

# **Preserving fisheries quota for Maori**

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## **Report to the Treaty of Waitangi Fisheries Commission**

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## Preface

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- by exposure of the team's work to the critical review of a broader range of Institute staff members at internal seminars;
- by providing for peer review at various stages through a project by a senior staff member otherwise disinterested in the project;
- and sometimes by engaging external peer reviewers at the request of a client.

## Authorship

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# 1. INTRODUCTION

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This report considers the pros and cons of the Treaty of Waitangi Fisheries Quota (Preservation as Taonga) Bill (the Bill) that is being promoted by Dover Samuels. The purpose of the Bill, as set out in its explanatory note, is to ensure that quota allocated to Maori as part of the settlement of Treaty of Waitangi fisheries claims is reserved to Maori in perpetuity.

The Treaty of Waitangi Fisheries Commission, or Te Ohu Kai Moana, holds in trust for Maori assets, resulting from settlements struck in 1989 and 1992, comprising of quota, shares and cash.

Twelve years ago the Maori Fisheries Act began a process of returning the fisheries assets for the benefit of Maori. They still continue to be held by Te Ohu Kai Moana.

This has not been due to any lack of hard work or endeavour. Three years ago, after much debate and consultation, an unprecedented majority of iwi reached agreement on a proposed “optimum” method of allocating the 1989 pre-settlement assets, known as PRESA. Putting that model into effect, however, has been prevented by litigation as different interests have sought leverage through the courts for their own positions on the allocation.

More recently there has been a move to promote the concurrent allocation of the PRESA assets and the benefits of POSA. POSA refers to assets accumulated post the 1992 settlement. The allocation options are canvassed in a public discussion document released late last year by Te Ohu Kai Moana (2001a and 2001b). One of the outcomes of the POSA consultations will be a new Maori Fisheries Act.

The same document raises the issue of the ongoing protection of the assets and their continued ownership by Maori once allocation has occurred. It sets out three options, namely to:

- fully prevent the sale of settlement quota returned to Maori;
- prevent the sale of settlement quota returned to Maori to anyone other than other Maori; and
- give a post allocation commission first right to purchase quota.

The first option reflects the purpose and effect of the present form of the Bill being advanced by Dover Samuels. The second option reflects current thinking regarding how the Bill may evolve. These two options form the focus of this report. While the existence of the third option is noted, evaluation of its pros and cons is beyond the scope of this report. The assumed counterfactual against which the first two options are evaluated is the hypothetical world where there are no constraints imposed on Maori regarding the trade of quota allocated to them, beyond that which already exists in the quota market.

This report is organised as follows:

- In the next section we cover background information on Maori’s involvement in New Zealand’s fisheries, Maori’s long struggle for fisheries assets, Te Ohu Kai Moana, PRESA and POSA, and moves to preserve quota for Maori.
- In section 3 we consider the arguments for preserving quota for taonga.
- In section 4 we consider the disadvantages of preservation.
- In the final section, section 5, we raise some practical considerations.

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## 2. BACKGROUND

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The purpose of this section is to cover information that is relevant as a backdrop to the discussion and analysis of subsequent sections in this report. Below we touch on:

- Maori's involvement in New Zealand's fisheries;
- Maori's long struggle for fisheries assets that are rightfully intended to be allocated to them;
- Te Ohu Kai Moana;
- PRESA and POSA; and
- moves to preserve quota for Maori.

### 2.1 Maori involvement in the fishing industry

Traditionally Maori are a maritime people. Their tupuna knew where all the best kaimoana spots were, and when and how to harvest. They knew how to read the water for the purposes of fishing. This was one of the products, along with others such as flax and kumera, that early Maori traded both nationally and internationally. In these early years, for example, Maori supplied the growing city of Auckland with much of its fisheries products.

However, Maori became increasingly alienated from their fisheries. During the hearing of the Muriwhenua claim evidence was presented showing that government policies aimed at removing part timers from the fishing industry had forced out almost all remaining Maori fishers in the north. By the time of the introduction of the quota management system in 1986, in-depth knowledge of the business and activity of fishing across Maoridom was almost non-existent (Ellison 2001).

The failure to recognise Maori rights to the fisheries furthered the exclusion of Maori. There were few Maori fishers and even fewer identifiable Maori fisheries businesses.

Few would have anticipated the rapid progress made by Maori since 1986 re-establishing themselves as a force in the industry.

Maori's presence in the modern commercial fishing industry has been growing since 1990. The interim settlement in 1989, the 1992 Deed of Settlement, and other developments have caused their presence in the industry to rise so much so that today iwi control between 55% to 60% of the total assets of the industry. Maori are now the largest player in the New Zealand fishing industry.

However, continued annual lease distributions to iwi and no final decisions yet regarding when and how to allocate settlement assets has created a dismal environment whereby few iwi have chosen to make direct use of their entitlements. Most Maori fisheries businesses confine their activities to the subleasing the quota (Kingett Mitchell 2001).

### 2.2 Maori's entitlement to the benefits fisheries assets

Maori have long struggled to gain formal recognition of their rights to New Zealand's fisheries. The struggle gained momentum with the introduction of individual transferable quota. The quota management system (QMS) took no account of Maori fishing rights under the Treaty of Waitangi. Maori took legal action. The first claim to be heard was the Muriwhenua claim by iwi in the Far North, which commenced in

1986. Ngai Tahu was shortly to follow. Both parties gave evidence on pre-existing and unextinguished collective tribal fishing rights.

