

4. Indigenous Rights

When an ITQ based system is introduced to manage a resource, the access to its use becomes restricted (by law or by economics) to individuals holding quota. Thus, if there are individuals who have a prior claim to the use of the resource, conflict can arise. In New Zealand, the introduction of the QMS assumed that there would be no effect on Maori fishing claims, which were established in the Treaty of Waitangi. But subsequent claims and reports by the Waitangi Tribunal disputed this, leading to a significant and lengthy settlement process between Maori and the Crown.

Under the Treaty of Waitangi and subsequent fisheries legislation, Maori had the unextinguished rights to the use of marine resources. However, the practical implications of these rights were not always appreciated. This chapter discusses the changing awareness of Maori fishing rights over time, including Maori fishing claims in the context of the QMS. The developments regarding Maori fishing claims and their impact on the QMS are discussed in detail in this chapter from the initial opposition from the Muriwhenua to the introduction of the system, through to the allocation of commercial assets to individual iwi. In addition to their commercial claims, Maori also have customary claims to fisheries resources to collect fish and shellfish for non-commercial purposes such as events on Marae. Consequently, the chapter concludes with a discussion of the legislation, both past and present, which protects Maori customary fishing rights and provides for Maori input into the management of culturally significant areas.

4.1 European Settlement and the Treaty of Waitangi

The traditional Maori diet was highly dependant on food from the aquatic environment. Apart from birds, dogs and rats, oceans and freshwater ecosystems were the only source of animal food for Maori (Waitangi Tribunal 1988). Early Maori had extensive knowledge of their fisheries and had an ownership system in place which reduced the risk of exploitation (Bess 2001). Traditionally, Maori utilised a large proportion of the open sea with fishing grounds that were up to 25 miles from the coastline and large fishing trips, which caught tonnes of fish, were a common occurrence (Waitangi Tribunal 1988). The fish that they caught were not only used for personal and local consumption, but also for trade between tribes. When Europeans started arriving in New Zealand, Maori extended this trade system and began to supply Pakeha ships in exchange for other resources.

In 1840, the Treaty of Waitangi was signed in an attempt to resolve some of the conflict between Maori and Pakeha settlers. But there were significant differences between the Maori and English versions of the Treaty. The most important difference between the two versions, with regard to fisheries, is found in the second article. While the English version grants Maori “exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties”, the Maori version guarantees Maori unqualified chieftainship over their lands, villages and treasures

(Treaty of Waitangi Information Programme 2006).¹ So Maori believed that they retained control of their resources while the settlers believed that the Crown could, from that point on, impose regulatory controls on resources within New Zealand. Both versions of the Treaty grant Maori ownership of their lands and fisheries.

4.2 Post Treaty Fisheries Legislation

There has been limited treatment of Maori fishing rights in fisheries legislation until recently. But their rights have been acknowledged to some extent in legislation since the passing of the Fish Protection Act 1877 (Batstone and Sharp 1999). Section 8 of this Act states that “nothing in this Act ... shall be deemed to repeal, alter or affect any provisions of the Treaty of Waitangi, or take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder”. Other legislation was also put in place to allow for the creation of exclusive fishing grounds for the use of local Maori and tribes, but this was later repealed and no fishing reserves were ever set up (Waitangi Tribunal 1983). Subsequently, fisheries legislation has recognised Maori fishing rights through the inclusion of sections stating that the legislation will not affect Maori customary fishing rights.

4.3 Awareness of Maori Fisheries Claims

In the past, many Maori may not have been aware of fisheries legislation, how it affected them and their customary rights. Many Maori lived in rural areas and fisheries legislation is unlikely to have had a major impact on their day-to-day lives, especially when there was plenty of fish available. Thus, Maori did not have a reason to complain about the way that their rights were affected under changing legislation, at least not until the QMS was introduced.

The 1983 Fisheries Act stated that none of the fishing regulations in the Act would affect Maori customary fishing rights (Section 88(2)). However, it was not until 1985 that this provision was actually tested.

In 1984, Tom Te Weehi (Maori of Ngati Porou descent) was caught with a number of undersized paua which he had collected for his personal consumption. He was consequently charged with breaching the Fisheries Act (Sinner and Fenemor 2005). But Te Weehi defended this charge stating that he was collecting the paua as part of his customary fishing rights under Section 88(2) of the Fisheries Act 1983. While Te Weehi was initially found guilty, in August 1986 Te Weehi’s appeal to the High Court was granted and the conviction was quashed.² This case was the first time that Maori customary fishing rights were successfully used as a legal defence and it represents a turning point in the way that Maori viewed their customary fishing rights.

¹ The Maori version of the Treaty does not explicitly state that fisheries were included in the settlement. However, it upholds their chieftainship of their lands, villages and treasures, thus implying their continued access to fisheries (Waitangi Tribunal 1983).

