CHAPTER 1

WATERWAYS AND THE LAW

1.1 Introduction

Generally the law was the instrument used by the Crown to secure control, and in many cases the ownership, of New Zealand's waterways. From the mid-nineteenth century it is apparent that the Crown was attempting to establish itself as the owner of New Zealand's waterways. In pursuing this policy, a pattern is apparent. English common law presumptions were asserted insofar as they could be relied upon to secure rights for the Crown. But if these presumptions could not achieve this objective, common law was modified by legislative intervention. Such interventions initially saw the Crown assuming the right to manage and control waterways. But later confiscatory measures were initiated to vest exclusive rights in the Crown in such riverbeds and all natural waters.

In the Crown's quest for the ownership and control of lakes in New Zealand, a crucial consideration is the nature of the interface between Maori customary tenure and common law – especially the extent to which the latter accommodated the former. An important issue in this interface was the relationship between ownership and use rights under Maori and English law. Maori rights in waterways can be seen as being primarily about use rights, from which claims to ownership derive. However, under English law the reverse was the case: the right to use and manage a resource flows from the ownership of it. The way Maori were forced to reconceptualise their rights and customary law in order that they be cognisable under English common law, is one of the key issues of the colonial encounter in New Zealand. A full consideration of this, however, is beyond the scope of this project.

The endeavour of the Crown to establish itself as the holder of paramount rights in waterways was very much related to the imperatives that drove its colonisation of New Zealand. To ensure the long term viability of the colony, it was considered important to develop industries other than ones based solely on the extraction of natural resources such as gum digging and whaling and sealing. In this regard the establishment of an agricultural sector was seen as critical. And with the advent of refrigerated shipping in the late 1880s and the huge European markets that this opened up, the demand for land suitable for dairy farming was even greater. Hence the draining of swamps and mitigation of flooding (operations that often involved interference with rivers and lakes) to bring more land into agricultural production, was equated with the 'national interest'. The country's future lay in sheep and

cattle, not eel and koura. In realising this future, it was claimed that the rights of Maori and Pakeha were on the same footing, and that both must yield to the national interest. But invariably the 'national interest' was identical to that of the Pakeha farming sector, and in conflict with traditional Maori economic practices.

Although this report is about lakes, in considering legislation it is necessary to employ a wider focus given the interconnections that exist between lakes, swamps, and rivers. Often decisions made in relation to swamps, for example, had a profound effect upon lakes. This chapter begins with an examination of principles of English common law as they pertain to lakes. It then proceeds to examine how this law has found application in New Zealand, and poses the question of who, as a question of English law, owns the beds of lakes in this country. A survey of legislation that pertains to waterways follows. In particular, this section looks at the statutory regime put in place to manage freshwater fisheries, at legislation that enabled the drainage of lakes and swamps, and Acts that vested use and proprietary rights in the Crown.

1.2 Lakes at Common Law

As will be shown in the case studies, successive governments have at various times attempted to secure rights to New Zealand's lakes predicated upon precepts of English common law. An obvious issue in relation to these attempts is how applicable such precepts were in New Zealand with its long history of pre-colonial settlement, and where Maori customary tenure was recognised as being a burden upon the Crown's title. Although a comprehensive consideration of this is beyond the scope of this paper, a major issue is how Maori rights and relationships with the environment were often adjudged solely in relation to western principles of ownership. Although this report does not attempt a general analysis of Maori customary law in relation to lakes, this is a consideration in the case study chapters that follow this one. And the principle that clearly emerges from those examples, and upon which this entire report is premised, is that iwi possess bodies of law that pertain to lakes and other inland waterways.

The inappropriateness of applying precepts of common law to waterways in New Zealand is particularly apparent in relation to the separation that is made at common law between the ownership of the bed of a lake and its waters. The Crown on many occasions argued as a point of law that the ownership of the bed of a lake was a concept that was foreign to Maori customary law, and that consequently lakes were incapable of being owned by Maori. In regard to this contention the views of Judge Acheson in his 1929 decision as to the ownership of Lake Omapere are instructive. He observed that:

> The bed of any lake is merely a part of that lake and no juggling with words or ideas will ever make it other than part of the lake. The Maori was and still is a direct thinker and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soils that

> comprise a mountain. In fact in olden days he would have regarded it as a rather grim joke had any strangers asserted that he did not possess the beds of his own lakes. A lake is land covered with water, and it is part of the surface of the country in which it is situated, and . . . it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a stream.[1]

It would seem nonsensical to contend that in traditional Maori society were the bed of a river or lake to become dry land, that land would not be rightfully claimed by those that had previously held rights in the waterway. This example stands as testament to the huge differences between the way in which nineteenth-century Maori and colonial officials grounded in English common law, viewed the world – especially environmental phenomena. In the context of the ownership of lakes, this disparity gave rise to a mutual non-comprehension which in some respects has endured until the present.

But regardless of the relative propriety of the imposition of common law in New Zealand, the orthodox view is that Britain's acquisition of sovereignty in New Zealand brought with it the automatic application of British law.[2] This was confirmed by statute in 1858, and re-enacted in 1908.[3] And although there would appear to have existed the possibility of integrating aspects of Maori customary law into English law in New Zealand 'so that it reflected the real circumstances of time and place', this was never seriously considered.[4]

1.2.1 Ownership of lake beds at common law

In respect to lakes in England, it is clear that at common law, the Crown does not have prerogative rights to the beds of lakes. *Halsbury's Laws of England* states that the 'soil of lakes and pools, even when they are so large that they might be termed inland seas, does not of common right belong to the Crown'.[5]

It is agreed that when a lake is situated wholly within a single block of land, title to the bed of the lake resides with the owner of the land in question.[6] This view appears to have been accepted by the Crown in New Zealand. However, the situation in respect to lakes that are abutted by more than one property, is somewhat less settled. Essentially there would seem to be two possibilities: the title to the lake bed is shared *ad medium filum aquae* by the owners of riparian lands; or title resides with the Crown. The doctrine of *ad medium filum aquae* holds that title to the bed of a river or lake is divided between the adjacent riparian landowners – the rights of each extending to the midpoint of the river or lake.[7] This presumption of ownership by riparian proprietors refers only to the origin of the title. The title to the bed of the

1. Bay of Islands Native Land Court minute book 11, 1 August 1929, p 7
2. See Law Commission, *The Treaty of Waitangi and Maori Fisheries – Mataitai: Nga Tikanga Maori me Te Tiriti o Waitangi*, preliminary paper no 9, Wellington, Law Commission, 1989, p 139.
3. English Laws Act 1858, s 1; English Laws Act 1908, s 2
4. Law Commission, p 142
5. *Halsbury's Laws of England*, 4th ed, London, Butterworths, 1984, vol 49, p 219
6. Ibid; H J Coulson and U A Forbes, *The Law Relating to Waters: Sea, Tidal and Inland*, London, Henry Sweet, 1880, p 98

lake and the adjacent land are not inseparably connected: an owner may, for example, retain one and alienate the other.[8]

Coulson and Forbes, in their 1880 text, *The Law Relating to Waters: Sea, Tidal and Inland,* observe that the doctrine of *ad medium filum aquae* applies to all inland waterways regardless of whether they are lakes or rivers, with the possible exception of large lakes where the rule might cause inconvenience. However, they state that 'modern' decisions of the courts had removed that doubt. In *Bristow v Cormican*, an 1877 case concerning a large lake in Ireland, the court ruled that 'the Crown has no *de jure* rights to the soil and fisheries of large non-tidal navigable lakes.'[9] This view was reiterated by Lord Macnaghten in his decision in the 1911 case *Johnston v O'Neill* – a case again pertaining to an Irish lake. Macnaghten stressed that there was no difference in this respect between a small lake and a lake so large that it may be termed an inland sea. To his mind, the same law applied to all inland, non-tidal waters, regardless of their size.[10]

But in other common law jurisdictions, the issue of the Crown's right to lake beds is less clear. In the case of the Great Lakes of North America, for example, it has been held that English common law was not applicable, and the rights of riparian owners *ad medium filum aquae* were rebutted.[11] More recently in Australia, the notion that it is the Crown and not the riparian owners that own lakes, has gained some currency. In this regard the key piece of case law is the 1979 decision of the South Australian Supreme Court in *Southern Centre of Theosophy Incorporated v South Australia.* The case was primarily concerned with the propriety of the plaintiff having successfully claimed title to land that was formerly part of a lake bed abutting its property. However, the decision necessarily pertained to the ownership of the lake bed in question. On this point Zelling J ruled that it was the property of the Crown, noting that this was contrary to the decision in *Johnston v O'Neill.* In justifying this departure from common law, Zelling observed that however appropriate the decision in *Johnston v O'Neill* may have been to Ireland – with its long history of settlement – the same position ought not necessarily pertain in Australia where the Crown had always been 'the ultimate proprietor of all the waste lands of the colony'. Further, Zelling held that the requirement in South Australian legislation that provision be made for esplanade reserves whenever littoral lands are subdivided or otherwise developed, showed a public policy that did not generally favour the security of landowners.[12] Although the decision was

