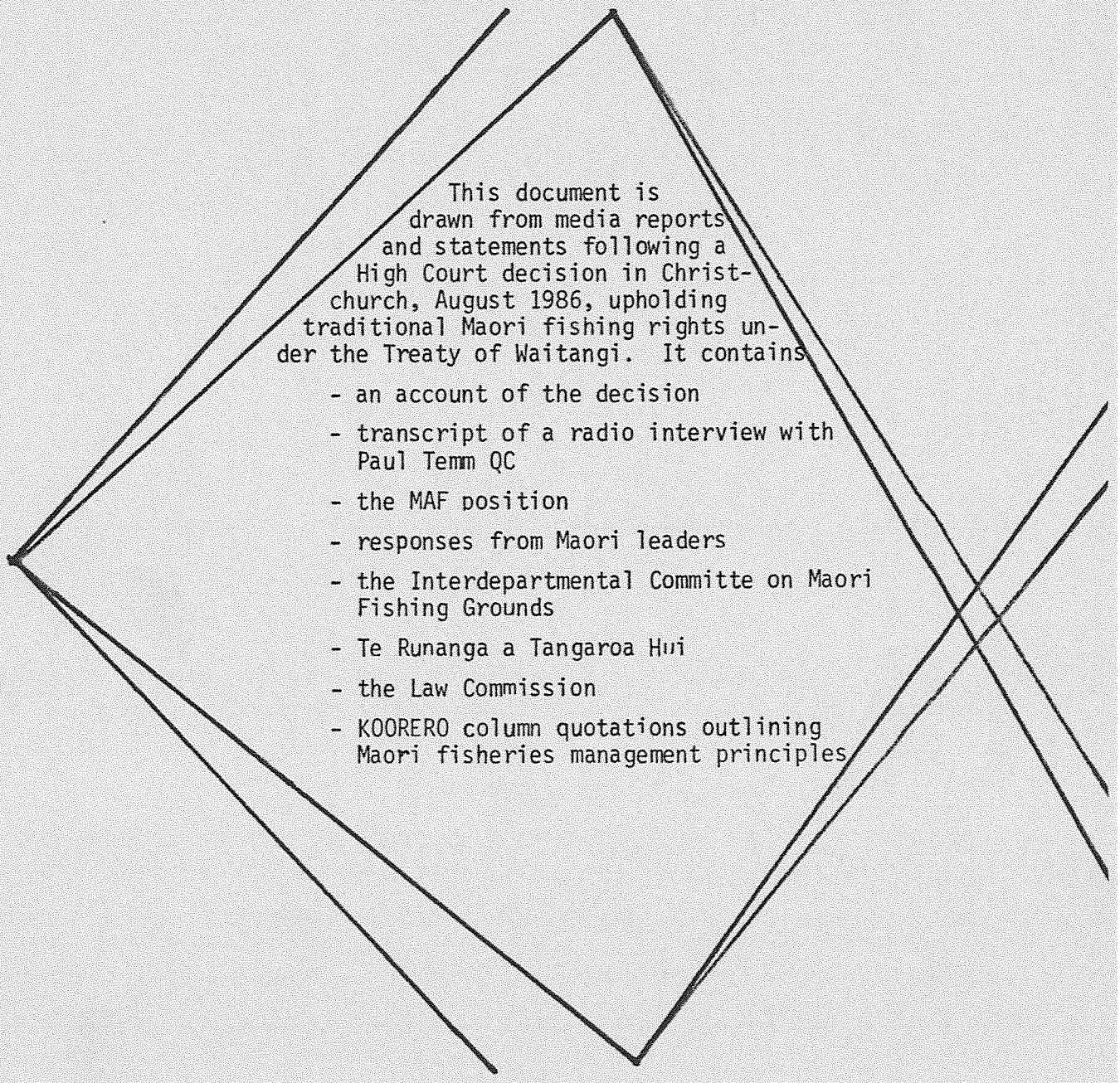
maori fishing rights



This document is drawn from media reports and statements following a High Court decision in Christchurch, August 1986, upholding traditional Maori fishing rights under the Treaty of Waitangi. It contains

- an account of the decision
- transcript of a radio interview with Paul Temm QC
- the MAF position
- responses from Maori leaders
- the Interdepartmental Committe on Maori Fishing Grounds
- Te Runanga a Tangaroa Hui
- the Law Commission
- KOORERO column quotations outlining Maori fisheries management principles

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In August 1986, in the High Court at Christchurch, Mr Justice Williamson made a far-reaching decision, by quashing a conviction for having undersized paua at Motunau Beach in January 1984, against Tom Te Weehi. Mr Justice Williamson ruled that Maori rights in the Treaty of Waitangi overruled any act or fishing regulations where Maori people took seafood for their own use. Section 88 of the Fisheries Act 1983, which stated, "Nothing in this act shall affect any Maori fishing rights" was the issue in the appeal against conviction.