In 1987 four Maori parties (Ngai Tahu, Muriwhenua, Tainui and the New Zealand Maori Council) sought and won on behalf of iwi a High Court injunction preventing the Crown from allocating quota under the QMS. Extended negotiations between the Maori parties and the Crown led to the passing of the Maori Fisheries Act in 1989. The Act reflected the interim settlement reached whereby 10% of all quota species then in the QMS was to be allocated to Maori along with a payment of \$10 million.

The Act also led to the establishment of the Maori Fisheries Commission (MFC) as the body through which the Crown could deliver quota to Maori. The intention was that the MFC hold and manage the quota on behalf of Maori, while at the same time developing an allocation scheme for its permanent hand-over. Over a period of just two years, the MFC acquired 11% of quota species. This included the acquisition of Moana Pacific Limited (MPL) together with its quota.

The next chapter in Maori's struggle was ushered in in 1992 when, after months of complex negotiations, an historic Deed of Settlement was signed and enshrined in the Treaty of Waitangi (Fisheries Claim) Act of the same year. The Crown agreed to fund Maori into a 50/50 joint venture with Brierley Investments Ltd to bid for Sealord Products Ltd. At the time, Sealord was New Zealand's biggest fishing company. The Deed also promised Maori 20% of quota for all species not yet in the QMS. In return, Maori agreed that their current and future claims to the commercial fisheries were satisfied and discharged.

The Act renamed the MFC as the Treaty of Waitangi Fisheries Commission. The Maori name selected for itself by the Commission was Te Ohu Kai Moana. The Act opened the way for allocation procedures for Maori fisheries assets to be developed. It made clear that there were to be two separate processes. The first is for the distribution of assets already held by Te Ohu Kai Moana, that is, – the existing quota, shares and cash - PRESA. The second is for the distribution of the benefits from new assets acquired under or subsequent to the Deed of Settlement - POSA.

Three years ago, after much debate and consultation, an unprecedented majority of iwi reached agreement on a proposed "optimum" method for the allocation of PRESA. While the model was not considered ideal by all, it was regarded by many as the fairest compromise that balanced competing interests. However, despite the level of support, litigation continued to bedevil implementation of the model.

Te Ohu Kai Moana is now taking a new approach towards resolving issues over the allocation of settlement assets. In a discussion document released late last year options are put forward not only for the allocation of PRESA assets, but also for the distribution of the benefits of POSA. Te Ohu Kai Moana's view is that, given the amount of time it is taking to resolve issues over PRESA, it is sensible to deal with both sets of assets simultaneously. Submissions on the discussion document were due last month, in March. The government has signalled that it desires that a resolution be reached before the next general election.

## 2.3 Te Ohu Kai Moana

According to Te Ohu Kai Moana's latest strategic plan (Te Ohu Kai Moana 2000a), it exists to:

- facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing;
- secure the growth, development, allocation and transfer to iwi of assets in recognition of the rights confirmed and guaranteed by the Treaty of Waitangi;
- ensure fisheries are managed in a manner consistent with the rights guaranteed and confirmed by the Treaty of Waitangi; and
- secure proper recognition of Maori customary fishing rights and to promote these rights with hapu/iwi.

(Te Ohu Kai Moana 2000a)

This mix of objectives sets Te Ohu Kai Moana apart from others in the business of fishing, whose primary objective is to maximise the return from fishing the quota owned by or leased to them.

Te Ohu Kai Moana's first objective reflects statutory obligations. The statute further requires that Te Ohu Kai Moana grant assistance to enable the entry to and development of Maori fisheries businesses.

The second objective reflects two statutory obligations: to develop a scheme for the distribution of the benefits of POSA to Maori; and to consider how best to give effect to the 1992 Hui-a-Tau resolutions relating to the allocation of PRESA. This is to be done in consultation with Maori.

Te Ohu Kai Moana and its subsidiary businesses are structured around PRESA and POSA. Te Ohu Kai Moana's balance sheet at 30 September 2000 (Te Ohu Kai Moana 2000b) shows equity of \$420 million, although that includes quota valued conservatively at \$346 million when the annual report says it was, in fact, worth \$668 million at 1999/00 market values.

## 2.4 PRESA and POSA

PRESA are the assets intended to be allocated to Maori under the 1989 interim settlement. As a result of the settlement, commercial development and investment by Te Ohu Kai Moana, PRESA now includes:

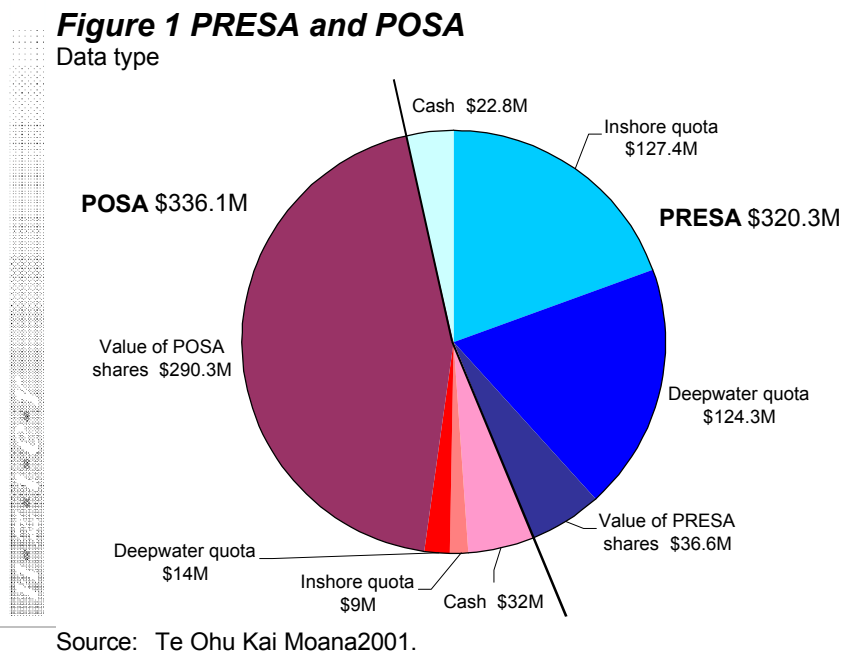
- **Quota:** 60,200 tonnes of inshore and deepwater quota, worth \$252.7 million.
- **Shares:** An 18.6% share in Te Kupenga Ltd, which owns 32% of Moana Pacific Ltd (MPL), and all shares in Te Ohu Kai Moana Ltd, which owns 68% of MPL. The estimated combined value of the shares is \$36.6 million.
- **Cash:** \$32 million in cash.