7. Property Law and Equity Reform Committee, 'Background Report on Ownership of River Beds', in *Interim Report on the Law relating to Water Courses*, Wellington, 1983, p 3; see also *Halsbury's Laws of England*, vol 49, p 215
8. Ibid, p 216
9. *Bristow v Cormican* (1877) 3 App. cas. 641, cited in Coulson and Forbes, p 98
10. *Johnston v O'Neill*, (1911) ac 552 at 578, cited in E J Haughey, 'Maori Claims to Lakes, River Beds and the Foreshore', NZULR, vol 2, April 1966, p 32
11. See FM Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', NZLJ, no 11, August 1981, p 368; Haughey, p 32, fn 12
12. *Southern Centre of Theosophy Incorporated v South Australia*, (1979) 21 SASR 399, cited in FM Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed'

later overturned by the Privy Council, the finding that the title to the bed of the lake resided in the Crown was not altered.[13]

1.2.2 Riparian rights

At common law, various rights accrue to the owners of lands abutting rivers and lakes. Importantly, the ownership of water is vested in no one; it being a common property resource like air. Riparian owners do, however, have various use rights in respect of waters abutting their land. Essentially they have the right to take and discharge water in accordance with their own needs, including the watering of stock. Conceivably the whole flow of a river could be taken if it was to be used for domestic purposes on riparian land.[14]

In terms of fisheries, the presumption at common law appears to be that the owners of lands abutting a lake have exclusive rights to the lake's fisheries. Hence if the lake is contained within a single block, the land owner has exclusive rights to the lake's fish. However, if several people own lands abutting the lake, the fisheries are shared between them. The public enjoys no rights to fish in such lakes either by custom or prescription. Similarly the Crown has no rights at law to the fisheries of lakes.[15] At common law, the owners of lake beds are entitled to the mineral resources within the bed.[16] Like navigable rivers, however, lakes are public highways at common law, and are navigable by all persons in a reasonable way for a reasonable purpose.[17]

1.2.3 The doctrine of accretion

Where land is bounded by water, the water boundary is not fixed but is movable. Such land is sometimes referred to as 'moveable freehold'. This raises the issue of who owns part of a lake bed that through a gradual and imperceptible change in the lake's water level, becomes dry land. The doctrine of accretion holds that this land accrues to the owner of the parcel of land to which it is added. Where the change is sudden (such as when a lake bed is uplifted by an earthquake) title to the accretion goes to whoever owns the lake bed. Riparian landowners are not entitled to land that is deliberately reclaimed.[18]

Brookfield draws attention to the possibility that many boundaries in New Zealand that appear to be water boundaries, are in fact fixed line boundaries that at the time of survey happened to coincide with a lake shore or river. In *Southern Centre of Theosophy Inc v South Australia*, the South Australian Supreme Court

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13. F M Brookfield, 'Accretion and the Privy Council', NZLJ, May 1982, p 174
14. G W Hinde, D W McMorland, and Sim, *Introduction to Land Law*, 2nd ed, Wellington, Butterworths, 1986, pp 556–557
15. *Halsbury's Laws of England*, vol 18, p 268
16. Property Law and Equity Reform Committee, *Interim Report on the Law Relating to Water Courses*, pp 11–12
17. Coulson and Forbes, pp 72, 101
18. Hinde, McMorland and Sim, pp 202–203

found that the boundary of the land in question was in fact not coterminous with the lake. Hence it ruled that the plaintiff had wrongly received title to an accretion of 20 acres.[19]

1.3 Lakes and English Law in New Zealand

It is agreed by various commentators that the legal situation vis-a-vis inland waterways in New Zealand – especially as to their ownership – is at best indeterminate.[20] There can be little doubt that lakes come within the ambit of article 2 of the Treaty of Waitangi – as either 'taonga' in the Maori version, or as 'fisheries' or 'other properties' in the English version. But as has been the case with land in New Zealand, the Treaty did not guide the policy of successive governments in respect to lakes.

In New Zealand a key piece of case law pertaining to the ownership of lakes is the Court of Appeal decision in *Tamihana Korokai v Solicitor General*. The plaintiff sought a determination from the court that he had a right to go the Native Land Court to have his claimed title to the Rotorua lakes investigated. This right, however, was disputed by the Crown.The Solicitor General claimed that his assertion that the bed of lake in question was Crown land meant that the Native Land Court could not investigate whether the bed was Maori customary land, and that this settled the matter.[21] In this regard, the Crown saw the case as an opportunity to get the Land Court to decide as a matter of law the legal position with regard to the ownership of inland navigable lakes.[22] The Crown's contention, however, was rejected unhesitatingly by the Court. It was ruled that the Native Land Court could determine title to land that was claimed by the Crown, and that the fact of whether the land was a navigable lake or not, was immaterial.[23]

Although the New Zealand courts made it clear in the late nineteenth century that the doctrine of *ad medium filum aquae* applied to rivers in New Zealand,[24] its application to lakes is doubtful. The only piece of domestic case law which holds that the presumption applies to lakes known to the present author is the 1905 case of *Strang v Russell*. Under the special circumstances of that case, it was held that the presumption of ownership *ad medium filum aquae* applied to sections abutting a small lagoon. However, Hinde, McMorland, and Sim state that this presumption 'is almost certainly not of general application'.[25]

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19. Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', p 365
20. J A B O'Keefe *The Law and Practice Relating to Crown Land in New Zealand,* 1967, cited in Property Law and Equity Reform Committee, 'Background Report on Ownership of River Beds', p 9; Hinde, McMorland, and Sim, p 202
21. *Tamihana Korokai v Solicitor General*, (1912) 15 GLR, 95, p 95
22. Haughey, p 30
23. Ibid; Haughey, pp 30–31
24. See *Mueller v the Taupiri Coal Mines Ltd*, (1900) 20 NZLR 89 (discussed below)
25. Hinde, McMorland and Sim, p 202

In an article on accretion and the ownership of lakes, Professor F M Brookfield considers the decision in *Southern Centre of Theosophy Incorporated v South Australia* in relation to the question of lake ownership in New Zealand. In particular he discusses it in relation to *Tamihana Korokai v Solicitor General.* Brookfield opines that the Court of Appeal's decision in respect of the Rotorua lakes only makes sense if the bed of the lake is Crown land, subject to Maori customary title if found to exist. This, he claims, is consistent with the view that the Crown holds an allodial title in New Zealand, subject only to Maori customary title. Brookfield attaches significance to the court's finding in *Tamihana Korokai* that the ownership of the bed of Lake Rotorua could be investigated independently of the lake's riparian lands. This, he considers, is consistent with the view that Crown Grants for lands abutting the lake did not carry with them title to the midpoint of the lake: in effect a rebuttal of the doctrine of *ad medium filum aquae*. Hence Brookfield contends that:

> saving where the Maori customary title in a lake bed is found by the Maori Land Court to exist . . . or has been lawfully extinguished under statute, the bed in such cases generally remains the allodial property of the Crown.[26]

Brookfield's argument is consistent with what has been termed an orthodox view of tenure in New Zealand. This view holds that upon annexation, the Crown acquired the allodial title to all lands in New Zealand, and that the only fetter upon this is Maori customary title.[27] This was the opinion held by Crown officials such as John Salmond and Francis Dillon Bell in connection with the major lakes cases heard by the Native Land Court in the first decades of the twentieth century (these are discussed in the following chapters). Salmond, the Solicitor General from 1910 until 1920, had presented the Crown's case in *Tamihana Korokai* and subsequently worked hard but unfruitfully to establish the Crown as being the owner of lakes in New Zealand. He maintained that under the Treaty of Waitangi the Crown acquired both imperium (territorial authority) and dominium (ownership) subject to Maori customary rights.[28] Subsequent to the Native Land Court decision awarding Maori title to Lake Waikaremoana, Bell, the Attorney General stated a similar view, stressing the limited nature of the Maori customary title:

> By the Treaty of Waitangi the whole fee simple of the land of New Zealand became vested in the Crown, subject to the Native right. The Native right in respect to these waters was the exclusive use by certain tribes and hapus, but as in the case of the shores of the sea and navigable rivers of New Zealand, the bed of the waters was in no sense vested in the tribes and hapus, which have the rights over the waters. The contrary view confuses the question of Maori right which is a matter of custom

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26. Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', pp 365–366
27. Law Commission, p 106
28. See for example Alex Frame, *Salmond Southern Jurist*, Wellington, Victoria University Press, 1995, p 129; Alex Frame, 'John William Salmond', *Dictionary of New Zealand Biography*, vol 3, Wellington, Department of Internal Affairs, 1996, p 457

> determinable by the Native Land Court, with the legal result in England of ownership of fishing rights and marginal occupation.[29]

But although the Crown tried repeatedly to prove that lakes were not subject to a Maori customary title, this was not the view taken by the Native Land Court. Hence the Crown was forced to admit the existence of strong Maori rights in lakes, and negotiate settlements to secure public rights in them.

