

Cook Islands Maori Tradition, Culture, By-laws and the Establishment of the Cook Islands Marine Park

Legal Analysis Report Part B

By Janet Maki

Commissioned by Te Ipukarea Society

April 2014

Contents

1. INTRODUCTION	4
1.1 Scope of report – terms of reference	5
1.2 Terms and Definitions.....	5
2 EXISTING COOK ISLANDS CULTURE AND TRADITIONAL MANAGEMENT APPROACHES FOR THE SUCCESSFUL ESTABLISHMENT OF A MARINE PARK 6	
2.1 The effect of legislation and international obligation	10
2.2 Statutory recognition of “Custom” and Traditional Leaders.....	13
2.2.1 The Constitution.....	13
2.2.2 House of Arikis Act 1966.....	14
2.2.3 Cook Islands Amendment Act 1952.....	15
2.2.4 Cook Islands Amendment Act 1954.....	15
2.2.5 Environment Act 2003.....	16
2.2.6 Marine Resources Act 2005 (“MRA”).....	16
2.2.7 Island Government Act 2012-13 (“IGA”).....	17
3 REVIEW OF ISLAND COUNCIL BYLAWS RELEVANT TO THE DESIGNATION OF A MULTI-ISLAND MULTIPLE USE MARINE PARK	20
3.1 Island Government- Bylaws and Regulations.....	20
3.1.1 Pukapuka Ordinance No.1 - An Ordinance for the Peace Order and Good Government of the Island of Pukapuka 1937.....	22
3.1.2 Penrhyn Harbour Charges and Fees Bylaw Order 1983	23
3.1.3 Aitutaki Licensing of Boats By-laws Order 1986.....	23
3.1.4 Mauke Water Rates By-laws 1997.....	24
3.1.5 Aitutaki Fisheries Protection By-laws 1990.....	24
3.1.6 Penrhyn Pearl and Pearl Shell By-laws 1993.....	25
3.1.7 Rakahanga Bylaws 2000.....	26
3.1.8 Manihiki (Natural Resources) Bylaws 2003	28
3.1.9 Aitutaki (Controlled Zones) By-laws 2006.....	30
3.1.10 Penrhyn (Prohibition on Exportation of Pasua) By-laws 2007	30
3.2 Environment Act - Regulations	31
3.2.1 Environment (Atiu and Takutea) Regulations 2008.....	31
3.2.2 Environment (Mitiaro) Regulations 2008	36
3.3 Marine Resources Act - Regulations.....	41
3.3.1 Marine Resources (Aitutaki and Manuae Bonefish Fishery) Regulations 2010	41

3.3.2	Marine Resources (Ra'ui) Draft Regulations 2011	43
3.4	Forms of TMS other than "ra'ui"	45
3.5	General Comment.....	46
3.6	Recommendations	47
3.6.1	Make Traditional Management Systems (TMS) law optional and where adopted, preserve the role of the Aronga Mana.....	47
3.6.2	Consider the consequences on Aronga Mana of legislating TMS	49
3.6.3	Draft simple and relevant TMS law.....	50
3.6.4	Draft TMS law that relies on partnerships for implementation	53
3.6.5	Use local expertise when legislating TMS.....	54
3.6.6	Consider whether legislating TMS is necessary	54
3.6.7	Maintain public awareness and education throughout implementation	57
3.6.8	Develop capacity for implementation of the TMS law	57
3.6.9	Install performance monitoring during implementation of TMS law....	60
3.6.10	Consider the House of Ariki as a clearing house mechanism for TMS	61
3.6.11	Improve coordination, collaboration, cooperation and consultation.....	61
3.6.12	Recognise the attraction and value of TMS in tourism	62
4	FEEDBACK FROM THE CIMP STEERING COMMITTEE INCLUDING FEEDBACK ON OPTIONS FOR STRENGTHENING MAORI LAWS.	63
4.1	Preserve the status quo.....	65
4.2	Introduce principal legislation	65
4.3	Introduce Subsidiary legislation.....	66
4.3.1	Island Government Act 2013 ("IGA")	66
4.3.2	Environment Act 2003 ("EA").....	67
4.3.3	Marine Resources Act 2005 ("MRA").....	68
4.3.4	House of Ariki Act 1966 ("HAA").....	69
5	CONCLUSION	70
6	REFERENCES	71

1. INTRODUCTION

The Cook Islands has committed to establishing a marine park over the southern half of its exclusive economic zone. A review of statutory legislation to determine “issues and options for the legal designation, establishment, design and management of the Cook Islands Marine Park” is reported in a separate report, “Part A” written by Justin Rose. This report forms “Part B of the legal review and relates to the codification of traditional Maori law and ra’ui as well as a review of island bylaws and regulations relevant to the designation of the marine park.

Subsequent to undertaking this consultancy, advice was received that the Aronga Mana had applied for separate funding to:

“research, write and compose translated written and visual materials and organize and coordinate consultations, meetings and workshops that will add capacity and knowledge to assist the Ui Ariki, Aronga Mana and Matakeinanga of each of our inhabited islands, that they may make their own informed and considered decisions and determinations on the matters enunciated in sections B, C and D of this document relative to their Island pertaining to the Cook Islands Marine Park and our EEZ.”¹

Section B of the funding proposal includes:

- *Akonoanga Tupuna* – The ways of our ancestors;
- *Te Ture Maori* – Customary Maori Law;
- *Rauī* – ancient customary law of the sea that applies the custom of natural conservation and sustainable practice for the gathering of food resources both on land and in the sea and would directly affect unsustainable fishing practices;
- *Atinga* – a custom that requires any person who uses a resource that belongs to an owner to pay tribute to the owner for its use or in the case of a gathered resource (fish) a percentage of that resource gathered;
- *Kena Maori* – traditional land boundaries that indicate the beginning of the marine boundaries established by the Ui Tupuna. “Our intention is to mark them on a Marine map with the Ui Ariki and Aronga Mana that act as guardians for the Matakeinanga within those boundaries for each Island;
- *Roto Akau* – the lagoon is also identified with the boundaries that append to the reef also, that demarcate the Tapere, Vaka Tangata use, as well as the Tauranga Ika, Tauranga Koperu, Rua Ika of the various families of the matakeinanga of each island;
- *Te moana* – the areas traditionally used for pelagic fish are identified with the inclusion of suggested extensions to boundaries to take into account the new regime of the EEZ and the proposed Marine Park concept for each island;
- *Rauī motukore* – a strictly no activity tapu, regarded as a necessary inclusion in the boundaries of the Island waters for the protection of the matakeinanga fishing area about the Islands and the protection of fish stocks having regard for the hazardous and illegal fishing practices that abound in our oceans today.²

¹Proposal for funding to Oceans Five America – Rio Rangatira, Koutu Nui, June 2012

²Ibid pages 6-9

The Aronga Mana propose to hold consultations in each island of the Southern Group for the purpose of identifying the application of these concepts in the respective island communities. It is assumed that this would be followed by an assessment of how these findings are to be addressed within the legislative framework of the CIMP. The Aronga Mana are also in the process of providing the Pa Enea with relevant material prior to such meetings in order for the people to make “informed” decisions.

Respectfully, the important role of the Aronga Mana in carrying out this level of consultation is fully acknowledged, recognizing the invaluable information that will be garnered through such a process. In addition, prior to the CIMP Workshop held on 5th March 2014 Aronga Mana members of the CIMP Steering Committee (CIMPSC) visited some of the Pa Enea including the Northern Group in February and consulted with island authorities on *ra’ui*.

The information obtained during these visits is still being incorporated into a proper report or record and has therefore not been considered in this analysis. It is envisaged that such information will be extremely useful in terms of assisting the CIMPSC to address the options set out in the last part of this report, as well as in developing drafting instructions for marine TMS³ legislation requested or proposed for the respective Pa Enea.

1.1 Scope of report – terms of reference

1. *“Analyse existing Cook Islands Maori Culture and traditional management approaches, for the successful establishment of a Marine Park.*
2. *Review of Island Council Bylaws relevant to the designation of a Multi-island Multiple use Marine Park 1.1 sq km.*
3. *Obtain feedback from the CIMP Steering Committee including feedback on options for strengthening Maori laws.”*

1.2 Terms and Definitions

- “CIMPSC” means Cook Islands Marine Park Steering Committee;
- “Government authorities” means the relevant government departments on the CIMP Steering Committee;
- “Island authorities” means the Island Government and the Aronga Mana;
- “Authorities” means both central and local government (which includes the Aronga Mana);
- “Environment Regulations” refers to the Environment (Atiu and Takutea) Regulations 2008 and the Environment (Mitiaro) Regulations 2008;

³ Traditional management systems

- “*HOM*” being a term familiar to the authorities means a head of ministry or government department;
- “*Island communities*” means Rarotonga (either in its entirety or its three *vaka* districts and *tapere*) and the Pa Enuā;
- “*Pa Enuā*” means the islands other than Rarotonga;
- “*Principle legislation*” means an enactment or statute e.g. Environment Act, Marine Resources Act. Principle legislation is submitted to Cabinet for approval then is tabled with Parliament and *passed* by Parliament. It does not officially become law until it is assented to by the Queen’s Representative;
- “*Subsidiary legislation*” means regulations, bylaws and orders in Executive Council made under enabling provisions contained in principle legislation e.g. Rakahanga Bylaws 2000, Environment (Mitiaro) Regulations 2008. Subsidiary legislation is submitted to Cabinet for approval then *promulgated* by the Executive Council (i.e. becomes law). The Executive Council consists of Cabinet sitting with the Queen’s Representative who is also required to assent to the legislation.
- “*TMS*” means traditional management systems as they relate to or impact upon the marine environment and includes ra’ui].

2 EXISTING COOK ISLANDS CULTURE AND TRADITIONAL MANAGEMENT APPROACHES FOR THE SUCCESSFUL ESTABLISHMENT OF A MARINE PARK

Before one can “analyse existing Cook Islands Maori *Culture*”, ideally one needs to be able to define what the term “culture” means. Given its many multi-layered, context-dependent interpretations, to attempt to define the term is a difficult task – hence the lack of legal definitions within the legislation, despite references to “culture” or “cultural” made in various statutes. A similar observation could also be made when considering a definition of “custom”.

Another reason why Cook Islands statutes are silent as to what “culture” means, is due to a reluctance to restrain or bind the notion of culture to a strict or rigid definition, in recognition of the fact that “culture” as well as “custom” is ever-evolving under the influences of social, economic and political changes within a community – as quoted by the late Sir Geoffrey Henry KBE, former Prime Minister of the Cook Islands: “*Culture is a voyage, not a harbour*”.

Not only is “culture” and “custom” different from country to country but there are also differences within a country and the Cook Islands is no exception. As a collective group of islands they share characteristics, values or aspects of culture that are similar but each island also has certain cultural features that are unique to it. To “analyse existing Cook Islands Maori Culture” therefore, cannot be achieved without

first deciding whether in fact, we want to define it and if so, extensive consultation on this issue would need to be undertaken in all inhabited islands of the Cook Islands.

Even if such consultation were to take place, difficulties can arise in terms of people agreeing or consenting to an interpretation of culture or custom, or a description of a cultural/customary practice. An attempt to draft a Maori Customs Bill by Crown Law Office in the early '90s at the request of the late Sir Apenera Short proved to be a difficult task given the lack of consensus on certain customary practices.

It soon became clear that in order for matters to progress, the representatives of the House of Ariki at the time, needed to identify what could safely be agreed upon. Progress was slow and in the end, the impetus was lost and the draft was not completed.

In the absence of a definition of “culture” in domestic legislation, reference is made to the UNESCO Declaration of Cultural Diversity, which provides the following internationally accepted definition:

“a set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, in addition to art and literature, lifestyles, ways or living together, value systems, traditions and beliefs”.

It is indeed a broad, encompassing definition, which obviously cannot be covered in its entirety even if restricting it to Cook Islands culture as it relates to the marine environment. However as an alternative, an attempt is made to express in general terms the “relationship” between the sea and the people of the Cook Islands including their customary rights and how these rights have been treated under the ensuing legislation.

As with other Polynesian islands, “Te Moana Nui O Kiva” – the great ocean of kiva⁴ - has always been an influential and integral part of the culture and livelihood of the Polynesian maori who occupied the islands that were to become collectively known as the Cook Islands. The voyages undertaken by Polynesians in pre-contact times, is well-documented and reference is made to the oceans being their “highways” and “trade routes” keeping them well-connected.

Cook Islands maori not only recognized the sea as an important food source but also believed in the spiritual nature and connection with the sea, paying homage to certain deity as gods of the sea or calling upon their own particular family gods for assistance at times while fishing. Voyages and fishing excursions were therefore undertaken in recognition of these spiritual forces with canoes either being carved with images of gods or in the form of charms affixed to the canoes. It was believed that such actions would give them spiritual favour through protection from the perils of the ocean as well as a bountiful catch from which fish would be set aside for tribal gods.

Certain fish or marine species were also identified as belonging to a tribe or family and permission to harvest such species had to be obtained from the particular family

⁴Kiva meaning ‘blue space, as of the sky’ – A Dictionary of the Maori Language of Rarotonga, S. Savage

(and in some cases a tribute paid). It is understood that recognition of this type of ‘right’ over certain species still exists in certain islands particularly of the Northern Group.

In addition, Cook Islanders recognized their rights over land as extending also to rivers, streams, lakes and the sea:

Pulea (93/23)⁵:

“Land is perceived under customary law to include both land, water, sea areas, reefs and shelves. The marine environment is viewed conceptually under customary law as forming part of the land and the principles of a marine tenure differ little, if at all from land tenure.”

Crocombe⁶ also points out that “rights to the lagoon and its products were generally exercised by the matakeinanga occupying the tapere”. Furthermore, although boundaries or the demarcation of the areas could be unclear, Crocombe discovered documented court cases wherein people refer to coral rocks as boundary markers.

In understanding the nature of such “rights” recourse can be given to Crocombe’s explanation of land rights:

“It is inappropriate to say that anyone ‘owned’ land in Rarotonga, for this might suggest that individuals had absolute power to use and dispose of land as they wished. In fact, more than one person was involved in every piece of land and the rights of every individual were conditioned, not only by rights of a similar order held by others in the same land, but also by a hierarchy of rights of different orders held at various levels within the society. No rights were recognized as belonging to the island as a whole and all the rights in any particular piece of land have never belonged to any one individual. Land rights were held by social groups, and the rights of each group were nominally vested in the title name of the head of that group.”⁷

Crocombe also advises caution in referring to traditional rights in the form of “customary tenure” or “traditional tenures” as they imply that these were forms practiced by islanders pre-contact with Europeans or industrial societies. He advises that there is no customary or traditional *tenure* in the Pacific Islands given that the term “tenure” implies a form of rights under which property is held with varying degrees of obligations attached - such as rendering services or paying a fee.

What is generally relied upon to describe as ‘customary’ or ‘traditional’ tenure includes significant changes brought about by the impact of steel tools, guns, population decline, labour recruiting, etc. (Crocombe 1974)⁸

⁵“An Overview of Constitutional and Legal Provisions Relevant to Customary Marine Tenure and Management Systems in the South Pacific” – Mele Pulea, USP, FFA Report 93/23, p18

⁶As quoted by Mele Pulea in “An Overview of Constitutional and Legal Provisions Relevant to Customary Marine Tenure and Management Systems in the South Pacific” –USP, FFA Report 93/23

⁷“Land Tenure in the Cook Islands” – R. Crocombe 1961, p60

⁸“Customary Tenures and Incentives to Produce” – R. Crocombe, USP Paper 1974

For this reason, the use of the term “customary tenure” or “traditional tenure” is avoided (unless quoted from another source) and preference is given to the terms “customary rights” or “customary systems” as suggested by Crocombe.

Pulea also quotes Mokoroa Paiere on customary rights to the use of sea and water on Atiu⁹:

“Vaipuna, Vairoto, Vaiana and Vai maunga. Owning one of these water reservoirs adds wealth and prestige to a family or tribe. To own one or two of these reservoirs depends on the acquisition of the land. If a Vaipuna is in a particular person’s land, that would then belong to that person. This right also extends to the water in the sea. From inside the lagoon and out beyond the reef at the place where the ta’ungakoperu is. The right to own the sea may sound strange to some people, especially to those who do not understand the custom. To maintain valuable resources, one has to obtain the territory and put a mark around it. In this particular case the ta’ungakoperu is the boundary in the sea as tree or hills are the boundary mark on the land. Whoever owns the land, that same right extends into the sea to the site known as the ta’ungakoperu.”

Tiraa¹⁰ refers to the existence of “complex systems of marine and land tenure” in traditional Cook Islands societies and particular reference is made to the management system of *ra’ui* through which restrictions or bans on the use of resources or facilities in land, rivers, lakes and the sea were applied:

“Inhabitants of Rarotonga and Aitutaki had rights of ownership over adjacent reefs and inshore waters, based on clan subdivisions within tribal districts. Lagoon and reef resources were managed by tenure systems and on Rarotonga, in addition, codes of access to canoe passages. On Pukapuka, marine resource rights included the right to exploit resources within the clan’s sector of reef and lagoon, and right of access or passage through another clan’s area. These arrangements were strictly enforced.” (Tiraa 2006)¹¹.

In Pukapuka, the four *rauwi* areas - Motu Kotawa, Motu Ko, Motu Uta and Motu Niuva are allocated respectively to the three villages of Yato, Ngake and Loto and include rights to the lagoons. It is also reported that during the revival of the *ra’ui* in Rarotonga from 1998-2000, recognition was also given to a claim made by landowners of a particular coastal property in Nikao, when they requested *ra’ui* be imposed for their area which also extended to the reef.

Notably, the concepts of ‘conservation’ and ‘sustainable use’ of resources are recognized by traditional management systems or practices that have existed since pre-contact times and there is no doubt that these applied to both land and marine areas as well as other bodies of water. A continuing commitment to traditional forms of conservation and sustainable use was reflected by participants at the CIMP

⁹supra note 4

¹⁰“Ra’ui in the Cook Islands – Today’s Context in Rarotonga” – Anna Tiraa, 2006

¹¹ ibid

Framework Workshop held in February 2012, who called for “recognition of our mana” over the ocean being “our legacy handed down through generations” and deeming it an “honour” to be its “responsible stewards”.

With the onset of colonisation, the traditional principle of Cook Islands rights to the sea (or customary systems over the sea) was all but extinguished through the imposition of English law and a general disregard by colonial administrators of such rights, recognizing only customary *land* ownership and ignoring any similar claim to sea and other waters.

2.1 The effect of legislation and international obligation

In 1915 the New Zealand Parliament passed the Cook Islands Act and some parts of it remain in force today. It provided for a Resident Commissioner in the Cook Islands appointed by a Cabinet Minister in NZ and it also established a High Court and a Native Land Court. Furthermore it declared that the common law of England as of 14 January 1840 applied in the Cook Islands except where inconsistent with the Cook Islands Act 1915 and “inapplicable to the circumstances” of the Islands.

Whereas it does not define “custom” or extend any recognition to traditional marine rights it does define the term “native custom” insofar as it applies to land rights which is still valid today. It is defined as meaning:

“the ancient custom and usage of the natives of the Cook Islands”.

