IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-614
[2025] NZHC 657

BETWEEN	TE OHU KAI MOANA TRUSTEE LTD together with TE OHU KAI MOANA TRUST Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing: 8–11 July 2024

Appearances: V E Casey KC and A K Irwin for Plaintiff
M G Colson KC, J B Watson and R M Fistonich for Defendant

Judgment: 27 March 2025

JUDGMENT OF BOLDT J

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Introduction

[1] The Treaty of Waitangi fisheries settlement, concluded in 1992, represented a watershed in the relationship between Māori and the Crown. It was the first "modern" settlement of Crown breaches of Te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) and provided the model for many of the settlements that have followed. This case is about the legal obligations the fisheries settlement conferred upon the Crown in 1992, and what obligations, if any, endure in 2025.

[2] In this proceeding, Māori do not seek to revisit the settlement or undermine the finality of the resolution it signalled. This case arises because the applicant, Te Ohu Kai Moana Trustee Ltd (Te Ohu), alleges the Crown is in ongoing breach of the settlement. The Crown denies any breach; it says it discharged its obligations under the settlement long ago. It argues, in any event, that Te Ohu is barred from bringing the present proceeding.

[3] The case centres on a once-benign provision — s 28N of the Fisheries Act 1983, first enacted in 1986 — which was designed to enable the Crown to repay a debt it incurred when the quota management system (QMS) was established that year. Changes to the QMS since then have transformed that provision into a mechanism by which fishing quota, transferred to Māori as part of the 1992 settlement, are confiscated, without compensation, and given to other operators. Te Ohu says it was never part of the settlement that the quota Māori acquired would remain vulnerable to permanent reappropriation.

The settlement

[4] By the early 1990s, the nature and scope of the fishing rights guaranteed to Māori under art 2 of the Treaty,[1] had devolved into a protracted and difficult dispute. Interim orders made in 1987 had frozen parts of the newly-established QMS.[2]

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1 For the purposes of this decision, the differences between the English and te reo Māori texts of the Treaty | Te Tiriti are immaterial. The Crown's guarantee of "full exclusive and undisturbed possession of [Māori] … Fisheries" is materially identical in both documents.

2 *New Zealand Maori Council v Attorney-General* Wellington HC CP553/87, 30 September 1987. See a copy of that decision in *Muriwhenua Fishing Report* (Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, Wai 22, June 1988) [*Muriwhenua Report*] at 303.

Multiple proceedings, most notably those consolidated in *Te Runanga o Muriwhenua v Attorney-General*,[3] resulted in the allocation of quota for some fish species being suspended. Those orders endured for five years as the parties sought, through negotiation, litigation and legislation, to craft a lasting solution.

[5] A breakthrough came in September 1992. After a swift but successful negotiation, the longstanding question of commercial fishing rights under the Treaty was resolved. An opportunity arose for a joint venture representing Māori and Brierley Investments Ltd to purchase Sealord Products Ltd (Sealord), and the Crown agreed to provide Māori with the capital to participate. Sealord was, and is, a giant in the New Zealand commercial fishing industry. In 1992 it held 26 per cent of total fishing quota. As the Court of Appeal observed in *Te Runanga o Wharekauri Rekohu v Attorney-General* (*Sealords*):[4]

> The Sealord opportunity was a tide which had to be taken at the flood. A failure to take it might well have been inconsistent with the constructive performance of the duty of a party in a position akin to partnership.

[6] The agreement was recorded in a Deed of Settlement (the Deed), executed in September 1992, and followed shortly afterwards by the Treaty of Waitangi (Fisheries Claims) Act 1992 (the Settlement Act). The acquisition of Sealord was a central feature of the settlement, which is colloquially known as the Sealord deal. But acquisition of Sealord was only one part of it. The progressive acquisition by Māori of standalone tranches of fishing quota, which had been underway since 1989, also formed part of the settlement.

[7] In return for the settlement quota and the capital required to purchase Sealord, Māori permanently surrendered their right to seek judicial recognition of customary or Treaty-based commercial fishing rights.[5]

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3 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA). See also *New Zealand Maori Council v Attorney-General*, above n 2; *Ngai Tahu Maori Trust Board v Attorney-General* Wellington HC CP 559/87, 12 November 1987; and *Muriwhenua Report*, above n 2.

4 *Te Runanga o Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301 (CA) [*Sealords*] at 307.

5 Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 [Settlement Act], ss 9 and 10. Section 88(2) of the Fisheries Act 1983 was repealed. Section 88(2) provided that nothing in that Act should affect any Māori fishing rights. That provision was the statutory foundation for existing Māori claims against the Crown.

[8] The Deed recorded that the Crown and Māori wished to resolve their disputes about fishing rights and interests and sought "a just and honourable solution in conformity with the principles of the Treaty of Waitangi".[6] The same phrase formed part of the Preamble to the Settlement Act.[7] The Long Title to that Act provided, among other things, that it was an Act "to give effect to the settlement of claims relating to Māori fishing rights."

[9] The settlement was controversial at the time. Many iwi did not consider their interests were represented in the negotiations. In *Sealords*, opponents of the settlement unsuccessfully asked the courts to stop the introduction of the Bill that enshrined the settlement in law.[8]

[10] But with the benefit of more than 30 years' hindsight it can be said the settlement has been a conspicuous success. It was a landmark in the relationship between Māori and the Crown. Ten pieces of complex litigation, commenced in 1987 and 1988, were immediately discontinued.[9] Māori have, over the last 32 years, gained a substantial stake in New Zealand's fisheries through a combination of settlement quota, the Sealord stake and judicious investment in other large fishing companies. Māori are now a significant force in New Zealand's commercial fisheries.

The problem

[11] I explain below how quota work and where they fit into the settlement, but it is sufficient for present purposes to note that quota holders are entitled to fish for particular species, in specified quota management areas (or fisheries), up to a certain volume. In theory, the total catch entitlement in each fishery should never exceed the level required to ensure fish stocks remain sustainable. Since their creation in 1986, fishing quota have become valuable property rights. They represent a tangible stake in New Zealand's commercial fisheries.

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6 Deed of Settlement, Preamble, recital J. The full text of the Deed of Settlement is appended to *Sealords*, above n 4.
7 Settlement Act, Preamble, recital (j).
8 *Sealords*, above n 4.
9 Settlement Act, s 11(2).

[12] The QMS was established in 1986. Back then, the Government promised to compensate fishing operators who were obliged to reduce their catch levels and fish sustainably as part of the new system. While the Government kept that promise by paying cash to some operators, others opted for a different solution — an undertaking that when catch levels increased in the future, they would be the first to receive new quota, and would do so free of charge. In other words, the Government took on a debt to some fishing operators (referred to in this judgment as 28N rights holders), which it promised to pay, in years to come, through free quota.

[13] Then things changed. For reasons I set out in detail below, the structure of the QMS was overhauled in 1990, and the Government stopped issuing new quota when catch levels increased. As a result, the Government could no longer pay its debt by issuing new quota. It decided, instead, to repay the debt by reallocating *existing* quota. In effect, Parliament transferred the Government's debt to private fishing operators. Instead of the Government paying its debt by issuing new quota, it began confiscating quota from some operators, and passing them to others. The provision responsible for the reallocation of quota was re-enacted as s 23 of the Fisheries Act 1996.

[14] Private fishing operators continue to pay the Crown's 28N debt today. Quota held by Māori under the 1992 settlement, which otherwise enjoy a number of special protections, are as vulnerable to confiscation under s 23 as any other. Quota are stripped from Māori automatically, compulsorily, and without compensation, and given to companies the Crown promised to compensate nearly 40 years ago.

[15] Section 23 is the modern manifestation of s 28N of the Fisheries Act 1983, which was part of the suite of provisions that established the QMS in 1986 (hence the reference throughout this judgment to "28N rights"). It is random and irrational in its effect — it is possible, if the total allowable commercial catch levels (TACC) in a fishery fall steeply then rise again, for Māori and other quota holders can lose much or even all of their quota. If TACC remains stable, they lose nothing.

[16] Section 23 continues to erode the settlement benefits Māori won in 1992. Te Ohu says that when the settlement was negotiated, Māori had no idea the quota they received might later be taken from them to pay off someone else's debt, and that they would never have entered the agreement if they had realised the fruits of the settlement were so vulnerable. Te Ohu says both parties intended the 1992 settlement to be final, and to provide Māori with a permanent ownership interest in New Zealand's fisheries.

[17] The Attorney-General, on behalf of the Crown, denies any breach. The Crown says that nothing in the settlement agreement said or implied that allocations of settlement quota would be permanent. Moreover, it argues the legislation which implemented the agreement deems the Crown to have fully discharged its settlement obligations and protects it from litigation. It says Māori are barred from seeking judicial redress even if the Crown is in flagrant breach.

[18] This case turns on what the Crown promised Māori as part of the settlement, and what, if any, ongoing obligations the Crown has to Māori today. Te Ohu says the Crown has been systematically breaching the settlement, almost from the moment the agreement was signed, and seeks declarations to that effect.[10]

History: introduction

[19] The background to this case involves two separate, sometimes intersecting, series of events which unfolded between 1986 and 2004. Today's problem is the product of officials seeking to devise solutions to two sets of problems across two separate timelines, which came together in a way no-one foresaw.

[20] The first concerns the establishment and evolution of the QMS, beginning with its initial design and the first allocations of quota in 1986. That scheme — explained in some detail below — sought to manage New Zealand's fisheries sustainably by creating a new property right in the form of individual transferable quota (ITQ) which were then assigned to fishing operators.

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[10] Pursuant to the Declaratory Judgments Act 1908.

[21] The second timeline concerns the efforts of Māori and the Crown to reach a permanent fisheries settlement. Fishing rights were a source of significant disagreement between Māori and the Crown between 1986 and 1992. The centrepiece of the second timeline was the Sealord settlement, reflected in the Deed of Settlement dated 23 September 1992 and the legislation enacted shortly afterwards to give it legal effect. The settlement was designed to provide a permanent resolution of "outstanding claims and Treaty grievances of Māori in relation to fisheries."[11]

First timeline: the evolution of the quota management system

An introduction to the QMS and the creation of 28N rights

[22] By the early 1980s, overfishing had become a significant problem for New Zealand's inshore fisheries. Over the years the Government attempted to find mechanisms which would prevent overfishing, but those efforts were largely unsuccessful.[12] Then, in the mid-1980s, the Government alighted upon a solution in the form of the QMS. Even today it is regarded as world-leading.[13]

[23] Sustainability is the cornerstone of the QMS. After making allowance for non-commercial fishing (for example, recreational and traditional interests), the Minister capped the total allowable catch (TAC) in each fishery at a sustainable level.[14] Fishing operators received individual transferrable quota (ITQ) which added up to the TAC. They could catch fish up to the level of their ITQ, but no more. Each year's TAC was (and still is) designed to ensure stocks are fished as fully as practicable, while also ensuring the resource is sustainably preserved for the future.[15]

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11 Deed of Settlement, Preamble, recital I.

12 For a detailed discussion of the state of fisheries in the early 1980s see *Muriwhenua Report*, above n 2, at 116–117.

13 For example, see Bjørn Hersoug "'After all these years' — New Zealand's quota management system at the crossroads" (2018) 92 MP 101.

14 Fisheries Act 1983 (as at 1 August 1986), ss 28B and 28C.

15 Fisheries Act 1996, s 8.

Allocating the first ITQ

[24] While the concept underpinning the new regime was innovative, its establishment gave rise to a host of practical issues. In addition to establishing quota management areas and assessing sustainable catch levels, the Government had to determine who would receive ITQ and in what amounts. Given many fisheries had been heavily overfished, there were many places where significant catch reductions would be required to ensure they remained sustainable. In those fisheries it was inevitable there would not be enough quota for operators to continue fishing at their pre-QMS levels.

[25] The starting point for ITQ allocations was a fishing operator's catch history. From its 1982, 1983 and 1984 catches, the operator nominated its best two years, thereby avoiding distortions if it had had a bad season. From this, the Director-General of the (then) Ministry of Agriculture and Fisheries (the Ministry) calculated levels of provisional maximum individual transferrable quota (PMITQ) for each operator.[16] An operator's PMITQ represented its maximum quota entitlement under the new system.

