AHU MOANA

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The Aquaculture and Marine Farming Report

WAI 953

WAITANGI TRIBUNAL REPORT 2002

The cover design by Cliff Whiting invokes the signing of the
Treaty of Waitangi and the consequent interwoven development of
Maori and Pakeha history in New Zealand as it continuously
unfolds in a pattern not yet completely known

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TABLE OF ABBREVIATIONS

app	appendix
CA	Court of Appeal
ch	chapter
cl	clause
doc	document
ed	edition, editor
fol	folio
inc	incorporated
J	justice (when used after a surname)
ltd	limited
NA	National Archives
NZLR	*New Zealand Law Reports*
NZPD	*New Zealand Parliamentary Debates*
NZRMA	*New Zealand Resource Management Appeals*
P	president of the Court of Appeal (when used after a surname)
p, pp	page, pages
para	paragraph
RMA	Resource Management Act 1991
ROI	record of inquiry
s, ss	section, sections (of an Act)
sch	schedule
vol	volume

'Wai' is a prefix used with Waitangi Tribunal claim numbers

Unless otherwise stated, references to claims, papers, and documents in the footnotes are to the record of inquiry, which is reproduced in appendix II.

The Honourable Parekura Horomia
Minister of Māori Affairs
Parliament Buildings
WELLINGTON

The Waitangi Tribunal
110 Featherston Street
WELLINGTON

20 December 2002

Tēnā Koe
E te Minita o ngā Take Māori

Tēnā koe e te rangatira e noho mai nā i te tūnga tiketike e whakatutuki nei i ngā wawata o tō iwi Māori. Kāti tēnā tātou i runga i te āhuatanga o ngā mate huhua puta noa i te motu mai Muriwhenua ki Murihiku whakawhiti atu ki Wharekauri. Nō reira ngā mate haere atu rā, haere atu rā, oti atu.
Ko tēnei pūrongo e tukuna ake nei ki a koe i oti i runga i ngā tono a ēnei o ngā iwi arā a Ngāti Kahungunu, Ngāti Whatua, Ngāti Koata, Ngāti Kuia, Ngai Tahu, me Te Ati Awa ki te tauihu o te waka ā Maui. Ko tōna kaupapa e pā ana ki ngā mahi ahumoana me ngā ture hou e hangaia nei e te Kawanatanga. Koianei ngā kohikohinga kōrero me ngā whakaaro a te Rōpū Whakamana i te Tiriti ō Waitangi.

Enclosed is the Ahu Moana – the Aquaculture and Marine Farming Report, prepared following a hearing held in Wellington over two days on 23 and 24 October 2002.

The claimants represent Ngāti Kahungunu, Ngāti Whatua, Te Atiawa ki te Tau Ihu, Ngāti Koata, Ngai Tahu, and Ngāti Kuia. They claim to have a broad relationship with the coastal marine area and that as an incident of that relationship they have an interest in aquaculture, or more particularly marine farming.

The Tribunal was assisted by submissions from Te Ohu Kaimoana and the New Zealand Marine Farming Association.

The claimants allege that they had been prejudicially affected by the proposals of the Crown to reform the laws regulating aquaculture and in particular marine farming in New Zealand. They allege that these Crown actions amount to acts, policies, and practices in breach of the principles of the Treaty of Waitangi.

The Tribunal's focus during the inquiry was on the proposals for reform and not on the existing aquaculture regime. The concern was the discrete question of whether the proposed reforms were in breach of the principles of the Treaty of Waitangi. We also considered whether attempts made by the Crown, subsequent to the filing of these claims,

addressed Māori issues adequately so as to discharge the Crown's duty actively to protect Māori interests.

In summary, we find in this report that Māori have an interest in marine farming that forms part of the bundle of Māori rights in the coastal marine area that represent a taonga protected by the Treaty of Waitangi. We find that the proposed reforms do breach the principles of the Treaty of Waitangi and the reasons for this are explained in chapter 6 and 7 of this report. Further consultation with Māori is needed to ascertain what should be done to ensure that their Treaty interests are adequately provided for. To facilitate this process we have recommended that the delay before the introduction of the Bill should be used by the Crown to establish a mechanism (resourced by the Crown) for consultation and negotiation with Māori including the claimants facilitated by Te Ohu Kai Moana. The basis of consultation should be the existence of Treaty rights in the coastal space, which include rights, the extent of which are yet to be determined, to aquaculture and marine farming.

The parties should use the mechanism to discuss:

- A process for investigating the nature and extent of the Maori interest in marine farming.
- A process for agreeing on the mechanism needed to protect the Maori interest in marine farming, including a mechanism for preserving capacity to intervene once the full nature and extent of that interest is defined.
- A process for ensuring appropriate Māori participation in the development of AMA areas and tendering process.
- A mechanism for preserving the Crown's capacity to meet its Treaty obligations in the short term, until such time as the longer planning issues are dealt with.

Since the claims are well founded, we further recommend the payment by the Crown of the claimants' reasonable costs and expenses.

We have also indicated that the claimants have leave without further application for urgency, to return to the Tribunal should they have concerns that these matters have not been properly addressed after any legislation has been enacted.

We hope such a course will not be necessary.

Na Judge Caren Wickliffe
Presiding Officer

CHAPTER 1

THE MARINE FARMING AND AQUACULTURE CLAIMS AND THE URGENT HEARING

1.1 Introduction

The marine farming and aquaculture claims relate to the proposed legislative reforms of the regime regulating aquaculture, including marine farming, in Aotearoa.[1] The claimants primarily say that they have not been adequately consulted regarding the reforms and that the reforms do not provide adequately for their interests in aquaculture.

The Crown initiatives to reform the regime regulating aquaculture date back to February 1998, when an independent review of the Fisheries Act 1996 was agreed to. That review was reported back in September 1998 and concluded that the legislative matrix regulating aquaculture was fragmented.[2] After some public consultation, policies relating to the reforms were developed over the period 2000 to 2001.

On 28 November 2001, a public announcement was made about proposed legislation which would bring into effect significant reforms to aquaculture, including that regional councils would both be given the responsibility of setting aside aquaculture marine areas (AMAS) within which marine farming would be confined and be delegated to tender the coastal marine space to determine competing applications within the AMAS. In addition, the announcement revealed that a two-year moratorium on the granting of resource consents for new aquaculture developments was also to be effected through the legislation and that the moratorium was to have retrospective effect. It was the pending imposition of the moratorium and the wider issue of the impact of the proposed reforms on Māori interests in marine farming that gave rise to the claims currently before this Tribunal for inquiry.

1.2 Definitions

Aquaculture and marine farming, we suspect, are not areas whose detail is familiar to most New Zealanders. Accordingly, a careful delineation of the terms used is necessary in order to properly understand the nature of the claims made, and the Crown's response. The word

1. Resource Management Act 1991, Marine Farming Act 1971, Fisheries Act 1983, Fisheries Act 1996
2. Document A29, paras 21–23

'aquaculture' comes from the Latin terms 'aqua' (water) and 'cultura' (to grow). The evidence presented shows that it refers to the entire range of activities involving manipulation or intended manipulation of aquatic resources to supplement their natural supply. As such, it is more than the simple catching of wild fish. The Resource Management (Aquaculture Moratorium) Amendment Act 2002, in section 2(1), defines 'aquaculture activities' as 'marine farming or spat catching or both'.

Spat are the spawn from which shellfish grow. The spat swim and attach themselves to objects in order to grow into adults. These spat can be collected and taken to other sites to be grown into adult shellfish. Spat can be collected when they wash up on beaches. Alternatively, they may be collected by suspending structures in water to give the spat something to attach themselves to. This latter operation is a form of 'passive taking' of fish.[3]

Marine farming is a subset of aquaculture. It takes place in the inshore coastal area, perhaps best defined by the term 'coastal marine area', which extends from the high-water mark to the outer limit of the territorial sea (ie, 12 miles from the shore).[4] The Resource Management (Aquaculture Moratorium) Amendment Act defines 'marine farming' as the 'breeding, hatching, cultivating, rearing, or ongrowing of fish, aquatic life, or seaweed for harvest' (s 4), while the Marine Farming Act 1971 provides a broad definition of 'farming' as the breeding, cultivating, and rearing of fish, shellfish, and marine vegetation and refers to 'marine farming' as the development of a farm in an authorised area (s 2).

1.3 The Ngati Kahungunu and Ngati Whatua Marine Farming Claim

On 7 December 2001, the Tribunal received a statement of claim made on behalf of both Ngati Kahungunu and Ngati Whatua in respect of proposed reforms to the law relating to aquaculture. The claim, which was registered on 11 December as Wai 953, related to an announcement by the Government that legislation would be introduced to put in place a two-year moratorium on marine farming and to reform the aquaculture regime generally.[5] The claimants' primary ground for bringing the claim was the Crown's alleged failure to consult with Māori over the proposed moratorium. They alleged that the moratorium would prejudicially affect Māori, as distinct from other members of the community, and that it would 'apply to all applications for marine farming not already in hearing and this will result in prejudice' and substantial financial loss to Māori.[6]

3. Document A4(2), p 20; doc A4(71)
4. Resource Management Act 1991, s 2
5. Claim 1.1
6. Ibid, para 7

1.4 The First Application for Urgency

The Wai 953 statement of claim was accompanied by an application for an urgent hearing.[7] On 11 December 2001, the matter of urgency was delegated to Judge Carrie Wainwright for determination, and she sought submissions on various questions relating to the matter.[8] On 14 December, the Crown filed a memorandum advising the Tribunal that the Resource Management (Aquaculture Moratorium) Amendment Bill had been introduced to Parliament four days earlier and noting that the Tribunal had no jurisdiction in relation to the Bill by virtue of section 6(6) of the Treaty of Waitangi Act 1975.[9] On 17 December, Judge Wainwright issued a determination on the application for urgency, finding that the Tribunal was precluded by this provision from inquiring into the matter.[10] Judge Wainwright further noted that 'the applicants may of course revise their application so that its focus is the proposed further changes to the marine farming regime planned for introduction in April 2002'.[11]

1.5 The Amended Statement of Claim

An amended statement of claim was filed on 19 July 2002 with a renewed application for urgency, and the claim was registered on 23 July.[12] The amended statement of claim considered the Crown's proposal to enact substantive reforms to the marine farming legislative regime. The claim alleged that further legislation was to be introduced into the House following the then forthcoming general election on 27 July 2002 to bring these reforms into effect and that the Crown did not intend to make any specific provision for Māori interest in marine farming.[13]

1.6 The Second Application for Urgency

On 22 July 2002, the acting chairperson delegated the revised application for urgency to Judge Caren Wickliffe for determination.[14] On 24 July, Judge Wickliffe issued a memorandum and directions summarising the grounds for urgency as follows:

7. Paper 2.1
8. Paper 2.5
9. Paper 2.8
10. Paper 2.9
11. Paper 2.9
12. Claim 1.1(a); paper 2.10
13. Claim 1.1(a), paras 10–12
14. Paper 2.11

1. *Significant and irreversible prejudice:* The claimants allege that they will suffer significant and irreversible prejudice if substantive reform of the current marine farming regime is implemented without specific provision having been made for the interests of Maori in marine farming.

2. *There is no reasonable, alternative remedy in the circumstances:* The claimants allege that they have tried to engage with the Crown in order for the Crown to provide for Maori interests in marine farming to no avail. The claimants further allege that they do not consider the select committee process can in any way 'substitute for the careful scrutiny of an independent body such as the Waitangi Tribunal'.

3. *The claimants are ready to proceed urgently to hearing:* The claimants have indicated that they are ready to go to hearing no later than 12 August 2002 and that no more than 3 days of hearing time would be required to dispose of the issues.

4. *Widespread support from other Maori groups:* The claimants have stated that there is likely to be widespread support from other claimant and Maori groups and that the inclusion of such groups would not push out the estimated 3 days for hearing.[15]

Before deciding whether or not to grant urgency, the Crown, claimants, and interested parties were directed to file material that raised Treaty of Waitangi and Māori issues in relation to the proposed reforms.[16] The Tribunal was subsequently advised by a number of groups of their support for both the application for urgency and the Wai 953 claim and their interest in participating in any urgent proceedings. Submissions were received and, upon the basis of those documents, the decision whether to grant urgency was made.

1.7 The Determination on Urgency

On 30 July 2002, Judge Wickliffe issued a determination on the urgency application.[17] The claimant groups with a noted interest in the urgent proceedings at this stage were Ngati Kahungunu, Ngati Whatua, Ngai Tahu, Ngati Koata, Ngai Taimanuhiri, Te Atiawa, and the Whakatohea Māori Trust Board. A second claim, Wai 992 (the Ngai Tahu aquaculture law reform claim), was formally added to the inquiry.[18]

In her directions, Judge Wickliffe noted that the 'claims of Ngati Kahungunu and Ngati Whatua differ in emphasis to that of Ngai Tahu', the former highlighting interests in marine farming deriving from their relationship with Tangaroa and particular land and waterways within the coastal marine area, while the latter also emphasised an interest in marine

15. Paper 2.13, pp 2–3
16. Ibid, p 3
17. Paper 2.21
18. Ibid

farming based on their relationship with Tangaroa and the coastal marine area and associated waterways. The Ngai Tahu claim differed by adding fisheries. The claimants alleged that the policies for the reform of the aquaculture regime amounted to a breach of the principles of the Treaty of Waitangi in that they:

- failed to actively protect the interests of the claimants;
- failed adequately to recognise and provide for the interests of the claimants; and
- represented a lack of good faith on the part of the Crown.[19]

The directions set out the factors that the Tribunal has regard to when considering whether to grant urgency and found that all the grounds had been made out. The key factors relevant to the application were that:

- the reforms would provide for regional authorities to determine mechanisms for allocating individual sites within aquaculture management areas and for implementing a tendering system for coastal permits;
- the reforms were significantly advanced;
- only a limited amount of consultation had been undertaken with Māori regarding the reforms; and
- the Crown had made extensive policy decisions without fully informing itself of the nature and extent of Māori Treaty rights in the coastal marine area and marine farming.[20]

Judge Wickliffe granted urgency to Wai 953. She found that:

> the claimants have tendered sufficient information to establish a prima-facie case for urgency that has not been adequately responded to by the Crown and I refer specifically to their submissions and evidence filed in support.[21]

Counsel for the Crown was directed to file all Cabinet minutes, Government policy, and working papers relating to the reform of the aquaculture legislation.

The Crown was also invited to file within a month any further submissions and evidence in respect of the matter. Counsel was to report back to the Tribunal on:

- the steps that the Crown proposed to take to consult with Māori on the reforms, so as to ensure that Māori and Treaty issues would be adequately addressed; and
- the options that would be taken relevant to the reforms.[22]

1.8 The Crown's Response

As directed by the Tribunal, on 13 August 2002 the Crown filed copies of all Cabinet minutes, Government policy, and working papers relating to the reform of aquaculture legislation.

19. Claim 1.2, para 4.3
20. Paper 2.21, p 3
21. Ibid, p 4
22. Ibid

By way of memoranda dated 30 August 2002, the Crown sought an extension for reporting on the issues set out in the Tribunal directions of 30 July 2002.[23] The basis for the request was that time was required for interdepartmental liaison and to consult with multiple Ministers.[24] On 6 September 2002, the Crown made a further request for one final extension, giving an undertaking that 'if matters are not resolved by 4 October [2002], the Crown will agree to go immediately to a substantive urgent hearing'.[25]

After requesting claimant responses, further Tribunal directions were issued on 13 September 2002, granting the one-month extension and provisionally setting down the hearing for 16 to 18 October 2002.[26]

The Crown filed a memorandum on 4 October 2002 setting out the proposals that it believed would dispose of the issues involved in the urgency applications.[27] In particular, the memorandum detailed the following proposals for inclusion in the reform legislation of a specific mechanism to protect Māori interests:

> Deeds of Settlement and subsequent settlement legislation for historical Treaty claims set out in detail the obligations relating to coastal space (eg rights of first refusal over the tendering of coastal space) and no additional Crown direction powers are needed to ensure these obligations can be implemented.
>
> The Aquaculture Reform Bill will include a duty on regional councils to implement Crown Treaty settlement obligations in relation to the occupation of coastal space.
>
> A specific direction power is proposed to be provided to the Minister of Conservation in relation to preserving the capacity to provide redress for historical treaty claims, where the Crown and claimants have reached a formal agreement in principle that includes aquaculture redress (prior to legislation implementing any formal deed of settlement).
>
> A specific direction power will be provided to the Minister of Conservation in order to allow the Crown to preserve its capacity to recognise Treaty, aboriginal or customary rights relating to aquaculture if they are identified in the future.
>
> While work continues to be required on delineating the specific power, it is intended that where the power to direct regional councils affects the choice of allocation method to be adopted through the regional coastal plan, the power should be exercised prior to the notification of the proposed plan and again at the point at which coastal plans are considered for approval by the Minister of Conservation. Where the power affects the conduct or outcome of a particular tender round or tender rounds, it should be exercised prior to public advertisement and call for tenders.[28]

23. Paper 2.22, para 5
24. Ibid, , paras 3–4
25. Paper 2.23, para 5
26. Paper 2.28
27. Paper 2.38
28. Ibid, paras 7.1–7.5

The powers of the Minister of Conservation would be exercised by Order in Council and would include power to direct councils not to proceed with a proposed allocation or allocation method. There would also be a power to proceed with allocation by giving effect to certain matters. This may include limiting the term of consents issued over a specific AMA or part of an AMA, or allocating authorisations for a specific area within an AMA to the Crown.[29]

The claimants responded to the Crown's proposals through a joint memorandum filed on 9 October 2002. It stated that:

> Counsel have discussed the Memorandum with the claimants and advise the Tribunal that, from the perspective of the claimants, the Crown proposal does not provide any tangible or sufficient provision for Māori interests in Marine Farming.[30]

On 10 October 2002, the Tribunal convened a judicial teleconference to discuss the issues arising from the Crown's 4 October memorandum. In directions recording the outcomes of the conference, the Tribunal noted:

> It was made clear during the course of these discussions that the claimants wished to proceed to a substantive hearing. They indicated that a Tribunal inquiry is likely to be of assistance to all parties at this stage of the reform process.[31]

On this basis, the urgency hearing was confirmed and a timetable set down.

1.9 Hearing Procedure

In directions issued on 18 September 2002, the acting chairperson appointed a Tribunal to hear the marine farming and aquaculture claims.[32] It comprised Judge Wickliffe (presiding), Dame Margaret Bazley, and John Clarke, and the the matter was set down for hearing on 23 and 24 October 2002 at the Duxton Hotel in Wellington.[33]

Because the Tribunal was originally faced with having to produce a report by mid-November, the anticipated date for the introduction of the Bill into Parliament,[34] the claims were heard in part through oral submissions and partly on the papers and the following process was adopted:

- witness briefs and opening legal submissions were filed in advance;
- notice of those witnesses who were to be examined was given prior to the hearing;
- evidence was taken as read;

29. Ibid
30. Paper 2.39, para 2
31. Paper 2.45, p 2
32. Paper 2.30
33. Papers 2.30, 2.34
34. Paper 2.22

- witnesses identified for examination had to summarise their reports orally and answer questions following the usual format; and
- counsel spoke to their filed legal submissions and answered questions from the Tribunal.

Judge Wickliffe opened the substantive part of the hearings by giving a short background to both the urgent application and the claims. She then proposed that counsel and their witnesses be heard in the following order: first, Grant Powell, counsel for Ngati Kahungunu and Ngati Whatua (Wai 953); then Damian Stone, counsel for Ngai Tahu (Wai 992); Kathy Ertel, counsel for Te Atiawa ki te Tau Ihu (Wai 1002); Martin Dawson, counsel for Ngati Koata (Wai 1007); Gina Rudland, counsel for Ngati Kuia (Wai 1014); Jamie Ferguson, counsel for Te Ohu Kai Moana (TOKM); Mr Fletcher, from the New Zealand Marine Farming Association of New Zealand Incorporated; and, lastly, Virginia Hardy, counsel for the Crown.[35]

In this way, the Tribunal was able to process the evidence of a number of witnesses and hear legal argument in the two days available. All counsel accepted these arrangements.

