

Ngai Tahu Sea Fisheries Report

07 From Crown Regulation to Crown Disposition of Rights to the Sea Fisheries

7.1 Introduction

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By the early 1980s it had become apparent to government officials, the industry and Maori that the inshore fisheries were being seriously depleted. As MAF official Robert Cooper told us:

The decline in the yields of the major species placed many fishermen and fishing companies under financial pressure. Coastal communities heavily dependent on fishing became at risk. Recreational and traditional Maori fisheries began to suffer as the fishery resource became further depleted. (P13:24)

As a holding measure the government imposed a moratorium on new entrants to the inshore fishing industry in 1982 while the nature and extent of the problems in the fishery were investigated.

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7.2 The Fisheries Act 1983

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This new Act followed the review instigated in 1982. It placed heavy emphasis on the need to conserve and enhance depleted resources and to bring a greater measure of economic security to those in the industry. We mention only the principal measures designed to achieve these objectives:

- it provided for the development of a comprehensive and integrated approach to managing fisheries by way of Fishery Management Plans for areas designated as fishery management areas (part I). The Director-General of Agriculture and Fisheries (MAF) was obliged to consult and have regard to the views and responsibilities of various organisations including Maori in the preparation of a fishery management plan;
- part III enabled any part of New Zealand fisheries to be a controlled fishery for the purposes of the management or conservation of the fishery or the economic stability of the industry. It could be defined by reference to species or class of fish, the areas to be fished and the persons who could engage in the fishery. The minister could set a maximum number of licences to be granted in respect of such a fishery. Licences could be granted only to commercial fishermen;
- commercial fishermen were defined in s2 of the Act as meaning in the case of an individual, a person who was engaged or intending to engage in fishing for sale throughout the year, or a specified part of the season of each year, and who could satisfy the director-general that during such time as he engages in fishing for sale he relies wholly or substantially on his fishing activities for his income. As we will shortly relate, the definition was to result in a substantial number of part-time fishers being excluded from commercial fishing;
- under part IV of the Act, commercial fishing vessels were required to be registered and a fishing permit was necessary to engage in commercial fishing. Permits could be restricted to specific areas, species, quantities, methods, types of fishing gear and periods of time as fixed by the director-general;
- s88(2) provided that nothing in the Act shall affect any Maori fishing rights. The word "existing" which appeared in the 1908 Act was omitted; and
- s89(1) empowered the making of regulations generally regulating fishing in New Zealand and New Zealand fisheries waters covering a wide range of specific matters and including paragraph (g): "Prescribing a quota or total allowable catch for any fish,

or in respect of any fishery or method of fishing, in any part of New Zealand fisheries waters; and authorising the Minister to allocate any such quota or total allowable catch to such commercial fisherman or fishermen as he may specify ..."

This provision was later to be superseded by a statutory scheme in 1986. We were informed by Mr G C Billington, Deputy Chief Executive of the New Zealand Fishing Industry Board, that in 1983 the individual transferrable quotas (ITQs) were allocated on the basis of fishing company investment and catch history in deepwater fisheries, and initially were allocated for a ten year period only for seven species. Nine New Zealand companies were involved in this initial allocation in 1983 (Z18:10). Provision for royalties was made in the Fish Royalties Act 1985.

Removal of part-time fishers

7.2.1 The restricted definition of commercial fishermen caused much heart-burn among Maori and non-Maori fishers who overnight were excluded from any further commercial fishing. MAF adopted a set of criteria to be applied to applicants seeking commercial fishing vessel registration and commercial fishing permits. These were stated in evidence from Neil Martin, then a MAF officer, to be:

- that during 1982 the fisher had caught the equivalent of \$10,000 of fish, or
- the fisher held a controlled fishery licence, or
- approval had previously been granted in respect of the 1982 moratorium provisions and had been used or only recently granted, or
- the fisher earned at least 80% of non-investment income from fishing, or
- the fisher held a permit for the period 1 January-30 September 1983 and fishing income was a vital part of the fisher's annual subsistence income (R32:2).