The combined value of PRESA is estimated at \$320.3 million.

POSA are the assets intended to be allocated to iwi under the 1992 settlement. POSA also comprises of quota, share as and cash, although in different proportions than PRESA. POSA includes:

- **Quota:** 20% of all new inshore and deepwater species brought into the quota management system, valued at \$15 million.
- **Shares:** Half the shares in the Sealord Group, and shares in the companies that have subsequently been acquired/set up to manage and market the quota. The combined value of the POSA shareholdings is estimated at \$290.3 million.
- **Cash:** \$22 million in cash.

The combined value of POSA is estimated at \$336.1 million.



## 2.5 Preserving fisheries quota for Maori

The allocation of PRESA and the benefits of POSA will be full and final settlement of the Treaty of Waitangi commercial fisheries claims. Because of this, some have argued that quota allocated to Maori should be reserved to Maori in perpetuity. Indeed this is the purpose set out in the explanatory note of the Bill being promoted by Dover Samuels. Te Ohu Kai Moana has similarly recognised this end as important and has commenced a consultation process to canvass stakeholders opinions on, amongst other things, options to:

- fully prevent the sale of settlement quota returned to Maori;
- prevent the sale of settlement quota returned to Maori to anyone other than other Maori; and
- give a post allocation commission first right to purchase quota.

This report analyses the first two options against the counterfactual of no restrictions being placed on the trade of settlement assets, other than those which already exist.

### **2.5.1 Fully prevent transfers**

Under this option any quota returned to Maori would be subject to a condition that prevents the quota from ending up in the hands of any party other than Maori who received the initial allocation.

This would be the effect of the Bill as currently drafted. The Bill inserts two new provisions (sections 11A and 11B) in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The provisions prevent the sale, transfer, exchange or disposal of quota managed by Te Ohu Kai Moana by virtue of the Fisheries Act 1983, the Maori Fisheries Act 1989, and the Fisheries Act 1996.

The Bill does not prevent the granting of leasehold interests, Annual Catch Entitlements (ACE) or other rights in the quota whatsoever to any other party, regardless of whether they are Maori or not.

The provisions are to be given effect by providing for quota allocated to be identified as a different class of quota in the quota registries, and by prohibiting any change to the registers with respect of the quota without the written approval of Te Ohu Kai Moana.

The detail of the Bill is set out in the Appendix.

The Bill is being promoted as a private members bill. That means that it has to be placed in a ballot system. Whether the Bill starts its legislative process today or in two or more years time is entirely dependent upon fate. That is, whether it is the bill that is picked when the Clerk of the House's hand emerges from the ballot box.

### **2.5.2 Allow transfers with other Maori only**

This is the second of the three options being canvassed by Te Ohu Kai Moana. It has been suggested that future drafts of the Bill may tend more in the direction of this option, rather than the more restrictive first option.

The intent is to allow for some sales, transfers or exchanges, but to restrict those transactions to Maori. The sale, transfer or exchange of quota with non-Maori interests is prohibited. Transactions with non-Maori involving leasehold, ACE or other interests in quota will be allowed. These restrictions would apply to PRESA and POSA quota that has been or will be transferred to Te Ohu Kai Moana from the Crown.

While not stated, it is reasonable to assume that settlement quota will be differentiated from other quota in the quota registries to ensure the effective enforcement of the restrictions.

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## 3. PROS

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The benefits of preserving quota for Maori in perpetuity are that it:

- safeguards settlement decisions;
- is consistent with the Maori custom of handing down treasures from one generation to the next; and
- minimises the risk that quota would be lost simply because iwi are not ready.

### 3.1 Safeguarding settlement decisions

Together PRESA and POSA represent full and final settlement for Maori commercial fisheries. Ensuring the assets are allocated appropriately raises the ongoing protection of these assets and their ownership by Maori as an issue. If the quota was sold by Maori to non-Maori interests, after distribution by Te Ohu Kai Moana, then Maori could no longer benefit from the assets beyond the price they receive for them. That is, if the settlement is for the benefit of all Maori then the argument is that the assets should remain in Maori hands. If the assets are lost to Maori then so too is their right to fish commercially.