The hearing ended after the Crown presented its closing submissions.[36] Again owing to time constraints, the Tribunal directed that all claimant counsel should file submissions in reply to the Crown's closing submissions. The Crown was invited to file further submissions should the claimants raise issues beyond those contained in its closing. In the result, the Crown took this opportunity, claiming that many of the claimants had raised new material. However, this was disputed, and some claimants sought to have aspects of the Crown's further submissions disregarded by the Tribunal on the ground that they introduced new material.[37] In order to clarify whether any new material had indeed been introduced by either the claimants or the Crown, the Tribunal issued a direction that all claimant counsel and the Crown were required to reference back each of their submissions to evidence before the Tribunal.[38]

The Tribunal has considered the submissions of all the parties, and all relevant material properly raised by them has been incorporated into the report.

35. Paper 2.56. Although their claim had not been registered at the time of the hearing, Ngati Kuia were granted leave to join the proceedings , and their claim was later registered on 29 October 2002 as Wai 1014.
36. Document A49
37. Paper 2.62
38. Paper 2.67

CHAPTER 2

THE EVOLUTION OF THE CROWN'S AQUACULTURE AND MARINE FARMING POLICIES TO 1998

2.1 The Aquaculture Industry

2.1.1 The history of the industry

The claimants asserted that they were involved in aquaculture in pre-Treaty times. If that is correct, marine farming may have been a feature of life in New Zealand practised by Māori for hundreds of years.

The first 'modern' aquaculture enterprise, an intertidal oyster farm, was established in the early 1960s in Northland. Oyster farming involves holding oysters in trays that are placed on wooden racks in the intertidal area.

Commercial mussel farming began in the 1970s in the Hauraki Gulf. Mussel farming involves the seeding of mussels on to ropes suspended from a floating long-line which is anchored at either end to the seabed.

The first salmon farm was set up in 1976 at Pupu Springs in Golden Bay, and the first sales of salmon reared in fresh water were made in 1978. Salmon farming involves holding salmon in nets suspended below a floating cage structure.

In the 1980s, there was further development of oyster farms and the farming of paua began.[1] Intensive paua farming is a more recent development, and has been established in the South Island and the lower half of the North Island, following intensive research and development over the last 10 years.[2]

The production of the commercial greenshell mussel has become central to the success of the industry. New species under development include kina, scallops, and whitebait.[3]

In the 1990s, there was a sharp acceleration in the growth of the aquaculture industry. Fish or shellfish can now be farmed on land in purpose-built hatcheries with recirculating water tanks and grow-out ponds.[4] Recent technological innovations have led to an increasing interest in offshore aquaculture, involving marine farms as much as five nautical miles from shore and in exposed locations. These farms are, however, still largely experimental.[5]

1. Document A38, p 3
2. Document A6, para 19
3. Document A38, pp 3, 10
4. Ibid, p 3; doc A29, para 7
5. Document A6, para 12

2.1.2 The current state of the industry

About 1000 marine farms exist in New Zealand today.[6] Greenshell mussels are the major farmed seafood and account for some 3000 hectares, or 75 per cent, of the coastal area being farmed. These farms are located mainly in the Marlborough Sounds, Coromandel, Golden Bay, Stewart Island, Banks Peninsula, and Northland areas.[7] Oysters are farmed mainly in the Bay of Islands, the Whangaroa and Mahurangi Harbours, and the Coromandel. Paua are farmed mainly in the South Island and in the lower half of the North Island. Salmon are currently farmed only in the South Island.[8]

Freshwater fish farms, marine farms, and spat-catching areas occupy around 4000 hectares and produce more than $200 million per annum.[9] In 2000, domestic and international sales of aquaculture products – mainly greenshell mussels, quinnat salmon, and oysters – returned $287 million.[10] In terms of growth, nearly one-third of the world's fish and shellfish is produced by aquaculture, or 20 million tonnes of the 100 million tonnes of world's annual fisheries production. This is predicted to grow to 50 per cent of seafood production worldwide in the next 20 years.[11] The industry expects a managed expansion to achieve $1 billion in export earnings by 2020, with aquaculture farms covering some 17,000 hectares, or one per cent of New Zealand's territorial waters. This figure compares with the roughly 17,000 kilometres of New Zealand coastline. To put this in perspective, it is estimated that the financial return from all uses of New Zealand's exclusive economic zone is currently around $2 billion.[12]

The aquaculture industry identifies the current legislative tangle as the primary challenge facing it today. The 'weakness of the property right' held by marine farmers and the uncertainty surrounding Māori issues, including the seabed claims of Māori groups, is said to require urgent resolution to enable the industry to progress.[13] A publication from the New Zealand Aquaculture Council puts the industry's case for reform succinctly:

> Land-based agriculture has been practiced in New Zealand for some 800 years. Since the arrival of European settlers, a legislative framework from the United Kingdom has been used to develop our current terrestrial property rights.
>
> There is no such legislative heritage around which to mould our water-based farming enterprises. Because there is no such over-arching legislative framework, we have a range of conflicting and contradictory legislation. There are no less than 14 overlapping pieces of

6. Document A4(2), p 6
7. Document A38, p 4; doc A4(2), p 6; doc A29, para 12
8. Document A29, para 12
9. Document A38, pp 2, 4; doc A4(2), p 6; doc A6, para 18
10. Document A4(35), para 13
11. Document A29, para 10
12. Document A36, p 28; doc A38, pp 2, 4
13. Document A38, pp 6–8

> New Zealand law that impact directly on the coastal marine area and the growing aquaculture industry.[14]

Evidence from Government papers also indicates that many of the current farms are incorrectly positioned and a proportion are also oversized. For example, a survey of farms in the Marlborough Sounds found that 70 per cent of the farms were positioned off their authorised sites (the majority were, however, within 100 metres of their correct location) and 15 per cent of the farms were oversized.[15]

2.1.3 Māori participation in the industry

It is apparent that some iwi are heavily involved in the aquaculture industry. Some also have contemporaneous interests in other areas of the fishing industry, and thus there is the potential for overlaps with their marine farming interests. The Te Atiawa Manawhenua ki te Tau Ihu Trust carries out fishing activities via Totaranui Limited, a wholly owned subsidiary of the trust. The trust has interests including:

- a shareholding in a scallop enhancement company;
- a shareholding in the Ringroad Consortium (a fishing consortium involving some Māori groups) operating in Golden Bay and Tasman Bay;
- a shareholding in a spat-catching consortium in Golden Bay;
- mussel, oyster, and paua farms in the Marlborough Sounds;
- wetfish, finfish, and paua quota; and
- an aquaculture training facility in Blenheim.[16]

Not surprisingly, the trust has been very actively involved in the Tasman District Council regional plan references relating to marine farming. The background papers provided by the Crown indicate that the neighboring Ngati Tama iwi has interests at least as extensive as those of Te Atiawa, and Ngati Tama acknowledged that:

> Given the . . . range of its interests in matters relating to the coastal spaces of Golden Bay and Tasman Bay, the Trustees and members of Ngati Tama ki Te Tau Ihu are extremely conscious of the competition between these interests, with the potential for internal conflict, and conflict with external parties.[17]

Should hard decisions have to be made, Ngati Tama would 'be inclined' to favour customary interests over commercial interests, including quota fishing and aquaculture activities.[18]

14. Ibid, p 6
15. Document A4(61), para 38
16. Document A4(15), para 5
17. Document A4(11), para 7.1
18. Ibid, para 7.3

Ngati Kahungunu is involved in an offshore marine farm located off the Napier coast. The Whakatohea Māori Trust Board has a proposal before the Bay of Plenty Regional Council for a staged aquaculture development covering 4750 hectares. Ngati Wai have applied for a small fin-fish farm in Bream Bay.[19]

Māori have a significant involvement in the industry via TOKM. Sealord is a significant owner of marine farms in the Coromandel and the Marlborough Sounds. Pacific Marine Farms is wholly owned by TOKM and has farm interests in the Coromandel, Bay of Islands, and Far North and is one of the country's largest exporters of Pacific oysters. TOKM runs, in association with Te Puni Kokiri, an aquaculture grants scheme, which has distributed over $700,000 to Māori since it was established in 1992.[20]

2.2 The Current Legislative Regime

2.2.1 Marine farm leases and licences – the old regime

Before 1991, the establishment of a marine farm required a licence or lease from the Crown under the Marine Farming Act 1971. Leases and licences could be for up to 14 years and could contain a right of renewal for one or more terms.[21] If leases or licences did not contain a right of renewal, lessees and licensees had a right to be offered a new lease or licence over the same area when their current right expired.[22] In 1991, the Resource Management Act (RMA) repealed most of the provisions of the Marine Farming Act 1971. The RMA deemed existing leases and licences to be coastal permits and allowed them to continue under the same terms and conditions. It also removed the right of renewal on expiry.[23] That regime was significantly amended again in 1993 by the Resource Management Amendment Act of that year, to its current state, which requires marine farmers to obtain both a coastal permit from local authorities to occupy coastal space and a marine farm licence from the Minister of Fisheries.[24]

2.2.2 Coastal permits

Under the RMA, the coastal marine area is subject to the authority of the Minister of Conservation and regional councils or, in cases where the functions of regional councils and district councils are combined in the one body, unitary authorities.

There is a presumption against activities in the coastal marine area or any occupation

19. Document A6, para 17; doc A4(51), para 13; doc A4(52), p 26
20. Document A28, paras 8, 12
21. Marine Farming Act 1971, s 3
22. Ibid, s 22
23. Resource Management Act 1991, s 426
24. See Resource Management Act 1991, pt VI

of space in the coastal marine area unless some specific provision has been made for it in planning documents or by the issue of resource consent called a coastal permit.[25]

Regional councils are required to prepare regional coastal plans. This includes the Tasman District Council, the Nelson City Council, the Marlborough District Council, and the Gisborne District Council – which are unitary authorities.[26]

The Minister of Fisheries must be consulted in the development of plans.[27] These plans must be consistent with the *New Zealand Coastal Policy Statement* (NZCPS). The NZCPS provides that activities which 'exclude or effectively exclude' public access from 10 hectares of the coastal marine area or 316 metres of foreshore or would 'restrict public access' to or through over 50 hectares of the coastal marine area, are restricted coastal activities requiring consent directly from the Minister of Conservation. A farm of oyster racks of suitable size might invoke the 'exclude or effectively exclude' test, whereas a farm of mussel long lines of a suitable size would invoke the 'restrict' test.[28]

Plans identify zones in which farming can occur and rules for those zones. Rules can allow farming to be permitted, controlled (requiring a resource consent, which must be issued if certain standard requirements set out in the plan are met), discretionary (the council retains discretion to grant or refuse an application), or non-complying (exceptional case). The Minister of Conservation has final approval on all coastal plans under the current regime. In practice, an application is made to the regional council to obtain a coastal permit to occupy coastal space. Applications have to be dealt with on a 'first come, first served' basis.[29] Space in the coastal area can either be rationed by councils through coastal occupancy charges or tendered by the Crown. Coastal charges are presently applied only by the Southland Regional Council and are low, but the Auckland Regional Council is investigating introducing such charges.[30] Coastal tendering has to date not been used.[31]

Māori interests are provided for in this planning process in several ways. Iwi authorities must be consulted and iwi management plans must be considered when coastal plans are drawn up.[32] Both in the making of plans and in the issuing of individual coastal permits, the relationship of Māori and 'their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga' is a matter of national importance which must be recognised and provided for.[33] Decision-makers must also have regard to kaitiakitanga and must 'take into account' the principles of the Treaty of Waitangi.[34]

25. Resource Management Act 1991, s 12
26. Document A4(2), p 12, n 4
27. Document A4(32), paper 1, para 35; Resource Management Act 1991, sch 1, cl 3(3)(c)
28. Document A4(32), paper 2, paras 29–32
29. *Fleetwing Farms Limited v Marlborough District Council* [1997] NZRMA 385 (CA)
30. Document A4(36), para 47
31. Document A4(2), p 12; see discussion in doc A4(32), paper 2, paras 23–26
32. Resource Management Act 1991, sch 1, cl 3(1)(d)
33. Resource Management Act 1991, s 6(e)
34. Ibid, ss 7(a), 8

The maximum length of a coastal permit is 35 years, and permits are not automatically renewed[35] and whether farms are sustainable at the time of expiry is examined afresh. The evidence before this Tribunal is that there have been 165 consents issued in the Coromandel area that have been granted for the full 35-year term, which provides an indication of the volume likely to be issued for such a period.[36]

The RMA provides that, when preparing regional coastal plans and when considering applications for coastal permits, councils must not consider any matter relating to the 'control of the harvesting or enhancement of populations of aquatic organisms'.[37] Those matters are to be dealt with under the Fisheries Act.[38] The integrated management of specific fisheries, including the impact of marine farming on access to other fisheries, is also a matter to be addressed under the Fisheries Act.

However, the current regime is permissive, in the sense that regional councils may consider the environmental effects of marine farming proposals, such as effects on the seabed, fish or animal populations, and the landscape, and any navigation issues.

2.2.3 Marine farming permits

Having obtained a coastal permit from the regional council or unitary authority, a marine farmer must obtain a separate consent from the Minister of Fisheries. In 1993, the Fisheries Act 1983 was amended to provide that no person should farm any fish, aquatic life, or seaweed in coastal areas without the authority of a marine farming lease or licence under the Marine Farming Act 1971 or a marine farming permit issued under the current regime (ie, resource consent and marine farming permit).

Marine farming permits may be issued only to persons holding a coastal permit obtained under the RMA.[39] Application is made to the Director-General of Fisheries, who may issue it only if satisfied that 'the activities contemplated by the application would not have any undue adverse effects on fishing or the sustainability of any fisheries resource'.[40]

The RMA does not provide any more detailed criteria than this. The Ministry of Fisheries has released a draft guide which explains that applications should be accompanied by an ecological investigation (which is referred to as a fisheries resource impact assessment).[41]

Concern has been expressed that the test is subjective, the legislation provides little guidance, and it is not open to review or appeal except on the grounds of process, or in other

35. Ibid, s 123(c)
36. Document A29, annex A, para 95
37. Resource Management Act 1991, s 30(2)
38. Fisheries Act 1996, s 6(1). This section has been amended by section 6 of the Resource Management (Aquaculture Moratorium) Amendment Act 2002: see below.
39. Or a certificate of compliance if the plan permits marine farming: Fisheries Act 1993.
40. Fisheries Act 1983, s 67J(8)
41. Ministry of Fisheries, *A Guide to Preparing a Fisheries Resource Impact Assessment: Marine Farming and Spat Catching Permit Applications – Draft* (Wellington: Ministry of Fisheries, [2002])

words by judicial review.[42] The 'undue adverse effects' test is supposed to ensure that rights of other fishers holding quota or other rights are not rendered ineffective by the granting of a marine farming permit. The test is apparently set at a high threshold and is most likely to arise where marine farm developments occur over sedentary inshore fisheries (eg, scallops, cockles, lobsters, paua).[43]

Ministry of Fisheries papers indicate that in the past 10 years no marine farms have been turned down because of undue adverse effect impacts on commercial fishing, and only four have been turned down on the basis of impacts on recreational and customary fishing. Three applications being considered in October 2001 before the moratorium were at that time at risk of being turned down because of their cumulative effects on fishing arising from the expansion of marine farms.[44]

Under the Fisheries Act 1983, records of the farm must be kept and a register of farms maintained.[45] The term of a marine farm permit is as long as the coastal permit that accompanies it. This will be 35 years at the most.[46] The conditions of the marine farming permit may be reviewed at times specified in the permit.[47]

Separate authority is also required to catch spat. A spat-catching permit (for up to five years) will usually require evidence that a coastal permit has been obtained for the farm to be serviced by the spat operation, or there is an existing lease or licence.[48]

2.2.4 Current litigation

To assess how the current system works, the Tribunal was referred to litigation before the Environment Court concerning a proposal by the Tasman District Council (a unitary authority under the RMA) to provide in its coastal plan for AMAs. Within these areas, aquaculture would be a controlled or discretionary activity.[49] Outside the AMAs, there will be a designated aquaculture exclusion area of three nautical miles contiguous with the shoreline.[50] In this zone, all aquaculture would be prohibited.[51]

The council in this case considered a ballot option for awarding space in the coastal marine area as a way of providing for competing interests. That idea was abandoned because it was concluded that the RMA did not sufficiently enable councils to devise process

42. See doc A4(17), para 53; doc A4(32), para 26
43. Document A4(24), p 4, and see CRA3 *Industry Association Inc v Minister of Fisheries and Others* unreported, 29 March 2001, (CA124/00, p 16)
44. Document A4(32), para 23
45. Fisheries Act 1983, s 67J(10), (12)
46. Ibid, s 67N; Resource Management Act 1991, s 123(c)
47. Ibid, s 67P
48. Ibid, s 67Q
49. *Golden Bay Marine Farmers v Tasman District Council* unreported, 27 April 2001, Judge Kenderdine, Environment Court, W42/2001, para 35
50. Ibid
51. Ibid

alternatives to the 'first-in-first-served' option created by the current legislative regime and the timeframe directives given in the RMA.[52]

Iwi were involved in this litigation both as shareholders in aquaculture and fishing ventures and as groups whose ancestral waters were affected by the proposal. They included at least one group in the inquiry before this Tribunal. Some iwi were opposed to the exclusion of aquaculture from inshore areas because of a tradition developed over the past decades of locating aquaculture ventures there. The effect of marine farms on fishers of individual transferable quota, and particularly on scallop fishers, was a major issue.[53]

In its interim report issued in April 2001, the Environment Court found that the creation of three large AMAs, several nautical miles from the shore, with aquaculture prohibited outside such zones, was an acceptable means of managing aquaculture under the RMA. Within the AMAs, spat holding and marine farming up to 50 hectares would be a restricted discretionary activity, with the Tasman District Council retaining discretion over, inter alia, Treaty matters.

The court concluded that the proposals were consistent with the RMA in that they would 'further the ability of the Treaty iwi to go fishing with a new net in coastal waters they have traditionally fished'. The court directed the district council and iwi to meet, to 'assess how Iwi concerns may be further advanced'.[54]

52. Ibid, para 44
53. Ibid, paras 44, 229–230
54. Ibid, para 1219

CHAPTER 3

THE AQUACULTURE REFORM PROCESS

3.1 Initial Crown Proposals for Aquaculture Reform

3.1.1 The aquaculture discussion document

The current initiatives to reform the management framework for aquaculture can be traced back to February 1998, when the then National Government agreed to terms of reference for an independent review of the Fisheries Act 1996. That review was reported back in September 1998 and concluded that the relevant legislation in relation to aquaculture was fragmented.[1] Ministry of Fisheries officials developed a paper for Cabinet outlining proposals to 'amend the aquaculture management regime under the Fisheries Act 1996', with the focus on simplifying the current dual system of authorisations and providing a new marine farming harvesting right which would be perpetual.[2] It was realised that the change to a perpetual right was a major change and would have significant implications for Māori. Nevertheless, Cabinet agreed to those proposals, but directed that further work be undertaken.[3] Following the change of government, the new Labour Government retained much of this reform package, but dropped the idea of a perpetual harvesting right. At that point, it was felt that the reforms became essentially operational in nature, and officials concluded that 'bigger picture' matters, including Treaty issues, would be dealt with in work on an overarching 'oceans policy'.[4]

In July 2000, Cabinet approved the release of a document by the Ministry of Fisheries and the Ministry for the Environment entitled *Aquaculture – Join the Discussion* for public consultation. A report back to Cabinet was expected by 31 March 2001.[5] The focus of the document was the outdated legislative framework and lack of integration of the law, which made it difficult for the Government to effectively manage the coastal marine area.[6] The document set out four key proposals for discussion:

- all aquaculture activity to take place under a single aquaculture harvesting right called an aqua permit;

1. Document A29, paras 21–23
2. Ibid, para 24
3. Ibid, paras 25–26
4. Ibid, paras 27–30
5. Document A4(1)
6. Document A4(2), pp 5–6

- one agency to have responsibility for managing all effects of aquaculture on the environment, including effects on fisheries;
- mechanisms to be developed to allow applicants for marine farms to negotiate arrangements with other fishers as to the use of coastal space; and
- the regime for land-based aquaculture to be streamlined.

