The Kermadec/Rangitāhua Ocean Sanctuary: Expropriation-free but a breach of good faith

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Introduction

In this article I explore the legal claims at the heart of the Kermadec/Rangitāhua Ocean Sanctuary dispute. While I conclude that there is little merit in the claim that the creation of the sanctuary will result in an illegitimate expropriation of private property, the claim that the Crown breached its duty of good faith to Māori is both strong and depressingly familiar.

On 29 September 2015 the Prime Minister announced, at the United Nations in New York, that New Zealand would create an ocean sanctuary around the Kermadec Islands, which would form a global contribution by New Zealand towards the better protection of the world’s oceans. The thirty-five times larger than all of New Zealand’s other 44 marine reserves combined, the proposed sanctuary will cover 620,000 km² and include all of the New Zealand Exclusive Economic Zone surrounding the five Kermadec Islands. With very limited exceptions, no fishing or mining will be allowed within the sanctuary, and the overall goal is to give this area the highest possible category of protection by managing the impact of human activities in order to protect the long-term ecological integrity of the area.3

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1 See Hon Dr Nick Smith, Minister for the Environment “Kermadec sanctuary a global contribution to ocean protection” (press release, 29 September 2015).

2 Smith, above n 1.

3 Smith, above n 1.
Less than six months later, on 8 March 2016, the Kermadec Ocean Sanctuary Bill 2016 was introduced into the House of Representatives. In the first reading the Hon Dr Nick Smith, Minister for the Environment, began:4

The bill is anchored in the philosophical view that humankind does need to put some limits on its development and have the wisdom to set aside areas for nature. New Zealand was a global pioneer in this thinking when Tūwharetoa chief Te Heuheu, in 1887, with the support of our parliamentary forebears, created the Tongariro National Park. It was the fourth such park in the world, and since then, Governments have progressively protected over 30 percent of our land in public parks, in reserves, and in sanctuaries.

The new frontier for protection is the marine environment. ...

This bill is part of this Government's ambition to be a world leader in the management and protection of our ocean environment.

With court proceedings in action, I consider why some Māori oppose the creation of this sanctuary and the strength of their arguments in law. I begin by summarising the history of Māori claims to fisheries and their settlement. I then consider whether the Kermadec/Rangitāhua proposal will effect an expropriation of private property under the quota management system governed by the Fisheries Act 1996. Finally, I assess whether the Crown's behaviour in relation to the sanctuary proposal amounts to a breach of the principles of the Treaty of Waitangi.

**Background on Māori fishing rights**

Fisheries have always been of crucial importance to Māori, and much Māori mythology centres on both the act of fishing and the significance of fish.5 This was recognised in the Treaty

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of Waitangi, with the English version guaranteeing "the full exclusive and undisturbed possession of ... Fisheries", and the Māori version guaranteeing "te tino rangatiratanga" (essentially "the unqualified exercise of chieftainship") over "taonga" (treasures), including fisheries.⁸

Leaving to one side arguments regarding the differences between the two texts, the extent and content of Māori rights to fish became an issue from the moment the Treaty was signed in 1840.⁹ Over a century of disputes followed¹⁰ until the issues were brought to a head by the introduction of the Fisheries Amendment Act 1986.¹¹ This legislation introduced a quota management system (QMS) for the management of New Zealand's fisheries, under which individual fishers are allocated individual transferable quota, which reflect a share of a total catch.¹² The practical effect of the initial allocation policies (which were based on catch history) was that Māori would be unlikely to be allocated quotas and would therefore be unable to participate in the industry unless they had sufficient resources to buy into the market.¹³ As a consequence, "[s]uddenly, Māori no longer had special rights that guaranteed 'undisturbed possession' of their fisheries".¹⁴ Unsurprisingly, this precipitated a claim to the Waitangi Tribunal¹⁵ and a finding that the QMS was "in

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6 Treaty of Waitangi Act 1975, sch 1, art 2.
8 Jackson, above n 5, at 62.
10 For a review see Jackson, above n 5.
11 Boast, above n 9, at 113.
12 See the text to n 50 below.
15 Waitangi Tribunal Muriwhenua Fishing Report (Wai 22, 1988) at 13-63. The Waitangi Tribunal is a permanent commission of inquiry that makes recommendations on claims brought by Māori relating to potential breaches of the Treaty of Waitangi. See the Treaty of Waitangi Act 1975.
fundamental conflict with the Treaty’s principles and terms”.16 The Tribunal suggested that it was essential that the Crown and Māori reached agreement to ensure the introduction of a QMS that was compliant with the Treaty of Waitangi.17 When this proved to be impossible, a number of Māori representatives successfully sought an interim injunction from the High Court preventing the introduction of any further species to the QMS.18 This injunction “forced the government into negotiations with Māori”.19

An interim settlement was reached in 1989 with an agreement to establish a Māori Fisheries Commission. The Crown agreed to pay $10,000,000 and transfer 10 per cent of fishing quota to the Commission.20 While this settlement was predicated on the basis that the pending litigation would continue, the second settlement (reached in 1992) was expressly reached on the understanding that the litigation would be stopped by settlement legislation.21

The second settlement was reached by deed on 23 September 1992 following significant debate.22 It provided Māori with a cash settlement of $150,000,000, which enabled the purchase of half of Sealord Products Ltd (the other half to be purchased by Brierley Investments as a joint venture).23 Sealord Products Ltd already held 26 per cent of the total fishing quota, and the Crown agreed to provide Māori with 20 per cent of the quota for any new species brought under the QMS.24 The settlement also provided for the Māori Fisheries Commission to become the Treaty of

16  At [55.2] (on p xx).
17  At [12.2].
19  Milroy, above n 13, at 67.
20  See Maori Fisheries Act 1989, s 40 (now repealed), the Dear of Settlement between the Crown and Maori dated the 23rd day of September 1992 at preamble F, and Boast, above n 9, at 116.
21  Dear of Settlement, above n 20, at cl 4.3 and Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 11.
22  Dear of Settlement, above n 20; and see Boast, above n 9, at 118.
23  Dear of Settlement, above n 20, at cls 1.1-17, 3.1 and 4.1.
24  Dear of Settlement, above n 20, at cl 3.2 and Milroy, above n 13, at 68.
Waitangi Fisheries Commission (a body which is now known as Te Ohu Kaimoana).\textsuperscript{25}

