991 – **RMA**) confers on the holder the exclusive right to apply for resource consents to undertake aquaculture activities in a designated part of the coastal marine area (s.165E(1), RMA). The authorisation also prohibits the grant of resource consents for any non-aquaculture activities that would be incompatible with the conduct of aquaculture activities (s.165E(2), RMA).

In the ordinary course, an authorisation lapses when a resource consent for aquaculture activities is applied for and granted in relation to it. Authorisations which are Settlement Assets do not lapse on grant of a resource consent, however, but continue in perpetuity (s.17, MCACSA), so that – in the event that resource consent lapses, expires or is cancelled – the authorisation continues to confer on the holder of it the exclusive right to apply for resource consents for the same or other aquaculture activities.

Assuming, therefore, that Ngā Iwi wish to retain the status of Settlement Assets, options for the legal structure in which those assets are held are limited in several ways:

- The structure must be a company under the Companies Act 1993;
- The company must be wholly-owned by IAOs (though it need not be *directly* owned by IAOs, i.e. shareholders in the company may be wholly-owned subsidiaries of IAO, such as Asset Holding Companies under the Māori Fisheries act 2004);
- The constitutional documents of the company must contain restrictions that ensure no shareholding can be transferred to an entity that is not an IAO (or wholly-owned subsidiary of an IAO).

Current aquaculture investments and activities

As the brief survey of the current picture with respect to investments by Ngā Iwi in aquaculture shows, consolidation of those investments and associated activities into a single entity would not be feasible – even if desired by the current owners – due to the large number of shareholders, pre-emptive rights and funding/investment constraints involved. The one partial exception to this is the potential opportunity for other Iwi to invest in the hatchery development being progressed by Te

Whānau ā Apanui, in the event that capital needs cannot be fully met from Te Whānau ā Apanui hapū and other entities (such as land trusts, etc).

Collaboration and Autonomy

Ngā Iwi appreciate that collaboration and collective action is necessary in order to achieve the scale that is essential for success in the aquaculture industry. As identified in Stage Two of the project, however, this collaboration must recognise the mana and rangatiratanga of tāngata whenua and respect existing intellectual property and mātauranga, as well as ensuring appropriate recognition of mana moana and mana whenua, and respect for the autonomy, interests, and aspirations of individual Iwi and hapū.

This report endorses the perspective that:

> *Collaboration and autonomy between Iwi can co-exist successfully, strengthening outcomes. For example, collaborative models and platforms can transform Iwi aquaculture potential and address key constraints of access to finance and spat supply. In some cases, a collective approach to small scale, whānau-centric operations, with shared research, processing, and distribution platforms, could unlock opportunities that might otherwise be unviable*.

8. Desirable characteristics of an optimal structure

The existing situation, aspirations of Ngā Iwi and constraints noted above suggest a number of assumptions that must be factored into the consideration of structuring options, namely that a sustainable, resilient and world-class aquaculture industry in the Bay of Plenty will:

- Be owned and led by Māori, for Māori;
- Require scale – assets, investments, expertise and tautoko of Ngā Iwi, hapū and whānau and others;
- Involve a diverse combination of assets and investments within aquaculture value chains, including:
    - Assets owned by individual iwi (outright, or in conjunction with third parties), e.g. Whakatohea Mussels existing resource consents and processing facility.
    - Assets jointly owned by iwi, e.g. settlement space obtained via the Māori Commercial Aquaculture Claims Settlement Act 2004 (MCACSA).
    - Assets developed jointly by iwi (with or without third party investors/partners), e.g. Intellectual Property.
    - Relatively low risk assets, e.g. resource consents for aquaculture activities.
    - Medium risk investments and operations, e.g. marine farming servicing and product processing.
    - High risk investments and operations, e.g. research and development in relation new aquaculture species.
- Take place over the medium-to long-term;
- Involve iwi and other partners/investors with a range of investment capacities and appetites for risk.

Those assumptions, in turn, lead to a set of desirable characteristics against which options can be measured. These are proposed in addition to the more generic characteristics identified in respect of the types of legal structures (company, trust, limited partnership, etc.) that were identified and considered as part of Stage Two of the project.