[26] The Director-General could make discretionary (upwards) adjustments to an operator's PMITQ allocation if persuaded the raw figure did not fairly reflect the operator's commitment to, and dependence on, the fishery.[17] Operators who were unhappy with their PMITQ allocation also had the right to appeal to the Quota Appeal Authority, which could make further changes.[18] As noted by Mr Bruce Shallard, then a senior policy adviser for the Ministry, many operators successfully appealed their PMITQ allocation, which further increased the volume of PMITQ.

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16 Fisheries Act 1983 (as at 1 August 1986), s 28E(1).

17 The Director-General also had regard to any other PMITQ allocations the operator had received: see s 28E(3).

18 Fisheries Act 1983 (as at 1 August 1986), ss 28H and 28I.

[27] It followed that even without the need to address pre-QMS overfishing, the system for allocating PMITQ meant it was far from uncommon for the volume of PMITQ in a fishery to exceed the total allowable catch, and therefore the volume of ITQ on offer.[19] The question then arose — given the need to reduce catch levels, how should ITQ in the newly-sustainable fisheries be distributed among holders of PMITQ?

[28] That question posed both a practical and political challenge for the Government of the day. Even as it set about curbing the endemic overfishing of the old system, the Government was conscious of the financial position of fishing operators, many of whom appear to have made investments on the (rather short-sighted) assumption they would be able to fish at their pre-QMS levels indefinitely. Instead of simply reducing the TAC to a sustainable level and requiring operators to absorb a proportionate reduction in their catch (which is broadly what happens when new species enter the QMS today),[20] the Government made the fateful decision that operators whose catch entitlements would be cut deserved compensation.

28N rights

[29] The Government offered fishing operators two options. The first was described as a quota buy-back.[21] Essentially, operators received a cash payout which corresponded to the reduction in their catch. In his affidavit, Mr Shallard explains that in two rounds of buy-backs, the Government paid around $42 million to extinguish around 16,000 tonnes of PMITQ. That option was simple and permanent.

[30] There was a second option for operators who did not want to pursue the buy-back option. It was found in s 28N of the Fisheries Act 1983. Operators who did not participate in the buy-back programme had their PMITQ reduced on a proportionate basis to match the volume of ITQ available. But the PMITQ they surrendered were not lost forever; instead, operators received a deferred entitlement

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19 Often it did so by a considerable margin. For example, the North Island snapper fisheries had been very heavily overfished, and significant catch reductions were required.

20 See Fisheries Act 1996, s 47(1).

21 Fisheries Act 1983 (as at 1 August 1986), s 28L.

to future quota. In simple terms, an operator who surrendered ten tonnes of PMITQ received ten tonnes in 28N rights. Those ten tonnes were shelved. As long as the operator continued to hold ITQ in the fishery, in later years its 28N rights were transformed, free of charge, into ITQ as increases in TAC permitted.[22]

[31] In those early years, the same process was followed whenever a new species was introduced into the QMS, meaning new 28N rights were created throughout the second half of the 1980s.

The first incarnation of the QMS

[32] In 1986, ITQ were a new form of property right. Quota could be bought, borrowed, sold, leased and mortgaged. They were calculated on a strict tonnage basis. If the TAC increased, ITQ holders would not see an automatic benefit.[23] Rather, the Minister could offer new ITQ to existing quota holders at a nominated price. Alternatively, the Minister could put the new quota up for tender, allocate it to the Crown, or authorise the quota to be fished on a competitive basis.[24]

[33] If TAC went down, the reduction in catch would (usually) be achieved by reducing the quota held by each operator.[25] In that event, the Crown paid compensation "for the fair market value of the individual quota",[26] meaning the Crown carried an ongoing financial risk. The corollary of the Crown's power to sell new quota was an open-ended commitment to act as guarantor if TAC levels fell.

[34] In those early years, if TAC went up and there were unredeemed 28N rights in the fishery, the first new quota would go, free of charge, to the 28N rights holders.[27] That free allocation meant the Crown was required to forego the revenue it would otherwise have gained from selling the quota, but in doing so it was slowly paying back the compensation debt it assumed when catch levels were reduced in 1986.

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22 Section 28T.
23 Section 28C(8).
24 Section 28T(3).
25 Section 28D. It was also common for the Crown to hold quota. If it did, the Crown holding could be cancelled under s 28U(4), thereby providing a buffer between any reduction in TAC and the need to cancel ITQ held by private operators.
26 Section 28D(4)(a).
27 Section 28T(1).

[35] As a result, from the perspective of other quota holders, 28N rights were benign. If TAC went up, some operators might receive new ITQ free of charge, but existing quota holders lost nothing, apart perhaps from the opportunity to purchase quota if they wished. The only party that suffered actual loss was the Crown, in the form of foregone revenue.

The orange roughy crisis

[36] Not long after the QMS was established, the Government decided to introduce orange roughy into the QMS. Orange roughy was a very popular deep water fish, discovered around the Chatham Rise in the late 1970s. It was described as "white gold" for the New Zealand fishing industry.[28] At its 1988 peak, TAC for orange roughy was set at 63,110 tonnes. That year, New Zealand's fish exports increased from $309 million to $657 million, with orange roughy making up a quarter of the increase.

[37] The orange roughy boom was too good to last. Not long after it was introduced into the QMS, research came to light showing orange roughy lived longer and had a much longer breeding cycle than other fish. The result was that the TAC had been massively overestimated, and the Minister had to respond urgently. Drastic cuts were required.

[38] Under the first incarnation of the QMS, where the Government acted as guarantor in the event of a reduction in TAC, the steep reductions in orange roughy catch levels would have cost the Crown a substantial sum, "potentially in the hundreds of millions", as Mr Shallard put it. He observed that by 1989 "[G]overnment books were not in a healthy state and there was no political will to absorb the cost".

[39] Instead, the QMS was overhauled. A substantial amendment in 1990 changed the system from one based strictly on tonnage to a new "proportional-tonnage" model. Under the new model, fishing operators automatically received a

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[28] For an in-depth discussion of the boom and bust of orange roughy, see Holly Ryan "Big Red: Return of the Roughy" *The New Zealand Herald* (online ed, Auckland, 2 June 2017).

proportionate increase in ITQ as the allowable catch (now known as total allowable commercial catch, or TACC) increased, and took a proportionate cut when catch levels fell. ITQ holdings were still expressed in tonnes, but the Crown no longer sold new quota when TACC levels increased, nor did it act as guarantor when levels fell. As McGechan J put it:[29]

> In 1990 there was a major philosophical change. The Crown decided to shift the biological risk, i.e. the risk TAC and thus ITQ might be reduced for conservation ("biological") reasons, over onto the industry. No longer would the Crown compensate. The *quid pro quo* would be that any increase in TAC, and therefore in ITQ, would go as a bonus to ITQ holders. No doubt financial considerations played a significant part. Money was in short supply in 1990. There was also an arguable economic justification.[30] With biological risk squarely on the industry, it would be more conservation conscious.

[40] The Fisheries Amendment Act 1990, which was introduced to address the problem, also proved a turning point for 28N rights. The 28N regime was created with a purely tonnage-based QMS in mind. Its original design was incompatible with a proportional system in which increases in TACC were to be shared among existing quota holders. The original 28N regime effectively amounted to deferred compensation for a loss of PMITQ; instead of the Government raising revenue by selling new quota, it gave them to rights holders, thereby paying back the debt it incurred in 1986. That aspect of the model could not be replicated under a proportional-tonnage system; the Crown was no longer in the business of selling quota.

Consultation

[41] The Crown consulted the fishing industry about the changes. The result was a memorandum of understanding dated 27 September 1989 known as "the Accord". The only mention of 28N rights was a paragraph recording that "those quota holders who suffered administrative cuts in quotas without compensation will receive first preference when TACs are increased". As is discussed in more detail below, that description of the new way 28N rights would work can charitably be described as incomplete.

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29 *New Zealand Federation of Commercial Fishermen v Minister of Fisheries* HC Wellington CP 237/95, 24 April 1997 at 22.

30 Justice McGechan may have meant an arguable environmental justification.

[42] Māori were not invited to participate in the Accord, which involved only the Ministry, the Fishing Industry Association and the Federation of Commercial Fishermen.

[43] Cabinet agreed to proceed with the new model. The Ministry sent key stakeholders a letter dated 13 October 1989, which outlined what Cabinet had decided and invited submissions on the proposal as soon as possible.[31] The letter contained the same sentence about 28N rights that appeared in the Accord. Māori were not consulted further.

28N rights under the new model

[44] The Fisheries Amendment Act 1990 sought to graft a 28N regime designed for the tonnage-based system onto the fundamentally different proportionate-tonnage model. In the process, whether by accident or design, it extinguished the Crown's 28N debt entirely, and moved it onto the shoulders of existing quota holders. Instead of the promised swings and roundabouts, the new 28N regime meant quota holders would lose ITQ when TACC decreased, but would derive no benefit when TACC went up, at least until all 28N rights had been redeemed.

[45] The Court of Appeal expressed surprise when 28N rights were explained to it in 1997:[32]

> We were informed that holders of these rights are entitled on any future increase in the total amount of quota to their share of that increase at no cost. Apparently, in order to qualify the increase does not have to be an increase above the base amount which applied immediately after the holders had suffered their reduction; it can be any subsequent increase. If this is indeed the effect of the legislation, the position may justify some examination. Those bearing the present sacrifice on a decrease in quota will not necessarily recoup all that sacrifice on any subsequent increase.

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31 Although no letter addressed to the Maori Fisheries Commission was provided to the Court, Ms Tamar Wells, a Policy Manager for the Inshore Council of Seafood New Zealand Ltd and a former policy analyst for Te Ohu, accepted it was likely the Commission received one.

32 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries* CA82/97, 22 July 1997, at 25.

[46] The provision which incorporated 28N rights into the new QMS model was s 28OE of the Fisheries Act 1983, as enacted by s 15 of the Fisheries Amendment Act 1990. It provided:

> **28OE Increase in total allowable commercial catch**
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> (1) Where any total allowable commercial catch for any species or class of fish other than rock lobster is increased under section 28OB of this Act (not being an increase made pursuant to section 28J of this Act),
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> (a) Subject to subsections (3) and (4) of this section, the Minister shall first offer the additional quota available thereby on a proportionate basis free of charge to those persons who
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> (i) Had provisional maximum individual transferable quota for that species or class of fish for the relevant area reduced under section 28N of this Act; and
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> (ii) Continue to hold any quota for that species or class of fish for that area on the date on which the increase takes effect; and
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> (b) Where any amount of quota remains unallocated after compliance with paragraph (a) of this subsection, all individual transferable quota for the species or class of fish for the relevant area shall be increased on a proportionate basis to total the amount of the increased total allowable commercial catch.
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> …
>
> (3) Any quota offered under subsection (1)(a) of this section shall be offered in amounts such that each person receives not more than the amount of provisional maximum individual transferable quota that was reduced under section 28N of this Act, or lesser proportionate amounts if sufficient quota is not available.

[47] The new provisions were technical and dense, and none of the accompanying material emphasised the profound change to the redemption of 28N rights under the new regime. Indeed, the Accord and the written advice which followed it focused on the one aspect of the 28N regime that remained unchanged. It did not mention that the Government's 28N liability would soon belong to the fishing industry rather than the Crown.

[48] The actual operation of the new system did not make its effects any clearer. Under the proportional-tonnage system, s 28N redemptions slipped under the radar. Quota allocations changed from year to year as stock levels rose and fell, and the

Ministry did not publicise the fact that some operators were surrendering quota to pay the Crown's 28N debt. It was possible for operators to lose quota under s 28OE and not realise it had happened.

Final change to the QMS: a proportional shares regime

[49] The Fisheries Act 1996 overhauled and reformed New Zealand's fisheries legislation. The new Act retained the essential features of the proportional model, but greatly improved its transparency. Every fishery was divided into 100,000,000 quota shares, which were allocated to quota holders in proportion to the share of quota they held beforehand. In other words, a fishing operator with ten per cent of the quota in the fishery would receive 10,000,000 shares. Mr Shallard described the change as "essentially an exercise in standardisation".

[50] The 1996 Act separated ownership and fishing rights by creating a new concept called Annual Catch Entitlement (ACE). ACE represents how many tonnes of fish a quota holder can take each year. It is ACE, rather than quota holdings, which increase and decrease in line with changes in TACC.

