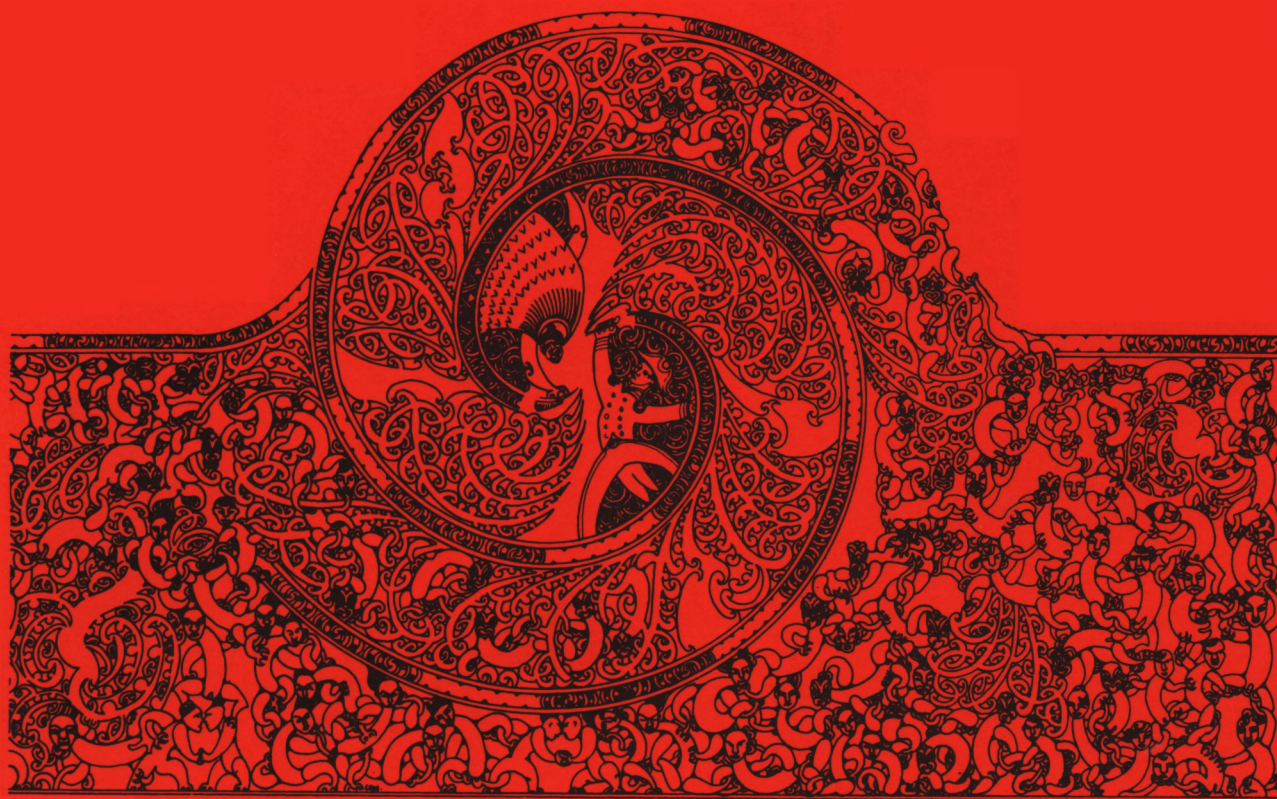


THE
FISHERIES SETTLEMENT
REPORT 1992



WAITANGI TRIBUNAL REPORT 1992

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The cover design by Cliff Whiting invokes the signing
of the Treaty of Waitangi and the consequent interwoven development
of Maori and Pakeha history in New Zealand as it continuously
unfolds in a pattern not yet completely known

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Definitions

In this report some words have special meanings:

| | |
|----------------|---|
| whanau | the extended family |
| hapu | the local tribe |
| iwi | the people as a whole, the parent tribe |
| runanga | tribal council |
| allocation | the division of settlement benefits amongst the hapu and iwi |
| abrogation | the repeal or cancellation of rights or interests |
| mandate | an authority to negotiate, speak or sign for iwi or a Maori organisation |
| ratification | the general Maori or tribal approval of a proposal |
| representation | the questions of: <ul style="list-style-type: none">• which tribe can speak for an area (customary representation)• whether the local or parent tribes should settle any matter (level of representation)• what body can speak for any tribe (institutional representation)• what body can speak for Maori (national representation) |

The Honourable Doug Kidd
Minister of Maori Affairs
Parliament Buildings
WELLINGTON

Tena koe e te Minita i o turanga maha. Ka nui te mihi me te tautoko a te iwi.
We have made inquiry into several claims concerning the Crown-Maori settlement on fisheries, September 1992. Particulars of the claimants and of the proceedings are given in an appendix.

The complaint is that the Deed of Settlement, or the Crown policy that it proposes, is contrary to the Treaty and prejudicial to claimants in that it would diminish their rangatiratanga and fishing rights and impose new arrangements that have not been adequately agreed.

1. **The Settlement**

According to the deed the Crown will:

- pay \$150 million to promote Maori commercial fishing thus assisting Maori in a joint venture purchase of Sealord Products Ltd (deed, para 3.1);
- give Maori 20 percent of new species quota (in addition to the 10 percent of previous quota as agreed in 1989) (3.2);
- place Maori on statutory bodies on fisheries management (3.3, 3.5); and
- restructure the Maori Fisheries Commission (which promotes Maori fishing) making it more accountable to Maori, giving it more input to fisheries management and reorganising its membership with appointments to be in consultation with Maori (3.4, 3.5). It will then be called the Treaty of Waitangi Fisheries Commission.

In return, the Maori who signed agree:

- that the settlement “shall discharge and extinguish all commercial fishing rights and interests of Maori” (at sea or inland) and shall satisfy all current and future claims thereto (5.2). Consequentially they agree:
- to discontinue their current court actions relating to fisheries and to take no more proceedings (4.3), to endorse the quota management system (4.2) and to support legislation to give effect to the settlement (4.4); and
- that this tribunal shall have no further say on commercial fishing matters (3.5.1.4).

It is also agreed that:

- customary fishing rights will be replaced by regulations (3.5.1.1, 3.6, 5.2);
- the Treaty of Waitangi Fisheries Commission will develop a procedure to determine who will benefit from the settlement and a scheme for the distribution of benefits (4.5.4.2, 4.5.5);
- previous negotiations and arrangements respecting Maori fishing interests are cancelled, save the Treaty of Waitangi itself (1.3); and
- the settlement will restrict the Crown’s ability to meet other claims (4.6).

Thus the settlement affects more than commercial sea fisheries. It affects non-commercial fisheries and inland fisheries and outstanding land and other claims as well.

2. Background

The terms of the settlement are best explained by reference to the background. An inquiry into Maori fishing in Muriwhenua, in 1987, led to court actions concerning the Quota Management System, the primary policy for the regulation of New Zealand commercial fishing. There was some uncertainty within the industry as a result. Fish quota created a property right in fishing, the courts considered, and this was in conflict with the proprietary interests of Maori, which are protected under section 88(2) of the Fisheries Act 1983. Accordingly, the courts placed injunctions on developing the quota management policy, which, to the consternation of various fishing interests, have remained in force ever since.

The proprietary rights of Maori had not been quantified however, and, with goading from the courts, it became necessary that those rights should be settled. That is now what has happened. Maori negotiators were mandated at a national hui in 1988, and subsequently thereafter, to seek a settlement. They were instructed to settle for not less than 50 percent of the quota, in some opinions, on the basis that the Treaty gave a right to 100 percent.

A partial settlement in 1989 provided for the transfer of 10 percent of quota, as it became available, to a Maori Fisheries Commission established to promote Maori fishing. The proposed sale of Sealords this year however, provided the opportunity to overcome a major difficulty that most of the quota had been allocated, for Sealords holds some 26 percent of the quota. This represents a major quota holding and an opportunity unlikely to be repeated. The affidavits of the Maori negotiators, copied to this tribunal, testify to their concern to seize this opportunity.

The settlement was first proposed in an agreement in principle of 27 August 1992, called a Memorandum of Understanding, that was made subject to Maori ratification. It was taken to national hui and some 23 marae throughout the country. The negotiators' report on those hui appears to have satisfied the responsible Ministers that the understanding should be formalised in a deed of settlement.

The negotiators' affidavits consider that the hui were generally supportive of the settlement as proposed in the memorandum while still instructing the negotiators to oppose the inclusion of traditional and freshwater fisheries if they could. As it turned out they could not.