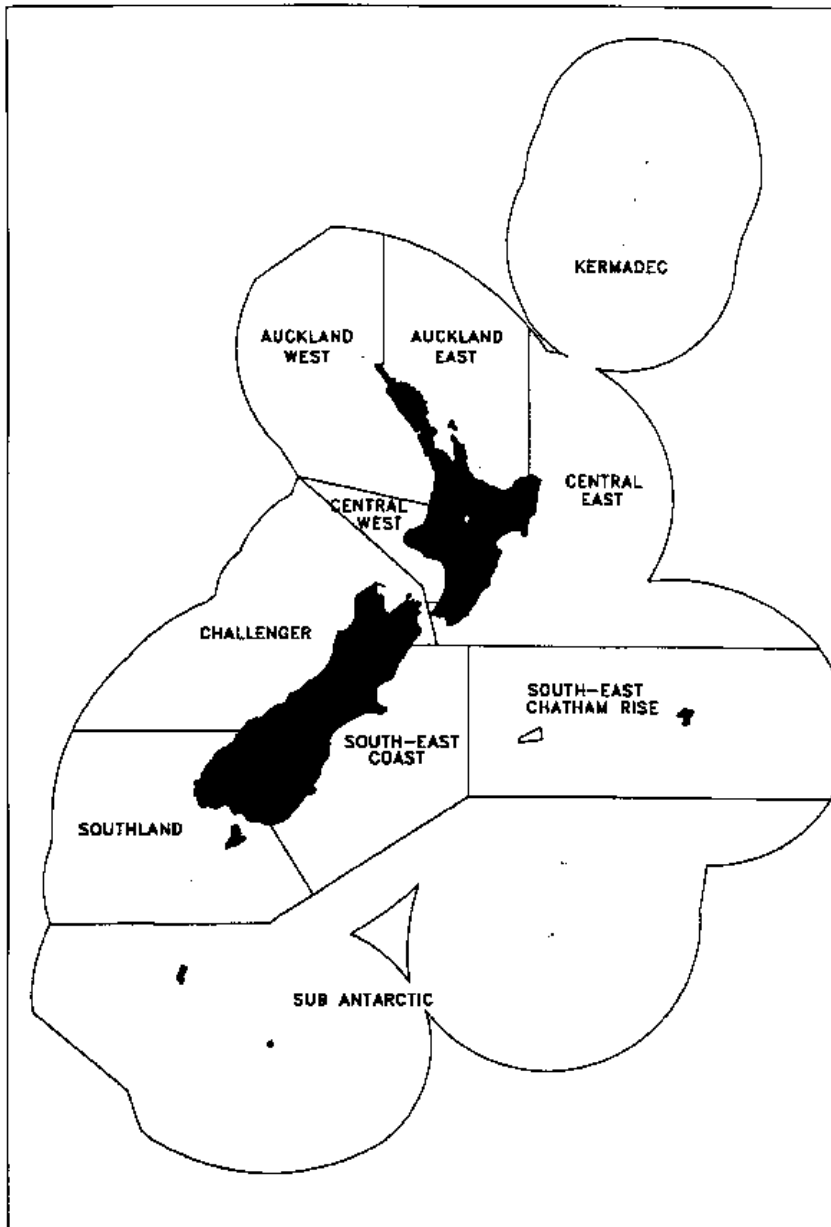
7.2.2 Mr Martin pointed out that the effect of this policy was to reduce the number of permits by removing unused and under-used permits from the fishery. The policy is commonly referred to as the removal of part-timers (R32:2). Fishing industry witness Mr Billington told us the result of this policy was that between 1500 and 1800 part-time fishers were excluded from the industry. Mr Billington considered that while the change did not have a great impact on the total catch nevertheless it was regarded as a reasonable first step in addressing a very difficult problem (Z18:13).

Mr Cooper from MAF explained that the 1982 moratorium on the issue of new commercial fishing permits remained in effect until 1986. This measure, along with the extensive cancellation of the permits of "so-called part-time fishermen" which occurred in 1983-1984, were, in Mr Cooper's judgement, the most significant events affecting Maori involvement in the fishing industry (R23:6). Mr Martin produced statistics indicating the number of small scale fishers who may have been excluded as a result of the 1983 Act in the Ngai Tahu claim area. The information was collated for ports within the Ngai Tahu claim area and showed the total number of fishers excluded as being 137. The total tonnage for all species for 1983 was 91 tonnes (R32:6).

The tribunal has no information as to how many of the 137 or so part-time fishers excluded were Ngai Tahu. But given our knowledge of the life-style of many Ngai Tahu who relied on seasonal work and the level of objections to this policy which we heard, we believe the proportion of Ngai Tahu would have been substantial. Ironically, Crown witness Neil Martin acknowledged in hindsight that had government been able to introduce the ITQ policy in 1983 in its present form (as applicable to inshore as well as deep-sea fisheries), the removal of part-timers would not have been necessary. In the light of later information it was concluded that the policy should have been restricted to those fishers not dependent on fishing, that is to the truly part-time fishers (R32:4).

7.2.3 This belated concession will be cold comfort to those many Ngai Tahu fishers who were victims of the part time removal policy. The tribunal heard detailed evidence from William Goomes a witness called by the claimants, who was a victim of the policy while living in the Chatham Islands (H5:25-31). According to David Higgins a considerable number of Ngai Tahu paua fishers suffered in the same way around the east and southern coasts of the South Island which constitute 70 percent of the New Zealand paua fishery (J10:63). Mr Goomes, along with a colleague Sig Kamo, pioneered the selling of paua meat as a commercial product in the Chatham Islands in 1968. By 1971 five groups of Chatham Island divers were working in their own areas. Between 1972 and 1975 a further 12 divers started. All were Chatham Islanders and most were Maori. Mr Goomes was himself of Ngai Tahu. By the late 1970s the processing firms started reducing prices to the point where by 1980 Mr Goomes was unable to support his family on the prices being paid. He did not renew his permit and instead was obliged to go odd-jobbing on farms. A year or two after he had let his permit lapse MAF introduced what Mr Goomes called "the 80 percent rule". He decided he would give paua diving one more try but was refused a fresh permit because none of his income in the previous 12 months came from paua. Having failed to regain a permit for paua harvesting Mr Goomes realised that after working for 25 years in the fishing industry there was no future for him in the Chatham Islands. He reluctantly moved to Nelson. He told us:

