Preliminary Paper No 9

THE TREATY OF WAITANGI AND MAORI FISHERIES

MATAITAI: NGA TIKANGA MAORI ME TE TIRITI O WAITANGI

A Background Paper

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Kaore i hangaia te kupenga hei hopu ika anake, engari i hangaia kia oioi i roto i te nekeneke o te tai.

(The net is not made up just to catch fish, but also to be flexible so that it may flow with the tide.)

Time present and time past
Are both perhaps present in time future
And time future contained in time past.

T S Eliot, Burnt Norton

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PREFACE

In May 1986 the Minister of Justice asked the Law Commission to consider and report on the law affecting Maori fisheries. In the Minister's words, the purpose of the reference was "to ensure that the law gives such recognition to the interests of the Maori in their traditional fisheries as is proper, in the light of the obligations assumed by the Crown in the Treaty of Waitangi." The full text of the reference appears in the introductory section.

The Commission decided as a first step to prepare a preliminary background paper on legal and historical aspects of the subject-matter of the reference. The expectation was that this would be published, possibly together with an issues paper, and comments generally solicited. This would have led in the ordinary course to extensive consultation and discussion with all those interested, and in particular with the many important interest groups.

However, the progress of events - judicial, political and legislative - described in the introductory section has made it doubtful whether further involvement by the Law Commission would serve a useful purpose. It likewise delayed the paper's completion and posed the problem of the most helpful time to issue it. No moment is or will be ideal, but the Commission believes that the value of the paper would be diminished by further postponing its publication.

Underlying these specific events is a deeper theme - a rapid and even perhaps dramatic change of perceptions of the Treaty of Waitangi's place in New Zealand law and the relationship between many aspects of the law and the Treaty. The true significance of this, its dimensions and its larger implications, are not yet apparent. It is thus not possible to do more than view the issues of our reference in a particular time-frame - the beginning of 1989. The study should be read with this in mind.

The paper's nature - a background and research document - has determined the nature of the consultations that have taken place in its preparation. It is not and was not envisaged as a report of any sort, with findings and recommendations about future action. Nor is it even a discussion paper in the sense of containing proposals or options. Accordingly, while a number of interest groups were contacted and the Commission's task explained to their representatives, there was no attempt to elicit or discuss their detailed views at that stage. On the other hand there was wide discussion with persons having special interest or expertise in the field - historians, practising lawyers, academics, representatives of government agencies, and others. An earlier draft of the paper was sent to various experts and their responses obtained. The help they have

freely given is gratefully appreciated. They are, of course, not responsible in any way for statements or opinions contained in the paper.

Among the materials and information that have been considered, the reports of the Waitangi Tribunal are in a class apart. Without the Tribunal's thorough and painstaking analysis of issues, history and law, and the unique body of evidence it has received from the tangata whenua, the preparation of a document such as this would at best have required extraordinary and prolonged labours.

The purpose of the paper is to make the work done available to those who may be interested and to inform public discussion of the extremely important and complex issues implicit in Maori fishing claims. The Law Commission's hope is that it will help in the clarification and understanding of the issues and their history, the state of the law and how it has developed, and the reasons for current Maori grievances and claims. The present is difficult to understand except in the light of the past. And the past in turn may have valuable lessons for the future.

PART I

1 INTRODUCTION

1.1 In May 1986 the Minister of Justice gave the Law Commission the following reference under section 7(2) of the Law Commission Act 1985 -

> Purpose of reference
>
> To ensure that the law gives such recognition to the interests of the Maori in their traditional fisheries as is proper, in the light of the obligations assumed by the Crown in Te Tiriti o Waitangi (the Treaty of Waitangi).
>
> Reference
>
> With this purpose in mind you are asked to consider and report on -
>
> (1) The recognition of Maori fisheries (including lake and river fisheries) in the law, and whether any, and if so what, changes ought to be made to the law in that regard;
>
> (2) What protection Maori fisheries should have in respect of acts or omissions by the Crown, public bodies and other corporations, and individuals;
>
> (3) What measures and procedures are necessary or desirable to ensure that legislative proposals in any way affecting Maori fisheries take adequate account of Maori interests;
>
> (4) What criteria should be applied in resolving conflicts between Maori interests in respect of fisheries and other public interests.

1.2 On receiving this reference the Commission undertook extensive research (mainly of a historical and legal nature) into the issues which the reference raised. There was also some consultation of a preliminary nature. The intention was to prepare a paper that would be a prelude to and assist in the essential process of consultation and discussion, which in turn would lead to recommendations on what ought to be done.

1.3 Subsequent events, however, have left it in serious doubt whether the Commission still has a part to play. A great deal of the ground has been covered at a local and most detailed level by the hearings of the Waitangi Tribunal

of the Muriwhenua and Ngai Tahu claims.[1] Various aspects (although by no means all) have been litigated before the Courts. In December 1987 the Government and the New Zealand Maori Council set up a Joint Working Group to report by 30 June 1988 on "how Maori fisheries may be given effect, conservation and management of fisheries in the interim, and a timetable for the transition process". The Joint Working Group could not reach complete agreement[2] and on 22 September 1988 the Government introduced a Maori Fisheries Bill containing a detailed scheme for the recognition of Maori interests in sea fisheries. This Bill is still (February 1989) before a Select Committee. It is unclear what the legislation will finally provide. Negotiations between the Crown and Maori representatives are continuing.

1.4 The answer to one principal issue referred to the Law Commission is thus to be determined by negotiation and in the political arena.

1.5 There have been other significant events. Paragraph 2 of the reference asks what protection Maori fisheries should have in respect of acts or omissions by the Crown, public bodies and other corporations, and individuals. This goes beyond the recognition of Maori interests under the fisheries legislation. A large body of other statutes, and indeed common law, impinge on and may affect fishing grounds. Not only off-shore fishing is in question but also foreshore, river and lake fisheries. Much land below the high water mark has long been vested in harbour boards and other public bodies. It is not covered by the provisions to protect Maori interests in the Treaty of Waitangi (State Enterprises) Act 1988.

1.6 In June 1986 Cabinet directed that all future legislation coming before it at policy approval stage should draw attention to any implications for the recognition of the principles of the Treaty of Waitangi, and that departments should consult with appropriate Maori people on significant matters affecting its application. This has been reinforced by Cabinet's adoption of the proposals of the Legislation Advisory Committee in its report: Legislative Change, Guidelines on Process and Content (August 1987).

1.7 As a solution this depends on the continued will of the Executive for the time being to maintain the directive,

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1 Muriwhenua Report Wai-22, June 1988. The Ngai Tahu claim is proceeding. The formal claims in these cases are set out in Appendix D.

2 Appendix E reproduces the reports of the Crown and the Maori members of the Joint Working Group.

and on the judgment by Government and Parliament of how far particular proposals are consistent with the Treaty's principles, and if they may not be, how far they should prevail nonetheless.

1.8 Paragraph 4 of the reference raised a related issue. What criteria should be applied in resolving conflicts between Maori and other interests in matters pertaining to fisheries? What degree of paramountcy should these Maori interests have? This is ultimately a political question in the wider sense, but desirably there should be some coherent and consistent approach. That has hitherto been lacking. Some recent legislation, notably the Conservation Act 1987, goes a long way towards giving the principles of the Treaty an overriding force. In contrast the Environment Act 1986 lists these principles as one among several purposes of the Act without stipulating any sort of balancing test.[3] The Town and Country Planning Act 1977 does not expressly mention the Treaty of Waitangi or its principles. Some other legislation directly or indirectly affecting fisheries is silent on the question of Maori interests.

1.9 However, in March 1988 the Minister for the Environment announced a programme for resource management law reform embracing a number of planning resource statutes. They comprise the

- Town and Country Planning Act 1977
- Water and Soil Conservation Act 1967
- Soil Conservation and Rivers Control Act 1941
- Mining Act 1971
- Coal Mines Act 1979
- Geothermal Energy Act 1953
- Petroleum Act 1937
- Quarries and Tunnels Act 1982
- Noise Control Act 1982
- Clean Air Act 1972
- Environmental protection and enhancement procedures and the relevant sections in the
- Continental Shelf Act 1964
- Iron and Steel Industry Act 1959
- Atomic Energy Act 1945

together with, where appropriate, issues and resource management laws related to the matters under review.

1.10 The review was to proceed with the following guidelines:

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3 But see Law Reform (Miscellaneous Provisions) Bill 1989, cl 72.

i "the primary goal for government involvement in resource allocation and management is to produce an enhanced quality of life both for individuals and the community as a whole through the allocation and management of natural and physical resources;

ii "resource management legislation should have regard to the following, sometimes conflicting objectives: to distribute rights to resources in a just manner taking into account the rights of existing right holders and the obligations of the Crown. The legislation should also give practical effect to the principles of the Treaty of Waitangi."

In September 1988 a coastal law reform programme, relating principally to the Harbours Act 1950, was merged with the national resources law review. A discussion paper on the review was released in January 1989.

1.11 In consequence of what has happened, the scope of the paper is circumscribed and its purpose modest. Essentially it is a historically oriented survey of laws and policies affecting Maori fisheries. The aim of presenting it now is to explain the facts and the law and to provide perspective.

2 ESSENCE OF THE PAPER

2.1 This paper is a commentary upon a series of questions raised by the Commission's reference.

i What is the field of inquiry - what is meant by traditional Maori fisheries?

ii What were the terms of the Treaty of Waitangi in this context - what obligations did the Crown assume?

iii How far did (and does) the law give effect to these obligations?

iv How far have the actions and policies of governments in relation to Maori fisheries been consistent with the obligations the Crown assumed in the Treaty?

v What is the present state of the law affecting Maori fisheries?

vi Would a greater legal recognition of Maori fisheries in terms of the Treaty give Maori people unjustified privileges or be inconsistent with the principle of equality before the law?

2.2 The paper is divided into 3 parts. The first contains introductory material - an analysis of the different geographical situations where fishing rights can come into question and of the various possible legal rights in relation to fishing, and a description of the existing legal regime under the Fisheries Act 1983, particularly in relation to sea fisheries: section 4.

2.3 The second part begins with a very broad overview of the historical and legal background: section 5. It then addresses in sections 6 to 12 the questions: what were "Maori fisheries" at the time of the Treaty of Waitangi, how the Treaty itself dealt with them, and how the law enacted by Parliament or decided by the courts relates to the obligations of the Crown under the Treaty. This requires separate treatment of the legal regime governing sea and coastal fisheries (section 10), and river and lake fisheries (section 11). Moreover the law of fisheries itself is by no means the whole story. A large mass of other legislation - devolutionary (as in the Harbours Acts), resource, regulatory and planning - has or could have an effect on fisheries (section 12). And lying beneath much of the current argument about the adequacy or inadequacy of the

law governing Maori fisheries and fishing claims are fears of "special laws" or "special privileges" for one group, and a belief that this is contrary to the rule of law. This has to be addressed if the issue is to be dispassionately and constructively approached. Section 13 attempts to set this question in perspective.

2.4 The third part contains a fuller account of the historical development of the law in New Zealand, with reference to what has happened in analogous situations overseas, notably in the United States and Canada: section 15. Section 16 examines, also in the context of fisheries, the legal status of Maori custom. And finally section 17 considers the course of government policies, the legislation that they have generated, and Maori responses to them.

2.5 In all this, the Treaty of Waitangi is central: what it meant and was understood to mean at different times, what its implications were in terms of the imported English law, and how legislation and government policies and actions have dealt with it.

2.6 The reference relates to fisheries, but this cannot be isolated from other and more general topics, notably judicial decisions, policies and legislation concerning Maori land. The land cases often throw light on fishing rights by implication and analogy. Few judicial decisions have been directly on fisheries, and hardly any during the crucial nineteenth century period. The way in which the Courts have approached Maori claims, and the Treaty itself, can thus be properly appreciated only by looking in some detail at land cases.

2.7 Conversely, conclusions about the Treaty's application to fisheries have a larger context and significance.

2.8 The settlement of New Zealand and the status of Maori property and customs needs to be set in the wider context of the expansion of Europe after 1500 and the debates that occurred over aboriginal rights. These issues were reflected in arguments over waste lands (and are germane also to fisheries). They have a bearing on an understanding of the Treaty of Waitangi.

2.9 What are the Maori fisheries that the reference has to do with? Any answer in terms of inland or littoral fisheries only would be inadequate given the nature, extent and importance of sea fisheries to the Maori. There is evidence that historically Maori tribes and hapu fished well off shore, and that their fishing had a dimension beyond mere subsistence and ceremony. Some of this evidence

appears in the report of the Waitangi Tribunal on the Muriwhenua claim[4] but section 6 mentions other sources also.

2.10 To determine what obligations were assumed by the Crown requires a careful examination of the Treaty of Waitangi and of the views of those who have expounded it, both Maori and Pakeha. Early understandings are of great importance, and special weight must now be placed on the Court of Appeal's decision in New Zealand Maori Council and Latimer v Attorney General and Others.[5]

2.11 The principles of the Treaty, said the Court, required the Crown to respect, guarantee and actively protect Maori rights. The Maori Council case was itself concerned with land rights, but the Court did not distinguish these rights from others, including fishing rights, specified in the Treaty's English version. The Maori version used a word (rangatiratanga) which imported more than possession and indicated elements of management and control.

2.12 A choice of approaches, however, exists, and is fundamental. What is the proper starting point of a consideration of Maori fishing claims? Hitherto, this has been taken as Crown sovereignty over the sea and the seabed. The alternative is Maori "rangatiratanga" over fishing resources. The gist of the Waitangi Tribunal's report on the Muriwhenua claim is that the true question is what the Crown may reasonably seek from the Maori rather than how much it should concede to them. An acceptance of this would call for a reorientation in the basic assumptions of many Pakeha.

2.13 The key question is the relationship between Article 1 of the Treaty, which recognised the sovereignty of the Crown over New Zealand, and Article 2, which guaranteed the Maori tribes in the English version possession of their fisheries and in the Maori version authority (rangatiratanga) over their taonga, which the Waitangi Tribunal has held include fisheries. This question cannot be answered simply by looking at the Treaty itself, necessary though that is.

2.14 The second essential point is that, as the Court of Appeal has said, the Treaty is to be applied in accordance with its spirit and intent, and in the circumstances of 1989, not of 1840. It is thus "always speaking"; it is an organic instrument. But at the same time the circumstances

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4 Muriwhenua Report Wai-22, June 1988.

5 [1987] 1 NZLR 641.

of 1989 are themselves in part the product of the way in which the Treaty has been applied to fisheries in the past.

2.15 Against this background, the paper examines in detail the development of the law by the Courts and Parliament, and the policies of the Executive.

2.16 Until recently national sovereignty stopped at the traditional limit of 3 nautical miles. The Territorial Sea and Fishing Zone Act 1965 created a 9 nautical mile fishing zone beyond this limit. The territorial sea was itself extended for New Zealand to 12 nautical miles by the Territorial Sea and Exclusive Economic Zone Act 1977. The unquestioned doctrine of English law was that the sea was open to all to navigate and fish. Because the right to fish was a general right (subject to various legislative restrictions going back in New Zealand to 1866) private persons had no remedy for actions that indirectly destroyed or impaired fishing. This doctrine conflicted with traditional Maori customs and interests in respect of reefs, shoals and other offshore fishing grounds.

2.17 The situation of foreshore - coastal and harbour - fisheries was less clear even in terms of conventional understandings of the law.

2.18 In New Zealand the concept of the title of indigenous people to their land was accepted as a moral right, was inferentially recognised by legislation in 1841[6] and had apparently been upheld by the courts in 1847 and 1872 as a legal right even apart from legislation.[7] Later cases, especially Wi Parata v Bishop of Wellington,[8] are usually taken to have rejected it, although not as unequivocally as is sometimes supposed. What these cases did insist was that in the absence of statute no Maori claims to land were cognisable in the courts, and that assertions by the Crown that Maori title had been extinguished were conclusive. The Crown's acquisition of Maori land was explicitly held to be an act of State not reviewable by the courts. If this were not so, said the Judges, all private property rights to land might be endangered.[9]

2.19 Nonetheless there existed from 1862 a series of statutory schemes whereby the Native Land Court investigated customary land titles and converted them into English-style titles, that is titles held from the Crown. Thus as a

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6 Land Claims Ordinance 1841.

7 R v Symonds [1840-1932] NZPCC 387; In re the Lundon and Whitaker Claims Act 1871 (1872) 2 NZCA 41.

8 (1877) 3 NZ Jur (NS) 72.

9 Ibid, at 79-80.

general proposition (confiscations after the New Zealand Wars being to some degree an exception) Maori lands were dealt with by a judicial process. From the beginning then they did receive a degree of legal recognition.

2.20 The Crown, however, took a restrictive view of where 'land' for this purpose stopped. It asserted a complete and unqualified ownership of all land below high tide-mark. The matter first seems to have assumed importance in the late 1860s. There was an insistence on the public right to fish anywhere in tidal waters as well as offshore; a Maori had no more right than any other individual to fish there. The Court upheld this in 1914 in the key decision of Waipapakura v Hempton.[10] And under Parliamentary sanction the Government disposed of large parts of the foreshore and harbours to Harbour Boards and other local bodies. This has generally been regarded as freeing this land from any Maori claims. Even if there were residual Maori rights in respect of the foreshore they were (on this view) destroyed once the customary title to adjoining land was converted into Crown-derived title. Yet because of a provision in successive Harbours Acts from 1878 the Maori Land Court had no power to issue titles in respect of land below high water mark. That land could never become Maori freehold land.

2.21 The state of affairs described in the previous paragraph was inconsistent with Maori perceptions of their customary rights, as frequent complaints and petitions indicate. The Court of Appeal in Re The Ninety Mile Beach[11] concluded that originally the Native Land Court did have jurisdiction to investigate Maori title over foreshore lands. T A Gresson J remarked that otherwise the Maori would have been deprived of their customary rights by a sidewind and the spirit of the Treaty seriously infringed.

2.22 Maori complaints and claims for redress in respect of fisheries and fishing grounds were frequent, forceful and often futile.

2.23 Pressures by European settlers and those who represented them were also evident in relation to lakes and rivers. In 1903, the Coal Mines Amendment Act declared the beds of navigable rivers to belong to the Crown. Soon afterwards, the Executive made strenuous efforts to persuade the Courts that the Crown owned lakebeds as well as the seabed beneath tidal waters. The Courts did not accept (though they have never definitively rejected) this claim.

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10 (1914) 33 NZLR 1065.
11 [1963] NZLR 461.

The result was a series of compromises between the Crown and Maori claimants, sanctioned by legislation.

2.24 The progressive enlargement of the Crown's contentions should be noted. In the first years of British settlement there seems to have been no clear policy as to the ownership of the foreshore. By the 1870s the Crown was vigorously asserting complete proprietorship over all land below high tide mark, but often with the concession that the Maori might have fishing rights. Perhaps in the 1880s, and certainly by the beginning of the twentieth century, these too were inferentially rejected, a rejection that Stout C J upheld in Waipapakura. By 1910 the Crown was claiming that it had absolute ownership also of beds of lakes.

2.25 When sea fisheries were first made the subject of statutory regulation in 1877, Maori rights under the Treaty of Waitangi were preserved.[12] This provision was omitted in 1894 and reinstated in 1903 in a vaguer form.[13] It is now section 88(2) of the Fisheries Act 1983. The High Court's decision in Te Weehi v Regional Fisheries Officer[14] has given it a substantial but as yet uncertain content. It may mean no more than that the regulations and restrictions imposed by fisheries legislation do not in certain circumstances apply to Maori. All fisheries legislation assumes and is built on the basic common law under which, as hitherto interpreted in New Zealand, the foreshore and the sea beyond it "belong to the Crown" without any qualification.

2.26 The present Fisheries Act and its predecessors have specific provisions enabling particular areas to be reserved for Maori use.[15] These provisions are narrow, and their exercise was and is purely a matter of Executive discretion. Nor can there be any certainty that such areas, or any other Maori fishing grounds, will continue to yield fish. Other uses, and the effects of pollution, have often made them worthless for that purpose. The Manukau Harbour is a precisely documented instance.[16] Legislation apart from the Fisheries Act must be taken into account in any consideration of the present situation of Maori fisheries.

2.27 The scheme of controls over commercial fishing created by the Fisheries Amendment Act 1986 has introduced a wholly new element. This is the Quota Management System, discussed in section 4. It puts limits on the total

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12 Fish Protection Act 1877, s 8.
13 By s 14 of the Sea Fisheries Amendment Act 1903. See para 8.7.
14 [1986] 1 NZLR 680.
15 Fisheries Act 1983, s 89(3)(b).
16 Manukau Report Wai-8, July 1985.

allowable catch (TAC) for each quota management area of each fish species included in the system and divides that quantity among those entitled to individual transferable quotas (ITQ). Allocations of quotas were made only to holders of existing fishing permits or persons who had held one within the previous 12 months. ITQs may be transferred or may be leased for a specified period or a specified tonnage of fish. Substantial annual "resource rentals" prescribed by the Act are payable in respect of each quota.

2.28 Established both for conservation reasons and for motives of economic efficiency the scheme has created a new form of property right and what is technically called a limited monopoly.

2.29 The legal effect of section 88(2) has consequently become a matter of much greater importance, since on the face of it the statutory scheme is subject to that subsection. The answer is at present uncertain. The issue may be determined by the Courts. Or the matter might be dealt with by negotiation ratified by legislation or by legislative settlement as the Maori Fisheries Bill, introduced on 22 September 1988, envisaged.

2.30 But considered historically and conceptually, what the 1986 legislation signifies is this. For more than a century the Crown consistently declined to recognise any exclusive right of the Maori in their sea fisheries. The ground was that the common right of everyone to fish below high water mark was a matter of basic legal doctrine and public policy, albeit subject to licensing and other regulatory regimes. On the Crown's initiative Parliament has now "fenced the watery common", established exclusive commercial fishing rights and given them to those operators who in the immediately preceding years had caught substantial quantities of fish.

2.31 This paper suggests that the law applicable to Maori fisheries is unsatisfactory. As understood until quite recently it has given little recognition to Maori interests in their sea fisheries. And the very changes and developments that are occurring (through case law and statute) leave the state of the law uncertain. Moreover the mass of other legislation that bears directly or indirectly on fisheries is inconsistent and often fails to give any express weight to Maori interests.

2.32 This result was not a necessary application of the common law. The law did not have to develop in New Zealand in the way it did. The cases after Wi Parata (appearing to deny Maori property rights unless they were expressly conferred by legislation) are out of phase with some earlier decisions, and with at least one current of Privy Council

cases. On the same common law base, the Canadian and especially the United States courts have given quite different answers. Even if the Treaty of Waitangi could not itself create rights directly recognisable by the Courts, many of the New Zealand decisions could have gone the other way, if, for instance, the Courts had been consistently willing to regard the Treaty as a source of public policy. The most recent cases illustrate this clearly.

2.33 These decisions, including Greig J's interim judgment in The Ngai Tahu Maori Trust Board v Attorney-General and Another and other cases[17] , have taken a much more favourable approach to Maori claims than previously. But they have been based on special statutory provisions in the Fisheries Act 1983 and the State Owned Enterprises Act 1986. Legislation itself may not be sufficient, but will doubtless be needed to give effect to solutions reached by a political process and to produce clarity, certainty and perceived fairness.

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17 Unreported CP 559/87, 610/87 and 614/87, H C Wellington, 2 November 1987.

3 CLASSIFICATION OF FISHERIES AND RIGHTS

3.1 The general reference to fisheries covers a variety of places, a variety of possible interests, and a variety of bodies in which these interests may be vested.

3.2 At one extreme are the high seas, over which no national control is claimed by the State beyond 200 nautical miles. There is in New Zealand law, since 1977, the Exclusive Economic Zone (EEZ), which extends from the outer boundary of the territorial sea to a distance of 200 nautical miles from a baseline measured from low-water mark generally, but as a straight line across indentations whose headlands are not more than 24 nautical miles apart. The territorial sea extends for 12 nautical miles from that baseline. (Again this is a modern enlargement of the traditional 3-mile limit of national sovereignty.) Between the territorial sea and the shore are the internal waters, comprising harbours, bays, and the foreshore generally below the mean high tide level. Inland, and subject in part to a different legal regime, are rivers (navigable and non-navigable), lakes and even swamps insofar as they may be a source of fish.

3.3 The Territorial Sea and Exclusive Economic Zone Act 1977 declares the seabed and subsoil between low-water mark and the outer limits of the territorial sea to be and to have always been vested in the Crown, subject to the grant of any estate or interest therein. This last would seem to refer to grants by the Crown to public bodies or private individuals. By implication it appears to exclude any possibility of Maori customary title in respect of these areas, since customary title does not derive from Crown grant. Whether it would now be held to have this effect is not clear.

3.4 Ownership of the foreshore between high and low water-mark is sometimes in the Crown, sometimes vested in harbour boards and other public authorities, and in a few cases in private persons (setting aside any question of continuing Maori fishing rights). The bed of any navigable river (a term that is itself not without uncertainty: see paras 11.8 - 11.10) is vested by statute in the Crown. The beds of non-navigable streams normally belong to the owners of the land on their banks. The basic legal status of lakes is not beyond doubt. In the orthodox view lakebeds, like riverbeds, prima facie belong to the owners of the adjoining land. The ownership of many lakes is, however, governed by special legislation, often the result of settlements between the Crown and the Maori interest concerned.

3.5 The nature of possible interests in relation to these various areas likewise varies. There is sovereignty or dominion, the ultimate authority of the national State expressed in the power to make general laws and to take property for public purposes. The right to control is a subordinate form. It is likely itself to import a certain power to make laws. The powers of local authorities, such as county councils and harbour boards, are of this kind. Overlapping but distinguishable from this is a right to manage. None of these forms of authority are "property" in terms of English law, and they are subordinate to the powers of the sovereign state. They are distinct from ownership, which is itself a parcel of rights - the right to exclude others, the right to use and exploit, and the right to alienate. But the exercise of a right to make laws by the body having sovereignty or a power of control may and often does limit the rights of ownership.

3.6 The "owners" of property may hold it for themselves or for others (the concept of trusteeship). And finally ownership may be absolute (of goods and in practice of freehold land), or it may be limited either in time, as in a life interest, or in extent. So one person might own a stream, but another might have a right to navigate it, or to take water or fish from it. Or, as with a lease, ownership and the right to possess and occupy might be divorced for a short or long period.

3.7 Some things are not the subject of ownership under our legal system. Thus there is no property in the fish in seas, rivers and lakes until they are caught. No-one can own sea water. The right to take or use other natural water (but not its ownership as such) is vested in the Crown with certain exceptions by the Water and Soil Conservation Act 1967 (section 21).

3.8 Whether fishing rights divorced from the ownership of the underlying bed may exist in New Zealand law in respect of rivers and lakes is not completely certain. Note, however, that section 73 of the Fisheries Act 1983 prohibits anyone from selling or leasing the right to fish in any waters, the substance of the section going back to 1902. Whether separate fishing rights can exist in respect of the foreshore between high and low tide is clouded with uncertainty. Almost certainly there can be none for non-Maori. Until Te Weehi's case,[18] the weight of judicial authority was for practical purposes against their existence for Maori also. The interpretation of section 88(2) of the Fisheries Act is one key to the answer. The degree of recognition of aboriginal title by the common law is another.

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18 [1986] 1 NZLR 680.

3.9 But a caution is necessary. This sort of analysis is useful only up to a point. New concepts and classifications may be called for to deal with new circumstances. Moreover, the concepts are themselves a product of Western legal thought and relate to Western systems and institutions. This is an area where the Pakeha unlearned in Maoritanga must tread with the greatest diffidence and circumspection. It seems that these concepts do not wholly correspond with Maori thinking and Maori concepts. To take only 2 examples, one cannot easily if at all subsume the fundamental ideas of mana and wairua under any of the heads mentioned above. And the word "rangatiratanga" used in Article 2 of the Treaty of Waitangi in relation to Maori rights is by no means co-extensive with "ownership".

3.10 Since Maori ways of thought have been a largely closed book to the vast majority of Pakeha, and Pakeha lawyers, the temptation exists to see Maori claims in terms of one or other of these categories. However, the Law Commission has a statutory obligation to take account of te ao Maori (the Maori dimension). And the law has often proved flexible and adaptable enough to cope with unfamiliar institutions and concepts.[19]

3.11 Meanwhile, answers must perhaps be looked for in specific arrangements rather than simply in terms of general legislation built on a structure of English or European jurisprudential concepts.

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19 See, for example, Pramatha Nath Mullick v Pradyunna Qumar Mullick (1925) LR 52 Ind App 245, where a Hindu idol was held to have legal personality. The case was discussed by P W Duff in (1929) 3 Camb LJ 42.

4 THE PRESENT SEA FISHERIES REGIME

4.1 The geographical limits of the fisheries over which New Zealand has some jurisdiction are determined by the Territorial Sea and Exclusive Economic Zone Act 1977. It declares that the seabed and subsoil between low water mark and the outer limits of the territorial sea (12 nautical miles from the baseline) is deemed to be, and always to have been, vested in the Crown. Beyond the territorial sea is the Exclusive Economic Zone, whose outer limits are 200 nautical miles from the baseline of the territorial sea: see para 3.2. The Zone is part of New Zealand's fishery waters, and the Act controls foreign fishing in the Zone.

4.2 There was little pressure on New Zealand's offshore fishery resources until the 1960s, apart from a few localised fisheries such as oysters. Legislation in 1945 had licensed fishing vessels and required them to land their catches only at their port of registration. Following the report of a Parliamentary Select Committee,[20] restrictive licensing was abolished in 1964 and a Fishing Industry Board set up to promote the industry.[21] The emphasis was on the expansion of production and economic efficiency.

4.3 During the 1960s and 1970s the New Zealand fishing industry grew dramatically. The catch of many inshore species rose towards and past the level that their numbers would sustain. Objectives switched from maximium yields to maximum sustainable yields. The first serious attempt to deal with this was the "controlled fisheries" scheme enacted in the Fisheries Amendment Act 1977. It was to be applied to particular species by regulation. The first to be included were scallops and crayfish (rock lobsters); finfish in the Hauraki Gulf were added in 1981. As no total catch could be prescribed, the scheme was not very effective. It is overlapped by later schemes, and we were told that the intention is to revoke its applications as these schemes take effect.

4.4 In 1982 a policy designed to control total deepwater catches, bring greater efficiency to deepwater fishing and enhance New Zealand participation in that fishing was established under powers in the Fisheries Act 1908. Many of its characteristics looked forward to the later Quota Management System. A limitation of the total catch was of its essence. Provision for royalties was later made by the Fish Royalties Act 1985.

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20 (1962) AJHR I-14.

21 Fisheries Amendment Act 1963; Fishing Industry Board Act 1963.

4.5 The Fisheries Act 1983, an Act "to consolidate and reform the law relating to the management and conservation of fisheries and fishery resources within New Zealand and New Zealand fisheries waters", established regimes for all waters, including inland waters. The scheme of the Act in relation to commercial sea fisheries is to divide fisheries waters into 6 Fisheries Management Areas, to require a Management Plan for each Area incorporating matters that the Act prescribes and having the force of regulations, and to control fishing through the licensing of commercial operators and their vessels. The purpose of management plans was to conserve, enhance, protect, allocate, and manage the fishery resources within New Zealand fisheries waters.[22] Under this Act limits could be imposed on total catches.

4.6 The expectation that fishery management plans could be brought quickly into force proved too optimistic. By February 1989 no Management Plan had yet been adopted and only two had reached the stage of release for public comment.

4.7 Another aspect of the 1983 Act demands mention. Only licensed "commercial fishermen" could take fish for sale. This term was defined to comprise those who could satisfy the Director-General of Agriculture that they relied wholly or substantially for their income on fishing activities or (for companies) that they had made or intended to make an "appreciable investment" in the industry. The objects were to create a business-like fishing industry and to separate recreational and commercial fishing. The Director-General adopted the criteria of gross earnings of $10,000 a year or 80 per cent of total income.

4.8 The result was to approximately halve the number of commercial operators, something like 1500 to 1800 going out of business. In Northland it excluded something like 300 out of 600 fishermen. It reduced the catch by the order of only 5 per cent. A report prepared by Dr George Habib for the Maori Economic Development Commission and the Department of Maori Affairs dated December 1985,[23] suggested that a large number of those excluded from both vessel and shore fishing were Maori. The legislation affected numerous operators living in small coastal communities, where in some cases, such as Te Kao, all catching for sale had to cease.

4.9 The Quota Management System (QMS) introduced by the Fisheries Amendment Act 1986 supplements and completes the 1983 regime. It has effected a fundamental and far-reaching

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23 Korekore Piri Ki Tangaroa, Maori Involvement in the Fishing Industry.

change, the essence of which is a shift from the previous effort-oriented controls (closed seasons, size of nets etc) to what was seen as a much more efficient and effective extraction-oriented control. Its basic principle is to place a limit on the total commercial catch for each species to which it is applied by setting a total allowable catch (TAC). Many commercially significant species - 27 finfish species and paua - have been brought under it. However, as at February 1989 there were still a number of important exceptions, including rock lobster (crayfish), all types of tuna, scallops and oysters. A proportion of the total for each species is allocated to each operator as an Individual Transferable Quota (ITQ). Only those who held permits when the 1986 Act came into force or at some time during the preceding 12 months were entitled to receive a quota.

4.10 TACs are set for each species for each Quota Management Area, the boundaries of which are based on, but are not identical to, those of Fishery Management Areas. Under section 28C they are to be determined "after making allowance for Maori, traditional, recreational and other non-commercial fishing". (The use of the comma between "Maori" and "traditional" is confusing. It appears to distinguish Maori and traditional fisheries. But the clear implication is that the Maori fishing that must be allowed for is non-commercial.) In practice, we were informed, no specific allowance was made except for snapper, up to a third of which was allocated for recreational fishing. It was assumed that the Maori and recreational catch of other species was taken care of by a conservative setting of each TAC.

4.11 The Act enables TACs to be increased or reduced. Compensation is payable to quota holders whose ITQs are correspondingly reduced.

4.12 The original ITQ holders did not pay for their right. Indeed, an integral aspect of the scheme was financial assistance for those initially wishing to leave the industry. The Crown bought quotas back from those who saw their ITQ as being uneconomic or who for some other reason did not wish to accept it. About $55 million has been paid for this purpose. Fishing operators were also permitted to tender for the surrender of their quota. The policy has been successful in that almost all the excess of aggregated individual quotas over the TAC has been eliminated, and little pro rata reduction has been necessary.

4.13 ITQs are transferable. A holder may transfer it permanently or may lease the rights under it for a specified term or a specified tonnage of fish. A good deal of trading in ITQs has occurred, to the extent that a Fish Quota Exchange has come into existence. Anti-aggregation

provisions are designed to prevent any operator from having more than 20 per cent of the TAC by area for inshore species, or 35 per cent of the TAC for deepsea species. These provisions apply, however, only to legal ownership and could thus be circumvented.

4.14 Although original holders received their ITQs without payment, the 1986 Act provides for substantial annual resource rentals, varying with the species. They are prescribed on a per tonne basis in Schedule 1B of the Act, but may be varied by Order in Council: section 107G. The Minister recommending a variation must have regard to the value of ITQs for the species and the net returns and likely net returns to commercial fishermen.

4.15 The total resource rentals billed by the Ministry of Agriculture and Fisheries for the 1987/88 fishing year (1 October 1987 - 30 September 1988) were approximately $22.5 million, up from approximately $21.7 million the previous year.

4.16 The rentals set for the fishing year beginning in October 1988 vary from $6 per tonne (red cod taken in South-East Coast area) to $252 (orange roughy and paua) where the holder has the use of a foreign owned New Zealand fishing boat, and $3 and $126 respectively where the holder does not. Other typical rentals per tonne are (in round figures):

snapper	$98/$49
hake	$65/$32
blue cod	$31/$16
hapuku (groper and bass)	$43/$22
tarakihi	$24/$12

4.17 In fact these rentals have little relationship to the prices at which quotas have been traded, and we were told that the industry resisted proposals that they should. In any event such prices have varied enormously between, as well as within, different fishing areas. Thus for the period June to November 1987 the average price per tonne of snapper quota varied from $14,763 in area 1 to $3337 in area 7. In that area the lowest price was a purely nominal $28 per tonne of snapper. Of the transactions in orange roughy quotas, $6600 per tonne was paid in one area, $2000 in another. It should be remembered that transactions may be sales of quotas or leases for a specified period or tonnage. No useful conclusions can be drawn from these sorts of figures without further analysis.

4.18 The New Zealand fishing industry has in the last twenty years become large and economically important, bringing substantial revenue to the Government as well as being a significant export earner. The value of the domestically consumed catch is much more modest. Concentration of ownership has resulted in about 18 companies catching over 75 per cent of the total. The share of foreign vessels is much smaller proportionately than formerly. Thus in 1988 the total allocation to Korea and Japan, the two main foreign operators in New Zealand waters, was only 17,000 tonnes for all finfish and squid.

4.19 Detailed information about Maori participation in this industry either before or after the 1983 legislation is not readily available. Dr Habib's study (see para 4.8) yields the following exemplary table for 1985.

	Total vessel permits	Maori holders
Northland	318	36
Auckland/ Hamilton	78	12

4.20 In economic terms the ITQ scheme has created a new limited monopoly akin to those arising from other restrictive licensing schemes, such as liquor licences and taxi licences. In legal terms it has converted a public right to fish commercially (subject, of course, to regulation) into a series of private rights. It has created a new property right in the nature of a profit a prendre - broadly an ongoing right to take something tangible that is present on another person's land - and allocated that right to those who held, or had recently held, commercial fishing licences at the time of its commencement. The small, essentially part-time, operators whom the 1983 Act excluded from commercial fishing did not receive any share. Nor did they receive compensation. On the other hand the Crown bought out those 1986 participants in the industry who for one reason or other did not wish to take up their ITQ.

PART II

5 THE HISTORICAL SETTING

5.1 Throughout the history of humankind the emigration and re-settlement of peoples has been a recurrent theme. One such movement was the great folk-migration from Europe that began as a trickle at the end of the fifteenth century. From about the middle of the eighteenth century it gathered volume, and during the nineteenth and early twentieth century became a flood which filled the temperate lands discovered by European explorers and largely displaced their existing inhabitants.

5.2 The causes of this migration were diverse and operated at different levels. To discuss them is far beyond the scope of this survey, but one may note the conjunction of a dramatic growth in population after about 1750, a general condition of poverty but an optimism that it might be ameliorated, a spirit of confidence and adventure that accompanied the industrial revolution, and greatly improved means of mass transport. At the same time technological superiority, especially in arms, enabled white settlers to impose themselves on indigenous peoples to a large degree.

5.3 In these circumstances the large scale settlement by Europeans of New Zealand, a temperate land with a favourable climate and soil, had almost an air of historical inevitability. And the power and mana of Great Britain on the seas after the Napoleonic wars meant that this settlement was likely to be essentially British. The European colonisation of New Zealand is as much a fact of history as the Anglo-Saxon and Danish settlements of England, the Bantu migration into southern Africa, and the initial discovery and settlement of Polynesia itself. It is a fact that has to be accepted at the threshold of any honest inquiry. To disparage it is beside the point.

5.4 The formation and expansion of Polynesian culture brought their colonists to uninhabited islands, and about 1000 years ago to an Aotearoa that was likewise empty of people. European voyagers and colonists were in that respect less fortunate. The lands they saw themselves as discovering were already occupied by societies of various natures - nomadic, agricultural and urban. Except in a few unimportant cases they did not arrive as tangata whenua.

5.5 This expansion of Europe produced moral tensions that are not recorded as being associated with earlier folk-migrations. These tensions were not simply a product of the nineteenth century evangelical and humanitarian movement in England. The issues were first argued in sixteenth century Spain, soon after colonisation of the

newly discovered Americas began. They were predicated in medieval and renaissance natural law thinking, and by Christian teaching. The question was one of justice. In what circumstances and on what conditions were Christian powers justified in assuming rule over the Indians and (a separate question) in acquiring their land and other property? The answer that was given to the second question in official Spain, in the writings of most of the founders of modern international law such as Grotius (1583-1645), and in the usual practice of Britain and at least some other colonial powers, was that Indian property rights were to be recognised by the law and that their land and other possesssions could not be appropriated without sufficient cause. The desires and convenience of the colonists were not a sufficient cause. Already we have the concept of aboriginal title.

5.6 Moreover, treaties and agreements made with chiefs and other indigenous rulers were as binding as those made with other European powers. In both cases the moral and legal principle of pacta sunt servanda (promises must be kept) was accepted. In neither case did the practice always live up to the theory.

5.7 However, as the desire of European settlers and would-be settlers for land grew, a major qualification surfaced. It was founded on a natural law doctrine that the right to property is not absolute (a starving person who takes food is not morally guilty of theft) and that the ownership of property beyond reasonable needs may properly be limited. It was therefore proper, so the argument ran, that the rights of a few native people to range over a large area should yield to others who could use it more effectively so as to benefit many rather than a few. The practical distinction was commonly between nomads and pastoralists, who were readily assumed to be more primitive, and agriculturalists. The rights of indigenous people were thus confined to land they actually cultivated or which was actually necessary for their support. This notion goes back at least to Locke (1632-1704), who held that land was capable of ownership only when "the sweat of labour had been mixed with it", in his own phrase. One of its most influential exponents was the Swiss jurist Vattel (1714-1767), whose statements were often quoted in relation to New Zealand affairs.

5.8 As well as being arguable in terms of natural rights, such a philosophy fitted in well with utilitarian concepts ("the greatest happiness of the greatest number"). Naturally it was congenial to settlers and the promoters of settlement. It gave a moral sanction to those who wished to occupy sparsely populated countries. The degree to which this philosophy was applied varied. In

Australia, and in parts of Canada, the aborigines were regarded as having no rights against the British settlers. On the other hand, normal policy and practice in the United States dictated that all tribal lands should be purchased and certain rights preserved. Fishing and hunting rights were among them.

5.9 One early and far-reaching consequence of the Treaty of Waitangi for New Zealand was to settle the issue as to the extent of land whose Maori proprietorship was recognised. Its supporters and opponents soon realised that as long as it stood even its English version committed the Crown to the widest recognition of Maori land rights over the whole of New Zealand.[24] All or almost all land in New Zealand was claimed by some Maori group. As the British Resident, James Busby, perceived as early as 1835, "as far as has been ascertained every acre of land in this country is appropriated among the tribes".[25] There was no true waste land in New Zealand. All land had to be obtained by willing purchase.

5.10 Why then was the Treaty expressed in these wide terms? Partly because of a sense of justice that had long antecedents in British colonial policy but also owed a good deal to the evangelical and humanitarian movement. Partly because of the reality of Maori power in 1840. Britain sought to gain Maori consent as the basis for acquiring sovereignty over New Zealand. There is no reason to think that the British government would have contemplated for a moment a war of conquest in 1840. The only terms on which the Maori would possibly give their consent included an assurance of protection for all their land and property.

5.11 But what was accepted for land was not applied to fishing grounds below the high tide mark, nor in the long run to fishing rights that might be independent of ownership of the underlying soil. These fell foul of the common law rules that land below high tide mark was the property of the Crown, unless it had been granted to others, and that there was a public and general right to fish in both tidal and offshore waters. These rules were taken by courts and governments to prevail over any Treaty promises or principle of aboriginal title. To many Pakeha New Zealanders this did and does seem part of the natural order of things. However, to many Maori it was novel and alien. It lies at the heart of many Maori grievances over fishing rights.

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24 See eg report of 1844 House of Commons Committee - paras 9.5 - 9.9 below.

25 Orange The Treaty of Waitangi (1987) p 38.

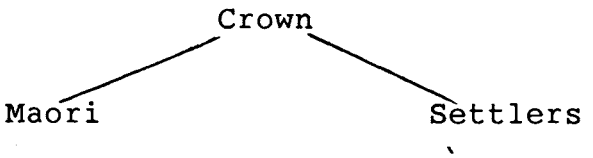
5.12 British sovereignty over New Zealand was followed (as the British government expected) by substantial immigration from Europe, almost wholly from the British Isles directly or through Australia. After 1858 European settlers and their children outnumbered an apparently declining Maori population. The disparity was made almost overwhelming by the influx following the South Island gold rushes of the 1860s and the Vogel immigration policy of the 1870s. The 1881 census recorded a population of 46,000 Maori and 490,000 non-Maori. Thus a century ago Maori already comprised less than a tenth of the population of New Zealand. Indeed like other indigenous people affected by European settlement, the Maori seemed for a time to be withering away.

5.13 Land acquisition followed this tide. By 1891 all but about 11 million acres (4.5 million hectares, one sixth of the total land of New Zealand) had gone out of Maori ownership. And this process continued until at least 1921. The countryside in much of New Zealand was colonial British in appearance and character.

5.14 With British settlers inevitably came English law and English institutions. In the circumstances of the time it was natural also that these should be applied to Pakeha and Maori alike. These systems reflected their British origins and the values and assumptions that lay behind them. The legal and institutional alterations that were made were in terms of arguments and principles familiar in Britain and Western Europe. Thus the social democracy that New Zealand aspired to, and achieved earlier and more fully than did Britain, was a Western concept.

5.15 For the majority of New Zealanders these things belonged and continue to belong. And they belong in geographical place as well as through inheritance. The issues and problems created by the presence in New Zealand of two principal cultural streams cannot usefully be approached by denigrating the legitimacy or value of one of them. To deny the Pakeha roots in New Zealand is itself an unwillingness to face reality.

5.16 The advent of responsible government - for most purposes in 1856 but more tardily for Maori affairs - created a dilemma and a conflict that even in 1989 have not been resolved. The Treaty of Waitangi was made between the Maori and the Queen of Great Britain. As long as the British Government and Governors acknowledged some responsibility as the Crown's agents for the welfare of the Maori, the Crown could attempt to hold the ring between settlers and Maori. The system produced serious tensions but it did provide an independent authority to which the Maori could look for protection of their interests.



5.17 In a nineteenth century colony of substantial British settlement, however, early self-government was inevitable. That necessarily meant that the Crown was identified with New Zealand Ministers answerable to a New Zealand Parliament whose lower House was elected almost wholly by settlers. The basic rule of democratic, and especially British-derived, systems is that the numerical majority determines laws and policies. This was, and is, exacerbated by the absence from mainstream New Zealand thinking of any doctrine of fundamental minority rights.

5.18 The Government was thus, constitutionally and in practice, the agent of the (settler) majority. Wherever the interests or wishes of settler and Maori conflicted, the only safeguard for the Maori (apart from resort to arms) was the Government's sense of fairness and restraint pursued even at the expense of its electors' self-interest. New Zealand governments were therefore put into the position of being judges in their own cause. It would hardly be surprising if justice was not always done.

6 THE NATURE OF TRADITIONAL FISHERIES

6.1 The explicitly stated purpose of the reference to the Law Commission is to ensure that the law gives such recognition to the interests of the Maori in their traditional fisheries as is proper. So there is need to consider what these "traditional fisheries" may be, their economic and cultural nature and significance, and their geographical extent.

6.2 In the past, Maori interests in fisheries have been seen as essentially personal and social, pertaining to subsistence and to hospitality. This has been the assumption of governmental and administrative policies and regulatory measures. Special reserves and exemptions from general regimes have been directed at allowing use for personal consumption or at hakari, hui and tangi. These uses are important. But the implication that there was no wider or more general Maori interest in fishing is inconsistent with a great deal of evidence, both from early history and more recently.

6.3 It may be doubted whether "traditional fisheries" can mean other than Maori fisheries as they were. Maori claims to fisheries and to land seem always to be based on historic and in that sense traditional rights. On that assumption, there are several principal issues -

i The date before which Maori fisheries should be regarded as "traditional".

ii Whether sea fisheries were regarded as the exclusive property of a group.

iii The extent of offshore fishing.

iv Whether Maori fisheries were purely for the subsistence of particular whanau or hapu or had a commercial element.

6.4 The range of primary and secondary material on each of these issues is very large. This paper mentions only a fragment of what is available.

The Operative Date

6.5 All dates are to some degree arbitrary because they ignore the process of change and development that characterises Maori (and other) societies and economies. But for practical purposes some dividing line is needed, and precedent, convenience and fitness suggest the choice of 6 February 1840, when the Treaty of Waitangi was first

signed. Customs, practices and activities that do or may reasonably be inferred to antedate 1840 are thus traditional in this context.

6.6 That does not seem to imply that to enjoy the Treaty's protection the technologies and methods of Maori fishing are to be frozen in their 1840 form. Freedom to take advantage of the dramatic changes that have occurred in technology seems as valid in the context of Maori fisheries as for Pakeha fisheries. (On the testimony of European explorers and voyagers from Cook and du Fresne, Maori fishing equipment and methods in the early nineteenth century were in many respects superior to those of Europe.) In Canada the Supreme Court has held[26] that a 1752 treaty that preserved "free liberty of hunting and fishing as usual" did not confine the right to hunt to methods usual in the eighteenth century. And no one ever seems to have supposed that the Treaty guarantee of Maori land covered only its use by the methods then in vogue, or to produce only those crops then cultivated.

6.7 Numerous writings testify to the special place of fisheries in Maori economy and culture in pre-European times and throughout the nineteenth century and even later. So too for the pre-contact period does archeological evidence. While fishing may have been less important economically in modern times, its significance to Maoritanga at a cultural level continues. And as a potential economic base and resource (which they undoubtedly were in 1840) the value of fisheries to Maori people may be very great.

Fisheries as Exclusive Property

6.8 The Maori did not see fisheries as something general and available to all, any more than they saw land in this way. Particular fishing grounds, wherever situated, were exclusive to a group (normally a hapu). Others could, and sometimes did, use them only by permission. Thus, some inland hapu had by custom a right to visit particular areas of the foreshore at particular times to fish there. The following may be cited among the many references covering various parts of New Zealand:

i J L Nicholas, Narrative of Voyage to New Zealand, vol 1. Entry for 29 December 1814.[27]

"These people [of the Bay of Islands] are very industrious in attending to their fisheries, which

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26 Simon v The Queen (1985) 24 DLR (4th) 390.
27 (1817), p 235.

are here numerous and well supplied; the coves in particular have a great abundance, and the right of fishing in certain places is recognized among them, and the limits marked out by stakes driven into the water. We observed several rows of these stakes belonging to the different tribes, each having respectively their prescribed boundaries, beyond which they durst not venture to trespass, without incurring the resentment of all the others, who would instantly punish them for any violation of the general compact. Their nets are much larger than any that are made use of in Europe: they make them of the flax in its undressed state, and one of them very often gives employment to a whole village. The coves and harbours abound in fish, which they are very careful in laying up for their winter store, by cutting it open from the head to the tail, taking out the back-bone, and exposing it in the sun to dry."

ii Evidence of James Mackay Jnr, Civil Commissioner, Waihou, to the Select Committee on The Thames Sea Beach Bill 1869.[28]

"The Natives occasionally exercise certain privileges or rights over tidal lands. They are not considered as the common property of all Natives in the Colony; but certain hapus or tribes have the right to fish over one mud flat and other Natives over another. Sometimes even this goes so far as to give certain rights out at sea. For instance, at Katikati Harbour, one tribe of Natives have a right to fish within the line of tide-rip; another tribe of Natives have the right to fish outside the tide-rip. The lands contained in the schedule of the Bill are probably the most famous patiki (flat fish) ground in New Zealand, and have been the subject of fighting between various hapus of the Thames Natives."

iii In the Kauwaeranga decision of the Native Land Court (1870), also relating to the Thames foreshore, Chief Judge Fenton said:[29]

"That the use to which the Maoris appropriated this land was to them to the highest value no one acquainted with their customs and manner of living can doubt. It is very apparent that a place which

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28 (1869) AJHR F-7 p 7.

29 Reproduced in (1984) 14 VUWLR 227, p 240.

afforded at all times, and with little labour and preparation, a large and constant supply of almost the only animal food which they could obtain, was of the greatest possible value to them; indeed of very much greater value and importance to their existence than any equal portion of land on terra firma."

iv Sir Peter Buck (Te Rangi Hiroa) 1920. Maori Food-supplies of Lake Rotorua.[30]

"The old-time Maori, a careful and observant student of nature and all matters connected with food-supplies, soon ascertained the parts of the lake where the various foods were most plentiful and most easily procured. These spots became the fishing-grounds, carefully marked and jealously guarded by the various subtribes and families. They were given names, and the most famous were alluded to in song and story. ...

"... the tumu in the lake were used like surveyors' pegs in modern times: they marked off the parts of the lake that belonged to the various families and subtribes. Undoubtedly more of the lake was pegged off than the part in the immediate neighbourhood of the shore, which proves how valuable it was considered as a source of food-supply. It was far more valuable to the old-time Maori than any equal area of land."

v Elsdon Best. The Maori As He Was (1924).[31]

"Each clan had its own fishing grounds, and any trespass thereon led to trouble. They were assigned special names, and when folk went out afishing they located the taonga ika or fishing ground, by lining objects on land, hill peaks, promontories trees etc. Two of such lines were utilised, the intersection of which marked the location of the ground."

vi R McDonald (1929), Te Hekenga, an account of old Horowhenua.[32]

"No one writing of the food supply of the Maori can afford to overlook the important part played

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30 Transactions of the NZ Institute Vol 53, 433, pp 436-7.
31 Reprint 1974, p 270.
32 1979 edition, p 45.

> by the tuna, or eel, in his dietary. The existence of a swamp or lake which provided a constant source of supply of what to him was one of his chief delicacies, constituted in a large measure his standard of the desirability of a locality. It was without doubt this fact which in a large measure determined Te Whatanui's selection of ... his place of abode. In fixing the boundaries of the Muaupoko territory ... he was careful to exclude the whole of the Hokio stream from their jurisdiction, thus assuring to himself the absolute control of the eels of the lake."

6.9 General reference may also be made to the conclusions of Dr P Hohepa in a paper presented at a seminar for Maori leaders in 1976 and to the submissions of Isla Nottingham of the University of Waikato and Dr George Habib, fisheries consultant to the Waitangi Tribunal, in March and April 1987 in relation to the Muriwhenua claim.

Offshore Fishing

6.10 Again there is ample material showing that Maori fishing was not limited to harbours, tidal waters and other inshore grounds, and extended well out to sea. For example R T Kohere[33] writes that his tupuna Mokena Kohere of Ngati Porou, who was born about 1812, claimed hapuku grounds at Hapurapoi as well as crayfish grounds off Whakori Bluff as belonging to his hapu. Mention is also made of the hapuku grounds nearer to his area and also used by his tribe. The ground favoured by Mokena was over 8 miles north of East Cape.

6.11 In his booklet, When All the Moa Ovens Grew Cold, Atholl Anderson states:[34]

> "Fishing was another important subsistence activity, especially about Otago Peninsula. It was at one time thought that fishing during the early Maori era was everywhere of minor significance compared with moa hunting and sealing but two recently excavated sites, at Purakanui and Long Beach, have disclosed specialised camps occupied AD/c. 1300-1500. Furthermore, recent radiocarbon dates for some of the large Catlins sites now show that fishing was beginning to replace moa hunting and sealing as early as AD 1350.

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33 The Story of a Maori Chief (1949) 30, 45.
34 (1983) pp 13-14.

The main species caught by the early Maori were barracouta, red cod, ling, blue cod and the spotty. Barracouta was by far the most important of these."

6.12 Colenso, describing Maori fishing at about 1840, commented that -

"The seas around their coasts swarmed with excellent fish and crayfish ... . In seeking all of these they knew the proper seasons when, as well as the best manner how, to take them ... Sometimes they would go in large canoes to the deep sea fishing, to some well known shoal or rock, 5 to 10 miles from the shore, and return with a quantity of large cod, snapper and other prime fish."[35]

6.13 The Rev J Buller, in Forty Years in New Zealand (1878), said -[36]

"Their fishing expeditions were great occasions, and attended with religious ceremonies. They used not only hooks, but nets and seines, made of the fibres of the flax leaf. In olden time their hooks were made of bone - often of human bone. They would go out into the deep sea, with their large canoes, for ten or more miles from the shore. Cod, snapper, and other large fish, in great quantities, rewarded their toil. In their nets, they take numbers of mullet, dog-fish, mackerel, and other kinds that are found in shoals. "

6.14 Coming to the present, oral evidence given to the Waitangi Tribunal at the hearing of the Muriwhenua claim on behalf of Ngati Kahu and other tribes identified many fishing grounds and the landmarks by which they are located. In its report of June 1988 on the Muriwhenua claim, the Tribunal found (inter alia) that:

- An intensive all year fishing use was made of the seas to about three miles off-shore.
- Throughout the balance of the continental shelf, to about 12 miles from the shore, fishing was intensive and regular but mainly seasonal.

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35 "On the Maori Races of New Zealand", Transactions of the New Zealand Institute, Vol 1, p 9.

36 P 231.

Expeditions coincided with the off-shore migrations of such species as hapuku, bass and snapper. Also fished were species more typical of off-shore areas such as tuna, pelagic sharks, tarakihi, piper, mackerel and squid.

- Where the continental shelf enlarges, or where underwater mountains rise closer to the surface, fishing occurred at distances up to 25 miles from the shore, as is evidenced by certain more isolated fishing grounds.

- There is no evidence of expeditions to catch such deep water fish as orange roughy, hoki and oreo dories, though Maori names show that some deep water species were known.[37]

6.15 It does not follow that offshore fishing occurred extensively everywhere in Aotearoa. Where offshore reefs and shoals were few, or where seas were unusually wild, or littoral sources of valued fish species ample, the Maori possibly did not venture far from land. More detailed evidence is needed. But certainly fishing well out to sea was customary in many places.

The Economic Function of Fisheries

6.16 Finally there is the question of the economic nature of the use made of fish resources. The Maori economy in pre- and early-European times seems not to have been fully examined, but there is some evidence that the use made of fish resources went beyond mere personal and family consumption, and the provision of food at hui, and included a species of trading in the form of gift-exchange. In Economics of the New Zealand Maori[38] Raymond Firth discussed the purpose, scope and mechanics of gift-exchange, which undoubtedly served the function of transferring a surplus of both natural and crafted products from their place of origin to other parts of the country. So basic and varied a resource as fish was naturally an important subject of gift-exchange, especially between coastal and inland groups.

> "Foodstuffs were the chief commodity which changed hands. Thus the people on the sea coast exchanged fish with the inland people, who responded with preserved birds, rats and various kinds of forest products. Cakes made from the meal of the hinau berry, the feathers and skins of birds for

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37 Muriwhenua Report Wai- 22, June 1988, pp 196-7.
38 2nd edition, 1959.

> ornament, and kokowai, red ochre, also went down to the coast, while shellfish, shark oil, karengo, paua shells, and the berries of the karaka were utilised as subsidiary articles of export by the sea-coast tribes." (p 403)

6.17 Firth mentioned various sources for this conclusion, and there are others that he did not quote.

6.18 The case of Hone Te Anga v Kawa Drainage Board[39] related to the effect of draining the swamp on eel supplies. Cooper J mentioned in his judgment that "large numbers of eels were caught by the Maoris from time immemorial by means of eel pas and weirs". He observed:

> "Sometimes the catches were exceptionally heavy and the surplus eels were sent as presents to other tribes, sometimes to Natives residing at Rotorua, sometimes to those at the Thames, and presents in return of other kinds of fish were received from these Natives." (p 1145)

6.19 A practice of barter among different coastal tribes is inferred by James W Stack in an article in 1877.[40] Stack describes the activities of Moko, a "robber chieftain" in about the middle of the sixteenth century. He set up a stronghold at Waipara:

> "... the choice of the spot being determined by the existence of a cave in close proximity to the highway, along which a regular trade was carried on up and down the coast; the preserved mutton-birds, dried fish, and kauru from the south being exchanged for preserved forest-birds, mats, etc., from the north." (p 62)

6.20 Edward Shortland in Traditions and Superstitions of the New Zealanders (1856) noted:[41]

> "The inhabitants of the villages on the upper parts of the river Wanganui are celebrated parrot catchers ... Every evening, the birds taken during the day are roasted over fires, and then potted in calabashes in their grease ... Thus preserved, parrots and other birds are considered a delicacy, and are sent as presents to parts of the country, where they are scarce: and in due time a return present of dried fish, or something

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39 (1914) 33 NZLR 1139.
40 Transactions of the NZ Institute, Vol 10, p 57.
41 Capper Press, reprint (1980) p 214.

> else not to be obtained easily in an inland country, is received.
>
> This was the sort of barter formerly most in vogue in New Zealand."

6.21 In his essay On the Maori Races of New Zealand William Colenso comments:[42]

> "Buying and selling for a price, as practised by us, was unknown to them ... They had, however, a kind of barter or exchange; or, more properly, a giving to be afterwards repaid by a gift. Dried sea-fish, or dried edible sea-weed, or shark oil, or karaka berries, would be given by natives living on the sea-coast to friendly tribes dwelling inland; who would afterwards repay with potted birds, or eels, or hinau cakes, or mats ..."

6.22 The report of the Royal Commission on Wairarapa Lake stated that:[43]

> "Eels were a favourite food with the Maoris and a good eel-fishery ... is of as much value to them as the banks of Newfoundland are to those who deal in codfish. .... Eels in olden times not only formed a large article of diet for the Natives but they used to dry them in quantities and send them as presents to neighbouring hapus, receiving in return other kinds of food..."

6.23 Traditional fisheries therefore provided not only food for the owners of the fishing grounds, but access to other things that they lacked. Moreover many sources show that a trading economy readily developed alongside the primarily subsistence pattern of life after European contact. A large trading dimension of Maori fishing continued for a number of years after 1840: see the references at para 17.29.

6.24 There is little profit in entering into semantic arguments about the connotations of "commercial": whether or not for instance commerce includes barter, or the notion of reciprocal gift that was integral to Maoritanga as to many societies. The point is precisely that these matters are not susceptible of answer in purely Western terms. What is reasonably certain is that before and after the eighteenth century European contacts Maori communities

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42 Transactions of the NZ Institute, (1868) Vol 1, p 339, 354. Previously published in 1864.

43 (1891) AJHR G-4 p 5.

often did not consume all the goods they produced but exchanged them for other goods, and that this process of exchange included fish.

6.25 The unreality of trying to separate subsistence, hospitality and commercial fishing in the comparable society of British Columbia is well expressed in the following passage from the Final Report of the Commission on Pacific Fisheries Policy:[44]

> "Today many Indians still depend heavily on fish for food ... Some continue to fish with traditional equipment, the technical and economic efficiency of which often compares favourably with that of the modern industrial fishery. Traditional methods of processing and preserving fish ... are also practised and ... its use in feasts and ceremonies has been increasing. The traditional Indian fishery is thus a blend of a search for food, production for trade, a social activity and a cultural expression. The distinction customarily drawn by non-Indians between commercial and recreational fishing is inappropriate in this context. Indian fishing has elements of both, and more."

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44 (1982) p 174.

7 THE MEANING OF THE TREATY

> "Those who study the Treaty will find whatever they seek. Those who look for the difficulties and obstacles which surround the Treaty will find difficulties and obstacles.
>
> But those who approach it in a positive frame of mind and prepared to regard it as an obligation of honour will find the Treaty is well capable of implementation."[45]

7.1 The expressed purpose of the reference is to ensure the proper recognition of Maori fisheries by the law in the light of the obligations that the Crown assumed in the Treaty of Waitangi.

7.2 It is therefore convenient at this point to set out here (as well as in Appendices A and B) the English and Maori texts of the preamble and the three articles of the Treaty as authoritatively reproduced in the First Schedule of the Treaty of Waitangi Act 1975, as amended in 1985. Also appended (Appendix C) is a literal English translation of the Maori text by Professor H Kawharu.[46]

English Version

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the

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45 Sir Henare Ngata, quoted by Blank A and others in He Korero mo Waitangi (1985) p 144.

46 Taken from the Report of the Royal Commission on Social Policy (1988) vol 2, p 87.

native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the First

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article the Second

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the Third

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

<u>Maori Version</u>

KO WIKITORIA, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou

rangatiratanga, me to ratou wenua a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te Wakaminenga, me nga Rangatira katoa, hoki, kihai i uru ki taua Wakaminenga, ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira, ki nga Hapu, ki nga tangata katoa o Nu Tirani, te tino rangatiratanga o o ratou wenue o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu, ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua, ki te ritenga o te unu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini. Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani. Ka tukua ki a ratou nga tikanga katoa rite tahi ke ana mea ki nga tangata o Ingarani.

7.3 It is not necessary to consider whether at international law or constitutional law the Treaty is the source of British sovereignty over New Zealand. This is a complex and much debated issue. Even those who have

maintained that New Zealand was acquired by simple annexation disagree on what the operative date was. The Commission's starting point must be the Treaty itself; the reference assumes its constitutional status, and the continuing significance of the obligations under it.

The Heart of the Matter

7.4 Te Tiriti o Waitangi, the Treaty of Waitangi, is a covenant between the chiefs and tribes of Aotearoa and the Crown of Great Britain and Ireland, whose successor is the Government of New Zealand. While the reference to the Law Commission requires a careful examination of its texts and their history, a holistic view of the Treaty appears essential to its proper understanding and application. On that approach, none of its articles are subordinate to others. Neither the English nor the Maori text needs to be secondary. This is not to challenge the statement of the Waitangi Tribunal in its Orakei Report.[47]

> "We believe that when there is a difference between the two versions considerable weight should be given to the Maori text since this is the version assented to by virtually all the Maori signatories. Moreover this is consistent with the contra proferentem rule that, in the event of ambiguity, a provision should be construed against the party which drafted or proposed that provision."

7.5 Fundamental too is the Treaty's character as a living document. The past cannot neatly be divided from the present and the future.

7.6 What is necessary, and not simply from the aspect of fishing rights, is this -

- to understand the promises and undertakings contained in the Treaty
- to determine the relationship of Articles 1, 2 and 3
- to reconcile the promises of the Treaty with the legal order
- to apply it to the realities of the present

7.7 The question, what did the Treaty of Waitangi say about fishing rights, calls initially for an examination and comparison of the various texts and their history. The

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47 Wai-9, November 1987, p 128.

fullest treatments of this are by R M Ross in her article Te Tiriti o Waitangi: Texts & Translations,[48] and by Dr Claudia Orange in The Treaty of Waitangi.[49] McKenzie's Oral Culture, Literacy & Print in Early New Zealand: the Treaty of Waitangi[50] is also of interest, particularly as to the importance of what was said rather than written, although his views of Maori illiteracy have been challenged. Further valuable discussions of the text of the Treaty are contained in the Report of the Royal Commission on Social Policy.[51] And one must also take into account the manner in which the Treaty should be interpreted. As to this, statements of the Waitangi Tribunal in the Manukau case[52] are of great weight.