This settlement was eventually enshrined in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.\textsuperscript{26} In addition to amending the Treaty of Waitangi Act 1975 so as to prohibit the Waitangi Tribunal from inquiring into commercial fishing or commercial fishers and the 1992 settlement itself,\textsuperscript{27} s 9(a) of the 1992 Act declares that all claims (current and future) by Māori in respect of commercial fishing "are hereby finally settled".\textsuperscript{28} The obligations of the Crown to Māori are declared to be satisfied and discharged, and no court or tribunal:\textsuperscript{29}

... shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Māori in commercial fishing, or the quantification thereof, the validity of the Deed of Settlement referred to in the Preamble, or the adequacy of the benefits to Māori ...

The final step in the settlement process was the passage of the Maori Fisheries Act 2004, which created Te Ohu Kaimoana and empowered it to transfer fisheries assets to Māori.\textsuperscript{30} Te Ohu Kaimoana has been at the forefront of Māori objections to the creation of the proposed sanctuary.

The dispute

Although the proposed sanctuary has been applauded by some,\textsuperscript{31} Te Ohu Kaimoana and other groups have reacted much less

\textsuperscript{25} Deed of Settlement, above n 20, at cl 3.4.1.
\textsuperscript{26} Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, preamble (I).
\textsuperscript{27} Boast, above n 9, at 118 and Treaty of Waitangi Act 1975, s 6(7) (Inserted by s 40 of the Treaty of Waitangi (Fisheries Claims) Act 1992).
\textsuperscript{28} See the text to n 113 below.
\textsuperscript{29} Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, s 9(b).
\textsuperscript{30} Valmaine Toki "Adopting a Māori Property Rights Approach to Fisheries" (2010) 14 NZEL 197 at 209.
\textsuperscript{31} Eugenie Sage MP, Green Party environment spokesperson "Greens applaud great start by Government over Kermadecs" (press release, 29 September 2015).
positively. This is not to say, however, that their concerns are shared by all Māori. For example, both Ngāti Kurī and Te Aupōuri have deep connections to the Kermadec/Rangitāhua area.\textsuperscript{32} According to the Minister for the Environment, and media reports, both of these iwi have been advocating for a sanctuary for a long time.\textsuperscript{33} However, while these iwi may support the idea in principle, they both also have concerns about the process and level of consultation.\textsuperscript{34} Both iwi have expressed support for the court action taken by Te Ohu Kaimoana regarding Māori fishing rights, and in light of this their support for the proposed sanctuary is somewhat qualified.\textsuperscript{35} Indeed, it should be noted that the entire process appears to have caused some unfortunate divisions between Māori.\textsuperscript{36} However, this article does not explore the broader issues and competing views of the proposed sanctuary held by different groups, but focuses solely on the claims made in the High Court by Te Ohu Kaimoana.

Both Te Ohu Kaimoana and the commercial fishing industry have launched judicial review proceedings in the High Court,\textsuperscript{37} seeking declarations that the legislation creating the proposed

\textsuperscript{32} As acknowledged in Te Aupōuri Claims Settlement Act 2015, s 111 and sch 4, the Deed of Settlement between the Crown and Te Aupōuri dated 28 January 2012, and Ngāti Kurī Claims Settlement Act 2015, ss 6(5)(g), 109 and sch 4.

\textsuperscript{33} Hon Dr Nick Smith, Minister for the Environment “Labour claims over iwi consultation on Kermadec sanctuary weak” (press release, 30 September 2015) and Sarah Robson “Māori leaders speak out over Kermadec plan” (NZ Newswire, 11 April 2016).

\textsuperscript{34} Rick Witana, Chairperson of Te Rūnanga Nui o Te Aupōuri Trust “Submission to the Local Government and Environment Committee on the Kermadec Ocean Sanctuary Establishment Bill” and Shaunui-Thompson “KERM-WASHINGTON-TP” (Radio New Zealand Newswire, 15 September 2016).

\textsuperscript{35} Witana, above n 34, and Dean Nathan “Ngāti Wai concerned over potential impact of Kermadec Sanctuary” (21 March 2016) Māori Television <www.maoritelevision.com>.

\textsuperscript{36} See, for example, the comments made by Māori Party co-leader Marama Fox in NZN “Another party opposes ocean sanctuary” (NZ Newswire, 13 April 2016).

sanctuary is inconsistent with a number of important rights and attempting to disrupt the creation of the proposed sanctuary in its current form. While it should be noted that the judicial review proceedings brought by Te Ohu Kaimoana are currently stayed pending the passage of the Kermadec Ocean Sanctuary Bill 2016 through Parliament, Te Ohu Kaimoana has “vowed to continue the legal action in the High Court on behalf of iwi”, so it is unlikely that the passage of the legislation will be the end of the matter.

Broadly speaking, both groups claim that the Bill will effectively confiscate the individual transferable quota they hold under the QMS, which currently enables them to undertake fishing activities in the area subject to the proposed sanctuary. In addition, Te Ohu Kaimoana claims that the actions of the Crown breach its duty of good faith to Māori, and in particular, that the proposed sanctuary breaches that duty by being established without fully informed consultation, without the consent of Te Ohu Kaimoana and iwi, and without compensation. More broadly, Te Ohu Kaimoana claims that the actions of the Crown are contrary to the 1992 settlement of Māori claims under the Treaty of Waitangi regarding fisheries.

