

---

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

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

CIV-2023-485- 614

---

UNDER

The Declaratory Judgments Act 1908

BETWEEN

**TE OHU KAI MOANA TRUSTEE LTD**, a  
company with its registered office at 7  
Waterloo Quay, Pipitea, Wellington, together  
with **TE OHU KAIMOANA TRUST**, a trust  
incorporated pursuant to s 33(2) of the Māori  
Fisheries Act 2004

Plaintiff

AND

**Attorney-General on behalf of His Majesty  
the King in right of New Zealand**

Defendant

---

AMENDED STATEMENT OF CLAIM  
29 November 2023

---

Brianna Boxall  
Te Ohu Kai Moana  
158 The Terrace  
Wellington

Phone: 04 931 9500  
Email: [Brianna.boxall@teohu.maori.nz](mailto:Brianna.boxall@teohu.maori.nz)

Counsel:

Victoria Casey KC / Andrew Irwin  
Clifton Chambers

Phone: 021 0299 5428 / 027 472 2961  
Email: [victoria.casey@cliftonchambers.co.nz](mailto:victoria.casey@cliftonchambers.co.nz)  
[Andrew.irwin@cliftonchambers.co.nz](mailto:Andrew.irwin@cliftonchambers.co.nz)

**The plaintiff by its solicitor says:*****Parties***

1. The plaintiff is Te Ohu Kai Moana Trustee Ltd, a company with its registered office at Floor 12, 7 Waterloo Quay, Pipitea, Wellington. It is the successor to the Treaty of Waitangi Fisheries Commission (formerly the Māori Fisheries Commission) and the corporate trustee of Te Ohu Kaimoana Trust, a trust incorporated pursuant to s 33(2) of the Māori Fisheries Act 2004 (**Te Ohu Kaimoana**).
2. The defendant is the Attorney-General, named on behalf of His Majesty the King in right of New Zealand (**the Crown**).

***Dispossession***

3. By Te Tiriti o Waitangi<sup>1</sup> the Crown confirmed and guaranteed to the Rangatira, hapū and all Māori the full exclusive and undisturbed possession and te tino rangatiratanga of their fisheries.
4. In the following years Māori claimed the Crown had breached their Te Tiriti fisheries rights in various ways, including through the introduction of the Quota Management System (QMS) in 1986, which removed statutory recognition of Māori customary rights to fishing and fisheries.
5. In 1988 the Waitangi Tribunal found that the QMS, as then applied, was in fundamental conflict with Te Tiriti by apportioning to non-Māori the full, exclusive and undisturbed possession of the property in fishing that had been guaranteed to Māori through Te Tiriti, but that the QMS need not be in conflict with Te Tiriti if an agreement between the Crown and Māori could be reached.

---

<sup>1</sup> References in this statement of claim to “Te Tiriti o Waitangi” and “Te Tiriti” are references to both the Māori and English texts of te Tiriti o Waitangi/the Treaty of Waitangi and which are set out in the Treaty of Waitangi Act 1975, Sch 1.

***The Fisheries Settlement***

6. The Crown is party to a Deed of Settlement between the Crown and Māori dated 23 September 1992, that the parties entered into:
  - 6.1 to acknowledge that by Te Tiriti o Waitangi the Crown confirmed and guaranteed to the Chiefs, tribes and individual Māori full exclusive and undisturbed possession and te tino rangatiratanga of their fisheries;
  - 6.2 to resolve their disputes, outstanding claims and Te Tiriti grievances in relation to the fishing rights and interests and the Quota Management System, by way of a just and honourable solution in conformity with the principles of Te Tiriti o Waitangi;
  - 6.3 to affirm that they consider the completion and performance of the Settlement Deed to be of the utmost importance in pursuit of a just settlement of Māori fishing claims;
  - 6.4 to express their mutual and solemn acknowledgement that the settlement evidenced by the Deed marks the resolution of an historical grievance.
7. The Deed of Settlement followed on from a partial settlement in 1989 reflected in the Māori Fisheries Act 1989, and was further implemented through the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (together, **the Fisheries Settlement**).
8. Under the 1989 partial settlement the Crown agreed to make better provision for the recognition of Māori fishing rights secured by the Treaty of Waitangi through, inter alia, the commitment that Māori would receive 10% of all quota for all species then within the QMS (except where the Crown was unable to source the full 10% of for a particular stock, in which case compensation would be paid) (**the 1989 settlement quota**).