Furthermore, the text in the explanatory note to the Dover Samuels Bill suggests that new competing Treaty of Waitangi claims could be created if a prohibition on sale was not in place and there was a loss of quota allocated to Maori. If the past litigious history that Te Ohu Kai Moana, Maori and others have endured is suggestive of the future, then the risk and cost of litigation is high. The Privy Council has only this year settled an ongoing dispute and determined that the PRESA assets are best allocated for the benefit of Maori. However, rather than signalling the end of litigation, this decision has opened the way for other litigation that has been waiting in the wings for this decision to now come forward. Disputes that may arise and complicate matters include attempts to redefine coastal boundaries, mandate challenges, allocation policies, constitutional matters, and a variety of other issues.

Preventing the sale of settlement quota allocated to Maori, as is proposed under the Bill, is likely to be an effective safeguard as it preserves the outcome of the initial allocation. Another solution would be to prevent the sale of the settlement quota to anyone other than Maori.

### 3.2 Taonga tuku iho

Preserving quota within Maori ownership is consistent with tikanga Maori concerning taonga tuku iho. That is, it is Maori custom to hand down their treasures from one generation to the next. If the quota is alienated as a result of sales to non-Maori interests then the assets and, arguably more importantly, the right to fish commercially would no longer be available to future generations.

Parallels can be drawn here with Maori land. Maori land is inalienable under the Te Ture Whenua Maori Act 1993. By preventing the sale of this land it continues in Maori ownership in perpetuity for the use and benefit of future generations.

However, just as a parallel can be drawn against this positive outcome, parallels can also be drawn against the well known downsides of this situation, such as the reluctance of financial institutions to regard the land as security. This and other downsides are considered in the next section.

### 3.3 Maori readiness

A chicken and egg situation exists in Maori fisheries. One of Te Ohu Kai Moana's strategic objectives is to facilitate entry of Maori into, and the development by Maori of, the business and activity of fishing. This objective reflects statutory obligations. However, Maori have been reluctant to make the investments to upgrade their fisheries capacities and capabilities. A major reason for this is the high degree of uncertainty surrounding the timing and ultimate nature of allocation. In the surveys of iwi fisheries businesses undertaken by Te Ohu Kai Moana this theme comes up again and again. In the most recent survey (Kingett Mitchell & Associates Ltd 2001) it is noted (on page 12) that most iwi continue to sub-lease much of their quota due to the uncertain and annual nature of lease access. A few pages on (on page 18) it is further commented that:

*the majority of iwi appear to have taken the position that until such time as allocation of fisheries assets takes place, they will not seek to expand either the scale and/or the scope of their fishing businesses and will restrict their investments.*

Knowing this, an argument could be made that it is, therefore, wise to restrict the sale of quota by Maori as its continued retention creates an incentive for them to develop their capacity and capabilities in the business and activity of fishing.

However, even with retention, the opportunity still exists for those Maori who do not wish to engage in the business and activity of fishing to sell ACE or other interests in settlement quota allocated to them.

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## 4. CONS

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There are many downsides to either preventing fully the sale of quota by iwi or restricting sales to be with Maori. Most significant amongst these are that it:

- compromises rangatiratanga;
- discounts the value of quota;
- distorts the QMS and compromises its integrity;
- limits the ability to raise finance; and
- increases transaction costs.

### 4.1 Rangatiratanga

Rangatiratanga means chieftainship – chiefly authority. The Treaty of Waitangi provides that Maori have rangatiratanga over their fisheries.

Limiting the ability of Maori to decide how to deal with their settlement assets in the manner they consider best advances the outcomes they desire significantly compromises rangatiratanga. It is likely that Maori will regard the current provisions of the Bill, or even any contemplated softening that allows for quota trades amongst Maori, as imposing unreasonable and inequitable constraints that erode their rangatiratanga. The same restrictions do not apply to competing non-Maori businesses.

The flipside of this argument is that if the assets could be and were sold on to non-Maori, Maori would no longer have rights over the fisheries assets.