The term “customary land” is defined as:

“land which, being vested in the Crown is held by the Natives or the descendants of Natives under the Native customs and usages of the Cook Islands.”

The Act further provided for every title to and interest in customary land to be determined “according to ancient custom and usage of the natives of the Cook Islands”.

The Act also vested all land that was not held in fee simple in the Crown and gave it authority to acquire land for public services and the creation of reserves. Furthermore it declared that all land lying below the high water mark was to be “Crown land”¹² thereby annulling any form of rights to reef and lagoon waters.

The Cook Islands eventually became self-governing in 1965 with the adoption of a written Constitution that provided for:

- (a) a completely autonomous independent Legislative Assembly elected by the people;
- (b) declared Her Majesty the Queen in right of New Zealand as the Head of State of the Cook Islands, vesting in Her the executive authority of the Cook Islands;

¹²section 419

- (c) established a Cabinet of Ministers presided over by the Premier [Prime Minister] to advise Her Majesty on the discharge of Her functions in the Cook Islands.

No mention of the customary rights of people over marine areas was made and the legal suppression of such rights continued through subsequent legislation passed over ensuing years, further compounded by the Cook Islands' international obligations under conventions and treaties ratified or signed by the Cook Islands, through New Zealand prior to 1965 and subsequently in its own capacity.

This included a raft of UN Conventions covering the marine environment commencing with the adoption of four conventions by the United Nations Conference on the Law of the Sea in 1949: the Convention on the Territorial Sea and Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf.

These Conventions served to separate the marine environment into different zones and governed the use of and rights as to the open sea and territorial sea. The Law of the Sea Convention introduced the concept of the Exclusive Economic Zone (EEZ) measuring from baselines on the coast, 200 nautical miles seaward bringing a new area of seas and marine resources under national jurisdiction. Added to the conventions list was the Seabed Arms Control Treaty which dealt with the testing of weapons of war in the marine environment, which brought about recognition of the 12-mile zone. (Pulea).¹³

Other terms that were to impact upon the status of customary marine systems were also introduced, e.g. the "continental shelf" being defined as:

- (a) the seabed and subsoil of the submarine area adjacent to the coast but outside the area of the territorial sea to a depth of 200ms or beyond that limit, to where the depth of the superjacent water admits the exploitation of the natural resources of the said areas;
- (b) the seabed and subsoil of similar submarine areas adjacent to the coasts of the islands.

All these conventions served to solidify sovereign rights of coastal states over their surrounding seas including the continental shelf for the purpose of exploring and exploiting its natural resources (subject to non-interference with navigation, fishing, conservation of living marine resources or scientific research).

As a party or signatory to such Conventions, the Cook Islands was obliged to recognize these international commitments through domestic legislation and to commit to the rules agreed to including the protection and preservation of the marine environment and to respect agreements with other States or members. This was further enhanced regionally when the Cook Islands as a Pacific Forum member made a commitment through the Port Moresby Declaration 1977, to enact legislation declaring the 200nm EEZ and sovereignty over these areas.

¹³supra note

This led to the introduction of legislation such as the Continental Shelf Act 1964 and the Territorial Seas and Exclusive Economic Zone Act 1977, which recognized and specifically identified the demarcations of the different marine zones.

The Territorial Seas and Exclusive Economic Zone Act 1977 also includes:

“6. Bed of territorial sea and internal waters vested in Crown - Subject to the grant of any estate or interest therein (whether by or pursuant to the provisions of any enactment or otherwise, and whether made before or after the commencement of this Act), the seabed and subsoil of submarine areas bounded on the landward side by the low-water mark along the coast of all islands of the Cook Islands and on the seaward side by the outer limits of the territorial sea of the Cook Islands shall be deemed to be and always to have always been vested in the Crown.”

Sovereign rights over the sea were to be further reflected in other subsequent and more recent legislation e.g. the now repealed Conservation Act 1986-87 under which all foreshores and soil under the water were declared to be owned by the Crown. This Act also protected the foreshore by prohibiting the removal of silt, sand, gravel, coral and boulders from the foreshore and coastal waters without approval from the Conservation Council – a prohibition that continues in the Environment Act 2003:

“50. Protection of foreshore and Cook Islands waters - (1) Every person commits an offence who, without the prior consent in writing of the permitting authority¹⁴ or contrary to any provision of a management plan, -

- (a) removes any silt, sand, cobble, gravel, boulder, coral or any tree from the foreshore or Cook Islands waters; or*
- (b) carries out any excavation, dredging, clearing, paving, grading, ploughing, removal of trees or vegetation, or other activity within the foreshore or Cook Islands waters which may result in the alteration of the natural configuration of the foreshore; or*
- (c) places any fill or material of any type within the foreshore or Cook Islands waters; or*
- (d) carries out the construction or erection of any wall or structure within the foreshore or Cook Islands waters.”*

Section 2 of the Marine Resources Act 2005, defines the term “fishery waters” as –

“... the waters of the territorial sea of the Cook Islands and of the exclusive economic zone and other internal waters, including lagoons, as defined in the Territorial Sea and Exclusive Economic Zone Act 1977 and includes any other waters over which the Government of the Cook Islands has fisheries jurisdiction”;

Section 3(2) of the Act also provides that the Ministry of Marine Resources (MMR) has the principal function of, *and authority* for the conservation, management, development of the living and non-living resources in the “fishery waters” in accordance with the Act and the Ministry of Marine Resources Act

¹⁴National Environment Council/Island Environment Authority

1984.

It is echoed once again in the more recent Seabed Minerals Act 2009:

*“5. Ownership of Minerals – (1) All rights to the Seabed of the Cook Islands and its mineral resources are hereby vested in the Crown to be managed on behalf of the people of the Cook Islands.
(2) The regulation and management of the minerals of the Seabed of the Cook Islands shall be exercised in accordance with the provisions of this Act.”*

Section 7 defines "Seabed of the Cook Islands" as the seabed and subsoil of the inland waters, territorial sea, exclusive economic zone and the continental shelf of the Cook Islands.

In light of the legislation, it is clear that the Crown has always asserted exclusive authority over the marine areas and the resources found in them.

2.2 Statutory recognition of “Custom” and Traditional Leaders

Notwithstanding the ‘exclusive’ authority of the Crown referred to above, attention should be given to the efforts made by the Crown to recognize Cook Islands customs and the leadership of the Aronga Mana:

2.2.1 The Constitution

The Preamble to the Constitution provides:

*“We, the people of the Cook Islands, recognising the heritage of Christian principles, **Cook Islands custom**, and the rule of law, remember to keep holy the Sabbath Day, being that day of the week which, according to a person’s belief and conscience, is the Sabbath of the Lord.]”*

Article 47 establishes the High Court of the Cook Islands including its three divisions of Civil, Criminal and Land. In relation to the Land Division, Articles 47(3) and (4) provide:

*“[(3) Notwithstanding anything in this Part or in Part IVA, **and in recognition of the customs and traditions of the people of those islands**, the Land Division shall not exercise any jurisdiction or power in relation to land or chiefly titles in any of the islands of Mangaia, Mitiaro and Pukapuka, **and such other islands as may be prescribed by Act, provided that no such Act shall be introduced to Parliament except with the consent of the Aronga Mana of the island to which it relates.]**”*

*[(4) Where on any island to which subclause (3) applies, **jurisdiction or power in relation to any land or chiefly titles is exercised in accordance with the customs and usages of that island, the exercise of that jurisdiction or power shall be final and binding on all persons affected thereby and shall not be questioned in any Court of law.]**”*

Government also amended the Constitution in 1995 through the Constitution Amendment (No.17) Act 1994-95:

**“PART IVB
CUSTOM**

66A. *Custom* - (1) *In addition to its powers to make laws pursuant to Article 39, Parliament may make laws recognising or giving effect to custom and usage.*

(2) *In exercising its powers pursuant to this Article, Parliament shall have particular regard to the customs, traditions, usages, and values of the indigenous people of the Cook Islands.*

(3) *Until such time as an Act otherwise provides, custom and usage shall have effect as part of the law of the Cook Islands, provided that this subclause shall not apply in respect of any custom, tradition, usage or value that is, and to the extent that it is, inconsistent with a provision of this Constitution or of any other enactment.*

(4) *For the purposes of this Constitution, the opinion of the Aronga Mana of the island or vaka to which a custom, tradition or value relates, as to matters relating to and concerning custom, tradition, usage or the existence, extent or application of custom, shall be final and conclusive and shall not be questioned in any court of law.”*

It is important to note that Article 66A(3) recognizes “custom and tradition” as being “part of the law” therefore, any customary practice or TMS has legal status and can be imposed upon a community as long as it does not conflict or is inconsistent with, the provisions of the Constitution or any other enactment.

Concerning the traditional leaders, a legal entity “House of Ariki” is established under the Constitution by virtue of Articles 8 to Article 11B. The House of Ariki comprises all Ariki within the Cook Islands.

The functions of the House of Ariki are set out in Article 9:

“9. *Functions of House of Ariki* - *The House of Ariki shall have the following functions –*

- (a) *It shall consider such matters relative to the welfare of the people of the Cook Islands as may be submitted to it by [Parliament] for its consideration, and it shall express its opinion and make recommendations thereon to [Parliament]; and*
- (b) *It shall have such other functions as may be prescribed by law.”*

2.2.2 House of Arikis Act 1966

This was followed by the House of Arikis Act 1966 which further establishes this body and sets out the composition of the House of Ariki; qualifications and disqualifications of members; and also its functions, which include:

“It may of its own motion make recommendations to the Legislative Assembly upon any question affecting the customs or traditions of the Cook

Islands or any of them or of the inhabitants thereof provided that before considering such motion the President of the House shall invite the [Prime Minister] or any Minister of person the [Prime Minister] shall appoint to be present and take part in the proceedings as if present pursuant to section 10(3) of this Act¹⁵”

Section 19 also allows for Regulations to be promulgated under the Act that are to give “full effect” to the provisions of the Act and its administration. Section 19(2) provides that any regulations made may prescribe for offences against the Regulations not exceeding an imprisonment term of 3 months or a fine not exceeding [\$100] or both.

2.2.3 Cook Islands Amendment Act 1952

Section 7 of this Act vested the island of Nassau (except 10 acres reserved for administration purposes) in ‘the native inhabitants of the island of Pukapuka **..to be held according to the Native Customs and usages of the Island of Pukapuka**”.

2.2.4 Cook Islands Amendment Act 1954

This Act vests the island of Palmerston in the “native inhabitants of the island”. Section 2 provides:

Whereas the several islets comprising the atoll known as the Island of Palmerston are Crown land within the meaning of the principal Act; And whereas the Native inhabitants of the island are descendants of William Marsters who had settled there in the year 1862 when the island was inhabited: And whereas the last renewal of the license of that island granted by the Crown to the said William Marsters expired on 31stDecember 1953 and the license was not renewed, and it is expedient that the island be vested in the descendants of the said William Marsters as customary land: Be it therefore enacted as follows:

*Notwithstanding anything in the principal Act, the land comprising the Island of Palmerston (excepting an area of 10 acres, including the site of the radio station and its ancillary buildings, the site of the water supply tanks and equipment, and the site of the schoolhouse, to be retained for administration purposes on the main islet and to be hereafter defined by the Land Court) **is hereby vested in the Native inhabitants of the Island of Palmerston, and is hereby declared to be customary land within the meaning of the principal Act, to be held by the Native inhabitants of that island and their descendants according to their Native customs and usages.**”*

¹⁵Section 10(3) provides that the President of the House of Ariki can invite any member of Parliament to attend meetings of the House of Ariki.

2.2.5 Environment Act 2003

Section 2 of this Act contains a definition of “Aronga Mana” and provisions which set out membership of the respective Island Environment Authorities (IEA). Appointments to the IEA are on the recommendation of, and after consultation with the Aronga Mana of the island. The IEA is also to include one person to represent the Aronga Mana (in some cases identified to be the *Kavana Tutara*).

Pursuant to section 37, an IEA can request the Environment Committee to prepare a draft management plan for any area within the island for “protection, conservation and management” of matters relating to the environment including all areas of land and inland waters, foreshore and internal waters. They can also make such requests setting out restrictions to which land and waters in the area are to be subject to the objectives of the plan.

Section 37(c) requires the Director of the National Environment Service (NES) to invite interested persons of the island or district including the Aronga Mana to make representations on the draft management plan. Subsection (5)(d) provides that in preparing the management plan, regard shall be had to “*environmentally sound traditional resource management practices and standards*”.

After the consultative process, the plans are finally submitted to the Island State Government (includes a representative of the Aronga Mana) for approval. The plans come into effect upon such approval being received and once notified as a “protected area” under section 41 by publication in the Gazette.

Section 41 sets out the procedure for designating “protected areas” for the “purpose of environment and natural resource conservation and management”. Such notification is required to specify a description of the area; the particulars of its ecological, cultural, archaeological, historical and scenic importance as well as the resources, animals, plants and their habitats; name of the management plan; and where it may be viewed.

Section 41(3) further provides that an IEA shall not issue a notification in certain situations including in respect of native customary land, unless the Director and members of the Aronga Mana of the district or island and any other person with an interest in the land conclude a resource management agreement. Subsection (5) provides that no notification may be made in respect of any area unless the Aronga Mana of the relevant district or island concur with the notification.

2.2.6 Marine Resources Act 2005 (“MRA”)

Section 2 of the MRA includes a definition of “sustainable use” –

*“means conserving, using, enhancing, and developing marine resources to enable people to provide for their social, economic and **cultural wellbeing** while*

- (a) maintaining the potential of marine resource to meet the reasonably foreseeable needs of future generations; and*
- (b) avoiding, remedying or mitigating any adverse effects of fishing on the*

aquatic environment”.

The issue arises as to whether the term “cultural wellbeing” can include marine TMS in the absence of any definition of the term “culture” or “cultural wellbeing” in domestic legislation. The internationally accepted definition referred to in the UNESCO Universal Declaration appears broad enough to cover TMS:

“a set of distinctive spiritual, material, intellectual and emotional features of society or a social group, that encompasses, in addition to art and literature, lifestyles, ways or living together, value systems, traditions and beliefs”.

Furthermore there is a requirement for members of UNESCO (includes the Cook Islands) to integrate culture in their development policies at all levels “for the creation of conditions conducive to sustainable development and within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions.”¹⁶

Section 3 of the MRA sets out the principle objectives of both the Act and MMR, which include:

*“to provide for the **sustainable use** of the living and non-living marine resources for the benefit of the people of the Cook Islands”.*

Pursuant to section 4, the Minister or Secretary of MMR when performing functions or exercising powers, is to take into account several factors when performing functions or exercising powers. These include:

*“environmental and information principles in relation to achieving the **sustainable use** of fisheries and the need to adopt measures to ensure the long term sustainability of the fish stocks.”*

Finally, with regard to aquaculture in section 4, there is a requirement to take into account “the maintenance of **traditional forms of sustainable fisheries management**” and “protection of the interests of artisanal fishers, subsistence fishers and local island communities, including ensuring their participation in the management of fisheries and aquaculture; and broad participation by Cook Islanders in activities related to the **sustainable use** of marine resources”.

2.2.7 Island Government Act 2012-13 (“IGA”)

The IGA repeals and ‘replaces’ the Outer Islands Local Government Act 1987, applying only to the islands of the Pa Enuu. It contains similar provisions to its predecessor relating to composition of the Island Government (formerly known as the Island Council) and the electoral process of Island Government members.

In general terms, the IGA allows for or legally enables island communities to be self-regulating in the administration of their own affairs over any matters, rights or areas devolved to it by central government.

¹⁶ UNESCO Declaration on Cultural Diversity – Art 13

The Island Government consists of a Mayor and other persons elected by the constituents of the island (this number depends on the number of constituencies for each island as identified in the Schedule to the Act), in addition to their respective Members of Parliament. The Island Government also includes:

- “(c) *the person, and, if more than one, those persons (if any) invested with the office of the Ariki for or for part of the island;*
- (d) *one person (other than an Ariki) representing the Aronga Mana, and in the case of Aitutaki, the Mataiapo of the island appointed in accordance with section 17¹⁷;*

The composition differs for Palmerston whereby councilors consist of two members from each of the three families of Palmerston “as those families are recognized under the customs of that island”.

Part 6 of the IGA provides for “devolution of Crown responsibilities”. Pursuant to this Part, the Queen’s Representative upon the advice of the Minister may by regulation, identify a subject matter for which the Crown has responsibility and have it transferred or assigned to the Island Government, vesting in the Island Government responsibility for that matter subject to any restrictions or conditions that may be prescribed.

The regulations can also empower the Island Government to perform any functions and make any bylaws necessary to effectively carry out such responsibilities¹⁸.

Section 65(2) however sets out 3 conditions that must be met before such regulations are promulgated:

- (a) the Crown must first consult with the Island Government;
- (b) the Crown determines that the Island Government has the capacity and resources necessary to assume the responsibility;
- (c) the Island Government consents or agrees to take on the new responsibility.

As part of the process, pursuant to section 66 such transfer or assignment by the Crown may also include any property associated with the subject matter but only if the Island Government consents to the transfer or assignment of that subject matter.

“Associated property” is defined in section 66(2) as including:

- (a) assets;
- (b) liabilities;
- (c) land or interests in land;
- (d) licenses, permits or *any other rights or authority*,

and such property is deemed to be the property of the Island Government without the need for any other formality to effect the transfer¹⁹.

¹⁷This is provided in section 8. In terms of para (d), the Aronga Mana decide amongst themselves who to appoint as their representative. Aitutaki has an “Executive Council of the Mataiapo” and its Chairperson is deemed to represent the Aronga Mana.

¹⁸Section 65(1)

¹⁹Section 68

Part 7 of the IGA empowers the Island Government to make bylaws to give effect to the performance of its powers and responsibilities, as well as other matters listed in section 69 which include:

- (d) recognizing the status, position and authority of the Ui Ariki, and the role of the Ui Ariki in applying and implementing the Act;
- (e) the imposition and collection of fees or charges for goods or services provided;
- (f) licensing and regulating any activity or matter affecting the island.

Section 69(3) also imposes an obligation upon the Island Government to ensure all bylaws are “*consistent with the provisions of the Environment Act 2003*, and must have regard to the importance of conserving and sustaining the environment on the island”.

Section 70(5) further provides:

“Despite the provision of any other law, an Island Government is empowered to make bylaws for the protection and promotion of the culture, traditions and community values of the island, and such bylaws may protect intellectual property in any traditional knowledge or practice and regulate research into culture and traditions of the island”.

Of course such bylaws will still need to be in harmony with the provisions of the Constitution and other principal legislation (or statutes) so that it is not deemed invalid should a conflict exist.

The penalties that can be imposed under bylaws are a fine not exceeding \$2,000 or a period of 3 months imprisonment or both. Responsibility for enforcing the bylaws lies with the Police and any other person empowered under a bylaw or regulation to enforce the bylaw.

In addition, pursuant to section 78, regulations can also be made by way of Order in Executive Council to give effect to the provisions of the Act and include:

- (a) *to recognize the status, position and authority of the Ui Ariki on each island, taking proper account of the traditions and customs of each island;*
-
- (i) *to protect the rights of island communities relating to their traditional knowledge and practices;*
- (j) *to control access to and use of the resources of the islands used in relation to the islands customs and traditions;”.*

Penalties imposed under regulations are similar to bylaws – a fine up to \$2,000 and a term of imprisonment of 3 months, or both.

