



Customary Regulations for the Southern Titi/Muttonbird Islands

Regulatory Impact Statement

ISBN No: 978-0-908334-87-2 (online)

July 2015

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1 Regulatory Impact Statement

Customary Regulations for the Southern Tītī/Muttonbird Islands.

AGENCY DISCLOSURE STATEMENT

This Regulatory Impact Statement has been prepared by the Ministry for Primary Industries (MPI).

It analyses proposed customary fishing regulations for the Titi/Muttonbird Islands, off Stewart Island.¹ The regulations would provide for customary, non-commercial food gathering by the birding community, and recognise the special relationship between the islands' birding community (as tangata whenua) and areas which are of importance for customary food gathering.

To achieve this, Te Rūnanga o Ngāi Tahu (on behalf of the birding community) proposes commercial fishing to be restricted in 31 areas around the islands. Twenty-five of these areas would be closed to the commercial harvest of kina and paua, five areas would be closed to the commercial harvest of kina, alone, and one area to the commercial harvest of kina, paua and rock lobster. The proposal relates to relatively small spatial areas (totalling around 1.9 square kilometres). MPI prefers this option over the status quo.

The analysis relies on information held by MPI and/or supplied by tangata whenua and the fishing industry.

Kina, paua and rock lobster catch is reported by statistical area. Due to the coarse scale of the statistical areas, MPI cannot use this information to directly estimate take at the finer scale of the 31 areas for which closures are proposed. Instead, the analysis assumes that reef area is a useful indicator of the proportion of total catch from a statistical area that is taken from the 31 areas. However, MPI's catch estimates do not account for variations in productivity and catch per unit effort across reef area. Actual catch from the 31 areas may be higher or lower than estimated. This leads to similar uncertainty for the resulting estimates of the economic impacts of the proposed regulations.

Under s 5 of the Fisheries Act 1996 (the Fisheries Act), decision makers must act in a manner consistent with the provisions of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the Settlement Act). The Settlement Act aims, inter alia, to make better provision for Maori non-commercial traditional and customary fishing rights and interests. These requirements must be considered in the analysis.

Scott Gallacher
Deputy Director-General
Regulation and Assurance

18 March 2015

¹ For a map showing the general locations of the closed areas, see Figure 1 at the end of this Regulatory Impact Statement.

2 Executive summary

On behalf of the Titi/Muttonbird Island birding community, Te Rūnanga o Ngāi Tahu (Ngāi Tahu) has requested 31 areas around the Islands be closed to commercial fishing: 25 areas to the commercial harvest of kina and paua; 5 areas to the commercial harvest of kina, only; and one area to the commercial harvest of kina, paua and rock lobster. The closures would recognise and provide for customary food gathering and the special relationship between the birding community and the areas which have been identified of customary food gathering importance.

Tītī (muttonbird) harvesting on the islands is recognised nationally and internationally as being of special importance to tangata whenua. The Titi/Muttonbird Islands birding community traditionally gathers kaimoana, particularly shellfish (kina, paua and rock lobster) to help sustain them while on the islands for the tītī harvest.² The closures aim to allow that tradition to continue.

MPI considers that regulations under s 186(1) of the Fisheries Act are necessary as commercial fishing has placed pressure on shellfish resources in the 31 areas and voluntary measures and existing tools (see Table 1) have not adequately provided for customary needs. The proposed regulations better provide for customary, non-commercial fishing and so better meet the Crown's obligations under s 10 of the Settlement Act than the status quo.

Based on indirect estimates of catch, MPI estimates the maximum total economic impact³ of the closures on commercial kina and paua fishing to be approximately \$310,000 and \$50,000, respectively (including losses in quota value, and direct, indirect and induced⁴ income). However, the economic impact model used assumes that there will be a permanent loss of catch as a result of the proposed closures. MPI considers that any displaced catch can likely be taken elsewhere and that losses of those magnitudes are unlikely.

