IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE **CIV-2023-485-614**

UNDER THE	**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 the right of New Zealand** **Defendant**

AMENDED STATEMENT OF DEFENCE FOR THE DEFENDANT

13 December 2023

CROWN LAW
TE TARI TURE O TE KARAUNA
PO Box 2858
Wellington 6140
Tel: 04 472 1719

Contact Person:
Nicholai Anderson / James Watson
Nicholai.Anderson@crownlaw.govt.nz / James.Watson@crownlaw.govt.nz

The defendant by her solicitor says in response to the amended statement of claim dated 29 November 2023, that she:

1. Admits paragraph 1 except to say that:

    1.1 the name of the trust established in accordance with s 31(1) of the Māori Fisheries Act 2004 is "Te Ohu Kai Moana"; and

    1.2 it was the plaintiff, as trustee of Te Ohu Kai Moana, that was incorporated pursuant to s 33(2) of the Māori Fisheries Act 2004 (**MFA 2004**).

2. Is not required to plead to paragraph 2.

3. Admits paragraph 3 and relies on the text of Te Tiriti o Waitangi/Treaty of Waitangi (**Te Tiriti/the Treaty**) contained in Schedule 1 of the Treaty of Waitangi Act 1975 in its entirety.

4. In relation to paragraph 4:

    4.1 admits that:

        4.1.1 there was uncertainty and dispute between the Crown and Māori as to the nature and extent of Māori fishing rights in the modern context and whether they derived from Te Tiriti/the Treaty or common law or both (such as by customary law or aboriginal title or otherwise) and as to the import of s 88(2) of the Fisheries Act 1983 (**1983 Act**) and its predecessors; and

        4.1.2 Māori claimed in proceedings in the High Court and various claims to the Waitangi Tribunal that the QMS introduced by the Fisheries Amendment Act 1986 was unlawful and in breach of the principles of Te Tiriti/the Treaty, or had no application to Māori fisheries (including commercial fisheries), and obtained from the High Court and Court of Appeal, by way of interim relief, a declaration that the Crown ought not

take further steps to bring the fisheries within the QMS; and

4.2 otherwise denies paragraph 4; and

4.3 says further that:

4.3.1 s 88(2) of the 1983 Act, which provided that "Nothing in this Act shall affect any Maori fishing rights", was only repealed by s 33 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (**1992 Settlement Act**) on 23 December 1992;

4.3.2 s 89 of the 1983 Act was simultaneously amended by s 34 of the 1992 Settlement Act to enable the making of regulations "recognising and providing for customary food gathering by Māori and the special relationship between tangata whenua and places of importance for customary food gathering (including tauranga ika and mahinga kai), to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade"; and

4.3.3 ss 9 and 10 of the 1992 Settlement Act address the effect of the 1992 fisheries settlement on commercial and non-commercial Māori fishing rights and interests, respectively; and

4.4 relies on ss 9, 10, 33 and 34 of the Settlement Act in their entirety.

5. Admits paragraph 5 and relies on the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22) for its content and meaning.

6. In relation to paragraph 6:

6.1 admits:

6.1.1 the Crown is a party to a Deed of Settlement dated 23 September 1992 (**Settlement Deed**) between

the Crown and the Māori representatives listed in the Settlement Deed; and

6.1.2 the contents of the preamble to the Settlement Deed summarised in paragraphs 6.1 to 6.4; and

6.2 says further that the Settlement Deed is a political compact, its subject-matter so closely linked with (then) contemplated Parliamentary activity as to be inappropriate for contractual rights, that is only enforceable to the extent it has been given effect in legislation; and

6.3 relies on the Settlement Deed in its entirety, including as to its nature and character.

7. Admits paragraph 7 and:

7.1 says further that:

7.1.1 there was no Deed of Settlement recording the terms of the interim arrangement reflected in the Māori Fisheries Act 1989 (**MFA 1989**), which was intended (among other things) to make better provision for the recognition of Māori fishing rights secured by Te Tiriti/the Treaty and to facilitate the entry of Māori into, and the development by Māori of, the business and activity of fishing;

7.1.2 the Settlement Deed and the 1992 Settlement Act supersede the interim arrangement and fully and finally settle all claims directly or indirectly based on the rights or interests of Māori in commercial fishing (s 9 of the 1992 Settlement Act); and

7.1.3 the Settlement Deed was further implemented through the provisions of both the Fisheries Act 1996 (**1996 Act**) and the MFA 2004; and

7.2 relies on s 9 of the 1992 Settlement Act in its entirety.