1.3.1 Marginal strips

The existence of marginal strips along the shores of many lakes in New Zealand functions to further obfuscate the issue of who has title to the beds of lakes. Marginal strips, more commonly known as the 'Queen's chain', have their origin in the Land Act 1892. Under section 110 of that Act, when the Crown sold lands abutting either the foreshore, lakes over 50 acres, or streams and rivers wider than 33 feet, a one chain strip was to be reserved and vested in the Crown. The purpose of the reserves was to provide for public access to waterways and the foreshore. The provision was later re-enacted by the Lands Act 1948. Similar provisions exist in the Conservation Act 1987 and the Local Government Act 1974. Today all marginal strips are administered by the Department of Conservation.[30]

The issue insofar as the ownership of lakes is concerned is whether title to such marginal strips carries with it title to lake beds *ad medium filum.* If they do, the Crown would be the owner of all lakes which are subject to a marginal strip. To the present author's knowledge the principle that marginal strips include title to abutting lakes has not been recognised by statute, nor is it supported by any domestic case law. However, in the case of *Southern Centre of Theosophy Incorporated v South Australia*, the existence of state legislation requiring that waterfront reserves be designated when lands with water boundaries are subdivided or developed, was considered by the court to be relevant to the question of who owned the lake in question. But rather than lakes to which such reserves abutted being owned by the Crown *ad medium filum*, the court took the view that the reserve provision suggested a public policy that did not favour the general interests of landowners. Hence the application of the doctrine of *ad medium filum aquae* was rebutted.[31] Another complication with respect to marginal strips in New Zealand is that there can be no general assumption as to which lakes have marginal strips. Presumably lands alienated by the Crown prior to 1892, would not have marginal strips attached to them. Neither would land subject to sales transacted directly between Maori and individual Pakeha.[32]

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29. Attorney General to Cabinet, 21 March 1922, cl 196/10, NA Wellington
30. Conservation Act 1987, s 24; Local Government Act 1974, s 289
31. F M Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', p 36
32. James P Ferguson, 'Maori Claims Relating to Rivers and Lakes', Research paper for Indigenous Peoples and the Law (LAWS 546), Victoria University, 1989 (Wai 167 rod, doc A49(d)), 266–313), p 15

1.4 General Legislation Pertaining to Waterways in New Zealand

The history of legislation pertaining to inland waterways in New Zealand clearly evidences the Crown's assumption that it had the right to control rivers, streams and lakes. This assumption was in effect a tacit assertion of ownership. But as was discussed in the preceding sections, at common law such rights were not vested in the Crown. In light of this, it seems that from the mid-1800s successive governments pursued a policy whereby the rights of Maori in waterways were gradually displaced, and the Crown was established as being the owners of such. In the context of land drainage the Crown was guided by the presumption that it had the right to take private property for public purposes in exchange for compensation. But as the history of public works legislation in New Zealand shows, generally only the value of 'productive' land was considered to be compensable. Less tangible usufructuary rights associated with waterways were typically not compensated.[33]

The Land Claims Ordinance of 1841 declared all 'unappropriated' land to be Crown Land, subject to the 'rightful and necessary occupation and use thereof by the aboriginal inhabitants'.[34] The problem for Maori though was that rivers and lakes were rarely considered by colonial officials to be subject to such 'rightful' or 'necessary' occupation. Consequently governments passed a raft of legislation that enabled swamp drainage and flood protection works to be undertaken; provided for domestic and agricultural water supply; and instituted a management regime for freshwater fisheries. Only in relation to fisheries legislation were any specific protections of Maori rights afforded. This is telling of the Crown's attitude that the interests of Maori in inland waterways were confined solely to rights of fishery. But even then protections afforded were minimal, and the courts proved reluctant to give effect to them.

Essential to the success of colonial New Zealand was the conversion of the landscape to enable large scale agricultural production. In many areas swamps and their associated waterways rendered lands useless that were otherwise suitable for agricultural production. Although some swamps were preserved by Pakeha landowners because of the value of the flax that they supported, generally Pakeha invested huge amounts of energy in draining swamps upon their land and bringing it into agricultural production. And with the advent of refrigerated shipping in the 1880s and the expansion of the export market for New Zealand's agricultural produce, the demand for arable land was even greater.

Swamps also failed to attract any support from the nascent preservation movement. From around the turn of the century there is evidence that at least some Pakeha settlers were beginning to appreciate lakes and rivers for their scenic values. But with the possible exception of the flax entrepreneurs, swamps were viewed altogether differently. They lacked the scenic and recreational values of larger waterways, and along with the bush, were an embodiment of the 'otherness'

33. See for example Cathy Marr, *Public Works Takings of Maori Land*, Report for the Treaty of Waitangi Policy Unit, Wellington, 1994
34. Land Claims Ordinance 1841, s 2

of the New Zealand landscape. Swamps stood as an impediment to realising the colonial vision of creating a pastoral Arcadia in New Zealand. Hence legislation was passed that enabled the drainage of huge areas of wetland.[35]

And whereas to many colonialists the notion that Maori had rights in rivers and streams was far fetched, to contend that they had rights in swamps was idiotic. The thinking at the time was clearly that title to any land acquired by settlers carried with it exclusive rights to swamps. But it is possible that Maori who sold lands containing swamps assumed they would continue to enjoy usufructuary rights in the swamps. Little did they realise that not only would they be excluded from the land, but their mahinga kai would be totally transformed and their much cherished fisheries destroyed. In some areas such as the Wairarapa where the Crown had acquired large amounts of land, Maori were anxious to ensure their livelihoods by retaining rights in their lake fisheries. But pastoralists that had taken up occupation of lands abutting such lakes were often anxious to lower them in order that their farms were not subjected to flooding every winter. Such contests between agriculture and Maori customary fishing rights were the impetus for the Crown seeking to acquire ownership of several North Island lakes.

It also important to bear in mind that the distinctions made between swamps, streams, rivers, and lakes are in many respect entirely arbitrary. When does a swamp ceases to be a swamp and become a lake? Also each of these entities do not exist in isolation. Swamps, rivers, and lakes of an area are interconnected, forming a catchment. In many respects they can, and perhaps should be regarded as single entities. The draining of swamps can lower the entire water table in a particular catchment having an adverse effect upon say the fisheries of a lake.

1.4.1 Drainage, flood protection, and general public works legislation

The earliest legislation pertaining to inland waterways vested powers in provincial councils and other local authorities to undertake public works with a view to providing domestic water supply and draining land. Later this tradition was continued with the vesting of powers to undertake a wide variety of public works (many of which affected waterways) in various regional and local authorities. It has been observed that these acts were generally intended to develop land to facilitate further settlement, and were very much in the interest of Pakeha settlers.[36]

In 1858, the Highways and Watercourses Diversion Act was passed. It empowered provincial councils to pass laws for the purposes of diverting or damming rivers and streams, and to sell and exchange the beds of any such waterway so diverted or dammed.[37] Five years later the Provincial Councils Powers Extension Act became law. This enabled provincial councils to pass legislation affecting Crown lands for the purposes of undertaking work in relation to roads and

35. See Geoff Park, *Nga Uruora–The Groves of Life: Ecology and History in a New Zealand Landscape*, Wellington, Victoria University Press, 1995, pp 176–177
36. Marr, p 105
37. Highways and Watercourses Diversion Act 1858, s 1

highways. The Act stated that any law passed that affected ‘a navigable river stream or creek’ required the consent of the Governor – clear evidence that the beds of rivers and streams were considered to be the property of the Crown. In 1865, another Provincial Councils Powers Extension Act was passed. This Act extended the powers of provincial councils to pass legislation that affected any waste lands of the Crown. Such lands were deemed to included the ‘bed of any creek stream river pond or lake’.[38] Included in the Act was the proviso that councils could not pass an Act affecting land to which the ‘title of the Native Aboriginal owners’ had not been extinguished. The extent to which such title was held to extend to rivers and lakes is unclear. But other legislation, and the attitude of the Crown in relation to rivers and especially lakes, suggests that the Crown considered customary title to have only limited application to inland waterways.

The Crown’s assumption of rights in waterways was further expressed in legislation that made provision for residential water supply. In 1867 the Municipal Corporations Act was passed. Part 20 of the Act provided that corporations established under the Act were to supply water within their municipality. Five years later the Municipal Corporations Waterworks Act became law. Under section three, corporations were empowered to construct and maintain waterworks in order to abstract water for domestic supply from any stream or reservoir. All such waters, ‘together with all rights incidental to the ownership of such waters’, were deemed ‘to be the property of and to be vested in the Crown.’ This was a modification of the common law presumption that water was a common property resource. No mention was made in the statute of any pre-existing rights of Maori in water.

The 1876 Public Works Act saw the Crown formally vesting in itself strong powers over waterways. Under the Act any natural watercourse in which fluvial action occurred could be declared a ‘public drain’. Such drains could be proclaimed to be under the control of a local authority. The Government was also empowered to build drains through any lands in the colony.[39] Under section 165 of the Act, a ‘drain’ was defined as being ‘every passage or channel above or on the ground through which water flows, except a navigable river.’ A ‘public drain’ was deemed to be any drain made by the Government or a local authority prior to or after the passage of the Act. Every river that was not navigable was a public drain within the meaning of the Act. Although it is doubtful whether lakes themselves would have satisfied the criteria of being drains, as is recounted in the chapter in this report dealing with Lake Wairarapa, the outlet of that lake was.