Commercial fishing industry submitters object to the use of s 186(1) to make the regulations, though they raise no concerns about the impact on the sustainability of the SUR 5, PAU 5B or CRA 8 fisheries.

MPI considers making regulations under s 186(1) is the most appropriate and effective way to recognise and provide for customary food gathering by the birding community and the special relationship between the birding community and these areas which are of customary food gathering importance.

3 Status quo and problem definition

Tītī (muttonbird) harvesting on the Titi/Muttonbird Islands is recognised nationally and internationally as being of special importance to tangata whenua. The relationship of the islands' birding community is also recognised in domestic legislation. The birding community traditionally gathers kaimoana, particularly shellfish (kina, paua and rock lobster) to help sustain them while on the islands for the tītī harvest.

² Generally, the birding community is on the islands from 15 March until around 20 May each year. The tītī harvest starts from 1 April.

³ The calculations of economic impact include losses in annual value (around \$35,000) and capitalised future value (around \$275,000).

⁴ Induced income refers to losses to the broader economy through flow-on effects.

Ngāi Tahu wishes to ensure the birding community can continue this tradition of gathering kaimoana and also seeks recognition of the special relationship between the birding community and the 31 areas which it has identified as of importance for customary food gathering. The 31 areas are all adjacent to safe landing areas and total approximately 1.9 square kilometres.

The birding community is tangata whenua of the islands. Due to the remote location of the islands and other restrictions to land access,⁵ the only take of shellfish is by the birding community and commercial fishers. The tītī harvest runs from mid-March to mid-May. The islands are unoccupied at other times.

Under the status quo, the ability of the Titi/Muttonbird Island birding community to manage and have access to traditional fishing resources is impeded by commercial fishing in the areas. They see this as an unnecessary barrier to their expression of tikanga (customary protocols). The status quo does not provide recognition of the special relationship between the birding community and the areas.

Ngāi Tahu worked with the commercial fishing industry over several years to try to resolve concerns around access to shellfish for the birding community. This included an attempt at voluntary closures of areas which met with varying degrees of compliance. MPI is unable to enforce voluntary closures.

On behalf of the Titi/Muttonbird Islands birding community (as tangata whenua), Ngāi Tahu has requested regulations be made under s 186 for 31 areas around the Titi/Muttonbird Islands. Ngāi Tahu consulted with the commercial fishing industry to identify areas and options for regulatory closures that would minimise the impact on commercial fishing.

Section 10 of the Settlement Act declares that:

“... claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983 ... shall, in accordance to the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations ...” (s 10(a)).

Section 10 obliges the Minister for Primary Industries, in pursuance of those Treaty obligations, to:

“... recommend to the Governor-General ... the making of regulations ... to recognise and provide for [non-commercial],⁶ customary food gathering ... and the special relationship between tangata whenua and places which are of customary food gathering importance ...” (s 10(c)).

Section 186(1) of the Fisheries Act provides that the Governor-General may make such regulations, “from time to time”.

⁵ Only Rakiura Māori with a beneficial interest in any of the islands or their family members (with authorisation) may enter onto the islands without a permit or harvest tītī from the islands (reg 3 of the Titi (Muttonbird) Islands Regulations 1978). Rakiura Māori are members of the Ngai Tahu tribe or Ngati Mamoe tribe who are also descendants of the original Maori owners of Rakiura/Stewart Island (s 333 of the Ngai Tahu Claims Settlement Act 1998).

⁶ Food gathering that is neither commercial in any way nor for pecuniary gain or trade.

4 Objectives

Government objectives which relate to this policy initiative include:

- to recognise and provide for:
 - non-commercial⁶ customary food gathering (Objective 1a); and
 - the special relationship between tangata whenua and those places which are of customary food gathering importance (Objective 1b).
- the provisions of the Settlement Act (Objective 2)

Section 5(b) of the Fisheries Act requires persons exercising powers conferred under that Act to act in a manner consistent with the provisions of the Settlement Act. The provisions of the Settlement Act (particularly s 10) reflect the Crown's recognition "that traditional fisheries are of importance to Maori and that the Crown's Treaty duty is to develop policies to help recognise use and management practices and provide protection for and scope for exercise of rangatiratanga in respect of traditional fisheries."⁷ That recognition is also reflected in the provisions of s 186 of the Fisheries Act.