8. In relation to paragraph 8:

8.1 repeats her pleading at paragraph 7.1.1 above;

8.2 otherwise denies paragraph 8; and

8.3 says further that:

8.3.1 ss 40 to 42 of the MFA 1989 provided for the transfer from the Crown to the Māori Fisheries Commission (**Commission**) of 4 instalments of 2.5 percent of the existing total allowable catches specified under ss 28C and 28CA of the 1983 Act at particular points in time;

8.3.2 s 41 of the MFA 1989 allowed the Commission to postpone the transfer of quota until a later date and/or request the Crown to transfer a quota equivalent;

8.3.3 s 42 of the MFA 1989 authorised the Crown to transfer a quota equivalent to the Commission where sufficient quota was not available; and

8.3.4 under s 40 of the MFA 1989, the final tranche of quota or quota equivalent was due to be delivered by 31 October 1992 (subject to the postponement power in s 41 of that Act); and

8.4 relies on ss 40 to 42 of the MFA 1989 in their entirety.

9. In relation to paragraph 9:

9.1 admits the Crown:

9.1.1 subsequently promoted the enactment of the MFA 1989;

9.1.2 proceeded to acquire and transfer quota, or an equivalent amount of money (**quota equivalent**) to the Māori Fisheries Commission (**Commission**) in accordance with ss 40 to 42 of the MFA 1989; and

9.2 otherwise denies paragraph 9; and

9.3 says further that:

9.3.1 in 1990, the Crown and the Commission entered into a "Backdated Quota Agreement" under which:

(a) the period within which the Crown was to acquire and deliver quota to the Commission was extended, by mutual agreement, to 31 October 1993; and

(b) the Crown and Commission agreed that where the Crown was unable to purchase quota in a timely manner, the Commission could elect to receive a quota equivalent pending the delivery of "backdated quota" at a later date, at which time the Commission would refund the quota equivalent; and

9.3.2 after the Backdated Quota Agreement expired on 31 October 1993, the amount of quota not delivered to the Commission by the Crown totalled 341.831 tonnes (of a total of approximately 60.5 thousand tonnes); and

9.3.3 in 1994, the Crown and Commission negotiated a final settlement of the Crown's outstanding obligations under the MFA 1989 and Backdated Quota Agreement (approved by Cabinet in CAB (94) M 22/7 (3b)) pursuant to which:

(a) the Crown transferred 42.766 tonnes of quota, being quota that was undelivered as at 31 October 1993 but subsequently acquired by the Crown;

(b) a final cash settlement of $9,402,632.50 in respect of the balance of quota undelivered by the Crown as at 31 October 1993;

(c) the transfer of 101.770 tonnes of quota, being quota previously offered to the Commission but rejected in favour of quota equivalent, at prevailing market prices; and

(d) the Commission reserved its ability to pursue options (including arbitration) in respect of certain lump sum payments deducted from the final cash settlement, and any consequential interest adjustments; and

9.4 relies on the provisions of the MFA 1989 and the terms of the Backdated Quota Agreement and CAB (94) M 22/7 (3b) in their entirety.

10. In relation to paragraph 10:

10.1 admits:

10.1.1 the Settlement Deed acknowledged (Preamble, Recital F) the quota provided under the MFA 1989 and the benefits delivered under the MFA 1989 are recognised as benefits of the settlement in s 9 of the 1992 Settlement Act;

10.1.2 paragraphs 10.1 and 10.2; and

10.1.3 the Settlement Deed provided that the Crown would pay $150 million to the Commission (on behalf of Māori) to enable Māori to purchase a 50 percent interest in Sealords Products Limited (Settlement Deed, cl 3.1); and

10.2 otherwise denies paragraph 10; and

10.3 says further that:

10.3.1 under the Settlement Deed (cl 3.2), the Crown agreed that it would:

(a) introduce legislation to amend the Fisheries Act to authorise the allocation of 20 percent of any new quota, issued as a result of the extension of the QMS to fish species not included in the QMS as at the date of the Settlement Deed (including any as yet unknown species) to the Commission for distribution to Māori; and

(b) consult with the Commission on the management regime to apply at the time of the extension of the QMS to the new species; and

10.3.2 the Crown subsequently, following consultation with the Commission (or its successors), introduced and promoted the enactment of the Bills that became:

(a) the 1996 Act, which provides (at ss 44 and 363) for the allocation of 20 percent of any new quota to the Commission; and

(b) the MFA 2004, which provided for the allocation of quota held by Te Ohu Kaimoana to Māori.

