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# REPORT OF
# THE WAITANGI TRIBUNAL
# ON A CLAIM BY
# J P HAWKE AND OTHERS OF
# NGATI WHATUA
# CONCERNING
# THE FISHERIES REGULATIONS

## (WAI 1)

WAITANGI TRIBUNAL
DEPARTMENT OF JUSTICE
WELLINGTON
NEW ZEALAND

March 1978



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*Original cover design by Cliff Whiting,*
*invoking the signing of the Treaty of Waitangi*
*and the consequent development of Maori–Pakeha history interwoven in*
*Aotearoa, in a pattern not yet completely known, still unfolding.*

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# REPORT TO

Hon Duncan MacIntyre, DSO, OBE, ED
Minister of Maori Affairs of the Waitangi Tribunal
as to a claim by:
Joe Hawke of Auckland, company director, and Others

| | |
|---|---|
| Kenneth Gillanders Scott<br>Chief Judge of the Maori Land Court | <u>CHAIRMAN</u> |
| LH Southwick QC | <u>MEMBER</u> |
| Graham S Latimer, JP | <u>MEMBER</u> |

March, 1978.

## THE PARTIES WHO APPEARED BEFORE THE TRIBUNAL, WITH THEIR COUNSEL OR THOSE REPRESENTING THEM, WERE AS FOLLOWS:

| | | |
|---|---|---|
| (a) | Mr Joe Hawke, a claimant | —Mr GV Hubble |
| (b) | Harry Matthews, Te Witi McMath and Rua Paul—claimants | — |
| (c) | The Ministry of Agriculture and Fisheries | —Mr HS Gajadhar |
| (d) | The Auckland Harbour Board | —Mr GB Chapman |
| (e) | The Hauraki Gulf Park Board | —Mr G McMillan |

## DURING THE HEARING OF THE CLAIM BEFORE THE TRIBUNAL, EVIDENCE WAS PRESENTED BY THE FOLLOWING, IN ADDITION TO THAT OF THE CLAIMANT, HAWKE, AND IN ADDITION TO THAT GIVEN BY THE DEPARTMENT OF AGRICULTURE AND FISHERIES:

(A) Mrs Cooper
(B) Mr NH Fairs
(C) Mrs Margaret Peters
(D) Mrs Bycroft
(E) Mr Jack Ramaka
(F) Mrs Pio Pio Hawke



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## THE FOLLOWING IS A LIST OF THE PARTIES UPON WHOM A NOTICE OF THE HEARING WAS SERVED:

1. Counsel GV Hubble, PO Box 1825, Auckland.
2. Messrs Wright & Co, Barristers and Solicitors, PO Box 3073, Auckland.
3. Messrs Langton & Halford, Barristers and Solicitors, PO Box 47-114, Auckland.
4. Director-General, Agriculture & Fisheries, PO Box 2298, Wellington.
5. Minister of Agriculture & Fisheries, Parliament Buildings, Wellington.
6. Auckland City Council, Private Bag, Auckland.
7. Auckland Harbour Board, PO Box 1259, Auckland.
8. Auckland Harbourside Regional Council, PO Box 6787, Auckland.
9. Auckland Regional Authority, Private Bag, Auckland.
10. Newmarket Borough Council, PO Box 9009, Newmarket.
11. Commissioner of Crown Lands, PO Box 2206, Auckland.
12. Commissioner of Crown Lands, PO Box 5249, Wellesley Street, Auckland.

The claim was heard in Auckland by the Tribunal on 30 May and 1 June 1977.

1. **THE CLAIM:**

   A claim was lodged with the Tribunal on behalf of Joe Hawke of Auckland, Company Director, and Others. It was expressed to be "in the matter of prosecutions brought by the Ministry of Agriculture and Fisheries at Auckland" and was said to be made pursuant to Section 6 of the Treaty of Waitangi Act 1975.

2. By memorandum addressed to the Tribunal subsequent to the lodging of the claim, the "Others" referred to in the application were said to be:

   Harry Matthews of Auckland, drainlayer
   Te Witi McMath of Whangarei, engineer
   Rua Paul of Auckland, carver

3. The claim as lodged was as follows:

   "1. This claim is brought by the abovenamed all of whom are Maori within the meaning of the Treaty of Waitangi Act 1975.