The claims based on the QMS

Te Ohu Kaimoana claims that while not yet fully exploited, there is the potential for quota owners to develop the fishery in the proposed sanctuary area over time. As a result, it suggests that the legislation to create the proposed sanctuary means the quota shares held by Te Ohu Kaimoana would be rendered “nugatory”, which would amount to an extinguishment of the property

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38 See Te Ohu Kai Moana Trustee Ltd v Attorney-General, above n 37.
39 Te Ohu Kaimoana “Questions and Answers: Kermadec Ocean Sanctuary” (press release, 19 September 2016).
40 Te Ohu Kai Moana Trustee Ltd v Attorney-General, above n 37, at [7]–[10].
41 Te Ohu Kaimoana “Submission on the Kermadec Ocean Sanctuary Bill” at [97]–[107].
42 At [45].
rights comprising quotas in the proposed sanctuary area. This argument is predicated on the structure of the Fisheries Act 1996 and the QMS, which governs commercial fishing throughout New Zealand’s waters. The overall purpose of the Fisheries Act is outlined in s 8 and is to provide for the “utilisation" of fisheries resources while “ensuring sustainability”. By s 18 the Minister for Primary Industries may declare a fish stock subject to the QMS. The Minister must then set a “total allowable catch" in respect of each quota management stock in a “quota management area” (s 13). Quota management areas are based on a number of administrative and biological factors and are set at the time when a fish stock is bought within the QMS.

In setting the boundaries of a quota management area, the starting points are the 10 “fishery management areas” which make up New Zealand’s “exclusive economic zone”. It is Fishery Management Area 10 (FMA 10) that lies at the heart of this dispute. The proposed sanctuary would cover the 620,000 km² of the exclusive economic zone that comprises FMA 10 and, as noted, no commercial or recreational fishing would be allowed within the proposed sanctuary.

The total allowable catch must be set at a level which will maintain, or replenish, the stock at or to a level that can produce the “maximum sustainable yield”. The Minister may vary the total allowable catch from time to time, by either increasing or decreasing it (s 13(4)). The Minister may set or vary any total allowable catch at, or to, zero (s 13(5)).

Once the total allowable catch has been set, the Minister must set an annual “total allowable commercial catch" for each quota management stock in a quota management area. This is established having regard to the total allowable catch and non-commercial fishing interests (s 20). A proportion of the

43 At [46].
44 Fisheries Act 1996, s 24(2)(a).
45 Fishery management areas were created under the Fisheries Act 1983, s 5. See now Fisheries Act 1996, sch 1, pt 1.
46 That is, the greatest yield that can be achieved over time while maintaining the stock’s productive capability. See Fisheries Act 1996, s 2(1), definition of “maximum sustainable yield".
total allowable catch is set aside to provide for recreational fishing, customary uses, and all other fishing-related mortality of that stock (s 21). The balance is available as the total allowable commercial catch. This represents the total quantity of a particular fish stock that quota holders may catch that year. As with the total allowable catch, the Minister may vary the total allowable commercial catch and may set it at zero (s 20(2) and (3)). The proposed sanctuary seeks to achieve its goal of forbidding fishing within the proposed sanctuary by inserting new ss 113AB and 113AC into the Fisheries Act. The latter currently states that, within FMA 10, the total allowable catch and total allowable commercial catch for all quota management stock is zero.

Within FMA 10 it is believed that fish are abundant, and that approximately 66 of the 109 species of fish brought into the QMS are likely to be found. Interestingly, this fishery has not yet been fully developed and is currently not heavily exploited. It follows that each species of QMS fish within FMA 10 has only been given a nominal total allowable commercial catch. Nonetheless, in line with the Fisheries Act, quota shares have been allocated to those entitled to them, and under the fisheries settlement Te Ohu Kaimoana holds 10 or 20 per cent of those quota shares. The differential here is explained by the different percentages of quota allocated to Māori under the 1989 interim settlement and the 1992 final settlement.

These quota shares lie at the heart of Te Ohu Kaimoana’s concerns and so it is useful to outline how they operate. Individual transferable quotas are central to the QMS and sit within a vein of environmental management that suggests that the creation of a market in a resource will give resource users the incentives necessary to ensure the resource is used in a way that efficiently and rationally secures long-term sustainability. Well-defined

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47 Kermadec Ocean Sanctuary Bill 2016 (120-2), cl 47.
48 See New Zealand Fishing Industry Association, above n 37, at [11.1].
49 See the text to nn 19–30 above.
50 Gerd Winter “The Climate is No Commodity: Taking Stock of the Emissions Trading System” (2010) 22 JEL 1 at 16; Carol M Rose “Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to
private property rights are a central, and necessary, feature of such schemes, and the QMS is no exception. In essence, quotas are generated when a fish stock is introduced to the QMS. Quotas are expressed as a number of shares in each fish stock (s 42). The total number of quota shares for each stock is 100,000,000. It follows that an individual quota represents a one-hundred-millionth share of the total allowable commercial catch. Quotas are allocated in perpetuity and are fully transferable (subject to some important limitations).\footnote{51} Loosely modelled on the provisions of the Land Transfer Act 1952, each transfer must be registered, and registration is both proof of ownership and backed up by a Crown guarantee of title.\footnote{52} A range of other property dealings are provided for by the Fisheries Act, including the ability to mortgage quota (ss 136–146) and caveat the register (ss 147–152).

Te Ohu Kaimoana claims that by forbidding fishing within the proposed sanctuary the Crown will have rendered its quota shares within FMA 10 “nugatory”,\footnote{53} and that this is an expropriation of its private property. Moreover, Te Ohu Kaimoana claims that the establishment of the sanctuary would be a breach of the 1992 Deed of Settlement and constitute a removal of the benefits provided to Māori by the Crown (referred to in s 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992).\footnote{54} These benefits are claimed to include the FMA 10 quota held by Te Ohu Kaimoana. Te Ohu Kaimoana suggests that the proposed sanctuary amounts to the unilateral removal of these rights, and that it is being done without the consent of Te Ohu Kaimoana and iwi, and without fair compensation.\footnote{55}