3 REVIEW OF ISLAND COUNCIL BYLAWS RELEVANT TO THE DESIGNATION OF A MULTI-ISLAND MULTIPLE USE MARINE PARK

Existing “Island Council bylaws” were promulgated under the Outer Islands Local Government Act and its predecessors. There have also been regulations promulgated under the Environment Act 2003 and the MRA which specifically apply to islands in the Pa Enua. There is also draft Marine Resource Ra’ui regulations which will also be considered in this review.

The approach taken is to provide a summary of the respective bylaws and regulations, followed by an overarching analysis of these laws as a whole.

3.1 Island Government- Bylaws and Regulations

Since the passage of the IGA, the name “Island Council” has been replaced with “Island Government”. All bylaws and regulations promulgated under the earlier Outer Islands Local Government Act 1987 have been retained by way of section 80 of the IGA being a “savings and transitional” provision.

In the same manner, bylaws and regulations promulgated before the Outer Islands Local Government Act were similarly saved thereby perpetuating the continuity of bylaws that were introduced prior to 1987. These include Ordinances that date as far back as 1937 which are still legally valid insofar as they do not conflict with subsequent legislation – one in particular is included in this review.

There is further evidence of some very old laws that date back even further, made by former governance entities known as the “Federal and Island Councils” but these old laws are no longer in force having been repealed by the Cook Islands Act 1915. Notwithstanding, although they may not refer specifically to or extend to marine areas they are listed below to illustrate that the codification of ra’ui and the involvement of the Aronga Mana in the process (including implementation responsibilities), dates back further than most would realise.

The following is taken from a list annexed to Ron Crocombe’s “*Land Tenure in the Cook Islands*”:

- 1847 E Ture No Te Toru Ariki o Aitutaki - no copy preserved
- 1862 The Laws of Rarotonga written by the chiefs and printed at their special request and cost – no copy preserved
- 1879 The Laws of Rarotonga. Made by the Council of Arikis, by Makea, Karika, Tinomana, Pa and Kainuku – made with guidance of missionaries
- 1890 E Akamoni I te Au Ture (For upholding the law) – made by Island Council. Gave the Ariki of Rarotonga the power to appoint judges and confirmed the validity of all existing laws meantime

- 1891 Law for the future government of Mangaia – appointed judges for each district and made future appointments the responsibility of the ariki and kavana. It also created a Council which was to be the only law-making body on the island
- 1891 A Law to Provide for the good government of Aitutaki – set up a similar council to Mangaia’s with power to appoint judges
- 1891 To settle disputes about land (Aitutaki) – all disputes as to boundaries or ownership of land shall be heard by 3 judges whose decision shall be reported to the Government i.e. the four ariki plus six members of the local council
- 1891 For Electing the Au (Rarotonga) – clause 5 empowered local Au (district councils) to impose ra’ui on crops. Other powers of the Au were very loosely defined but included a duty to maintain order and a right to make laws. A similar law was enacted by the Council of Mangaia.
- 1894 Declaration as to Land – “We, the Parliament of the Cook Islands Federation hereby declare the customs of the Maori in that matter from time immemorial to the present day. The Land is owned by the tribe; but its use is with the family who occupy that land. The family consists of all the children who have a common ancestor, together with the adopted children, and all the descendants who have not entered other tribes. The control of that land rests with the head of the family; but it is for the support of all the family.. No maori can sell to another maori, or to a foreigner. Therefore on that point we need not say more”.
- It also provided that the right of access to water and to the use of roadways could not be denied except by a law of the Council.
- 1894 Land Occupants Act (Rarotonga) – clause 1 provided that disputes over the ownership and use of land were to be heard by the judge of the relevant district. The judge was required to send his judgment to the Ariki of the district “whose decision thereon shall be final”.
- 1896 Te Au Ture Enea i Manihiki (The Land Laws of Manihiki) – included provisions dealing with customs relating to coconut trees including the recognition of ownership of coconut trees as being separate from the land (a special feature found on the atolls). Part 5 regulated the planting of land other than one’s own, and delimited the period of non-use after which land rights lapsed. Part 8 dealt with tribute.
- 1899 The Au Empowering Act – defined the powers of the existing Au, which included the power to impose ra’ui and the right to order any landowner to plant such crops as might be specified by the Au.
- 1903 The Coast Timber Conservation Ordinance (Rarotonga) – placed all coastal lands under the control of the district ariki and forbade landowners to exercise

any ownership on those lands without the written permission of the ariki concerned and the Resident Commissioner.

- 1903 The Manihiki Ordinance No.1 - Gave the Island Council power to control wandering stock and trespass and to impose ra'ui over all lands on the island.
- 1904 The Au Empowering Act Amending Ordinance – transferred the duties, obligations and powers of the Au to the Island Councils (included power to impose ra'ui)
- 1904 Cook and Other Islands Government Amendment – abolished the ariki courts on those islands where a European Resident was stationed and made provisions for lagoons containing pearl shell to be declared Crown Land.
- 1906 Proclamation – Governor General. Proclaimed the Manihiki and Penrhyn lagoons to be Crown lands set aside as public pearl-shell fisheries. Regulations governing the use of the lagoons were thereupon promulgated by the British Resident.
- 1908 Te Mana Ra'ui (Public Statement by Resident Commissioner) – asserted that the ancient right of ra'ui no longer existed in respect of any land which has been investigated by the Native Land Court. (NB. Later Resident Commissioners varied in their practice in relation to ra'ui, some sanctioning them in relation to lands investigated by the Court and others not allowing them.)

The Cook Islands Act 1915 repealed all existing laws in the Cook Islands at the time including those passed by the Federal and Island Councils.

3.1.1 Pukapuka Ordinance No.1 - An Ordinance for the Peace Order and Good Government of the Island of Pukapuka 1937

Reference has been made in earlier reports on ra'ui to the “Pukapuka Bylaws” as being one of the few examples of legislation containing provisions on ra'ui. However the full citation to these bylaws was not provided and there are no “Pukapuka Bylaws” as such listed on the main legislative index for the Cook Islands.

Pukapuka Bylaws were drafted around 1994 at the request of the late Sir Inatio Akaruru CBE with assistance from former Secretary of Foreign Affairs Jim Gosselin but these do not appear to have been promulgated.

Requests to relevant government departments for a copy of the draft bylaws were unsuccessful but what has been found is a 1937 Ordinance which is still in force insofar as it does not conflict with subsequent legislation. The Ordinance includes provisions on *rahui*, albeit relating to copra.

Section 8 of the Ordinance provides:

“Island Council may impose a rahui – The Island Council of Pukapuka may impose a rahui upon any area or areas of coconuts in the Island of Pukapuka subject to such conditions as are in accordance with Native custom, provided that such customary conditions are not repugnant to or inconsistent with the express provisions of this Ordinance”.

The Ordinance further provides that a rahui is not to exceed 4 calendar months per year whether as a period of 4 months or as a ‘sum of periods’ throughout the year. There is also a restriction that no rahui imposed shall extend to or include or in any manner affect, lands lawfully alienated to Europeans by the Native owners thereof. The Island Council is required to give one month’s public notice of its intention to impose a rahui setting out the commencement and termination dates, as well as specifying the rahui areas.

However, pursuant to section 13, a rahui had to be approved by the High Commissioner (a title subsequently amended to ‘the Queen’s Representative’).

The Ordinance also provides that “the owner of any land which for the time being is not subject to the operation of a rahui shall weed the said land” and clear it of rubbish and undergrowth. The land is also to be kept fully planted with coconuts and during the rahui period, the Island Council can give permission to an owner of any land to keep it clean and to carry out more planting.

The penalty for failing to comply with the provisions of the Ordinance is a penalty not exceeding five pounds (ten dollars).

3.1.2 Penrhyn Harbour Charges and Fees Bylaw Order 1983

This Bylaw requires the payment of a berthage charge for every vessel that enters any harbour of Penrhyn and also imposes the payment of a “cargo fee” in respect of all cargo loaded onto or off a vessel at a harbour. It further sets out how the berthage charge and cargo fee is to be assessed and how the funds received are to be applied.

3.1.3 Aitutaki Licensing of Boats By-laws Order 1986

These bylaws regulate the licensing of boats on the Aitutaki lagoon and provide the conditions upon which such boats may operate and also sets out the fees applicable.

It prohibits any person from operating a boat on a lagoon except in accordance with the terms and conditions of a license issued by the Island Council.

The annual license requirements may specify:

- (a) the maximum number of passengers that may be carried;
- (b) the minimum safety requirements of the boat;
- (c) designate the area or areas of the lagoon in which the boat may be operated;
- (d) such other conditions as may be imposed.

Any contravention of the license can result in suspension of the license or cancellation or disqualification from holding a license for such period as may be determined. It may also result in a fine not exceeding \$200.

Any person refused a license has the right to appeal to the Minister. The Police have the responsibility of preventing the use of any boat that is not licensed under these bylaws.

3.1.4 Mauke Water Rates By-laws 1997

These bylaws impose the payment of an annual water rate of \$30 for every dwelling on Mauke. Penalty for contravening its provisions is a fine not exceeding \$200.

3.1.5 Aitutaki Fisheries Protection By-laws 1990

These bylaws apply to the islands of Aitutaki, Manuae and Te-Au-O-Tonga²⁰ and extend to the waters surrounding each island measured seaward from the outer limits of the reef, every point of which is 200 metres distant from the nearest point of the outer limit of the reef.

The bylaws prohibit the removal and sale of *paua*, *kai* and *ariri* unless that person has a permit issued under the bylaws. The Island Council can grant a permit subject to such conditions and period of time as it sees fit for the purpose of sale; consumption for a social event; and for export sale, provided the proceeds are to go towards a project in Aitutaki or elsewhere that is for the benefit of Aitutaki residents²¹.

A permit can stipulate the number of fish that can be taken, the type and size of fish, the part of the lagoon from which it is to be taken, names of person permitted to take it and the expiry date of the permit. If the permit is required urgently, the Mayor, Deputy Mayor or Clerk has the authority to grant a permit.

Part 2 of the bylaws prohibits the use of underwater breathing apparatus gear (including scuba but not a snorkel) while spearfishing, gathering any species of fish and setting any net or collecting fish from a net. Hauling nets other than by the use of hand is also prohibited.

There is also a restriction on setting nets within 100 metres of any harbour or boat channel and as to the size, depth and mesh of a set net. A person is also not permitted to use more than one set net at any one time, or to leave it unattended.

Drop nets of a length exceeding 75 metres and/or a mesh of less than 60 mm is not permitted. A person is also prohibited from using more than one drag net at any one time.

In terms of enforcement, in addition to the Police, the Council can appoint “able and suitable persons” to be Enforcement Officers whose functions and powers include carrying out investigations; searching baggage, boxes and containers of any kind and can impose immediate fines of \$200. The Enforcement Officer can also confiscate catch and institute legal action against offenders.

²⁰Manuae consists of two islands – Manuae and Te Au O Tonga

²¹ e.g. construction of the Aitutaki Hostel in Rarotonga

Section 16 prohibits the use of explosives and poisonous substances to catch fish, or to use any method in removing shell fish that would endanger coral.

Penalties include for a first offence, a fine not exceeding \$200 and for repeated offending, a fine not exceeding \$300 or 3 months imprisonment, or both. In addition, underwater breathing apparatus including scuba gear as well as nets can be confiscated. Any confiscated fish is to be disposed of by the Police under the instructions of the Council.

3.1.6 Penrhyn Pearl and Pearl Shell By-laws 1993

These bylaws provide for permits and licenses to be issued by the Island Council upon application, for the purpose of diving, seeding, cultivating or otherwise causing to grow artificially, any pearl shell in the lagoon.

A person must obtain the following permits for the respective activity:

- Pearl Shell Diving Permit – for free diving for natural pearl shell
- Scuba Diving Permit – for using underwater breathing apparatus (not including a snorkel) in the lagoon.

The Island Council can grant a permit for such length of time and upon such conditions as it sees fit. It can also revoke all permits or any one permit by way of a public notice posted on the notice board of each village if it considers that naturally occurring pearl shell stocks in the lagoon are over exploited or likely to be over exploited.

A person must obtain the following permit or license for the respective activity –

- Pearl Shell Farming Permit or Pearl Shell Farming Corporate License²²– for farming pearl shell or collecting spat;
- Cultured Pearl Shell Farming Permit or Cultured Pearl Shell Farming Corporate License – for cultivating, seeding or causing to grow artificially, any pearl.

A person must have a Pearl Shell Farming Permit or a Pearl Shell Farming Corporate License (whichever applies) before they can be granted a Cultured Pearl farming permit or license.

Technicians must have a Seeding License issued by the Council before seeding pearl and must provide proof of competence when applying for such a license.

The Bylaws also require the Council to keep and maintain an updated map of the lagoon showing the names of pearl farm owners and location of farms in designated areas allocated by the Council. The Council must also keep a register of names of owners; location of farm; numbers of shells seeded; seeding dates; and harvesting dates.

Section 39 requires the Council to conform to any Fisheries Plan approved by Cabinet under the Marine Resources Act, which applies to Penrhyn.

²²A corporate license is for body corporates or companies

In terms of enforcement, this is the responsibility of the Police who may on suspicion, enter upon any premises, boat or farm to conduct a search; open any package, baggage, box or container of any kind; confiscate pearl shell; and dispose of such shell at the direction of the Council.

Penalties include a fine of \$200 or 3 months imprisonment or both. However any penalties under Part IV which relates to technicians, include an initial fine of \$200 and if the offence is a continuing one, a further fine of \$200 for every day that the offence continues or a term of one-year imprisonment or both.

3.1.7 Rakahanga Bylaws 2000

These Bylaws are quite broad in their application. Part I refers to the observance of the Sabbath and establishes an anthem and ensign for the island of Rakahanga. It also defines the terms “Aronga Mana”²³ and “Rahui”.²⁴

Part II covers public health regarding cleanliness of premises, housing and keeping of pigs as well as burial and public water supply. Part III prohibits dogs and requires Island Council approval to be sought for the importation of other animals and birds not native to Rakahanga.

Part IV sets out provisions protecting crayfish of a certain size or any female crayfish with eggs attached to its body. It also prohibits spearing crayfish and selling it outside the island.

Within Part IV is also section 15 which provides that no person shall take any coconut crab or *kavou* under rahui except with the prior written approval of the Council and no one can take a female with eggs attached to its body.

Kotaa, *tavake* and *tara* are also not allowed to be caught, trapped or killed without the prior written approval of the Council and their eggs cannot be removed from nests. *Kavakai Maui* on the other hand is fully protected without recourse to the Council and neither can a person remove eggs from its nest.

Female turtles on its way to or from its nesting place cannot be caught or killed and neither can turtle eggs or young turtles from the nest be moved or removed without written approval of the Council.

Part V covers “Marine Resources”. Prior written approval from the Council is required for underwater spear-fishing and underwater net fishing. For *maroro* fishing, no person is to use a spotlight operated by generator or battery and any *maroro* spawning or about to spawn must be released back into the sea. The use of a net when fishing for *koperu* is not permitted and neither is scuba fishing within or outside the reef.

²³ includes Te Whakaheo Ariki, Te Whaingaitu Ariki, Hui Mataiapo, Hui Rangatira and the Religious Advisory Council

²⁴ means the traditional custom of imposing restrictions on the use of land, reef and lagoon with regards to their resources.

A person is not permitted to construct a *pa-ika* without the prior written approval of the Council and harvesting *paua*, trochus, *pipi* and mother of pearl needs Council approval also. Farming pearl shell and collecting spat requires a permit from the Council, as does farming seaweed.

Part VI covers boat safety and all boats are required to be registered with the Council who shall keep a record of registered boats and issue the owner with a Boat Registration Certificate.

There are also safety requirements for any boat that travels to and from Manihiki in accordance with the Small Craft (Inter-Island Voyages) Safety Rules 1994.

Part VII contains the main rahui provisions:

“30. Rahui to be under the control of the Council – (1) The rahui shall be under the control of the Council who shall impose such restrictions in accordance with custom.

(2) Subect to subsection (3) of this section, during the term of a rahui, the owner of any land may enter upon such land for the purpose of collecting uto, cutting rito, cutting pandanus, fano and to collect kotaa leaves.

(3) Before the owner of any land under rahui enters onto such land for the purpose referred to in subsection (2) the owner must first obtain the approval of the Council and shall when entering such lands be accompanied by a member of the Council or member of the Raungahuru Committee.

31. No trespassing on land, reef or lagoon under rahui – (1) Subject to section 30(2) of these Bylaws, no person shall enter onto any land, lagoon or reef which is under rahui, until the rahui is declared open by the Council.

(2) Where any person enters onto any land, reef or lagoon under the rahui as a result of any problems with his boat or outboard motor, that person shall as soon as practicable advise the member of the Council in charge of the rahui”.

Part VIII sets up the Raungahuru (Environment) Committee made up of 10 persons comprising 2 persons from each *whakaava* (village) appointed by its respective Council member. The functions of this Committee include:

- To protect and conserve the environment and ensure sustainable use of the natural resources;
- Evaluate and act on activities that significantly affect the environment;
- Make recommendations to the Council in relation to the environment;
- Formulate and coordinate environment policies as well as make recommendations to the Council.

Part IX sets out general provisions relating to village curfews, fires, inspection by Council of all land affected by the bylaws, new religions requiring consultation with the Aronga Mana and also identifies the Police as enforcers of the bylaws.

Finally Part X sets out the penalty provision, which consists of a fine not exceeding \$200 but where an offender is unable to pay a fine, he or she is to carry out

community service activities identified by the Council for a period not exceeding 20 days.

3.1.8 Manihiki (Natural Resources) Bylaws 2003

These bylaws apply to the island of Manihiki, “to its lagoon and reef and to its surrounding waters”.

Section 3 defines “rahui protected species” as:

Any species of fish, plant, animal or other species of flora or fauna (whether living or dead) which is the subject of rahui or restriction on sale, export or commercial exploitation, declared by the Council under these by-laws;”

Parts 1 and 2 relate to pearl farming and require any person wanting to take naturally occurring pearl shell, to apply for a Pearl Shell Diving Permit to the Island Council. The Council can impose such conditions as it sees fit, as well as determine the time period of the permit. Underwater breathing apparatus is permitted when collecting naturally occurring pearl shell from a spat collector with a pearl farming permit.

A permit is also required for pearl farming which again the Council can grant upon such conditions and for such period of time as it sees fit. Where the area in any pearl farm permit includes any *kaoa* (coral or coral head), the permit holder is extended rights to use the *kaoa* as set out in the permit or management plan.

Part 3 provides for pearl technicians to obtain the approval of the Council who must satisfy the Council as to his or her qualifications, experience and competence. The Council can revoke a technician’s permit if the work of the technician is found to be below the standard considered commercially acceptable in Manihiki.

Part 4 concerns “Natural Resource Management”. Section 13 prohibits the use of underwater breathing apparatus while fishing and setting or gathering nets.