   "2. The claim to the Tribunal arises because the claimants have been prosecuted by the Ministry of Agriculture and Fisheries pursuant to Section 106K(2) and 106K(A)(3) of the Fisheries (General) Regulations 1950, which Regulations state as follows:

   "106K(2)

   Notwithstanding anything in sub-clause (1) of this regulation, no association of persons shall on any 1 day, without lawful excuse (of which the proof shall lie on them), take, bring ashore, convey by any means whatsoever, have on board or land from any boat, or in



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any way possess, more than the number of each species of shellfish specified in the following table:

| No of persons in association | Paua | Scallops | Mussels | Tuatua | Pipis | Cockles |
|---|---|---|---|---|---|---|
| 2 | 20 | 40 | 100 | 300 | 300 | 300 |
| 3 | 30 | 60 | 150 | 450 | 450 | 450 |
| 4 | 40 | 80 | 200 | 600 | 600 | 600 |
| 5 or more | 50 | 100 | 250 | 750 | 750 | 750 |

"106KA(3)

No person shall have any ordinary paua or mussels in or on board any boat or vehicle in or on which there is any underwater breathing apparatus."

"3. For the purposes of this claim to the Tribunal, the following facts may be accepted:

(a) The claimants were apprehended by Fisheries Inspectors in the Okahuhu (Auckland) area on the 14th November, 1975, whilst on board a boat owned by the claimant, Joe Hawke.

(b) The boat had on board a quantity of shellfish and underwater breathing apparatus contrary to the provisions of the Regulations set out above.

(c) The breathing apparatus had not been used for the purposes of obtaining the shellfish.

(d) All the shellfish had been obtained for the purpose of a Hui to be held that day at the Te Ongawhahu Marae in Epsom.

(e) No permit was obtained pursuant to Clause 106K(5A) of the Fisheries (General) Regulations 1950, although discussions had taken place with the Chairman of the local Committee to the effect that such a permit would be obtained at some subsequent stage. However, because of the seizure and prosecutions, no application was made pursuant to that sub-section, and it is accepted that no defence is available within the terms of subsection 5A of the Regulations.

(f) The claimant, Joe Hawke, had been asked by the organisers of the Maori Land March Group known as Te Matakite O Aotearoa to obtain sufficient shellfish for the purposes of the Hui at the Marae abovementioned.

"4. Mr Joe Hawke is a direct descendant of the tribal land owners in the Orakei area being members of the Ngatiwhatua Tribe, and claims to have an ancient customary right to take shellfish within the Orakei area as described in Ct55/236. Mr Hawke claims that this ancient customary right is preserved by Article (2) of the Treaty of Waitangi.

"5. The essential question upon which the claimants seek determination is as follows:

In the circumstances outlined above, does Article (2) of the Treaty of Waitangi protect Mr Joe Hawke (and hence the other claimants) from prosecution pursuant to the above Sections of the Fisheries (General) Regulations 1950."



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4. **BACKGROUND:**

Section 6 of the Treaty of Waitangi Act 1975 (hereinafter referred to as "the Act"), pursuant to which the claim was said to have been made, reads as follows:

"6. Jurisdiction of Tribunal to consider claims—(1) Where any Maori claims that he or any group of Maoris of which he is a member is or is likely to be prejudicially affected—

(a) By any Act, regulations, or Order in Council, for the time being in force; or

(b) By any policy or practice adopted by or on behalf of the Crown and for the time being in force or by any policy or practice proposed to be adopted by or on behalf of the Crown; or

(c) By any act which, after the commencement of this Act, is done or omitted, or is proposed to be done or omitted, by or on behalf of the Crown—

and that the Act, regulations, or Order in Council, or the policy, practice, or act is inconsistent with the principles of the Treaty, he may submit that claim to the Tribunal under this section.

(2) Subject to section 7 of this Act, the Tribunal shall inquire into every claim submitted to it under this section.

(3) If the Tribunal finds that any claim submitted to it under this section is well-founded it may, if it thinks fit having regard to all the circumstances of the case, recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

(4) A recommendation under subsection (3) of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take."

Sub-sections (5) and (6) do not call for repetition.

5. The Tribunal accepts that Joe Hawke is a direct descendant of the tribal landowners in the Orakei area. Article the Second of the Act (which article is referred to in the claim) reads from the text in English in the First Schedule to the Act as follows:

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

The Tribunal was informed that there is no conflict between the English text and the Maori text in regard to this Article.