Under each proposal, the document asked submitters to consider whether the process should be managed under a joint RMA and Fisheries Act regime or under a single RMA regime.[7] Under the heading 'The Need to Uphold the Crown's Relationship with Māori', the document stated that:

> Although aquaculture was not included as part of the Māori Fisheries Settlement in 1992, Māori involvement in the aquaculture industry has grown to the extent that Māori are now a significant player in the sector.
>
> Aquaculture is seen by many iwi as an area where continued participation and further development is desirable.[8]

The document went on to identify two concerns specific to Māori:

- The effect of marine farms on customary fishing, and the need to ensure that new farms did not extinguish or in some way inhibit the use of any customary fishing right.[9]
- The claims to the foreshore and seabed. The document admitted that, should these claims be upheld, and customary rights to the seabed be 'clarified', the Crown might have to 'develop new arrangements with tangata whenua regarding use of the seabed for marine farming and other activities'. Nevertheless, since it was likely to be some time before those claims would be resolved, the Government considered that aquaculture reforms should proceed because they would have positive economic and environmental outcomes.[10]

Thus, for example, if a regime of aqua permits were established, and if tangata whenua identified an application for a marine farm which had the potential to extinguish or have an undue adverse effect on customary fishing, then that would give rise to ministerial intervention.[11] Similar considerations would apply if an RMA approach were taken, but regional councils would determine the question of undue adverse effects on customary fisheries.[12]

It was notable that there was no discussion of any Māori interests beyond their interest in the seabed and customary fishing. Possible Māori interests in coastal space and the water column above the seabed, within which marine farming sites would be situated, were not considered. The document did refer to use rights over the water column, but only to state

7. Ibid, pp 8–15
8. Ibid, p 14
9. Ibid, pp 14, 18
10. Ibid, p 14
11. Ibid, p 18
12. Ibid, p 21

that they would go to the marine farmer under any aqua permit. The document proposed that existing holders of aqua permits should have first right to any renewal, but they would still be required to obtain a fresh resource consent.[13]

Again, it is notable and we think important that the document did not mention any moratorium or any proposal that in future all aquaculture should take place within designated AMAs, subject to tendering by councils. There was some discussion in the document about the current system of processing applications on a 'first come, first served' basis.[14] Under a heading entitled 'Are improvements required under the RMA to better allocate the use of water space?' the document outlined the coastal tendering and coastal occupancy charging regimes and asked:

> Are more allocation tools required? Do councils need more or different tools to allocate space between potential applicants for marine farming? These could include a greater range of methods for allocating zoned space (such as balloting) or tendering by a regional council or other changes to the Act.[15]

However, no detailed proposals were advanced, which stands in contrast to the proposals to provide for a more cohesive system of permitting for aquaculture.

3.1.2 Consultation on the discussion document

Multiple copies of *Aquaculture – Join the Discussion* were sent to a large number of sector groups, and it appears that there was some consultation over a pre-release draft of the discussion paper.[16] Submissions from the public were to be filed by 31 October 2000, a period of two months from the release date of 1 August 2000.[17]

Over 120 Māori groups were sent copies.[18] In addition, a number of hui with Māori were held, at some of which recreational fishing issues as well as customary fishing issues were also discussed.[19] A list provided of these consultation hui indicates that a number of tribes were consulted. Reviews on recreational fishing and marine reserves were also being held at this time.[20] There was some talk of 'consultation fatigue' as a way of explaining why the Crown's process for consultation with Māori was limited, and consideration was given to undertaking 'more targeted consultation' with iwi once submissions on the discussion document were analysed.[21] However, the discussion document included a timetable which

13. Ibid, p 16
14. Ibid, pp 12–13
15. Ibid, p 13
16. Document A4(15), p 5
17. Document A29, para 33
18. Document A4(3); doc A29, para 38
19. Document A4(4); doc A29, para 38; doc A4(16)
20. Document A4(15), paras 4–5
21. Document A4(12)

did not anticipate further consultation with Māori before a draft Bill was introduced to implement changes.[22]

Thirteen written responses from Māori were received, and the Tribunal was provided with copies of them.[23] For the most part, they are brief and generalised and dealt with the particular proposals put forward for legislative change. Common themes were:

- an interest in aquaculture and a desire to become involved in the industry;
- a strong concern about local authorities taking a significant role in fisheries management under any reform scheme; and
- a desire for the Crown to remain involved.

Matters beyond the discussion document were also mentioned. The submission of Te Runanga o Ngai Tahu referred in passing to a 'finite amount of sheltered water space' as one of the principal issues of concern.[24] In other words, only a limited amount of space will be available for marine farming. A submission from Ngati Tama Manawhenua ki te Tau Ihu Trust suggested that aquaculture reforms should:

> Provide an integrated approach through which Coastal Planning maps can be developed which will display clearly and unequivocally permitted areas and exclusion zones for aquaculture activities, based on both Resource Management Act and Fisheries Act considerations.[25]

A submission from the Te Atiawa Trust drew attention to the historical significance of aquaculture to iwi such as Te Atiawa, referring to past active involvement in aquaculture activities, including seeding paua from Taranaki to Golden Bay in the early 1800s.[26] The trust also referred to its involvement in the Golden Bay Environment Court hearing and noted the excessive costs involved. This highlights one of the major impacts of the proposed reforms that we return to later in this report.

The TOKM submission noted that the 'seminal issue is whether the reform embraces Approach One, the dual regime, or Approach Two, a single regime under the RMA', and warned that the extent of the reform needed to be made clear, in order to avoid creating a new set of problems in the process.[27] Under a heading of 'Other Matters', TOKM commented that, given the time delay in addressing reform, it was disappointing that a range of substantive issues were not adequately dealt with in the reform proposals; among them, the Māori claim to the foreshore and seabed and a better method than the 'first come, first served' allocation of coastal space.[28]

22. Document A4(2), p 23
23. Document A29, para 40; docs A4(6)–(17)
24. Document A4(9), p 2
25. Document A4(11), para 10.5
26. Document A4(15), para 27
27. Document A4(17), para 16
28. Ibid, para 13

TOKM went on to warn that:

> Improving allocation of coastal space is an important issue in itself, but its scope is much wider than that of the current aquaculture reforms. . . . Te Ohu Kai Moana would not, however, like to see the improvement of marine farming rights put on hold yet again while the more general issue of allocation methods is addressed. We would also note that any such initiatives while of significant merit could not be implemented without first settling claims to the foreshore and seabed.[29]

That comment was echoed by Te Atiawa in its submission.[30] TOKM also raised the issue of the foreshore and seabed litigation and proposed that, until all claims were settled, at least 20 per cent of all new aqua permits for the right to grow fish under the Fisheries Act should be provided to Māori via TOKM.[31]

3.1.3 The Ministry proposals

On 10 April 2001, in a letter from the chief executive of the Ministry of Fisheries to the Minister of Fisheries, a package of measures to improve the management of aquaculture was outlined.[32] The measures were said to be 'preliminary' and more work was required to test the viability of this approach with officials from the Ministry for the Environment and the Department of Conservation.[33] The letter said that the discussion paper on aquaculture had 'set out a range of problems' facing aquaculture management. However, the 'core problem' was the lack of integration between coastal planning, aquaculture, and fisheries management in the allocation of water space for new marine farm development, which had led to conflict and contest over each new marine farm application:

> This conflict drives the focus of attention down to the processes used to allocate water space on a site by site basis, as opposed to the focus being placed on integrated management between central and local government at the start of the coastal planning process.[34]

The letter went on to outline a package of 12 key measures to address this core problem, including:

- the establishment of discrete 'aquaculture management zones' within RMA coastal plans;
- the prohibition of marine farming development outside of such zones;

29. Ibid, para 80
30. Document A4(10), p 2
31. Document A4(17), para 76
32. Document A4(18), para 8
33. Ibid, para 2
34. Ibid, para 6

- regional councils to consider all uses of coastal space, including fishing, when deciding to establish the zones;
- the managing through a single RMA process of approvals for the occupation of individual sites within the zones – that is, no separate marine farming permit from the Ministry of Fisheries would be required;
- the allocation of individual sites within the zones to be done through tendering;
- the application of tender funds to recover the cost of establishing the zones and to compensate fishers for undue adverse effects;
- the establishment of the zones to need the approval of the Minister of Fisheries, or other Ministers responsible for the 1992 fisheries settlement legislation.[35]

Supporting papers pointed out that one advantage of the proposed tender mechanism was that it would provide the Crown with the opportunity to 'deliver water-space settlement of iwi claims'.[36] While it was recognised that the foreshore and seabed litigation could provide the basis for an appeal against tendering, it was thought that the 'development of a settlement allocation within each marine farm tender zone may alleviate the concern of iwi'.[37] Later in April, a further key element was added requiring 'central government to reserve sites within 'aquaculture development blocks' for settlement of Treaty claims and to facilitate the entry of Māori into the business of marine farming'.[38] The second part of this formulation – namely, the Government facilitating 'the entry of Māori into the business of marine farming' – disappeared in subsequent papers.

The 10 April letter stated that the aquaculture discussion document had set out a 'range of problems', but it did not acknowledge that these new proposals, 'fundamental reforms' as the letter itself called them, went well beyond what had been contained in the discussion document. However, the letter indicated that the Ministry had preliminary discussions with the Aquaculture Council, the Sea Fishing Industry Council, and 'some regional councils' about the proposals. (It does not appear that any iwi organisations were approached.) In his evidence to the Tribunal, Ministry of Fisheries policy analyst Philip Kirk simply states of this period (between the consultation on the aquaculture discussion document and the production of the new proposals in April):

> During 2001, government continued to consider submissions and develop policy. Policy evolved over the year as input from officials from several Ministries was considered and as details of the proposed reforms were fleshed out. During this period there were several meetings between Ministers and officials of Māori Affairs, Environment, Conservation,

35. Ibid, para 8
36. Ministry of Fisheries, 'Aquaculture Reform –How Should it Be?' paper tabulating information on aquaculture reform, undated, p 3
37. Ibid
38. Document A4(19), para 22(i)

Fisheries and Treasury. The emphasis was on trying to create a coherent model which would improve efficiency across the board.[39]

3.2 Development of the Proposals

In subsequent months, the proposals were further developed by an interdepartmental steering group, which included officials from Te Puni Kokiri.[40] Key Ministers, among them the Minister of Māori Affairs, were kept fully briefed from an early stage.[41] Officials also considered a proposal that areas within the aquaculture development zones (by now called AMAs) be reserved pending Treaty settlements. This was rejected because the reforms were not intended to arrive at 'some grand all-encompassing settlement for iwi claims to water space', which was a wider political issue. One approach tentatively advanced was to reserve 20 per cent of all tendered water space, which would be managed similar to the 'land banks' for Crown surplus lands and with interim occupation of sites on shortened tenure terms.[42] A meeting with the Office of Treaty Settlements and Te Puni Kokiri was suggested, but it appears that the Office of Treaty Settlements subsequently advised that the proposal should not be proceeded with.[43]

In order to make the move to AMAs effective, a moratorium on aquaculture consents was also proposed to prevent applications being filed as plan changes to implement AMAs were being prepared and notified.[44] That in itself is an indicator of the fundamental change which was being contemplated to the existing regime. No moratorium was mentioned in the aquaculture discussion paper, because the changes contemplated by that paper were not so fundamental as to require one. Interestingly, the fact that the moratorium needed to be announced quickly, to prevent applications being made to avoid it, was put forward as one reason why there had been no specific prior consultation with any groups before the Bill was introduced.[45]

The result was that by this stage, and without consultation with Māori, several key features of the proposals as developed in *Aquaculture – Join the Discussion* were significantly reframed or totally changed. In addition, mechanisms to provide for Māori interests in marine farming by making specific provision for their increased participation in the business and activity of marine farming and the TOKM suggestion of allocating 20 per cent of the water space available for tender to Māori were being omitted or actively negated as the policy and

39. Document A29, para 47
40. Document A4(28)
41. Documents A4(20), (22), (23)
42. Document A15, paras 33–34
43. Document A4(26); doc A4(49), para 10; doc A4(50), p 7; doc A29, para 4.3
44. Document A4(30). Paper F makes this explicit. See also doc A29, para 66.
45. Document A4(52), pp 11, 15

proposed practices evolved. Furthermore, and perhaps more significantly, new attempts by Māori to participate in the industry by making application for the relevant consents were to be affected by the rushed introduction of the moratorium legislation.

In September 2001, Te Puni Kokiri advised the Minister of Māori Affairs that it was 'undertaking some limited discussions with Māori both in the fishing and local government sector' in order to make an informed response on the specific proposals in the draft Cabinet papers then circulating.[46]

In that same month, a summary of submissions on *Aquaculture – Join the Discussion* was produced, nearly a full year after submissions had closed.[47] Under the heading of 'Outstanding Issues', the document referred to concerns about the 'first-in, first-served' basis of applications and the need for some rational planning basis to be applied to the use of coastal space. It noted that submitters had identified solutions, including allocating zones for aquaculture and establishing a tendering process, and allocating space for iwi.[48] The synopsis did not contain any indication or appreciation that such matters were already the subject of detailed draft Cabinet papers.

3.2.1 Māori concerns and the proposed aquaculture reforms

The summary of Māori submissions on the *Aquaculture – Join the Discussion* focused on the proposed reforms. There was generally a concern that:

- the 1992 fisheries settlement and customary fisheries should not be affected by any reforms;
- the ongoing seabed and foreshore litigation should not be prejudiced by any reforms;
- there should be greater Māori participation in decision-making affecting coastal marine areas; and
- Māori kaitiakitanga, mana, and tino rangatiratanga over coastal areas should not be further reduced.[49]

There was also a concern that local authorities had generally not performed adequately in considering and addressing Māori concerns in the coastal area, and the ability to take on any devolved powers from the Crown was questioned. In addition, the resources and expertise of local authorities to deal with fisheries matters was questioned.

We note that Māori were never given an opportunity to consider the revised proposals which followed the submission process emphasising the setting aside of AMAs and the delegating of major responsibility to local authorities for the planning and allocating of space via a default tendering mechanism. This is discussed in detail below.

46. Document A4(29)
47. Document A4(30)
48. Ibid, p 15
49. Document A4(30)

3.2.2 The November announcement

Six Cabinet papers on the proposals went to the Cabinet Committee on Finance, Infrastructure, and the Environment on 12 November 2001. The papers included a recommendation that the committee:

> note that the reservation of sites within AMAs will occur where necessary to fulfill the Crown's obligations under Treaty settlement legislation and that minor amendments to correctly cross reference existing settlement legislation will be needed to achieve this.[50]

In relation to the issue of Treaty settlements, the papers suggested that existing settlements would be enhanced by the default tendering mechanism.[51] Setting aside areas for potential future settlements had been considered but rejected, because it would have made initial zoning decisions by councils difficult and could have affected negotiations with iwi.[52] Only claims actually in settlement were therefore to be provided for. It was suggested that the Crown's ability to provide for future settlements could be taken care of in re-tendering, perhaps with a right of first refusal to iwi which had a settlement in place.[53] An amended *New Zealand Coastal Policy Statement* could provide guidance.[54]

On 26 November 2001, Cabinet gave permission to officials to prepare drafting instructions for parliamentary counsel on the proposed changes.[55] On 28 November, a public announcement was made about the proposed reforms. It stated that the reforms followed from the public consultation undertaken in 2000 and gave notice of the intention to introduce legislation to restrict aquaculture in the future to AMAs and to provide for the tendering of space within them.[56] A two-year moratorium on the granting of resource consents for new aquaculture developments was also announced – with legislation to give it retrospective effect from 28 November 2001.[57]

The announcement, which was posted on the Ministry's website, was the first information that the public received about proposals for a nationwide regime of AMAs, tendering by regional councils, and the moratorium.

No copies of the announcement or background papers were distributed to the 120 or so iwi organisations consulted about the aquaculture reforms. The Ministry had earlier identified that it would be difficult to predict how iwi would receive the proposals, but that 'those iwi who are involved in new marine farm developments are likely to be discontented'.[58]

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50. Document A4(36), p 3
51. Ibid, paper B, para 56, p 10
52. Ibid, para 57
53. Ibid
54. Document A4(35), paper B, para 57, p 10
55. Document A29, para 62
56. Document A4(48); doc A29, para 62
57. Document A29, para 63
58. Document A4(43), p 7

By contrast, some regional councils were well aware of the proposals prior to the announcement. The Cabinet papers of 12 November 2001 indicated that, during the drafting of the reform legislation, 'officials will continue their existing dialogue with regional council practitioners to cover technical implementation issues'.[59]

Following the November announcement, Te Puni Kokiri commissioned research to consider Māori involvement in aquaculture.[60] A briefing paper in April 2002 noted that issues had arisen with regard to the Treaty of Waitangi and claim settlement legislation that required further consideration.

The briefing paper indicated that, once available, that information would be considered in relation to the aquaculture reform legislation.[61] In May 2002, the Ministry of Fisheries sent a letter headed 'Resolution of Residual Policy Issues' to relevant Ministers. In that letter, the Ministry noted that the 'vast majority of issues' had been satisfactorily resolved and that only four significant issues remained.[62] One of those issues was the 'on-going policy development' required on Treaty of Waitangi issues. An opinion from the Crown Law Office on the 'nature and extent of any Māori Treaty right to aquaculture space' was needed, and effects on any claim settlements to date.

3.2.3 The Resource Management (Aquaculture Moratorium) Amendment Act 2002

Following the November announcement, an interdepartmental working group coordinated responses to the introduction of the Resource Management (Aquaculture Moratorium) Amendment Bill and advanced the aquaculture reforms generally.[63]

It was proposed that the moratorium would cover all applications for coastal permits for marine farming which had not been publicly notified at the commencement of the moratorium. It was also to cover those applications that might have been or were about to be processed as non-notified applications.[64] It was this attempt to impose a blanket moratorium which motivated the concern of the Wai 953 claimants. They filed their first application for urgency on the basis that the then proposed Bill would be introduced into Parliament without adequate regard to Māori interests in marine farming. As discussed above at section 1.4, the Tribunal declined to hear the claim for want of jurisdiction. The claimants subsequently raised their concerns with the select committee constituted to receive public submissions and report back to Parliament on the Bill. (It is notable that at this time there were applications for consents involving Māori captured by the provisions in the legislation.[65])

59. Document A4(36), p 3
60. Document A4(59)
61. Document A4(61), paras 54–55, p 8; doc A4(73), p 2; doc A4(75), p 8
62. Document A4(75), para 2
63. Documents A4(60), (62)–(71)
64. Resource Management Act 1991, s150B(1) (as inserted by section 9 of the Resource Management (Aquaculture Moratorium) Amendment Act 2002)
65. Document A29, para 65; doc A4(52), table 1

Following public submissions, including many from Māori marine farmers, the Bill was amended. Commenting on the Bill at its second reading, the Minister for the Environment said that:

> In the bill as amended, applications that were publicly notified before 28 November, or accepted by council as completed non-notified applications before that date, will not now be covered by the moratorium. That means that about 142 additional applications for nearly 15,500 hectares will now be exempt from the moratorium.

There appears to be an acknowledgement that many applicants had invested considerable resources in getting their applications to the point of being processed. Exempting certain applications from the moratorium meant that a significant proportion of iwi applications could be processed.

The change did meet the aquaculture industry's need for development to continue without delay.[66]

The Resource Management (Aquaculture Moratorium) Amendment Bill 2002 was introduced to the House on 10 December 2001, was passed into law on 21 March 2002, and came into effect on 26 March 2002. The purpose of the Act is:

> (a) to impose a moratorium on the granting of coastal permits for aquaculture activities; and
> (b) to provide regional councils with the opportunity, during the moratorium, to provide in their regional coastal plans and proposed regional coastal plans for—
> (i) aquaculture management areas where aquaculture activities can be undertaken only as a controlled or discretionary activity; and
> (ii) areas where aquaculture activities are prohibited; and
> (c) to make consequential amendments to fisheries legislation.[67]

The key provisions of the Act impose a moratorium on the processing and issuing of coastal permits for aquaculture activities (ie, marine farming and spat catching) from the beginning of 28 November 2001 till the close of 26 March 2004 (being two years after the commencement of the Act).