[51] In recognition of its quota holding, an operator with 10,000,000 shares would receive an ACE corresponding to ten per cent of the TACC. In a fishery with no 28N rights, its ACE increases and decreases in line with changes in the TACC.

[52] It is different if there are unredeemed 28N rights in the fishery. The regime continues to prioritise the redemption of 28N rights over the interests of existing quota holders. As long as 28N rights remain unredeemed shares, corresponding with any increase in TACC, are automatically allocated to the 28N rights-holder. As the number of shares in each fishery remains constant at 100,000,000, those shares are taken, without compensation, from existing quota holders. It was the mandatory reallocation of quota shares under the 1996 Act which threw the 28N issue into stark relief.

[53] Section 23 of the 1996 Act is lengthy and features three mathematical formulae. Its practical upshot, however, is that today the Crown's historic 28N debt is paid by the mandatory confiscation of quota shares from existing quota holders.

Second timeline: the settlement of Māori fisheries claims

[54] Article 2 of the Treaty guarantees Māori the "full exclusive and undisturbed possession of their … Fisheries … so long as it is their wish and desire to retain the same in their possession." Article 2 of Te Tiriti guarantees Māori unqualified exercise of rangatiratanga over their whenua, kāinga and taonga. There has never been any dispute that taonga includes fisheries.[33]

[55] In its 1988 Muriwhenua Report, the Waitangi Tribunal concluded there had been "numerous blatant and serious breaches" of the Treaty guarantee as it applied to fisheries.[34] By the late 1980s the nature and scale of the Crown's breaches were no longer in serious dispute, and the debate shifted to what redress might be appropriate.

The initial Māori response to the QMS

[56] Section 88(2) of the Fisheries Act 1983 provided that "[n]othing in this Act shall affect any Māori fishing rights." With a brief hiatus between 1894 and 1903, statutory protection of Māori fishing rights had formed part of New Zealand's law since 1877.[35]

[57] Section 88(2) was not affected by the 1986 amendments. Section 28C(1), which was enacted in 1986, provided that the Minister was to specify the TAC "after allowing for the Māori, traditional, recreational and other non-commercial interests in the fishery".[36]

[58] When the QMS was enacted, the Waitangi Tribunal, which had recently had its jurisdiction expanded to include historic claims,[37] was considering a claim by iwi from the Muriwhenua area about their fishing interests. On 30 September 1987, the Tribunal released a preliminary opinion which found Muriwhenua hapū and iwi had

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33 *Muriwhenua Report*, above n 2, at 173–174.

34 At 239.

35 Section 8 of the Fish Protection Act 1877 provided:

> 8 Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.

36 Fisheries Act 1983 (as at 1 August 1986), s 28C(1).

37 Treaty of Waitangi Amendment Act 1985, s 3.

extensive unrecognised fishing rights. The Tribunal advised it would be contrary to the Treaty for the Minister to issue further ITQ, "at least in so far as Muriwhenua tribes are concerned".[38] The Tribunal recommended the Crown negotiate with Muriwhenua iwi before further steps were taken under the QMS. On the same day Muriwhenua, along with the New Zealand Māori Council, commenced judicial review proceedings claiming the QMS, as far as it affected Muriwhenua, was unlawful because it breached their fishing rights.

[59] Justice Greig, relying on s 88(2) of the 1983 Act, made an interim order that the Minister ought not to take further steps under the QMS so far as it affected Muriwhenua.[39] He noted the Ministry had not made any serious effort to define Māori fishing rights, instead treating Māori fishing as something without "any proprietary significance".[40] Shortly afterwards, other iwi commenced similar proceedings, and further orders were made suspending the entry of particular species into the QMS.[41]

[60] The Government, anxious to find a solution, set up a joint working group on 25 November 1987. It consisted of four representatives from the New Zealand Māori Council and four from the Crown, and was given the task of reporting, by 30 June 1988, on "how Maori fisheries may be given effect".[42] Meanwhile, on 31 May 1988, the Waitangi Tribunal released its Muriwhenua Report. It reached the following conclusions:[43]

> 12.1.1 The Treaty guaranteed to Maori full protection for their fishing activities, including unrestricted rights to develop them along either or both customary or modern lines. Save for some prior agreement or arrangement, general fishing could neither delimit nor restrict the Maori fishing interest as so described. To the extent that general fishing might do so, the Crown was bound to intervene.
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> …

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38 *Te Runanga o Muriwhenua Inc v Attorney-General*, above n 3, at 646.

39 *New Zealand Maori Council v Attorney-General*, above n 2.

40 *Ngai Tahu Maori Trust Board v Attorney-General*, above n 3. See relevant passage of this decision in *Muriwhenua Report*, above n 2, at 310. Although these comments are from a later decision that did not concern Muriwhenua, the comments of Grieg J in this decision have been described by the Court of Appeal as "his main reasons" for the Muriwhenua decision: *Te Runanga o Muriwhenua Inc v Attorney-General*, above n 3, at 646.

41 *Ngai Tahu Maori Trust Board v Attorney-General*, above n 3.

42 At 647.

43 *Muriwhenua Report*, above n 2, at 239.

> 12.2.3 The Quota Management System, as currently applied, is in fundamental conflict with the Treaty's principles and terms, apportioning to non-Maori the full, exclusive and undisturbed possession of the property in fishing that to Maori was guaranteed; but the Quota Management System need not be in conflict with the Treaty, and may be beneficial to both parties, if an agreement or arrangement can be reached.

[61] Despite the assistance provided by the Tribunal's report, the working group was not able to reach agreement. Instead, it produced two reports, one from each set of representatives.[44] Māori sought 100 per cent of fisheries but, as a compromise, proposed that over the next 20 years, 50 per cent of quota should be acquired by the Crown and transferred to Māori.

An interim solution: the Maori Fisheries Act 1989

[62] On 22 September 1988, the Maori Fisheries Bill was introduced.[45] It caused alarm among Māori; Mr Dewes described the Bill as an "attempt to unilaterally 'settle' Māori fisheries claims".

[63] In introducing the Bill, the Minister accepted there had been blatant and serious breaches of the Crown's Treaty obligations.[46] The Bill sought to impose a solution. In the area of commercial fishing, Māori were to be given an opportunity to obtain up to 50 per cent of quota in increments of up to two and a half per cent a year for 20 years, conditional upon their "substantially" fishing their existing allocations.[47]

[64] The Bill was envisaged as a long-term solution. It proposed the repeal of s 88(2), the nullification of the High Court's interim orders and the discontinuance of the proceedings in which they had been made. It sought to extinguish the possibility of future claims, either through the courts or (at least for the next 20 years) the Tribunal.

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44 Full copies of these reports were appended to the Law Commission's report into Māori Fisheries: *The Treaty of Waitangi and Maori Fisheries — Mataitai: Nga Tikanga Maori me te Tiriti o Waitangi* (Te Aka Matua o Te Ture | Law Commission, NZLC PP9, March 1989) at Appendix E.

45 When referring to or quoting from historic documents, judgments and legislation, macrons have been omitted to reflect the original spelling.

46 *Te Runanga o Muriwhenua Inc v Attorney-General*, above n 3, at 648.

47 Maori Fisheries Bill 1988 (as introduced), recital (l).

[65] Iwi responded with a flurry of new proceedings from "virtually all tribes with claims to fishing rights".[48]

[66] The Bill was referred to a Select Committee, which recommended major changes. It recharacterised the Bill as an interim solution. The repeal of s 88(2), the ouster of the jurisdiction of the courts and Tribunal and the 50 per cent quota maximum were all dropped. Instead, the amended Bill sought to facilitate the acquisition by Māori of a stake in the commercial fishing industry, along with Māori control of local non-commercial fisheries. It proposed the Crown should transfer ten per cent of quota to Māori, in every existing fishery, at the rate of two and a half per cent per year between 1989 and 1992.

[67] Like other quota, settlement quota represented a property right and a tangible share in the fisheries. Unlike other quota, newly-transferred settlement quota could not be alienated. That restriction (or protection) reflected a desire on the part of Māori that future generations would continue to benefit from the holding.

[68] Adopting the Select Committee's recommendations, the then-Ministerof Fisheries, the Hon Colin Moyle, said during the second reading debate:[49]

> The Bill … recognises tino rangatiratanga with respect to fisheries. It does this by transferring to Maori 10 per cent of quota, thus getting Maori into the business and activity of fishing — the phrase used by the Waitangi Tribunal in its report on the Muriwhenua claim. It recognises rangatiratanga in the provision it makes for the allocation of quota …
>
> It is fitting indeed that at last Maori, who have a deep attachment and a proud historical association with the seas around New Zealand, are guaranteed a real and permanent place in the ownership and partnership of New Zealand's marine resources. I do not claim that those measures give full effect to the guarantees in the Treaty of Waitangi given by the Crown to Māori with respect to fisheries, but everyone should consider them as a practical, reasonable, and responsible outcome to a difficult and complex issue.

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48 *Te Runanga o Muriwhenua Inc v Attorney-General*, above n 3, at 648.
49 (12 December 1989) 504 NZPD 14522–14523.

[69] The Bill received the Royal Assent on 20 December 1989 and came into force as the Maori Fisheries Act 1989 on the same day. Another of its principal features was the establishment of the Maori Fisheries Commission. The Commission had the function of facilitating Māori development in the business and activity of fishing.[50]

[70] Meanwhile, litigation before the courts and claims before the Tribunal continued. An interim agreement was reached on 27 February 1990, by which current proceedings would be indefinitely adjourned in exchange for the Crown bringing no further species into the QMS in the absence of agreement or resolution by the courts. Discussions continued. In August 1992, the Waitangi Tribunal released its *Ngai Tahu Sea Fisheries Report*, which reaffirmed its view that the QMS was in fundamental conflict with the Treaty and Ngāi Tahu's fishing rights.[51]

Final resolution

[71] The evidence of Mr Dewes about negotiations between the Crown and Māori and the Crown after 1989 was very helpful. Mr Dewes was a member of the Maori Fisheries Commission and was personally involved in the relevant discussions. His evidence is largely uncontradicted.

[72] Mr Dewes noted the Maori Fisheries Act 1989 was never meant to be a final settlement of Māori fishing claims. That perspective was endorsed by both parties in the present case. The 1989 transfers were effectively a down payment.

[73] Mr Dewes explained the perspective of Māori in the post-1989 settlement negotiations:

> 21 Both the Crown and the Māori negotiators were clear that any final settlement had to reflect the Tiriti o Waitangi promise that there would continue to be major involvement by Iwi in the business and activity of fishing. This was about ownership and control. It was about the future, ensuring that Māori were guaranteed a stake in the industry going forward. Quota was a means to that end: what Māori required from the Crown was recognition and agreement that Māori would have a permanent right to participate in the fisheries resource

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50 Maori Fisheries Act 1989, s 4.

51 *The Ngai Tahu Sea Fisheries Report* (Te Rōpū Whakamana i te Tiriti o Waitangi | Waitangi Tribunal, Wai 27, 1992) at 300–303.

> going into the future, whether that was achieved by quota allocation or other means was beside the point.
>
> 22 From the Māori side, the perspective was simple. Fishing was seen as he taonga i tuku iho mai i ngā atua ki ngā mokopuna, that is as a treasure passed down from the ancestral gods to our grandchildren, something to be nurtured and handed on to the generations yet to come. It was also based on the tikanga of the relationship with Tangaroa and fishing, something that included trade and commerce. Fishing is something permanent and enduring. In the commercial (as opposed to the customary) side of the settlement, given the QMS this permanency was to be manifested through quota. The Crown's promise to transfer quota was the means of guaranteeing to us the ownership and control of the resources guaranteed and confirmed by Te Tiriti o Waitangi. This was about mana, not money. We did not want cash. We wanted recognition of our permanent ownership of the resource.

[74] The Maori Fisheries Act 1989 provided that the 10 per cent quota transfer would occur over three years.[52] From time to time the Crown found it difficult to obtain sufficient quota. While the Act contained provisions allowing the Crown to pay compensation instead,[53] Mr Dewes emphasised, and I accept, that for Māori the issue was "mana not money." That perspective was reflected in a "backdated quota" agreement the parties reached in 1991, by which compensation could later be returned in exchange for quota as it became available. It is evident that for Māori, quota represented a permanent proprietary interest in New Zealand's commercial fisheries. That perspective was consistent with Mr Moyle's promise that the transfers would guarantee Māori a real and permanent place in the ownership and partnership of New Zealand's marine resources.