Thereafter events moved swiftly. It appears the deed was still being finalised when a gathering assembled at Parliament to mark the occasion of the settlement. Some of those present then executed the deed, moments after it was engrossed. Amongst the signatories were 43 from some 17 different iwi and 32 of the Maori plaintiffs in the various fish actions in the courts. Though only the signatories are legally bound to promote the settlement, the support is seen to emanate from the preceding hui.

Reading together the 1989 settlement as provided for in the Maori Fisheries Act 1989, and the terms of this current deed, there is a consistent objective, as it is put in the deed (para 3.1.3.1), to promote "the development and involvement of Maori in the New Zealand fishing industry". As we see it, that goal is

more important than any precise quantification of the Maori proprietary interest.

In return the Crown expects an end to the litigation that has caused uncertainty in the industry and an agreement that further fish quota may now issue. There is no public gain unless those assurances can be given. Mindful of their treaty obligations however, the Crown and Maori make it clear that what is sought is a "just settlement" (preamble L) and "the resolution of an historical grievance" (preamble M).

A complete settlement was nonetheless seen to be necessary. There is "an uncertainty" respecting the whole of Maori fishing rights, preamble C and H declare, and it was the Crown's wish, according to the negotiators' affidavits, that all Maori fisheries should be included and that regulations should be settled to remove the uncertainties (as is provided for in para 3.6). The Maori negotiators have sworn to some diffidence over the broadening of the settlement to include other fisheries but that they eventually had to concede to an all-in settlement. The provision to regulate (and thus regularise) other Maori fishing interests, is nonetheless constrained by the Crown's recognition (in preamble K) of its "Treaty duty" to "develop policies ... for (the) exercise of rangatiratanga in respect of traditional fisheries".

The settlement has rightly been hailed as historic. While it is not the only national settlement, it is the first to extinguish claims (the forestry and state enterprise settlements were but steps along the way); and the first to affect all iwi (Railcorp binds only those who agree). It is significant too in that previously, 'first in, first served' applied, while this settlement proposes the allocation of benefits according to some regular plan.

Nonetheless there are objections. They tell of a division in the Maori community that reflects in part a desire on the one hand to seize the opportunity, and on the other, to maintain the integrity of the Treaty. It reflects as well anxieties over the level of consultation and over the prospective allocation of benefits. But it does not demonstrate a major division in our view. The concerns the claimants expressed are in fact shared by all. The difference was that some would give more emphasis to opportunity while others would give more to conserving customary positions.

3. Complaints

The complaints came mainly after the terms of the deed were studied. Perhaps as a consequence of the inevitable haste, the deed was not packaged well for Maori, in our view. What might have been a noble compact presents like a warranty to protect the manufacturer. There is a poverty of spirit in the operative parts, a burden of legalism that does no justice to the preamble's references to "co-operation and good faith". Also the goals are not clearly stated and the document is difficult to understand. The Court of Appeal, referring to apparently conflicting provisions in the deed, has said:

This weakness in the Deed and other aspects of it which are criticised by the appellants could be in part accounted for by input into it from different hands. Certainly it is a most unusual document and, perhaps even designedly, obscure in some major respects. [*Te Runanga o Wharekauri Rekohu Inc and ors v Attorney-General and ors* (CA 297/92, p 11 judgment 3.11.92)]

The more specific concerns are set out under the following headings:

Abrogation

Most especially the deed was seen by the complainants to extinguish rather than fulfil the Treaty's obligations. All treaty fishing rights are either extinguished (5.1) or made unenforceable (5.2). The deed does not see the Treaty as a living and on-going covenant but as something to be ended; and that was wrong in their view. In substitution however regulations are proposed, but the terms are still unknown. This was like buying a pig in a poke, it was thought, and in addition, there was a risk the Crown would make the regulations to suit itself, subjecting tribal rangatiratanga once more to the bureaucracy. Most felt the regulations should be agreed and should be subject to judicial review. There was some anger that the Crown might compromise the standing of the Treaty and the principle of rangatiratanga.

There was a particular view that under the deed, regulations could be made for Maori fishing areas only if there were no commercial aspects. A commercial component is a natural ingredient of some important areas however, it was said, and a commercial and non-commercial distinction cannot in practice be maintained.

Not only fishing rights are abrogated. All previous arrangements are set aside too (1.3). These date from last century, apparently, and include agreements provided for in special legislation, orders in council, certificates of title and court orders. They were said to derive from past settlements thought to be final and binding and to involve private property interests. The language of the deed was thus seen as broad and sweeping, at least when it came to taking things away.

Recent negotiations are swept aside too, like those of the Whanganui people with regard to their river fishing, without notice or warning. This was seen to belittle the sincerity of their deliberations and to trample on their mana.

Effect on other settlements

Other negotiations are also to be affected. It is axiomatic that the large fisheries payout diminishes the Crown's ability to settle claims elsewhere but saying so in the deed, (at 4.6), without more particulars, led only to uncertainty. What does it mean? How will it be applied? Will it affect proposals under the Railcorp settlement (per Ngati Paoa)? Will the impact be fairly spread amongst the current competing negotiators? Will some claims be deferred while others proceed, and if so, who will go first and why? And will the tribes that benefit most from the fisheries settlement be the first to have their land claims deferred or discounted? What principles will the Crown apply?

Consent and ratification

The concerns were not only about the contents of the deed but how the deed was executed; and most especially it was claimed, there were insufficient consents. There could have been no proper agreement, it was said, if people were not informed. At some meetings, it was claimed, the Memorandum of Understanding was not presented or properly explained. In concentrating on the commercial aspects, many said they did not know, or did not have it explained, that customary and freshwater fisheries were involved, that previous arrangements would be abrogated or that other claims would be affected.

The reality of consent was questioned too when there were significant uncertainties, on the regulations to be made, the method of allocation or the impact on other claims, for example.

The question of who could consent raised many difficulties. Most had assumed that the consents should come from iwi. Not so, in the opinion of others. The fisheries belonged to the hapu in their view, and each hapu had to agree, not some large iwi group purporting to act on their behalf.

Hapu or iwi, the consent of each group with an interest had to be obtained in many views. They challenged the assumption of the deed that a majority rule could apply, arguing that the Treaty guaranteed that the groups would keep their fisheries for so long as they wished to.

Others contended that the majority had not agreed anyhow.

Which iwi might consent, was challenged in some areas. Is it the Moriori in the Chathams for example or the Taranaki people who came later?

Then the question arose, which person or body could represent the appropriate hapu or iwi, the local runanga, Maori council, trust board or some other body or person; and it was alleged the wrong persons had signed the deed or the wrong people had called the hui. (Similarly it might have been asked if the complainants before us were the appropriate representatives of the proper body.)

The manner of ratification, or lack of it, was also attacked, by nearly everyone; but some appreciated the difficulties, there being no settled Maori structure for mandating, a condition thought to have been worsened by the repeal of the Runanga Iwi Act 1990. Some blamed the Crown for destroying the legal personality of the tribes from last century.

Viability

Only three groups questioned the viability of the Sealords' proposal however. There are some doubts about the venture's worth should a major fishery collapse. The business, it appears, depends on the maintenance of the Quota Management System in an industry where systems had often changed; and the Quota Management System may depend on scientific programmes that are under-resourced, need improvements and lead to advice that may not be followed.

Allocation

The more important concern however, was not the business viability of Sealords but the settlement structure. Many feared a central Maori agency, a Maori bureaucracy that might keep the power and the assets from the people. It would be better, they argued, if the Crown settled direct with the tribes, who were ready, willing and able to manage their own fishing industries and neither wanted nor needed a controlling intermediary.

Again, those from the Chathams were staunch advocates for a separate settlement for their islands, presenting a compelling case based upon the rigours of their lives, their dependence on the fisheries, the extent of their fishing resource and the chilling prospect of continuing mainlander domination. What can the Fisheries Commission do for us, it was argued, that we cannot do for ourselves? How long would it take for the Chathams to receive a direct benefit through this mainlander agency?

The prospective allocation of settlement benefits to the tribes caused the greatest consternation. The principles of allocation have yet to be resolved but there was a feeling that no settlement should be agreed to while things so crucial to the tribes were still unknown. There was a very large concern too that the principles might be fixed on the basis of only two tribunal inquiries. Just two

tribes had been heard on those principles, it was said, and one expected the lion's share on the basis of the tribunal's findings. Other tribes had no say on the relevant principles, they pointed out, and nor had they the chance to demonstrate their special circumstances or to have their treaty fishing rights defined according to their perspectives.