Although there is a moratorium on the processing and issuing of coastal permits, the 2002 Act contains an interim reference to AMAs, pending the full aquaculture reform legislation. The 2002 Act provides that regional councils may develop coastal plans which include AMAs. In these areas, aquaculture activities may be undertaken as controlled or discretionary activities. The Act also provides for the setting aside of areas where aquaculture is prohibited. Further, councils are given the power to specifically consider impacts on fishing if they

66. Marian Hobbs, 19 March 2002, NZPD, vol 599, p 15102
67. Resource Management (Aquaculture Moratorium) Amendment Act 2002, s 3

choose to establish AMAs during the moratorium period, an important change to the current regime and a prelude to the proposed reforms.

Applications for coastal permits to replace marine farm leases or licences, or coastal permits for the same activity in the same area, are not covered by the moratorium.[68] The moratorium can be lifted over a region earlier than March 2004 if a regional council requests this and the Minister of Conservation is satisfied that suitable aquaculture management areas have been set aside.[69]

68. Resource Management Act 1991, s 150B(5) (as inserted by section 9 of the Resource Management (Aquaculture Moratorium) Amendment Act 2002)

69. Resource Management Act 1991, s 150C (as inserted by section 9 of the Resource Management (Aquaculture Moratorium) Amendment Act 2002)

CHAPTER 4

EVIDENCE AND LEGAL SUBMISSIONS

4.1 The Case for the Claimants

4.1.1 Evidence

A major research report was commissioned by counsel for Ngati Kahungunu and Ngati Whatua. This followed a memorandum–directions of 13 September 2002 in which the Tribunal authorised the commission.[1] The report, which was completed by Simon Hedley, was to provide the basis for the generic evidence required to prosecute the claims. Additional evidence was provided by the witnesses for the claimants and is summarised with the Hedley report below.

(1) The Hedley report

Mr Hedley, a coastal resource management consultant, produced a research report for the claimants examining the extent to which the claimants have an interest in marine farming.[2] He concluded that they had a significant interest stemming from customary ownership and any derivative rights attaching to that interest, including the control, management, and use of the coastal marine area. The claimants believed that the coastal marine area was a taonga which was inseparable from their iwi. They believed that they exercised mana over coastal waterspace, which manifested itself in customs relating to the use of this space. These customs included karakia, rahui, tapu, and whakanoa, and obligations as kaitiaki to apply those customs to protect the mauri of coastal areas within their rohe. Mr Hedley argued that these rights and obligations continued regardless of changes in the ownership of land adjoining the coast. He also considered that claimant iwi, and their constituent hapu and whanau, have traditionally practised marine farming or coastal resource enhancement, including the collecting and cultivating of mussel spat, the transplanting of shellfish between sites, and the keeping of shellfish beds clear of competing marine life. In his opinion, the claimants viewed contemporary marine farming as an extension of their traditional practices.[3] Additional evidence was provided by witnesses for the claimant groups.

1. Paper 3.1
2. Document A6
3. Ibid, paras 51–74

(2) Ngati Whatua

Waata Herewini Richards, a kaumatua at Haranui Marae, claimed customary ownership of the Kaipara Harbour on the basis of the original conquest of the coastal lands. Evidence was presented that demonstrated that Ngati Whatua's interest in the coastal marine area and marine farming included:

- customary restrictions on the gathering of food, in order to avoid the exhaustion of fish and shellfish stocks;
- the customary use of the harbour for transport between communities;
- the identification of taniwha having residence in the harbour; and
- access for the collection of kaimoana being restricted to specific marae.[4]

(3) Ngati Kahungunu

Ngahiwi Tomoana, the chair of the Ngati Kahungunu Iwi Incorporation, provided a whakapapa for their tipuna Hawea, who fought over a beached whale and secured mana over surrounding land, as an example of the rights of Kahungunu hapu in the coastal marine area.[5] Evidence of their interest in marine farming included the Ngati Kahungunu oral tradition of tupuna who collected paua from offshore beds and relocated them to shallower waters, where they were accessible to hapu, subject to strict controls.[6]

(4) Te Atiawa ki te Tau Ihu

An extensive report prepared by researchers Anna Hewitt and Dr Diana Morrow, 'Te Atiawa and the Customary Use of Natural Resources in Te Tau Ihu, 1840–2000' was filed with the Tribunal. The authors identified sources which historically indicated a level of participation of Te Atiawa in marine farming. They pointed to the fact that many species of shellfish were in abundant supply and were gathered by hand. For example, in the traditional territory of Te Atiawa there was no need to dive for paua, although diving for kina was common. Kina, scallops, and oysters were also collected with wooden dredges. The harvesting of kai moana was carried out with the preservation of the resource in mind. A range of techniques, including rahui, was used to ensure that resources were conserved and protected. The report provides an example of active 'farming' of shellfish in which boulders were placed in circles about two feet high with smaller boulders with mussels attached to them being placed in the middle and left to breed. Other management techniques included the transplanting of paua. Baby paua were trapped on pieces of rocks and later transplanted onto kelp.[7] There was also evidence that, in Te Tau Ihu, Ngati Tama (a neighbouring iwi) regularly transplanted paua from distant beds to beds closer to kainga.[8]

4. Document A26
5. Document A18
6. Document A6, para 55
7. Document A5, p 34
8. Document A6, para 70

(5) Ngai Tahu

David Higgins, a commercial fisherman of 25 years, a former chief executive of Ngai Tahu Fisheries, and the kaupapa atawhai manager for the Department of Conservation's Canterbury conservancy, stated that Ngai Tahu had been marine farmers 'since time immemorial'. Their customary associations with the marine area included:

- waiata describing the relationship of people with the coastal area (eg, the waiata of Kati Hateatea);
- the customary practice of transferring toheroa from one bed to another to enhance stocks (specifically, it was said that toheroa were transferred from Oreti beach in Murihiku to Moeraki pursuant to 'kaihaukai agreements' between particular whanau, who would collect rimurapa for poha at Moeraki);
- the collection of tuaki or cockles for reseeding at Moeraki;
- the transfer of juvenile paua within the Moeraki reserve;
- the capture and use of tuari (blind eels) to remove marine vegetation inhibiting the growth of paua stocks; and
- the removal of kina from paua beds to allow better growth of the paua.[9]

John Perenara Tainui of the Kai Tarewa and Kati Irakehu hapu of Ngai Tahu described his experiences as a long-time fisherman in the Horomaka (Banks Peninsula) region, including the breeding of shellfish by Ngai Tahu people and the use of ana (caves) along the coast to store fishing gear.[10]

(6) Ngati Koata

Ngati Koata provided evidence from other Tribunal proceedings which they believed was relevant to the marine farming claim. This included evidence from James Elkington, a master mariner, that Ngati Koata have transplanted kaimoana in the Rangitoto ki te Tonga region for five or six generations. This included sowing and maintaining paua beds around Rangitoto–D'Urville Island. The women of the tribe would transplant shellfish to provide food close to living areas and to ensure the survival of stocks in particular areas.[11] Mr Elkington also claimed a role for Ngati Koata in control over the navigation of enclosed waters within the tribal rohe.[12] Mr Elkington's son Carl, also a skilled seaman, supported his father's comments.[13] Evidence was also provided of a petition of Rewi Maaka and 29 others in 1903 claiming rights over the seas around Rangitoto Island and seeking to invoke a custom 'to make sacred the said seas' to preserve fish and shellfish stocks.[14]

9. Document A17, p 6; doc A6, para 71
10. Document A10, paras 8–9
11. Document A19, paras 37–45, 49, 60
12. Ibid, paras 112–116
13. Document A24
14. Ibid

(7) Ngati Kuia

Ngati Kuia sought leave to join the hearing of the marine farming claims as a fishing people and as one of the tangata whenua iwi in the Te Tau Ihu region.[15] Ngati Kuia adopted the submissions of other parties and did not bring any evidence of their own.

4.1.2 Legal submissions

(1) Ngati Whatua and Ngati Kahungunu

Counsel for Ngati Whatua and Ngati Kahungunu argued that the Māori interest in marine farming was an 'incident of Māori rights as customary owners of the coastal marine area'. Ownership rights arose from acts of discovery and the naming of coastal areas, the settlement and occupation of adjoining lands, and the use of the coastal marine area itself, and ownership could be transferred in terms of custom.[16]

Māori also had a development right, which has been recognised in relation to fishing in the coastal area in a number of Tribunal reports. The interest might vary from place to place, but its 'central tenets' would be similar throughout New Zealand. Such rights did not require legal recognition to be protected in terms of the Treaty of Waitangi. Consequently, ongoing litigation over the jurisdiction of the Māori Land Court to consider whether the foreshore and seabed were Māori customary land was of limited relevance to the claim.[17]

Counsel argued that, where the Crown became aware of Māori rights or claims to rights, it was under an obligation to undertake an appropriate investigation of the nature and extent of those rights and not simply to stand back and dispute their existence. The situation was said to be 'directly analogous' to the failure to properly investigate pre-Treaty land transactions, which was criticised in the *Muriwhenua Land Report*.

Counsel submitted that the 1992 deed of settlement and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 did not affect the marine farming interests of Māori because legislation made a clear distinction between marine farming and fishing.

Furthermore, the Crown duty of active protection required it to ensure that an appropriate amount of water space was made available to Māori. Current legislation was not Treaty consistent. The RMA gave little or no priority to Māori interests, requiring only that Treaty principles be 'taken into account'.

The Crown had misconceived the claims as historical, and therefore suitable for a remedy within historical settlement, when they in fact concerned contemporary rights. The Crown approach also begged the question of what should happen to historical claim settlements already achieved without providing for or addressing the issue of coastal space.

15. Paper 2.55
16. Document A8
17. Ibid

Counsel argued that the reforms should make some tangible provision for the Māori interest in marine farming. Under the current proposals, there was no incentive to make changes to actively consider the nature of Māori interests.

With regard to the protection proposal put forward by the Crown, it was argued that such a proposal had little merit if the Crown had not taken steps to determine the nature of the interest and what needed to be protected. In such a situation, there was no certainty that the protection proposal would ever even operate.

Counsel argued that consultation with Māori was required over 'some form of preferential allocation of water space' to give effect to the Māori interest, which should be an integral part of the reform legislation and not an 'add on' to the substantive reforms.

(2) Te Atiawa

Counsel for Te Atiawa argued that the Treaty guaranteed to Te Atiawa the right to administer and allocate rights within their marine rohe. The claimants did not believe that the current reforms would appropriately recognise their rights, which they claimed had been ignored for many years and they objected to reforms which would result in 'further interference' in their rights and which would not give priority to first recognising and restoring the rights which they claimed were guaranteed by the Treaty.[18]

In terms of the Treaty, counsel stressed that, in contrast to the English text, which focused on the possession of property, the Māori text emphasised the exercise of authority over resources, including over domestic political entities such as 'kainga'. The Treaty therefore envisaged the administration, management, and regulation of taonga or treasures, and in the context of this claim that meant the administration, management, and regulation of the taonga of coastal space.

Counsel further submitted that Te Atiawa exercised a sophisticated tikanga (system) of management over their coastal resources, which included the use of rahui, and had a tradition of marine farming, including the transplanting of species.

The current law did not allow Te Atiawa to continue to administer, manage, and regulate the marine area within their rohe. The Marine Farming Act 1971 contained no Treaty reference and the RMA referred to the Treaty only in a weak sense, which allowed the Crown to continue to actively oppose claims to Māori rights over the foreshore and seabed.

Finally, counsel argued that the protection proposal put forward by the Crown was a 'residual remedial power' which was 'unsatisfactory'.[19]

(3) Ngai Tahu

Counsel for Ngai Tahu argued that the Waitangi Tribunal had already made findings on Ngai Tahu's interests in the coastal marine area in both the Ngai Tahu land and sea reports.

18. Document A7
19. Ibid, para 29

Furthermore, the Crown had made statutory acknowledgements of Ngai Tahu's associations in the Ngai Tahu Claims Settlement Act 1998.[20] The Tribunal had already found that hapu had special use rights of places and areas within the coastal marine area and exercised 'mana moana' over parts of the sea. It had also accepted that rangatiratanga included management and control of the resource.

Counsel argued that the coastal marine area was a taonga for Ngai Tahu and all iwi. The evidence from the witnesses called demonstrated that Ngai Tahu had participated in marine farming for centuries, particularly through traditional practices for enhancing fish stocks. Marine farming was an incident of Ngai Tahu's customary interests in the coastal marine area. Tribunal reports had also recognised Ngai Tahu's right to develop customary practices in accordance with changing techniques and technologies.

As for Ngai Tahu's rights in the coastal marine area and any associated activities other than commercial fishing, if one took a purposive approach to that settlement legislation (under the Interpretation Act 1999) and considered the limited definition of commercial fishing in fisheries legislation, then those rights were not affected by the 1992 fisheries settlement.

The claim was not limited by the Ngai Tahu Claims Settlement Act 1998 because it related to Crown actions in the proposed aquaculture law reforms, which took place after 21 September 1992.

The litigation concerning whether the Māori Land Court could determine title to the foreshore and seabed is of limited relevance to this claim because a grant of title under the Te Ture Whenua Māori Act 1993 would relate to only one facet of customary title; namely, the exclusive possession of the soil.[21] Many other facets or incidences of customary title might not rely on that possession or might not be capable of recognition by the Māori Land Court. In any event, a grant of title by the land court might prove impractical if the area above the seabed had been compromised by marine farm structures.

It was argued that the protection proposal put forward by the Crown would activate Ngai Tahu's preferential right, by virtue of its claim settlement, to purchase 10 per cent of any coastal space tendered under the RMA. However, it had been specifically agreed by the Crown and Ngai Tahu that that preferential right did not evidence any rights in the coastal marine area and was in settlement of historical claims and that it should not be used to settle contemporary claims.

The Crown had a duty under the Treaty actively to protect Ngai Tahu's rights, including customary title in the coastal marine area. It had breached that duty and the duty to make informed decisions, to act only after consultation, and to act in good faith. The inadequacy of the protection proposal also affected the right of redress under the Treaty.

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20. Schedules 100–104 in relation to Te Tai o Mahaanui (Banks Peninsula), Te Mimi o Tu Te Rakiwhanoa (Fiordland), Te Tai o Arai Te Uru (Otago, including Moeraki), Rakiura / Te Ara a Kiwa (Rakiura / Foveaux Strait)

21. The case concerned is *Fleetwing Farms Limited v Marlborough District Council* [1997] NZRMA 385 (CA).

(4) Ngati Koata

Counsel for Ngati Koata noted that the Court of Appeal in *New Zealand Maori Council v Attorney-General* had endorsed the view that, before the Treaty of Waitangi, the whole of New Zealand was divided among Māori tribes and subtribes.[22] Furthermore, the Muriwhenua and Ngai Tahu reports of the Tribunal had commented on the significance to Māori of coastal and marine areas.[23] The matter was therefore 'notorious' and one of which judicial notice should be taken.

Ngati Koata had also presented evidence in various proceedings before the Tribunal supporting their claim to tino rangatiratanga over the seas. This included evidence of their role as users and kaitiaki of various sea lanes, their exercise of tikanga over harbour areas (including Croisilles Harbour), their interests in offshore islands and fishing reserves, and their sowing and maintaining of paua beds at Rangitoto–D'Urville Island. Their evidence concerning the latter demonstrated their interest in marine farming.

Counsel claimed that the 1992 fisheries settlement had not affected this claim, since that settlement dealt with commercial fishing only, and not rangatiratanga in respect of coastal and marine space and waters and in the use and allocation of such.

Counsel submitted that, before embarking on any substantive reform of aquaculture, the Crown was under a duty to redress existing breaches of the Treaty in the current regime. Experience in other areas, such as the proposed sale of forestry assets in the 1980s, had shown that, once Government policy had been developed without sufficient attention to Treaty obligations, the incentive for the Crown to address those obligations in the implementation of the policy was 'greatly reduced'.

In counsel's view, the existing regime for marine farming under the Marine Farming Act 1971, the Fisheries Acts of 1983 and 1996, and the RMA interfered with their right to undisturbed tino rangatiratanga over taonga, guardianship duties, rights to exercise customary entitlements, and the development rights of the iwi and hapu. The Treaty of Waitangi had only to be 'taken into account' under the RMA, and the ability to transfer powers to iwi authorities under section 33 of that Act was very limited. In addition, as he pointed out, no transfers of such powers have been identified.

When compared to the protection mechanisms accepted for the disposal of State enterprise lands and Crown forests, the protection proposal put forward by the Crown was deficient in that it failed to mention Treaty principles and contained no proposal for the Crown to take action to better inform itself about the Māori claims.

Counsel said that the litigation concerning whether the Māori Land Court could determine title to the foreshore and seabed had little relevance to the claim, since the rights claimed before the Tribunal were Treaty rights. If the Crown were found to have unencumbered legal title and authority over the foreshore and seabed, the situation would be even

22. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 653–654 (CA)
23. Document A13

more analogous to that faced in the *Lands* and *Forests* cases, where the Crown had full legal title to the land which was subject to claim. Further, the fact that coastal areas were unaffected by private ownership reduced the potential difficulties that could arise in negotiations.

The reforms should not proceed until a system had been put in place to protect the claimed Māori and Treaty interests over areas intended or likely to be used for marine farming and aquaculture. The system of protection should involve Māori representatives having a 'decisive voice' in any allocation and management of coastal areas for marine farming and aquaculture. Crown resourcing for the system and its development were sought, as well as Tribunal supervision, including the appointment of a mediator.

4.1.3 Interested parties

(1) TOKM

TOKM filed a brief by a senior policy analyst, Kirstin Woods.[24] She confirmed that the commission had been active in promoting Māori entry into marine farming. The commission viewed that any form of spatial allocation of the marine environment amounted to an alienation either permanently or indefinitely.[25] This, we believe to be an important point which we will return to.

Ms Woods noted that, at an early stage, the commission had made submissions supporting the aquaculture reforms, and it had suggested that space be left aside to deal with potential Māori claims.[26] The commission considered that the Crown had avoided the issue of Māori rights to coastal space in its actions to date, including in its proposed mechanism for intervention.

The commission believed that tangible recognition of Māori interests in marine farming was required in any reform legislation, and it did not believe that major delays in the reform process would be required to reach agreement on a suitable mechanism. Ms Woods also commented that:

> To my knowledge, in the course of the Commission's discussions with the Crown, the Crown has never alleged that the fisheries settlement settles Māori claims in respect of aquaculture/marine farming.[27]

In legal submissions, counsel for the commission noted that the Tribunal had accepted in previous reports that physical resources – including fishing grounds, estuaries, harbours, and foreshores – and possessions can be taonga.

Counsel argued that the Fisheries Settlement Act 1992 did not cover aquaculture activities, including marine farming since they were not 'commercial fishing' as defined in the 1992

24. Document A15
25. Ibid, para 18
26. Ibid, para 14, p 4
27. Document A15, para 8

legislation. The meaning of 'commercial fishing' was considered by the High Court in *Te Arawa Maori Trust Board v Attorney-General.*[28] However, the High Court had refused a request from the plaintiffs to answer whether fish farming fell within the definition of fishing on the basis that it was a hypothetical question in that litigation.[29]

The commission considered that the Crown proposals fell short of the Treaty requirement of active protection in that they were contingent and did not sufficiently recognise or take immediate steps to discover those rights. The administrative complexity that might arise from making provision in the reforms for currently undetermined rights was a minor matter compared to the risk of compromising tino rangatiratanga, which the current reforms ran.

Counsel further submitted that, while the commission accepted that the allocation of a percentage of marine farming space to iwi might not be the protection mechanism that was ultimately agreed on, it was 'essential that the reforms include a negotiated provision for Māori interests as a fundamental part of any legislative change'.

(2) The New Zealand Marine Farming Association

Mr Coates, who was the executive officer of the New Zealand Marine Farming Association and had 35 years' involvement in the industry, gave oral evidence. He informed the Tribunal that the association was voluntary but had members with about 100 farms in the northern South Island region. The association took a neutral position on the claims.

Mr Coates pointed out that the mussel is the only native species in New Zealand that is farmed commercially on a large scale. The industry had been composed of small businesses, but was now dominated by larger companies with growing Māori involvement.