11. In relation to paragraph 11:

11.1 admits that:

11.1.1 one of the purposes of the MFA 1989 was to "facilitate the entry of Māori into, and the development by Māori of, the business and activity of fishing" (MFA 1989, Long Title);

11.1.2 the MFA 1989, Settlement Deed and the implementing legislation (namely, the 1992 Settlement Act, the 1996 Act and the MFA 2004) have secured a permanent place for Māori in the commercial fishing industry; and

11.1.3 one of the purposes of the MFA 2004 is "to provide for the development of the collective and individual interests of fisheries, fishing, and fisheries-related activities in a manner that is ultimately for the benefit of all Māori" (MFA 2004, s 3(1)(b)); and

11.2 otherwise denies paragraph 11; and

11.3 says further that:

11.3.1 quota issued under the 1983 Act was, and having been converted into quota shares under the 1996 Act is, issued to its holder in perpetuity subject to the provisions of the applicable legislation (including those that provide for reduction);

11.3.2 none of the MFA 1989, the Settlement Deed, nor the 1992 Settlement Act guaranteed that Māori would continue to hold a particular proportion of quota over time; and

11.3.3 the capacity for lawful changes in quota holdings, including as a proportion of total quota holdings:

(a) has always been inherent in the QMS, which Māori endorsed as a lawful and appropriate regime for the sustainable management of commercial fishing in New Zealand (clause 4.2 of the Settlement Deed refers);

(b) was inherent in the QMS at the time of the interim settlement given effect by the MFA 1989; and

(c) was inherent in the QMS when the Settlement Deed was signed in 1992; and

11.3.4 the Māori representatives who negotiated the content of the Settlement Deed with the Crown:

(a) were respected leaders, including the (then) Chair of the Commission;

(b) were represented by experienced counsel and received funding from the Crown to support the negotiation process; and

(c) studied the QMS carefully, including the nature of individual transferable quota (**ITQ**) at the time, before deciding to endorse it and compromise litigation challenging the QMS.

Particulars

(a) The Māori negotiators and their affiliates discussed the Settlement Deed at several hui throughout in September 1992, before the Settlement Deed was signed.

(b) This was an important step in ensuring the Settlement Deed was understood by and had the support of Māori.

(c) The Māori negotiators explained the care with which they had examined the QMS and the qualities of ITQ, and stated that they had done so with the benefit of advice.

(d) During one of these hui (on 10 September 1992), Dr George Habib specifically referred to the proportional system introduced in 1990 and noted that compensation would no longer be available for quota reductions.

12. In relation to paragraph 12:

12.1 denies the Settlement Deed contains any implied terms;

12.2 repeats her pleading at 6.2 above; and

12.3 says further that:

12.3.1 via the Settlement Deed and implementing legislation, the Crown and Māori sought and achieved a just and honourable solution in conformity with the principles of the Treaty of Waitangi;

12.3.2 there is no express term in the Settlement Deed that the Crown will maintain the honour of the settlement consistent with its obligations under Te Tiriti/the Treaty, or explaining what such a term would require;

12.3.3 the Settlement Deed was confirmed to embody the entire understanding and the whole agreement between the Crown and Māori and cl 1.3 of that Deed extinguished, cancelled, and excluded any previous negotiations, warranties, representations, agreements, and statements (if any) whether express or implied (including any collateral agreement or warranty) with reference to the subject matter of the Deed and the intentions of the parties to the Deed, save Te Tiriti/the Treaty itself (Settlement Deed, cl 1.3);

12.3.4 the provisions of the 1992 Settlement Act are to be interpreted in a manner that best furthers the agreements expressed in the Settlement Deed (1992 Settlement Act, s 3); and

12.3.5 the 1996 Act is to be interpreted in a manner consistent with the 1992 Settlement Act (1996 Act, s 5); and

12.4 apprehends that, to the extent paragraph 12 relates to the interpretation of the MFA 1989 or the legislation implementing the Settlement Deed, she is not required to plead to paragraph 12.