6. At the hearing of the claim the Tribunal was informed that the prosecutions referred to in the claim itself, and brought against the claimants by the Ministry of Agriculture and Fisheries pursuant to



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the provisions of the Fisheries (General) Regulations 1950, had been heard in the Magistrate's Court at Auckland. The Tribunal was informed that the claimants had been discharged without conviction under Section 42 of the Criminal Justice Act 1954.

7. The question asked in the claim in paraphrase is whether Article the Second of the Treaty of Waitangi protects the claimants from prosecution. The Tribunal is mindful of the fact that it is given jurisdiction to consider claims under Section 6 of the Act, and that it has no jurisdiction apart from this. In terms of that section and in paraphrase, any Maori claiming that he is or is likely to be prejudicially affected by any Act or regulation, and that the Act or regulation is inconsistent with the principles of the Treaty of Waitangi, may submit a claim to the Tribunal. This defines the extent of the Tribunal's jurisdiction. Accordingly, the first comment the Tribunal makes is that it cannot make a declaration in the manner of the Supreme Court to answer the question put to it in the claim addressed to it.

8. The Tribunal can consider whether any actual prosecution under a regulation is in the circumstances and as established by evidence, prejudicial to or likely to prejudicially affect a claimant. In the instant case, however, it would appear that the discharging of the claimants under Section 42 of the Criminal Justice Act 1954 would make it impossible factually to allege prejudice or likely prejudice as a consequence of a prosecution under a regulation. The regulations in this case are, of course, the Fisheries (General) Regulations 1950. If the matter rested there, the Tribunal would have no hesitation in finding that the claim before it was not well founded in terms of the Act.

9. At the hearing, however, it was submitted that the Fisheries (General) Regulations 1950 imposed restrictions on food gathering from the sea or seashore by both Maori and pakeha, and that the regulations discriminated against the Maori in that they ignored the fishing rights guaranteed under the Treaty of Waitangi. They also ignored the importance of seafood in the diet of the Maori.

10. The Tribunal has considered Regulation 106K of the Fisheries (General) Regulations 1950. These are the regulations referred to in the claim. The regulations impose restrictions on the number of shellfish that may be taken on any one day. It appears to be the argument of the claimants that the regulation is or is likely to prejudicially affect them in that the restrictions in the regulations are unjust and inconsistent with the principles of the Treaty of Waitangi.

11. The Tribunal was presented with no evidence to establish factually how the regulations were unjust. All it had was argument that the Maori should have the right to take shellfish without restriction or permit.

12. The Tribunal has also considered Regulation 106K(5A) of the Fisheries (General) Regulations 1950. This regulation provides as follows:

    "(5A) The provisions of this regulation shall not apply to any person who on behalf of a Maori Committee, or a District Maori Council, within the meaning of the Maori Welfare Act 1962, takes, brings ashore, conveys, has on board or lands from any boat, or possesses, any paua, scallops, mussels, tuatua, pipis, or cockles for use at a specific tangi or hui, in accordance with the following conditions:



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(a) The Committee or Council applies to a Maori Welfare Officer, appointed for the purposes of the Maori Welfare Act 1962, for permission to take the shellfish, and specifies to the officer the tangi or hui for which they are required; and

(b) The Maori Welfare Officer, after consulting an inspector of fisheries, approves the quantity of those shellfish that may be taken and the area or areas from which they may be taken; and

(c) Full compliance is made with the approval given by the Maori Welfare Officer, and the shellfish are used only at the specific tangi or hui for which the application was made."

13. In the case which gave rise to the claim before the Tribunal no prejudice could be alleged in regard to the manner in which permits were granted because no permit was sought in terms of Regulation 106K(5A).

14. It may be that it can be argued that the restrictions imposed by the Fisheries (General) Regulations 1950 at Regulation 106K are, per se, inconsistent with the guarantees contained in Article the Second of the Treaty of Waitangi. If this question were to be considered, a detailed examination of the operation of Section 77(2) of the Fisheries Act 1908 would be necessary. But Section 6 of the Act may be clearly expressed as follows:

"(a) Where any Maori claims that he or any group of Maoris of which he is a member is or is likely to be prejudicially affected by any Act, regulation, etc and

(b) Where any Maori claims that the Act, regulations, etc are inconsistent with the principles of the Treaty, he may submit a claim."