Mr Coates understood that there was currently a large backlog of marine farm permit applications before the Ministry of Fisheries and that many of those applications were from iwi. The Ministry had informed the industry that the backlog would be cleared by mid-2004 and that all pre-moratorium applications would be cleared by mid-2005. The cost of the current delays was estimated by the industry at over $400 million in farm sales losses. There were also lost job opportunities. Mr Coates was fearful that, once the moratorium was lifted, new applications would be dumped onto the existing backlog and there would consequently be further delays.

The association sought some firm direction on Māori interests in aquaculture and marine farming claims. It was concerned that the reform process had proceeded for some four years and that basic issues were only now being brought before the Tribunal. The association accepted, however, that the matters before the Tribunal were between the Crown and Māori. While the association was not supportive of further delays, it would support them if they would result in enhancing the objectives of the reforms, including improving security

28. *Te Arawa Maori Trust Board v Attorney-General* unreported, 5 December 2000, Anderson and Paterson JJ, High Court, Auckland, CP448–/C099

29. Document A12, para 27(d), fn 8

of tenure for all rights holders in the coastal marine area. The association acknowledged that further delays would have real costs both for Māori and the industry. The association's preference was for a 'willing buyer, willing seller' approach to be adopted as the default mechanism for dealing with competing interests rather than ill-defined intervention models.

4.2 The Case for the Crown

At the request of the Tribunal, the Crown provided two volumes of background documents on the aquaculture reforms.[30] These have proved extremely useful to understanding the background to the current reforms and the degree of Māori involvement and understanding.

4.2.1 Ministry of Fisheries

Philip Kirk, a senior policy analyst at the Ministry of Fisheries, provided a useful brief of evidence outlining the reform of aquaculture policy and also attaching briefing and Cabinet papers about proposals to deal with Māori claims.[31] He began by indicating that the Government views aquaculture as a different activity from fisheries 'enhancement', where fish or shellfish are redistributed back into the sea and are not privately held.[32]

Mr Kirk highlighted the growing importance of aquaculture within the fishing industry and the immediate need for reform. The current 'first come, first served' approach to applications for marine farming had led to a 'gold-rush' situation, with developers seeking to maximise their share of the potentially available water space.[33]

In relation to the current reform process, Mr Kirk pointed out that it could be traced back to a general review of fisheries law in 1998. At that stage, there were proposals to allocate marine farm rights in perpetuity; however, those had been dropped.

Mr Kirk described the release of the aquaculture discussion document in 2000 and noted that it was sent to over 120 Māori organisations and that a number of meetings with Māori were held. He stressed that the submissions received from Māori addressed a number of broad concerns – in particular, the submission of TOKM set out in detail a proposed interim settlement for aquaculture claims, including reserving 20 per cent of any harvesting rights for iwi.

Mr Kirk then explained that, following the closing of submissions, in April 2001 a 'conceptual model to improve the management of aquaculture' was put forward by the Ministry of

30. Document A4
31. Document A29
32. Ibid, para 9
33. Ibid, para 17

Fisheries that included the concept of AMAs, tendering by regional councils, and a moratorium.[34]

In terms of specific concerns raised by Māori, Mr Kirk indicated that the Government had determined not to await the outcome of the foreshore and seabed litigation, since most of those making submissions, including Māori, wanted reform of the industry, and the proposed reforms were 'essentially operational in nature' and would not preclude the relief that the claimants sought. He acknowledged, however that, if the Māori in that case were successful, the whole RMA regime would probably require adjustment, since it proceeded on the basis that the foreshore and seabed were not privately owned but Crown owned.[35] In his view, the current reforms were 'operational changes' to 'improve processes'.[36]

He also opined that the identification of AMAs and the restriction of aquaculture to them would enable iwi to target their applications better, and reduce their costs. The current duration of consents for marine farming (35 years) would not alter, fishing rights under the 1992 settlement and customary fishing rights would not be disturbed, and the tendering proposal would activate coastal rights in existing Treaty claim settlements.[37]

Finally, Mr Kirk outlined the Government reasoning behind the 4 October proposals. The background papers on these proposals indicate that the Crown appears to have considered:

- Introducing Treaty clauses in aquaculture reform legislation. This was rejected on the basis that it would probably simply lead to further litigation and not really resolve the issue.
- Setting aside at the outset a proportion of space to iwi for possible future claim settlements. This was rejected because of the uncertainty of the amount which should be set aside and because it would create expectations, with few firm indications on how those expectations might be appropriately considered and dealt with.
- Setting aside space at the outset for general economic development in aquaculture. This was rejected because it would not resolve Treaty claims.
- Reducing the term of coastal permits. This was rejected because of its likely effect on investment in the industry.[38]

He repeated the Crown's protection proposals to retain capacity to preserve Treaty settlements and to preserve some capacity to recognise contemporary claims to Treaty interests in aquaculture linked to rights in the foreshore and seabed and/or occupation of coastal space.[39] These have previously been detailed and need not be repeated here. What is important for our purposes is to establish the rationale behind the adoption of these protection mechanisms.

34. Ibid, paras 48–50
35. Ibid, para 52
36. Ibid, para 67
37. Ibid, para 76; see also Ngai Tahu Claims Settlement Act 1998, s 317, sch
38. Document A29
39. Ibid, para 82

In this regard, Mr Kirk noted that the Minister of Conservation could use his powers, once heads of agreements which included coastal space redress were concluded with a mandated settlement group.[40] Iwi who would be affected by these proposals are:

- Ngai Tahu, who have legislation regarding coastal tendering in place; and
- Ngati Tama, Ngati Ruanui, Nga Rauru, and Ngati Awa, who have settlements or proposed settlements with coastal tendering clauses.[41]

One proposal was that the aquaculture reform legislation could list deeds of settlement in a schedule, and new deeds could be added to the schedule by legislation. Regional councils would become responsible for implementing the provisions in the deeds of settlement relating to aquaculture by providing for them in tender rounds. The Minister could also use the power to preserve some capacity to recognise contemporary claims to Treaty interests in aquaculture linked to rights in the foreshore and seabed or the occupation of coastal space.[42]

4.2.2 Te Puni Kokiri

Evidence was also provided by Debra Packman, a senior policy analyst working with Te Puni Kokiri.[43] She noted the extensive involvement of Māori in aquaculture, currently through TOKM and other initiatives.[44] In addition, she noted that, in association with TOKM, Te Puni Kokiri had provided direct assistance through an aquaculture grant scheme.

Ms Packman repeated the key concerns Māori had expressed in submissions on the aquaculture discussion document of 2000, including their desire for the reforms to proceed in order to facilitate their continual entry into and development of the industry. Māori also wanted present claim settlements to be preserved (including the 1992 fisheries settlement) and customary fishing rights to be protected, and they wanted to ensure that the reforms did not usurp the outcome of the foreshore and seabed litigation.

The Tribunal was informed that Te Puni Kokiri supported the view that, given the complexity of these issues, they were best dealt with under a broad ocean policy covering all issues, which we discuss in detail below.[45] On the issue of Māori rights and interests, she concluded that the Government 'does not have a clear view of what any Māori rights in aquaculture might be, nor how the range of interests might be held or exercised amongst Māori'. Nor did she think that Māori themselves had a clear understanding of the nature and extent of rights and interests claimed in respect of aquaculture.

Given this , she considered that further dialogue was required.[46]

40. Ibid, annex B, para 38
41. Document A29, paras 73–74; see also doc A8, para 44
42. Document A29, annex B, paras 33, 39–42
43. Document A28
44. Document A28, paras 7–15
45. Ibid, para 25
46. Dcoument A28, paras 27–28

4.2.3 Legal submissions

Counsel for the Crown argued that the need for reform in aquaculture was pressing.[47] To the extent that any claim is made 'via a fishing right', this has clearly been settled by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The litigation over the foreshore and seabed, if successful, would require an 'entire reworking' of the Crown management of activities in those areas, and was too remote to delay the reforms.

In terms of the claims to coastal space, the Crown had insufficient evidence as to the merits of such claims. Even if there were such evidence, identifying the groups to whom coastal space rights might attach would be complex and, consequently, the Crown believed that the reforms should not be delayed for those claims either.

The Crown accepted that it should not take action now which might prevent it from providing redress should rights be proven in the future. The Crown conceded that 'there might be sustainable claims to coastal space, though [they are] likely to be non-exclusive'.[48]

Counsel said that the Crown's protection proposals for preserving its capacity to address Māori issues, as detailed in the memorandum of counsel dated 4 October 2002, were intended to strike a balance between advancing the reforms, while retaining the capacity to provide redress.

The Crown questioned what relief the Tribunal could provide in such a situation, where the claimants clearly accepted that aquaculture reform was necessary.

Ms Hardy submitted that the most detailed proposal put to the Tribunal had been advanced by TOKM, and that was to reserve 20 per cent of space within AMAS. The Crown had rejected this because it would involve holding a quantum of aquaculture assets for allocation with no certainty at present as to the reasoning behind any allocation, who the beneficiaries might be, and how the allocation should be managed. The complexities of such a process could already be seen in the fisheries allocation.[49] Nor could a protection mechanism similar to the resumption clauses in the *Lands* and *Forests* cases be negotiated and legislated for in this case, since in those cases the courts and the Waitangi Tribunal had accepted that there were cases of acquisition of land by the Crown which would require the return of land.[50]

In further submissions, counsel for the Crown argued that the select committee process was an important forum for submissions on the reforms since 'the broadest interests' could be considered at that stage, and that the Tribunal should consider the existence of that further available process if it were to make any recommendations on the urgency issue.[51]

Counsel also pointed to an apparent contradiction in the stance of some claimants who had opposed the moratorium because it would delay their entry into aquaculture but were now seeking further consultation which would 'inevitably' delay the reforms. That indicated

47. Document A27
48. Document A27, para 6, p 6; doc A29, annex B, para 40
49. Document A27, para 16
50. Ibid, para 19
51. Document A49, paras 3–6

that this was a situation where a balancing of interests had to be achieved, and the Crown believed that its policy achieved that balance.[52]

In addition, the claimants appeared to hold differing views as to what they considered the legal nature of the customary interest to be and whether it was affected by the foreshore and seabed litigation.

Counsel pointed out that some claimant evidence related to the enhancement of wild fisheries, not marine farming, with which the reforms were solely concerned. (The reforms do not prevent the continuation of practices associated with enhancement.) Counsel concluded:

> In short, the evidence is relatively slender. Having said that, the Crown accepts that there may be claims, likely of a non-exclusive nature, to the coastal area. That is why a precautionary approach has been adopted.[53]

In addition, since the claimant evidence concentrated on fisheries enhancement, where fish and shellfish were not kept separate from naturally occurring aquatic life, their concerns in relation to fishing had already been dealt with in the 1992 fisheries settlement.

The Crown did not deny that a claim might be made to coastal space distinct from fisheries. It was concerned to see that the evidence and issues be focused in this way.

Furthermore, there was no evidence before the Tribunal to make even a preliminary finding on the customary ownership of the foreshore and seabed. Sourcing the Māori interest in marine farming to that feature of the coastal marine area was therefore not possible. In any event, since aquaculture rights were granted only on a temporary basis, they would not prejudice any future benefits for Māori resulting from that litigation.[54]

Counsel accepted that Māori had not been consulted specifically about the reforms announced in November 2001 and that the consultation in that respect had not been 'perfect'. The Crown conceded that there should have been 'further consultation of a more formal nature with Māori following the November 2001 formulations by the Crown'.[55] The Crown did, however, advise the general public, including Māori, of the reforms by having information on them placed on the website of the Ministry of Fisheries.

Despite the imperfect consultation with Māori, the Crown considered itself 'reasonably informed' of the thrust of the claimants' concerns, which it had responded to with a balanced protection mechanism despite the legal proceedings before the Tribunal and the courts.

52. Ibid, paras 17–18
53. Ibid, para 44
54. Ibid, para 50
55. Ibid, para 76

4.3 Submissions in Reply

In reply, counsel for Ngati Whatua and Ngati Kahungunu noted that the Crown officials had themselves accepted that the select committee process was 'not an appropriate place to formulate a policy response on Treaty issues'.[56] Counsel rejected the view that the seabed and foreshore litigation prevented the Crown from entering into negotiations for a mechanism to protect Māori interests in marine farming, since different outcomes were sought in that litigation. This was a repeated submission and it was supported by other counsel.

Counsel for Te Atiawa emphasised the fiduciary duties arising under the Treaty relationship and argued that the Crown must not simply make a judgement call on the different rights involved, but needed to justify with some precision its interference in the marine farming rights of the claimants. Counsel also noted the Crown's acceptance that its consultation on the November 2001 proposals had been imperfect.[57]

Counsel for Ngai Tahu was concerned that the Crown viewed the aquaculture reforms, and in particular the tendering of coastal space, as satisfying Ngai Tahu claims to aquaculture, when the 10 per cent mechanism in the Ngai Tahu settlement was in recognition of historical claims and did not recognise any contemporary rights in the coastal marine area.[58]

He also contended that what might historically be termed 'enhancement' was a precursor to modern aquaculture and gave rise to a development right to participate in modern aquaculture practices. Counsel rejected the notion that evidence of Ngai Tahu's interests in the coastal area was slender, particularly given the statutory acknowledgments of those interests. Importantly, in terms of the recommendations that we might make, he indicated that Ngai Tahu were opposed to any arrangement that would vest assets in TOKM.

Counsel for Ngati Koata argued that their evidence of a customary interest in coastal areas was ample, and essentially unchallenged.[59] The outcome of the foreshore and seabed litigation was irrelevant, since whatever was determined in the courts would have little or no impact on the claims before the Tribunal because it concerned legal questions relating to the foreshore and seabed.

Counsel for Ngati Koata also highlighted the circular nature of the Crown's reasoning that, since Māori interests in aquaculture were not known, policy makers had difficulty in making policy provision for them, thereby even further reducing their understanding of them. The current proposals would create high costs for Māori to engage in and respond to the planning processes proposed to establish AMAs, especially given that funding for legal assistance was limited.[60]

56. Document B3, para 2.1
57. Document B2
58. Document B1
59. Documents A47, B5
60. This point from document A47, paras 38–39

Counsel indicated that the claimants had all committed themselves to urgent and thorough negotiation (appropriately resourced) to achieve a negotiated protection mechanism.

Counsel for TOKM was critical of the placement of the November 2001 decisions on the website.[61] The website had not indicated that further submissions were sought, and Māori had not been consulted about specific proposals subsequently developed in September and October 2002. He also pointed out that, with regard to the current claims and the alleged difficulties in making interim provision for them, the situation was not dissimilar to that which faced the Crown in the late 1980s when the nature and extent of Māori fishing rights remained at large, and yet interim arrangements were successfully made and legislation passed in a timely fashion.

In final comments, Crown counsel acknowledged that, in terms of evidence, while the claimants had been emphatic about their important relationship with the coastal marine area, they had not given particular details of their rights. The Crown contended that this was necessary to determine how those rights intersected with fishing rights already settled and how they might be allocated among Māori groups.[62]

In terms of the 1992 fisheries settlement, the Crown considered that, 'Because of the nature of aquaculture, linked as it is to occupation of coastal space, the Crown does accept that it is not settled by the 1992 Settlement Act'.[63]

61. Document B6
62. Document B8
63. Ibid, para 8

CHAPTER 5

ISSUES, JURISDICTION, AND THE NATURE AND EXTENT OF THE MAORI INTEREST IN MARINE FARMING

5.1 Issues for the Tribunal

The Tribunal has to consider the following issues:

- whether it has jurisdiction to hear these claims; and
- what the nature and extent of the Māori interest is in aquaculture – in particular, marine farming – and whether it is an interest protected by the Treaty of Waitangi.

If the Tribunal finds that it does have jurisdiction, it then has to decide which of the principles of the Treaty of Waitangi are relevant in the circumstances of these claims and whether there have been acts, policies, practices, or omissions of the Crown that are inconsistent with the Treaty and that have resulted in prejudice to the claimants.

If the Tribunal finds that there has been prejudice, it then has to consider what recommendations it should make to remove that prejudice based on the practical application of the principles of the Treaty.

5.2 Jurisdiction

5.2.1 The Treaty of Waitangi Act 1975

The Treaty of Waitangi Act 1975 is an Act designed to provide for the observance and confirmation of the principles of the Treaty of Waitangi.[1] Under section 6 of the Act, any Māori can, on their own behalf or on behalf of a group of Māori, file a claim with the Tribunal alleging that he or she is likely to be prejudicially affected by any one or more of the following which are inconsistent with the Treaty of Waitangi:

> (a) Any ordinance of the General Legislative Council of New Zealand, or any ordinance of the Provincial Legislative Council of New Munster, or any provincial ordinance, or any Act (whether or not still in force), passed at any time on or after the 6th day of February 1840; or

1. Treaty of Waitangi Act 1975, preamble

(b) Any regulations, order, proclamation, notice, or other statutory instrument made, issued, or given at any time on or after the 6th day of February 1840 under any ordinance or Act referred to in paragraph (a) of this subsection; or

(c) Any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(d) Any act done or omitted at any time on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown.

The Tribunal should inquire into such claims and, if the Tribunal finds that any claim submitted to it under this section is well-founded, it may, if it thinks fit and having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or to remove the prejudice or to prevent other persons from being similarly affected in the future. A recommendation may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take.

As a preliminary matter, we note that the Tribunal has no jurisdiction in respect of any Bill that has been introduced unless the Bill has been referred to the Tribunal.[2] We note that the aquaculture reforms will soon be effected through a Bill to be enacted following the standard select committee process of receiving public submissions and reporting back to the House. These claims have been heard and reported on despite the imminent introduction of a Bill giving effect to the proposed aquaculture reforms. As both parties have agreed to participate in the urgency hearing, no issue as to jurisdiction was raised regarding whether the Tribunal should hear the claims at this time. We merely raise this matter because the Crown submitted that the select committee is one further process available for both the claimants and the general public.[3] Counsel for the Crown submitted that any Tribunal recommendation should take account of that uncertainty and that ongoing process.

However, we note that the views of Crown officials on the development of reforms and implementing legislation is the correct one in Treaty terms when they advised the Cabinet that 'the Select Committee process is not an appropriate place to formulate a policy response on Treaty issues'.[4] The claimants obviously agree with this statement. Where a policy would significantly affect Māori, the Treaty requires a more active response from the Crown than one that rests solely on Māori views being considered in a report from the relevant select committee. That report comes far too late in the process of law making. In the normal course of events, the Crown should not rely on such a process, since it is not sufficient in Treaty terms to demonstrate active protection.

We have, therefore, focused our findings and recommendations below so as to assist the Crown and the claimants to assess whether the measures that have been adopted by the

2. Ibid, ss 6(6), 8
3. Paper 2.38, para 3
4. Document A29(a), p 16, para 60

Crown reflect what is needed for the Crown to meet its obligations to Māori under the Treaty of Waitangi.

5.2.2 Ngai Tahu

As has been identified in previous chapters of this report, one of the claimants before this Tribunal was Te Runanga o Ngai Tahu. This Tribunal does not have jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of, any or all of the Ngai Tahu claims, as defined in section 10 of the Ngai Tahu Claims Settlement Act 1998; or the deed of settlement, as defined in section 8 of the Ngai Tahu Claims Settlement Act; or the benefits provided to Ngai Tahu under that deed of settlement or the Ngai Tahu Claims Settlement Act; or the Ngai Tahu Claims Settlement Act.[5] However, the jurisdiction of the Tribunal in respect of the interpretation or implementation of the deed of settlement or the Ngai Tahu Claims Settlement Act 1998 remains.[6] Ngai Tahu have argued that the issues before this Tribunal are not historical matters settled by the Ngai Tahu Claims Settlement Act 1998 but rather relate to matters that are contemporary in nature and are therefore not captured by the 1998 Act. We agree with that view and find that the Waitangi Tribunal does have jurisdiction to deal with the contemporary aquaculture claims of Ngai Tahu because the thrust of the Ngai Tahu claim concerns policies or practices adopted by the Crown after 1992.

5.2.3 Further points concerning jurisdiction

There were a number of further points raised during closing submissions which have implications for the way in which we exercise our jurisdiction. Although no issues were raised by counsel regarding our jurisdiction to hear the claims, the Crown submitted that the claims must of necessity be limited, given the impact of settlements and current uncertainties as to the ownership of the seabed and foreshore. If the claims are limited, then our jurisdiction is also affected. That is why we deal with the arguments made in this section of the report.