13. In relation to paragraph 13:

13.1 denies the Settlement Deed contains any implied terms;

13.2 repeats her pleadings at paragraphs 6.2, 12.3.1 and 12.3.3 – 12.3.5 above; and

13.3 says further that:

13.3.1 there is no express term in the Settlement Deed that the Crown will maintain the honour of the Settlement consistent with its obligations in tikanga, or explaining what such a term would require; and

13.3.2 the plaintiff has not identified the tikanga to which it refers or how it is alleged to bind the Crown, and as a result the defendant cannot understand or meaningfully respond to this allegation; and

13.4 apprehends that, to the extent paragraph 13 relates to the interpretation of the MFA 1989 or the legislation implementing the Settlement Deed, she is not required to plead to paragraph 13.

14. In relation to paragraph 14:

14.1 denies the Settlement Deed contains any implied terms;

14.2 repeats her pleadings at paragraphs 6.2, 11.3, 12.3.1 and 12.3.3 – 12.3.5 above; and

14.3 says further that:

14.3.1 there is no express term in the Settlement Deed to the effect that Māori would be permanently allocated a minimum fixed proportion of quota under the QMS or providing any form of relativity mechanism;

14.3.2 there is no express term in the Settlement Deed to the effect that quota allocated to Māori would be treated differently from quota allocated to non-Māori;

14.3.3 there is no express term in the Settlement Deed to the effect that the QMS would be maintained in its (then) current form (and any such clause would, in any event, be unenforceable);

14.3.4 it was an express term of the Settlement Deed that the quota Māori received under the Fisheries Settlement would be subject to the QMS, including those aspects of the QMS referred to at paragraph 11.3.3 above (clauses 3.2, 4.2 and the First Schedule of the Settlement Deed refer); and

14.3.5 the pleaded implied term is inconsistent with:

(a) ss 40 – 42 of the MFA 1989;

(b) the nature of quota under the 1983 Act at the time the MFA 1989 was enacted (ss 28D, s 28N and 28T) and the period during which the settlement quota was delivered (in particular, ss 28OD and 28OE);

(c) the terms of the Backdated Quota Agreement and the settlement of the Crown's obligations under ss 40 to 42 of the MFA 1989 recorded in CAB (94) M 22/7 (3b);

(d) the express terms of the Settlement Deed referred to at paragraph 14.3.4 above;

(e) ss 23, 163 and 308 of the 1996 Act; and

(f) ss 147A and 147B and cl 11A of Sch 6 of the MFA 2004; and

14.3.6 apprehends that, to the extent paragraph 14 relates to the interpretation of the MFA 1989 or the legislation implementing the Settlement Deed, she is not required to plead to paragraph 14.

15. Admits paragraph 15 and relies on ss 32 to 35 of the MFA 2004 in their entirety.

16. In relation to paragraph 16:

16.1 admits that Te Ohu Kaimoana has standing to hold the Crown to account for the performance of its obligations under the MFA 1989 and the statutes implementing the Deed of Settlement;

16.2 otherwise denies paragraph 16; and

16.3 repeats her pleadings at 6.2 and 15 above.

17. In relation to paragraph 17:

17.1 admits that:

17.1.1 where the total allowable commercial catch (**TACC**) for any stock is increased under s 20 of the 1996 Act and any person holds preferential allocation rights for that stock (**28N rights**), s 23 of the 1996 Act requires the chief executive of the administering department to first deduct shares from existing quota holders in accordance with a set formula and reallocate those shares to the 28N rights holder(s) to discharge those rights;

17.1.2 the operation of s 23 of the 1996 Act does not require the consent of existing quota holders;

17.1.3 s 23 of the 1996 Act applies equally to all quota shares, including those deriving from the ITQ delivered under the MFA 1989; and

17.1.4 no compensation for a reduction in quota shares under s 23 of the 1996 Act is provided to existing quota holders; and

17.2 otherwise denies paragraph 17; and

17.3 says further that:

17.3.1 the capacity for lawful changes in quota holdings, including as a proportion of total quota holdings, has always been inherent in the QMS and is a basic aspect of the property right obtained under the MFA 1989, the Deed of Settlement and implementing legislation;

17.3.2 the fact that capacity has been (lawfully) realised is an incident integral to the property received; and

17.3.3 although the mechanism for the redemption of 28N rights has been amended over time:

(a) the holders of 28N rights have been entitled to receive the first benefit of any increase to the total allowable (commercial) catch for a stock to which those rights attached since the inception of those rights in 1986;