I am currently employed full-time by Sealord Products Nelson as a factory hand on one of their deep sea trawlers. I like the job, but Nelson is not the Chatham Islands, and I would dearly love to go back to the Chathams. I cannot do so because I cannot get into the fishing industry there. The ITQ system and the 80% Rule which went before it mean that I could not now get a permit or ITQ for paua. To me it seems quite unfair that, as a pioneer of the paua industry in the Chatham Islands, I cannot now get a permit or ITQ which will allow me to continue in the industry which I helped found (H5:31).



Map 7.1 New Zealand Quota Management Areas, from the New Zealand Fishing Industry Board (NZFIB)

New Zealand Maori Council representations

7.2.4 Submissions were made by the New Zealand Maori Council on the 1983 Fisheries Bill before its enactment. The council submitted that the purpose and scope of the bill was too narrow. Among the matters it unsuccessfully sought to have included in the Bill were:

- formal recognition of the Treaty of Waitangi;
- the rahui concept as a basic principle;
- special licences to be issued to Maori authorities under the New Zealand Maori Council for the gathering of fishery foods on the occasion of rites of passage (birth, baptism, honours, memorials, weddings, death) for the purpose of a hakari;

- that s33 of the Maori Social and Economic Advancement Act 1945 be re-enacted as part of the Fisheries Act;
- provision for fishing licences to be granted to specific groups of Maori (eg Maori incorporations or trust boards);
- a right of appeal by Maori authorities against the issue of special permits in traditional fishing areas; and
- District Maori councils to be consulted before the declaration of closed seasons. (Z45:appendix a:23-24)

Among points made by the four Maori Members of Parliament, who all strongly criticised the Fisheries Bill, were the lack of recognition of the Treaty of Waitangi, the discretionary nature of Maori representation on fishery management advisory committees and a discretionary power only to seek Maori opinion on fishery management plans (Z45:appendix a:25). It is not surprising that Maoridom found the new legislation unsatisfactory.

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7.3 Towards a Comprehensive Quota Management System

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From the time of its enactment it appears none of those most concerned, that is the government, Maoridom or the fishing industry, considered the 1983 Act adequately dealt with the problems confronting both inshore and deep water fisheries. Counsel for the industry, Mr Castle, submitted that from a practical point of view the 1983 Act was recognised as failing to provide for the most economically efficient conservation and management controls. Both the deep water resources and inshore stocks were under pressure.

7.3.1 Mr I N Clark, MAF Chief Fisheries Economist, described what came to be known as the deepwater trawl policy, which has a quota system inaugurated in 1982-1983. Species allocations were made among nine separate companies including two consortia of individual companies. Quota allocation was restricted to firms with at least 75.1 percent New Zealand ownership and quota holders were required to process 35 percent of the total deep-water catch onshore in New Zealand. Mr Clark told us both the participants and government were in general satisfied with the results of the deepwater policy and the programme was merged with the inshore ITQ programme when that was adopted in 1986 (R21:8).

7.3.2 The proposal for a quota management system for the inshore fishery was put forward by government in 1984. It was widely discussed, initially with fishing industry leaders, and later at a series of public meetings. As the Muriwhenua Fishing Report notes the 1984 discussions were preceded in 1983 by the publication of a document entitled "Future policy for the inshore fishery - a discussion paper". {FNREF|0-86472-103-X|7.3.2|1} This paper summarised the state of fisheries and outlined options for future management, including the quota management system. It was discussed at 12 public meetings held throughout New Zealand in September 1983. The Muriwhenua tribunal noted that the meetings were widely publicised and attended by commercial fishers (including some Maori), other interested groups and the general public. {FNREF|0-86472-103-X|7.3.2|2}

During a three week period at the end of 1984 and the start of 1985, three MAF teams attended some 65 public hearings throughout the country during which fishers were briefed on the proposals for a quota management system. The MAF teams also sought to obtain the fishers' reactions to the new proposals (R21:8). It appears the input from Maori at these meetings was minimal, the reasons for which are explained in the Muriwhenua Fishing Report. {FNREF|0-86472-103-X|7.3.2|3} What was totally lacking was any discussion with Maori tribes. As the Muriwhenua tribunal put it:

the evidence was clear that at the crucial time, the Ministry had not been inclined to consult with Maori interests in their fisheries in any tribal or sub-tribal way. Marae meetings were suggested but were never held. {FNREF|0-86472-103-X|7.3.2|4}

7.3.3 In 1984 following the passing of the Fisheries Act 1983, MAFFish established five Fishery Management Advisory Committees. Mr Cooper recognised however that Maori and other non-commercial representation was inadequate and the ministry undertook a review. As a result tribal representation was achieved.