Sealord

[75] In mid-1992, Sealord came up for sale. On 27 August, the Crown and Māori representatives entered into a Memorandum of Understanding (the MOU) which outlined their intention to develop a proposal which would resolve all Māori commercial fishing claims. The proposal was summarised in the MOU as follows:[54]

> 1 At meetings held at Parliament on 26 and 27 August 1992 of the Crown and Maori ('the Parties') through their representatives and agents [a list of those in attendance is attached as Annex 1]

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52 Section 40.
53 Section 42.
54 The Memorandum of Understanding is appended, in full, to *Sealords*, above n 4, at 309.

> considered a proposal that the Crown provide Maori with capital to participate in a joint venture with Brierley Investments Ltd ['BIL'] to purchase Sealord Products Ltd ('Sealords'). In return Maori will withdraw all existing litigation … and support the repeal of all legislative references to Maori fishing rights and interests including, but not limited to, repeal of s 88(2) of the Fisheries Act 1983 and an amendment to the Treaty of Waitangi Act 1975 ('the TOW Act') to exclude from the Tribunal's jurisdiction claims related to commercial fishing.

[76] In the first three weeks of September, Māori negotiators attended a series of hui to obtain a mandate to enter an agreement along the lines set out in the MOU. Draft deeds were exchanged. The final Deed of Settlement, signed on 23 September 1992, contained the following key provisions:

(a) The Crown was to pay the Maori Fisheries Commission $150 million in three instalments. That capital was to be used for the development of Māori in the New Zealand fishing industry, including the acquisition of a 50 per cent interest in Sealord.[55]

(b) The Crown was to introduce legislation authorising the transfer of 20 per cent of quota for any new species introduced into the QMS, including species which were then unknown, to the Maori Fisheries Commission.[56]

(c) The Crown was to introduce legislation:[57]

(i) repealing of s 88(2) of the Fisheries Act 1983;

(ii) recognising the finality of the settlement; the Crown and Māori agreed the Deed, and the settlement it evidenced, would satisfy and discharge all claims, current and future, in respect of the commercial fishing rights and interests of Māori;

(iii) ousting the jurisdiction of the Waitangi Tribunal to inquire into or make findings on commercial fisheries, the Deed of

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55 Deed of Settlement, above n 6, cls 1.1.17 and 3.1.
56 Clause 3.2.
57 Clause 3.5.

Settlement, or legislation giving the Deed of Settlement effect; and

(iv) giving legal effect to the Deed of Settlement itself.

(d) The Crown would introduce legislation reconstituting the Maori Fisheries Commission as the Treaty of Waitangi Fisheries Commission.[58]

(e) Māori would endorse the QMS as "a lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand."[59]

(f) Māori would permanently discontinue all commercial fisheries litigation.[60]

[77] The Deed recorded that the Crown and Māori wished to "seek a just and honourable solution in conformity with the principles of the Treaty of Waitangi".[61] The preamble recognised the interim agreement enacted in the Maori Fisheries Act 1989, including the transfer of quota totalling the 10 per cent of TAC for all species then subject to the QMS. The Deed made no changes to that arrangement. Clause 1.3, on which the Crown places some emphasis in these proceedings, reads:

1.3 Exclusion of other terms

> This Deed embodies the entire understanding and the whole agreement between the Crown and Maori relative to the subject matter hereof and all previous negotiations, representations, warranties, arrangements and statements (if any) whether expressed or implied (including any collateral agreement or warranty) with reference to the subject matter hereof or the intentions of any of the parties hereto are extinguished and otherwise are hereby excluded and cancelled save the Treaty of Waitangi itself.

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58 Clause 3.4.
59 Clause 4.2.
60 Clause 4.3.
61 Preamble, recital J.

[78] Aspects of the Deed were given legal force in the Settlement Act. Importantly, the preamble to the Settlement Act set out key aspects of the agreement in some detail.

[79] Section 3 provides:

> **3 Interpretation of Act generally**
>
> It is the intention of Parliament that the provisions of this Act shall be interpreted in a manner that best furthers the agreements expressed in the deed of settlement referred to in the Preamble.

[80] Other aspects of the settlement were enshrined in later legislation. The promise that Māori would receive 20 per cent of the quota in any new QMS species was implemented in the Fisheries Act 1996.[62]

[81] It took several more years for the fruits of the Deed of Settlement to be distributed to Māori. As Mr Dewes explained, "it took some time and litigation before a final allocation model was determined". Final allocations were given effect through the Maori Fisheries Act 2004. That Act created the plaintiff, Te Ohu Kai Moana Trustees Ltd.[63]

[82] The 2004 Act describes Te Ohu's purpose as follows:

> **32 Purpose of Te Ohu Kai Moana**
>
> The purpose of Te Ohu Kai Moana is to advance the interests of iwi individually and collectively, primarily in the development of fisheries, fishing, and fisheries-related activities, in order to—
>
> (a) ultimately benefit the members of iwi and Maori generally; and
>
> (b) further the agreements made in the Deed of Settlement; and
>
> (c) assist the Crown to discharge its obligations under the Deed of Settlement and the Treaty of Waitangi; and
>
> (d) contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement.

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62 Section 44. See also, for example, Fisheries (Kaimoana Customary Fishing) Regulations 1998.
63 Maori Fisheries Act 2004, pt 2.

28N rights and their effect on Māori

[83] The 28N regime, originally designed as part of the 1986 tonnage-based QMS, was always going to pose a challenge for policymakers when the system was overhauled in 1990. As already noted, the proportional system enacted that year was incompatible with the original 28N regime. The regime, as originally conceived, depended on the Crown's ongoing role as the issuer and vendor of new quota, a role it surrendered under the new system. Without fanfare, quota holders assumed responsibility for the Crown's 28N debt. 28N rights holders still received the first allocations of ITQ when TAC went up, but those allocations now came at the expense of their fellow quota holders, not the Crown.

[84] There is no evidence the transfer of the 28N debt to quota holders featured in the discussions that preceded the 1990 amendment, which was hastily drafted and passed by way of a supplementary order paper with little Parliamentary scrutiny. It would be unsurprising if the full implications of the change were missed. On its face, s 28OE made only modest changes to the 28N regime. But the switch to a proportionate system meant that in practice the differences were profound.

[85] Today, outcomes under s 23 are very different from what would have occurred under the original s 28N. The Appendix to this judgment outlines hypothetical examples which show how, in a proportion-based system, redemption of a tonnage-based debt can produce wild distortions in holdings.

[86] In fisheries where TACC remains stable, the existence of unredeemed 28N rights will have no effect. But in fisheries where TACC fluctuates, and especially where TACC falls sharply and rises again over time, s 23 can strip existing quota holders, including Māori, of large tranches of their quota shares. Its effects can be random and capricious. The magnitude of changes in TACC, and the order in which those changes occur, become of critical importance. Share losses are permanent; they are not reversed if TACC returns to its original level.

[87] The most extraordinary outcome arises if TACC drops to zero, a possibility expressly contemplated by s 20(3) of the Fisheries Act 1996. When the fishery recovers and TACC is restored, it is entirely possible that all shares in the fishery will

be allocated to the 28N rights-holders.[64] Existing holdings, including settlement quota, can be lost for good.

[88] The Crown submits that total loss of quota shares is unlikely. That said, in 2023 the Minister decreased the scallop TACC to zero in the Coromandel. Although no 28N rights were attached, reduction to zero is contemplated by law and does occur in practice. And, as already noted, steep reductions in TACC, which produce the greatest distortions in quota holdings, are far from unprecedented.

The problem becomes apparent

[89] It is unclear how well even the Ministry understood the confiscatory effect of the new regime. For example, the Maori Fisheries Act 2004 required Te Ohu to distribute settlement quota, in line with a complex mechanism which had taken many years to configure, to mandated iwi organisations. Te Ohu's quota share holdings, which the Act set out to allocate, were listed in sch 1 of the Act.

[90] The Act came into force on 25 September 2004. Six days later, TACC increases triggered 28N rights redemptions in seven stocks, meaning quota shares were lost. The 2004 Act, despite being administered by the Ministry of Primary Industries (MPI), overlooked 28N redemptions entirely, and made no provision for adjustment. As a result, Te Ohu was unable to distribute quota shares as the Act required, and there was an urgent need for amending legislation.[65] It was around this time that Māori began to object to the operation of 28N rights; non-Māori quota holders began raising objections as well.

[91] While it may have taken some time for s 23's full implications to be appreciated, they are now well understood. MPI has for several years been attempting to resolve the difficulties and distortions caused by the operation of s 23. It has commissioned extensive policy work designed to address the anomalies it produces.

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64 For example, if there were ten tonnes of unredeemed 28N rights in the fishery, and the new TACC is ten tonnes or less, the 28N rights-holder will capture the whole of the fishery.

65 Maori Fisheries Amendment Act 2006.

[92] In 2018 MPI, together with Te Ohu and the fishing industry, established the "Section 28N Rights Working Group". It reported in 2019.[66] The Working Group's report noted the current redemption regime differs from the model designed for the tonnage-based system in 1986. The original model was never designed to take quota from existing holders. The report noted the distortionary effect of redemptions, particularly where they occur following reductions in TACC. After canvassing other options, the Working Group recommended a "compensated extinguishment of 28N rights". It described that course as the "only principled and most appropriate means of addressing this complex issue".[67] In 2020 a joint proposal by Te Ohu and the fishing industry recommended that the latter proposal be combined with compensation to iwi for settlement quota already lost.

[93] The then-Minister for Oceans and Fisheries, Hon Stuart Nash, was unpersuaded. He responded to the 2019 report by observing:

> To be honest, I'm not really of a mind to continue with this work. As mentioned a number of times, I am interested in the courts ruling on this. [P]lease provide an update, as I indicated that I wish court action to proceed.

[94] In 2020 Mr Nash observed that "sometimes it's best to just let the courts decide either way".

[95] In an affidavit in the present case, Alastair Cameron, the Director, Primary Sector Policy at MPI, observed:

> Officials have sought opportunities to resolve this issue. However, the issue is complex and there are a range of stakeholders or affected groups, including iwi and Māori, 28N rights holders, other quota holders in the affected stocks and recreational fishers. There is no easy solution that all stakeholders are likely to agree to.

[96] The distortionary effect of s 28N rights is not in dispute. What is heavily disputed, however, is whether the confiscation of settlement quota from Māori under s 23 breaches the 1992 settlement. The Crown says it does not.

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66 *Section 28N Rights: Report of Working Group* (10 December 2019).
67 At [59].

This proceeding

[97] The central proposition in Te Ohu's case is straightforward. Te Ohu contends the quota transfers under the Maori Fisheries Act 1989, which later formed part of the 1992 settlement, were meant to be permanent. It argues that an expectation of permanence, while not expressly set out in the Deed or the Settlement Act, was so obviously part of the settlement that it went without saying. The Crown and Māori were seeking an enduring solution. Just as Māori promised to surrender their right to litigate their commercial fishing rights and interests for all time, the Crown agreed to the permanent provision of quota and other benefits to Māori.

[98] One of Te Ohu's principal contentions is that the profound change to the 28N regime in the Fisheries Amendment Act 1990 was accompanied by so little discussion that nobody outside the Ministry realised or appreciated the implications it would have for settlement quota. Ministry officials did not emphasise the fact s 28OE transferred the Crown's 28N debt to the industry. ITQ holdings fluctuated from year to year under the proportional-tonnage system, and 28N redemptions were not publicised. Nor did the Crown draw attention to the fact the redemptions were coming at the expense of existing quota holders. Te Ohu says it was only after 2001, when the quota share system took effect, that quota holders realised they were losing quota year on year.

[99] The Crown says it simply promised that Māori would receive quota on the same basis as all other quota holders. By 1992, *all* quota holders were vulnerable to the loss of ITQ in favour of 28N rights holders.

[100] The Crown observes that the essential features of today's s 23 were in place when the Crown and Māori reached their settlement. Section 28OE of the Fisheries Act 1983, set out above, made it clear the first allocations of ITQ when TACC increased would go to 28N rights holders. It was only once all 28N rights were redeemed that existing quota holders would see the benefit of TACC increases.