When the Act was before Parliament, George Waterhouse, the Legislative Councilor for Wellington, drew attention to what he saw as being a general abrogation of individual rights in waterways:

> According to the existing law, where a creek or river passes through a property the water in that creek or river belongs to the proprietor. But here it is declared that all

38. Provincial Councils Powers Extension Act 1863, s 2
39. Public Works Act 1876, ss 168, 176

> such watercourses, etc, are public drains and all public drains are under the control of the Council of the county in which they are.[40]

No provision appears to have been made in the Act for compensation to be paid to either Maori or Pakeha who had rights in waterways (arising from either customary or common law) that were thus apparently expropriated.

County councils were also established in 1876. And as Waterhouse observed, they were given wide ranging powers in relation to waterways.[41] Under the 1876 Public Works Act, county councils could undertake large scale drainage operations. Councils could take any land under the Act required for drainage purposes, build new drains, declare any existing drain to be a 'public drain', and deepen or widen any existing drain. In 1883 the powers of county councils were extended so that they could undertake irrigation works. Any stream could be taken for the purposes of supplying an irrigation race, and councils were free to make dams.[42] These provisions were re-enacted by the Counties Act 1886 with no protection being afforded to Maori rights.[43]

Powers to interfere with waterways were also vested in private companies that were considered to be engaged in enterprises that were in the national interest. In 1881, for example, the Railways and Construction Act vested powers in companies engaged in building railways to alter the course or level of any river, stream, or other waterway.[44] Such actions by the Crown further evince the displacement of the rights of Maori in New Zealand's waterways.

It would seem though that Maori had some recourse through the courts to safeguard their interests in waterways. In 1871 a Thames Maori concerned at the potential for damage to his eel weirs, successfully debarred a settler from floating timber down a river that passed through his land unless a toll was paid. Although winning an action brought in the Supreme Court, the jury protested against the law being made 'the instrument of spoliation and oppression'. Parliament responded by passing the Timber Floating Act 1873.[45] Essentially the Act required a licence to be obtained before timber was floated down a waterway, and provided for compensation to be paid to riparian landowners whose properties were damaged as a result of activities carried out under the Act.[46] While still in bill form, several petitions were sent to Parliament by Maori in connection to the Bill. These petitions expressed concern 'that their rights over those [affected] streams would be taken by the Queen or by the Government' as a consequence of the legislation. Despite Maori members speaking of the possible catastrophic effects the practice could have upon Maori eel weirs, the Bill was passed into law. During the Bill's passage, Karaitiana Takamoana, the Member for Eastern Maori, recounted how the water

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40. NZPD, 1876, vol 22, p 109
41. Counties Act 1876, s 6
42. Counties Act Amendment Act 1883, ss 30–32, 37
43. Counties Act Amendment Act 1883, ss 266–289
44. Railways and Construction Act 1881, s 34(4)
45. Alan Ward, *A Show of Justice*, Auckland, Auckland University Press/Oxford University Press, 1973, p 305
46. Timber Floating Act 1873, ss 3–4

necessary to run a Maori-owned sawmill had been diverted by Pakeha for the purposes of timber floating, and as a consequence the mill had become inoperative.[47] The 1873 Act was repealed by the Timber Floating Act 1884. Although this legislation again included provisions for compensation for downstream river users affected by the floating of timber, it is doubted that these provisions were available to Maori, especially as the Act was never translated into Maori.[48]

Under the Public Works Act 1894, rivers could be brought under the 'control' of local authorities. The extent and nature of this control was tested in the 1901 case of *Taranaki Borough Council v Brough.* In this case Justice Conolly ruled that such control of rivers could not deny 'ownership which at common law extends to the centre of the river bed in non-navigable rivers'.[49] By this time Public Works legislation made special provision for the notification of the owners of Maori land affected by operations carried out under the legislation. However, there was no recognition that Maori may have special interests above and beyond the ownership of land. As with legislation pertaining to river boards and drainage boards discussed below, it was only land owners who were recognised as having any specific rights. Thus Maori could not object to a public work on the grounds that it would disrupt a fishing right unless that right attached to an interest in land which they owned.

As well as vesting powers in existing authorities, legislation was passed that created bodies with powers strictly in respect of waterways. In 1884, the Rivers Board Act was enacted. Section 6 of the Act made provision for catchments to be declared river districts if the Governor was petitioned by not less than two-thirds of ratepayers in an area affected by flooding. Subsequent to such a proclamation, all rivers, streams, and other water courses subject to flooding within the district came within the jurisdiction of the board for the purpose of undertaking flood protection works. Boards were empowered to compulsorily acquire land under the Public Works Act 1882, levy rates, raise loans, and enter into contracts for the execution of works permitted under the Act. Board members were elected by ratepayers.[50]

The provision that a river board could be constituted if this was favoured by a majority of ratepayers would generally have been prejudicial to Maori interests. In places where Maori had sold much of their land and were consequently even more reliant upon freshwater resources, the ratepayer criteria was particularly unjust. Similarly where Maori land was held in trust for several owners, it is likely that only the trustees would be actual 'ratepayers'. Given the deleterious effect that drainage operations had upon an economy based upon freshwater resources, the Act's bias towards ratepayers was particularly cruel, as was the fact that members of the boards were also elected by ratepayers. In this way it is likely that farmers with a vested interest in the prevention of flooding (and interference with

47. NZPD 1873, vol 15, pp 1006–1011
48. CFRT Maori Land Legislation Database, Timber Floating Act 1884
49. *Taranaki Borough Council v Brough,* (1901) 2 GLR 160
50. River Boards Act 1884, ss 18, 44, 74, 88, 110

waterways) could dominate boards and override other community interests. The ways in which river boards acted to the detriment of Maori is evidenced in the chapter of this report concerning the Wairarapa lakes.

In 1893, a Land Drainage Act was passed – 'An Act to provide for the Drainage of Agricultural and Pastoral Land'. This Act contained similar provisions for the constitution of drainage boards as were employed for river boards. A drainage board was established if the Governor was petitioned by a two-third majority of ratepayers, and ratepayers elected the board's members. As well as being able to maintain, deepen, and widen existing watercourses, boards were empowered to dig new drains.[51] As was the case with river boards, drainage boards could raise loans, levy rates, and enter into contracts to effect drainage operations. Limited powers were afforded landowners to object to drainage operations, and provision was made for landowners to have drainage work undertaken on other person's properties to alleviate flooding on their own property.[52] The Act also provided for boards to be constituted to carry out irrigation works where the provisions of the Water Supply Act 1891 had been insufficient to meet landowners' needs.[53]

Near identical provisions as featured in the 1893 Act were contained in the 1908 Drainage Act – a consolidation of earlier drainage legislation. Under the 1908 Act, landowners on whose properties it was proposed to construct drains or other works could object to such operations. However, there appears to have been no provision for objections to be made by other people who would have suffered injury as a consequence of drainage works being undertaken. Consequently Maori had no recourse under the Land Drainage Act if drainage works adversely affected their fisheries. The chapter of this report that recounts the history of Lake Horowhenua shows how Muaupoko's fisheries were deleteriously affected by drainage operations carried out under the 1908 Act.

Central government's powers to undertake large drainage operations were extended under the Swamp Drainage Act 1915. This measure was enacted with a view to making more agricultural land available for settlement. To facilitate drainage, land could either be purchased or compulsorily acquired under the Public Works Act 1908. Land being used exclusively for the purposes of Maori settlement could not be taken unless the Governor General considered it essential for the successful completion of the proposed drainage operations.[54]

1.4.2 Local drainage schemes

As well as legislation that vested powers in particular authorities to undertake drainage in the areas over which they had jurisdiction, Acts were also passed to enable the drainage of particular areas of swamp. Officially these were described as 'land improvement' schemes.

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51. Land Drainage Act 1893, title, ss 5, 9, 19
52. Land Drainage Act 1893, ss 30, 36, 43, 63–74
53. Land Drainage Act 1893, s 62
54. Marr, p 106

The Hauraki Plains Act 1908 is an example of such legislation. It was passed to enable the drainage of swamp lands abutting the Piako River near Thames. Being a large expanse of flat land dominated by stands of tall straight kahikatea, the Hauraki plains had long been regarded as a location eminently suitable for European settlement. Geoff Park recounts how Cook explored the Waihou River on his visit to New Zealand in 1769. To Cook's mind the plains, along with the Bay of Islands, would be 'the best place for fixing a colony'. In this respect, the bestowing of the name Thames upon the area is revealing.[55] But because of the softness of kahikatea (making it unsuitable for ship building), and the scale of the drainage operations required, the area remained relatively unchanged until the 1890s. Around that time a number of factors converged which meant that draining the Piako flood plain became feasible. While the demand for cheap land for settlement continued, the advent of refrigeration meant that there was now an almost unlimited market for New Zealand dairy products. And although soft, kahikatea was ideal for building boxes in which to export butter. Further, advances in engineering technology meant that a drainage scheme of the magnitude required, became feasible.[56]

At the turn of the century the Crown began to consider the district as the object of a land improvement scheme to be effected by the construction of canals, stop banks and various other public works. Following an investigation of the area in 1906, an engineer (W C Breakell) prepared a scheme to drain the flood plain. An integral part of the proposal was the acquisition of much Maori-owned land on the Piako delta.[57]