² The Ministry of Agriculture and Fisheries sought approval to appeal this ruling but this approval was not granted.

The first Treaty claim came from a group of iwi from the far North of the North Island, the Muriwhenua, in 1985 (Bess 2001). Their objection initially focused on the then current plan to introduce large marine reserves that would prevent all fishing in the chosen areas. But during the processing of this claim, the changing focus of fisheries management and the imminent introduction of the QMS became apparent. This led the Muriwhenua to alter the focus of their claim. Instead of trying to prevent the creation of marine reserves in the area, they challenged the way in which the QMS would effectively quash Maori Treaty rights. In December 1986, as part of this claim, the Waitangi Tribunal wrote to the Ministry of Agriculture and Fisheries asking that the notification of fishers of their ITQ allocation be delayed until the Tribunal had finished assessing the claims that were currently lodged. However, because of statutory obligations and the fact that the ITQ system was already in place, this request was rejected (Waitangi Tribunal 1983). The subsequent enquiry and report by the Waitangi Tribunal on the Muriwhenua case was not completed until 1988, by which time the QMS was well established.

4.4 The Introduction of the QMS

During the development and implementation of the QMS, the Government assumed that Maori and their rights under the Treaty would not be affected since this system was put in place to manage commercial fisheries (Clark and Major 1988).³ Consultation that was carried out with the New Zealand Maori Council prior to the introduction of the system failed to see conflict between customary rights and the QMS. This prevailing view is clearly illustrated in Section 88(2) of the 1983 Fisheries Act which stated that “nothing in the Act shall affect any Maori fishing rights”.⁴

While the regulators did not see any relevance between the QMS and Maori rights under the Treaty, iwi did (Wallace 1998). This system not only provided something tangible for Maori to claim, but also led Maori to question whether their rights were being compromised (Falloon 1993). The Crown, through the Treaty of Waitangi, had already granted Maori unextinguishable rights to fisheries resources yet now the Crown was giving the commercial property right to commercial fishers through the QMS (Waitangi Tribunal 1992a). Maori did not object to the introduction of the property rights based system for managing fisheries and they could see the distinct advantages that it had for the environment. In fact, the QMS has all of the characteristics that Maori would want to see in a fisheries management system. But they were concerned about the impact that the system had on their customary rights (Falloon 1993).

The Waitangi Tribunal report on the Muriwhenua claim concluded that a new agreement was needed and that the newly introduced QMS was “in fundamental

³ Through the legislation, two key assumptions have been made regarding Maori and their fishing practices (Bess 2001). These are, firstly, that Maori never had a system for managing fisheries and, secondly, that their fishing activity should be limited to subsistence use. But in actual fact, Maori had a well developed property rights based system in place well before settlers arrived in New Zealand and fish played an important role in trade between tribes and subsequently with settlers (Waitangi Tribunal 1988).

⁴ Interestingly, this differs from previous Acts which state that nothing shall affect existing Maori fishing rights (Waitangi Tribunal 1992a).

conflict with the Treaty's principles and terms" (Waitangi Tribunal 1988). The High Court subsequently agreed with this view (Batstone and Sharp 1999) and an injunction was put in place preventing the introduction of additional species into the QMS (Falloon 1993, Bess 2001, Sinner and Fenemor 2005).

4.5 Interim Settlement

4.5.1 Maori Fisheries Act 1989

With an injunction in place which prevented further species from entering the QMS, negotiations were carried out between Maori and the Crown to address Maori grievances. These negotiations resulted in the Crown implementing an interim settlement, which was passed into law as the Maori Fisheries Act 1989 (Bess 2001). This Act only had limited support from Maori and failed to address all of their concerns. However, it was a starting point to addressing the inconsistencies of the past (Waitangi Tribunal 1992b).

This Act is in multiple parts. Part I establishes the Maori Fisheries Commission and the transfer of assets from the Crown. Part II declares rock lobster to be included in the QMS. Part III authorises the declaration of taiapure.

4.5.1.1 Maori Fisheries Commission

The Maori Fisheries Commission was set up under the Maori Fisheries Act 1989 to administer Maori fishing rights and facilitate entry into and development of the fishing industry by Maori (Waitangi Tribunal 1992a). The Commission, under the 1989 Act, received \$10 million and 10% of existing quota from the Government. The transfer of the quota was carried out in four separate transfers of 2.5% of the current TACC with the final transfer occurring by the 31st of October 1992. This settlement led to the Government actively trading in the quota market to fulfil the quota transfer requirement (Bess 2005). However, it was not possible for the Government to obtain all of the quota required. Thus, under Section 42 of the Act, they transferred the equivalent dollar value for the missing quota (TOKM 2003). When cash was transferred, the Commission decided to retain this cash in a trust to be used to purchase the quota when it became available.