[101] Moreover, s 28OD(7) provided that no compensation would be payable when ITQ were lost because of a reduction in TACC.[68] The Crown says s 28OE, when read together with s 28OD(7), should have made it clear that quota holdings could go down, but would not go up until 28N rights had been redeemed in full. In other words, it says the downwards-ratchet on quota holdings was there for all to see. The Crown says those negotiating on behalf of Māori in 1992 had considerable expertise, and the Maori Fisheries Commission had more than two years' experience working with the proportional-tonnage system.

[102] While the Crown does not go as far as to submit that Māori negotiators knew or expected that 28N redemptions would come at the expense of their settlement quota, it does observe that that outcome reflected the statutory status quo in 1992. In the absence of express agreement that settlement quota would be protected from confiscation, the Crown says it is impossible to conclude the parties agreed to disapply s 28OE to quota Māori received as part of the settlement.

Relief sought

[103] Te Ohu seeks four declarations, plus a catch-all. It asks me to declare:

(a) In allowing the 28N rights confiscations to occur the Crown is in breach of the fisheries settlement.

(b) The provisions of the Fisheries Act 1996 that allow the 28N right confiscations to occur are inconsistent with the fisheries settlement.

(c) To discharge its obligations under the Deed of Settlement and the Treaty the Crown is required to address the 28N rights anomaly.

(d) The Crown is obliged under the fisheries settlement to restore the lost 1989 settlement quota shares and compensate Māori for the losses arising from the 28N right confiscations.

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[68] Fisheries Act 1983 (as at 1 April 1990).

[104] It also invites me to make "such other declarations as the Court thinks fit".

The Crown's response

[105] The Crown denies it has breached the settlement. It says Te Ohu's case can only be understood as an attempt to read a non-existent implied term into the 1992 settlement. The Crown says the terms of the settlement are set out in full in the Deed itself, and that cl 1.3 expressly provided that the Deed "embodie[d] the entire understanding and the whole agreement between the Crown and Māori".

[106] The Crown contends there is no inconsistency between the ongoing loss of settlement quota under s 23 and the promises it made to Māori in 1992. It argues the settlement contains no implied terms, let alone an implied term that the quota provided to Māori pursuant to the settlement would be permanently protected. Mr Colson KC submitted there is no statutory mechanism in any of the settlement legislation capable of importing Treaty principles into the analysis. Rather, he submitted the Settlement Act must be read strictly and in accordance with its terms. Even acknowledging the Settlement Act was designed to implement the agreements in the Deed, Mr Colson argued there was nothing in that document capable of supporting Te Ohu's position.

[107] Mr Colson described the preamble to the Settlement Act, which reproduced large parts of the Deed, as a "non-operative" part of the statute. As a result, he submitted the preamble's reference to the settlement representing a "just and honourable solution in conformity with the principles of the Treaty" does not "establish Treaty principles as a legal standard" which the Crown must meet as a matter of law.

[108] The Crown emphasised the Court of Appeal's remarks in *Sealords* that the settlement itself was unenforceable and should be regarded as a political compact rather than a binding legal instrument. The Court observed:[69]

> The deed is couched in the form of a legal contract and contains, especially but not only in cl 6, numerous provisions having that appearance. One of

[69] *Sealords*, above n 4, at 308. See also *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 [*Forests case*] at 338.

> these, cl 1.2.5, is a severability clause designed to apply in the event of partial invalidity. Nothing in that clause or in the deed as a whole should be allowed to obscure the truth that the deed is a compact of a political kind, its subject-matter so linked with contemplated Parliamentary activity as to be inappropriate for contractual rights. At best the provisions for payments might be contractually enforceable, yet they are so associated with the rest of the deed that even that is doubtful.

[109] Mr Colson submitted that *all* quota holders are liable to lose shares under s 23. The Act does not single out settlement quota for expropriation; s 23 is an equal-opportunity confiscator. It takes from Māori and non-Māori fishing operators alike, and for better or worse is part of the everyday operation of the QMS. The Crown argued the loss of quota shares under s 23 is no different to the quota losses that occurred under s 28OE when the Deed was signed, and the uncompensated losses of settlement quota that always accompanied a fall in TACC under the proportional-tonnage system.

[110] The Crown relied, in part, on the Court of Appeal's 1997 decision in *New Zealand Fishing Industry Association v Minister of Fisheries*.[70] In that case, Te Ohu's predecessor, the Treaty of Waitangi Fisheries Commission, sought to argue the Minister was obliged to consider the inevitable loss of settlement quota before reducing TACC under the proportional-tonnage system. The Court of Appeal firmly rejected that submission, observing:[71]

> In our judgment the implication sought by the Maori appellants cannot be made. The evidence is that the Maori negotiators studied the QMS very carefully before deciding to settle their claims in return for quota. The capacity for a reduction has always been inherent in the quota system. No doubt no one anticipated a reduction of the present size, but under the settlement Maori accepted quota with its capacity to go down without compensation and up without cost. Under the settlement Maori became holders of quota along with all other holders. Their rights were in our view no more and no less than those of non Maori quota holders. The Minister was accordingly obliged to give them exactly the same consideration as all other holders of quota. Any other conclusion would be to give Maori a preference, which appropriately Mr Finlayson said that they did not seek.

[111] The Crown argued that by 1992 the main features of today's s 23 were in place. Māori received quota which, even as the law stood at the time, might be lost in favour of 28N rights holders. The Crown submitted that in 1992 all quota holders

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70 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries*, above n 32.
71 At 20.

knew, or should have known, that their holdings would only increase in line with TACC if there were no unredeemed 28N rights in the fishery.

[112] Mr Colson argued that quota are a statutorily-derived property right. As a creature of statute, quota are always subject to the twists and turns of the statutory scheme. There is no reason to single out this particular quirk for condemnation. Even leaving aside the fact the 28N regime existed in 1992, Māori could have had no expectation, when they entered the settlement, that the statutory regime would remain unchanged and entitle them to keep all their quota permanently.

[113] The Crown referred me to draft clauses which Māori proposed as part of the settlement negotiations, but which were not reflected in the final agreement. For example, Māori suggested a clause by which the Crown would undertake to preserve the QMS in its present form and not to take any action which "may in future have a detrimental effect on the utility and value of ITQ owned by any Māori or in which any Māori has an interest". A later draft suggested a provision by which the rights Māori surrendered under the agreement would revive if the Crown or Parliament took action "adversely affecting the value and utility to Māori of the QMS and ITQ". Mr Colson submitted the parties' ultimate rejection of those clauses confirms they did not intend settlement quota to acquire special status or special protection.

[114] The Court of Appeal made a similar point in its *New Zealand Fishing Industry Association* decision:[72]

> …While quota are undoubtedly a species of property and a valuable one at that, the rights inherent in that property are not absolute. They are subject to the provisions of the legislation establishing them. That legislation contains the capacity for quota to be reduced. If such reduction is otherwise lawfully made, the fact that quota are a "property right", to use the appellants' expression, cannot save them from reduction. That would be to deny an incident integral to the property concerned. There is no doctrine of which we are aware which says you can have the benefit of the advantages inherent in a species of property but do not have to accept the disadvantages similarly inherent. Of course, if the Minister is considering any reduction in TACC with a consequential reduction in quota, he must carefully weigh the economic impact of what he proposes to do both on individual quota holders and on the QMS generally. That is a given, but it would not be consistent

[72] At 16.

> with the capacity to reduce quota to hold that the property rights inherent in the QMS afford any kind of absolute protection from reduction. Thus the Minister was not in our judgment acting unlawfully simply by dint of the fact that his decision reduced the property rights inherent in the quota system.

The legal framework

The Settlement Act and related legislation

[115] The starting point, though it may appear obvious, is that the settlement crystallised the Crown's obligations under the Treaty. As already noted, it was the first modern and comprehensive Treaty settlement. The Deed, together with s 9(a) of the Settlement Act, expressly provided that performance of the Crown's obligations under the settlement would satisfy all claims, and discharge all commercial fishing rights and interests, of Māori under the Treaty.[73]

[116] The Deed and the Settlement Act recorded that the Crown and Māori sought "a just and honourable solution in conformity with the principles of the Treaty".[74] The Parliamentary Debates were littered with references to the Crown acknowledging breaches of the Treaty, and committing, through the performance of its obligations under the settlement, to fulfilling its Treaty obligations.[75]

[117] I reject the Crown's submission that the settlement has no enduring legal force. The Court of Appeal's comments in *Sealords* in 1992 and the *Forests case* in 2007,[76] which described the respective settlement deeds as political compacts rather than legally-binding agreements, pre-dated the legislation which immediately followed in both cases.

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73 Deed of Settlement, above n 6, cl 5.1. "… whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi or otherwise"; see also Settlement Act, s 9(a).

74 Deed of Settlement, above n 6, Preamble, recital J. Settlement Act, Preamble, recital (j).

75 (18 December 1992) 541 NZPD (Treaty of Waitangi (Fisheries Claims) Settlement Bill — Third Reading, Jim Bolger): Among many comments to this effect during the passage of the Bill into law, the Prime Minister, the Rt Hon Jim Bolger, observed during the third reading debate:

> This is an opportunity. This will allow New Zealanders to say in this Parliament that this generation of New Zealanders have acted to fulfil the obligations that were signed into being in 1840.

76 *Sealords*, above n 4 and *Forests case,* above n 69.

[118] It was the Settlement Act and subsequent legislation which gave the settlement legal effect. In *Sealords* the Court of Appeal said the Deed meant nothing until it was enshrined in legislation; six weeks later legislation enshrining much of it in law came into force.[77]

[119] The Settlement Act is to be interpreted in a manner that best furthers the agreements in the Deed. The preamble records key aspects of the underlying settlement, including its status as a "just and honourable solution in conformity with the principles of the Treaty". As the Court of Appeal later observed in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission*, "[t]he deed, unlike the resolutions, is not set out in the [Settlement Act] but plainly the Act was intended to implement it."[78]

[120] The settlement's enduring legal force is also confirmed by s 32(b)–(d) of the Maori Fisheries Act 2004. Section 32, read as a whole, confirms the agreements in the Deed still bind the parties, and that the Crown's obligations under the settlement remain in force.[79]

[121] I asked Mr Colson how he reconciles s 32 with his submission that all obligations pursuant to the settlement were discharged in 1992. I also asked how Te Ohu could have been established to assist the Crown to discharge obligations under a Deed that had no continuing legal effect. He replied that the Crown has a continuing obligation only to maintain a relationship with Māori. I do not accept that submission. The three limbs of s 32(b)–(d) make sense only in the context of an enduring agreement, where the two parties retain ongoing obligations to one another.

[122] The preamble to the Settlement Act refers expressly to the transfers of quota pursuant to the 1989 Act and the Crown's promise to transfer 20 per cent of new

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77 The *Sealords* decision was released on 3 November 1992. The Bill, which became the Settlement Act, was passed through all its stages in a single sitting, and received its third reading on 11 December 1992. The Settlement Act came into force on 23 December 1992.

78 *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 (CA) at [117].

79 See also *Seafood New Zealand Ltd v Royal Forest & Bird Protection Society of New Zealand Inc* [2024] NZSC 111, [2024] 1 NZLR 511 at [71] and [73]. In footnote 118, the Supreme Court noted that the Settlement Act did not expressly record that Māori endorsed the QMS, and added "for that, see cl 4.2 of the Deed of Settlement (23 September 1992)."

quota in the future. While the Maori Fisheries Act 1989 enacted an interim arrangement, the Deed (and later the Settlement Act) drew the fruits of the preceding three years of negotiation together into a single agreement. There appears no dispute that everyone intended the new agreement would be comprehensive and permanent.

[123] It follows that the Settlement Act provided legislative recognition of the Crown's promises to Māori under the Deed. It also provided the statutory basis for the Crown to resist future Treaty-based commercial fishing claims.

[124] Section 9 of the Settlement Act, which the Crown characterises as an absolute bar to the present proceeding, must be read in that context. Section 9 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, 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, or the adequacy of the benefits to Maori referred to in paragraph (a); and

> (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.