Te Weehi was a Maori. He was born in Ruatoria and was a member of the Ngati Porou tribe and had lived at Waikari in North Canterbury about 13 years. From time to time he went to Motunau Beach to gather shellfish and catch fish. The shellfish was taken for immediate eating, and only upon a small scale. Before collecting seafood, Te Weehi obtained permission from a local Maori elder, Mr Rikiana Tau.

Extensive evidence was called in support of a customary right for particular Maori people to collect limited quantities of shellfish of reasonable length from stretches of beach over which their tribe or consenting tribe exercised control. At times the tribe exercising control would give approval to a member of another tribe to collect shellfish from their beach. Tribal enemies would not be given consent. Historically tribes had battled over access to fishing grounds and coastlines.

Mr Billy Awaroa Nepia, a senior lecturer in Maori at the University of Canterbury gave evidence of the history of such a right. He said that in exercising that traditional Maori right, the person collecting the shellfish had to act in a Maori way, taking the food for use rather than for sale. Certain areas of the coastline were 'rahui', that is, they were out of bounds for conservation reasons. Any Maori was obliged to respect sanctions imposed by the local people.

William Joseph Karetai, a Maori elder who has been a member of the New Zealand Maori Council for 25 years, a member of its special committee on fisheries and a member of the Southern Regional Fisheries Committee management board, is considered a leader and spokesperson for the Ngai Tahu tribe. He also gave extensive evidence about Maori customary fishing rights.

Mr Justice Williamson said that the Treaty of Waitangi, signed in 1840, set out rights which were to be protected, which arose from the traditional possession and use enjoyed by Maori tribes before 1840. "The evidence in my view is sufficiently clear, undisputed and precise to establish a customary right of the nature contended by Mr Te Weehi", he said.

The following interview with Queen's Counsel and former Waitangi Tribunal member, Paul Temm, broadcast 22 August 1986, responds effectively to many of the reactions which followed Mr Justice Williamson's decision.

A decision by the High Court in Christchurch has confirmed for Maoris a right guaranteed under the Treaty of Waitangi to take fish from traditional fishing grounds irrespective of laws or regulations covering fishing. The judge upheld a reference in Section 88 of the Fisheries Act 1983 that says that nothing in this Act shall affect any Maori fishing right. The decision has been welcomed by Queen's Counsel and former Waitangi Tribunal member, Paul Temm.

How has the Treaty been regarded in the past by the courts?

Until the Land Wars, the courts recognised the Treaty in the same way that similar treaties had been recognised by Canadian and United States courts and before then by English courts, including the Privy Council on many occasions: which was that a Treaty made between the Crown and an indigenous people was valid and binding in law. The fundamental proposition as I read it from the cases is that when the Crown makes a Treaty it gives its word, and the courts have always been very solicitous to ensure that the Crown should not disavow its own word, that it should not break its word, and they've always enforced that. That's been the case from 200 years before the Treaty was ever signed. Now until the Land Wars, that was the position in New Zealand.

But from 1877, after the Land Wars, there was suddenly a change, and instead of being on the main trunk railway along with the other colonies in the Empire, we took a siding of our own and said the Treaty was a nullity, it was meaningless, because it was not adopted into New Zealand law and international law, and therefore it had no effect. That kind of argument was advanced. Now this decision has thrown the points on the railway track and sent us back on to the main line, so to speak. It's a very important decision.

If we look at this particular decision, though, and if we assume that the Treaty of Waitangi obliges the Crown to protect Maori fishing grounds, taking undersized paua is an infringement of the Treaty.

I don't know why you say that. Taking undersized paua would be an infringement of Maori law. You see Maoris have got their own laws about fishing, and they're very important laws. I'll give you an illustration, it was part of the evidence on the Manukau Harbour case. It is Maori law, as far as fishing is concerned, that if you want to gather shellfish, you should use a kit that is no larger than to get sufficient food for a couple of meals for your household: and further than that, that kit should never be dragged across the surface of a sandbank or something like that, it should always be carried.