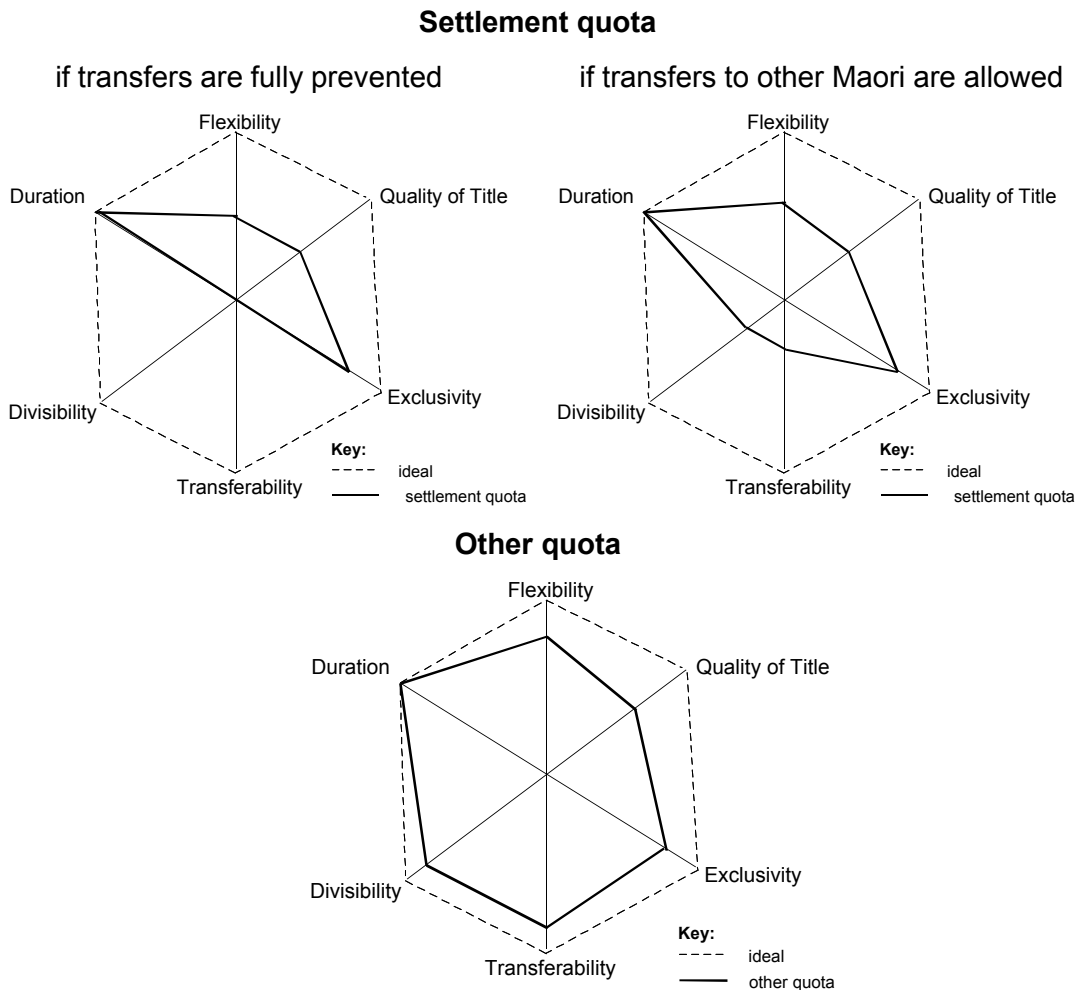
### 4.2 Discounts the value of quota

Quota is a property right. It bestows a bundle of entitlements to access the fisheries, withdraw fish stock up to a specified limit, and exclude others from the exercising the same rights.

The value of a property rights is a function of its duration, flexibility, exclusivity, quality of title, transferability and divisibility (Scott, 1988, p 291). The value of a right is greatest when it persists in perpetuity, is flexible, certain and secure, that can be simply and costlessly transferred, and where others can be excluded from use of the right. If we measured these characteristics along a star of axes (as we have done in Figure 2 over) then a right that maximises each characteristic and, thereby, its value, creates a large hexagon when we link the end points of each axes. Any right that diverges from the hexagon is imperfectly delineated and lesser valued.

As we see in Figure 2 (over) both settlement quota and other quota are irregularly shaped and smaller than the large hexagon. But the irregularity and size reduction is noticeably more pronounced for settlement quota, suggesting the poorer quality of this form of property right.

**Figure 2: Six characteristics of efficient property rights**



Source: Framework adapted from Scott (1988).

Below we discuss the areas where differences would be created between settlement quota and other quota if the sale of the former is restricted or prohibited.

#### 4.2.1 Flexibility

Flexibility implies the freedom to structure operations to maximise the flow of benefits from an asset.

If Maori were prohibited from selling the quota allocated to them then their ability to manage their fisheries strategically would be handicapped. For example, Maori fisheries business A may wish to focus its operations around hoki and, therefore, it may have little interest in holding quota in other fishstocks. However, the effect of the Bill would be to prevent the business from selling its non-hoki settlement quota and using the proceeds to acquire more hoki quota. On the other hand, it could be argued that, in theory, long term undertakings to sell ACE each year to one party could be entered into which would effectively put the business in largely the same position as a holder of non-settlement quota. However, for reasons of greater certainty and security buyers are likely to prefer quota ahead of such undertakings unless the price is discounted.

If sale was allowed, but only with Maori, then the strategic impediment would be less harsh. However, compared with a situation of no restrictions on sale, the pool of parties from which quota could be sold would be significantly thinned. Calculated on the basis of value we estimate that quota held by Te Ohu Kai Moana represents 9.7% of all quota if quota held in the Charisma package is excluded and 10.3% if it is included (refer discussion on practical considerations). If there is rivalry between iwi then iwi politics may further frustrate matters.

#### **4.2.2 Quality of title**

A high quality title is certain and secure. Certainty and security are increased the more predictable the nature of entitlement and how such may change over time. The more certain and secure the rights are, the more likely fishers are to invest in capacity and capability and the fisheries to enhance their operations. Furthermore, the more certain and secure the rights are, the more likely it is that financial institutions will accept them as collateral against loans. Access to borrowed funds may be an important prerequisite for financing investment (refer paragraph 4.4).

Unless final resolution is reached regarding who are entitled to settlement assets, on what basis, what iwi occupy which parts of the coastline and so on, the uncertainty and security of quota allocated iwi is likely to prevail.

#### **4.2.3 Transferability and divisibility**

If Maori are prohibited from selling their quota then the efficiency of the QMS would be compromised as those who are either inefficient fishers or who have little strategic interest in fishing will be forced to remain in the business. At a minimum their activities will comprise selling ACE or other interests in quota. If some transfers are allowed, but only with Maori, then the impact would be modified, but not eliminated.

Similarly, as argued under the characteristic of flexibility, the ability of iwi to strategically manage their operations would be hampered, but not fully prevented. Difficulties are likely to be experienced regardless of whether the desired strategic direction is to specialise in one or few fishstocks or to diversify into many, or even to exit fishing and concentrate on land-based activities,

#### **4.2.4 Range of loss**

A legal right to property, where the characteristics identified in Figure 2 are present, is what enables surplus value to be produced over and above its physical use value (de Soto, 1988). If these characteristics are compromised then the surplus is eroded.