(b) the redemption of 28N rights necessarily impacts the proportional holdings of other quota holders (whether expressed in tonnes or shares) and has done since the inception of those rights in 1986; and

(c) the effect on other quota holders has been virtually identical since at least 1 April 1990 (despite the later change from a tonnage to a share-based system); and

17.3.4 compensation was available for a reduction in ITQ holdings:

(a) prior to the enactment of the Fisheries Amendment Act 1990 (**1990 Amendment Act**) on 1 April 1990 (1983 Act, s 28D); and

(b) during a "transitional compensation period" between 1 October 1989 and 30 September 1994 established by the 1990 Amendment Act (1983 Act, ss 28OF-28OO); and

17.3.5 quota owners were not subsequently compensated for a reduction to their ITQ, but were (between 1 April 1990 and the commencement of the current system on 1 October 2001) instead entitled to a proportionate increase to their ITQ (in tonnes) resulting from any increase to the relevant TACC (over and above that required to discharge existing 28N rights); and

17.3.6 repeats her pleadings at paragraph 11.3.4 above.

Particulars

(a) The QMS was introduced by the Fisheries Amendment Act 1986, which inserted new Part IIA into the 1983 Act from 1 August 1986.

(b) To facilitate the operation of the QMS, Part IIA of the 1983 Act provided for the allocation, in respect of particular species or classes of fish and quota management areas (**QMAs**), of:

(i) provisional maximum individual transferable quota (**PMITQ**), based on the actual commercial catches of that species or class of fish taken by individual fishers and/or their

commitment to, and dependence on, the taking of fish or that species or class in that QMA (1983 Act, s 28E);

(ii) guaranteed maximum individual transferable quota (**GMITQ**), based on a pro rata reduction of all the PMITQ for a particular QMA to match the total allowable (commercial) catch for that area (1983 Act, s 28F); and

(iii) ITQ, which was allocated following the resolution of any appeals and necessary reductions of PMITQ (1983 Act, s 28O).

(c) PMITQ, GMITQ and ITQ were all expressed in tonnes.

(d) To facilitate the surrender of PMITQ to match the total allowable (commercial) catch, the Crown entered into voluntary agreements with fishers under s 28L of the 1983 Act (**buy-backs**).

(e) Where buy-backs were not sufficient to reduce the total PMITQ to the total allowable (commercial) catch for a QMA, the Director-General of Agriculture and Fisheries was required to reduce each fisher's PMITQ on a proportionate basis so that the total allowable (commercial) catch was not exceeded (1983 Act, s 28N).

(f) No compensation was payable for the reductions under s 28N (s 28N(3)) but, where the total allowable (commercial) catch for any

QMA was subsequently increased, quota holders who had PMITQ reduced under s 28N and continued to hold ITQ for that species or class of fish in the same QMA had a preferential right to be offered (on a proportionate basis and free of charge) ITQ up to the amount of PMITQ that had been reduced (1983 Act, s 28T).

(g) There are presently a total of 31 stocks to which 28N rights attach (at 1 October 2001 there were 50 such stocks), all of which are stocks covered by the MFA 1989.

(h) Until the commencement of the 1990 Amendment Act on 1 April 1990:

(i) an increase to the total allowable (commercial) catch did not, with the exception of 28N rights holders, entitle the holders of ITQ to any increase and additional quota had to be purchased (s 28T(3)); and

(ii) any decrease in the total allowable (commercial) catch required the Crown to either cancel any ITQ held by the Crown under s 28U(4) of the 1983 Act or reduce all ITQ on a proportionate basis and compensate the holders of ITQ for any reduction (1983 Act, s 28D(4)).

(i) Although the redemption of 28N rights at this time did not impact the ITQ of other quota holders (the tonnage remained the same), it

nevertheless changed the proportion of total ITQ held by other quota holders.

(j) From 1 April 1990, the 1990 Amendment Act changed the QMS to a proportional (tonnage) system.

(i) Under the amended system, quota holders who had been the subject of reductions of PMITQ under s 28N still had a preferential right to be offered (on a proportionate basis and free of charge) ITQ (in tonnes) up to the amount of PMITQ that had been reduced (1983 Act, s 28OE(1)(a)).

(ii) Following the redemption of any 28N rights, the holders of ITQ received (free of charge) a proportionate share in any increase to the TACC (1983 Act, s 28OE(1)(b)) but also shared in any reduction (1983 Act, s 28OD(3)).