Now those laws, and others like them, are designed purely for conservation, they're very sensible. But the bitterness with which some Maoris giving evidence before the Waitangi Tribunal in the Manukau Harbour hearing described the way workmen from the steel mill extension site were gathering, in coal sacks, their shellfish, and dragging the coal sacks across the mud flats, and disturbing the other shellfish and exposing them to the seagulls and so on, the bitterness was intense; especially when they protested to the, mainly migrant, workers, who just told them what they could do with their Maori customs. Now, to say that to give the Maoris their rights under the Treaty is going to mean depredation of the fishing grounds is not sound. They've got their own laws, based upon their own rules of conservation.

Do you think that this decision is going to change anything?

Well, it remains to be seen. I wouldn't be surprised if the Fisheries division of MAF applied for leave to go to the court of appeal. Then the court of appeal would have to consider it, and we'd see what happened then. But as it stands today, it's going to change a great deal because at long last Maori people are going to be able to rejoice in the fact that promises they made, which they have kept, might now begin to be kept by the Crown. Now that's very important to them. And it's very important to us, especially to our grandchildren.

For the time being, Maori people will continue to have open access to fisheries if it can be proved that they have traditional fishing rights. However, Fisheries Inspectors will still arrest anyone breaking existing regulations and, if the Ministry's legal advisers identify circumstances different from the precedent-setting case, the offender will be taken to court.

Although the courts would rule in particular cases, the Ministry was looking at a long-term solution for difficulties in applying the law, he said. Discussions were being held with Maori groups to determine how best to incorporate into management plans who had traditional rights. These plans, with a code of Maori fishing practices might be acceptable to most people, although special legislation setting out who was entitled to fisheries might have to be passed. The Law Review Commission was studying fishing rights and might produce legislation that could be applied successfully. "It's a very complex question and will take some time to come up with the best answer", said Mr Dobson.

Although differing in detail, most reported Maori leaders welcomed the way the ruling affirmed rights guaranteed in the Treaty of Waitangi, while recognising that a great deal of work lies ahead in working out the details of managing customary rights, and most anticipated a transition stage while negotiations take place. Here is a selection drawn from public comments.

Maori Council Chairman, Sir Graham Latimer, Taitokerau, said that a new formula of management for the shoreline would be needed. That would have to involve Maori management. He said that the Waitangi Tribunal hearing on the Manukau Harbour had recommended that guardians of the harbour be appointed, consisting of both Maoris and Pakehas. He said this could possibly be a model for future management. The laws of the shoreline would have to be carefully reviewed.

The leader of the Mana Motuhake Party, the Hon. Matiu Rata said that instead of facing the prospect of a rash of testing actions, the Government should impose a moratorium on the law pertaining to traditional fishing rights. He said the Minister of Fisheries, Mr Moyle, should consult national Maori committees. "What is needed is a pause for consultation, so that rulings of the court can be upheld, and benefits can be assured to the Maori community".

Mr Manu Paul, Chairman of New Zealand Maori Council's Fisheries Subcommittee, said that adminstration of traditional Maori fishing rights should be done on a bicultural basis, and spelt out in law. Maori tribal authorities should be vested with the control indicated in the High Court decision. At Lake Taupo, the local tribe shared decision-making on regulations as well as income from trout fishing. That model, which had continued for years on a bicultural basis, should be followed by every tribal authority for fishing resources around the rest of the country.

Mr Paul said that the High Court case was saying the Maori law took precedence over the Pakeha law, however there ought to be orderly development and control over resources. The fisheries resource should be considered in the same way as the marae. "The marae is available for non-Maoris as well as Maoris. Tribal authorities control the marae." He said that the fisheries resource should develop using that concept of bicultural legislation, allowing Maori customary rights to be recognised alongside present conservation practices. "Quite clearly bicultural development of legislation means that both Maori and Pakeha share in the decision making of that legislation, and that has never happened before."

"Our main concern", said Manu Paul, is to ensure that no hiatus continues to exist where the fisheries officers are not sure whether the legal system will support their control measures."

Maori fisheries laws are far more stringent that Pakeha laws and regulations on fishing, says Aila Taylor, the fisheries authority for the Taranaki tribe of Te Atiawa. A common ground has to be reached between Maori and Pakeha on the question, and a way found to marry both sets of laws. In order to do this, Maori fisheries authorities had to work on defining the traditional fishing grounds. Mr Taylor, who was a member of the Interdepartmental Committee on Maori Fishing Grounds and attended Hui Tangaroa in November 1985, expressed impatience that this work was proceeding so slowly.