At the time of the 1989 Maori Fisheries Act, the QMS was still a reasonably new system that had been introduced to increase the efficiency of the fishing industry through, at least in part, the consolidation of the industry. Splitting Maori fishing assets amongst all iwi seemed to be contrary to the purpose of this new system. Thus, Aotearoa Fisheries Limited (AFL) was set up under the 1989 Maori Fisheries Act in order to make money for Maori from the settlement assets and to acquire additional assets (Day 2004). The profit that was made from the aggregated assets was to then be allocated to individual iwi, thus maintaining the efficiency of the system while still allowing individual iwi to benefit from their assets. AFL received half of the assets transferred to the Commission and all of the profit made by AFL was transferred back to the Commission to enable it to be allocated to iwi. However, after consultation with iwi, assets were to be transferred directly to iwi. Thus, at the completion of the

transition period specified in the Act, AFL was effectively dissolved and all assets were transferred back to the Commission.

All quota held by the Commission was leased out on an annual basis with preference given to Maori fishers (Day 2004). Despite the creation of AFL, the Commission retained half of the awarded quota enabling it to be leased to individual fishers. Once AFL's assets and quota were transferred back to the Commission, this additional quota was also leased out.

4.5.1.2 Introduction of Rock Lobster into the QMS

Within the Maori Fisheries Act 1989, legislation was introduced to complete the introduction of two rock lobster species (spiny rock lobster and the packhorse lobster) into the QMS as these species were partially entered into the system when the injunction was put in place. However, the introduction of these species was not part of the settlement of Maori treaty claims. For more information on the introduction of these two species into the QMS see Section 3.1.5.

4.5.1.3 Taiapure

As part of the Maori Fisheries Act 1989, provisions were made to allow for Maori management of estuarine and coastal areas that had customary significance to any iwi or hapu for either food or spiritual and cultural reasons. The creation of these areas, known as taiapure, was the first attempt to allow for non-commercial aspirations of Maori and to provide a mechanism through which local Maori could play an advisory role to the Ministry of Fisheries. Within the specified taiapure areas, a committee recommended by local Maori becomes responsible for managing the recreational and customary fishing. While this committee is unable to change the regulations applicable to the taiapure, they have the right to recommend to the Ministry that changes to regulations are made.⁵ Thus, taiapure provide a system for local Maori to have input in the management of the customarily significant marine environments (Ministry of Fisheries 2006a).

To create a taiapure, local tangata whenua must submit a proposal to the Ministry of Fisheries. This proposal must outline all the individuals who are likely to be affected by the taiapure, the species involved, the proposed management policies and objectives and the significance of the area to Maori (S177). If the proposal has the support of the Minister of Fisheries, an opportunity is provided for public submission on the proposal. The Minister is then able to make his final decision based on all the submissions that have been made and the recommendations from a judge of the Maori Land Court. Once a proposal has been accepted, the Minister is able to appoint a management committee based on the nominations provided by local Maori (Bess and Rallapudi 2006).

Under Section 183 of the 1996 Fisheries Act, no individual can be refused access to the use of, or be required to leave, any taiapure based on their colour, race, ethnicity or national origins. This ensures that non-Maori would not be excluded from coastal

⁵ Until regulations are altered for this area, based on recommendations made by the management committee, the relevant fisheries regulations remain in place.

areas or discriminated against, but it has caused some conflict with Maori. Under early legislation, which has long been repealed, (the Maori Councils Acts of 1900 and 1903 and the Maori Social and Economic Advancement Act 1945) there was provision for exclusively Maori reserves to be set up (Waitangi Tribunal 1992a). This legislation was repealed in 1962 and until the Maori Fisheries Act 1989, there was no legislation allowing taiapure, or similar areas, to be created. So although the 1989 Act provided provision for Maori input into the management of culturally significant areas, it did not go as far as previous legislation which allowed for exclusive access (Waitangi Tribunal 1992a). The failure to secure exclusive access has been a disappointment for some Maori. Despite this, both Maori and non-Maori have been able to see the potential benefits of the taiapure system as it allows individual communities greater control over their local resources (Waitangi Tribunal 1992a, Option4 2006a).

Currently eight taiapure have been established in New Zealand (Anderton 2006). The first of these was set up in 1995 at Palliser Bay on the South Wairarapa coast and subsequently taiapure have been established throughout the country. But since the late 1990s, Maori have started to lose interest in establishing taiapure because of the relatively lengthy legislative process involved in creating them when compared with establishing mātaimai (see Section 4.8.3.1 for more details on mātaimai) (Bess and Rallapudi 2006).