\footnote{51} See Fisheries Act 1996, ss 57B and 59.
\footnote{52} Fisheries Act 1996, ss 168 and 171. For an introduction to New Zealand’s Land Transfer Act 1952, see Tom Bennion and others New Zealand Land Law (2nd ed, Brookers, Wellington, 2009) at ch 2.
\footnote{53} Te Ohu Kaimoana, above n 41, at [45].
\footnote{54} At [45]–[49] and Te Ohu Kai Moana Trustee Ltd v Attorney-General, above n 37, at [7].
\footnote{55} Te Ohu Kai Moana Trustee Ltd v Attorney-General, above n 37, at [7].
Unsurprisingly, the New Zealand Fishing Industry Association has made submissions on behalf of commercial fishers in similar terms. Among other things, the Association suggests that the Bill is inconsistent with common law rights to property, as it would confiscate (without compensation) the quota owners' right to harvest fisheries resources in FMA.56 Moreover, the Association suggests that the proposal fails to take into account the impact on the integrity of the QMS if property rights in the quotas were effectively confiscated without compensation.57

**Assessing the QMS claims**

As Simon France J noted in his judgment granting the Attorney-General an interim stay of proceedings, this aspect of the proposed sanctuary has brought into focus issues about the nature of the property rights attaching to quota shares, and the impact of the total allowable commercial catch process.58 I suggest, however, that the claim that the proposed legislation illegitimately confiscates private property misunderstands the nature of quotas under the QMS.

By any metric, quotas are private property; holders have possession of quotas, can use them, and are able to alienate them.59 However, in the context of this dispute it is crucial to recognise that the ambit of the property right is extremely limited. Under the QMS, quotas do not represent a private property right in the fish themselves. Rather, quotas represent a share of a total overall commercial catch. Quotas provide no ability to exclude others from the fish and provide no say in how the resources are managed. In line with private property theory,60 quotas are exclusive to the extent that the quota

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56 New Zealand Fishing Industry Association, above n 37, at [44].
57 At [41.2].
58 Te Ohu Kai Moana Trustee Ltd v Attorney-General, above n 37, at [25].
share (a percentage of the total commercial catch) need not be shared with anybody else. It is possible to think of a quota holder’s fish as swimming around waiting to be caught in the manner and at the time that suits the fisher best. However, this is entirely dependent on the fisher actually being able to catch those particular fish first. Quota holders are still in competition with the other quota holders for the actual fish. It follows that the property right is in a share of the catch, which can go up or down, or even be non-existent in any particular period. It is not an immutable property right in the fish, or even in the ability to definitively catch fish in any given year. It is dependent on the level that the total catch is set at, which in turn is determined by a range of factors prescribed in law including environmental, cultural and recreational considerations. Thus, while quotas are a type of private property, the property is in the quota shares, which are fluctuating and contingent. The possibility that quotas may not entitle a fisher to any fish is structured into the bedrock of the property right.

This point has already been recognised by both the High Court and the Court of Appeal. In 1995 and 1996 the (then) Minister of Fisheries decided that the amount of snapper that could be caught in a quota management area at the top of North Island should be reduced. The Minister determined that the catch should be reduced by about 39 per cent in an attempt to replenish the stock of snapper. Unsurprisingly, a number of groups objected to this decision. As there was no right of appeal under the relevant Fisheries Act, the decision was challenged by way of judicial review. Among the manifold heads of review was the submission that the Minister had failed to take into account, as a

or, Blackstone’s Anxiety” (1998) 108 Yale LJ 601 at 604.

Fisheries Act 1996, s 21.

New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries HC Wellington CP237/95, 24 April 1997; New Zealand Fishing Industry Assoc Inc v Minister of Fisheries CA82/97, 22 July 1997.

Cath Wallace “Environmental Justice and New Zealand’s Fisheries Quota Management System” (1999) 3 NZJEL 33 at 49.

Fisheries Act 1985; see now the Fisheries Act 1996.
relevant consideration, a legislative intention to create "strong property rights" in the quota in question.\textsuperscript{65}

In essence, the applicants argued that as a "strong" right had been created, the Act required the Minister to reduce the quota by using one of the alternative mechanisms at his disposal (of which there were several) before interfering with their property rights. By not doing this he had behaved unlawfully. However, neither the High Court nor the Court of Appeal had any hesitation in dismissing this head of review, although they did uphold others.

In the High Court McGechan J accepted "without difficulty"\textsuperscript{66} that quotas constitute a form of valuable property right, which are central to commercial fishing activity.\textsuperscript{67} Crucially, however, he held that the property right was qualified and subservient to the Minister's powers under the Fisheries Act. Quotas are held on the basis that their holders must take the "rough along with the smooth";\textsuperscript{68} and although "[s]anctity of property has its place in law and society, ... much depends on the terms of which the property is held".\textsuperscript{69} The Court of Appeal agreed, noting that the structure of the legislation creating the right was important, and that:\textsuperscript{70}

While quota are undoubtedly a species of property and a valuable one at that, the rights inherent in that property are not absolute. ... There is no doctrine of which we are aware which says you can have the benefit of the advantages inherent in a species of property but do not have to accept the disadvantages similarly inherent.

In this case the courts happily accepted that quota is a form of private property, but were explicit in stressing that the right has inherent advantages and disadvantages. Neither court was

\textsuperscript{65} Federation of Commercial Fishermen, above n 62, at 8.
\textsuperscript{66} At 20.
\textsuperscript{67} At 90.
\textsuperscript{68} At 91.
\textsuperscript{69} At 92.
\textsuperscript{70} Fishing Industry Assoc, above n 62, at 16.
convinced that the property right was "strong" in the sense that it provided a sphere of complete individual autonomy that could not be impeached.

Importantly for this dispute, it also indicates that it is quite within the (now) Minister for Primary Industry's power to reduce the total allowable commercial catch for a fish stock (indeed, the legislation allows it to be set at zero), and that doing so will not interfere with a quota holder's property right. The Minister can adjust what the property right holder is entitled to by reducing the catch, in order to protect the sustainability of the fishery, achieve the purposes of the Fisheries Act 1996, and generally defend the public interest in having a healthy fishery. The rationale behind this structure is straightforward: it provides the flexibility necessary to achieve the purposes of the Fisheries Act. The Minister may protect fish stocks and ensure sustainability by setting the fishing effort at a level that will produce the maximum sustainable yield. It allows for a political determination of the level of fishing that will be allowed in the community interest. This is entirely appropriate and reflects the broader community interest in having a healthy, well-managed fishery.