He said that one person was designated kaitiaki (protector-caretaker) within each hapu or tribe. His father had held the position, and he did so now. The role of the kaitiaki was to decide when a particular fishing ground was open and what could be taken. Both Mr Taylor and respected Wellington Maori elder Wiremu Parker repeatedly pointed out that extensive knowledge about traditional fishing laws and areas exists within Maoridom. It is spread around the country in pockets, and would take some time to be brought forward, and old tapu rules resurrected. It would be both possible and desirable for Maori and Pakeha to work out a common fishing policy reconciling both sets of interests.

On another occasion, Manu Paul reacted angrily to a suggestion that the Minstry of Agriculture and Fisheries intended to develop a consensus with the holders of Maori fishing rights and other interests on how to manage the fishery as a whole. "What we're saying is that the basis of all new legislation be the Treaty of Waitangi fishing right. What they're saying is that they will try to accomodate that and take it into account. That's a completely different ball game. They don't have that power."

Dr Ranginui Walker, Chairman of the Auckland District Maori Council, says that the decision "vindicates Maori faith in the Treaty's moral force". It reverses the declaration by Justice Prendergast in 1877 that the Treaty was a nullity. He points out that all the reactions to the decision are unnecessary, because at least 15 years ago, in 1971, the Maori Council made a 14-page submission based on the Treaty of Waitangi to the then Minister of Agriculture and Fisheries. Some of the issues raised in that submission included: the need for Maori reserves, public reserves, rotational and seasonal harvesting, recognition of rahui in marine law, opposition to mussel dredging and toheroa canning, opposition to exploitation of paua, an embargo on shore shellfish licences, conservation practices, pollution, and strict oversight of the coastline by bringing in tribal committees and Maori wardens to supplement fisheries officers. Pakeha intransigence ignored what was offered by responsible Maori leadership, and fifteen years when the information could have been gathered and a bicultural system put in place were wasted. Now in November 1986 Te Runanga a Tangaroa, the Hui made virtually the same recommendations again.

The High Court decision of Mr Justice Williamson seems to have put pressure on the Ministry to speed up a process which they had been engaged on haphazardly and with relatively low commitment for a couple of years. Despite some feelings of resentment within MAF, this seems all to the good, not just because it is almost a century since Maori rights under the Treaty were unjustly suspened, as Paul Temm points out, but because many urgent issues of conservation, exploitation and fisheries management are currently under consideration, and Maori people should have a decisive input into those discussions.

Decisions by the Waitangi Tribunal on Motunui and the Manukau Harbour, and the findings of the Interdepartmental Committee on Maori Fishing Grounds, whose first report was published in November 1985, have emphasised that the present laws, and present management policies do not give proper recognition to Maori interests. "There is a view that Maori fishing interests can be protected as part of the general public interest in fishing. This view reflects a refusal to take Maori values seriously or to come to grips with the promise our forefathers made in the Treaty of Waitangi. We must now face Maori demands for the exclusive use of traditional fisheries in accordance with a literal interpretatior of the Treaty" (Manukau findings).

The Interdepartmental Committee was composed of representatives of nine Government Departments, and Aila Taylor of Te Atiawa, and presented a unanimous report. It defined the Maori fishing grounds they were concerned with as "those sea, river and lake areas to which identifiable Maori hapu (sub-tribes) or other communities have traditionally and in modern times resorted to gather fish, shellfish or other marine resources." The committee stressed that it did not proceed from the premise that the whole coastline of Aotearoa is a Maori fishing ground. The facts about Maori fishing grounds are often unknown or obscure, and more exact knowledge should be systematically sought. "We do not think that all further action should be postponed until this information is available. The fishing grounds are certainly numerous and important. Any failure of the law to recognise them is a serious defect."

The law governing the grounds is contained in common law and general legislation and in numerous specific statutes and regulations, including local legislation. It is "seriously wanting in both precision and coherence". The committee said that while in the past the tendency had been to see the provisions of the Treaty as subordi te to other policies, it should be the other way round. While this would have considerable implications in terms of public policies and activities, both local and national, "we are compelled to think that history and justice support it, and the fundamental premises of a bicultural society reinforce it. The implications of a refusal to recognise Maori rights over their fishing grounds as a legal concept are likewise, in our view, considerable. Time may be running out."