7.3.4 The development of fishery management plans provided for in the 1983 Act resulted in early drafts being produced in 1984-1985. These focused on the inshore finfishery and did not include other fisheries or a Maori dimension. Development of these plans was largely halted in late 1985 while the quota management system was developed (Z45:7). Mr Cooper suggested that the period between November 1985 and September 1987 should be viewed as a period of consultation "at the regional but not quite tribal level" (Z45:8). While he said that the MAFFish Maori working group was aware of the need to consult with Maori at the tribal level, it lacked a tribal organisational focus. In default it utilised mainly the networks of the New Zealand Maori Council and Maori Womens' Welfare League. He went on to point out that by contrast a major exercise was held jointly by J Elkington and MAFFish officers with Ngai Tahu. These discussions were, however, held after the 1986 amendment authorising the quota management system was passed. Nor did they relate to the quota management system. We will discuss them in the context of taiapure arrangements under the Maori Fisheries Act 1989.

7.3.5 In November 1985, at the initiative of the New Zealand Maori Council, a major national fisheries hui "Te Runanga a Tangaroa" was held at Takapuwahia marae. According to Mr Cooper, Maori aspirations and issues were identified for government and MAFFish. The Maori fisheries programme proposed by MAFFish was a direct result of discussions following the national fisheries hui and consultations with the New Zealand Maori Council, its district councils and other Maori organisations in 1986 (Z45:8-9).

The claimant H R Tau told us that he attended the November 1985 fisheries hui on behalf of his Runanga o Ngai Tuahuriri. He told the hui that Ngai Tahu fishing rights stemmed from Kemp's deed as well as the Treaty and that Ngai Tahu would therefore deal directly with the Crown on its own behalf. Arising from this hui he said the MAF representative agreed to contact him "with the intention of discussing Ngai Tahu fishing rights to Tribal structures as opposed to Maori Council structures". This, he said, did not eventuate (J10:27-28).

We conclude that the input from Maori, including Ngai Tahu, at the tribal level into the discussions leading to the passage of the Fisheries Amendment Act 1986 was virtually non-existent. MAFFish simply had no experience in consulting with Maori at this most important and basic level.

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7.4 The Fisheries Amendment Act 1986

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Mr Clark advised us that following the widespread discussions from late 1984 to early 1985 on the proposals for a quota management system, the government decided in May 1985 to start to manage the inshore fisheries under individual transferable quotas (ITQs) from October 1985. But problems in making quota allocations to individual fishers forced a postponement of the starting date to October 1986 (R21-8). Obviously the government had made its mind up on the issue some six months prior to the national fisheries hui held in November 1985.

7.4.1 While the 1986 Fisheries Amendment Act does not lack complexity, its essential features may, at the risk of over-simplification, be described as having the following important characteristics. These appear in a new part 11A of the Fisheries Act 1983. The section references are to the new sections inserted in part 11A:

- the minister, after consulting the Fishing Industry Board, may specify the quota management areas and species to be subject to the quota management system (QMS) established under part 11A as from 1 October 1986 (s28B);
- the minister, after allowing for the Maori traditional, recreational and other non-commercial interests in the fishery may specify the total allowable catch (TAC) for all specified species and management areas (s28C);
- the TAC, "with respect to the yield from a fishery means the amount of fish ... that will produce from that fishery the maximum sustainable yield as qualified by any relevant economic or environmental factors, fishing patterns, the interdependence of stocks of fish, and any generally recommended sub-regional or regional or global standards" (s2);

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7.5 Reaction of Maori to the Quota Management System

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In appendix 5 we reproduce the valuable discussion of the QMS in the Muriwhenua Fishing Report. Although it is primarily concerned with the Muriwhenua claim, it serves to articulate major concerns of Maori throughout New Zealand (as evidenced by subsequent proceedings issued in the High Court). It is evident that those concerns were shared by Ngai Tahu which has taken a leading role in the High Court litigation. We note here some of the main concerns of Maori about the QMS discussed in the Muriwhenua Fishing Report.

The importance of the scheme

7.5.1 The Muriwhenua tribunal had no reason to doubt that the QMS had many good qualities and was introduced for sound reasons. It was also made aware of much adverse criticism. It recognised the scheme to be important state policy. But if any aspects of the system were contrary to the Treaty its duty was to enquire if they could be remedied without affecting the overall strategy.

Because drastic action was required to halt and if possible reverse the serious depletion of fish resources, part-time fishers had their licences removed. Other fishers were paid out to retire.