7.8 In addition to discrepancies between English and Maori versions of the Treaty, the English text itself left major loose threads. For instance, the meaning of the right of pre-emption was ambiguous; and moreover was stipulated for lands only. This does nothing to elucidate what those on the British side thought they were doing in relation to fishing rights. Nor do we know what documents and precedents Busby and Hobson had access to, other than the Instructions of 14 August 1839 sent to Hobson by Lord Normanby, the Secretary of State for the Colonies.

The Nature of the Treaty

7.9 At the threshold it is appropriate to note an essential distinction between the Treaty of Waitangi and many treaties negotiated with the indigenous people of Canada and the United States. These were agreements for the acquisition of property; governments did not regard the Indian tribes as having any sort of sovereignty over their lands, although in the United States they had a species of autonomy expressed in the phrase "domestic dependent nations". The Treaty of Waitangi did not purport to transfer any property. Apart from the cession of sovereignty (however that may have been understood by Maori) its provisions confirmed Maori property rights and laid down the ground rules for their subsequent disposition, and declared Maori to have all the rights and privileges of British subjects. A closer New Zealand analogy with the nineteenth century Indian treaties was the land purchases subsequently made by the Crown.

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48 NZ Journal of History (1972) 6, 130.
49 Allen and Unwin (1987).
50 Victoria University Press (1985).
51 Vol 2, p 28 et seq.
52 Wai-8, July 1985, pp 88,95.

7.10 But in one aspect the Treaty of Waitangi is nonetheless analogous to many of the Indian treaties negotiated by the United States government. These did not exchange fishing rights for land; the United States had no power to confer fishing rights because it did not possess them: see eg United States v Winans.[53] Nor did the Treaty of Waitangi purport to grant possession of fisheries or land in exchange for sovereignty. They already belonged to the Maori. If the concept of common law title is valid in New Zealand, they continued to belong to the Maori legally as well as morally. Insofar as cases such as Te Heuheu Tukino v Aotea District Maori Land Board[54] held that the Treaty was not the origin of these rights they need not be criticised. Rather the Treaty undertook in the English preamble to "protect the just rights and property" of the Maori, and in Article 2 "confirmed and guaranteed" possession of their fisheries and their properties. The United States treaties used similar language - they "reserved and secured" fishing rights.

7.11 The next general point to be observed is that the Treaty was not made with "the Maori" collectively or anyone on behalf of the Maori as a whole. Nor could it have been, given the nature of the 1840 Maori polity. Unlike Hawaii and Tahiti at this period,[55] no chief or alliance of chiefs had acquired paramountcy over Aotearoa. So the guarantee of protection for (inter alia) "their fisheries" refers to the particular fisheries of each iwi or hapu. This is not unimportant; it gives a concrete and specific rather than abstract character to the Crown's promise.

The English Version

7.12 The preamble to the English version of the Treaty is worth attention. It provides a succinct and authoritative summary of the acknowledged reasons for acquiring sovereignty and the perceived implications. It is obviously influenced by the terms of the Instructions of 14 August 1839 which Hobson received from Lord Normanby.

The Queen of England is anxious -

(a) to protect the just rights and property of the chiefs and tribes, and

(b) to secure to them the enjoyment of peace and good order.

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53 (1905) 198 US 371, 381.

54 [1941] NZLR 590; [1941] AC 308.

55 See K R Howe, Where the Waves Fall (1984).

7.13 The state of affairs justifying British intervention is "the great number of Her Majesty's subjects already settled in New Zealand and the rapid extension of emigration from Europe and Australia still in progress". This has produced the need to avert the "evil consequences which must result from the absence of necessary laws and institutions alike to the native population and to British subjects", a need that it is predicated can be satisfied only by the cession of sovereignty.

7.14 The dominant intention expressed is to secure law and order both for Maori and Pakeha, and the relevance of this would have been apparent to those living in northern and coastal New Zealand at the time, as well as to anyone today acquainted with pre-1840 history.

7.15 The secondary purpose, manifested in the instructions given by Lord Normanby both to Hobson and to Sir George Gipps, Governor of New South Wales, is to secure to the Crown the promise of an exclusive right of pre-emption over "such lands as the proprietors may be disposed to alienate." And by pre-emption the British party meant more than what we call "first refusal"; the Maori were taken as promising not to sell land at all except to the Crown : R v Symonds.[56]

7.16 Briefly the English version of Article 2 of the Treaty reads, as far as relevant:

> "Her Majesty ... confirms and guarantees to the Chiefs and Tribes of New Zealand .... the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess ..."

7.17 This assurance, "confirms and guarantees", is strong and unequivocal. It appears to embrace the notion of active protection. This indeed has now been categorically stated by Cooke P in the Maori Council case.[57]

> "Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their land and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's ... reports which support that proposition and are undoubtedly well-founded."

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56 [1840-1932] NZPCC 387.
57 [1987] 1 NZLR 641, 664.

7.18 The Treaty in its English version guaranteed the chiefs and tribes of New Zealand and the respective families and individuals thereof "full exclusive and undisturbed possession" of their fisheries. Did that mean that no-one except Maori could catch fish in New Zealand or off its coast? Differing views have been expressed about this. But Maori complaints and assertions in the nineteenth century and later disclaimed any desire to exclude the Pakeha altogether. Nor is there anything in the findings of the Waitangi Tribunal to support such a claim.

7.19 Was the term fisheries, as has occasionally been suggested, intended to apply only to inland lake and especially river fisheries? While it is impossible to say what may have been in the minds of the English draftsmen, there seems no justification for reading down the wide meaning of the word. In the only relevant judicial decision, Baldick v Jackson,[58] Stout C J assumed the widest meaning and applied the Treaty's guarantee to whaling.

7.20 How the words fisheries and forests got there at all is one of the minor mysteries of the Treaty. Interestingly, no specific reference to the protection of fisheries (or forests) occurs in earlier African treaties that are otherwise remarkably similar in language to the Treaty of Waitangi. There is, for example, a treaty that Britain concluded in 1825 with Banka, King of Sherbro, as part of the British acquisition of Sierra Leone. It stipulates that in return for a cession of sovereignty the African parties were to retain the full, free and undisturbed possession and enjoyment of the lands they now hold and occupy and to receive the rights and privileges of British subjects.[59]

7.21 Nor was there any reference to fisheries in one draft of the Treaty of Waitangi that later found its way to England.[60]

7.22 One must remember that the "audience" addressed by the Treaty was the Maori chiefs. Hobson had been instructed to deal fully and frankly with them. Although the chiefs doubtless did not appreciate some of the concepts and words used (notably sovereignty), the Treaty in its English form reads very much as a 'plain language'

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58 (1910) 30 NZLR 343.

59 Sir E Hertslet, The Map of Africa by Treaty (1967) Vol 1, p 32.

60 Ross p 134, Orange p 40.

document by the standards of the time. The phrase "lands and estates, forests, fisheries and other properties" does not look like a technical legal description. In terms of strict 1840 English property law "lands and estates" could only cause confusion. "Forests" has no particular legal significance. The article guarantees "possession", as some analogous treaties do, but in the context of pre-emption (itself, as has been noted, ambiguous) refers to "proprietorship" and "proprietors" (not "possessors"). It seems most unlikely that the authors meant to use technical legal language.

7.23 More plausible, but still mere speculation, is to look at the enumeration in terms of major Maori economic resources: lands (dwellings and cultivations) fisheries (which is self-defining) and forests (hunting and timber). These are precisely the things that sympathetic officials might have supposed that the Maori would principally want to be protected. In Northland, of all parts of New Zealand, the association of fisheries with sea as well as river or lake fisheries was close. It would have been extraordinary if Busby, who played a large part in drafting the final English version,[61] was unaware of this.

The Maori Version

7.24 The Maori version is what almost all the Maori parties signed. Only 39 chiefs at Waikato Heads are known to have signed the English version. Over 500 signed the Maori version at Waitangi and elsewhere. It is not a close translation of the final English text, and does not explicitly refer to fisheries. It uses the phrase "o ratou wenua o ratou kainga me o ratou taonga katoa". W(h)enua signifies lands and kainga habitations; and the last 3 words can be literally translated as "all things valued" or "all things treasured": see the Te Atiawa, Manukau and Te Reo Maori cases.[62]

7.25 Why did this version not mention fisheries, and what is the significance of that? Here again we are in the realm of supposition. However, both Ross ("almost certainly") and Orange ("probably") suggest that Williams, who was the author of the Maori translation, was working from an earlier English draft.[63]

7.26 Ross says that when Bishop Selwyn asked Williams in 1847 how he had explained the Treaty to the Maori, Williams re-translated the Maori text into English as

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61 Busby's "Remarks" (1861) AJHR E-2, 67.
62 Wai-6, March 1983; Wai-8, July 1985; Wai-11, April 1986.
63 Ross p 142, Orange p 40.

"their lands and all their other property of every kind and degree". But this would be wide enough to embrace fisheries, and the suggestion that Williams did not envisage "taonga" as including fishing rights seems unsupported. The further view that the Maori did not see the Treaty as the guardian of their fishing rights until the present century[64] is untenable. It must certainly have been in their minds at least after the Kohimarama Conference in 1860.

7.27 The Waitangi Tribunal in its Motunui decision has expressly found that "taonga" did include fisheries.

7.28 The Maori text also has a weaker verb: "agrees to protect" in Professor Kawharu's translation[65] in place of "confirms and guarantees". But significantly, it talks not of "possession" but of "te tino rangatiratanga" (usually rendered as full chieftainship). Professor Kawharu translates this as "the unqualified exercise of their chieftainship". This seems a much wider notion and does not replicate any concept in any extant English draft. The reasons why it was chosen are obscure.[66] Undoubtedly, however, it sowed the seeds of later misunderstandings.

7.29 For some early writers the implication of the term seems to have been almost a commonplace. In his Pamphlet on the Taranaki Question Sir William Martin had this to say -[67]

> "The Treaty of Waitangi carefully reserved to the Natives all then existing rights of property. ... It assured to them "full, exclusive and undisturbed possession of their lands and other properties which they may collectively or individually possess, so long as it is their pleasure to retain the same." This Tribal right is clearly a right of property and it is expressly recognised and protected by the Treaty of Waitangi. ...
>
> The rights which the Natives recognised as belonging thenceforward to the Crown were such rights as were necessary for the Government of the Country, and for the establishment of the new system. We called them "Sovereignty"; the Natives called them "kawanatanga" "Governorship".

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64 Ross p 142.
65 See Appendix C.
66 Orange, pp 41-42.
67 Reprinted in (1861) AJHR, E-2, p 2.

> This unknown thing, the "Governorship", was in some degree defined by a reference to its object. The object was expressed to be "to avert the evil consequences which must result from the absence of Law". To the new and unknown Office they conceded such powers, to them unknown, as might be necessary for its due exercise. To themselves they retained what they understood full well, the "tino Rangatiratanga", "full Chiefship", in respect of all their lands."

7.30 Gorst remarked in 1864 - [68]

> "According to the Maori version of this Treaty - which differs from the English text of which it purports to be a translation - the Queen of England guaranteed to the Maoris the full chiefship over their lands and other property. They also gave up to the Queen the whole governorship over their lands, and the Queen promised them the full rights of British subjects."

7.31 In 1865 the House of Representatives debated and carried a motion to table a copy of the "original" Treaty of Waitangi, a copy of the received translation into Maori, and a literal translation of this into English.[69] Fitzgerald reminded the House that if the document was signed in its Maori version the English version was irrelevant as to its binding effect. Carleton added: "in the Maori copy chiefs were guaranteed chieftainship over their land ... The Governor was under a misapprehension in thinking this had been yielded."

7.32 A consistent theme among Maori who spoke publicly of the Treaty in the nineteenth century was that the Treaty purported to preserve and guarantee their mana.

7.33 Thus Patara, the editor of the King movement's paper Te Hokioi, wrote in 1861 - [70]

> "Successive governments have declared to us that the Queen by the Treaty of Waitangi promised us the full chiefship of such of our lands rivers fisheries etc as we might wish to retain. Now Waikato is one of the rivers which we wish to retain under our own chiefship. How is it then that we are told a steamer is to be sent into this river, though we have not given our consent. Is

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68 The Maori King, p 25.
69 [1864-66] NZPD 292.
70 Gorst, p 217.

> this the way in which the Treaty of Waitangi is observed by your side. Pakeha friends, why do you trample under your feet the words of your Queen."

7.34 A recurrent theme at the "Orakei Parliament" in 1879 was the degree to which the mana assured by the Treaty had been protected. The conference resolved that:[71]

> "The Chiefs and people would remain loyal to the Queen ... would adhere to the Treaty of Waitangi and the principles of the conference of Kohimarama; would retain the mana over their lands, fisheries..."

7.35 And almost 20 years later in 1898 Te Heuheu of Tuwharetoa, using the Maori text of the Treaty, told the Select Committee on the Native Lands Settlement and Administration Bill -[72]

> " ... what we understand, and what we have always understood, is this: that section 2 of the Treaty of Waitangi assures to the Natives all their rights title and the management of their own affairs."

7.36 What the then Governor (Gore-Browne) wished the Maori to understand from the Treaty appears from his address at the opening of the Kohimarama Conference in 1860. This was a gathering of some 200 chiefs from all parts of New Zealand except Taranaki and Waikato. Gore-Browne read and expanded on the Treaty's provisions. This was read to the assembly in Maori, possibly by Donald McLean, the Native Secretary. Both translation and address specifically referred to both forests and fisheries. "Ko o ratou oneone, me o ratou whenua, me o ratou ngaherehere, me o ratou wai mahinga ika, (all fishing places) me o ratou taonga ake."[73]

7.37 The word "rangatiratanga" was not used in the Maori explanation. Indeed no word corresponding either to authority or possession appeared. On the other hand, the explanation of Article 1 did retain the term kawanatanga ("mana Kawanatanga katoa i a ratou katoa").[74]

7.38 A similar sidestep occurred in 1869, when a new translation from the English text was tabled in the Legislative Council.[75] "Rangatiratanga" disappears both

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71 (1879) AJHR G-8.
72 (1898) AJHR I-3A p 7.
73 Te Karere Maori, Nos 13-18, p 6.
74 Ibid.
75 (1869) AJLC 67-71.

from the preamble and Article 2. But in a complete reversal of the original Maori it was used in Article 1 to replace "kawanatanga" - the phrase was "ma tikanga me nga mana katoa o te Rangatiratanga". Orange observes that this was an altogether different treaty from the one that had been signed.[76]

7.39 As the Royal Commission on the Electoral System noted in its Report[77] the content of the term "rangatiratanga" has not yet been settled. "Rangatiratanga" was the word used in the 1835 Declaration of Independence in reference to the independence of Aotearoa that Britain acknowledged. Williams' Dictionary The Maori Language simply defines it as "evidence of breeding and greatness", which does not take us far in the Treaty context. The usual modern translation is "chieftainship". The English preamble to the Maori Affairs Bill now before Parliament uses the Maori word without any translation. The New Zealand Maori Council's kaupapa of 1983 on which that Bill is based stated its meaning in pragmatic terms as "the wise administration of assets possessed by a group for that group's benefit: in a word, trusteeship".

7.40 In the Maori preamble "rangatiratanga" also appears in the phrase "ratou rangatiratanga, me to ratou wenua". Here it is used side by side with the word for land (w(h)enua) and corresponds to the English "just rights".

7.41 In its Orakei report, the Waitangi Tribunal discussed this problem at some length. Inter alia it said:[78]

> "The meaning of 'tino rangatiratanga' has caused us much trouble. There is no precise English equivalent and it is used in the Treaty in an 'un-Maori' manner. To give it the meaning both parties appear to have understood, we would render it as 'full authority."

7.42 Whichever English word is used - chieftainship, trusteeship, authority - the Maori version of Article 2 would seem to convey more than a right to occupy or possess, and carry connotations of control and regulation: see para 3.5. One Maori view of its implication for fisheries (which may or may not be typical) was given on behalf of the Tainui Maori Trust Board to the Waitangi

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76 Op cit p 183.
77 Towards a Better Democracy (1986) p 109.
78 PP 131-133.

Tribunal in the course of its Muriwhenua hearings in March 1987 -

> "Tainui believes this right covers all fisheries around their tribal territory out to the three mile limit. It encompasses all inshore and shoreline fisheries, shellfish beds, other inshore and seashore resources such as seaweed; all inland waterways, rivers and lakes which fall within their tribal boundaries ...
>
> Tino rangatiratanga is not perceived as ownership in Paakehaa terms. Its meaning is that the overall kaitiaki or guardianship lies with the local tribe or hapuu. The final management of both the commercial and non-commercial use of fishing resources is encompassed by this role. It does not imply that only certain areas are of traditional importance. Moreover, it does not imply that, by reserving the use of these areas to the local tribe or hapuu, the Ministry of Agriculture and Fisheries has the right to look after, or arrange, for the commercial exploitation of all the rest." [emphasis added.]

7.43 The Muriwhenua claim itself dealt with the area from Whangape Harbour around from the north (including the Three Kings) to the Mangonui River. The claimants asserted that among the taonga recognised by the Treaty were:

> "exclusive title to and possession and use of the harbours, sea coasts, on-shore and off-shore fisheries, and the customary title and other rights (including those of management and control) in respect of sea harbours, coastal waters, coastline, fisheries (on and off-shore) and including shellfish in respect of the whole of this area."[79]

Conflict of Understandings

7.44 One vital question is probably impossible to answer now. Were rights over the sea (to use as neutral a term as possible) seen by the signatories as pertaining to kawanatanga and thus passing to the Crown or to rangatiratanga and retained by the tangata whenua? The Waitangi Tribunal has interpreted "kawanatanga" as including the right to make laws. But this in turn would seem to imply a right to control and regulate, and thus

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79 Wai-22, June 1988, pp 245-247.

overlap rangatiratanga. The lawmaking power would on this basis belong both to the Crown and the Maori.

7.45 The English version opposes sovereignty and rights of possession. There can be little doubt that in the minds of Hobson and his officials the cession of sovereignty gave it power and authority over the sea below low water mark, leaving aside the question of tidal waters. This is not necessarily the same as an exclusive right to exploit the resources of the sea. A loosely analogous modern distinction exists in the concept of the Exclusive Economic Zone, which is not part of the national territory but is marked by an exclusive right to control and exploit the resources of the sea and the seabed.[80]

7.46 A lead to British views at the time is provided by an opinion given by Lord Russell to Governor Gipps on 27 November 1840.[81] Gipps had inquired what effect the annexation of New Zealand had on the position of American citizens inter alia as whale fishermen. The reply stated:

> "I believe the law of nations to be that no Alien has the right to fish in land-locked waters, ... but that all mankind have a right to fish in the open Sea and even close in shore on any Territory unless the State to which that Territory belongs can establish as a matter of fact from time immemorial, it has enjoyed an exclusive right of fishing on such shores. Hence I infer that the right of aliens to fish in the open Harbours, Bays, Roadsteads and Shores of New Zealand is indisputable. Moreover, I believe that it would be very bad policy to dispute it. The Whalers will be among the very best customers of the Colonists."

7.47 The essential difficulty is that there are really three concepts - dominion, control and management, and ownership: see para 3.5. Each version of the Treaty uses only 2 of them, but not the same 2.

The Relationship of the Articles

7.48 How to relate Articles 1 and 2 is both a crucial and an intractable question. The words of the Treaty provide no direct answer. The context in which it was drawn up and accepted suggests that the minds of the

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80 Territorial Sea and Exclusive Economic Zone Act 1977.

81 Recorded at CO 209/6 p 204 (National Archives reference microreel 353).

British authorities and the Maori did not altogether meet. Dr Orange suggests[82] that the Maori envisaged something like a British protectorate over New Zealand, akin to the one that France established over Tahiti in 1843. That would leave the Maori with greater autonomy than annexation and Crown colony status did. On the other hand it would have been unsuited to extensive British settlement. By the time of the Treaty this was explicitly contemplated by the British government, and indeed was going on.

7.49 There would seem to be a reciprocity between the two articles. If Article 2 in a sense limits the sovereignty conferred by Article 1, the converse is also true. Article 1 limits the authority recognised in Article 2.

7.50 The concept of partnership is valid and fruitful but insufficient. How was and is authority to be shared? What things in New Zealand of the year 1989 belong to "sovereignty" and what to "rangatiratanga"? What does it mean in terms both of access to and control over fisheries? And how does it affect the equal rights promised by Article 3? No predetermined answer is possible. The government of a modern State must have the effective power to govern and to make laws. There are such things as overriding national interests. Numerous overseas examples, past and present, prove that this is not incompatible with a considerable degree of autonomy for particular groups. But the dividing line has to be worked out for a particular society at a particular time. It is important to avoid this being done in terms of the values and priorities only of the section holding effective power - in democratic societies like New Zealand, the numerical majority.

7.51 The interaction of Articles 2 and 3 presents a less formidable but nonetheless real problem. The Royal Commission on Social Policy dealt with it in this way -

> "Article 3 ... is sometimes seen as limiting the authority of Article 2 and its emphasis on rights accruing from tribal membership. There is no real incompatibility. Clearly the acceptance of 'the rights and privileges of British subjects' (English version) does not require an extinction of those rights which the members of any tribe have inherited. Indeed the whole thrust of the Treaty was to confer new aspects of citizenship

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82 Op cit p 46.

and at the same time ensure the continuation of existing Maori social and economic systems".[83]

7.52 The rights specified in Articles 2 and 3 may be seen as separate and cumulative. Otherwise, Article 2 is simply merged in Article 3. This would amount to submerging in a purely Western political and social order what was to the Maori of 1840 - and perhaps many Maori today - essential and vital. But nonetheless there is room for conflict and argument.

Conclusion

7.53 An overriding lesson is that we should be wary of too minute an analysis or pedantic an interpretation of the Treaty of Waitangi. The nature of the document and the circumstances in which it was drawn up will simply not support it. Rather it is the essence and spirit of the Treaty that should be looked at in considering the Crown's obligations. The continual emphasis of the Waitangi Tribunal, and of the Court of Appeal in the Maori Council case, has been on this spirit and on the living character of the document. To adopt the words of section 5(d) of the Acts Interpretation Act 1924, the Treaty of Waitangi might rightly be regarded as always speaking, to be applied to circumstances as they arise so as to give effect to its spirit, true intent and meaning.

7.54 This approach is reflected in the language of the Treaty of Waitangi Act 1975, which set up the Waitangi Tribunal. The basis of a claim is that the claimant (or a Maori group of which he or she is a member) is likely to be prejudicially affected by any legislation, policy, practice, act or omission which was or is inconsistent with "the principles of the Treaty of Waitangi."[84] Two recent statutes,the Conservation Act 1987, and the State Owned Enterprises Act 1987, use the same phrase.

7.55 So the Treaty must now be applied to the circumstances of 1989. The Waitangi Tribunal has consistently stressed this and it lies behind and is acknowledged in the phrase "principles of the Treaty". Almost 150 years of history and of profound change cannot be set aside. Nonetheless it is the Treaty that must be so applied; not some new and fictitious document. The Treaty gave the Crown what it sought; sovereignty and governance over New Zealand. This is a continuing authority and

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83 The April Report, Vol II "Future Directions" (1988) p 44-45.

84 S 6(1) as substituted by the Treaty of Waitangi Amendment Act 1985.

power. What the Maori received in return is likewise ongoing - the continued protection of the rights that the Treaty acknowledged as theirs. Among these rights were the fisheries of Maori tribes.

8 THE STATE OF THE LAW

The Traditional View

8.1 The prevailing understanding of the law applicable to Maori fisheries for most of the twentieth century and until recently is simple.

8.2 The moral obligation resting on the Crown by virtue of the Treaty promises was seldom publicly denied. But the generally accepted opinion from the 1870s was that its legal effect was nil, and the very acquisition of British sovereignty prevented the courts from taking account of any so-called Maori rights.

8.3 The Treaty of Waitangi was not a treaty at international law, principally because the Maori, because of their lack of political organisation and law, were not capable of entering into international relationships. Under the familiar dichotomy New Zealand was acquired by annexation and was thus a settled and not a ceded colony. On the acquisition of sovereignty the common law automatically extended to New Zealand, this being confirmed by the English Laws Act 1858. In particular the title to all land vested in the Crown. Title to land could be acquired only from and through the Crown.[85] And the common law right of all persons to fish in tidal rivers, estuaries and the sea precluded any sort of Maori ownership or control of fishing grounds there, or exclusive rights to fish: Waipapakura v Hempton.[86]

8.4 Even if the Treaty were a valid cession it could not be a source of rights under municipal law: Te Heuheu Tukino v Aotea District Maori Land Board.[87] The Treaty of Waitangi thus had no direct effect on the law of New Zealand, and did not give rise to rights that could be recognised in a court of justice.

8.5 Starting from the propositions that the title to all land in a British possession vested in the Crown, and that a subject could hold land (including fishing rights) only by or through a grant from the Crown, it seemed to follow that the only source of Maori property rights over land in the absence of a specific grant was legislation. From the beginning (Land Claims Ordinance 1841) Maori land rights did receive statutory recognition. There was no comparable legislation in respect of fishing rights. So

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85 Veale v Brown (1868) 1 NZCA 152.
86 (1914) 33 NZLR 1065.
87 [1941] NZLR 590; [1941] AC 308.

except as a consequence of title to the underlying soil (important in respect of lakes) Maori tribes and hapu had no fishing rights that any Court could recognise. They had no title to the beds of navigable rivers, this being in the Crown.[88] And they had no title to the soil below high water mark, which was vested in the Crown at common law.

8.6 There existed one indirect and uncertain exception. The first general legislation providing for the control of fisheries, the Fish Protection Act 1877, provided in section 8:

> "Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder."

8.7 This Act was "incorporated" in the Fisheries Conservation Act 1884 and repealed in its application to sea fisheries by the Sea Fisheries Act 1894, which contained no similar provision, nor any provision purporting to protect Maori fishing rights. In 1903, a clause was added to the Sea Fisheries Amendment Bill and became section 14 of that Act:

> "Nothing in this Act shall affect any existing Maori fishing rights."

8.8 Section 14 was carried into the consolidating Act, the Fisheries Act 1908, as section 77(2), and (omitting the word "existing") is now section 88(2) of the Fisheries Act 1983.

8.9 That provision, however, could be no more than a qualification of the scheme of restrictions and regulations created by the Act. Stout C J said in Waipapakura[89] that it was merely a savings provision for rights that existed apart from the Act. These could not be treaty rights because the Treaty could not confer legal rights. It had no effect on other legislation that otherwise diminished or destroyed access by Maori to their traditional fishing grounds; nor did it confer any sort of property in respect of those grounds, or alter the common law except insofar as the scheme of the Act itself qualified it.

8.10 This was "taught law" in New Zealand at least as recently as the 1950s. It was propounded without question

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88 S 14, Coal Mines Amendment Act 1903, confirming the decision in Mueller v The Taupiri Coal Mines Ltd (1902) 20 NZLR 89.

89 (1914) 33 NZLR 1065, at 1070.

in both editions of Robson, New Zealand - The Development of its Laws and Constitution (1953 and 1967), and in McLintock's Crown Colony Government in New Zealand (1958). It underlay the decisions of the Courts in the Wanganui River[90] and Ninety Mile Beach[91] cases. Support for many of the propositions appears in articles written by Haughey in 1966[92] and Molloy in 1971.[93] No subsequent reported case rejected or questioned it, until the decision of Williamson J in Te Weehi v Regional Fisheries Officer.[94]

The Alternative View

8.11 Nonetheless, this view overlooked a mass of early history, practice and judicial decision both in New Zealand and other British colonised territories. This has been brought to light in many articles and commentaries during the last 25 years. Strong arguments can be mounted in favour of the following propositions:

- That the Treaty of Waitangi was a valid treaty of cession in terms of a common understanding of international law both then and now.

- That regardless of its status at international law the Treaty was a valid act of cession in British constitutional law and therefore capable of making New Zealand a ceded rather than a settled colony (though in terms of the reception of English law the practical consequences were the same).

- That the common law itself, in its application to British territories, however acquired, recognised the land and related rights of native peoples as a legal qualification, the precise nature of which is unsettled, of the paramount title of the Crown. The Treaty was no more than declaratory in this respect, and Maori property rights did not and need not derive from the Treaty. This is the concept of aboriginal title. In respect of land where Maori customary title has been ascertained and extinguished the common law has

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90 [1962] NZLR 600.
91 [1963] NZLR 461.
92 "Maori Claims to Lakes, Riverbeds and the Foreshore" (1966) 2 NZULR 62.
93 "The Non Treaty of Waitangi" [1971] NZLJ 193.
94 [1986] 1 NZLR 680.

> admittedly been superseded by statute. But in other cases it remains applicable except that, because of sections 153-157 of the Maori Affairs Act 1953, it cannot be invoked against the Crown in respect of land. In other words Maori property rights continued to exist unless and until legislation took them away.

8.12 If the last of these propositions is valid, the law already recognises to an uncertain degree Maori rights in respect of traditional fisheries. It cannot yet be affirmed that the New Zealand courts have adopted it. However, some very recent decisions have gone some way towards accepting the concept that indigenous people had property rights at common law.

8.13 Te Weehi is authority for the view that traditional Maori fishing rights exist and are not subject to the regulatory regime of the Fisheries Act. Waipapakura had held that customary rights could not receive legal recognition without legislative sanction. In Te Weehi Williamson J preferred the view that such rights continued unless extinguished in one way or another. He found support for this view in Inspector of Fisheries v Ihaia Weepu[95] and Keepa v Inspector of Fisheries[96] as well as in the Canadian cases. Those New Zealand decisions had nonetheless been adverse to the Maori defendants. He distinguished them (and Waipapakura) on the grounds that in the case before him the claim did not rest on any assertion of proprietorship of the soil and was not a claim to an exclusive right. Williamson J referred to, but did not place any weight on, the omission from the 1983 section of the word "existing", which was in the corresponding provision of the 1908 Act. (The Select Committee on the 1983 Bill omitted the word on the ground that it was redundant and added nothing.)

8.14 The facts in Te Weehi and Waipapakura bear a considerable similarity. In both cases an individual was fishing in a manner prohibited by the Fisheries Act. In Waipapakura the breach was using nets unlawfully; in Te Weehi it was taking undersized paua. The plea in both cases was that the action was in exercise of Maori fishing rights and was within the exception in the Fisheries Act in favour of such rights. Nor is there any suggestion in Waipapakura that the plaintiff based her claim on either an exclusive right or Maori ownership of the soil.

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95 [1956] NZLR 920.

96 [1965] NZLR 322.

8.15 The reasoning in Te Weehi by which Waipapakura was distinguished therefore presents some difficulties and if strictly applied could give that decision a limited effect. Nonetheless there is at least an implicit recognition of a common law aboriginal title, and the approach and tone are quite different from most of the New Zealand cases since Wi Parata.

8.16 The Court of Appeal's decision in the Maori Council case is not of direct application to aboriginal title or to fishing rights. That case arose from a provision in the State Owned Enterprises Act 1986 (section 9) whereby nothing in the Act was "to permit the Crown to act in a manner inconsistent with the principles of the Treaty of Waitangi". The Court had to determine the relationship between that section and the much more detailed provisions of section 27, which dealt with the transfer of land from the Crown to the new enterprises, and to consider the meaning of "the principles of the Treaty of Waitangi". A unanimous decision of 5 judges gave section 9 an overriding effect, and in doing so recognised the Treaty as having a fundamental constitutional character. But as Cooke P remarked, the way for the decision was opened only by the legislation. He expressly refrained from any comment on -[97]

> "other issues, however important or interesting they are in themselves ... For example, whether the Treaty had a status in international law; what are the principles for interpreting international treaties; whether apart from the Treaty Maori customary title has protection at common law. These are big questions."

8.17 But the Court accepted Te Heuheu Tukino as a binding decision that in the absence of legislation no treaty could create or affect legal rights.[98] And one Judge (Somers J) referred without any sign of reservation to earlier cases holding the Crown's obligations to be non-justiciable.

8.18 The Te Weehi decision has now been reinforced by Greig J's judgment in a series of actions brought by Maori interests seeking an injunction against the government from extending the quota management system created by the Fisheries Amendment Act 1986 to certain additional species: Ngai Tahu Maori Trust Board v Attorney-General &

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97 [1987] 1 NZLR 641 at 655.

98 For example, Cooke P at 655.

Another.[99] It is necessary to appreciate, as the Judge stressed, that this decision was an interim one only. The judgment is nonetheless significant. The thrust is that Maori fishing rights having a commercial element existed in 1840, that they had not been taken away by statute, that it would be surprising if they had been taken away by the operation of the common law, but that in any event in the context of fisheries law, section 88(2) and its predecessors had expressly preserved them. Greig J considered section 88(2) to mean that nothing is to be done under the Fisheries Act that would affect, restrict, limit or extinguish those fishing rights.

8.19 To the extent that the law is uncertain it is deficient. This uncertainty is an unsound basis for a practical solution.

8.20 Moreover the law is unlikely to be able to accommodate Maori claims for control and management of fisheries resources. The legal validity of these claims is not readily found in a common law doctrine of aboriginal title as generally understood.[100] It must rest constitutionally on the covenant between the Crown and nga iwi Maori in the Treaty of Waitangi. So if these claims are to be accepted in any degree Parliament must positively intervene to determine the issue specifically.

8.21 The state of the law, and in particular its historical development and the law in other comparable countries of settlement, are discussed in greater detail in sections 15 and 16, in Part III of this paper.

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99 Unreported CP 559/87, HC Wellington, 2.11.1987. See Appendix F(6).

100 See, however, B Slattery, "Understanding Aboriginal Rights" (1987) 66 Canadian BR 727.

9 THE TREATY AS PUBLIC POLICY

9.1 The doctrine that the Treaty of Waitangi conferred no legal rights does not mean that it could not affect the law indirectly. As a formal agreement between the Crown and the Maori chiefs providing for the acquisition of British sovereignty and the assurance of protection for Maori rights and the recognition of their status as British subjects it had and has a moral status. The Courts, the Legislature and the Executive might see it as a source of policy. This could affect the legislation that was or was not enacted, and the policies of the Executive government.

9.2 The Courts themselves could, for instance -

i interpret legislation where possible so that it is not inconsistent with the Treaty;

ii give specificity to general or neutral words in legislation in the light of the treaty;

iii regard the Treaty as declaratory of the existing common law;

iv possibly, in an extreme case, consider the Treaty as a basic limit on legislative power.

9.3 The existence of the Treaty undoubtedly coloured early land legislation. It had a considerable, possibly a decisive, effect on the waste lands issue in the 1840s (see paras 15.36-15.44). It was explicitly recognised in the Fisheries Protection Act 1877. However, the acceptance of the Treaty as part of public policy was infrequent, inconsistent and haphazard.

9.4 In 1844 the Port Nicholson landowners were complaining about Fitzroy's waiver of pre-emption. Their memorial to the British Government was presented and doubtless prepared by George Evans, an English barrister who acted as legal adviser to the New Zealand Company in Wellington. He asserted -[101]

> " ... the impossibility of the natives conveying that which they have not in contemplation of law - an estate of freehold in the soil. In order to do this we need only refer to those numerous citations of what may be termed the common law of the colonies ...

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101 British Parliamentary Papers (1844) NZ Vol 4, Irish UP, p 625.

> This view ... is not in any sense repugnant to the Treaty of Waitangi, which we acknowledge as a fundamental law in this colony. This treaty simply and absolutely confirmed and assured to them all their territorial rights ... the question of what these rights are being unaffected by the Treaty."

9.5 There were, however, certainly voices both in New Zealand and in England that regarded the Treaty as an unfortunate act having most undesirable consequences. One such voice was heard in the majority report of the House of Commons Select Committee on New Zealand.[102]

> "The evidence laid before Your Committee has led them to the conclusion that the step thus taken, though a natural consequence of previous errors of policy, was a wrong one. It would have been much better if no formal treaty whatever had been made, since it is clear that the natives were incapable of comprehending the real force and meaning of such a transaction; and it therefore amounted to little more than a legal fiction, though it has already in practice proved to be a very inconvenient one, and is likely to be still more so hereafter."

9.6 The Committee was particularly upset that - [103]

> "... these stipulations, and the subsequent proceedings of the Governor founded upon them, have firmly established in the minds of the natives notions, which they had then but very recently been taught to entertain, of their having a proprietory title of great value to land not actually occupied; and there is every reason to believe that, if a decided course had at that time been adopted, it would not have been difficult to have made the natives understand that, ... all the unoccupied territory of the islands was to vest in the Crown by virtue of the sovereignty that had been assumed."

9.7 The Committee, however, admitted that "erroneous as they believe the policy hitherto pursued to have been, they are sensible of the great difficulty which may now be experienced in changing it".

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102 British Parliamentary Papers (1844) NZ Vol 2, Irish UP, p 5.
103 Ibid.

9.8 The majority report was not accepted by the Crown. Noteworthy is Lord Stanley's affirmation in reply to the contemptuous dismissal of the Treaty by Joseph Somes of the New Zealand Company as "a praiseworthy device to amuse and pacify savages".[104]

> "Lord Stanley entertains a different view of the respect due to obligations contracted by the Crown ... he will not admit that any person or any government, acting in the name of Her Majesty, can contract a legal or moral or honorary obligation to despoil others of their lawful and equitable rights."

9.9 He later instructed Grey:[105]

> "In the name of the Queen I utterly deny that any Treaty entered into and ratified by Her Majesty's command, was or could have been made in a spirit thus disingenuous or for a purpose thus unworthy. You will honourably and scrupulously fulfill the conditions of the Treaty of Waitangi."

9.10 The Courts in New Zealand have also explicitly acknowledged the relevance of the Treaty. Four twentieth century judicial statements will serve as examples -

> Mueller v The Taupiri Coal Mines Ltd per Edwards J;[106]
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> > "it appears to me to be impossible to infer any dedication by the Crown so long as the soil in the river remained Native land .... To do so would be to assume that the sovereign power has not respected, but has improperly invaded, the Native proprietary rights."
>
> Baldick v Jackson per Stout C J;[107]
>
> > "though the right to whales is expressly claimed in the statute of 17 Ed. II, c. 2, as part of the Royal prerogative, it is one not only that has never been claimed, but one that it would have been impossible to claim

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104 British Parliamentary Papers (1844) NZ Vol 2, Irish UP, Appendix p 36.
105 British Parliamentary Papers (1846 - 47) NZ Vol 5, Irish UP, p 230.
106 (1902) 20 NZLR 89 at 123.
107 (1910) 30 NZLR 343 at 344.

> without claiming it against the Maoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with - they were to be left in undisturbed possession of their lands, estates, forests, fisheries, &c. I am therefore of opinion that so far as this ground of appeal is concerned it has no validity."

Tamihana Korokai v Solicitor-General per Stout C J;[108]

> "It is not necessary to point out that if the Crown in New Zealand had not conserved the native rights and carried out the Treaty a gross wrong would have been perpetrated."

Re The Bed of the Wanganui River per Turner J;[109]

> "Upon the signing of the Treaty of Waitangi the title to all land in New Zealand passed by agreement of the Maoris to the Crown; but there remained an obligation upon the Crown to recognise and guarantee the full exclusive and undisturbed possession of all customary lands to those entitled by Maori custom."

9.11 Whether these and similar statements can always be reconciled with actual decisions of courts, and the policies and actions of governments, in respect of fisheries is quite another matter. In Mueller and Baldick they are undoubtedly part of the grounds of the decision. But if legislation had always been interpreted wherever possible so as to be consistent with the principles of the Treaty, a number of the cases adverse to Maori fishing rights could well have been decided otherwise.

9.12 The public statements of politicians did not always match what they said on more confidential occasions, nor their actions. For example, in 1930 the Minister of Marine wrote to (Sir) Apirana Ngata. A call had been made for a fishing reserve in the Kawhia Harbour for exclusive Maori use. There was no power, he said, to grant such rights. Even if there were it would not be reasonable to do so.[110]

> "It is recognised that under the Treaty of Waitangi the Chiefs and Tribes were to have the

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108 (1913) 32 NZLR 321 at 343.
109 [1962] NZLR 600 at 623.
110 Marine Department files M1 2/12/429.

> full exclusive and undisturbed possession of their fisheries.
>
> The fact is however that there never could have been any exclusive right to fisheries, and in any case the land which the Natives want set aside is mostly tidal land. These tidal flats are, as you are aware, Crown property in its common law right."

9.13 Doubtless politicians and officials thought that they were acting in accordance with the Treaty of Waitangi. Often, however, and perhaps above all in relation to fisheries, they interpreted the English version of Article 2 narrowly, and Article 1 largely and liberally. The Maori version was almost totally ignored.

9.14 One may detect the true beginning of a new spirit in the enactment of the Treaty of Waitangi Act 1975. The Act created the Waitangi Tribunal with jurisdiction to inquire into any claim by a Maori that any existing Act, regulation, Order in Council or Crown policy or practice was inconsistent with the principles of the Treaty of Waitangi and that the claimant was or was likely to be prejudicially affected thereby. Where the Tribunal considered the claim well founded it could recommend action by the Crown to compensate for or remove the prejudice or to prevent others being prejudiced. The long title of the statute was - "An Act to provide for the observance, and confirmation, of the Treaty of Waitangi by establishing a Tribunal ... to determine whether certain matters are inconsistent with the principles of the Treaty."

9.15 The 1975 Act was the stirring of a breeze that has become a powerful wind. Its force and implications were not realised for some time. Even in 1984 counsel for the Ministry of Agriculture and Fisheries admitted to the Waitangi Tribunal that the Ministry had considered neither the Treaty of Waitangi nor the Treaty of Waitangi Act 1975 in the preparation of the Bill that became the Fisheries Act 1983.[111] In fact, that Bill as introduced would have radically diminished the potential protection for Maori rights in section 77(2) of the Fisheries Act 1908. The words "nothing in this Act shall affect any existing Maori fishing rights" were qualified by adding the phrase "under any enactment". That phrase was omitted by the Select Committee after vigorous protests.

9.16 A recent shift in official attitudes has occurred. In 1985 an Interdepartmental Committee on Maori Fishing Rights said this in its unanimous report - [112]

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111 Manukau Report Wai-8, July 1985, p 110.

112 Department of Justice (1985) p 9.

> "We accept that a proper understanding of the Treaty is likely to call for changes in the received official sense of priorities. The tendency in the past has been to see the provisions of the Treaty as subordinate to other policies. The opposite approach is the more appropriate. While (again in the words of the Waitangi Tribunal) the treaty does not fossilise a status quo, its principles should not be watered down to conform with more limited objectives and policies.
>
> The first basic question that requires the government's decision is whether the law is to recognise as a principle Maori fishing rights as we have defined them. The implications of this would be considerable both in themselves and as a precedent. It would place constraints on a number of public policies and public activities both at the national and local level. But we are compelled to think that history and justice support it, and the fundamental premises of a bicultural society reinforce it."

9.17 That report was presented in November 1985. Although the Ministry of Agriculture and Fisheries was represented on the committee, there must be doubt whether those who prepared the Bill that was introduced in December 1985, and was to establish the ITQ scheme, seriously considered the relationship of the scheme either with the Treaty of Waitangi or with section 88(2) of the Fisheries Act 1983. The Minister's introduction speech[113] made no mention of the Treaty, of section 88, or of Maori issues. Nor did the Bill itself contain any reference to Maori fisheries or rights. Later, a clause was added by the Select Committee, after hearing submissions, providing for the total allowable catch to be set after taking account of "Maori traditional recreational and other non-commercial interests in the fishery". This, the chairman said, would keep the way open for proper consideration of traditional and customary fisheries.[114]

9.18 But in 1986 Cabinet issued a directive to departments as follows:

> "Cabinet on 23 June 1986-
>
> i agreed that all future legislation referred to Cabinet at the policy approval stage

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113 468 NZPD 8958.
114 472 NZPD 2883.

should draw attention to any implications for recognition of the principles of the Treaty of Waitangi;

ii agreed that departments should consult with appropriate Maori people on all significant matters affecting the application of the Treaty, the Minister of Maori Affairs to provide assistance in identifying such people if necessary."

This has subsequently been affirmed by Cabinet's adoption of the proposals contained in the report of the Legislative Advisory Committee: Legislative Changes - Guidelines on Process and Content (August 1987).

9.19 The force of the Treaty of Waitangi as a source of public policy to be applied by the Courts has now been established by recent decisions. They include Huakina Development Trust v Waikato Valley Authority & Bowater.[115] Here Chilwell J, interpreting a statute which made no express reference to the Treaty or to Maori interests, spoke of the Treaty as "part of the fabric of our society".

9.20 The judgments of the Court of Appeal in the Maori Council case[116] are notable. The basis of this decision on the facts was that the Government had taken no steps to give effect to section 9 of the State Owned Enterprises Act 1986. Its legal essence was that section 9 of the Act prevailed over the more detailed and specific section 27 of the same Act. The Maori Council challenged the Crown's intention to transfer large areas of Crown land to the new corporations created by the State Owned Enterprises Act 1986. Before the Court it argued that section 27 was a code which "covered the field" of land, leaving section 9 to apply only to other assets. The Court rejected this. Cooke P suggested as a more tenable proposition that section 27 was intended as an exclusive application of the principle of section 9 in relation to land. But he continued:[117]

"But the difficulty remains that on that interpretation s 9 adds little or nothing to the protection that s 27 would give in any event. It is true that a difficulty of this kind is not necessarily fatal. From time to time overlapping or surplus provisions are found in complicated legislation. Nevertheless in matters of such

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115 [1987] 2 NZLR 188.
116 [1987] 1 NZLR 641.
117 [1987] 1 NZLR 641, at 658.

transcendent importance for the Maori people as land and the Treaty of Waitangi a court would reach that conclusion with great reluctance."

9.21 Of still wider significance is the following:[118]

"The submissions were rather that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms; and that the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty. I accept that this is the correct approach when interpreting ambiguous legislation."

9.22 Apart from the State Owned Enterprises Act, the Treaty of Waitangi has received statutory recognition in 2 significant pieces of legislation. The long title of the Environment Act 1986 states one of the purposes of the Act as being to ensure that in the management of natural and physical resources, full and balanced account is taken (inter alia) of the principles of the Treaty of Waitangi. The Conservation Act 1987 goes further, section 4 requiring that Act to be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi.

9.23 Nonetheless, the Royal Commission on Social Policy has concluded [119] that "... in New Zealand today there remains a lack of consensus as to the authority [the Treaty] commands or the importance which should attach to it." The Royal Commission itself saw the Treaty as a document of fundamental importance both to the history of New Zealand and to the future development of our country and all its people.

9.24 Section 17 of this paper develops in detail the history of Executive policies and actions in respect of Maori fishery claims.

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118 Ibid, 655-6.

119 The April Report Vol II, "Future Directions" p 29.

10 FORESHORE AND SEA FISHERIES

10.1 Maori land rights were recognised arguably by the common law but in any event accepted by statute. But the question arises of what was meant by "land". After some uncertainty and hesitation the Executive took, and steadfastly maintained, the view that land for that purpose stopped at high-water mark. Maori ownership of and rights in respect of the foreshore were denied. In Waipapakura the Courts upheld the Crown's argument that the plaintiff (a Maori woman fishing in tidal waters) had no individual or communal right to do so. The Crown further asserted that the Maori had no claim to the ownership of lakebeds, but it did not succeed in the Courts on this issue.

10.2 The concept of the foreshore, and sea, lake and river beds, as part of the public domain is a respectable one and there is much to be said in favour of it. Freedom of access to the sea for fishing as well as for all manner of other recreational purposes was and continues to be a highly valued "taonga" of New Zealanders. Any government that was seen to be taking it away would have been in trouble with its electors. The notion of fishing rights as private property was objectionable to a wide public opinion. Prevailing attitudes are epitomised in the succinct words of section 5 of the Fisheries Conservation Act Amendment Act 1902: "it shall not be lawful for any person to sell or let the right to fish in any waters".[120]

10.3 What can be said, however, is that governments were dismissive of the Maori viewpoint and did little to accommodate it in overall laws and policies.

10.4 Under Maori custom, tidal and sea fisheries were not usually regarded as common to all, but rather the jealously guarded property of a hapu. See para 6.8. But in official and orthodox legal eyes the foreshore below high tide mark and a fortiori offshore reefs and shoals was Crown land in a special sense. The Harbours Act 1878 and its successors embodied that concept.

10.5 The Crown's argument in the Kauwaeranga case[121] sums up its attitude accurately. By the law of England the foreshore belongs to the Crown and can only be held by a subject by grant from the Crown either actual or presumed. The Maori cannot own the foreshore according to their customs and usages, as such ownership would be in derogation of the prerogative of the Crown. This was

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120 See now s 73, Fisheries Act 1983.

121 Reproduced in (1984) 14 VUWLR 227.

essentially the view that prevailed in subsequent decisions. It requires analysis.

10.6 Two distinct issues have to be disentangled - the ownership of estuaries, foreshores and seabed on the one hand, and the freedom of the public to fish on the other.

Ownership of the Foreshore

10.7 The New Zealand courts have mostly treated the Crown's rights in respect of the foreshore with great deference and virtually as a necessary attribute of sovereignty. Among politicians, the Crown's legal advisers and the judges alike the proposition "the Crown owns the foreshore" became unquestioned.

10.8 The development and ultimate triumph of this view is traced in section 15. In the absolute form in which it prevailed in New Zealand, judicial authority does not support it. Thus in 8 Halsbury (4 ed) 1418 it is said that

> "by prerogative right the Crown is prima facie the owner of all land covered by the narrow seas adjoining the coast, and also of the foreshore. There is a presumption of ownership in favour of the Crown. This presumption arises from the fundamental principle that all the land in the realm belonged originally to the sovereign." [emphasis added]

10.9 The paragraph adds that the presumption is now of less weight than formerly.

10.10 That is the current view. It is consistent with the earlier cases. Thus in Le Strange v Rowe[122] Erle C J said that "in a great number of cases the Crown has parted with the foreshore ... I take it that in the great majority of cases the right to the foreshore between high and low water is in the Lord of the Manor." As the Maori Appellate Court asserted in the Ngakororo Mudflats case,[123] it is a matter of facts and evidence. Statute apart, there is no difference between the Crown's title over the foreshore as ultimate proprietor and its ultimate title over the dry land. It can make grants of one as much as of the other. In the earlier days of European settlement, a number of grants of land below high tide were in fact made to private citizens.[124] So the fact that the Crown holds the

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122 (1866) 4 F & F 1048.

123 (1941) Auckland Appellate Court Minute Book 12, 137.

124 See the return published in (1868) AJHR C-3, a list which is probably itself incomplete.

paramount title to the foreshore is not even prima facie incompatible with the legal recognition of indigenous property rights. Every word that has been said since 1839 about the Crown's title being subject to rightful and necessary occupation and use by the indigenous inhabitants can apply equally to the foreshore.

10.11 There is some recognition of the logic of this in North J's judgment in Re The Ninety Mile Beach (see paras 2.21, 15.111). He was not prepared to accept the Solicitor-General's "attractively simple" contention that the Crown's right to the foreshore was such that the Maori Land Court never had jurisdiction to investigate title to land below high water mark. The same view was expressed by T A Gresson J. But in terms of the judgment as a whole this jurisdiction could only flow from legislation, and legislation in the form of the Harbours Act 1878 had put an end to it.

10.12 That the Crown owns the foreshore by virtue of paramount title (unless it has granted it to others) is not in doubt. What is in question is the nature of that title and whether there may be a legal burden on it. The New Zealand approach typifies the tendency that the Privy Council deprecated in Amodu Tijani v Secretary, Southern Nigeria[125] to apply technical concepts and rules of English law to an irrelevant situation.

Fishing Rights

10.13 Paradoxically, it is in relation to fishing rights as distinct from ownership of the soil that the received view of the common law is less favourable to Maori claims.

10.14 With the major exception of the fisheries legislation, the public right to fish in all waters below high tide mark was well established as a fundamental policy of the law of New Zealand up to 1986. A private right of fishery, effective to exclude the public right, could, it is said, only be created by an act of the Crown.[126] At least since Magna Charta it could not be the subject of a Crown grant because of chapter 16 of that statute,[127] with the result that private fisheries can now be created only by legislation. Any Crown grant of foreshore land is necessarily subject to public rights of fishery and of

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125 [1921] 2 AC 399.

126 18 Halsbury 4th ed, paras 601-615.

127 "No banks shall be defended from henceforth but such as were in defence in the time of King Henry ... by the same places and the same bounds as they were wont to be in his time."

navigation. It can exist only by prescription or (in England) by a presumed grant prior to Magna Charta, one instance being the fishery that was the subject matter of Goodman & Blake v Borough of Saltash: see para 16.20.

10.15 The concept of a presumed grant, however, cannot apply outside Britain because in the nature of things there could have been no such grant. A leading case is the judgment of the Privy Council in Attorney-General for British Columbia v Attorney-General for Canada.[128] The issue of indigenous property or fishing rights did not arise in this case, and the judgment cannot be regarded as decisive on that question. But as a general statement it is unequivocal.

10.16 The question was whether the British Columbia legislature (as distinct from the Canadian Parliament) had power to regulate the rights of fishery in tidal and non-tidal waters of the Fraser and other rivers. The Privy Council held that the province did not. In doing so it discussed the nature of fishing rights and the circumstances in which private fisheries over tidal waters could exist.

Their Lordships affirmed the proposition that -

> "the subjects of the Crown are entitled as of right to fish in the high seas and tidal waters alike. The legal character of that right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial and in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean." (p 169)

To this right there were, however, exceptions exemplified by English decisions where separate and exclusive rights of fishing in tidal waters had been recognised. In all such cases proof of the existence of the right had of necessity gone further back than the date of Magna Charta. (This is too strong - the English cases are based on a presumed grant.) "... No such case could exist in any part of British Columbia, inasmuch as no rights there existing could possibly date from before Magna Charta." (p 171)

> "Since the decision of the House of Lords in Malcolmson v O'Dea, it has been unquestioned law that since Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters,

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128 [1914] AC 153.

> and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. This is now part of the law of England, and their Lordships entertain no doubt that it is part of the law of British Columbia." (p 170)

10.17 The objection may be made that the phrase "then existing" makes nonsense of the conclusion. To suppose that in 1297 or thereabouts there was any public right of fishery in British Columbia (or New Zealand) is as untenable as the notion, which the decision dismisses, of a Crown grant before that date. But the substance of the decision has not been doubted.

10.18 These lines of reasoning, however, overlook the argument that in acquiring new territory the Crown must take indigenous property rights as it finds them. The use of an obscurely worded provision of Magna Charta (which the Imperial Laws Application Act 1988 does not list as part of the law of New Zealand and which was repealed in Britain: Statute Law Reform Act 1969) to deprive the Maori of valued and supposedly guaranteed rights may be thought to infringe a more fundamental public policy than the unrestricted right of the public to fish. That right has in any event been restricted and regulated directly and indirectly for more than a century by a series of statutes. Such an argument seems consistent with the Court of Appeal's approach in Re The Ninety Mile Beach and with Te Weehi.

Regional Fisheries Officer v Williams

10.19 The decision of O'Regan J in Regional Fisheries Officer v Williams in 1978 shows a new and more liberal judicial philosophy towards foreshore fishing rights.[129] Although very much a judgment on the special facts and legislation, it can be seen as a harbinger of cases like Te Weehi. Williams too arose from the prosecution of a Maori for breaching the Fisheries Act - in this instance taking whitebait out of season at the mouth of the Hokio stream, near Levin. Special statutory provisions, going back to the Horowhenua Block Act 1896, governed Maori fishing rights in this stream, and the decision turned on the interpretation and application of these provisions and laid down no general principles. But the Judge emphasised that the legislation (in particular section 18(5) of the Reserves and Other Lands Disposal Act 1956) was expressed to preserve existing rights and not to grant new ones. It preserved to the Maori owners of certain parts of the

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129 Unreported CP 116/78, HC Palmerston North, 12.12.1978.

Horowhenua Block "free and unrestricted use of their fishing rights over the Hokio stream". This right, he held, extended over the foreshore at the stream's mouth and overrode the more general provisions of the Harbours Act vesting foreshores in the Crown.

> "... [Counsel] submitted that the appellant, fishing as he was on the foreshore, was on Crown land to which his fishing rights do not extend. I do not accept that submission. The rights of piscary which he and the other members of the Muaupoko who own Horowhenua XI block are ... unique rights. They are also ... old rights. .... They might well have existed prior to the coming of the Pakeha. They were asserted in necessarily general terms throughout the years over which the settlement was made and in the end they were given statutory recognition. That statute [sic] ... declared the bed of the Hokio stream 'to be and to have always been owned [emphasis in original] by the Maori owners'. The declaration ... is statutory recognition that such ownership preceded the advent of the Pakeha and the introduction of his artifices for the making of laws and for creating and recording property rights .... I think therefore [emphasis added] that the right of the Crown to the foreshore at the outlet of the Hokio stream is subject to the rights of piscary of the Maori owners in that part of the stream."

The Effect of Recent Legislation

10.20 The enactment of the State Owned Enterprises Act 1986 opens the way to the Crown's transfer of such part of the foreshore as it still owns to the new enterprises. That, however, would face the hurdle of section 9 as interpreted by the Court of Appeal in the Maori Council case, which precludes the Crown from acting in a manner inconsistent with the principles of the Treaty of Waitangi. The present policy is that foreshores and the seabed beyond them are to remain Crown property. We are informed that commercial port areas (now mostly defined) are to be administered by the Ministry of Transport and other parts of harbours and foreshores are the joint responsibility of that department and the Department of Conservation. How far the rules for the administration of the Conservation Act, which inter alia is required to give effect to the principles of the Treaty, now govern these areas is unclear.

11 RIVER AND LAKE FISHERIES

11.1 Fishing rights in New Zealand non-tidal rivers and lakes have usually been taken to flow from the ownership of the underlying soil. There are conflicting statements, but in Re The Bed of the Wanganui River[130] the Court of Appeal did not question a finding of the Maori Appellate Court that Maori fishing rights in the river were an incident of title to the bed, and could not be separated from that title. In other words, no title to the bed, no fishing rights.

11.2 A similar approach seems implicit in a statement by Cooper J in Tua Hotene v Morrinsville Town Board.[131]

> "The plaintiffs, in conjunction with other Native proprietors of Maungatapu D and Te-au-o-Waikato, have had fishing-rights in the Piako River and such other rights as the river afforded, the same being a non-navigable river at the place where it flows through the lands of the plaintiffs. It is, in my opinion, clear that the bed of the river where it flows through the lands owned by the plaintiffs in common with the other Native proprietors was vested ad medium filum in the Natives who owned the land on each side of the river. Therefore the Proclamation purports to take from these Native owners the bed of the river and to destroy their fishing-rights."

(The proclamation had said nothing about fishing rights; this was taken to be a consequence of vesting the bed.)

11.3 The concept of common law aboriginal title might, however, involve the recognition of a fishery right in relation to lakes and rivers, as well as over the foreshore, separate from the ownership of the bed. Though based on the savings provision of section 88(2) of the Fisheries Act, the Te Weehi decision provides some support for that notion. The point may well still be open.

11.4 Nonetheless, the accepted view of the common law operated in a way more favourable to Maori claims to lake and river than to littoral fisheries. There was no presumption of Crown ownership of lakes or river beds.

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130 [1963] NZLR 461.
131 [1917] NZLR 936, 945.

Rivers

11.5 At common law the owner of land along a river bank presumptively owns the bed of the river and therefore fishery rights over it to the middle line of the river.[132] However, the bed of navigable rivers is vested in the Crown by statute. Section 14 of the Coal Mines Amendment Act 1903[133] declared that:

> "Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown."

11.6 The provision was a sequel to the decision in Mueller v The Taupiri Coal Mines Ltd.[134] This held that grants of land along the Waikato River did not carry title to the bed to the middle line, because circumstances extrinsic to the grant rebutted this presumption - namely the Crown's obvious wish to retain the use of the river as a public highway.

11.7 The Crown was asserting through legislation an exclusive title to river beds of navigable rivers analogous with its title over the foreshore and the title it unsuccessfully claimed over lakebeds, implicitly to the exclusion of any Maori customary rights.

11.8 What is a navigable river? The Coal Mines Act 1979 defines it in section 261 (repeating earlier definitions) as:

> "a river of sufficient width and depth (whether at all times so or not) to be used for the purpose of navigation by boats, barges, punts or rafts."

11.9 This seems a very wide definition, and it might be wondered if changes in technology such as the jet boat can affect the scope of "navigable rivers". In The King v Morison[135] the Crown accepted that the definition only applied to those parts of a river which are in fact navigable and not to its whole length, but the Court itself came to no firm decision on this. This leaves open the possibility that the Act applies to stretches of river along which boats cannot in fact pass.

11.10 The provision received a very restricted interpretation from Savage J in Tait-Jamieson v I C Smith

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132 18 Halsbury 4th ed, 628, 629.

133 Now section 261 of the Coal Mines Act 1979.

134 (1902) 20 NZLR 89, (see the comment of counsel in The King v Morison [1950] NZLR 247 at 250).

135 [1950] NZLR 247.

Metal Contractors Ltd.[136] Preferring the view of Adams J among inconsistent dicta in Attorney-General ex rel Hutt River Board v Leighton,[137] he held that section 261 did not affect the presumption that a Crown grant of land bordering a river conveyed the bed to the middle line. In other words the grant had to expressly exclude the riverbed if section 261 was to apply. Morison was not cited. If Tait-Jamieson is correct there would be little to which the section could apply, and its purpose becomes difficult to understand. And it would mean that the beds of navigable rivers have mostly passed out of Crown hands, so that the Crown would be powerless to return them to Maori ownership. On the other hand it would advantage Maori owning freehold land on the banks. One cannot assume that Tait-Jamieson is by any means the last word. In any event, since the great majority of streams in New Zealand are by any test non-navigable, fishing rights in respect of them belonged to Maori riparian owners, whether by Maori custom or under the freehold titles issued by the Native Land Court.

Lakes

11.11 The law concerning the ownership of lake beds is not settled beyond all doubt. Where a person's land completely surrounds a lake, it is clear that ownership of the lake bed is incorporated in it. With other lakes the view accepted in New Zealand is that, as is certainly the case in England, each riparian proprietor owns (and thus has exclusive fishing rights over) a corresponding section of the lake.

11.12 While this is reasonably satisfactory for small lakes, its application to the largest lakes could be regarded in the words of the English Laws Act 1908[138] as "not applicable to the circumstances" of New Zealand. Some modern support for this is to be found in Southern Centre of Theosophy Incorporated v The State of South Australia[139] where the court suggested that this ad medium presumption, while applicable to regions with a long history of European settlement, did not necessarily apply to Australian states where the Crown was "the ultimate proprietor of waste lands". See para 16.29. This is in accord with comments made in Mueller that the Crown is "trustee" of "waste lands" in New Zealand. The view, however, would have seriously adverse consequences to Maori

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136 [1984] 2 NZLR 513.

137 [1955] NZLR 750.

138 Repealed, but effect continued by s 5 of the Imperial Laws Application Act 1988.

139 (1979) 21 SASR 399.

claims to mana over their lakes and the fisheries belonging to them. It was in fact strenuously but unsuccessfully contended for by the Crown in Tamihana Korokai v Solicitor-General,[140] where the title to the bed of Lake Rotorua was at issue.

11.13 Generally, disputes between the Crown and Maori concerning lakes have been dealt with on an ad hoc basis. The orthodox view of ownership put the Maori in a strong negotiating position. The result was that while the agreements were not necessarily as fair as they might have been, the working out of a concept of partnership can be discerned.

11.14 The settlements fall into two classes, those where Maori ownership of the lake bed is retained, and those where it is not. Apart from this distinction, there are varying degrees of Maori control over the use of the resource, but in all cases traditional fishing rights are retained, albeit in some cases in modified form.

11.15 Lake Horowhenua is an example of the first class. There was conflict initially among several Maori parties claiming sole or beneficial ownership of the lake. A Royal Commission in 1896 resolved these claims in favour of the local Maori tribe (Muaupoko) who customarily used the lake for fishing purposes, with trustees holding the fee simple title for them. Public use of the lake was, however, desired, and after negotiation the lake was declared a public recreation reserve in the control of a Domain Board in 1905.[141] The Maori owners retained some control over the lake through membership of this Board and a statutory preservation of their fishing rights. These rights were not, however, to interfere with the public use of the lake for recreation purposes.

11.16 This arrangement was modified in 1956 because of doubts which had arisen as to the precise legal ownership of the lake bed in the light of the 1905 Act. They were brought to a head by drainage operations which exposed land on the lake perimeter. The trustee arrangement was confirmed by legislation and those members of the Muaupoko tribe living near the lake were declared beneficial owners of the lake bed, with their fishing rights again preserved. A new Domain Board was appointed with the statutory requirement of half Maori-recommended appointees.[142] This arrangement continues in force today. The fishing rights of the Muaupoko are supported,

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140 (1912) 32 NZLR 321.
141 Horowhenua Lake Act 1905.
142 S 18, Reserves and Other Lands Disposal Act 1956.

at least as far as eel fisheries are concerned, by the Fisheries Regulations 1986.[143]

11.17 The Lake Waikaremoana Act 1971 is another instance. A Maori Appellate Court judgment in 1944, upholding an earlier determination of the Maori Land Court, confirmed that the bed of this lake was in Maori ownership. The Crown chose not to challenge this decision and entered into lengthy negotiations with the owners. A Crown proposal to buy the lake was rejected. The bed was left in Maori ownership, but a 50 year lease over it was given to the Urewera National Park Board. The Maori lessors retain the right of access to the lake, but day to day control is with the Park Board. An annual rental is paid to 2 Maori trust boards, who administer this money for the benefit of the lake owners.

11.18 In the case of Lake Rotoaira near Lake Taupo, a very high degree of Maori control has been retained over traditional land and fishing rights. The Maori owners of the lake complained that the introduction of trout had all but destroyed the traditional koura fishery. The Crown here simply gave the owners the right to take any fish in the lake without the need for licences normally issued for trout fishing. This settlement was the subject of some controversy when it was proposed to charge outsiders for the right of access to the lake - in effect the sale of a fishery right contrary to what is now section 73 of the Fisheries Act 1983. This proposal was effected by Part I of the Maori Purposes Act 1959, but not before strong protests had been entered against such a precedent.[144] It was widely viewed as an unfortunate if necessary exception to the general rule that no private fishing rights should exist in New Zealand.

11.19 Taupo and Rotorua moana illustrate the second type of settlement where the beds passed out of Maori ownership, but substantial fishing rights were provided for. The Crown's failed attempt to override Maori claims in the Court in the case of Rotorua has already been noted. Agreement was reached with the Arawa claimants to the lake bed before the issue could be finally determined in the Land Court (the proceedings of which were interrupted by the death of one of the judges hearing the case). This agreement, partially enacted in section 27 of the Native Land Amendment and Native Land Claims Adjustment Act 1922, declared the beds of some 14 lakes (including Rotorua) and the right to use their waters to be," the property of the

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143 SR 1986/223.