In November 1985 Hui Tangaroa took place, organised by MAF, the New Zealand Maori Council and the Department of Maori Affairs. All tribes were represented, but the recommendations of this authoritative gathering have not been carried out with much speed. Aila Taylor has been critical of the lack of progress in gathering Maori expertise and information. Recommendations that legislation be derived from customary rights which predated and were enshrined in the Treaty, and that 'te tino rangatiratanga' of all fishery be vested in the appropriate tribes have been referred to the newly-established Law Commissio n .

Law Commissioner, Professor Ken Keith, says that commissioners Jim Cameron, who chaired the Interdepartmental Committee, and Jack Hodder, began work in the second part of 1986. Their task is to ensure that the law gives such recognition to the rights of the Maori in their traditional fisheries as is proper in the light of the obligations assumed by the Crown in the Treaty. The commission will be "trying to work out to what extent Maori fisheries are recognised by the law and how those various interests are to be reconciled with other interests", he says.

In a KOORERO column in the Listener of October 11th, 1986, Dr Walker outlined some of the general principles and patterns of traditional Maori fisheries management principles.
"Coastal tribes controlled sections of the coastline right around New Zealand with hapu (sub-tribes) responsible for control, use and management of smaller subdivisions. Shellfish beds, rocks and taunga ika (off-shore fisheries) were named as the property of hapu. These areas were basic to the subsistence economy and any encroachment by outsiders was regarded as an offence punishable by muru (ceremonial plunder in compensation) or even warfare. Tribal traditions abound with stories of poachers being killed."

"There were varying customary usages from tribe to tribe for the protection and conservation of fisheries. When gathering shellfish the young were instructed to komiri (sort out) the juveniles and return them to the sea. Cracking or eating shellfish on the rocks was taboo; it was an offence to Tangaroa who sometimes responded by withdrawing the bounty of nature. Unseemly behaviour along the coastline was strictly prohibited. According to one tribal leader, when he was learning to dive for paua in the Waitemata he was instructed by his elders to lick the slimy, gritty foot of each paua he took before putting it in his kit. Under this custom it took considerable fortitude to take more than a full kit."

"In the report of the Motunui hearing before the Waitangi Tribunal, the 'Aunties' of Te Atiawa recounted how in taking kina or paua they took great care to return any rock they had disturbed to its original position, for that was the 'home' of the shellfish, and an intact home ensured a continuous supply. Recent research by a Maori marine biologist suggests that juvenile sea-eggs are able to suspend growth until space becomes available to them, so when the shellfish are periodically harvested a juvenile takes up the empty space and resumes growth."

"The most widely observed conservation practice was the custom of rahui (prohibition or closed season) and its imposition was an expression of mana (sovereignty). .... In former times a rahui was imposed to allow fisheries to regenerate, but today its most common surviving use is in the case of drowning."

"Kaimoana is highly valued by the Maori. For centuries this bounty from the sea has been taken to feed one's family, to share with one's relatives and friends and above all to manaaki (honour) guests. ... Atiawa gave evidence that in preparing the table for a hakari (feast) on the marae they regarded kaimoana as the *piece de resistance*; that it was the expression of their tribal mana. When they were unable to honour their guests with kaimoana, they felt diminished. These values are beyond monetary considerations; that is why the commodification and sale of seafood is anathema to those who adhere to their traditions. They know that it is commercialisation that has progressively depleted snapper, crayfish, paua and natural stocks of mussels. Last year Maoris were agitated by a report that kina was the next likely species of kaimoana to be commercialised for the Japanese market."

*ACORD, Box 47-155 Auckland, KINA, $1.00, a paper about exploitation of seafoods.

As you mentioned, the Ministry of Agriculture and Fisheries says that they may appeal against the decision. But Fisheries Officers have expressed concern at the decision, because they want to know how they'll identify a Maori, whether that person has a traditional fishing right. Will that be difficult, do you think?

The first thing I'd do is employ Maori Fishery Officers. They'll tell you quick and lively who's a Maori and what their rights are. You see, there's a great dearth of Fishery Officers. The Manukau Harbour finding disclosed how unsatisfactorily the fishing regulations are being policed at the present time. And of course the knowledge that the Ministry had about the Manukau Harbour was extremely slender, largely because they haven't got the money and they haven't had the interest, I suspect. We made recommendations there that I hope will one day be followed.

To come back to your question, how will they tell a Maori? Very simple: once you identify a Maori fishing ground, they are easily identified I believe, then get Macris to police them and they'll soon sort it out - don't you think?

There's also been concern from the Federation of Commercial Fishermen, at the implication that the ruling will allow the taking of undersized fish.