The Muriwhenua tribunal found that most Maori fishers operated in a part-time or small way and were affected by the scheme. Some who had left fishing for a short time found they could not fish commercially again. Others who had hopes of starting were precluded. {FNREF|0-86472-103-X|7.5.1|6}

The property interest created

7.5.2 While conservation was the scheme's rationale, and the basis on which it was promoted, the Muriwhenua tribunal noted that the more radical feature of the scheme was the creation of a property interest in an exclusive right of commercial fishing:

From its initiation, the scheme had the facility to continue the policy of excluding small operators, and so to continually reduce the pressure on the overworked resource. To start with, those who fished a particular species were regarded as having a right to catch a given share, or quota, assessed according to their latest catch records. Where the sum of such quota exceeded the total that could be allowed, which was usual in the inshore fishery, the quota that each held was cut back pro rata. This left some of

those at the bottom of the scale with quota that were too small. Those under a minimum figure were compulsorily purchased by the Crown.

Others chose to sell. It is an important feature of the system that individual quota can be readily transferred by sale, lease or licence. Thus the right to fish is given the characteristics of a property right. It is called an individual transferable quota (ITQ). {FNREF|0-86472-103-X|7.5.2|7}

The Muriwhenua tribunal found there to be some 1700 to 1800 quota holders, the average value of quota holdings being some \$600,000 with large holdings being held in the offshore fishery:

The initial quota holders did not purchase these rights. The [Muriwhenua] claimants graphically described it as a free gift of 'their' property to those who had destroyed their resource ... The position will not be the same for future entrants however, they will need to buy in. {FNREF|0-86472-103-X|7.5.2|8}

The Ngai Tahu attitude to the quota management system is expressed in the following passage from an affidavit by Tipene O'Regan:

The true situation ... is that the Crown first of all took away from Maori Tribes the fishery resources which in fact from time immemorial belonged to Maori, not to the Crown, and then the Crown went on to purport to give those resources, or the beneficial usage of them, together with tradeable property rights on an individual transferable basis of title, to other persons.

The true owners were thus deprived of their estate in fishery, which was transferred by main force of the Crown in its right of administration in government, and given away without fee or compensation to other commercial non-Maori interests. The recipients of this unearned and undeserved property and usage rights in fishery then proceeded, in many cases, to sell those rights handed out to them by the Crown, for money, and left "the industry".(AA16:11-12)

In another affidavit Mr O'Regan expressed the following view on behalf of Ngai Tahu:

12. We say that the assumption of Crown property rights in fish as distinct from a right to regulate, is a recent innovation, dating from the 1983 and 1986 Fisheries Acts introducing the Quota Management System and the allocation of ITQs to individual fishermen.

13. We did not feel the need to formally assert Rangatiratanga over sea fisheries, in the absence of any assertion by the Crown to the ownership of the sea fishery resources. There was until recently no hint that any Government would attempt, or that it could be legally possible, to alienate assumed property rights in sea fisheries into private hands. (AA12(d):annex ZA4:7)

Counsel for the fishing industry, in submissions to us, characterised as a "popular misconception" the view that those fishers who originally secured ITQ at the commencement of the QMS in 1986 "got them for nothing" or had them "gifted"

(AA43:17). He submitted that while it is correct that no capital payments were made in consideration of the receipt of the quota, "quota was allocated according to the investment made in the industry by individual fishermen" (AA43:18). Mr Castle, the industry counsel, relied on statements by Mr P I Talley, President of the New Zealand Fishing Industry Association, to the effect that all allocations were made on the basis of what fishers had historically caught. Mr Talley contended that it was:

not unreasonable for someone who has fished for maybe 30 years to expect to be able to carry on fishing in the future. The historical basis of allocating (quota) reflected that reasonable expectation. To make someone buy the business they had been running in the past would have been unreasonable and would have ignored the large investment in capital and labour that had gone in, and that was represented by past catches. The original participants in the fishery had earned; had paid for the allocations they received. They did not get something for nothing. (AA43:18-19)

It seems to be implied in Mr Talley's comments that those fishers who were allocated quotas following the 1986 legislation did not receive anything more than they already had. In fact they received from the Crown a valuable asset by way of addition to their existing investment; an asset which has proved to be readily tradeable. This was recognised by Mr Talley who was quoted as saying that since the inception of the QMS over 450,000 tonnes, or in excess of 66 percent of the TACs under the quota management system, had been traded at commercial rates. We have little doubt that the original quotas for which no capital payments were made were in fact valuable additional fishery assets.

The fundamental conflict

7.5.3 The Muriwhenua Fishing Report states that "fishing has been corporatised". The government, it says:

has issued shares in a resource that was once seen as publicly owned, and has backed those shares with a guarantee that a certain quantity of fish can be caught. {FNREF|0-86472-103-X|7.5.3|9}

But the Muriwhenua claimants contended that the Treaty secured the fisheries of Muriwhenua to them. Ngai Tahu have made the same claim. The Muriwhenua tribunal was in no doubt that the quota management system had created at least a property right in the quota holders to catch fish:

If it is true, as was stressed in the submissions to us, that the Crown does not own the fish resource, it has certainly created a property interest in the right to harvest it. There is undeniable truth in the opinion that unless the Crown orders otherwise, no one owns a fish until it is caught. Nonetheless, such opinions appear as fancy semantics when the right to catch is now worth many thousands of dollars, an exclusive right to catch has been established and apportioned to individuals, the quota right so given is held in perpetuity, quota are freely tradeable on a formal exchange in daily operation, and resource rentals are payable to the Crown. Subtle distinctions between ownership and access rights likewise are made academic. If a property has not been created in fish, it certainly exists now in the right to catch them. {FNREF|0-86472-103-X|7.5.3|10}

We agree with this conclusion.

