

Ngai Tahu Sea Fisheries Report

08 Maori Fisheries Act 1989

8.1 Introduction

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It will, we think, be apparent from the foregoing discussion that the Maori Fisheries Act 1989, by any standard a breakthrough towards Crown recognition of Maori Treaty fishing rights, had its genesis in a number of factors. Important among these was the publication of the Muriwhenua Fishing Report in June 1988. Among its conclusions was a finding that the QMS as currently applied was in fundamental conflict with Treaty principles. The report also concluded, however, that the system itself need not be in conflict with the Treaty and may indeed be beneficial to both Maori and the Crown if an agreement could be reached. {FNREF|0-86472-103-X|8.1|1}

Some months after the High Court made interim declarations on 30 September 1987 and 2 November 1987, the Muriwhenua tribunal reported that the Crown should not take any further action to issue notices in respect of the QMS system in relation to certain named fish. Among Mr Justice Greig's reasons were that the QMS system was operating without taking into account Maori rights in fisheries which were protected by s88(2) of the Fisheries Act 1983. This decision also had a powerful influence on the Crown's resolve to seek a solution to the problem. These combined circumstances persuaded the Crown to enter into negotiations with Maori and ultimately led to the passage of the 1989 Act. As Sir Robin Cooke noted, the minister in introducing the Maori Fisheries Bill, said the government accepted that in the past there had been blatant and serious breaches of the obligation that the Crown undertook by the Treaty.

8.1.1 The Maori Fisheries Act 1989 is in two parts. Part I establishes the Maori Fisheries Commission; part II amends the Fisheries Act 1983 by declaring rock lobsters subject to quota fishing and also enacts a new part IIIA of the 1983 Act authorising the declaration of taiapure - local fisheries. We will deal with each of these three matters in turn. In our consideration of the Act we have been greatly helped by evidence and submissions of all the parties and by a submission made at the tribunal's invitation by Whaimutu Dewes, a Maori Fisheries Commissioner (AA39(a)). A number of Mr Dewes comments are incorporated in our discussion of part I of the Act.

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8.2 Maori Fisheries Commission

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The long title to the Act says it is an Act:

- (a) To make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi; and
- (b) To facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing; and
- (c) To make better provision for the conservation and management of the rock lobster fishery.

Mr Dewes emphasised the importance of paragraph (a) of the long title which applies to part I of the Act and to s74 which inserts provisions into the Fisheries Act 1983 enabling the establishment of taiapure, or local fisheries. The commission has no legislative mandate with respect to taiapure. The Maori Fisheries Commission sees the significance of paragraph (a) as being a reminder to it and all who seek to make or interpret the provisions of the Act that the assets (principally ITQs) to be transferred to and managed by the commission are "taonga" within the meaning of the Treaty of Waitangi and Tikanga Maori (AA39(a):4-5).

Mr Dewes impressed on us that the recognition of Maori fishing rights secured by the Treaty requires consideration of tikanga Maori with respect to those taonga and requires the provisions of the Treaty to be applied to the transfer and management of those taonga.

8.2.1 The Act established the Maori Fisheries Commission comprising seven members appointed on the advice of the Minister of Maori Affairs. Among its principal functions are the duty to facilitate the entry of Maori into, and the development by Maori of the business and activity of fishing. It is required to form and be sole shareholders in a public company called Aotearoa Fisheries Limited and to transfer to that company at least 50 percent of all quota and money transferred to the commission by the Crown under ss40 to 42. All quota and money so transferred is to be applied in paying up in full the shares in the company to be issued to the commission.

The Act provides for a "transition period" which begins on the date of commencement of the Act (20 December 1989) and ends on 31 October 1992 or such later date as the governor-general may declare. This is the period over which quota is to be transferred by the Crown to the commission.

In considering whether to grant assistance to any Maori or group of Maori the commission must, among other matters, have regard to Maori custom and economic and social considerations. By a 1990 amendment, the commission is required to consult with representatives of tribes who have a history or tradition of engagement in the business and activity of fishing and to take into account the views expressed in such consultations. We understood from Mr Dewes that the commission was actively involved in securing this amendment. The commission has held hui in some 11 separate localities as part of its consultation process. The commission is enjoined to endeavour to conduct its activities profitably.

Transfer of quota

8.2.2 The transfer of quota by the Crown is to be in four equal tranches of 2.5 percent of the total allowable commercial catch (TACC) (calculated at the time of transfer). The Act specifies a timetable of April 1990, October 1990, October 1991, October 1992. The calculation of the 2.5 percent at the time of transfer in each case is a sore point with Maori. Mr O'Regan claimed that the understanding with the Crown was that the 10 percent was to be of the TACC at the time the agreement was made with the Crown prior to the passage of the Act. Since that time the TACC has been reduced by the Crown and as a consequence, the 10 percent is correspondingly less than was earlier contemplated. We understand this is the subject of ongoing negotiation.