Sections 14 – 16 provide as follows:

“14. Declaration of rahui or commercial restrictions – (1) *Where the Council resolves that conservation of the natural resources require it, the Council may from time to time –*

- (a) *declare a rahui; or*
- (b) *place restrictions upon sale, export or commercial exploitation in respect of the taking of any fish, other creature or any plant or substance from any area or areas of the island of Manihiki or its surrounding waters.*

(2) *Every such declaration shall be effective on and from the date upon which notice of that declaration, together with a description and plan of the area affected and (if the rahui or restriction is limited to a particular species or number or species) of the rahui protected species shall be notified to the public in accordance with these bylaws.*

(3) *It shall not be necessary that the notice use the scientific term for any rahui protected species nor shall it be necessary that the description*

and plan be of any particular form or degree of accuracy provided that the nature and degree of notice such as to be reasonably understandable and intelligible by the public.

15. *Taking of rahui protected species from rahui area prohibited* – *No person shall take or attempt to take any rahui protected species by any means from an area over which a rahui has been declared and where the Council has placed restrictions on the sale, export or commercial exploitation of a rahui protected species, no person shall deal with that species in any way which is inconsistent with those restrictions.*

16. *Traditional rahui lands* – *Where any land is subject of a rahui declared under these By-laws has been traditionally regarded as being the subject of a rahui restrictions (including but not limited to the lands described in the Schedule to these by-laws), no person shall keep or permit to be or to roam on that land any pig, goat, chicken or other animal or bird, whether domesticated or not without the written consent of the Council, which consent may be given or withheld on such terms and conditions as the Council thinks fit.”*

Section 17 provides that the Council may in consultation with the Ministry of Marine Resources and other interested parties on Manihiki prepare a draft management plan for the protection, conservation, management and control of the Manihiki lagoon, taking into account the matters listed therein. These include references to the lagoon being a resource to be enjoyed by the Manihiki community; recognition of it being a community resource; as a fragile resource; and both lagoon and community being susceptible to change over the period of an issued permit.

The Council also has the power to revoke or amend any permits granted under these by-laws if it considers it necessary having regard to the interests of the lagoon, pearl farming industry or in the interests of the public.

Part 5 deals with ‘quality control and industry standards’ and authorizes the Council to impose terms and conditions to a permit that promote quality control and product enhancement. Terms and conditions can also include the length of time between seeding and harvesting and re-seeding that pearl shell; and may also require the keeping and production of records to ensure compliance by the permit holder.

Pursuant to section 20, upon the Council being satisfied, it may issue a certificate of authenticity describing a pearl with reference to the farmer and technician, as well as the age of that pearl at harvest.

Section 21 provides that the Council can also impose terms and conditions as to the accommodation and upkeep of an employee of the permit holder, where that employee is not ordinarily a resident of Manihiki.

Responsibility for enforcing the provisions of the by-laws lies with the Police as set out in Part 6, who have powers similar to those under other bylaws, i.e. enter upon any premises, boat or pearl farm to conduct searches; open and search any package, baggage, box or container; confiscate any ‘illegal’ pearl shell and dispose of it as

directed by the Council; institute legal action against anyone breaching the bylaws; and can demand production of any permit for inspection.

Part 7 sets out the penalties which are a fine of \$200 or of a larger amount provided for under the provisions of the Outer Islands Local Government Act 1987 or its successor²⁵ and to such term of imprisonment²⁶ as may be imposed under such legislation. It also recognizes continuing offences and allows for the forfeiture to the Council of any boat, underwater breathing apparatus, farming equipment and any other property used in committing the offence. The Council can also suspend or terminate the permit.

A provision relating to giving of notices is satisfied where it is handed in person to the intended recipient/s and a notice is recognized as published, when placed on a public notice board such as at the Post Office.

3.1.9 Aitutaki (Controlled Zones) By-laws 2006

These bylaws designate “controlled zones” in the Aitutaki lagoon, which ceased at the latest, on 31 October 2006. The term “controlled zones” is defined in section 2 as:

“those identified zones of the lagoon that are designated to have limited access to the general public;”

The purpose of this bylaw was to accommodate filming taking place or about to take place in the lagoon during that time. It controlled the entry of other persons into the area but permission was granted where the applicant was seeking access through the zone to property owned by the applicant.

Section 6(5) provided that such person shall be afforded reasonable access at such times and subject to such terms and conditions imposed by the Council having regard to the “need for privacy, security and filming requirements of any other person who may have been given consent to enter or remain within that zone”.

The Council could appoint “suitable persons” as Enforcement Officers who had powers to investigate and conduct searches; to intercept or stop any person, boat, vessel or aircraft from entering the area; as well as confiscate equipment used by an unauthorized person including any recording equipment. An on the spot fine could be imposed of \$200.

Penalties for acting in contravention of the bylaws included a fine not exceeding \$200 and for a repeated offence, a further fine of \$200 or 3 months imprisonment or both.

3.1.10 Penrhyn (Prohibition on Exportation of Pasua) By-laws 2007

This bylaw prohibits the taking or removal of *pasua* from the reef, lagoon or ocean surrounding Penrhyn for the purpose of export or causing it to be exported outside of Penrhyn. Any person contravening this provision faces a fine not exceeding \$500.

²⁵Being up to \$2,000 in the Island Government Act. Term of imprisonment remains at 3 months.

²⁶ibid

It further allowed for the appointment of Enforcement Officers who had powers to carry out investigations; to search any port without warrant and also any package, box or container; to seize and confiscate all *pasua* found on a person; and to dispose of it as directed by the Council.

An Enforcement Officer could also obtain photographic or other evidence as proof of breach to assist in any prosecution. Police, Fisheries and Customs Officers are also authorized to enforce these bylaws.

3.2 Environment Act - Regulations

3.2.1 Environment (Atiu and Takutea) Regulations 2008

These Regulations apply to both Takutea and Atiu. It defines “Atiu” as “the island of Atiu *and includes waters within 12 nautical miles*” and “Takutea” has a similar definition.

It also defines ra’ui as:

“the traditional custom of imposing restrictions on the use of the land, reef and lagoon with regards to their resources;”

Part 1 covers the management of the island of Takutea and declares Takutea as a “community conserved area under the management and control of the Trustees of Takutea” (section 4).

Section 4(2) prohibits any person from:

- disturbing or harming any plant, fish, bird or animal or their eggs;
- littering or depositing waste;
- setting a fire;
- fishing in the lagoon, reef and within 5 nautical miles.

Written permission is required from the Trustees and Island Council to build or operate any tour operation to the island. A person also requires permission to harvest paua and remove plants.

The *Takutea Trustees or Management Committee of Takutea* comprises the Aronga Mana - namely Ngamaru Ariki, Rongomatane Ariki, Parua Ariki, Te Ipo Mataiapo, Paerangi Mataiapo, Tinikura Mataiapo and Aumai Mataiapo, who are required to manage the island of Takutea in accordance with Rules set out in Schedule 6 of the Regulations.

The Trustees are also required to prepare a draft management plan for Takutea in consultation with the native landowners of Atiu. Pursuant to section 5(2) it must take into account the environmental policies of the Island Council and Government; and must receive the approval of the Aronga Mana²⁷ and any landowners affected by it.

²⁷obviously it would already have the support of the Aronga Mana given the Trustees are the Aronga Mana

In Part 2, it is unlawful to import animals into Atiu as well as coconuts and plants that are not native to Atiu except with the written approval of the Council and subject to quarantine requirements.

The taking or harming of *unga kaveu* is also an offence under section 8 but where a person intends to kill, harm or possess an *unga kaveu in accordance with traditional practice* such person can apply to the IEA of Atiu. Section 9 protects crayfish by prohibiting the removal of crayfish of a prescribed size from the lagoon, reef or waters within 12 nautical miles of Atiu.

A person is also not permitted to take a female with eggs still attached to the body or to spear a crayfish. In both cases, the IEA is required to initiate an assessment and inventory of the respective species population and thereafter develop a management plan for its conservation.

There is also protection covering flying fish whereby no person is to use a machine-operated vessel where they are spawning; as well as protection extended to birds and their eggs; and marine turtles.

Even trees are protected under section 14 where it is an offence to set a fire to any bush or rubbish, which results in the widespread burning of trees. Native trees cannot be cut without the permission of the IEA and a register is to be established for culturally and historically significant trees.

Section 15 provides for designated protected areas and are listed in Schedule 3 – these include *ana* or caves, ancient burial sites and *marae*. Pursuant to section 16, the IEA may in consultation with the Island Council and landowners, prepare a draft management plan for any protected area.

It is also an offence to remove artifacts and archaeological material from Atiu without the written consent of the landowners, Ui Ariki, Ui Mataiapo, Island Council and IEA.

Part 3 relates to Ra'ui:

“PART III
RA’UI

18. *Ra’ui* - (1) *A Ra’ui may be declared and under the control of the Ui Ariki, Mataiapo Tutara and Mataiapo and they may, in consultation with the Island Council, the Island Environment Authority and Landowners concerned, impose such restrictions in accordance with traditional custom.*

(2) *No person shall enter onto any land, lagoon, reef, or vai roto which is under Ra’ui until the Ra’ui is declared open by the Ui Ariki, Mataiapo Tutara, and Mataiapo and notified to the public by the Island Council and the Island Environment Authority.*

(3) *Notwithstanding the provisions of subclause (2), during the term of the Ra’ui –*

- (a) *the owner of any land may enter upon such land, for the purpose of passing through to another place or the collecting of dried coconuts and other fruits that may be in season unless those coconuts or fruits are subject to the Ra'ui*
- (b) *the owner of any land may enter upon such land, for the purpose of collecting any stray animals or may order the owner of such animals to collect them; and*
- (c) *in the case of an area of the lagoon that is declared a Ra'ui, a person may enter such areas, for the purpose of passing through to another area.*

(4) *Where a person enters onto any land, lagoon or reef under a Ra'ui as a result of an emergency, that person must advise a member of the Ui Ariki, Ui Mataiapo Tutara, Mataiapo, the Island Council or the Island Environment Authority as soon as practicable.*

19. *Declaration* – (1) *Every area under Ra'ui shall be declared by the Ui Ariki and notified to the public by the Island Council and the Island Environment Authority.*

(2) *Every such declaration shall be effective on and from the date upon which the Ui Ariki, may determine by notice of declaration and notified to the public by the Island Council and the Island Environment Authority.*

(3) *Every such notice, together with a description and plan of the area affected shall be posted on the notice board at the meeting house and public buildings of each village on Atiu and shall be advertised on the television and radio system on Atiu.*

20. *Ra'ui Management Plan* – (1) *The Ui Ariki, Mataiapo Tutara and Mataiapo may from time to time, in consultation with the Island Council, Island Environment Authority and landowners, prepare a draft management plan for any Ra'ui designated pursuant to Regulation 18 (1).*

21. *Tiaki Ra'ui* – (1) *The Ui Ariki, Mataiapo Tutara and Mataiapo shall be entitled to appoint- and dismiss certain persons to be called “Tiaki Ra'ui”, who shall act as guardians or caretakers of the Area and carrying out the activities in the Management Plan.*

(2) *The names of the Tiaki Ra'ui shall be publicised throughout public places in Atiu as well as in the radio and television.*

(3) *In the event that a Tiaki Ra'ui resigns, retires, passes away or moves to another village or island, the Ui Ariki, Mataiapo Tutara and Mataiapo shall appoint another person to be his or her replacement.*

22. *Role and Duties of the Tiaki Ra'ui* – (1) *A Tiaki-Ra'ui may use all of his or her powers stated in Part III of these Regulations for the purpose of carrying out of activities necessary to give effect to the Ra'ui Management Plan in consultation with the Ui Ariki, Mataiapo Tutara and Mataiapo.*

(2) *Where any person is found to have committed an offence against the Ra'ui Management Plan, the Tiaki Ra'ui shall-*

- (a) *be empowered to request the name, address and identification from the person;*

- (b) *seize any plant or animal found in their possession and seize any article used for the commission of the offence; and*
- (c) *apply an on-the-spot utunga of \$100.00; or*
- (d) *refer the matter to the National Environment Service for prosecution under the provisions of the Act or any regulations thereunder.*

(3) *Each Tiaki Ra'ui shall, where necessary, be given an identification card by the Ui Ariki, Mataiapo Tutara and Mataiapo for the purpose of identifying themselves to any person for the purpose of the enforcement of the Ra'ui Management Plan.*

(4) *The National Environment Service shall issue to the Ui Ariki, Mataiapo Tutara and Mataiapo consecutively numbered on-the-spot utunga books for the Tiaki Ra'ui to record any violations of the Ra'ui Management Plan.*

(5) *All on-the spot utunga issued pursuant to Regulation 22 (2) (c) shall be recorded in triplicate with the offender being given the original Notice of Utunga and the Ui Ariki, Mataiapo Tutara and Mataiapo being given a duplicate copy of the Notice of Utunga and the Tiaki Ra'ui shall retain the third duplicate copy of the Notice of Utunga.*

(6) *The Tiaki Ra'ui shall forward any utunga collected pursuant to subclause (5) to the Ui Ariki, Mataiapo Tutara and Mataiapo within seven (7) days of the date the amount was received.*

(7) *The Tiaki Ra'ui shall on a regular basis file a report to the Ui Ariki, Mataiapo Tutara and Mataiapo and the National Environment Service of any violations of the Ra'ui Management Plan Regulations.*

(8) *The Ui Ariki, Mataiapo Tutara and Mataiapo shall maintain a central registry of all utunga issued pursuant to subclause (5).*

(9) *Every person who is required to pay an utunga issued pursuant to Regulation 22 (2) (c) -*

- (a) *may elect to pay the utunga in which case the Ui Ariki, Mataiapo Tutara and Mataiapo shall upon payment acknowledge in writing the receipt of such sum and that person shall not be liable to prosecution; or*
- (b) *where the offender cannot afford to pay the utunga as imposed, such person must carry out community service activities as identified by the Ui Ariki, Mataiapo Tutara and Mataiapo for no more than 30 working days;*
- (c) *may elect to have the matter referred to Alternative Dispute Resolution as provided in these Regulations;*
- (d) *may elect not to pay the utunga in which case the matter shall be referred to Court and that person shall be liable upon conviction to a fine not less than \$150 plus Court costs;*
- (e) *any person who defaults in payment of the sum imposed by the Court pursuant to clause (d) upon such default shall be liable to a further fine not less than \$200 plus Court costs.*

(10) *Where a person receives an on-the-spot utunga and has no money in his possession he must pay the amount within seven (7) days of the date the offence was committed as specified in a written Notice of Fine to be given to the offender.*

(11) *The Tiaki Ra'ui shall also be responsible for ensuring nothing of archaeological significance is removed from the Area or is moved or vandalized in the Area.*

(12) *Should any person remove any animal or plant from a stream or waterway such animal or plant shall be seized and forfeited by the Tiaki Ra'ui which shall be returned to its habitat if it is still alive and if it is dead it shall be disposed of by the Tiaki Ra'ui as he deems fit.*

(13) *It shall be an offence to interfere with the work of a Tiaki Ra'ui or refuse to provide information or provide false information to a Tiaki Ra'ui when requested.*

23. *Other Tiaki Ra'ui Officers – Any Police Constable appointed under section 25 (6)(b) of the Act, any Officer of the National Environment Service; any Officer of the Ministry of Agriculture; any Officer of the Ministry of Marine Resources and the Island Secretary, may exercise the powers and be considered as a Tiaki Ra'ui under these Ra'ui regulations.”*

Part 4 covers “environmental health” and prohibits the polluting of any drinking water supply or source (section 24) either through waste or litter; or tendering animals within a water reserve; or plant or remove any crops or plants within 10 metres of any river or stream. There is also a requirement for residents to keep their premises clean and tidy as well as the outlawing of the importation of non-biodegradable shopping bags or glass beer containers (this includes for personal use).

Section 28 further requires proper disposal of litter by burning litter other than disposable nappies, glass, plastic bags, hazardous waste and motor parts which are to be disposed of as stipulated therein (e.g burning in the ground or disposal at a waste and treatment site).

There is also a responsibility for the Island Council to manage recyclable materials and it is unlawful to import any hazardous waste without a written permit from the Council.

Sections 32 and 33 also regulate household sewage as well as sewage from businesses, any treatment of which must comply with Public Health Regulations. Wandering Animals must also be contained and pigs cannot be kept within 50 metres of a home or boundary of a neighbouring property²⁸.

Part 5 covers “marine resources”. Pollution by vessels is prohibited and vessels used for tours must be registered. The use of a fishing net for *koperu* in the harbour is also prohibited. Scuba fishing is unlawful – whether in the lagoon or on the reef or within 12 nautical miles of Atiu or Takutea. The use of explosives and poison is also not permitted in fishing. A permit is also required for any vessel anchoring within the lagoon, harbor or on the reef or within 12 nautical miles of Atiu.

Part 6 relates to the “foreshore” and pursuant to section 42, the removal of silt, sand, gravel, cobble or boulders is unlawful without a permit from the Island Council.

²⁸sections 34 and 35

Part 7 identifies as Enforcement Officers, members of the Council and any officer of the National Environment Service, Police, Agriculture, Public Health and Marine Resources. These officers also have similar powers as set out in other bylaws – the power of entry for the purpose of searches, and authority to open and search any package, box or other container. Entry into any private residence however requires a warrant issued by a Justice of the Peace.

An officer can also impose ‘on the spot’ fines of not more than \$100.

Part 8 sets out the penalties which are a maximum fine of \$50,000 or to imprisonment for a period of 1 year or both. For a continuing offence, an additional fine of \$1,000 can be imposed for each day the offence continues. For a minor offence where the fine does not exceed \$500 and the offender cannot pay, such person must carry out community service for not more than 30 working days. In addition, equipment or vessels used in the commission of the offence can be confiscated.

In addition the Court can prohibit the offender from doing any act or engaging in any activity and it can direct the offender to take such action to remedy or avoid any harm to the environment. The Court can also direct the offender to post bond to ensure compliance with any directive of the Court, and also give a directive to compensate any affected party.

Section 51 provides that the Council can also establish an alternative dispute resolution process to resolve any dispute concerning these Regulations, i.e. arbitration, mediation, facilitation or a combination of these processes.

The Atiu (Peace Order and Good Government) Bylaws Ordinance 1937 is also repealed pursuant to section 52.

3.2.2 Environment (Mitiaro) Regulations 2008

The definition of “Mitiaro” is “the island of Mitiaro *and the waters within twelve nautical miles of the coast of Mitiaro*”.

Part 1 relates to “species and habitat protection”. It prevents the importation of animals not native to Mitiaro except with written approval of the Council and also prevents the importation of any coconut, *iniao* (native tree), *ange* (makatea geniostoma) or plant not native to Mitiaro except with the written approval of the Council.

Section 6 prohibits the harming of the *ungakave’u* (birgus latro) unless a person intends to use traditional practice or means for which the written approval of the Council is required. Crayfish is also covered under section 7 and cannot be removed from the lagoon, reef or within 12 nautical miles of the island if the tail is less than 12 cms. Female crayfish with eggs are also protected.

Section 9 covers eels and fish and makes it unlawful for a person to catch eels, milkfish, goatfish, *ature* and other fish species that may be identified by the IEA during any ra’ui declared under section 17. No person can fish for or catch eels after a ra’ui has been lifted other than by traps, hooks and bushknives. A speargun is not

permitted to be used.