The Muriwhenua tribunal further concluded that:

If Maori fisheries covered the whole of the inshore seas, as past records suggest, the policy was effectively guaranteeing to non-Maori, the full exclusive and undisturbed possession of the property right in fishing, that the Crown had already guaranteed to Maori.

The prospect of such a fundamental conflict should have been apparent in our view. It required no more than an inquiry into what Maori fisheries had been, when the Treaty was signed. It ought to have been obvious, even on a brief reading of the Treaty, that the Ministry's proposals stood to be diametrically opposed to the provisions of the Treaty. {FNREF|0-86472-103-X|7.5.3|11}

But, said the Muriwhenua tribunal, it did not follow that if the Treaty was breached, the whole scheme must be jeopardised, provided that is, a reasonable agreement could be made. {FNREF|0-86472-103-X|7.5.3|12}

In fact, negotiations did ensue but only after Ngai Tahu and other Maori iwi and organisations had issued High Court proceedings against the Crown. We now relate the circumstances which gave rise to this legislation and ensuing events which led ultimately to the passage of the Maori Fisheries Act 1989.

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7.6 Court Proceedings

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The first hearing of the Muriwhenua tribunal took place at Te Reo Mihi marae, Te Hapua, in the far north on 8 December 1986. Prior to this the Fisheries Amendment Act 1986 had been enacted. It came into force on 1 October 1986.

7.6.1 Following representations made to them by the Muriwhenua claimants at an early stage of the proceedings, the tribunal wrote to the Director-General of MAF on 10 December 1986. This letter expressed the tribunal's extreme concern at both its own ability to make recommendations on the claim before it and the ability of the government to agree to those recommendations should the proposed allocation of ITQs take place before the tribunal had an opportunity adequately to consider the claim and report to the ministers involved. The tribunal sought the deferment of any further action on the allocation of quota until it was able to report on the claim. {FNREF|0-86472-103-X|7.6.1|13} By letter of 23 December 1986 the director-general advised that after consulting the minister, it had been decided he should proceed to notify fishers of their ITQ. He added an assurance that this action should not be seen as in any way derogating from the ministry's acceptance of and commitment to applying the principles of the Treaty of Waitangi as they relate to fisheries. {FNREF|0-86472-103-X|7.6.1|14}

7.6.2 A memorandum by the Muriwhenua tribunal of its preliminary opinions as conveyed to the Minister of Fisheries on 30 September 1987 recorded that it was made on a motion by the claimants that the tribunal report then or as soon as practicable in the light of the Crown's intention to issue further ITQs. While unable to furnish a report at that stage, the tribunal was able to express certain findings and opinions including the following:

We find that the Maori hapu and tribes of Muriwhenua made a full and extensive fishing use of the sea surrounding their lands and for a distance of some 12 miles out from the shore.

Occasional fishing use was made of an area beyond that but the 12 mile limit involved a regular fishing use. It is also quite apparent that while favoured fishing grounds were well known, named and capable of ready identification, fishing occurred throughout the whole area. There was not one part of the seas within that zone over which the hapu and tribes of Muriwhenua can be considered not to have exercised some fishing user.

....to proceed further with the issue of ITQ's would be contrary to the Treaty at least insofar as the Muriwhenua tribes are concerned (for we have had no evidence with regard to any other tribes) and that we consider the Crown should negotiate now with the Muriwhenua tribes, before further steps are taken, in the light of our findings of fact and interpretation. {FNREF|0-86472-103-X|7.6.2|15}

7.6.3 The delivery by the Muriwhenua tribunal of its preliminary opinions on 30 September 1987 coincided with the issue on the same day of proceedings CP 553/87 in the High Court by the Muriwhenua claimants against the Crown. An appreciation of the outcome of these and subsequent legal proceedings, and various consultations between Maori and the Crown which ultimately led to the passage of the Maori Fisheries Act 1989 is necessary to an understanding of that Act. The essential background is conveniently and succinctly stated by Sir Robin Cooke, President of the Court of Appeal in *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 646-649. The following passage from the judgment of the president commences with a reference to the issue of the proceedings referred to above:

On the same day (30 September 1987) proceeding CP 553/87, the review application, was commenced, initially orally, in the High Court in Wellington. In short this application claims that the quota management regime so far as it affects Muriwhenua is unlawful because of breaches of their fishing rights, and seeks the setting aside of various decisions already taken and declarations against further implementing the scheme. That evening Greig J heard an oral application for an interim declaration that the Minister ought not to proceed further. The Judge granted it, for reasons which he recorded on 8 October 1987. Further proceedings of the same type were subsequently commenced by the Ngai Tahu Maori Trust Board and others, representing between them the Maori tribes of most of the other coastal lands of New Zealand. The various review applications have come to be called collectively the first bracket proceedings. On 2 November 1987 Greig J made an interim declaration that the Minister ought not to take any further action to issue notices under s 28B or s 28C of the Fisheries Act or any other step in respect of the quota management system established in respect of jack mackerel and squid by notices in the Gazette. These interim declarations remain in force, but temporary arrangements have been made, mostly by consent, whereby commercial fishing has continued unrestricted for the time being by Maori claims.