Aotearoa Fisheries Limited

8.2.3 The Act requires the commission to incorporate Aotearoa Fisheries Limited. Fifty percent of all quota and quota equivalent must be transferred by the commission to the company. Mr Dewes advised us that the commission and the company directors have agreed that the commission will transfer to the company all of the deepsea species and will make any cash payments necessary to maintain the value of the transfer as required by the Act. This division of responsibility for inshore and deepwater species quota respectively is seen as providing a much more effective focus for the management of the resource than if both had responsibility for the two categories.

The balance of quota retained by the commission is leased by public tender. In considering tenders a large preference is given to iwi wishing actively to participate in the business and activity of fishing. The leases are on a short term basis reflecting the commission's intention to transfer the resource to iwi after October 1992.

The commission's kaupapa

8.2.4 Mr Dewes, on behalf of the Maori Fisheries Commission, stressed the commission's kaupapa, founded on its understanding and application of tikanga Maori and the Treaty of Waitangi, as being that its assets belong to iwi; not the commission, not the Crown, not the fishing industry, not the general public. An important part of the commission's kaupapa is its commitment to the principle of consultation with iwi. The commission acknowledges that it holds assets transferred to it on behalf of the iwi. The commission's primary concern is to effect the allocation and transfer of quota to appropriate iwi. Pending such transfer the commission recognises that it must manage the quota in such a way that the economic value of the quota is maintained.

For the next few years the commission will be operating closely with Aotearoa Fisheries Limited to develop and maintain the value of the assets transferred from the Crown. At the same time it will be preparing for the eventual transfer to iwi of ownership, management and control. The ultimate roles of the Maori Fisheries Commission and Aotearoa Fisheries Limited will be shaped by the collective and individual wishes of the iwi - this lies in the future.

The tribunal was impressed with Mr Dewes' account of the commission's stewardship, its evident commitment to adherence to the Treaty of Waitangi in the conduct of its statutory obligations and its emphatic recognition of its trusteeship on behalf of iwi. Surely out of much travail substantial good has finally come.

We turn now to consider the two other matters covered by the Maori Fisheries Act 1989 which resulted in substantial amendments and additions to the Fisheries Act 1983.

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8.3 Rock Lobster Become Subject to Quota

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Extensive amendments were made by Part II of the Maori Fisheries Act 1989 to the principal Fisheries Act 1983 declaring rock lobsters to be subject to quota fishing.

The amendment made provision for 10 percent of the newly authorised rock lobster quota to be transferred to the Maori Fisheries Commission on an instalment basis.

8.3.1 A novel feature of the legislation was the creation of a new form of quota known as "transferable term quota". This was defined to mean:

quota that confers on the holder the right to take rock lobster at any time in the period of 25 years beginning on the 1st day of April 1990 (being quota that may be transferred as if it were individual transferable quota allocated under Part IIA of this Act). {FNREF|0-86472-103-X|8.3.1|2}

The amendment further provided that the taking of rock lobster in the quota management areas described is to be subject, for the period of 25 years from 1 April 1990, to the quota management system established under the Act. Thereafter no doubt the position will be reviewed.

We understand that this new "term" transferable quota was instituted for rock lobster as a result of an undertaking by the Crown, as part of its interim agreement with Maori, that it would not in the meantime create any further permanent individual transferable quotas. It appears Maori were concerned that if more permanent ITQs were created the prospects of the Crown being able, over time, to meet what Maori believe to be its obligations would be seriously diminished. Maori therefore sought a term quota of no more than ten years but the Crown insisted on the 25 year period.

8.3.2 The tribunal received numerous submissions from experienced fishing industry witnesses strongly advocating the retention of ITQs on a perpetual basis in opposition to any transformation of such ITQs into transferable term quota. These submissions were reasoned and temperate and were made by representatives of many of the major operators, the majority of whom favour the quota management system while recognising there may well be grounds for simplification and improvement. In addition to the extensive evidence from these witnesses, the industry presented affidavit evidence from Professor L G Anderson, a professor of Economics and Marine Studies at the University of Delaware in the USA, and an academic specialist in the economics of fisheries management. He is recognised internationally as an authority in his field. In his affidavit (AA2) Professor Anderson considered the various economic merits of term and permanent quota and the implications of the

introduction of term quota for the New Zealand fishing industry. He concluded that there were very few, if any, benefits to be had from using term quotas. He believed they would result in a far less effective system than operates under a permanent quota system. Some of Professor Anderson's views were questioned by Dr Habib and these were in return responded to by Professor Anderson in a further affidavit.