It could be argued that, as the proposed sanctuary will impose an ostensibly permanent zero limit, it cannot be said to be aimed at creating a healthy fishery within the proposed sanctuary area that can be exploited at a later date. However, the proposed sanctuary may contribute to healthy fisheries more generally. Fish are a fugitive resource and they will still be able to be caught outside the sanctuary area. Presumably this could benefit those who hold quotas in those other areas. In addition, while it seems likely that the quota will be permanently set at zero, this in itself does not amount to an extinguishment of the right. If, at any point, government policy changed so as to allow fishing within FMA 10, it would not require the grant of new rights under the Fisheries Act, but rather a simple repeal of the proposed ss 113AB

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71 This point appears to have been made by the (then) Prime Minister, who noted that "[c]reating protected areas will support not only our own fisheries, but those of our Pacific neighbours": Rt Hon John Key, Prime Minister "PM announces Kermadec Ocean Sanctuary" (press release, 29 September 2015).
and 113AC to allow total allowable catches to be set for quota currently held for the area.

Although it is important to recognise that the quota shares for fish stocks in FMA 10 endure, the practical effect of setting them at zero for the foreseeable future is that the ability to actually catch fish will be removed. While this will have an impact on the value of those quotas, it does not actually function as an expropriation of private property. The quota shares do not disappear as a result of the Kermadec Ocean Sanctuary Bill 2016, and it is incorrect to claim that the Bill will cause an extinguishment of the property rights comprising the FMA 10 quotas.\textsuperscript{72} This was recognised by the select committee’s report on the Bill, where it noted that the advice it received was that none of the provisions of the Bill would extinguish any individual fishing quotas in FMA 10.\textsuperscript{73}

The select committee also acknowledged that some members sympathised with the concern that the proposed sanctuary would, in effect, prevent the utilisation of quota within the area of the sanctuary. However, although the value of the quota shares will no doubt decrease, they may not be rendered “nugatory”.\textsuperscript{74} Contrary to the New Zealand Labour Party minority view expressed in the select committee report, the structure of the Fisheries Act 1996 and the setting of the total allowable catch and total allowable commercial catch at zero does not mean that quota is “effectively being taken away”.\textsuperscript{75} Such logic would mean that whenever the Minister used s 20 to reduce the total allowable commercial catch, compensation could be due. One of the reasons that the QMS changed from a fixed tonnage approach to a quota share system in 1990\textsuperscript{76} was to avoid such claims.\textsuperscript{77}

\textsuperscript{72} See Te Ohu Kaimoana, above n 41, at [118].
\textsuperscript{73} Kermadec Ocean Sanctuary Bill 2016 (120-2) (select committee report) at 7.
\textsuperscript{74} See Te Ohu Kaimoana, above n 41, at [45].
\textsuperscript{75} Select committee report, above n 73, at 9.
\textsuperscript{77} Tracy Yandle “Developing a Co-management Approach in New Zealand Fisheries” in Donald R Leal (ed) Evolving Property Rights in Marine Fisheries (Rowman &
Moreover, quotas may not, in fact, be rendered otiose. Although the reduction of the total catch in FMA 10 to zero may be ostensibly permanent, quota holders will still own their quota, and they will still be able to transfer it to someone prepared to take the risk that Parliament may repeal ss 113AB and 113AC (and that the proposed sanctuary will be lifted) or that the mandated review may result in changes.78

Moreover, although it is clear that the value of the quotas in question will be significantly reduced, it does not necessarily follow that this is an expropriation of private property. It is quite common for governments to impose restrictions on the way owners can use their property. In these circumstances, an owner will keep their property but will be prohibited from using it in a way that the community (through the State) considers contrary to the collective interest. The Resource Management Act 1991 is a paradigmatic example.79 However, inevitably restrictions on how private property can be used have an impact on value. In New Zealand this is not considered to be an expropriation, and it is not something for which compensation is usually provided.80

The claims based on the Treaty of Waitangi

Although there is little merit to the claim that the Kermadec Ocean Sanctuary Bill 2016 will expropriate or extinguish private property rights, Te Ohu Kaimoana’s claims that the Crown’s actions amount to a breach of the Treaty of Waitangi are much

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78 See Kermadec Ocean Sanctuary Bill 2016 (120-2), cls 27A and 27B. However, Te Ohu Kaimoana can only allocate FMA 10 quota shares to iwi once there is a commercially viable total allowable commercial catch (see Maori Fisheries Act 2004, s 146). Consequently, while Te Ohu Kaimoana retains the quota, iwi do not currently have the ability to transfer the quota to someone more prepared to take the risk that Parliament will change its mind.


stronger. As noted by Simon France J, Te Ohu Kaimoana’s claims also raise questions regarding whether the original source of the property interest in the Treaty of Waitangi and the fisheries settlement imposes obligations on the Crown in relation to this quota holder that it may not have in relation to other quota holders.\(^{81}\) Thus, while from a property law perspective the proposed sanctuary is unlikely to give rise to any successful claim, the effect of the proposal on the full and final redress provided under a negotiated settlement of a Treaty claim may well be different.

Following litigation in the late 1980s and early 1990s it is now well recognised that, although the Treaty of Waitangi itself has no direct legal force, it should nonetheless be seen as a constitutionally significant document, and that "the Court will not ascribe to Parliament an intention to permit conduct inconsistent with the principles of the Treaty".\(^{82}\) Consequently the principles of the Treaty have become of paramount importance, and have been developed by the courts and the Waitangi Tribunal over time. They encompass duties including active protection, partnership and good faith.\(^{83}\) Te Ohu Kaimoana suggests that in the context of the proposed sanctuary these principles required the Crown to:\(^{84}\)

- fully consult with iwi at an early stage regarding the proposed sanctuary, and to have particular regard to the views of iwi;
- uphold the integrity of existing settlements between the Crown and Māori, including the fisheries settlement; and
- not extinguish (or substantively preclude the exercise of) property rights such as quotas held by iwi and Te Ohu Kaimoana without their informed consent and without proper compensation.

\(^{81}\) Te Ohu Koi Moana Trustee Ltd v Attorney-General, above n 37, at [25].