It is proposed that a structure must be capable of:

1. Ngā pou e whā – delivering excellent outcomes measured against the four pou:
    a. Te Pāpori (Social)
    b. Te Taiao (Environmental)
    c. Te Ahurea (Cultural)
    d. Te Ōhanga (Economic)
2. Diverse ownership – accommodating collectively and individually owned assets and activities
3. Alignment – empowering strategic governance and alignment across a range of separatelyowned assets and operations
4. Asset protection – protecting low risk investments and assets from losses that could be accrued by higher risk ones
5. Investor choice – allowing iwi (and other investors) to choose their own:
    a. Level of investment
    b. Appetite for risk
    c. Place in the value chain
6. External investment – attracting external investors, including government, angel/impact and institutional investors
7. Advocacy – supporting collective advocacy, e.g. for necessary changes to legal frameworks in relation to new and emerging aquaculture species and/or products
8. Scalability – growing in scale (and complexity?) over time
9. Succession – providing for orderly entry (and exit) of participants over time
10. Role clarity – providing for (and balancing) whanaungatanga, representation, governance and management

9. Comparable structures/governance models

Three existing business structures have been considered as potential models for Bay of Plenty aquaculture as those businesses have some commonalities. In summary, these models are:

- Maara Moana Group – collective of eight Te Tau Ihu iwi jointly holding Settlement Assets (authorisations and resource consents for aquaculture activities) and farming mussels in Golden Bay
- Golden Bay marine farming consortia – consent-holding companies with shareholder farmers
- Iwi Collective Partnership – vehicle for collectivising iwi fisheries Settlement Assets

Maara Moana Group

Settlement Assets (authorisations and resource consents) are in eight distinct blocks, each held by a separate Holding Company (**HC**). Each of the eight Tau Ihu Iwi holds an equal shareholding in each HC. Iwi can trade shares in the companies between themselves, but cannot sell to third parties (this is necessary to protect the status of the Settlement Assets, as noted above (p.11)). Iwi do not have direct ownership interest in the Settlement Assets but can – after a defined period – trigger a winding up of any one or more of the HCs and division of assets between the shareholders on an equitable basis.

Costs and duplication of effort between the 8HCs is minimised by all having identical Board composition, so all eight Boards meet simultaneously, and a single management company contracting services such management, administration and accounting services on behalf of all.