144 Marine Department File M1 1/7/132.

Crown, freed and discharged from the Native customary title, if any ...".

11.20 The Lake Taupo settlement[145] makes identical provision for Taupo, in that Maori retain the right to fish for indigenous species in the lake, and are to be given licences on favourable terms to fish for imported fish. This last provision was made partly because of the damage that imported trout had done to the populations of indigenous fish species - as happened with Rotoaira.

11.21 Both settlements provided for the creation of a local Maori Trust Board, which receives annual payments from the Crown and administers these for the benefit of Maori people living around the lakes. In the Taupo case the Crown hoped to have the cost of these payments to the trust board offset by the fees paid by the general public for licences to fish for trout in the lakes[146] - in effect a payment of part of a "resource rental" to the local Maori. With both lakes the Governor-General may reserve portions of either lake bed for Maori use.

11.22 As with river fisheries, rights claimed by Maori in lakes are subject to statutory provisions which have the potential to limit them considerably. For example almost identical provisions in the Coal Mines Act 1979[147] and the Petroleum Act 1937[148] authorise the Minister of Energy (or the "appropriate Minister") in each case to grant rights of exploitation over:

> "All land that is the bed of a lake if it is held by or on behalf of the Crown or if, <u>in the opinion of the Minister</u>, it is not clearly established who is the owner of the land." [emphasis added]

11.23 What these provisions seem to say is this. A Minister can give someone authority to drill or mine on land that does not belong to the Crown as long as the Minister is doubtful who the land does belong to. Although such a grant would presumably be subject to judicial review, the ordinary law would require the Crown to go initially to the Courts to determine such questions of ownership.

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145 Native Land Amendment and Native Land Claims Adjustment Act 1926, s 14.
146 Native Land Amendment and Native Land Claims Adjustment Act 1924, s 29(3).
147 S 21(1)(k).
148 S 29(1)(p).

12 THE IMPACT OF OTHER LEGISLATION

12.1 The status of Maori fishing rights whether under common law or as a result of legislation cannot be seen in isolation. There exists and has long existed a large amount of empowering, regulatory and planning legislation that affects both inland and marine fishing grounds and the ability to harvest kaimoana from them. Private law rights can be lawfully exercised to the detriment of fisheries.

12.2 This mass of statutes can be classified in a variety of ways. They may for example be divided into:

i. Those that authorise the taking of private land for public purposes.

12.3 The principal Act is the Public Works Act 1981, which authorises central and local authorities (the latter with the approval of the Governor-General) to purchase land compulsorily for public works. Local authorities include regional and local councils, hospital and harbour boards and "any other person or body, however designated, having authority, under any Act, to undertake the construction or execution of any public work".[149] The power was restricted between 1981 and 1987 to "essential works", but this restriction has been removed by the Public Works Amendment Act (No 2) 1987.

12.4 Many different Acts empower local authorities and the Crown to carry out public works, and these Acts often adopt the compulsory acquisition powers and procedures in the Public Works Act. Such works may often affect fishing rights, for example swamp drainage, supplying electricity and natural gas, and harbour works.

ii. Those that authorise public bodies to carry out activities that might otherwise be unlawful as affecting private rights.

12.5 Along with the power to take land for public works is the power to carry out these works. Various Acts empower public authorities to carry out activities on public land or other land that might otherwise be unlawful as affecting private rights.

12.6 The Harbours Act 1950 contains many illustrations. Powers granted in the Act include constructing harbour works, laying pipes and building

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149 S 2.

railways and tunnels. Harbour Boards may also have powers under bylaws to control many aspects of the use of harbours.

12.7 Other significant examples are works connected with land drainage under the Land Drainage Act 1908, and water control under the River Boards Act 1908 and the Soil Conservation and Rivers Control Act 1941. These last 2 Acts contain very wide powers including the power to alter the course of rivers and divert water from them; to construct and maintain watercourses and to take water from watercourses. Each Act empowers the relevant authority to enter onto private land to carry out its functions.

iii. Those that license private persons to use public land or property.

12.8 Many statutes license private persons and public authorities to carry out activities that they would not, under the common law, be entitled to perform.

12.9 The Harbours Act contains important licensing powers which include granting licences to take stone and sand from foreshores, harbours, lakes and rivers and the seabed; and licences to use the foreshore for various purposes. Licencees in the latter case have the power to carry out reclamations despite the later provisions of the Act regarding reclamations.

12.10 Licensing regimes are common in minerals statutes. The Petroleum Act 1937 is an example. The Act vests petroleum in its natural state in the Crown, then provides a licensing procedure for individuals who wish to prospect and mine for it.

iv. Those that in the public interest restrict the use of property or rights by land owners or the public either absolutely or conditionally.

12.11 A number of statutes control and restrict the use that land owners can make of their land, in order to conserve resources or to prevent others being adversely affected.

12.12 The best known example is the Town and Country Planning Act 1977. It provides for the creation of 3 types of scheme, Regional, District and Maritime Planning Schemes, which are binding on public authorities, land owners and the public generally. District and maritime schemes set out certain activities which are permitted as of right; any other activity requires a consent from the Council or Maritime Planning Authority.

12.13 Maritime schemes directly affect fishing by controlling the activities that may be carried out within areas of water. District schemes are land use plans. They do not in the usual case deal specifically with issues of water quality and water rights - these being the province of the Water and Soil Conservation Act - but they determine the siting of industries and other land uses which may have significant effects on water quality.

12.14 The Water and Soil Conservation Act 1967 controls the use a landowner may make of his or her land, by vesting all rights to natural water (with limited exceptions) in the Crown. A person wishing to use water must apply to the local Catchment Board for a water right. (The Geothermal Energy Act 1953 institutes a similar regime, under which a licence to use geothermal energy must be obtained from the Minister of Works.) The issue of water rights is governed by the objects of the Act generally but also by any classification of water and any water conservation orders made under the Act.

12.15 A different sort of statute restricts public access to Crown land, in the interests of conserving or enhancing some natural feature of the land. Under the Conservation Act 1987 and the Reserves Act 1977 public use of areas of Crown land is restricted in accordance with the objectives of the conservation area or reserve. The Marine Reserves Act 1971 is another example.

12.16 This body of statute law has 3 notable characteristics.

12.17 First, each Act tends to deal with its own subject in isolation, and may overlap or even be inconsistent with the terms or the policy of other statutes. The relationship between statutes that deal with the same subject matter is often not spelt out. One example is the relationship between reserves under the Reserves Act and conservation areas under the Conservation Act on the one hand, and zoning and other planning requirements under the Town and Country Planning Act on the other. Do pipelines authorised under the Petroleum Act need consents under the Water and Soil Conservation Act? It is now clear that mining operations authorised under the Mining Act 1971 do not require planning consent, but this was the subject of long debate.

12.18 There have been some attempts to achieve consistency. Thus section 4 of the Town and Country Planning Act requires local, regional and maritime planning authorities to have regard to the principles and objectives of the Water and Soil Conservation Act 1967 and the Soil Conservation and Rivers Control Act 1941 in preparing and

administering their schemes. There is also provision for joint hearings of planning and water right applications where a project requires both consents.

12.19 Generally, however, until fairly recently there has been little consistent policy, other than "development". This meant settling immigrants or their descendants on the land and maximising the production of exportable goods. In the case of mining statutes it meant providing mechanisms for exploitation of the particular resource.

12.20 In recent years the policy of conservation and environment protection has been incorporated to a greater or lesser degree in various statutes, such as the Reserves Act, Town and Country Planning Act and Marine Reserves Act. It is expressed in the long title of the Water and Soil Conservation Act. In this Act, as in the Town and Country Planning Act, the policy of conservation is balanced against the policy of making productive use of the resource, policies which may sometimes conflict. Under the Conservation Act 1987, however, the administration of a number of other statutes, such as the Reserves Act 1977 and the National Parks Act 1980 becomes subject to the principles of conservation.

12.21 One of the implicit aims of the resource management law review that commenced in 1988 is to propose consistent policies for all resource management legislation.

12.22 Second, there is an absence of any uniform or principled approach to rights and grounds of objection. Contrast, for instance, 2 of the most important statutes, the Town and Country Planning Act 1977 and the Water and Soil Conservation Act 1967. Under the former, standing to object to land use planning applications and planning schemes is restricted to persons either "affected" or "representing some relevant aspect of the public interest". Where maritime planning is concerned, however, the right to object is greatly extended, to "any body or person". Under the latter Act the grounds of objection are fairly wide. A person may object on the grounds that the grant of the application would prejudice his or her interests or the interests of the public generally. This provision has recently been applied by Chilwell J in Huakina Development Trust v Waikato Valley Authority[150] to a Maori group's interests in the spiritual, cultural and traditional relationships with natural water.

12.23 Under the Petroleum Act 1937, there is no right of objection to the grant of a prospecting or mining licence,

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150 [1987] 2 NZLR 188.

or a pipeline authorisation. Similarly the Harbours Act 1950 provides no right to object to the grant of licences, for example, for the use of foreshores. The Iron and Steel Industry Act 1959 gives no right of objection to the exercise of the Minister's power to authorise any person to prospect and mine ironsands. The Soil Conservation and Rivers Control Act 1941 gives a right of objection to works to certain public bodies only.

12.24 Despite these inconsistencies a trend can be discerned towards decision by independent authority (rather than, for example a Minister, as used to be common) and towards greater and more detailed rights of objection. For example the Public Works Act now gives the final power of decision in compulsory purchase cases to the Planning Tribunal, rather than the Minister.

12.25 Third, until very recently, the legislation failed to give any protection to Maori interests except in terms of ownership of land or insofar as they could be subsumed under the head of "public interest". One quite recent instance where the law was held to exclude any requirement to consider Maori interests was Dannevirke Borough Council v Governor-General.[151] The Council wished to acquire Maori land by compulsion for a rubbish tip. The Governor-General, whose consent was necessary, refused it on the ground that the compulsory acquisition of Maori land was contrary to government policy. The High Court (Davison C J) held that the Governor-General had no power to exercise his discretion on that basis and that the refusal was therefore invalid. The judgment is notable in that no mention whatever was made of the Treaty of Waitangi and its possible implications for construing a statute.

12.26 The scheme of planning legislation tended to follow overseas derived concepts and values. This is seen clearly in the effect of the Town and Country Planning Act 1953 on marae housing. Its 1977 successor does acknowledge Maori interests in several respects. In preparing and administering both district and maritime schemes the local or maritime planning authority is subject to sections 3 and 4, which set out matters of national importance, and the objectives of planning respectively. Matters of national importance include "the relationship of the Maori people and their culture and traditions with their ancestral land." Also of relevance in this context is the preservation of the coastal environment and the protection of the physical environment generally. These are among matters which are to be "recognised and provided for" in all plans.

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151 [1981] NZLR 129.

12.27 The effectiveness of these provisions to protect Maori interests generally has been limited in 2 ways. First they are only some of a number of matters which must be provided for; they may conflict, for example, with the requirement in section 4 to promote the economic welfare of the people of an area. Maori interests have not been accorded any paramountcy. Second, until recently "ancestral land" received a narrow interpretation which excluded land that had passed out of Maori ownership, even where that land was in Crown ownership. However, this has now been rejected.[152]

12.28 Under the Town and Country Planning Act the local or maritime authority is also required to make provision for such of the matters set out in schedules to the Act as it considers necessary. This is somewhat circular, and appears to leave authorities with a wide discretion. The schedules list potentially conflicting matters to be "dealt with". In the case of district schemes these include a specific reference to Maori interests in the following: "Provision for marae and ancillary uses, urupa reserves, pa, and other traditional and cultural Maori uses".

12.29 Schedule 3 which concerns maritime schemes contains a provision, recently inserted, to take account of Maori traditional and cultural uses, including fishing grounds, but again this is only one of several matters.

12.30 Nonetheless there is a growing judicial willingness to recognise Maori values in planning. Abbott v Lower Hutt City Council[153] exemplifies this. Land designated for a cemetery drained into a river used by Maori for eeling, whitebaiting and shellfish. The Tribunal accepted that sub-surface discharge would render the stream unusable for these purposes and would offend Maori cultural and spiritual values. Under the head of "social and environmental effects" these effects were taken into account and the designation revoked.

12.31 The Public Works Act contains a procedure for notifying the owners of land and those with an interest in land, and those persons have a right to object before the Planning Tribunal to the acquisition. Special provision is made for identifying owners of Maori land, but there is no further recognition or protection of Maori interests. A person who wished to object on the grounds that the acquisition would affect a fishing right would be unable to

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152 Royal Forest and Bird Protection Society v W A Habgood Ltd (1987) 12 NZTPA 76.
153 (1985) 11 NZTPA 65.

do so unless the right was attached to an interest in land. Nor does the Water and Soil Conservation Act 1967 provide any explicit protection for Maori values.

12.32 Under the Petroleum Act a person holding a mining or prospecting licence is authorised to enter onto the land that is the subject of the licence. In the case of certain lands such as conservation areas, national parks, the foreshore (outside port areas), and the beds of navigable rivers, the consent of the Minister of Conservation must be obtained before the licensee can enter the land. The Minister may refuse consent with or without conditions. As the Conservation Act must be administered in accordance with the principles of the Treaty, this requirement for consent could now protect Maori interests. There are similar provisions in the Coal Mines Act 1979 and the Mining Act 1971.

12.33 Some Acts contain a protection for Maori interests that is expressly secondary, for example the Swamp Drainage Act 1915. Section 7 provides that land used exclusively for Maori settlement shall not be compulsorily acquired "unless this is necessary for the successful conduct of the drainage operations."

12.34 Even where Maori interests are mentioned they are not made paramount, but are among matters to which regard must be had.

12.35 A new and important exception is the Conservation Act 1987, which upholds the principles of the Treaty as paramount public policy. Section 4 has been noted previously: see para 9.22. It requires the Act to be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi. Section 6 obliges the Department of Conservation to administer a number of other Acts in the first Schedule subject to the Conservation Act. There is a nice question concerning the Harbours Act 1950, which is not enumerated in the first Schedule, but is amended by the second Schedule so as to divide the administration between the Ministry of Transport (for port areas) and the Department of Conservation for others.

12.36 A proposal to add a new paragraph to the long title of the Environment Act 1987,[154] while not referring to the Treaty as such, would enhance the regard to be paid to Maori values under that Act. The paragraph reads:

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154 Law Reform (Miscellaneous Provision) Bill 1989 cl 72.

"(d) Kia poua kia uu nga kaupapa Maori e hangai ana ki nga taonga a Ranginui raua ko Papatuanuku (establish and confirm a philosophy for the recognition of the treasures of the sky father and the earth mother)".

12.37 Past failure to acknowledge Maori interests in legislation has been mirrored in the payment of compensation for land compulsorily acquired, which has been assessed in European terms. Payment is normally confined to direct property damage and not indirect injury. Under the Public Works Act, which provides the method of assessment for compulsory acquisition in most cases, compensation is only payable to land owners.

12.38 Much of this legislation is relevant to Maori fisheries. Historically, the effect on eel and other inland fisheries of legislation providing for land drainage and the prevention of flooding was profound. The story of Lake Wairarapa is mentioned elsewhere in this paper: see paras 17.87-17.90. Another situation that must have been common was the subject of the decision in Hone Te Anga v Kawa Drainage Board.: see para 6.18.

12.39 The pollution of lakes, rivers, harbours and coastal waters as a result of the exercise of statutory powers has likewise had serious effects on fish resources. It is unnecessary to go further than the reports of the Waitangi Tribunal in the Kaituna, Manukau Harbour and Orakei cases for detailed examples.

12.40 The vast majority of statutes that do or may adversely affect Maori fisheries in a significant way contain no express provision either to safeguard Maori interests or to permit objections based on them. There could well be others in addition to the following -

Coal Mines Act 1979
Electric Power Boards Act 1925
Electricity Act 1968
Geothermal Energy Act 1953
Harbours Act 1950
Iron and Steel Industry Act 1959
Land Drainage Act 1908
Local Government Act 1974
Marine Farming Act 1971
Marine Pollution Act 1974
Mining Act 1971
New Zealand Ports Authority Act 1968
Petroleum Act 1937
River Boards Act 1908
Soil Conservation and Rivers Control Act 1941
Submarine Cables and Pipelines Protection Act 1966

Swamp Drainage Act 1915
Water and Soil Conservation Act 1967

12.41 There is also the question of the exercise of private (common law) rights. The ordinary law of nuisance has had little application to the sea, which in terms of orthodox law was not subject to private ownership or rights analogous to ownership. Fishing resources along the coast and over offshore reefs and shoals could be and were depleted, impaired and even destroyed. If any sort of legal right in traditional fisheries had been acknowledged, the freedom to affect them adversely without specific legislative sanction might have been circumscribed.

13 SPECIAL PRIVILEGES AND EQUALITY

13.1 Any balanced view of Maori fishing rights must take account of an objection that is often raised. Why should any group enjoy special rules or privileges that are withheld from others? The goal should surely be equality of every person before the law. Furthermore, to regard an agreement made almost 150 years ago in utterly different circumstances as binding today is to make the dead hand of the past rule the present.

13.2 These views are widely and sincerely held. They are understandable and attractive. Equality before the law is an aspect of the rule of law and is indeed a fundamental tenet of a just society. It is reflected in Article 3 of the Treaty of Waitangi itself. In modern times it has been powerfully reinforced by international covenants. Racial discrimination is proscribed by the UN Convention on the Elimination of All Forms of Racial Discrimination. New Zealand has acceded to this Convention, and the Race Relations Act 1971 ensures that our laws gives effect to the obligations of that Convention.

13.3 To dismiss or denigrate the principle of equality as belonging to English or Western value systems is unconvincing. Likewise, rigid adherence to irrelevant or outmoded rules is unlikely to promote real justice or to produce sensible and practical answers.

13.4 However, a phrase such as equality before the law must itself be properly understood. It means and can only mean that those in like circumstances should be treated alike. Our law abounds in instances of powers, rights and obligations that exist for some but not all. Many appointed and elective bodies have powers that the ordinary citizen does not. The people of one borough or county may have rights and obligations under local bylaws and ordinances that the people of other boroughs and counties do not. Universities have always possessed considerable legal autonomy, in respect both of persons (faculty, graduates and students) and places (on campus). Many professions and organisations have powers of self-government, with tribunals to regulate their affairs and impose sanctions on members who act in breach of rules and standards. Landowners have an exclusive right to use, manage and exploit their land. Thus they may exclude the public from riverbanks and beaches above high tide (and in a few cases down to low tide).

13.5 Moreover, the rule of law in the full sense has to do with the content of the law as well as its equal application. A law that applies equally to all may be

unfair to all or to some. The law does not exist in a vacuum. It arises out of the circumstances and reflects the experience, perspectives and values of those who make it. The common law was "the custom of the people of England". It was fashioned by the history and the environment of the people of England and in modern times the English people who settled the various overseas communities. (The law of even Scotland is different in many respects.) What does justice to one set of people in one sort of community in one place may be inadequate or oppressive in another.

13.6 We should be wary of too simplistic a concept of democracy. Respect for minority rights is arguably as much a pillar of a just society as the principle of majority rule.

13.7 So there is nothing strange or inconsistent in the idea that the law in New Zealand should take account of Maori institutions, values and customs. These should not be ordered in ways that may have been appropriate for those of British descent but that were (and to some extent may still be) alien to the Maori. To subject them to all the rules of English derived law, many of which are of the greatest technicality, is to deny rather than promote real equality.

13.8 Three responses of a more specific nature may be made.

13.9 First of all, the past often does govern the present, whether we like it or not. To deny this is to reject history. Old covenants and old statutes may be a source of rights and duties today that few would query. The Treaty of Waitangi is no more part of an irrelevant past than the Ten Commandments, the Hippocratic Oath or Magna Charta. In the Treaty of Waitangi the Crown made certain promises as a condition of acquiring and continuing to hold sovereignty over New Zealand. These promises are as valid on an enduring basis as the power of sovereignty.

13.10 Second, the value and importance of the Treaty is not limited to the Maori people. The Treaty, it has been pointed out[155], marks the beginning of constitutional government in New Zealand. It was the means by which British authority and government came to New Zealand peaceably and with the consent of those this country belonged to. By the Treaty the Maori gave to the British

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155 Report of the Royal Commission on the Electoral System, Towards a Better Democracy (December 1986) p 81.

Crown the right to make laws and govern in return for the promise to recognise and protect those things that the Maori valued. And by implication the Treaty acknowledged the right of settlers to come to New Zealand, live here and bring up their children as New Zealanders. Both these rights and this promise are of their nature ongoing. The power to make laws and to govern, and for the Pakeha to have their home in this land, is a lasting one. It is accepted today by the overwhelming majority of Maori people. Because of the Treaty the Pakeha lives here not as a conqueror or an interloper but as a New Zealander.

13.11 The same point can be put another way. No-one wants to inherit a stolen country. No-one doubts that New Zealand formerly belonged to the Maori. The Pakeha New Zealander rightly denies that he is a thief or a receiver of this country. But this can only be so if his forebears' possession was acquired by consent. The evidence of that consent for New Zealand as a whole is the Treaty of Waitangi.

13.12 Third, it is not "the Maori" who are claiming rights in relation to fisheries, any more than in Western terms it is "the people" who own land. Rather, it is the particular iwi or hapu whose historic possession and mana found the claim to legal recognition. They regarded their fisheries as property - as much property as land itself and of comparable economic importance. To look at these claims simply in racial terms is a misapprehension. The case for the recognition of Maori fisheries rests in large degree on respect for property rights. Few people in our society see the ordinary rights of ownership and control as conferring improper privileges or as contrary to equality before the law.

13.13 Expressed more positively, the argument for the recognition of Maori fisheries is this. These fisheries were historically vested in the iwi and hapu of Aotearoa (and were a major economic resource). A condition of the consent of the chiefs to British sovereignty was that possession of these fisheries should be guaranteed "as long as it is their wish and desire to retain" them. Fishing rights are to be respected and protected not as a privilege for Maori, but because these rights belonged to the various communities which formed the people of Aotearoa before the European came to its shores and have never been sold or given away.

13.14 This seems consistent with equality before the law and the rejection of racial discrimination.

14 THE WAY AHEAD

14.1 An examination of the history and law of Maori fisheries since 1840 leads to the conclusion that the law as generally understood in the past did not give full effect to the Crown's obligations assumed in the Treaty of Waitangi. Actions and policies of the Crown over several generations have likewise often failed to honour these obligations. This failure has been at 2 levels - to protect tribal fisheries as a property right and to preserve tribal mana over their fisheries in the sense of participation in their control and management. Indeed the very existence of the second obligation was not generally perceived until recently. The understandings and expectations of the Pakeha public have reflected and built upon the behaviour of governments.

14.2 However, the law itself, and perceptions of it, are not static. The courts have been prepared to revisit and rethink the approaches to these issues that previously prevailed. The Te Weehi decision, the judgments of Chilwell J in Huakina Development Trust and Greig J in Ngai Tahu Maori Trust Board, and above all the thrust and tenor of the Court of Appeal's judgments in the Maori Council case are examples. Recent government responses have been positive and constructive: the introduction of the Treaty of Waitangi (State Enterprises) Bill and the agreement to set up a Joint Working Group with the Maori Council to report on how Maori fisheries may be recognised were landmarks.

14.3 Acceptable reform must start not merely with existing law but with the existing state of affairs that in this case has developed over a century or more. Opinions about past wrongs do not answer the question what ought to be done now to achieve practical justice. As the Waitangi Tribunal has said, injustices are not to be rectified by creating new and different injustices. Over a very long period of time public authorities have acted and have made decisions and dispositions on the footing that tidal land and the sea bed were free of any qualifying Maori rights. Amateur and commercial fishermen have made use of fishing grounds for generations, and the law has encouraged them (special legislative restrictions apart) to regard these as open to all. There is no reason to query their good faith. As the Waitangi Tribunal said in the Motunui case -[156]

> "The Treaty was also more than an affirmation of existing rights. It was not intended to merely

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156 Wai-6, November 1984, p 61.

> fossilise a status quo, but to provide a direction for future growth and development ... We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to its broad principles.
>
> We do not therefore consider that both the Maori and the Crown should be so bound that both sides must regard all Maori fishing grounds as inviolate."

14.4 Extracts from this part of the Tribunal's report were quoted with approval by Bisson J in the Maori Council case. And in the same case Casey J regarded as "a valuable insight" the Tribunal's concept of the Treaty as "the foundation of a developing social contract".[157]

14.5 More than that, long-standing habits of thought are involved. Past arrangements and perspectives are so engrained among Pakeha that they have become part of the assumed order of things. Account must be taken of this if change is to be sound and lasting.

14.6 Nonetheless, there is wide agreement among those who have considered the matter that the law pertaining to Maori fisheries needs review. Recent legal developments have left it uncertain. Without Parliamentary intervention it can be clarified only by a possibly long process of litigation. Reconciliation between the promises of the Treaty of Waitangi and the legal order is necessary and inevitable. Perhaps of particular difficulty is the relationship between the sovereignty (kawanatanga) that the Maori agreed to yield to the Crown and the rights (tino rangatiratanga) the retention of which they were promised. This is already a real issue in the fisheries context. A similar problem of the relationship between the United States and Indian nations has been accommodated in that country (however imperfectly and contentiously), but its solution will be hard in a society like New Zealand with its strong emphasis on equality and uniformity and consequent strong belief in a unitary legal system.

14.7 How can a satisfactory solution best be brought about? Without some legal imperative underlying them, administrative policies, arrangements and undertakings are unlikely to be enough. What the Danks Committee on Official Information said in a different context is in point:[158]

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157 [1987] 1 NZLR 641, 702.

158 Towards Open Government (1981) p 22.

> "... we have concluded that in New Zealand circumstances injunctions to officials would not work without a firm commitment by government to back them. And we doubt whether any commitment that did not have the force of law would either be acceptable to the community as an earnest of government intentions or give officials a sufficient base towards taking further steps"."

14.8 The decision in the Maori Council case was made possible only by the enactment of section 9 of the State Owned Enterprises Act. There are other difficulties in the way of relying altogether on the development of a body of law in this field by judicial decision. Not the least is the prospect of a prolonged period during which the law remains uncertain. So legislation will be needed, if only to ratify and give effect to agreements and decisions independently arrived at. Past disputes between the Crown and the tangata whenua over lake fisheries were often settled case by case through a compromise reached after negotiation and ratified by legislation.

14.9 New Zealand may have something to learn from events in the States of Oregon and Washington following a period of intense confrontation in the courts. During the nineteenth century many Indian tribes made treaties with the United States ceding large parts of their lands subject to the reservation of certain land and other property, including fishing rights. These treaties bound the States, but the Federal Courts acknowledged the States' power to restrict tribal fishing in the interests of conservation. Diminishing numbers of salmon in the Columbia River in the 1960s led to restrictive regulations. In Sohappy v Smith,[159] the Oregon District Court held that tribes were entitled to a "fair share" of the harvestable salmon and put treaty fishing rights on an equality with the conservation of fish for other uses. Fishing could be regulated to the extent that it was reasonable and necessary for conservation of resources, did not (either in terms or in effect) discriminate against the Indians, and conformed to standards prescribed by the Court. Further litigation led the parties to see the need for co-operation and a tribal role in the management process. With the Court's prompting a 5-year Fisheries Mangagement Plan was adopted in 1977. It proved defective in important respects, but following yet further litigation a more comprehensive plan is now being negotiated. This embraces production management as well as allocation, and provides for a much more adequate tribal participation in management.

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159 (1969) 302 F Supp, 899.

14.10 In his 1986 Jurisprudential Lecture at the University of Washington,[160] William C Canby reminded his audience that "negotiations are greatly affected by the legal armament that each side brings to the negotiating table". In New Zealand the legal armament that Canby spoke of has come into being with the Court of Appeal's decision in the Maori Council case and its veto on the transfer of Crown land to the new corporations pending settlement, and the interim decision in the Ngai Tahu case. In the Maori Council case, the Court directed the Crown to prepare a scheme of safeguards giving assurance against the transfer of lands or waters that would prejudice claims, that were or might foreseeably be submitted to the Waitangi Tribunal. One can observe in this an interaction between Parliament, the Courts, the Tribunal and the Executive, with representatives of the Maori people participating in the search for a solution.

14.11 There is also in respect of sea and inland fisheries the extra dimension of other impacting practices and laws. The establishment, for instance, of a right to take shellfish from a harbour is of little worth if pollution of the harbour has destroyed the shellfish or made them a danger to health. The American courts have recognised this sort of reality[161] and have recently pushed its implications further.[162] A clearer foundation of legal right for Maori interests in fisheries might serve both as a base to build management schemes and structures and to develop policies and remedies where outside actions affect fishing grounds.

14.12 If change went beyond ad hoc treatments of specific problems, the application of existing legal concepts and doctrines might not be enough. Some fundamental and imaginative thinking may be required. Thus, while the concept of trusts may be relevant (and the Explanatory Note to the Maori Affairs Bill 1987 observes that the idea of the trust is congenial to Maori thinking), doctrines of equitable estates and interests have their own rigidities and artificialities. The implications of the partnership analogy that the Maori Council decision accepted may need to be explored. New approaches to ownership, and new kinds of property rights and varieties of legal personality could fall to be considered. The kind

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160 (1987) 62 Wash LR 1.

161 United States v Winans (1905) 198 US 371.

162 See eg, Washington v Fishing Vessel Association (1979) 443 US 658, United States v Adair (1983) 723 F2d 1394, Kittitas Reclamation District v Sunnyside Valley Irrigation District (1985) 763 F2d 1032.

of analysis set out in section 3 above may not be enough to accommodate what is required. These are fascinating questions, but they have a practical dimension also.

14.13 The old net must be cast aside - but what is the new net that will go fishing?

PART III

15 THE HISTORICAL DEVELOPMENT OF THE LAW

15.1 Section 8 summarised the view of the law governing Maori property claims (including fishing claims) that came to be accepted as settled in New Zealand during the present century, and the revisionist view based on a common law doctrine of aboriginal title that has re-emerged during the last 20 years or so. There is support for this second view in very recent cases here and overseas. It is, however, not yet established for New Zealand.

15.2 The purpose of this and the next section is to examine more fully these views, their development and the basis on which they rest.

Preliminary Issues Defined

15.3 At the beginning, it is essential to distinguish the numerous issues surrounding the legal status of the Treaty of Waitangi and of Maori property claims, of which fisheries claims were part. This has not always been done and confused thinking is the frequent result. At least 10 separate and distinct issues can be identified.

i The Treaty of Waitangi as an international instrument and the source of British sovereignty under international law.

ii The Treaty as evidence and exemplar of the position under customary international law.

iii The Treaty as an act of British government policy, and the effect of a formal annexation as an act of State.

iv The Treaty as a source of rights under the ordinary law.

v The legal classification of New Zealand as a settled or a ceded colony.

vi The initial law of New Zealand as a British colony.

vii The status of Maori customary law after British sovereignty.

viii The proprietary rights of the Maori as the indigenous inhabitants.

ix The Treaty as a declaration of the existing municipal (common) law as it applies to

overseas possessions acquired by the British Crown.

x The Treaty as a source of public policy, affecting the construction and interpretation of legislation and executive acts and policies.

15.4 For example, more than one court decision has proceeded on the assumption that because the Treaty could not be a source of rights recognised by the ordinary law (an answer to iv) the Maori had no property rights without the intervention of legislation (an answer to viii and ix). The question whether the common law recognised Maori property rights (viii) was confused with the issue of whether that law superseded Maori custom (vii).

15.5 And New Zealand might be a ceded colony (v) and yet be subject to the application of the common law immediately upon coming under British sovereignty (vi). The tests are not the same. Comments in the various opinions and cases are usually obiter, often ambiguous and sometimes inconsistent. Perhaps the common sense resolution of the matter is that suggested by Roberts-Wray:[163]

> "The rule that settlers take English law with them is often referred to as a birthright of British subjects. But ... that does not adequately explain the rule or its difference from the law governing ceded or conquered territories. The truth is that there is no practical alternative. In the kind of territory where a Colony could be established by settlement, there was only indigenous law which was quite irrelevant to the needs of the settlers. The situation was very different in the places acquired by cession or conquest when the rules were laid down. ...
>
> This distinction has practical importance if it is permissible to look beyond the rules and extend them to other circumstances where the rationes are equally valid. Apparently it is. The idea behind Lord Mansfield's suggestion in Campbell v Hall that Jamaica, though acquired by conquest or cession, should be treated as a settlement because (as he thought) the Spaniards had disappeared when British colonists arrived, is to be welcomed ... In Yeap Cheah Neo v Ong Cheng Neo the Judicial Committee expressed the view that English law

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163 Commonwealth and Colonial Law (1965), pp 542-3.

> applied to an uninhabited colony (Penang) acquired by cession ... It is only one step further to extend the rule regarding settlement to a case of cession or conquest of a country which, being inhabited by people with laws unsuitable for the settlers, could have been colonised by settlement."

15.6 Given that English law applied to New Zealand from the date of its acquisition by Britain (although the operative date of 14 January 1840 established by statute is wrong historically), what was the legal status of Maori property and customs? This is of central importance to the issue of fishing rights, and the degree to which subsequent law has upheld or rejected these.

Misconceptions

15.7 No complete view of the common law concerning indigenous property rights is possible without going beyond the New Zealand cases. Curiously (given the propensity of New Zealand judges to range widely over common law jurisdictions) a number of important persuasive authorities, even Privy Council dicta, have been little regarded after the early colonial period. One reason may be an assumption that the Treaty of Waitangi was the only possible source of Maori rights apart from legislation. Another may be the popular view that the Treaty of Waitangi was a unique act of enlightenment and generosity by the British government.

15.8 Issues debated in New Zealand in terms of the Treaty of Waitangi or of aboriginal title are not novel. Arguments about the existence and nature of "native title", what land was subject to it, and the policy and meaning of pre-emption in newly acquired territories were rehearsed in British North America long before 1840. The concept of aboriginal title has an even longer pedigree. Similar situations usually produced similar answers. Many early New Zealand judges and officials were well aware of this. It was only in later years that it was ignored or forgotten.

15.9 The eighteenth and nineteenth centuries saw many agreements between Britain and other European powers and local chiefs and rulers in Africa, Asia and the Pacific. C H Alexandrowicz mentions numerous treaties with African rulers. For instance:[164]

> "in the treaty between Great Britain and Bey Sherbro, Ruler of Kafir Bulloms (1827), the British Governor of Sierra Leone accepted for

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164 The European-African Confrontation (1973) p 101.

> Great Britain the stipulated cession of territory and separately "guarantees to the Kafir family and the inhabitants ... the continued and unmolested enjoyment of such lands and other property as they now possess."

15.10 Elsewhere he instances many dealings with Indian and South East Asian rulers throughout the seventeenth and eighteenth centuries on a manifest footing of equality.[165]

15.11 The 1825 treaty between Britain and Banda in Sierra Leone has already been mentioned: see para 7.20.

15.12 Proper understanding has been further clouded by the concept of tenure, which is fundamental to English and English-derived land law but has no necessary relevance to aboriginal property concepts. It was tempting to conclude that because all English tenure derived from the Crown, land rights not deriving from the Crown could have no legal existence apart from statute.

15.13 This point was made in the Privy Council's judgment in Amodu Tijani v Secretary, Southern Nigeria.[166]

> "in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, ..."

15.14 In Guerin v The Queen Dickson C J remarked:[167]

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165 An Introduction to the History of the Law of Nations In the East Indies (1967).

166 [1921] 2 AC 399 at 402.

167 (1984) 13 DLR 321 (4th), p 339.

> "[I]n describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law ...
>
> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right ... The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered."

Note too the statement of Justice Holmes delivering the judgment of the Supreme Court in Damon v Hawaii,[168] a case that related to fishing rights over lagoons and over the open sea up to 1 mile from the beach -

> "The right claimed is a right within certain metes and bounds to set apart one species of fish to the owner's sole use, or alternatively, to put a taboo on all fishing within limits for certain months and to receive from all fishermen one-third of the fish taken upon the fishing grounds. A right of this sort is somewhat different from those familiar to the common law but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding it as property and a vested right than there is regarding any ordinary easement or profit a prendre as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit." (p 158)

15.15 Confusion arose also from a failure to appreciate the distinction between the politico-legal concept of sovereignty (Vattel's haute domaine) and the concept of title to land, domaine utile in Vattel's terms. This is pointed out by Roberts-Wray, with specific relation to New Zealand.[169] The acquisition of sovereignty does not automatically extinguish lawfully existing property rights, although the new sovereign can of course put an end to them if it wishes. Furthermore, sovereignty does not necessarily imply title, even paramount title, to land.

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168 (1903) 194 US 154.

169 Commonwealth and Colonial Law (1965) Ch 14.

The concept of the sovereign as owner of all land is a feudal one that lies at the heart of our property law but is far from universal. One should reflect on the fact that many other legal systems have allodial (that is, absolute) ownership of land.

Aboriginal Title Overseas

15.16 The doctrine of aboriginal title is neither novel nor modern. It precedes the beginning of English colonisation. It is not limited to the common law system. On the contrary it was part of what may be called the ius gentium of European colonial powers, going back to Las Casas (1474-1566) and Vitoria (1483-1546) in sixteenth century Spain. In 1524 Vitoria published his book De Indis,[170] arguing that the Indians of America were entitled to be treated as owners of their land and other property and not to be disturbed in their possession. This view prevailed in Spanish law and policy (though not always in colonial practice).[171]

15.17 This was likewise a guiding principle in the British colonisation of North America, as evidenced by the Proclamation of 1763 following the conquest of Quebec from the French.[172] No doubt many transactions were grossly unfair, but the principle was accepted and the policy followed that the Indians had a title which had to be purchased before any land belonged wholly to the Crown or, in the United States, its successor.

15.18 Its classic formulation is in the judgments of Marshall C J in Johnson v McIntosh,[173] and Worcester v Georgia.[174]

> "[Title by discovery] regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial

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170 De Indis et de iure belli relectiones, On the Indians Lately Discovered (1696 ed) Carnegie Institution reprint 1917.

171 For an account of the Spanish debates on the question of aboriginal rights, and their outcome, see J H Parry, The Spanish Seaborne Empire (1973), pp 123-139.

172 See Revised Statutes of Canada 1985, App 2, No 1.

173 (1823) 21 US 543.

174 (1832) 31 US (6 Peters) 315.

> of the possessor to sell. [The original inhabitants] were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, according to their own discretion."
>
> (Johnson v McIntosh 574)

15.19 This principle has often been reiterated. For example in United States v Santa Fe Railroad Co.[175] Justice Douglas said at page 345 -

> "Occupancy necessary to established aboriginal possession is a question of fact .... If it were established that the lands in question ... constituted territory occupied exclusively by the Walapais ... then the Walapais had "Indian title" which unless extinguished, survived the national grant of 1866 .... Nor is it true that a tribal claim to any particular lands must be based upon a treaty, statute or other formal government action."

15.20 And in Lipan Apache Tribe v United States -[176]

> "Indian title based on aboriginal possession does not depend on sovereign recognition or affirmative acceptance for its survival. Once established in fact it endures until extinguished or abandoned." (per Judge Davis)

15.21 Recently, in County of Oneida v Oneida Indian Nation[177] the Supreme Court unanimously reaffirmed the right of the Oneidas to bring an action for unlawful possession of tribal land. (The claim arose out of a transaction in 1795, and the Court held 5-4 that the action was not barred on the ground of undue delay.) In a part of the majority judgment that was not subject to dissent the Court said this:

> "By the time of the Revolutionary War, several well-defined principles had been established governing the nature of a tribe's interest in its property and how those interests could be conveyed. It was accepted that Indian nations held "aboriginal title" to lands they had inhabited from time immemorial. The "doctrine of discovery" provided, however, that discovering nations held fee title to these lands, subject to

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175 (1941) 314 US 339.
176 (1967) 180 US Court of Claims 487.
177 (1985) 470 US 226.

> the Indians' right of occupancy and use. As a consequence, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign. ... From the first Indian claims presented, this Court recognized the aboriginal rights of the Indians to their lands. The Court spoke of the "unquestioned right" of the Indians to the exclusive possession of their lands, and stated that the Indians' right of occupancy is "as sacred as the fee simple of the whites". This principle has been reaffirmed consistently." (page 178)

15.22 The existence of aboriginal title is now recognised by the law of Canada: Calder v Attorney-General of British Columbia;[178] Guerin et al v The Queen;[179] R v Sparrow, a decision of the Court of Appeal of British Columbia.[180] In Calder the Supreme Court of Canada divided equally on whether certain general legislation in British Columbia had extinguished Indian title, but both groups of judges agreed that it did exist, and that it was not dependent on treaty, executive order or legislative enactment. Sparrow is of particular interest here because it concerned fishing rights. A member of an Indian band had been convicted for fishing with a drift net larger than permitted. The Court had no hesitation in holding that there was a legally recognised aboriginal fishing right, that its existence did not depend on any positive treaty, statute or agreement, and that it had not been extinguished by positive legislation. The real issue was the extent to which it could lawfully be regulated. The decision on this issue rested on specific Canadian legislation and legislative history; the Court held that the power of regulation existed to the extent that its exercise could be reasonably justified as necessary for the proper management and control of the resource or in the public interest.

15.23 On the other hand, in Australia, Blackburn J of the Northern Territory Supreme Court rejected aboriginal title as a source of any legal property rights in Milirrpum v Nabalco Pty Ltd[181] after a lengthy examination of cases decided in various Commonwealth countries, including New Zealand.

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178 [1973] SCR 313, (1973) 34 DLR (3rd) 145.

179 [1984] 2 SCR 335; (1984) 13 DLR 321 (4th).

180 (1986) 36 DLR (4th) 246.

181 (1971) 17 FLR 141. And see Coe v Commonwealth (1978) 24 ALR 118, and Gerhardy v Brown (1985) 57 ALR 472 (per Deane J at 532).

15.24 At this point, one possible technicality needs to be mentioned. Many of the territories in respect of which the courts have upheld indigenous property rights were colonies or former colonies that Britain acquired or was said to have acquired by conquest or cession. New Zealand on the other hand was (arguably) a settled colony - that is, one acquired by mere occupation and annexation. It has been contended that the rule protecting existing property rights does not apply to such territories. And some cases have, implicitly or explicitly, indicated a distinction between the 2. They include Wi Parata.[182]

15.25 This is dubious on the facts; it is clearly opposed to principles of justice and fairness; moreover it is very difficult to find authoritative support for it. Rather there are dicta (eg, in Te Heuheu Tukino) suggesting that in any case, irrespective of the mode of acquisition, "the inhabitants can make good in the courts only such rights as the sovereign has recognised". This in turn might seem at first sight unfavourable to any doctrine of native title, which would be inconsistent with other decisions in England and elsewhere. The dictum was cited with approval by Lord Denning in Oyekan v Adele,[183] which concerned land in Lagos (Nigeria) a territory that Britain acquired by treaty of cession in 1869. But Lord Denning added in a very significant passage:

> "In inquiring, however, what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law." (p 788)

15.26 In other words, there is a presumption in favour of existing property rights which will be displaced only by the positive conduct of the Crown.[184] Inaction amounts to recognition. The Courts will enforce these rights, applying the rules not of English real property law but of native law and custom.

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182 (1877) 3 NZ Jur (NS) at 78.

183 [1957] 2 All ER 785.

184 See, in Canada, R v Sparrow (1986) 36 DLR 4th 246.

The Legal Status of Customary Land

15.27 What may be called the orthodox twentieth century school in New Zealand maintained that on annexation the Crown automatically acquired title to all land in New Zealand, and any legal rights of the Maori to their land in the absence of a Crown grant could only exist insofar as they had a legislative source and foundation. It further asserted that in respect of land (but not fishing rights) such legislation was enacted, beginning with the Land Claims Ordinance 1841.

15.28 But if legislation was not a pre-requisite of legal recognition of Maori title to land, it was not necessary for fishing rights either. Whether or not fishing rights are severable from ownership of the soil beneath, they are part of the rights of full ownership. It is thus relevant to examine in some detail both legislation and judicial decisions pertaining to land.

15.29 There is throughout the key constitutional documents and the early New Zealand cases a constant theme that Maori property rights were to be respected. It is not always clear whether moral rights or rights known to the law were meant. One reason for the obscurity is the very early intervention of legislation dealing with land, beginning with the Land Claims Ordinance 1841. A great deal of what argument there was initially related to the interpretation of "pre-emption". This is what the Land Claims Ordinance 1841 dealt with; it was the central issue in Symonds' case;[185] and it was the dominant and almost exclusive theme of the dispute in 1840 between Gipps, the Governor of New South Wales, and Wentworth, a prominent settler who laid claim to vast areas of New Zealand by alleged purchase from Maori. Two other burning issues, on which a great deal was written, concerned what lands were subject to native title (was it only land in actual occupation, as various authorities contended from Vattel on, and a good deal of opinion as well as interest maintained?) and subsequently who owned and who could alienate Maori land (what was the position of chiefs?). This was the subject of intense controversy at the time of the Waitara Purchase.[186]

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185 [1840-1932] NZPCC 387.

186 See the dispute between Sir William Martin and C W Richmond, and the collection of papers, in (1861) AJHR E-2.

Pre-emption

15.30 The quarrel between Wentworth and Gipps concerned the ability of British subjects to acquire a good title to land they had purported to purchase whether before or after Britain had acquired sovereignty. The transactions of Wentworth and his fellow speculators had preceded the establishment of sovereignty and their rapacious character was itself a compelling reason for the Government to intervene. As the Privy Council much later remarked in Re Southern Rhodesia - [187]

> "private concessions of large extent and of ambitious character when obtained by white financiers from untutored aborigines, are generally and justly the objects of close scrutiny ..."

15.31 In his speech to the New South Wales Legislative Council Gipps, quoting Kent and Storey, admitted the Natives to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it and to use it according to their own discretion. Their rights (he asserted) fell short of ownership in that they lacked any power to dispose of it to third parties.

15.32 One therefore cannot use this episode, as Foden seems to do,[188] in aid of a denial of indigenous land rights. The essence of the matter was a public policy interest overriding any property rights in land claimants.

Land Claims Ordinance 1841

15.33 If the view is correct that Maori land rights existed only because legislation conferred or provided for them, one might have expected some positive provision that did this. And that provision should strictly be retrospective, dating back to whatever was regarded as the operative time of the acquisition of sovereignty. The first Land Claims Ordinance calls to be examined in that light.

15.34 The relevant part of the ordinance provided:

> "All unappropriated lands, subject to rightful and necessary occupation and use by the aboriginal inhabitants, are and remain Crown or domain lands."

The term "unappropriated" appears to be unique to this Ordinance in New Zealand legislation. However, it does appear in the Instructions accompanying the Royal Charter

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187 [1919] AC 211 at 236.

188 Foden, The Constitutional Development of New Zealand 1839-49 (1938) pp 32-39.

of 8 November 1840. When land had been surveyed registers were to be kept showing lands "hereafter to be appropriated" and, as far as possible, land already appropriated. They were also to show surveyed land not appropriated.[189] A person who paid for land was entitled to have appropriated to him or her "such unappropriated land" as the person selected.[190] The sensible interpretation of the Ordinance is therefore that it excludes land that has been the subject of a Crown grant. But nothing of importance seems to attach to it.

15.35 As a legislative foundation of Maori title (as distinct from an acceptance of it), this enactment looks rather thin. It reads rather as an aside, casually acknowledging an existing legal situation. The thrust of the Ordinance was very different. Its purpose, recited in its long title, was to replace the New South Wales Land Claims Act 1840, which governed New Zealand land claims, and accordingly to deny validity to land purchases made in New Zealand before or after the acquisition of sovereignty, to provide for claims to be examined by a Commissioner, and to maintain the Crown's exclusive right to acquire land from the Natives. In passing, this last would hardly have been necessary if the Crown was indeed considered to have an unqualified title. The Maori would have had nothing to dispose of. And if respect for Maori interests was a matter simply of government policy, again legislation would not be required.

And there is a little more to it than that. At the end of the Land Claims Ordinance is a proviso that nothing in it "shall be deemed in any way to affect any right or prerogative of Her Majesty ...". If the Crown could at common law disregard Maori land rights, this proviso would have been in open conflict with the phrase about Crown land being subject to rightful and necessary occupation and use. To give the latter any force would have been difficult. On this approach the Ordinance could not have been the source of any Maori rights.

The Issue of Waste Lands

15.36 The Land Claims Ordinance 1841 looks back to the Royal Charter of 1840. One provision of that Charter empowered the Governor to make grants of waste land belonging to the Crown, with a proviso that nothing in the Charter was to affect the rights of any aboriginal Natives to the actual occupation or enjoyment of any lands in the

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189 Paras 47 and 48.
190 Para 49.

colony which they actually occupied or enjoyed.[191] This again implied that these rights did exist, and that the prerogative legislation of the Charter was not to be construed as affecting them. The Charter, however, on the face of it took a narrow view of the extent of native land - only that land which the Maori actually occupied and enjoyed. As Sir William Martin said in 1846:[192]

> "So far as yet appears, the whole surface of these islands, or as much of it as is of any value to man, has been appropriated by the Natives, and, with the exception of the part which they have sold, is held by them as property".

15.37 This in turn merely amplifies what Busby had already said 5 years before the Treaty : "As far as has been ascertained every acre of land in this country is appropriated among the tribes".[193]

15.38 The 1840 Charter represented a line of thinking in England (shared by many settlers in New Zealand), based on the theories of Locke and Vattel, that Native peoples had rights only in land that had been improved by labour. Vattel, for example, wrote:[194]

> "It is asked whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country. ... Their uncertain occupation of these vast regions can not be held as a real and lawful taking of possession ...
>
> ... when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them ... ."

(He said nothing about sea or other fisheries.)

15.39 This doctrine was strongly expressed in the majority report of the Select Committee of the House of Commons on New Zealand affairs in 1844: see paras 9.5-9.9. Its apogee for New Zealand was Earl Grey's Instructions of 1846, which, with a new Royal Charter, were

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191 Domett, Ordinances of NZ 1841-1849 p 6.
192 1846 Pamphlet reproduced in (1890) AJHR G-1.
193 See Orange p 38.
194 The Law of Nations (1758) Rep Carnegie Institute 1916, p 85.

designed to introduce representative government in this country. Paragraph 9 of Chapter XIII provided - [195]

> "No claim shall be admitted ... on behalf of the Aboriginal inhabitants of New Zealand to any Lands situate within the said Islands, unless it shall be established ... that the claimants or their progenitors, or those from whom they derived title, have actually had the occupation of the Lands so claimed, and have been accustomed to use and enjoy the same, either as places of abode, or for tillage, or for the growth of crops, or for the depasturing of cattle, or otherwise for the convenience and sustentation of life, by means of labour expended thereon."

15.40 This was resisted by the authorities in New Zealand partly on the ground that it could be effected only by military force. There was also opposition in principle and because of its manifest breach of solemn promises - a clear and early instance of the effect of the Treaty of Waitangi on policy. The missionaries who had told the Maori in 1840 that their properties would be fully protected were outraged.[196] The Instructions were never brought into effect and the British authorities acquiesced.

15.41 Nor did this narrow notion of indigenous property rights prevail in the United States. Mitchel v United States[197] concerned a claim to land in Florida. Baldwin J, delivering the judgment of the Supreme Court, restated the orthodox doctrine of Indian title, and added -

> "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its conclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals." (p 559)

15.42 What constituted possession was defined in Indian terms. Neither practice nor doctrine placed limitations on the territory of the Indian nations that had to be lawfully acquired by treaty.

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195 Domett, Ordinances of New Zealand 1841-49 (1850) p 61.
196 Carleton, The Life of Henry Williams, Archdeacon of Waimate, vol 2.
197 (1835) 9 Peters 539.

15.43 The New Zealand Constitution Act 1852 (UK) accepted the wider view. Section 52, empowering the General Assembly to make laws regulating the sale of waste lands, defined waste lands essentially as "lands wherein the title of Natives shall be extinguished as hereinafter mentioned", referring to section 53 which embodied the rule of Crown pre-emption. This prevailed over the Vattelian doctrine that title was limited to land under active occupation and use.

15.44 Although this controversy was carried on in relation to land it is germane to the question of fisheries also. The words of the Treaty were accepted as bearing a Maori understanding of what "their lands" were. There is no basis for rejecting the same approach to fisheries. The Maori were promised protection for "their fisheries" ie, fisheries as they understood them. Things, however, did not turn out that way.

Subsequent Maori Land Legislation

15.45 The Land Claims Ordinance was followed by various special pieces of legislation confirming or regularising grants to Europeans, or awarding them compensation. None of these contained any express recognition of Native title. The Land Claims Ordinance remained until formally repealed in 1878 by the Repeals Act as among those measures that were "spent or ceased to be in force otherwise than by express and specific repeal, or have ... become unnecessary".

15.46 Later general legislation dealt with Native title in the same oblique fashion. It was descriptive and not constitutive. For example the Native Districts Regulation Act 1858 referred to "districts over which the native title shall not for the time being have been extinguished". The Native Rights Act 1865 was to the same effect, section 3 reading:

> "The Supreme Court and all other Courts ... ought to have and have the same jurisdiction in all cases touching ... the titles to land held under Maori customs and usage as they have under any law ... touching the persons and property of natural born subjects of Her Majesty."

15.47 And under the Lands Act 1877 "demesne lands of the Crown" were defined as "all lands vested in Her Majesty wherein the title of the aboriginal natives has been extinguished". "Crown lands" were in turn defined as a species of demesne lands. It follows logically that land still held by the Maori under their customs was not Crown

land, although in accord with received doctrine Her Majesty held paramount title.

15.48 From 1862 successive Native Land Court Acts provided the machinery by which the acknowledged object of separating the Maori from their lands could be legally effected. They assumed the existence of Maori title. Thus the Native Land Court Act 1862 after reciting Article 2 of the Treaty of Waitangi, and the desirability of assimilating the ownership of such lands "as nearly as possible to the ownership of land according to British law," provided that "all lands over which Native title shall not have been extinguished" were to be dealt with and disposed of under the Act. Its 1865 successor recited that it was "expedient to amend the laws relating to lands ... which are still subject to Maori proprietary customs, and to encourage the extinction of such proprietary customs and provide for the conversion of such modes of ownership into titles derived from the Crown". "Native land" was defined as "lands which are owned by Natives under their customs and usages", as distinct from "hereditaments" - land subject to tenure or held under a title deriving from the Crown. Clearly therefore the Act posited that all title to land was not derived from the Crown. The East Coast Act 1868 uses the phrase "land owned according to Native custom". And as late as 1888 the Native Land Act (essentially a measure for promoting free trade in Maori land) was applied to "all land held by Natives under any title except under their customs and usages" - again an implication that custom and usage was a source of legal title.

15.49 Lord Haldane, delivering the judgment of the Privy Council in Manu Kapua v Para Haimona[198] on appeal from the Native Appellate Court, put the state of affairs thus:

> "Prior to the grant ... the land in question had been held by the Natives under their customs and usages ... As the land had never been granted by the Crown, the radical title was ... vested in the Crown subject to the burden of the Native customary title to occupancy" (p 416)

15.50 The particular interest of this statement in the present context is that it cited no authority. There was no attempt to show that the law thus expounded derived from the long repealed Land Claims Ordinance or any other statutory source. The passage simply echoes in different language what the Privy Council had said 25 years previously in the St Catherine's Milling and Lumber Co v

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198 [1840-1932] NZPCC 413, [1913] AC 761.

The Queen[199] on appeal from Canada. Apparently the proposition was too basic to need support.

15.51 On the positive side there are a number of references to Maori ownership as a right of a legal character.

Normanby's Instructions

15.52 The Instructions of Lord Normanby to Hobson dated 14 August 1839,[200] refer to -

> "A numerous and inoffensive people whose title to the soil .... is indisputable and has been solemnly recognised by the British Government."

15.53 This might at first sight be argued to refer to moral rights only. But a thorough examination of the Instructions makes it almost impossible to doubt that in the eyes of Normanby and his advisers the Maori had a property in the land that was not at the whim of the Crown, would not be automatically destroyed or impaired by annexation, and needed no legislation for its preservation. There was no discussion of aboriginal title. It was simply taken for granted. Later, Hope's letter of 10 January 1843 (on behalf of Lord Stanley) to Somes, the Chairman of the New Zealand Company; is unequivocal - [201]

> "... Her Majesty distinctly recognised the proprietorship of the soil in the natives and disclaimed alike all territorial rights and all claims of sovereignty which should not be founded on a free cession."

15.54 More pointedly he continued -

> "Lord Stanley cannot now permit it to be maintained, ... that the natives had no proprietary right in the face of the Company's declaration that they had purchased those very rights ..."

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199 (1888) 14 App Cas 46.
200 British Parliamentary Papers (1840) NZ Vol 3, Irish UP, p 85.
201 British Parliamentary Papers (1844) NZ Vol 2, Irish UP, Appendix p 21.

R v Symonds (1847)

15.55 R v Symonds[202] was a test case brought to determine the validity of Fitzroy's waiver of the Crown's exclusive right to purchase native land and to determine the nature of "pre-emption". It was that issue that the case decided, but it is of particular importance for wider reasons.

15.56 The principal judgment was that of Chapman J. He held that the Crown was the exclusive source of private title and had the exclusive right of extinguishing the title of aboriginals. But, he suggested, a private purchase might be good against the Native sellers. Conversely in the United States the courts would not hesitate to impeach a grant in a suit by Native Indian owners on the basis that Native title was not extinguished. (Here he was referring in particular to the Supreme Court's decision in Cherokee Nation v State of Georgia.)[203] Chapman J continued:

> "Whatever may be the opinion of jurists as to the strength and weakness of the Native title, ... it cannot be too solemnly asserted that it is entitled to be respected and that it cannot be extinguished otherwise than by the free consent of the Native occupiers". ... It follows ... that in solemnly guaranteeing the Native title ... the Treaty of Waitangi does not assert either in doctrine or practice anything new and unsettled." (p 390)

15.57 Later he said at page 391:

> "It is not at all necessary to decide what estate the Queen has in the land previous to the extinguishment of the Native title ... the full recognition of the modified title of Natives ... is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects."[204]

15.58 Martin C J was equally clear that settlers could acquire no title except from the Crown. He quoted Kent:

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202 [1840-1932] NZPCC 387.

203 30 US (5 Peters 1) (1831).

204 Cf. Marshall C J in Fletcher v Peck (1810) 10 US (6 Cranch) at 142: "The nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to Seisin in fee on the part of the State".

> "The European nations which respectively established Colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The Natives were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it ..." (p 393)

15.59 There is nothing whatever in the judgments in Symonds to suggest that Maori property rights were not justiciable, or that they were justiciable only because of the Land Claims Ordinance 1841.

The Kaitorete Judgment (1868)

15.60 The 1841 Ordinance was examined in the Native Land Court judgment of Chief Judge Fenton in Kaitorete (1868).[205] The subject matter was the spit of land between Lake Ellesmere and the sea. The issue was the validity of a sale by the Ngai Tahu to Wakefield as agent for the New Zealand Company, the date of which does not appear from the judgment but certainly refers to the Kemp purchase of 1844. In essence it was held, consistently with Symonds, that under the common law a fair sale by Natives to a private person extinguished the Native title but gave no title to the purchasers but rather to the Crown. Fenton obviously had difficulty with the term "unappropriated" in the Ordinance but considered that the common law would not be interfered with by this statute "which is in fact simply an affirmance of the common law".

15.61 In other words, the situation would have been the same even if the reference to Maori occupation and use had never appeared.

15.62 Note that Fenton saw no problem in resolving the dispute by granting the Maori claimants a fishing easement over the land comprising the spit, while leaving ownership in the Crown.

The Kauwaeranga Judgment (1870)

15.63 This decision of Chief Judge Fenton is of particular interest in the present context because it is the only fully reasoned nineteenth century judgment concerning fishing rights, because it related to rights over the foreshore between high and low water marks, and

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205 The judgment is reprinted in Important Judgments Delivered in the Compensation Court and Native Land Court 1866-1879 (1879).

because of the Judge's last minute retreat from the logic of his reasoning (and the substance of his earlier decision in the Whakaharatau case) to deny on unabashed policy grounds an absolute property right as distinct from a right to fish.[206] Fenton while Chief Judge of the Native Land Court was for a time a member of the Legislative Council, and was present at and took part in the debate on the Bill that became the Shortland Beach Act 1869. He would thus have had a close acquaintance with the political implications.

15.64 His decision gave the Maori claimants full and exclusive fishing rights in respect of an area of the foreshore, a mudflat between high and low water. It therefore rejected by implication the contention of the Crown that:[207]

> "by the law of England ... the foreshore belongs to the Crown, and can only be held by a subject by grant from the Crown, either existing or presumed by prescription. This seisin of the Crown is an incident of sovereignty. ... The Native Lands Acts do not affect the Crown; and Maoris cannot own the foreshore according to their customs and usages, as such ownership would be in derogation of the prerogative of the Crown, ..."

15.65 More was heard of this contention later, and a more receptive audience found. But Kauwaeranga was applied by the Native Land Court in the Porirua Foreshore case in 1883[208] where Chief Judge Macdonald held that the applicants were entitled on the facts to a right of fishery over certain tidal land in Porirua Harbour. But he felt doubtful whether the court could issue a title and he did not do so, Cf Richmond J in Ex parte Piripi Te Maari (see para 17.87), although that case concerned title to a lake. Kauwaeranga was accepted (and reproduced in full) in Judge Harvey's report in 1948 on the Ahuriri Lagoon petition.[209]

15.66 In the Ngakororo Mudflats case (1941) the Native Land Court gave title to Maori claimants of certain Hokianga land that may have been tidal in 1840 on the ground (inter alia) that it was customary land. The Native

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206 The Kauwaeranga judgment is reproduced in (1984) 14 VUWLR 227.
207 Ibid at 229.
208 Wellington Minute Book 1, 157.
209 (1948) AJHR G-6A p 3 at p 69.

Appellate Court reversed this. But in doing so it said - [210]

> "The Native Land Court's decision as to whether these mudflats are papatupu (customary) land must rest upon findings of fact .... In England the fee simple to land below high-water mark has, in certain instances, become vested in the proprietor of the foreshore. If, under the circumstances of the English people, title to the sea-bed can be established in this way, we see no reason why title should not just as well be established by the Maori people of New Zealand.
>
> As before mentioned, this must necessarily be a question of fact, and this is referred to in Judge Fenton's Kauwaeranga judgment of 1870."

15.67 The Court found as a fact that the lands were below water in 1840 but were not customary lands. It set a high evidential standard because "satisfactory proof might entitle the claimants to an award of these mudflats as papatupu land ..."[211]

Re Lundon and Whitaker Claims Act 1871

15.68 The strongest judicial recognition of Maori title irrespective of either the Treaty of Waitangi or subsequent legislation is that of the Court of Appeal of 5 judges in Re Lundon & Whitaker Claims Act 1871.[212]

> "The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it." [emphasis added]

15.69 The Court also pointed out (and this statement is important to an accurate understanding of many of the decisions) that all title to land by English tenure had to be derived from the Crown. For example, it throws light on Gillies J's judgment in Mangakahia v New Zealand Timber Co Ltd,[213] which has been said to be adverse to the concept of legal recognition of Maori rights.

15.70 In Mangakahia the plaintiffs sought a remedy against an alleged trespass based not on actual possession but on title to possession. This was seen by the Court as

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210 Maori Appellate Court Auckland Minute Book 12, 137.
211 Ibid, at 141.
212 (1871) 2 NZCA 41, 49.
213 (1884) 2 NZLR 345.

an incident of English tenure. Gillies J held that ownership of land according to native custom did not carry the incidents of ownership under a Crown derived title. Ownership according to Native custom did not confer any title known to English law; it was not ownership in "fee simple". That seems unexceptionable, and the decision implies a form of legal ownership in the Maori. In passing Gillies J explicitly denied that the Treaty of Waitangi was a "simple nullity" as Prendergast had said in Wi Parata.

15.71 What the case did demonstrate was the absence of any adequate remedy for infringements of that ownership.

> "The remedy according to native custom was much more simple speedy and conclusive, but our law does not recognise these modes .... nor does it confer upon native title the incidents of title held under the Crown." (p 350)

15.72 What then, were the incidents of Native title, and how should the Court set about protecting legally recognised property? No-one addressed these issues. The law was applied in what now seems a rather wooden fashion. Compare the United States law referred to in the Oneida case:[214]

> "Numerous decisions of this Court prior to Oneida I recognized at least implicitly that Indians have a federal common-law right to sue to enforce their aboriginal land rights. In Johnson v McIntosh, supra, the Court declared invalid two private purchases of Indian land that occurred in 1773 and 1775 without the Crown's consent. Subsequently in March v Brooks it was held: "That an action of ejectment could be maintained on an Indian right to occupancy and use is not open to question. This is the result of the decision in Johnson v McIntosh". More recently, the Court held that Indians have a common-law right of action for an accounting of "all rents, issues and profits" against trespassers on their land. Finally, the Court's opinion in Oneida I implicitly assumed that the Oneidas could bring a common law action to vindicate their aboriginal rights. We noted that the Indians' right of occupancy need not be based on treaty, statute or other formal Government action. We stated that "absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law."

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214 (1985) 470 US at 235.

Wi Parata: The Act of State Doctrine

15.73 From the 1870s nonetheless there was a shift of judicial attitudes towards the legal status of Maori rights. Wi Parata v Bishop of Wellington (1877)[215] is rightly regarded as the turning point.

15.74 In the report of this case an interesting passage occurs. Counsel for the plaintiff was arguing that all the land in the country was vested in the Crown in trust for its subjects, and the Crown still held a great portion in trust for the Natives.

15.75 Richmond J interposed:[216]

> "subject to a principle of common law applicable to newly settled countries in which there was an aboriginal race. The Crown takes all their land, subject to a rightful and necessary occupation by the aborigines." [emphasis added]

15.76 This last phrase simply repeated the words of the 1841 Ordinance. But Richmond's comment did not find any expression in Prendergast C J's judgment, the only one given. And the decision itself is certainly antithetical to any notion of legally enforceable native property rights. It makes derogatory comments about existing legislation referring to rights and native customs. There are several pieces of circular reasoning, an incomplete reading of Blackstone, and a confusion between the importation of the body of common law and the recognition of property rights.

15.77 The Wi Parata judgment in a now notorious passage referred to the Treaty of Waitangi as a nullity. The restricted context must be appreciated - it was a nullity in so far as it purported to cede sovereignty. Prendergast C J, however, continued: "so far as the proprietary rights of the natives are concerned the Treaty merely confirms the rights and obligations which iure gentium vested in and devolved upon the Crown" (p 78). There is no reference to possible common law native rights and a distinction was drawn (p 78) between respect for property rights on the cession of civilised territory and the case of "primitive barbarians".