\(^{82}\) New Zealand Maori Council v Attorney-General [1987] 1 NZLR 641 (CA) [Lands case] at 656.


\(^{84}\) Te Ohu Kaimoana, above n 41, at [51].
Te Ohu Kaimoana claims that because the Crown did not adhere to these principles it has breached its duty of good faith.\textsuperscript{85}

Certainly, with regard to consultation, it does not appear that the Crown has covered itself in glory. According to media reports, Te Ohu Kaimoana was not informed of the Crown’s proposal to create the proposed sanctuary until the night before the Prime Minister’s announcement at the United Nations in New York;\textsuperscript{86} apparently only 10 hours before the Prime Minister spoke.\textsuperscript{87} Quite simply, this is not consultation, a point which appears to have been conceded by the Minister for the Environment who (at least as reported by Te Ohu Kaimoana) has offered to acknowledge that the Crown erred by not consulting earlier on the proposed sanctuary.\textsuperscript{88}

Even viewed as a one-off incident, this lack of consultation would be extremely troubling. The duty to consult is not an absolute duty, but it is one way of demonstrating that the duty of good faith has been adhered to.\textsuperscript{89} Its absence here is certainly suggestive of a broad lack of good faith regarding the proposed sanctuary. However, a deeper concern relates to the possibility of an additional, and more serious, breach of the duty of good faith arising from the impact that the Crown’s behaviour may have on the fisheries settlement itself, and the flow-on effect this may have for all Treaty of Waitangi settlements.

\textsuperscript{85} Te Ohu Kai Moana Trustee Ltd v Attorney-General, above n 37, at [9]–[10]. Interestingly, although Te Aupōuri has advocated for a sanctuary (see the text to n 33 above), it was only told of the proposed sanctuary shortly before the Prime Minister’s announcement in New York, and there was apparently no consultation before this (Witana, above n 34, at [13]). Although, from Te Aupōuri’s point of view, this “oversight” was subsequently remedied (Witana, above n 34, at [14]), this does not appear true for Te Ohu Kaimoana.

\textsuperscript{86} Isaac Davison “Iwi fight marine sanctuary” The New Zealand Herald (online ed, Auckland, 21 March 2016).

\textsuperscript{87} Te Ohu Kaimoana “Media Release” (press release, 2 October 2015).

\textsuperscript{88} Te Ohu Kaimoana “Government Rejects Māori Compromise to Kermadec Sanctuary” (press release, 14 September 2016).

\textsuperscript{89} Te Puni Kōkiri, above n 83, at 86.
The *Lands* case suggested that:⁹⁰

... the Treaty created an enduring relationship of a fiduciary nature akin to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honourably towards the other.

It is difficult to see how any Crown action which would unilaterally have an effect, however minor, on a negotiated settlement of Treaty claims could be anything other than a breach of good faith. Offering redress as part of a negotiated settlement at one point in time, only to unilaterally modify the utility or value of that redress at another, can hardly be seen as the Crown acting reasonably, or with the utmost good faith.⁹¹ It should be remembered that this duty is not a light one, and it is “infinitely more than a formality”.⁹² While it is clear that the private property right in quotas granted to Māori are not technically being extinguished or expropriated, there can be no doubt that the value of these quotas will be reduced, possibly permanently. While there is no general presumption of compensation for such a loss of value, the context of a Treaty settlement must be an important consideration which should inform the Crown’s approach to Te Ohu Kaimoana and its claims. The Treaty settlement process has demonstrated that at the end of the day, both Treaty partners tend to be pragmatic. The proposed sanctuary would be one of the world’s largest and most significant fully-protected areas, and it would make a wonderful contribution to New Zealand’s attempts to manage our oceans responsibly.⁹³ In light of this, surely an outcome recognising the proposed sanctuary’s effect on Māori and the fisheries settlement (as opposed to its effect on the quota directly) is possible. In any event, the Crown ought to be careful that in

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⁹⁰ *Te Runanga o Wahrekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304.

⁹¹ *Lands* case, above n 82, at 667.

⁹² At 667.

⁹³ Rt Hon John Key, Prime Minister “PM’s address to 70th UN General Assembly” (New York, 2 October 2015).
creating the proposed sanctuary it adheres to the principles of the Treaty by, at the very least, proper consultation, but also by not undermining an earlier settlement negotiated in good faith.

Putting aside the lack of consultation, the Crown’s behaviour in relation to the proposed sanctuary may still be a breach of good faith as a result of the diminution of value of the quota and the effect this will have on Māori self-determination. As a result of setting the total allowable catch and total allowable commercial catch at zero, Māori have essentially lost the ability to manage and utilise the fish stock within FMA 10 and, consequently, to exercise self-determination or rangatiratanga in respect of that area. Context is everything here. While setting the total allowable catch and total allowable commercial catch at zero is not an appropriation of private property, and claims founded on this are unlikely to be successful, in light of the genesis of Māori ownership of quota a successful claim under Treaty principles may be possible.

While the exercise of tino rangatiratanga over fisheries that was guaranteed by art 2 of the Treaty of Waitangi was extinguished by the fisheries settlement, the Crown recognised its Treaty duty to “develop policies to help recognise use and management practices and provide protection for and scope for exercise of rangatiratanga in respect of traditional fisheries” in the 1992 Deed of Settlement. By settling the total catch at zero within FMA 10, the Crown has effectively removed this ability in respect of this area of fisheries; a point only strengthened by the ostensibly permanent nature of this total reduction. It is no answer to say that Māori knew of the possibility of setting a catch

94 “Tino rangatiratanga” is a difficult concept to translate into English. In discussing the use of the words in the Māori version of the Treaty of Waitangi, the Waitangi Tribunal has noted in Maori Electoral Option Report (Wai 413, 1994) at 4: “Some have argued that tino rangatiratanga was a guarantee of Maori sovereignty; others a right to self-determination; others again a right of self-management.” Here is it used in the sense of meaning “a right to maintain one’s own affairs; self-determination”. See generally Waitangi Tribunal The Ngai Tahu Sea Fisheries Report 1992 (Wai 27, 1992) at 269.