Subsequently the Hauraki Plains Act 1908 was passed. The Act provided the legal machinery for both the drainage operations and the acquisition of lands in the area. In the three years following the passage of the Act, almost 2000 acres of Maori land were acquired supposedly to facilitate 'the more effective carrying out of drainage works' as stipulated by the Act. However, Robyn Anderson presents evidence that it is doubtful whether all of this land was strictly necessary to carry out the operations.[58] As well as being divested of much of their remaining land, many valuable water-based resources exploited by Hauraki were destroyed. In the course of approximately 50,000 hectares of land being drained, important habitat for eel, water fowl, and flax disappeared. Further, as a consequence of retaining so little land, Hauraki received virtually no benefit from the expansion of the dairy industry on the plains.[59] But to the Government's mind the whole scheme was a success: 'a dreary waste . . . where previously there had been only a few Natives and flax workers' had been transformed into a 'productive district'.[60]

55. J C Beaglehole (ed), *Cook Journal I: The Voyage of the Endeavour*, Cambridge, Cambridge University Press, 1955, p 278, cited in Park, p 28
56. Robyn Anderson, *The Crown, the Treaty, and the Hauraki Tribes, 1880–1980,* Paeroa, Hauraki Maori Trust Board, 1997, pp 118–119
57. Ibid, pp 120–121
58. Ibid, pp 122–123
59. Ibid, pp 120, 124

Other examples of legislation passed to enable local drainage operations include the Poukawa Native Reserve Acts of 1903 and 1910, the Ellesmere Lands Drainage Acts of 1905 and 1912, the Auckland and Suburban Drainage Act 1908, and the Manawatu-Oroua Rivers District Act 1923.

1.4.3 Legislation vesting rights in the Crown

As well as the loss of rights in specific waterways (such as were effected by the Hauraki Plains Acts), governments also passed legislation that expropriated general rights of Maori in inland waterways and vested them in the Crown.

In 1903, the beds of navigable rivers were vested in the Crown by section 14 of the Coal Mines Amendment Act 1903. This provision arose as a consequence of the Court of Appeal's decision in *Mueller v The Taupiri Coalmines Ltd* – a case in which the rights to mine the bed of the Waikato River were contested. This action involved consideration of the proposition that the vesting of riverbeds in riparian owners *ad medium filum aquae* is rebuttable if the river is navigable. The plaintiff, the Auckland Commissioner of Crown Lands, sought a declaration that certain lands beneath the Waikato River that the defendants had been mining were in fact Crown lands. The defendants had justified their actions by virtue of being the riparian landowner *ad medium filum*.

Although the rights of the Crown were upheld by the majority of the judges, Chief Justice Stout issued a vigorous dissenting judgement to the effect that the navigability of a river did not detract from the riparian owner's proprietary rights in the river bed. In arriving at their decision rebutting the common law position, the remaining judges stressed: that in New Zealand the Crown has a role as a trustee over lands of such public importance as those in question; the historical circumstances of the original Crown grant; and the fact that the section of river in question had been navigated for commercial purposes.[61]

In the 1900 case *Re Beare's Application*, the rights of the riparian owners were upheld against the Crown's contention that the bed of the Arahura River was Crown land. The case resulted from the question as to whether or not mining licences could be granted for a section of the river that ran through a Native Reserve. In upholding the rights attaching to the riparian owners, Chief Justice Stout made much of the fact that for all intents and purposes the river was neither 'a public highway or such [a] navigable river as makes the bed of the river Crown lands.'[62] This decision, as with the dissenting judgement of Chief Justice Stout in *Mueller v Taupiri*, suggests that prior to the enactment of the Coal Mines Amendment Act 1903, the Crown lacked prima facie rights to the beds of navigable rivers.[63]

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60. 'The Drainage and Settlement of the Hauraki Plains' p 8, ls1 15/13/180 NA Wellington, cited in Anderson, p 123
61. *Mueller v the Taupiri Coal Mines Ltd*, (1900) 20 NZLR 89, cited in Graeme Austin, 'Legal submissions on the beds of navigable rivers, section 246 of the Coal Mines Act 1979', in Waitangi Tribunal, *The Pouakani Report 1993*, Wellington, Brookers, 1993, pp 462–464
62. *Re Beare's Application*, (1900) 2 GLR 242, cited in Austin, p 463
63. Austin, p 464

Section 14 of the Coal Mines Act 1903 (by which the beds of navigable rivers were vested in the Crown) was an addition to a controversial piece of legislation pertaining to the rights and working conditions of miners, and appears to have received scant attention in the parliamentary debates concerning the Bill. The provision was re-enacted in the Coal Mines Acts of 1905, 1908, 1925, and 1979. Although those Acts are now repealed, anterior vestings pursuant to the Coal Mines legislation are preserved by section 354 of the Resource Management Act 1991. An important issue is whether section 14 of the Coal Mines Act 1903 and its subsequent re-enactments were declaratory of the situation under common law or confiscatory. In a report to the Waitangi Tribunal, Graeme Austin has contended that when compared to common law, the provisions appear to be confiscatory.[64] This raises the spectre of compensation for riparian owners' rights – recourse that it appears Maori did not seek at the time the provision was enacted. In a 1993 decision concerning claims to dams on the Wheao and Rangitaiki Rivers by Te Runanganui o Te Ika Whenua, the Court of Appeal stated that the:

> vesting of the beds of navigable rivers in the Crown provided for by the Coal-mines Act Amendment 1903 and succeeding legislation might not be sufficiently explicit to override or dispose of the concept of a river as taonga, meaning a whole and indivisible entity, not separated into bed, banks and waters.[65]

In 1903, the Water-Power Act was enacted. Section 2 vested in the Crown the sole right to use waters in lakes and rivers for electricity generation. While the Act was before Parliament, many members expressed concern at what they considered to be an essentially privative clause. Hone Heke, the member for Northern Maori remarked that:

> It would not be proper for a Bill like this to take away from Maori owners the use of water-power on their lands. There is no telling what use even the Maoris may desire to put such water-power for themselves . . . the sweeping provision of subsection (1) is going too far. . . . It is an attempt to take away active rights.[66]

The Crown's exclusive right to generate electricity from water was continued under section 306 of the Public Works Act 1928.

In 1967, the rights of the Crown in relation to freshwater were extended by the Water and Soil Conservation Act. Section 21(1) vested in the Crown:

> the sole right to dam any river or stream, or to divert or take any natural water, or discharge natural water or waste into any natural water, or to use natural water.

The right of people to take water for their reasonable domestic needs was preserved. Although stopping short of actually nationalising water, this is what the Act achieved in practice. Provision was also made in the Act for the management

64. Ibid, p 466
65. *Te Runanganui o Te Ikawhenua Incorporation Society v Attorney-General*, (1994) 2 NZLR 20, p 21
66. 24 September 1903, NZPD, 1903, vol 125, p 798

of municipal water supplies and the granting of permits to use water. The Act has been criticised for making no provision for the protection of Maori interests, especially in view of the fact that many Maori fisheries have been seriously affected by pollution allowed by authorities exercising powers under the Act. This led the Waitangi Tribunal to state that the Water and Soil Conservation Act had been 'aptly described as monocultural legislation'.[67]

Other legislation in the twentieth century extended the powers of local authorities in respect of waterways by delegating them town planning responsibilities. The Town Planning Act 1926 required that local authorities prepare planning schemes for both rural and urban areas. Matters they were to provide for included sewerage, drainage, and water supply.[68] Such powers were continued in the Town and Country Planning Acts of 1953 and 1977. Unlike the 1926 and 1953 Acts, the 1977 Act made a limited recognition of Maori rights. Section three required agencies exercising powers under the Act to have particular regard for the 'relationship of Maori people and their culture and traditions with their ancestral land.'[69] The Soil Conservation and Rivers Control Act, passed in 1941, consolidated existing legislation pertaining to flood control. It set up the system of catchment boards that continued until the enactment of the Resource Management Act in 1991. Boards were also empowered to carry out public works in the interests of conserving soil and mitigating erosion.[70]

Virtually all legislation affecting waterways was either repealed by the Resource Management Act 1991 or at least made subject to its principles – most significantly that of sustainable management. Local authorities wanting to undertake drainage operations must apply for a resource consent and abide by the process the Act sets out for public notification and the hearing of objections. Also people exercising powers under the Resource Management Act must 'take into account the principles of the Treaty of Waitangi', 'have particular regard to Kaitiakitanga', and 'recognise and provide for . . . the relationship of Maori . . . with their ancestral lands, waters, sites, waahi tapu, and other taonga.'[71] However, the right to allocate water remained vested in the Crown – a major criticism of the Act being that it did not address the issue of the Maori ownership of resources.[72]

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67. Waitangi Tribunal, *The Report of the Waitangi Tribunal on the Manukau Claim*, Wellington, Department of Justice, Waitangi Tribunal, 1985, p 86
68. Marr, p 106
69. Town and Country Planning Act, s 3(1)G
70. Judy van Rossem, 'Fresh and Geothermal Water' in Christopher Milne (ed), *Handbook of Environmental Law*, Wellington, Royal Forest and Bird Protection Society, 1992, p 124
71. Resource Management Act 1991, ss 6(e), 7(a), 8
72. See for example Jane Kelsey, 'The Treaty of Waitangi, Local Government Reform and Resource Management Law Reform' in *People, Politics, and Processes,* Proceedings of the New Zealand Planning Institute Conference, Waikato University, 1989, p 33; Robert Mahuta, 'Maori Perspectives In Resource Planning Perspectives', in *Regional Resource Futures,* Conference Proceedings, Waikato University, August 1991, p 165

1.5 Fisheries Legislation

As is evident in the case studies of this report, freshwater fisheries were historically of the utmost importance to Maori. In many areas fish found in rivers and lakes formed the basis of the local economy. In terms of legislation, fisheries were affected in two ways. Firstly, as has been detailed in the preceding sections, legislation was passed that resulted in the habitat of fish being altered through drainage operations and water abstraction. And secondly, from the 1860s, various acts were passed concerning the management and control of freshwater fisheries.