We note that Ms Hardy identified a potential dilemma for the Crown. As the claimants submitted, and as the Crown acknowledges, Māori views of the coastal marine area and associated waters are holistic, but the Crown for many years has dealt with the resources of the coastal marine area and associated waters and issues impacting on it in a segmented way; namely, shoreline, fisheries, mammals, seabed, water column, sea waters, marine farming, navigation, and environmental factors, including intrinsic values, flora, impacts, and effects. Each segment is dealt with pursuant to different rules, some rooted in the common law and some rooted in statute. This segmented approach is particularly demonstrated by having

5. Treaty of Waitangi Act 1975, s 6(9)
6. Ibid, s 6(10)

regard to the impact of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and the current litigation (judgment pending) before the Court of Appeal concerning the jurisdiction of the Māori Land Court to inquire into the status of the foreshore and seabed.[7] We deal with each of these issues in turn.

(1) The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992

We note that this Tribunal has no jurisdiction to inquire into or further inquire into, or to make any finding or recommendation in respect of:

- commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983);
- the deed of settlement between the Crown and Māori dated 23 September 1992; or
- any enactment, to the extent that it relates to such commercial fishing or commercial fisheries.[8]

Section 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 provides:

> **9. Effect of Settlement on commercial Maori fishing rights and interests**—It is hereby declared that—
>
> (a) All claims (current and future) by Maori in respect of commercial fishing—
>
> (i) Whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise; and
>
> (ii) Whether in respect of sea, coastal, or inland fisheries, including any commercial aspect of traditional fishing; and
>
> (iii) Whether or not such claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal,—
>
> having been acknowledged, and having been satisfied by the benefits provided to Maori by the Crown under the Maori Fisheries Act 1989, this Act, and the Deed of Settlement referred to in the Preamble to this Act, are hereby finally settled; and accordingly
>
> (b) The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Maori in commercial fishing, or the quantification thereof, the validity of the Deed of Settlement referred to in the Preamble to this Act, or the adequacy of the benefits to Maori referred to in paragraph (a) of this section; and

7. Appeal to Court of Appeal from *Attorney-General v Ngati Apa* [2000] 2 NZLR 661
8. Treaty of Waitangi Act 1975, s 6(7); see also Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, ss 9, 10
9. Fisheries Act 1983, s 2

(c) All claims (current and future) in respect of, or directly or indirectly based on, rights and interest of Maori in commercial fishing are hereby fully and finally settled, satisfied, and discharged.

'Commercial fishing' is defined in the Fisheries Act 1983 as 'taking fish for sale within New Zealand or New Zealand fisheries waters'.[9] It was argued that 'taking' includes all forms of fishing and harvesting.[10] Marine farming seems to involve some 'taking' of fish for harvest and it is a commercial industry.[11] The contrary view is that it is an activity that is more deliberate than fishing and harvesting. We note in this regard the definitions that support such a distinction being made relevant to marine farming, which definitions remain in the Marine Farming Act 1971 and the Fisheries Acts of 1983 and 1996 – namely, 'farming', 'marine farm', and 'fishing sector.'

Under section 2 of the Marine Farming Act 1971, 'farming':

> in relation to any species of fish or marine vegetation, means the breeding, cultivating, and rearing of any such fish or the cultivating of any such vegetation, as the case may be; and to farm has a corresponding meaning:

Furthermore, under the same section, a 'marine farm' is defined as:

> (a) In relation to a leased area, all that part of the area that is being or has been developed into a farm for the farming of fish or marine vegetation; and includes all structures and rafts used in the area in connection with the farm, and all boundary markings, and all fish or marine vegetation for the time being farmed in the area by the lessee; and
>
> (b) In relation to any licensed area, all that part of the area in which the licensee is for the time being carrying on the business of farming of fish or marine vegetation in accordance with his license; and includes all structures and rafts used in the area in connection with the farm, and all fish or marine vegetation for the time being farmed in the area by the licensee:

'Marine farming' and 'farming' are defined in section 2 of the Fisheries Act 1983 as follows:

> 'Marine Farming' means the activity of breeding, hatching, cultivating, rearing or on-growing of fish, aquatic life or seaweed for harvest; but does not include:—
>
> (a) Any such activity undertaken pursuant to regulations made under section 91 of this Act [to do with freshwater fish farming]; or
>
> (b) Any such activity where fish, aquatic life or seaweed are not within the exclusive and continuous possession or control of the holder of the marine farming permit; or

10. Document A4(70), p 3
11. Document A4(2), p 20

(c) Any such activity where the fish, aquatic life or seaweed being farmed cannot be distinguished, or be kept separate, from naturally occurring fish, aquatic life or seaweed;—

and 'To farm' has a corresponding meaning which includes any operation in support of, or in preparation for, any marine farming.

Under section 6 of the Fisheries Act 1996, a 'fishing sector' means:

(a) Commercial fishers:
(b) Recreational fishers:
(c) Maori non-commercial customary fishers:
(d) Fish farmers:
(e) Other fishers authorised under this Act to take fish, aquatic life, or seaweed.[12]

We are somewhat perplexed by these definitions because they appear ambiguous as to whether marine farming is captured by the term 'commercial fishing'. One could argue, as some claimants did, that marine farming involves a different form of activity to fishing. Likewise, contrary arguments can also be made in the way put to this Tribunal by the Crown. A review of the current case law on the interpretation to be given to the relevant sections of the legislation has not been of any assistance in helping us understand whether marine farming can be described as 'commercial fishing' captured by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.[13]

The parties presented some evidentiary material on this issue. In relation to the commercial aspect of the Treaty of Waitangi (Fisheries Claims) Settlement Act, evidence from a report produced by Gardiner and Parata dated 2 May 2002 was placed before us. In that report, the authors recorded the outcome of interviews conducted with key people involved in negotiating the fisheries settlement.[14] We note the response from the Minister of both Fisheries and Māori Affairs at the time, the Honourable Douglas Kidd. He thought that the Treasury had wanted to bring aquaculture into the quota management system, but he had personally forbidden Treasury officials from mentioning the matter during discussions on the deed of settlement since it would confuse an already complex set of negotiations. Aquaculture was mentioned only in passing in the meetings, the concentration being on the matters at hand (ie, commercial fisheries issues).[15] That a Minister holding dual posts in the key areas at that time has this recollection is important. Mr Habib, a key adviser to the Māori negotiators,

12. Section 6 was amended for the purposes of the RMA not to include fish farmers.

13. See *Te Arawa Maori Trust Board v Attorney-General* unreported, High Court CP448–CO/99, where the court considered whether the term 'commercial fishing' captured freshwater fisheries. The court found that it did as the term must apply to any 'past, current or future claim by Maori relating to ventures of a business nature in fishing'. However, the court was not asked to consider what the word 'fishing' in the legislation means. See also doc A12, para 27(d), fn 8.

14. Document A4(72)

15. Document A4(71)

understood that aquaculture was also excluded. On the other hand, two negotiators, Sir Tipene O' Regan and Manu Paul, thought that aquaculture was on the table, at least to be discussed at a later date. Sir Tipene later deposed by way of affidavit to this Tribunal that, in his view, the deed of settlement and the 1992 settlement Act did not deal specifically with aquaculture or the Treaty rights surrounding the activity.[16]

We also note that the Crown's August 2000 discussion document on the early suggestions for aquaculture reform stated that 'aquaculture was not included as part of the Maori Fisheries Settlement in 1992'.[17]

TOKM supported the position of the claimants in contending that marine farming was not within the definition of 'commercial fishing' in the Fisheries Act 1983 and therefore not covered by the 1992 settlement Act.[18] They further argued that there was a distinction to be drawn between aquaculture and wild-fishing, which is primarily what the term 'commercial fishing' addresses.[19] We note that TOKM has been facilitating Māori involvement in the business and activity of aquaculture.[20]

The Crown position as argued before this Tribunal was that, to the extent that any Māori interest in aquaculture and any Māori claim 'rests on fishing', including the enhancement of fisheries, then it is settled by the 1992 Act.[21]

All of this is very interesting, but, for the reasons we set out below, the submissions and evidence provided by the parties on fisheries do not, in the circumstances of these claims, have to influence the findings and recommendations that we make.

(2) The Māori Land Court and the seabed

Currently, there is an application to the Māori Land Court to determine the ownership of the foreshore and seabed of various parts of the coastline. Following an initial decision by that court, a case was stated by the Māori Appellate Court to the High Court concerning the extent of the jurisdiction of the Māori Land Court under the Te Ture Whenua Māori Act 1993 to determine the status of the foreshore and seabed. The High Court found that the law does not admit of the possibility that foreshore can be Māori customary land separate from adjoining dry land (following the conclusion in *In Re the Ninety Mile Beach*), and the law of New Zealand has not contemplated at any time that seabed (as opposed to foreshore) could be declared Māori customary land.[22] However, the High Court added that:

> My findings do not preclude Māori from establishing customary rights over the foreshore, the seabed and the waters over them short of a right of exclusive possession. The

16. Document A16, para 20
17. Document A4, p 14
18. Document A12, paras 26–27, p 8; doc A15, para 8
19. Document A4(17), p 1, para 2
20. Document A12, para 9
21. Document A49, p 15
22. *In Re the Ninety Mile Beach* [1963] NZLR 461 (CA); *Attorney-General v Ngati Apa* [2000] 2 NZLR 661

mechanisms for establishing such are provided by the Resource Management Act, the Fisheries legislation (including that relating to Māori settlements) and the Waitangi Tribunal. There may be other mechanisms as well.[23]

This decision was appealed to the Court of Appeal and a decision is awaited from that court.

(3) Findings on general jurisdictional issues

We of course accept the submission for the Crown that the Tribunal's jurisdiction to inquire into or further inquire into, or to make any finding or recommendation in respect of, commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983) no longer exists. However, and as we have noted, there is some ambiguity regarding whether marine farming is captured by the 1992 settlement Act as an activity that falls with the definition of 'commercial fishing'.

Nevertheless, we do not need to decide the issue conclusively, because all the parties agree that the claims partially concern matters that fall outside the terms of the 1992 settlement. Therefore, we leave this issue to one side and instead concentrate on the way in which the claims were argued before us by the majority of the claimants. On that basis, we find that, because these claims are not solely rooted in Māori fishing rights, then the jurisdiction of the Tribunal remains unaffected.

Nor is the Tribunal's jurisdiction excluded or suspended because the Court of Appeal is dealing with issues that bear upon the ownership of the foreshore and seabed. This is because of the Tribunal's unique jurisdiction to hear claims alleging prejudicial effects as a result of Crown policies, practices, legislation, or acts and omissions in breach of the principles of the Treaty of Waitangi.[24] This is a jurisdiction quite separate from that exercised by the ordinary courts in New Zealand. In this jurisdiction, we ask what was intended in Treaty terms, not what are the imposed common law or statutory law rules, although these matters may be contextually relevant. We are to have regard to the two texts of the Treaty, and we have exclusive authority to determine the meaning and effect of the Treaty as embodied in the two texts and to decide issues raised by the differences between them in the context of the claims before us.[25]

Furthermore, we understood the Crown to concede that these claims may be premised on Māori interests in the coastal marine area irrespective of the underlying ownership of the foreshore and seabed.[26]

The claims are about aquaculture and, in particular, marine farming within the coastal marine area. They are also about the Crown's assumption of the right to delegate further responsibility for allocating occupation of that area to regional or unitary authorities for the

23. Ibid, para 52
24. Treaty of Waitangi Act 1975, s 6
25. Ibid, s 5(2)
26. Document A49, pp 13–15

purpose of aquaculture and marine farming through the development of AMAs and the use of tendering as a default mechanism to deal with competing interests. The reforms have been significantly advanced, the claimants say, without adequate consultation with Māori and without making proper provision for Māori interests in the proposed reforms of the current aquaculture regime.

In closing this section, we acknowledge the dilemma for the Crown in having to deal with the issues concerning the coastal marine area and the associated waters in a segmented way unless and until there is major legislative reform, whether inspired by any results concerning the seabed and foreshore litigation or otherwise. We also appreciate that the segmented approach may impact on the type of recommendations that we can make in practical terms (assuming that these claims are well founded). We note too the attempts by the Crown to find a more holistic way of dealing with the coastal marine area and associated waters through the development of an overarching 'oceans policy'.

The oceans policy is the work of an ad hoc group of six Cabinet Ministers supported by a ministerial advisory committee. They are all attempting to identify the goals and principles for managing the marine environment and the best ways to achieve those goals. An overarching framework is to be developed to ensure that all decisions made about the marine environment are coherent and consistent in direction. The Ministers include the Ministers for Māori Affairs, for Conservation, and for the Environment.[27] The policy is to be developed in three stages. The first stage, which has been completed, is to define the vision and values of the policy.[28] The next stage is to analyse the existing environment and identify the tools, policies, and legal and institutional frameworks necessary to deliver the vision and values.[29]

The committee has consulted widely throughout New Zealand and some 71 meetings have been held. A website has also been developed.[30]

The allocation of coastal space is to be considered in the oceans policy. A lack of community understanding of planning processes in relation to marine farms has already been identified as a concern. A large number of submissions have been received. Submissions generated from the Nelson and Marlborough areas appear to be out of proportion to the population of those regions but probably reflect the intensive marine farming in those districts.[31]

There has been much input from Māori. Indeed, Māori groups appear to have dominated group submissions.[32]

The Māori world view and rights accorded to Māori under article 2 of the Treaty of Waitangi are clearly identified as a key issue in the development of the policy:

27. Document A36, pp 9, 10, 53
28. Document A29, para 30
29. Document A36, p 53
30. www.oceans.govt.nz
31. Document A36, pp 33, 58
32. Ibid, p 61

> It will act as the ridgepole over the house – the tahuhu over the whare – to provide a framework for separate support, each of which in itself is essential to a complete and functional structure.[33]

The vision for the oceans policy identifies as a key component the 'management of human interaction with the marine environment to reflect New Zealand perspectives and in particular the Māori world view' and states that rights accorded to Māori under article 2 of the Treaty are a 'challenge to be addressed'.[34] The committee has heard that many Māori are concerned about a lack of recognition of the Māori perspective in legal and management frameworks, and that any change in relation to the management of the oceans should not result in further loss for Māori. A strong use ethic among Māori, and the recognition of some customary practices in legislation such as rahui, has been noted.[35] Officials were due to report back to the Government in late November 2002 on Māori involvement in ocean policy and Treaty issues.[36]

We note that a draft oceans policy has not been completed. Furthermore, options and preferences will not be developed for the draft until mid-2003.[37] Cabinet will not consider a draft public consultation document until late July 2003, so it appears that the completion of the oceans policy is still some way off and there are no guarantees as to what the final policy may look like.[38]

In summary, we find that the Tribunal does have jurisdiction and should inquire into these claims in accordance with section 6 of the Treaty of Waitangi Act 1975. In the end, our findings on jurisdiction do not turn on the interpretation to be given to the 1992 settlement Act or the need to await the decision of the Court of Appeal. This is because we have confined our inquiry to the broader issue of the holistic Māori relationship with the coastal marine area. In particular, the claims concern only one incident of that relationship – namely, the interest Māori have in aquaculture and marine farming. We limit our consideration of the claims to the particular, whilst acknowledging that they are linked to Māori beliefs concerning Tangaroa and other aspects of Māori tikanga and tribal ways of life.

With regard to the segmentation of rights and issues in the Crown's treatment of coastal space, we think it unnecessary to make an artificial distinction between aquaculture and marine farming. It is our view that the right persists and is not annulled simply because it is practised outside of the coastal space that traditionally Māori associated with. In contemporary times, the Māori interest in aquaculture cannot be restricted in this way.

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33. Ibid, pp 7, 10; see also doc A34
34. Document A36, pp 45, 46
35. Ibid, pp 18, 25
36. Document A34, p 2; doc A35, p 2
37. Document A35, p 1
38. Document A29, para 31

5.3 The Extent of the Māori Interest

The next issue for us to consider is the nature and extent of the Māori interest in aquaculture – in particular, marine farming – and whether it is an interest protected by the Treaty of Waitangi.

5.3.1 Previous Tribunal Findings

The Tribunal has not previously considered aquaculture and marine farming in detail in past reports.[39] However, given that these claims in part rest on the relationship Māori have with the coastal marine area generally, it is important to review what the Tribunal has stated about Māori rights to this space. In this section, we therefore refer to a number of Tribunal reports.

In the *Report on the Manukau Claim*, the Tribunal found that, in Māori eyes, the Treaty reference to taonga was never limited to fishing places but encompassed broader control and mana over the sea.[40] The Tribunal thought it of 'great significance' that, at the great Orakei hui in 1879, Māori participants made it clear that they considered that the Treaty 'included the notion that the Maori people retained the mana over all seafoods and even the seas'.[41] Several chiefs complained that, apart from interfering in fisheries, the Crown was collecting money for the arrival of ships and not sharing it with Māori. For example:

> 'The Queen also said that the Maori should keep their mana over the sea . . . When vessels anchor they have to give money to the Queen but none of it is given to the Maoris' (Waata Tipa).[42]

The Tribunal concluded:

> The obvious point is that the harbours and foreshores were as much the prized possessions of particular tribes as their landed estates. On a reading of the Maori text the lands and seas cannot be divorced no matter how preposterous or inconvenient the result may now appear to the general public gaze. The obvious point also is that the Maori claims have been consistent. Tawhiao we noted earlier, claimed ownership of the Kawhia harbour with the words 'I have a title – the Treaty of Waitangi'. Those who appeared before us repeated the claim, thus 'the Manukau belongs to us' (Carmen Kirkwood).[43]

39. There is a passing reference to the Marine Farming Act 1971 in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Motunui–Waitara Claim* 2nd ed (Wellington: Government Printing Office, 1989), para 8.5, and in Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992* (Wellington: Brooker and Friend Ltd, 1992), ch 6.

40. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* 2nd ed (Wellington: Department of Justice: Waitangi Tribunal, 1989), p 69

41. Ibid, pp 67–68

42. Ibid, p 68

43. Ibid, pp 65–70

The Tribunal went on to find that the Treaty promised an interest in the harbour beyond particular fishing grounds.[44]

In the *Report on the Muriwhenua Fishing Claim*, the Tribunal considered whether, in the English text of the Treaty, the association of fisheries with properties implied a limited construction, referring to fishing grounds as opposed to fishing territories. The Tribunal concluded:

> We . . . are satisfied that a wider view of properties was intended than site specific places.
>
> In one sense the word is related to the things that they 'possess', not 'own', and the fisheries of which the claimant tribes were possessed was the whole of the sea area described. The Maori text supports this construction. Rangatiratanga covers the whole of tribal territories, whether at land or sea.[45]

The Tribunal also found that, with regard to Māori control over access to the places where they fished:

> We do not think the intended principle was that Maori would have the sole right to fish, but rather that their business of fishing and fishing places would not be interfered with unless there was some agreement or rights were clearly waived.
>
> We are reinforced in that opinion by reference to the Maori text and Maori culture. The text enhances ownership by emphasising authority and control. An important finding of fact that we came to was that in the culture, the sea areas that were fished, were property, in much the same way as land. They were areas over which Maori claimed an authority or control. The evidence is that Maori did not prevent the non-Maori use of the seas for their own domestic purposes but they considered themselves nonetheless as retaining their control; and they had no objections for so long as their fishing business, operations and places were not interfered with.[46]

In the *Ngai Tahu Sea Fisheries Report 1992*, the Tribunal found that:

> Tribal territories were generally well defined and acknowledged between tribes. Each tribe had complete dominion over the land and foreshore – mana whenua – and over such part of the sea as they exercised mana moana.[47]

The Tribunal translated mana moana as 'authority over the seas'. The precise extent of this authority might vary in different areas, but it was undoubtedly strongest in inshore areas.[48] The *Report on the Muriwhenua Fishing Claim* suggests that the right might not have been

44. Ibid, p 70
45. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 3rd ed (Wellington: GP Publications, 1996) p 205
46. Ibid, pp 216–217
47. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, p 100
48. Waitangi Tribunal, *The Fisheries Settlement Report 1992* (Wellington: Brooker and Friend Ltd, 1992), p 18

exerciseable to exclude all comers, but it amounted to a significant interest in the control and management of the coastal areas over which it extended.

