

The
Ngai Tahu Sea Fisheries
Report 1992

(Wai 27)

Waitangi Tribunal Report

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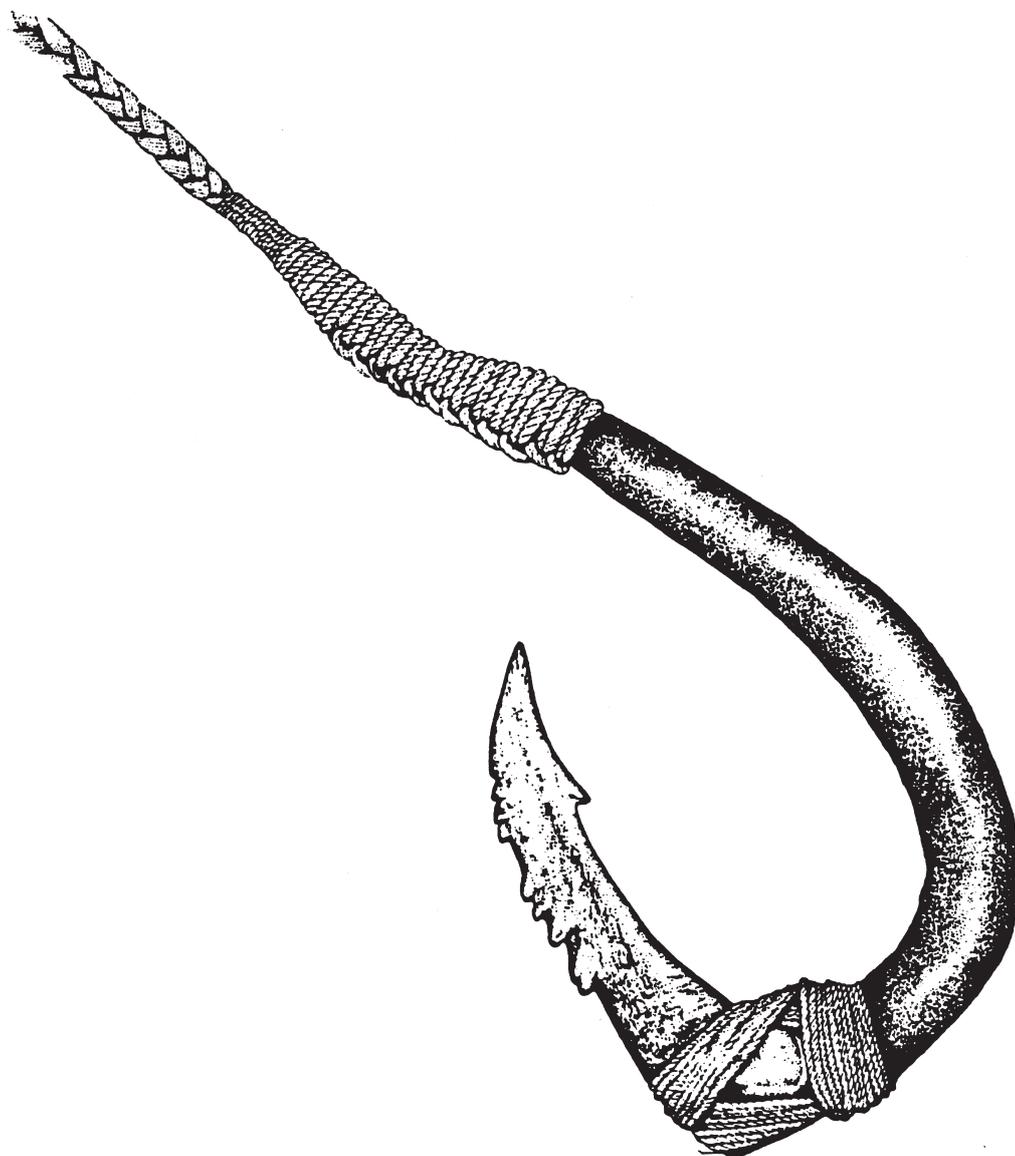
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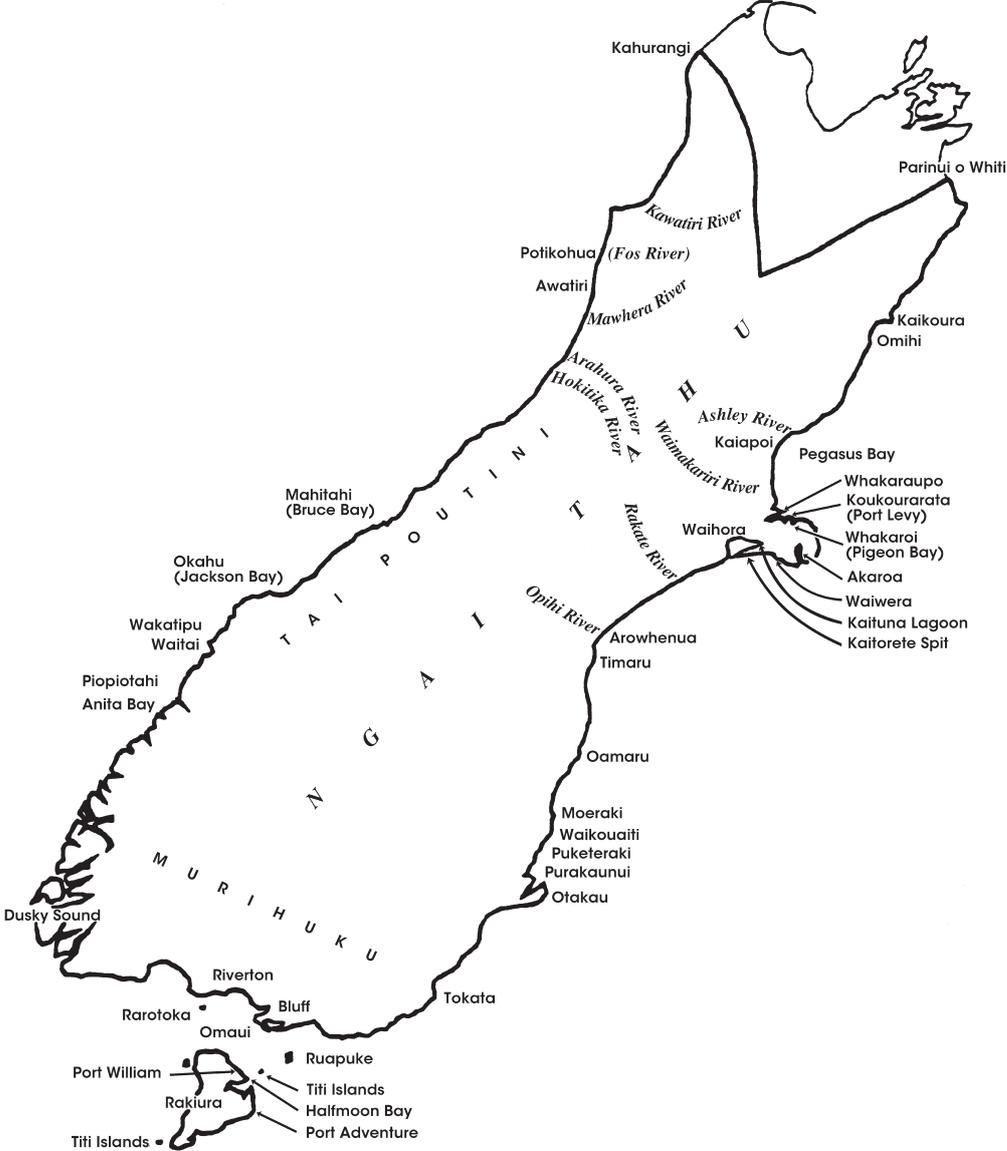
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Matau in Barry Brailsford *The Tattooed Land: The Southern Frontiers of the Pa Maori* (AH and AW Reed Ltd, Wellington 1981)



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The Honourable Minister of Maori Affairs
Parliament Buildings
WELLINGTON

Te Minita Maori

Tihei mauriora!