Greig J's reasons for his interim decisions in favour of the Maori plaintiffs were emphasised by him to be tentative findings on an interim basis. He relied on s 88(2) and his main reasons are best expressed in his own words in passages from his judgment in the proceedings by Ngai Tahu and others:

"I am satisfied that there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole coast of New Zealand, at least where they were living. That was divided into zones under the control and authority of the hapu and the tribes of the district. Each of these hapu and tribes had the dominion, perhaps the rangatiratanga, over those fisheries. Those fisheries had a commercial element and were not purely recreational or ceremonial or merely for the sustenance of the local dwellers....

"The next question that I think arises is whether it can be said that the Maori gave away or waived any of those rights. That appears to be an issue but on the material

that is before me at this stage there cannot be said to be any evidence which would satisfy me that those rights have by those means been lost. What is clear is that over the time since 1840 there has been a great diminution and a restriction in Maori fishing through circumstances, to use a neutral word, which have in the end limited the exercise of those rights.

"The next point that seems to me to arise is to ask the question whether the rights have been taken away. There is nothing pointed to in any statute as directly or expressly doing that. It is I think clear, and I would if necessary cite T A Gresson J in the Ninety-Mile Beach case, that there needs to be some express enactment to take away the rights; they cannot be taken away by a side wind or by some indirect implication. There is nothing, in my view, in the Fisheries Act 1983 or its amendments which could be said to have taken away the existing fishing rights....

"What has been done in the promulgation and the operation of the quota management system has been done without taking into account the Maori rights in fisheries, at least in the sense that I have concluded on this interim basis these rights exist. There has been an allowance made and a regard had to Maori recreational and non-commercial fishing. The Ministry has not made any serious effort yet to define Maori fishing rights but has treated them for a long time as recreational, occasional and ceremonial fishing without any commercial or indeed without any proprietary significance. What has been done and what will be done in the continuation of the quota management system is, in my view, contrary to the Act in that it will affect the Maori fishing rights.

The next step was the establishment on 25 November 1987, pursuant to an interim agreement between the Government and the New Zealand Maori Council, of a joint working group, consisting of four members on each side, to report by 30 June 1988 on "how Maori fisheries may be given effect" and related matters. By the stipulated date the group were able to agree on some points, but unfortunately not the major ones.

Each side made a separate report. The stance of the Maori members was that in principle under the Treaty Maori were entitled without seaward boundary to 100 % of the fisheries but that as a compromise Maori would retain ownership of 50 %, making the other 50 % available to the Crown, and would participate equally with the Crown in the management and control of the fisheries. The Crown members calculated that the Maori share should be 100 % of the inshore fisheries (out to 12 miles, approximately the continental shelf) and 12.5 % of the deep water fisheries, representing approximately 10 % of the total fisheries. They calculated that in all this would amount to a total of 29 % of the fisheries. The 12.5 % was based on the Maori proportion of the total population in 1986. The two reports, which contain many more details, are conveniently reproduced as an appendix to the Law Commission paper of March 1989.

In the meantime the Waitangi Tribunal had completed their Muriwhenua Fishing Report, dated 31 May 1988, and transmitted it to the Minister of Maori Affairs. A work of 370 pages, it has been printed and is on public sale. For present purposes, it will suffice to quote the following passages from the Conclusions at p 239:

"12.1.1 The Treaty guaranteed to Maori full protection for their fishing activities, including unrestricted rights to develop them along either or both customary or

modern lines. Save for some prior agreement or arrangement, general fishing could neither delimit nor restrict the Maori fishing interest as so described. To the extent that general fishing might do so, the Crown was bound to intervene.

"12.1.2 To guarantee to Maori the full protection described, the Crown was obliged to support their economic initiatives in fishing, or otherwise to seek arrangements whereby Maori and non-Maori fishing could proceed to the mutual advantage of both sides.

"12.1.3 On the evidence, the fishing activities of the Muriwhenua people involved the whole of the adjacent continental shelf. Those activities were capable of being developed as a commercial industry and in fact had been developed on commercial lines.

"12.1.4 In the Muriwhenua circumstance, any commercial fishing by others must necessarily have interfered with their full, exclusive and undisturbed right to maintain and develop their fishing capabilities. Accordingly, an agreement or arrangement was necessary to permit of any other commercial fishing on the continental shelf that they used. No such arrangement or agreement was made.