There are a range of tools available to meet the Crown's obligations under the Settlement Act and the Treaty of Waitangi. MPI has developed internal policy guidelines to help assess whether customary regulations under s 186 of the Fisheries Act are the appropriate tool. Consistency with the MPI guidelines is a further objective (Objective 3). The matters MPI considers relevant to this assessment include:

- whether customary interests can be provided through existing tools;
- whether the proposed new regulations meet the conditions of s 186;
- whether the proposed regulations are consistent with fisheries legislation and other legal obligations;
- the rights and interests of other groups; and
- resourcing and implementation issues.

5 Options and impact analysis

Two options are considered:

- Option 1 – status quo (no action): Commercial fishers are able to continue to harvest paua, kina and rock lobster from the 31 areas proposed for closure.
- Option 2: Regulations are made closing the 31 areas: 25 areas to the commercial harvest of kina and paua; 5 areas to the commercial harvest of kina, only; and 1 area to the commercial harvest of kina, paua and rock lobster.

Voluntary measures could be used to implement the proposed closures. However, as noted, a previous attempt met with varying degrees of compliance from commercial fishers, resulting in Ngāi Tahu's request for regulatory closures.

The assessment of options is set out in Table 1, below.

⁷ See paragraph (k) of the Settlement Act.

Table 1: Assessment of options

Key: ✓ = option meets the objective; ✗ = option does not meet the objective; ? = uncertain if the option meets the objective; N/A = assessment against the option is not applicable to the option

	Option 1: Status quo	Option 2: Closing the areas by regulation
Objective 1a: Recognise and provide for customary food gathering by the birding community	<p style="text-align: center;">?</p> <p>The birding community are reliant on voluntary measures to manage and ensure access to their traditional fishing resources. These measures have met with varying degrees of compliance.</p> <p>Kina and paua in particular are relatively sessile (immobile) and susceptible to localised depletion. Commercial fishing for kina, paua and rock lobster in the areas would reduce numbers and might make access to these resources more difficult to the birding community. The birding community might have to go to other, less accessible areas, away from safe landing sites.</p>	<p style="text-align: center;">✓</p> <p>Creating new customary fishing regulations would provide the birding community with the ability to more fully express their tikanga (customary protocols) and mātauranga Maori (traditional knowledge) in relation to the harvest of tītī, which includes the gathering of shellfish for sustenance. Safe access to shellfish would improve and be better assured compared to the status quo.</p>
Objective 1b: Recognise and provide for the special relationship between the birding community and places identified as being of customary food gathering importance	<p style="text-align: center;">✗</p> <p>Tītī harvesting and the relationship between Ngāi Tahu and the islands are recognised through legislation.⁸ Though closely associated to the tītī harvest, the relationship of the birding community with the 31 areas identified as being of importance for gathering kaimoana during the tītī harvest is not currently recognised and provided for.</p>	<p style="text-align: center;">✓</p> <p>Creating the proposed regulations would provide recognition of the relationship of the birding community with the areas.</p>
Objective 2: Consistent with the provisions of the Settlement Act	<p style="text-align: center;">?</p> <p>It is unclear whether the status quo is consistent with the provisions of the Settlement Act. Ngāi Tahu had previously explored voluntary closures as an option. If compliance could be improved, voluntary closures could be sufficient to meet the Crown's Treaty obligations. But, the effectiveness of voluntary measures could be a recurring concern.</p>	<p style="text-align: center;">✓</p> <p>Voluntary measures and existing tools have not adequately provided for customary needs. Option 2 better provides for customary, non-commercial fishing interests than the status quo and is consistent with the Crown's obligation under s 10 of the Settlement Act</p>

⁸ See the Ngāi Tahu Claims Settlement Act 1998 and the Titi (Muttonbird) Islands Regulations 1978, in particular.