Whatever expertise the tribunal may have, it does not extend to adjudicating upon complex economic arguments of the kind raised by Professor Anderson. Nor, fortunately, is it necessary for us to express an opinion on the respective merits, economic or otherwise, of permanent or term quotas. They are simply not relevant to the basic questions we are concerned with which centre upon claims that the Crown has infringed Ngai Tahu Treaty fishing rights. We accept Mr O'Regan's contention that the arguments are better addressed to the government of the day and cannot have any effect upon the Ngai Tahu Treaty claim before us (AA16:15). Having said that, however, we acknowledge that the concern expressed by the various industry representatives on the question is genuinely and strongly held. No doubt they will continue to pursue it vigorously with government.

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8.4 Taiapure

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Part I of the Maori Fisheries Act 1989 recognises the commercial interest of Maori in the fisheries as do the provisions in part II bringing rock lobsters under the QMS. Section 74 in part II further amends the 1983 Act by inserting a new part IIIA of that Act dealing with taiapure - local fisheries. References to sections are to sections of the 1983 Act as added by the 1989 Act.

Objective of the new Part IIIA

8.4.1 In relation to areas of New Zealand fisheries waters (being estuaries or littoral coastal waters) that have customarily been of special significance to any iwi or hapu either:

- (a) as a source of food; or
- (b) for spiritual or cultural reasons,

Section 54A has as its object to make better provision for the recognition of rangitiratanga and of the rights secured in relation to fisheries by article 2 of the Treaty of Waitangi. We note the expressed concern to make better provision for the recognition of rangitiratanga and for Maori treaty rights to their fisheries. How well this objective will be achieved remains to be seen.

The Kaupapa of taiapure

8.4.2 In a joint statement by Manatu Maori and the Maori Fisheries Commission it was said that:

In recent years the Maori fish negotiators have concentrated considerable effort on traditional Maori and Iwi rights in non commercial fishing. The discussion has revolved around the establishment of non commercial fishing zones, over which Iwi would have substantial control. Whilst the Maori fish negotiators have argued for absolute Iwi control of such zones Parliament has not conceded the Crown sovereignty as the ultimate controller of the non commercial fish resource. The compromise effected by the Maori Fisheries Act offers Iwi a substantial level of control over the non commercial zones named as Taiapure by the Act. That control applies to all citizens Maori or Pakeha. The development of Taiapure management will place heavy demands on Iwi organisation and committment [sic]. It also demands the evolution of an effective management partnership between Iwi and the Crown represented by MAF. (AA34:10)

How is a taiapure established?

8.4.3 In the context of the Maori Fisheries Act 1989, taiapure is said by Manatu Maori and the Maori Fisheries Commission to mean a local fishery (AA34:3.3).

Any one may apply with supporting information to the director-general of MAF for the taiapure to be established in a specified locality (s54C). If the Minister of Fisheries, after consulting the Minister of Maori Affairs, agrees in principle with the proposal, appropriate procedures for public notice and objections and a subsequent public hearing by a Maori Land Court judge are provided for. To date there has been no such hearing.

If after the appropriate procedures have been followed the minister is satisfied that the application should be approved the minister may recommend the governor-general to declare the area to be a taiapure, or local fishery (ss54 B and 54 I).

The Minister of Fisheries is required to appoint a committee of management for each taiapure, who are to hold office at his pleasure. This provision does little to secure their independence. Any such management committee may recommend to the minister the making of regulations under s89 for the conservation and management of the fish, aquatic life and seaweed in the taiapure. No such regulation can provide for any person to be refused access to or the use of or to be required to leave or cease to use any taiapure by reason of the colour, race, or ethnic or national origins of that person or any relative or associate of the person. It follows that no taiapure, however great its special significance may be to any hapu or iwi, can be made exclusively for such hapu or iwi.

8.4.4 Robert D Cooper of MAF gave us detailed evidence of extensive meetings held by MAF officers with many tribal groups in the South Island. The purpose was to implement a Rahui Areas Programme intended to provide for the long term protection of seafoods. It appears 170 proposed non-commercial fishery areas were identified. They were distributed throughout the South Island except in the Fiordland area, on the Stewart Island coast and in the vicinity of land near Cape Campbell. Species included eels, mussels, paua, kina and seaweed. Access was to be non-discriminating (R26:8-10). We understand, however, that this initiative has been overtaken and superseded by the taiapure provisions of the Maori Fisheries Act. Nevertheless it was a valuable initiative by MAF.