[125] Section 9(a) provides that current and future commercial fisheries claims have been satisfied by the benefits "*provided to Maori by the Crown* under the Maori Fisheries Act 1989, this Act and the Deed." In other words, it was the Crown's actual and promised fulfilment of its side of the bargain which discharged Māori claims under the Treaty. Similarly the Deed, incorporated by reference into s 3 of the Settlement Act, affirmed that the settlement was reached "in consideration of the respective obligations and agreements contained [within it]".[80]

[126] Section 9(b) must be read in light of s 9(a) and (by virtue of s 3) in a manner that best furthers the agreements in the Deed. In that context, it is plain its purpose is to protect the Crown from fresh claims. If proceedings were brought contending (for example) that the settlement provided inadequate recognition of the Crown's Treaty obligations, or which ignored the settlement entirely, s 9(b) would provide a complete answer.

[127] Mr Colson submitted s 9(b) deems the Crown to have fully met its obligations pursuant to the settlement, whether it has actually done so or not. In light of ss 3 and 9(a) of the Settlement Act and s 32 of the Maori Fisheries Act 2004, I have no hesitation in rejecting that submission.

[128] The result is that the Crown remains subject to the obligations it assumed in 1992. If legislation, ostensibly designed to give effect to the settlement, fails to discharge the Crown's obligations in full, then the Crown remains under a residual duty to do so in some other way. As long as the Settlement Act, which gives legal recognition to the promises in the Deed of Settlement, remains in force, the Crown's obligations endure.

[129] It also follows that as long as the Crown abides by the settlement, there can be no suggestion it is acting in breach of the Treaty. The corollary, however, is that

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[80] Deed of Settlement, above n 6, Preamble, recital M.

a breach of the settlement is also a breach of the Treaty, which must be met with an appropriate remedial response by the Crown.

Legal relations

[130] Ms Casey KC, on behalf of Te Ohu, asked me to note the Crown's submission that "the Deed does not, and was not intended to, constitute an attempt to create legal relations". That submission is as surprising as it is untenable. The 27 August 1992 Memorandum of Understanding between Māori and Crown negotiators plainly reflected a mutual intention to enter a binding agreement. It said so in as many words. For example, cl 2 provided:

> The parties wish to record their preliminary understandings on the matters agreed during the discussions which were conducted on a without prejudice basis without an intention to create legal relations. This Memorandum of Understanding ('MOU') does not create legal relations between the Parties, or in favour of third parties. Both acknowledged the need to seek endorsement of the matters contained in this MOU from their respective principals. *Following which it is the Parties' desire to enter into a binding Agreement.*

[131] Ms Casey noted that if the Crown's submission in this Court were correct, Crown negotiators would have misled Māori in 1992 when the final agreement was struck.

[132] The Crown plainly intended to conclude a binding agreement with Māori in 1992, and Mr Colson was wrong to suggest otherwise. My review of the contemporaneous documents, and the subsequent Parliamentary debates, leaves no doubt about the good faith of the respective Ministers and other Crown negotiators; indeed, the "spirit of co-operation and good faith" in which the settlement was struck is spelled out in the Deed itself.[81]

[133] The Crown's submission to the contrary may arise from a misreading of *Sealords*. As already noted, the Court's conclusion the Deed was a political compact with no legal force lasted only until it was ratified by the Settlement Act. After that it was incorporated by reference into legislation, and, as I have concluded, continues to bind the Crown today.

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81 Deed of Settlement, above n 6, Preamble, recital M.

[134] My approach to Te Ohu's claim is guided by the Settlement Act and, to the extent relevant, the Maori Fisheries Act 2004. The Crown stressed that the Treaty is not justiciable in the absence of legislation giving it legal effect. That submission is, of course, uncontroversial. But there are multiple statutes which give legal effect to the Deed, which itself is to be read in light of the principles of the Treaty. Further, the 2004 Act gives Te Ohu an express mandate to assist the Crown to discharge its obligations under the Deed and the Treaty.[82] Sometimes, when all else fails, that assistance may have to be achieved by bringing proceedings.

Declaratory judgments

[135] Declaratory judgment proceedings provide a mechanism for parties to obtain an authoritative ruling on legal questions. They perform a "critical constitutional function of vindicating legal rights and promoting the ideals of the rule of law".[83] Parties whose rights depend on the meaning of a statute or instrument — including an agreement — may seek a declaration.[84]

[136] The jurisdiction is discretionary; the Court may "on any grounds which it deems sufficient, refuse to give or make any such judgment or order."[85] The jurisdiction for making a declaration arises both under the Declaratory Judgments Act 1908 and the general equitable jurisdiction of the High Court.[86] It follows that even in the absence of a catch-all prayer for relief, the I am not constrained by the declarations Te Ohu seeks.

The Crown's affirmative defences

[137] The Crown relies on four affirmative defences. Because they would, if accepted, render the question of compliance with the settlement moot, I deal with them first.

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82 Maori Fisheries Act 2004, s 32(c).

83 Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [27.3.3(2)] citing *Middlecorp v Avondale Jockey Club Inc* [2020] NZCA 13 at [30] and [44].

84 *Mandic v Cornwall Park Trust Board (Inc)* [2011] NZSC 135, [2012] 2 NZLR 194 at [9].

85 Declaratory Judgments Act, s 10.

86 *Association of Dispensing Opticians of New Zealand Inc v The Opticians Board* [2000] 1 NZLR 158 (CA) at [10].

Jurisdiction to make declarations sought

[138] The Crown seeks to characterise Te Ohu's case as an application to declare s 23 inconsistent with the settlement. A declaration of that kind, it argues, is beyond the Court's power, and would offend both the Parliamentary Privilege Act 2014 and art 9 of the Bill of Rights 1688.

[139] That submission does not reflect Te Ohu's case. A conclusion that the settlement is not being fully honoured will not affect the operation of any existing statutory provision, nor would it affect the ongoing redemption of 28N rights.

[140] Te Ohu seeks a declaration that the Crown and Māori intended the transfer of settlement quota to be permanent, and not subject to compulsory reappropriation in years to come. A declaration to that effect would signal a residual, and presently unmet, settlement obligation. That breach could be rectified in any number of ways; it need not involve changes to today's iteration of the 28N regime. The Crown could provide redress which makes good the losses Māori, as a party to the settlement, have sustained without affecting the wider operation of s 23. Resolving the breach, if there is a breach to resolve, will be for the parties to work through in light of the Court's declarations.

Section 308 of the Fisheries Act 1996

[141] The relevant part of s 308 provides:

> **308 Protection of the Crown, etc**
>
> (1) No transfer of quota or annual catch entitlement by the chief executive under … [section 23] … —
>
> (a) shall be regarded as placing the Crown or any other person in breach of, or default under, any contract or arrangement relating to quota or annual catch entitlements, except to the extent that specific provision to the contrary is made in the relevant contract or other arrangement; or
>
> (b) shall invalidate any contract or other arrangement in relation to quota or annual catch entitlements, or be regarded as giving rise to a right for any person to terminate or cancel any such contract or other arrangement, except to the extent that specific provision to the contrary is made in the relevant contract or other arrangement; or

(c) shall be regarded as otherwise making the Crown guilty of a civil wrong.

(2) Nothing effected or authorised by—

…

(c) [section 23]; or

(d) any provision of the Fisheries Act 1983 that is amended or enacted by this Act—

shall be regarded as making the Crown liable to pay compensation or damages to any person.

[142] The Crown pleads that Te Ohu's proceeding is barred by s 308. It argues the proceeding effectively alleges the Crown is has breached a "contract or arrangement relating to quota", is "guilty of a civil wrong", and that the Crown is obliged to pay compensation to Te Ohu as a result.

[143] The Crown is right that a claim for damages or breach of contract arising from the operation of s 23 would be barred by s 308. But Te Ohu does not seek damages, nor does it allege breach of contract; indeed, a fundamental part of the Crown's case is that the settlement is *not* a contract.

[144] The Crown is right to submit that when the Deed was signed it represented a political compact; it was not, and is not, a contract. It would have remained unenforceable had it not been ratified by Parliament and incorporated by reference into legislation. It is enforceable today through the statutes which make it part of our legal framework, not as a matter of private law.

[145] Moreover, and as already noted, the Crown's settlement obligations define its Treaty obligations. A breach, if established, does not sound in damages; rather, the well-established principles which govern departures from the Crown's Treaty obligations will be engaged.[87]

[146] In any event, a provision such as s 308, which would prevent a claim for damages, is not determinative when declarations are sought. The Court may make declarations whether or not consequential relief is available.[88]

Section 9 of the Settlement Act

[147] As noted above, Mr Colson submitted that s 9(b) deems the Crown to have discharged its obligations under the settlement, even if it has not. It follows, he argued, that the Court may not examine whether the Crown has actually complied with the settlement. He argued Māori have no remedy even in the event of a blatant breach.[89] For the reasons discussed in paragraphs [125]—[129] above, I reject that submission. The Settlement Act was designed to facilitate implementation of the agreements in the Deed, not to license the Crown to breach its obligations with impunity.

Limitation Act 1950

[148] Finally, the Crown pleads that Te Ohu's claim is barred by the Limitation Act 1950.[90] It argues 28N rights have existed, in roughly their current form, since 1990. They were first discussed by the Court of Appeal in 1997.[91] Mr Colson submitted Te Ohu's claim is "tantamount to" a claim for monetary relief, and is therefore time-barred. The Crown also seeks to rely on "analogous common law / equitable doctrines".

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87 Including the Crown's duty to act honourably and in good faith, and the principle of redress.

88 Declaratory Judgments Act, ss 3 and 11.

89 Nor could there be any inquiry into an alleged breach by the Waitangi Tribunal: see Treaty of Waitangi Act 1975, s 6(7).

90 The Crown argues the actions giving rise to Te Ohu's complaint occurred before the Limitation Act 2010 came into force.

91 *New Zealand Fishing Industry Association (Inc) v Minister of Fisheries*, above n 32.

[149] This ground does not require extensive discussion. Te Ohu is not seeking damages, and neither the Limitation Act 1950 nor the Limitation Act 2010 apply. In any event, I have already determined that the settlement has ongoing legal force, and the Crown's obligations pursuant to it are as binding today as they were in 1992.

[150] It follows the Crown's breach, if there is one, is a continuing act. While the events which have led to this case date back many years, I am being asked to determine the rights of Te Ohu, and Māori more generally, as they stand today.

Concluding remarks

[151] I reject each of the Crown's affirmative defences. Moreover, this case is before the Court, at least in part, because the then-Minister indicated he wanted to allow legal proceedings to run their course and would be assisted by the Court's view. It is difficult to reconcile the Minister's apparent enthusiasm with the Crown's attempts to persuade me I am barred from even considering the questions Te Ohu has raised.

[152] Credible claims the Crown has breached its obligations under the Treaty (whether in the form of a Treaty settlement or more generally) should not be met with technical defences. Treaty settlements are steps towards reconciliation, the restoration of mana and the putting right of historic wrongs. They are too important, if a credible suggestion of breach emerges, to be resolved on anything other than their merits. If either party is non-compliant, it should be concerned about that and anxious to put things right.

The pleadings

[153] One measure of the gulf between the parties was the fact they were unable to agree about what kind of case this is. Ms Casey presented it as a public law proceeding; she characterised the issue as the nature and extent of the Crown's obligations under the settlement, the legislation implementing the settlement and (to

the extent it added anything) the Treaty. Te Ohu is not seeking private law remedies, but declarations of its rights which may form a basis for future redress.

[154] Mr Colson, by contrast, sought to insist this is a private law case. He argued Te Ohu's statement of claim, which refers to the presence of an implied term in the settlement, engages the principles of contract law. He argued Te Ohu is seeking to enforce the Deed as if it were a contract giving rise to private law rights. He relied heavily on the Supreme Court's recent clarification of the circumstances in which an unarticulated term may be implied into a contract in *Bathurst Resources Ltd v L & M Coal Holdings Ltd.*[92]

[155] Mr Colson sought to define the term Te Ohu was seeking to imply into the Deed as a promise settlement quota would never fall below the 10 per cent transferred under the 1989 Act. In fact, Te Ohu contended it was part of the agreement that transfers of quota to Māori would be permanent and would not be compulsorily re-acquired without compensation.

[156] Given the parties were at loggerheads during the hearing about the basis on which the case had been brought, I allowed them the opportunity to file further written submissions afterwards. I was particularly concerned at the Crown's suggestion it had misunderstood Te Ohu's pleadings and had not had the opportunity to meet the broader, public law footing on which the case was advanced. In particular, Mr Colson indicated the Crown had not understood that it was the legislation implementing the settlement which was said to provide the basis of the breach, rather than the Deed.