9. The Crown subsequently promoted the enactment of the Māori Fisheries Act 1989 and proceeded to transfer 10% of all quota in all stocks then within the QMS (except where the Crown was unable to source the full 10% of for a particular stock, in which case compensation was paid), in four tranches of 2.5% each. The final tranche was transferred on 1 October 1992.
10. The 1992 Deed of Settlement affirmed the 1989 settlement quota commitment, and further provided with respect to commercial fishing:
  - 10.1 Māori withdrew their legal challenges to the legitimacy of the QMS, discontinued their proceedings and agreed that their fisheries claims had been acknowledged and satisfied “*by the benefits provided to Māori by the Crown under the Māori Fisheries Act 1989, this Act, and the Deed of Settlement...*” (section 9 of the Settlement Act, clause 4.3 of the Deed);
  - 10.2 Māori endorsed the QMS and acknowledged that it was a lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand (clause 4.2 of the Deed); and
  - 10.3 Māori would receive, in addition to the already received 10 percent of the quota for stocks already in the QMS, 20 percent of quota for stocks that subsequently came into the QMS and \$150 million to enable Māori to purchase a 50 percent interest in Sealord Products Limited (clause 3 of the Deed) (together, **the settlement benefits**).
11. A central element of the Fisheries Settlement was the commitment that Māori would receive a permanent place in the commercial fishing industry, represented (in part) by the permanent apportionment to Māori of a minimum fixed proportion of total quota under the QMS.
12. It is an implied term of the Fisheries Settlement that the Crown will maintain the honour of the Settlement consistent with its obligations under Te Tiriti.

13. It is an implied term of the Fisheries Settlement that the Crown will maintain the honour of the Settlement consistent with its obligations in tikanga.
14. It is an implied term of the Fisheries Settlement that the Crown will not re-take the settlement benefits, and in particular would not subsequently enact legislation and operate the QMS in a way that had the effect of re-taking 1989 settlement quota, and reducing the minimum fixed proportion of the 1989 settlement quota.
15. Te Ohu Kaimoana is established under the Māori Fisheries Act with the purpose of advancing the interests of iwi individually and collectively, primarily in the development of fisheries, fishing, and fisheries-related activities, in order to -
  - 15.1 ultimately benefit the members of iwi and Māori generally; and
  - 15.2 further the agreements made in the Deed of Settlement; and
  - 15.3 assist the Crown to discharge its obligations under the Deed of Settlement and Te Tiriti; and
  - 15.4 contribute to the achievement of an enduring settlement of the claims and grievances referred to in the Deed of Settlement.
16. Te Ohu Kaimoana has standing to hold the Crown to account for its performance of its obligations under the Fisheries Settlement and (in that context) Te Tiriti.

***Re-taking of the settlement benefits by the Crown***

17. By a range of legislative amendments the Crown has developed a statutory regime that allows the Crown to re-take the 1989 settlement quota away from Māori without consent or compensation (**the 28N rights confiscations**).

Particulars

- 17.1 Amendments to the Fisheries Act 1983 in 1986 created preferential rights for certain quota holders to receive additional quota from the Crown when allowable catch limits were increased, without charge **(the s 28N rights)**.
- 17.2 The 28N rights were provided in lieu of compensation that would otherwise have been payable by the Crown, following allowable catch limit reductions effected by reacquisitions of quota by the Crown.
- 17.3 28N rights attached only to certain stocks that were in the QMS before the 1992 Deed of Settlement, so only affect (some of) the 1989 Settlement quota.
- 17.4 At the time of the 1989 partial settlement, 28N rights operated in a way that had no impact on the 1989 settlement quota.
- 17.5 The QMS regime was adjusted by the Crown in the 1990s from tonnage as a basis of ownership to proportional shares, with the quota for each stock permanently set at 100 million shares. The 1989 settlement quota were accordingly converted to 10 million quota shares (10%) for each stock already in the QMS<sup>2</sup> and 20 million quota shares (20%) for all new stocks coming into the QMS post Settlement.
- 17.6 The intention and effect of the adjustments to the QMS now reflected in the Fisheries Act 1996 were to allocate the risks and benefits of reductions and increases to total allowable commercial catch limits (TACC) away from the Crown to quota holders on a proportional basis. When TACC are increased or decreased under

---

<sup>2</sup> Except where the Crown was unable to source the full 10% for a particular stock, in which case a smaller number of shares was provided along with financial compensation to make up the shortfall.

the Act, the annual catch entitlement associated with each quota share goes up or down without cost or compensation.