While the Maori Fisheries Act 1989 started the process of settling Maori Treaty claims, it did not represent a full settlement and it led to a number of legal claims being filed. Thus, additional work was required before the issue was fully resolved.

In August 1987, Ngai Tahu filed a fisheries claim against the Crown disputing the rights of the Crown to implement the QMS under the Treaty of Waitangi (Bess 2001). Ngai Tahu claimed full ownership of fisheries in their area and demanded compensation for the damage that had been done to their fisheries during the Crown's stewardship. Their claim took a long time to process and, in the meantime, the Maori Fisheries Act 1989 was passed. But in 1992, the Waitangi Tribunal produced its report on Ngai Tahu's claims which supported the iwi's right to ownership and their claim to a development right. (Waitangi Tribunal 1992a). This development right states that Maori have rights to the fish species that have been discovered and technology that has been developed since the signing of the Treaty in 1840. Despite this being found in the Muriwhenua claim, it was not until the Ngai Tahu report that the practical implications of this right were defined.⁶ The Tribunal concluded that Ngai Tahu have the right to a reasonable share of the sea fisheries within twelve to two hundred miles offshore (Waitangi Tribunal 1992a). The acknowledgement of the development rights has ensured that Maori receive both inshore and deepwater quota as part of the Treaty settlement independent of whether a species was fished traditionally (Bess 2001).

⁶ In the Muriwhenua's traditional area, all species that were covered by the QMS had traditionally been fished by the local Maori. Thus, there was no reason for the Muriwhenua report to assess the right of Maori to newly developed fisheries. But there are species that are fished within Ngai Tahu's tribal area which were never fished traditionally such as the deep-water species. Therefore, whether the iwi should have access to these fisheries became an issue only once the Ngai Tahu claim was being investigated.

4.6 Final Settlement of Commercial Claims

4.6.1 Treaty of Waitangi Settlement Act 1992

While negotiations were taking place surrounding the Ngai Tahu claim, New Zealand's largest seafood firm, Sealord Products Ltd., was offered for sale. This presented an opportunity to obtain the significant amount of quota required to settle Maori fishing claims. Negotiations took place between Maori and the Crown, which culminated in 1992 with a Deed of Settlement (Batstone and Sharp 1999). This Deed became the basis of the Treaty of Waitangi Settlement Act 1992 and provided a full settlement of all Maori commercial fisheries claims in accordance with the Treaty of Waitangi (Bess 2001).

Under this settlement, Maori were given \$150 million for a half share of Sealord Products Ltd and in addition to the quota that they already received under the 1989 Act, they would receive 20 percent of all new QMS species when they were introduced into the system (Wallace 1998, Bess 2001, Newell 2004). It was stated in both the Deed of Settlement and the 1992 Act that these assets must be used to the benefit of all Maori despite the fact that they would eventually be allocated to individual iwi.

The passing of this Act extinguished all rights of Maori to commercial fisheries no matter what system was being used to manage the species. However, because of the mechanism used to compensate Maori, they would not get direct benefits from a species unless they were introduced into the QMS. This was not important for the most significant commercial species (as they are all in the QMS) but it meant that direct compensation might not have been gained for other species such as freshwater species.

The 1992 settlement did not have the support of all Maori. A Court of Appeal injunction against the 1992 Deed was attempted (Bess 2001) and an inquiry was carried out by the Waitangi Tribunal (Waitangi Tribunal 1992b). However, these appeals were unsuccessful and the objections from Maori towards the QMS are now largely resolved (Connor 2001a).

4.7 Allocation of Commercial Assets

Although the level of compensation for Maori was decided through the Treaty of Waitangi Settlement Act, the more difficult task of allocating this among Maori still needed to be resolved. After the Treaty of Waitangi Settlement Act 1992 was created, the Maori Fisheries Commission was restructured and the Treaty of Waitangi Fisheries Commission or Te Ohu Kai Moana (TOKM) as it is otherwise known was formed (Bess 2001). TOKM was given ownership of both the pre-settlement assets (PRESA) awarded under the 1989 Maori Fisheries Act and the post-settlement assets (POSA) awarded under the 1992 Treaty of Waitangi Settlement Act. Not only is TOKM required to manage these assets on behalf of all Maori, they must also facilitate the allocation of these assets to iwi (TOKM 2002). When this allocation

takes place, TOKM must ensure that it is to the benefit of all Maori, not just those who affiliate with a particular iwi.