"12.1.5 Had the Treaty guarantee been maintained, and had their fishing activities been properly supported and promoted by the Crown, the claimant tribes would have developed an off-shore fishing capability."

Ministers of the Crown and the Maori representatives took up the negotiations but again were able to reach only limited agreement. On 22 September 1988 the Minister of Fisheries moved in the House of Representatives the introduction of a Maori Fisheries Bill (Hansard;492 NZPD 6884). The Bill had an extensive preamble reciting some of the history which we have already summarised. In introducing it the Minister said that the Government accepted that in the past there had been blatant and serious breaches of the obligation that the Crown undertook by the Treaty.

The main features of the Bill were that the Government took from the Waitangi Tribunal report that the tribes should be in the business of fishing, but the Government also regarded fisheries and quota management as very important to the economy. Small local non-commercial fisheries, to which all recreational fishers irrespective of race would have access, would be placed under the management of the local tribes. As to commercial fishing, Maori were to be given an opportunity to earn up to 50 % of the quotas for the various species by allocations of up to 2.5 % annually over 20 years, conditionally on substantial fishing of the existing allocations.

Evidently the Bill containing those provisions was hoped to be a fairly long-term solution. For the other provisions included the proposed repeal of s 88(2), the nullification of the interim orders of the High Court and the discontinuance of the proceedings in which they had been made. Further it was to be enacted that nothing in the principal Act or the Amendment Act was to entitle any person to rest on the Treaty or on any rule of law relating to aboriginal rights a claim made in any Court for fishing rights. There were somewhat similar clauses to preclude the Waitangi Tribunal from inquiring into fisheries claims, though that bar was to be limited to 20 years.

The Maori reaction to that Bill led to the commencement in the High Court, by virtually all the tribes with claims to fishing rights, of what have been called the second bracket proceedings. The Muriwhenua proceeding (Wellington, CP 743/88) is one of these. There are pleadings of trespass, breach of fiduciary duty and negligence against the Crown. The plaintiffs rely on their pre-Treaty "sovereignty" and proprietorship, the reservation of their rights in the Treaty, customary rights and aboriginal title. Actions of the Crown in 1986-1987 with respect to fisheries are alleged to be breaches of the rights of and duties owed to Maori. Declarations, inquiries as to damages and accounts of profits are the principal relief sought.

The Bill introduced in September 1988 was referred to a select committee, who after extensive hearings presented a majority interim report on 19 September 1989 (Hansard; 501 NZPD 12665). The committee made sweeping amendments to the Bill, leaving little of the original form. These were such that further submissions from interested parties and a further report to the House were seen to be called for. After some further changes and debates (Hansard; 504 NZPD 14406; 14522; 14628) the Bill was finally enacted. Largely the September amendments reflected a submission to the select committee dated 17 March 1989 from the Chairman of a working party who met at the request of the (then) Deputy Prime Minister. After the hearing of the present appeals, the Solicitor-General concluded that it would probably assist the Court to have the submission made by the Crown on the Bill. Accordingly he lodged a copy, with a copy of the covering letter to the select committee and also a copy of the Ngai Tahu response. From the Crown submission and the covering letter it appears that an interim arrangement was proposed:

"... a permanent solution may not be achieved until final legal pronouncements on the fundamental nature of Maori fishing rights are available. For this reason, access to the Waitangi Tribunal and to the Courts of law must remain open for all to test these important questions."

From the Ngai Tahu comment it is evident that Maori likewise well understood the proposal to be an interim one.

This concludes the passage from the judgment of Sir Robin Cooke.

7.6.4 That Ngai Tahu understood the Maori Fisheries Act 1989 (passed on 20 December 1989) to be an interim one subject to "continuing negotiations on certain fundamental questions" was made clear by Mr O'Regan who in affidavit evidence told us:

A final round of negotiations in late 1989 resulted in the Maori Fisheries Negotiators [of whom Mr O'Regan was one] accepting a proposal by the Ministers ... to adjourn the High Court proceedings sine die and give the new Act a chance to establish the transfer mechanism by which the Crown would move quota to Iwi and establish Taiapure. Assurances were received from the Prime Minister and accepted that there would be continuing negotiation on certain fundamental questions ... The Maori parties have committed themselves, subject to the Crown honouring its agreements, not to recommence proceedings in the High Court until the transition period specified in the Act is completed. That is due to have occurred by October 1992 (AA16:6-7).

We now proceed in the next chapter to consider the Maori Fisheries Act 1989.

References

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{FNTXT|0-86472-103-X|7.3.2|3}3 ibid pp 155-156

{FNTXT|0-86472-103-X|7.3.2|4}4 ibid p 156

{FNTXT|0-86472-103-X|7.4.3|5}5 ibid p 140

{FNTXT|0-86472-103-X|7.5.1|6}6 ibid pp 141

{FNTXT|0-86472-103-X|7.5.2|7}7 ibid p 142

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Waitangi Tribunal, Department of Justice, Wellington.