An important aspect of the colonial project in New Zealand was the acclimatisation of English biota. This has been seen as an attempt to mitigate the 'otherness' of the New Zealand environment by making it more like that of England.[73] From the 1860s large numbers of trout were introduced to the rivers and lakes of New Zealand with a view to establishing sport fisheries. Although some fish were introduced by private individuals, mostly this work was undertaken by acclimatisation societies. In the 1860s, informal societies or committees were formed by Pakeha settlers as a means to alleviate the costs and logistical problems of acclimatising wildlife. In 1867, acclimatisation societies were recognised by statute and afforded rights in respect of fauna they introduced.[74]

Also in 1867, Parliament passed the Salmon and Trout Act 1867. It appears that this legislation came about at the instigation of the Canterbury and Otago Acclimatisation Societies. The societies were about to release trout and salmon into the waterways of the east coast of the South Island, and were anxious that provision was made to prevent poaching.[75] The resultant Act enabled the Governor of the colony to make regulations to preserve and propagate stocks of salmon and trout, and to take punitive action against any person in breach of such regulations. The Governor's powers under the Act were far reaching. Regulations could be made as were thought necessary with a view to promoting and preserving stocks of trout and salmon in particular rivers and streams. As well as prohibiting the use of particular kinds of fishing tackle, these powers presumably extended to declaring closed fishing seasons for particular rivers.[76]

But it appears that the Act did not apply to lakes. This became apparent when a person was charged pursuant to the Salmon and Trout Act with taking trout from Lake Wakatipu by the use of dynamite and nets. The charges, however, were dismissed because it was held that the Act only applied to rivers and streams, and not to lakes. This gave rise to the Salmon and Trout Amendment Act 1884 – section 2 of which extended the operation of the 1867 Act to lakes.[77] Unlike later fisheries legislation, the Salmon and Trout legislation applied equally to Maori and

73. See for example Paul Hamer, 'Nature and Natives: Transforming and Saving the Indigenous in New Zealand', MA thesis, University of Victoria, 1992, p 3, passim
74. R M McDowall, *Gamekeepers of the Nation: The Story of New Zealand's Acclimatisation Sicieties,1861–1990*, Christchurch, Canterbury University Press, 1994, p 17; Protection of Animals Act 1867, s 3
75. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, Wellington, Brooker and Friend, 1992, p 135
76. Salmon and Trout Act 1867, s 2
77. 2 October 1884, NZPD, 1884, vol 49, p 173

Pakeha. Thus if a closed season was declared to promote stocks of salmon and trout in a particular waterway, Maori would presumably have been prevented from taking native fish from the waterway in question. This was considered by the Ngai Tahu Sea Fisheries Tribunal to be a clear encroachment of Treaty rights.[78]

The Larceny Act of 1869, closely modelled on an English Act of Parliament, codified some common law presumptions in relation to fisheries. It recognised that the ownership of the bed of a waterway gave rise to exclusive rights in the water's fisheries. The Waitangi Tribunal has observed that Maori fisheries were not considered to come within the ambit of 'private waters' unless they had been specifically reserved or granted. This reflects the policy that customary fisheries were held to have no status unless they had been expressly reserved to Maori.[79] Evidence does exist though that Maori could and did reserve fishing rights in waters abutting lands that they had sold.[80]

The first comprehensive fisheries management regime was introduced by the Fish Protection Act 1877. It extended the Government's control to both sea and freshwater fisheries. Under the Act the Governor was empowered to issue licences granting exclusive rights to fisheries prescribed under the Act. In respect of such fisheries, the Governor could make regulations specifying seasons and declaring that certain species could not be taken. Section 8 declared that nothing in the Act '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.'[81]

Prima facie this provision afforded broad protection of Maori fishing rights as had been contemplated by the Treaty. But the Waitangi Tribunal has noted it is typical of the approach adopted by successive governments in respect of recognising Treaty rights in legislation. An attitude is apparent that such rights could be recognised simply by mentioning the Treaty in a general way, despite everything else in the Act being contrary to Treaty principles. In the case of the Fisheries Protection Act, the Muriwhenua Sea Fishing Tribunal postulate that section 8 was in all likelihood 'window dressing' inserted to placate Maori members of Parliament, and that no one really knew or cared what it entailed.[82] It would appear that any Treaty-derived interest in fisheries was limited by the Government's right to make regulations governing the exploitation of fisheries.

The Fish Protection Act 1877 became operative by the issue of regulations. The first general regulations were issued by the Governor in April 1878. Importantly, clause four of these stated that the regulations were not to apply to Maori, nor to any

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78. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, p 135
79. Waitangi Tribunal, *Report of he Waitangi Tribunal on the Muriwhenua Fishing Claim*, Wellington, Department of Justice: Waitangi Tribunal, 1988, p 83
80. Ibid, p 83
81. Tony Walzl has described how this clause what not in the original Act that was passed, but was inserted at the request of the Governor the following Month. Tony Walzl, 'Evidence on the Crown/Maori Relationship Over Fisheries, 1849–1890', Report commissioned by the Crown, nd (Wai 27 rod, doc z49), p 265
82. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 85

method of fishing other than by net. The regulations were entirely concerned with commercial sea fisheries and did not affect freshwater fisheries. Although the Act enabled exclusive rights in particular fisheries to be granted to licence holders, this was not done.[83] In 1878, legislation was passed that made it illegal to use dynamite in public fisheries.[84]

In 1884, the Fisheries Conservation Act was passed. Section 2 held that the Act was to be read in conjunction with various fisheries legislation in force at the time – including the Fish Protection Act 1877. This meant that the provision preserving Maori Treaty rights in respect of fisheries was to be given effect under the 1884 legislation. Under the Act, regulations could be issued that, inter alia: provided for the protection and improvement of any fishery or waterway; afforded protection to any species of fish; prohibited the sale of any fish; prescribed the minimum size of any fish caught; restricted the use of certain types of tackle; prohibited fishing in certain waterways in which fry or spawn were present; and prohibited the dumping of any sawmill refuse into streams or rivers. Section 3 of the Act states that its provisions do not apply in privately owned waters. This exemption attracted the attention of Sir George Grey during the parliamentary debates concerning the Act. He contended:

> that the rivers and the fish in them were the common property of the whole nation. Why, therefore, should any person pay a license [sic] for fishing in waters running through government lands?[85]

But the section of the Act that enabled the Government to build fish hatcheries in any river or other fresh waters evinces the Crown's assumption that it had sufficient rights in inland waterways to build such facilities.

Regulations were subsequently issued under the Fisheries Conservation Act pertaining to commercial fishing. The regulations stated that they were not to apply to Maori. However, shortly afterwards this regulation was amended so as that Maori were only exempted if they were engaged in fishing for their own needs and not commercially.[86] In light of the guarantees afforded by section 8 of the Fish Protection Act 1884, the Ngai Tahu Sea Fisheries Tribunal considered this limitation to non-commercial fishing to be both ultra vires and inconsistent with the Treaty.[87] Although the Sea Fisheries Act 1894 repealed section 8 of the Fish Conservation Act insofar as it affected sea fisheries, the section remained in force in relation to freshwater fisheries.[88]

The next Act passed that affected freshwater fisheries was the Fisheries Conservation Amendment Act 1903. The provisions of this Act pertained primarily to trout. The Governor was empowered to require people fishing for trout and perch

83. 11 April 1878, *New Zealand Gazette*, 1878, no 33, vol 1, pp 441–442
84. Fisheries (Dynamite) Act 1878, s 3
85. 7 November 1884, NZPD, 1884, vol 50, pp 477–478
86. 2 April 1885, *New Zealand Gazette*, 1885, no 20, pp 380–381; 4 June 1880, *New Zealand Gazette*, 1885, no 20, p 720
87. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, pp 141–142
88. Ibid, pp 144–145

to hold a licence. Regulations could also be issued to control the export of trout and to prevent the pollution of streams in which trout and salmon were present. When before the house, Tame Parata drew attention to what he perceived as the expropriation of Maori fishing rights in inland waterways:

> Under the deed of sale by Ngai Tahu the Maoris were allowed to retain their rights to their fisheries – their sea-fishing grounds, their eel and other freshwater fisheries, in the rivers and lakes – and there is also a clause in the Treaty of Waitangi which assures to them the fishing rights in their rivers, lakes and seas . . . Why should this house pass legislation to ask the Maoris to pay for a license [sic] when the rivers belong to them and the fish belong to them?[89]