8.4.5 While Maori, including Ngai Tahu, have reservations about aspects of the taiapure provisions, in particular the overriding ministerial control, the provisions have been generally welcomed as a potentially beneficial development. It remains to be seen to what extent, if at all, effect is given to the provisions.

8.4.6 We have earlier described various attempts made by Maori and Ngai Tahu in particular to have certain reserves set aside for their exclusive use as fishing grounds pursuant to the Maori Councils Acts of 1900 and 1903 and s33 of the Maori Social and Economic Advancement Act 1945. Despite many requests, including a number from Ngai Tahu, no such reserves were created. The provision was clearly intended to benefit Maori and could be seen as an attempt by the legislature to give some modest and very particular recognition to Maori Treaty fishing rights. As we have indicated,

the provision was totally undermined by administrative and political intransigence (6.10.3). It was repealed in 1962.

Notwithstanding the totally disillusioning experience of Maori with this provision, the New Zealand Maori Council, in its submissions on the 1983 Fisheries Bill sought, unsuccessfully, to have it reinstated in the new Bill. The taiapure provisions in the Maori Fisheries Act 1989 fall short of the former s33 in that they expressly exclude the possibility of taiapure being reserved solely for Maori. We believe this to be a major weakness of the taiapure scheme.

8.4.7 In his final submissions on behalf of the claimants Mr Upton advised that Ngai Tahu:

has no objection, should a NON-COMMERCIAL ITQ be developed to manage non-commercial fisheries, to incorporating such a principle into our mahinga kai and sea fisheries, as long as the associated control structures truly reflect its rangatiratanga, and in particular;

(a) clearly protect certain zones for its exclusive tribal use,

(b) clearly reflect its special interest in certain species and their associated ecosystems, eg. paua/kina/seaweeds

(c) clearly permit it to hold usufructuary title to significant areas of coast and seabed so as to restore and enhance non-commercial resources by use of a rahui. (AB1:29-30)

Ngai Tahu are now seeking, among other related matters, the protection of certain zones for their exclusive tribal use, as they had previously attempted to no avail under s33 of the 1945 Act.

8.4.8 We are aware that following recommendation six in the tribunal's Manukau Report 1982, the Whatapaka creek, an estuary of the Manukau harbour, has been set aside pursuant to s439A of the Maori Affairs Act 1953. It has now become a Maori reservation for the purpose of a landing place, fishing ground, catchment area, bathing place and an area of historic, spiritual and cultural significance for the common use of hapu of Whatapaka Marae o Tainui. {FNREF|0-86472-103-X|8.4.8|3}

8.4.9 We are also aware that the Fisheries Task Force in its April 1992 report to the Minister of Fisheries has proposed that rights for iwi to manage tribal fisheries should be made explicit by recognising iwi ownership over specific marine areas. The purpose of this is to give local iwi the right to exercise rangatiratanga in defined areas within their coastal rohe. It is envisaged by the Ministerial Task Force that such mahinga kaimoana would be relatively small areas of sea (estuary, reef or coastline) where an iwi has maintained a strong tradition of food gathering together with the observance of conservation practices. Local iwi would be able to exclude from harvesting all others (Maori and non-Maori) to the extent they felt this was beneficial.

8.4.10 We believe there is a strong case for the creation of mahinga kaimoana as envisaged by the Ministerial Task Force and as requested by the New Zealand Maori Council in 1983 and by Ngai Tahu before us. Ngai Tahu, and doubtless many other

Maori tribes, are still entitled to their sea fisheries as guaranteed by article 2 of the Treaty. It is in no sense a case of discriminating in favour of Maori. It is in fact an extremely modest and entirely justifiable proposal that traditional fishing grounds which are of special significance to the tangata whenua, the ownership of which they have never surrendered, be given statutory recognition and protection. It cannot be discriminatory to restore to Maori something of special value which is in any event theirs by right.

8.4.11 We RECOMMEND that the Fisheries Act 1983 be amended to provide that in appropriate circumstances mahinga kaimoana as envisaged by the Ministerial Task Force in chapter 2 of its report of April 1992 may be reserved to an iwi or hapu.

References

{FNTXT|0-86472-103-X|8.1|1} 1 Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) (Muriwhenua Fishing Report) 1988 p 239

{FNTXT|0-86472-103-X|8.3.1|2} 2 Section 48 Maori Fisheries Act 1989

{FNTXT|0-86472-103-X|8.4.8|3} 3 New Zealand Gazette 27 February 1992 No 25 p 505

Waitangi Tribunal, Department of Justice, Wellington.