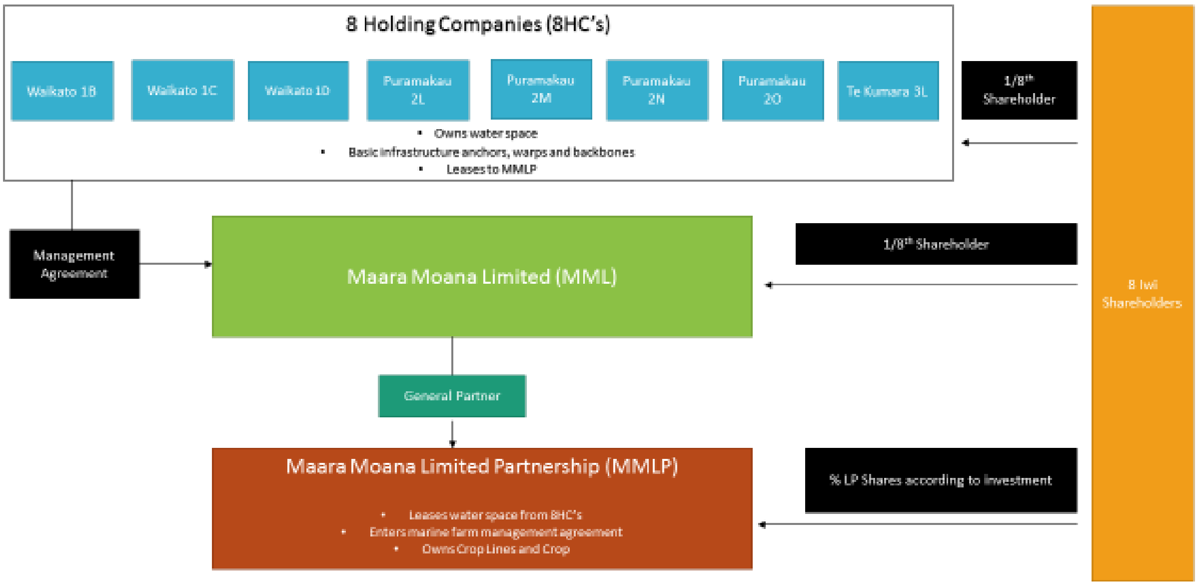

Fig 3 – credit Maara Moana Group

The HCs lease out the use of waterspace at market rate. This means the capital contribution required of shareholders is low, returns are consistent and risk is low. Some of the blocks are leased to Maara Moana Limited Partnership (formed by some, but not all of the eight iwi), which farms it through contracts with on-water operators, processors, etc. The Limited Partnership has higher working capital needs than the HCs and a different risk/return profile.

In 2020, the Maara Moana Group and Te Ohu Kaimoana jointly commissioned an 'efficiency review' of these structures, to investigate whether/how they could be improved, and what lessons could be learned by iwi in other regions seeking to establish. Key among the recommendations of this review of relevance to the options to be considered by Ngā Iwi:

- Much of the design of the structure is driven by the need to provide for possible future winding up of the companies and division of Settlement Assets between iwi. If the iwi have made a long-term commitment to collective operations, some of the design becomes redundant and could be simplified, e.g. one HC, rather than eight.
- Boards comprising eight directors, one representing each iwi shareholder, can be unwieldy and inefficient, with the role of Chair being particularly taxing for an iwi representative to manage. Options to address this issue could include constitutional changes to permit:
    - Appointment of an independent Chair;
    - Reduction in size of the Board to, say, three directors, each appointed by ordinary resolution of the shareholders; and

- Introduction of a shareholder council or similar vehicle to provide a forum for iwi-to-iwi kōrero and provision of strategic input and oversight to the running of the business.

In addition, the review identified the value of the Maara Moana Group, as a whole, developing a long-term strategy or vision to drive its operations and guide consideration of the recommended structural changes.

Golden Bay marine farming 'consortia'

Substantial areas of marine farming space in Golden Bay are subject to resource consents held by companies comprising effective consortia of marine farmers and investors, including iwi. These companies are responsible for certain collective functions, particularly with respect to the meeting of resource consent conditions such as monitoring requirements. The companies themselves do not undertake farming, however, but operate a system where each shareholder is entitled to farm (or lease out) a pro rata share of the waterspace covered by the resource consent.

These companies have operated successfully for a number of years now and have proven themselves to provide a stable and efficient framework for shareholders. They do not, however, provide truly collective or strategic management of the water space assets they hold, as individual shareholder farmers are free to make their own decisions, within the terms of the resource consents and constitutional arrangements.

Iwi Collective Partnership

The Iwi Collective Partnership (**ICP**) is a vehicle through which a number of iwi collectively manage assets, in the form of Annual Catch Entitlement (**ACE**) provided to them under the Māori Fisheries Act 2004.