	Option 1: Status quo	Option 2: Closing the areas by regulation
Objective 3: Consistent with MPI guidelines	N/A	<p style="text-align: center;">✓</p> <p><i>Existing regulations:</i> MPI considers existing tools (taiāpure-local fisheries,⁹ mātaimai reserves,¹⁰ temporary closures, appointment of tangata tiaki/kaitiaki, and existing regulations) are not appropriate:</p> <ul style="list-style-type: none"> • MPI considers mātaimai reserves and taiāpure-local fisheries would not be appropriate for so many isolated, small scale areas, particularly as management would be resource intensive for the birding community. • Mātaimai reserves would impact a wider range of commercial fisheries than the proposed closures. • The main management mechanism for a taiāpure-local fishery is to recommend the making of regulations (including under s 186). • Temporary closures would not enhance access to customary fisheries in the longer term. • Tangata tiaki/kaitiaki are not able to manage commercial fishing. • Existing regulations do not adequately provide for customary interests in the 31 areas. <p><i>Conditions of s 186:</i> The birding community has a special relationship with the Titi/Muttonbird Islands. This has been acknowledged by the Crown. The gathering of paua, kina and rock lobster by the birding community is for sustenance and not for pecuniary gain or trade.</p> <p><i>Legal obligations:</i> MPI considers the proposed regulations are consistent with fisheries legislation. MPI is not aware of any inconsistency with any other legal obligation, including the Bill of Rights Act 1990.</p> <p><i>Rights and interests of other groups:</i> Ngāi Tahu worked with commercial</p>

⁹ Taiāpure-local fisheries aim to provide for recognition of rangatiratanga and the fisheries rights secured under Article Two of the Treaty of Waitangi, over an area of estuarine or coastal waters that have customarily been of special significance to any iwi or hapu either as a source of food or for spiritual or cultural reasons (s 174 of the Fisheries Act).

¹⁰ Mātaimai reserves provide for tangata whenua to manage all non-commercial fishing in some of their traditional fishing grounds. Tangata tiaki/kaitiaki may be appointed by tangata whenua to make by-laws for a mātaimai reserve.

Option 1: Status quo	Option 2: Closing the areas by regulation
Objective 3:cont'd	<p>fishers to try to minimise the impact of the proposed closures on commercial fishing. Only PauaMAC 5 (in 2010) commented on the impact of the closures on commercial fishing, and Ngāi Tahu amended its proposals in response to PauaMAC5's concerns.</p> <p>Based on indirect estimates of catch, MPI estimates the maximum total economic impact¹¹ of the closures on commercial kina and paua fishing to be approximately \$310,000 and \$50,000, respectively (including losses in quota value, and direct, indirect and induced income). However, the economic impact model used assumes that there will be a permanent loss of catch as a result of the proposed closures.</p> <p>MPI considers that it is likely that any displaced catch can be taken elsewhere and that losses of those magnitudes are unlikely. This is supported by a submission from industry bodies in 2014 which noted, "any displacement of commercial fishing effort from the proposed closures ... is unlikely to increase any sustainability risks for the relevant paua, kina or rock lobster stocks."¹²</p> <p>No economic costs are expected on commercial rock lobster fishing as MPI estimates there is no rock lobster take from the one area proposed for closure to commercial rock lobster fishing. Recreational fishing would not be impacted by the proposed closures.</p> <p><i>Resourcing and implementation:</i> MPI considers that there will be no new significant resourcing or implementation issues as a result of the proposed regulations (see Implementation Plan below for further).</p>

¹¹ The economic impact calculations include losses in annual value (around \$35,000) and capitalised future value (around \$275,000).