95 Milroy, above n 13, at 84.

96 Deed of Settlement, above n 20, at preamble K and Treaty of Waitangi (Fisheries Claim) Settlement Act 1992, preamble (k).
to zero when they signed the Deed in 1992, and that therefore they should simply have to take the rough along with the smooth as other quota owners must. While Māori retain the property right, their ability to utilise it in the manner they see fit has been removed by the Crown. With respect to general rights holders, the Minister for Primary Industries has the ability (and even the requirement) to do so pursuant to the overarching goals of the Fisheries Act 1996. The difference with Māori is that these rights were granted expressly with the aim of recognising Treaty duties, including protection for and scope for exercise of rangatiratanga. Potentially, it is breach of good faith to legislate in a way that removes this protection, albeit related to a relatively small area of the overall fisheries settlement.

A history of depressingly similar behaviour
One of the other unfortunate aspects of this episode is that it is not the first time the Crown has acted in a way that serves to undermine an attempt to remedy past wrongs. This dispute bears a number of similarities to the events surrounding the South Island Landless Natives Act 1906 and the effect that the implementation of modern rules surrounding the logging of indigenous forests had on the utility and value of the redress provided under that Act.

In 1906, following a Royal Commission examining concerns about the ability of South Island Māori to access sufficient land to support themselves, roughly 57,000 hectares of land was given to approximately 4,000 Māori under the South Island Landless Natives Act (the SILNA lands). These Māori were “landless” as a result of the Crown’s (and its agents’) actions in purchasing land without reserving sufficient land for Māori to support

themselves, despite promises to the contrary.\textsuperscript{98} However, the land granted under the Act was "so remote and hostile as to be basically useless until the type of timber growing there was over harvested elsewhere[,] thus driving up the price."\textsuperscript{99} While some harvesting did occur on SILNA lands, it was not until the 1970s that it became economic for these landowners to fell their trees, as timber in other parts of the country had already been cleared.\textsuperscript{100}

However, around the same time public opinion shifted in favour of conservation. By the mid-1980s the Crown had adopted a policy of either conservation or sustainability in relation to New Zealand's remaining indigenous forests.\textsuperscript{101} Over the late 1980s and early 1990s various steps were taken which had the effect of either protecting parts of the forest estate or controlling the export of indigenous timber.\textsuperscript{102} This culminated in a 1993 amendment to the Forests Act 1949, which inserted a new pt 3A of the Act. Essentially, this prohibits the export and milling of trees from indigenous forests, unless they are subject to a sustainable forest management plan or permit.\textsuperscript{103} Although the Act originally contained an exemption for SILNA lands, this was partially repealed in 2004.

Today, while the legislation continues to distinguish between SILNA lands and other indigenous forests to a limited extent, it is clear that the ability of the Māori landowners to exploit the valuable resource on their lands is extremely limited. SILNA landowners can harvest their land without the need for a permit or sustainable forest management plan under the Forests Act (subject to the Resource Management Act 1991) and sell this timber on the domestic market. However, SILNA land is subject to the export provisions of the Forests Act, and landowners must

\textsuperscript{98} Wheen, above n 97, at 227.
\textsuperscript{99} At 227.
\textsuperscript{100} At 229.
\textsuperscript{101} At 229.
\textsuperscript{102} At 229.
\textsuperscript{103} Forests Act 1949, ss 67C and 67D.
bring their forests under a sustainable management plan or permit under the Act in order to export their timber.\textsuperscript{104}

Interestingly, after 2001 the Crown refused to negotiate with, or provide compensation to, affected landowners. The only option for those wishing to gain some recompense for the Crown's forestry policy and their lost cutting rights is to negotiate a conservation covenant under a Nature Heritage Fund.\textsuperscript{105} While the preservation of indigenous forest is a noble cause, it must be galling to know that the restrictions on logging, and the economic effect this has on those landowners, came about because of the relatively uncontrolled harvesting that occurred over the balance of the 20th century on more desirable lands that had been acquired by the Crown and sold in the 19th century. It is clear that the South Island Landless Natives Act 1906, as an act of redress for poor Crown behaviour in the 19th century, was indeed a "cruel hoax".\textsuperscript{106} As noted by the Waitangi Tribunal, "the facts speak for themselves," and it was "unable to reconcile the Crown's action with its duty to act in the utmost good faith towards its Treaty partner".\textsuperscript{107} Indeed, the hoax appears to have continued throughout the late 20th century and into the 21st; just at the point that the "woefully inadequate"\textsuperscript{108} land became economically viable, the goal posts were changed. While the Crown did reach settlements with some SILNA landowners,\textsuperscript{109} changing policies meant that this did not continue, which must call into question the Crown's commitment to provide a remedy

\textsuperscript{104} Ministry for Primary Industries "Forests under the South Island Landless Natives Act 1906" <www.mpi.govt.nz>.

\textsuperscript{105} This "fund can make a monetary consideration payment for a conservation covenant in perpetuity": Department of Conservation "SILNA forests" <www.doc.govt.nz>. Payments are not equal to the commercial value of the timber: see Wheen, above n 97, at 230–234.

\textsuperscript{106} Waitangi Tribunal Ngai Tahu Land Report (Wai 27, 1991) at [2.13] and Wheen, above n 97, at 228.

\textsuperscript{107} Waitangi Tribunal, above n 106, at [2.13].

\textsuperscript{108} McPhail, above n 97, at 8.

when later Crown action has a material effect on an earlier settlement.\textsuperscript{10}

Clearly, the Kermadec/Rangitāhua Ocean Sanctuary dispute carries similar hallmarks. The Crown is motivated by a desire to protect New Zealand’s “remaining pristine ocean environments and ecosystems”,\textsuperscript{11} just as the amendments to the Forests Act 1949 were designed to protect New Zealand’s remaining untouched indigenous forests. As with pt 3A of the Forests Act, however, the practical outcome of the Kermadec Ocean Sanctuary Bill 2016 is that Te Ohu Kaimoana will not be able to utilise an aspect (albeit relatively minor and, as yet, undeveloped) of the redress provided under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. While Māori knew at the time of signing the 1992 Deed of Settlement that there was a possibility that total allowable catches may be set at zero, the implication in the Deed is that a valuable property right was being provided, which would recognise Māori rights under the Treaty of Waitangi and provide for some degree of rangatiratanga. Twenty per cent of zero equals zero, both in terms of value, but also in terms of use and control. It is extremely unlikely that Māori would have agreed to a bargain that rendered a portion of that redress vulnerable to becoming permanently unavailable. While the utility of the quota in question is not necessarily high on current fishing patterns, this should not obscure the deeper point. There is a real risk that by changing the content and contours of redress post-settlement, the Crown risks undermining the entire settlement process. This could have a marked impact on the process of negotiation in the future. If Māori believe that Treaty settlements, and the redress provided under them, may be unilaterally altered by the Crown at some later date, it is likely that the process will be approached much more carefully.