In this case the Tribunal finds a situation where there is nothing to establish prejudice or likely prejudice by any Act or regulation. In other words, the Tribunal is satisfied that there was no prejudice to be found in the Fisheries (General) Regulations 1950 because there was no evidence to show that the regulation had been interpreted in any prejudicial manner.

15. Furthermore, Counsel for the Ministry of Agriculture and Fisheries called an inspector (Mr McDonald), who told the Tribunal of the manner in which applications are made in terms of the aforesaid Regulation 106K(5A). From what Mr McDonald said the Tribunal is satisfied that no person making application in terms of the regulation faces difficulty. Moreover the Tribunal has no evidence whatever which would justify it in finding that any Maori is prejudicially affected, or likely to be prejudicially affected, by the way in which this restriction on or control of fishing rights is exercised.

16. **CONCLUSION**

The Tribunal having considered the claim submitted to it does not find that claim to have been well founded. Accordingly it has no recommendation to make thereon.

17. **FURTHER COMMENT:**

During the course of the hearing one of the claimants, Mr Joe Hawke, read a lengthy statement. Very much of this statement was irrelevant in the Tribunal's view to the claim before it. That the Tribunal's assertion that this evidence was irrelevant might be appreciated, that portion of Mr Hawke's statement dealing with



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customary Maori land is set out hereunder. The Tribunal is most anxious that Mr Hawke and others should appreciate that it will receive evidence in support of claims, but it cannot be used as a venue for airing matters which are beyond its jurisdiction.

*"Submission: Customary Maori Land*

In the spirit of the Treaty of Waitangi, present day legislation still defines all land below high water mark as customary Maori land.

This means that all reclamations on the Waitemata Harbour, and all buildings on those reclamations, should have been approved by the Maori people of this area. But my people have been totally ignored on this matter, and no compensation has ever been paid to them.

It is worth noting that in the early 1800s the Ngati Whatua of Tamaki used to collect port levies from all ships entering the Waitemata Harbour. This right was soon taken away, But my people later played an important part in the founding of Auckland. Apart from providing the land for the city, they also provided most of the agricultural produce for the settlers and provided labour on all the building sites. They took part in all the special activities of the day.

Moreover, the Tamaki people were given a guarantee under the Hikurangi Treaty of 1853 that 10% of the purchase price of Maori land resold by the Government would be forwarded to the original owners. My ancestors earmarked the money they expected to receive from this Treaty for the provision of educational facilities, housing and health services for their people.

But despite the Ngati Whatua's contribution to the development of Auckland, this debt has never been paid. A full public enquiry into this scandal would show that my people have been swindled out of millions of dollars in revenue.

Today the Ngati Whatua of Tamaki are fighting the Government over yet another injustice which has been perpetrated against them. For five months they have been occupying their ancestral land at Bastion Point, and by their presence there have forced the Government to stop its plans to sub-divide the area. This land was declared inalienable by a Maori Land Court in 1868, yet by the end of 1950 the Ngati Whatua of Tamaki held title to no more than a quarter acre of Okahu Bay. They had been legislated and forcibly evicted from their last remaining acres of ancestral land—land which was supposed to be "inalienable".

I refer to all these injustices in order to show that the attempt to over-ride Maori rights to customary land above high water mark is only one example of how my people have been maltreated. The denial of the rights of the Maori people—rights guaranteed under the Treaty of Waitangi—forms a pattern of callous repression. While the Maori people have been told they must have the utmost respect for legal documents and treaties, their rights have been trampled on by those who blatantly disregard any legal document or treaty which doesn't suit their purpose. For example, the shore line of Auckland city used to be in the vicinity of what is now Fort St. This means that a



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large part of present-day Auckland is sitting on land which has been reclaimed over customary Maori land.

Among the current occupiers of this area we find Government departments (the Railways, the Central Post Office), the Ferguson Container Terminal, the Downtown complex, the city's fruit and vegetable markets, Travelodge, the Air New Zealand building, facilities for storing petrol and oil, many hotels, all Auckland's main wharves, and numerous office blocks, business centres and shops.

Is any further evidence needed that the wealth and prosperity of Auckland today was built in large part on the trampled rights of the Ngati Whatua of Tamaki?

If justice is to be served on the Tamaki people, under the guidelines of the Treaty of Waitangi, it is imperative that the following measures be carried out:

1) All the Waitemata shore line which has been reclaimed since 1840 should be placed under the jurisdiction of a Ngati Whatua Trust Board.
2) This Board should negotiate rents to be paid to it on the properties occupying the reclaimed land.
3) The Board should negotiate compensation to be paid for all the reclamations which have taken place without the authority of the Ngati Whatua of Tamaki.
4) The Board's approval must be sought for all future reclamations or developments on the customary Maori land around the Waitemata.