Again the Chatham Islanders presented a special case. They claimed the largest sea resource in relation to land mass and population, and the greatest community dependence on the seas; but they considered they would not get fair treatment from any Maori commission, company or hui on the mainland, especially on allocation, and they wanted a direct deal with the Crown.

Thus the tribes would be prejudiced by the repeal of the tribunal's jurisdiction to hear their cases, it was claimed, since their side of the story would not be known. Claimants were anxious to have their claims heard, to explain their particular circumstances, the places of special significance in their areas, the impact of quota management on them and their own plans to develop into fishing.

Relief

Some groups sought specific relief, being, in paraphrase:

- a finding that the Crown would breach its fiduciary obligations were it to extinguish the Treaty fishing rights of any group without that group's consent;
- a finding that the consent must come from the hapu and whanau to whom the rights accrue; or a recommendation that the proposal be made binding only on those who agreed;
- a recommendation that the Crown buy the Maori share in Sealords to hold until the new non-commercial regulations and the system of allocation was known, and until the level of the then Maori consent could be assessed properly;
- a recommendation that the Crown devise an independent system to protect and promote the fishing rights of those claimants who do not agree to the settlement; and
- recommendations by which the Maori Land Court would determine the customary fishing rights of Moriori, Tuhuru and others who were prejudiced because their customary entitlements have yet to be established.

4. Issues

At a chambers meeting the tribunal expressed its view that the claims and complaints amounted to a contention that the settlement promoted policies that would be contrary to the Treaty and prejudicial to claimants in proposing the abrogation and substitution of treaty rights without adequate consents and in imposing new arrangements that had not been agreed. This was in addition to the overall claim that the settlement would diminish Maori rangatiratanga and fishing rights.

'Adequacy of consent' was seen to raise questions of representation and ratification. Who could consent and had sufficient consents been obtained?

'Abrogation' raised questions of whether that taken away was fully compensated by that which was given (would Maori fishing rights in fact be

diminished?) and the 'new arrangements' included the establishment of the commission and the proposals for allocation.

Central to those issues were basic questions about customary and modern Maori society and on how local and national Maori opinion might form. The answers required wide consultation with Maori and lengthy, considered submissions; but time, and members other commitments did not allow this. We were aware that government proposed early legislation and that we would need to report promptly or not at all.

Accordingly hearings were curtailed and, with regret, important delegations that came late were not heard (for in addition, some members were involved in North Auckland and Taranaki sittings at the time). Further evidence was restricted and counsel were required to respond in writing within four days after the issues were defined and without further personal appearance. In addition we had not the opportunity to inquire of all whom we would like to have seen.

This report bears those limitations. Our consideration of Maori societal structures is based mainly on our own understanding. There were submissions from T O'Regan and H M Mead and an affidavit from G S Latimer, but we did not hear full argument. Our conclusions on social structure must therefore be limited to this case. No doubt they will be amended after a fuller debate within the Maori community.

A lack of submissions from those supporting the settlement also restricted our inquiry. Some wrote in but did not appear. The Maori negotiators did not wish to intrude on what they saw as the dissentients' opportunity to be heard, but following our request for particulars of the hui they filed copies of their affidavits in the Court of Appeal, and later, a full record of the hui proceedings.

We now refer to certain preliminary matters.

5. Ancillary Questions

Moriori

- 5.1 There is some dispute between the Runanga o Wharekauri-Rekohu and Te Iwi Moriori Trust Board and counsel for the former contended we could not hear the latter, as we could hear only claims from Maori. Moriori were not Maori, he said, and in any event, Moriori had ceased to exist. No expert evidence was called.

We would dispose of that matter briefly. 'Maori' and 'Moriori' are both dialects for 'normal' or 'usual', and when used with 'wai' mean fresh water running with the land as compared to that from the sea. When Pakeha arrived, both words came to mean 'native'. Both people are from the same stock.

'Maori' in section 6 of the Treaty of Waitangi Act 1975 denotes an aboriginal New Zealander, in our view, and none could be more aboriginal in the Chathams than the Moriori. Accordingly we do not accept the Runanga submission that Moriori are not Maori and nor do we agree that Moriori have ceased to be.

Court proceedings

- 5.2 During our inquiry certain claimants took High Court and Court of Appeal proceedings. We may decline to hear a claim if a remedy can be effected in the courts, and in this case, we would not need to report if the courts invalidated the settlement. We had also to consider however that if no such relief was given,

we would need to report early, covering especially matters generally outside the courts' purview but within ours, like those relating to proposed Crown policy. Therefore we proceeded with our inquiry but resolved, eventually, to defer reporting until the Court of Appeal decision had been given, as we are bound by the findings of the courts, and because a prior tribunal report might prejudice the legal process in this case. That decision has now been given and we are now able to complete this report.

Government intentions

- 5.3 We considered too whether the inquiry should proceed in view of government's intention to legislate for the settlement in the near future. This would include removing the tribunal's ability to review the settlement itself.

The tribunal must act by what the law is and not in anticipation of what it might be, in our view, and it would be wrong to deny the claimants' present legal right to challenge the government's proposals.

Legality of the settlement

- 5.4 We did not consider claims that the settlement or proposed legislation would be unlawful as those matters should be addressed in the courts.

6. Abrogation

Abrogation means the repeal or cancellation of rights or interests.

The treaty interest in non-commercial fisheries

- 6.1 The intention of the settlement, from what we can make of a confusing deed, is that the Treaty interest in commercial fisheries will be extinguished (5.1) while the treaty interest in non-commercial fisheries will be made legally unenforceable and replaced by policies and regulations (3.5, 3.6 and 5.2). The latter interests are thus effectively abrogated. The regulations and policies for non-commercial fisheries however may be reviewed in the tribunal (by inference from 3.5.1.4; though not all counsel agreed with that interpretation).

The question is whether the abrogation of the general treaty right and the substitution of regulations is contrary to treaty principles and prejudicial to the claimants. We consider the provision of regulations to perfect, augment or develop the treaty right is entirely consistent with the Treaty. It is also necessary in our view, that all people should know the more precise extent of them.

However, it is neither consistent with the Treaty nor necessary in our view, to abrogate the general treaty right at all. We see no reason why the regulations should not be made to effect the principles of the Treaty, without abrogating anything. The treaty right is broadly stated, without precise definition, but it is the important yardstick against which the precise regulations are to be assessed. The general treaty right cannot be put down.

A further concern however, and the cause of immediate prejudice to claimants, is the lack of some body to conclusively determine whether the regulations are consistent with the Treaty and provide adequately for Maori treaty interests. The deed leaves doubts whether the tribunal can undertake that role, but assuming that it can, we are not convinced that tribunal recommendations substitute adequately for court determinations, or that the courts should be excluded in cases like this where the function is to assess regulations against certain broad principles.

We think it well established that there is a duty on the Crown to actively protect Maori fishing interests. Active protection requires in our view, access to the courts in appropriate cases. The settlement in this case is contrary to treaty principles in that the regulations proposed or any failure to make them are not subject to court review and Maori interests are not therefore adequately protected. The danger is that Maori interests will become, as they have been before, overly susceptible to political convenience or administrative preference. The defect would be remedied by enabling judicial review against the principles of the Treaty. (A similar position prevails in Canada where aboriginal and treaty rights are constitutionally entrenched.)

Having disposed of this matter in those terms, we need consider only briefly some particular complaints.

It was contended, especially from Rangitane of Wairau, that the treaty right was expansive, providing exemption from fishing laws and immunity from prosecution. We do not agree. The Treaty promised Maori exclusive possession of their fisheries, not an exclusive right to fish, and Maori fishing rights have perforce to acknowledge the rights and interests of others. There accrues to the Maori right also, the duty to protect the resource. All users must be bound by reasonable state laws for overall resource management and protection.

The treaty right was enough, it was also contended, and prescriptive regulations are not needed. We do not agree. The Treaty stated only the broad principle, that Maori fisheries should be protected, but precisely what those fisheries were or how they should be protected had still to be worked out. Regulations should be made to do that.

There were then some fears that certain traditional fishing places might not be protected, in terms of the deed, because they have an intrinsic commercial capacity. Crown counsel demonstrated however, that commercial activity can be accommodated in traditional reserves in suitable cases (see B26, annexure A, para 2).