More generally, there is always the possibility that any later Crown action materially affecting a settlement may itself amount

\textsuperscript{10} For a detailed discussion of the extent of Crown breaches of the Treaty in relation to the SILNA lands, see Waitangi Tribunal The Waiohau Trust (SILNA) Report (Wai1090, 2005).

\textsuperscript{11} Ministry for the Environment “About the Kermadec Ocean Sanctuary” <www.mfe.govt.nz>.
to a breach of the Treaty. Indeed, such an argument may prove to be an answer to the thorny legal issues that arise in this case from s 9 of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, which attempts to oust the jurisdiction of the courts and the Waitangi Tribunal to inquiry into Māori claims to fisheries or commercial fishing.\textsuperscript{112} There are interpretive approaches that provide a route through this provision.\textsuperscript{113} However, a simpler approach might be to argue that the Crown's apparent breach of the duty of good faith in relation to the proposed sanctuary amounts to a new breach of the Treaty rather than a claim to fisheries or commercial fishing \textit{per se}. Although the success of such an argument in this case is open to conjecture, the spirit of the \textit{Lands} case suggests that it is unlikely the courts or the Waitangi Tribunal will idly stand by and watch the Crown fundamentally undermine a Treaty settlement simply because of the presence of a privative clause.

It is accepted that Parliament is sovereign and can legislate in any way it chooses. However, it would be an extraordinary result indeed if Parliament had legislated so that a settlement it conferred could itself be undercut by later Crown actions. If indeed this were to be the result, why settle? Of course, there is nothing to stop Parliament legislating away the rights of any person, be they proprietary or otherwise. However, in the context of its relationship with Māori the Crown is bound by the principles of the Treaty, and this must be seen as confining its actions and limiting the types of legislation it can introduce to Parliament without resulting in a further breach of the Treaty.

\textbf{Conclusion}

As noted by the Minister for the Environment, Māori have been world leaders in acting to protect and preserve natural resources.\textsuperscript{114} Te Heuheu's foresight in establishing a mechanism

\textsuperscript{112} See the text to n 28 above.

\textsuperscript{113} See Benjamin Bielski "Final Settlement Clauses in Treaty Settlement Legislation" (LLB (Hons) Dissertation, University of Otago, 2016).

\textsuperscript{114} See the text to n 4 above.
to preserve the sacred mountains in the Central North Island\textsuperscript{15} is notable in this regard and to be celebrated. However, it must be remembered that this was driven by Te Heuheu; it was not done unilaterally by the Crown over Māori objections. It is therefore a bit rich for the Minister to call in aid the memory of a great leader when introducing a Bill that was drawn up with no consultation with one of the centrally affected parties, and that will have the effect of limiting the utility of an aspect of redress provided under a negotiated settlement. While the proposal will not directly affect the private property right inherent in individual transferable quota, it will clearly have an impact on the ability of Te Ohu Kaimoana to utilise the quota they hold in FMA 10. While other commercial fishers may have to simply accept the “rough along with the smooth”,\textsuperscript{16} the fact that the quota held by Te Ohu Kaimoana arose out of a settlement of Māori claims to fisheries and which recognised and aim to provide for rangatiratanga must make all the difference, and this ought to be recognised by the Crown. How to recognise this is open to conjecture, but it need not take the form of monetary compensation. The fisheries settlement ultimately settled Māori claims to fishing rights, but it was also aimed at making “better provision for Maori participation in the management and conservation of New Zealand’s fisheries”.\textsuperscript{17} In recent years the Crown and Māori have agreed to some very interesting and innovative co-management regimes.\textsuperscript{18} It would not be a stretch

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\item[\textsuperscript{15}] Steven Oliver “Te Heuheu Tukino IV, Horonuku” Te Ara – The Encyclopedia of New Zealand <www.teara.govt.nz>.
\item[\textsuperscript{16}] Federation of Commercial Fishermen, above n 62, at 91.
\item[\textsuperscript{17}] Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, long title, para (c).
\item[\textsuperscript{18}] See the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, the Te Urewera Act 2014 and the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017. It is acknowledged that the proposed sanctuary is to be governed by a seven-member board comprised of four ministerial appointees, one member appointed by the Minister for Māori Development, and one member each by Ngāti Kuri and Te Aupōuri; Kermadec Ocean Sanctuary Bill 2016 (20-2), cls 23 and 24. Thus, to a limited extent, there is to be some co-governance. However, the Crown has insisted that there will be no “co-management”; Rosanna Price “No co-management with Maori on Kermadec ocean sanctuary” (8 March 2016) Stuff <www.stuff.co.nz>. Clearly, co-governance is not co-management, and it is certainly not in the same league as giving either a national park, or a river,
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to imagine a similar regime being possible for the proposed sanctuary. Perhaps such an approach may solve all difficulties. In the absence of consultation and good faith, it is difficult to know.

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legal personality. Nor do the responsibilities of the members of the Kermadec/Rangitāhua Conservation Board appear to go as far as those who are members of the Waikato River Authority under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act. Given the importance of fisheries to all Māori, in addition to the particular importance Rangitāhua has for Ngāti Kuri and Te Aupōuri, it is disappointing that the Crown is not prepared to accept greater input from all of these groups. Moreover, there seems no reason in principle why the innovative thinking evident in other areas of co-management ought not to become the norm, rather than the exception.