15.78 The essence of Wi Parata, however, is that the Crown's dealings with the Maori for the acquisition of their lands were acts of State not cognisable in the

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215 (1877) 3 NZ Jur (NS) 72.
216 At p 76.

Courts. The real fear is manifest. If the Crown was indeed obliged to extinguish Native title in accordance with law and was answerable to the courts accordingly, the derivative title of settlers might be in jeopardy. This was a legitimate concern, but there were of course possible answers to that problem.

15.79 Again one should appreciate the relevance of all this to fishing claims. Some of these dealings related, or could be argued to relate, to fishing rights. Whether and how far these rights had been extinguished seems clearly to come within the proposition laid down in Wi Parata and its successors: it was for the Crown to decide.

15.80 The decision in Wi Parata was foreshadowed in an opinion given by the then Attorney-General Whitaker in 1863. The question was whether the Crown had a legal right to use land not purchased from the Maori for making roads and for defence. His predecessor Sewell had opined that it had, invoking the concept of eminent domain. Whitaker took a broader view.[217]

> "I am not aware of any instance in which either the Crown or legislature ... has recognised a title in the Aborigines cognisable in a court of law ... Assuming then that the land over which the Native title has not been extinguished to be Crown lands, ... it follows that the Crown has a right in law, so long as there is no interference with the rightful and necessary occupation and use thereof by the aborigines, to use the land".

15.81 Even here there is a qualification. The Crown had this legal right provided it did not affect the Native right of occupation and use. But if it did, what then? Whitaker avoided this issue. Wi Parata and later cases did not concede even as much.

15.82 Wi Parata's view of the juridical status of Maori rights was confirmed by the Court of Appeal in Nireaha Tamaki v Baker.[218] In that case the Court treated all dealings with Maori for the purchase of land as acts of State beyond the law. Richmond J delivering the brief judgment of the Court, anticipated Salmond's argument in Tamihana Korokai.

> "There can be no known rule of law by which the validity of dealings ... of the Sovereign with the

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217 Sewell, New Zealand Native Rebellion: letter to Lord Lyttelton (1864), 40.

218 (1894) 12 NZLR 483.

> Native tribes ... for the extinction of their territorial rights can be tested".
>
> ".... The Crown is under a solemn obligation to observe strict justice ... but of necessity it must be left to the conscience of the Crown to determine what is justice." (p 488)

15.83 The Court approved the decision in Wi Parata as authority for the proposition that "the mere assertion of the claims of the Crown is in itself sufficient to oust the jurisdiction of this or any other court." No other authority is given to support the proposition or the decision, which itself is a simple assertion. One has the uncomfortable sensation of Bodin revisited - sovereignty as "maiestas legibus solutis" (the sovereign is above the law). The concept of an unreviewable act of State, orthodox in the sphere of foreign relations, was applied to an ordinary piece of Crown acquisition of property. The common contemporary use of the term "cession" to cover the transfer both of sovereignty and land may have muddied the judicial waters. But again the policy foundation was explicit enough: "the security of all titles in the country depends on the maintenance of this principle."[219]

The Act of State Doctrine Outside New Zealand

15.84 A very different stance was taken at this period by the English Law Officers in relation to Fiji. Article 4 of the Deed of Cession of 10 October 1874 provided -[220]

> "That the absolute proprietorship of all lands not shown to be now alienated so as to have become bona fide the property of Europeans or other foreigners or not now in the actual use or occupation of some Chief or tribe or not actually required for the probable future support and maintenance of some chief or tribe shall be and is hereby declared to be vested in Her said Majesty her heirs and successors."

15.85 The essential distinction between this article and the policy embodied in documents such as the Royal Charter of 1840 and the 1846 Instructions was the recognition of bona fide land acquisitions by settlers before the cession. Otherwise there are clear similarities. But the Colonial Office at first took rather a cavalier view of the article and instructed the Governor that its application was entirely a matter for Crown discretion. The Governor

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219 Ibid, at 488.

220 Legge, Britain in Fiji (1958), Appendix, p II.

was to determine what land was in native occupation or required for future use. Such land would be held in trust, leaving it for the time being in Native occupation. And (echoing the Land Claims Ordinance 1841) Europeans were to give satisfactory evidence of the fairness of their transactions and would receive such Crown grants as the Governor thought fit.

15.86 This was challenged by the European settlers. The Deed of Cession, they claimed, was a treaty which recognised the existence of previously acquired rights to land. The Executive therefore could not dispose of them, or indeed grant them to the holders. Nor could it finally decide on the validity of claims.

15.87 The Law Officers essentially upheld these contentions. They reported that settlers could not be required to take Crown grants as the basis of their title. The Crown could of course investigate land claims but could not place any interpretation on the Deed of Cession that it did not bear in the judgment of a court. By the same token Native rights were valid against the Crown, and the final decision on what lands were occupied or required by Natives would be for the court. It depended on the facts.

15.88 The subsequent course of events is outside the theme of this paper, but in the upshot all land not sold before the cession became (without the need for court intervention) the virtually inalienable property of the indigenous inhabitants.[221]

15.89 Coming close to the present day, contrast also Lord Reid's remark in Attorney-General v Nissan:[222]

> " ... I am of the opinion that a British subject ... can never be deprived of his legal right to redress by any assertion by the Crown or decision of the court that the acts of which he complains were acts of state."

Although other judges in that case were not prepared to go quite as far, Lord Pearson was categorical that:

> "There is an error in and in so far as it is implied that an act of State could be committed against a subject within the realm." (p 239)

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221 Legge, Britain in Fiji (1958) pp 170-201.

222 [1970] AC 179, p 213.

15.90 The statement in Halsbury[223] that the notion of act of State has no application to a citizen within the realm accords with this.

15.91 Not long after the judgment in Nireaha the case of Attorney-General for Canada v Attorney-General for Ontario[224] came before the Privy Council on appeal from the Supreme Court of Canada. This related to an 1850 treaty of cession of their land by the Ojibeway Indians in return for, among other things, a perpetual annuity. Like many Canadian appeals it was really a dispute between federal and provincial governments. But there was no suggestion in the judgment of Lord Watson that the treaty did not create legally binding obligations on the Crown. He said :

> "The effect of these treaties was, that, whilst the title to the lands ceded continued to be vested in the Crown, all beneficial interest in them, together with the right to dispose of them, and to appropriate their proceeds, passed to the Government of the Province, which also became liable to fulfil the promises and agreements made on its behalf, by making due payment to the Indians of the stipulated annuities, whether original or increased... . the Indian annuities payable under the treaties of 1850 were debts or liabilities of the old province, either present, future or contingent." (p 205)

15.92 Following this, the Supreme Court of Alberta in R v Wesley[225] accepted the analogy of contract. In Canada, the Indian treaties appeared to have been treated judicially as "mere promises and agreements", but the obligation on the government was still binding. A recent writer[226] has been able to state categorically that these obligations are enforceable by law.

15.93 The modern case of Pawis v The Queen[227] is also in point.

The Later Course of Events in New Zealand

15.94 Some 7 years after the Court of Appeal's judgment in Nireaha it was reversed by the Privy Council.[228] Their

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223 Vol 18, (4th ed), 1418.
224 [1897] AC 199.
225 [1932] 4 DLR 774 (ASCAD).
226 Bruce H Wildsmith in Aboriginal Peoples and the Law (1985).
227 (1980) 102 DLR (3d) 602.
228 Nireaha Tamaki v Baker [1840-1932] NZPCC 371.

Lordships seemed to find no difficulty with the notion that a court could enquire and decide whether Native title had been extinguished according to law, or that the terms in many relevant New Zealand statutes "Native title", "owners" and so forth had a legal content. The Privy Council's decision given on 11 May 1901 was followed by a number of Maori challenges mounted in the courts and, in 1902, by the Land Titles Protection Act. This ousted the courts' jurisdiction to examine the validity of any Native Land Court Order, Crown grant or other instrument of title subsisting before 3 October 1892 without the leave of the Governor in Council.

15.95 One of these challenges is reported in Hohepa Wi Neera v Bishop of Wellington,[229] an attempt at a re-run of Wi Parata. The Court of Appeal would have none of it, and affirmed the earlier case, notwithstanding the Privy Council's decision in Nireaha Tamaki, which the Court indeed said had held Wi Parata to be rightly decided. Stout C J nonetheless had some caustic words for what their Lordships said in that case. Among other failings, they had not realised that the Native Rights Act 1865 could not bind the Crown. This was clear from section 5(8) of the Interpretation Act 1888, which provided that no Act in any manner affects the rights and privileges of the Crown unless it "expressly" states that the Crown is bound. Other New Zealand cases have taken the view that this provision and its successors cannot mean what they say and that the Crown may be bound by "necessary intendment". They include the judgment of Chapman J in Tamihana Korokai.[230]

15.96 In 1891 a Royal Commission on Maori Lands was set up. Its members were James Carroll, William Lee Rees and James MacKay. Mackay died during the preparation of what would have been a partially dissenting report. His incomplete opinion contained this passage:[231]

> "The assumption of the sovereignty of the islands under the Treaty of Waitangi extinguished the separate nationalities that existed prior to its promulgation, while at the same time it saved all their proprietary rights, and, subject to Her Majesty's right of pre-emption, confirmed to the Native landowners the power of alienation which they had already begun to exercise."

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229 (1902) 21 NZLR 655.
230 (1913) 32 NZLR 321 at 355.
231 (1891) AJHR G-1A, p 4.

15.97 This made no reference to Wi Parata but the majority report did. It took what now seems to be a surprising view of the law.[232]

> "Wi Parata ... decided ... that all Maori lands were waste lands of the Crown, subject to the rights of the Natives. That judgment (Wi Parata) is clear but the facts and the law warrant even a broader utterance. By the law of nations, English occupation vested the ultimate title to all lands in the Crown. The Maoris at the moment of occupation became tenants ... The Maori title is that of occupation, but occupation by an indefeasible right." [emphasis added]

15.98 This is a clear affirmation of the doctrine of aboriginal title but it is certainly not what later generations have taken from the decision. Nonetheless no case had directly denied Maori title to their land; none derived that title solely or principally from legislation. Edwards J in Mueller v The Taupiri Coal Mines Ltd had explained the famous "nullity" passage in Wi Parata.[233]

> "This passage simply denies any operation to the Treaty of Waitangi as a cession of the sovereignty: it does not deny that it declared the existence of the proprietary rights of the Natives, although it puts those rights on a higher footing than if they had stood on the Treaty alone."

15.99 What the cases did insist was that these proprietary "rights" were wholly at the mercy of the Executive; if the Government said it had extinguished them then they were extinguished. The nature of a "right" of this kind, and the notion of a right at common law which nonetheless cannot be enforced by the courts, pose some problems.

15.100 Yet as late as 1912 Chapman J was wrestling in Tamihana Korokai[234] with the relationship between Crown title and Maori right. He began by observing that the Natives could properly commence a proceeding in the Native Land Court to have their claim of title investigated. "They therefore have some right, and the first thing to be considered is what that minimum right is". He assumed "as has generally been assumed" that Native lands were vested in the Crown by virtue of the sovereignty and remained so

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232 (1891) AJHR G-1, p 10.
233 (1902) 20 NZLR 89 at 123.
234 (1913) 32 NZLR 321.

vested until individual titles were ascertained. Statute law (he said) supported that view "but that does not dispose of the matter". In fact Chapman J went on to review numerous Acts, both Imperial and New Zealand, which used language implying the confined existence of a Native title.

15.101 "The due recognition of this right or title by some means was imposed on the colony as a solemn duty" - a duty that the Legislature had endeavoured to perform in a long series of enactments. What Chapman J seems not to have considered is that perhaps legislative recognition was not necessary. He ignores for instance R v Symonds and the words of the Lundon & Whitaker decision. Yet, he continued, "the creation of [the Native Land] Court shows that Native titles have always been regarded as having an actual existence... The lands may be Crown lands but they are not vacant Crown lands".

> "In the Native Land Act 1909 ... "customary land", ... is used to describe land which, being vested in the Crown, is held by Natives or the descendants of Natives under the customs and usages of the Maori people. "Held" here does not mean wrongfully retained, but held and retained under the same customs that were declared to be valid if existent by the Imperial statute of 1846 already referred to, and the later enactments, Imperial and colonial. That this is not inconsistent with such lands being Crown lands is shown by section 88, which specially declares that they shall be regarded as Crown lands while recognising that this is for the protection of the interests of Natives. To say that these customs are not cognizable by the Supreme Court, and that the Supreme Court does not know the nature of the customs and the resulting tenure, does not dispose of the legally ascertained fact that the tenure exists. (p 357)

15.102 But, he pointed out, the right could be met and defeated by the Crown exercising its power under section 85 of the Native Land Act 1909 to declare Native title extinguished.

15.103 Chapman in his judgment seems almost to have accepted, a year before Manu Kapua, the concept of a radical Crown title legally burdened, even in the absence of positive legislation, with a Native right of occupation and use.

The Triumph of Crown Rights

15.104 The monumental restatement of Native land law prepared by Salmond with the assistance of Carroll and Ngata put the New Zealand position beyond doubt. Sections 84-87 of the Native Land Act 1909 provided that customary title was not available or enforceable against the Crown, that a proclamation that any Crown land was free from Native customary title was conclusive (a similar provision had been in earlier Native land legislation), and that no grant or other disposition of land by the Crown could be questioned on the ground that Native title had not been extinguished. Moreover, customary title was automatically extinguished in respect of land which for 10 years before 31 March 1910 had been continuously in possession of the Crown, whether through its tenants or otherwise.[235] The Governor in Council was authorised, at any time and for any reason, to prohibit the court from ascertaining the title to any land.[236]

15.105 This last remarkable privative clause was repealed in 1913, and a savings provision was introduced to give Maori the right to have their claims to customary land investigated and adjudicated by the court. Herries, moving the committal of the Native Land Amendment Bill, pictured this as a great concession[237] but he referred to "those obnoxious sections" and implied their inconsistency with the Treaty of Waitangi. There does seem to have been a sense that the 1909 provisions went altogether too far.

15.106 With these qualifications the law now contained in sections 153-157 of the Maori Affairs Act 1953 has remained the same. The Maori Affairs Bill now before Parliament proposes to drop them.

15.107 In Waipapakura in 1914[238] the conventional New Zealand view had crystallised. A Maori was net fishing in the tidal waters of the Waitotara river. A fishery officer seized her nets on the ground that they were being used in breach of regulations under the Fisheries Act. She claimed that her use was in accord with a Maori fishing right, and sued unsuccessfully for conversion. The case came before the Supreme Court on appeal from the Magistrates' Court. It was heard by a Full Court, with Stout C J delivering the sole judgment. He began by rejecting the proposition that only the Native Land Court could inquire into Maori custom. That Court had no special jurisdiction to deal with "fishing rights", only with "land". The proposition that fishing rights derive from

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235 S 84.
236 S 100.
237 167 NZPD 389.
238 (1914) 33 NZLR 1065.

ownership of the underlying soil and are simply one of the bundle of rights that make up ownership was apparently not raised. But substantively Stout C J applied Wi Parata and the Court of Appeal's version of Nireaha Tamaki. The Treaty of Waitangi could create no legal rights. Even if it had the effect of a statute it would be difficult to read it as conferring any recognition of fishing rights in tidal waters. No New Zealand statute gave any communal or individual rights of fishery in the sea or tidal waters (begging the question of what the Fisheries Act proviso did mean). In the absence of a statute there could be no rights.

> "So far as sea fisheries are concerned ... there must, in our opinion, be some legislative provision made before the Court can recognise the private rights, if any, of Maoris to fish in the sea or in tidal waters." (p 1072)

15.108 The overall themes and policy of the decision were the public right to fish in the sea and tidal waters, elevated virtually to a constitutional principle, and the concept that there should be no special privileges for Maori in that regard.

Conclusion

15.109 The recognition by New Zealand courts of aboriginal title in the form of fishing rights might require the overruling of Waipapakura. That case was followed in Keepa v Inspector of Fisheries.[239] Here also the appellant had raised section 77(2) of the Fisheries Act 1908 as a defence to a charge of taking undersized toheroa. Hardie Boys J upheld the conviction because

- a grant of freehold title over land bordering the foreshore extinguished any customary fishing rights attached to the land; and
- the claim to a fishing right would exclude the rights of others to fish in the area and was thus invalid.

15.110 The status of these decisions has now been rendered uncertain by the judgment in Te Weehi (see paras 8.13-8.15), which has opened the way for a more far-reaching reappraisal of the law, but was based on a positive (if ambiguous) statutory provision.

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239 [1965] NZLR 322.

15.111 The Court of Appeal's decision in Re the Ninety Mile Beach[240] also stands in the way of judicial acceptance of a common law aboriginal title. The dispute in this case concerned the beach below high tide. The thrust of the judgments was firmly based on the "no statute, no rights" doctrine. Claiming to apply Chapman J's judgment in Symonds, North J thought that:

> "it necessarily follows that on the assumption of British sovereignty - apart from the Treaty of Waitangi - the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water mark ... But as we all know, the Crown did not act in a harsh way ..." (p 468)

15.112 In the Maori Council case the Court of Appeal expressly left open the question whether the law protected Maori customary title. But in any case the questions would remain whether there is room to apply the doctrine in the face of much specific and exclusive legislation, and how it might be applied to sea fisheries.

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240 [1963] NZLR 461.

16 MAORI CUSTOM AND THE LAW

16.1 In no respect is the divergence between British and Maori expectations earlier or more clearly seen than in respect of the status of Maori customs. Two statements in 1840 epitomise it. In his speech at Waitangi on 5 February during the debate that preceded the Treaty's signing Tamati Waka Nene was translated as saying - [241]

> What did we do before the Pakeha came? We fought, we fought continually. But now we can plant our grounds, and the Pakeha will bring plenty of trade to our shores. Then let us keep him here. Let us all be friends together. ... O Governor, remain. ...
>
> Do not go away from us; remain for us a father, a judge, a peacemaker. You must not allow us to become slaves. You must preserve our customs, and never permit our lands to be wrested from us. ... . Stay thou here, dwell in our midst. Remain, do not go away.

16.2 At the end of the same year Lord Russell directed-[242]

> "you will look rather to the permanent welfare of the tribes ...than to their supposed claim to the maintenance of their own laws and customs."

Diverse Attitudes to Maori Custom

16.3 The cultural and religious climate of nineteenth century England was unfavourable towards accepting other ways of life. The missionary spirit and its idealism was itself inimical to respect for Maori custom, except at most as something to be tolerated pending the conversion of the Natives to Christian and therefore English ways. There was nothing hypocritical about this approach. The equal value of every human being in no way implied equality of religion, custom or culture. The Maori deserved better than their savage customs. They deserved to become brown Victorian English people.

16.4 A cruder hostility existed among some settlers after 1840. They were unlikely to show much tolerance of

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241 Buick, The Treaty of Waitangi, 3rd ed (1936) p 143.

242 Russell's despatch to Hobson 9 December 1840, British Parliamentary Papers (1841) NZ Vol 3, Irish UP, p 146.

Maori ways and values, the less so if these stood in the way of their acquisition and use of the land they had emigrated to obtain. The Maori were an inherently inferior people whose natural destiny was to be dispossessed. Darwinism was in the New Zealand air well before The Origin of Species was published.

16.5 A middle ground between these attitudes, which would probably be common among Pakeha even today, is exemplified in a speech on the Maori Councils Amendment Bill by Herries, the Member for Bay of Plenty, and subsequently Native Minister, in 1903:[243]

> "Why should there be two laws - one for the Europeans and one for Maoris? ... a great deal of this separation between the races was due to the land laws...the Government brought down legislation to keep the two races apart, and made different laws for the Pakeha and the Maori ... Bills of this kind, which made one law for the European and another for the Maori, only intensified the evil. Instead of trying to join the two together they were only driving in the wedge harder that separated the two races ... Why not try to weld them together? ... to make them live like Europeans, to give them the same laws and not separate laws, to get them to intermarry and become one New Zealand race ... I would like to see legislation brought in to put an end to the kainga and to the pa, to make Maoris live the same as Europeans, and have the same aspirations and views as the Europeans ..."

The Effect Of Annexation

16.6 When British intervention in New Zealand was being considered in the 1830s, one option was to set up European enclaves, on the model of the "factories" in India, where English laws and institutions would prevail. Hobson suggested following a visit in 1837 that these might be established at the Bay of Islands and elsewhere and that treaties should be concluded with the chiefs for the recognition of factories and the protection of British subjects and their property. Subsequently Busby proposed a protectorate with special laws for British subjects. As late as June 1839 the British government still contemplated the cession of only parts of New Zealand. But by August of that year a more ambitious course had been decided upon and expressed in Normanby's instructions to Hobson:

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243 127 NZPD 515.

> "The spirit of adventure having thus effectually been roused, ... an extensive settlement of British subjects will be rapidly established in New Zealand; and that, unless protected and restrained by necessary laws and institutions, they will repeat ... the same process of war and spoilation ... to advert these disasters, and to rescue the emigrants themselves from the evils of a lawless state of society, it has been resolved to adopt the most effective measures for establishing amongst them a settled form of civil government.
>
> Believing, however, that their own welfare would ... be best promoted by the surrender to Her Majesty of a right now so precarious, and little more than nominal, and persuaded that the benefits of British protection, and of laws administered by British judges, would far more than compensate ....
>
> It is further necessary that the chiefs should be induced, if possible, to contract ... that henceforward no lands shall be ceded ... except to the Crown of Great Britain."[244]

16.7 The British government's clear view at the time was that the acquisition of sovereignty over New Zealand, albeit by cession, would carry the automatic application of the law of England. Russell's despatch of 9 December 1840 forwarding the Royal Charter constituting New Zealand a separate colony is explicit on this point. It referred to "the well established principle of law, that Her Majesty's subjects, settled in a country acquired as New Zealand has been acquired, carry with them as their birthright so much of the law of England as is applicable to their altered circumstances".[245]

16.8 Discussing the various categories of Native custom, the despatch continued:

> "finally there are customs which ... may be borne with until they shall voluntarily be laid aside by a more enlightened generation. It is important to advert distinctly to this topic because, without some positive declaratory law ... <u>the law of England would prevail over them</u>, and subject the natives to much distress and many unprofitable hardships." [emphasis added]

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244 <u>British Parliamentary Papers</u> (1841) NZ Vol 3, Irish UP, p 85.
245 Ibid, p 146.

16.9 Meanwhile, the Treaty of Waitangi had been concluded. Three things bear on the likely expectations of those who signed it.

- the speech of Waka Nene, which, it is generally accepted, was influential if not decisive in persuading those who were present. It contains the quotation at the beginning of this section.

- The text of the Treaty itself in its Maori version. The signatories yielded kawanatanga but retained rangatiratanga, which carried something much more than the idea of material property. And the Crown guaranteed to preserve not merely whenua and kainga but "ratou taonga katoa" - all prized or treasured things.

- The "Pompallier episode". The fullest account is that of Colenso, an eyewitness. Bishop Pompallier had asked for the Maori to be assured that there would be full liberty for the Catholic religion. Hobson assented, but referred also to the protection of Maori customs and beliefs. This was all put in writing. Colenso states: I got Mr Williams (though with some hesitation on his part) to insert "me te ritenga Maori hoki" as a correlative to that of Rome. The English read, "The Governor says that the several faiths of England, of the Wesleyans, of Rome, and also the Maori custom, shall alike be protected by him."[246]

16.10 Dr Orange in The Treaty of Waitangi[247] depreciates the significance of this last. It is quite true that the addition of the words was a tactical move on the part of the Protestant missionaries affronted by the prospect of the recognition of the Catholic religion. But the phrase was nonetheless recorded.

16.11 A detailed account of legislative and judicial treatment of Maori custom in the general sense is out of place in this survey. Despite the promptings of the British government, and the later provision in section 71 of the Constitution Act 1852 (UK), little was done then or at any time to recognise local Maori custom.

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246 Colenso, The Authentic and Genuine History of the Signing of the Treaty of Waitangi p 32.

247 p 53.

Section 71 read:

> "And whereas it may be expedient that the Laws, Customs, Usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general Principles of Humanity, should for the present be maintained for the Government of themselves, in all their relations to and dealings with each other, and that particular Districts should be set apart within which such Laws, Customs, or Usages should be observed:
>
> It shall be lawful for her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from Time to Time to make Provision for the Purposes aforesaid, and any Repugnancy of any such native Laws, Customs, or Usages to the Law of England, or to any Law Statute, or Usage in force in New Zealand, or in any part thereof, in anywise notwithstanding."

The power given by this provision was never used. It was repealed along with other surviving sections of the Constitution Act 1852 by the Constitution Act 1986.

16.12 The Native Districts Regulation Act 1858 and the Native Circuit Courts Act 1858 permitted a limited recognition of Maori custom in predominantly Maori districts, along with self-government through runanga or district councils. They were a response to the threat perceived from the King movement. The advent of the New Zealand wars and the persistent hostility of many settlers and politicians caused the system to be abandoned in the late 1860s. The comment of Alan Ward[248] is that -

> "the opportunity for Maori leaders to exercise a wide range of legislative and judicial powers [was] virtually closed. Nor could the Resident Magistrates any longer be mediators in the sense of helping the Maori to evolve and administer a pattern of bylaws compounded of English elements and local customs, to suit local requirements. Essentially they could now only be mediators of English law to the Maori.

The 2 Acts were repealed in 1891.

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248 A Show of Justice (1974), p 204.

The Maori Councils Act 1900 subsequently provided for a limited degree of self-government for Maori communities, but little came of it in the longer term.[249]

16.13 The one significant and lasting exception was in relation to land titles, including succession. Even here, the provisions of the various Native Land Acts requiring the Court to ascertain ownership according to Native custom were apparently not always applied in reality. In the very instructive case of Willoughby v Panapa Waihopi[250] Chapman J remarked:

> "Its Judges have acted on the assumption that they might invoke Native custom to determine the succession to the freehold lands of Maoris. That is to say, that Court has applied the same rules of succession to the lands of Maoris which happened to be held under title derived from the Crown as it habitually applied to lands not so held ... . A body of custom has been recognized and created in that Court which represents the sense of justice of its Judges in dealing with a people in the course of transition from a state of tribal communism to a state in which property may be owned in severalty, or in the shape approaching severalty represented by tenancy in common. Many of the customs set up by that Court must have been founded with but slight regard for the ideas which prevailed in savage times." (p 1149)

16.14 Nor, however, was English law applied in its entirety, as the judgments of Chapman J and other judges in Willoughby also demonstrate. Examples are the exclusion of spouses and the recognition of customary marriages and adoptions for succession purposes. It seems rather a case of the application and development of custom by analogy; an attempt to apply customary rules to the novel species of Maori freehold land. That policy is not to be condemned. Indeed, if it had been applied at a more fundamental level it could have avoided many problems, such as those that arose in Mangakahia: see paras 15.69-15.71.

16.15 Adams in Fatal Necessity[251] refers to a perceptive analysis by George Clarke, the Protector of Aborigines, in 1845. He opined that many of the existing difficulties might have been prevented by legalising Maori customs not repugnant to fundamental morality and investing

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249 See the summary in The Maori and New Zealand Politics (ed JOA Pocock) (1965) by R J Martin, 53.

250 (1910) 29 NZLR 1123.

251 (1977) Auckland UP, p 229.

the chiefs with magisterial authority. Instead the Government had been so apprehensive lest any portion of the Executive power should pass into other hands that confidence in its ultimate intentions had been shaken.

16.16 A minute by Sir James Stephen at the Colonial Office shows the issue in an even clearer light. The New Zealand Attorney-General, William Swainson, had expressed the view that British sovereignty over New Zealand extended only over those parts whose chiefs had signed the Treaty of Waitangi. Stephen commented:[252]

> "The difficulty which presses Mr Swainson manifestly is, that he assumes the impossibility of separating the sovereignty of the Crown over the aborigines from their subjection to the same code of laws by which their European fellow subjects are governed; but this consequence, absurd as I admit it to be, does not really follow. I know of no theoretical or practical difficulty in the maintenance, under the same sovereign, of various codes of law, for the government of different races of men. In British India, in Ceylon, at the Cape of Good Hope, and in Canada, the aboriginal and the European inhabitants live together on these terms.
>
> Native laws and native customs, when not abhorrent from the universal and permanent laws of God, are respected by English legislatures and by English courts; and although problems of much difficulty will occasionally arise out of this state of things, they have never been such as to refuse all solution, or as to drive the local authorities on the far more embarrassing difficulty of extending the law of England to persons wholely ignorant of our language, manners and religion".

16.17 But this was not a view that ever commanded much support in New Zealand. The attitude of Grey was firm:

> "The general line of policy I have endeavoured to adopt in reference to the subject of legislation for the mixed races inhabiting this country has been to convince the natives that their traditional customs had, in reference to their own present state, and that of the country generally, become obsolete and useless, and that it would be to their own advantage to adopt our laws, and to

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252 British Parliamentary Papers (1844) NZ Vol 2, Irish UP. Appendix pp 173-174.

> resort to our tribunals. With this view, I felt that it would, perhaps, be better not to require our Courts in any way to recognise the barbarous customs of the native race ... ".[253]

16.18 The picture is different in the United States, and this is why American experience and American court decisions are of indirect application only. From the beginning United States law recognised the Indian tribes or "nations" as "domestic dependent nations," not sovereign in the international sense, but legal and political entities. They possessed and still possess a measure of legal autonomy and their own courts, which have a considerable jurisdiction.

Maori Custom and the Common Law

16.19 Could fishing rights as part of Maori custom nonetheless have entered through the common law? In one case Maori custom did find a niche in New Zealand law. In Public Trustee v Loasby.[254] Cooper J held that tangi expenses properly incurred were a charge on a Maori deceased's estate, recognising as law a well settled custom. He laid down 3 requisites for the legal recognition of such a custom -

i The custom exists as a general custom of a class eg, the Maori;

ii It is not contrary to statute law;

iii It is reasonable in all the circumstances.

16.20 Note, however, the very narrow scope of the decision. It threatened no Pakeha interest. It is also said that a profit, (roughly, a right to take from time to time something from someone else's land) unlike an easement, cannot arise by custom.[255] A right to fish on another's land is clearly a profit. The principal authority is Gateward's Case,[256] which has been subsequently applied, for example in Race v Ward.[257] But the English courts have likewise been prepared to find a way round this distinction with its somewhat specious reasoning. Thus the House of Lords in Goodman and Blake v

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253 Adams, op cit p 58; McLintock Crown Colony Government in New Zealand (1958) p 205.

254 (1908) 27 NZLR 801.

255 12 Halsbury (4th ed) 431.

256 (1607) Co Rep 59b, 77 ER 344.

257 (1855) 4 E & B 702, 119 ER 259.

Borough of Saltash[258] invoked the notion of a presumed trust to uphold a claim to dredge for oysters in a navigable tidal river. (The right to the fishery itself was a prescriptive one vested in the borough corporation). A lawful origin for the usage ought to be presumed if reasonably possible. And Gateward's case itself accepted that copyholders could claim profits by custom because they were precluded from claiming them by prescription.[259]

16.21 There is also a cryptic statement in the Privy Council's judgment in Attorney-General of British Columbia v Attorney-General of Canada that the severance of a fishing right from the ownership of the underlying soil cannot be brought about by custom, "for the origin of such a custom would be an unlawful act.[260] This is plainly obiter, and is difficult to follow. It should, however, be noted.

16.22 In Malcomson v O'Dea[261] on which the Privy Council relied, the House of Lords upheld a claim to a private fishery of very old but uncertain origins in the tidal part of the Shannon River in Ireland. And at least one English decision has upheld fishing rights extending to the seabed beyond low water mark. This is Gann v The Free Fishers of Whitstable.[262] The respondents owned a private oyster fishery that extended about 2 miles into the sea below the low water mark. The case concerned the right to charge anchorage dues from vessels anchoring within the boundaries of the fishery. The House of Lords found that such an interference in the public right of navigation in the sea would require evidence of some express grant from the Crown. The fishery right, however, was upheld, subject to the public right of navigation. There was evidence of immemorial usage (a deed of conveyance in 1792 stated the fishery had existed "for many hundred years now long past"), and a grant by the Crown prior to Magna Charta was presumed.

16.23 The Mayor of Colchester v Brooke[263] provides another example of a fishing right beyond low water mark (the right itself was not questioned). It concerned a private oyster fishery in a navigable tidal river. Even at the lowest tides, much of the fishery remained submerged.

16.24 Another line of argument could also be used to support common law recognition of customary Maori fishing

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258 (1882) 7 App Cas 633.
259 See Payne v Ecclesiastical Commission and Landon (1913) 30 TLR 187.
260 [1914] AC 153 at 167.
261 (1863) 10 HL Cas 593.
262 (1865) 11 HLC 191, 11 ER 1305.
263 (1845) 7 A & E 339 (QB).

rights. The orthodox view is that, on the extension of British sovereignty to a "settled" and in some circumstances a "ceded" colony, (see para 8.3) the common law of England extends to that colony as far as it is appropriate to its circumstances. This doctrine goes back to Blackstone and further, but its classic statement is that of the Privy Council in Cooper v Stuart.[264]

> "The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class ... the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute."

16.25 In New Zealand this rule was enacted in the English Laws Act 1908. This Act has been repealed by the Imperial Laws Application Act 1988, but section 5 of that Act provides that the common law of England, so far as it was part of the laws of New Zealand at the commencement of the Act, is to continue to be part of the laws of New Zealand. The exact effect of this somewhat unsatisfactory provision remains to be seen.

16.26 The 1908 Act repeated the English Laws Act 1858. The origin of that Act was a decision of Stephen ACJ that the Wills Act 1837 was not in force in New Zealand because the country was already under British sovereignty (and therefore British statutes did not in the ordinary case extend to New Zealand). This odd notion conflicted with the conventional view that the initial date of receiving English law was 14 January 1840. The 1858 Act adopted the latter. But it likewise adopted the standard formula "so far as it is applicable to the circumstances of the colony."

16.27 There are many cases on the meaning and application of that phrase - Cooper v Stuart itself,

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264 (1889) 15 App Cas 286 at 291.

Attorney General v Stewart,[265] Whicker v Hume,[266] Jex v McKinney,[267] Ruddick v Weathered[268] and so on. Nearly all approach it from the aspect of the settlers, British or other. But it seems equally legitimate to take into account the circumstances of a large indigenous population hitherto governed by their own laws and customs. As Lord Russell said, the application to such people of the whole of the common law would cause "much distress and many unprofitable hardships".[269]

16.28 The Cooper v Stuart dichotomy is moreover inadequate. New Zealand was not a territory "practically unoccupied, or without settled inhabitants". The facts and the whole course of British dealings with New Zealand negate the notion. Indeed until the 1860s European settlers were in a minority in the North Island.

16.29 While the vast majority of the cases, both in New Zealand and overseas, have dealt with the applicability of Imperial statutes in various British possessions, there are decisions where a common law rule was in question. Cooper v Stuart is again an instance. The Privy Council had no difficulty in deciding that the rule against perpetuities was part of New South Wales law, but went on to hold that the rule did not apply to a Crown grant in New South Wales, irrespective of whether it had been extended to the Crown in England. No statute was involved. Again, quite recently in Southern Centre of Theosophy Incorporated v South Australia,[270] a case on accretion, a full court of the Supreme Court of South Australia opined that, whatever the position in Britain, ownership of lake beds in Australia vested in the Crown under the common law. This was not dealt with by the Privy Council when it reversed the judgment.[271]

16.30 On that footing indigenous custom could have been given a wider application than legally recognised custom in England. It could, for example, qualify in societies such as New Zealand the traditional rules about the Crown's title over the foreshore and the nature of the public's right to fish.[272]

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265 (1817) 2 Mer 143; 1 ER 881.
266 (1858) 7 HL Cas 124; 1843-60 All ER Rep 450.
267 (1889) 14 App Cas 77.
268 (1889) 7 NZLR 491.
269 British Parliamentary Paper (1841) NZ Vol 3, Irish UP, p 149.
270 (1979) 21 SASR 199.
271 38 ALR 586.
272 See generally Slattery, (1987) 66 Can BR 727.

16.31 However, the point seems never to have been taken judicially. In Baldick v Jackson[273] Stout C J held that the statute of 17 Edw II c 2 (right to whales part of the Royal prerogative) was not in force in New Zealand, as being inapplicable to the circumstances of the colony. The grounds were first, that throughout the long history of New Zealand whaling the right had never been claimed and second, that it would have had to be claimed against the Maori, which would have been contrary to the Treaty of Waitangi. The logical implications of this decision were far reaching but no later decision has taken it up. And Baldick v Jackson was concerned with the applicability of an English statute. The Chief Justice took a very different view where it was a question of the common law. In Waipapakura v Hempton, 4 years later, he said:

> "Now in English law - and the law of fishery is the same in New Zealand as in England, for we brought the common law of England with us except insofar as it has not (sic) in respect of sea fisheries been altered by statute - there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast."[274]

Custom and Common Law in Hawaii

16.32 The wider worlds of Polynesia and the common law intersect not only in New Zealand but also in the American State of Hawaii, where indigenous custom has a much higher status. From its European discovery in 1778 Hawaii was recognised by Western powers as an independent and sovereign State. In the nineteenth century it acquired a missionary-influenced code of laws. There was substantial white (and Asian) immigration to the extent that Westerners achieved economic and political dominance. Hawaii became a territory of the United States in 1898, when native Hawaiians comprised 35 per cent of the population. By 1976 this proportion had decreased to 20 per cent. The territory was admitted as a State in 1959. Legally, Hawaii is a common law jurisdiction; the common law of England, as ascertained by English and American decisions, is declared to be the common law of the State.

16.33 Nonetheless, rights under customary law are recognised, and an interaction has occurred between the 2 systems.

16.34 Article 12, section 7 of the Hawaii constitution (as amended in 1978) provided -

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273 (1910) 27 NZLR 801.
274 (1914) 33 NZLR 1065, 1071.

> "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."

The principle embodied in Article 12.7 is not new. It is said that:

> "A number of Hawaiian rights predating the Republic of Hawaii have been preserved by the deference that Hawaii has long given to customary law. Continuation of the practice after annexation and statehood indicates the viability of some traditional Native Hawaiian law. Absent statute, traditional Hawaiian usage is not only admissible in the courts of Hawaii, but also controls inconsistent common law. ... Statutory law controls inconsistent customary law, but custom can be used to clarify ambiguous statutes."[275]

The contrast with New Zealand is stark.

Conclusion

16.35 Realistically the application of Maori custom and usage to a substantial body of British settlers was out of the question. The general extension of the common law to New Zealand was inevitable; so also was its broad application to all the people in theory - and, as settlement continued and spread, in practice. What was not faced up to then or later outside the sphere of land law, and succession in relation to Maori land, was the possible integration of indigenous custom into the law so that it reflected the real circumstances of the time and place.

16.36 Nonetheless, the common law did very possibly have the capacity to acknowledge and integrate Maori custom in relation to rights in the nature of property. The concepts of aboriginal title and of the validity of lawful customs could thus have come together. The starting point would have been Re the Lundon and Whitaker Claims Act. The essence of that decision,which is consistent with all the cases, is that all property rights by English tenure must derive from the Crown. But the decision is also authority for the proposition that "the Crown was bound to a full

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275 Cohen, Handbook of Federal Indian Law (1982 ed) p 804.

recognition of native proprietary right, and whatever the extent of that right by established native custom might be, the Crown was bound to respect it". [emphasis added]

16.37 As the law stands it appears that the courts could read customary rights by implication into statutes whose wording does not clearly preclude it. This would be in line with the general promises of the Treaty and with its higher legal status following recent legislation and litigation.

17 GOVERNMENT POLICIES AND MAORI GRIEVANCES

17.1 The New Zealand courts insisted after Wi Parata that while the Crown was obliged to act in a strictly just manner towards the Maori, it was for the Crown and not the judges to decide what was just. The absence of any sort of judicial control or review placed an unusually onerous duty on the Executive government to honour the Crown's treaty obligations through its policies and the legislation it sponsored or declined to sponsor. The Government's behaviour in relation to Maori fisheries needs therefore to be closely scrutinised.

17.2 The accepted doctrine that the Crown enjoyed exclusive rights over foreshore land led to strongly expressed Maori grievances over what they saw as equivalent to the confiscation of a very important economic and cultural resource. In terms of the English text of the Treaty of Waitangi the Government appeared to be denying them exclusive and undisturbed possession of their coastal fisheries. In terms of the Maori version it seemed to be asserting that the "kawanatanga" yielded to the Crown included not merely the right to make laws in respect of the seashore but ownership of that area to the exclusion of Maori rights and mana.

The Early Years

17.3 This insistence on Crown rights did not come about immediately. In the first years of British settlement the Government's later possessiveness about the foreshore was not apparent. As mentioned above, (see para 10.10) a number of Crown grants were made of land below high-water mark. One such grant was to Frederick Whitaker of Auckland of sub-tidal land at Kawau Island in exchange for some Auckland land on which the Government wanted to build a fort. The grant came before the Supreme Court in Attorney-General v Whitaker (1849)[276] and was held to be invalid, on the ground that the Australian Land Sales Act 1842 (UK) applied to the transaction and did not provide for land to be exchanged. But both plaintiff and Court ignored the sub-tidal location of the land and treated it simply as waste land in the ordinary sense. Nothing was said about the extinguishing of Native title.

17.4 In 1866 section 12 of the Crown Grants Act provided that-

> "Whenever in any grant the ocean sea or any sound bay or creek or any part thereof affected by the

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276 Unreported - 19 July 1849, GBPP 1850/1280 pp 8-15.

> ebb or flow of the tide shall be described as forming ... the boundary of the land ... such boundary shall be ... the line of high watermark at ordinary tides."

17.5 This, as the side note suggests, did no more than establish a prima facie rule. It did not preclude more extensive grants.

17.6 A question of Maori fishing rights arose directly in 1855, over a toheroa bed in the Kaipara district. The Resident Magistrate at Kaipara wrote to the Attorney-General, Swainson, as follows - [277]

> "On the West Coast between high and low water marks, there exists... . a bed of "toheroa". This fishery is highly valued by the natives. At present, the value of the fishery as furnishing considerable supplies of food has been discovered by the Europeans, and large quantities are carried for the use of the workmen on the European stations.
>
> The Ngatiwhatua have made a demand for annual payment by way of rent. The Europeans, supported by Ngapuhi, aver that the fishery, being below high water mark of the ocean, is the property of the Crown; ... I confess myself unwilling to decide this question without reference to higher authority, though I am inclined to think that the Treaty of Waitangi would confirm the Ngatiwhatua in the enjoyment of a right, which they seem for many years previous to the establishment of British sovereignty to have exercised uncontested."

17.7 Swainson simply minuted that the writer should be informed "that the judgment to be given in all cases is such as the Resident Magistrate himself shall find to stand with equity and good conscience."

17.8 The only specific legislation before the Fisheries Act 1877 was the Oyster Fisheries Act 1866. It dealt in part with artificial oyster beds but also imposed closed seasons for taking natural oysters and prohibited the taking of rock oysters below <u>low</u> spring tides without a licence. A speaker in 1874, when the Act was extended to apply to the taking of oysters below <u>high</u> tide mark, suggested that the earlier limitation was "out of consideration for the aboriginal natives".[278]

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277 Department of Internal Affairs file, 1855/202.
278 16 NZPD 478.

17.9 When the general regulation of fisheries was first introduced in 1877, Maori rights under the Treaty of Waitangi were specifically preserved.[279] The timing of this is puzzling. Unless the Treaty was seen as a source of rights in some way, or at least as an affirmation of legal rights that existed independently of it, it is hard to see what the section could mean. Wi Parata's case might thus suggest that the provision as it was enacted was meaningless. Curiously, judgment in Wi Parata had been delivered on 18 October 1877, some weeks before the Fish Protection Bill was debated (15 November) and nearly 2 months before it was enacted (8 December).

17.10 On 8 November 1877 Taiaroa, the Member for Southern Maori, had asked the Minister of Justice in the House by what authority Europeans were taking fish and shellfish from the Mangahoe Inlet in Otago while the Native title thereto was not extinguished. The inlet was situated "in the midst of his [Taiaroa's] land". A hearing for the investigation of the Maori title to the inlet (separate from the title to the adjoining land) was at that time taking place, but Europeans were meantime "plundering all the oysters and fish from the place, and selling them in Dunedin". Taiaroa asked that "a stop should be put to that proceeding, until the Native title was extinguished"

17.11 Sheehan's reply included the statement that "... under the Treaty of Waitangi certain rights were reserved to the Natives in regard to their fisheries." The effect of Wi Parata seems to have either been not appreciated or ignored.

17.12 Why was section 8 dropped in 1894 without being replaced? The Minister in charge, Ward, incorrectly told the House that the measure was a merely consolidating one. Possibly the answer may be found in the Annual Report of the Marine Department for 1894-95:[280]

> "Representations having been made to the department that it would be desirable to prescribe a close season for mullet in all waters between Cape Wiwiki and the North Cape, and also to prohibit the Maoris from using certain methods of fishing which had the effects of depleting the fishery, in consequence of their taking small mullet in large quantities, inquiries were made ... with the result that a close season was declared and Maoris were made amenable to the

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279 Fish Protection Act 1877, s 8. See para 8.6.

280 (1895) AJHR H-29.

> fishery regulations, from the operation of which they had hitherto been exempted when taking fish for their own consumption."

17.13 The close season was soon lifted; the subjection of Maori to the Sea Fisheries Act remained. The depletion of mullet resources continued. Commercial fishing continued at high levels, and by 1906 several canning factories in Northland had closed for lack of fish.[281]

Maori Protests 1870-1890

17.14 The Crown's assertion of absolute title over the foreshore underlies a great many Maori grievances from the late 1860s, epitomised in a speech by Hori Ngatai of Ngaiterangi in 1885 when Ballance (then Native Minister) visited Whareroa marae in the course of a peregrination.[282]

> "Now, with regard to the land below high water mark immediately in front of where I live, I consider that is part and parcel of my own land ... part of my own garden. From time immemorial I have had this land, and had authority over all the food in the sea ... I am now speaking of the fishing grounds inside the Tauranga Harbour. My mana over these places has never been taken away. I have always held authority over these fishing places and preserved them; and no tribe is allowed to come here and fish without my consent being given. But now, in consequence of the word of the Europeans that all the land below high water mark belongs to the Queen, people have trampled upon our ancient Maori customs and are constantly coming here whenever they like to fish. I ask that our Maori custom shall not be set aside in this manner, and that our authority over these fishing-grounds may be upheld. The whole of this inland sea has been subdivided by our ancestors, and each portion belongs to a proper owner, and the whole of the rights within the Tauranga harbour have been apportioned among our own different people; and so with the fishing grounds outside the heads: ... I am speaking of the fishing grounds where hapuku and tarakihi are caught. Those grounds have been handed down to us by our ancestors ... I am not making this complaint out of any selfish desire to keep all the fishing grounds for myself; I am only striving

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281 Muriwhenua Report Wai-22, June 1988, p 94.
282 (1885) AJHR G-1.

> to regain the authority which I inherited from my ancestors."

17.15 This complaint is instructive in 2 ways. It is certain that the Crown had no dealings with the Ngaiterangi in relation to foreshore land, either by purchase or confiscation. The land that was regarded by the Maori as theirs no longer belonged to them. And Ballance's reply foreshadows the decision in Waipapakura 30 years later. It was a question of law, which he said he would submit to the law officers. It depended on the construction placed on the Treaty. If the rights were ceded by the Treaty, or not upheld, they were in the Queen, "for the Queen owns the land between high and low water marks".

17.16 The same response came from Whitaker at the second "Orakei Parliament" in 1889. Whitaker wanted to know what specifically had been violated in regard to the Treaty. One answer came from Major Kemp (Keepa Te Rangihiwinui, a rangatira of Muaupoko and a leader on the Pakeha side during the Hauhau campaign). He asked who had sold the foreshore of the country to the Government. He had never sold the foreshore where the wharf now stood and he considered that where the pipi were belonged to the Maori. They had never given up their rights to the foreshore.

17.17 Whitaker's rejoinder was that the Treaty gave the Queen the sovereignty to high-water mark. The land under the sea belonged to the Queen for the benefit of the community at large. Paul (Paora Tuhaere) replied that it had not been inserted in the Treaty that the Queen owned the land under the sea. That might be very well from the Pakeha's point of view but not from the Maori's.[283]

17.18 Clearly, the 2 races were simply talking past each other.

17.19 Earlier in his journey Ballance had been told by Paora Tuhaere of Ngati Whatua that "the Government seized the land and the foreshores". Tuhaere had been the sponsor of the "Orakei Parliament" of 1879, a gathering widely attended by chiefs of the northern part of the North Island.[284] Tuhaere summed up the issues:

> "That Treaty of Waitangi left the rights of the soil with the Maori Chiefs. [The Queen] left the fisheries to the Maoris.... She also left us the places where the pipis, mussels, and oysters, and other shellfish are collected ... Let us see

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283 NZ Herald, 29 March 1889.
284 (1879) AJHR G-8.

whether the stipulations made in the Treaty of Waitangi are still in force or not."

17.20 The answer from the participants seems clear enough: To select only a few examples -[285]

Eruena: (Ngaoho:)
" ... there is both life (ora) and death (mate) in that treaty .... The Queen stipulated in that treaty that we should retain the mana of our .... forests, fisheries, pipi grounds, and other things ... but now these words have been overlooked."

Hamiora (Te Arawa):
"I should be glad if this Parliament were to succeed in getting back the Native mana over the fisheries of the Island."

Kawatupu (Ngapuhi):
"The words of the Treaty are just and clear when explained, but they are not well defined ... what is meant by the rivers in which fish are caught, and which are the fish?

Do you suppose that we still possess those fisheries that were to remain with us by the words of that treaty. I think not. They have been taken away, in spite of the words of this treaty."

Makoare (Kaipara)
"I think we should ask the Government to allow us to retain our claims over the foreshore. I have seen for the last two years that the Europeans at Kaipara have gone over our lands, and have taken our fish, shells, and oysters without our permission. We only look on."

Paikea (Urihau)
"The Treaty says that the Maoris are to retain possession of their forests, and fisheries, and pipi-banks. The only right that the Queen took was the right to anchor, and the sea as far as low-water mark".

Tukere (Ngatipaoa)
"I object to the Europeans taking the fisheries where the flounders were caught, and stealing my mussels ... I think we ought to have authority over all our lands, as well as the foreshore, and over all the fisheries."

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285 Ibid.

17.21 The Parliament passed a number of resolutions, not all of which were translated into English in the official report. Some of these are significant for the present purpose. Thus -[286]

> "7. Ma tenei runanga e whakamana ko nga mahinga ika me nga kopua mango kei nga iwi Maori ano te mana." (That this assembly asserts the mana of the Maori people over their fishing grounds and deep water shark.)
>
> "8. Ma tenei runanga e whakamana ko nga mahinga patiki, tuna kei nga iwi Maori ano te mana." (That this assembly asserts the mana of the Maori people over their flounder and eel fisheries.)
>
> "9. Ma tenei runanga e whakamana ko nga tahuna pipi, toka tio, kutai, paua, kina, tipa ki nga iwi Maori ano te mana." (That this assembly asserts the mana of the Maori people over their sandbanks of pipi, rock oysters, mussels, paua, kina and scallops.)" (p 30)

17.22 During the 1880s similar grievances over fisheries were raised at several large meetings at Waitangi and elsewhere in Northland. In 1885 Clendon, the Resident Magistrate at Whangarei, reported of one such meeting:[287]

> "The constant gathering and wholesale destruction by the Europeans of the oysters on the foreshore of the Bay of Islands is causing a considerable amount of uneasiness, the natives asserting a claim to the shellfish under the Treaty of Waitangi."

17.23 And Greenway, Resident Magistrate at Russell, complained -[288]

> "The Natives continue to occupy and waste much of their time at meetings to discuss political, i.e. "Treaty of Waitangi" questions .... great expectations ... are entertained by many, such as the return of all confiscated lands, also the foreshores, and various other rights, which they

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286 Ibid. The translations into English are not necessarily exact, but give the general meaning of the Maori.

287 (1885) AJHR G-2 p 7.

288 Ibid p 5.

consider they are entitled to under the provisions of the Treaty of Waitangi."

17.24 Aggrieved Maori were not content to complain at their own gatherings. In 1886 a petition was presented to Parliament by Wiremu Katene and 11,976 others (an astounding figure that must surely be a misprint). The petitioners complained that -

> "all their mussels and fisheries have been buried by the Europeans, and the land formed into townships in Auckland and other places. They say that these places were secured to them by the Treaty of Waitangi, in the year 1840. They pray that they may be returned to them in accordance with the provisions of that treaty."[289]

17.25 The Select Committee reported that:

> "The subject of the Maori rights to coastal and other fisheries present serious difficulties, and, as settlement progresses, these difficulties are likely to increase. The Committee recommends that the Government should, as soon as possible, institute a searching inquiry, and try to have the rights of the Natives defined and secured to them as far as possible. The Government is referred to the statement by Mr Hakuene, MHR, as evidence in this case. It shows the great value the Natives set upon these fishing rights."

17.26 In 1887 2 petitions from 8 Maori people were presented asking that "certain foreshores and sandbanks be vested in [Maori] for the purpose of obtaining food ... according to the Treaty of Waitangi". This may have been a sequel to the visit of Ballance to Whareroa: see para 17.14. The Committee recommended "that the question of foreshore rights be again referred to the Government for consideration".[290]

17.27 It was thus impossible for the Government to be unaware of widespread and strongly felt Maori grievances over the loss of their foreshore fisheries.

17.28 The reason these grievances surfaced when they did throws a good deal of light on the whole issue of fishing rights. Those who spoke at the great Kohimarama gathering in 1860 were not recorded as saying anything

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289 (1886) AJHR I-2 p 27.
290 (1887) AJHR I-2 p 1.

about violations of fishing rights.[291] Yet by 1879 they were a burning issue.

17.29 It is a reasonable surmise that an underlying cause was simple pressure on a resource that had previously been ample for all. By and large Europeans came to New Zealand for land, not for fish. Such fish as they needed could be obtained without affecting traditional Maori fishing. Indeed much of the Pakeha demand for fish was on the evidence met by Maori supplying a commercial market. Many sources refer to this. Thus -

> "In the early days of the Otago settlement, when the colonists depended solely on the Maoris for the supply of fish, it (barracouta) was very extensively used. It dries well, and is thus preserved in large quantities by the natives." R A Sherrin, Handbook of the Fishes of New Zealand (1886).

> "From a distance of nearly 100 miles, the natives supply the markets of Auckland with the produce of their industry, brought partly by land carriage, partly by small coasting craft, and partly by canoes. In the course of the year 1852, (a total of) 1,792 canoes entered the harbour of Auckland, bringing to market by this means alone ... 45 tons of fish ..." W Swainson, Auckland (1853).

> "The Maoris were the sole purveyors of peaches in those days [the 1860s]. They brought them from their settlements around the Hauraki Gulf in canoes or half-decked sailing boats ... The Maoris also supplied nearly all the fish that came into the town ..." H B Morton, Recollections of Early New Zealand (1925).

17.30 The surmise is supported by the fact that many of the earlier Maori complaints (and the first legislation) concerned oysters, a shellfish prized by both Maori and Pakeha. Not until much later did offshore fishing come into the argument. As European population grew, and occupied more and more of the shoreline, it seems likely that special protection for Maori shell-fishing was increasingly objected to. The settlers had brought in their mental baggage the belief that the foreshore and the sea were common to all for the purpose of getting fish. Some would doubtless have recalled with resentment the existence in Britain of exclusive and saleable fishing rights on stretches of river or lake. If regulation and

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291 Te Karere Maori (1860) Nos 13-18.

restriction of fishing there had to be, let it at least apply equally to everyone.

The Thames Goldfield Legislation

17.31 This is supposition, and the crisis came not over fish but over gold. The rush of miners and would-be miners to the Thames made some speedy action over title to foreshore land essential. Maori attitudes were strongly divided and a great deal of tension existed.[292]

17.32 The initial legislative response was the Goldfields Amendment Act 1868. Reciting the expediency of authorising and regulating mining for gold over lands still held under Native title, it authorised in section 8 regulations specially applicable to lands for which a title had been issued under the Native Land Acts, and land over which the Native title had not been extinguished, as long as the Governor had by lease, agreement or consent of the Native owners obtained powers to authorise mining. Section 9 provided that land abutting on such lands and lying below high-water mark was deemed to be land over which Native title had not been extinguished.

17.33 This was followed by the Shortland Beach Act 1869, which began its Parliamentary life as the Thames Sea Beach Bill, a Bill apparently promoted by the Auckland provincial government. A Bill of that name was introduced by Fox on 3 August 1869. Some doubts, he said, had been cast - [293]

> "upon the character of the Native right to land between high and low water-mark. There appeared to have been an idea that such land belonged to the Natives unless it had been conveyed to the Crown, and certain steps, based upon that idea, had been taken by the Native Commissioner at the Thames. It was proposed by this Bill to put the rights of the Crown and of the Natives respectively upon proper bases; but, while asserting the rights of the Crown, ample provision would be made against the Natives suffering any loss ... He thought that the question (1) of the right of the Crown to land between high and low water-mark, and (2) of the right of the Crown to precious metals, wherever found within the Empire, would not admit of any discussion. Those rights rested upon the very highest authorities, and he apprehended they would be admitted; so that it was

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292 Salmon, The History of Goldmining in New Zealand (1963).

293 6 NZPD 196.

only by grant from the Crown that such rights could be acquired by subjects."

17.34 The Bill was referred to a Select Committee, which reported - [294]

i until the question of the prerogative rights of the Crown, and of native claims in relation thereto, over the fore-shore and over precious metals in the Colony, are set at rest, it would be inexpedient to legislate upon the particular case of the Hauraki Gulf.

ii the Government should take the necessary steps to obtain the cession of the prerogative rights of the Crown, as above defined, over the fore-shore and precious metals in the Colony.

iii steps should be taken to arrange with the Natives for the control of the Thames Sea Beach by the Government of the Colony."

17.35 A new Bill of a holding character was introduced in the Legislative Council on 31 August, and a measure of the urgency that was felt is that it received the Governor's assent on 2 September 1869. It prohibited any private dealings with the foreshore land affected while preserving that part of the 1868 Act which declared it for the purposes of the goldfields legislation to be land over which Native title had not been extinguished.

17.36 The proceedings of the Select Committee disclose several points of great interest. For example, Mackay said in evidence that the Native Land Purchase Department took the view that the extinction of Native title over the mainland put an end to any rights over the adjacent tidal land. He was unaware of any cases in which the Government had wanted to use tidal land before customary title was extinguished over the adjoining land.

17.37 The value attached by the Maori to their foreshore rights came through in two eloquent petitions presented to the Committee. And once again we see the confusion in high places about the nature of paramount title, as if R v Symonds had never been decided see paras 15.55-15.69. The chairman, Swan, seemed to think that an Act inconsistent with the prerogative would be ultra vires. He asserted that the Native Land Court had no jurisdiction over

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294 (1869) AJHR F-7.

foreshore land and that no claim of ownership could be recognised. Dillon Bell likewise said that no recognition of a Native right could have any force or operation against the prerogative, and that legislation recognising any right other than the Crown's would be upset before the courts. (How this could be reconciled with several enactments from the Public Reserves Act 1854 onwards is not apparent.)

17.38 J C Richmond regarded the Treaty of Waitangi as ceding all prerogative rights to the Crown, but thought it would be unwise and impolitic to insist on it. The claims of the adjoining Maori owners had some force. Their equitable value was not inferior to their claims to terra firma. At the same time the prerogative rights, however fictitious, might be binding on the courts. So like the others he saw the solution in Imperial legislation.

17.39 What Richmond and Bell later said in the House is also of interest. Richmond had always believed the whole business of the Treaty of Waitangi to be a nonsense. Perhaps a little superfluously he disclaimed any undue partiality for the Natives. Nonetheless he saw the matter much more clearly than others.[295]

> "... at least seven years ago, we had done with any rights which, as men going into a wild country to subdue it, we might have previously possessed. Having thus, as he had pointed out, swallowed the camel, it seemed that we were now to strain at the gnat - that this wretched little strip of land on the Shortland beach was now, on the plea of prerogative rights unknown and incomprehensible to the Natives, to cause a renewed assertion of those beneficial rights which we had abandoned as to every other part of the Colony."

17.40 He proceeded -

> "it would bear argument before the Privy Council, whether the Crown ever did obtain, in this Colony, the same rights over the sea beach and over mines as the Crown possessed in the old country and in colonies acquired in the ordinary manner. The words in the Treaty of Waitangi upon which, as against the Natives, those rights were based, were very vague, and by no means certainly conferred any of what were called prerogative rights."

17.41 The real issue was one of policy -

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295 6 NZPD 903.

> "All the great ports of the Colony, for all present purposes, had been alienated by the Natives. There never was, in their minds, any doubt that, in alienating the terra firma, all that abutted upon it on the coast was also alienated, unless there was a special reservation. The fact that there was such reservation in some cases, showed that total alienation was the rule."

17.42 Bell opined that neither the Native Land Act 1862 nor any other legislation prior to 1868 intended Native title to extend over the foreshore. The fishery right, he added, undoubtedly existed but the Natives had not previously claimed any right to the foreshore.

17.43 The Committee also examined Williamson, the Superintendent of Auckland province, and one part of the transcript deserves to be quoted in full:[296]

> "Do you say the Government in former times have abstained from granting land on the sea beach? - Yes, they declined to give us as harbour endowment any land beyond a certain point. For instance, Chief Paul's land at Orakei was not recognised as Crown land. My opinion was that the whole of the fore-shore of that land should be regarded as Crown land.
>
> Do you know the reason of the Orakei land not being granted? Was it because the Government did not claim the right to the fore-shore, or do you think it was a question of expediency? - I think it was more a matter of expediency. There was a difference of opinion existing between Mr Swainson, late Attorney-General, and Mr Rochfort, who was then provincial solicitor to one of my predecessors in the Superintendency. Mr Rochfort contended that the Treaty of Waitangi having secured to the Natives their lands, forests, and fisheries, the Crown had no right to take any of the land below high water-mark for any purpose without having first extinguished the Native title to it. I never knew the Natives to urge that right themselves.
>
> I have always understood that pipi-beds were reserved? - Yes; it was the custom to reserve pipi-beds. I may mention that Mr Swainson advised that the land granted as harbour endowments should

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296 (1869) AJHR F-7 p 6.

> not be extended beyond the limits of the land belonging to the Crown abutting on the harbour. I believe that was a question of expediency altogether. I will not undertake to say what Mr Swainson's own opinion of it was, as it was not recorded. Mr Rochfort's opinion is recorded, and can be found in the Provincial Blue Books."

17.44 In the upshot, no attempt appears to have been made to seek Imperial legislation, or even the comfort of Imperial advice. In the Kauwaeranga judgment in December 1870 Fenton noted that Parliament had not settled the question by legislation since the Shortland Beach Act. Nor did it ever do so, at least directly. Not affected by the consolidating Mines Act 1877, the Act was repealed without any Parliamentary comment by the Mines Act 1886.

17.45 What did occur is also of interest. In 1872 Maori were claiming part of the Coromandel foreshore. The Colonial Secretary wrote that - [297]

> "it appeared that these claims were only the forerunners of others likely to be put forth extending over a much wider area, and embracing so large an extent of property that with a view to the necessary protection of the important interests involved it was desirable to place such restrictions as were allowed by law upon the action of the Court pending the passing of a declaratory Act by the Legislature."

17.46 Accordingly the Governor proclaimed in May 1872, pursuant to section 4 of the Native Land Act 1867, the suspension of that and the Native Land Act 1865 in all the territory in the Auckland province below high tide mark.[298] This would have prevented any investigation of title by the Native Land Court and the issue to Maori of any title derived from the Crown. It does not appear whether this proclamation was ever revoked. But in 1873 the legislation was repealed and replaced without any savings for proclamations issued under section 4. A later proclamation relating to the Upper Thames was subsequently revoked, the instrument reciting doubts whether the repeal of the 1867 Act left it still in force. The same would be true of the foreshore proclamation. It could have been revived under section 6 of the Native Land Act 1873, but apparently it was not.

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297 Quoted in Re the Ninety Mile Beach [1963] NZLR 461, at 479.

298 NZ Gazette (1872) 347.

17.47 One should of course note that a proclamation did not affect the status of the land as customary land. It simply stopped the Land Court from investigating ownership and issuing a freehold title.

The Riverton Dispute

17.48 These contentions arose in the South Island also. In 1874 the Land Commissioner Mackay visited Riverton to adjust a dispute with the Maori as to their rights to the foreshore contiguous to the Native Reserve. He was unsympathetic to any notion that they had any.[299]

> "it was pointed out that the custom hitherto respecting land between high and low watermark had been to consider that when the Native title was extinguished over the main land, that any supposed rights which the Native owners had over the tidal lands ceased. The rumours that had reached them from the North Island on the subject had reference to cases where the mainland was held under Native tenure; but even then the usufructuary rights of the natives over the tidal lands had not been allowed to interfere with the Crown's prerogative, which included, inter alia, the dominion of the foreshore. The Natives, on the assumption of British sovereignty over the Islands of New Zealand, became British subjects, and thereon all former dominion, if any existed, was extinguished; it was clear, therefore, that it was useless on their part to assert any rights antagonistic to the Crown's prerogative".

17.49 Mackay's arguments got nowhere with the Murihiku Maori; so he told them that any attempt to interfere with the general use of the beach by the public was at their own risk.

Crown Powers to Grant Land

17.50 The Attorney-General, Prendergast, had given a brief opinion (without reasons) in April 1872 to the effect that the Crown could make grants, whether of ordinary waste lands or lands below high water mark, only by virtue of legislative provision.[300] The request for this opinion arose from reclamations and railway works at Wellington and Dunedin and did not relate to Maori title.

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299 Report on Aparima Kawakaputaputa and Oraka Reserves (1874) AJHR G-5C.

300 12 NZPD 284.

17.51 His opinion was in line with the orthodox view of the law, which now appears firmly established.[301] However, the necessary statutory power was given by the New Zealand Constitution Act 1852 (UK), section 72, and later New Zealand enactments of a general character. Note that Prendergast drew no distinction between land above or below high water mark.

17.52 Already the Public Reserves Act 1854 had expressly conferred power to grant land below high water mark. The purpose of that Act, indicated in its preamble, was to hand over to provincial management land owned by the Crown which was held for various purposes of public utility of local concern. The principal provision empowered the Governor in Council to grant the Crown's interest in demesne lands to provincial Superintendents. Nothing was to prejudice or affect the right of anyone except Her Majesty in those lands, which would have included Maori.