With regard to the fish species aforementioned, they can only be fished or caught after the lifting of a ra'ui with hooks and nets of a size authorized by the Ui Ariki and Island Council. There is also protection for birds under section 10.

The above provisions also include a requirement for the IEA to undertake an assessment and keep an inventory of the population of the species and thereafter develop a management plan for conservation purposes.

Pursuant to section 11, no person is permitted to disturb or harm living wild turtles or eggs and it is also unlawful to disturb a nest or remove eggs and to export from Mitiaro any turtle, eggs or parts thereof whether living or dead.

The Council in consultation with the IEA may also establish measures to control or eradicate invasive animals, plants or bird species that threaten or harm species that are native to Mitiaro²⁹. Bush fires are to be controlled under section 13 and section 14 provides for the designation of protected areas listed in Schedule 3, which include burial sites and marae. The Council can direct the IEA to draft management plans for any protected area.

It is also unlawful to remove any artifact or archaeological material from Mitiaro or undertake any archaeological excavations without the written approval of the Ui Ariki and the Council.

Parts 2 and 3 set out the main ra'ui and *tiaki ra'ui* provisions:

“PART 2
RAUI

17. Raui - (1) *A raui shall be declared and under the control of the Ui Ariki and they may, in consultation with the Island Council and Landowners concerned, impose such restrictions in accordance with traditional custom.*

(2) *No person shall enter onto any land, lagoon, reef, or roto which is under raui until the raui is declared open by the Ui Ariki and notified by the Island Council and the Island Environment Authority.*

(3) *Notwithstanding the provisions of subclause (2), during the term of the Raui -*

(a) *the owner of any land may enter upon such land, for the purpose of passing through to another place or the collecting of dried coconuts and other fruits that may be in season unless those coconuts or fruits are subject to the Ra'ui;*

(b) *in the case of an area of the lagoon that is declared a raui, a person may enter such areas, for the purpose of passing through to another area or to a motu.*

(4) *Where a person enters onto any land, lagoon or reef under a raui as a result of an emergency, that person must advise a member of the Ui Ariki or the Island Council as soon as practicable.*

²⁹section 12

18. Declaration - (1) Every area under raui shall be declared by the Ui Ariki and notified to the public by the Island Council.

(2) Every such declaration shall be effective on and from the date upon which the Ui Ariki may determine by notice of declaration and notified to the public by the Island Council and the Island Environment Authority.

(3) Every such notice, together with a description and plan of the area affected shall be posted on the notice board at the main Post Office and public buildings of each village on Mitiaro and shall be advertised on the television system on Mitiaro.

19. Ra'ui Management Plan - (1) The Ui Ariki may from time to time, in consultation with the Island Council, Island Environment Authority and Landowners, prepare a draft management plan for any Ra'ui designated pursuant to Regulation 17.

PART 3 TIAKI RA'UI

20. Tiaki Ra'ui - (1) The Island Council shall be entitled to appoint and dismiss certain persons to be called "Tiaki Ra'ui", who shall act as guardians or caretakers of the Area and assist in enforcing these Regulations and carrying out the activities in the Management Plan.

(2) The names of the Tiaki Ra'ui shall be publicised throughout public places in Mitiaro as well as in the radio, newspaper and television.

(3) In the event that a Tiaki Ra'ui resigns, retires, passes away or moves to another island, the Committee shall appoint another person to be his or her replacement.

21. Role and Duties of the Tiaki Ra'ui - (1) A Tiaki-Ra'ui may use all of his powers stated in part 2 of these Regulations for the purpose of carrying out of activities necessary to give effect to the Ra'ui Management Plan and these Regulations in consultation with the Island Council.

(2) Where any person is found to have committed an offence against the Ra'ui Management Plan, the Tiaki Ra'ui shall -

- (a) be empowered to request the name, address and identification from the person;
- (b) seize any plant or animal found in their possession and seize any article used for the commission of the offence; and
- (c) apply an on-the-spot utunga of \$100.00; or
- (d) refer the matter to the National Environment Service for prosecution under the provisions of the Act or any regulations thereunder.

(3) Each Tiaki Ra'ui shall, where necessary, be given an identification card by the Island Council for the purpose of identifying themselves to any person for the purpose of the enforcement of the Ra'ui Management Plan.

(4) The National Environment Service shall issue to the Island Council consecutively numbered on-the-spot utunga books for the Ti'aki Ra'ui to record any violations of the Ra'ui Management Plan.

(5) All on-the spot utunga issued pursuant to Regulation 21(2)(c) shall be recorded in triplicate with the offender being given the original Notice of

Utunga and the Island Council being given a duplicate copy of the Notice of Utunga and the Ti'aki Ra'ui shall retain the third duplicate copy of the Notice of Utunga.

(6) The Ti'aki Ra'ui shall forward any utunga collected pursuant to subclause 21 (2) (c) to the Island Council of the Ra'ui within seven (7) days of the date the amount was received.

(7) The Ti'aki Ra'ui shall on a regular basis file a report to the Island Council and the National Environment Service of any violations of the Ra'ui Management Plan.

(8) The Island Council shall maintain a central registry of all utunga issued pursuant to subclause 21(2)(c).

(9) Every person who is required to pay an utunga issued pursuant to these Regulations -

(a) may elect to pay the utunga in which case the Island Council shall upon payment acknowledge in writing the receipt of such sum and that person shall not be liable to prosecution; or

(b) where the offender cannot afford to pay the utunga as imposed, such person must carry out community service activities as identified by the Island Council for no more than 30 working days;

(c) may elect to have the matter referred to Alternative Dispute Resolution as provided in these Regulations; and

(d) may elect not to pay the utunga in which case the matter shall be referred to Court and that person shall be liable upon conviction to a fine not less than \$150 plus Court costs, and

(e) any person who defaults in payment of the sum imposed by the Court pursuant to clause (d) upon such default shall be liable to a further fine not less than \$200 plus Court costs.

(10) Where a person receives an on-the-spot utunga and has no money in his possession he must pay the amount within seven (7) days of the date the offence was committed as specified in a written Notice of Fine to be given to the offender.

(11) The Ti'aki Ra'ui shall also be responsible for ensuring nothing of archaeological significance is removed from the Area or is moved or vandalized in the Area.

(12) Should any person remove any animal or plant from area or waterway, such animal or plant shall be seized and forfeited by the Ti'aki Ra'ui which shall be returned to its habitat if it is still alive and it is dead it shall be disposed of by the Ti'aki Ra'ui as he deems fit.

(13) Any person who commits an offence under these Regulations may have his name and offence published on a public notice in the Village or in the public newspaper.

(14) It shall be an offence to interfere with the work of a Ti'aki Ra'ui or refuse to provide information or provide false information to a Ti'aki Ra'ui when requested.

22. Other Ti'aki Ra'ui Officers - Any Police Constable appointed under section 25(6)(b) of the Act, any Officer of the National Environment Service, any officer of the Public Health Department, any officer of the Ministry of Marine Resources; any officer of the Ministry of Agriculture and the Island

Council may exercise the powers and be considered as a Ti'aki Ra'ui under these Regulations.”

Part 4 covers “environmental health” provisions similar to the Atiu and Takutea Regulations, which prohibit the pollution of any drinking water supply or source, as well as requiring homes to be kept tidy and free of litter. It also prohibits the importation of non-biodegradable plastic bags and glass beer containers. Disposal of litter in the home is to be disposed of in a safe and proper manner as prescribed in section 27 of the bylaws.

There is also a responsibility for the Island Council to manage recyclable materials and it is unlawful to import any hazardous waste without a written permit from the Council. It is also unlawful to use any chemical, pesticide or poison other than in compliance with conditions established by the Council. The Council is also responsible for designating a site for public waste disposal and storage of recyclable materials.

Sections 31 and 32 regulate household sewage as well as sewage from businesses, any treatment of which must comply with Public Health Regulations. Wandering Animals must also be contained and pigs cannot be kept within 50 metres of a home or boundary of a neighbouring property³⁰.

Part 5 covers “marine resources”. Pollution by vessels is prohibited and vessels used for tours must be registered. The use of a fishing net for mackerel scads is also prohibited. Scuba fishing is unlawful – whether in the lagoon or on the reef or within 12 nautical miles of Mitiaro. Gillnets with a mesh size less than 2 inches is not permitted in the lagoon or on the reef and neither is the use of explosives and poison. A permit is also required for any vessel anchoring within the lagoon, harbor or on the reef or within 12 nautical miles of Mitiaro.

Part 6 relates to the “foreshore” and pursuant to section 43, the removal of silt, sand, gravel, cobble or boulders is unlawful without a permit from the Island Council.

Part 7 provides for inspection of any land affected by the Regulations to be carried out by Enforcement Officers who can be appointed or dismissed by the Council and also includes any officer of the National Environment Service, Police, Agriculture, Public Health and Marine Resources. These officers also have similar powers as set out in other bylaws – the power of entry for the purpose of conducting searches, and authority to open and search any package, box or other container. Entry into any private residence however requires a warrant issued by a Justice of the Peace.

An officer can also impose ‘on the spot’ fines of not more than \$100.

Part 8 sets out the penalties which are a maximum fine of \$50,000 or to imprisonment for a period of 1 year or both. For a continuing offence, an additional fine of \$1,000 for each day the offence continues. For a minor offence where the fine does not exceed \$500 and the offender cannot pay, such person must carry out community

³⁰sections 33 and 34

service for not more than 30 working days. In addition, equipment or vessels used in the commission of the offence can be confiscated.

In addition the Court can prohibit the offender from doing any act or engaging in any activity and it can direct the offender to take such action to remedy or avoid any harm to the environment. The Court can also direct the offender to post bond to ensure compliance with any directive of the Court, and also give a directive to compensate any affected party.

Section 51 provides that the Council can also establish an alternative dispute resolution process to resolve any dispute concerning these Regulations, i.e. arbitration, mediation, facilitation or a combination of these processes.

3.3 Marine Resources Act - Regulations

3.3.1 Marine Resources (Aitutaki and Manuae Bonefish Fishery) Regulations 2010

These Regulations declare Aitutaki and Manuae Bonefish Fishery as a “designated fishery”. This term is defined in section 2 of the Marine Resources Act 2005 as one established under section 6 of the Act:

“6. Designated fisheries-(1) The Queen's Representative may by Order in Executive Council declare a fishery as a designated fishery where, having regard to scientific, social, economic, environmental and other relevant considerations, it is determined that such fishery -

- (a) is important to the national interest; and*
- (b) requires management measures for ensuring sustainable use of the fishery resource.”*

It requires a fishery management plan, which is set out in the Schedule to the Regulations. Article 3 of the plan provides that the purpose of the fishery plan is to:

“provide ecologically sustainable development and establish an effective, beneficial and enforceable management structure for the Aitutaki and Manuae Fishery.”

One of the primary objectives is “to maintain the traditional values and practices of the Aitutaki community in harmony with a bonefish sports fishery”. Principal ways of achieving objectives includes imposing restrictions on particular fishing techniques or methods as required and closure of specified areas within the lagoon to fishing - for example bonefish spawning aggregation areas and in marine protected areas.

It also recognizes the importance of reef passages and sand flats by requiring an EIA to be carried out where there are modifications in the reef passages and for any proposed mining, dredging or other human activities that may cause change to their natural status.

It also requires raising community awareness through consultation with users of the area and through a public awareness and education program.

Clause 11 also establishes the Aitutaki and Manuae Bonefish Management Committee which consists of the Mayor, the Island Secretary, Police and Marine Resources representatives, as well as three representatives of the licensed Bonefish Guides and a representative of the Aronga Mana of Aitutaki. This Committee's responsibilities include providing a forum for the discussion of issues and strategies, assessing Bonefish Guide license applications, implementation of the Fishery Plan and preparing annual budgets.

The Island Council is required to provide local administrative support; grant licenses and permits; recommend new regulations, fees and penalties; provide assistance to implementation of the plan; receive fees; and review/approve the annual budget.

The Ministry of Marine Resources has a monitoring, surveillance and compliance role. It is also to provide the technical information and advice including annual reports on the status of the bonefish resource to the Council and Committee.

There are restrictions on the number of Bonefish Guides (who shall comply with the Code of Conduct) and Anglers. Any person contravening this provision, commits an offence and is liable to a fine not exceeding \$1,000. Priority for Bonefish Guide applications is also given to applicants of Aitutaki descent who are 18 years and older, married or in a stable de facto relationship with a person of Aitutaki descent and living in Aitutaki.

All non-Cook Islanders wishing to fish in Aitutaki and Manuae lagoons and surrounding reefs require a Visitors Lagoon Fishing Permit which are issued by the Mayor for time frames of 1 week, 2 weeks and 1 month duration, and are not transferable. However, a non-Cook Islander wanting to fish for the purpose of research, conservation or other purposes beneficial to the bonefish industry, is exempt from obtaining a permit. An offence committed under this provision attracts a fine not exceeding \$1,000.

There are also restrictions on fishing in nursery areas, as well as when it is deemed necessary to allow recovery of fish stocks. Gillnets also must comply with the restrictions under the Aitutaki Fisheries Protection Bylaws 1990. There is also a prohibition on the sale of bonefish but any person who wishes to export it for non-monetary gain or barter, can export no more than 10 fish per household per month.

There is also a requirement for the proper keeping of fishing trip logs by license and permit holders and to allow and assist, an authorized enforcement officer to board the boat to carry out inspection of the boat, fishing gear and inspect the log. The enforcement officer also has authority to take photographs and collect fish specimen if necessary.

Any person or category of persons may be appointed by the Minister on the advice of the Secretary of Marine Resources, to be authorized officers.

For any breach or violation of the provisions of the Plan or condition of the license or permit where no penalty is prescribed, that person shall be liable upon conviction to a fine not exceeding \$250.

3.3.2 Marine Resources (Ra'ui) Draft Regulations 2011

Although these draft Regulations are not yet law, it is prudent to consider them given the possibility of their being promulgated. It is understood that the push for these regulations came from the Koutu Nui however, given some disagreement over certain provisions during the consultation process, the draft did not progress further to promulgation stage. Two slightly different drafts were obtained from two separate government offices and it cannot be ascertained which draft is the later in time. However these differences between the drafts are not significant for the purpose of this analysis.

The draft Regulations apply only to Rarotonga and extend to the waters surrounding the island defined as “internal waters” by section 4 of the Territorial Sea and Exclusive Economic Zone Act 1977³¹.

The definition of “ra’ui” in clause 2 is:

“a declaration made pursuant to Regulation 7(1) of these Regulations;”

Clause 5 provides that a ra’ui can be declared over a lagoon or reef area to manage the biological diversity of the area or a species or effect to a traditional practice and shall be under the control of the Secretary of Marine Resources and the Aronga Mana of the area concerned. The Aronga Mana are also authorized to impose terms and conditions appropriate in accordance with traditional customary practice as determined by the Aronga Mana with advice from the Secretary.

It further prescribes offences which are liable to a term of imprisonment of up to 6 months or a fine not exceeding \$1,000 –such offences include harvesting fish from within an area under ra’ui; harvesting fish from a species placed under a ra’ui; being in possession of any fishing gear capable of being used for harvesting fish; undertaking any activity which may have a significant negative impact³² on the biodiversity of the ra’ui area unless permitted by law; and failing to comply with the conditions of a permit issued under the Regulations.

If the offence is a continuing one, a further fine of not exceeding \$500 is imposed for every day the offence continues.

Clause 6 sets out conditions in which a person may apply to enter the ra’ui for the purpose of harvesting for a traditional purpose and to undertake scientific research. All applications for permission under this provision must be made to the Aronga Mana who can impose such terms and conditions as they deem necessary. All determinations must be made in consultation with the Secretary.

Clause 7 provides that every ra’ui shall be established by the Secretary by way of declaration and must be made in consultation with the Aronga Mana and the local community of the area concerned.

³¹ “4. **Internal waters** - The internal waters of the Cook Islands include any areas of the sea that are on the landward side of the baseline of the territorial sea of the Cook Islands”.

³² The term ‘significant negative impact’ is not defined

Every ra'ui declaration is to include:

- (a) the date it is effective;
- (b) the duration;
- (c) a physical description of the area under ra'ui (using a GPS);
- (d) a description of any markings or signage to designate the area;
- (e) a description of the species protected and/or exempted from being under ra'ui;
- (f) any description of the method of fishing and type of fishing gear permitted;
- (g) any terms and conditions imposed by the Secretary and Aronga Mana.

A declaration is to be posted in both English and Maori on a notice board at the meeting house in the area concerned and shall be advertised widely in the community and local media.

The Secretary in consultation with the Aronga Mana can vary, amend or revoke a ra'ui declared.

Pursuant to Clause 8, the Aronga Mana are required to develop a management plan for any declared ra'ui in consultation with the Ministry of Marine Resources; NES; other relevant stakeholders; and the local community for the area concerned. The management plan shall be reviewed every 2 years.

The Secretary is required to keep and maintain a register of all ra'ui declared under the Regulations and may provide technical expertise and resources to monitor and evaluate the effectiveness of the ra'ui from time to time.

Part 2 provides for "*tiaki ra'ui*" (wardens) and all Aronga Mana are deemed to act as *tiaki ra'ui* under clause 11 and other persons can also be appointed by the Secretary as *tiaki ra'ui* in consultation with the Aronga Mana.

Part 3 sets out the powers of the *tiaki ra'ui*, being powers of entry and search. These include the power to stop, enter and board any vessel or vehicle to examine any document or apparatus, and any equipment found in such vessel or vehicle; stop any person to examine a document, article and other equipment that may be used in fishing; as well as any fish. They can enter any premises and land to conduct searches and open and search any package, box or container to determine whether there has been a breach of the Regulations. However, a warrant from a Justice of the Peace is required in order to enter a private residence.

Clause 15 provides that a *tiaki ra'ui* also has power to question persons and require production of documents if he or she has reasonable cause to suspect that a person has committed an offence against the Regulations. This clause also sets out the information a *tiaki ra'ui* can ask for, which includes personal details such as name, date of birth, residence and occupation. A *tiaki ra'ui* can also require the person to provide an explanation or information concerning any fish, equipment, fishing method or thing relating to the harvesting of fish or any other unlawful activity.

Part 4 sets out enforcement provisions. Clause 16 provides that a notice of infringement can be issued which includes an infringement fine and the *tiaki ra'ui* shall record the infringement notices. A fine must be paid within 7 days. The recipient of such a notice may elect to pay the fine or have the matter referred to

alternative dispute resolution. If the fine remains unpaid for 7 days, the matter shall be referred to the Court, and upon conviction the person shall be liable to a fine not exceeding \$500 plus Court costs.

A *tiaki ra'ui* who has reasonable grounds to believe that any person is committing an offence, can order that person to desist from offending and issue a notice of infringement to that person. He or she may also refer the matter to an authorized officer (Police).

A *tiaki ra'ui* may also seize any “illegal” fish; fishing gear and equipment; and any document, record or thing that may be evidence of the commission of an offence. Notwithstanding, property that is valued under \$100 can be returned upon the offender paying his or her infringement fine.

In addition to any other penalty, the Court may order the forfeiture of any property seized, to the Ministry of Marine Resources. Any person who provides false or misleading information or interferes with a *tiaki ra'ui*, commits an offence and is liable to a fine not exceeding \$1,000.