So too, in our view, the freshwater tribes need not be overly anxious. They have more to gain than lose from the settlement, gaining regulations to acknowledge their fisheries and a source of revenue to protect or develop them. This assumes however that adequate regulations will in fact be provided. It is apparent then, that the negotiations of the freshwater tribes have not been ended by this settlement but will need to continue, in order that their concerns might be incorporated into appropriate policies and regulations.

Similarly, where previous arrangements are set aside, they will, we presume, be re-instated under the new regulatory and policy scheme, provided they are still relevant.

The main concern was that too much power was left in the hands of the Crown, or its departmental agents, to determine the regulations. There was a very real fear that some matters might not be properly provided for, and most especially, that the tribal control, or rangatiratanga, would once more be subverted. We would expect judicial review to guard against that prospect. Certainly it would be contrary to the Treaty in our view, if there were no provision to review the regulations against the Treaty's principles.

The treaty interest in commercial fisheries

- 6.2 The treaty interest in commercial fisheries is simply extinguished (5.1). The purpose, we presume, is to put an end to all claims affecting the commercial fishing industry, but we think it was neither necessary nor desirable to extin-

guish the right in order to the end the actions. It is clearly inconsistent with the Treaty, and indeed, the terms of the settlement suggest the nature of treaty obligations are not properly understood.

The principle of the Treaty is that Maori fishing interests will be safeguarded. The Crown is obliged to actively protect. Counsel for the Runanga o Ngati Porou referred to this passage from the recent Canadian decision in *R v Sparrow* (1990) 70 DLR (4th) 385, 408 per Dickson C J:

The relationship between the government and aboriginals is trust-like rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship. [Quoted by counsel for Runanga o Ngati Porou.]

To this the Court of Appeal has added (*supra* at page 12):

clearly there is now a substantial body of Commonwealth case law pointing to a fiduciary duty.

In New Zealand the Treaty of Waitangi is major support for such a duty. The New Zealand judgments are part of widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement.

The deed does not capture this responsibility. Maori interests can be bought off, it assumes, using the language of last century when land rights were said to be extinguished by Crown purchase. Yet in this case nearly every essential for a sale is lacking.

What was required was not an extinguishment but an affirmation, in our view, an affirmation that Maori do have interests in commercial fisheries, and an acknowledgement that any current responsibility on the Crown to provide for those interests has now been satisfied by the arrangements made. There are passages in the affidavits of the Maori negotiators suggesting that they too expected the deed would be presented as performing the Treaty's terms rather than extinguishing the Crown's obligations.

It is necessary to dispose of one particular contention however, that in this settlement Maori were giving away too much of their commercial fishing interests. We do not agree. Most especially we do not accept the view that Maori are entitled to 100 percent of the fishery and should compromise at nothing less than 50 percent. That view does not derive from the tribunal's findings, despite assertions to the contrary. The Maori interest has not been quantified, may not be quantifiable and the tribunal has said simply that there should be such fair shares as might be negotiated, or failing negotiation, as might eventually be recommended. We are not convinced there is a compromise in the quota aspects of this settlement, at least on the Maori side.

The Crown interest in Maori fisheries; the settlement as a whole

- 6.3 That leads to the point that in terms of the Treaty, the Crown has an interest in Maori fisheries, to provide a protection for so long as Maori wish to keep them. That interest, or obligation, cannot be traded off, unless all agree. By its very nature, it is not an obligation that can be acquitted at any one moment in time.

Questions of extinguishment apart, it would be difficult not to say that the Crown has acted well to secure a place for Maori in the commercial fishing industry. We quote these passages from the recent Court of Appeal decision:

The proposal of the Crown and the Maori negotiators to endeavour to obtain a substantial Maori interest in Sealord is thoroughly consistent

with the approach of this Court in previous cases The Sealord opportunity was a tide which had to be taken at the flood

and:

a responsible and major step forward has been taken. [*Te Runanga o Wharekauri Rekohu Inc and ors v Attorney-General and ors* (supra pp 12,13 and 18)]

It is thus appropriate and reasonable in the circumstances that the Crown should now legislate to end the present actions and stop all others, for at least so long as the current conditions pertain.

Who can predict the future however? Circumstances change. The protection needed for today may be different for tomorrow. The essence of the Treaty is that it is all future looking. It is not about finite rules, or final pay-offs, no matter how handsome. It is about the maintenance of principle over ever-changing circumstances. Accordingly, the abrogation of the treaty interest, and the implicit responsibility of the Crown that goes with it, is a contradiction of the Treaty's terms.

To overcome the difficulty, it is appropriate that treaty settlements of this kind should not be expressed in finite terms but defined by reference to goals. If the object is to get Maori into the business and activity of fishing, with compensation for past losses, then that, in our view, should be stated, and provisions should be made for regular checks, and for adjustments if the goals are not being achieved.

The alternative is to provide for judicial review, specifically enabling the courts to assess the Crown's protection of treaty fishing rights against its treaty obligations. It would be reasonable nonetheless to restrict some actions for some time, in view of the recent history and the commercial imperatives. No such term should exceed one generation, or 25 years, in our view, having regard to some Maori customary opinion.

We have reviewed then, the complaints and claims concerning the settlement deed. Some are well founded in our view, but are capable of remedy, and ought not to invalidate the main proposals.

There were other contentions however that the settlement as a whole should not proceed, for example, because consents were not given by appropriate representatives or because it was not otherwise properly ratified.

7. Representation

Complaints that the settlement had not been adequately agreed raised questions about who could agree; and most especially about who held customary fishing rights, about who could decide and about who could represent the decision makers. At issue were three aspects of representation:

- which descent group(s) represent the holders of customary fishing rights in a district? (customary representation);
- at what level should descent groups be represented in this case? (level of representation); and
- what authority represents the persons at that level? (institutional representation).

Customary representation

7.1 First, who own the Maori fisheries? Who had the customary rights?

Maori recognised a range of interests in our view. An eel weir in a river might belong to a single family while many hapu could have interests in common or severalty in a sea-fishing ground. For Maori, there was little distinction between land and fisheries in that both tended to be held not by individuals but the group, but which group, the smaller hapu or the larger iwi? The tribal ownership of fisheries was made clear in the Muriwhenua Report, as J C Upton for Ngai Tahu pointed out in referring to para 11.6. The Muriwhenua Tribunal carefully refrained from commenting however, whether 'tribe' meant 'hapu' or 'iwi'. From our own knowledge and from subsequent evidence tendered in various Tribunal inquiries it does appear however that the main Maori group in this context was the hapu.

Some claimants assumed this to be so. Whanau-a-Apanui for example did not lodge one claim, but several in the name of each hapu and their submissions talk only of a hapu entitlement. Submissions from Ngati Porou however, suggest that many interests have all to be accommodated, whanau, hapu and iwi. A similar position pertains at Maketu. All the hapu of Te Arawa have interests there and they sometimes undertook sea fishing on a large-scale, iwi basis. Nonetheless it does appear that local fisheries were mainly associated with hapu, while smaller units and individuals on the one side and the larger iwi on the other, had interests too.

The Treaty supports this view. It recognises both collective and individual possession, and as to the collective interest refers to 'hapu', the word 'tribe' in the English text being rendered as 'hapu' in the Maori. The Ngai Tahu Report does not appear to conflict. The passages of that report that describe the Ngai Tahu ownership, to which Mr Upton referred, can equally refer to any Ngai Tahu hapu.

We had then to consider which of the competing hapu have the right in the Chathams, the Moriori hapu who were there first or those of the Taranaki people who claim the right of conquest? That question should be disposed of on another claim, already filed, we consider. For now it is enough to say that by traditional protocol, as both are there then both must be respected.

Level of representation

7.2 Ngai Tahu are the predominant people of the greater part of the South Island. For as long as we can remember they have spoken with one voice on other than local issues, through a single authority which was, until recently, the Ngai Tahu Maori Trust Board. On the West Coast however is a well known section of Ngai Tahu at Arahura, who now identify as Tuhuru, or Ngai Tuhuru as their counsel described them in his closing submissions. Ngai Tuhuru contended that no-one can agree but them on anything affecting 'their' fisheries. The Ngai Tahu Trust Board responded that Tuhuru was a break-away group from Kati Waewae and should not be separately recognised.

We find that we need not determine the independent or other status of Ngai Tuhuru in order to deal with this matter. In this case the question is one of the level at which the decision should be represented? Can the iwi authority bind all or must each local group consent?