17.53 In Committee a new clause was added.[302] The Governor in Council might similarly grant land reclaimed from the sea, and any land below high water mark in harbours, navigable rivers and along the sea coast, to a Superintendent or to such other person as the Governor in Council thought fit. A grant to anyone other than a Superintendent required a joint recommendation of the appropriate Superintendent and Provincial Council. All such grants were to be without prejudice to the rights of persons claiming a water frontage. (This had all the marks of an afterthought. The reference to other persons was out of phase with the scheme and stated purpose of the legislation.)

17.54 By 1874, the question of Maori rights over foreshore land had arisen in a different form. Reclamation had become a major issue. The Member for Southern Maori, Taiaroa, asked whether the reclamation of land below high water mark in the North Island was not in contravention of the Treaty of Waitangi. Sir Donald McLean answered that land below high water mark was granted to Provincial Superintendents under the 1854 Act and that when the Maori ceded land to the Crown all rights connected with them, such as rivers and streams, were also ceded. This begged the question of what had in fact been ceded, made no reference at all to the foreshore, and overlooked the saving of rights in the 1854 Act.[303]

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301 Cudgen Rutell (No. 2) Ltd v Chalk [1975] AC 520.
302 1 NZPD 393.
303 16 NZPD 508.

The Harbours Act 1878

17.55 A comprehensive Harbours Act was enacted in 1878. Section 147 provided:

> "No part of the shore of the sea or of any creek bay arm of the sea or navigable river communicating therewith where and so far up as the tide flows and re-flows nor any land under the sea or under any navigable river except as may already have been authorised by or under any Act or Ordinance shall be leased conveyed granted or disposed of to any Harbour Board or any other body (whether incorporated or not) or to any person or persons without the special sanction of an Act of the General Assembly."

17.56 The Act had nothing explicit to say about customary Native title, or extinguishing it, or about fishing rights. The only reference to the section in the Parliamentary debates was by Whitmore in the Legislative Council in the course of explaining its provisions. By one provision, he said, foreshores and land under the sea could be granted only by special authority of the General Assembly "for reasons that are obvious".[304]

17.57 One likely (and legitimate) concern was the effect grants might have on future or existing harbour works. On the face of it, the owner of foreshore land would be able to reclaim it. This could be contrary to the public interest, either by interfering with navigation or by affecting the harbour by obstructing tidal currents. Each case should therefore be judged by Parliament on its merits, if necessary after hearing evidence.[305]

17.58 But the section can be seen also as a somewhat tardy response to Maori foreshore claims at Coromandel and elsewhere. On its face section 147 was limited neither to harbours nor to harbour boards, and prevented any further grant of Maori freehold titles by the Native Land Court such as had occurred in Whakaharatau. Both propositions were upheld in Re an Application for Investigation of Title to the Ninety Mile Beach (Wharo Oneroa a Tohe).[306] But equally as a provision limiting Executive power it could have been argued not to override Maori customary title as recognised by statute.

17.59 However, the Harbours Act was preceded and followed by numerous cases of "special sanction" whereby

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304 28 NZPD 214.

305 Letter of 14 October 1869 J M Balfour to Postmaster General (1874) AJHR E 4 p 4).

306 [1960] NZLR 673.

foreshore land was either leased to or vested in fee simple in the numerous harbour boards that were then or later created. There was no express reservation of Maori interests except in one instance in 1917. See para 17.61. Again an argument could be raised that Parliament should not be presumed to have meant to transfer to a subordinate public body greater total rights than the Crown possessed, and that a presumption existed against inconsistency with the obligations resting on the Crown: see Mueller v The Taupiri Coal Mines Ltd.[307] No such argument seems to have been put forward; the theory about the nature of the Crown's right in the foreshore was not questioned. And such an argument today would have to run the gauntlet of such decisions as Inspector of Fisheries v Ihaia Weepu[308] (a case concerning river fisheries) where the transfer of title from the Crown to the Maori Trustee was held to have extinguished any Maori fishing rights.

17.60 The substratum in Canada is rather different because of section 109 of the British North America Act 1867 whereby Crown land passed to the provinces "subject to an interest other than that of the Province in the same", Indian rights clearly being such an interest: St Catherine's Milling & Lumber Co v The Queen;[309] Attorney-General for Quebec v Attorney-General for Canada.[310] In Calder v Attorney-General of British Columbia[311] the Supreme Court of Canada divided on the issue whether certain legislation and executive acts amounted to an effective extinction of aboriginal title. Three of the justices held that title continues to exist in the absence of a clear and plain intention to extinguish it. Guerin v The Queen[312] provides support for this view, which is clearly adopted in R v Sparrow.[313]

17.61 The 1 exception is both puzzling and instructive. Section 2 of the Whangarei Harbour Board Vesting Act 1917 reserved from the property vested in the Board "any Native land as defined by the Native Land Act 1909 and any Native fishing grounds and fisheries." Just what its proponents thought it meant, and who they were, and why (uniquely) it was there at all, is unknown. No reference to it occurs in Hansard. What is instructive about it is that in the Native Affairs Committee, to which the clause was referred,

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307 (1902) 20 NZLR 89.
308 [1956] NZLR 920.
309 (1888) 14 App Cas 49.
310 [1921] AC 401.
311 [1973] SCR 313, 34 DLR (3d) 145.
312 [1984] 2 SCR 335, 13 DLR (4th) 321.
313 (1986) 36 DLR (4th) 246.

Henare, member for Northern Maori, proposed the following addition:[314]

> "the full exclusive and undisturbed possession of which was confirmed and guaranteed to the Natives under the second Article of the Treaty of Waitangi."

17.62 As a matter of law, this would seem to have added little to the substantive provision. It simply recited the words of the Treaty as a subordinate clause.

17.63 The response was unequivocal. The Crown Law Office advised that the amendment should be strenuously opposed. The Crown had never recognised any right in Natives to own the foreshore between high and low water marks, and in Waipapakura the Court had decided that Maori as such had no communal or individual rights of fishery in the sea or tidal waters.[315] This advice was conclusive, as apparently was a like objection in the case of the Thames Harbour Bill 1907. Clause 4 of that Bill as introduced provided that:

> "Prior to the issue of the grant the Governor in Council may appoint one of the Judges of the Supreme Court to ascertain the just claims and rights of aboriginal Natives under the Treaty of Waitangi, which have not been satisfied and discharged, of and in the land authorised to be granted under this Act."

17.64 This was omitted in committee, but the only discoverable reference is a statement by Ngata that:[316]

> "Whether there is a definite pronouncement by Parliament that it recognises the Treaty rights of Maoris to their fishing grounds ... is a matter for the Crown Law officers to advise the Minister on."

17.65 At the other end of the spectrum is the Manukau Harbour Control Act 1911. Perhaps by oversight, this legislation unilaterally extinguished a title to a shellfish bed conferred by a Crown grant. The case is referred to in the finding of the Waitangi Tribunal on the Manukau Claim.[317]

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314 Marine Department files, subseries 3/2, Whangarei 1922-54.
315 Ibid.
316 142 NZPD 538.
317 Wai-8, July 1985, p 51.

> "the Whatapaka people were given an area of shellbank in the harbour near to their marae ... but the shellbank is no longer recorded on the certificate of title as being in their ownership. We think the title is correct because the people have lost the shellbank. Until 1878 the Maori Land Court could issue titles to tidal lands uncovered at low tide ... The Crown grant was issued pursuant to the Maori Land Court's determination of 1867 and the shellbank appeared on the provisional title that later issued. The effect of the Manukau Harbour Control Act was to vest all tidal land in the Harbour Board. This included ... the valuable shellfish bed that the people of the Whatapaka marae had owned ... the new title to the Whatakapa grant, which issued in 1921, omits reference to the shellbank on the grounds that the grant was superseded by the 1911 Act."

17.66 In passing, this seems to overlook the presumption that legislation does not apply retrospectively to take away vested rights.

17.67 Parata, the Member for Southern Maori, claimed in 1903 that:[318]

> "... along the coast of Otago, and right up to Akaroa, there are a number of fishing grounds that have been handed down to the Maoris by their ancestors, but have been overrun and made use of by everybody, including Europeans, in recent years. I do not object to the Europeans fishing at these places, but these reefs should be to some extent protected for the benefit of the Maoris; and there are other parts of the sea which are available for European fishermen to make use of ... the House should uphold the promises made by the representatives of the King, and carry them out."

17.68 It was following these remarks that an attenuated form of the repealed section 8 of the Fish Protection Act 1877 was inserted in the Sea Fisheries Amendment Bill - "Nothing in this Act shall affect any existing Maori fishing rights". What these "existing rights" were was left unanswered. If Wi Parata was applied they could not derive from the Treaty of Waitangi.

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318 126 NZPD 17.

Rivers

17.69 As has been seen (11.1-11.4), the legal basis of Maori fishing rights over rivers was different. However, the existence of fishing rights did not ensure that there would be fish to catch. Fish resources might be destroyed by the actions of other riparian owners, by damage from schemes undertaken by drainage boards and others, or the destruction of fish breeding habitats in other ways, and by the presence in streams of imported trout, which were protected by law and tended to displace the native species. Grievances expressed by the Maori related to each of these.

17.70 For example, in 1906 Maori living on the Ohinemuri River complained about the disastrous effects gold mining activities were having on the fishery:[319]

> "formerly the Ohinemuri river was a good fishing-place for eels and whitebait, and fish constituted an important part of their sustenances, now the cyanide deposits have destroyed the river as a fishing ground: that by the Treaty of Waitangi the fisheries of the Natives were specifically reserved ... "

17.71 The actions of the Kawa Drainage Board were the subject of litigation in 1914. The drainage operations of the Board had the effect of destroying the claimant's eel-pa, and also of rendering the swamp useless as a fattening-place for eels. The Native owners had from time immemorial drawn a great portion of their food supplies from the swamp and stream: Hone Te Anga v Kawa Drainage Board.[320]

17.72 The activities of river boards also engendered protest. The Land Court noted that Maori eel-weirs and other fish traps on the Wanganui River had been "indiscriminately and ... without any right or justification, destroyed or done away with to provide a passage for river steamers. Any protest of the unfortunate people who owned the eel-weirs remained unheeded".[321]

17.73 A similar instance occurred when the Waihou (Thames) River was cleared to make it navigable and it is described at length by J C Firth in Nation Making: a Story

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319 (1906) AJHR I-4 p 2.
320 (1914) 33 NZLR 1139.
321 Report of Royal Commission on Claims Made in Respect of the Wanganui River (1950) AJHR G-2 p 7.

of New Zealand.[322] Firth owned large areas of land in the Matamata district and his object was to make them accessible by river boats in the days before railway or roads had reached them. While his account of how he dealt with the objections of the Ngati Maru is doubtless tendentious, the result is clear.

17.74 This Maori grievance was still alive in 1885, when complaints were made to Ballance both about the clearing of the Waihou and the effect of steamers on its banks.[323]

17.75 Another set of grievances emerges from the reports of the Royal Commission on Middle Island (South Island) Native Land. In 1868 the Native Land Court had directed the observance of provisions for reservations in the 1848 deed between the Crown and the Ngai Tahu, by setting aside 212 acres for fisheries easements in Canterbury and 112 in Otago. "The fishery easements", said the Commission, "have been rendered worthless through acclimatisation societies stocking the rivers with imported fish. These are protected by special legislation."[324]

17.76 A further report of this Commission had more to say on the subject:[325]

> "The Natives at Waitaki ... are very badly off for food supplies ..., and, to make matters more trying they cannot fish in the Waitaki for eels or whitebait, owing to that river being stocked with imported fish.
>
> ...The importance now of setting apart fishery easements for the Natives [at Lake Ellesmere] is much greater than heretofore as they are gradually being deprived of all their former privileges in the settled parts of the country through the drainage of the land, as well as through all the rivers, lakes, and lagoons being stocked with imported fish."

17.77 The subject of such grievances does not belong merely to the past. For example, submissions to the Waitangi Tribunal hearing the Ngai Tahu claim have alleged that the diversion of upstream water for hydro-electric generation has adversely affected fishing in the Arahura River.[326] No opinion on the validity of this assertion

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322 (1890), 24.
323 (1885) AJHR G-1 p 38.
324 (1888) AJHR G-1.
325 (1891) AJHR G-7A pp 6-7.
326 Dominion, 2 December 1987.

can be expressed. But the allegation well illustrates the possibilities, the multiplicity of indirect ways in which fishing rights can in practice be impaired or destroyed.

17.78 In the United States the superior status of Indian treaty rights has enabled the courts to accommodate problems of this sort.[327]

> "the tribes' right to a fair benefit of their bargain continues to evolve. For example, the right to a fair share of the harvest may not be satisfied if the fish runs are so depleted that there are little or no fish left to be harvested ... Consequently, in "Phase II" of United States v Washington (1980) 506 F. Supp.187 Judge William Orrick held that the treaty right included a right to have the fish protected against environmental degradation. Although the Ninth Circuit ultimately ruled that establishing this principle in a summary judgment was impermissible, both prior and subsequent case law indicate that the treaty right can be successfully asserted in a variety of factual contexts to protect fish habitat. Thus it can stop construction of dams, change the operation of existing dams, and limit irrigation withdrawals to maintain river flows necessary for fish propagation."

17.79 The second problem was the resentment created by Maori exercise of rights of ownership which affected the use others wished to make of streams. Governments and public authorities were prepared to accept with equanimity the destruction of Maori eel fisheries by the drainage of swamp land belonging to others. They were less ready to acquiesce in, for example, Maori insistence on payment for floating timber through their property.

17.80 A decision of the Supreme Court about 1873 (Mohi v Craig[328]), that compensation must be paid to a Maori owner of eel fishing rights which were interfered with by timber floatage, was greeted with alarm. The jury complained that:

> "the law has in this case been made the instrument of spoilation and oppression, which shocks every sentiment of natural justice ..."[329]

17.81 They awarded only token damages and asked that the Legislature remedy this "intolerable wrong."

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327 Michael C Blumm in (1985-86) 22 Idaho L R 629 at 636.
328 Unreported: see 15 NZPD 1172.
329 Ibid.

17.82 Parliament obliged in 1873 by passing the Timber Floating Act which permitted the floating of timber down streams and rivers and the payment of compensation only for immediate damage to holders of rights in river beds. Several Maori MPs protested that the measure would unduly interfere with Maori eel weirs in rivers. Their objections, along with those of some European MPs who saw that a wide variety of non-Maori property interests would also be affected, were overruled.

17.83 Equally disconcerting to settler interests were Maori claims, not just to fishing rights in rivers, but to their important corollary, rights to the bed itself. The passage of the Coal Mines Amendment Act in 1903 may have appeared to make this point merely academic, but if that legislation had extinguished Maori rights which previously existed, then there would be at least a moral claim to compensation.

17.84 In the long running dispute over ownership of the bed of the Wanganui River this vexed question was faced. After an exhaustive series of hearings before several courts and a Royal Commission, the Court of Appeal finally decided that Maori ownership of the bed was a simple matter of fact and the decision in each case rested with the Land Court.[330] However, once freehold Maori land on the banks of rivers was sold, so too was any right to the river bed. This meant in effect that even before the 1903 Act, most Maori fishing rights in rivers had been granted away.

Lakes

17.85 Although Maori ownership of lakebeds was not seriously questioned until the twentieth century, difficulties arose from the activities of settlers. Lake Wairarapa is a striking example. Here the settlers' interest in ending the periodic flooding of their lands on the shores of the shallow lake conflicted with the Maori need to keep the outlet to the lake blocked to maintain their eel fishery. The story of the actions of the local River Board in opening the outlet from the lake, and the overbearing pressure on the Maori owners of this vital fishing resource, appears in a Royal Commission report.[331]

17.86 One complaint to the Commission concerned the action of the River Board in trespassing and opening the mouth of the river at Lake Onoke. "This complaint," the Commission stated, "was a justifiable one in as much as the

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330 See In Re the Bed of the Wanganui River [1955] NZLR 419 and [1962] NZLR 600.

331 (1891) AJHR G-4.

property belongs to the Natives and the interference with their fishing rights is an infraction of the Treaty of Waitangi."

17.87 In its narrative the Commission referred to a tantalising ex parte judgment by Richmond J in Re Claim in Native Land Court of Hiko Piata and Ors to Wairarapa lakes: ex parte Piripi Te Maari.[332] He said that the Native Land Court was the only existing jurisdiction for ascertainment of Native custom; there was no reason why the Native Land Court should not issue certificates of title to rights of fishing as tenements distinct from the right to the soil which would then be in the Crown, and that the term "land" in the Native Land Court Act 1880 could have the extended meaning given by the Interpretation Act 1878: that is, including tenements and hereditaments.

17.88 The settlers turned to the Legislature for assistance, and were able to have the lake defined as a public drain, which the River Board had the power to maintain. In 1893 the Court of Appeal in Piripi Te Maari v Matthews[333] held that (trespass apart) the River Board had power to open the channel and keep it permanently open. The adverse affect on Maori fishing rights did not make the Board's action unlawful.

17.89 Ultimately the Crown took the lake bed in return for land given to the owners in the far distant Mangakino area.[334]

17.90 A later summary by (Sir) Francis Bell clearly expressed the prevalent Pakeha view:[335]

> "Drainage was only another example of the same principle. It was impossible to permit a Maori to ... prevent the reclaiming of swamp land and turning it into productive land. It was not alone the land immediately that must suffer for the public good; the whole of the land above and below it suffered if the drainage was to be held up by a lagoon or stream ... in the case of the Wairarapa Lake the Maoris did for many years so hold the lake until they recognised the necessity of settlers, and they then accepted full compensation."

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332 Ibid, document 78.
333 (1894) 12 NZLR 13.
334 Bagnall, The Wairarapa, an Historical Excursion (1975).
335 161 NZPD 1117.

17.91 Bell was speaking in reply to Parata on the Ellesmere Lands Drainage Amendment Bill 1912 where the same sort of question was raised. Their speeches once more typify the clash of values and a mutual incomprehension. In Bell's speech, the dominant official and popular attitude comes through with his customary lucidity. Maori rights of ownership are on exactly the same footing as European rights. Both must yield to the public interest, subject to compensation. The public interest in production was, however, identical with that of the settlers farming the lake margins; the private interests to be sacrificed were those of the tangata whenua for whom the lake had been a principal source of food for numerous generations.

17.92 Already in 1868 the Crown saw Maori interests as subordinate to development. Following his Kaitorete judgment, which held that an agreement between Ngai Tahu and the New Zealand Company (Kemp's Deed) gave the Company no rights but extinguished the Maori title in favour of the Crown: see paras 15.60-15.62, Chief Judge Fenton expressed the hope that the Government would give the Natives the fisheries reserves provided for in the deed "where available". Rolleston on behalf of the Crown agreed. But, he said, there was a stipulation the Crown insisted on - that eel weirs and fisheries should not interfere with the general settlement of the country.[336]

17.93 The dilemma posed by conflicting interests was again illustrated in the Report of the Rivers Commission on the Taieri River:[337]

> "Your Commissioners cannot conceive that such a consideration as fishing rights in a lake which is almost dry, and which therefore could have no commercial value to anyone, should be allowed to weigh against the enormous benefits ... which would accrue to the settlers and the State if the Maori Lake were utilised for the purposes herein indicated, and in which capacity it would do a service infinitely greater than ever it will do as a fishing-ground for Natives."

17.94 Therefore it proposed, "even in opposition to strict justice, to take the lake and pay the Maoris some compensation in order to wipe out their opposition for ever".

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336 A Compendium of Official Documents Relative to Native Affairs in the South Island; (1872) p 211.

337 (1920) AJHR D-6D, p 12.

The State of Settled Policy in 1920

17.95 The position established by the time of the First World War was that the Crown owned the foreshore to the exclusion of the Maori. Any Native fishing or other rights there might nonetheless be (and Waipapakura strongly indicated there could be none) ceased when customary title was extinguished over the adjoining land. The individualisation of title (which is what the Land Court was set up to achieve) had the same effect unless foreshore land was expressly granted as Maori freehold land. That in turn was prevented by the Harbours Act. In any event the grant by the Crown of foreshore land to harbour boards or others was inconsistent with the recognition of Native rights and thus overrode them. Any assertion of exclusive title by the Crown was conclusive and not reviewable by the courts.

17.96 The situation seen through Maori eyes is summed up in a 1976 paper by P Hohepa:[338]

> "Nowhere in the transaction between Maori owners and the Crown, or the Crown's agents, or legitimate buyers, have I found evidence that large numbers of Maori owners ever gave up their wish [not ?] to individually or collectively surrender fisheries. There is ample evidence in this regard of wishing to alienate land, forest and the rights to lakes and riverbeds but such surrender of the water areas is often accompanied by continuing special fishing rights."

17.97 A close examination of the legislation and the judicial decisions and their associated history makes it difficult to disagree with this. Neither fishing rights nor property in fishing grounds were extinguished by express legislation or by any process of law. Nor were they formally confiscated. They simply vanished, and under the law declared by the courts they were non-existent.

17.98 In essence the Maori people were promised full and exclusive possession of all their lands and fisheries as long as they wished to retain them. The document they actually signed assured their retention of "rangatiratanga" over these things. But acceptance of the Queen's kawanatanga was held to mean that the custom of the realm of England, the common law, prevailed over Maori customs. By a rule of that law which "was unknown and incomprehensible" to them (J C Richmond - see paras 17.38-17.41 above) they lost their mana and their rights

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338 "Fisheries and the Maori People" presented at a seminar on Fisheries for Maori Leaders, August 1976.

over all their fisheries below high tide mark except to the extent that the Government might allot particular areas for particular purposes.

New Zealand Policy in Island Polynesia

17.99 New Zealand government actions in respect of its Pacific territories seem worth recording as a sidenote. New Zealand had been authorised by the Imperial government in 1901 to acquire the Cook Islands, most of which had been a British protectorate since 1888. Pursuant to an Imperial Order in Council of 13 May 1901 and a proclamation by the Governor of New Zealand dated 10 June 1901 the Cook Islands and Niue were incorporated in the then colony of New Zealand, and Parliament thereafter made laws for that territory.

17.100 The first such law was the Cook and Other Islands Government Act 1901. Section 2 declared that the laws then existing, including the local laws customs and usages of the Native inhabitants, should continue in force until other provision was made. The Act contained no express recognition of Native property rights, but section 6 empowered the constitution of a tribunal to ascertain and determine title to land, distinguishing titles acquired by custom and usage from those otherwise lawfully acquired. (One may observe the implicit acceptance of the validity of aboriginal title.)

17.101 Shortly afterwards the status of the lagoon at Penryhn Atoll and its pearl fisheries came into question. In December 1903 the Attorney-General asserted that the lagoon and shell beds became Crown property by virtue of the Imperial Order in Council (ignoring the fact that this was an empowering and not a constituting document and overlooking also that Penryhn had actually been annexed by Britain in 1889). He opined, however, that questions might still be raised about the Natives' rights and that legislation was the best answer. When legislation was passed,[339] however, it simply authorised the taking of land for public fisheries among other stated purposes, subject to compensation as determined by the Land Titles Court. Despite the views of the Executive, lagoons appear to have been treated as subject to Native ownership in the same way as land above high water mark.

17.102 However, in 1914 a very comprehensive Cook Islands Bill was introduced and passed the following year with minor changes. We know that this Bill was drafted by

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339 Cook and other Islands Government Amendment Act 1904.

Salmond.[340] Part XII dealt with customary land. Sections 417 and 418 followed the pattern of the Native Land Act 1909. Every Order in Council declaring land to be free from Native customary title was conclusive. No alienation or disposition of land by the Crown could be challenged in any court on the ground that Native title had not been extinguished. But section 419 went further and was more explicit:

> "Native customary title, whether already judicially investigated or not, shall not extend or be deemed to have extended to any land below the line of high-water mark, and all such land, except so far as it may have been granted by the Crown in fee-simple before the commencement of this Act, is hereby declared to be Crown land."

17.103 When Western Samoa came under New Zealand rule, a similar provision was made for that country by section 276 of the Samoa Act 1921:

> "The foreshore - that is to say all land lying between high and low-water mark - and all tidal lands and waters within the limits of the Territory are hereby declared to be vested in His Majesty as Crown land free from any right title or interest in any other person, and subject only to the public right of fishery and navigation."

17.104 Obviously those who promoted this law were unwilling to permit any argument about claims that the indigenous people owned or had fishing rights over their foreshore lagoons. The prerogative as they interpreted it was to triumph.

The Continuation of Protest

17.105 Even though the law and government policies seemed to be definitively established by 1920, Maori grievances over fishing rights continued to be expressed. As time went by the perceived consequences of any reversal of the official stance became more far-reaching. An instance of financial fears surfacing occurred in 1946. Reference has been made above (paras 15.66-15.67) to the Maori Appellate Court's decision in the Ngakororo Mudflats case. The Court stipulated a very high evidential standard because of the consequences of recognising the claimants' title. Officials were also aware of those consequences, and one can sense the sigh of relief at the "right" decision. We

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340 Pomare in 170 NZPD 248.

find the Secretary for Marine writing to the Controller and Auditor-General on 2 May 1946:[341]

> "there was a much greater principle involved than either this small area of mudflat or the rental due [by the lessee to the Crown]. Had the natives succeeded in their claim, the principle that the bed of harbours and the adjacent foreshore had not been ceded to the Crown would have been established. This would have resulted in the payment of hundreds of thousands of pounds by the Crown to the Natives for all reclaimed land in the Dominion ..."

17.106 The story of the Manukau Harbour, the Waitara reefs and the shore at Orakei is given in the reports of the Waitangi Tribunal on those claims. Petitions regularly came before Parliament on the same subject.[342] In 1916 Wita Wepiha and 9 others of Whangapuru asked for "certain fishing-rights" to be confirmed to them. Three years later Hoani Te Hau Pere and 39 others asked that Lake Forsyth be set aside as a fishing reserve for the Ngai Tahu tribe. In 1923 a petition from Kaha Puhi and 37 others prayed "that Europeans be prohibited from netting certain fish in Kawhia Harbour". Tamaiwhuia Rawiri and 6 others in 1927 sought recognition of their fishing rights in the Hauraki Gulf, and in 1928 Te Aputa Ihakura and others called for the removal of restrictions on whitebaiting. In 1931 Korerehu Mihaka and 65 others, Tame Kerei and 34 others and Te Aika and 105 members of the Ngai Tahu tribe brought fishing grievances to the attention of the Marine Department and Parliament.

17.107 The prevalent view is again illustrated in the memorandum by the Minister of Marine, quoted at para 9.12, relating to Kawhia Harbour. It bears repetition in the present context.

> "It is recognised that under the Treaty of Waitangi the Chiefs and Tribes were to have the full exclusive and undisturbed possession of their fisheries.
>
> The fact is however that there never could have been any exclusive right to fisheries, and in any case the land which the Natives want set aside is mostly tidal land. These tidal flats are, as you are aware, Crown property in its common law right."

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341 Marine Dept file M1 4/675.

342 Most can be found in AJHR I-3 of each year.

17.108 The logic of the last part is difficult to follow. In fact oyster and other reserves had already been set aside under the Fisheries Act. Nor does the Minister seem to have been aware of the provisions of the Maori Councils Act 1900: see para 17.115.

Whanganui a Rotu (Napier Harbour)

17.109 In 1932 Hori Tupaea and others petitioned Parliament for redress in respect of the Napier Inner Harbour (Whanganui a Rotu). This area became dry land following the 1931 earthquake, but claims to it had already been brought in the Native Land Court in 1916. It had been vested in the Napier Harbour Board in 1874 and a certificate of title issued to the Board in 1929.

17.110 Under section 27 of the Maori Purposes Act 1933 the petition was referred to the Maori Land Court for inquiry and report, the inquiry being conducted by Judge Harvey. The first issue was whether the area had been included in the 1851 sale of the Ahuriri Block. The Court found that (contrary to the view of the 1920 Native Land Claims Commission) most of the area was never sold by the Maori. The 1851 deed was in Maori and that Commission's finding may have been based on a bad and incorrect translation. Even so, the Commission had suggested that there was doubt whether the Maori appreciated the full effect of the dealing, or its effect on the fishing rights "they were so anxious to retain". The Judge pointed out that counsel for the claimants in 1920 was not allowed to make a copy of the original deed.

17.111 On the footing that the tangata whenua had not agreed to part with the inner harbour area, did they have any rights in it when it was vested in the Harbour Board? In the Judge's view this depended in a large degree on whether the harbour was inland and non-tidal or an area of the sea. If the latter was correct, it would as the Crown asserted, and in accord with the orthodox view, belong to the Crown anyway, "subject perhaps to fishing and possibly other rights of the Maoris". Since he felt unable to reach any conclusion on this issue, he left the question open. It appeared, he said, that the Maori had some just and equitable rights arising out of the whole business, but had not established just what these were. So he proposed further consideration by the Government.[343] The petition was duly referred "for consideration". Nothing was done and the land is now the subject of a claim before the Waitangi Tribunal.

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343 (1948) AJHR G-6A.

Awapuni Lagoon

17.112 Another example of the law's working is that of the Awapuni Lagoon at Gisborne. Land around this coastal lagoon was dealt with by the Native Land Court in 1875 and titles issued. The lagoon itself, an area of 727 acres, came before the Court only in 1928 on an application by Maori who owned contiguous land and whose hapu had long used the lagoon as a source of fish. The Crown counter-claimed and the Court held that because the lagoon was tidal it was prima facie vested in the Crown. "That title can be ousted only by clear and substantive proof inconsistent with it." The applicants had asserted that until 1876 the lagoon had been a freshwater one. The question, said the Court, was whether its change in nature had been sudden, in which case former ownership would continue, or gradual. The burden of proof was on the Maori claimants. (This may have been a misapplication of the supposed presumption in favour of the Crown, the proper starting point being arguably the earlier Maori ownership of the lagoon.) But in any event the Court doubted whether it could grant a title because of the provisions of the Harbours Act. This appears correct.

17.113 There the matter rested until 1953. There was a plan to drain the lagoon. Floodgates have since been erected and the land drained.[344] To preclude the possibility that as dry land title over the former lagoon could be granted to Maori claimants, section 20 of the Reserves and Other Lands Disposal Act 1953 vested it in the Crown as Crown land. The preamble to the section recited that -

> "the lagoon bed was vested in the Crown subject to the rights, if any, of the owners of the adjoining land, and ... it is desirable that provision be made securing the title of the Crown ... against possible claims by adjoining owners in the event of the dewatering of the bed ..."

The "rights, if any," of the adjoining owners' vanished.

The Period Since 1945

17.114 The Maori Social and Economic Advancement Act 1945 empowered the Governor-General to set aside fishing grounds and shellfish areas for the exclusive use of any tribe or section of a tribe.[345]

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344 Ranginui Walker Nga Tau Tohetohe: Years of Anger (1987) p 61.

345 S 33.

17.115 The section's predecessor was section 16(10) of the Maori Councils Act 1900, which authorised Maori district councils to make bylaws:

> "For the control and the regulation of the management of all oyster-beds, pipi-grounds, mussel-beds, and fishing-grounds used by the Maoris or from which they procure food, and from time to time to close such grounds or to protect such grounds from becoming exhausted, and to make reserves for the protection and cultivation of such shell-fish or eels and to prevent their extermination, and to restock such grounds as are in danger of extermination or exhaustion".

17.116 This had the appearance of a very wide recognition of Maori control over their foreshore (and perhaps off-shore) fisheries. However, there was a proviso that rules, regulations and bylaws made under section 10 were not to conflict with any Act dealing with the same subject matter (eg, fisheries and harbours legislation). Moreover they first had to be submitted to the Governor for approval.

17.117 Section 4 of the Maori Councils Amendment Act 1903 empowered the Governor in Council for the purposes of section 16(10) to reserve any oyster, mussel or pipi bed or any fishing ground exclusively for the use of Maori of the locality or of such Maori hapus or tribes as might be recommended. The Governor might take the requirements of residents into account.

17.118 Despite this history, several speakers in the Parliamentary debate on the 1945 bill expressed reservations about what became s 33.[346] One member worried that there might be an infringement of Crown rights. The possible exclusion of Pakeha fishermen was a common theme. The chairman of the Select Committee was confident that the Governor-General would see that the Maori received a fair share, but not to the exclusion of Pakeha rights.

17.119 By 1948 requests had been made for reserves in 5 areas - at Mokau, Raukokore, Waiuku Estuary, Matakana Island and Whangaruru Bay. These were not well received by the Marine Department. The Secretary of Marine saw the provision as undesirable and invidious.[347]

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346 272 NZPD 468.

347 Marine Department file M1 2/12/517.

> "The policy of this department", he wrote to the Undersecretary of Maori Affairs, "has always been that where a ... shellfish bed was situated near to any Maori village commercial exploitation was prohibited ... [The Fisheries General Regulations 1947] do in effect reserve these fisheries for the Maori people nearby but at the same time do not reserve them exclusively ..."

17.120 He reiterated the principle that had been followed, that -

> "the taking of fish or shellfish for one's own domestic consumption be permitted in areas in the vicinity of Maori villages. This protects the fishery ... from commercial exploitation and at the same time precludes the possibility of unsavoury repercussions that would most certainly arise if the area were reserved for the sole use of one section of the community only."

17.121 No reserves were created under the 1945 Act and section 33 was repealed without Parliamentary comment in the Maori Welfare Act 1962.

17.122 There is another provision outside the Fisheries legislation, section 439 of the Maori Affairs Act 1953. As amended from time to time it now reads in part -

> "(1) The Secretary may, by notice in the Gazette issued on the recommendation of the Court, set apart any Maori freehold land or any General land ... as a Maori reservation for the purposes of a village site, marae, meeting place, recreation ground, sports ground, bathing place, church site, building site, burial ground, landing place, fishing ground, spring, well, catchment area or other source of water supply, timber reserve, or place of historical or scenic interest, or for any other specified purpose whatsoever.
>
> (2) The Secretary may, by notice in the Gazette issued on the recommendation of the Court, declare any other Maori freehold land or General land ... to be included in any Maori reservation, and thereupon the land shall form part of that reservation accordingly."
>
> "(3) Except as provided by subsection (12) of this section, every Maori reservation under this section shall be held for the common use or benefit of the owners or of Maoris of the class or classes specified in the notice. For the purposes

of this subsection the term "Maoris" includes persons who are descendants of Maoris."

17.123 Various offshore fishing grounds have been reserved under section 439. The number varies from district to district. However, as the inter-departmental committee's 1985 report[348] pointed out, the validity of such reservations in respect of areas below high water mark is very doubtful. For example Crown land is excluded from the definition of "general land"; nor does the section apply to any customary land that may remain.

17.124 A new section 439A was added in 1974 which enables the Maori Land Court on application by the Minister of Maori Affairs to recommend that any piece of land (including Crown land) "by reason of its historical significance or spiritual or emotional association with the Maori people" be set aside as a reservation under section 439. Whether that could be used to reserve sea fishing grounds has not been tested.

17.125 To complete the picture, it is to be noted that fisheries legislation provides wide regulation-making powers.[349] Among many other things, such regulations may apply special conditions or confer special rights in relation to fishing by specified communities. There are a few of these regulations, covering some foreshore and inland places, that directly or indirectly benefit Maori communities. Some of them go back for many years. None of them create any special regime of commercial fishing.

17.126 The most general is clause 27 of the Fisheries (Amateur Fishing) Regulations.[350] Its effect is to exempt from restrictions on amateur fishing fish taken for the purposes of a hui or tangi subject to prior notification of a Fishery Officer and to conditions that the Director-General of Agriculture may impose. The Fisheries (Auckland and Kermadec Areas Amateur Fishing) Regulations 1986[351] reserve certain oyster fisheries in Northland for Maori. Other regulations restrict commercial fishing in Northland harbours, a restriction that could benefit Maori[352] and prohibit non-Maori from taking eels in Lake Forsyth[353].

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348 Interdepartmental Committee on Maori Fishing Rights: First Report, Department of Justice, (1985), p 2.

349 S 89, Fisheries Act 1983.

350 SR 1986/221.

351 SR 1986/222.

352 Fisheries (Auckland and Kermadec Areas Commercial Fishing) Regulations SR 1986/216.

353 SR 1986/225.

Legislation relating to certain lakes provides fishing regimes that advantage Maori: paras 11.13-11.21.

17.127 In 1953 a petition was presented to Parliament providing for "complete and effective recognition of Ngati Kahungunu fishing rights". The Select Committee recommended that the petition be referred to the Government for inquiry "and that the fishing industry be investigated with a view to the conservation of fish supplies." The chairman thought consideration should be given to the reservation of fishing grounds for the Maori people "although perhaps not on a legal footing".[354]

17.128 The New Zealand Maori Council made submissions in 1971 to a Parliamentary Select Committee giving the Maori viewpoint on fisheries resources, and claiming indigenous rights to natural stocks of shellfish. It also expressed concern at the arbitrary impositions of quotas on certain species; this was said to penalise Maori living in rural areas who derived much of their food from the sea.[355]

17.129 In August 1976 a Seminar on Fisheries for Maori Leaders was held at Auckland. Many recommendations came from the 4 workshops set up at the seminar, of which those from group 2 are representative.

- That Maori committees and Maori wardens be given a statutory role within the Fisheries Act in the protection of natural shellfish resources in their areas.

- That the permit system for Maori huihuinga be amended so that district Maori councils, Maori committees and Maori wardens have some responsibility over the issue of permits.

- That there be closer scrutiny of the amounts obtained by permit holders.

- That the Minister of Fisheries be requested to introduce differing size requirements for paua in appropriate districts and to exempt mussels from size requirements in all areas.

- That Maori leaders be involved with fisheries officers in the use and protection of kaimoana (seafood) and the Fisheries Department be made aware of their willingness to assist.

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354 (1953) AJHR I-3 p 5.
355 (1972) AJHR I-14, p 41.

- That the number of commercial fishing licences be pruned and closely monitored.

- That New Zealanders have the first right to natural stocks of shellfish at a price determined by internal market factors and only the surplus to be exported for overseas consumption.

- That some natural shellfish beds be reserved for domestic consumption and others defined for commercial use.

- That a closed season be imposed in areas where shellfish stocks are depleted.

- That stiffer fines and penalties be imposed for violating fisheries regulations and closed seasons.

- That all raffling of seafoods in hotels and other places be made illegal.

- That the great concern of the Maori people regarding the direct flow of raw sewage, industrial waste and the discharge of incompatible water from power plants into lakes, rivers and seas be translated into a large scale protest and conveyed to the Government and relevant authorities to effect necessary changes for the protection of kai moana.

- If Maori are considering venturing into box nets, they should do so on a limited basis until more information is available on costs, productivity and suitability of box nets for New Zealand conditions.

- That the export of kina (sea eggs) and paua be prohibited until it is possible to farm these species.

- That heavier penalties be imposed by the courts for serious breaches of the regulations of the Fisheries Act.

- That no encouragement at this stage be given to the development of eeling as an economic activity.

17.130 More recently Te Runanga a Tangaroa, a body sponsored by the New Zealand Maori Council, passed the following resolutions at a hui held at Takapuwahia, Porirua, in December, 1985.

1. That legislation be derived from customary rights which predated and are enshrined in the Treaty of Waitangi.

2. That the te tino rangatiratanga (control) of all fisheries be vested in appropriate tribes.

3. That a Runanga Board be statutorily constituted to service all tribes in the management of their fisheries.

4. That the tribal information gathered at Takapuwahia Marae be the base date for the new legislation.

5. That a monitoring committee of Te Runanga a Tangaroa will closely scrutinise the implementation of legislation.

6. That as a temporary* measure:

   (a) All commercial fishing licences for the harvesting of kina, paua, mussels, cockles, kaiawa (river fishery), kairoto (lake fishery) be banned forthwith;
   (b) appropriate tribal representatives be appointed immediately to existing decision-making fishing authorities, ie, New Zealand Fishing Industry Board and Port Liaison Committees;
   (c) rahui processes required by tribal authorities be appropriately recognised by government and the New Zealand society;
   (d) the right to gather kaimoana for tribal hui be appropriately recognised by government.
   (e) tribal hui be an initial step in the machinery of legislation;
   (f) all kaimoana be protected from pollution;

   *These measures are deemed temporary so that they do not take away from the mana of a local tribe who may deal alone and have their own responsibility. The recommendations do not exclude any future management policy or concept.

Conclusion

17.131 The Maori people have never accepted the official view of their fishing rights, or been reconciled to the rejection of their claims. They saw the actions of governments, and by implication the decisions of courts, as a breach of the promises made to them in 1840. They

consistently used the ordinary procedures available to them for the redress of grievances with little success. Current claims and protests have simply been more sharply expressed and directed and have had the benefit of wide publicity. This is at least in part the product of the greater opportunity created by the establishment of the Waitangi Tribunal.

THE TREATY OF WAITANGI

The English Text

HER MAJESTY VICTORIA Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects who have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly authorised to treat with the Aborigines of New Zealand for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands - Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to her Majesty to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article The First:

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

Article The Second:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article The Third:

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.

THE TREATY OF WAITANGI

The Maori Text

KO WIKITORIA, te Kuini o Ingarani, i tana mahara atawai ki nga Rangatira me nga Hapu o Nu Tirani i tana hiahia hoki kia tohungia ki a ratou o ratou rangatiratanga, me to ratou wenua a kia mau tonu hoki te Rongo ki a ratou me te Atanoho hoki kua wakaaro ia he mea tika kia tukua mai tetahi Rangatira hei kai wakarite ki nga Tangata maori o Nu Tirani-kia wakaaetia e nga Rangatira maori te Kawanatanga o te Kuini ki nga wahikatoa o te Wenua nei me nga Motu-na te mea hoki he tokomaha ke nga tangata o tona Iwi Kua noho ki tenei wenua, a e haere mai nei.

Na ko te Kuini e hiahia ana kia wakaritea te Kawanatanga kia kaua ai nga kino e puta mai ki te tangata Maori ki te Pakeha e noho ture kore ana.

Na, kua pai te Kuini kia tukua a hau a Wiremu Hopihona he Kapitana i te Roiara Nawi hei Kawana mo nga wahi katoa o Nu Tirani e tukua aianei, amua atu ki te Kuini e mea atu ana ia nga Rangatira o te wakaminenga o nga hapu o Nu Tirani me era Rangatira atu enei ture ka korerotia nei.

Ko te tuatahi

Ko nga Rangatira o te Wakaminenga, me nga Rangatira katoa, hoki, kihai i uru ki taua Wakaminenga, ka tuku rawa atu ki te Kuini o Ingarani ake tonu atu te Kawanatanga katoa o o ratou wenua.

Ko te tuarua

Ko te Kuini o Ingarani ka wakarite ka wakaae ki nga Rangatira, ki nga Hapu, ki nga tangata katoa o Nu Tirani, te tino rangatiratanga o o ratou wenue o ratou kainga me o ratou taonga katoa. Otiia ko nga Rangatira o te Wakaminenga me nga Rangatira katoa atu, ka tuku ki te Kuini te hokonga o era wahi wenua e pai ai te tangata nona te wenua, ki te ritenga o te unu e wakaritea ai e ratou ko te kai hoko e meatia nei e te Kuini hei kai hoko mona.

Ko te tuatoru

Hei wakaritenga mai hoki tenei mo te wakaaetanga ki te Kawanatanga o te Kuini. Ka tiakina e te Kuini o Ingarani nga tangata maori katoa o Nu Tirani. Ka tukua ki a ratou nga tikanga katoa rite tahi ke ana mea ki nga tangata o Ingarani.

TREATY OF WAITANGI

The Maori text translated directly into English by Prof I H Kawharu

Victoria, The Queen of England, in her concern to protect the chiefs and subtribes of New Zealand and in her desire to preserve their chieftainship and their lands to them and to maintain peace and good order considers it just to appoint an administrator one who will negotiate with the people of New Zealand to the end that their chiefs will agree to the Queen's Government being established over all parts of this land and (adjoining) islands and also because there are many of her subjects already living on this land and others yet to come.

So the Queen desires to establish a government so that no evil will come to Maori and European living in a state of lawlessness.

So the Queen has appointed me, William Hobson a captain in the Royal Navy to be Governor for all parts of New Zealand (both those) shortly to be received by the Queen and (those) to be received hereafter and presents to the chiefs of the Confederation chiefs of the subtribes of New Zealand and other chiefs these laws set out here.

The First

The Chiefs of the Confederation and all the chiefs who have not joined that confederation give absolutely to the Queen of England for ever the complete government over their land.

The Second

The Queen of England agrees to protect the Chiefs, the subtribes and all the people of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures. But on the other hand the Chiefs of the Confederation and all the Chiefs will sell land to the Queen at a price agreed to by the person owning it and by the person buying it (the latter being) appointed by the Queen as her purchase agent.

The Third

For this agreed arrangement therefore concerning the Government of the Queen, the Queen of England will protect all the ordinary people of New Zealand and will give them the same rights and duties of citizenship as the people of England.

(Signed) William Hobson
Consul and Lieutenant-Governor

So we, the Chiefs of the Confederation and the subtribes of New Zealand meeting here at Waitangi having seen the shape of these words which we accept and agree to record our names and marks thus.

Was done at Waitangi on the sixth of February in the year of our Lord 1840.

The Chiefs of the Confederation

See Report of Royal Commission on Social Policy (1988) Vol 2, page 87

THE MURIWHENUA CLAIM

[see 1.1.1]

IN THE MATTER **of the Treaty of Waitangi Act 1975**

AND

IN THE MATTER **of claims by the Honourable Matiu Rata on behalf of himself and of the members of the Ngati Kuri Tribe; Wiki Karena on behalf of himself and the members of the Te Aupouri Tribe; Simon Snowden on behalf of himself and of the Te Rarawa Tribe: Reverend Maori Marsden on behalf of himself and on behalf of the Ngai Takoto Tribe and by MacCully Matiu on behalf of himself and on behalf of the Ngati Kahu Tribe; all claims also being on behalf of the following groups of Maoris namely Muriwhenua Incorporation, the Aupouri Trust Board, the Ngati Kahu Trust Board, the Parengarenga BC3 Trust, the Runanga o Muriwhenua Incorporation, the Te Rarawa Tribal Executive, the Ngai Takoto Tribal Executive and Murimotu II Trust.**

STATEMENT OF CLAIMS

1. That all or any of the abovenamed claimants are likely to be prejudicially affected—

(a) by the ordinances and Acts referrred to in Appendix A

(b) by the regulations, orders, proclamations, notices and other statutory instruments referred to in Appendix B

(c) by the policies or practices adopted by or on behalf of the Crown or proposed to be adopted by or on behalf of the Crown recorded in Appendix C

(d) by the acts done or omitted or proposed to be done or omitted by or on behalf of the Crown recorded in appendix D

and that such ordinances, Acts, regulations, orders, proclamations, notices, statutory instruments, policies and practices, acts and omissions were and are inconsistent with the principles of the Treaty of Waitangi and that appropriate relief by way of statutory and other amendment, change of policies and practices as proposed in such appendices and compensation or otherwise should be awarded.

2. That in the areas traditionally possessed by the claimant Tribes (being generally that area commencing at the Whangape Harbour on the West Coast and including all lands to the North including the Aupouri Peninsula, the Manawatawhi (Three Kings Islands), such areas extending

on the East Coast as far south as the Mangonui River (being generally the area within the Mangonui County) together with the traditional fishing grounds within a 25 mile band off the coast of the mainland and Manawatawhi the claimants are entitled to recognition and enforcement of their customary rights and for compensation or other relief in respect of their breach.

2A. That the Claimants make claim to the whole of the lands in the regions referred to in paragraph 2.

3. That the geographic area described in paragraph 2 and the activities performed or able to be performed upon or in respect of it by way of legislation regulations and Crown policy practice acts and omissions require to be examined within the perspective of the Treaty of Waitangi, to be altered as a result of past and continuing failure to comply with it; and that compensation be provided in respect of such failures of compliance as are not now capable of rectification.

4. That the region known as Te Rerenga Wairua be recognised as a national Taonga and be accorded due recognition in the legislation institutions and administration of New Zealand. That the Ngati Kuri and Te Aupouri Tribes be recognised as guardians of the Mauri of Te Rerenga Wairua, such recognition to be formalised by appropriate legislation and administrative procedures.

5. That exclusive title to and possession and use of the harbours, sea coasts, on-shore and off-shore fisheries (including claims to take the *Rawa-Whenua* and *Rawa-Moana* including shellfish and other marine life and other fauna) in the areas described in paragraph 2 are and should be recognised as among the Taonga of the claimants and given effect by legislation and administrative arrangements; and that since they have not been given effect in the past and to the extent that they cannot be given effect for the future that compensation be provided to the claimants.

6. That existing and past fishing legislation, policies, practices, acts and omissions on behalf of the Crown has failed to comply with and should be examined and reviewed in accordance with the principles of the Treaty, such legislation including Fisheries Act 1983, the Fisheries Amendment Act 1986, the Marine Reserves Act 1987, the Marine Pollution Act 1974, the Continental Shelf Act 1964, the Territorial Sea and Exclusive Economic Zone 1977, the Harbours Act 1950, the New Zealand Ports Authority Act 1968, the Town and Country Planning Act 1977, the Crown Grants Act 1908, the Public Works Act 198l, the Historic Places Act 1980, the Water and Soil Conservation Act 1967 and the Mining Act 1971; such policies and practices including the in shore fisheries management policies published February 1984, the Auckland Region Marine Reserves Plan published May 1985 and the Auckland Fishery Management Plan Phase l, June 1986; that the detriment caused to the claimants and their Tupuna be reviewed; that appropriate legislation and policies be adopted and that compensation or other relief for past and present breaches be provided.

6A. The Crown, in breach of principles of the Treaty of Waitangi

(a) has omitted or refused

(i) to investigate the scope, nature and extent of Maori fisheries and fishing rights; and/or

(ii) to record and maintain the record of the results of any such investigation; [and/or]

(iii) to establish and maintain systems for protecting such fisheries and enforcing such rights.

(b) has embarked on and implemented legislation, policies and practices, acts and omissions calculated to interfere with such rights; and as a result the claimants are likely to be prejudiced.

7. That the creation of Independent Transferable Quotas by current policy does not provide for the claimants, contrary to the provisions of the Treaty, and that relief should be accorded the claimants as follows:

(a) by recognising the exclusive rights of the claimants in the areas referred to in paragraph 2; and

(b) insofar as such exclusive rights are to be interferred with or withdrawn by granting the claimants compensation, including compensation by the grant to the claimants of quotas or other sufficient compensation in a manner conforming to maori custom and tradition

8. That the customary title and other rights of the claimants (including those of management and control) in respect of sea, harbour, coastal waters, coast line, fisheries, (on and offshore and including shellfish) lands, estates, forests, coal and other minerals in the area described in paragraph 2 together with all other rights and interests recognised by the Treaty in respect of the claimants' Tribal areas be recognised and confirmed and either restored by changes of legislation and other public documents and practices or made the subject of appropriate compensation (including compensation for past breaches) or both.

9. That in recognishing the proprietary and other claims of the claimants and in determining the appropriate method of affording compensation for loss of or impairment to customary rights the concept of guardianship by the claimants be considered.

10. That the impairment to wildlife by past policies and the failure to recognise Maori interests and rights be recognised and rectified for the future by appropriate policies with compensation for past or continuing breaches.

11. That the quality of the water of the streams, lakes, harbours and coast line of the areas described in paragraph 2 be reviewed and that impairment of such quality permitted by legislation or resulting from legislation regulations policies or practice acts or omission be rectified and that compensation be provided for past losses caused by breach of the principles of the Treaty of Waitangi and for such continuing loss as cannot be avoided.

12. That in respect of the Parengarenga Harbour and other areas similarly affected land use patterns be altered so as to restore the water quality and harbour standards to their original quality.

13. That the effect on the structure of the harbour of the silica sand operations be examined and appropriate measures taken to ensure that the ecology of the harbour and its physical structure are protected. Insofar as this is not achievable compensation be provided.

14. That the legislation and practices in relation to fishing and management of coastal and harbour lands (including farming and land development practices) by parties other than the claimants be examined with a view to restoring the original extent quality and character of fish and marine life (including shellfish) and failing such achievement to provide appropriate compensation.

15. That the relationship between the Aupouri Trust Board and the Crown in relation to the taking of silica sands be reviewed and that compensation be paid for any deficiency in equitable provision for the claimants.

16. That the spiritual significance of the Ninety Mile Beach be appropriately recognised in legislation and departmental practices.

17. That the title of the claimants to the Ninety Mile Beach be recognised and given effect.

18. That the customary rights to fish and to take shellfish from the Ninety Mile Beach be recognised and given effect.

19. That the claimants' rights to control and manage the Ninety Mile Beach be recognised and given effect.

20. That compensation be paid for the damage to the claimants caused by the licensing of commercial toheroa operations and the creation of a public highway along the Ninety Mile Beach. Compensation to be paid for any shortfall in restoration and for past losses.

21. That the causes of impairment of the quality of the Ninety Mile Beach, including the afforestation of Crown land adjoining it and the passing of traffic along it be examined and steps taken to restore the original condition of the beach, compensation to be paid for any shortfall in restoration.

22. That the depletion of fish life along the Ninety Mile Beach and elsewhere around the coast line be examined and measures taken to restore the same. Compensation to be paid for any shortfall in restoration and for past losses.

23. That the existing structure of administration, legislation and institutions including the Local Government Act, the Town and Country Planning Act, the Reserves Act, the Land Act, Water and Soil Conservation Act and the other Statutes referred to in the First Schedule be reviewed to determine the extent to which they fail to comply with the principles of the Treaty of Waitangi and that they be appropriately amended to take its principles and values into account and in order to bring Maori values into account in New Zealand life.

24. That the Historic Places Trust, Antiquities and other legislation at present in force be reviewed so as to recognise the Maori interests in Pa sites, burial sites and other features of significance (including those recorded in Regulation 38(3) of the Survey Regulations 1972 (SR 1972/264).

25. That the legislation as to Maori land tenure be reviewed and amended so as to:

(a) give effect to Maori custom and practice

(b) facilitate the investigation of Maori land issues

26. That the title of geographical features in the area referred to in paragraph 2 be reviewed and that any necessary amendment to the Geographic Board Act 1946 be made to facilitate such procedure.

27. That the nature of land tenure in:

(a) Te Rerenga Wairua

(b) the other areas of land within paragraph 2 thereof

be reviewed to give due effect to Maori values and the principles of the Treaty of Waitangi and any necessary statutory and other amendments be made in consequence.

28. That by reason of breach of the principles of the Treaty of Waitangi, lack of authority, breach of duty, unlawful or improper conduct affecting the Claimants, inadequacy of consideration the following parcels of land or shares should be restored to the Claimants and/or they be compensated for such breaches:

(a) The area of Cown Land known as "North Cape Scenic Reserve" including the Lighthouse Reserve; the land at Cape Reinga taken for defence purposes and for lighthouse purposes; the land at Te Reinga taken for defence purposes; Motu-o-Pao Island; Manawatawhi; the area known as "Taylors Grant", the shares in Te Neke block and Mokaikai block.

(b) The following parcel of land or shares in the area known as the Parengarenga lands being those lands, interests and shares in respect thereof the subject of the Parengarenga development scheme insofar as such lands, interests or shares therein were compulsorily acquired by the Maori Trustee. By way of relief the Claimants seek the return to the relevant Tribes of such lands, interests and shares without consideration.

(c) the area formerly known as Muriwhenua Block containing originally 56,000 acres

(d) the area known as Murimotu and that its royalties be accounted for to the claimants

29. That there be an enquiry as to the extent to which and the circumstances in which the original land of the claimants and their Taonga passed into other and particularly Crown hands; for restoration of such land as ought properly to be restored to the claimants and for compensation for the deficiency and for past exclusion from the area of difference.

30. The claimants claim return of the forestry lands, together with a review of the leases to the Crown of forestry lands and the consideration receivable in respect thereof; that the vesting of such lands in the Forestry Corporation and the policy of the Crown leading to such vesting, are prejudicial to the claimants and should be reversed; a reduction of the term of the lease to the duration of a single rotation; for payment of equitable remuneration; and for compensation in respect of any deficiency.

31. The claimants claim compensation in respect of the disruption of their Iwi; the social dislocation which has occurred as a consequence of

legislation and Government policies; and for the taking of measures dealing with the social issues of unemployment and loss of Mana; and for compensation by way of policies, practices and funding appropriate to restore the Mana of the Tribes; the education and training of Tribal members.

32. The claimants claim compensation for the costs of preparing and submitting the present claims.

33. If the Tribunal lacks jurisdiction to make appropriate orders as to costs and disbursements the claimants claim by way of relief amendment of the Treaty of Waitangi Act to empower such provision to be made.

DATED this 8th day of December 1986

This Statement of Claims is filed by Robert Gordon Whiting whose address for service is at the offices of Messrs Connell Lamb Gerard & Co., Rathbone Street, Whangarei.

APPENDIX A

Antiquities Act 1975
Burial & Cremation Act 1964
Continental Shelf Act 1964
Crown Grants Act 1908
Deeds Registration Act 1908
Fisheries Act 1983
Fisheries Amendment Act 1986
Forestry Encouragement Act 1962
Geothermal Energy Act 1963
Harbours Act 1950
Historic Places Act 1980
Land Act 1948
Land Draingage Act 1908
Land Transfer Act 1962
Local Government Act 1974
Maori Affairs Act 1963
Maori Vested Lands Administration Act 1954
Marine Farming Act 1971
Marine Reserves Act 1971
Mining Act 1971
Ministry of Agriculture & Fisheries Act 1953
Nature Conservation Council Act 1962
New Zealand Constitution Act 1852
New Zealand Geographical Boards Act 1946
New Zealand Planning Act 1982
New Zealand Walkways Act 1975

Public Works Act 1928 and 1981

Reserves Act 1977

Rivers Board Act 1908

Sand Draft Act 1908

Soil Conservation & Rivers Control Act 1941

Surveyors Act 1966

Swamp Drainage Act 1915

Territorial Sea and Exclusive Economic Zone Act 1977

Town and Country Planning Act 1977

Water & Soil Conversation Act 1967

Animals Protection & Game Act 1921–1922

Crown Grants Act 1866

Harbours Acts of 1866, 1878, 1908

Land Acquisition Emergency Regulations 1945

Land Acts of 1892 and 1908

Native Lands Act 1862, 1865, 1867, 1873, 1886, 1894, 1909

New Zealand Land Claims Ordinance 1841 & Victoria Session I No.2

Native Land Courts Acts of 1862, 1865, 1867, 1873, 1880, 1886 & 1894

Native Lands Frauds Prevention Act 1870

Reserves & Domains Act 1953

Waste Lands Act 1858, 1875

State Owned Enterprises Bill (in course of enactment)

APPENDIX B

Motuopao Island

1. Action in notifying Native title extinguished over "the islet adjacent to and situated to the north-west of Cape Maria Van Dieman and bounded on all sides by the sea, Refer Gaz 1875 p.181.

2. Reserving to H M the Queen by order in Council pursuant to the provisions of The Waste Lands Act 1858 the island now known as Motuopai Island. Refer Gaz 1875 p.18l.

3. Changing pursuant to the provisions of the Reserves & Domains Act 1953 the status of the reserve from a reserve for lighthouse or other purposes of the General Government to a reserve for the preservation of flora and fauna.

Three Kings Islands

1. Proclamation 4 July 1908 declaring Three Kings Islands as Crown Lands reference in Gazette 1908 p.1815.

2. Declaration of Three Kings Islands as a Sanctuary referenced in Gazette 1930 p.666.

3. Setting apart Three Kings (Manawatahi) as a reserve for the preservation of flora and fauna, Gazette 1956 p.39.

Ninety Mile Beach

1. Declaring beach to be a public road.

Muriwhenua

1. Acquiring Te Neke Block in 1968 and declaring land to be Crown Land pursuant to Gazette Notice 1969/107.

2. Lack of enforcement and lack of recognition of the provisions of the Native Lands Frauds Prevention Act 1870 and improper care and duty by Crown Commissioner appointed under the Act.

3. Registration of land transactions in title system by the Crown and its agents when such transactions were invalid due to lack of jurisdiction by the Crown.

4. Improper use of the provisions of the Public Works Act 1928 and the Land Acquisition Emergency Regulations 1945–refer Gazette Notices 1944 p.357, 1945 p.568 and 1945 p.1555.

5. Setting apart land for recreation reserve—refer Gazette 1984 p.2925.

6. Declaring certain lands at Cape Reinga for lighthouse purposes—refer Gazette 1983 p.485.

7. Gazetting land at Cape Maria van Dieman for lighthouse purposes—refer Gazette 1981 p.1904.

Whangakea Block

1. Setting apart block as recreation reserve subject to the provisions of the Reserves Act 1977—refer NZ Gazette 26.7 1984 p.2862.

Taylors Grant

1. Granting to Richard Taylor that area of land known as "Taylors Grant" comprising some 852 acres and referred to in Deeds Index I H 600 such grants being made by the Crown and its agents without authority such land being already occupied and owned by Maoris.

2. Setting apart the land as a recreation reserve pursuant to the provisions of the Reserves Act 1977—refer Gazette Notice 1984 p.2862.

Murimotu

1. Actions of the Native Land Court under the provisions of s.107 of the Native Land Act 1873 ordering 1706 acres and referred to as Murimotu No.1 to be ceded in Her Majesty Queen Victoria.

2. Actions of the Native Land Court under the provisions of s.107 of the Native Land Act 1873 in limiting in number to three, the owners of the land known as Murimotu No.2.

3. Action taken in July 1879 declaring Murimotu No.1 to be waste lands of the Crown, refer Gazette 1870 p.966.

4. The reservation of the site for lighthouse comprising some 351 acres (North Cape lighthouse)—refer Gazette 1879 p.1591.

5. Issuing mining licences in the area defined by SO.54360.

6. Reserving s.1 Block v North Cape S.D. as the North Cape Scenic Reserve—refer Gazette 1964 p.1179 and as a Scientific Reserve—refer Gazette 1980 p.3327.

Mokaikai

1. Actions of the Native Land Court under the provisions of the Native Lands Act 1873 granting 10823 acres known as Mokaikai Block to Francis Sinclair.

2. Registration of land transactions in title system by the Crown and its agents when such transactions were invalid due to lack of jursdiction by the Crown.

3. Classifying land as Scenic Reserve subject to Reserves Act 1977—refer Gazette 2.8 1984 p.2925.

APPENDIX C

1. Auckland Region Marine Reserves Plan

   Prepared by Fisheries Management Division

   Ministry of Agriculture & Fisheries

   Auckland May 1985

As to proposals, implementation and enforcement of proposed marine reserves contained in this document.

2. Auckland Fishery Management Plan

   Draft Discussion Paper Phase 1: Fin Fish

   Prepared by Fisheries Management Division

   Ministry of Agriculture & Fisheries June 1986

As to proposals to restrict, prohibit and control the taking or management of fish as contained in this document.

3. Coastal Reserves Investigation

   Report on Mangonui County

   By Department of Lands & Survey 1980

As to reserve proposals contained in this document.

4. Te Paki

   Lands Use Committee Report

   Prepared by the Te Paki Land Use Committee

   Department of Lands & Survey June 1979

As to land use and management proposals contained in this report.

5. New Zealand Forest Service

As to future management and utilisation options and land tenure options for the forests and associated lands and facilities under the control of the Service and/or its successor.

6. Ministry of Transport

As to the issuing of licences for sand extraction.

7. Ministry of Agriculture & Fisheries

As to the issuing of licences for catching fish, gathering seaweed and other products of the sea and to the issuing of shell fish licences.

8. Other Government Departments or Agencies

As to the issuing of licences in terms of minerals including coal.

APPENDIX D

1. Any acts or omissions relevant to the matters pleaded being 1 to 31 inclusive in the Statement of Claims.

DATED 2nd June 1987

WAI-27

IN THE MATTER of Claims to the WAITANGI TRIBUNAL by HENARE RAKIHIA TAU and NGAI TAHU TRUST BOARD

AMENDED CLAIM

WESTON, WARD & LASCELLES
SOLICITORS
CHRISTCHURCH

DMP1/D

WAI-27

IN THE MATTER of Claims to the WAITANGI TRIBUNAL by HENARE RAKIHIA TAU and NGAI TAHU TRUST BOARD

AMENDED CLAIM

WHEREAS the Claimants have already filed claims dated respectively the 24th November, 1986 and the 16th December, 1986 AND WHEREAS both those claims were accompanied by schedules AND WHEREAS they are now requested to particularise those claims

THE CLAIMANTS SAY:-

THE CLAIM

From 1840 to the present day the Crown has, in respect of the Maori people, their land, their culture and their well being, consistently acted in ways contrary to the Treaty of Waitangi, and therefore has been and remains in breach of the Treaty and its principles.

The multiplicity of the Acts complained of and the extent of the lands involved, together with the range of cultural and social grievances is such that, short of calling the evidence to be presented at the hearing of the claims, it is not possible for the complainants to succinctly state their grievances. For this reason, the complainants are concerned lest any omission from this document should be held to deny them the right to later seek redress of grievance in respect of the omitted material. They therefore give notice that in the event of matters not covered by this document

arising later, they will seek leave to further amend their claims.

PARTICULARS

LAND

In 1840 the Ngai Tahu people owned virtually all of the land in the South Island south of a line drawn between Cape Foulwind in the West and White Bluff just north of Cape Campbell in the East. Today they own very little land. The acquisition of this land by the Crown and the subsequent sales to other owners, were contrary to Article 2 of the Treaty of Waitangi in that Ngai Tahu did not "wish or desire" to sell, nor were they "disposed to alienate" all of the land. Further, the prices paid for the various blocks were never "agreed upon" in the manner required by Article 2.

Land purchases apart, other Crown dealings with the land were contrary to Article 2 of the Treaty. In particular the Crown has:-

(a) Failed to allocate reserves which were an integral part of the agreements for sale and purchase of Ngai Tahu land to the Crown.

(b) Failed to allocate all the reserves required by the South Island Landless Natives Act 1906.

(c) Confiscated without compensation various reserves in the South Island.

(d) Appropriated to itself Ngai Tahu land without consultation or agreement and, in at least one case, namely Greymouth, without the knowledge of its Ngai Tahu owners.

(e) Without the consent of its Ngai Tahu owners has converted freehold land into Leases in perpetuity.

(f) Without the consent of its Ngai Tahu owners has fixed unrealistically low rentals for their leased lands.

(g) Without the consent of its Ngai Tahu owners has fixed unrealistically long rests between rent reviews in respect of their leased lands.

(h) Has refused to permit registration of land in the names of the Maori tribes and/or in other ways which would reflect Maori customary land ownership.

All these actions are contrary to the preamble and Articles 2 and 3 of the Treaty of Waitangi in that the Crown:-

(i) Has failed to "protect the just rights and property" of the claimants.

(ii) Has failed to "guarantee" to the claimants and their ancestors "the full, exclusive, and undisturbed possession of their lands and estates, forests and fisheries and other properties so long as they wished and desired to retain the same in their possession".