[157] Both parties have now had the opportunity to file further detailed submissions which comprehensively engage with the issues as they emerged during the hearing. As it transpired, the Crown's emphasis on the principles of private law has provided a useful cross-check on my approach to the Settlement Act and the agreement it was enacted to implement. All produce the same outcome.

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92 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

Has the Crown breached its obligations under the settlement?

[158] There are several strands to draw together. First, I examine the subjective understanding the parties had in 1992 when they reached the settlement.

The 1992 negotiations

[159] A singular feature of the 1992 negotiations was the speed with which they were concluded. The opportunity to acquire Sealord arose suddenly. The Crown and Māori recognised it had to be grasped immediately. As the Court of Appeal noted in *Sealords*, there were competing consortia bidding for Sealord, which meant negotiations unfolded under considerable time pressure.[93]

[160] Despite the speed with which negotiations unfolded, it is clear they were robust, and Māori had access to expert legal advice throughout. The Crown says, as a result, that Māori either must have understood, or should have understood, the way the Act had treated 28N rights since the 1990 amendments. Since 1990, all quota were subject to expropriation to meet the Crown's 28N debt; by 1992, those rights were governed by s 28OE, and Mr Colson submitted express agreement would have been required to exclude settlement quota from its reach.

[161] I do not accept that submission. The contemporaneous evidence offers no hint the negotiators on either side considered the operation of s 28OE, or the way the ongoing redemption of 28N rights might affect settlement quota. I doubt anybody involved in the negotiations was aware of the profound change the 1990 amendments had made to the way 28N rights were treated.

[162] Indeed, there is no evidence that anybody, at least outside the Ministry, understood the significance of the 1990 amendment for the 28N regime. If fishing operators were told, prior to its enactment, that the Crown's 28N debt would shortly be transferred to them, they took the news remarkably well; there is no evidence a single word of protest was raised.

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93 *Sealords*, above n 4, at 304.

[163] It is possible the full effect of s 28OE — that a large Crown debt had been quietly passed to other quota holders — was not well understood even within the Ministry. For example, Mr Shallard, who was Director of Operations at the Ministry in 1990, continues to deny the change had that effect. He deposed:

> I note that Ms [Tamar] Wells says … the Crown through the change to a proportional system in 1990 … transferred a "debt" it owed to 28N rights holders to be paid by other quota holders. I do not agree with that. It is more correct to say that under both systems (fixed tonnage and proportional) additional quota was going to be given preferentially to s 28N holders; and this is what has happened.

[164] In fact, Ms Wells' analysis is entirely accurate. Mr Shallard's response overlooks the identity of the party which provides the additional quota. Under the fixed tonnage system, new quota, which might otherwise have been sold, was provided by the Crown. In so doing it discharged its debt. Under the proportional system, the new quota is supplied by other operators, who would otherwise have been entitled to the benefit of the increase.

[165] It may even be that the privatisation of the Crown's debt was an unintended and (initially) overlooked side-effect of the shift to the proportional system; that would explain the Ministry's incomplete description of the 1990 Amendment Act's treatment of 28N rights.

[166] The fact that by 1992 the new regime had been in force for two years did not make its operation any clearer. The 1990 amendments were dense and technical; operators could have been forgiven for not studying them in detail, especially as the Ministry had signed a high-level summary which conveyed the most important aspects of the change but made no mention of the transfer of the Crown's 28N debt.

[167] At the same time, there is ample and conclusive evidence that Māori understood the transfers of quota would provide them with a permanent or perpetual stake in New Zealand's fisheries. For example, the Hon Matiu Rata, one of the principal Māori negotiators, advised the Ruatoria consultation hui that "[t]he

negotiators took meticulous care to ensure that this deal not only equated with Article II *but also the requirement of quota in perpetuity*".[94]

[168] Equally, it is clear Māori understood the shift to the proportional-tonnage model meant any losses of quota associated with a falling TACC would only be temporary. The following extract from the minutes of the Wairaka hui is instructive:

> Chair advised that compensation is for all [Māori]. George [Habib] advised that government changes all the rules over the last couple years. The new rule is now that they reduce proportional quotas. The reduction is without compensation but with an undertaking. The theory is still on the table and needs to be tested thoroughly.
>
> …
>
> George advised that one of the concerns arising from all hui is perpetuity of rights. In 1986 it was sold to us that rights would be held in perpetuity. It is difficult to talk about perpetuity in respect of fish because of its nature. Proportional quota it takes away perpetuity rights which you thought you held and used the North as an example re snapper.

[169] In other words, participants in the hui understood the proportional-tonnage model may cause catch entitlements to fluctuate from year to year, but there was no suggestion settlement quota could be lost permanently, let alone to repay a debt the Crown incurred in 1986.

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[94] Minutes of the hui held at Uepohatu Marae, Ruatoria, 9 September 1992. Emphasis added. Similar remarks, all attributed to the Hon Matiu Rata, include:

> The key factor in the Sealords proposal is the need to ensure perpetual quota – akeake quota rights. Quota acquired through Sealords, MFC and AFL should remain inalienable. (Pipitea Marae hui, 5 September 1992)
>
> Matiu explained that the ten per cent transferred by the Crown is a settlement. This matter is a treaty settlement matter. The law under the Fisheries Act 1983 provides permanency of quota. The ten per cent should not be subject to an alienation right. (Uepohatu Marae hui, 9 September 1992)
>
> The main task is to ensure that the quota perpetuates forever. The task of the negotiators is simply to get the fish. Other issues such as how allocation and property right is to be applied is for the motu to determine. (Uepohatu Marae hui, 9 September 1992)
>
> The fish quota must last forever. In terms of the Fisheries Act quota must be in perpetuity. The quota should not be made inalienable [*sic*], open to debt and bankruptcy. (Wairaka Marae hui, 10 September 1992).
>
> Securing of the quota should be in perpetuity and should not be available for debt and bankruptcy proceedings. Thus future generations can enjoy the right and usage of the resource. (Tauranga Moana Trust Board hui, 16 September 1992).

[170] The permanent nature of the allocation was underlined by the proposal that settlement quota would not be transferable, thereby ensuring it could not be traded away or otherwise lost over time. The legislation implementing the settlement afforded settlement quota special protection, both from alienation and from loss through other mechanisms.[95] The transfer of quota to 28N rights holders stands as a conspicuous exception.

[171] As to the understanding of Crown negotiators, it is sufficient to note that neither 28N rights nor the operation of s 28OE were mentioned in negotiations at any stage. Section 28OE was an obscure and technical provision. Fishing operators were not told they had lost quota shares to redeem other operators' 28N rights. In the pre-Internet era, fishing operators simply received a letter each year indicating their new annual catch entitlement. They could have been forgiven for understanding that reductions in catch entitlement reflected the usual fluctuations inherent in the new proportionate-tonnage model.

[172] I doubt anybody involved in the negotiations, on either side, fully understood the way the 28N regime operated after 1990. If they did, it is highly unlikely they worked through the implications of the new regime for the settlement. While both sides had access to expert legal advice, the records of the negotiations indicate that neither the technical detail of the Fisheries Act, nor any hazards within it, formed part of the discussion. Understandably, the negotiations focused on the big picture — what the Crown would offer and the permanent extinguishment of further commercial fishing claims in return. Both sides were determined to craft an enduring settlement which established a permanent and significant Māori presence in the industry.

[173] With more time, it is possible officials might have examined the proposal from a technical perspective, and identified the fact that settlement quota, now part of the Sealord deal, were vulnerable to reappropriation. Nonetheless, I am satisfied, based on the extensive body of contemporaneous material I have reviewed, that at

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95 See, for example, Fisheries Act 1996, ss 49A, 50(1A), 132(1)(c), 140A and 152B.

the time the settlement was negotiated, no one considered the way s 28OE would affect settlement quota.

[174] I am aware that conclusion is a striking one. Nonetheless, the evidence is clear. The events which drove the changes to 28N rights and the events which led to the 1992 settlement never intersected. I am satisfied that before 1992 nobody involved in either sequence gave any thought to the other.

[175] Indeed, it is evident the disconnect between the evolution of Māori fishing rights and the recovery of the 28N debt continued for many years. As already noted, even as late as 2004 the Maori Fisheries Act, as enacted, made no provision for the redemption of 28N rights. The conflict between the Crown's obligations to Māori, on one hand, and right holders on the other, only became evident after the 2004 Act came into force, and amendments were urgently required to facilitate the expropriation and redistribution of settlement quota.[96]

[176] It follows the contemporaneous evidence overwhelmingly supports Mr Dewes' recollection of the negotiations and the expectations of Māori. He deposed:

> 33 … In 1989 it was generally known that at some point in the future, when a total allowable catch for a stock would be increased, section 28N rights holders would be given quota tonnage at no cost, before others had the opportunity to buy. There was no thought that the 28N rights affected the existing rights of other quota holders – they only meant the 28N rights holders had 'first go' at acquiring new quota tonnage. This wasn't a live issue in the settlement discussions, and I don't think it was on anybody's radar at all as a potential problem.
>
> 34 No one contemplated in 1989 or in 1992 that the Crown would or could use the 28N rights actually to take quota shares away from other quota holders to give to the 28N rights holders. And it was never anticipated that having agreed to apportion a minimum percentage of the fisheries resource to Māori, the Crown might then sometime in the future turn around [and] take part of that back again. I do not believe that anybody in the settlement discussions – Crown or Māori negotiator – contemplated such a thing. That would have undermined the whole point of the settlement, and it would never have been agreed to.

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96 See [90] above.

[177] I accept Mr Dewes' account, and find it accurately reflects the respective understandings of Crown and Māori negotiators in 1992. I find the Crown and Māori negotiators intended and understood that the allocations of settlement quota which formed part of the settlement would be permanent. I also accept, without hesitation, that Māori would have regarded the proposed settlement as unacceptable if they had understood settlement quota would be subject to reappropriation, without compensation, in years to come. The hui which preceded the settlement made it clear the permanence of their stake was of critical importance in persuading Māori to embrace the agreement.

The Deed and 28N rights

[178] The next question is whether, and if so how, the fact the parties did not turn their minds to the effect of s 28OE affects the Crown's obligations under the settlement. Mr Colson noted the Deed made no mention of the transfer of quota being permanent, and submitted it is impossible to imply a term to that effect into the settlement. The Deed provided that it embodied "the entire understanding and whole agreement between the Crown and Māori relative to the subject-matter hereof", and that all other negotiations, representations, arrangements and statements between the parties were extinguished "save the Treaty of Waitangi itself".[97]

[179] It follows, Mr Colson submitted, that in the absence of an express reference to the transfer of settlement quota being permanent, it is not open to the Court to find the Crown promised to refrain from reappropriating parts of the settlement in years to come. Section 28OE sat in the background throughout the negotiations, even if nobody turned their mind to it. It was plainly implicit, he submitted, that the existing statutory regime would continue to operate. That regime happened to provide for the progressive confiscation of quota to satisfy the Crown's 28N debt.

[180] I am satisfied the Crown has mischaracterised the burden Te Ohu must meet. In effect, the Crown challenges Te Ohu to identify a term in the settlement which states or implies that settlement quota would *not* be subject to reappropriation without compensation.

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[97] Deed of Settlement, above n 6, cl 1.3.

[181] Yet every settlement, compromise or agreement presumes the transfer of valuable consideration will be permanent unless the agreement itself says otherwise. When two parties settle a piece of litigation, and one agrees to pay money to the other, there is no need to spell out that the payee takes the settlement sum permanently, and that the payer promises not to reclaim it in a few years to satisfy a separate debt.

[182] The presumption of permanence is straightforward but decisive. If the parties intend that part of an agreement will *not* be permanent, it is incumbent upon them to set that out expressly. Otherwise, it goes without saying.

[183] The Crown submitted that quota allocations, at least before the current share-based model came into force, were never permanent. Under both the original tonnage-based model and the proportionate-tonnage model introduced in 1990, quota could be lost as allowable catch levels fell. That is true, but those losses, which were accompanied by the promise of either monetary compensation or increases in quota as TACC rose in future years, were very different from the permanent, uncompensated loss of quota which accompanies the redemption of 28N rights.