All offences under the Regulations are considered “strict liability” offences whereby the prosecution does not need to prove the defendant intended to commit the offence. It is a defence however if the defendant proves he or she did not intend to commit the offence and took all reasonable steps to ensure that it was done or not done.

Finally clause 23 provides that the Aronga Mana and Secretary may establish an alternative dispute resolution process to resolve any dispute concerning these Regulations, which may include arbitration, mediation, facilitation, or a traditional practice.

3.4 Forms of TMS other than “ra'ui”

It is noted that all TMS legislation and articles cited written on Cook Islands TMS refer only to *ra'ui* or *rahui*. There may be other forms of TMS still relevant and being practiced in certain Pa Enea but they appear not to have surfaced. There is reference made to “*atinga*” but only an explanation of what it means, i.e. where tribute is required to be paid to the owner of a resource for the use of the resource or to pay to the owner a percentage of the resource gathered.

It would seem that the customary practice of *atinga* is to ensure a person owning a resource is compensated for the use of that resource by others outside the family. Whether or not an owner can restrict or conserve the use of such a resource by imposing a *ra'ui* over it is unknown. Furthermore it is doubtful that the community would observe any *ra'ui* imposed by an individual or a family who do not have Aronga Mana status. In such cases, the owner would need to approach the Aronga Mana to request a *ra'ui* over the resource or area owned.

Perhaps further information on other marine TMS has been obtained through the subsequent Pa Enea consultation carried out by members of the CIMP Steering Committee prior to the March workshop; or alternatively, is an area the Aronga Mana can focus on as part of their project.

3.5 General Comment

The rules and laws of a society are on the whole, respected and adhered to due to the “*mana*” or authority behind them. In a Westminster system such as exists in the Cook Islands, the laws that govern the Cook Islands ultimately derive authority from Her Majesty the Queen who receives advice from Parliament as tendered to her through the Queen’s Representative whose assent is required in order for laws to come into force. These laws are then administered, enforced and upheld by and through the other two arms of government – namely, the Executive (government administration) and the Judiciary (the Courts).

As is commonly known, a democracy gives a right to the people to elect their leaders by way of majority vote, as opposed to leadership being inherited by birthright or dependent upon bloodlines.

Both of these systems contributed to the weakening of the ‘*mana*’ of the traditional leaders. Another major factor would have been the arrival of Christianity, which all but destroyed traditional belief systems further impacting upon any spiritual recognition associated with the *mana* of the Aronga Mana. These and other influences from the “outside world” continue to undermine and ‘chip away’ at what authority the Aronga Mana have remaining.

It would be tempting therefore to conclude that the *mana* or authority of traditional leaders has been completely usurped. In the same vein, one would also be tempted to conclude that their purpose is merely ‘ceremonial’ and no longer relevant in today’s society - a view no doubt held by a sizeable portion of the population.

However, such notions need to be considered in light of the respective *Pa Enuā* and the reality of their social structure and way of living. One should also keep in mind that whereas the ‘power’ of central government and the ‘arm of the law’ is blatantly obvious in Rarotonga, the ‘tyranny of distance’ for some of these islands along with their very small populations, would make it less of a reality for them. It is also difficult for central government to monitor or keep abreast of developments in these islands due to resource constraints and a focus on other priorities.

Perhaps one can consider as evidence of this, the fact that islands of the *Pa Enuā* continue to impose TMS over marine areas regardless of the absence of a formal law enforcement system, illustrating that the reality for these small island communities is that traditional marine rights as well as customary law or TMS, meets their requirements without regard to any conflicting legislation or policies recognized by central government.

Much has been written about the need to preserve customary law and TMS practices through legislation recognizing that this is dependent on its recognition and preservation in the Constitution and statute law but equally important is the preservation of the system of traditional leaders who play a critical role in shaping custom and practices, as well as forming a unique forum to influence laws through its constitutionally recognized function of making recommendations on custom and customary practice to government as well as Parliament. Some believe that there is an urgency to preserve custom through law given that the weakening of TMS continues

through ongoing social changes such as ‘people migration’ as well as increasing immigrant numbers, legislative changes and global interaction to name a few.

It is further recognized that the important function of traditional leaders in promoting and developing customary law and practice, needs to be supported by central government and fully utilized.

3.6 Recommendations

Having considered the legislation and articles that document “ra’ui” and “traditional management systems”, as well as the report of the CIMP Framework Workshop held on 9th February 2012, the following conclusions and recommendations are presented for consideration.

3.6.1 Make Traditional Management Systems (TMS) law optional and where adopted, preserve the role of the Aronga Mana

Codifying or legislating TMS should continue, with island communities having the option of being included in such legislation *or not*. Where it is legislated, the role of the Aronga Mana should be preserved within these laws as much as possible.

There is strong support from members of the Aronga Mana as well as participants of the CIMP Workshop held in 2012 for Cook Islands culture and custom to be recognized in the CIMP legislative framework by codifying or legislating for TMS including the functions of the Aronga Mana within those systems. Such support mainly arises out of concern expressed over the lack of effective enforcement of ra’ui as particularly experienced with the several ra’ui imposed in Rarotonga in the late 1990s. Some continue to hold the view that the only way ra’ui can be effectively enforced is by giving it “teeth” through legislation.

However, given the differences between islands, caution should be exercised in terms of how much of the TMS process needs to be legislated (if at all) based on a determination of the needs and experiences of each respective island community. For example, islands far smaller than Rarotonga may not have any difficulty with enforcement of TMS.

In recognition of such differences, it is proposed that TMS legislation should remain optional particularly for the Pa Enea. This approach also preserves the autonomy of the island authorities and encourages self-regulation or responsibility for their own affairs insofar as they are able, as envisaged through the IGA.

Authorities may also wish to consider whether a national overarching law providing a legal framework for TMS is more beneficial or whether to continue with subsidiary legislation prepared under the existing principal legislation³³.

It may be argued that there is more ‘protection’ for TMS by having a statute or enactment as opposed to a bylaw/regulation given that principal legislation will

³³Environment Act 2003, Island Government Act 2012, Marine Resources Act 2005

always prevail and there may be a risk of legislation being passed in future that will adversely affect any TMS bylaw or regulation.

Others who have concerns over codification of customary law would argue that the danger is that custom would be rigidified and difficult to change later – particularly when a community becomes accustomed to a particular process. This would also undermine the ‘flexible nature’ of customary practices. In addition, some would have concerns over the costs of introducing a new enactment particularly for the department identified to administer it.

The option of setting up a “Marine Park Trust” which would meet these extra costs was raised by one of the CIMPSC members. A trust of this nature could be established under legislation but will of course require clear policy decisions to be made on matters including:

- how would such a fund be administered and by who – a Board? The government department responsible for administering the legislation?
- who would be able to ‘tap into’ such funding – just the department? NGOs? Island Governments? If entities other than the administering department could apply for funds in the Trust then obviously the HOM would have a conflict of interest;
- any funding received by a government department falls within the definition of “public money” as that term is defined in the Ministry of Finance and Economic Management Act 1995-96 (MFEM Act) and will need to be administered or managed in accordance with its provisions;
- can government in future be ‘trusted’ not to divert such funds to another purpose or to have it form part of the general ‘appropriation pool’ as occurred with the Environment Protection Fund? This Fund received by way of statutory appropriation, a certain portion of the international departure tax. The initial intention of the appropriation was that it would be available to both government and non-government entities for conservation purposes. It later formed part of the NES annual budget appropriation. However as the Fund grew it was decided that it was in excess of NES’s needs and the legislation was repealed in order for the funds to become part of the normal budgetary/appropriation process.

In terms of the option of covering TMS through subsidiary legislation, an amendment or promulgation of such legislation is not as difficult or as lengthy a process compared to the amendment or passing of principle law - particularly when one takes into account the intermittent sittings of Parliament throughout the year. By having TMS covered under subsidiary legislation, this would allow for some flexibility in that should the legislation require an amendment, it would be a simpler, faster process.

One may also bear in mind that the threat of legislation undermining or affecting TMS subsidiary legislation will only arise if there is a lack of commitment and cooperation by government departments to the TMS process, i.e. if such a commitment exists, then government authorities will be mindful of TMS legislation when proposing new legislation and will ensure that such legislation accommodates existing TMS bylaws and regulations.

It may also be argued that once custom becomes law, it is no longer custom but law further weakening the traditional authority of the Aronga Mana given that the force or authority behind the TMS would no longer be that of the Aronga Mana but of Parliament and ultimately Her Majesty the Queen. Others may respond by pointing out that traditional systems are disintegrating due to the inability of traditional authorities to effectively manage and enforce these systems – codification can boost traditional law by strengthening the power of the traditional leaders through legislative support.

As mentioned earlier, much has been written about the need to preserve and perpetuate customary systems through legislation before knowledge and practices of these systems fade even further and for that reason, legislation (in addition to any written articles or books that may be written on custom) could also be viewed as a record of customary systems as they exist at the time the laws are made.

3.6.2 Consider the consequences on Aronga Mana of legislating TMS

Whereas there are features of both statutory and customary systems that are similar, authorities may want to consider whether there is a risk in treating TMS in like manner as another entity (“protected area” for example), in terms of the legislative requirements connected to these entities.

The apparent similarities between statutory and customary systems include declaring open and closed fishing seasons, as well as extending protection to or over certain areas.

If authorities agree that in order to preserve and promote customary law:

- one must either incorporate into the law as much of the customary principles as can be identified (without conflicting with the principal law); and/or
- draft the law in a way so as not to change or alter the traditional nature of the customary practice,

then consideration should be given as to whether treating ra’ui as another entity or form of conservation, would undermine the ‘authenticity’ of the customary practice.

For example, ra’ui recognized under the Environment Regulations, is given the same status as a “protected area”. As a “protected area”, the administration and management of ra’ui must include the preparation of a draft management plan which in Atiu’s case in particular is to be carried out by the Aronga Mana.

Obviously, preparing a draft management plan in order to declare a ra’ui is not part of a traditional customary process. It also places new responsibilities on the Aronga Mana who may require education, training and capacity building in this area noting the requirements under section 37(5) of the Environment Act when preparing a management plan:

“(5) In the preparation of the management plan, regard shall be had to the following objects:

- (a) the protection of special features, including objects and sites of biological, geological, and geographical interest;*
- (b) the protection of the water catchment values of those areas within*

- the plan;*
- (c) *the protection, conservation, and management of soil resources;*
 - (d) *environmentally sound traditional resource management practices and standards.”*

It has also been commented that the best conservation programmes provide simple management rules that can be easily followed and understood by the community. There is also a need to recognize the limitations of community-based management without imposing additional new responsibilities which may only complicate ra’ui matters for some of the Pa Enuu. In addition, compliance is easier if a process is relevant to the respective island and clearly understood by its residents.

3.6.3 Draft simple and relevant TMS law

Drafting TMS laws requires ‘sensitivity’ to the respective island and its particular customary systems therefore drafters or those issuing drafting instructions should not readily assume a “one size fits all” precedent will suffice. It should further be noted that people want simple and *relevant* laws.

With the advent of English law into the Cook Islands, the island communities have been subjected to laws that were in the main, drafted to suit English jurisdictions in terms of its relevance to their particular social, cultural, political and economic systems.

Even in modern times, legislation is often drafted based on precedent law that is borrowed from another country (or is a precedent used for another island within the Cook Islands), which is then tweaked to adapt it to the Cook Islands or the particular island community. Sometimes model laws are also prepared under the auspices of regional and international organisations to assist in ‘simplifying’ the job of a drafter and to ensure that the final draft bill covers all relevant regional/international obligations. However, relying upon precedents and model laws may not encourage or facilitate a consultative process with the community that will be subject to the proposed legislation.

This practice has also resulted in the existence of a number of laws that have not been driven from the “community up” but were initiated by outside influences and in some cases, by political and private concerns.

In addition, despite a judicial expectation that Cook Islanders will know and understand laws that affect them given that “ignorance of the law is no excuse”, laws are rarely written in a way that the general population can understand thus leading to the need to seek legal advice thereby incurring costs. There is also a general lack of awareness of what laws are in force or are being passed in Parliament and promulgated by the Executive Council (Cabinet sitting with the Queen’s Representative).

These factors can result in legislation that may satisfy government policy decisions and regional/international obligations but may end up “sitting on the shelf” due either to its lack of relevance and practicality in a Cook Islands context or to the inability of the administrators to implement its provisions.

There is a risk that if a similar approach is taken in producing TMS legislation that it may weaken customary law as island communities find themselves ‘stuck’ with legislation that may either conflict with their customary practices or alter them in some impractical or unworkable manner. There is also a concern that Ministers, HOMs and even the Courts who often shape the development of law, do so without a thorough knowledge of customary law, resource management practices and traditions - and sometimes without knowledge of the local language where and when required.

Against such a background, government authorities in particular are invited to consider whether it is more beneficial when codifying TMS, to put aside model laws and precedents (including those that reflect the requirements of the principal legislation) in order to focus on producing a legislative framework that is more practical and broad enough to accommodate ‘island-specific’ TMS.

Although in the interests of timeliness and for some the importance of uniformity, there is always a temptation to apply a “one size fits all” precedent or model law, problems with this approach may also include:

- Drafter or person issuing drafting instructions assumes that provisions are relevant to the island and there is no need for full consultation;
- Acceptance by both government authorities and the community that there is no room for “innovation” because it is how laws are drafted.

There should be a willingness at least among drafters (or those issuing drafting instructions) to “think outside the box” insofar as one is able within the confines of the provisions of the Constitution and any relevant principal legislation, in determining how to incorporate specific TMS features that are more appropriate for island communities - particularly the Pa Enea.

To illustrate this point, Dorothy Munro in her report on TMS in Pukapuka, advises that the sanctions for breaching ra’ui in Pukapuka are traditional sanctions, e.g. an adult being relegated to “child status”. She further advises that although the standard penalty provisions are available to the Pukapuka authorities, they have never been used – in other words at the time of writing at least, they were not relevant to the community.

If therefore the custom of *rahui* was to be codified for the island of Pukapuka, ideally in terms of relevance, these traditional sanctions would be included instead of or in addition to the standard monetary fine and term of imprisonment.

Of course an objective response to this would be that the principal legislation does not allow for any other penalties which of course raises the question as to the practicality of such penalties in the Pa Enea communities given the above example and the fact that some residents would struggle to pay a monetary fine (which under the IGA is now a fine up to \$2,000), not to mention the only *prison* facility in the Cook Islands is on Rarotonga.

The Environment Regulations model does provide another alternative in the case of a minor infringement whereby a sentence of community service not exceeding 30 days

can be imposed instead. Whether this is permitted under the Environment Act is questionable given that the provisions of the Environment Act under which the regulations are formed, do not set out any penalties other than a fine and/or term of imprisonment. Another option in terms of relevant penalties is to amend the principal legislation by allowing in certain circumstances, for the payment of fines to be made in kind.

There have also been recommendations made to set up “Customary Tribunals” at community level consisting of traditional leaders, which would have jurisdiction over TMS offending or any dispute related thereto. The penalties to be imposed by such a tribunal could be restricted to traditional sanctions or both traditional and those recognized under the principal law. Should the offender fail to comply with the directives of the Tribunal, the Tribunal may refer the matter to prosecution before the Court. Recognition may also be given to an offender’s right of appeal to the Court subject to Article 66A(4) of the Constitution which recognises the opinion of the Aronga Mana on “matters relating to and concerning custom, tradition, usage or the existence, extent or application of custom” to be “final and conclusive” - and furthermore cannot be questioned in any court of law. In other words if the offender is appealing to the Court on a matter relating to custom, under the Constitution the Court would not have jurisdiction to determine the matter unless such custom conflicts with existing legislation.

In addition to traditional penalties, TMS legislation may also be drafted setting out the traditional public declaration of ra’ui instead of such declaration being made by way of written public notice on a notice board. In all bylaws and regulations reviewed, this standard notice provision is utilized with such notice including a written description and plan of the area³⁴.

Reports on ra’ui for Rarotonga at least, describe the declaration of ra’ui as involving a traditional ceremony being held whereby signs having been placed on the roadside at the boundaries of the ra’ui, were unveiled. There was also a blessing of the ra’ui by the church. Further on this point, an excerpt from WWF Report, J Evans:

“The decision to make ra’ui would be made by the Ariki or chief of the tribe and declared through the Va’a Tuatua (speaker for the Ariki). The Mataiapo or heads of the sub-tribes, would then communicate the idea to the community. The way in which this was communicated is unclear but in Te Au O Tonga, the Pu Tapere (or head of a subdivision of a village) would beat a pate (drum) or blow a Pu (conch shell) to call a meeting of the community where the message would be conveyed. The area to be protected would be marked using sticks with coconut fronds tied to them and placed on the beach at each boundary of the area.”

There will be situations where not all in the community will read the notice board or even be aware of a notice until much later and some may find it difficult to understand certain information contained in it³⁵ but everyone regardless of literacy,

³⁴ Environment Regulations also refer to the option of using the media

³⁵In the Manihiki Bylaws section 14(3) attempts to address this – “it shall not be necessary that the notice use scientific terms for any raui protected species nor shall it be necessary that the

from children to the elderly, are more likely to notice and be drawn to a traditional ceremonial declaration involving the beating of *pate*, the blowing of a conch shell and a blessing by the church. If the purpose of “public notice” is to “get the message across”, the traditional method may be more effective in some island communities than posting written notices on public notice boards.

Authorities may want to consider including such a process in a bylaw/regulation as either part of the declaration process or to substitute the standard declaration process altogether. Of course this would depend on the provisions of the principal legislation under which the bylaw or regulations are to be made. Alternatively principle legislation could be amended or introduced that would allow for such an approach.

3.6.4 Draft TMS law that relies on partnerships for implementation

The Crown is committed through legislation and policy to promote and utilize TMS and to involve the Aronga Mana in the legislative process as well as the implementation of any TMS laws.

Based on the legislation and government policies, one can conclude that government authorities recognize their resource constraints and see the benefit of ‘partnering’ with island authorities to assist them in the sustainable management of the Cook Islands environment, albeit the level of commitment to this partnership may vary from time to time.

As part of this recognition, other forms of leadership in the Pa Enea such as the Aronga Mana are being relied upon to ensure the community complies with government policies, particularly in matters relating to the environment as well as culture or custom preservation.

Government also recognizes the “tyranny of distance” in regard to the remoteness of some of the islands of the Pa Enea and given that key ministries such as MMR do not have the resources to establish a presence on every island nor the finance to travel regularly between islands, they must rely upon island authorities to assist in providing necessary information as well as addressing any immediate concerns.

It is therefore considered more cost effective for government departments to support and rely upon island authorities to assist them in meeting the objectives of legislation the government departments administer that apply to the Cook Islands as a whole. Such support would include providing island authorities with the necessary tools which may include the legislative framework; financial support for setting up systems required; as well as support for capacity building. NGOs are also important partners in this process through providing funding sourced from overseas donors to assist with any training needs and the dissemination of relevant information.

description of the plan be of any particular form or degree of accuracy provided that the nature and degree of notice such as to be reasonably understandable and intelligible by the public”.