(iii) Compensation for the loss of ITQ resulting from a decrease to the TACC was only payable during a transitional period between 1 October 1989 and 30 September 1994 (1983 Act, s 28OG).

(iv) These changes were intended to allocate the benefits and risks of increases and decreases to the TACC to the holders of ITQ.

(v) The redemption of 28N rights did not affect the ITQ of other quota holders (as previously, the tonnage remained the same), but did result in a permanent change to the proportion of quota held by existing owners, which was now more significant given reductions and increases to the TACC would be shared on a proportionate basis.

(k) The 1996 Act amended the QMS (from 1 October 2001) to a proportional (share based) system under which existing ITQ was converted to quota shares (1996 Act, s 343), with the sum of all quota for each QMA totalling 100 million shares and each share being equal to one hundred-millionth of the total allowable commercial catch for the stock (1996 Act, s 42).

(l) The Commission (and subsequently Te Ohu Kaimoana) was entitled to receive 20 million shares for any new stock introduced to the QMS (1996 Act, s 44). (As 28N rights do not attach to those stocks, they are unaffected by their redemption.)

(m) Under the proportional (share based) system, an increase or reduction of the TACC affects the Annual Catch Entitlement (ACE) generated by each quota share but does not (except where 28N rights apply) impact the number of shares owned by each quota holder.

(n) But where the TACC is increased in a QMA in respect of which an existing quota owner had PMITQ reduced under s 28N of the 1983 Act, s 23 of the 1996 Act requires the chief executive of the administering department to deduct shares from existing quota holders in accordance with a set formula and reallocate those shares to the 28N rights holder(s) to discharge those rights.

(o) The deduction and reallocation of shares to 28N rights holder(s) under s 23 of the 1996 Act results in a permanent change to the proportion of quota held by existing quota owners (to the same extent as s 28OE of the 1983 Act).

(p) The extent of the impact of redeeming s 28N rights under s 23 of the 1996 Act, as for s 28OE of the 1983 Act, depends on the relative size of the 28N rights entitlement (which are measured in tonnes) to the TACC.

(q) This means that where the TACC has been reduced to low levels, the subsequent redemption of 28N rights will have a larger impact on the shares of (other) existing quota owners.

(r) There are no instances in which the TACC for a stock with unredeemed 28N rights has been reduced to zero.

18. Denies paragraph 18 and says further that:

18.1 she rejects the characterisation of the current legislative settings as an “anomaly”;

18.2 although the changes to the QMS which commenced in 2001 made the impact of the redemptions of 28N rights more obvious (since it required a reallocation of shares), the effect of those redemptions on the proportionate holding of all quota holders was the same under s 28OE of the 1983 Act (from 1 April 1990); and

18.3 the fishing industry and Te Ohu Kaimoana's predecessor (the Treaty of Waitangi Fisheries Commission) have been aware of the effect of the redemptions of 28N rights since at least 1997 when the issue was raised in proceedings before the Court of Appeal to which they were a party (*New Zealand Fishing Association & Ors v Minister of Fisheries* 22 July 1997 CA 82/97).

19. In relation to paragraph 19:

19.1 admits that a joint working group comprising 4 members from Fisheries New Zealand (a business group within the Ministry for Primary Industries) and 3 members from the Seafood Industry and Te Ohu Kai Moana was established in 2018 to:

19.1.1 evaluate the impacts of honouring 28N rights on rights holders and the broader fisheries management system; and

19.1.2 examine potential option to resolve 28N rights, including the merits and shortcomings of the status-quo, mitigating options, or buy-back approaches; and

19.2 otherwise denies paragraph 19; and

19.3 says further that:

19.3.1 the joint working group was established in the context of legal proceedings challenging proposals in 2018 to adjust catch limits for stocks with 28N rights attached;

19.3.2 discussions by the joint working group regarding legal matters were expressly without prejudice to the parties; and

19.3.3 for the avoidance of doubt, the Crown does not waive privilege in any such discussions; and

19.4 repeats her pleading at paragraph 18.1 above; and

19.5 relies on the "28N Rights Policy Working Group Terms of Reference" in their entirety.