Deciding on a fair allocation model took 12 years and involved extensive consultation with individual Maori, iwi and other interested parties (TOKM 2003). In November 1998, TOKM had identified what it believed was the optimum method for allocating PRESA, but was unable to report this to the Minister because of unresolved litigation (TOKM 2001a). This proposal was subsequently revisited and a new allocation strategy was published as He Anga Mua in December 2001. Within this report, it was stated that PRESA and POSA would be allocated using the same allocation method, and four possible allocation methods were suggested (TOKM 2001b).⁷ These methods varied in the extent to which the assets were held in a centralised organisation and on whether population and/or coastline were used to determine the allocation of assets to tribes. Extensive discussion was then carried out with iwi to get feedback on the options and to ensure that they understood the proposal.

Following a review of the submissions received regarding He Anga Mua, TOKM reviewed its options and published a new proposal of a single allocation method in August 2002 as Ahu Whakamua (TOKM 2003).⁸ This document was used to gain agreement from iwi and interested parties on the proposal (TOKM 2002). The final report to the Minister, He Kawai Amokuri, contained very slight alterations to Ahu Whakamua regarding how and when iwi would receive their allocation and was published in May 2003 (TOKM 2003).

In 2004, the Maori Fisheries Act 2004 was passed, finalising the method to be used to allocate Maori fishing assets to iwi. The allocation method in the Act follows that which was presented in He Kawai Amokuri and outlines the process of allocation of quota, cash and other assets. A number of organisations were established to centrally manage assets on behalf of iwi and to promote Maori fishing.

4.7.1 Key Organisations

The Maori Fisheries Act 2004 established six distinct entities including the additional restructuring of TOKM.

4.7.1.1 Te Ohu Kai Moana Trust

The Te Ohu Kai Moana Trust governs the allocation and management of assets.

4.7.1.2 Te Ohu Kai Moana Trustees Limited (TOKM)

Te Ohu Kai Moana Trustees Limited (TOKM) administers the rules of the Te Ohu Kai Moana Trust and holds the assets until they are allocated. The Trustees also

⁷ Despite the decision to allocate the PRESA and POSA in the same manner, a key difference still remained. The PRESA quota are only able to be traded within Maori settlement groups (i.e. iwi and TOKM) while the POSA quota are able to be freely traded. While this restriction reduces the efficiency of the system, this effect is likely to be minimal due to the large number of iwi involved. The ACE that is generated from this quota though can be freely traded without restriction.

⁸ See Section 4.7.2 for more details on the final allocation method.

manage Te Putea Whakatupu Trust, Te Wai Maori Trust and Aotearoa Fisheries Limited (TOKM 2006a).

Setting up Te Ohu Kai Moana as a trust company has had distinct benefits. It ensures that individual trustees are not personally liable for the assets that are held by Te Ohu Kai Moana and it benefits from the efficiency of company law. The following trusts and companies are all administered by Te Ohu Kai Moana:

4.7.1.3 Aotearoa Fisheries Limited (AFL)

While TOKM was set up as the governance body for Maori fishery interests, Aotearoa Fisheries Limited (AFL) was re-established to control the commercial side of the assets (AFL 2006) and to provide an income stream for Maori. In this role, AFL fishes the quota held in central ownership by TOKM and aims to increase the total commercial assets (AFL 2006).⁹ AFL currently holds around half the total value of Maori fishing assets and is estimated to be worth at least \$350 million (TOKM 2006b). AFL is entirely owned by TOKM who hold all of the voting shares but the profit that AFL generates is split two ways. Eighty percent of the income shares are held by iwi and the remaining twenty percent is held by TOKM.¹⁰

4.7.1.4 Te Putea Whakatupu Trust

Te Putea Whakatupu Trust was established in March 2005 to promote the educational advancement of Maori, with a focus on fisheries related activities (TOKM 2005a). Prior to the creation of Te Putea Whakatupu Trust, the TOKM Charitable Trust had already distributed more than 2,000 education and training scholarships to Maori. Te Putea Whakatupu Trust will build on the success of TOKM's scholarship programme (TOKM 2005b). It is through this trust that assets are used to help all Maori, including those who do not affiliate with a particular iwi.

4.7.1.5 Te Wai Maori Trust

The Te Wai Maori Trust uses its income to fund education and research related to Maori freshwater fishing. It also promotes the protection and enhancement of freshwater fisheries habitat, especially those that have traditionally supported iwi (TOKM 2005a). By carrying out research into freshwater species, it may be more likely that these species are introduced into the QMS, thus enabling Maori to gain further financial benefits from the settlement deal. But there are also social and cultural benefits from the work carried out by this trust through the enhancement of the environment.

4.7.1.6 Te Kawai Taumata

Te Kawai Taumata was set up with the sole purpose of appointing and removing directors from Te Ohu Kai Moana Trustees Limited. There must be between 6 and 11

⁹ These assets include 50% shareholdings in Sealord and Prepared Foods Ltd and 100% ownership of Moana Pacific Fisheries, Chatham Processing, Pacific Marine Farms and Prepared Foods Processing.