Since successive Governments have shown themselves to be unwilling to provide the necessary finance for facilities and social services for the Maori people, the finances derived from this Trust Board would be used to:

1) Form a Maori bank, the Bank of Tamaki, to be administered by the Ngati Whatua of Tamaki.
2) Establish Maori educational facilities and bursaries at all levels, from pre-school to tertiary level.
3) Give assistance to the development of maraes within the tribal area.
4) Provide housing for the Maori people.
5) And provide the staff and facilities for the health needs of the Maori people.

Finally, it should not be forgotten that this particular abuse of Maori rights applies throughout the length of New Zealand, since reclamations and shore line development projects have taken place everywhere. While other tribes may or may not choose to make similar demands on this issue as the Ngati Whatua of Tamaki, it is obvious that no redress of grievances can take place until the following steps are taken:

1) The setting up of a public enquiry, presided over by three Maoris, to determine the compensation due to all tribes affected by this denial of their rights.



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2) The halting of all present or planned projects for the pumping of sewage off New Zealand's shore line.
3) The halting of all reclamation work and projects for extending wharves.

*Conclusion*

The basis of all the issues raised in these submissions is the denial of Maori land rights. For Maoris the land has more than a practical value; it also has a spiritual value which can't be calculated in dollars.

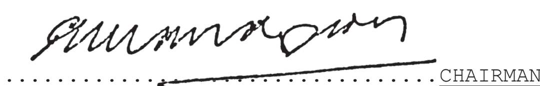
Having land enables Maoris to speak, it is part of their Maoritanga, a place where their ancestors live. It is their Turangawaewae—a place to stand proudly.

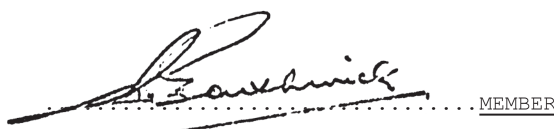
To Maoris the marae is their sacred land and symbolises the history of the tribal group. It is where they build their meeting house, for the marae represents the soul of the people. It is a place to tangi, to cry for the dead of today and for those who went before.

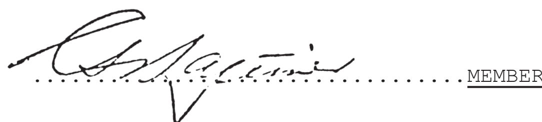
It is essential that the Maori people be recognised as having different needs and values to their pakeha contemporaries. For over one hundred years now the pakeha has been telling Maoris what is best for them. But the time has come for the Maori people to decide these questions for themselves, and this is their inherited right.

Some call this Maori nationalism and say that it will lead to the complete separation of Maori and pakeha. But the special discrimination suffered by Maoris means that Maori and pakeha are already separated; and in order to contribute fully in any society the Maori people must first have their rights restored. Only then will they be able to participate on an equal basis; only then will true understanding and a two-way respect between Maori and pakeha be possible."

SEALED with the Seal of the Waitangi Tribunal this 22 day of March 1978, in the presence of:


............................CHAIRMAN


............................MEMBER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## LIST OF REPORTS OF THE WAITANGI TRIBUNAL

| | | |
|---|---|---|
| Wai–1 | Fishing Rights (Hawke) | March 1978 |
| Wai–2 | Waiau Pa Power Station | February 1978 |
| Wai–4 | Kaituna River | November 1984 |
| Wai–6 | Motunui–Waitara | March 1983 |
| Wai–8 | Manukau | July 1986 |
| Wai–9 | Orakei | November 1987 |
| Wai–10 | Waiheke Island | June 1987 |
| Wai–11 | Te Reo Maori | April 1986 |
| Wai–12 | Motiti Island | May 1985 |
| Wai–15 | Fishing Rights (Te Weehi) | May 1987 |
| Wai–17 | Mangonui Sewerage | August 1988 |
| Wai–18 | Fishing Rights (Lake Taupo) | October 1986 |
| Wai–19 | Maori 'Privilege' | May 1985 |
| Wai–22 | Muriwhenua Fishing | June 1988 |
| Wai–25 | Maori Representation (ARA) | December 1986 |

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