(iii) Has failed to "import" to their ancestors all "the rights and privileges of British subjects".

The land transactions giving rise to these

The land transactions giving rise to these breaches of the Treaty occurred at Horomaka(Banks Peninsula),Te Pakihi o Waitaha (North Canterbury),Kaikoura,Otakou (Otago),Murihiku(Southland) Rakiura (Stewart Island) and on Te Tai Poutini (West Coast of the South Island). The lands which the claimants seek to have allocated to them or which they seek to be compensated in respect of are largely described in a schedule lodged with the Claim dated the 16th.December,1986. It should be noted that that schedule is as complete as the data made available by the Crown thus far permits and the claimants give notice that the schedule will be extended as further necessary data becomes available.

MAHINGA KAI

According to the Treaty of Waitangi and later specifically confirmed by the Kemp Deed the Ngai Tahu people were guaranteed "the full,exclusive and undisturbed possession" of their kainga and mahinga kai, but the acts and ommissions of the Crown and agents of the Crown have in fact dispossessed Ngai Tahu of their mahinga kai.Ngai Tahu have thus been deprived of a major economic and sustaining resource in their mahinga kai including birding,cultivation, gathering and fishing resources. Since the issue of Treaty rights to mahinga kai,especially in respect of fisheries,is subjudice in the Muriwhenua Claim now proceeding in the Waitangi Tribunal it would be inappropriate to detail it further at this stage,but notice is given now that claim will be pressed for a share in the fisheries, including the commercial fisheries,of Te Waipounamu and for the recovery of or compensation for birding and other traditional resources of which Ngai Tahu have been wrongfully deprived.

CULTURE

From shortly after 1840 down until the present time, all legislation affecting the Maori people, (and therefore the claimants) has reflected a policy of assimilation. As part of this process the Maori has been required to adapt to a Westminster system of Central and local government which gives little or no recognition to Maori ways of performing these functions. Wherever the Maori and Pakeha cultures have been in conflict it is the Maori who has had to bend. The result is that Maori cultural and social patterns and values have broken down and the people have become confused and dispirited, with some now tending to seek radical remedies for Maori grievances.

The claimants seek a recommendation that the policy of assimilation be reversed. This would involve a substantial programme of legislative reform to all statutes which reflect that policy.

The claimants believe that the Treaty of Waitangi can be read for the principles which it spells out and for the spirit which underlies the whole document. The former are currently under consideration by the Court of Appeal so comment on them would be presently inappropriate. The spirit which underlies the Treaty, and the instructions given to those who wrote it, is a simple acceptance of the fact that we are two races. The Treaty is a partnership between those two races

and that partnership requires consultation, the absence of which is the root cause of all the grievances now held by the Maori people. The claimants therefore seek a recommendation that the Crown should now unequivocally give a public assurance that hereafter the Maori people will be consulted and listened to in all matters affecting them.

REMEDIES

Changes to Crown policies and attitudes have already been mentioned. These will need to be extensive and the detailed implementation of them will be difficult and may take a long time. The claimants believe that these changes are fundamental to the future of our country, and the only reason that they do not develop this aspect of the claims further at this stage is their belief that the changes will be largely uncontroversial if carried out with sensitivity.

The resolution of land based claims is quite another matter and is likely to be extremely controversial. For that reason it is important to state that the claimants acknowledge the sanctity of contracts and the provisions of the Land Transfer Act. Although they seek land as a partial remedy for their claims, they acknowledge that people who have bought or leased land for value cannot be dispossessed of it. Contracts arising from the operation of the State Owned Enterprises Act may be another matter, but that Act is currently under consideration by the Court of Appeal, so the claimants reserve their position in respect of it.

For these reasons the claimants seek the allocation of Crown Land to them. The lands which

are the subject of the claims have largely passed into private ownership and so other lands are sought in substitution. Any lands allocated to the claimants should be representative of the lost land in both character and geographic distribution. It may well be that any recommendation of the Tribunal should be limited to the kind and quantity of the land to be allocated leaving the identification of particular parcels for determination elsewhere. Alternatively, if the Tribunal is minded to recommend allocation of land, it might give an interim decision to that effect. The claimants and the Crown could then consult with each other and, hopefully, reach an agreement which they could present to the Tribunal for its approval.

The claimants recognize that complete compensation in the form of land may prove impossible. In that event they would seek compensation in the form of a mix of land and money. They have also considered whether they should claim interest on the money value of all disputed land from the date of the dispute down to the present day. At this moment they have not decided whether to make such a claim but hereby give notice of the possibility, so that those potentially concerned may take such steps as they are advised in case such a claim is finally made.

DATED at Christchurch this 2nd day of JUNE . 1987.

D.M. Palmer
Solicitor for the Claimants.

DMP1/D1-6

NGAITAHU MAORI TRUST BOARD

4th FLOOR, TE WAIPOUNAMU HOUSE,
127 ARMAGH STREET, TELEPHONE 67 154.
P.O. Box 13 042. CHRISTCHURCH 1.

16 December 1986

Mr S.M. Gracie,
Administration Officer,
Waitangi Tribunal,
Tribunals Division,
Department of Justice,
Private Bag,
WELLINGTON.

Attention: Dr M. Goodall

Dear Sir,

Re: Ngaitahu Land Claims - REF: WAI-27

In view of recent legislation passed through Parliament our substantive claim WAI-27 regarding Ngaitahu Lands is hereby amended to more particularly identify Crown and customary lands that are the subject to Ngaitahu Claims under Section 6 of the Treaty of Waitangi Act 1975.

The amended claim is delivered to your office by courier today and I ask that you notify interested parties accordingly.

Yours faithfully,
NGAITAHU MAORI TRUST BOARD

S.B. ASHTON
SECRETARY

SCHEDULE

A. We claim that that the refusal of the Crown to honour the allocation of "Tenths" in respect of the Otago Purchase renders that purchase invalid and contrary to the principles of the Treaty of Waitangi and merits remedy by

(i) the return to the descendants of the Maori owners of the land within the boundaries of the Otago Purchase of 1844 OR alternatively

(ii) the allocation of Crown land within the boundaries of the Otago Purchase equivalent to the "Tenths" and FURTHER that

(iii) that suitable compensation be provided for the loss of use of those lands since the date of purchase

B. That the lands specified in the Petition to Parliament of the Ngai Tahu Maori Trust Board dated 7 December 1979 be returned to the Maori owners and compensation provided for loss of use of those lands.

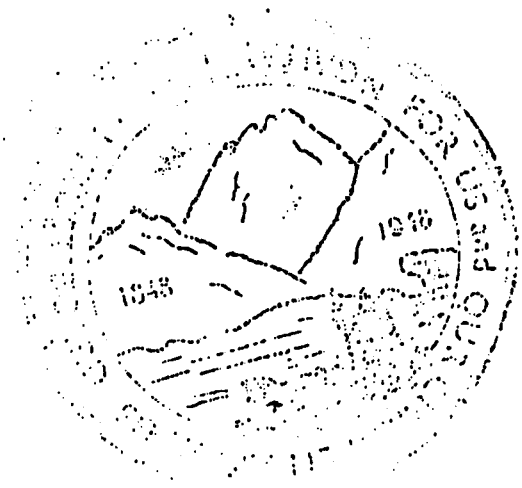
C. That the native lands reserved from the Kaikoura Purchase and later vested in the Hundalee Scenic Reserves Board and now administered under the Reserves Act and other Acts were improperly alienated and should be returned to tribal ownership.

D. That the lands reserved from the exhange about 1900 of Maori land Kaikoura for Crown land at Mangamaunu were improperly vested in the Crown and Public Bodies and should be returned to tribal ownership or appropriate compensation paid.

1. The Minister of Lands
2. Director-General of Lands
3. Department of Lands and Survey
4. Department of Maori Affairs
5. Ministry of Agriculture and Fisheries
6. Ministry of Environment
7. Ministry of Conservation
8. Royal Forest and Bird Protection Society
9. President, Federated Farmers
10. Federated Mountain Clubs
11. Deerstalkers Association

DATED this 21st day of November 1986.

SEAL OF THE NGAITAHU MAORI TRUST BOARD



Member

Member

Secretary

IN: THE WAITANGI TRIBUNAL

E NGA MANA, E NGA REO, E NGA KARANGARANGA O NGA HERENGA WAKA KATOA, TENA KOUTOU I RARO I TE MARU O TE MATUA TAMA WAIRUA TAPU ME NGA ANAHERA PONO. TENA HOKI KOUTOU NGA KANOHI ORA O RATOU KUA WEHE ATU KI TE PO HAERE. E NGA MATE, HAERE, HAERE, HAERE. HAERE KI TO TATOU MATUA I TE RANGI TE HUNGA ORA, TENA KOUTOU TENA KOUTOU, TENA TATOU KATOA.

HENARE RAKIHIA TAU and the NGAITAHU MAORI TRUST BOARD (a Maori Trust Board constituted by the Maori Trust Boards Act 1955) claim by way of amendment to the claim WAI-27

THAT:

1. The acts and omissions of Henry Tacy Kemp and other officials and agents of the Government of New Zealand in and after acquiring the lands of the Ngaitahu people have prejudicially affected the legitimate claims and rights of the Ngaitahu people.

2. The provisions of the Land Act 1948 and amendments affect the legitimate claims and rights of the Ngaitahu people to Crown Pastoral Lease lands lying within boundaries of land acquired from Ngaitahu by the Crown under Kemp's Deed and subsequent purchases and awards.

3. Proposed grants, transfers or sales of freehold title by the Crown to various parties affect the legitimate claims and rights of the Ngaitahu people to the lands referred to in (1) above.

4. That the particular claims specified in the schedule attached hereto are contrary to the Treaty of Waitangi and should be remedied

THAT these things are contrary to the Treaty of Waitangi

THAT the claimants are prejudiced as a result; and

THAT the claimants seek reform of these acts and policies

TO: The Registrar of the Waitangi Tribunal and to the following who should receive notice of this amended claim:

E. That the lands described in Kemps Deed ,otherwise known as the Ngai Tahu Purchase of 1848,and subsequent purchases and awards which should have been allocated as reserves under that agreement should be now allocated from Crown lands within the boundaries of that deed.

APPENDIX E

REPORT OF THE

MAORI MEMBERS OF THE JOINT WORKING GROUP

ON FISHERIES

TO MAORI AND CROWN

Sir Graham Latimer KBE
The Honourable Matiu Rata
Denese Henare
Tipene O'Regan

30 June 1988

REPORT OF THE MAORI REPRESENTATIVES ON THE FISHERIES WORKING GROUP

1 THE NEED FOR THIS REPORT

1.1 On 25 November 1987 a joint Working Group was established to report to the Crown and Maori by 30 June 1988 on

- how Maori fisheries may be given effect
- conservation and management of the fisheries in the interim
- a timetable for a transition process.

1.2 The negotiations not having reached resolution the Maori representatives presented an interim report to Maori through a hui representative of the Tribes held in Wellington on 24 and June. A copy of that interim report is attached. The report indicated proposals being put forward by the Crown members of the Working Group.*

1.3 The hui confirmed the view of the Maori members that Maori claim, through the Treaty of Waitangi, the full, exclusive and undisturbed possession of the fisheries of New Zealand. It supported and endorsed the approach of the Maori members that a settlement of the claim to all the fisheries was possible on the basis

- that Maori would make available to the Crown 50% of the fisheries
- that Maori would be confirmed in ownership of 50% of the resource
- that Maori would have equal say with the Crown in management and control of the fisheries of New Zealand and would receive 50% of the net resource rental received from the fisheries.

1.4 Following the hui's endorsement of the position of the Maori representatives, negotiations continued during the week beginning 27 June. They have been unable to reach agreement on the three points of critical importance to Maori, although there is much common ground.

1.5 The Maori members of the Working Group have always taken the view that they were required to

* Not reproduced in this appendix.

participate in a joint report to the Crown and Maori people. We have tried very hard to reach that position, even if there are to be, in the end, differences between the Maori and Crown representatives.

1.6. We accept that all individual members of the Working Group have tried honestly to reach a solution on matters of substance, and have all appreciated the importance for our country of the issues we have been discussing.

1.7 While the Crown has entered into negotiations because of the High Court declarations granted by Mr Justice Greig and based upon section 88(2) of the Fisheries Act, Maori assertion of their rights to the fisheries of New Zealand is not based on any Act of the New Zealand legislature or any legal advice as to the extent of the rights recognized by law. Instead, Maori rights are derived directly from the Treaty of Waitangi and have been asserted by our ancestors ever since the Treaty was signed. They have always been the ample rights explicitly recognized by Article II. They have never recognized any seaward boundary to the fisheries which are territorial, following the tribal land boundaries.

1.8 It was common ground that the settlement must be such as to give effect to the Treaty promise that te tino rangatiratanga in their fisheries was confirmed and guaranteed to the Maori people.

1.9 The concept includes authority, control and ownership over the resource and is represented in Rangatira of chiefs who led by virtue of their mana or personal and spiritual prowess. The word "mana" applies to both temporal authority and personal attributes.

1.10 The guarantee of rangatiratanga is distinct from sovereignty, conferred by Article I of the Treaty. In the present context a major element of rangatiratanga is the Maori property right in the fisheries, which like all property rights, such as ownership of land, is to be protected by the Crown, in exercise of its sovereignty. The Crown's residual power to interfere with such rights may be exercised only in special circumstances in the national interest and subject to appropriate safeguards.

1.11 The Crown members have sought to focus on the Treaty. But the Crown approach applies the term "rangatiratanga" to the fisheries in a sense unknown to Maori - as apt to describe a minority interest in a corporation controlled by the Crown in which Maori benefit is limited to receipt of a share of net resource rentals paid by holders of fishing quota.

1.12 The basic difference as to the meaning of what is a fundamental Maori concept has meant that Maori and Crown members have not yet achieved a joint report.

2 THE OPPORTUNITY

2.1 Maori members would like to have realised through the opportunity provided by the Joint Working Group a major improvement in Maori and Pakeha relationships for the lasting benefit of New Zealand society.

2.2 The issues we have been discussing have been burning ones since shortly after the Treaty was signed. The discharge today of the Joint Working Group does mean that the issues will go away. The kaumatua who brought their mana to the National Fisheries Hui emphasised the weight they place on the honouring of the Treaty guarantee of the fisheries and achieving resolution.

2.3 We greatly hope that the opportunity may still be seized.

3 CROWN PROPOSALS

3.1 The Crown have proposed

- Reversion of all ITQ.
- All ITQ are to be held by a corporation in which Maori will own 25% of the equity and Crown 75%.
- Other benefits assessed at 4% of the value of the resource.
- Maori are to have three directors and the Crown three with a Crown appointed chairperson. (Appointed after consultation with Maori.)

- The net income from resource rentals is to be divided on the same basis as the equity ownership so that 25% will be received by Maori and 75% by the Crown.

- The Corporation is required to act in a commercial manner, although Crown and Maori will owe duties of good faith to each other in the organisation, and will not itself operate quota but simply lease it out on a tender basis.

3.2 There are other aspects to the Crown's proposal which are discussed further below. They are not unimportant but the above elements capture the essence of what is offered by the Crown members to Maori.

3.3 The Crown members have advised that it is an essential ingredient of their proposal that resource rentals will be progressively raised to achieve the maximum economic return. They propose that this will be achieved during a five year adjustment period for the industry. The period of reversion for quota is proposed by the Crown members to be set after further negotiation involving the industry. Crown members have indicated that reversion at current market value would be extremely expensive and would lead to an unacceptable windfall to current ITQ owners. For this reason, as well as to allow the industry a period for adjustment, it is proposed that the process of reversion will be closely tied into the process of raising the resource rentals (since, at the end of that process, there should be no capital value in the quota).

3.4 Thus, if the Crown expectation were realized Maori could expect to receive substantial benefit after a period of approximately five years, although only in the form of monetary dividends.

3.5 The Crown members have arrived at a 25:75 split of the equity on the basis of

- The 1988 ratios between the value of the inshore and deep water fisheries.

- 100% of the inshore fisheries (in 1988 approximately 19% of the total value of the fisheries) and

- 12.5% of the balance of the fisheries (on the basis of the 1986 census Maori proportion of the total population).

4 MAORI MEMBERS' RESPONSE TO THE CROWN PROPOSALS

4.1 The Maori members do not accept that the Crown members' proposals achieve a result which is consistent with the Treaty of Waitangi because

- instead of "their fisheries" what is delivered is a monetary payment with no guaranteed access to the fisheries.

- the corporation model locks Maori into a minority position with Crown having control.

- Maori fisheries were exclusive, territorial and without seaward boundary so that Maori are entitled to 100% of the fisheries.

- There is no reasonable principle in the use of the 1986 population statistics formula for a share of the offshore fishery:

  1 The basis puts the Maori in the same position as the rest of the population in access to the deep sea fisheries whereas the Treaty confirmed property rights which would have permitted Maori to exclude others or to share with them upon terms.

  2 The Treaty would never have been signed on the basis of a measure of protection according to representation in the population because Maori interest would have been subject to erosion by the very event expressly contemplated by the recital to the Treaty.

  3 The population proportions have varied markedly and continue to do so (applying the proportions at 1840 for example leads to a very different result than the Crown members proposed).

  4 No regard is paid to the affirmative obligation of the Crown to protect Maori rights, by which Maori would have been placed in a materially better position had the Crown discharged its fiduciary responsibilities.

- It is not right to use the 1988 apportionment between the inshore and deepwater fisheries as the basis for

settlement. The relative importance of these has varied over time, and Crown members have advised there are no up to date figures to support the contention that the present TACs are appropriate guidelines.

5 THE PROPOSALS OF THE MAORI MEMBERS.

5.1 The Maori members have always taken the view that the I.T.Q. system, by assigning permanent property rights in the fisheries to non-Maori, is illegal and fundamentally inconsistent with the Treaty guarantee. That position is maintained.

5.2 In the spirit of the Treaty, however, and in order to achieve a settlement, Maori have been prepared to offer to the Crown 50% of the fisheries. This approach has been endorsed by the National Hui. It represents a substantial concession, for the purposes of achieving settlement, and is in itself an affirmation and exercise of rangatiratanga.

5.3 If a settlement can be achieved which delivers the Maori requirement of

- access to the fisheries for iwi and Maori (not just a share of the resource rental)
- equality with the Crown in ownership of the fisheries
- equality with the Crown in control and management of the resource

Maori members have indicated that they are prepared to consider any mechanism which may accomodate the respective needs of Crown and industry. We have taken the view, endorsed by the National Hui that injustice to Maori is not to be succeeded by injustice to the industry.

5.4 For these reasons, we are prepared to consider all options, even including a modified ITQ system by which Maori hold 50% of the resource and the Crown has the option to let out its share of the resource on an ITQ basis.

5.5 We have also proposed, at a late stage, an economic model prepared by Mr Stephen Jennings by which Maori 50% equity can be achieved over a period of time by a process which does not impose

a fiscal burden on the Crown. The Crown members have said that they have not had sufficient time to respond formally to the suggestion but that their personal and preliminary view is that it is a system which could meet Crown objectives also. It is suggested that the model should receive early attention as potentially it removes an impediment expressed by the Crown members to settlement.

5.6 We have attached the proposal we gave the Crown members on 23 June. We emphasised at the time that elements of the proposal were negotiable (in particular, the time for its implementation).

5.7 Crown members have expressed concern that Maori directors on the Commission would have a conflict of interest with the objectives of the Commission by reason of Maori ownership of quota. We believe that there are acceptable techniques for removing any such potential conflict of interest (for example, by the legislation or Articles of Association setting up the Commission) and have expressed willingness to work through these to any solution which removes this impediment. Maori members do not themselves wish to see conflicting objectives in the structures set up. We are advised that there is a potential conflict in any event in the model set up by the Crown members as a solution and that the conflict would, they propose, be managed by the sort of techniques we would contemplate.

5.8 We have thought further about our proposal after receiving the Crown members' reaction to it. We would be prepared to consider other options and indeed set out two options. We are prepared to work these options through to achieve a solution acceptable to the Crown although at present we believe that our initial proposal, if worked through, provides the best vehicle to achieve both Maori and Crown aims.

6 PRINCIPLES APPLIED IN PROPOSALS ADVANCED

6.1 The principles applied by Maori members in putting forward the following proposals are

6.1.1 To give effect to the Treaty of Waitangi

6.1.2 To provide for management and conservation of the fisheries which is in accordance with the Treaty and efficient.

6.1.3 To ensure Maori access to the fisheries for both commercial and non commercial use and to legitimate non Maori commercial and non commercial use of the fisheries.

6.1.4 To be fair in its achievement to all parties. It is accepted that there must be a period of adjustment for the industry. Maori members throughout have taken the view that they do not wish to be the cause of injustice to the industry. It is for this reaon that they have all along been prepared to wait to realize their fisheries. They particularly do not wish to be seen as the catalyst for reforms which the Crown seeks to introduce for the fisheries in any event. But it is also the view of the Maori members that Maori should not bear the cost of restructuring which would have been necessary in any event (for example the need, expressed by Crown members, in the National interest to raise resource rentals to an economic level). That cost should be born by the Crown.

6.1.5 To be durable. Maori members have approached settlement on the basis that it is important that there be an end to conflict. While members cannot bind future generations, it is the view of the Maori members of the working group that a settlement along the lines proposed would be lasting. (The Crown members have acknowledged that the Treaty rights cannot be modified by one generation and have proposed that the settlement bind for 25 years).

7 <u>PROPOSAL A (The proposal delivered to Crown members on 23 June 1988 and endorsed by the national hui subsequently)</u>.

7.1 It is proposed that management of the fisheries and their holding of the resource be split. The first function would be exercised by a corporate body (the Commission) in which Maori and Crown would have equal say. The functions of the Commission are to receive resource rentals and distribute them to shareholders (Crown and Maori in equal proportions) and to exercise the management and conservation functions formerly exercised by the Crown through Ministry of Agriculture and Fisheries. These are not

functions of sovereignty (as to which see paragraph 1.10). They are rather functions of property management just as the good husbandry of any resource (for example, land or forest) is a matter for the resource owner.

7.2 The Maori share of the fisheries resource (50%) is to be vested in a Maori corporate authority wholly owned by trustees upon trust for the tribes. (It is envisaged that the ownership of the resource will be that of the tribes and will be held by them directly once the process of transition is completed). For the purposes of settlement, it is suggested that the transfer of 50% of the resource may conveniently be achieved by transfer to the trust of 50% of the ITQ.

7.3 It is proposed that 10% of the fisheries should be transferred by quota to the Maori Trust body by the end of 1988. That quota could either be supplied by the Crown from its existing holdings or by acquisition from current quota holders. Thereafter quota is to be acquired by the Crown and transferred to Maori at the rate of 2.5% per annum until 50% of the quota is held by Maori. (That position will be reached in 16 years.)

7.4 The quota transfer to Maori will be non-transferable but able to be leased.

7.6 The ITQ repurchases should be approximately proportional to each species and each area with no distinction between inshore and deep water.

7.7 50% of new permanent quota will be issued without costs to Maori.

7.8 Species not subject to ITQ will be assigned as to 50% to Maori.

7.9 The Fisheries Commission will pay to Maori during the next 16 years dividends based on a true value of the resource (even though the resource rental may not in fact reflect that value). This is to ensure that Maori do not carry the cost of adjusting the resource rental to appropriate levels.

7.10 Where during the next 16 years it becomes necessary to reduce any TAC because the resource will not sustain the yield, the cost of reduction (payment of compensation) is to be born by the Crown. If ITQ's are to be converted from a tonnage figure to a percentage of the TAC for that

species, any compensation deemed necessary for the change shall be paid by the Crown. This provision is also to ensure that Maori do not bear the cost of a restructuring which is already accepted by the Crown to be necessary in any event.

8. PROPOSAL B

8.1 This represents a refinement of proposal A and aims to ensure that there is no fiscal disadvantage to the Crown in achieving the results sought.

8.2 The structural arrangements would remain the same as in proposal A.

8.3 Instead of a phase in period of 16 years, however, with Maori receiving immediately 10% of the quota Maori would waive receipt of an economic rental for their share of the resource for the period of restructuring. proposed by Mr Jennings to bridge the gap between the Crown's offer and the Maori insistence on 50% of the fisheries.

9 PROPOSAL C

9.1 If Maori objectives as set out above can be achieved, we are willing to discuss with the Crown a variation on proposal A (whether or not refined by proposal B) whereby ITQ would revert to the Commission (as in the Crown's proposal) but on the basis of 50% Maori shareholding in the Commission and on the basis of Maori being assured of 50% of the quota then leased by the Commission.

10 COMMENT ON FOREGOING PROPOSALS

10.1 Rangatiritanga of their fisheries could most simply be met by taking Maori property rights completely out of the private system of quota management. That would entail transfer of property in 50% of the resource to Maori (whether by permanent quota or by other method of partition as by territorial definition). That quota would be held and administered by Maori without payment of resource rental to the Crown. The management and method of allocation of the share afforded to the Crown by Maori would be a matter for the Crown.

10.2 Maori members of the working group have assumed that this solution would not be acceptable to the Crown as splitting the management of the total resource.

11 COMMENT ON CROWN PROPOSALS

11.1 We were supplied last evening with the Crown's proposals for a draft report. We do not attempt to review them. They have been discussed at length and carefully considered by Maori after receiving economic advice.

11.2 Apart from considerations already discussed we mention the following which are some of the matters of particular importance

- The relationship between a minority and a majority partner within a corporation almost invariably places the minority partner at disadvantage. Where their partner is the Crown which has responsibility for many concerns other than those of the particular interests of the corporation, the problem is compounded. We are advised that a deduction in excess of 30% of any minority shareholding would be required to allow for this factor.

- The expression of the Maori interest as a proportion not of the total resource but of the resource rental entails risk of the eventuality that an economic level of resource rental is not achieved. That could result from many factors.

- For these and other reasons an institutional model is acceptable to Maori only on the basis of equal sharing of its equity and control.

- The Crown's proposal entails taxation considerations which would place Maori at risk and benefit the Crown equivalently.

12 OTHER ELEMENTS

12.1 In the earlier part of this paper we have concentrated on the substantial matters in which it has not been possible to reach agreement. There have been, however, many matters on which we have ~~not yet~~ been able to agree either in whole or in large part. These matters include the need for public education; the desirability of dealing separately with fresh water fisheries; and the proposals as to distribution of benefits through the tribes.

12.2 Other important matters on which there is substantial agreement in principle require further work, including recreational fisheries; the proposals to rehabilitate small fishers excluded from the industry; arrangements for Maori control of local non-commercial fisheries; the application of existing legislation such as the Commerce Act, the Town and Country Planning Act and the Conservation Act; implementation of earlier Waitangi Tribunal recommendations on fisheries (for example the specific recommendations relating to the Manukau Harbour); interim arrangements and methods of implementation.

12.3 Training programmes must be provided for Maori to enable them to participate in the fishing industry.

12.4 The issue of the topic of compensation for exclusion from the fisheries and for damage to them by over-fishing is reserved. The tribes to be free to apply to the Waitangi Tribunal for relief.

12.5 We have no doubt that if the major issues which must now be addressed outside the working party can be resolved these and many other matters requiring attention can be dealt with without particular difficulty.

13 THE TREATY IN PERSPECTIVE

13.1 The recital to the Treaty emphasises its purpose- to protect the position of Maori in the circumstances of European immigration. Its consequences elsewhere were well known.

13.2 Prior to 1840 sovereignty was possessed by Maori. Maori also enjoyed rights of property in the New Zealand Fisheries. Those property rights were explicitly reserved by the Treaty and the Crown undertook to protect them. The reservation under Article 2 was a reservation of those rights by a sovereign people to protect their position when they assumed the status of subjects of the Crown. By its promises the Crown undertook to guarantee and protect these and other interests.

13.3 In 1840 the Crown obtained sovereignty of New Zealand; it did not secure the property in Maori land or fisheries. Nothing has occurred to pass that property right to the Crown.

13.4 For well over a century the promise was not given effect. Progressively the fisheries have been removed from Maori hands, the latest and ultimate development being the purported allocation to private interests of virtually the entire commercial fishery by the issue of individual transferable quota at the end of 1986 notwithstanding the advice of the Waitangi Tribunal that this was inconsistent with the principles of the Treaty.

13.5 On the eve of a proposed issue of further ITQ the Waitangi Tribunal delivered an urgent report on the basis of which the High Court of New Zealand on 30 September 1987 granted a declaration to the Muriwhenua Incorporation preventing the issue of further quota within their Tribal waters. Subsequently a further declaration was granted to Ngai Tahu, Tainui, Raukawa, Taranaki, Waiariki District Maori Council, Tai Tokerau District Maori Council and to the New Zealand Maori Council preventing the issue of any further quota throughout New Zealand.

13.6 The declarations led to the establishment of the joint working group which reports today.

13.7 The present right of property of Maori and their fisheries is of course altogether distinct from the grave losses - economic and social - suffered by Maori as a result of their past exclusion from enjoyment of their fisheries and from claims for damage done to the resource by over-fishing.

13.8 It is the earnest wish of the Maori members to achieve settlement which will allow Maori to take their place within the fishing industry alongside the Crown and existing members of that industry.

13.9 While it has not been possible to achieve this resolution in time for today's report the Maori members expect that the Crown will continue the initiatives which have been commenced and carried a considerable distance with a view to such resolution.

14 RECOMMENDATIONS

That the Crown agree in principle that Maori

- are confirmed in ownership of 50% of the fisheries of New Zealand

. are to participate with the Crown on an equal basis in management and control of the New Zealand Fisheries

and that the Crown agrees to work towards resolution of the proposals made by the Maori members of the Joint Working Group in this paper.

Sir Graham Latimer KBE
The Honourable Matiu Rata
Denese Henare
Tipene O'Regan

30 June 1988

REPORT OF THE

CROWN MEMBERS OF THE JOINT WORKING GROUP

ON FISHERIES

TO MAORI AND CROWN

Fred Baird

John Chetwin

Ross Sayers

The Hon Mr Justice Wallace

30 June 1988

REPORT OF THE CROWN MEMBERS OF THE JOINT WORKING GROUP ON MAORI FISHERIES

INTRODUCTION

1 In accordance with the provisions of the interim agreement of 26 November 1987 between the Government and the New Zealand Maori Council, the parties undertook to set up a joint committee to report to the Crown and to the Maori tribes and people by 30 June 1988:

- on how Maori fisheries may be given effect;

- on conservation and management of the fisheries in the interim;

- on a timetable for a transition process.

2 The Joint Working Group met extensively over the period January to June 1988 and developed a good measure of understanding on a wide range of issues relating to its terms of reference. It has not, however, been possible to reach agreement on several major matters and, accordingly, the Crown and Maori members are reporting separately.

3 This report, by the Crown members, outlines our approach to the principal order of reference - how Maori fisheries may be given effect - and sets out a proposal which we believe would achieve that end. Because discussions continued up until yesterday evening, this report has been prepared in haste and does not, therefore, deal with all issues in the depth we should have wished. It does nevertheless, in our view, point to a practicable way ahead.

General Approach

4 The approach we have adopted to the Joint Working Group's task has been driven by the Treaty of Waitangi and its principles. In this we have been guided by a number of sources, but particularly by the various reports of the Waitangi Tribunal, which is the body charged by Parliament with "exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them" (Section 5 (2) of the Treaty of Waitangi Act 1975).

5 We have also been particularly mindful of the words in the Tribunal's Te Atiawa Report, where they said:

> "The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place."

and later:

> "... The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.
>
> "We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to the broad principles."

6 The task of meeting those goals is no mean one. The goals may be mutually incompatible and our efforts may also be inadequate. But we have given the deepest thought to the problems and have tried to understand the Maori point of view - indeed the whole Maori perspective - because we believe that a willingness to do that has often been lacking in the past.

7 Thus our general approach has been to observe both the Treaty of Waitangi and its principles to derive a solution which is appropriate in this day and age, and which recognises both Maori rights and the requirements of modern fisheries management.

8 The Waitangi Tribunal Report on the Muriwhenua Fishing claim has been a significant factor in our deliberations. Crown members have endeavoured to apply the report fairly. We do not consider that either Crown or Maori members should adopt the report when it suits their views and decline to follow it when they do not agree with the findings or conclusions. We have found that the report is, in several areas, difficult to apply and there are differences of opinion between Crown and Maori members on the scope of the report. However, we should point out that there has been very limited time available for detailed analysis of the report. In these circumstances, we have endeavoured to take a broad rather than a narrow approach to the report, keeping at all times in mind the obligations of utmost good faith and reasonableness. Crown members also record that, in formulating our proposals we have not been constrained by political considerations.

9 As noted above, we have seen our central task as being to give effect to Maori rights in the fisheries and to design a practical scheme for expressing those rights. In doing so, we believe we have also taken account of the needs of the Maori tribes and people insofar as these are reflected in the Muriwhenua report.

10 The remainder of this report expands on our proposal of 29 June 1988, which is attached as Annex 1. *

BACKGROUND

Principles

11 In approaching our task, Crown members have had regard to a set of principles, which we believe must be considered in giving effect to Maori fisheries. Very briefly we believe any settlement should:

a meet the two Treaty concepts of kawanatanga and tino rangatiratanga, the second of which, from the Maori point of view, should allow for a Maori beneficial interest in the resource and for Maori participation in management and control. (These terms are described more fully in Annex 2.); *

b deliver good fisheries management, including conservation;

c be fiscally realistic and genuinely be used to assist Maori economic development;

d have regard to New Zealand's obligations under international law;

* Not reproduced in this appendix.

e maintain a strong and commercially viable fishing industry i.e., should not of itself damage the commercial viability of the fishing industry;

f be durable.

Participation by Maori

12 The central concern of the Crown members of the Joint Working Group in meeting its principal order of reference - how Maori fisheries may be given effect - has been to identify and develop an appropriate institutional mechanism for recognising Maori claims to tino rangatiratanga in terms of Article II of the Treaty, while still providing for effective management of the fisheries. Kawanatanga or sovereignty remains with the Crown.

13 Crown members consider that any solution must involve recognition of Maori claims to tino rangatiratanga. We believe that this can best be given effect by:

a Maori participation in the management and control of the fisheries;

b a Maori share in the fishery resource by way of a beneficial interest in it.

14 Until now, management and control of the fisheries have been regarded as a governmental (Article 1) function, carried out by a department of state - currently the Ministry of Agriculture and Fisheries. Recognising tino rangatiratanga by Crown and Maori sharing in the management and control of the fisheries would convert this into an Article II function. Such a move would, we believe, be consistent also with the trend in government policy generally in recent years whereby a number of departmental functions have been devolved onto independent organisations at arms length from the Government, but still subject to general legislative constraints.

Conservation and Management

15 The Government has a duty to ensure that the fisheries are conserved and managed in a way that will maximise their contribution to the wellbeing of the nation. This involves recognising all the values which the nation places on the fisheries. It must also involve recognition of our obligations under the Law of the Sea Convention.

16 The very nature of the fisheries resource, being common property, requires that, where there are different interests, the management of all the interests be undertaken by a single entity. That inevitably leads to the conclusion that Maori interests must be managed as a part of the whole and that a unified structure needs to be established in which the Crown and Maori together participate in the management of the whole resource. Separate control would be disastrous for the future of our fisheries.

Incentives to Manage the Fisheries

17 The other issue which has been of major concern in developing an institutional framework for giving effect to Maori fisheries is to ensure that all participants - Crown, Maori and the industry - have the strongest possible incentives to manage the fisheries in the best interests of the nation. This requires that each element of the framework have clear objectives and be fully accountable for its own role.

18 In particular, if Maori and Crown are to share in the management and control of the fisheries, it is essential that they share common objectives. We would see these as being summed up in the goal of maximising the long term value (net present value in economic terminology) of the fisheries including conservation. This, together with the requirement of a unified management and control structure, has led us to the conclusion that the principal form of collective Maori beneficial interest in the fisheries should be by way of a share in the net income stream rather than in quota. Some of the reasons for this are:

a there will be a conflict of interest in the management of the resource if a manager is also a major quota holder as of right;

b an important consequence of good fisheries management is that, in the long run, the benefits accrue to those who have the right to allocate the quota rather than to those who hold quota;

c when resource rentals are set so as to recover the full economic rent in the fisheries, quota will lose most of its monetary value;

d if quota to Maori is inalienable, a two-tiered market could develop which would be detrimental to sound fisheries management;

e for enforcement and conservation reasons, quota allocated to Maori could not be inalienable. On the other hand, a share of the income stream could be secure;

f as all rights in the fisheries are not covered by the quota management system, a share based on quota rights only would not be comprehensive.

19 A Maori share in the net income stream will give Maori and Crown the same incentives to optimise resource rentals and invest in conserving, enhancing and developing fish stocks. It would also give Maori the maximum flexibility in utilising the returns from their share of the fisheries resource, including the ability to purchase quota to gain access to fishing activity.

The Institutional Solution

20 The Crown members of the Joint Working Group have reached the conclusion that the solution which best meets both the principal order of reference for the Group and the principles enunciated earlier in this report is a new fisheries control institution, with commercial objectives, owned and managed jointly by Crown and Maori.

NEW INSTITUTIONAL ARRANGEMENTS

21 This new institution would provide the basis for giving effect to Maori participation in management and control and provide for a Maori beneficial interest in the fisheries. The institution would have the rights to fish in New Zealand fisheries waters vested in it. It would also be responsible for all aspects of fisheries management and as part of its core functions would:

a allocate the rights to fish, both through the Quota Management System and other management measures;

b allocate the marine domain for aquacultural development.

22 Details on the role and functions of the new institution and, in particular, how Crown members see the potential conflicts between commercial and non-commercial functions being addressed, are discussed in an attachment to Annex 1.

Maori Share in Resource

23 From the principles outlined earlier plus an acceptance of the principles and findings contained in the Waitangi Tribunal's Muriwhenua Fishing Report, Crown members have calculated a Maori share of New Zealand's marine fisheries. We note that assessment of such a figure has to take account of a number of variables and we have endeavoured to reflect the variables fairly in our assessment. The basis of the calculation is as follows:

a 100 percent of the inshore fisheries (defined as the fisheries out to 12 miles, which approximates the extent of the continental shelf) OR 100 percent of the fish species generally caught by Maori, both of which produce a figure of approximately 19 percent of the total fisheries;

b plus 12.5 percent of the balance of the fisheries i.e., the deep water fisheries, which represents approximately a further 10 percent of the total fisheries.

24 Crown members consider that this total of 29 percent of the fisheries is favourable to Maori in a number of respects. For example, the calculation both accepts 100 percent of the inshore fisheries as the Maori entitlement and applies that percentage to the whole of the New Zealand inshore waters: no allowance is made for the fact that Maori benefit, as New Zealand citizens, from activities of the Government which are funded in part from the Crown's share of the net income from the fisheries. These assumptions are more favourable to Maori than a strict interpretation of the Muriwhenua Report or the evidence available to Crown members concerning other areas would justify. In quantifying the development right in relation to the deepwater fisheries, we have applied the Maori portion of the total population as revealed in the 1986 census (12.5 percent) to the value of the deepwater fisheries. We consider this approach is reasonable and logical: we also point out that it is not an attempt to equate the Maori share with their percentage of the population (as is evidenced by our acceptance of 100 percent of the inshore fisheries). The history of the development of New Zealand's deepwater fisheries in the late 1970s and 1980s shows that there is no necessary connection between the presence of operators in the inshore fisheries and their penetration of the deepwater resource: the latter was initiated largely by foreign companies and picked up by new domestic organisations.

25 Accordingly, Crown members consider that the total percentage assessed contains a real element of compensation for past wrongs.

Amateur Fishing

26 In light of the Muriwhenua Report we have put to one side the question of the non-commercial catch and in any event, it is insignificant, amounting to approximately 1 percent by value of the total fisheries resource.

Delivery of Maori Share

27 Crown members suggest that the Maori share of the total fisheries should be received in the various ways set out below. In order to meet any preferences Maori may have, Crown members are prepared to accept that it should be open to Maori to vary the components of the package, provided the total share to Maori does not exceed 29 percent. Other elements of our proposal, the net present value of which would be accommodated within the 29 percent total share, are quota for Maori and a programme to facilitate Maori entry into the industry. If Maori wish to increase the amount of quota or the scope of the training and development programme, this can be accepted provided it is compensated for by an equivalent reduction in the equity share in the new institution. Should Maori decide to accept a larger part of their entitlement in quota, it would be necessary to consider the effect of this on the proportions in which the directorate of the new institution is shared between Maori and Crown due, for example, to potential conflicts of interest.

28 We propose that the equity share should be 25 percent with the other two components each representing a further 2 percent of the value of the fisheries.

Director and Shareholding Arrangements

29 With regard to the director and shareholding arrangements, Crown members propose that:

a the new institution would have seven directors, of whom three would be appointed by Maori and three by the Government. The seventh director, the chairperson, would be appointed by the Government after consultation with the Maori directors. Maori and Crown would owe each other duties of reasonableness and good faith in the operation of the new institution;

b The share capital of the new institution would be held 75 percent by the Crown and 25 percent by Maori.

30 The net profits of the institution (both distributed and retained) would accrue to Crown and Maori in proportion to their shareholding. It should also be noted that Maori would continue to receive the benefits of the Crown shareholding as members of the population at large.

31 In relation to the directorship of the new institution, it can be argued logically that, if the Maori share of the equity is 25 percent, then the principle of tino rangatiratanga requires Maori to have a 25 percent share of the control. Crown members believe that such an argument consigns Maori to a permanent minority role, whereas it should be recognised that all positions in our society are open to Maori at all levels and that this does not depend on percentages of population or ownership of resources. Hence, in the context of our proposal, the Crown members recommend that the Maori share in the directorate should exceed the proposed equity share.

Option to Purchase Additional Shares in New Institution Proposed on 29 June

32 In an attempt to reconcile the 25 percent Maori equity proposed by Crown members to their requirement for 50 percent equity, Maori members proposed that they should have the ability to increase their equity by purchasing Crown shares on the basis of independent valuation but without the Crown having a reciprocal right.

33 In the very limited time available, Crown members have been unable to address the issues with Maori members and, if it is intended to pursue this matter, further analysis will be necessary.

Reversion of Individual Transferable Quota (ITQ)

34 A considerable amount of time of the Joint Working Group has been devoted to the issue of the permanency of the ITQ:

- the Waitangi Tribunal considers that the Quota Management System (QMS) effectively guarantees to non-Maori "... the full exclusive and undisturbed possession of the property right in fishing, that the Crown had already guaranteed to Maori";

- Greig J has found that there is an arguable case that continued operation of the QMS in its present form is in disregard of Maori fishing rights;

- the fishing industry has argued strenuously that permanent access to the fisheries is essential for industry development and efficiency and that forced changes to quota tenure would be unfair and inequitable;

- until 23 June, Maori members argued that the permanency of the tenure for quota was in breach of the Treaty.

35 It has also been acknowledged, however, that the QMS is an effective management regime for the fisheries.

36 Maori members had been adamant throughout the negotiations that permanency of tenure for quota was in breach of the Treaty and we understood their position to be that the issue of Maori fisheries could not be resolved if this feature continued. Crown members accepted the reversion of ITQ on the basis that this was an essential element in recognising tino rangatiratanga. However, on 23 June, Maori members presented a proposal in which reversion of ITQ's was not an essential component. As we understand their position, it is that, tino rangatiratanga would not be achieved by the Crown members' proposal with less than 50 percent Maori equity and equality in control.

37 Nothwithstanding the alteration in Maori members' position, Crown members believe that this element of our proposal should remain - there are good reasons in terms of fisheries management for reversion. For reasons outlined in an attachment to Annex 1, we have not formulated details on how this should be carried out.

38 Accordingly, we recommend that the interim board of the new institution should be charged, as one of its first tasks and in its role of advising the Minister of Fisheries, with developing a programme for implementing quota reversion.

Resource Rentals

39 Effective management of the fisheries requires that an appropriate resource rental policy be in place. Advice available to us suggests that full economic levels for resource rentals should be able to be realised within a period of five years, i.e., by the end of 1993. We recommend that the interim board of the new institution should be charged with the responsibility of phasing in such a rental policy.

40 Because this is likely to be a contentious issue, we have elaborated details of this in an attachment to Annex 1.

OTHER ELEMENTS OF PROPOSAL

Local/Tribal Non-Commercial Fisheries

41 Crown members believe that tino rangatiratanga can be acknowledged by a Maori beneficial interest in the fisheries resource and by Maori participation in the management and control of the fisheries. The new institution that we have proposed acknowledges Maori claims to tino rangatiratanga. Crown members have been very much aware, however, of the singular importance to Maori of access to local fishing resources: it is a means by which Maori cultural and spiritual needs can be given effect and hence, contribute directly to the recognition of tino rangatiratanga. Maori members have reaffirmed the importance of such access through the course of the negotiations.

42 A key element of our proposal, therefore, is that certain local non-commercial fisheries should be controlled by the iwi or hapu. The application of the controls should be non-discriminatory as between Maori and non-Maori and the continuation of local control should be based on this principle and that of good fisheries management.

43 In identifying the particular areas to be operated in this way, we suggest that the model already developed in the South Island could provide an appropriate basis for selection. Based on that experience, we envisage that the areas under local control will be relatively small and discrete.

44 Practical considerations relating to fisheries management mean that areas controlled by iwi or hapu should be non-commercial in nature: otherwise, commercial fishers would face a patchwork of controls which, in effect, would mean no control at all.

45 Formal channels of communication and consultation will need to be established between the iwi or hapu controlling local fisheries and the new institution responsible for the overall management of the fisheries. This should provide for a two-way interchange on management issues and so offer a further way of recognising tino rangatiratanga.

Quota for Maori

46 The next element of our proposal is also designed to recognise tino rangatiratanga. Maori people have been particularly concerned at the way in which recent policy developments have excluded small scale and part-time operators from the fisheries. Maori members have also stressed to us the need for Maori to hold quota so as to participate in the fisheries. We believe that any settlement of Maori fisheries must address the real and perceived grievances over Maori exclusion from the fisheries and the additional need for participation. Accordingly, we propose that provision should be made for iwi or hapu to hold quota to provide access for Maori into the fisheries, including those who may have been excluded. This quota would be subject to the normal terms and conditions applying to all quota.

47 A generous assessment of quota to cover Maori excluded by the application of the policy on part-time fishers in 1983 and 1984 would be 0.25 percent. To provide for this and to allow for a return of Maori to fishing, we propose that a monetary amount equivalent to 2 percent of the net present value of the rights vested in the new institution be made available by the Government for the purchase of quota by Maori, for allocation to iwi or hapu. This amounts to more than 10 percent of the value of existing quota and rights in the inshore fisheries. In view of the current high price of quota, it is suggested that it would be desirable to defer purchasing much of the quota until resource rentals have been reassessed. It would also be desirable for any quota to cover a spread of species.

48 This forms part of the Crown members' proposal for a Maori share of 29 percent in the resource. We also record that under our proposal, it is open to Maori:

a to take more than 2 percent of their share in the fisheries in quota (which would involve an equivalent reduction in the other elements of our proposal);

b to use the income from the Maori share in the equity of the new institution to purchase quota.

Action to Facilitate Maori into Industry

49 To give effect to Maori fisheries in a meaningful way, it is essential that Maori participate in the industry at all levels. This is clearly not the case at the present and Crown members propose that a programme be developed to remedy the situation.

50 We have not formulated a definitive programme on this issue. Rather we have identified the broad areas which would need to be encompassed in such a programme. These include:

a **Pre-vocational and Semi-Skilled Courses**

We envisage that Maori ACCESS could be utilised as a model for designing these courses which would aim at enhancing general work skills as well as providing skills specific to the fishing industry;

b **Courses to Foster Technical and Management Skills**

Two components in particular, are envisaged under this heading. First, courses which provide skills with direct relevance to the fishing industry, such as marine engineering. Secondly, a programme which, while initially directed at the fishing industry, would equip Maori with portable managerial skills. The Kimihia Television Training model would seem to provide a basis for such a programme;

c **Research and Related Areas**

Participation of Maori graduates in specialised areas related to the industry and the fisheries should be promoted. This could involve the provision of scholarships, for example, in marine biology at the graduate and post graduate levels;

d **New Institution - Affirmative Action Programme**

Our proposed new institution should, as part of its employment/training policies, have an affirmative action programme to ensure that it operates in an appropriately bicultural manner. A sound working relationship between the new institution and iwi and hapu will be necessary if local input is to be successfully integrated into overall management objectives: bicultural sensitivity will facilitate this process;

e **Owner-Operators**

Provision of the skills discussed above will be important in facilitating Maori participation in the fishing industry. Maori aspirations will not be met, however, unless they share in the ownership of the industry. To accomplish this, capital and advisory assistance will be needed. Existing institutions may be helpful in the first instance but new ones may have to be designed to meet particular needs.

51 We see the development of a programme to facilitate the involvement of Maori at all levels of the industry as an essential element in our overall proposal. Consultation with and the co-operation of the fishing industry will be critical to its success.

52 As to funding, Crown members suggest that the Government should make a direct contribution of $2 million per year for 10 years. Additional sources of funding should be identified and tapped where possible.

RELATED MATTERS

Public Education on Maori Fisheries

53 As we have found, the issue of Maori fisheries is a complex one and it is, moreover, one on which many people are ill-informed. Consequently, there is a need for background and knowledge to be made available so that people understand the reasons for the changes we have proposed. Such understanding will assist in the process of change and will contribute to its success.

54 Crown members believe that a comprehensive public education programme on Maori fisheries issues should be initiated as a matter or urgency. In the first instance, the focus should be towards explaining the changes to the fishing industry: that aspect of the programme should be the responsibility of the interim board of the new institution. Consideration should be given by the Government to incorporating the fisheries issue into a broader public education programme on Treaty matters.

Resolution of Conflict Between Fisheries and Other Resource Uses

55 During the period over which the Joint Working Group has been meeting, resource management laws have been under review. We have not had input into that review but recognise that our proposal will impact on other resource-use allocation decisions. Fisheries management cannot operate in isolation and there will be areas where fisheries management will conflict with other decisions: the pollution of fisheries and fishery waters is an obvious example. It is not possible for us to resolve this issue. We suggest that mechanisms to resolve the inevitable conflicts between fisheries and other resource use allocation decisions should be developed as part of the reform process.

Freshwater Fisheries

56 On a number of occasions during our discussions, the issue of freshwater fisheries was canvassed and, in particular, whether the Group's terms of reference included this topic. Our conclusion was that, while it was an important issue, given the time constraint it would be unlikely that sufficient attention could be devoted to it.

57 Not only are the issues complex, but we believe that many of them are distinct from those relating to marine fisheries. Hence, it is proposed that a separate process should be established at the earliest opportunity. As a first step, a task force of two or three people should be formed to identify the issues and to recommend a process.

Distribution of Benefits

58 A satisfactory means must be found to ensure that the profits or benefits which accrue to Maori are distributed in a way which results in their being shared fairly and equitably amongst Maori people.

59 Maori members have said that it is for Maori people to decide how the monetary and non-monetary benefits of any settlement on Maori fisheries are to be distributed. They believe the revenue represents a return to them as shareholders in an asset and should be regarded in that way.

60 Crown members recognise that the method of distribution must be acceptable to Maori. They have two qualifications to this, viz., whatever method is chosen, it should ensure that the benefits are distributed fairly and equitably amongst Maori people and should contain a satisfactory mechanism for resolving disputes. Throughout the negotiations we have been very much aware that some people have felt that the Joint Working Group by its nature and composition could not adequately represent their interests. This is particularly the case for Moriori. It is our understanding that the Maori members' view is that Moriori should be included on the same basis as other tribes. We support that view.

Compensation

61 Maori members propose that the question of compensation for past Treaty breaches be expressly reserved.

62 As noted earlier, Crown members believe that their offer of a 29 percent share in the resource contains a real though unquantified provision for compensation for past wrongs.

63 Crown members would have preferred to reach a settlement which dealt with all issues of compensation so that all dispute over the fisheries is terminated. It is difficult, however, in the absence of detailed research and further guidance from the Waitangi Tribunal or the Courts, to assess what compensation Maori are entitled to. Moreover, the Waitangi Tribunal has indicated it prefers an approach directed to restoration of a base for the tribes rather than compensation based on quantification of losses relating to past wrongs (see, for example, the Waitangi Tribunal's report on the Waiheke claim).

64 We expect that any agreed proposals would be accepted by Maori as satisfying all claims for compensation. If this is not the case, Crown members consider that any assessment of compensation must have due regard to whatever parts of our proposal or any other proposal are implemented.

Interim Period

65 Crown members consider that it may not be practicable to have the legislation necessary to implement any Government decision relating to Maori fisheries by 1 October 1988. If this proves to be the case, we suggest that:

a Maori entitlement to their proportion of the net income from the fisheries should be calculated from 1 October 1988;

b an interim Board should be appointed to oversee the establishment of the new institution and advise the Minister on fisheries management measures in the interim.

66 The legislation necessary to give effect to the proposal will be of considerable public interest. By its nature it will be complex and it may be early 1989 before such legislation could be in place. Crown members propose that appropriate interim arrangements be adopted to take account of this.

Duration of Settlement

67 In all respects, other than compensation, the proposals made by Crown members are put forward in settlement of all Maori fisheries claims, whether under the Treaty or in terms of any statute or the common law.

68 Crown members recognise, however, that Treaty-based arrangements may require to be reconsidered by Crown or Maori as a result of changes which take place in our society. It is proposed, therefore, that the settlement should stay in place for a minimum period of 25 years, with it being open to either Crown or Maori to initiate a review after that period. Rights in relation to the fisheries would, in effect, be in suspension for the 25 year period. From this it would also follow that during the 25 year period Maori would not be able to avail themselves of any rights created by, for example, S 88(2) of the Fisheries Act 1983 or the so-called doctrine of aboriginal title. The Crown's kawanatanga or sovereign rights would not be affected by the settlement.

69 Maori members have suggested to Crown members that it would be desirable during the period of any settlement to allow the Waitangi Tribunal, as a "safety valve", to hear and make recommendations about Maori fisheries claims i.e., not only claims for compensation. Crown members have some concerns about this but, on balance, would be prepared to accept the Maori suggestion, provided the jurisdiction of the Tribunal remains recommendatory only. This would allow the Tribunal to make recommendations about issues which have not been covered by the Working Group or where there is otherwise a serious injustice. Crown members expect, however, that virtually all contentions concerning the fisheries can be put behind us for the period of any settlement. A stable environment is needed to encourage investment and progress in the fishing industry for both Maori and non-Maori.

Industry Consultation

70 The Joint Working Group met with a delegation from the fishing industry and the Crown members held discussions with representatives of the fishing industry on several occasions. It is most difficult to adequately summarise those meetings or the many submissions made to the Joint Working Group by individuals and organisations involved in the fishing industry. However, we should convey two concerns of industry which appear as a common view in the submissions made by industry on the Crown's proposal to give effect to Maori fisheries.

71 The first concern relates to our proposal for Crown and Maori to manage the fisheries through a new institution. This proposal is not supported in concept by the industry. The industry's position, we believe, can be summarised by a sentence in the submission of the NZ Fishing Industry Board which states "But should such a [new institution] be established, industry would find it an anathema to have other than a significant Crown majority.".

72 The second concern was the Crown members proposal for quota to revert from in-perpetuity to leasehold. The industry considers that if quota is to revert then this "should be achieved by using the market arrangements currently available, not by compulsion". In particular, they are adamant that, if any action to revert quota is taken, they be fully compensated for the loss of security and its effect on the value of their investments in all sectors of their operations. We accept that introducing a finite life for quota is likely to result in some reduction in its value, and that the industry should be compensated for this. However, the assets employed in the catching, processing and marketing sectors will still be required and, provided reversion is implemented in accordance with the objectives we have described in the attachment to Annex 1, should not reduce in value.

73 The concern about the Crown's majority does not arise under our proposal and the second concern can be addressed by further consultations with the industry, as we propose. In designing our proposal we have been very much aware of the industry's concerns and have endeavoured to find a solution which as far as practicable will not damage the commercial viability of the fishing industry.

Chatham Islands

74 People from the Chatham Islands made submissions to the Joint Working Group requesting that "their fisheries" be separated from the balance of the national resource and that the benefits derived from that fishery be directed exclusively to the Chatham Islands.

75 In the interests of good fisheries management, we believe that it is impracticable to isolate one fishery from others. The social and other economic needs of the Chatham Islands are for the Government to address. The specific Moriori claim is mentioned elsewhere.

Enforcement and Limitations on Amateur Fishing

76 Crown members have noted the concerns of Maori members in the area of fisheries enforcement and agree that it is essential for the preservation of fisheries that, irrespective of which body is to manage New Zealand's fisheries, urgent attention should be given to effective control of access to the fisheries.

77 An element of these concerns is the current limits for amateur catches. It is the view of all members of the Joint Working Group that the present bag limits far exceed those which could be considered reasonable as amateur catches. These limits represent in many cases catches equivalent to those taken by commercial operators.

Maori Proposal of 23 June 1988

78 Apart from our view that an equal share in the resource cannot be justified, the proposal presented by Maori members appears to us to present a number of difficulties in terms of good fisheries management. The structure proposed seems to Crown members to result in a confusion for Maori in its roles of "landlord" and of "tenant" and provides for different incentives for Crown and Maori in the management of the resource. In addition, although it would appear to deliver an equal share of the resource to Maori, many of its components would, if adopted, provide the potential for a considerably larger share being achieved by Maori.

CONCLUSION

79 What we have tried to achieve in our proposal is a means of recognising tino rangatiratanga in a manner which is appropriate in today's conditions. We think this must take into account both the Maori share in control of the fisheries and the Maori share of the beneficial interest in the fisheries. Our proposal constitutes a recognition of Maori tino rangatiratanga in the fisheries in partnership with the Crown, but on a basis which also maintains the kawanatanga of the Crown.

80 We appreciate that our proposal only partly realises the Maori wish to have direct access to fishing rights. We believe we have offered something more significant - sharing in the management, control and income in partnership with the Crown. If Maori desire to have that partnership, then, for reasons which relate to the proper management of the fisheries, it is inappropriate to provide for them a large share in the physical assets.

81 We consider the proposal which we have made is as far as we can go under our terms of reference which require us to advise on how Maori fisheries may be given effect. There are wider issues relating to Maori needs which are not for us to address in this report. We believe, however, that we are at a critically important time for our society when there is a need for generosity and reciprocity.

[IN THE SUPREME COURT.]

S.C.
AUCKLAND.
1847.
MARTIN, C.J.
H. S. CHAPMAN, J.

THE QUEEN (ON THE PROSECUTION OF C. H. McINTOSH) *v.* SYMONDS.

Constitutional Law—Powers of Governor—Validity of Proclamations Waiving Pre-emption—Land Claims Ordinance, 1841, Sess. I, No. 2—Nature of Native Title—Treaty of Waitangi—Australian Waste Lands Act, 1842 (Imp.), 5 & 6 Vict., c. 36.

At common law the Crown is the exclusive source of private title. The Land Claims Ordinance, 1841, enunciates the same principle. Courts—*sc.*, subject to the rules of prescription—can therefore not give effect to any title not derived from the Crown (or from the representative of the Crown, duly authorized to make grants), verified by letters patent.

The Governor derives his authority partly from his Commission, and partly from the Royal Charter of the Colony.

From the rule that the Crown has the exclusive right of acquiring new territory, and that whatsoever the subject may acquire vests in the Crown, flows the rule that the Crown has the exclusive right of extinguishing the Native title to land.

Purchases of land by subjects from Natives are good against the Native seller—*sc.*, subject to legislative provisions—but not against the Crown. Subject to the rights of the Crown, the Natives may deal in their land amongst themselves.

The Crown's exclusive right to extinguish title is more than such a pre-emptive right of first refusal as would import a right (after refusal) for others to buy.

Quaere, What estate the Crown has in the land previous to the extinguishment of Native title.

The Proclamations of March 26, 1844, and October 10, 1847, waiving the Crown's right of pre-emption (*Government Gazette*, 1844, pp. 68, 160) were made in evasion of the Australian Waste Lands Act, 1842 (Imp.), 5 and 6 Vict., c. 36, and cannot be acted upon.

With the true meaning of the Treaty of Waitangi, as it stands in the Maori language, the Court has no concern. The right of the Crown to land in New Zealand, as between the Crown and British subjects—*sc.*, other than Maori—is not derived from the Treaty nor could the Treaty alter it.

SUIT upon Scire Facias. The claimant's title to the land was an assurance from Natives upon a purchase from them coupled with a certificate from the Governor purporting to waive in the claimant's favour the Crown's exclusive right of acquiring the land. The defendant's title was a grant from the Crown under the Public Seal.

Bartley, for the claimant.

Swainson, Attorney-General, for the defendant.

CHAPMAN, J. This case comes before the Court upon demurrer to a declaration in a suit upon a writ of *Scire Facias*—whereby the party suing out the writ seeks to set aside a grant from the Crown, made under the public seal of the Colony to the defendant, on the ground that the claimant has a prior valid title to the same land, by virtue of a

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certain certificate, whereby, it is alleged, the late Governor waived, in the present claimant's favour, the Queen's exclusive right of acquiring the land in question from the Natives.

The question which this Court has to determine is, Did the claimant, Mr. C. Hunter McIntosh, acquire by the certificate and his subsequent purchase (admitted to have been in all respects fair and *bona fide*) such an interest in the land, as against the Crown, as invalidates a grant made to another, subsequently to the certificate and purchase?

As this question involves principles of universal application to the respective territorial rights of the Crown, the aboriginal Natives, and the European subjects of the Queen; as moreover its decision may affect larger interests than even this Court is up to this moment aware of, I think it is incumbent on us to enunciate the principles upon which our conclusion is based with more care and particularity than would, under other circumstances, be necessary.

The intercourse of civilized nations, and especially of Great Britain, with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our colonial Courts, and the Courts of such of the United States of America as have adopted the common law of England, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the colonial Courts. They flow not from what an American writer has called the "vice of judicial legislation." They are in fact to be found among the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon.

It is a fundamental maxim of our laws, springing no doubt from the feudal origin and nature of our tenures, that the King was the original proprietor of all the lands in the kingdom, and consequently the only legal source of private title: *2 Bl. Com.* 51; *Co. Litt.* 65, a. In the language of the year-book—M. 24, Edw. III—"all was in him, "and came from him at the beginning." This principle has been imported, with the mass of the common law, into all the colonies settled by Great Britain; it pervades and animates the whole of our jurisprudence in relation to the tenure of land; and so *protective* has it been found, that although strictly a prerogative rule, the Republican States of America, at least all those States which recognize the common law as the origin and basis of their own municipal laws, have found it expedient, if not necessary, to adopt it into their jurisprudence: *Kent's Commentaries*, vol. iii, Part vi, lecture 51.

As a necessary corollary from the doctrine, "that the Queen is "the exclusive source of private title," the colonial Courts have invariably held (subject of course to the rules of prescription in the older colonies) that they cannot give effect to any title not derived from the Crown (or from the representative of the Crown, duly authorized to make grants), verified by letters patent. This mode of verification is nothing more than a full adoption and affirmation by the colonial Courts of the rule of English law; "that (as well for the protection "of the Crown, as for the security of the subjects, and on account of "the high consideration entertained by the law towards Her Majesty)

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"no freehold, interest, franchise, or liberty can be transferred by the "Crown, but by matter of record"—*Viner Abr. Prerog.*; *Bac. Abr. Prerog.*—that is to say, by letters patent under the great seal in England, or (what is equivalent thereto in the Colony) under the public colonial seal. In the instruments delegating a portion of the royal authority to the Governors of colonies, this state of the law is without any exception, that I am aware of, universally and necessarily recognized and acted upon. In some cases the authority and powers of the Governor are set out in his Commissions—*Quebec Commissions by Baron Mazeres*, 4to., 1772—but in this Colony the Governor derives his authority partly from his Commission, and partly from the Royal Charter of the Colony—*Parl. Paper*, May 11, 1841, p. 31—referred to in and made part of such Commission. In this Charter, we find the invariable and ancient practice followed: the Governor, for the time being, being authorized to make and execute in Her Majesty's name, and on her behalf, *under the public seal of the Colony*, grants of waste lands, &c. In no other way can any estate or interest in land, whether immediate or prospective, be made to take effect; and this Court is precluded from taking notice of any estate, interest, or claim, of whatsoever nature, which is not conformable with this provision of the Charter; which in itself is only an expression of the well-ascertained and settled law of the land.

Here, under ordinary circumstances, I think we might stop. On the one hand, the defendant has a grant from His Excellency the Governor, complying in all respects with the law, which grant is not impeached upon this record on any one of the grounds upon which grants are liable to be repealed. There is no allegation, on the part of the adverse claimant, of any illegality, uncertainty, mistake, misdescription, misinformation, or deception: *2 Bl. Comm.* 348; *Co. Lit.* 5, 6; *Gladstanes* v. *Earl of Sandwich*(1). On the other hand, the claimant founds his title on an instrument not under the seal of the Colony, having none of the features of a patent, and therefore not complying either with the common law, or with the Charter of this Colony, framed evidently with special reference thereto.

But the peculiar character of the instrument under which Mr. McIntosh claims, being the act of the late Governor of the Colony, whose acts ought to be supported, if not repugnant to the law of the land, and issued in conformity with a Proclamation, with which it is admitted the claimant has faithfully complied, demands that we should go further, and examine the validity of his claim upon its own intrinsic merits.

It seems to flow from the very terms in which the principle, "that the Queen is the only source of title," is expressed, that no subject can for himself acquire new lands by any means whatsoever. Any acquisition of territory by a subject, by conquest, discovery, occupation, or purchase from Native tribes (however it may entitle the subject, conqueror, discoverer, or purchaser, to gracious consideration from the Crown) can confer no right on the subject. Territories therefore, acquired by the subject in any way vest at once in the Crown. To state the Crown's right in the broadest way: it enjoys the exclusive right of acquiring newly found or conquered territory, and of extinguishing the title of any aboriginal inhabitants to be found thereon. Anciently private war was not unusual. The history of Sir Francis Drake is an instance of a subject acquiring territory for the Queen, by a mixture of conquest and discovery, without a Commission. In like manner an accidental discovery is taken possession of, not for the benefit of the discoverer himself, but for that of the Crown. The rule, therefore, adopted in our colonies, "that the Queen has the exclusive right of extinguishing the Native "title to land," is only one member of a wider rule, that the Queen has the exclusive right of acquiring new territory, and that whatso-

(1) (1842) 4 Man. & G. 995; 134 E.R. 407.

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ever the subject may acquire, vests at once, as already stated, in the Queen. And this, because in relation to the subjects, the Queen is the only source of title.