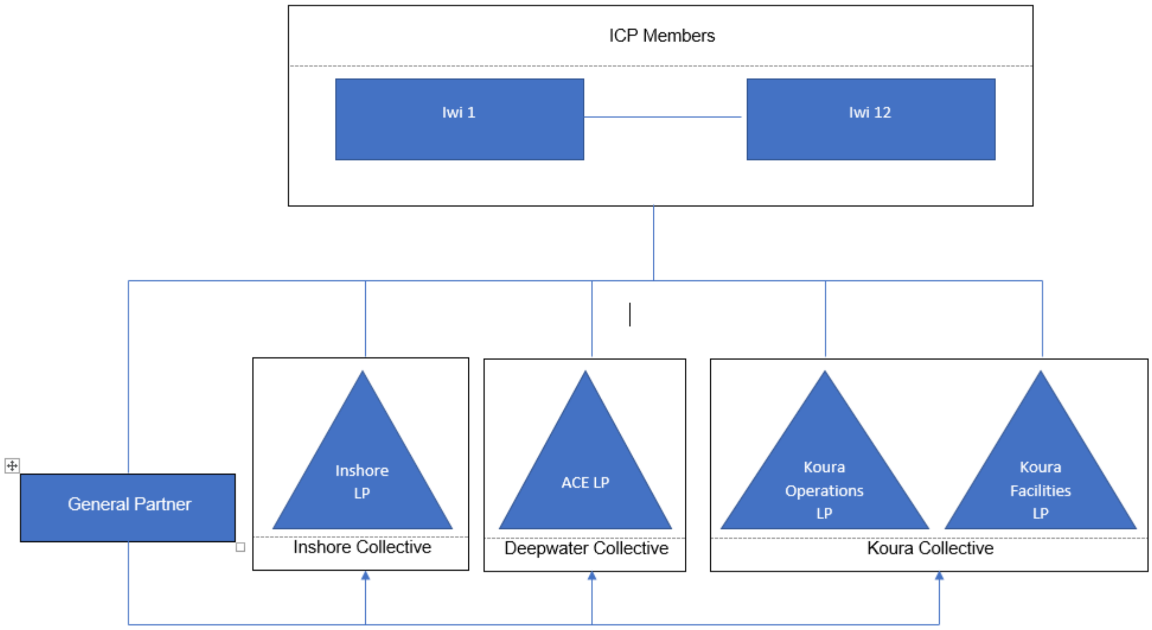

Fig 4 – credit Iwi Collective Partnership

As depicted above, the ICP operates through four Limited Partnerships (**LPs**) sharing a single General Partner (company). Each of the LPs holds and/or manages different asset classes (inshore ACE, deepwater ACE, koura/rock lobster ACE and koura/rock lobster processing facilities). Those LPs, in turn, form strategic partnerships with third parties and operate them through contractual arrangements and/or 'second tier' LPs

Iwi participants in the ICP:

- Can participate in any or all of these LPs (but later entrants face a joining fee reflecting a contribution to original establishment costs);
- Commit their ACE to the relevant LP for a rolling five-year term;
- Have a shareholding in the General Partner company based on their percentage of the total ACE committed, with the top three shareholders each appointing a director to the General Partner company (the balance, a further three directors appointed by resolution of the remaining shareholders);
- Each appoint a representative to an Advisory Committee which provides guidance to the General Partner with respect to strategic governance.

The model may be relevant to Ngā Iwi in that it demonstrates a way in which diverse operations can be conducted through a series of interlinked legal structures, rather than a single, all-encompassing structure. It is also notable that the Advisory Committee and directorship model utilised by the ICP is quite similar to that recommended to the Maara Moana Group in its efficiency review.

10. Recommended structure

The review of the current picture, Ngā Iwi aspirations and constraints set out above, along with the agreed desirable characteristics of an optimal structure and review of comparable models, leads us to the view that what will be optimal in this case is not a single legal entity or structure with a series of business units, but a series of connected structures. It is the 'connective tissue' joining these structures that will add value to them in a way that makes the whole more than the sum of its parts.

In its fully realised form, that connective tissue will have a number of components, including:

- Common ownership, including through subsidiaries;
- Interlinking ownership/cross investments; and
- Contractual arrangements.

Initially, it is recommended that Ngā Iwi work towards establishing three legal entities:

a) Joint development/investment vehicle in the form of a Limited Partnership;
b) IP/R&D Trust; and
c) Joint asset holding company(s) to receive and hold Settlement Assets.

These are discussed below as the Stage One entities, with an outline of possible Stage Two entities and arrangements following.