There can be no one rule for all cases. Some matters are local issues and should be handled locally. A specific claim to a particular piece of land may fall in that category. The fisheries settlement however involves broad policy and we accept

the submission of Mr Upton for Ngai Tahu that that should be dealt with at no less than an iwi level.

Certainly, property rights are important and they are affected in this case, but there are many with customary interests in fishing. Groups like Tuhuru can legitimately claim interests along with smaller whanau and even individuals. The consent of all with an interest would be impracticable, and thus the political reality that in any society, the protection, enhancement or limitation of property rights may need to be settled for all through appropriate representative institutions.

To reach a conclusion in this matter we have had to have regard to the nature of customary Maori society as we see it. As earlier mentioned, there was not time to meet with all who could have assisted this inquiry although we had some help from submissions from T O'Regan and H M Mead and an affidavit from G S Latimer. Traditionally, it appears to us, Maori society was essentially anti-state and egalitarian. Sections regularly split off to stand alone and form new hapu following leadership or other struggles. They still do, and Tuhuru, which distance themselves from Kati Waewae, well illustrate this. This tendency to fractionate and reform ensured the operational autonomy of small hapu groups and so, though they were forever dividing and reassembling in new shapes, the hapu remained the basic political and resource owning unit. (T O'Regan describes the groups as sub-units, and sub-sub units. They may also divide laterally however to simply create more hapu.)

Nonetheless the fragmentation of hapu was conditioned by the need to band together on occasions, and thus there remained a loyalty to a larger collectivity, to those of the common descent line called the 'iwi', or simply, the 'people'. For the most part 'iwi' effectively describes the parent tribe from whom all hapu have come, or a confederation of tribes, as G S Latimer contended; but the word has been variously applied. Iwi were sometimes a transient collation of hapu members for some expeditionary, military or political purpose, and some iwi crusades involved unrelated hapu. In addition, as H M Mead pointed out, iwi may split to form new iwi, or, as G S Latimer considered with regard to Ngati Wai, larger hapu may claim an iwi status. Most importantly however, there were times when iwi associations were more regularly dominant, through war or some personal influence, and times when hapu chiefs met in regular conclaves or iwi runanga.

The tension between those two strong desires, for local autonomy on the one hand and unity on the other, has characterised ancient and modern Maori society. Opinions will no doubt vary but we venture to suggest that local autonomy was seen as more important for Maori, while yet it was recognised that some things had perforce to be done by the iwi. Major arrangements with outside groups, or tauiwi, were usually at this level.

With Pakeha settlement iwi structures became more necessary, significant and permanent. Pan-iwi structures likewise appeared, with waka or iwi-whanui confederations. Each is a legitimate extension from the customary base in our view, a necessary response to a new circumstance. The present-day position now varies from place to place but the current wisdom appears to be that matters of common policy affecting the people generally, should be determined or ratified at an iwi or iwi-whanui plane. Likewise, though resources are primarily hapu owned, generations of Maori have accepted that some commercial operations should be undertaken on an iwi basis.

We find in the Treaty some support for our view. It distinguishes ownership and representation and then points to the need for new representational models. While the land and fisheries are guaranteed to the 'hapu' (Maori text), the Treaty purports to be made with the newly formed 'Confederation of United Tribes' (English text), and was in fact mainly executed along iwi lines.

Mr Woods contended for Tuhuru that the consent of each hapu was required before any tribal policy could be said to be formed; and even that there had to be total consensus within the hapu. The approval of everyone, or of each hapu seems to us to put the matter too strongly, although in former days it seems, there was a tendency for dissentient groups to accept a majority opinion. We think it has now been accepted for a long time however, that matters of common policy must be resolved with the Crown at an iwi or wider plane, and that of necessity, some decisions should be binding on sub-entities including dissentients. We need not conclusively determine that matter however, but only that the Crown is not bound to inquire beyond the iwi on a matter of general policy. How the iwi reaches an agreement is an internal domestic matter for the iwi, not the Crown, to work out.

But who represents the iwi?

Institutional representation

7.3 Several bodies may be seen to represent the iwi of an area, including

- trust boards
- Maori councils
- federated Maori authorities, and
- runanga

We will briefly review each.

Trust boards became the embodiment of the people in many districts from about the 1940s and some boards claim a mandate to this day. Other trust boards have been recently created by statute for this same purpose.

The Maori councils were also effective from an early period and predominate in some areas.

It would be difficult to bypass local branches of the *Federation of Maori Authorities* (FOMA) in some places, especially in major land-owning areas when questions of resource use and ownership are involved.

More recently, *runanga* have been created expressly to represent iwi.

Today there is a diversity of structure and different institutions may stand for the iwi in different places. To illustrate this we speculate as follows.

There appears to exist, for Tainui and Ngai Tahu, settled arrangements that combine marae or hapu based representation (Nga Marae Toopu; Runanga Nui-a-Tahu) with a trust board (Tainui; Ngai Tahu) under some uniting umbrella (Kingitanga; Iwi Authority).

On the other hand there appears to be three separate bodies with standing in Te Arawa—a trust board, a runanga and the local branch of FOMA. In that district one may need to consult with each of these. Separate bodies are also important in Kahungunu, but the main ones there appear to be, at present, a district Maori council, a trust board and a runanga. The Tuwharetoa however, are represented in a single trust board. And so it goes on.

The extent to which any of these bodies may represent the iwi, or replace the traditional Maori authority, is still problematical. The tribe exists irrespective of these structures in some opinions (see for example, the affidavit of H K Ngata B28f). In other words, the rangatiratanga of the iwi has not necessarily been relocated. Others make the point that in some areas, the ratification of the kahui ariki, kawai rangatira or the ropu kaumatua, remains a pre-requisite, irrespective of the existence of a board or other authority (thus the affidavit of G S Latimer, B28c)—“it would be unthinkable when dealing with a matter of great significance for the tribe to proceed without the approval of rangatira or kaumatua who are acknowledged custodians of the authority of the tribe”). In yet further places, kaumatua councils have been integrated into the structural design. For others however, especially many younger people, the expectation remains that whoever assumes to sign for the iwi must have a mandate from an elected or representative body. In many areas, these difficulties have still to be worked through.

There was a proposal to provide formally for iwi structures and give certainty to the situation, in the Runanga Iwi Act 1990. There were arguments over the details however, and rather than deal with them, the Act as a whole was recently repealed. This was unfortunate in our view. Now the position remains as it was, fluid or even flaky.

National representation

- 7.4 Whether Maori opinion could have been settled through the New Zealand Maori Council or National Maori Congress was not considered in this case. It was assumed that the iwi, or Maori generally, should be approached.

This tribunal is in no position to advise Government on the appropriate institutional representation for iwi except following lengthy sittings in an area (and thus a decision was made on institutional representation in Ngai Tahu). We consider below however, under the heading of Ratification, the question of whether the settlement can be said to have been adequately agreed, having regard to the representation problems.

8. Ratification

Ratification involves the approval of appropriate persons and bodies. To obtain that approval, the Maori negotiators arranged for numerous hui on marae around the country, issuing notices and maintaining minutes, and arranging for Maori organisations to undertake meetings of their own. A full record of the hui is contained in a 260 page report. A copy of the report was made available to the Crown Ministers, and as we understand it, it was on the basis of this that the Crown considered there was a sufficient mandate to proceed to the conclusion of a formal deed. We have read that report ourselves and have gained the same impression. The report is commendable for its thoroughness and detail. It conveyed to us the impression that there was indeed a mandate for the settlement, provided however that the Treaty itself was not compromised.

In this type of case, where a natural resource is involved, one would expect ratification to be on an iwi basis. Such are the problems on representation however, on who are the appropriate iwi, who qualify as iwi and who represents them, that it is hard to imagine any procedure the Maori negotiators might have adopted other than that which they chose. Likewise, numerous claims and counter-claims that the majority were for or against, or that signatories had or had not a sufficient authority, cannot be determined as things stand at

present. This lack of settled structure, as earlier described, means no formal iwi ratification process is presently possible. That, in our view, is regrettable, but it is also, in our view, a fact. The position is too, and for the same reason, that we are in no better position than anyone else to decide whether or not a majority iwi consent has or has not been given.

Accordingly, we are of the view that the Maori negotiators acted reasonably in pursuing the programme of hui they embarked upon; and that the Crown Ministers acted reasonably in relying upon the report of those hui, to resolve that a deed should then be finalised. The deed signing we see, not as giving a consent but as affirming that a sufficient consent had already been given at hui, and that, to that end, the signatories were prepared to make a personal commitment.