Parata was incorrect in thinking that the Act would require Maori to hold a licence in order to fish for indigenous species. But he still drew support from William Field, the member for Otaki:

> I am one of those who hold that the provisions of the Treaty of Waitangi are too apt to be forgotten. It is unmistakable that in that treaty there is preserved to the Natives the right to fish freely in all rivers, streams, and lakes of the colony; and in dealing with legislation on fishing matters we should bear that closely in mind. . . . The Natives should undoubtedly have the free right to fish for native fish, at any rate, in the streams of the colony; and if it is true that the imported fish variously devour the native fish, then I am not sure the Natives ought not to be allowed to fish for imported fish in the same way as they do the native fish, without having to purchase licences.[90]

Field and Parata were wrong in thinking that Maori would require a licence under the 1903 legislation. Further, Maori rights in respect of freshwater fisheries were supposedly protected by section 8 of the Fish Protection Act (which was still in force at this time). But the licence requirement did create problems for Maori. In the course of fishing for native fish, if a trout was incidentally caught, Maori were liable for prosecution unless they had a licence. Although incidences of Maori catching fish without licences have been documented, it is not always clear whether trout in these cases were a by-catch or whether they were the species targeted by the fishers involved (see below). However, it is known that some Ngai Tahu were prosecuted for taking trout when they were attempting to catch eels.[91]

As is evinced in the case study chapters of this report, the effect trout were having on indigenous fisheries, as averted to by Field, was a major grievance of Maori. A speech in Parliament by Wi Pere (the member for Eastern Maori) illustrates the grievance of many Maori in respect of trout. He complained on behalf of Te Arawa that the fishing rights that they had held 'from time immemorial', had been disturbed by the introduction of exotic fish. Pere said Te Arawa were aggrieved that exotic fish were depleting stocks, and that Maori were required to

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89. NZPD, 1903, vol 126, p 115
90. Ibid, pp 119–120
91. Anake Goodall and David Palmer, *Water Resources and the Kai Tahu Claim*, Wellington, Ministry for the Environment/Resource Management law Reform, 1989, p 7

obtain fishing licenses for fish 'that are absolutely no good, because they are unpalatable.'[92]

In 1908, a new Fisheries Act was passed that repealed and consolidated all prior legislation. In the previous year section 8 of the Fish Protection Act had been repealed by the Statutes Repeal Act 1907. Part 1 of the Fisheries Act 1908 pertained to sea fisheries, whereas part 2 related to freshwater fisheries. Although part 1 contained a guarantee that nothing in the Act 'shall affect any existing Maori fishing rights', no such provision was contained in part 2.[93] The parliamentary debates say nothing as to why a guarantee of Maori fishing rights was not extended to freshwater fisheries. Under part 2 of the Act, section 89 held that it was illegal to sell or let the right to fish in any waters. Under section 90 the lawful occupier of any land could fish without a licence during the prescribed season. Otherwise the provisions governing freshwater fisheries remained the same as they had under the previous Acts.

The Fisheries Act 1908 remained in force until it was repealed by the Fisheries Act 1983. Although several minor amendments were made to the 1908 Act in the 75 years from when it was passed, it remained substantively unchanged. The only amendments that were of any real significance to freshwater fisheries were in relation to commercial eel fishing. In 1963, the licensing of commercial fishers was replaced by a permit system. Unlike licences, permits were freely available to anybody upon application. It was thought that conservation could be ensured by the permits specifying the kind of fishing gear that would be used by each permit holder. But it would appear that in the case of eels and certain shellfish, this was not so. Consequently in 1977 the Fisheries Amendment Act was passed. The Act gave the Minister of Fisheries the power to declare commercial eel, paua, crayfish, mussel, and scallop fisheries to be 'controlled fisheries'. This modified the free entry provisions that had been introduced by the permit system in 1963. Were the Minister to declare a controlled fishery, the methods of fishing could be regulated, and anyone fishing in the fishery required a licence.[94]

The Waitangi Tribunal has observed that throughout the history of fisheries legislation, the Crown acted 'on the assumption that it was entitled to disregard Maori fishing rights under the treaty.'[95] Importantly in respect of freshwater fisheries, there was no procedure by which Maori could secure legal recognition for their customary fishing rights other than by inviting prosecution and having a court rule on the extent of their rights. But as will be seen in the following section which briefly surveys some of the key cases, until the mid-1980s, the Crown's reluctance to recognise Maori rights in respect of fisheries was mirrored by the attitude of the courts.

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92. NZPD 1908, vol 145, p 1159
93. Fisheries Act 1908, s 77(2)
94. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, pp 197–198
95. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, p 214

1.5.1 Fisheries legislation as seen by the courts

For most years since the 1870s, fisheries legislation in New Zealand has contained provisions that ostensibly protect the fishing rights of Maori. However, as will be shown in the following survey of key cases, the courts have refused to give meaningful effect to these provisions. Although this report is concerned primarily with lakes, because many of the legal principles pertaining to fishing apply to both sea and freshwater fisheries, sea fishing must be considered in the development of freshwater fisheries case law.

The first case of relevance to Maori fishing rights that was brought before the New Zealand courts did not actually involve Maori. In *Baldick v Jackson* the Supreme Court considered whether an English statute that conferred certain rights in respect of whales was applicable in New Zealand. One of the grounds upon which the court held that the act was not applicable, was that the rights sought by the plaintiff:

> would have been impossible to claim, without claiming it against the Maoris for they were accustomed to engage in whaling and the Treaty of Waitangi assumes that their fishing was not to be interfered with. They were to be left in undisturbed possession of their lands, estates, forests and fisheries.[96]

This case suggests that in matters of English law in relation to fisheries, the courts were to bring into account existing Maori fishing rights under the Treaty of Waitangi.[97] But decisions of the courts in the years immediately following *Baldick v Jackson* were to adopt the opposite position – a position that was to endure until 1986.

Subsequent to the introduction of trout to the Rotorua lakes, Maori were convicted for taking the introduced fish without licences. In 1908 Reverend F A Bennet was convicted for taking trout from the Ohau channel and fined £5. Although his conviction incensed Te Arawa leaders, he appears not to have appealed the conviction.[98] Five years later, Pita Heretini was convicted of breaching fisheries regulations by taking trout out of season from Lake Rotorua. Before Mr Dyer SM, Heretini pleaded that he had a customary right guaranteed by the Treaty of Waitangi to take fish from the lake. Dyer, however, was not impressed. He was reported as having said that:

> it was not the duty of any court, in dealing with statutes relating to Natives, to decide if there had been any infringement of that [Treaty of Waitangi] . . . If Parliament had dealt unfairly with the natives . . . that was the business of parliament.

Heretini was fined £5 plus 12s in costs.[99]

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96. *Baldick v Jackson* (1910) 30 NZLR 434, cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim,* p 97
97. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 97
98. Manatu Maori, *History of the Rotorua Lakes Settlement and Resource Materials*, Wellington, Research Unit Manatu Maori, 1990, p 16; W A Leonard, 'The Formation of the Te Arawa Maori Trust Board and its First Ten Years', MA Research Essay, University of Auckland, 1981, p 12

In 1914, a young Te Atiawa woman, Waipapakura, had her whitebait nets confiscated by a fisheries officer for non-compliance with regulations issued under the Fisheries Act 1908. Waipapakura was fishing in the tidal reaches of the Waitara River. She filed an action for the wrongful conversion of her nets. The matter came before the Magistrates Court in New Plymouth in October 1914. Mr Crooke SM dismissed the action on the basis that it was the Native Land Court alone that could determine what fishing rights were conserved by the Treaty of Waitangi.[100]

The plaintiff then removed the matter to the Supreme Court. In her defence Waipapakura claimed that she was exercising a customary fishing right protected under section 77(2) of the Fisheries Act 1908. In the case, the court adopted a narrow construction of 'existing fishing rights'. Rather than considering that the plaintiff was exercising a non-territorial aboriginal right, the court took the clause of the Fisheries Act to mean rights guaranteed by the Treaty of Waitangi. And in accordance with the view enunciated by the Privy Council that in the absence of legislative enactment the Treaty conferred no rights, the court held that section 77(2) created no rights that were enforceable against the Crown. Rather it was held that the section merely guaranteed those fishing rights provided for by statute. Further the Court made it clear that there 'cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast'.[101] The Waitangi Tribunal has expressed the view that the Crown were more than happy with this interpretation of section 77(2) and therefore took no action to amend it.[102]

A similar set of circumstances came before the Crown again in 1953. But whereas the *Waipapakura* case had involved tidal waters, the plaintiff in *Inspector of Fisheries v Ihaia Weepu and others* had been fishing for whitebait in a river. Although the court considered that section 77(2) protected Maori fishing rights that had been 'preserved by the Treaty', it was held that in the case of land-based fishing, those rights lapsed upon the sale of the adjoining land. As a matter of law the court considered that 'when Maori sold land, they sold their fishing rights too'.[103]