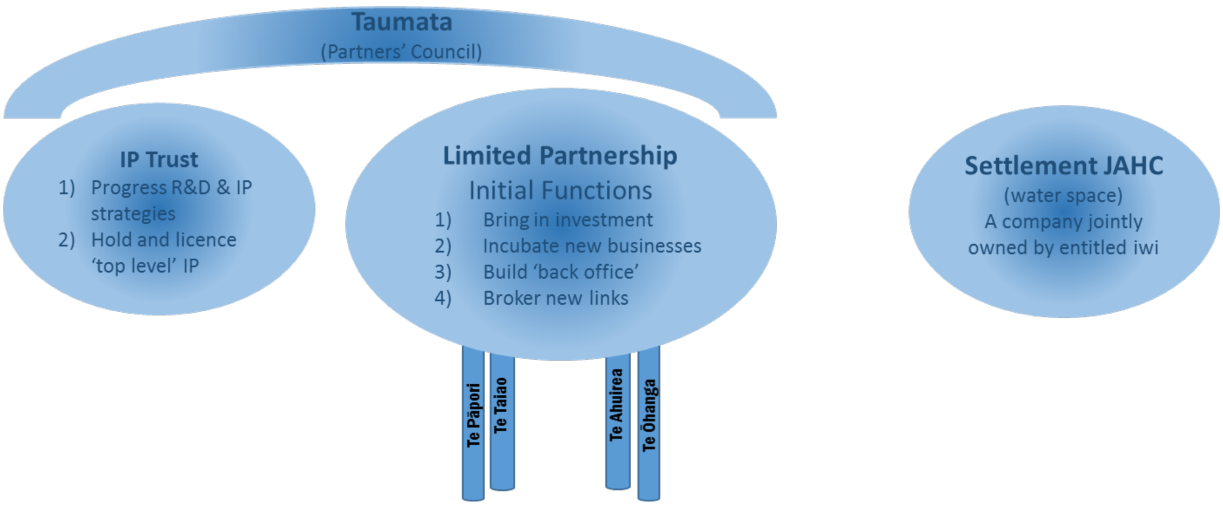

Fig 5 – Recommended Structure

10.1. Stage One – Limited Partnership

It is recommended that Ngā Iwi form a Limited Partnership which has as its initial functions to:

- Bring in investment from Ngā Iwi, the Crown, impact investors and other third parties to implement the business case(s).
- Support the IP trust in progressing the IP and R&D strategies.
- Incubate new businesses and (as appropriate) assist in establishing distinct legal entities for them, with structural and/or contractual relationships to the LP and other entities as required.
- Build 'back office' capacity for businesses within the group, e.g. shared procurement and treasury services.
- Broker linkages (likely via contract) between existing aquaculture businesses within Ngā Iwi.

Limited Partnership structure

It is proposed that Ngā Iwi (and hapū, whānau, other Māori entities, e.g. land trusts and incorporations, if Ngā iwi wish to extend the opportunity to them) would be invited to become Limited Partners of the LP, and that entry of new partners would be restricted to that category of entities in the future, except with the unanimous agreement of all existing Limited Partners. The relative size of each Limited Partner's partnership interest would reflect their level of investment in the LP. At its simplest, this would be based on capital contributions to the LP, but a more sophisticated model would utilise a valuation model driven off Ngā Pou e Whā, i.e. attribution of value to contributions of environmental, social and cultural 'capital', in addition to the purely economic. Further work would be required in in order to fully operationalise that concept.

As with any LP model, the Limited Partners would have a constrained role in the governance and operations of the LP, with those being the primary preserve of the General Partner (see below). In this case, however, we propose the adoption of an overarching Taumata, or Partnership Council (see below) to perform the dual roles of providing a forum for whakawhanaungatanga between iwi

Limited Partners and a mechanism for those Partners to exercise strategic guidance and oversight over the LP.

The Limited Partners would be required to each contribute an agreed amount of working capital to the LP, as it would not have any income-generating capacity in the initial phase. That could change over time as the LP begins to charge other entities within the group for services it provides to them and/or itself invests in identified development opportunities.