¹⁰ By retaining some of the revenue in a central organisation, the commitment to using the assets for the benefit of all Maori can be met, at least in part.

people on the board, all of whom must be of Maori descent. These individuals are chosen by regional iwi groups in a manner which attempts to ensure that the best people are chosen for the task, rather than people who will try to advance the interests of large tribes.

4.7.2 Allocation of Assets

The Maori Fisheries Act 2004 outlined the process of allocation of the settlement assets given to Maori under the Maori Fisheries Act 1989 and the Treaty of Waitangi Settlement Act 1992.

4.7.2.1 Quota

Under the Maori Fisheries Act, deepwater and inshore quota are allocated through different methods. Deepwater quota are defined as fish stocks where at least 75% of the catch is caught at 300m or deeper and inshore quota is caught above 300m (S8-9 Maori Fisheries Act 2004). If a fish stock is unable to be classified through this rule, then the fish stock is classed by TOKM based on the location of fishing, fishing equipment used and any other relevant information (Maori Fisheries Act 2004 S9). Inshore quota is allocated based on an iwi's share of coastline within the relevant QMA so that iwi receive the same proportion of quota as their share of the QMA's coastline (S140). The deepwater quota is allocated to iwi based 75% on an iwi's population and 25% on its share of coastline within the QMA (S141). However, some exemptions and alternative allocation rules were also put in place to ensure that iwi were not disadvantaged.

The quota for species in the Chatham Island zone is allocated to iwi slightly differently in recognition of the dependence of the Chatham Islands on fishing (S142) (TOKM 2003).¹¹ While the inshore quota in the Chatham Islands is still allocated based on the coastline, the deepwater quota is allocated based on 50% population and 50% coastline. When the QMA of a species is only partially within the Chatham Island zone, the quota is divided into two portions so that some of it is assigned under Chatham Island zone regulations while the remainder is assigned as regular quota.

Due to the large amount of coastline that can be accumulated through the inclusion of harbours, special provisions have been made for dealing with these areas under Section 143 of the Act. This section defines the total amount of coastline able to be claimed within significant harbours. Schedule Two of the Maori Fisheries Act 2004 identifies the amount of quota in each of the specified harbours that can be allocated to local iwi whose territory adjoins the harbour. The quota that is allocated through this provision is deducted from the total settlement quota before general allocation of inshore quota occurs.

When quota is allocated for freshwater species, such as long-finned eels, only iwi whose territory is within the relevant QMA are eligible for quota. If a single iwi is located with the QMA, they receive the entire quota held by TOKM. When multiple

¹¹ The Chatham Island zone is a special 200 nautical mile zone that was identified around the Chatham Islands for the purpose of quota allocation.

iwi are involved, the proportion of quota allocated to each can be based on the population of each iwi group or by agreement across parties.

4.7.2.2 Settlement Asset Money

Under this Act, TOKM receives the settlement assets granted to Maori. However, under Section 137, it must transfer these assets to a number of entities (described above): Te Putea Whakatupu Trustee Limited receives \$20 million, Te Wai Maori Trustee Limited receives \$10 million, and Te Ohu Kai Moana Trustee Limited receives \$5 million. Once this process is complete, TOKM must use its revenue from AFL to fund its activities. Additional money from the settlement process must also be transferred to iwi.¹² The proportion each iwi receives is determined by its size. The iwi also receive the cash that was earned by the Commission through leasing quota on the iwi's behalf. ..

Because some iwi are only entitled to a small amount of quota under the allocation scheme, they are will receive additional cash. Small allocations are inefficient to manage, so tribes with small allocations receive an additional \$1 million to help with the management and to enable them to purchase more quota.

Other tribes receive money instead of quota. When cash was received from the settlement deal in place of quota, the Commission retained this money in a separate trust, in order to secure the missing quota. Where the quota has not yet been purchased, the iwi that would have received this quota instead receives money from the Trust.

4.7.2.3 Income Shares

Te Ohu Kai Moana Trustee Limited must also allocate 80% of the income shares that it holds in Aotearoa Fisheries Limited. These shares are to be allocated based on iwi population size which are provided in the Third Schedule.

Due to the potential for financial gain, much lobbying about the allocation mechanism took place before the Maori Fisheries Act 2004 was passed. But this lobbying did not prevent the model from going to Parliament (Day 2004) and once the Act was passed, no legal action was taken.