Well, that's setting up a straw horse to knock it down, isn't it? As far as the commercial fishermen are concerned, the temptation is to make a rather tart reply but in the interests of reasoned debate one can say that really they should recognise and acknowledge the complaints that Maoris have been making about their activities for a long time, especially in the Manukau. To assume that because Maoris exercise a right that the Crown promised to them, something bad is going to happen, is not a reasonable assumption.

I think that they should accept the fact that if somebody's got a right to do something, you can expect them to do it sensibly and to protect their own interests. It is not in the interests of Maori people to deplete their own fishing grounds, and to say that they'll take undersized paua is really to make an assertion to try to justify an objection to the use of a right which is quite clear and again I say, if you want to protect a Maori fishing ground, leave it to the Maoris and they'll protect it beautifully.

The important thing also to bear in mind is that the Maoris aren't, and didn't in this case demand an exclusive right, which the Treaty gives them, they just said that they want to exercise the right to get fish on their own customary fishing grounds. They're not trying to prevent other people from getting fish there too. They've been extremely broad and generous, as we've said more than once in the Tribunal. Maori policy is always to share. The European tradition is not to share, that's the catch, and that's why the commercial fishermen are perhaps raising these objections, because they're looking at it in a European way. I suggest they stop and look at it in a Maori way, and they won't see quite the same difficulties that they're raising at the moment, I suspect.

Do you feel at all that this particular case was an unfortunate test case in that a conviction for having undersized paua was quashed by the judge? Now a report prompted by the Waitangi Tribunal and its decision on claims by the Te Ati Awa of Taranaki that their rights were being violated by pollution from Motunui concluded that laws on Maori fishing rights were a mess, but the report

said that proper recognition of Maori rights wouldn't mean their interests would always come first. Now in this particular instance, doesn't this mean that Maori interests do come first, no matter what?

It depends what you mean by Maori interests. If you acknowledge that it is in the interests of Maoris to preserve fishing grounds, then one needn't worry too much about the question of the size of the fish they take, because they won't take fish, shellfish, that are going to deplete the fishing ground, that's a foolish thing to do. In this particular matter, the customary right that was proved in the court, and accepted by the High Court Justice who considered it, was a right to take fish of a reasonable size in a reasonable quantity: in effect, for a couple of meals. Now, what's a reasonable size is a matter of looking at the nature of the fish, the kind of fish in that locality, and all that sort of thing. To talk about some arbitrary limit laid down by some regulation is one thing, but to talk about Maori customary fishing rights is to recognise the laws which the Maoris have themselves.

So, in effect, there would be two parallel laws governing fishing grounds?

Well, you'd have a law for everybody who didn't have the right to go on to that particular customary fishing ground - that would cover Maori and European and Yugoslav and Vietnamese and Chinese and everybody else. But for Maoris in a particular place, who had their own fishing ground, then they'd be entitled to get that fish for their food. Which is an important thing for Maoris. And that's what the Treaty intended, and that's what the promise was, and that's the promise which the High Court Justice concerned has acknowledged.

Putting aside European depredation of the environment, though, are you saying that Maori tribes should have sole rights to their fishing grounds, no matter what the larger ecological consequences were of what they did with them?

I don't know quite what that means, but all one can say at the moment is that the Treaty has given them certain rights in respect of their fishing grounds, and the Court has now acknowledged those rights. Now the consequences of that you'd have to look at case by case and place by place. But what I am asserting is that this is a return to the position that used to be the law in New Zealand before the Land Wars, and it's a return to the position that has been held in Canada for several hundred years, and in the United States for an equal length of time, right back to the American colonies, right back to the very beginning. It goes back to the seventeenth century. Now, to start at shadows about environmental damage seems to me to be like the fishermen saying they'll take undersized paua. Let's look at the principle first, ask ourselves: what is the right? then ask ourselves: should we allow this to be enforced?

12 September 1986 it was announced that the Ministry of Agriculture and Fisheries would not appeal the ruling. The Ministry's Assistant Director of Fisheries Management, Ray Dobson, said that an appeal on the legality of the ruling would not have got at the heart of the issue, which was defining which Maoris were entitled to fish, and where. Since 1983 Maori fishing rights had been written into Fisheries Management Plans. However, the ruling was the first to define it in one particular case, he said. The Ministry's legal advisers would consider cases "very carefully" before deciding to take them to court. "We don't want to clog up the courts for the sake of it", said Mr Dobson.