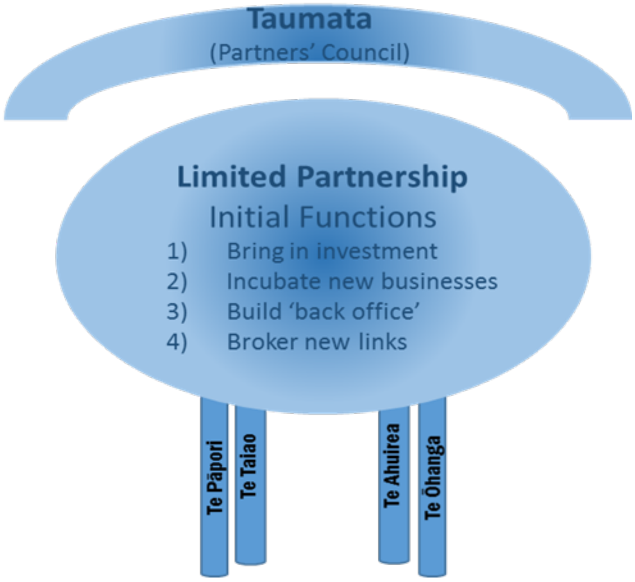

Fig 6– Limited Partnership

General Partner

The General Partner (**GP Ltd**) would be a company incorporated for that purpose, in which shares are held by the Limited Partners in proportion to each Limited Partner's contribution to/interest in the LP (see below). It is recommended that GP Ltd has a small (i.e. 3-5 member) board of directors, with one director appointed by each of the majority shareholders and the balance by resolution of the remaining shareholders (see reference to appointments in the ICP model, p.16 above). Note that this proposal assumes a core of major shareholders, plus others with smaller interests and would need to be tweaked if shareholdings were equal (or roughly so), in which case the preference would be for the Taumata to simply make all director appointments via a special (75% majority) resolution.

The alternative would be for each Limited Partner to appoint a director to the Board; however, that is not recommended, based on the Maara Moana Group experience noted at p.14 above, as it is preferable that the representative function be housed in the proposed Taumata.

Te Taumata

A Partners' Council is not a necessary element of an LP but can be a useful addition, especially in cases where there are a large number of Limited Partners and/or where the LP serves as a mechanism for advancing relationships, in addition to undertaking business. The model of the ICP and the efficiency review recommendations to the Maara Moana Group both underline the value of something like a Partners' Council in comparable structures.

In this case, a Taumata/Council would provide a forum in which the whakawhanaungatanga of Ngā Iwi can be expressed and exercised. The LP's constitutional documents would reserve specified powers and decision-making responsibilities to the Taumata. Key among these would be approval of a Strategic Vision for the LP, based on Ngā Pou e Whā, and monitoring of progress against that Vision.

An option would be to provide for Iwi (and/or hapū, whānau and other Māori entities) that are not active as Limited Partners in the LP to also participate on the Taumata as a means of extending whanaungatanga and providing a pathway for entry over time. As a matter of law, such participants would be non-voting members of the Taumata, though the Taumata would be expected to operate on the basis of consensus, with voting by (full) members only taking place as a last resort.

10.2. Stage One – R&D/IP Trust

It is proposed that a trust be established to hold IP as part of Stage One, given that there is some urgency to some of the work to be undertaken under that heading. Because IP will naturally accrue to the legal entity that develops any new processes, technologies, know how etc., it is proposed that the same trust will have primary responsibility for progressing the group's research and development strategy. IP held by the trust would be licensed to relevant parts of the group for their use, on commercial terms.

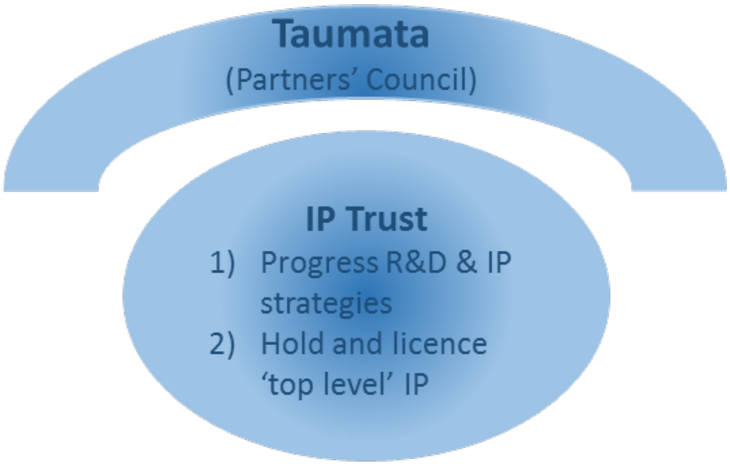

Fig 7 – IP/R&D Trust

A trust is proposed as the primary IP entity, as it is the legal structure that provides maximum protection of these valuable, intergenerational assets. Consideration should be given to whether a Charitable Trust under the Charitable Trusts Act 1957 (with charitable tax-exempt status) or a 'standard' common law trust is a better fit for the group as a whole. The latter is more likely to be the case, as it would position the trust better to license IP to other businesses within the group on a 'cost recovery' rather than profit-making basis, which would best support the profitability of those businesses.