In view of the decision in *Waipapakura* and the unlikelihood of a more general recognition of fishing rights by the Crown, Maori in many parts of the country instituted proceedings in the Native Land Court to have their ownership of their waterways determined. In this way sections of Te Arawa, Tuhoe-Ruapani, Ngati Kahungunu, and Ngapuhi applied to the Native Land Court to have title to their respective lakes investigated. These claims are the subject of the following chapters. Similarly proceedings were initiated in respect of the Whanganui River and Ninety Mile Beach. These claims were considered by the Muriwhenua Fishing

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99. 'Old Fishing Rights: Treaty Trout and the Maori', *Dominion*, 25 September 1913, p 8
100. Mr Crooke SM's decision, CLO 267, cited in Frame, p 104
101. *Waipapakura v Hempton* (1914) 33 NZLR 1065, cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, pp 97–98
102. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim,* p 98
103. *Inspector of Fisheries v Ihaia Weepu and others*, (1956) NZLR 920, cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 98; Ibid, p 98

Tribunal as being primarily driven by the desire to secure a recognition of the respective hapu's fishing rights.[104]

In 1965, Keepa and Wiki were prosecuted for taking undersized toheroa from Ninety Mile Beach. As in the case of *Ihaia Weepu*, their defence that they were exercising a customary right was rejected on the grounds that those rights had been extinguished at the same time as the customary title to the abutting land.[105] The issue of customary rights was not tested again until 1986, when Tom Te Weehi appealed against his conviction for taking undersize paua. In *Te Weehi v Regional Fisheries Officer*, the plaintiff argued that he was exercising a customary right as was preserved to him under the Fisheries Act 1983. In his decision, Justice Williamson made it clear that this customary right claimed by Te Weehi did not derive from the ownership of land adjacent to where he took the shellfish. Rather it was a common law non-territorial customary right. Williamson held that such a right was within the ambit of what was guaranteed to Maori by section 88(2) of the Fisheries Act 1983, but that such rights were narrow in their extent. He held that they could only be exercised in accordance with Maori custom, they were non-exclusive, and they could only be exercised to take fish for one's own use.[106] The case of *Te Weehi* was the first general recognition at law of a Maori right of fishery that did not attach to adjacent land. Also it was the first time that the doctrine of aboriginal title had been recognised in the New Zealand courts since *R v Symonds* in 1847.[107]

As well as asserting their fishing rights in the courts, there is also a substantial legacy of Maori protesting against the abrogation of their freshwater fishing rights by the Crown. The report of the Ngai Tahu Sea Fisheries Tribunal, for example, chronicles protest by Ngai Tahu against the way in which they were disadvantaged by the Crown's management regime in respect of freshwater fisheries.[108]

1.6 Conclusion

Upon the Crown's acquisition of sovereignty in New Zealand, it is held that it acquired the allodial title to all of the country subject to Maori customary title. However, the Crown has generally adopted the view that such title had only a limited application to inland waterways – Maori rights in such being confined to those of fishing. Although this position was not clearly articulated by the Crown until around the turn of the century, from the 1860s, successive governments have simply assumed the right to pass legislation governing the use and control of inland waterways. Such legislation left open the ultimate question of who had ownership rights in rivers and streams. However, it was tantamount to an assertion of

104. Ibid, pp 98–99
105. *Keepa and Wiki v Inspector of Fisheries* (1965) NZLR 322, cited in Ibid, p 98
106. *Te Weehi v Regional Fisheries Officer* (1986) 1 NZLR 680, cited in Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, p 99
107. Ibid, p 99. For a discussion of non-territorial aboriginal rights see Doig, pp 23–30
108. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, pp 203–205

ownership and reflected the conviction of Government officials that the Crown should be the owner of rivers and lakes in New Zealand.

Establishing the Crown as being the owners of waterways required a departure from English common law. In England the beds of lakes, no matter how large, do not of common right belong to the Crown. Instead they are owned by whoever has title to lands abutting the lake. Similarly, rivers above the point that they ebb and flow belong to riparian landowners *ad medium filum* – not to the Crown.

The Crown's desire to be the owner of inland waterways in New Zealand was very much tied up with ideology that underpinned the colonial project in New Zealand. One of the objectives of the Colonial Government in New Zealand was to avoid the situation that existed in Britain where people held private rights in waterways and fisheries, from becoming established in New Zealand. In the interests of 'the public', the Crown sought to extend its prerogative rights in relation to the foreshore and seabed to inland waterways. A view was apparent that the Crown should be the trustee of lands and waters that were of public importance. This was a reason given by the Court of Appeal in 1900 for why it ruled that the doctrine of *ad medium filum aquae* should not be applied to a navigable river.[109] Similarly in other 'New World' common law jurisdictions (such as Canada, the United States, and Australia), the Crown was held to be the owners of navigable lakes. The thinking in rebutting the presumption of *ad medium filum aquae* in these countries was that it was inappropriate to apply it in countries that did not have the long history of settlement that had given rise to common law in Britain.[110] But while there had not been a long history of English settlement and law in New Zealand, there was an irrefutably long history of Maori use and occupation of waterways. Further, there was a complex body of customary law governing their use and ownership. But as a question of English law, the precise legal situation as to the ownership of lake beds in New Zealand remains unclear to this day. Although 'it is arguable that there is a presumption that lakes remain the allodial property of the Crown', the law 'is not finally settled on this point'.[111]

Undeniably the history of legislative intervention in respect of waterways constituted an abrogation of Maori rights. Importantly, no such legislation acknowledged any pre-existing Maori rights in waterways, or made any specific provision for the payment of compensation for such. The objective of much of the legislation that affected waterways was to promote settlement, and bring more land into agricultural production. In this way legislation was passed that provided for flood protection, swamp drainage, irrigation, domestic water supply, and electricity generation. As well as many of the public works undertaken under this legislation having a deleterious effect upon Maori fisheries, large amounts of Maori-owned land were compulsorily acquired.[112] Another issue is the way in which the Crown

109. *Mueller v the Taupiri Coal Mines Ltd*, (1900) 20 NZLR 89
110. See for example *Southern Centre of Theosophy Incorporated v South Australia*, (1979) 21 SASR 399, cited in Brookfield, 'Wind, Sand and Water Accretion and Ownership of the Lake Bed', p 366
111. Hinde, McMorland and Sim, p 202
112. See for example Anderson, pp 118–127

vested powers in various local authorities to undertake public works that interfered with rivers and lakes.

In relation to such land development schemes it was held that Maori rights were on the same footing as those of Pakeha in respect of these enterprises, and that they must both give way to the 'national interest'. But this unquestioned 'national interest' aligned squarely with the aims and aspirations of Pakeha farmers, and if anything, provision for Maori to continue their traditional economic practices was seen as being antithetical to these goals. This was illustrated in a report of a commission appointed to investigate ways to alleviate the flooding of lands abutting the Tairei River in Otago. An earlier flood protection scheme had been abandoned because of objections from Ngai Tahu. The commission observed that it could not:

> conceive that such a consideration as fishing-rights in a lake which is almost dry, and which could therefore have no commercial value to anyone should be allowed to weigh against the enormous benefits, financial and otherwise, which would accrue to the settlers and the State if the Maori Lake were used for the purposes herein indicated, and in which capacity it would be doing a service infinitely greater than ever it will do as a fishing-ground for Natives.[113]

Clearly provisions that allowed Maori to continue to exercise traditional food gathering rights did not feature in the Government's vision of the country's future.

The right of the Crown to take private property for public works was a principle of government that was brought to New Zealand from Britain. This right, however, was subject to the proviso that compensation was paid to persons who had their rights expropriated. The issue of the extent to which Maori received compensation for rights they forfeited in waterways as consequence of drainage schemes and flood protection works has not been researched by the present author. But it would appear that if the Crown did pay any compensation to Maori, it would have only been in respect of their fishing rights. This reflects the Crown's view that Maori rights in waterways were limited solely to rights of fishery, and did not extend to the actual ownership of them. Maori have received no compensation for legislation that divested them of rights in waterways such as the coal mines legislation, the Water-Power Act, and the Water and Soil Conservation Act.

The Crown's recognition of Maori freshwater fishing rights found expression in fisheries legislation. From 1877, Maori fishing rights have been afforded a degree of statutory recognition. Initially this was in terms of what was guaranteed by the Treaty of Waitangi, and later in terms of 'existing rights'. The courts, however, have constructed the extent of these rights very narrowly. The position that was adopted repeatedly from the turn of the century until 1986 was that the only rights conferred by the guarantees of Maori rights in the fisheries legislation were those that had been expressly confirmed by Parliament. Also it was held that because the Treaty was not recognised in any domestic legislation, it conferred no rights in

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113. 'Report of Rivers Commission on Tairei River' AJHR, 1920, D-6D, p 12

respect of fisheries. As technically correct as this may be, it is hard to reconcile this position with either the guarantee contained in the English version of the Treaty (that preserved to Maori the full and exclusive possession of their fisheries), or with the original intentions of the Acts. The refusal of the Crown and the courts to afford any substantive recognition to Maori freshwater fishing rights can be seen as being a manifestation of the Crown's ideology that private rights in waterways and fisheries should be limited as much as possible. This refusal has been seen as a reason why hapu applied to the Native Land Court to have title to their lakes determined.[114] The history of such applications in respect of Lakes Wairarapa, Rotorua, Waikaremoana, and Omapere are contained in the case study chapters that follow.

114. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim*, pp 98, 105