The value of an asset is equivalent to the value of the income that can be earned from the asset over its lifetime, after allowing for the lost opportunity to invest the same money elsewhere.

If we apply the same concept to the fisheries, then the value of quota should reflect the sum of money paid for ACE in perpetuity after discounting. Since any reduction in Maori control over fisheries assets increases the risks they face, we can represent the effect of the proposal in terms of an increase in the implicit discount rate. From this we can calculate the effects on the value of the settlement captured by Maori.

The calculations in the table (over) are derived using the best available fisheries data. Unfortunately, the quota market is notoriously thin and ACE has only been available since October last year. Nonetheless, using weighted average quota prices from the last five years and the most recently available ACE values, we find that the discount rate that equates the combined value of the assets to the combined value of the use

rights in perpetuity is 9.6%. This is comfortably within the range of discount rates that is regarded as the norm within the fisheries.<sup>1</sup>

**Table 1 Scenarios of loss**

	PRESA + POSA	PRESA + POSA + Charisma	TACC
Discount rate that sets the value of ACE in perpetuity equal to quota			9.6%
Value of quota	\$250 million	\$265 million	\$2,568 million
Share of TACC	9.7%	10.3%	
Loss in the value of ACE in perpetuity at a risk premium of			
0.5%	\$12 million	\$13 million	
	4.9%	5%	
1.0%	\$23 million	\$25 million	
	9.3%	9.4%	
1.5%	\$33 million	\$36 million	
	13.4%	13.5%	
2.0%	\$43 million	\$46 million	
	17.1%	17.3%	

Note: The values of PRESA, POSA and Charisma quota are estimated by NZIER and differs slightly from the Te Ohu Kai Moana 2001a and 2001b estimates referenced elsewhere in this report.

A discount rate comprises two parts: a risk free rate of return plus a risk premium that reflects the risk profile of the expected cashflows. The 9.6% will reflect a risk premium that is typical in the fisheries quota market.

However, if, as we have just argued, cashflows are less certain and secure from purchasing the ACE than the quota, then investors are likely to build in a higher than normal risk premium when assessing how much they are willing to pay for any long-term entitlement to ACE. It is not possible to predict how large the additional premium is likely to be. However, there is no shortage of examples where perceived policy or political instability, the politics of indigenous people, or other sources of uncertainty have caused rational investors to apply significant premiums. In Canada, for example, the policy uncertainty tends to translate into implicit discount rates of around 30% being applied to dairy quotas. In Table 1 we examine a conservative range of scenarios. At the low end of the scale we assume that 0.5% is added to the discount rate. The effect is to devalue settlement quota by between \$12 and \$13 million, depending on whether or not quota held in the Charisma package is captured by the proposed restrictions (refer discussion on practical considerations). At the other end of the scale where 2% is added to the discount rate, then the loss in value would range between \$43 million and \$46 million.

<sup>1</sup> In Seafood Industry Council (2001) it concludes that “Real discount rates between 4% and 15% are appropriate for applied fisheries models and these rates are consistent with recent implicit rates calculated for several NZ fisheries.”

### **4.3 Distorts the QMS and compromises its integrity**

Prohibiting or restricting transactions involving settlement quota will undermine the efficiency of the QMS by distorting the quota market. As a result, there will be an overall loss of economic value to New Zealand from less efficient use of the fisheries resource.

In the case of a prohibition the QMS would be smaller by 10% compared to what it would have been had the quota been available for sale. As much of the quota in key fishstocks is tied up and quota held by Maori has traditionally formed one of a scarce few sources of quota available for trade, the impact is likely to be considerably more significant than the 10% suggests. Quota prices could be artificially inflated.

Restricting sales of settlement quota to Maori would effectively be to split the market into two: 90% of the quota would trade in one and could be freely transacted by all; and the remaining 10%, comprising of settlement quota, which could be purchased only by Maori. The first is likely to suffer from the same distortionary impacts as discussed above. The second will be impacted by the small number of buyers and sellers and the risk that inter-iwi politics could effectively shrink the market even further (refer discussion on practical considerations).

In either scenario – prohibition or restrictions – quota volumes and prices would be distorted.

### **4.4 Limits the ability to raise finance**

The characteristics of a property right (refer 4.2) defines the quality of the right as a form of security for the purposes of raising finance. The ability to use fisheries quota as security against loans is explicitly recognised in the Fisheries Act 1996.

The advantages of this finance raising option for Maori could be considerable. For example, it could enable Maori to invest in their previously neglected fisheries businesses (refer previous discussion) or, if fishing was not where the strategic priorities of some Maori lie, it could enable them to diversify into more profitable areas or fund development projects.

If the law were to prevent the transfer of settlement quota to non-Maori or at all then banks are unlikely to regard the quota as a viable form of security. This is clearly because they would have no claim on the quota in situations where Maori defaulted on their loan repayments.

We have seen this happen in the case of Maori owned land. Banks have been reluctant to regard Maori land as security under Te Ture Whenua Maori Act as the change in the status of the land is not guaranteed. This is a very real impediment to Maori development. When this issue was considered by policymakers in 1997, the Government felt it had a responsibility to prevent further alienation of Maori land and provide for its development. However, officials also warned that “by preventing further alienation of Maori land, it is considered that TTWM [Te Ture Whenua Maori Act] may be impeding land development by rendering Maori land virtually unusable for Maori” (Te Puni Kokiri, 1997). While it is not the purpose of this report to argue for or against the provisions of that Act, the parallels to the options considered here are clear.