We note that the Māori comprehension of taonga such as rivers, waterways, lakes, lagoons, harbours, bays, and oceans has been covered in detail in a number of Tribunal reports.[49] It is clear that such resources are often highly significant to Māori wellbeing and ways of life. The relationship exists beyond mere ownership, use, or exclusive possession; it concerns personal and tribal identity, Māori authority and control, and the right to continuous access, subject to Māori cultural preferences.[50]

While we appreciate that many of the quotes above refer to the situation that existed prior to the 1992 fisheries settlement and that, as found in the Tribunal's 2001 *Rekohu* report, Māori interests must have been reduced by the subtraction of commercial fisheries, the evidence presented by the claimants in these claims suggests that Māori have retained a sphere of influence based on the traditional relationship that they enjoy with this space.[51]

5.3.2 Evidence of the claimants' relationship

After reviewing a series of interviews with important Māori leaders and considering other material available on the topic, Mr Hedley commented on the Māori relationship with the coastal marine area.[52] He specifically stated that, in respect of the claimants:

> The claimant iwi have enjoyed a continued and strong relationship with the coastal marine area and its resources. Without exception they regard the coastal marine area as a taonga. They have inherited rich traditions, beliefs and customs about the coastal marine area from their ancestors. Fundamental to the way they interact with the coastal marine area is the belief that they are part of the coastal marine area and the coastal marine area is part of the claimant iwi. This belief is maintained through the oral history of the respective iwi, in stories and waiata passed down from one generation to the next.[53]

We note here the very important cultural example of the oral tradition that was presented to us by Ngahiwi Tomoana of Ngati Kahungunu reciting the whakapapa from Maui Tikitiki-a-Taranga.[54] Overall, the evidence of the claimants convinces us that Māori have a relationship with the coastal marine area.

The Crown has argued that a specific claim to coastal space, divorced from foreshore and seabed title, is a relatively recent one.[55] However, Government papers indicate that officials

49. See, for example, Waitangi Tribunal, *The Whanganui River Report*, ch 2
50. As summarised in doc A9, paras 5.6–5.9.
51. See Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), p 58
52. Document A6, paras 51–65
53. Ibid, para 55
54. Document A18
55. Document A27, para 3.4.6

have been aware of and concerned about a broad range of Māori interests in the coastal marine area for some time. As counsel for Ngai Tahu pointed out, there are significant Crown documents that bear on this issue. For example, he quoted from the Crown's old guide to claim settlements, which states:

> From negotiations to date the Crown is aware of the following specific interests relating to the broader interests of mana recognition and kaitiakitanga that claimant groups may raise in negotiations about the coastal marine area (including the foreshore) and islands:
>
> - Obtaining ownership of culturally significant areas
> - Improving participation in resource management
> - The health of the foreshore and coastal environment, particularly as it affects kaimoana
> - Sustainable non-commercial fishing and other harvesting
> - Being able to prevent damage or inappropriate access to wāhi tapu
> - Preserving or re-establishing indigenous plants and animals
> - Being able to pass down or enhance traditional skills and knowledge
> - The use of traditional placenames
> - acquiring better access for customary gathering of food and other resources.[56]

We note too that several settlements now provide for rights to coastal space, and thereby to marine farming.[57] In addition, during the recent consultation over the oceans policy, the Government has been made aware that the concepts of kaitiakitanga, manaakitanga, mauri, noa, rahui, tapu, tino rangatiratanga, utu, whakapapa, and whanaungatanga apply to the oceans:

> The committee was told often that all these concepts are interrelated. From the world view of Māori it is difficult to divorce kaitiakitanga from mana, which provides the authority for the exercise of the stewardship obligation; or tapu, which acknowledges the special or sacred character of all things and hence the need to protect the spiritual well-being of those resources subject to tribal mana; or mauri, which recognises that all things have a life force and personality of their own. It is from the ethic of kaitiakitanga that the traditional mechanism of rahui comes.[58]

In the aquaculture reform process, officials have identified under the heading of the Treaty interest in aquaculture the following potential interests:

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56. *Healing the Past, Building a Future. A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown*. October 1999, p 110. We note that there has been no change in the Crown's noted awareness of broader interests in the coastal marine area in the recently published *Healing the Past, Building a Future. A Guide to Treaty of Waitangi Claims and Direct Negotiations with the Crown* (2002).

57. For example, the Ngai Tahu and Ngati Awa settlements.

58. Document A36, p 16, oceans policy

- iwi claims to the exclusive ownership of the foreshore and seabed;
- a possible non-exclusive right to the foreshore and seabed – 'while not having the right to exclude others, Māori have the right to be involved in aquaculture development'; and
- an aquaculture development right analogous to the development right recognised to deep-sea fisheries.[59]

These understandings, combined with the evidence presented by the claimants in this hearing, which we have outlined above, indicate that the broad parameters of Māori interests in the coastal marine area, including coastal space, are known, even if the interests of Māori have not in most cases been described in detail.

5.3.3 Our view of the arguments on the coastal marine area

After hearing the evidence presented during this inquiry, most of which relates to the broader relationship that Māori have with the coastal marine area, we are convinced, and we find that it likely, that all the claimants would be able to establish that they have a similar relationship.

We must also acknowledge that several significant coastal tribes, including Ngai Tahu, have established in the past that they have a tangible relationship with the coastal marine area and associated waters within their rohe (tribal domains), whether rooted in whakapapa from Tangaroa, Maui Tikitiki a Taranga, or other ancestors; whether based on ownership or non-exclusive user; whether based on control of activities including navigation, cultural use, and prohibitions over access to significant sites; or whether based on a general right to development.[60]

Furthermore, it is likely that the claimants would be able to demonstrate the nature of the relationship through further evidence of whakapapa, the exercise of rangatiratanga, mana or mana moana, tikanga, cultural use, and kaitiakitanga.[61]

5.4 Māori Interests in Marine Farming

We find that, as an incident of the Māori relationship with the coastal marine area, Māori have an interest in aquaculture and marine farming. In doing so, we suggest that the Crown's

59. Document A4(50), p 7

60. See generally *The Ngai Tahu Sea Fisheries Report 1992* and, in particular, pp 98–102

61. See generally Waitangi Tribunal, *Report on the Manukau Claim*, sec 8.3; *Report on the Motunui–Waitara Claim*; *Report on the Muriwhenua Fishing Claim*; *The Ngai Tahu Sea Fisheries Report 1992*, pp 98–102; *Te Whanganui-a-Orotu Report 1995* (Wellington, Brooker's Ltd, 1995), pp 201–204; *The Whanganui River Report* (Wellington, Legislation Direct, 2001), ch 2, pp 282–307, 326, 328–333; *The Mohaka River Report 1992* (Wellington: Brooker and Friend Ltd, 1992); *Rekohu*, pp 276–280

arguments that traditionally Māori engaged only in the enhancement of wild stocks cannot be sustained.[62]

We now explain why. The Crown contended that the evidence of the claimants indicated that Māori engaged in enhancement rather than aquaculture, or, more particularly, marine farming. As a consequence, that evidence fell into the category of activities for commercial fishing captured by the 1992 settlement Act.[63] For the Crown, Mr Kirk said that aquaculture generally involves the holding of fish or shellfish on (or in) man-made structures that are placed either in the sea or on land and involves the continuous and exclusive possession of fish or shellfish in these structures until they are sold.[64] Mr Kirk distinguished aquaculture from 'enhancement', since the latter may involve fish or shellfish being grown on structures, but 'they are then redistributed freely back into the sea where they grow to enhance the wild stock'.[65] No private rights attach to the enhanced stock once released, and they could be harvested by any person as wild stock.[66] We note as consistent with his view the definition of marine farming in the Resource Management (Aqauculture Moratorium) Amendment Act 2002, which excludes situations where the fish, aquatic life, or seaweed are not within the exclusive and continuous possession or control of the holder of a marine farming permit, or cannot be distinguished or kept separate from naturally occurring fish, aquatic life, or seaweed.

However, in our view there was some evidence that the claimants did traditionally engage in the practice of aquaculture, if one accepts, as clearly we do, the broader common usage of the term. The practices associated with aquaculture suggest a form of marine farming, however rudimentary and less detailed it may have been in terms of man-made infrastructure of the type that we now see for contemporary marine farms. For example, the following material for Te Atiawa ki te Tau Ihu provides a flavour of the type of evidence that we suspect most of the claimants could lead, given the time and resources necessary to prove a substantive interest in marine farming:

> 'Farming' of resources, especially shellfish, was one way Te Atiawa people, reliant on these resources for sustenance, could ensure adequate amounts of the resource to feed their people in future years. Te Atiawa Kaumatua George Martin recalls his mother-in-law farming green-lipped mussels more than fifty years ago, off Onauku in East Bay. She would place boulders in circles, about two feet high, and within these put smaller boulders with the mussels attached to them, leaving them to breed. These would be set at low spring tides, and replenished annually. The boulders still remain where they were placed all those years ago, but their stocks have not been kept up by younger generations.

62. Document A49, paras 9–13, 21–44
63. Ibid, p 4
64. Document A49, para 11
65. Document A29, paras 6–8 [Document A49, para 12]
66. Ibid, para 9 [Document A49, para 12]

Other management techniques included transplanting paua:

> We used to trap baby pauas from around the Northern Entrance on pieces of rocks when they were about that big and we would transplant them onto a wee bit of kelp we had growing around the coastline there. They grew to big pauas in time . . .[67]

We therefore think it is too early to contend, as Mr Kirk and Ms Harvey did for the Crown, that the evidence presented indicates that Māori engaged only in a form of enhancement of wild stock. We note that, in the context of fishing, the Tribunal found in the *Report on the Muriwhenua Fishing Claim* that, given the general evidence of expansive fishing activities undertaken by Māori, there must come a stage at which the onus of proof would shift to the Crown, requiring it to establish those parts of the sea which Māori did not use, as opposed to Māori being required to prove every last area over which they had customary rights and interests.[68]

We think that a similar approach is necessary here. We wonder, therefore, why the Crown, despite knowing that it is likely that the Māori interest exists, insists that it must continue with the reforms without identifying with Māori a mechanism for investigating the nature and extent of the Māori interest in marine farming.

An honest inquiry into the nature and extent of the Māori interests will help all parties and others in the industry identify how the Māori interest intersects with the interests of other right-holders. If there is currently uncertainty, then that uncertainty exists, in part, because the Crown has not been able adequately to inform itself.

We do not think that the Crown should be able to take advantage of any lack of information on the nature and extent of that interest and proceed with the reforms, simply because the claimants have not been able to produce hundreds of pages of evidence for these proceedings detailing that interest, given the rushed timetable for the reforms, exacerbated as it was by the expectation during the hearing that the Bill was to be introduced in mid-November.

That being the case, we find that Māori have an interest in aquaculture and marine farming. We acknowledge that the exact nature and extent of that interest is still to be fully investigated and that, given the restrictions of time, we could not undertake a substantive inquiry into that issue.

5.5 Treaty of Waitangi

We have found that Māori have a broad relationship with the coastal marine area and that as an incident of that relationship Māori have an interest in aquaculture, or, more particularly, marine farming. In our view, taonga in the context of these claims extends to the rights that

67. Document A5, p 34
68. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, pp 233–234

attach to that space. We note and adopt the oft-quoted definition of the concept of taonga in the 1988 *Report on the Muriwhenua Fishing Claim* :

> All resources were 'taonga', or something of value, derived from gods. . . . To understand the significance of such key treaty words as 'taonga' and 'tino rangatiratanga' each must be seen within the context of Maori cultural values.[69]

The term covers all things highly prized. The way that the Tribunal has interpreted the term need not be rehearsed in full, suffice it is to note that it extends to the language, to tikanga and cultural preferences, and to other Māori rights and interests in the social policy sphere.[70]

We therefore find that Māori interest in marine farming forms part of the bundle of Māori rights in the coastal marine area that represent a taonga protected by the Treaty of Waitangi.

69. Ibid, pp 179–180.

70. For language, see Waitangi Tribunal, *Report of the Waitangi Tribunal on the Te Reo Maori Claim*, 3rd ed (Wellington: Brooker's Ltd, 1993); for tikanga and cultural preferences, see Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, para 8.3; and for social policy rights and interests, see Waitangi Tribunal, *Te Whanau o Waipareira Report* (Wellington: GP Publications, 1998).

CHAPTER 6

PRINCIPLES OF THE TREATY OF WAITANGI AND BREACH

In this section, we describe the principles that we find relevant and provide some analysis of how they apply in the context of the claims before us. We have found that Māori have a broad relationship with the coastal marine area and that as an incident of that relationship Māori have an interest in aquaculture, or, more particularly, marine farming. We have also found that the Māori interest in marine farming forms part of the bundle of Māori rights in the coastal marine area that represent a taonga protected by the Treaty of Waitangi. We now consider:

- what the relevant principles of the Treaty of Waitangi are that should be applied in the circumstances of these claims; and
- whether there have been acts or omissions of the Crown inconsistent with the Treaty of Waitangi that have resulted in prejudice to the claimants.

We acknowledge that, under the current fisheries legislation and the RMA, there is already provision for allowing the occupation of coastal space for marine farming. In our inquiry into these claims, we have not traversed the adequacy or otherwise in Treaty terms of the current legislation. Instead, we have focused on the more discrete question of whether the proposed reforms are Treaty compliant. All claims concerned the reforms and were considered on that basis.

We are concerned to assist the Crown to ensure that the Māori interest is protected during the reforms so as to minimise any negative infringement on Māori. We are encouraged by the fact that there are still options open to the Crown. As the officials working on the reforms have so far demonstrated, quite wide policy options have already been canvassed on a number of matters relating to the reforms. This section of our report, while critical of some aspects of the Crown approach, should be seen in that light, and we hope that our recommendations go some way towards demonstrating what can be done in Treaty terms to achieve a result where there is no unnecessary delay with the reforms, whilst still providing for the Māori interest in aquaculture and marine farming.

6.1 Governance for Rangatiratanga – The Resulting Partnership

6.1.1 Analysis

We find that the principle of partnership applies in relation to Māori interests in aquaculture and marine farming for the following reasons.

The Treaty of Waitangi resulted in an exchange. Māori gifted governance to the Crown in exchange for the Crown's protection of rangatiratanga. Through this exchange, the idea of a continuing partnership between two peoples has been developed as a principle of the Treaty of Waitangi.[1]

The Tribunal has found in other reports that the kawanatanga of the Crown must not be exercised in such a way as to diminish the guarantees in article 2 of rangatiratanga of the tribes to exercise control over their resources.[2] This involves more than acknowledging ownership or tenure. It means providing for Māori control because of the guarantee of rangatiratanga. The Tribunal has variously described rangatiratanga as the exercise by Māori of autonomy, authority, self-government, or self-regulation over their tribal domain, which includes lands, waters, and oceans,[3] and, as an extension of that, it encapsulates their right to the development of their resources.[4]

We heard sufficient evidence from the claimants to identify that the claimants did traditionally exercise some authority in accordance with their own cultural preferences over the coastal marine area (see ch 5), and it is likely that other Māori will be able to establish similar rights. This authority extended to the control of certain activities within the coastal marine area, and we heard some evidence of that in relation to Māori cultural practices relevant to aquaculture (see ch 4).

In relation to the right to development, we accept the submissions of Mr Powell that such a right exists, and we particularly note the Tribunal's findings in the *Report on the Muriwhenua Fishing Claim* at section 11.6.6, where it was stated in the context of commercial fisheries that the right to the:

> commercial development of resources does not depend upon proof of a pre-Treaty commercial expertise. A treaty that denied a development right to Maori would not have been signed.
>
> . . . It is the inherent right of all people to develop and progress in all areas. No one has seriously suggested that Maori could not develop their lands and sell the produce of their industry.

1. Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993* (Wellington: Brooker and Friend Ltd, 1993), pp 101–102

2. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, 2nd ed (Wellington: Government Printing Office, 1989), p 187; Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993), p 41

3. Ibid; see also Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995* (Wellington: Brooker's Ltd, 1995), ch 12; Waitangi Tribunal, *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* (Wellington: Legislation Direct, 2001), pp 276–279

4. Ibid and see Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, pp 234–236

In the *Radio Spectrum Management and Development Final Report*, the Tribunal explained that the Treaty was not intended to fossilise the status quo and is a living instrument to be applied in the light of developing circumstances. This is especially so in relation to development rights arising from the Treaty.[5] The Tribunal has indicated in several reports that there were no customary constraints on the use of new technologies, apart from a customary requirement to maintain the resource used, whatever technology was applied.[6]

If rights to the electromagnetic spectrum and radio frequencies can be protected by the Treaty of Waitangi, then it follows that the same protection should be accorded to Māori interests in aquaculture and marine farming. We therefore accept that Māori cultural practices can be seen as a precursor for modern marine farming. In other words, Māori participation in the industry is a natural and logical progression and extension of those practices traditionally exercised.

6.1.2 Breach

However, far from protecting the rangatiratanga and right to development of Māori, we note that, without adequate consultation with Māori, the reforms will:

- alienate Māori from large sections of the coastal marine area;
- result in the further delegation of responsibility for that allocation to regional councils and unitary authorities; and
- not necessarily result in the increased participation of Māori in the marine farming industry.

In respect of the alienation of Māori from the coastal marine area, we note that the reforms will lock up large areas of coastal space in marine farming. There was discussion at the hearing about how long AMAs and their associated marine farms might last once established. As we have noted, the consents will last for a long time. After all, leases and licences under the Marine Farming Act 1971 were issued for individual farms for 14 years. It appears that, even though the right of renewal on expiry was removed in 1991, to date, no application to the Ministry of Fisheries for a renewal has ever been refused.[7] Coastal permits have a maximum term of 35 years, more than twice the statutory length of permissions under the old regime, and at least 165 permits have been issued for that maximum period.[8] Permits expire at the end of the statutory period, or the period specified in them, and a completely fresh application must be made. On its face, the RMA contemplates that the coastal marine space is alienated for a limited period only. This is a point which Crown counsel and Crown witnesses

5. Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report* (Wellington: GP Publications, 1999), p 18, pp 51–52

6. Waitangi Tribunal, *Report on the Muriwhenua Fishing Claim*, pp 200–201; Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, (Wellington: Brooker and Friend Ltd, 1992), pp 300–301

7. Document A29(a), p 23

8. Ibid

stressed. But we are concerned that in practice the permits will be renewed. The Government must be aware that marine farmers have an expectation that a new coastal permit will be issued on the expiry of their old permit.[9] In addition, it may be difficult to refuse the reissue of a coastal permit where a marine farm has been in operation on the same spot for several decades. Accordingly, current indications are that the creation of AMAs, combined with the prohibition on marine farming outside AMAs, may amount to a significant allocation of coastal space for that purpose and an alienation from Māori, spanning, in people terms, one to two generations.

The aquaculture reforms will certainly change, in the short to medium term, the timing of Māori input to decision-making. That will not necessarily improve the relationship of Māori with the Crown or increase Māori participation in decision-making over the coastal marine area in accordance with the guarantee of rangatiratanga.

Indeed, Māori in some regions will be forced to expend considerable resources in the very near future on consultation, submissions, and, possibly, litigation as AMAs are proposed and finalised. That contrasts with the current case-by-case approach to marine farm applications. We are not persauded that, just because the cost of the AMA definition process may be equal to or less than the costs of a case-by-case response to marine farming issues,[10] this justifies imposing such a gauntlet of procedures on Māori without adequate consultation with them.

In evidence from the Crown, the Tribunal was referred to local government reforms as a way of providing for Māori concerns.[11] This is an important component of the scheme of management for marine farming, because local authorities will prepare coastal plans and make decisions over applications under the RMA.

In 1999, Te Puni Kokiri organised a series of discussion hui with Māori focus groups on Māori participation in local government. It was realised at that time that further work was required on the implications for Māori of extending the functions, duties, and powers of councils.[12]

As noted, we were provided with policy documents relating to the local government reforms which helpfully described the intentions behind the legislation.[13] We cannot comment further, but we note that the Tribunal has identified deficiencies in Treaty provisions contained in other statutes. Worthy of note is its previous discussions on the adequacy of the RMA to protect Māori interests.[14] In our view, the proposed local government reform makes the situation of the claimants less certain, not more certain.