As to the practical consequence that the Queen may lawfully oust any subject who attempts to retain possession of any lands he has acquired, it is a power which has often been exercised. The settlement of New Haven (now part of Connecticut) is an early case. Connecticut had originally been colonized under a royal grant to Lord Say and Sele. New Haven was settled by people from Connecticut, who purchased from the Indians; yet that title was not recognized, and a new charter was obtained from Charles II, incorporating New Haven with Connecticut. The early settlements of Port Philip are equally in point. The opinions of eminent lawyers were without exception against the claims of the purchasers, and, as in New Zealand, the claimants were glad to take a Crown grant of a portion of their acquisitions, leaving a large portion of territory in the hands of the Crown. To say that such purchases are absolutely null and void, however, is obviously going too far. If care be taken to purchase off the true owners, and to get in all outstanding claims, the purchases are good as against the Native seller, but not against the Crown. In like manner, though discovery followed by occupation vests nothing in the subject, yet it is good against all the world except the Queen who takes. All that the law predicates of such acquisitions is that they are null and void as against the Crown: and why? because "the Queen is the exclusive source of title."

The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians. In the case of the *Cherokee Nation* v. *State of Georgia*(2) the Supreme Court threw its protective decision over the plaintiff-nation, against a gross attempt at spoliation; calling to its aid, throughout every portion of its judgment, the principles of the common law as applied and adopted from the earliest times by the colonial laws: *Kent's Comm.* vol. iii, lecture 51. Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.

Mr. *Bartley* contends that all that the Natives convey to the Queen by the Treaty of Waitangi is a right to have the first offer of the land, or, say, in one word, the refusal, a conclusion which he draws from the etymological structure of the word pre-emption. There can be no doubt that according to the strict meaning of the word, the right of "buying before" others connotes the existence of a right residing in others to buy after refusal by him who has the pre-emptive right. But the right which resides in the Crown is, as we have seen, the exclusive right of extinguishing the Native title. Mr. *Bartley's* criticism is therefore rather philological than legal. It

(2) (1831) 5 Peters 1.

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amounts to this, that the Crown's right is loosely named; that the word pre-emption is not the one which ought to have been chosen. Be that as it may, the Court must look at the legal import of the word, not at its etymology. The word used in the Treaty is not now used for the first time. If it were so, it perhaps might be contended that a limited right being expressed the larger right is excluded. But the framers of the Treaty found the word in use with a peculiar and technical meaning, and, as a short expression for what would otherwise have required a many-worded explanation, they were justified by very general practice in adopting it. No one now thinks of objecting to the use of the word sycophant, in its secondary meaning, because its true meaning is a "shower of figs."

The legal doctrine as to the exclusive right of the Queen to extinguish the Native title, though it operates only as a restraint upon the purchasing capacity of the Queen's European subjects, leaving the Natives to deal among themselves, as freely as before the commencement of our intercourse with them, is no doubt incompatible with that full and absolute dominion over the lands which they occupy, which we call an estate in fee. But this necessarily arises out of our peculiar relations with the Native race, and out of our obvious duty of protecting them, to as great an extent as possible, from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the Natives in a very short time. The rule laid down is, under the actual circumstances, the only one calculated to give equal security to both races. Although it may be apparently against what are called abstract or speculative rights, yet it is founded on the largest humanity; nor is it really against speculative rights in a greater degree than the rule of English law which avoids a conveyance to an alien. In this Colony, perhaps, a few better instructed Natives might be found who have reduced land to individual possession, and are quite capable of protecting their own true interest; but the great mass of the Natives, if sales were declared open to them, would become the victims of an apparently equitable rule; so true it is, that "it is possible to oppress "and destroy under a show of justice": *Hawtress*. The existing rule then contemplates the Native race as under a species of guardianship. Technically, it contemplates the Native dominion over the soil as inferior to what we call an estate in fee: practically, it secures to them all the enjoyments from the land which they had before our intercourse, and as much more as the opportunity of selling portions, useless to themselves, affords. From the protective character of the rule, then, it is entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds.

In order to enable the Court to arrive at a correct conclusion upon this record, I think it is not at all necessary to decide what estate the Queen has in the land previous to the extinguishment of the Native title. Anciently, it seems to have been assumed, that notwithstanding the rights of the Native race, and of course subject to such rights, the Crown, as against its own subjects, had the full and absolute dominion over the soil, as a necessary consequence of territorial jurisdiction. Strictly speaking, this is perhaps deducible from the principle of our law. The assertion of the Queen's pre-emptive right supposes only a modified dominion as residing in the Natives. But it is also a principle of our law that the freehold never can be in abeyance; hence the full recognition of the modified title of the Natives, and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects. This technical seisin against all the world except the Natives is the strongest ground whereon the due protection of their qualified dominion can be based. This extreme view has not been judicially taken by

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any colonial Court that I am aware of, nor by any of the United States' Courts, recognizing the principles of the common law. But in one case before the Supreme Court in the United States there was a mere naked declaration to that effect by a majority of the Judges. One of the Judges, however, differed from his brethren, he considering the Natives as absolute proprietors of the soil, with the single restriction arising out of the incompetency of all but the sovereign power to buy, and he treated what is commonly called the pre-emptive right as "a right to acquire the fee-simple by purchase when "the proprietors should be disposed to sell."

The Charters of the Stuarts certainly assumed the fee to be in the Crown, and they were never impeached on the ground that the King had conveyed a larger estate than he had in him, though attempts were often made to get rid of them. In spite of this assumption, the Native outstanding title was usually got in by purchase. The Charter to the New England Puritans in 1620 granted the land in fee, leaving it to the grantees to extinguish the Native title. In the case of William Penn, usually cited as a model of humanity and fair dealing, the Charter was granted in 1681; then Penn proceeded to settle the land; and lastly "the settlers having made and improved "their plantation to good advantage, Penn, in order to secure the "plantation from the Indians, appointed Commissioners to purchase "the land, &c.": *Encyclop. Brit.*, article "Penn." It was not until 1683 that Penn reached the Colony. *Vattel* sees no violation of law in this course. He and the writers before his time seem to have attached little weight to the Native title; and he cites the cases of Penn and the New Englanders as evidence of their moderation, rather than as fulfilling a condition necessary to the completion of their title and precedent to its full enjoyment: *Law of Nations*, Book I, c. xviii, para. 209.

But for more than a century certainly, neither in the British American colonies nor subsequently in the United States has it been the practice to permit any patent to pass the public seal of the Colony of States previous to the extinguishment of the Native title—*Collection of Indian Treaties*, Washington, 1837—a practice certainly far more conducive to the security of Native rights than the ancient practice. To part with the Crown's interest during the existence of the Native title, leaving it to the grantee to acquire that title, is obviously fraught with evil to both races, and with great inconvenience and perplexity to the colonial Governments.

Such are the principles in conformity with which, I conceive, this Court is bound to view the rights of the Crown, the Queen's European subjects, and Her Majesty's new subjects, respectively; and guided by their light, we are enabled to decide the question raised upon this record. Even abstaining from regarding the Queen's territorial right, pending the title of the Natives as of so high a nature as an actual seisin in fee as against her European subjects, and regarding it in the view most favourable to the claimant's case, as the weakest conceivable interest in the soil, a mere possibility of seisin, I am of opinion that it is not a fit subject of waiver either generally by Proclamation, or specially by such a certificate as Mr. McIntosh holds. Both by the common law of England (now the law of the Colony in this behalf) and by the express words of the Charter, such an interest can only be conveyed by letters patent under the public seal of the Colony.

I am also of opinion, after very carefully considering the statement of Mr. *Bartley*, and the apparent admission of the Attorney-General, that the want of compliance with the Australian Waste Lands Act, until lately in force in this Colony, would, even in the absence of a grant to the defendant, be a fatal defect in Mr. McIntosh's claim, and this on two grounds: First, notwithstanding the words "waste "lands of the Crown" may seem to import lands the title to which was complete, I think the language of s. 5, extending the formalities

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prescribed by the Act to "any less estate or interest," would be sufficient to include that interest which the Crown has in all the lands of the Colony; and that, consequently, a Proclamation made in evasion of the Act of Parliament cannot legally be acted upon; secondly, by Mr. McIntosh's purchase (assuming it to be a complete extinguishment of the title of all Native claimants) the land vests in the Crown, and so becomes part of the waste lands of the Crown, even in contemplation of the Attorney-General's distinction; and as such could only be alienated (so long as the 5 & 6 Vict., c. 36, was in force here) in strict compliance with its provisions.

For these reasons I think the judgment of the Court upon this record must be for the defendant.

MARTIN, C.J. The facts admitted in this case are the following: First, that a complete and honest purchase of the land now in question was effected by the claimant, Mr. McIntosh; and, secondly, that the purchase was made under and in conformity with a certificate issued by Governor Fitz Roy, as set forth on the record. Upon these two facts the claimant's case rests.

It may make the whole matter clearer to consider, in the first place, the legal effect of such a purchase, viewed by itself, and apart from the certificate or alleged authority.

Now the general law of England, or rather of the British colonial empire, in respect of the acquisition of lands, such as those which are comprised within the claimant's purchase and the defendant's grant, has from very early time stood as follows: Wherever, in any country to which (as between England and the other European nations) England had acquired a prior title by discovery or otherwise, there were found land lying waste and unoccupied, and the same came to be occupied and appropriated by subjects of the British Crown it was holden that such subjects did not and could not thereby acquire any legal right to the soil as against the Crown. And this rule was understood to apply equally, whether the country was partially peopled or wholly unpeopled and whether the settlers entered and obtained possession with or without the consent of the original inhabitants. Accordingly, colonial titles have uniformly rested upon grants from the Crown. This was the case in the oldest British colonies in America; and it is notorious that the same rule has been acted upon without deviation or exception in the more recent colonization of Australia.

Nor is the rule and practice of England only, but of all the colonizing States of Europe, and (by derivation from England) of the United States of America. The very full discussion of this subject in the judgment of my learned brother, Mr. Justice *Chapman*, renders it superfluous for me to enter further upon the question. I shall content myself with citing two passages from the well-known *Commentaries on American Law*, by Mr. Chancellor Kent, of the State of New York. I quote this book, not as an authority in an English Court, but only as a sufficient testimony that the principle contained in the rule of law above laid down—and which same principle, with no other change than the necessary one of form, is still recognized and enforced in the Courts of the American Union, is understood there to be derived by them from the period when the present States were Colonies and Dependencies of Great Britain. "The European "nations," says Mr. Chancellor Kent, Vol. 3, p. 379, "which respectively established Colonies in America, assumed the ultimate "dominion to be in themselves, and claimed the exclusive right to "grant a title to the soil, subject only to the Indian right of occupancy. "The Natives were admitted to be the rightful occupants of the soil, "with a legal as well as just claim to retain possession of it and to use "it according to their own discretion, though not to dispose of the "soil at their own will, except to the Government claiming the right

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"of pre-emption." Again, in p. 385, after speaking of the "several "local governments both before and after" the American revolution, he says: "Those governments asserted and enforced the exclusive "right to extinguish Indian titles to lands inclosed within the exterior "lines of their jurisdictions, by fair purchase, under the sanction "of treaties; and they held all individual purchases from the Indian, "whether made with them individually or collectively as tribes, "to be absolutely null and void. The only power that could lawfully "acquire the Indian title was the State, and a Government grant "was the only lawful source of title admitted in the Courts of justice. "The *Colonial* and State Governments, and the Government of the "United States, uniformly dealt upon these principles with the Indian "nations dwelling within their territorial limits."

Now, at the very commencement of the colonization of this country, the same principle was distinctly enunciated. Section 2 of the Land Claims Ordinance of June, 1841 (Sess. 1, No. 2), declares and enacts that "the sole and absolute right of pre-emption from "the aboriginal inhabitants vests in and can only be exercised by "Her Majesty, Her heirs and successors, and that all titles to land "in the said Colony of New Zealand which are held or claimed by "virtue of purchases or gifts or pretended gifts, conveyances or pre-"tended conveyances, leases or pretended leases, agreements or other "titles, either mediately or immediately from the chiefs or other "individuals or individual of the aboriginal tribes inhabiting the said "Colony, and which are not or may not hereafter be allowed by her "Majesty, Her heirs and successors, are, and the same shall be, abso-"lutely null and void:" and, as if to carry the principle which I have mentioned to the extreme length, it is by s. 6 provided that even after the Commissioners acting under that Ordinance shall have reported in favour of any claimant, yet "nothing herein contained "shall be held to oblige the said Governor to make and deliver any such "grants as aforesaid, unless His Excellency shall deem it proper so "to do." In fact, if we pass in review the various provisions of this Ordinance, both as to the limitations and restrictions under which grants are to be made in any case, and as to the express directions that lands of certain descriptions shall not be proposed to be granted to any claimant whatsoever, we see throughout the Ordinance a distinct recognition and assertion of the doctrine just now stated. It is everywhere assumed that where the Native owners have fairly and freely parted with their lands the same at once vest in the Crown, and become subject wholly to the disposing power of the Crown. This Ordinance, whilst it asserts the Crown's absolute right of control and disposal over the purchased lands, and is careful to show that the recognition of the claims was not to be taken as an acknowledgment of any right in the purchasers as against the Crown, does at the same time clearly intimate the object with reference to which that power of control and disposal is to be exercised. It points to subjects of the Crown other than those purchasers, and whose interests would likewise demand consideration. Section 3 recites that "Her Majesty "hath been pleased to declare Her Majesty's gracious intention to "recognize claims to land, which may have been obtained on equitable "terms from the chiefs or aboriginal inhabitants or inhabitant of the "said Colony of New Zealand, and which may not be prejudicial "to the present or prospective interests of such of Her Majesty's "subjects who have already resorted, *or who may hereafter resort*, to "and settle in the said Colony." Moreover, the Ordinance closes with an express proviso "that nothing in this Ordinance contained "shall be deemed in any way to affect any Right or Prerogative of "Her Majesty, Her heirs or successors."

It may well be presumed that a rule so strict and apparently severe, and yet so generally received, must be founded on some principle of great and general concernment. And this presumption would be

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strengthened by observing, that not only in England but also in the United States of America, not only in a country which retains many traces of the old feudalism, but also in a State which sways all things by the will of the majority of its individual citizens and in which, too, the business of colonization—the disposing of the public domain for the benefit of the nation—is made a regular and distinct branch of public Administration, this rule is yet most strongly recognized and enforced.

The principle is apparently this: that colonization is a work of national concernment, a work to be carried on with reference to the interests of the nation collectively; and therefore to be controlled and guided by the Supreme Power of the nation.

This rule may have had its origin in the feudal doctrine which vested the supreme dominion and ultimate ownership of all land personally in the Sovereign; but in modern times, and especially since the Domain of the Crown passed under the control of Parliament, it has acquired an enlarged significancy and importance. It is now understood that the waste lands of the Crown are to be administered for the national behoof upon an impartial and (so far as may be) a uniform system. This is expressed or implied in all the Statutes, Ordinances, and Instructions which have had reference to this Colony. Now, the Sovereign right of control, without which no uniform or general system would be possible, is secured by this rule. If a subject of the Crown could by his own act, unauthorized by the Crown, acquire against the Crown a right to any portion of the lands of a new country, it is plain that he might, acting upon that right, proceed to form a colony there. Now, the law of England denies to any subject the right of forming a Colony without the license of the Crown. And when we consider the complicated responsibilities which flow out of the existence of a colony, and which may seriously affect the power to which the settlers owe allegiance, and from which they expect to receive protection, and when we also estimate the means and appliances needed for successful colonization, that denial can scarcely fail to appear reasonable and necessary.

So soon, then, as the right of the Native owner is withdrawn, the soil vests entirely in the Crown for the behoof of the nation. To borrow the words of a very learned judgment recently pronounced by the Supreme Court of New South Wales, *Attorney-General* v. *Brown*(3): "In a newly-discovered country, settled by British sub-"jects, the occupancy of the Crown with respect to the waste lands "of that Colony is no fiction. If, in one sense, these lands be the "patrimony of the nation, the Sovereign is the representative and the "executive authority of the nation; the 'moral personality' (as "Vattel calls him, *Law of Nations*, bk. 1, chap. 4) by whom the nation "acts, and in whom, for such purposes, its power resides. Here is "a property depending for support on no feudal notions or "principle"(4).

It is true that the colonization of New Zealand has differed from the mode pursued in many of the older colonies. As was said by the learned Attorney-General, it has been distinguished by a practical advance of the doctrine that "Power has duties as well as rights." But the adoption of a more righteous and a wiser policy towards the Native people cannot furnish any reason for relinquishing the exercise of a right adapted to secure a general and national benefit. This right of the Crown, as between the Crown and its British subjects, is not derived from the Treaty of Waitangi; nor could that Treaty alter it. Whether the assent of the Natives went to the full length of the principle, or (as is contended) to a part only, yet the principle itself was already established and in force between the Queen and Her British subjects. The Treaty of Waitangi was made in February,

(3) (1847) 1 Legge 312 (4) *Ibid.*, 318.

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1840. The Land Claims Ordinance, on which I have already commented, was passed in June of the same year. There is no indication, then, of an abandonment of the principle.

This rule then does in substance and effect assert that, whenever the original Native right is ceded in respect of any portion of the soil of these Islands, the right which succeeds thereto is not the right of any individual subject of the Crown, not even of the person by whom the cession was procured, but the right of the Crown on behalf of the whole nation, on behalf of the whole body of subjects of the Crown; that the land becomes from the moment of cession not the private property of one man, but the heritage of the whole people; that accordingly no private right shall be recognized as interfering with the public and national right; that no single member of the nation shall have any power to impede in any way the progress and working of the plan ordained by the Supreme Authority of the nation for the nation's benefit. It is a rule which excludes all private interest, in order to maintain and vindicate a general and public good. It does not forbid a careful and equitable regard to the circumstances of particular cases (as in the instance of the original land claims) but it reserves the entire discretion to the Sovereign Power. It says nothing of the fitness or unfitness of the regulations or conditions under which the State may from time to time allow this property to be distributed and appropriated to individual citizens, but only that to the State shall belong the management and responsibility of such distribution. In general, it asserts nothing as to the course which shall be taken for the guidance of colonization, but only that there shall be one guiding Power.

The doctrine now laid down was not denied by the learned counsel for the claimant: rather, by the ingenuity spent in endeavouring to trace an authority for the issue of the pre-emption certificate, it appeared to be indirectly admitted. Therefore, in what I have said, I have gone beyond what it was strictly necessary to say; but this I have done partly because the rule appeared not to have been clearly understood, and partly because a previous comprehension of its meaning may be useful in the considerations to which we now pass.

The claimant, McIntosh, acquired then no title by the purchase alone? Did he acquire any by the purchase in connection with the certificate?

The claimant says he has purchased this land with the Queen's authority; that he has expended his money with her sanction; and, therefore, has a legal right to have the land so purchased granted to him. This he says, without alleging any objection to the grant, or to the conduct of the grantee, without suggesting any illegality or irregularity at all. Leaving the Court to assume (as in this state of things must be assumed) that the grant is in itself good and unimpeachable, he calls on the Court to set aside that grant upon such grounds alone as are disclosed on this record. Now, when any loss or injury has arisen to any subject from any breach of any contract or undertaking on the part of the Crown, the law prescribes a mode in which the wrong done to the subject may be not of course enforced against the Crown but brought under the consideration of the Crown to the end that justice may be done. But the claimant's proceeding is quite a different one. He asks that the defendant's property, which (for all that is now shown) has been rightfully acquired, be taken from him.

Now, as the case stands, the defendant has the best and highest title upon which a subject can rely, and that wholly unimpeached. What is the title which Mr. McIntosh opposes to this? It is the certificate set forth upon the record. Now this certificate, though purporting to convey a right or interest in respect of certain lands within the Colony, is not only not under the colonial seal, but it does not even bear the signature of the Governor. It is really a certificate by the Colonial Secretary that the Governor had consented to waive

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the Queen's right of pre-emption in respect of certain lands. Strictly speaking, it is not a waiver, but only evidence of a waiver having been made. It is quite plain that such a paper cannot convey anything which can be called a legal right or title to the land mentioned therein. Such a title did not arise by the purchase alone, as we have seen; neither could it arise by virtue of this certificate.

Here, then, the claimant's case fails. But as the waiver is admitted to have been in fact the act of the Governor, and as the remaining question is, in several respects, an important one, I proceed to consider it.

Was there any authority in the Governor to make such a waiver, so as to bind the Crown? This, indeed, is the point on which the main stress of the argument was laid.

I premise that with the questions raised as to the true meaning of the Treaty of Waitangi as it stands in the Native language—whether it does or does not speak of "the exclusive right of pre-emption," or of "pre-emption" at all, or only and simply of "purchase"—we have obviously no concern. Nor, indeed, is it material to inquire whether the word "pre-emption," which is found in the English copy, be used in the sense now contended for—that is to say as indicating merely a prior right in the Crown upon the non-exercise whereof a subsequent right would, as of course and without anything further, accrue to the subjects of the Crown; or whether it was intended to express that superior right which the law recognizes in the Crown overriding and controlling all purchases of Native lands by subjects of the Crown. For the plaintiff stands upon the Crown's right as it is in the Crown, and upon nothing else. He bases his claim, not upon any right accruing to himself subsequently to, or independently of, that right, but upon a transfer of that very right to himself. The certificate purports to be something more than a mere waiver. A mere waiver or relinquishment of a Crown right would leave to all the Queen's subjects equally whatever benefit might arise therefrom. Whereas, this document purports to convey that right to one individual to the exclusion of all others; and to him, for a time undefined.

That there was no express authority for the issue of certificates of this kind is acknowledged. If there was an implied authority, it must be gathered from the acts and dealings of the Crown, the laws which have been made, and instructions which have been issued in respect of this Colony. Now, among the first Instructions given by one of Her Majesty's Principal Secretaries of State to the first Governor of New Zealand we find the following passage: "It is not, however, "to the mere recognition of the sovereign authority of the Queen that "your endeavours are to be confined, or your negotiations directed. "It is further necessary that the chiefs should be induced, if possible, "to contract with you, as representing Her Majesty, that hence-"forward no lands shall be ceded, either gratuitously or otherwise, "except to the Crown of Great Britain. Contemplating the future "growth and extension of a British Colony in New Zealand, it is an "object of the first importance that the alienation of the unsettled "lands within its limits should be conducted from its commencement "upon that system of sale of which experience has proved the wisdom, "and the disregard of which has been so fatal to the prosperity of other "British settlements": *Parliamentary Papers*, 1840, p. 38. Now, these directions appear to have been in no way confined to the Governor to whom they were personally addressed. They were clearly indicative of a policy to be steadily pursued by successive Governors, whilst the colonization of the country should be proceeding. These instructions were carried out, first, by the Treaty of Waitangi; and, afterwards by the Land Claims Ordinance, upon which I have already commented. Moreover, in respect of all lands which should in consequence vest in and become disposable on behalf of the Crown, strict rules were laid down; they were contained, at first, in Royal Instruc-

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tions, and afterwards embodied in an Act of Parliament, which was in force at the date of this certificate. Under either form, the rules were in substance the same. The two main points were common to both—namely, the provisions for raising an emigration fund, and the provisions for securing fair competition among purchasers. Now, doubtless, we may imply in the agent all authorities necessary for carrying into execution these two expressed purposes of his principal: but how can we imply an authority to do acts which tend directly to defeat them?

I pass by various topics which were strongly urged by Mr. *Bartley*, for two reasons—*viz.*, because they cannot be properly raised upon this record, which does not contain one word referring to them; and, further, because they are directly negatived by the terms of the Proclamation under which this certificate was issued. In fact, Governor Fitz Roy appears to have been careful to put all persons who might be disposed to act under that Proclamation upon their guard, and to give them to understand that, if they purchased at all, they would do so at their own risk. The concluding words of the Proclamation are these: "The public are reminded that no title to land in this "Colony, held or claimed by any person not an aboriginal Native of "the same, is valid in the eye of the law, or otherwise than null and "void, unless confirmed by a grant from the Crown."

These same words are found at the close both of the earlier Proclamation of March and the later one of October, under which Mr. McIntosh claims.

Upon the whole, then, Mr. McIntosh is simply a purchaser from the Natives, without authority or confirmation from the Crown. He cannot possibly stand in a better position than did the original land claimants. He cannot possess, any more than they did, a title against the Crown or the Crown's grantee.

Of course, we, in this place, have nothing to do with any question except the bare legal question of the existence or non-existence of a legal right and title in the claimant.

It may also be proper to remark that this judgment does not affirm the absolute validity of the grant to the defendant. It decides this only, that that grant cannot be set aside on the grounds which are set forth on the record.

Judgment for the defendant.

Judgment reserved.

Oct. 17.—PRENDERGAST, C.J., delivered the judgment of the Court:—In this case, on the conclusion of the original argument for the plaintiff, it appeared to us that his counsel had failed to answer the main objections raised to the declaration; and upon the deliberate consideration which we have given to the case, we have seen no reason to alter that opinion. Laying aside for the present all questions of procedure, the plaintiff, in order to succeed, must begin by establishing that the Crown grant to the Bishop of New Zealand and his successors is voidable on the grounds stated in the declaration. Of these the principal is, that the grant was issued by the then Governor without the knowledge or consent of the chiefs and members of the Ngatitoa tribe, and was a violation of the agreement and understanding between the native donors of the land and the Bishop, and a fraud upon the donors.

Now the Crown grant, which is set out in the declaration, recites that the land in question had, by what is called a deed from the natives, been ceded for the support of the school established by the grant. The declaration does not deny the existence of such a written instrument, and makes no averment respecting its contents. Specific allegations on this subject were, however, indispensable to show a cause of action. The alleged treaty with the Bishop of New Zealand, if it ever existed, was a legal nullity, the right of extinguishing the native title being exclusively in the Crown. Allowing that the Crown might be bound in law by any stipulations made by the native owners respecting the purposes to which the land should be applied, it was clearly not bound by the alleged prior treaty with the Bishop; and the declaration nowhere avers in specific terms, nor is it even inferable from its averments, that the trusts declared in the grant were other than those expressed in the act of cession.

But further, we are of opinion that the Court has no jurisdiction to avoid a Crown grant, or anything therein contained, on the pretence that the Crown has not conformed in its grant to the terms on which the aboriginal owners have ceded their rights in the land, or that the native title has not been extinguished—except perhaps in a proceeding by *scire facias* or otherwise, on the prosecution of the Crown itself.

In giving our reasons for this conclusion, we shall first consider the matter without reference to certain recent colonial enactments which may be thought to affect it.

On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognize the independent nationality of New Zealand. But the thing neither existed nor at that time could be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community. Lord Normanby, in the often-quoted despatch to Captain Hobson, bearing date the 14th August, 1839, fairly expresses the difficulty in which her Majesty's Government found itself. His Lordship writes:—

"We acknowledge New Zealand as a sovereign and independent State, so far at least as it is possible to make such acknowledgment in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate in concert."

Such a qualification nullifies the proposition to which it is annexed. In fact, the Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, *jure gentium*, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government. Thus the New South Wales Act, 4 Vic., No. 7, after stating that it was expedient and proper to put beyond doubt the invalidity of all titles to land within the islands of New Zealand, founded upon pretended purchases from the uncivilised tribes or aboriginal inhabitants, declares and enacts—"That all titles to land in New Zealand which were not, or might not thereafter, be allowed by her Majesty, were and should be absolutely null and void." The Land Claims Ordinance of 1841, repealing the New South Wales Act, and making new provision on the same subject, does not at all recede from the position assumed by the Legislature of New South Wales in relation to the rights of the Crown over New Zealand. On the contrary, by section 2 it is

"Declared, enacted, and ordained that all unappropriated lands within the colony of New Zealand—subject, however, to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said colony—are and remain Crown or domain lands of Her Majesty, her heirs and successors, and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by her said Majesty, her heirs, and successors."

And then the clause goes on to declare void all pretended purchases from the aborigines which should not be allowed by the Crown. These measures were avowedly framed upon the assumption that there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land;—see the speech of Governor Sir George Gipps on moving the second reading of the New South Wales Act above cited—Parliamentary Papers, May, 1841. They express the well-known legal incidents of a settlement planted by a civilised Power in the midst of uncivilised tribes. It is enough to refer, once for all, to the American jurists, Kent and Story, who, together with Chief Justice Marshall, in the well-known case of *Johnson* v. *M'Intosh* (4), have given the most complete exposition of this subject;—3 Kent Com. 378, *et seq.*; Story, Const., sec. 6, *et seq.* Had any body of law or custom,

(3) 45 L.J. Ch. 796.

(4) 8 Wheaton 543.

capable of being understood and administered by the Courts of a civilised country, been known to exist, the British Government would surely have provided for its recognition, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines. On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the Courts of the new sovereign. In this way British tribunals administer the old French law in Lower Canada, the Code Civil in the island of Mauritius, and Roman-Dutch law in Ceylon, in Guinea, and at the Cape. But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based. Here, then, is one sufficient reason why this Court must disclaim the jurisdiction which the plaintiff is seeking to assume. In this country the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over the land which it comprises has been extinguished. For the reason we have given, this implied fact is one not to be questioned in any Court of Justice, unless indeed the Crown should itself desire to question it, and should call upon the Court to lend its aid in correcting some admitted mistake.

The existence of the pact known as the "Treaty of Waitangi," entered into by Captain Hobson on the part of Her Majesty with certain natives at the Bay of Islands, and adhered to by some other natives of the Northern Island, is perfectly consistent with what has been stated. So far indeed as that instrument purported to cede the sovereignty —a matter with which we are not here directly concerned—it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist. So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case.

Our view of this subject is in accordance with previous decisions of this Court. In the case of the *Queen* v. *Symonds* (5), both Judges cite and rely upon the American authorities to which we have referred. Thus it is manifest that in their apprehension the case of the Maoris, like that of the Indian tribes of North America, falls within those rules of the law of nations to which we have adverted. At Auckland, in 1858, it was held by Acting Chief Justice Stephen that New Zealand had formed part of the colony of New South Wales from the time of the foundation of the latter, with the result that the English Wills Act of 1835 was not in force here, the statute having been passed since the country became a British possession. The decision imports that the title of the Crown to the country was acquired, *jure gentium*, by discovery and priority of occupation, as a territory inhabited only by savages. It led to the passing of the English Laws Act, 1858, the purpose of which measure was to fix the date which should be considered in our Courts as the foundation of the colony.

There is a second reason, closely connected with the former one, why the acts of the Crown in its dealings with the aborigines for the cession of their title are not examinable in any Court of the country. Upon such a settlement as has been made by our nation upon these islands, the sovereign of the settling nation acquiring on the one hand the exclusive right of extinguishing the native title, assumes on the other hand the correlative duty, as supreme protector of aborigines, of securing them against any infringement of their right of occupancy; —3 Kent, Com., *ubi supra*. The obligation thus coupled with the right of pre-emption, although not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation. It is one, therefore, with the discharge of which no other power in the State can pretend to interfere. The exercise of the right and the discharge of the correlative duty, constitute an extraordinary branch of the prerogative, wherein the sovereign represents the entire body-politic, and not, as in the case of ordinary prerogative, merely the Supreme Executive power;—1 Bl. Com. 252; *Rustomgee* v. *The Queen* (6). *Quoad* this matter, the Maori tribes are, *ex necessitate rei*, exactly on the footing of foreigners secured by treaty stipulations, to which the entire British nation is pledged in the person of its sovereign representative. Transactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State, and therefore are not examinable by any Court;—*The Nabob of Arcot* v. *The East India Co.* (7); *Doss* v. *Secretary of State for India* (8). Especially it cannot be questioned, but must be assumed, that the sovereign power has properly discharged its obligations to respect, and cause to be respected, all native proprietary rights.

(5) Not reported. See Parliamentary papers, December, 1847.

But it may be thought that the Native Rights Act, 1865, has made a difference on this subject, and by giving cognizance to the Supreme Court, in a very peculiar way, of Maori rights to land, has enabled persons of the native race to call in question any Crown title in this Court. This would be indeed a most alarming consequence; but if it be the law, we are bound so to hold.

We do not understand what could be the doubt vaguely referred to in the preamble, "whether her Majesty's Courts of Law within the colony of New Zealand have jurisdiction in all cases touching the persons and property of the Maori people." On the one hand, it has always been certain that a Maori could bring trespass or ejectment in respect of land held by him under a Crown grant. On the other hand, it has been equally clear that the Court could not take cognizance of mere native rights to land. Whatever doubt may now exist upon the latter point, is solely due to the Act itself.

Leaving the preamble, we pass to the third section; and in our remarks we shall disregard, as insignificant, the fact that the enactment is in form declaratory. Such declarations prove nothing as to the law, either past or present; though, as enactments, they may make it what it is declared to be; *Lundon and Whitaker's case* (9). The section is as follows:—

"The Supreme Court and all other Courts of Law within the colony ought to have, and have, the same jurisdiction in all cases touching the persons and property, whether real or personal, of the Maori people, and touching the title to land held under Maori custom and usage, as they have, or may have, under any law for the time being in force"—[this, we presume, is meant to include the common law"]—in all cases touching the persons and property of natural born subjects of her Majesty."

Whatever may be meant by the phrase "the persons or property, whether real or personal, of the Maori people," the next following words, "and touching the title," &c., can only signify that the Court is enabled and required to entertain and *determine questions of native* title. The Act speaks further on of the "Ancient Custom and Usage of the Maori people," as if some such body of customary law did in reality exist. But a phrase in a statute cannot call what is non-existent into being. As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition, that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts. Ideas and practices respecting property in land, and the power of alienation to Europeans, which have been growing up since the settlement of the country, cannot affect the question.

But the framers of the Act, conscious in some degree that the 3rd section

(6) 45 L.J. Q.B. Div. 249; L.R. 1 Q.B. Div. 493, judgment of Blackburn, J.
(7) 4 Brown, C.C. 180.
(8) L.R. 19 Eq. 509.

would lay upon the ordinary Courts of the colony an impossible task, have by the 4th section hastened to take off the burden which just before they had seemed to impose. The higher Courts having been mentioned, as it were for the sake of form, all questions of native title are by the 5th section relegated to a new and peculiar jurisdiction, the Native Lands Court, supposed to be specially qualified for dealing with this subject. To that tribunal the Supreme Court is bound to remit all such questions, and the verdict or judgment of the Native Lands Court is conclusive. If, therefore, the contention of the plaintiff in the present case be correct, the Native Lands Court, guided only by "the Ancient Custom and Usage of the Maori people, so far as the same can be ascertained," is constituted the sole and unappealable judge of the validity of every title in the country.

Fortunately we are not bound to affirm so startling a conclusion. The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when the native title has been duly extinguished;—*Magdalen College case* (10). If this prerogative be left intact, and we hold it is, the issue of a Crown grant must still be conclusive in all Courts against any native person asserting that the land therein comprised was never duly ceded.

This conclusion is strongly confirmed by remarkable provisions in the Native Lands Acts of 1867 and 1873. By section 10 of the former Act, a copy of the New Zealand Gazette, notifying the extinction of the native title over any land therein comprised, was made conclusive proof of that fact in the Native Lands Court. This provision is re-enacted by the 105th section of the Native Lands Act, 1873, and is extended in its effect to all Courts. If such a notification respecting the lands here in question had ever been issued, it would, we apprehend, be an answer to any claim founded upon a supposed native title. But it does not appear that any such notice has been published. Nevertheless, we cite these provisions as plain intimations on the part of the Colonial Legislature that questions respecting the extinction of the native title are not to be raised either here or in the Native Lands Court in opposition to the Crown, or to the prejudice of its grantees. In our judgment these enactments introduce no new principles, but merely provide a convenient mode of exercising an indubitable prerogative of the Crown.

Before we proceed to other points in the case it seems desirable to notice a dictum of a learned Judge, lately a member of this Court, which seems adverse to our own conclusion. In that part of the Commentaries of Mr. Chancellor Kent, to which we have more than once referred, the learned author writes:—

"Even with respect to the Indian reservation lands, of which they still retain the occupancy, the validity of a patent has not hitherto been permitted to be drawn in question in a suit between citizens of the State, under the pretext that the Indian right and title, as original lords of the soil, had not been extinguished."—3 Kent's Com., p. 378.

From this passage, Mr. Justice Chapman, in the judgment delivered by him in the case of *Queen* v. *Symonds* (5) appears to infer, that although the American Courts would not allow a grant to be impeached on the ground stated in a suit between their own citizens, "yet they certainly would not hesitate to do so in a suit by one of the native Indians.' This surely is no legitimate inference from the statement of Mr. Chancellor Kent, and we believe it would be impossible to find authority for it. In North America, the Crown was formerly accustomed to make grants of territory whilst the Indian title was still unextinguished. The patentee was always understood to take subject to the Indian right of occupancy, and was entitled to treat for its cession. This is quite certain;—*Johnson* v. *M'Intosh* (4), and is even mentioned by Mr. Justice Chapman, himself in this very judgment. It cannot therefore be true that a Crown grant could be impeached in an American Court

(10) 11 Rep. 75a.

on the ground supposed. Who could be plaintiff in such a suit? The learned Judge appears to speak of an individual Indian. But the Indian title is communistic. Then could the tribe sue? The very case which he presently cites of the *Cherokee Nation* v. *The State of Georgia* (11), determines that an Indian tribe has no *persona standi* as a plaintiff in the Courts of the United States. It appears clear that the learned Judge was mistaken in this particular.

The fourteenth paragraph of the declaration states a ground for impeaching the grant to the Bishop of New Zealand, on which the plaintiff seems to place his principal reliance. The statement here is "that the lands of Witireia were, and still are lands, the native title to which has never been lawfully extinguished, and at the time of the said gift"—[we presume the Crown grant is meant]—"they formed part of a reserve duly set aside by the Government of New Zealand for the exclusive use and purpose of the said Ngatitoa tribe, and the said tribe have never been permitted to sell or dispose of any portion of the said reserve lands," &c. The declaration discloses no authority in the Governor to make such a reserve, nor were we on the argument referred to any law or regulation under which it could be done. In *Reg.* v. *Macandrew* (1), the Court of Appeal inclined to think that, under the Royal Instructions of 1846, the Governor might have power, with the advice and consent of his Executive Council, to set apart reserves for the benefit of the natives out of blocks over which the native title had been extinguished. We are not aware of any other authority under which a native reserve could, at the date of these transactions, have been lawfully made.

The concluding portion of this fourteenth paragraph is wholly unintelligible.

As our opinion is against the plaintiff on the vital question which we have discussed at length, we need say less about the form of his procedure. But as the point is raised by the demurrer of the Attorney-General, it would be improper to pass over the matter in silence. It appears sufficiently clear that a Crown grant, which is voidable only for some defect not apparent on the face of the instrument, cannot be annulled except in some proceeding in which the Crown is nominal, if not actual, plaintiff. This, we say, is sufficiently clear, though it may not be certain that a *scire facias* is the only mode in which such a grant can be avoided in this colony. In *The Queen* v. *Hughes* (12), the Judicial Committee of the Privy Council were of opinion that the leases there in question might have been impeached either by information in Chancery or by writ of intrusion. In either case the remedy pointed out is a remedy in the power only of the Court itself. A subject is said to have a right *ex debito justitiæ* to a writ of *scire facias* to repeal a grant by which he alleges himself to be injured. But the Attorney-General on the part of the Crown has a discretion to exercise. "It is matter of right," according to Lord Campbell in *The Queen* v. *Eastern Archipelago Co.* (13), "to all who are justly entitled to to it; but those only are justly entitled to it who suffer prejudice by Letters Patent, and the breach of the condition upon which they have been granted. No *mandamus* would lie to the Attorney-General to grant his *fiat* for a *scire facias*." It is not a matter of course. With this agreed Mr. Baron Parke in the same case in error (14), although that very learned Judge differed on the main points of the case, both from the Lord Chief Justice in the Court below, and from the rest of the Judges in the Exchequer Chamber. Also the Attorney-General has control over the prosecutor's proceedings, and may at any time interfere and enter a *nolle prosequi*; Hindmarch on Patents, 397.

It is a common experience that in actions brought for the infringement of a patent for an invention, the defendant is allowed to impeach the validity of the patent if he can do so, and thereby to

(11) 5 Peters, U.S. Rep. 1.

(12) 35 L.J. P.C. 23; L.R. 1 P.C. 81.
(13) 22 L.J. Q.B. 213.
(14) 23 L.J. Q.B. 99.

show that he is not guilty of the wrong for which he is sued. But in such an action the validity of the patent is not directly in question, nor conclusively determined; and it has happened that after being defeated in one action the patentee has succeeded in another; as in the cases of *Arkwright* v. *Mordaunt* and *Arkwright* v. *Nightingale*, cited in Foster on *Sci. Fa.* p. 243; Hindmarch on Patents, 384. The course of pleading in such actions affords, therefore, no argument for granting the relief here asked for, which, as annulling the grant, would be a judgment *in rem*. The recent case of *O'Shanassy* v. *Joachim* (15), was also relied upon as showing that a grant may be declared void in a suit between subject and subject. There, in several actions of trespass, the invalidity of Crown grants to the infant plaintiffs was set up by way of defence. In this case also, judgment, had it gone for Sir John O'Shanassy, the defendant below, would not have been conclusive against the validity of the grants. Actually, the judgment of the Privy Council was in favour of the plaintiffs, and established the grants. Another point of distinction is, that these grants in *O'Shanassy* v. *Joachim* were objected to on the ground that the grantees, as infants, were incapable of taking any estate under them: which contention, had it been sustained by the Judicial Committee, proved the grants to be not merely voidable, but absolutely void. But even this conclusion would not have estopped the grantees (the Joachims) in a suit against a different defendant respecting other lands comprised in the grants.

The case of *Alcock* v. *Cooke* (16), is a plainer authority to the same purpose. There, in an action of trover for a wrecked bowsprit, the defendant was allowed to impeach a grant from the Crown under the Duchy seal of Lancaster (which is a record of the Court of Chancery of the Duchy), upon an objection not appearing upon the face of the grant. Even in this case the validity of the grant came but incidentally in question, and was not conclusively determined. The judgment settled nothing but the right to the bowsprit.

On the whole we see no sufficient reason to doubt the general position so often laid down, and correctly taken by the demurrer of the Attorney-General, that a Crown grant cannot be avoided for a matter not appearing upon the face of the grant, except upon a writ of *scire facias*, or by some analogous proceeding taken in the same or on behalf of her Majesty;—Foster on *scire facias*, 246; Hindmarch on Patents, 64.

Although the present action is disposed of effectually by our ruling on the points already noticed, it appears desirable, considering the public importance of the case, briefly to express our opinion on ulterior questions which were argued before us. Suppose, then, that the trusts of the grant had been confined, as on behalf of the plaintiff it is contended they ought to have been confined, to the establishment and maintenance of a school at Witirea for the children of the Ngatitoa, we are still of opinion that the plaintiff could not succeed in his present claim. If it were made out that this supposed object of the grant had become impracticable, there is abundant authority for the application of the rents and profits of the land to some purpose as nearly as possible similar to the object of the original trust, according to the doctrine of *cy pres*. Thus, in the case of *Attorney-General* v. *Glyn* (17), a school was founded for the education of the poor within a certain district; the district was converted into a dock under a local Act of Parliament, so that the objects of the charity failed. The Court referred it to the Master to approve of a scheme for the application of the funds of the charity *cy pres*. The case of *The Incorporated Society* v. *Price* (18), before Lord Chancellor Sugden in Ireland, is also a good deal in point. There a grantor, after reciting that a school was intended to be erected in the

(15) 45 L.J. P.C. 43; L.R. 1 App. Cas. 82.
(16) 5 Bing. 340.
(17) 12 Sim., 84.
(18) 1 J. & L. 498.

neighborhood of Cashel, granted to the Incorporated Society a rent charge of £30, to be applied for the maintenance and support of the said school "in such manner as in such like schools they shall direct." In consequence of a want of funds the Society discontinued the school at Cashel. It was held by the Lord Chancellor that the rent did not cease upon the school being discontinued.

But there are still other obstacles in the way of the plaintiff's claim. No case can be cited in which, on the failure of the object of charity founded by deed, a resulting trust of land has been established in favour of the heirs of the donor. Any cases in which bequests for charitable purposes may have been held to lapse in consequence of there being no object of the charity in existence at the time of the testator's death, are beside the purpose. Here the gift was by deed, and was not originally for an impossible purpose. According to Coke, on the dissolution of a corporation its lands revert to the donors or their heirs;—Co. Litt. 13 b. This appears to be the only instance in which such a right of reverter is admitted by the law;—*Burgess* v. *Wheate* (19). But even in this case the right of the donor's heirs does not extend to land held by the dissolved corporation upon trust for charitable purposes. Mr. Grant, in his work on Corporations, states the matter thus:—

"The rule has been laid down in equity, that where lands are given to a corporation for charitable uses, which, in the donor's contemplation, were to last for ever, and it becomes impracticable to execute the charity, the heir-at-law can never have the land, but another charity similar to the former must be substituted by the Court, which the corporation must administer as long as the corporation itself exits. When the corporation is dissolved, or otherwise becomes extinct, then, though the lands it holds to its own use will go to the heirs of the donors, those it holds to charitable uses will be administered for those uses by the Court of Chancery."—Grant on Corporations, p. 117.

For this he cites *Attorney-General* v. *Hicks* (20). Mr. Justice Story almost repeats this—Story's Eq. Jur., § 1177—and cites the same case. Such a case can rarely occur, as there are no gifts of land now-a-days in England upon charitable trusts. We find no modern authority upon the subject; but should be prepared, if necessary, to act upon the doctrine stated by Mr. Grant, and to decree the execution of the trust *cy pres*, rather than allow a resulting trust in favour of the donors.

Lastly, we are of opinion that in law the Crown is to be regarded as the donor, and not the Ngatitoa tribe. It is wholly unnecessary to develop this objection, as there are so many other answers to the plaintiff's claim.

The result is that the defendants must have judgments upon their respective demurrers. We have distinctly upheld the demurrer of the Attorney-General, and also the first part of the second ground of demurrer taken on behalf of his Lordship the Bishop of Wellington. The first ground of the Bishop's demurrer appears to amount to no more than a verbal criticism upon the declaration, which is certainly exceedingly ill drawn. However, as the general nature of the plaintiff's claim does appear with sufficient distinctness, and raises questions of great importance, it seemed desirable to base our judgment upon no minute criticism of the allegations made on his behalf. No objection was made to the general terms of the third paragraph of the Bishop's demurrer, which necessarily raises all the substantial questions in the case. On the question whether a Maori chief can sue on behalf of his tribe, we wish to give no opinion. It is one of the difficult questions raised by the Native Rights Act, 1865.

The plaintiff's motion for an injunction and the appointment of a receiver must fall with his declaration.

Demurrers allowed (21).

Solicitors: For the plaintiff, Barton and Fitzherbert; for the defendant, (Bishop of Wellington) Travers, Ollivier & Co.

(19) Wm. Bl. 165, per Lord Mansfield.
(20) Highmore on Mortmain, 336, 354.

(21) Leave to appeal direct to the Privy Council, under the Order in Council of 1860, was subsequently granted.

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RICHMOND, J., delivered the judgment of the Court(5) as follows:—

In our opinion the Attorney-General is a necessary party to this suit, and, that being so, he is by consent to be considered as a defendant, and as raising the questions stated as the third and fourth issues. The contest is as to the title of the Crown to a triangular piece of land alleged by the plaintiff to intervene between the eastern boundary of a block called Kaihinu No. 2, purchased by the Crown in 1871, and the western boundary of a block of 25,000 acres, or thereabouts, awarded to the Crown in 1885 by the Native Land Court as its proper share of Mangatainoko No. 3. On the part of the Crown it is asserted that Kaihinu No. 2 includes the land claimed by the plaintiff. The question raised is, therefore, whether the Native title to the piece of land claimed by the plaintiff on behalf of himself and other aboriginal natives has or has not been extinguished.

The plaintiff bases his title either upon an order of the Native Land Court, bearing date the 13th of September, 1871, for the issue to himself and the other members of the Rangitane Tribe of a certificate of title to the entire Mangatainoko Block of 62,000 acres, or upon the unascertained Maori title of occupancy. On the former ground he cannot stand, because the order is subject to the condition that a proper survey should have been furnished to the satisfaction of the Chief Judge of the Native Land Court, which has not been complied with. The plaintiff comes here, therefore, on a pure Maori title, and the case is within the direct authority of *Wi Parata* v. *The Bishop of Wellington*(1). We see no reason to doubt the soundness of that decision. It would be fallacious to treat the question now before this Court as one of boundary, to be determined upon the construction of deeds of cession and orders of the Native Land Court. The Commissioner has set up a defence grounded upon such instruments. But decision upon it involves disputed questions of fact into which we cannot enter—questions which, if the Supreme Court could entertain them at all, would be in part questions for a jury. What we have now to determine on the third and fourth issues is in the nature of a demurrer to the statement of claim. According to what is laid down in the case cited, the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony. There can be no known rule of law by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested. Such transactions began with the settlement of these Islands; so that Native custom is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. The security of all titles in the country depends on the maintenance of this principle. The third and fourth issues ought therefore, in our opinion, to be decided in the negative.

Defendant to have costs of the action on the scale.

Questions answered in favour of defendant.

Solicitors for the plaintiff: *Thompson & Baldwin* (Wellington).

Solicitor for the defendant: *Crown Solicitor* (Wellington).

(1) 3 N.Z. J.R. N.S. S.C. 72.

(1) 3 N.Z. J.R. N.S. S.C. 72.
(2) Ibid. pp. 79, 80.
(3) 8 Wheaton 543; 5 U.S. Rep. (Curtis) 503.
(4) 5 Peters 1; 9 U.S. Rep. (Curtis) 178.
(5) Prendergast, C.J., and Richmond, Williams, Denniston, and Conolly, JJ.

* The question whether an injunction could be granted against such an officer as the Commissioner of Crown Lands, and other questions, were also argued, but, as they are not dealt with in the judgment, the argument upon them is not reported.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal by an aboriginal inhabitant of New Zealand against an order of the Court of Appeal in that Colony dated May 28, 1894, in which questions of great moment affecting the status and civil rights of the aboriginal subjects of the Crown have been raised by the respondent. In order to make these questions intelligible it will be necessary to review shortly the course of legislation on the subject in the Colony.

The Treaty of Waitangi (February 6, 1840) is in the following words :—

ARTICLE THE FIRST.

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole Sovereigns thereof.

ARTICLE THE SECOND.

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Pre-emption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

ARTICLE THE THIRD.

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British subjects.

By s. 2 of the Land Claims Ordinance, 1841 (repealing the New South Wales Act, 4 Vict., No. 7), it was—

Declared, enacted, and ordained that all unappropriated lands within the Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are and remain Crown or domain lands of Her Majesty, Her heirs and successors, and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty, Her heirs and successors.

No doubt this Act of the Legislature did not confer title on the Crown, but it declares the title of the Crown to be subject to the "rightful and necessary occupation" of the aboriginal inhabitants, and was to that extent a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi. It would not of itself, however, be sufficient to create a right in the Native occupiers cognizable in a Court of law.

In the year 1852 New Zealand, which up to that time had been a part of New South Wales, received a Constitution as a self-governing Colony. By the New Zealand Constitution Act of that year (15 & 16 Vict., c. 72), s. 72, the Assembly was empowered to make laws for the sale, disposal, and occupation of waste lands of the Crown and lands wherein the title of Natives shall be extinguished as thereafter mentioned and (s. 73) it was made unlawful for any person other than Her Majesty to purchase or accept from aboriginal Natives land of, or belonging to, or used by them in common as tribes or communities, or to accept any release or extinguishment of the rights of such aboriginal Natives in any such land. By s. 8 of 25 & 26 Vict., c. 48, power was given to the General Assembly to repeal s. 73 of the previous Act.

By the Native Rights Act, 1865, of the Colonial Legislature (29 Vict., No. 11) it was enacted that every person of the Maori race within the Colony of New Zealand whether born before or since New Zealand became a dependency of Great Britain should be taken and deemed to be a natural-born subject of Her Majesty to all intents and purposes whatsoever—s. 2; that the Supreme Court and all other Courts of law within the Colony ought to have and have the same jurisdiction in all cases touching the persons and the property, whether real or personal, of the Maori people and touching the titles to land held under Maori custom or usage as they have or may have under

any law for the time being in force in all cases touching the persons and property of natural-born subjects of Her Majesty—s. 3; that every title to and interest in land over which the Native title shall not have been extinguished shall be determined according to the ancient custom or usage of the Maori people so far as the same can be ascertained—s. 4; and that in any action involving the title to or interest in any such land the Judge before whom the same shall be tried shall direct issues for trial before the Native Land Court—s. 5.

By the Native Lands Act, 1865 (29 Vict., No. 71), after a recital that it was expedient to amend and consolidate the laws relating to lands in the Colony which were still subject to Maori proprietary customs, and to provide for the ascertainment of the persons who according to such customs were the owners thereof, and to encourage the extinction of such proprietary customs, and to provide for the conversion of such modes of ownership into titles derived from the Crown, and for other purposes therein mentioned, it was enacted that "Native land" should mean lands in the Colony which were owned by Natives under their customs or usages—s. 2; that the Native Land Court (which had been established under earlier legislation) should be a Court of record for (amongst other purposes) the investigation of the titles of persons to Native lands—s. 5; that any Native claiming to be interested in a piece of Native land might apply for the investigation of his claim by the Court in order that a title from the Crown might be issued to him—s. 21; that the Court (after certain notices had been given) should ascertain the right, title, or interest of the applicant and all other claimants to or in the land in question, and order a certificate of title to be issued specifying the names of the persons or of the tribe who according to Native custom own or were interested in the land, describing the nature of such estate or interest and describing the land comprised in such certificate—s. 23. By s. 25 it was provided that no order for a certificate of title should be made unless a survey of the lands in question made by a duly licensed surveyor was produced during the investigation, and it should be proved that the boundaries had been distinctly marked out on the ground. It is from the neglect of this very useful provision that the whole difficulty of fact has

arisen in the present litigation. By ss. 46 to 48 provision is made for the issue of Crown grants to the persons mentioned in any certificates and to purchasers from them, which latter grants were to be as valid and effectual as if the lands had been ceded by "the Native proprietors" to Her Majesty.

By the Native Land Act, 1877 (41 Vict., No. 91), s. 6, power was given to the Native Minister to apply to the Native Land Court to ascertain and determine what interest in any plot of land had been acquired by or on behalf of Her Majesty, and all lands declared in any order made on such application to have been so acquired should from the date of the order be deemed to be absolutely vested in Her Majesty. This section has been repealed, but is re-enacted in a subsequent Act.

The Native Land Act, 1865, has been repealed by the Native Land Act, 1873, but was in force at the date of the orders made by the Native Land Court on September 13, 1871, hereafter mentioned. The provisions of the earlier Act with some alterations and additions were re-enacted in the Act of 1873. The only sections to which reference need be made for the present purpose are ss. 101 and 102, by which the Native Land Court is directed to hear and determine any reference from the Supreme Court under the Native Rights Act, 1865, and the effect of the decision of the Land Court thereon is defined, and s. 105 by which it is enacted that any notification published in the *New Zealand Gazette* and purporting to be made by, or by the authority of, the Governor, and stating that the Native title over any land therein described was extinguished previously to a date therein specified, shall for all purposes be received as conclusive proof that the Native title over the land described in such notice was extinguished at some time previously to the date therein specified and that such land on such date ceased to be Native land within the meaning of the Act.

Their Lordships do not think it necessary to review the series of Land Acts which were passed prior to 1892 for the purpose of enabling the Government to sell and dispose of Crown lands discharged from Native claims. The Act in force at the commencement of the present action was the

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Land Act, 1892. By s. 3 of that Act Crown lands are defined to mean and include (amongst other things)—

> All Native lands which have been ceded to Her Majesty by the Natives or have been purchased or otherwise acquired in freehold from the Natives on behalf of Her Majesty or have become vested in Her Majesty by right of Her prerogative.

By ss. 22 and 26 provision was made for the constitution of ten land districts (of which the Wellington Land District is one) with a Commissioner of Crown Lands for each district, and by s. 28 the powers and duties of the Commissioners were defined. By s. 106 Crown lands were divided into three classes: (1) Town land; (2) suburban land; and (3) rural land. By s. 136 the Governor was empowered by notification in the *Gazette* to declare that any rural land within the Colony (with an immaterial exception) should be open for sale or selection in the manner and upon the conditions mentioned in the Act. By s. 250 it is enacted that whenever the Governor is satisfied that any Native lands acquired by Her Majesty in any way or purchased out of moneys authorized to be expended on purchase of lands in the North Island are free from Native claims and any difficulties in connection therewith, he shall by Proclamation ordain such lands to be Crown lands subject to be sold and disposed of, and thereupon such lands so proclaimed shall become subject to the provisions of the laws in force regulating the sale and disposal of Crown lands.

On September 13, 1871, three orders were made by the Judge of the Native Land Court.

The first order was for the issue of a certificate of title under the Native Land Acts, 1865 and 1869, to certain Natives (not including the appellant) in respect of a block of land containing about 22,000 acres, known as and called Kaihinu No. 1, when a proper survey of the said land should have been furnished to the satisfaction of the Chief Judge. And it was further ordered that whenever a Crown grant should be made of the said land the legal estate therein should vest in the grantees on September, 13, 1871.

The second was a similar order in all respects as to a block of land, containing about 19,000 acres and called Kaihinu No. 2, in favour of certain Natives (also not including the appellant).

The third was again a similar order in all respects as to a block of land, containing 62,000 acres and called

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Mangatainoka Block, in favour of certain Natives (including the appellant) and all others (if any) of the members of the Rangitane tribe. By subsequent proceedings certain parts of this block (not including the areas in dispute) have been detached and have been ceded to the Crown.

By a deed dated October 10, 1871, various blocks of land (including Kaihinu No. 1 and Kaihinu No. 2, but not including the Mangatainoka Block) were surrendered by the Natives interested to the Crown. The boundaries of these blocks were not mentioned in this deed, but there is a plan on the deed the accuracy and effect of which are in controversy.

By a Proclamation dated July 2, 1874, the then Governor of the Colony "being satisfied that the lands described in "the schedule hereto are free from Native claims and all "difficulties in connection therewith in pursuance and "exercise of the power and authority vested in me by the "Immigration and Public Works Act, 1873," proclaimed the said lands to be waste lands of the Crown subject to be sold and dealt with in accordance with the provisions of the laws in force. The schedule includes all the blocks of land ceded by the deed of October 10, 1871, as the same are particularly delineated on the plan drawn in the margin of the deed.

On July 13, 1893, the respondent by public notice offered a block of land, called Kaiparoro, 20,000 acres in extent, and containing portions of Kaihinu No. 1 and Kaihinu No. 2 and part of an area of 5,184 acres the title to which is in dispute in this action, for sale or selection "in terms of s. 137 "of the Land Act, 1893," and he subsequently advertised the intended sale in the local newspapers. It is stated in the respondent's case in this appeal that a previous notification was made by the Governor pursuant to s. 136 of the Act of 1892 and published in the *Gazette* declaring open for sale the block called Kaiparoro, but there is no mention of such document in the statement of claim or the defence, and it is not referred to in the judgment of the Court, nor does it appear to their Lordships to be material to the questions which they have to decide on this appeal.

The appellant thereupon commenced the present action. The allegations in the amended statement of claim are confused, and some of them are irrelevant, and the prayer certainly goes beyond any relief which in the most favourable view of his case he can be entitled to. He sets out the

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several documents, the effect of which has been already stated. He does not in terms allege his title to the Mangatainoka Block, or that he and the other members of his tribe are enjoying the use and occupation of the lands in dispute, but he sets out the order relating to that block, and in para. 36 alleges that no license has been granted to any other person to occupy the lands in dispute. Their Lordships think that for the present purpose they are not bound to scan the sufficiency of the allegations too closely, and they must assume that the appellant has alleged or can by amendment allege a sufficient title of occupancy in himself and the other members of his tribe to raise the questions in controversy on this appeal.

The substance of the appellant's case appears to be that no proper or sufficient surveys of Kaihinu No. 1, Kaihinu No. 2, or Mangatainoka Blocks have ever been made, and that the respective boundaries between the last two blocks have never been ascertained, and that a certain triangular block of 5,184 acres and another piece of land are not parts of Kaihinu No. 2 (as claimed by the respondent) but parts of Mangatainoka, and that the Native title in those portions of the last-named block has never been extinguished by cession to the Crown or otherwise. By para. 36 of the statement of claim the appellant submits that the said triangular piece of land and the other piece of land still remain land owned by himself and other aboriginal Natives under their customs and usages, whether under the said order of the Native Land Court or otherwise. His prayer is—

1. For a declaration in the terms of his previous submission.

2. That the pieces of land form part of the Mangatainoka Block.

3. For a perpetual injunction to restrain the respondent from selling the two pieces of land or from advertising the same for sale or disposal as being the property of the Crown, and for further relief.

Their Lordships observe that the order of the Land Court not being completed by a certificate does not confer any title on the appellant, but they think it is evidence of his title, and the Act does not appear to make the obtaining of the certificate a condition precedent to the assertion of a Native

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title. In fact no certificates were issued in respect of Kaihinu No. 1 and Kaihinu No. 2 Blocks.

The issue of fact between the parties is whether the pieces of land in question were parts of Kaihinu No. 2 or of Mangatainoka. But if the action comes to trial there will be another question whether the pieces of land have in fact even if erroneously been included in the deed of cession of Kaihinu No. 2 or in some Proclamation or other act of the Governor which by the Acts in force is made conclusive evidence against the appellant.

Their Lordships, however, have not now to deal with the merits of the case, or to say whether the appellant has or ever had any title to the pieces of land in question, or whether such title (if any) has or has not been duly extinguished, or to express any opinion on the regularity or otherwise of the respondent's proceedings. The respondent has pleaded amongst other pleas that the Court has no jurisdiction in this proceeding to inquire into the validity of the vesting or (? the) non-vesting of the said lands or any part thereof in the Crown.

An order was made for the trial of four preliminary issues of law of which two only (the 3rd and 4th) were dealt with in the order now under appeal. They are in these terms :—

3. Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding ?

4. Has the Court jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the Native owners to the Crown ?

Both questions were answered by the Court of Appeal in the negative.

Their Lordships are somewhat embarrassed by the form in which the third question is stated. If it refers to the prerogative title of the Crown, the answer seems to be that that title is not attacked, the Native title of possession and occupancy not being inconsistent with the seisin in fee of the Crown. Indeed, by asserting his Native title, the appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy or possession. If, on the other hand, the unencumbered title alleged by the respondent to have been acquired by the Crown by extinguishment of the Native title be referred to, it is the same question as No. 4, and the answer to it must depend on a consideration of the character of the action

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and the nature of the relief prayed against the defendant. As the Court of Appeal point out, what they had to determine was in the nature of a demurrer to the statement of claim. The substantial question, therefore, is whether the appellant can sue, and whether, if the allegations in the statement of claim are proved, he will be entitled to some relief against the respondent. It is not necessary for him to show in this proceeding that he will be entitled to all the relief which he seeks.

The learned Judges in the Court of Appeal thought that the case was within the direct authority of *Wi Parata* v. *Bishop of Wellington*(1) previously decided in that Court. They held that "the mere assertion of the claim of the Crown "is in itself sufficient to oust the jurisdiction of this or any "other Court in the Colony." "There can be no known "rule of law," they add, "by which the validity of dealings "in the name and under the authority of the Sovereign "with the Native tribes of this country for the extinction "of their territorial rights can be tested "(2). The argument on behalf of the respondent at their Lordships' Bar proceeded on the same lines.

Their Lordships think that the learned Judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown or acting under the authority of the Crown for the purposes of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority the conditions of which (it is alleged) have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes and is confined within the four corners of the statutes. The Governor in notifying that the lands were rural land open for sale was acting and stated himself to be acting in pursuance of s. 136 of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of s. 137 of the same Act. If the land were not within the powers of those sections (as is alleged by the appellant), the respondent had no power to sell the lands, and his threat

(1) (1877) 3 N.Z. Jur. (N.S.) S.C. 72.

(2) (1894) 12 N.Z.L.R. 483, 488.

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to do so was an unauthorized invasion of the appellant's alleged rights.

In the case of *Tobin* v. *The Queen*(3) a naval officer purporting to act in pursuance of a statutory authority wrongly seized a ship of the suppliant. It was held on demurrer to a petition of right that the statement of the suppliant showed a wrong for which an action might lie against the officer, but did not show a complaint in respect of which a petition of right could be maintained against the Queen on the ground (amongst others) that the officer in seizing the vessel was not acting in obedience to a command of Her Majesty but in the supposed performance of a duty imposed upon him by Act of Parliament, and in such a case the maxim *respondeat superior* did not apply. On the same general principle it was held in *Musgrave* v. *Pulido*(4) that a Governor of a Colony cannot defend himself in an action of trespass for wrongly seizing the plaintiff's goods merely by averring that the acts complained of were done by him as "Governor" or as "acts of State." It is unnecessary to multiply authorities for so plain a proposition and one so necessary to the protection of the subject. Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament but really outside the statutory authority. The Court of Appeal thought that the Attorney-General was a necessary party to the action, but it follows from what their Lordships have said as to the character of the action that in their opinion he was neither a necessary nor a proper party. In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as pleading only and requires to be supported by evidence.

But it is argued that the Court has no jurisdiction to decide whether the Native title has or has not been extinguished by cession to the Crown. It is said and not denied that the Crown has an exclusive right of pre-emption over Native lands and of extinguishing the Native title. But that right is now exercised by the constitutional Ministers of the Crown on behalf of the public in accordance with the provisions of the statutes in that behalf, and there is no suggestion of the extinction of the appellant's title

(3) (1864) 16 C.B. (N.S.) 310.

(4) (1879) 5 App. Cas. 102.

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by the exercise of the prerogative outside the statutes if such a right still exists. There does not seem to be any greater difficulty in deciding whether the provisions of an Act of Parliament have been complied with in this case than in any other, or any reason why the Court should not do so. In so saying their Lordships assume (without deciding) that if it be shown that by an act of the Governor done pursuant to the statutes the land has been declared free from Native claims it will be conclusive on the appellant.

A more formidable objection to the jurisdiction is that no suit can be brought upon a Native title. And the first paragraph of the prayer was referred to as showing that the appellant sought a declaration of his title as against the Crown. Their Lordships, however, do not understand that paragraph to mean more than that the Native title has not been extinguished according to law. The right it was said depends on the grace and favour of the Crown declared in the Treaty of Waitangi, and the Court has no jurisdiction to enforce it or entertain any question about it. Indeed it was said in the case of *Wi Parata* v. *Bishop of Wellington*(5), which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of law can take cognizance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of ss. 3 and 4 of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that "a phrase in a statute "cannot call what is non-existent into being." It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence. By s. 5 it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in Native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a Court specially constituted for the purpose. The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the con-

(5) (1877) 3 N.Z. Jur. (N.S.) S.C. 72.