## **4.5 Increases transaction costs**

Restricting or prohibiting the transfer of settlement quota would increase transaction costs for:

- Maori;
- non-Maori; and
- the quota registry, FishServe.

### **4.5.1 Maori**

For Maori who do not wish to be engaged in the business and activity of fishing or who wish to divest themselves of quota in selected fishstocks, they would have to either:

- in the situation where they can sell their settlement quota to other Maori, find willing buyers within a shrunken pool of buyers. As discussed below, inter-iwi politics may render this pool very small indeed; or
- find willing buyers for ACE or other interests in the quota. While long term arrangements could in theory be entered into, the frequency of transactions would be greater than a one off sale. Uncertainty over iwi entitlements may cause investors' preferences to lean in the direction of annual negotiations.

### **4.5.2 Non-Maori**

Quota held by Maori is one of the few sources of quota available for trade within the QMS. All other quota is generally tied up by fisheries businesses. If settlement quota was not available for sale to non-Maori or at all then the search costs of non-Maori is likely to increase as they struggle to find willing sellers.

### **4.5.3 FishServe**

In October last year FishServe (a privately owned company under the umbrella of the Seafood Industry Council) took over the delivery of quota registry services previously provided by the Ministry of Fisheries. Amongst other things, FishServe gives effect to and keeps a record of any sales of quota or interests in quota.

If the sale of settlement quota is fully prevented then in order to police this, the quota would need to be tagged within the system as being not available for sale. This extends the scope of FishServe's activities beyond what was originally intended. However, this would appear to be the intent of clause 5 of the Bill which provides that no change be made to the registry with respect to settlement quota without the approval in writing of Te Ohu Kai Moana, (refer Appendix A).

The transaction costs of a regime where the trade of settlement quota is allowed but only with Maori is considerable. Not only would the settlement quota need to be tagged but so too would potential purchasers as they need to be identified as being either Maori or non-Maori (refer discussion below). It is likely that the most effective way of reflecting these differences would be to run two separate registers – one for settlement quota and another for all other quota. The cost attached to this is likely to be large.

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## 5. PRACTICAL CONSIDERATIONS

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Beyond the continued confusion regarding if, when and how settlement quota will be allocated, a number of practical considerations arise in respect of the proposals to restrict or prohibit any transfers of the quota. These include:

- what qualifies as settlement quota;
- who qualifies as Maori; and
- inter-iwi politics.

These are neither pros or cons associated with the proposals. Rather they are matters that would need to be carefully worked through if either of the proposals were to be implemented.

### 5.1 What qualifies as settlement quota

A range of transactions have occurred since the 1989 and 1992 settlements which now make it unclear regarding the status of quota held by Te Ohu Kai Moana. In particular, it is not clear whether the following would be regarded as settlement quota under the proposals put forward:

- Subsequent PRESA quota acquisitions by Te Ohu Kai Moana in the name of the Charisma Development Ltd to make up shortfalls in quota transferred under section 40 of the Maori Fisheries Act. The scenarios of loss considered earlier in this report looked at both situations; that is, where quota in the Charisma package was and was not included.
- Transfer decisions under sections 41 and 42 of the same Act. These have affected the quantum transferred under section 40.
- Changes in the volume of entitlements to fishstock due to changes in the TACC made under the Fisheries Acts of 1983 and 1996.
- Quota swaps. That is, in several cases Te Ohu Kai Moana has exchanged excess quota holdings with the Sealord Group and with Moana Pacific Limited in order to gain additional quota for fishstocks:
  - where the Crown's transfers were less than the 10% of TACC provided for under the Maori Fisheries Act, or
  - to meet shortfalls created by changes to the TACC made under the Fisheries Acts.

### 5.2 Who qualifies as Maori

If settlement quota can only be sold or otherwise transferred to Maori then it needs to be clear what fisheries organizations qualify as Maori and what do not. This is a difficult enough issue at the level of individuals, let alone organizations. For example, would a joint venture between Pakeha Fisheries Ltd and Iwi Fisheries Enterprises be regarded as Maori? Rules of thumb would need to be devised in order for the system to be operational.

This situation has similarities with circumstances where a distinction needs to be made between overseas investment and investment by a New Zealand interest. The rule of thumb applied here is that an organization is classified as overseas owned if 25% or more of the shares are held by overseas persons. This is clearly an ad hoc distinction as we can all probably think of examples where an overseas interest with less than 25% of the shares in a New Zealand based company has an effective voice in the running of

the business. On the other hand, an overseas company may own close to all of the shares in the business but have little say in its running. The rule is ad hoc but necessary.

One could well expect that a similarly less than perfect and ad hoc rule of thumb would need to be made in order to enable settlement quota to be traded between Maori. Such a rule might well need legislative support to be effectively administered.

### **5.3 Inter-iwi politics**

Currently most iwi trade their quota with non-Maori fisheries organizations.<sup>2</sup> This is partly reflective of the fact that many iwi have strong political elements. Those iwi may be unwilling to trade quota among themselves. As discussed elsewhere, this threatens to exacerbate distortions in a market where only settlement quota can be traded.

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<sup>2</sup> Personal comment from an industry source.

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- Treaty Tribes Coalition (2000) *Why the Maori Fisheries Settlement Must be Allocated Now*.