20. In relation to paragraph 20:

20.1 admits the Joint Working Group agreed in its draft report that "the effect of honouring 28N rights on the proportionate shares in a stock … means that the amount of quota received under the 1992 Deed of Settlement is permanently reduced from the level when this quota was first transferred or allocated to Māori" (at [34]);

20.2 otherwise denies paragraph 20;

20.3 repeats her pleadings at paragraphs 17, 18.1 and 19 above; and

20.4 says further that:

20.4.1 the Joint Working Group also observed (at 37]) that:

> Maori were aware that 28N rights were retained following the introduction of proportional quota but were not aware that the effect of this was for the Crown to transfer to quota owners its existing financial obligations towards 28N holders in the event of future TACC increases in 28N stocks.

20.4.2 the draft report of the joint working group dated 25 November 2019 does not represent government policy.

21. In relation to paragraph 21:

21.1 admits that the draft report of the joint working group states (at footnote 1):

> The Working Group could find no evidence that during the policy development and Cabinet and Select Committee consideration of the change to the QMS, the consequences of these changes on 28N rights were fully considered. The distortionary effect of honouring 28N rights under the new proportional system was seemingly lost in the complexity of the transition.

21.2 says further that the views of the joint working group are their own; and

21.3 repeats her pleading at paragraph 20.4.2 above.

22. In relation to paragraph 22:

22.1 admits that in a briefing to the (then) Minister of Fisheries dated 20 July 2020 officials stated (at [27]) that:

> Despite the evolution of the QMS from tonnage as a basis of ownership to proportional shares, 28N rights still endure as a tonnage amount. This has resulted in changes to how 28N rights are honoured, producing unintended impacts on other stakeholders in the fishery and the wider operation of the QMS.

22.2 otherwise denies paragraph 22; and

22.3 repeats her pleading at 18.1 above.

23. In relation to paragraph 23:

23.1 admits:

23.1.1 s 23 of the 1996 Act continues to have the effect described at paragraph 17 above; and

23.1.2 the Crown has not taken action to reform the operation of s 23 of the 1996 Act; and

23.2 otherwise denies paragraph 23; and

23.3 repeats her pleading at paragraph 18.1 above.

24. In relation to paragraph 24:

24.1 admits that:

24.1.1 the responsible Minister has continued to make sustainability decisions, including reductions and increases to the TACC, for particular stocks in accordance with the provisions of the 1996 Act; and

24.1.2 the Crown is aware of the impact of s 23 of the 1996 Act on other quota holders, including Māori; and

24.2 otherwise denies paragraph 20; and

24.3 repeats her pleadings at paragraph 17 above.

25. In relation to paragraph 25:

25.1 admits that any reduction in the proportion of quota owned by Māori (and other quota owners) caused by s 23 of the 1996 Act, or s 28OE of the 1983 Act, involves a financial loss compared to the hypothetical scenario where the TACC is increased without such a reduction;

25.2 admits the particulars at paragraph 25.1 and 25.2 of the amended statement of claim insofar as they refer to quota allocated under the MFA 1989;

25.3 otherwise denies paragraph 25; and

25.4 says further that:

25.4.1 the value of quota shares fluctuates depending on the ACE associated with each quota share, so that a smaller proportion of a larger total allowable catch may be of equivalent or greater value to a larger proportion of a smaller catch;

25.4.2 the effect of the redemption of 28N rights on the proportion of quota held by existing quota holders, including Māori, has been the same since 1 April 1990 and was apparent from the terms of the legislation at the time the Settlement Deed was executed;

25.4.3 Māori have substantially benefited, and continue to do so, from the totality of the benefits of the Fisheries Settlement of which shares of fish stocks in the QMS form part; and

25.4.4 in relation to the particulars at paragraph 25.3 of the amended statement of claim:

(a) although the total allowable catch and TACC settings for SNA 1 and SNA 8 are due to be reviewed in 2024, recommendations are yet to be formulated; and

(b) as a result, the value of quota delivered under the MFA 1989 that may be reallocated under s 23 of the 1996 cannot be reliably estimated at this time.

26. Denies paragraph 26 and says further that:

26.1 s 28N(3) of the 1983 Act was explicit that no compensation was payable for reductions in PMITQ under that section; and

26.2 the change to a proportional QMS in 1990 represented a trade-off under which quota owners would receive the benefits of any increases to the total allowable commercial catch (free of charge) while sharing the impact of any associated redemption of 28N rights, or reductions to the total allowable catch.

27. Apprehends that paragraph 27 contains an allegation of law to which she is not required to plead and otherwise denies paragraph 27.