If a common law trust is adopted, we would recommend the adoption of a corporate/company trustee, again to avoid difficulties created by changes in individual trustees over time.

In either case, our proposal is that the trust deed would provide for the trust to take guidance from the same Taumata/Partners' Council as the LP. This would provide a mechanism for ensuring overall strategic alignment of R&D priorities within the group.

10.3. Stage One – Joint Asset-Holding Company

As noted at p.11 above, the MCACSA provides that, in order to retain their status as Settlement Assets, water space assets transferred to Iwi under that Act may only be held by an IAO or a company wholly owned by one or more IAOs in the same region. Other legal vehicles such as trusts or LPs are therefore not available for the holding of Settlement Assets.

Fig 8– Settlement JAHC

It is therefore proposed that Ngā Iwi establish one (or more) Joint Asset-Holding Companies (JAHCs) for the purpose of receiving and holding Settlement Assets. Key issues to be resolved before this could occur include the need to reach agreement on which iwi have entitlements to the assets and therefore an entitlement to shareholding in the JAHC, and whether the relative size of those entitlements/shareholding are equal or determined on some other basis.

Once issues of shareholding are resolved, it is recommended that the JAHCs are constituted utilising the precedents available from the Maara Moana Group, with the benefit of the lessons learned by the Group to date, including:

- Providing for appointment of a director by each iwi shareholder initially, but allowing for the appointment of an independent director/Chair and a move to a smaller Board over time; and
- Considering whether extensive machinery for winding up the JAHC and dividing the waterspace assets between entitled iwi/shareholders is necessary at the outset.

At this stage it is *not* proposed that the JAHC(s) would come under the umbrella of the Taumata/Partners' Council to be shared by the LP and IP Trust, as it is assumed that the JAHC(s) may involve more or different iwi than those which choose to actively invest through those other entities. If there is alignment in the shareholding/make-up of all three entities, extension of the Taumata to the JAHC(s) would be desirable.

In order to ensure Settlement Assets in the form of waterspace are protected from commercial risk, the JAHC would be expected to lease or license that space to other entities to undertake actual investment (e.g. installing farming infrastructure) and farming and/or R&D activities. Those other parties would preferably come from within the wider grouping and could include one or more discrete farming LPs formed for that purpose.

10.4. Stage Two – Business to Business Contracts

Key to the second stage of development of the overall structure would be the development of a matrix of contractual, business-to-business relationships between the various entities and operations. This could include, for example, contracts between spat/hatchery services, farms and processing services, management or services contracts with the central LP, and licensing agreements with the IP trust. The LP could add value in this stage of development by building a library of model agreements, precedents, etc.

10.5. Stage Two – New business entities/business units

Ultimately, it is envisaged that the group will comprise a number of entities, each undertaking one or more of the activities within the aquaculture value chain depicted in the Figure 2 above. Maintaining some structural separation of these will allow investors to 'pick and choose' their own level of risk while overall strategic guidance provided by a Taumata (or similar), interlinked structures such as those utilised by the ICP, and contractual arrangements will provide connections.

11. Recommended pathway

Development of the proposed structure will require Ngā Iwi to make a number of critical decisions with respect to each of its three elements:

1. Limited Partnership:
    a. Which Iwi wish to participate?
    b. Do participating Iwi wish to invite other Bay of Plenty hapū, whānau, land trusts and incorporations, etc to also participate on the same basis?
    c. What minimum level of investment will be required of participants?
    d. What level of investment does each participant wish to contribute?

2. IP/R&D Trust:
    a. Who will be the beneficiaries of the trust – only participants in the Limited Partnership, all Bay of Plenty Iwi, or some other group?

3. Joint Asset-Holding Company:
    a. In what form do Ngā Iwi wish to receive their Settlement Assets (i.e. authorisations, cash, or some combination of the two)?
    b. Which of Ngā Iwi are entitled to share in those assets, and in what proportions?
    c. Do Ngā Iwi wish to divide those assets between themselves, or hold some or all of them jointly?

Appended to this report is a draft Heads of Agreement, which is intended to assist in focusing the discussions that will be required. It is recommended that a structured and independently facilitated series of wānanga and hui would greatly assist the decision-making process. Detailed commercial and taxation advice should also be sought before establishing any business structure.