There were concerns as well that the Maori negotiators had failed to explain the Memorandum of Understanding in some cases, and that uncertainties over the proposed regulations or the future allocation of benefits were such that no proper consent can be said to have been provided. Given our task to consider claims against the Crown, not claims between Maori, the question before us was whether the Crown would be failing in its duty if it proceeded with the settlement in view of the complaints of an inadequate presentation. The negotiators for their part have contested these allegations through personal appearance (T O'Regan), or through furnishing affidavits together with a full report on the proceedings. The report discloses that some negotiators went further than others. W Winiata in particular made a full and open disclosure of all material particulars at every meeting he attended. Others considered the Memorandum of Understanding should not be produced on account of some commercially sensitive content.

Given the task of explaining complex matters to diverse groups and the business and political imperatives, allegations of too much haste and too little information were inevitable. Having viewed the matter as a whole however, we are of opinion that the complaints are not justified in all cases. We also believe it was necessary that the final form of regulations and allocation procedures should be deferred, and that the latter should pass to a wider group than that comprising the present Maori Fisheries Commission. Further, in the light of the report emanating from the hui it was reasonable for the Crown to believe it was justified in proceeding.

The main contention however was that the settlement should not be binding on those who have not concurred. The Crown is obliged to uphold the independent rangatiratanga of each tribe, it was argued, and a settlement that is coercive and binding on non-consenting groups is in breach of this. The settlement should apply to those who have agreed, in other words, and not to those who are opposed.

Iwi have the right to negotiate direct and to make their own settlements, it was added, and iwi have in fact done this. Rangitane o Wairau for example reached direct agreement with the Crown on scallop quota allocations. They have had many subsequent negotiations, are now involved in a court action over paua, and have long been seeking a special arrangement for Whites Bay, an area of particular significance to them. To their chagrin, the national Maori negotiators have undermined their plans and course of actions, in their view. Nearly every other iwi group likewise claimed to have their own development plans, and some West coast iwi of the North Island had banded together for that purpose.

This objection presents the same difficulties that were noted under 'Representation'. Some persons of some tribes are agreed, others of the same tribe are in the opposite camp and no-one can say with certainty which is the correct group. The Runanga o Ngati Porou claims the right for Ngati Porou for example, and objects, while the affidavit of H K Ngata challenges that position and asserts that Ngati Porou have agreed.

In addition, Crown counsel contended that this must be an "all-in" settlement. The maintenance of the Quota Management System is central to the proposal and the system cannot be maintained on a piece-meal basis, it was said. The exclusion of some tribes would also require pro-rata reductions in the Crown's total payout, involving impossible computations and prejudicing the Sealords' acquisition. Finally, on the claimants' argument, a separate settlement would be needed with each iwi, or each hapu as some would contend, making the prospect of any national settlement with Maori a virtual impossibility.

Subject to what we said earlier about removing the extinguishment provisions, we are of the view that the settlement should proceed despite the inevitable compromise to the independent rangatiratanga of the dissentients. We consider the Crown would be justified in not proceeding except on an all-in basis, for the reasons above given, and the independent rangatiratanga of someone would be affected no matter which course was followed. There are some cases, we consider, where the consent of each iwi or hapu would be necessary, or where only consenting groups should be bound. The extinguishment of customary rights would represent such a case, in our view. Land rights for example, cannot be extinguished except with the actual consent of the title holders; but as we have said, extinguishment should not apply in this case.

On the basis then that the settlement is to introduce new national policy for the benefit of tribes, to perfect rights rather than abrogate them and with protection for the customary position, we consider this settlement can be dealt with not just at an iwi level, but a pan iwi level, where the actual consent of each iwi is not a pre-requisite, and a general consensus can be relied upon.

All this must be subject however, to the question of whether a fair allocation system can be agreed, for that is one area where the majority rule is not enough, and special protections are needed for minorities.

9. Allocation

Allocation describes the division of benefits amongst the various Maori groups entitled. The Sealords purchase would provide a major stake in the industry and an income to promote Maori fishing through a restructured commission. The concern was that the commission should allocate benefits fairly and impartially amongst the iwi, and that the interests of particular sub-groups and individual operators should also be protected. These things might not happen, some thought, without special safeguards.

The Crown has a treaty duty to all the tribes, in our view, and has therefore some delicate balancing to achieve. It cannot tell the commission what to do so as to undermine self-management on the one hand, but on the other, it would be failing in its treaty obligations to permit of a system that did not have protections for particular groups. To that end the deed envisages that an allocation system will be promoted through three stages. The new commission will propose an allocation scheme after full consultation with Maori. Then, the Crown must be satisfied it is fair, and finally, the legislation to effectuate the

scheme may be referred to this tribunal. The scheme is to include proposals for an independent dispute resolution process.

The question of whether this arrangement gives sufficient protection must be answered in the context of the complaints. The first of these, that there should be no settlement at all until an allocation system is agreed, is one we cannot uphold. An early settlement was needed in our view, and could not have awaited resolution of the allocation problems. In any event the allocation question was properly to be referred to the more representative Fisheries Commission that is still to be established.

Nor could we accept the submissions that the Crown should deal direct with each tribe, acknowledging though we do the proven competence of some tribes to make their own arrangements. The submissions do not resolve who should be dealt with, hapu or iwi, or how does the Crown deal with hundreds of hapu or identify who are iwi? Nor did these submissions consider how an equitable apportionment could be achieved on a piece-meal settlement basis. We think it reasonable that the Crown should call upon the expanded commission to resolve these problems.

Other concerns, that a Maori bureaucracy would emerge holding the power and the assets at the centre, that Maori would get shares in a business but not a chance to be in the business themselves, or that the scheme would advantage groups and prejudice individual initiatives, are all matters to be handled within an allocation scheme, through defining the goals and providing for reviews. The need to maintain the central business asset that generates the necessary revenue, must also be recognised and provided for, however.

Our inquiries then revealed a more serious concern. It appears the various ways in which allocations might be effected have not yet been adequately examined. The old commission had in fact proposed only one option to its annual general meeting, that each tribe should be deemed to possess the whole of the fishery from their shorelines to the deep blue yonder, with allocations to be based on the relative catch values in the consequentially defined sea territories. This definition gives more significance to the deep-sea and distant fisheries where the greater catch value is found, and less to the inshore fishery where most traditional fishing was done.

We will call it 'the off-shore equation'. It is said to be based on tikanga Maori, or Maori law, in that traditionally the tribes had authority over the seas adjoining their land, an opinion encapsulated in the recent expression, 'mana-whenua, mana-moana'. We would hesitate to use 'tikanga Maori' or 'mana moana' to describe the scheme however, for it is arguable that traditionally the mana, or authority, did not extend far from the shoreline, and the central feature of this scheme is the value given to the distant fisheries of modern times. The authority went only as far as it could in practice be enforced, it could be said, and customarily, the open seas were open. The equation does underline however, that there are differences in the extent of traditional resource ownership amongst the various iwi.

It particularly favours Ngai Tahu. It is also thought to advantage the tribal districts of most of the commission's members and thus there were concerns that only one option had so far been presented. As it turned out the commission's annual general meeting had not approved that option but, according to the resolutions as filed, had directed further inquiry. Nonetheless the commission chairman was of the view that an allocation based on tikanga Maori, by which he meant the off-shore equation, had been approved (thus for

example, B9:1) and the commission's September 1992 bulletin continues to describe the fishery as "a continuation of lines projecting into the sea from the land boundaries" (A2:1).

This concern appears to be covered by the settlement however. The commission is to be changed and made more representative and it is the new commission, not the old, that is to promote an allocation scheme.

It is important nonetheless to mention the allocation alternatives and some of the opinions that were given. As we see it, allocation could involve a number of options, as for example:

- the funding of approved schemes;
- the allocation of benefits at occasional iwi forums; or
- the division of assets according to predetermined criteria.

The first option is currently within the present commission's brief and may well form an important part of the new commission's policy.

The second, perhaps more aptly related to tikanga Maori, seemed to us to have potential despite some immediately obvious problems. Mr Harman for Maketu spoke of "iwi to iwi negotiations based on the sharing of the fullest information". This would substantially reduce the commission's role, he noted, elevate the role of iwi, and do away with what he saw as pre-conceived agendas. This process could well meet the needs for both national co-ordination and direct iwi involvement.