4.7.3 Requirements to Receive Quota

To receive quota, iwi must meet the criteria specified under Section 130 of the Maori Fisheries Act 2004. This criteria states that iwi must form a mandated iwi organisation (MIO) which will hold and manage the assets transferred to them on behalf of the iwi. The MIO must be set up as a company, trust or incorporated society whose directors, trustees or office holders have been elected or appointed in accordance with the organisation's constitution. The organisation needs to maintain a current register of all iwi members, which must contain at least the number of people listed in the fourth column of Schedule Three of the Maori Fisheries Act 2004. Until iwi have formed an

¹² This process involves a transfer of \$20.7 million plus earnings to iwi.

approved MIO, the settlement assets that would be given to them are held in a trust and managed by TOKM.

Until November 2004, it was not possible for iwi to form MIOs since the new TOKM, with whom they needed to register, had not yet been established. But many iwi had made significant progress before this time towards setting up their organisations (TOKM 2006c). So far, 34 MIO have been set up and approximately 60% of the value of the settlement assets has been allocated to individual iwi (TOKM 2006d).¹³ TOKM is required to have completed the allocation of all assets to iwi by 2010 (TOKM 2005a) but it is hoping to be able to complete this process by September 2007.

4.8 Customary Rights

In addition to commercial claims to fisheries resources, Maori also have customary rights which enable them to collect fish and seafood for events on Marae and for other traditional non-commercial uses. Food from the aquatic environment has played an important role in many cultural activities and constituted a large component of the traditional diet. Thus, there is a desire to ensure that this right is not extinguished. The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 recognised both the commercial and customary rights of Maori and consequently included provision for Maori customary use and input into the management of fisheries (Lawson *et al.* 2006). Without accounting for customary non-commercial fishing, it is unlikely that many iwi would have supported the fisheries settlement (Ministry of Fisheries 2004a).

4.8.1 Customary harvest allowance

The Minister of Fisheries is required to make allowances for different fishing interests, including customary harvest, when allocating the TAC. The allowance made for customary fishing should, as a matter of policy, fully satisfy customary interests, and therefore the allowance should not constrain the level of customary catch taken. The customary fishing regulations (Fisheries (South Island Customary Fishing) Regulations 1999 and the Fisheries (Kaimoana Customary Fishing) Regulations 1998) do not provide for the Crown to place limitations on customary fishing, apart from ensuring the sustainability of a particular stock.¹⁴

In most cases, there is very little information on customary fishing take, although this will improve as customary regulations take effect and better reporting processes are implemented. In the meantime, the Ministry bases the customary allowance on a variable proportion of the recreational allowance, based on an assumed similarity between recreational and customary Maori interest in inshore stocks; the proportion applied depends on the importance of the species for customary use. By following this approach, the customary take is unlikely to exceed the allowance. However, information collected under the reporting requirements of the South Island Customary Fishing Regulations may be available for a large proportion of the South Island and

¹³ Many iwi are not able to receive all of their entitlement yet due to a lack of agreement between neighbouring tribes over boundaries.

¹⁴ But given the highly similar nature of these two pieces of legislation, they are jointly referred to as the customary regulations (Option4 2006b).

could be used to estimate customary take. The Ministry will therefore use the reporting framework, and will work towards estimating catch for other parts of the country based on an estimation of the frequency of hui and tangi at each Marae within a given QMA.

4.8.2 Regulation 27

In 1986, regulations were passed that provided a mechanism through which fishers could be made exempt from amateur fishing regulations provided they met certain criteria and were taking fish for approved traditional non-commercial purposes (Regulation 27 and 27A of the Fisheries (Amateur Fishing) Regulations 1986). These regulations have been used to provide for customary harvest, thus allowing individuals to collect fish and seafood without being subject to amateur fishing regulations, provided they had permission from local Maori.

However, this system caused confusion since a number of groups were able to claim tangata whenua status within an area and, consequently, authorise exemptions. Thus in 2003, substantial changes were made to the regulations to improve this process. For instance, potential fishers must acquire written permission from an authorised representative of the local tangata whenua,¹⁵ all gear must be marked with an authorisation number and the sale or trade of any fish taken under this provision is prevented. The authorising representative may also choose to place further restrictions on the harvest such as limiting the time and place that fishing can take place. While this system enables Maori control over traditional areas, it still leaves room for interpretation about who is able to collect customary non-commercial fish. Thus, Regulation 27 is being replaced throughout the country with regulations for creating mātaihai (See Section 4.8.3.1 for more details).

4.8.3 Maori Guardianship

In order to assist in the management of their local fisheries, iwi need to appoint a representative who is able to liaise with Government officials and make decisions on their behalf. These individuals (Tangata Kaitiaki in the North Island and Tangata Tiaki in the South Island) are recommended by the local iwi that they represent, and provide a mechanism through which the tangata whenua have input into the management of their customary fishing areas.¹⁶ Although these positions are voluntary and require a large amount of work, there were around 280 Tangata Kaitiaki and Tangata Tiaki in New Zealand in 2006 and more are expected to be appointed in the near future (Ministry of Fisheries 2006b).