3.6.5 Use local expertise when legislating TMS

The Cook Islands has the legislative tools and the personnel with necessary expertise to assist in the establishment of TMS with successful outcomes.

The success of establishing or launching ra'ui initiatives is clearly illustrated in the reports written by Jacqui Evans and Anna Tiraa, as well as the Management Plans prepared for the Rarotonga ra'ui areas³⁶ such as the Pou'ara Rau Management plan³⁷ prepared by Kelvin Passfield and Anna Tiraa.

This capacity is also reflected in –

- subsequent MMR survey reports showing a significant increase in certain marine species identified within the ra'ui areas, compared to numbers within non-ra'ui areas; and
- existing bylaws and regulations that contain ra'ui provisions.

The Rau Management Plans for Rarotonga³⁸ set out a strategy that worked well in terms of securing the commitment of all stakeholders including 'buy in' from the public through public awareness programs and the inclusion of college students to assist with scientific monitoring surveys of the ra'ui areas.

In the Pa Enea, continuing use of ra'ui in the absence of TMS-specific legislation is also further proof that this particular customary practice remains a relevant and valuable conservation tool in their respective communities.

3.6.6 Consider whether legislating TMS is necessary

Island authorities would need to consider whether the codification of TMS will be more beneficial to the community in terms of enforcement

Subsequently, the initial success of ra'ui referred to above, was marred by evidence of continuous poaching, not just in Rarotonga but also in the islands of Mauke and Aitutaki where ra'ui areas had also been established - as demonstrated by the following news articles:

▪ **Cook Islands News 10 Jan 2002**

"[The article reports Kori Raumea's disappointment by reports of poachers taking food from the marine conservation areas around Rarotonga]. People had been removing sea urchins, trochus and ariri from the Nikao lagoon and he had unconfirmed reports of other transgressions elsewhere.

Raumea also backed recent calls from the Koutu Nui for local people to respect the marine reserves. He said the rau were becoming victims of their own success but added that the Ministry of Marine Resources did not have the power to prosecute people who break traditional laws governing the lagoon.

³⁶In addition to Pouara the ra'ui areas included Aroko/Avana/Nukupure, Rutaki, Nikao, Tikioki

³⁷copy of only plan obtained from NES

³⁸supra 34

'Not the first time reported to us, getting quite frequent. We are really looking for people to respect the raii. They are locals'. Raii has been successful but now some spoiling that success. Raii laws were controlled by villages and the Koutu Nui, but the lagoon still belonged to the locals. 'It is their lagoon' he said. 'The raii is based on trust, and people have generally been respecting it'."

The article also reported then Secretary of Marine Resources Navy Epati advising that permanent raii would affect both the community and the lagoon negatively. 'The marine system has a delicate balance. If you move too far in one direction it can have a negative effect. Raii should occasionally be lifted to allow the community to use the resources and take the pressure off other areas of the lagoon'.

Cook Islands News 2nd Feb 2011
400 paua killed as Mauke raii fails.

"Mass killing of hundreds of young paua on Mauke island will lead to a review of the raii there. In 2008 a raii was put in place on the island from Patito to Anaio, a half km stretch of lagoon which includes one of Mauke's noted tourist attractions, a salt water swimming cave known as Kopu Pooki.

A year later on 8 Dec 2009, the raii was opened for 1 week for public viewing only. Unlike Raii in Rarotonga, in Mauke when a tapu is placed no one is allowed in that area from the beach to the reef, at all, except in emergencies. At that time it was suggested that next time the raii be lifted for a harvest.

As 2010 came to a close, the community was divided on this idea but on 13 December unbeknown to some the raii was lifted. The next day we were appalled to find a beach littered with lime skins and paua shells. At the entrance we picked up 55 shells. We estimate as many as 400 paua were killed in just a few hours leaving few survivors.

Mayor George Samuel – "We need to look at Environment and Mauke Acts as a means of protection of the raii. The whole community must be involved in upkeeping such projects for the benefit of our heritage. An awareness programme should be in place to understand it's their own living they are destroying. I am sorry there was no rule put in place regarding what to take and what size. This raii signals a clear view of what to do for the next one".

Cook Islands News, Mon 30th July 2012
PM asked to enforce raii penalties

MMR senior fisheries officer in Aitutaki Richard Story speaks out against the "cowboys" who pillage fish from the raii areas in Aitutaki. Aitutaki raii was put in place by the Aronga Mana and the Aitutaki Island Council in 2000 on 4 sites. A group of fishermen had gone into the Motikitiu-Tapuaetai raii to fish at the disappointment of those who witnessed it. 'This particular incident saddened a lot of people because the kids were having a picnic on that day and the parents were looking after the kids'. Story told Cook Islands

News. 'Then some parents went and fished in the rauī, it was a really sad incident. They're showing kids they don't respect the reserve – that really, really hurts'. The senior fisheries officer said he's not surprised people are not adhering to the rauī but said it was time someone highlighted the issue.

'It's a bit of a sour issue with those who are respecting it. What it means now is those who respectful go the other way. I think it's important somebody highlights it so the councils do something about it.

While seen as very disrespectful towards the Aronga Mana and Aitutaki Island Council, there are no legal penalties for fishing within a rauī.

Story sent a letter highlighting the issue to Aitutaki Mayor John Baxter but no action was taken. The senior fisheries officer is calling on Prime Minister Henry Puna to look at bringing consequences for those who take from inside the reserve. "I believe it's not only happening in Aitutaki, its happening all across the islands – it's happening all over. It was the Prime Minister's vision, maybe that's one of the areas he should be pushing. That's part of the 'going green' process – more fish in the lagoon, more fish in the ocean. They should be supporting it". While some areas were very good watching out for pillagers – Titikaveka in particular received plaudits for having a very heavily watched area - others left themselves open for 'cowboys' Story said.

Story wanted to call a meeting of Aitutaki residents and Aitutaki Island Council to address the issue for all concerned. "People turn a blind eye to it".

Such behaviour lead to a change of heart among the Koutu Nui who had initially resisted proposals to legislate ra'ui - among them former President of the Koutu Nui, the late Te Tika Mataiapo Dorice Reid who is quoted by Tiraa³⁹ as having said: *"We would love our people to learn through education not legislation. Our approach to conservation is not by fear but through respect."*

Furthermore, the Police were reluctant to assist in the enforcement of the ra'ui given their concern that they had no legal jurisdiction to arrest poachers.

The comment made by the late Dorice Reid is relevant to the question for each island community when deciding whether to codify customary law – will it be more beneficial to the community as a whole for customary systems to be imposed through the use of a "big stick" (or "teeth") through legislation – or is it better to rely on the power of persuasion and community/family ties aimed at conformity through a willingness to comply out of respect for traditional authority, proper understanding and support, rather than 'coercion' through legislation.

It should be noted that punishment for infringing ra'ui was also exercised traditionally and appears to have been more severe compared to the existing fine and imprisonment term. It is reported that in pre-contact times punishment ranged from execution, being set adrift in a canoe, banishment, deprivation of certain land rights to being beaten or having one's property destroyed. Traditionally therefore the "big stick" approach may not necessarily conflict with pre-contact customary practices but more importantly the question is, which approach is appropriate in today's context for the respective island communities.

³⁹Supra note 9

It was further noted from what has been reported on the Rarotonga ra’ui that one of the main reasons identified for the eventual poaching was the decline in public awareness and dissemination of information. It therefore raises a question as to whether in fact legislative “teeth” to enforce the ra’ui was and is the answer to poaching problems or whether poaching could have been avoided if public awareness and education had been consistently maintained.

3.6.7 Maintain public awareness and education throughout implementation

Public awareness and education on TMS must be maintained to ensure the community does not forget a ra’ui is in place and continues to respect it. Proper signs that are regularly maintained are also necessary particularly on Rarotonga.

Reports on ra’ui indicate that public awareness and education of ra’ui must be maintained to keep ra’ui “in the public eye” whilst ensuring proper clear signage is regularly maintained – particularly in the larger island communities of Rarotonga and Aitutaki.

This was identified as one of the ‘lessons learnt’ from the Rarotonga ra’ui and one of the reasons why there was a decline in support. Whereas active community consultations were common at the initial phase, this became less frequent over time and the dissemination of information through the media and other channels declined. This resulted in a lack of awareness as well as uncertainty as to the current status of ra’ui⁴⁰.

It may be a challenge to continuously maintain the publicity “high” but no doubt it is something the authorities and administrators in Rarotonga in particular, can address through innovative measures and actively sourcing financial support for regular awareness campaigns – alternatively such costs could be covered by a Marine Park Trust fund.

From experience it would appear that public awareness requires financial input for long-term effective management, dedicated to a continuous and focused commitment on education activities. There is also a need to publicise the respective roles of stakeholders to avoid confusion as well as recognizing that lagoon management alone is insufficient to solve all problems, that it also involves to a larger extent the ‘management of people’.

3.6.8 Develop capacity for implementation of the TMS law

When a drafter has clear instructions, the drafting of the law is relatively simple. Promulgation is also without complication once it is submitted to Cabinet. The difficult part in the process is the implementation of the law.

As already mentioned, it is not uncommon for laws to be passed in the Cook Islands in order to meet policy directives then lie dormant without being fully implemented - or there may be momentum initially but after a time, such commitment dissipates. It

⁴⁰“Management Plan for a Ra’ui in Pouara – Matavera” – Kelvn Passfield & Anna Tiraa

would be correct in this context to view the law as a tool that is only useful if and when it is put to use.

One of the reasons for this is a lack of capacity and resources. Resource-strapped government departments can find it difficult to fully comply with their responsibilities as they currently exist without having extra responsibilities placed on them through new laws – particularly if they are not successful in their budget bids for extra funds for the purpose of fulfilling the new responsibilities. In such a climate, HOMs will tend to focus on their identified priorities at the expense of other responsibilities that fall further down in the priority list.

It may be prudent for the authorities to take this into consideration when determining the legislative process in order for island authorities to avoid facing a similar problem, i.e. being given extra responsibilities under legislation without the funding or assistance it requires in order to successfully implement the legislative responsibilities. It also emphasises the importance of full support being given to the island communities by way of proper funding and capacity building initiatives. For that reason island authorities should exercise caution when receiving a proposal from central government under the IGA to devolve to it, certain responsibilities – a careful analysis of its capacity both financial and administrative, would need to be considered.

The authorities may also consider whether it is preferable for capacity building initiatives to take place prior to the commencement of the legislation in order to better prepare island authorities for implementation from the commencement date rather than promulgating the law first, then following this up with capacity building and awareness – in view of the fact that some training programmes can be delayed despite the law being in place, due to a lack of funds and/or non-availability of training personnel.

Preparing in advance may also give island authorities a real sense of what the proposed law entails, providing an opportunity to identify ‘what works and what doesn’t’ thereby giving authorities time to amend draft bills or laws before it is submitted to Cabinet for approval. This may save time and resources in terms of having to repeat the whole legislative process for any amendments that may be required after the legislation has been passed or promulgated.

As can be seen from the bylaws and regulations currently in force, they contain a variety of provisions that do not specifically relate to TMS but include other areas that would “compete for attention” and limited resources.

In terms of resource and capacity, Government authorities may consider other alternatives to enable island authorities to meet legal obligations by resisting the temptation of covering everything under one bylaw and instead introduce or “stagger” them over a period of time allowing them to build up capacity gradually and so as not to stretch thin limited resources – for example, introduce TMS-specific legislation without adding other environmental or public health responsibilities at the same time.

To illustrate the amount of training required for all Pa Enea (should all islands decide to come under similar legislation) the following areas are identified under existing ra'ui legislation:

- Scientific monitoring of ra'ui areas – given that not all islands have a Fisheries Officer, people within the community need to be taught how to collect and analyse data;
- Drafting management plans;
- Alternative Dispute Resolution - where local dispute resolution or enforcement fails;
- Training of enforcement officers such as “tiaki ra'ui” by Police - in the collection of evidence and establishing a “chain of evidence” with regard to exhibits to be used as evidence in prosecution, how those exhibits are to be stored, preparing reports, search and seizure as well as understanding what is meant by the term “reasonable suspicion”;
- How to apply for a search warrant to search private premises;
- Familiarity with the Public Health Act and its relevant subsidiary legislation and codes;
- How to establish and maintain a register;
- Finance in terms of handling monies received under the bylaw/regulation.

Duplication and the importance of the consultative process

At the CIMP Framework Workshop held in February 2012, the participants concluded that CIMP legislation “should not be duplicated” and “should also be simple and culturally appropriate at all levels”. In terms of duplication, improved coordination and consultation is required among government departments when proposing legislation that impact upon or overlap their respective responsibilities⁴¹.

The lack of consultation and communication on proposed legislation has been an ongoing problem within government with some departments failing to consult others affected. It is not uncommon for Bills and draft regulations to be sent to Cabinet without having gone through a full consultative process at department level.

Not only would an improved consultative process foster and maintain good relationships between departments but it would also ensure that government policies are complementary and that precious resources are not being wasted on duplicating responsibilities under the legislation. Of course one may conclude that this can be addressed through the formation of sector-relevant committees e.g. a government environment committee however, this does not always work in practice as evidenced by the feedback received on the CIMP Steering Committee.

Unfortunately at the time of interview at least, it would appear that government stakeholders continue to focus on their own individual priorities without reaching consensus on CIMP policies. Perhaps as an additional measure, there needs to be more reliance on the Core Agencies Committee⁴² to ensure that all proposed

⁴¹ An example may be where NES and MMR draft “raui” legislation independently of each other

⁴² Consists of Solicitor-General, Financial Secretary, Public Service Commissioner, Chief of Staff and Secretary to Cabinet who collectively consider all Cabinet Submissions before they are tabled with Cabinet.

legislation has been commented on by all departments who are impacted by the legislation before it is tabled with Cabinet.

3.6.9 Install performance monitoring during implementation of TMS law

The importance of having the ‘right people’ in the relevant positions or reviewing their involvement in the process should not be overlooked

One area that is commonly overlooked is the importance of having the right people in key positions particularly in the implementation of law and policy. Sometimes problems are created not because of resource or legislative issues but are due to performance issues (lack of commitment or necessary skill) as well as personal agendas in terms of the objectives of the law and the priorities of the department. There are also times when political interference (influenced perhaps by pressure from political supporters) may dictate a department’s focus.

As pointed out in some reports, certain management strategies and the level of government involvement varies greatly and depends solely on individual HOMs, fisheries officers, leaders and communities.

In the WWF Report⁴³ reference is made to the failure among government departments to implement marine protected areas or sustain marine education and awareness activities.

“Each has worked individually and has failed to get messages through to all sections of the community”.

The tendency to “work individually” still exists among certain government departments according to the individual responses made by members of the CIMP Steering Committee.

The danger or risk that arises when authorities ignore what may be a personality issue, is a tendency to look to legislation as either being the problem or to ‘fix the problem’. For example, if a law or provisions of it are not being used or implemented appropriately it is easy to conclude that such provisions are unworkable and should be ‘done away with’ or alternatively, that more legislation is required to compel a person to implement a policy. This of course does not address the real problem or source of the problem.

In terms of offering a solution, in some cases any concerns should be taken up with the relevant Minister or alternatively government authorities could consider whether the HOM performance review criteria is sufficient to address such issues and whether new criteria should be recommended. This of course would require discussion with the Public Service Commissioner who is responsible for all HOM employment issues.

One interviewee also stated that the Aronga Mana should make use of the educated and skilled people within the family or tribe by entrusting to them certain responsibilities on their behalf given that they would have a better understanding of

⁴³Mechanisms for Establishing Marine Protected Areas on Rarotonga – WWF, J Evans, 2001.

the requirements of the law or be more aware of the legal and economic issues. Through their expertise and education they can further advance the tribe and community in terms of financial and other benefits.

3.6.10 Consider the House of Ariki as a clearing house mechanism for TMS

As a means of continuing to recognize and support the role of the Aronga Mana, consideration should be given to establishing the Office of the House of Ariki as a “clearing house mechanism” for all information on TMS and other customary systems in the Cook Islands

The term “clearing house mechanism” is taken from the Biodiversity Convention and is set up to facilitate access, to create transparency and to identify factors relevant to implementation. It assists with decision-making and improves coordination on relevant proposals and projects.

There has been comment made of the need to have a national register which would record all TMS sites within the Cook Islands and although there may be a government department currently maintaining such a register, this would not prevent the Office of the House of Ariki having one also along with all other information on customary systems in the Cook Islands – more particularly given the consultation that they will be carrying out should their application for funding be approved.

The requirement to forward information to the House of Ariki may also be included in any TMS legislation covering the Pa Enea or alternatively information can be received through Aronga Mana members in the Pa Enea. TMS could also form part of the agenda to be discussed and reported upon during the sittings of the House of Ariki.

Given however that such a responsibility is not covered by the functions identified in the House of Arikis Act, the Act would require an amendment to facilitate such a proposal.⁴⁴

3.6.11 Improve coordination, collaboration, cooperation and consultation

There is a need for improved coordination, cooperation, acceptance and consideration of the interests of each stakeholder involved in the CIMP.

This matter has been mentioned previously and is based on the feedback of CIMPSC members. It should be pointed out that at the time of consultation the CIMPSC had not collectively formulated any policy directives regarding CIMP due to internal ‘divisions’ and a refusal to compromise. One HOM in particular was identified as being particularly uncooperative and no longer attended meetings. Even within certain bodies represented, there was evidence of disagreement among its members.

⁴⁴Article 9(b) of the Constitution provides that the House of Ariki “shall have such other functions as may be prescribed by law”.

If this is the climate within which TMS is to be legislated and implemented, its success may be undermined from the start given the influence held by HOMs when it comes to policy development and legislation. It may be that the most effective way to ensure cooperation is by having a Cabinet Minister such as the Prime Minister, chair such a committee.

In the written reports of the CIMPSC Consultation Meetings that were held in 2011, 2012 and 2013, a common concern of the community were the foreign fishing vessels that could be seen from their islands and the impact of their presence on small-scale local fishermen. There was also public criticism of the MMR over the introduction of certain regulations:

- Marine Resources (Licensing) Regulations 2012
- Marine Resources (Large Pelagic Longline Fishery) Regulations 2012
- Marine Resources (Purse Seine Fishery) Regulations 2013

Criticism also included the lack of consultation – particularly concerning the Purse Seine Fishery Regulations. In addition to a concern over foreign fishing vessels, a desire was also expressed by the Pa Enea to be involved or consulted in the license application process insofar as it applied to waters around their islands. No enquiries have been made as to whether any consultation took place on these regulations but there is scope for it given the definition of ‘fishery waters’ and ‘fishery’ in the MRA – the latter requiring “geographical, scientific, social, technical, recreational, economic, and other relevant characteristics” to be taken into account.

It may be argued that it is not the intention of the Regulations to affect any TMS practices or marine resource management in the Pa Enea that are under the responsibility of the island authorities however, the definition of “fishery waters” in the principal Act is all encompassing and not only includes territorial sea but also includes “other internal waters, including lagoons”. Further note that the definition of “Atiu” “Takutea” and “Mitiaro” in the Environment Regulations includes waters within 12 nautical miles”. Pursuant to section 42 of the Regulations, “no vessel may anchor and remain with the lagoon, harbour or reef *or within 12 nautical miles of Mitiaro/Atiu/Takutea*”.