[184] If the Crown had intended that, in addition to the well-understood swings and roundabouts associated with fluctuations in TACC, settlement quota would also be subject to permanent confiscation *without compensation* in some fisheries, it would have been a simple matter to spell that out in the Deed. That said, I am certain, if it had attempted to do so, that Māori would not have signed.[98]

[185] It follows that in the absence of any provision in the Deed which provided that settlement quota were subject to expropriation to meet the Crown's historic 28N obligation, both parties were entitled to presume the transfers would be permanent. If it were otherwise, Māori could have had no expectation that any of the other benefits they derived from the settlement would be permanent either. For an agreement like the 1992 settlement, which was designed to provide definitive

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[98] The central provision in the Deed of Settlement, cl 5.1, is headed "Permanent Settlement of Commercial Fishing Rights and Interests"; I am satisfied the expectation of permanence infused every aspect of the settlement.

resolution of a previously intractable dispute, impermanence and uncertainty would have been intolerable. Permanence is presumed in all agreements, but was essential in this one.

[186] Moreover, the Deed recorded that the Crown and Māori wished to "seek a just and honourable solution in conformity with the principles of the Treaty of Waitangi".[99] The same phrase is incorporated into the Settlement Act.[100] Previous agreements between the Crown and Māori were "excluded and cancelled save the Treaty of Waitangi itself."[101] It follows that Treaty principles inform the interpretation of the Deed.[102] Treaty principles, including the principle requiring active protection of Māori interests,[103] may be pressed into service in the event uncertainty arises about the correct interpretation of the settlement.

[187] Unilateral expropriation of Māori fishing assets, without compensation, is the antithesis of active protection. It is also a direct breach of art 2. As the Waitangi Tribunal observed in the Muriwhenua Report:[104]

> Were the Crown to exercise its sovereign power so as to expropriate land without compensation, it would be a gross breach of the terms of the Treaty. Fisheries are in no different position.

Conclusions

[188] These observations lead to an inescapable conclusion. The Sealord agreement and the Settlement Act affirmed the Crown's existing obligation to transfer 10 per cent of fishing quota to Māori.[105] That transfer was designed to give Māori a

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99 Deed of Settlement, above n 6, Preamble, recital J.

100 Settlement Act, Preamble, recital (j).

101 Deed of Settlement, above n 6, cl 1.3.

102 To be clear, I do not suggest the Treaty gives rise to justiciable rights outside the four corners of the Deed. Even then, enforceable rights arise only because the settlement has been incorporated by reference into New Zealand law (see [133]–[134] above).

103 For example, in *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, at 560, the Court of Appeal observed:

> Since the lands case, *New Zealand Maori Council v Attorney-General* … (see especially pp 664, 674, 682, 693, 703, 717), it has been established that the [Treaty] principles require active protection of Māori interests.

104 *Muriwhenua Report*, above n 2, at 211.

105 For these purposes I disregard the narrow exceptions to that obligation which arose, for example, when the Crown could not acquire sufficient quota to transfer the four 2.5 per cent tranches as they fell due between 1989 and 1992.

permanent baseline stake in New Zealand's commercial fisheries. The Crown and Māori understood and expected the transfers of settlement quota would be permanent, and that expectation of permanence forms part of the settlement.

[189] As noted, in the area of commercial fisheries, the settlement crystallised, and continues to define, the Crown's obligations under the Treaty. The obligation *not* to expropriate settlement quota without compensation continues to bind the Crown today.

[190] Mr Colson rightly observed that the mechanism by which quota are taken from Māori (and other quota holders) forms part of the Fisheries Act, and that settlement quota are expropriated by operation of law. The fact the confiscation of Māori assets is effected by legislation does not make the breach any less palpable.

[191] The Deed does not set out what should occur if one party breaches the settlement. No doubt in 1992 both parties regarded the prospect of systematic breach as unthinkable, and I am satisfied neither the Crown nor Parliament acted deliberately.

[192] As already noted, the parties intended to reach a just and honourable solution in conformity with the principles of the Treaty. The principles of active protection and redress are well understood. The nature of the redress the Crown provides when a breach is established is always a matter of negotiation between Treaty partners. My task is only to examine whether there has been a breach, and I am comfortably satisfied there has.

[193] For the avoidance of doubt, this conclusion does not affect the operation of s 23, nor does it declare it inconsistent with the settlement or the Treaty. 28N rights holders remain entitled to the quota they were promised in 1986. Similarly, nothing in this decision affects non-settlement quota. The Crown is in breach because the permanent transfer of settlement quota formed part of the 1992 agreement. The Crown is under no similar obligation to other quota holders.

[194] The Crown's enduring obligation is to ensure the loss of quota shares under s 23 does not affect the integrity of the settlement. It follows that if Māori lose settlement quota, the Crown is obliged to provide appropriate redress. The need to offset the losses Māori have incurred in favour of 28N rights holders represents an unmet settlement obligation.

[195] There are many ways the Crown might do so, and it would not be appropriate to venture suggestions. If all else fails, the Crown and Māori may simply agree that monetary compensation will provide adequate redress. Whatever combination of measures is chosen, it is clear the Crown is in ongoing breach of the settlement, and accordingly the Treaty, and that the breach must now be addressed.

Declarations

[196] The declarations Te Ohu seeks are set out at [103] above. None of the four pleaded declarations fully reflects my analysis. Mr Colson is right that the Crown has not "allowed 28N confiscations" in breach of the settlement; s 23 is the law, and the Crown is bound by it. And it would be wrong to declare s 23 inconsistent with the settlement or to declare that the Crown must compensate Māori for the losses they have sustained. As already discussed, this is not a claim for damages. It is well established that breaches of the Treaty require active and affirmative steps by way of redress.[106] But the terms of that redress will, in the first instance at least, be a matter for the settlement (and Treaty) partners to resolve among themselves.

[197] Nor is it appropriate to make broad declarations about s 23. Parliament enacted that provision to protect 28N rights holders, and this proceeding says nothing about s 23 as it applies to non-settlement quota. The breach does not arise because Parliament enacted s 23, but because the Crown has failed to offset its effect in a way which preserves the value of the assets Māori acquired under the settlement.

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[106] See *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 [*Lands case*] at 693; *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*Mighty River Power*]; and *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) [*Radio Frequencies*] at 182.

[198] Instead, I propose to rely on paragraph [30.5] of the amended statement of claim, which invites me to make "such other declarations as the Court thinks fit". I declare:

(a) The Crown's obligation to transfer 10 per cent of existing fishing quota to Māori, initially created by the Maori Fisheries Act 1989, formed part of the 1992 fisheries settlement.

(b) Both parties to the settlement intended the transfer of settlement quota would be permanent, and that quota would not be compulsorily re-acquired from Māori without compensation.

(c) It is a breach of the settlement, and by extension the Treaty, for the Chief Executive to appropriate settlement quota from Māori under s 23 of the Fisheries Act 1996 without providing redress which preserves the value of the quota Māori acquired as part of the 1992 settlement.

Final observations

[199] The Ministry and Parliament have been determined, since the 28N debt was created in 1986, to prioritise the interests of rights holders, even at the expense of other fishing operators. The Government's commitment to honour a promise it made in the earliest days of the QMS is commendable, even if it has selected a mechanism for doing so which is random and capricious in its effect, and discharges the Crown's debt by taking from one set of fishing operators to pay another.

[200] That said, in 1992 the Crown gained an incalculable, and permanent, benefit when the Government and Māori resolved their long running dispute about commercial fishing rights under the Treaty. I need not repeat my observations about the landmark nature of the Sealord deal, or the fact it represented a turning point in the relationship between Māori and the Crown.

[201] It transpired that a relic from the earliest days of the QMS put the Crown in a position where it had to choose between two groups to whom it had made promises.

In those circumstances, the honour of the Crown demanded a commitment to Māori at least as steadfast as the commitment it has shown to the holders of 28N rights.

Costs

[202] Te Ohu has been successful and is entitled to costs. The case has been an immensely complex one, which belies the fact the argument was compressed into a three-day hearing, albeit followed by further written submissions. I have little doubt each of the relevant steps required a comparatively large amount of time.[107]

[203] I will be happy to receive memoranda if the parties cannot agree, but my initial inclination is that the Crown should pay Te Ohu's costs on a 3C basis.

[204] If the parties require a ruling as to costs, I direct Te Ohu, as the successful party, is to file a memorandum on no longer than ten pages within ten working days of the release of this judgment. The Crown is to file a memorandum in response, also of no longer than ten pages, within a further ten working days.

Boldt J

[107] High Court Rules 2016, r 14.5(2)(c).

Appendix

The operation of s 23: hypothetical examples

[205] Imagine two otherwise-identical fisheries — Fishery A and Fishery B. In each case the TACC is 100 tonnes and there are ten quota holders, each of whom holds 10,000,000 shares. Each operator would receive an ACE of 10 tonnes, or ten per cent of the TACC.[108]

[206] In Fishery A, there was no overfishing at the time the QMS was established, so there are no 28N rights. If the TACC goes up to 125 tonnes in year two, each operator will receive a new ACE of 12.5 tonnes. If it drops to 80 in year three, each operator's ACE will fall to eight. And if it returns, in year four, to 100 tonnes, each operator will return to an ACE of 10 tonnes. Each operator retains its holding of 10,000,000 shares, irrespective of the changes in TACC.

[207] The same formula would apply if a sudden reduction, as occurred during the orange roughy crisis, were required. If TACC were cut to 20 tonnes, each operator's ACE would drop to two, but it would return to 10 when, in this example, TACC returns to 100 tonnes a few years later.

[208] Fishery B, on the other hand, was heavily overfished in 1986, so there are 60 tonnes of outstanding 28N rights. For the sake of simplicity, imagine those rights are held by a single operator.[109] As long as TACC remains constant at 100 tonnes, nothing changes. Everyone continues to hold 10,000,000 shares and has an ACE of 10 tonnes.

[209] But if the TACC goes up to 125 tonnes in year two, the ACE for the existing quota holders will not increase to 12.5 tonnes, but will remain at 10. Instead, the increase is allocated to the 28N rights-holder. It receives the whole of the increased catch entitlement, and a corresponding tranche of quota shares. Section 23 of the Act provides that 2,000,000 quota shares will be permanently taken from each existing

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[108] This is a deliberately oversimplified example, but it captures the essential operation of s 23, and the consequences of temporary fluctuations in TACC.

[109] For ease of explanation, I am overlooking the requirement that, in order to redeem 28N rights, an operator must already hold *some* quota in the fishery; nothing turns on this.

operator, and given to the 28N rights-holder.[110] Under this scenario, at the end of year two, the 28N rights holder will hold 20,000,000 quota shares, and the remaining quota holders will be down to 8,000,000 each.

[210] Further fluctuations in TACC make the anomaly even more apparent. If TACC drops to 80 tonnes in year three, the original quota holders' ACE will drop to 6.4 tonnes each (eight per cent of 80 tonnes), while the 28N rights-holder will be entitled to 16 tonnes (or 20 per cent).

[211] Now imagine TACC returns to 100 tonnes in year four. The "new" 20 tonnes of ACE will be allocated to the 28N rights-holder too. Despite TACC starting and finishing at 100 tonnes in this example, by the end of year four the original quota holders will be down to 6,400,000 shares (representing 6.4 tonnes of ACE) each, while the 28N right holder will hold 36,000,000 shares (representing 36 tonnes of ACE).

[212] The effects are exaggerated if there is a sudden and significant fall in TACC. In that event, quota holders stand to lose much of their holding, even if TACC later recovers. Imagine TACC falls from 100 to 20 tonnes. Each quota-holder's ACE will drop to two, though they will still hold 10,000,000 shares each. But when TACC begins to rise again, the whole of the increase will be allocated to the 28N rights holder, and quota holders' shares will be confiscated accordingly. By the time TACC reaches 50 tonnes, the rights-holder will hold 60 per cent of the fishery.[111] When it reaches 80 tonnes, the original quota holders will be down to 2,500,000 shares each — 75 per cent of their original shares will have been reallocated to the rights holder. Only then, when the 28N holding is exhausted, will increases in TACC translate into increases in ACE for quota holders. By the time TACC returns to 100 tonnes, original quota holders will receive an ACE of only 2.5 tonnes.[112]

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110 Fisheries Act 1996, s 23(1).

111 30 tonnes of the 50 will be allocated to the rights-holder.

112 Because the 28N rights-holder now holds 75 per cent of the quota, it will also receive 75 per cent of the 20 tonne increase which takes TACC from 80 to 100 tonnes.