Karanga te pou whenua

Karanga te pou marae

Karanga te pou tangata.

E nga mana, E nga reo,

Tena koutou, tena koutou, tena koutou.

Tena koe te Minita mo nga take Maori. Kua rere atu koe i Whakatu ki Poneke hei kaiwhakarite mo nga hunga katoa o tenei motu o tena motu. Tenei matou te noho nei i roto i te pouri ranei, i te marama ranei, e tangi ana, e karanga ana ki a koe ena hoki kei te ringa kaha o te kawanatanga te ora mo tatou te iwi Maori e takoto ana. No reira tena koe.

I tenei ra ka oti nei te tuku atu ki a koe me to tari te ripoata mo te hi ika o Ngai Tahu. Ka kitea i roto nga whakaaro katoa o tenei roopu mo tenei o ona takenui.

Ka mutu ta matou mahi, ka timata ta koutou no reira e te kanohi o Te Puna Kokiri nga mihi nui ki a koe ara koutou ko nga kaimahi katoa. Tena koutou, tena koutou, tena koutou.

We present to you the tribunal's report on the Ngai Tahu sea fisheries claim. It is the second report of this tribunal on Ngai Tahu grievances and follows on the major land and mahinga kai report handed to your predecessor in office on 1 February 1991. There is yet to be completed by this tribunal its report into a large number of ancillary but generally small and specific claims brought to notice as the main claim was heard.

For your convenience we have included in chapter 13 a summary of the principal findings and conclusions of the tribunal. In the following and final chapter we have also summarised Crown breaches of the Treaty and then made six recommendations. You will observe that the first three recommendations, which relate to the substantive claim, simply recite the tribunal's findings as to Ngai Tahu sea fishing treaty rights; advise the parties to seek a settlement by negotiation; and suggest the settlement should include determination of an additional percentage quota allocated through the mechanism of the Maori Fisheries Act 1989.

A vast volume of evidence and submission was presented by the two parties and by the New Zealand Fishing Industry Board and the New Zealand Fishing Industry Association who were granted leave to appear and call evidence on behalf of the fishing industry. This evidence included traditional, historical, archaeological, anthropological and scientific material. The evidence not only went back in time to record the diverse and even sophisticated technology in specialised canoe

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fishing off the Ngai Tahu coast in the fourteenth century but it progressed through 1840 up to modern times. There was a massive input of present day fisheries knowledge by a large team of marine scientists, marine biologists and scientists. As happened in the first report the tribunal had overview reports presented by independent experts in the historical and marine biology areas.

You will also be pleased to read of the tribunal's acknowledgment that the Maori Fisheries Act 1989 is a positive step forward and certainly the only tangible and significant recognition since the Treaty of Maori treaty fishing rights. The tribunal refers in chapter 2 to the constructive discussion paper *Sustainable Fisheries Tiakina Nga Taonga a Tangaroa* prepared by the Fisheries Task Force.

These are the long overdue beginnings of a recognition of Maori sea fishing rights under the Treaty.

The tribunal hopes the report will provide the necessary background material, findings and recommendations to help in the continuing process of negotiation. We have pointed out to the parties that achieving a successful compromise often involves consideration of wider parameters than those necessarily at issue within the claim itself.

There is certainly a greater spirit of goodwill existing between the Crown and Maori today than was evident to this tribunal when it embarked upon this inquiry in 1987.

The tribunal urges both parties to build on that good faith in working towards an acceptable settlement of these longstanding Ngai Tahu grievances which in varying degrees are shared by all Maori iwi.

Karakia hi tuna, hi ika hoki

Taku aho nei, ka tangi wiwini.
Taku aho nei, ka tangi wawana.
Taku aho nei, ka hinga, ka mate ra.
Kai mai, kai mai, e te kokopu,
Ki taku nei mounu nei.
Tara wiwini, tara wawana,
Kia ai he whakataunga mau
Ki te uru ti, ki te makau.
Tara wiwini, tara wawana,
E tuapeka ki Wai-korire.