¹² In a joint submission from: Paua Industry Council, PauaMAC 5 Incorporated, NZ Rock Lobster Industry Council and the Kina Industry Council.

6 Consultation

The Ministry of Fisheries (MFish)¹³ undertook consultation on the proposed regulations in May 2010. That consultation was notified in local newspapers and sent to interested parties. MFish's initial position paper was also posted in full on its website, along with background information on tītī harvesting.¹⁴

MFish received eight submissions: five from the commercial fishing sector; two from the customary sector; and one from the recreational fishing sector. Following the consultation period (and in response to one of the submissions), Ngāi Tahu amended its proposal to reduce the impact on commercial paua harvesters, adjusting the boundaries of three areas and reducing the number of areas to be closed to commercial paua harvesting.

Between 2010 and 2014, Ngāi Tahu and commercial fishing representatives undertook negotiations to try to resolve points of disagreement, primarily in regard to the mechanism to be used for any closures. Ultimately, this was unsuccessful and Ngāi Tahu asked MPI to proceed with the proposed regulations as amended in 2010.

In October 2014, MPI undertook further targeted consultation with the eight submitters from 2010. This resulted in three further submissions, two from the commercial fishing sector and one from a customary stakeholder.

Other than concerns raised in 2010 that resulted in the amendments noted above, commercial stakeholders raised no concerns about the impact of the closures on commercial fishing. However, in submissions in both 2010 and 2014, commercial fishing sector submitters opposed the proposed regulations, arguing that they cannot be made under s 186 of the Fisheries Act. They say that closing areas to commercial fishing is beyond the intended scope of s 186 of the Fisheries Act.

The sole submission from a customary stakeholder in 2014 proposed an additional area and closing a larger number of the 31 areas to commercial harvest of rock lobster and paua. But, Ngāi Tahu requested that MPI continue with the advice on the existing proposals, without further amendment. The remaining submitters supported the management proposals.

7 Conclusions and recommendations

MPI considers that the proposed regulations better provide for customary, non-commercial fishing than the status quo. Commercial fishing industry submitters object to the use of s 186(1) to make the regulations, though they raise no concerns about the impact on the sustainability of the SUR 5, PAU 5B or CRA 8 fisheries.

MPI considers regulations under s 186(1) is the most appropriate and effective way to recognise and provide for customary food gathering by the birding community and the special relationship between the birding community and the 31 areas which are of customary food gathering importance.

¹³ MFish is now part of MPI.

¹⁴ Document titled *Overview of Rakiura Titi Harvesting* and provided by Ngāi Tahu. MPI can provide a copy upon request.

8 Implementation plan

If approved, MPI expects the new regulations implementing the closures to take effect in mid-2015 via amendments to the Fisheries (Southland and Sub-Antarctic Areas Commercial Fishing) Regulations 1986. Notification of the new regulations would occur through publication in the *Gazette*, a Minister's decision letter to tangata whenua, commercial and other stakeholders, and inclusion on the MPI website.

The relative isolation of the areas proposed for closure and the species-specific closures create risks to compliance and monitoring. Fishers may be fishing for other species in the closed areas or fishing in adjacent areas for those species subject to the closures.

During the tītī season, when the islands are occupied, the birding community could observe any breaches and notify MPI. Reliance would also be placed on information from commercial fishing stakeholders and the public. Monitoring compliance would be on a priority basis for resources and the focus would be more on ensuring awareness of the restrictions.

9 Monitoring, evaluation and review

MPI will monitor and evaluate the regulations based on information from Ngāi Tahu and commercial fishing stakeholders. Relevant factors will include reports of non-compliance and information about rock lobster, kina and paua abundance in the relevant areas.

Should information raise concerns about the effectiveness of the regulations, MPI will engage with Ngāi Tahu and commercial fishing stakeholders to determine if there is a need to review the regulations at that time.

Figure 1: Map of Stewart Island indicating the general locations of the proposed closures