The third option, of fixed criteria, is the only one previously canvassed, and as mentioned, only one criterion was earlier raised. The variables would appear to include the following however:

- the 'deep sea equation' as earlier discussed, based upon imagined tribal sea territories. This at least attempts to grapple with resource ownership;
- the comparable length of tribal coastlines. This is favoured by some east coast tribes. For certain inland tribes however, sea fishing rights were not dependent on owning any coastline at all;
- the size of the continental shelf. This suggestion was raised by a section from Maketu;
- past user, based upon a tribe's historical fishing activity. This favours Te Arawa for example, with a short coastline but with a record of large iwi fishing expeditions;
- the extent of dependence on fisheries, having regard to the lack of other resources. This would favour the Chathams and also Muriwhenua;
- comparable populations;
- comparable needs. Some tribes must rely more than others on fishing to re-establish their people. The Chathams for example lack the land and other resources that Ngai Tahu might capture while Muriwhenua has few other resources and a large number of unemployed;
- the impact of past over-fishing. Do some tribes need more help in becoming re-established?
- capability. Should the test be based on who can catch what?

- special needs, those of the freshwater tribes for example, in protecting habitats or in re-establishing or developing freshwater fisheries.

Accordingly, a variety of criteria may be considered before any allocation scheme is determined, even assuming that the better course is not simply to fund the most deserving proposals, or is not to settle matters at iwi forums.

This led to a further complaint. Nearly all those appearing before us considered the tribunal should retain its jurisdiction to hear their claims. Only through that process, it was considered, would their particular circumstances be made known and the criteria most suitable for them, identified.

The complainants wished to be heard for another reason too. Allocation is to be based on treaty principles (deed, 4.5.4.2). The Ngai Tahu Tribunal had confirmed the off-shore equation as a treaty principle, in T O'Regan's view, in holding that Ngai Tahu has the exclusive right to the deep-sea fishery off their shores as against other tribes. The concern was that no other tribes had been heard on that finding, and it was felt they should now be heard before the principles are finally laid down.

We are of opinion that it would be impractical for the tribunal to hear each and every fishing claim, and that the better course is to seek an allocation scheme that is fair to everyone, without hearing every claim, if that is possible.

We also consider however that allocation should not necessarily be based on treaty principles and that previous tribunal opinion should not be binding on the framers of the allocation scheme. We say this for three reasons.

In the first instance, treaty principles have been developed to define the relationship of Maori and the Crown, not Maori inter se, and allocation is primarily concerned with the latter.

Secondly, as already noted, the treaty principles in fishing were laid down in Muriwhenua and Ngai Tahu. Only the Muriwhenua and Ngai Tahu tribes were heard.

Finally, there is uncertainty over the tribunal's position. In T O'Regan's view the Ngai Tahu tribunal had confirmed the Ngai Tahu mana-moana of the deep and distant seas. That was a logical extension of treaty principles laid down in Muriwhenua, he claimed. In our view however, the Muriwhenua Tribunal found that customary authority applied only to the inshore area. Rights beyond that arose from the inherent human right of development, a right that needed augmenting in the Maori case to offset the past impairment of their original industry and the loss of a developmental capacity, and to compensate for the depletion of their customary fishing areas. On that basis all iwi have developmental rights and it could be that no custom restricts iwi from developing where they will in the open sea.

Accordingly we cannot see how this matter can be decided on treaty principles. Similarly the new commission should not be bound by the tribunal's opinions when promoting allocation proposals, but should endeavour to form its own view after full consultation with affected Maori, as the settlement requires.

There was then very real anxiety that the scheme might not give a sufficient protection for certain special interests. The Moriori and Tuhuru in particular had eloquent cases in this regard. Both have a marked dependence on a sea economy (the Moriori almost entirely), both claim to be under threat of domination by mainlander opinion on the one hand or a large iwi group on the other, and both are in the unenviable position of having their existence and their right to receive any benefits, under challenge from other Maori.

The position is especially critical for the Moriori. They were denied land rights in about 1870, by some Maori Land Court rule that placed great value on near-contemporary atrocities and very little on ancient and peaceful occupations. For the same reason their customary fishing right is now disputed, and, according to M Solomon, development quota was recently issued to a Chatham Islands enterprise without any consultation with Te Iwi Moriori.

Despite these large concerns, we do not think it beyond the wit of the new commission to work out a scheme to be legislated for that would accommodate these problems. It may well require the Maori Land Court to determine, or reconsider, questions of customary entitlement, to rule on Moriori and Tuhuru rights for example, or to determine whether they or other groups similarly placed, are entitled to share as beneficiaries.

We mention at this point that we decline the Tuhuru application to state a case to the Maori Appellate Court on the Tuhuru customary entitlement. Their concerns should properly be handled within the scheme of allocation. We decline to state a case however, upon the ground that it is not necessary to do so in order to dispose of this matter.

An allocation scheme may also need to provide for an investigation of the comparable circumstances of each tribe, by some appropriate body. Occasional reviews of the allocation system and a hearing of individual complaints may also be necessary.

Our conclusions then, are these. A fair system of allocation is crucial to the settlement. It would be inconsistent with the Treaty guarantees in our view, if the apportionment of fishing benefits dealt unfairly between the various interests, but the present provisions do not give an adequate assurance against that.

The proposed scheme goes first to the Crown to consider if it is fair. The Crown does not hear anyone or act transparently however. The effecting legislation may then be referred to this tribunal. This tribunal however deals with treaty principles and with claims against the Crown and the issues here are essentially between Maori. We would not therefore support a reference to the tribunal on the grounds that the tribunal's jurisdiction is too circumscribed to deal adequately with the matter.

Accordingly, we think it better that the scheme should not be based on treaty principles alone but on broad considerations of what is tika, or fair, in all the circumstances. The Crown should then appoint a special court or body to hear any objections.

10. Conclusions

The basic approach

It would be churlish not to consider that in seeking to provide for Maori interests in commercial fisheries, the Crown has done well in our time. The resolve, the enterprise and the spirit are all there. But the spirit became lost in the small print, in our view, leading to many of the complaints we have described. It was a salient reminder of what has been said before, that treaty matters are more for statesmen than lawyers.

Most especially it needs to be appreciated that any settlement of this nature has two essential goals, not just to pay off for the past, but also to buy into the future. The Treaty, it must be understood, is primarily concerned with the latter. It is not the extinguishment of rights that is essential but the affirmation

of them. Somehow the deed does not capture this, apart from the preamble, and Maori anxieties were understandable.

The problem is partly one of expression. The deed was not packaged well for Maori and what was presented as an abrogation of the Treaty could also have been given as a fulfilment of its goals. It is useful to compare for example, the stated purpose of the Maori Fisheries Act 1989 "to make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi".

There was nonetheless a fundamental flaw in the deed's basic approach, in our opinion. The Treaty is about the maintenance of basic rights and obligations. That sort of thing cannot be got rid of by agreement. The just rights of peoples are also meaningless without access to the courts to enforce them. The courts may be seen as the Pakeha taonga in the Treaty, a taonga which simply cannot be traded.

Purposes and principles

The settlement as we see it, is primarily to end the litigation, and with that, the Maori claims that the system for the management of commercial fisheries does not take account of Maori fishing interests. It has been agreed that Maori be given a capital interest in the commercial fishing industry, to manage as they will, in return for which Maori will abandon their claims and will accept the current fish management arrangement.

The essential acknowledgements as we see them are, on the Crown part, that Maori should have an interest in the commercial fishery, and on the Maori part, that that interest is not exclusive and must be constrained to work within resource management laws for the benefit of everybody. We see those as important acknowledgements both of which are consistent with the Treaty.

In addition further matters have been grafted onto the settlement. Other Maori fishing interests will be provided for in regulations and policies. This too is consistent with the Treaty, in our view, in so far as it is directed to giving better effect and definition to the Treaty's broad principles. It should also be helpful to all users to have that definition.

Subject to our comments below, we consider there is sufficient Maori support for these policy intentions.

What is then proposed however, is the effective extinguishment of the Treaty interest. This is wrong in our view and demonstrates a serious misunderstanding of what the Treaty is about, as we said earlier. The Treaty promised protection for Maori fishing interests for so long as Maori wish to keep them. The extinguishment of those interests is quite a different matter from providing rules and policies to protect and manage them. Some general consensus may do for the latter, but the former requires the consent of all with an interest, or their appropriate representatives. In much the same way, customary land rights are extinguished by purchase, only with an agreement that covers all interests.

The Crown is obliged to actively protect the Maori fishing interest. This is not an obligation that can be extinguished, or got rid of at any one point in time. The most that can be said is that the Crown has acquitted itself well of its current obligation in the present circumstance. Who can say what the future may hold however, or what adjustments may be needed if fish management policies change?