9. Ibid
10. A point made by Mr Kirk: doc A29, para 69.
11. Document A29, para 59
12. Document A37
13. Document A4(6)–(17)
14. See, for example, Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*; Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*; Waitangi Tribunal, *Whanganui River Report* (Wellington: GP Publications, 1999)

Under the aquaculture reforms, councils will have responsibility for planning decisions, and they will have the additional power to tender coastal space. This is in addition to the power that they already have to charge for the use of space. Councils will be able to decide whether to adopt tendering or decide applications on a 'first come, first served' basis, or they may adopt a ballot system.[15] In all cases, where the proposed intervention power of the Crown is not utilised, Māori will be expected to compete with other applicants, some of whom may well be large industry players.

Given these implications, there are too many uncertainties and not sufficient regard to Māori interests to say that in Treaty terms the Crown can be satisfied that it has done what it can to ensure that Māori rangatiratanga has been provided for. We find that, before these claims were filed, the Crown's actions amounted to acts, policies, and practices in breach of the principles of the Treaty of Waitangi. We will return to discuss the adequacy of the Crown's protection mechanism as a way of mitigating this breach in chapter 7.

6.2 Active Protection

6.2.1 Analysis

We find that the duty of active protection applies in relation to Māori interests in aquaculture and marine farming for the following reasons.

From the exchange of kawanatanga, the Crown has a fiduciary duty to protect Māori interests to the fullest extent practicable.[16] The Crown is obliged to protect the rangatiratanga of Māori over their resources and other interests for so long as Māori wish that protection.[17] This is especially the case where Māori clearly have a traditional interest in the resource, as in the case of marine farming.[18] The duty actively to protect requires that, to the extent that Māori interests in aquaculture and marine farming have been or will be prejudicially affected by Crown acts, practices, or omissions, the Crown must correct that imbalance and remove the prejudice.[19] This duty requires the Crown to make informed decisions, but, because the Crown has not fully investigated the nature and extent of the Māori interest in marine farming, it cannot be said with confidence that it has discharged its duty **to actively protect** that interest.

15. See s 157; doc A4(62)

16. See, for example, Waitangi Tribunal, *Taranaki Maori, Dairy Industry Changes, and the Crown* (Wellington: Legislation Direct, 2001), p 34; Waitangi Tribunal, *The Turangi Township Report 1995* (Wellington: Brooker's Ltd, 1995), p 284

17. See Waitangi Tribunal, *Taranaki Maori, Dairy Industry Changes, and the Crown* , p 34, and Waitangi Tribunal, *Te Whanganui-a-Orotu Report 1995*, pp 202–203

18. Waitangi Tribunal, *The Radio Spectrum Management and Development Final Report*, p 52

19. Document A29, pp 18–19

We note that the Crown has considered the impacts of the current proposals on other fishing sectors. It has dealt with this issue by retaining a role for the Minister of Fisheries.[20] Therefore, Māori holders of fish quota whose access to fisheries may be unduly affected by a proposed AMA have some protections.[21] It is less clear how the proposals might affect any customary aquaculture sites. With regard to local authorities, the current proposals will require them to consider fisheries matters in a way that they have not done previously. However, they will not act without some backstop. That will be provided by the Minister of Fisheries, who will have the final say on the effect of AMAs on fisheries.[22]

6.2.2 Breach

As the duty of active protection is an onerous duty, which must continue to be exercised at all times, then it is not clear how the Crown can do that adequately without having in place some mechanism to fully investigate that interest. Here, the situation is aggravated because the resource is scarce in some districts and there are a high number of competing applications for marine farms.

Under the reforms, a blanket provision will be imposed so that no farming may take place outside the AMAs. Under the reforms, AMAs will be applied in all regions where before they were not. As the advice from officials to Cabinet noted, 'for councils to adopt this approach, significant change to plans and the planning approach in the coastal marine area will be required'.[23]

New marine farming will take place within AMAs, generally large areas located offshore, which may potentially affect many Māori, including iwi. It may also affect iwi proposals for marine farms close to traditional settlements, which may not necessarily fall within an AMA. The AMAs will not always relate to iwi, let alone hapu, boundaries, and there may be no suitable sites left in some districts for the settlement of any claims within iwi boundaries.[24] The protection mechanism as currently proposed by the Crown and detailed in its 4 October 2002 memorandum does not appear to address all these issues adequately – a point that we will return to later (see ch 7).

Questions were raised about the space available to make provision for any claims. Some regions are already identified as being part way through a process of establishing AMAs – the Tasman and Waikato regions in particular. There are also hundreds of outstanding applications for coastal permits which will be processed as the reforms progress, and many applicants caught by the moratorium who will no doubt seek space within the new AMAs.

20. Ibid
21. Ibid, para 61.2
22. Ibid, para 61.2
23. Document A4(36), para 26, p 5
24. Document A29, annex A, para 80

The Crown acknowledges that, had it made a determination on perpetual rights, there would have been a Treaty consequence of some significance. We agree. We also think that the proposal will result in an alienation of Māori from those coastal marine areas that fall within the AMAs for at least one to two generations, given that the consents may last up to 35 years. That is not active protection of the Māori interest.

Nor can the Crown avoid its duty of active protection by delegating its duties to other bodies such as regional councils and unitary authorities. Where the Crown chooses to delegate, it must do so in terms which ensure that its Treaty duty of protection is fulfilled. Any delegation which is proposed to regional councils and unitary authorities under the aquaculture reforms should be consistent with the Crown's Treaty promises.[25] There is currently no certainty of that.

We find that the duty of active protection in this case has not been adequately addressed during the development of the reforms. The Crown is aware of existing claims and possible future claims. It is aware of the relationship that Māori have with the coastal marine area and that, as an incident of that relationship, Māori claim an interest in aquaculture and marine farming. In the circumstances of these claims, the Crown has chosen not to investigate that interest further. In the Crown's view, the uncertainty about the exact nature of the Māori interest is such that it could delay the reforms significantly if a full investigation were required. As pointed out, the claimants and the Crown are agreed that there should not be any undue delay in achieving the reforms. Where there is disagreement between the parties, it is over what the reforms should look like. Consequently, the majority of the claimants submitted that the Treaty principle of active protection requires that the Crown take steps to find out what the Māori interest in aquaculture and marine farming is and how Crown actions might impinge on it.

We agree with that position. If the Crown is given reasonable cause to suspect that there is a Māori interest, then steps should be taken to investigate fully the interest before policies or practices are finalised. In such situations, the Crown has a duty to take such reasonable steps as are necessary to ascertain the exact nature of the Māori interest, or **to at least consult** with Māori on how to preserve capacity to provide for that interest until Treaty parameters are ascertained. To the extent that the Crown failed to provide for such an investigation or consult with Māori on how to preserve its capacity to provide for the interest (at least up to the time that these claims were filed), the Tribunal believes that there was a failure **to actively protect** the Māori interest in aquaculture and marine farming.

We find that, before these claims were filed, the Crown's actions amounted to acts, policies, and practices in breach of the principle of active protection underpining the Treaty of

25. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (Wellington: Department of Justice: Waitangi Tribunal, 1989); Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* (Wellington: Brooker and Friend Ltd, 1993) (quoted in doc A12, paras 57–58)

Waitangi. We will return to discuss the adequacy of the Crown's protection mechanism as a way of mitigating this breach below in chapter 7.

6.3 Duty to consult

6.3.1 Analysis

It is now well established that, in a matter of particular significance to Māori, the Crown has a duty to act reasonably, to make informed decisions, and to turn its mind to the future needs of Māori. This cannot be done without consultation. Full discussion should take place with Māori before the Crown makes any decisions on matters that may impinge upon the rangatiratanga of a tribe or hapu in relation to its taonga.[26] It goes without saying that the Crown's duty of active protection cannot be fulfilled where the Crown does not have a full appreciation of the nature of the taonga (ie, all its attributes, including spiritual and cultural attributes). Those who exercise rangatiratanga over that taonga can assist with attaining that understanding. That is essentially why the duty to consult exists.

The Crown appears to have accepted the duty to consult and to have acted upon when it approved the release of the aquaculture discussion document of 2000 with its emphasis on applications for aquaculture permits.[27] However, as we have previously noted, after receiving submissions there was then a substantive change resulting in proposals favoring the establishment of AMAs. Decisions were made by officials, and supported by Cabinet, to change the reforms from an application by application approach to the development of AMAs and the use of tenders as the default mechanism to deal with competing interests. We note that it is one thing to follow a plan-by-plan, application-by-application approach to aquaculture. It is quite another matter to propose a major change across the country immediately requiring a particular prescriptive approach affecting every council and almost all coastal iwi and hapu. Documents show that, after initial consultation, officials went on with policy development. The initial consultation was correctly done, but the final result was quite different from what was initially discussed with Māori.

In other words, the adoption of a national system was a step that should have been directly notified to Māori. We find that it was not, although TOKM and a small number of iwi may have been consulted on certain features of the reform proposals.[28] The evidence before us, however, indicates that there was no consultation on the reform package as a whole.

Rather than consult with Māori directly, the reforms were announced only by public press statement, and this in our view was a very serious mistake. That mistake was mitigated to some degree by the tight timeframes and the calling of the general election. However, consultation with M āori should have been an integral component of the public noti fication

26. Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims* , p 42
27. Document A2(2)

strategy and should have been adopted either at the time that the reforms were announced or no later than April 2002. When it had the opportunity, the Crown deliberately chose not to initiate such a process of consultation. It is of further concern to us that Te Puni Kokiri, as the Ministry with responsibility for monitoring Māori policy, did not pick up the consultation 'gap'. Instead, while acknowledging that some issues would concern Māori, it approved the substantive changes.[29]

6.3.2 Breach

We note that these claims almost certainly have some universal element affecting Māori. Yet, these reforms were advanced based on 'imperfect' consultation. This is not sufficient in Treaty terms to discharge the Crown's duty of active protection. It calls into question whether it can be said that the Crown has acted reasonably and in good faith, a requirement accepted by the Crown as an important principle of the Treaty of Waitangi in the context of the current claims.[30] The approach adopted by the Crown was not acceptable. If a policy significantly changes in the process of ongoing policy development in the way in which it ocurred here, then the Crown must go back and discuss the matter with Māori. This should occur even when Cabinet has made a decision, if that decision also significantly alters what has earlier been consulted over.

We find that there has been a failure to consult adequately with Māori and that, before these claims were filed, the Crown's actions amounted to acts, policies, and practices in breach of the principles of the Treaty of Waitangi. We will return to discuss the adequacy of the Crown's protection mechanism as a way of mitigating this breach below at chapter 7.

6.4 The Principle of Redress

6.4.1 Analysis

It is well established that redress is required where the Crown fails actively to protect Māori interests, including the rangatiratanga of Māori over their taonga. This duty exists to ensure that any failure to discharge Treaty obligations in the past can be rectified by addressing the current and future needs of Māori.[31]

28. Document A12, paras 36, 40, fn 12, and see Higgens for Ngai Tahu.
29. Document A28, paras 25, 29
30. Document A27, para 5
31. Ibid; doc A9, para 5.4

6.4.2 Breach

In this case, significant reforms have been proposed and advanced without investigating the nature and extent of the Māori interest in marine farming and without adequately consulting with Māori about the reforms. Although the full nature and extent of Māori interests in marine farming are not yet known, a mechanism is needed to ensure that the Crown can in the future provide redress. Some further work is needed in this regard to discharge the Crown's obligations.

CHAPTER 7

FINDINGS AND RECOMMENDATIONS

7.1 The Crown's October 2002 Proposals

In the circumstances of these claims, the Crown for some time during the reform process inadequately responded to Māori issues under the Treaty of Waitangi. We turn now to consider the Crown protection proposals of October 2002.

7.1.1 The mitigation proposals

Since the filing of these claims, the Crown has taken some action to mitigate Treaty breaches by the proposals outlined in its 4 October 2002 memorandum to this Tribunal. Cabinet approved the following:

> Deeds of Settlement and subsequent settlement legislation for historical Treaty claims set out in detail the obligations relating to coastal space (eg rights of first refusal over the tendering of coastal space) and no additional Crown direction powers are needed to ensure these obligations can be implemented.
>
> The Aquaculture Reform Bill will include a duty on regional councils to implement Crown Treaty settlement obligations in relation to the occupation of coastal space.
>
> A specific direction power is proposed to be provided to the Minister of Conservation in relation to preserving the capacity to provide redress for historical treaty claims, where the Crown and claimants have reached a formal agreement in principle that includes aquaculture redress (prior to legislation implementing any formal deed of settlement).
>
> A specific direction power will be provided to the Minister of Conservation in order to allow the Crown to preserve its capacity to recognise Treaty, aboriginal or customary rights relating to aquaculture if they are identified in the future.
>
> While work continues to be required on delineating the specific power, it is intended that where the power to direct regional councils affects the choice of allocation method to be adopted through the regional coastal plan, the power should be exercised prior to the notification of the proposed plan and again at the point at which coastal plans are considered for approval by the Minister of Conservation. Where the power affects the conduct or

outcome of a particular tender round or tender rounds, it should be exercised prior to public advertisement and call for tenders.[1]

The powers of the Minister of Conservation would be exercised by Order in Council and would include the power to direct councils not to proceed with a proposed allocation or allocation method. There would also be a power to proceed with allocation by giving effect to certain matters. This may include limiting the term of consents issued over a specific AMA or part of an AMA, or allocating authorisations for a specific area within an AMA to the Crown.[2]

As we have noted previously, the claimants responded to the Crown's memorandum on 9 October 2002 stating that the Crown's proposals did not provide any tangible or sufficient provision for Māori interests in marine farming.[3]

7.1.2 Findings on the Proposals

We find that the proposals go some way towards addressing the claimants' concerns but that they need some further fine tuning. They are therefore still deficient and do not mitigate the breaches of the principles of the Treaty that we have identified above. Our reasons for finding this are that:

- No attempt has been made by the Crown to fully investigate the nature and extent of the Māori interest in marine farming, and only a limited attempt has been made to consult with Māori as to the reforms generally and as to the adequacy or otherwise of the proposals for protection.
- The proposals do not rectify that failure. For example, there is no indication that the Minister's powers will be subject to Treaty principles in terms of their implementation. In fact, Mr Kirk for the Crown told us that the Crown rejected this option on the ground that it could result in further litigation.[4] Nor is there any indication of how the Crown will better inform itself of the nature and extent of the Māori interest in marine farming.
- The proposals indicate that the ministerial power of intervention will be activitated only at the pre-finalisation of plan stage or at the pre-tendering stage. This begs the question of what will happen if it is subsequently established that either an AMA area or a particular marine farm within an AMA impinges on Māori interests in marine farming.
- The proposals indicate that the Crown is attempting to preserve some capacity to recognise Treaty, aboriginal, or customary rights. The deficiency is that in some regions, owing to current demands, there is only a limited amount of space available. Given the

1. Paper 2.38, paras 7.1–7.5
2. Ibid, para 7.6
3. Paper 2.39, para 2
4. Document A29

current 'gold-rush' for limited coastal space, there is a possibility that all available or suitable space will be gone before it is realised that provision needs to be made for Māori. In those districts, to provide for the Māori interest would require retaining some power to revoke consents or providing the power to buy back space, or compensating Māori in some other way. As currently framed, none of these options appears to be an acceptable remedy to the Crown in such a situation.[5] The Tribunal has been presented with evidence recording various estimates of the amount of coastal space that is under application for the setting up of marine farms. Whatever figure is accepted, the area is certainly substantial and illuminates the potential prejudice caused to Māori by proceeding with reforms without first determining the Māori interest in marine farming. The evidence before this Tribunal suggests that, 'with managed expansion', the currently occupied coastal space of approximately 4000 hectares could grow to 17,000 hectares.[6] In our view, it is possible that there will be very little, if any, coastal space available to give any real effect to that Māori interest.[7]

- Because the moratorium has not extended to as many applications as was first envisaged, there may be only a limited ability to tender coastal space under AMAs in some key aquaculture areas, such as Marlborough, Tasman, Banks Peninsula, south Westland, and the Firth of Thames.[8]
- The Crown made a decision to delay ascertaining the Māori interest in aquaculture and marine farming before embarking upon these particular reform proposals.[9] The Crown acknowledged that the Māori interest was a 'Treaty issue' and went to the extent of seeking a legal opinion on the matter.[10]

We therefore accept the submissions from counsel for the claimants that further work needs to be done to fine tune the Crown's proposals before the breaches of the principles of the Treaty of Waitangi are mitigated. Furthermore, we do not accept that the Crown's rationale for rejecting the other options, such as setting aside a percentage of AMAs for providing for Māori interests in marine farming, are convincing, since the decisions were made unilaterally and without adequate consultation with Māori.[11] It may be that the parties will reject this as an option, but at the least an informal discussion between them is warranted.

5. That outcome is specifically contemplated at document A29(c), para 65.
6. Document A38, p 2
7. Document A13, p 25
8. Document A4(40), para 32
9. Document 29, paras 57, 86
10. Paper 2.16, annex 1, para 55, p 8
11. Document A29, para 4.3

7.2 Recommendations

We find that Māori have a broad relationship with the coastal marine area and that, as an incident of that relationship, Māori have an interest in aquaculture, or, more particularly, marine farming. We also find that the Māori interest in marine farming forms part of the bundle of Māori rights in the coastal marine area that represent a taonga protected by the Treaty of Waitangi. The proposed aquaculture law reforms amount to acts, policies, practices, and omissions of the Crown inconsistent with the principles of the Treaty of Waitangi, which, if implemented in their current form, will result in prejudice to the claimants. We have concluded that the Crown's attempts to mitigate the breaches of the principles of the Treaty are still deficient in Treaty terms.

In making these findings, we do not suggest that there is something inherently wrong in the Crown proceeding with reforms while claims are not settled and rights are not adequately defined. So long as potential claims are provided for in a suitable manner, the Treaty obligation is discharged.[12] Any submissions of claimants overstate the case if they suggest that the Crown cannot proceed in such circumstances.

Further consultation with Māori is needed to ascertain what should be done to ensure that their Treaty interests are adequately provided for and that there are no further delays in implementing the reforms, which all the parties agree are necessary.

To facilitate the resolution of the differences between the parties, we note that TOKM has also offered to coordinate consultations with and future negotiations between the Crown and Māori.[13] We believe that TOKM is the ideal body to act as the coordinator of such consultation and future negotiations, given its current role and experience in dealing with complex issues of allocation. We do not recommend the precise groups to be involved in these consultations and negotiations in any detail, but, as a minimum, the process should involve all the claimants who appeared before us, along with representatives of other major Māori organisations, coastal iwi, other tribes, and urban Māori.

Accordingly, we recommend that the delay before the introduction of the Bill should be used by the Crown to establish a mechanism (resourced by the Crown) for consulting and negotiating with Māori (including with those claimants facilitated by TOKM). The basis of consultation should be the existence of the Treaty rights in the coastal space, which include rights, the extent of which are yet to be determined, to aquaculture and marine farming.

The parties should use the mechanism to discuss:

- a process for investigating the nature and extent of the Māori interest in marine farming;
- a process for agreeing on the mechanism needed to protect the Māori interest in marine farming, which should include a mechanism for preserving capacity to intervene once the full nature and extent of that interest is defined;

12. For examples of this occurring in relation to other taonga, see doc A9, para 6.16, and A13, paras 40–43, 83.
13. Document B6, para 11

- a process for ensuring an appropriate level of Māori participation in the development of AMA areas and tendering process; and
- a mechanism for preserving the Crown's capacity to meet its Treaty obligations in the short term, until such time as the longer planning issues are dealt with.

Because the claims are well founded, we further recommend that the Crown meet the reasonable costs and disbursements that the claimants incurred in the preparation and presentation of their claims.

The claimants have leave, without further application for urgency, to return to the Tribunal should they have concerns that these matters have not been properly addressed after any legislation has been enacted. We hope that such a course will not be necessary.

If these issues are approached with an open mind and the utmost good faith, then we believe that a speedy resolution is possible once all the options have been appropriately explored by those who represent the two partners to the Treaty.

Dated at Wellington this 20th day of December 2002

C L Wickliffe, presiding officer

M C Bazley, member

J Clarke, member

THE SEAL OF THE WAITANGI TRIBUNAL