The process of involving or consulting with the island authorities is not clearly stipulated in the Purse Seine Fishery Plan 2013. However, depending on the Secretary of MMR, the MRA is broad enough to allow for consultation to take place under clause 13(v) “make provision in relation to any other matter necessary for *sustainable use* of fishery resources”.

As referred to earlier in the report the definition of “sustainable use” in the MRA includes the “*cultural* wellbeing” of the people – whether or not the Secretary chooses to recognize this as including TMS is another matter.

3.6.12 Recognise the attraction and value of TMS in tourism

The CIMP including the use of TMS such as “ra’ui” is a drawing card for tourism

The Tourism Cook Islands Office fully supports the CIMP and confirmed that having a Marine Park is an attraction for tourists. Reference was made to the mural at the Rarotonga International Airport, which sends a message to tourists that the marine environment or CIMP is of key importance to the Cook Islands.

The CIMP is also included in Tourism Cook Island's marketing strategy, which includes a brochure on the CIMP covering "tips for protecting our marine park".

These tips include:

"Respect rahui (conservation) areas. You might notice signs around our coastline or find out from your host/accommodator where they are and what they are there for".

Speak up if you see people taking too much, taking creatures carrying eggs, taking from rahui (conservation) areas, scratching/graffiti on corals and so forth. Please speak up for our future!"

The brochure also includes information about the CIMP being one of the largest in the world and the variety of marine species within it. Also listed are 'Do You know?' facts identifying interesting facts about certain species and dangers to the marine environment which include:

"Global fisheries take US\$235 billion worth of marine resources every year. More than 40 percent of the ocean has been severely affected by over fishing."

- the message being that CIMP is or will be protected from such dangers.

Tourism also explained that visitor surveys show that two-thirds of visitors to the Cook Islands are well-educated at tertiary level and therefore have particular interest in conservation measures including seeing evidence of customary systems or TMS still being utilized today. It was further pointed out that many visitors come from countries to "see things they don't see any more in their own countries" and tradition and custom is high on that list.

4 FEEDBACK FROM THE CIMP STEERING COMMITTEE INCLUDING FEEDBACK ON OPTIONS FOR STRENGTHENING MAORI LAWS.

The draft report indicated issues that would need to be determined by policy-makers in order for options to be clearly set out - for example whether to continue to use precedent/model law or introduce a new legislative framework for ra'ui or marine TMS. Furthermore given the recommendation that the codification or legislating of maori customary practices be optional and determined by the specific TMS issues facing each island community, clarifying options would depend upon TMS information obtained from each of the communities.

It may be that the information gathered during the Pa Enea visits carried out in February by CIMPS members will be sufficient for this purpose and any further

information or clarification required can be obtained by the Aronga Mana.

In addition, Part A of the report also raises salient policy issues that would affect any determination of the options presented. These include:

- (a) whether to establish CIMP under a separate enactment or within existing legislation such as the MRA or Environment Act;
- (b) whether such an Act would be administered by an existing department or a new entity;
- (c) if a new entity is formed, a determination of its role and functions is required;
- (d) if the Act is to be administered by an existing government department, which department should have the responsibility;
- (e) how would such legislation impact upon other departments, organisations and bodies represented on the CIMPSC as well as island governments;
- (f) how would TMS be treated under such legislation;
- (g) how is the CIMP to be zoned or planned;
- (h) how is it to be financed.

One might argue that such matters do not need to be determined in order to decide on options to strengthen customary law but it may be a waste of time and resources to go through the process of preparing legislation only to find that parts of it are invalidated by new legislation or that it would have been better to prepare legislation under a ‘new CIMP Act’. Furthermore, if it were to be concluded that it would be best to formulate laws under an existing statute⁴⁵ it may be prudent to wait until a decision has been made as to which department will be responsible for CIMP in order to decide which statute would be preferable.

As Prof. Justin Rose explained by way of analogy at the recent CIMP Workshop⁴⁶, one cannot make “shoes” without knowing what kind of shoes are needed – details of which are currently unknown and must be decided upon by policy-makers. On this note it was stressed at the Workshop that it is not the job of the legal reviewer to “fill the gaps” by creating and determining government CIMP policy – this responsibility lies with the members of the CIMPSC and ultimately Cabinet.

One should also point out that there may not always be consensus on what is an “advantage” and what is a “disadvantage” i.e. what one may see as a disadvantage may not be so to another or may even depend on particular circumstances. For example, one of the concerns raised regarding the draft MMR Ra’ui Regulations concerned the authority of the Secretary of MMR. This is listed as a *disadvantage* in that it undermines and in certain cases, supersedes the authority of the Aronga Mana. MMR on the other hand may see this as an *advantage* given that the Secretary of MMR as the HOM is ultimately responsible for Regulations made under MMR legislation.

In addition as HOM he would be aware of issues that Aronga Mana may not be aware of such as Cook Islands legal obligations under treaties, conventions and agreements. By being consulted or having the final say over the establishment of ra’ui he can satisfy himself that all directives issued under the Regulations do not conflict with

⁴⁵ IGA, MRA or Environment Act

⁴⁶ 5th March 2014, Crown Beach Resort, Rarotonga

such obligations.

Against this background, what is set out below is a summary of options for CIMPSC members to consider and determine alongside the policy decisions required under Part A of the report. Advantages and disadvantages as listed are not exhaustive but identify some of the issues for them to consider:

4.1 Preserve the status quo

Some of the Pa Enea may not have any problems with TMS, i.e. these are being practiced, respected and enforced without the need for legislation. Legislation should only be introduced if it is needed.

Advantages:

- retains traditional status of custom as well as the authority of the Aronga Mana;
- ensures that offending is dealt with in accordance with penalties that are appropriate to the respective community;
- retains flexibility;
- teaches the younger generation to recognize *custom* as opposed to *law*.

Disadvantage:

- TMS may disappear if no longer practiced. Having legislation in place ensures that it is practiced, complied and retained for as long as the legislation remains;
- Police may not be able to enforce the ra'ui without legal jurisdiction.
- Poachers who have no respect for traditional practices will not be deterred.

4.2 Introduce principal legislation

Drafting a separate TMS or ra'ui enactment that would apply to all islands is another option. Alternatively, it could be covered under a CIMP Act. Such an enactment (or Part of an enactment) would include general provisions based on what is commonly shared by all islands – e.g. definition of ra'ui, fine and imprisonment sanctions as well as the ability to impose traditional sanctions as determined by the Aronga Mana. The legislation could also set up Customary Tribunals. Subsidiary legislation could then be made under such an enactment which would cover specific issues faced by the respective island communities.

Advantages:

- TMS protection is “stronger” and more protected as principal legislation in that it is far less likely to be invalidated by other enactments.
- As a statute, TMS is afforded more status and certainty as statutes are always considered to have more legal effect than subsidiary legislation, e.g. where there is a conflict between a principal law and subsidiary law, the principal law prevails;
- Unlike subsidiary legislation, an Act can include provisions relating to TMS that are not found in existing legislation, e.g. the imposition of traditional penalties.

Disadvantages:

- Custom is rigidified, i.e. no longer flexible. For example under TMS legislation any person who breaches a condition of the ra'ui is subject to a fine or term of imprisonment. The Aronga Mana may not wish to impose any penalty but in most cases the law will require it;
- In a situation where an urgent amendment is required, principal legislation takes longer to amend given that in order for an amendment to become law, it must be tabled and passed in Parliament which sits intermittently during the year.

4.3 Introduce Subsidiary legislation

Clearly TMS legislation can be drafted and promulgated as subsidiary legislation under the statutes below. In terms of timeliness the process for making bylaws and regulations has a much shorter timeframe than that for principal legislation.

It should also be noted that regulations and bylaws cannot introduce law or provisions not contained in the principal Act under which they are made – in other words, they are restricted to the provisions of the principal Act.

4.3.1 Island Government Act 2013 (“IGA”)

Bylaws and regulations that cover Pa Enea administration are mainly prepared under the legislation that establishes local government (as illustrated in this report).

Under the IGA, legislation covering ra'ui and other TMS can continue to be promulgated under Part 7 and more specifically section 70(5):

“Despite the provision of any other law, an Island Government is empowered to make bylaws for the protection and promotion of the culture, traditions and community values of the island, and such bylaws may protect intellectual property in any traditional knowledge or practice and regulate research into culture and traditions of the island”.

In addition to island governments being authorized under the IGA to make their own bylaws (without the need it would seem to go through Cabinet and the Executive Council), penalties of a fine up to \$2,000 and/or a term of imprisonment of 3 months can be imposed for any offences committed under these bylaws.

Advantages:

- The IGA specifically provides that an island government can make bylaws for TMS which means TMS bylaws in the Pa Enea can be made relatively quickly;
- The implementation and administration of such law lies solely with the island government which includes members of the Aronga Mana - as opposed to any central government department. Aronga Mana are legally recognized under the Constitution as being the authority of maori custom. Therefore any legislation that covers maori custom should include them

specifically. As members of the island government they are automatically included in the enforcement of TMS bylaws made under the IGA;

- Each island in the Pa Enea can initiate and prepare bylaws that relate specifically to their communities and customary practices.

Disadvantages:

- A bylaw made by island government may not have the same force of law as one promulgated by the Executive Council;
- Island governments would require guidance and assistance in preparing bylaws;
- Given the ease with which bylaws can be made, these may also be just as easily amended or revoked at the will or whim of an island government thereby undermining stability or consistency in these laws;
- Island governments may not have the capacity and resources to implement legislation – they may therefore pass bylaws without fully appreciating the costs and impact of implementing them. Alternatively, they may be unable to make bylaws without central government support;
- They may not have the “contacts” or established relationships (networks) with other countries and organizations that would assist them in delivering legal responsibilities or implementing the legislation;
- Given the small communities in the Pa Enea and the ‘independence’ of local government from central government, there may be less accountability, with island authorities being reluctant to enforce penalties against offenders or there may be inequitable treatment of offenders based on political or family favouritism.

There is also a legal requirement⁴⁷ for island governments to ensure that all bylaws are consistent with the provisions of the EA (Environment Act). There is a corresponding provision under the EA that island government bylaws relating to the “protection or management of the environment” must be approved by the Minister of the Environment. Once approved it is deemed to have the force of a regulation made under the EA and as a result attracts a higher penalty, of a fine not exceeding \$50,000 and a fine not exceeding \$1,000 for every day the offence continues.

This may be beneficial if the intention of the bylaws is to capture foreign companies as a fine of this magnitude would be more appropriate for such offenders however one would not expect such fines to be applicable to most local offenders. Although one might conclude (given the wording “*not exceeding* \$50,000”) that means a fine of anywhere from \$1.00 upwards could be imposed, the Courts do interpret the maximum figure of a fine as an indication of the seriousness of the offence. Therefore any fine imposed under such a provision would need to reflect the gravity of the offence.

4.3.2 Environment Act 2003 (“EA”)

TMS legislation as evidenced by the Environment Regulations is available to other Pa Enea who decide to come under NES jurisdiction. The Environment Regulations

⁴⁷ Section 69(3) IGA

were made under section 70 of the EA. Section 70(h) authorises regulations to be made to establish “protected areas”.

Advantages:

- In the absence of Rarotonga local government legislation, Rarotonga is covered by the EA;
- A precedent exists which can be applied to all islands thereby ensuring prompt preparation of the law, less costs in drafting legislation and uniformity of requirements;
- As the Regulations fall under the EA, the NES has an obligation to partner with island authorities to ensure that the Regulations are effectively being implemented as well as providing funding and capacity-building initiatives towards that purpose;
- NES has the expertise and knowledge to educate and train island government administrators in the implementation of the TMS legislation;
- NES can tap into a range of donor funding to meet capacity needs of island government administrators.

Disadvantages:

- not all Pa Enea islands come under the EA as this was made optional for the Pa Enea;
- “ra’ui” is treated as a “protected area” and all requirements for protected areas as set out under the EA of the principal Act, would apply. As mentioned earlier in the report, this raises issues as to whether these requirements alter in any way, the traditional nature or custom of ra’ui;
- the use of a precedent may not encourage proper consultation nor take into account the unique customary features of the respective Pa Enea;
- given the Regulations fall under an Act administered by a central government department, the possibility may exist of conflicts arising between NES and the island government in terms of its implementation or management;
- given NES’s other priorities, TMS legislation may have to ‘compete’ with other priorities in terms of budget and resources.

4.3.3 Marine Resources Act 2005 (“MRA”)

The draft Marine Resources (Ra’ui) Regulations were drafted under section 92 of the MRA - a provision which clearly allows for TMS regulations to be made given its broad and extensive application in matters relating to the marine environment.

Advantages:

- as the Regulations fall under the MRA, the MMR has an obligation to partner with island authorities to ensure that the Regulations are effectively being implemented as well as providing funding and capacity-building initiatives towards that purpose;
- MMR has scientific expertise and knowledge necessary to monitor the success of marine TMS such as ra’ui. Its officers can also provide training in scientific monitoring to enable Pa Enea officers or personnel to carry out such monitoring themselves;

- MMR can tap into a range of donor funding and/or expertise to meet capacity needs of island government administrators.

Disadvantages:

- The draft regulations grant the ultimate decision to establish ra'ui to the Secretary of MMR. This of course supersedes the traditional authority of the Aronga Mana to establish and declare a ra'ui.
- Given the Regulations fall under an Act administered by a central government department, the possibility may exist of conflicts arising between MMR and the island government in terms of its implementation or management;
- given MMR's other priorities, TMS legislation may have to 'compete' with other priorities in terms of budget and resources.

4.3.4 House of Ariki Act 1966 ("HAA")

Subject to amending the HAA, TMS regulations could be made under the HAA and may be more appropriate for Rarotonga in the absence of Rarotonga local government legislation.

Currently, the functions of the House of Ariki under the Constitution and the HAA is to "express its opinion and make recommendations" on matters referred to it by Parliament that are relative to the welfare of the people of the Cook Islands. It may also of its own motion make recommendations to Parliament upon any question affecting the customs and traditions of the Cook Islands.

Pursuant to section 19, regulations may be made if in the opinion of the Queen's Representative they are necessary to give full effect to the provisions of the Act and its administration. For the avoidance of doubt if TMS regulations are to come under the HAA, the HAA would need to be amended to extend its functions beyond an advisory role by setting out its authority to declare ra'ui over certain marine areas.

Advantages:

- Further recognition of the authority of Aronga Mana at legislative level;
- Strengthens leadership role of Aronga Mana in the area of custom and tradition;
- Would be beneficial for Rarotonga in particular in the absence of Rarotonga local government;
- Regulations would clearly fall under the authority and responsibility of the Aronga Mana.

Disadvantages:

- As with the introduction of any new legislation, extra administrative costs may be required to support the House of Ariki;
- If the Pa Enea do not utilize the HAA to introduce its TMS legislation and Rarotonga does, there may be a risk of the House of Ariki focusing most of its attention, resources and support on Rarotonga TMS legislation.

5 CONCLUSION

The current legislation may not be perfect but it clearly provides a framework within which TMS or ra'ui in particular can be legislated and recognized for those island communities that need such legislation. The objective is to provide island communities with the tools they require to assist them in preserving and implementing customary practice - whether that be in the form of legislation or capacity-building.

It is also a fact (both traditionally and legally) that all customary practice including TMS requires the direction and authority of the Aronga Mana. As referred to earlier in this report, their authority on what is custom is recognized in the Constitution. It is also clear that ra'ui can only be imposed if determined or supported by the Aronga Mana regardless of any relegation of their role to one of "advice and recommendation" only - even where legislation may stipulate that the decision to impose a ra'ui is made by the HOM, such authority would be in theory only.

There was some discussion during the recent workshop as to whether TMS could extend beyond the foreshore or 12 nm zone. This proposal of course was not supported by MMR who in response referred to the issue of security should island government enforcement officers try to board a vessel. In addition, fisheries expertise is required to understand fishing logs and data as well as regional/international fisheries law as it relates to dealing with foreign fishing vessels. Global studies of community-based fisheries management prove that it is most suited for inshore coastal areas where monitoring, control and surveillance activities would be far easier to execute. It was agreed however that should there be any suspicious sighting of foreign fishing vessels in the Pa Enea, the island authorities should report such sightings to MMR.

Finally, the establishment of a CIMP has without a doubt, provided an avenue to enhance and promote the relevance and significance of TMS and authorities should take full advantage of the opportunity being presented in recognition of its cultural value to the Cook Islands.

"The importance of traditional management practices should not only be measured by its present use but also by the possibility of its use in the future.... The preservation of customary practices and traditional marine resource management cannot be dismissed without striking at the very heart of the local communities' cultural identity ..."(Pulea 93/23)⁴⁸.

⁴⁸Supra no 4

6 REFERENCES

- “Land Tenure in the Cook Islands” – R. Crocombe 1961
- “Policy Brief for Developing Draft Ra’ui Regulations” –adapted from G. DeRomilly et al 2005
- “Mechanisms for Establishing Marine Protected Areas on Rarotonga” – J.Evans WWF Report 2001
- “The Reimplementation of Ra’ui: Coral Reef Management in Rarotonga, Cook Islands” – Tegan Churcher Hoffman (CORAL) 2002
- “Creating Legal Space for Community-based Fisheries and Customary Marine Tenure in the Pacific: Issues and Opportunities” – Based on the work of Blaise Kuemlangan, FAO Legal Office, 2004
- “Traditional Authority and Community leadership: Key factors in community-based marine resources management and conservation” – Annette Muehlig-Hofmann SPC 2007
- “Traditional Marine Management Areas of the Pacific in the Context of National and International Law and Policy” – M. Vierros, A. Tawake, F. Hickey, A. Tiraa, R. Noa, United Nations University
- “An Overview of Constitutional and Legal Provisions Relevant to Customary Marine Tenure and Management Systems in the South Pacific” – Mele Pulea, USP, FFA Report 93/23
- “The Organisation of Traditional Inshore Fishery Management Systems in the Pacific” – Kenneth Ruddle, National Museum of Ethnology, Osaka, Japan
- “Ra’ui in the Cook Islands – today’s context in Rarotonga” – Anna Tiraa, SPC, 2006
- “Management Plan for a Ra’ui in Pou’ara-Matavera” – K. Passfield and A. Tiraa, 2003
- Cabinet Minute (11) 0381 – establishment of CIMP Steering Committee
- “Cook Islands Marine Park Framework” – Adopted at CIMP Framework Workshop 9 February 2012
- “Mauke Consultation Report” – CIMP Delegation 5 – 7 December 2012
- “Aitutaki Consultation Report” – CIMP Delegation, 24-27 September 2013
- “Atiu Consultation Report” – CIMP Delegation, 30 Sept – 2 October 2013
- “Mangaia Consultation Report” – 9 October – 11 October 2013;
- “Vaka Te Au O Tonga, community consultation report” – CIMP Committee 12 July 2011
- “Vaka Takitumu, community consultation report” – CIMP Committee 13 July 2011
- “Vaka Puaikura, community consultation report” – CIMP Committee 14 July 2011
- “Marine Park Consultations with the Tere from Pa Enuu” – Central Policy and Planning Office of the OPM, 3-11 Aug 2011
- “Proposal for funding to Oceans Five America” – Koutu Nui, 2012