The Tangata Kaitiaki and Tangata Tiaki have substantial control over the use of the aquatic resources within their area. He or she can issue permits to allow the harvest of aquatic life for customary gatherings and can also put in place additional bylaws to

¹⁵ This permission must state: who can take the fish; how many fish of which species can be taken; the area the named parties are authorised to fish in; dates and times fishing can occur; and the purpose for, and place of, catching the fish.

¹⁶ The Tangata Kaitiaki and Tangata Tiaki must be appointed by the Ministry, but these appointments are made based on the recommendations of local tangata whenua.

influence the use of the resource.¹⁷ The authority of the Tangata Kaitiaki and Tangata Tiaki extends only within the area of their hapu or iwi.

Tangata Kaitiaki and Tangata Tiaki are accountable to both their hapu or iwi and the Ministry. Tangata Kaitiaki and Tangata Tiaki are appointed by their hapu or iwi to represent the group. Consequently, they are required to meet with their hapu or iwi annually to inform the group of the customary fishing occurring within their area, restrictions that are in place and any other relevant information. They must also report to the Ministry of Fisheries every three months to provide information regarding the customary fishing that they are authorising. For this reporting to occur, extensive record keeping must be undertaken by the Tangata Kaitiaki and Tangata Tiaki. The information that they gather assists in assessing the sustainability of fish stocks. If Tangata Kaitiaki or Tangata Tiaki do not follow the wishes of their hapu or iwi, or their actions affect the sustainability of the resources that they are responsible for managing, then the Minister of Fisheries can instruct the Tangata Kaitiaki and Tangata Tiaki to comply or remove them from their role (Ministry of Fisheries 2004a).

4.8.3.1 Mātaitai Reserves

In addition to permitting customary fishing in an area, a Tangata Kaitiaki or Tangata Tiaki may also apply to the Minister to have a mātaitai reserve established within their area under the customary regulations.¹⁸ Mātaitai are reserves set up in traditional food gathering areas, thus enabling Maori to control fishing resources in these culturally significant areas.

Applications for mātaitai reserves must be approved by the Minister if they meet all the legislative conditions outlined in the regulations. For instance, management aims which are consistent with the sustainable management of the resource must be created, a special relationship between tangata whenua and the area must be demonstrated and it must be shown that the proposed mātaitai will not affect the ability of quota holders to catch their ACE (Lawson *et al.* 2006).

The placement of a mātaitai reserve can affect commercial fishing in the area, as commercial fishing is prohibited in these areas (recreational fishing is not affected). But the Tangata Kaitiaki or Tangata Tiaki can apply to the Minister to reinstate commercial fishing or alter the restrictions on recreational fishing as they see fit.

The regulations governing the creation of mātaitai have replaced Regulation 27 over most of the country and will eventually replace it entirely. To date, only six mātaitai reserves have been created and cover just 136.8 km². However, there are eleven

¹⁷ These bylaws apply equally to Maori and non-Maori. However, there is one exemption to this. When a reserve is closed for general harvesting, the kaitiaki may still approve the collection of seafood to meet the needs of the local Marae (Seaweek 2006).

¹⁸ Separate legislation was passed to enable the establishment of mātaitai reserves in the North and South Islands; Fisheries (Kaimoana Customary Fishing) Regulations 1998 for the North and Chatham Islands and Fisheries (South Island Customary Fishing) Regulations 1999 for the South Island. But given the highly similar nature of these two pieces of legislation (Option4 2006b), they are jointly referred to as the customary regulations. These pieces of legislation were drafted with extensive consultation with Maori and for those areas which are not yet covered by either regulation, consultation and debate continue (Bess 2001).

proposals currently being processed and, if all of these are successful, will cover an additional 880 km² (Bess and Rallapudi 2006).

4.8.3.2 Rahui

Traditionally, Maori have applied rahui (temporary bans on fishing activity) to areas in order to ensure that a resource is not exploited and the 1996 Fisheries Act provides provision for rahui to be put in place for two years.¹⁹ Within these areas fishing is prohibited so that local fish stocks can recover from fishing pressure.

Rahui may be requested by tangata whenua through their Tangata Kaitiaki or Tangata Tiaki (Seaweed 2006). On application, these closures can be extended for an additional two years, such as occurred in Pukerua Bay in 2004 (Ministry of Fisheries 2006c). For more permanent closures, either taiapure or mātaimai are required (See Sections 4.5.1.3 and 4.8.3.1 for more details on taiapure and mātaimai respectively). Despite this limited time frame, many iwi have opted for rāhui, as mātaimai do not allow for complete fish population recovery.

¹⁹ Sections 186A and 186B of the Fisheries Act 1996 provide the provision for the creation of rāhui for the North and South Islands respectively.