### From the web

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|---|--|
| Ministry of Fisheries                   | <a href="http://www.fish.govt.nz">www.fish.govt.nz</a>                     |
| Seafood Industry Council                | <a href="http://www.seafood.co.nz">www.seafood.co.nz</a>                   |
| Treaty of Waitangi Fisheries Commission | <a href="http://www.Te Ohu Kai Moana.co.nz">www.Te Ohu Kai Moana.co.nz</a> |

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# APPENDIX A: THE BILL

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## **Treaty of Waitangi Fisheries Quota (Preservation as Taonga) Bill**

Member's Bill

### **Explanatory Note**

The purpose of this Bill is to ensure that quota allocated to Maori as part of the settlement of the Treaty of Waitangi fisheries claims is reserved to Maori in perpetuity. Currently, that aspect is not provided for in legislation. There is no general prohibition on the alienation or sale of such quota. The Bill is therefore essential to ensure that the benefits of the settlement are locked in, and reserved, for Maori. This is particularly important as the allocated of assets by the Treaty of Waitangi Fisheries Commission under the 1992 fisheries settlement nears. It is not necessary in that regard to wait for any legislation that may be required in conjunction with such an allocation. Rather, it is important that the Commission and all Maori can see that a prohibition on alienation of quota is a fundamental part of the future for Maori in fisheries, in the same way as Maori customary land is inalienable under Te Ture Whenua Maori Act 1993 (the Maori Land Act). New contemporary Treaty of Waitangi claims could be created if such a prohibition were not in place and there were a loss of quota that had been allocated to Maori.

*Clause 4* inserts two new sections 11A and 11B into the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The effect of the new sections is that fisheries quota allocated to Maori in the context of settlement of Treaty of Waitangi claims (to be known as Maori customary quota) is reserved to Maori in perpetuity. This applies to quota transferred to the Treaty of Waitangi Fisheries Commission by virtue of provisions in the Fisheries Act 1983, the Maori Fisheries Act 1989, and the Fisheries Act 1996. The new sections make it clear that they do not prevent the distribution of settlement assets to Maori by the Commission, or prevent the owner or holder of quota from granting to other persons leasehold or other rights or interests in that quota (short of sale, transfer or other disposal of the quota, or exchange of the quota by the Commission for any other quota). They also do not affect the settlement in other respects, or affect in any way the rights or interests of Maori in any fisheries quota that is outside the settlement.

*Clause 5* made amendments to the Fisheries Act 1996. Although the Bill provides for fisheries legislation to be subject to this legislation, it is appropriate to give protection to Maori customary quota by providing for it to be properly recorded in Quota Registries and by prohibiting any change to the Registers with respect to such quota except with the written approval of the Commission.

# **Treaty of Waitangi Fisheries Quota (Preservation as Taonga) Bill**

Member's Bill

## **Contents**

**The Parliament of New Zealand enacts as follows:**

**1. Title**

This Act is the Treaty of Waitangi Fisheries Quota (Preservation as Taonga) Act 2001.

**2. Commencement**

This Act comes into force on the day after the date on which it receives the Royal assent.

**3. Purpose**

The purpose of this Act is to ensure that the fisheries quota that is allocated to Maori as part of the settlement of fisheries claims under the Treaty of Waitangi cannot be alienated from Maori.

**4 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 amended**

The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 is amended by inserting after section 11, the following sections:

**“11A Reservation of quota to Maori in perpetuity**

“(1) This section applies to

- “(a) individual transferable quota and transferable term quota held by or on behalf of the Crown that is, or has been, transferred to the Treaty of Waitangi Fisheries Commission under section 28U(1)(d) of the Fisheries Act 1983; and
- “(b) the proportion of the total allowable catches and total allowable commercial catches transferred to the Treaty of Waitangi Fisheries Commission under section 40 of the Maori Fisheries Act 1989; and
- “(c) the 20,000,000 share of the individual transferable quota for each stock that is allocated by the chief executive to the Treaty of Waitangi Fisheries Commission under section 44 of the Fisheries Act 1996.

- “(2) For the purpose of this section, “quota” means the quota, proportion of catches, and shares to which **subsection (1)** applies.
- “(3) Quota is reserved to Maori in perpetuity, and must not be alienated, sold, transferred, or otherwise disposed of.
- “(4) Nothing in this section prevents –
- “(a) the allocation of quota to Maori, on such basis as the Treaty of Waitangi Fisheries Commission decides; or
  - “(b) the owner or holder of quota from providing any person with rights or interests in that quota whether of a leasehold nature or otherwise, that are consistent with **subsection (3)**.
- “(5) Nothing in this section affects –
- “(a) any rights or interests of Maori in any fisheries quota to which this section does not apply; or
  - “(b) any customary fishing rights; or
  - “(c) any other aspect of the fisheries settlement, including the payment of any money, shares or dividends, to which this Act applies.
- “(6) For the avoidance of doubt, this section overrides section 7 of the Maori Fisheries Act 1989.
- “(7) This section applies despite anything in the Fisheries Act 1983 and the Fisheries Act 1996.

**“11B Quota to be known as Maori customary quota**

Quota to which **section 11A** applies is called ‘Maori customary quota’.”

**5 Fisheries Act 1996 amended**

- (1) Section 127(1) of the Fisheries Act 1996 is amended by inserting, after paragraph (b), the following paragraph:
- “(ba) Maori customary quota pursuant to **sections 11A and 11B** of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 as notified to the chief executive in writing by the Commission”.
- (2) Section 127 of the Fisheries Act 1996 is amended by adding the following subsection:

“(4) Despite subsection (3), no correction or other change is to be made to any Quota Register in respect of Maori customary quota under **subsection (1)(ba)** without the approval in writing of the Commission.”