Findings and recommendations

Our more specific conclusions are these:

- The hapu have generally the main interest in the fisheries, but it is appropriate and not inconsistent with the Treaty, that a national settlement on fisheries should be ratified at no less than an iwi level.

It follows that the people of Tuhuru may be bound by a Ngai Tahu decision. It follows further that the Tuhuru status need not be determined here but may be relevant when it comes to allocating.

- There is presently no settled structure to determine who are iwi and who represents them on a national basis, and so no national iwi ratification process is currently possible. In the absence of such settled structures the canvassing of Maori opinion through general hui and by individual subscriptions was the next best alternative. With representational uncertainties however, the assessment of the outcome can only be subjective. In these circumstances, the Crown was justified in relying upon the report of the Maori negotiators.

- The report of the Maori negotiators indicates a reasonable mandate, but with the qualification that the Treaty itself should not be compromised.

The question of whether a Maori position might be represented through the New Zealand Maori Council or National Maori Congress did not arise in this inquiry.

- Subject to the deletion of extinguishment, as referred to below, it is reasonable and not inconsistent with the Treaty that the fisheries settlement, if generally agreed, should bind all, including dissentients. The settlement as a whole might be challenged if some dissentients are especially disadvantaged, but such disadvantage has not been established.

Some national settlements have not bound all, Railcorp for example, but only an all-in arrangement was workable for fisheries.

- The Crown's treaty obligations to hapu require that any allocation of benefits should be based on principles that are fair. Those obligations are likely to be compromised, inconsistently with treaty principles and in a manner prejudicial to some Maori, as the deed stands. To alleviate that position it is **recommended** :

— that the allocation scheme should not be based on treaty principles alone, but according to what is tika, or fair, in all the circumstances. This may include treaty principles, but need not be exclusive to them;

— that objections should not be referred to this tribunal, as our jurisdiction is constrained, but should be sent to some court or especially established body that is able to consider all relevant matters.

There are also legitimate anxieties over the future internal management of the settlement. To meet these it is **further recommended** :

— that the legislation should state the settlement's goals.

These we presume to be, to get Maori into the fishing business, to provide fairly for the different Maori groups, and to maintain a central business to fund local fisheries development. The goals however should be settled between the Crown and Maori negotiators. **It is then recommended :**

- that the legislation provide for a Crown-Maori body to review, say every 5 years, the progress towards achieving those goals, and to hear particular Maori complaints.
- We also consider that if there is an intention to legislate for para 4.6 of the deed, relating to the impact of this settlement on other claims, the Crown should clarify what the clause means and how in practice it is to be applied.
- It is not inconsistent with the Treaty that a settlement was proposed before allocation questions were decided, or that an allocation scheme should now be proposed by the new commission. A fair process may be difficult to establish but it is premature to consider that one will not be found. To accommodate particular complainants however, the scheme may need to provide:
 - for legal determinations on beneficial entitlements; and
 - for occasional reviews of the scheme and for the hearing of particular complaints.
- It is inconsistent with the Treaty and prejudicial to Maori, to legislate for the extinguishment of treaty fishing interests, or otherwise to make those interests legally unenforceable. **We recommend :**
 - that the legislation make no provision for the extinguishment of treaty fishing interests, and that the legislation in fact provides for those interests;
 - that fish regulations and policies be reviewable in the courts against the Treaty's principles; and
 - that the courts be empowered to have regard to the settlement in the event of future claims affecting commercial fish management laws.


However we consider:

- it would be reasonable for the Crown to place a moratorium on such claims for a term not exceeding 25 years (or earlier on a material change in fish management policies); and
- it is appropriate, in view of the settlement, that the Crown should legislate to terminate current actions.

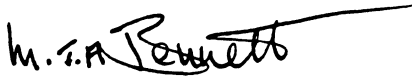
We are of opinion that the settlement is not contrary to the Treaty except for some aspects which can be rectified in the anticipated legislation. The “agreement” to legislate for those matters is not aptly so described, in the Court of Appeal’s judgment, as the Maori negotiators did not ask for various of the provisions (*supra* at pp 14-15). The court went on to note that the deed could not bind Parliament as to the legislation that may be passed.

Accordingly if the settlement proceeds, we urge that the effecting legislation has the modifications recommended above.

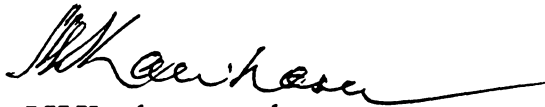
DATED at Wellington this 4th day of November 1992

A handwritten signature in black ink, consisting of a large, stylized 'D' followed by 'urie'.

E T J Durie, chairperson

A handwritten signature in black ink, appearing to read 'M. T. A. Bennett'.

M T A Bennett, member

A handwritten signature in black ink, appearing to read 'I H Kawharu'.

I H Kawharu, member

A handwritten signature in black ink, appearing to read 'J R Morris'.

J R Morris, member

Appendix

FORMAL CLAIMS

M A Solomon, Te Iwi Moriori Trust Board for Te Iwi Moriori (Chathams) (Wai 64). Counsel, M A Solomon.

M Te R K Weepu for Tuhuru (West Coast, South Island) (Wai 305). Counsel, T Woods.

M Sadd for Kurahaupo Waka Soc., Runanganui o Rangitane, Runanga o Tarakaipara o Ngati Apa, Runanga a Rangitane o Wairau (northern district, South Island) (Wai 44).

W Ngamoki and others for Te Whanau a Nuku, ... a Kahurautoa, ... a Kaiaio ... a Rutaia, ... a Tutawake of Whanau-a-Apanui (Te Kaha coast) (Wai 310). Counsel, T Woods.

M Cracknell and others for Rongomaiwahine and Runanganui o Ngati Kahungunu (Mahia) (Wai 311). Counsel, P Rikys.

T Tukapua for Muaupoko (Horowhenua coast) (Wai 52).

I Berkett for Motiti, Marutuahu, Te Uringahu, Pirirakau, Ngati Ranginui, Tuhua (Bay of Plenty) (Wai 159).

H Keelan and others for Runanga o Ngati Porou (Ruatoria coast). Counsel, C Wickliffe.

R R Karaitiana for Waitaha (Southland-Fiordland). Counsel O.K.G. Karaitiana.

INFORMAL CLAIMS IN SUBMISSIONS AND MEMORANDA

R B Perenara and others for Ngati Rangitihi, Ngati Makino, Ngati Whakahemo, Ngati Whakaue ki Maketu, Tuwharetoa ki Kawerau, Te Waka Hi Ika o Te Arawa (Maketu-Matata coast). Counsel, P Harman.

R R Preece for Te Runanga o Wharekauri Rekohu Inc (Chathams). Counsel, P Marriott.

W M T Manukau and anor for nga hapu o Ngati Whatua (Auckland and north). Counsel, A R Jones.

D Solomon for Moriori T'Chakat Henu Assoc (Chathams). Counsel, I M Antunovic and J Johnson.

T Faulkner and anor of Pirirakau and Ngati Ranginui (Tauranga).

H M Mead for Ngati Awa (Whakatane coast). Counsel, T Woods.

C Mohi for Runanganui o Ngati Kahungunu (Wairoa-Wairarapa Coast). Counsel, M A Solomon.

M Potaka for Whanganui River Maori River Trust Board (Whanganui).

H Gordon for Ngati Paoa Whanau Trust Board (Hauraki).

P B Marriott for Ngati Wai Trust Board (North Auckland).

OTHER APPEARANCES

S O'Regan for Ngai Tahu Maori Trust Board (South Island). Counsel, J Upton, QC.

J M Russell for Runanga o Kati Waewae (West Coast, South Island). Counsel, J Upton, QC.

J Lake for Crown.

M Dawson for Maori Fisheries Negotiators (initial chambers hearing only).

PROCEEDINGS

(a) A chambers hearing with counsel was held on 28 September.

Documents A1 to A3 were admitted to the record of documents.

(b) Hearings were held at Wellington on 29-30 September and 1 October.

Documents A4 to A33 were admitted to the record.

(c) A conference with counsel was held on 13 October.

Following the hearing and conference documents B1 to B33 were filed comprising mainly submissions.

The formal claims are at 1.1 to 1.15 of the record of proceedings and interlocutory papers at 2.1 to 2.23. The hearings have been taped and some of the tapes have been transcribed, at 3.1 of the record.