28. In relation to paragraph 28:

28.1 repeats her pleadings at paragraph 13 above; and

28.2 otherwise denies paragraph 28.

29. In relation to paragraph 29:

29.1 apprehends that paragraph 29 contains an allegation of law to which she is not required to plead but, to the extent paragraph 29 pleads matters of fact, otherwise denies the allegation; and

29.2 repeats her pleadings at paragraphs 12, 17, 18.1 and 23 above.

30. Is not required to plead to paragraph 30.

31. Is not required to plead to paragraph 31.

32. Repeats paragraphs 1-31 above and pleads by way of affirmative defences:

FIRST AFFIRMATIVE DEFENCE: NO JURISDICTION TO MAKE THE DECLARATIONS SOUGHT

33. The implied term pleaded at paragraph 14 of the amended statement of claim is that legislation of a particular nature or type would not be passed.

34. Such a term creates no legal obligation and is of no legal effect (cannot be 'breached' or be the subject of a declaration) because the executive cannot restrict the legislative competence of Parliament by agreement.

35. The same applies to the implied terms pleaded at paragraphs 12 and 13 of the amended statement of claim to the extent that substance of these alleged implied terms is that the Crown in the Settlement Deed intended, or had any authority, to restrict the legislative competence of Parliament.

36. There is no jurisdiction under the Declaratory Judgments Act 1908 or the Court's inherent jurisdiction or otherwise to grant declarations:

36.1 that the Fisheries Act 1996 is inconsistent with the Māori Fisheries Act 1989 or the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (which is, in any event, denied); or

36.2 that expressly or impliedly criticise the conduct of the Executive and Legislature in connection with the law-making process and purport to require the Executive and Legislature to promote and enact legislation, such as the relief sought in paragraph 30 of the amended statement of claim (Parliamentary Privilege Act 2014

and the principles of comity and non-interference in the law-making process refer).

SECOND AFFIRMATIVE DEFENCE: SECTION 308 OF THE FISHERIES ACT 1996

37. Section 308 of the Fisheries Act 1996, which the defendant relies on as if set out in full, is a complete bar to:

37.1 the claim for relief sought at paragraph 30.4; and

37.2 any express or implied allegation to the effect that, as a result of the operation of s 23 of the Fisheries Act 1996, the defendant has:

37.2.1 breached the Settlement Deed;

37.2.2 committed a civil wrong; or

37.2.3 must or ought to pay compensation or damages.

THIRD AFFIRMATIVE DEFENCE: SECTION 9 OF THE TREATY OF WAITANGI (FISHERIES CLAIMS) SETTLEMENT ACT 1992

38. To the extent the allegations made by the plaintiff:

38.1 do not concern the interpretation of the Settlement Deed; and

38.2 are instead (expressly or by implication) allegations that:

38.2.1 the Crown has unfulfilled obligations to Māori in respect of commercial fishing; and/or

38.2.2 the benefits provided to Māori under the Māori Fisheries Act 1989, the Settlement Deed, or Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 in return for the full and final settlement of Māori claims in respect of commercial fishing were inadequate;

applying s 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, on which the defendant relies in its entirety, the Court does not have jurisdiction to hear or determine those allegations.

FOURTH AFFIRMATIVE DEFENCE (IN THE ALTERNATIVE): LIMITATION BY STATUTE AND/OR BY ANALOGY

39. In the event the Court finds the Settlement Deed does create rights or obligations the breach of which can sound in damages, that the Crown is in breach of those obligations, and that it has jurisdiction to make an order that the Crown ought to compensate Māori for losses arising from the operation of s 23 of the Fisheries Act 2003, the defendant says:

    39.1 the plaintiff pleads events dating back to 2009 as non-exhaustive particulars of the alleged financial loss that has been caused to Māori;

    39.2 this proceeding was not brought until 2 October 2023;

    39.3 the plaintiff has not been delayed in bringing proceedings by any mistake of fact or law or by any other reasonable cause;

    39.4 the plaintiff has not been suffering under any relevant disability;

    39.5 the defendant will be materially prejudiced in its defence by the plaintiff's delay;

    39.6 the relief sought at paragraph 30.4 is, or is tantamount to, a claim for monetary relief; and

    39.7 any claims regarding the loss particularised at paragraphs 25.1 and 25.2 of the amended statement of claim are therefore time-barred by the Limitation Act 1950 and/or by analogous common law/equitable doctrines.