- 17.7 No consequential adjustments to the 28N rights were made, creating unintended consequences for other quota holders (**the 28N rights anomaly**).
- 17.8 Specifically, whenever a TACC for a stock subject to 28N rights is increased the effect of the Fisheries Act provisions is that quota shares are taken from other quota holders and permanently transferred to the 28N rights holders.
- 17.9 The pre-existing rights of 28N right holders to receive additional quota when a TACC is increased is thus no longer a charge to the Crown, but now to the cost of other quota holders.
- 17.10 When TACC for a particular stock is reduced the effect of the 28N rights anomaly is exacerbated, as the 28N right holders then become entitled to a further additional increased proportion of quota relative to other quota holders when the TACC levels for that fishing stock are increased again.
- 17.11 If the TACC for a particular stock subject to 28N rights is temporarily reduced to zero, the effect of the 28N rights anomaly is that when the TACC is increased again all quota shares for that stock are permanently allocated to the 28N rights holders, resulting in a total loss of shares in that stock for other quota holders.
- 17.12 The effect of the 28N rights anomaly is thus, by operation of legislation, to re-take from Māori the quota shares allocated to them by the Crown under the 1989 partial settlement, in order to discharge what had been a financial obligation to the Crown to other quota holders.

18. The 28N rights anomaly was not recognised by the industry until after 2001 when the 1996 reforms came into force and quota was converted from tonnage to shares. At that point the operation of 28N rights (which now resulted in an actual loss of quota shares to other quota holders) was compounded and became transparent to quota holders.
19. In 2018 a Joint Working Group was established comprising 4 members from Fisheries NZ (part of the Ministry for Primary Industries) and 3 members from the seafood industry and Te Ohu Kai Moana (**the Joint Working Group**) to examine potential options to resolve the 28N rights anomaly.
20. The Joint Working Group agreed that the effect of the 28N rights anomaly on the proportionate shares in a stock means that the quota received under the Fisheries Settlement is being permanently reduced from when this quota was first transferred or allocated to Māori.
21. The Joint Working Group recorded in its draft report that research into the policy development and Cabinet and Select Committee considerations in the 1990 shift to a proportionate quota system shows that the effect of these changes on 28N rights was not considered, and “the distortionary effects of honouring the 28N rights under the new proportional system was lost in the complexity of the transition.”
22. Officials advising the Minister of Fisheries in 2020 confirmed that the 28N rights anomaly had been unintended.
23. The Crown has not taken action to resolve the 28N rights anomaly.
24. The Crown has continued to reduce and increase TACC in accordance with the provisions of the Fisheries Act 1996 in the knowledge that those decisions will result in further 28N right confiscations.
25. The re-taking of quota shares and diminution in the 1989 settlement quota is a direct financial loss to Māori. Further losses continue to be incurred.



Particulars (by way of example only)

- 25.1 In 2009 the Crown increased the TACC for LIN7 resulting in the permanent loss of 4% of the quota shares in that stock allocated to Māori under the Settlement;
- 25.2 In 2016 the Crown increased the TACC for SNA7 resulting in the permanent loss of 7.94% of the quota shares in that stock allocated to Māori under the Settlement;
- 25.3 In or about 2024 the Crown proposes to increase the TACC for SNA1 and SNA8: the estimated value of the settlement quota that could be taken by the Crown from Māori to meet the 28N rights is approximately \$10 million.
26. The Crown continues to obtain a benefit from the 28N rights anomaly by using it to compensate at no cost to the Crown the 28N rights holders who would otherwise have a claim against the Crown.

***Breach***

27. By its actions and inactions pleaded in paragraphs 17 and 23 to 26 above the Crown is in breach of the Fisheries Settlement.
28. By failing to observe the honour of the Fisheries Settlement the Crown is in breach of tikanga.
29. In failing to take effective steps to resolve the 28N rights anomaly and thus cause the re-taking of the settlement benefits away from Māori, the Crown is also in breach of its obligations under Te Tiriti.

**Relief**

30. The plaintiff seeks the following declarations under the Declaratory Judgments Act 1908 or the inherent jurisdiction of the Court:
- 30.1 In allowing the 28N rights confiscations to occur the Crown is in breach of the Fisheries Settlement;

- 30.2 The provisions of the Fisheries Act 1996 that allow the 28N right confiscations to occur are inconsistent with the Fisheries Settlement;
  - 30.3 To discharge its obligations under the Deed of Settlement and Te Tiriti the Crown is required to address the 28N rights anomaly;
  - 30.4 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
  - 30.5 Such other declarations as the Court thinks fit.
31. The plaintiff seeks costs.