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struction and effect of the Native Rights Act, and one is rather at a loss to know what is meant by such expressions "Native title," "Native lands," "owners," and "proprietors," or the careful provision against sale of Crown lands until the Native title has been extinguished if there be no such title cognizable by the law and no title therefore to be extinguished. Their Lordships think that the Supreme Court are bound to recognize the fact of the "rightful "possession and occupation of the Natives" until extinguished in accordance with law in any action in which such title is involved, and (as has been seen) means are provided for the ascertainment of such a title. The Court is not called upon in the present case to ascertain or define as against the Crown the exact nature or incidents of such title, but merely to say whether it exists or existed as a matter of fact and whether it has been extinguished according to law. If necessary for the ascertainment of the appellant's alleged rights, the Supreme Court must seek the assistance of the Native Land Court, but that circumstance does not appear to their Lordships an objection to the Supreme Court entertaining the appellant's action. Their Lordships therefore think that, if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a Native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title. The question whether the appellant should sue alone or on behalf of himself and the other members of his tribe on an allegation that they are too numerous to be conveniently made co-plaintiffs is not now before their Lordships, but it does not seem to present any serious difficulty.

If all that is meant by the respondent's argument is that in a question between the appellant and the Crown itself the appellant cannot sue upon his Native title, there may be difficulties in his way (whether insurmountable or not it is unnecessary to say), but for the reasons already given that question, in the opinion of their Lordships, does not arise in the present case.

In the case of *Wi Parata* v. *The Bishop of Wellington*(6), already referred to, the decision was that the Court has no

(6) (1877) 3 N.Z. Jur. (N.S.) S.C. 72.

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were substituted therein instead of the words "the said "judgment of the Court of Appeal of New Zealand "of July 13, 1894."

The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *Hollams, Sons, Coward, and Hawksley* (London), agents for *Thompson and Baldwin* (Wellington).

Solicitors for the respondent: *Mackrell, Maton, Godlee, and Quincey* (London), agents for the *Crown Solicitor* (Wellington).

CASE ANNOTATION.

Expld. *Hutton* v. *Secretary of State for War*, (1926) 43 T.L.R. 106.

Folld. *Tamihana Korokai* v. *Solicitor-General*, (1912) 32 N.Z.L.R. 321, 344.

Dist. *Waipapakura* v. *Hempton*, (1914) 33 N.Z.L.R. 1065, 1071.

Refd. *Public Trustee* v. *Loasby*, (1908) 27 N.Z.L.R. 806.

STATUTE ANNOTATION.

The Land Claims Ordinance Act, 1841, s. 2, was repealed and not re-enacted.

The Native Rights Act, 1865, and the Native Land Act, 1865, were repealed and consolidated: compare Native Land Act, 1931.

Sections 136 and 137 of the Land Act, 1892, correspond with ss. 176 and 177 of the Land Act, 1924.

For other New Zealand cases thereon, see 3 *Butterworth's Annotations of Statutes*, 213.

For further Case Annotation, see current Supplement to *38 E. and E. Digest*, title *Public Authorities*, Case No. 380.

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jurisdiction by *scire facias* or other proceeding to annul a Crown grant for matter not appearing on the face of it, and it was held that the issue of a Crown grant implies a declaration by the Crown that the Native title has been extinguished. If so, it is all the more important that Natives should be able to protect their rights (whatever they are) before the land is sold and granted to a purchaser. But the dicta in the case go beyond what was necessary for the decision. Their Lordships have already commented on the limited construction and effect attributed to s. 3 of the Native Rights Act, 1865, by the Chief Justice in that case. As applied to the case then before the Court however, their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned Judges.

In an earlier case of *The Queen* v. *Symonds*(7), it was held that a grantee from the Crown had a superior right to a purchaser from the Natives without authority or confirmation from the Crown which seems to follow from the right of pre-emption vested in the Crown. In the course of his judgment, however, *Chapman*, J., made some observations very pertinent to the present case. He says: "Whatever may be the opinion of jurists as to the strength "or weakness of the Native title, . . . it cannot be too "solemnly asserted that it is entitled to be respected, that it "cannot be extinguished (at least in times of peace) otherwise "than by the free consent of the Native occupiers" (8). And while affirming "the Queen's exclusive right to extinguish "it" secured by the right of pre-emption reserved to the Crown he holds that it cannot be extinguished otherwise than in strict compliance with the provisions of the statutes.

Certain American decisions(9) were quoted in the course of the argument. It appears from the cases referred to and others which have been consulted by their Lordships that the nature of the Indian title is not the same in the different States, and where the European settlement has its origin in discovery and not in conquest different considerations apply. The judgments of Marshall, C.J., are entitled to the greatest respect although not binding on a British Court.

(7) *Post*, p. 387.
(8) Post, p. 390.
(9) (1831) *Cherokee Nation* v. *State of Georgia*, (1831) 5 Peters 1; (1832) *Worcester* v. *State of Georgia*, 6 Peters U.S. 515; (1810) *Fletcher* v. *Peck*, 5 Cranch 87; (1823) *Johnson* v. *McKintosh*, 8 Whea. 543.

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The decisions referred to, however, being given under different circumstances do not appear to assist their Lordships in this case. But some of the judgments contain *dicta* not unfavourable to the appellant's case.

Their Lordships are therefore of opinion that the order of the Court of Appeal should be reversed, and a declaration should be made in answer to the third and fourth issues of law as follows: That it not appearing that the estate and interest of the Crown in the subject-matter of this suit subject to such Native titles (if any) as have not been extinguished in accordance with law is being attacked by this proceeding, the Court has jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the Native owners to the Crown in accordance with law and the respondent should be ordered to pay the costs of the hearing before the Court of Appeal and they will humbly advise His Majesty accordingly.

Their Lordships observe that the declaration asked for by the statement of claim is too wide in its terms, and if the appellant succeeds in the action he can at the most be entitled to a declaration that the Native title in the lands in dispute has not been or is not shown by the respondent to have been duly extinguished according to law (which is probably what is meant) and the injunction asked for should be limited by omitting the word "perpetual" and inserting "until the Native title in the said lands has been duly "extinguished according to law," or some similar words. Their Lordships of course say nothing as to the other defences, and express no opinion on the question which was mooted in the course of the argument whether the Native title could be extinguished by the exercise of the prerogative, which does not arise in the present case.

By the Order in Council of July 8, 1895, leave is given to the appellant to appeal from the judgment of the Court of Appeal of July 13, 1894. It is not denied by the respondent and the appeal has been argued on the assumption on both sides that the order of May 28, 1894, was intended and that leave to appeal from that order was intended to be given. Their Lordships, therefore, will humbly advise His Majesty that the Order in Council should be read and have effect as if the words "the judgment of "the Court of Appeal of New Zealand of May 28, 1894,"

STOUT, C.J., delivered the judgment of the Court, as follows:—

This is an appeal from a decision of Alfred Crooke, Esq., S.M., sitting at New Plymouth.

The respondent, a fishery officer, purporting to act under regulations made under the Fisheries Act, 1908, seized certain nets belonging to the appellant, and has refused to give them up. The regulation under which the respondent purported to act says, "Set-nets having an opening of not more than 3 ft. "by 1 ft. 6 in. may be used for taking whitebait in the rivers "and streams in the Counties of Clifton, Taranaki, and Egmont, "but no person shall use any groyne, race, or lead in connection with such nets. No person shall use more than one "set-net, and no person shall set a line of set-nets across any "river or stream in the said counties."

These regulations are authorized by section 5 of the Fisheries Act, 1908, paragraphs (*a*), (*d*), and (*l*). This section and the subsections are as follows:—

"5. The Governor may from time to time, by Order in "Council gazetted, make regulations, which shall have force "and effect either throughout New Zealand or only in such "waters or places as are specified in the regulations, for any "of the purposes following, that is to say:—

"(*a.*) Generally regulating sea-fishing in New Zealand:

"(*d.*) Imposing conditions and restrictions on the taking of "fish, &c.:

"(*l.*) Fixing the minimum size, when wet, of the mesh in "the square, or in extension from knot to knot, of "nets and seines to be used in fishing; prescribing "the mode of measuring the same; and prohibiting "the use of nets or seines of all descriptions or of "any specified description."

The appellant relied on section 76 and subsection 2 of section 77 of the Fisheries Act, 1908, which are as follows:—

"76. (1.) No Maori or half-caste habitually living with "Maoris according to their customs shall be sued for any "fine or forfeiture under this Part of this Act unless and "until the authority of the Native Minister to take proceedings "has been filed in the Court in which such proceedings are "intended to be taken.

"(2). The aforesaid authority of the Native Minister may "from time to time be signified by him to any person, either "generally or specifically, and shall be valid if signified by "telegraph or telephone message.

"77. (2.) Nothing in this Part of this Act shall affect any "existing Maori fishing-rights."

The Magistrate held that he could not inquire as to whether the appellant had any right by Maori custom or under the Treaty of Waitangi, and that right, if any, must be found by the Native Land Court. In this respect he was, in my opinion, wrong. The Native Land Court has jurisdiction only to ascertain the title of Natives to land, and to grant a certificate accordingly. No special jurisdiction has been conferred on the Native Land Court to deal with "fisheries"—*i.e.*, fishing-rights.

(1) [1914] A.C. 158. (2) [1905] 2 Ch. 605.

S.C. 1914. WAIPAPAKURA v. HEMPTON. STOUT, C.J.

The case of *Tamihana Korokai* v. *The Solicitor-General*(1) only determined that where, as in that case, a Native claimed the ownership of the bed of a lake it was the duty of the Court to hear and adjudicate on such claim. The judgment of the Court was "that the Native Land Court can only be prevented "from performing its statutory duty, first, under the Native "Land Act; or, second, on proof in that Court that the lands "are Crown lands freed from the customary title of the "Natives; or, third, that there is a Crown title to the bed "of the lake." The judgment of the Court was not, therefore, a decision that if fishing-rights existed these could not be proved in a Magistrate's Court.

A much wider question has, however, been raised in this appeal. First, it is said that the Fisheries Act, 1908, creates no right of fishing in favour of Maori people; second, such a right as is claimed was not granted by the Treaty of Waitangi; and, third, if granted, the Legislature has not confirmed that grant. Subsection 2 of section 77 is a saving clause; it is not the grant of a right. There are several provisions in Part I of the Act that show that the Legislature acted on the assumption that Maoris have not absolute fishing-rights (see sections 17, 46, and 76). It is not averred that the appellant had any fishing-right save a right of succession by virtue of her ownership of land, to which it is admitted she has obtained a title in fee-simple, to fish in the sea, and that right was granted to her, if granted at all, by the Treaty of Waitangi. That treaty states, "Her Majesty the Queen "of England confirms and guarantees to the chiefs and tribes "of New Zealand, and to the respective families and indi-"viduals thereof, the full, exclusive, and undisturbed possession "of their lands and estates, forests, fisheries, and other pro-"perties which they may collectively or individually possess, "so long as it is their wish and desire to retain the same "in their possession; but the chiefs of the united tribes "and the individual chiefs yield to Her Majesty the exclusive "right of pre-emption over such lands as the proprietors "thereof may be disposed to alienate, at such prices as may "be agreed upon between the respective proprietors and "persons appointed by Her Majesty to treat with them in "that behalf." How the treaty is to be interpreted is stated in *Wi Parata* v. *Bishop of Wellington and The Attorney-General*(2). Assuming that we are bound by that decision—though, perhaps,

(1) 32 N.Z. L.R. 321. (2) 3 N.Z. Jur. N.S. S.C. 72.

S.C. 1914. WAIPAPAKURA v. HEMPTON. STOUT, C.J.

not by all the expressions used in the judgment—it is clear from the decision of the Privy Council in *Nireaha Tamaki* v. *Baker*(1) that, until there is some legislative proviso as to the carrying-out of the treaty, the Court is helpless to give effect to its provisions. In *Nireaha Tamaki* v. *Baker*(1) their Lordships of the Privy Council said that the Treaty of Waitangi would not of itself be sufficient to create a right in the Native occupiers of land "cognizable in a Court of law." In that case their Lordships relied upon the provisions of the Native Rights Act, 1865. We do not think that Act could have affected the question which we have now to decide, but it may be as well to observe that that Act was repealed finally by the Native Land Act, 1909.

Even if the Treaty of Waitangi is to be assumed to have the effect of a statute it would be very difficult to spell out of its second clause the creation or recognition of territorial or extra-territorial fishing-rights in tidal waters. There is no attempt in the Fisheries Act, 1908, to give rights to non-Maoris not given to Maoris. All have the right to fish in the sea and in tidal rivers who obey the regulations and restrictions of the statute. This statute has not given, and no New Zealand statute gives, any communal or individual rights of fishery, territorial or extra-territorial, in the sea or tidal rivers. All that the Fisheries Act does is to regulate all fisheries so as to preserve the fish for all. There are concessions given, but these concessions are to Maoris, as appear in the sections already referred to, and do not affect the question to be decided in this case. Now, in English law—and the law of fishery is the same in New Zealand as in England, for we brought in the common law of England with us, except in so far as it has not in respect of sea-fisheries been altered by our statutes—there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast. In the sea beyond the three-mile limit all have a right to fish, and there is no limitation of such general right in the regulations dealing with such waters. There is special legislation regarding extra-territorial waters the result of treaties, but that does not apply to us. In the tidal waters—and the fishing in this case was in this area—all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant

(1) [1901] A.C. 561.

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to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right, and in the absence of such both *Wi Parata* v. *The Bishop of Wellington*(1) and *Nireaha Tamaki* v. *Baker*(2) are authorities for saying that until given by statute no such right can be enforced. An Act alone can confer such a right, just as an Act is required in England to confer such a right unless some charter from the Crown prior to Magna Charta can be proved: See *Halsbury's Laws of England*(3). There is no allegation in this case that the land over which the tide flows belongs to the Maoris. The Maoris have land adjoining, but if so the Crown grant would be to high-water mark and would not include the land under the sea or tidal waters. In *Mueller* v. *The Taupiri Coal-mines (Limited)*(4) the Court of Appeal held that even the bed of a navigable river remained vested in the Crown and did not pass to grantees of land fronting the river.

Therefore, so far as sea-fisheries are concerned—and the question of fishing-rights on inland rivers adjoining Maori land is not before the Court—there must, in our opinion, be some legislative provision made before the Court can recognise the private rights, if any, of Maoris to fish in the sea or in tidal waters. It is clear, therefore, that, so far as this appeal is concerned, the appellant cannot succeed even if the Court were to refer the case back to the Magistrate.

It appears from the case stated that the appellant's nets have merely been seized by a fishery officer. There is no statement that they have been forfeited, nor any finding of the Magistrate to that effect. The seizure was on the 22nd of August, 1913, and the action was brought on the 5th of October, 1913.

The regulations made under section 5 prohibit the use of more than one set-net in the Waitara River for the purpose of taking whitebait, and also the use of any groyne, race, or lead in connection with any nets for the purpose of taking whitebait, and impose a fine for a breach. At the time of the seizure by the fishery officer of the appellant's nets she was using more than one set-net, and also using them in connection with groynes and for the purpose of taking whitebait. This use was in contravention of the regulations, and was therefore an offence against the Act. Under section 52 of the Act the fishery officer had authority to seize them and hold them. At the time the action was brought and heard there was

(1) 3 N.Z. Jur. N.S. S.C. 72.
(2) [1901] A.C. 561.
(3) Vol. xiv, p. 574, pars. 1269, 1274.
(4) 20 N.Z. L.R. 89.

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no evidence adduced that they had been forfeited, but they were nevertheless, although not up to that time forfeited, in the lawful possession of the fishery officer. Section 76 of the Act does not conflict with section 54. Section 54 gives authority to seize; section 76 to forfeit. The appellant being a Maori, there could not be any suit for forfeiture under section 76 without the written sanction of the Native Minister to bring the suit. It does not appear from the case that this sanction has been applied for, or has been refused or granted. If the Native Minister has refused to give his sanction then it may be that in appropriate proceedings the appellant may be entitled to recover the nets, but she cannot in the present action.

As, therefore, we hold that the case shows that she was unlawfully using the nets at the time they were seized, it follows that they were properly seized and were at the time the action was brought in the lawful possession of the fishery officer, although owned by the appellant. The Magistrate was therefore right in entering a judgment of nonsuit, but wrong in the reasons he gave for that judgment.

On account of the importance involved in this appeal, Mr. Justice Edwards, before whom the case was first brought in New Plymouth, suggested that it was desirable that it should be reargued before the Full Court, but that in such case the Crown should pay the appellant's costs of the appeal in any event. To this suggestion the officers of the Crown agreed, and it is therefore unnecessary now to deal with the question of costs.

Appeal dismissed.

Solicitor for the appellant: *D. Hutchen* (New Plymouth).

Solicitor for the respondent: *C. H. Weston* (New Plymouth).

TE WEEHI V REGIONAL FISHERIES OFFICER

Cur adv vult

WILLIAMSON J. "Nothing in this Act shall affect *any Maori fishing rights.*" The meaning of s 88(2) of the Fisheries Act 1983, and particularly the words I have italicised, is the issue in this appeal against conviction. Mr Te Weehi has appealed against his convictions on charges of possession of undersized paua and behaving in a threatening manner towards a fisheries officer. He claims that at the time of the alleged offences he was not committing any offence and that the fisheries officer was not acting in the execution of his duty.

The facts

On 19 January 1984 at approximately 2 pm two fisheries officers, Howard Brown and Peter Southen, were on a routine patrol at Motunau Beach. After checking landings of rock lobster from commercial vehicles they observed three adult persons and a boy with some bags and a flax kit. As the fisheries officers approached them they noticed that there appeared to be shellfish, including paua, in the bags. One of the three adults was the appellant. Another was a Maori woman, Mrs Hauraki, who indicated straight away that they had been collecting shellfish for a feed. The fisheries officers asked if they could check the bags. At this stage the appellant told Mr Brown to leave them alone and he threatened the fisheries officer with a stick. He told the fisheries officers that they ought to be concentrating on the commercial exploiters of fisheries. When it was suggested by one of the fisheries officers that the police would be called they were then permitted to inspect the bags. They found a number of paua as well as mussels and sea snails. The total number of ordinary paua in all four bags was 49, of which 46 were undersized. Those 46 varied between 89 millimetres in length and 123 millimetres. The permissible minimum size is 125 millimetres.

The appellant is a Maori. He was born at Ruatoria and is a member of the Ngati Porou tribe. He has lived in Waikari in North Canterbury for approximately 13 years. During that time he has visited the Motunau Beach area from time to time in order to gather shellfood and fish. These shellfish were taken for immediate eating and only upon a small scale. Prior to collecting the sea food the appellant had obtained permission from a local Maori elder, Mr Rikiana Tau. Consequently the appellant said he believed he had a "Maori fishing right" to collect shellfish from the Motunau Coast for personal and family consumption.

Nature of Maori fishing right claimed

Extensive evidence was called in support of a customary right for particular Maoris to collect limited quantities of shellfish of reasonable length from stretches of beach over which their tribe or a consenting tribe exercised control. It was stated that from time to time a tribe exercising control in the area would give approval for a member of another tribe to collect shellfish from their beach. Tribal enemies would not be given such consent. Indeed in many instances tribes had battled over access to fishing grounds and coastlines.

A senior lecturer in Maori at the University of Canterbury, Mr Billy Awaroa Nepia, gave evidence of the history of such a right. He said that in exercising this traditional Maori right the person collecting the shellfish had to act in a Maori way which involved the taking of the food for use rather than for sale. He claimed that this right extended not only to persons of the immediate tribal group or necessarily only to Maoris provided that the collecting of the shellfish was in a traditional Maori way. While he accepted that there had been significant changes in New Zealand and in the way in which Maoris lived and the manner in which fish resources were conserved, Mr Nepia said that such a Maori fishing right continued to exist and to be significant because of an attitude by the Maori people to areas of fisheries which traditionally belonged to them. Mr Nepia also gave evidence that certain areas of the coastline were "rahui" which effectively meant they were out of bounds for conservation reasons. He said that in this respect any Maori was obliged to respect the sanctions imposed by the local tamatawhere.

Similar but more detailed evidence was given by a respected Maori elder, William Joseph Karetai. He has been a member of the New Zealand Maori Council for 25 years, a consultant to the Maori Affairs Department and the Social Welfare Department, a member of the New Zealand Maori Council's Special Committee on Fisheries, and a member of the Southern Regional Fisheries Committee Management Board. He is regarded as the leader and a spokesman for the Ngai Tahu tribe.

Mr Karetai gave evidence of the long involvement of the Ngai Tahu people with the South Island. He said that the Ngai Tahu had been regarded as the host tribe of the South Island for many years; that one of his ancestors had signed the Treaty of Waitangi for the South Island and other ancestors had specifically sold portions of the South Island to various groups. He indicated that the questions of setting aside specific local areas for Maori fishing grounds and the rights of Maori people to take shellfish have been the subject of many meetings of the New Zealand Maori Council and of special discussions with the Government. In relation to fisheries he said the Ngai Tahu people have always purported to exercise fishing rights over the South Island coastland. The Motunau area was always claimed to be under the official jurisdiction of the Ngai Tahu people as a fishing ground. He discussed and described the special historical relationship between the Ngai Tahu and the Ngati Porou tribes. He said that a member of the Ngati Porou tribe would always have an invitation to take shellfish from the coastline of the Ngai Tahu provided he did not abuse such a trust by selling or otherwise dealing with the food. He said that he and other members of the Ngai Tahu people regarded the Motunau area as a traditional Maori ground which would be protected and conserved. He confirmed that Mr Rikiana Tau was a well-known Maori leader in North Canterbury. While he was being cross-examined, Mr Karetai accepted that he was still pressing for specific Maori fishing rights and grounds to be recognised. He confirmed that the customary Maori fishing right about which he had been giving evidence was originally a tribal right attaching to a particular tribe on its tribal lands. He agreed that in this case the rights in relation to Motunau Beach attached to the people of the Ngai Tahu tribe. He accepted that Europeans by the name of Kemp had purchased from the Ngai Tahu tribe a large tract of land running from the Hurunui River in the north to the Motunau River in the south. He agreed that land near Motunau was now owned by various private individuals rather than the Ngai Tahu tribe.

The offences

The specific charges against the appellant are:

1. That he, without lawful excuse, negligently failed to comply with the restriction on minimum size of paua set out in the Fisheries (Amateur Fishing) Notice 1983 in that he was in possession of 46 ordinary paua,

which were less than 125 millimetres in length (reg 8(1)(b) of the Fisheries (Amateur Fishing) Regulations 1983).

2. That he behaved in a threatening manner towards a fisheries officer in the execution of his duties (s 94(1)(c) of the Fisheries Act 1983).

District Court decision

The learned District Court Judge regarded the provisions of s 88(2) of the Fisheries Act 1983 as an exemption provision in terms of s 67(8) of the Summary Proceedings Act 1957. He held that the existence of a Maori fishing right in these circumstances must be established by the defendant on the balance of probabilities. He said that although the existence of such a right had been claimed the basis of the right was not clear on the evidence and that accordingly the defendant had not discharged the burden of proof on him. The District Court Judge suggested that establishing the existence of such a right was a complex task which could be pursued more suitably by the Maori Appellate Court or under the Treaty of Waitangi Act 1975. Convictions were entered on each charge.

Appellant's submissions

Two main submissions were made by the appellant:

1. That the learned District Court Judge was incorrect in applying s 67(8) of the Summary Proceedings Act 1957.
2. That if the learned District Court Judge was right in applying s 67(8) then the appellant had clearly proved the existence of a Maori fishing right applying to him and accordingly s 88(2) of the Fisheries Act 1983 meant that the Act as a whole could have no effect on the appellant's actions.

Submission one—exemption

Section 67(8) of the Summary Proceedings Act 1957 states:

> "Any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the offence in the enactment creating the offence, may be proved by the defendant, but, subject to the provisions of section 17 of this Act, need not be negatived in the information, and, whether or not it is so negatived, no proof in relation to the matter shall be required on the part of the informant."

Under this section the burden of proof is upon a defendant. The standard of proof is upon the balance of probabilities.

The appellant's argument was that the Fisheries Act did not apply to him because what he was doing was not generally unlawful. It was contended that in this respect the appellant was not relying on any excuse or exemption and did not need to do so because the statutory provisions did not prohibit the type of activity in which he was involved. Further the appellant argued that s 94(1)(c) of the Fisheries Act 1983 did not contain any words of exception or qualification and consequently could not be brought within the class of provision to which s 67(8) could apply. It was accepted that it could apply to reg 8(1)(b) of the Fisheries (Amateur Fishing) Regulations 1983 since this provision contained the words "Without lawful excuse" but it was submitted that in this case the appellant was not relying upon that phrase in reg 8(1)(b) because the Fisheries Act and regulations had no applicability to his actions.

The application and effect of s 67(8) has been considered in cases such as *Coddington v Larsen* [1962] NZLR 512, *Akehurst v Inspector of Quarries* [1964] NZLR 621 and *Smith v Apple and Pear Marketing Board* (Auckland, M 708/79, 25 July 1979). In the case of *Coddington v Larsen* McGregor J was considering a charge of carrying on a goods service otherwise than in conformity with the terms of the goods service licence when the prosecution was based on a breach of the

restriction implied in licences, namely that concerning the carriage of goods by road where there is an available route including not less than 30 miles of open Government railway. His Honour held that the question of whether the goods service was being carried on in accordance with the licence was not an exception, exemption, proviso, excuse or qualification, but rather was the substance of the offence. He reiterated the general principle that to shift the burden of proof from the prosecution there must be a clear statutory exception.

Akehurst v Inspector of Quarries [1964] NZLR 621 concerned an exception contained in s 16(1) of the Quarries Act 1944. This provision required certain rules to be observed in all quarries "except in so far as in an individual case and in the particular circumstances prevailing it may not be reasonably practicable to observe the requirements of some particular rule" (p 623). It was held by Richmond J that the inclusion, in s 16(1), of the words "so far as may be reasonably practicable" had the effect of introducing an excuse or qualification in favour of the person charged with contravening the general rules. Accordingly his Honour applied s 67(8). An explanation which was cited with approval in this judgment is that contained in the case of *R (Sheahan) v Justices of County Cork* [1907] 2 IR 5 at p 11:

> "The test, or dividing line, appears to be this: – Does the statute make the act described an offence subject to particular exceptions, qualifications, etc, which, where applicable, make the *primâ facie* offence an innocent act? Or does the statute make an act, *primâ facie* innocent, an offence when done under certain conditions? In the former case the exception need not be negatived; in the latter, words of exception may constitute the gist of the offence."

A more recent examination of the section is contained in the judgment of Holland J in *Smith v Apple and Pear Marketing Board*. After reviewing New Zealand and English cases and after rejecting the wide interpretation suggested by Sir Francis Adams in a book entitled *Criminal Onus and Exculpations* (1968), the learned Judge posed the test in this way:

> ". . . whether the offence was intended to be a complete prohibition, but providing exceptions or excuses for the act if it is done by a particular type of person or in particular circumstances."

He proceeded on to say that if the offence was designed only to prevent certain types of act then the onus of proof beyond reasonable doubt that the act is one of the type prohibited rests on the prosecution.

In the present case one of the offences is under the Fisheries Act 1983 while the other is under the Fisheries (Amateur Fishing) Notice 1983. Under the provisions of s 4 of the Acts Interpretation Act 1924 "Act" includes all rules and regulations made under any Act. Consequently the provisions of s 88(2) of the Fisheries Act 1983, namely "Nothing in this Act shall affect any Maori fishing rights", apply to both offences.

The offence of taking undersized paua created by regs 8(1)(b) and 5 of the Fisheries (Amateur Fishing) Regulations 1983 is a general one. It contains in the description of the offence an exception in the words "Without lawful excuse". The exception or exemption however does not need to accompany the description of the offence in the enactment. Section 94(1)(c) of the Fisheries Act which creates the other offence alleged against the appellant is also in general terms and is not accompanied by a description of any exception or exemption. By s 88(2) it is effectively provided that certain activities, if carried out by a particular type of person or in particular circumstances, are not affected by the provisions of the Act. My view, in accordance with the authorities referred to above, is that the tests for the applicability of s 67(8) are satisfied and accordingly s 67(8) applies.

Consequently the appellant was obliged to prove that he was exempt from the general provisions already referred to. If he were able to establish on the balance of probabilities that he possessed and was carrying out a Maori fishing right, then he would be exempt from the prohibitions in the Act.

Submission two—any Maori fishing right

The submission of the appellant was that he had proved on the balance of probabilities the existence of a Maori fishing right covering his activities at the time of the offence. I have already summarised the evidence in this respect but it may be shortly stated in the following propositions:

1. The appellant is a Maori of Ngati Porou descent.
2. Rights to take shellfish including paua from the sea at Motunau are claimed by the Ngai Tahu tribe.
3. The appellant had obtained permission or approval to take paua in this area from Mr Rikiana Tau, a local Ngai Tahu elder.
4. The taking of the paua by the appellant was in terms of traditional Maori custom and in accord with the genealogical ties between the Ngati Porou and the Ngai Tahu people.

The phrase "any Maori fishing rights" in its plain ordinary meaning is a wide expression. The use of the word "any" and the lack of any capital letters for "fishing" and "rights" suggest that the phrase is meant to include all Maori fishing rights rather than just some particular or specific ones. There are no words of qualification. A great deal has been spoken and written about rights. In recent years there has been detailed consideration and discussion undertaken in relation to a proposed Bill of Rights for New Zealand. As a consequence fundamental freedoms and minimum standards for society have been debated to the extent that New Zealanders have an increased awareness of the importance of claims by others to rights which may or may not be protected by statute.

According to the *Shorter Oxford English Dictionary* "a right" is a "Justifiable claim, on legal or moral grounds, to have or obtain something, or to act in a certain way". Some rights are based on legislation, others are special rights which arise from a promise, special transaction or relationship and are limited to the parties concerned. Many rights, however, do not appear to have such an origin but rather are rights which are often termed fundamental rights with their basis in the inherent nature of humans. Others arise from custom or tradition within a community or group of communities.

The phrase "Maori rights" has been considered in several New Zealand judgments. Many but not all of these have taken a restrictive approach. Any consideration of such rights often commences with a discussion of the Treaty of Waitangi. The official text of this Treaty is set out in the first schedule to the Treaty of Waitangi Act 1975. The Treaty was signed in 1840 but obviously the rights which were to be protected by it arose by the traditional possession and use enjoyed by Maori tribes prior to 1840. In its terms the Treaty guaranteed

> ". . . to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties . . .".

In the case of *Kauwaeranga* in 1870 (see the comment and report in (1984) 14 VUWLR 227) Chief Judge Fenton was obliged to consider an application for a certificate of title to land on the New Zealand foreshore. It was claimed that this land had been used as a Maori fishing ground for both fish and shellfish for generations. It was asserted that as a result of the Treaty of Waitangi the right to such a fishing area was expressly preserved. Further it was contended that

doctrines of feudalism in English law should not be allowed to deprive Maoris of rights they had customarily owned. An order recognising the right was made. As part of his judgment the learned Chief Judge said:

> "That the use to which the Maoris appropriated this land was to them of the highest value no one acquainted with their customs and manner of living can doubt. It is very apparent that a place which afforded at all times, and with little labour and preparation, a large and constant supply of almost the only animal food which they could obtain, was of the greatest possible value to them; indeed of very much greater value and importance to their existence than any equal portion of land on terra firma. It is easy to understand then why the word 'fisheries' should appear so prominently in the instrument by which they admitted a foreign authority to acquire rights of sovereignty over their country" (14 VUWLR 227, 240).

No doubt this decision was still within a period when a benevolent and even protective attitude towards Maoris prevailed among British settlers. In 1847 Chapman J said in a case of *R v Symonds* (1847) NZPCC 387 at p 390 that:

> "Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled."

The overall control of the Crown as the exclusive source of title was emphasised both by Chapman J and Martin CJ in this case. Both Judges referred to the experience of the Courts in the United States of America and the practices of other colonies of Great Britain. The treatment of its indigenous peoples under English common law had confirmed that the local laws and property rights of such peoples in ceded or settled colonies were not set aside by the establishment of British sovereignty. (See *Campbell v Hall* (1774) Lofft 655.)

Similar views to those in the *Kauwaeranga* and *Symonds* cases were expressed in 1872 in the Court of Appeal decision in *Re Lundon and Whitaker Claims* (1872) 2 NZCA 41, the Court stating at p 49:

> "The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it."

Later, however, (perhaps significantly after the Maori Wars in the 1860s) while the Courts continued to acknowledge the theoretical obligation to respect native proprietary rights, they gave less weight to that obligation when weighing it alongside executive Government decisions. See for example the judgments of Prendergast CJ in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72 and *Moore v Meredith* (1889) 8 NZLR 160, Richmond J in *Nireaha Tamaki v Baker* (1894) 12 NZLR 483 (CA) (later reversed in the Privy Council (1901) NZPCC 371) and Gillies J in *Mangakahia v New Zealand Timber Co Ltd* (1881) NZLR 2 SC 345. It was on these foundations that Stout CJ built when he restricted the

recognition of title to cases where it followed an appropriate statute or Crown grant. Decisions such as *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655, *Wallis v Solicitor-General* [1903] AC 173, *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 and *Waipapakura v Hempton* (1914) 33 NZLR 1065 indicate the manner in which such kinds of customary rights in relation to land were dealt with. Interestingly it also indicated a period when dissatisfaction with appeals to the Privy Council was openly expressed. (See the Appendix to NZPCC at p 730.)

In this case counsel for the appellant has argued that the position of fishing rights is different from those rights pertaining to land because not only is there no express legislation setting aside customary Maori rights but indeed there is specific legislation intended to preserve them. Various statutory provisions have been referred to as illustrating the legislative intent to preserve rather than to take away Maori fishing rights, namely the Fish Protection Act 1877, Maori Councils Act 1900, Fisheries Act 1908, Native Land Amendment and Native Claims Adjustment Act 1922, Native Land Amendment and Native Claims Adjustment Act 1926, Maori Social and Economic Advancement Act 1945, Maori Affairs Act 1953, Reserves and Other Lands Disposal Act 1956 and the Fisheries Act 1983. The first of those Acts, the Fish Protection Act 1877 contained in s 8 the following provision:

> "Nothing in this Act shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder."

Some of the provisions expressly provide for the exclusive use of certain areas for Maori fishing. It is submitted by counsel for the appellant that these provisions are not inconsistent with the reservation of customary or traditional rights in other areas but rather provide a formal management and control structure for some particular fisheries.

A very similar provision to the one under consideration in this case was contained in the Fisheries Act 1908 at s 77(2), namely:

> "Nothing in this Part of this Act shall affect any existing Maori fishing rights."

It is to be noted that the difference is that in the present provision the word "existing" has been omitted. I doubt whether this omission is of any real significance since the word "existing" does not appear to add any feature to the phrase Maori fishing rights. If they were not existing at the time the event occurred then of course they could not be considered under this provision. The word "existing" may have indicated that the right could not be acquired after the date of the passing of the Act but in the context of this case where the right claimed is one allegedly existing prior to the Treaty of Waitangi in 1840 the point seems of little importance. There is certainly no doubt that in early cases the existence of a customary title for fishing rights was recognised as is confirmed by the approach taken in the cases of *Nireaha Tamaki v Baker* (1901) NZPCC 371 and *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321. In the latter case a full Court of Appeal determined that it was a question for the Native Land Court as to whether or not any particular piece of land was native customary land and in particular to determine whether or not Lake Rotorua or any part of it was a navigable lake and, if so, whether according to native custom the Maoris were the owners of the lake or whether they had merely a right to fish in the waters of the lake.

Section 77(2) of the Fisheries Act 1908 was specifically considered in the case of *Waipapakura v Hempton* (1914) 33 NZLR 1065. The case concerned a Maori woman who had taken action for wrongful conversion of her fishing nets. She had claimed that she was using these nets in the Waitotara River as part of the exercise of a Maori fishing right. The nets were planted in or fixed to the soil. The Magistrate had nonsuited her claim upon the grounds that he had no jurisdiction to inquire into the existence of Maori fishing rights. At pp 1071-1072 Stout CJ said:

> "In the tidal waters – and the fishing in this case was in this area – all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right, and in the absence of such both *Wi Parata v The Bishop of Wellington* and *Nireaha Tamaki v Baker* are authorities for saying that until given by statute no such right can be enforced. . . .
>
> "Therefore so far as sea-fisheries are concerned and the question of fishing-rights on the inland rivers adjoining Maori land is not before the Court, there must, in our opinion, be some legislative provision made before the Court can recognize the private rights, if any, of Maoris to fish in the sea or in tidal waters."

On that basis it was found that the regulations concerning set nets in a river applied. Accordingly it was held that the appellant had committed an offence under the regulations and that the fisheries officer had authority to seize the nets. The approach taken in this case is rather different from that taken by Stout CJ in the case of *Baldick v Jackson* (1910) 30 NZLR 343. It concerned a dispute over rights to a whale which had been killed but then lost and the carcass recovered by others. In dealing with the submission that an English statute concerning whales applied, his Honour said:

> ". . . it would have been impossible to claim without claiming it against the Maoris, for they were accustomed to engage in whaling; and the Treaty of Waitangi assumed that their fishing was not to be interfered with – they were to be left in undisturbed possession of their lands, estates, forests, fisheries, etc" (ibid, 344-345).

This judgment does not suggest that an Act of Parliament in New Zealand was necessary to preserve such customary whaling fishing right. In the *Waipapakura* case s 77(2) is described as a "saving clause" which does not grant any right. In effect the decision in that case restricts the words "Maori fishing rights" to a consideration of Maori fishing rights conferred by statute only. No specific argument was considered as to the absence of such words in s 77(2) but rather reliance was placed on the previous decisions concerning land in *Wi Parata* and *Nireaha Tamaki*.

In 1956 the provision in s 77(2) of the Fisheries Act 1908 was again considered in a case of *Inspector of Fisheries v Weepu* [1956] NZLR 920. This case concerned the greatly valued rights to whitebait fisheries in the Arahura River. F B Adams J gave close consideration to the expression "existing Maori fishing rights". After observing that the *Waipapakura* case dealt only with tidal waters he said that in his view Maori fishing rights included customary fishing rights which were preserved by the Treaty of Waitangi and which were still unextinguished. He considered that such rights may have become merged in a freehold title. Further he held that the existence of such rights necessarily depended on the continuing power of the Crown as proprietor to give effect to them or where the title to lands has passed from the Crown whether they had been preserved by statute or by some other means. He specifically rejected a submission that fishing rights could be separated from the incidence of ownership of the land and held that the transfer of the title from the Crown to the Maori Trustee extinguished the power in the Crown to implement

the Treaty in respect of lands. Accordingly he held if there had been any Maori fishing right in existence at the time when the Fisheries Act 1908 came into existence then it had ceased and had not been preserved by any statute.

In 1962 and 1963 the Court of Appeal in New Zealand considered claims for Maori ownership of land in the cases of *Re the Bed of the Wanganui River* [1962] NZLR 600 and *Re the Ninety-Mile Beach* [1963] NZLR 461. In the former case the title of the owners of the banks of the river was held to include the bed of the river to the middle of the river. Fishing rights were considered but were found to be of such a nature that they could not divide them from the rights of the riparian owners. In the latter case the Court held that land lying between mean high water mark and mean low water mark belonged to the Crown and that following an investigation of title to land having sea as a boundary the Crown was freed and discharged from obligations undertaken in the Treaty of Waitangi. This case was not of course concerned with fishing rights as such but rather the jurisdiction of the Maori Land Court to investigate title to the foreshore itself.

In the case of *Keepa v Inspector of Fisheries* [1965] NZLR 322 the Court however did specifically consider the issue of customary Maori fishing rights on the foreshore. It was held that such rights were extinguished when title was granted or a freehold order made in respect of the land bordering the sea. There was great similarity to this case in that the appellant had been convicted of taking undersized toheroa but had asserted that he was protected by virtue of s 77(2) of the Fisheries Act 1908. Hardie Boys J rejected that claim upon the basis:

> 1. That the grant of a freehold order for land bordering the foreshore established the Crown as owner of the foreshore and extinguished former Maori rights and also extinguished any customary fishing right attached to the land;
> 2. That the claim to such a fishing right would exclude the right of the Crown and other persons who were not members of the two claimant tribes from fishing rights in the area.

He specifically relied on the earlier decision of F B Adams J in the *Weepu* case concerning the concurrence of Maori fishing rights with ownership of the land.

In the case I am considering the customary right claimed is not based on ownership of the foreshore but rather the right to collect a meal of shellfish from land over which no proprietary interest was ever claimed. The right is by courtesy of a friendly and related tribe. At common law fishing rights could exist independently of the ownership of soil. (See *Attorney-General v Emerson* [1891] AC 649, per Lord Herschell at p 654.) Examples of such rights are given in *18 Halsbury's Laws of England* (4th ed) para 601. In the *Weepu* decision F B Adams J acknowledges (at p 926) that a fishing right may "become dissevered from the ownership of the soil". But he dismisses any further consideration of that possibility by indicating that it is an incidence of ownership of the soil and that in his opinion all rights of fisheries must be regarded as included in the title to the land. Hardie Boys J followed this view in the *Keepa* case without further comment. Respectfully I do not agree. In my view a customary right to take shellfish from the sea along the foreshore need not necessarily relate to ownership of the foreshore.

The second reason which was given by Hardie Boys J in the *Keepa* case was that an exclusive right would be given to the two Maori tribes concerned. This exclusiveness point also troubled the Court in the *Waipapakura* case. In the case I am considering, however, the customary right contended for is not an exclusive one since there can be no restriction on other persons taking paua from the same area, the difference being that a Maori exercising a customary right as claimed would be taking paua in very limited quantities of a "reasonable" length rather than a specific measured size.

The decisions in the *Weepu* and *Keepa* cases appear to be on a different fundamental basis from that in the *Waipapakura* case. They proceed on the basis

that customary fishing rights preserved under the Treaty of Waitangi may be extinguished by statute or by the transfer of land upon which the fishing right was based, whereas in the *Waipapakura* case it was held that such customary fishing rights were not preserved in law by the Treaty of Waitangi and could only exist if they had been conferred by legislation.

Canadian Courts have consistently taken the view that customary rights of aboriginal peoples must be preserved and that charters and treaties similar to the Treaty of Waitangi recognise obligations which arise as a result of those customary rights. This affirmation of old rights based on promises in treaties is discussed in a number of decisions including *Kruger and Manuel v R* [1978] 1 SCR 104 and *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513. In the latter case Mahoney J suggested (at p 552) that the real test in law for assessing legislation as to whether it was adverse to a right of aboriginal occupancy was whether it "expressed a clear and plain intention to extinguish that right".

More recent Canadian decisions are those of *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 and *Guerin v R* (1984) 13 DLR (4th) 321. The *Guerin* decision explores the nature of an aboriginal title following European colonisation and colonist claims to sovereignty. It also explains the pre-existing rights of the Indians as creating an enforceable equitable obligation. It described the nature of the Indian title as not properly characterised as beneficial nor as personal usufructuary but rather as a unique interest which gave the Indians a legal right to occupy and possess the lands, although the ultimate title was in the Crown. It appears that the rights claimed by nomadic Indian tribes were often of a different type to those of a principally localised nature made by Maori tribes.

The Canadian cases follow the general approach that customary rights of native or aboriginal peoples may not be extinguished except by way of specific legislation that clearly and plainly takes away the right. Similar expressions of view can be found in United States of America cases such as *Lipan Apache Tribe v United States* 180 Ct Cl 487 (1967) at p 492. Obviously the investigation of any particular customary right claimed is a detailed process requiring evidence of a convincing nature. It may relate to limited rights in very limited areas. Certainly in order to be effectively enforced the rights must be capable of definition with some precision.

The problem of defining customary rights has been referred to in various cases such as *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, *Re Southern Rhodesia* [1919] AC 211 and *Oyekan v Adele* [1957] 2 All ER 785. In the *Amodu Tijani* case Viscount Haldane said at p 403:

> "There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check . . ."

In the case of *Re Southern Rhodesia* Lord Sumner stated at p 234:

> ". . . there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law."

The effect of New Zealand decisions in relation to Maori fishing rights and the application of s 88(2) of the Fisheries Act 1983 have been discussed in various articles and in decisions of the Waitangi Tribunal in their Report on the fishing grounds in the Waitara District (17 March 1983) and their Findings on the Manukau Claim (19 July 1985) and on the Kaituna Claim (30 November 1984). The articles were written by a prolific writer on this topic, namely Mr P G McHugh of Sydney Sussex College, Cambridge. I have read his three articles, namely "Aboriginal Title

in New Zealand Courts" (1984) 2 Canta LR 235, "The Legal Status of Maori Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247 and "Maori Fishing Rights and the North American Indian" (1985) 6 Otago LR 62. These articles and decisions were referred to by counsel during argument.

After reading the findings of the Waitangi Tribunal and the articles referred to and after hearing the detailed submissions of counsel, I have further considered the application of the important decisions of *Waipapakura, Weepu* and *Keepa* to this case. I note that the customary right contended for in this case is not based upon ownership of land or upon an exclusive right to a foreshore or bank of a river. In that sense this claim is a "non territorial" one. The customary right involved has not been expressly extinguished by statute and I have not discovered or been referred to any adverse legislation or procedure which plainly and clearly extinguishes it. It is a right limited to the Ngai Tahu tribe and its authorised relatives for personal food supply. It differs significantly from the rights contended for in the *Weepu* and *Keepa* decisions. So far as the *Waipapakura* decision is concerned I note that there is no suggestion of any set nets or structures in the soil of the foreshore and no exclusive right is contended for in this case. It follows that I prefer the reasoning in the *Weepu* decision concerning the preservation of customary rights unless extinguished rather than the view that such rights are excluded unless specifically preserved or created in a statute.

During the argument in this case I was advised by counsel that the draft form of the relevant section which appeared in the Fisheries Bill as cl 83(2) stated:

> "Nothing in this Act, . . . shall affect any Maori fishing rights given *under any other enactment*."

But the italicised words were omitted from the Act. This omission may have been based upon a view that they were unnecessary in view of the *Waipapakura, Weepu* and *Keepa* decisions or because the legislature was continuing to preserve customary as well as statutory rights. If Parliament's intention is to extinguish such customary or traditional rights then it will no doubt do so in clear terms following its exploration of claims by Maori tribes to specific customary rights.

In a clear and careful argument counsel for the Crown submitted first that the customary right claimed by the appellant was too vague and indefinite, and secondly that if s 88(2) of the Fisheries Act 1983 was interpreted to include customary Maori fishing rights rather than statutory Maori fishing rights, the purposes of the Act would be frustrated. He expanded the second submission by contending:

1. That the purpose of the Fisheries Act 1983 to protect and conserve fish for the good of all New Zealanders would be frustrated if Maoris were exempt from the requirements of the Act.
2. That a general right to take fish for personal food needs was not within the term "Fisheries" as used in the Treaty of Waitangi.
3. The customary right contended for by the appellant would logically extend to all New Zealanders provided they were fishing within Maori tradition or with the consent of local Maoris.
4. Such an interpretation would render an injustice to the European who was accompanying the appellant and who had been convicted for the same conduct.
5. There could be no common law fishing right existing independently of ownership of land.

So far as the first submission is concerned, I agree that the wide terms used in part of the evidence of Mr Nepia would suggest a customary right which was so broad that it would encompass everyone fishing in a traditional Maori manner who took sufficient shellfish to satisfy only personal food needs, but I do not accept that that over-statement by Mr Nepia established such a broad right or took away

from the limited customary right contended for by the appellant and described in other parts of Mr Nepia's evidence and in the evidence of Mr Karetai. When the customary right claimed for is viewed in its narrow proven perspective the arguments concerning frustration of the purposes of the Act have less significance. Clearly such a limited customary right would not apply to Europeans or other New Zealanders fishing in a particular way. So far as injustice to the European who was convicted is concerned, I am conscious that the same argument can be made whenever any person or class of persons are exempted from particular provisions. Viewed in a more general way, such inequality between persons may indicate an overall justice rather than an injustice. I have already dealt in this judgment with the question of common law fishing rights being apart from ownership of land.

The evidence in this case, which I have summarised earlier in this judgment, was in my view sufficiently clear, undisputed and precise to establish a customary right of the nature contended for by the appellant. I appreciate that in this respect I am differing from the decision of a learned and experienced District Court Judge but I am conscious that I have had an opportunity to hear more detailed argument and analysis of the evidence which was given. It is not a question of credibility or reliability so that the importance of hearing and seeing the witnesses is considerably lessened. While I understand the District Court Judge's reluctance to decide that a customary Maori fishing right existed when an investigation of that issue might more easily have been comprehended by a specialist tribunal, I am of the view that this defence must be considered on its merits. It may be that a thorough and extensive investigation by experts may not support the existence of such a customary right but the undisputed evidence called in this case did support such a right and it is upon that evidence that this case must be decided.

Conclusion

In view of the conclusion I have reached that the appellant was exercising a customary Maori fishing right within the meaning of s 88(2) of the Fisheries Act, it follows that the other provisions of the Fisheries Act (including the regulations passed under that Act) did not affect his right to take the paua. Accordingly, he did not commit an offence under reg 8(1)(b) of the Fisheries (Amateur Fishing) Regulations 1983. His conviction on that charge is accordingly quashed.

Consequently, at the time when the appellant was spoken to by the fisheries officers he was not committing any offence. There was clear evidence and indeed no dispute that the appellant did behave in a threatening manner towards a fisheries officer. The defence raised in relation to the second charge is that in view of the right which the appellant had to collect the paua the fisheries officer was not acting at the time in the execution of his powers or duties. Under s 79 of the Fisheries Act 1983 a fisheries officer has power at all reasonable times to examine any parcel, package or thing where the fisheries officer believes on reasonable grounds that any offence is being or has been committed against the Act or regulations. At the time when the fisheries officer stopped the appellant he had no knowledge of any claimed customary Maori fishing right; he was aware that the appellant was in an area where fish may have been taken and that he was with persons carrying bags which appeared to contain shellfish. In my view the only reasonable inference from the evidence establishes that the fisheries officer did believe on reasonable grounds that an offence had been committed and accordingly he was acting properly within his powers at the time when he spoke to the appellant. Accordingly, on the second charge, the appeal is dismissed.

Appeal allowed in part.

Solicitor for the appellant: *M J Knowles* (Christchurch).
Solicitor for the respondent: *Crown Solicitor* (Christchurch).

NGAI TAHU MAORI TRUST BOARD v ATTORNEY-GENERAL

CP 614/87

BETWEEN	ROBERT TE KOTAHI MAHUTA First Plaintiff
A N D	TUMATE MAHUTA and others Second Plaintiffs
A N D	THE TAINUI TRUST BOARD Third Plaintiffs
A N D	HER MAJESTY'S ATTORNEY-GENERAL First Defendant
A N D	THE HONOURABLE THE MINISTER OF FISHERIES Second Defendant

Hearing: 30 October 1987 (In Chambers)

Counsel: W D Baragwanath QC and S Elias for applicants
D P Neazor QC and Shona Kenderdine for Crown
J L Marshall for Fishing Industry Board

Judgment: 2 November 1987

ORAL JUDGMENT OF GREIG J

These are applications for orders to restrain the Minister and his officers from taking any action or any further action in carrying out the quota management system in respect of squid and Jack mackerel and any other species of fish or fishery, in particular, rock lobster, paua and eel. These applications are consequential on proceedings which were brought and the orders that I made on 30 September 1987 on applications by Runanga O Muriwhenua in respect of fishing rights claimed by the tribes in the Far North.

It is not easy to ascertain from the large mass of paper which was presented to me during Friday, 30 October 1987, precisely who or in respect of what the applications are now made. The principal application is made by Ngai Tahu and that it is pretty clear extends to claims in respect of almost the whole of the South Island.

There were also claims filed on behalf of the Tainui people. That makes claims in respect of the Kawhia and Aotea and part of the Manukau Harbours, Whangaroa Harbour and the coastline from Tamaki down to Katikati.

There are also proceedings on behalf of the Raukawa people. Their claim is, it seems, in respect of the coastline and the seas from Rangitikei down to Porirua.

There are also claims on behalf of the Mataatua tribes. That appears to make claims in respect of the coastline and the sea from Cape Colville to Cape Runaway, which is the whole of the Bay of Plenty, as well as the East Cape, or part of that.

The claims made now comprise, together with the Muriwhenua claim, a very great part of the foreshore, the coastline and the sea beyond for the whole of New Zealand. It seems from what I have been able to gather from the papers that there are no claims specifically in respect of Hawke's Bay, Wairarapa, Taranaki and Wanganui coastlines but, as it will appear, nothing turns on that.

The relief claimed is to protect the Maori fishing rights as alleged by and on behalf of all the peoples represented by the various nominal claimants.

The Ngai Tahu proceedings commenced on 8 October 1987. Some affidavits were filed with those papers and at least one other affidavit was filed on the day of the hearing, 30 October 1987. The Raukawa proceedings were filed on the day of the

hearing with a number of affidavits. The Tainui proceedings were filed but were not formally processed. By the time I commenced to hear the proceedings I had before me a copy of the statement of claim. There were no affidavits filed or sworn at the time of that hearing in respect of the Tainui application.

I was presented with a great mass of material which largely purported to be exhibits to unsworn affidavits. I accepted all of this material de bene esse, as we say in the law, subject to one exception. In the three volumes of the principal mass of the material, pages numbered 179 to 205, appeared to be Cabinet papers or papers presented to a sub-committee of Cabinet. There was no apparent provenance of those papers and so for the time being I refused to admit or to read these papers, and I have not done so.

Much of the material that has been put before me was material that has already been referred to the Waitangi Tribunal in claims made there, particularly by the Runanga O Muriwhenua. There is it seems, however, material in support of the other claims, particularly that of the Tainui claimants who appeared before the Waitangi Tribunal at the time of the Muriwhenua hearing in support of that claim but also in support of their own claims. There are a number of Crown affidavits made and filed by officers of the Ministry.

All of the material that I have mentioned I have now read over the weekend. Admittedly I have not read it with the care and attention that would be required if I was coming to a final or substantive decision on this matter. There was not time in the weekend in any event to read all of the material carefully, as might be appropriate, but I am confident that I have understood the essence of the material contained in all these documents. It may be noted that to some extent there is repetition in citations and quotations from the past, the historical and archaeological material in particular. Today I received some further papers, including the affidavit of

Robert Te Kotahi Mahuta, which now exhibits the three volumes. I have read Mr Mahuta's affidavit quickly. With respect to him, I do not think that at this stage it adds substantially or significantly to what I have already read.

I think it is important that I say with some emphasis and in some detail that this is an interim application for a temporary restraint until the claims made by all the claimants can be dealt with in substance and, one would hope, finally. The important point that I wish to stress now is that I am not making a final decision. I am making tentative findings subject to a full review and consideration of all the material, and no doubt more material by way of evidence that would be put forward, and that applies to the law as well as to the facts. It is important to stress this because at this stage the evidence is clearly incomplete. In any event, the topic and the extent of it is massive encompassing, as it does, archaeological findings and opinions, oral and written history, as well as recent past conduct. It will, it seems, deal with matters for a number of centuries past and long before the European came to New Zealand. That is the facts, but the law too is in a developing state and it is difficult and indeed impossible for me in the time available to consider the common law aspects as they affect this whole matter in any detail or the implications of statutory law or Treaty obligations. When I use the word "Treaty" I mean, of course, the Treaty of Waitangi.

There are as well many decisions of great variety and reasoning which are not easy to put together in any consistent way. I have, of course, read the decision of Williamson J in Tom Te Weehi v Regional Fisheries Officer (High Court, Christchurch, M 662/85, 19 August 1986) I have also read Waipapakura v Hempton (1914) 33 NZLR 1065; Re the Ninety Mile Beach [1963] NZLR 461; Inspector of Fisheries v Weepu [1956] NZLR 920; and Keepa v Inspector of Fisheries [1965] NZLR 322.

What is very plain is that there arises out of all these matters before me some of the very largest questions of deep complexity and difficulty which now the time is fast coming when the Court will have to grapple with all of these questions and will have to decide, at least on this question of fisheries, what is the status, the meaning and effect of Maori rights. But, as I say, that is not to be decided today.

When I dealt with the Muriwhenua application I had before me a report of the Waitangi Tribunal in an interim form made on 30 September 1987. Indeed that was the principal material before me on that day. That had a considerable influence upon me as a finding, albeit an interim one, as to the meaning and extent, so far as could then be ascertained, as to Maori rights in Muriwhenua. I could not in logic say that that ought to apply to other Maori or to other parts of New Zealand.

As I say, I have now read in abbreviated form, and with some speed, the material, a great part of which was before the Tribunal, together with a great mass of other material which relates in particular to the claimants and the Maori represented by them. 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. Having said that, the extent of these rights and fisheries seaward and along the coastline is not clear. It is not clear to me anyway to what extent those rights might have also had a public content in the sense that others, perhaps with necessary permission, might make use of the fishing areas. As I have said already, there is no evidence before me strictly as to what occurred in the other areas.

outside those in which the claimants make their claim, but I am prepared now to accept that in logic the same must apply to Taranaki and Wanganui, Hawke Bay and Wairarapa, subject of course to actual proof of those rights, their extent and their scope.

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 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 TA 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.

It may be argued that common law has taken away or diminished those fishing rights. There is an argument that, on the assumption of sovereignty by the Crown in 1840, fishing in tidal waters and at sea became public under the control of the Crown. But even at common law private rights of fishing could continue, could be granted and can be protected. I think, however, that it would be surprising that such fishing rights which existed for centuries before the European came should be extinguished by common law, contrary to the solemn undertaking in the Treaty, particularly in the English version. However

that, I think, is resolved, at least for my purposes on this interim application, by the express provision of s 88 (2) of the Fisheries Act. That is in similar form to provisions in previous legislation and provides expressly that nothing shall affect any Maori fishing rights.

I agree, with respect, with the decision of Williamson J in Tom Te Weehi that that must mean, in perhaps a passive sense, that whatever is contained in the Act will not apply to the exercise of Maori fishing rights. The fishing rights then are outside the Act and unaffected by it. But I think that the phrase means more than that. It means that nothing is to be done under the Act which affects those fishing rights: no action is to be taken which would affect, restrict, limit or extinguish those fishing rights. It must be plain at all events that such a phrase as is contained in s 88 (2) carries with it an implicit recognition that there are such fishing rights subject, of course, to proof of their existence, their scope and their extent.

It was not put to me during the course of the hearing, but there may be an argument that that specific and direct provision might be treated as the carrying into municipal law of the Treaty obligation, thus making the right under the Treaty obligation enforceable directly, but that is a digression and I am not making any decision even on a limited basis on that.

It was suggested by the Crown in the submissions by the Solicitor-General that the effect of s 88 (2) is cut down implicitly and necessarily by the provisions of the quota management system and, in particular, the provisions of s 28C. It is the Crown's case, and indeed the Ministry's understanding throughout, that the provisions of s 28C are referable to the quantity of fishing done by Maori and on a non-commercial basis. Assuming for the purposes of this argument that that is the effect of s 28C, I do not accept that s 88 (2) is directly

or indirectly diminished by that section or indeed by the new Part IV of the Act introduced in 1986. Section 88 (2) stands, in my opinion, overall with full effect to protect Maori 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.

My conclusion at this stage has not been based on the words of the Treaty or its meaning or its effect. This application is not like the applications made under the State-Owned Enterprises Act 1986 which expressly required the consideration of the Treaty. I have come to my conclusion more directly on a construction of the Fisheries Act and the evidence contained in the material before me. Whether the Treaty ought to have effect in the construction of the Fisheries Act or whether because of the provisions of s 88 (2) it is part of the municipal law as applied to fisheries, is something that may be argued later.

That is not to say, however, that the Treaty has no significance in my consideration of this matter. It does have importance when I come to consider the question of relief. That is because of the solemn confirmation and guarantee contained in the Treaty of the full, exclusive and undisturbed possession of the fisheries of the Maori, the tino

rangatiratanga o ratou taonga katoa.

The application that I heard about Muriwhenua on 30 September 1987 was brought before, if just before, the Minister had published notices in the Gazette in pursuance of ss 28B and 28C of the Act creating and applying the quota management system to squid and Jack mackerel. At that stage, therefore, the relief sought was sought at a time before the system had come into operation. Now a further month has gone by. The system is in operation. It was done in two stages for Jack mackerel by Gazette notices on 1 October and 22 October 1987, which related to different fishing areas. In respect of the squid and the Jack mackerel system promulgated on and from 1 October 1987, provisional maximum ITQ's and guaranteed minimum ITQ's have been issued to a number of fishermen.

The appeal procedure under the statute is now pending. In the meantime, at least from the commencement of the QMS, and that in respect of squid commenced on 1 November 1987, it appears to me that those with PMITQ and GMITQ will be entitled to fish. Their rights will not be transferable until formal ITQ's have been issued. There are a number of other procedures which may be taken in furtherance of the management system, including the restriction of the extent of it.

In respect of the Jack mackerel in the areas in the second notice of 22 October 1987 no quotas have been allocated or issued. There may be some real doubt and difficulty if an order is made as sought by the claimants whether those fishermen would be entitled to fish at all for those two species since the system applies and the areas have been promulgated but no specific allocations made. I should acknowledge here that it was anticipated that those latter quotas would have been notified and issued on 29 or 30 October but in light of the applications made the Ministry stayed its hand.

In addition to those fishermen there are some others who

have committed themselves to the purchase or adaptation of vessels for fishing for these species to whom it was intended some particular quotas would have been granted, notwithstanding the absence of any appropriate history of fishing.

I have mentioned now the lapse of time since the Muriwhenua claim and the order that I made in respect of that. There has been, of course, a lack of action such as this over many years and in recent times the evidence shows that the Ministry has given to Maoridom notice of its intentions in the promulgation of future quota management. The QMS itself is recent and it may be of little significance that it is not until September 1987 that application has been made to challenge that particular system. However, there has been Ministry control over fishing for a long time and that control, like the QMS, appears to have been undertaken without any significant consideration of Maori fishing rights.

I referred earlier to circumstances which have restricted and diminished Maori fishing. Those circumstances have had their effect on the realisation and the knowledge of Maori as to their rights and how to exercise them. I accept that in recent times there has been a failure to realise the significance of the control methods of the Ministry. It is only recently in any event that there has been the burgeoning interest and concern with the rights of Maoris and their ability to make claims that have arisen before 1975. There is further the apparent acceptance of the assurance taken from what was said or stated by the Ministry that there would be consultation at least before further steps were taken in the control of the New Zealand fisheries. Indeed, there is an appearance from the material before me that the Ministry, and indeed the Minister, has said one thing and done another. That, I think, is at least partly because the Ministry has for a very long time acted on the assumption that Maori fishing rights were non-commercial, non-proprietary, and were merely recreational and ceremonial.

I have mentioned that the application seeks to prevent any further QMS being applied to any other fishing species in New Zealand waters. In particular, rock lobster, eel and paua are in the forefront of that part of the application. It is said on behalf of the Ministry that there are no present plans or, at the least, that there is no clear evidence of any present plan to bring those or any other species within the QMS. There does seem, however, to be an intention to take some steps to control at least some of those three species under the QMS.

It can be said that the QMS merely continues what has been going on in the way of control for a long, long time. The Ministry clearly has acted in the control of the whole of the New Zealand fishery in the interest of conservation and the management of it. The intention is that all should benefit from that conservation and management. It is apparent that all may participate in it if they have the money and the history of fishing.

It is part of the Crown case that if there is eventually a recommendation from the Waitangi Tribunal to make recompense or other provision for the Maori fishing rights, and that is adopted, it would not be difficult to meet that recompense or provision through the management system and the ITQ's. That will have to happen to the main part of the fishery inasmuch as the QMS applies already to all species other than those now mentioned and those perhaps to be brought within it in the future.

The claimants say that they are fearful of the continuing and the increasing derogation from their fishing rights by the QMS and its expansion. They fear that there will be difficulty in persuading the New Zealand Government to make compensation or other provision if that becomes too expensive. I think it is plain that interests in New Zealand fisheries which are now vested in possession will become stronger and more difficult to

dislodge as time passes.

Those comments, which apply particularly to any results of the Waitangi Tribunal hearings, have application too to the exercise of the discretion for relief claimed under the Judicature Amendment Act. I think that it can be said that the continuation of the system makes no immediate detriment to Maori. There are, it might be said, only two more species made subject to control and licensing. There are numerous species already subject to control which are not within the compass of the proceedings now before the Court. Equally it may be said that only two species will have little effect on those fishermen who work now in the industry. They, in broad terms, will still be free to fish for all the other species under the QMS.

I remind myself that the discretion that I am to exercise here is not simply an unfettered discretion, let alone a discretion which is to be exercised at my whim or in accordance with my sentiments or sympathies. In accordance with s 8 of the Judicature Amendment Act the relief sought can be granted only if it is reasonably necessary for the purpose of preserving the position of the applicants. I refer here to the decision of the Court of Appeal in Carlton v United Breweries and Shields (CA 34/86, 14 March 1986).

I have given very careful consideration to all the various matters which I have now rehearsed and which are on one side or the other of this question of relief which would stop the continued operation of the QMS, at least in respect of Jack mackerel and squid, and in respect of the three other species in the future. At the end I have come to the view, on an interim basis, that what has taken place and what is to take place is in disregard of Maori fishing rights and is a denial of them.

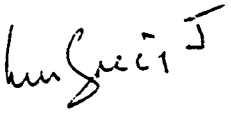
I wish to make it very plain that it would be quite wrong to infer from what I have just said that the Minister or the

Ministry have acted deliberately to defeat or to deny those rights. I have come to the conclusion that the Minister and the Ministry, Ministers in the past and Ministries in the past, have acted rather in ignorance and on a longstanding belief that Maori fishing rights were no more than recreational or ceremonial, without any commercial significance in the economy and society of Maori. Subject to those limitations, I think it ought to be recognized that the Ministry has made considerable efforts in the development of a Maori fisheries programme, albeit that appears to be a relatively recent development.

In face of what has now appeared before the Tribunal and before this Court I have come to the conclusion that what has taken place and what is to take place should stop. It cannot be just or right that what is arguably wrong and in breach of the Act should continue. It is, in my opinion, reasonably necessary in the interim to stop the process for the purpose of preventing any further inroads into those apparent rights of fishery until they are fully and finally resolved.

I make a declaration that the second respondent, the Honourable the Minister of Agriculture and Fisheries, ought not to take any action or any further action to issue notices under ss 28B and 28C of the Fisheries Act 1983, as amended, or to take any other step by himself, the Director-General of Agriculture and Fisheries, or any other officer of the Ministry in respect of the quota management system established in respect of Jack mackerel and squid by notices in the New Zealand Gazette published on 1 and 22 October 1987.

I will reserve costs.



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