Karakia used in catching eels or fish

My fishing line here, its cry is awesome.
My fishing line here, its cry is dreadful.
My fishing line here, it is dropped, it sinks there.
Bite here, bite here, O you kokopu,
Bite here at my bait.
Awesome point, dreadful point,
That allows you to be landed
By the sharp point, by the hook.
Awesome point, dreadful point,
Which will deceive at Wai-korire.

Preface

*“Ahakoa kia paa te upoko o Te moana-Taapokopoko-a-Taawhaki
ki ngaa takutai o Te Waka-o-Aoraki,
Engari, i taakekea te kupenga a Tabu kia oioi i roto i te
nekeneke o te tai.”*

*“Although the shores of Te Waipounamu may be buffeted by the turbulent
currents of the great waves of the southern oceans, the fishing net of
Tabu has
been made flexible so as to move at one with the tides.”*

This is the second report on Ngai Tahu grievances. It deals with Ngai Tahu sea fisheries. The first report under the title *Ngai Tabu Report 1991* addressed grievances arising out of eight regional purchases of Ngai Tahu lands by the Crown between 1844 and 1864. The 1991 report also dealt with mahinga kai; that term meaning “those places where food was produced or procured”. Because of the sheer size of the earlier inquiry and because also of proceedings running contemporaneously in the High Court and Court of Appeal the tribunal decided to defer this sea fisheries report and a further third investigation into over one hundred smaller grievances so that the findings of the *Ngai Tabu Report 1991* could be digested. That process has proved satisfactory and has provided a firm base for the Crown and Ngai Tahu to embark upon settlement negotiations. Unfortunately, the separate reporting of the land and sea-fisheries claims has tended to compartmentalise areas of inquiry which are really closely interrelated. To Maori the phrase “Nga hua o te whenua, nga hua o Tane me nga iwi o Tangaroa” (J10:5) embraces the resources of the land, the forests, the lakes, rivers and the sea. The severance of the claim has therefore somewhat affected the continuity and holistic appraisal of land and water resource.

It was put to the tribunal during the hearing of the land claim that Ngai Tahu considered its lands and seas to be a physical and spiritual unity, a seamless whole which could not be divided into parts. This concept caused some problems for Professor Alan Ward who was commissioned by the tribunal to overview the historical evidence. Professor Ward considered there was overwhelming evidence that rights to take shellfish and fish in the tidal zone and inshore waters were closely demarcated and that some rights seemed to have been exercised by the wider village or hapu community, others by families and others even by individuals.

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The concept also led to argument before the tribunal to which we shall later refer that when Ngai Tahu sold their land their exclusive rights to sea fisheries were modified to give rights to the transferee.

As we shall shortly see the tribunal's earlier findings that Ngai Tahu had well founded grievances in respect of their land claim have had considerable bearing on the tribe's access to and development of its sea fisheries. And although this report is dealing with the major question of sea fisheries, to Ngai Tahu that involves not only the inshore, offshore and deep water fisheries, but also the highly important onshore kaimoana and the estuarine, lake, river and waterway resources. In the *Ngai Tahu Report 1991* under the subject heading of mahinga kai the tribunal dealt in some detail with the land based fisheries and in this inquiry is more directly concerned with the tribe's sea resources. There will however be a number of references to the onshore and inland fisheries particularly in chapter 2 where we listen to the peoples' claims. By any standard this sea fisheries claim is of major proportion. Ngai Tahu claim the exclusive right to the fish in the sea off their tribal boundary without restriction as to species, depth or seaward boundary. Evidence was tendered to the tribunal that over 70 percent of the New Zealand fishing catch, by value, occurred in the area claimed by Ngai Tahu. Ngai Tahu have offered, without prejudice to their claimed Treaty right to 100 percent of the total allocated commercial catch (TACC) off their rohe to accept ITQ equivalent to one half of the TACC and to hold such quota as tribal property.

In the *Ngai Tahu Report 1991* the tribunal found that certain governors and other officers in their negotiations and dealings with Ngai Tahu had at times acted arrogantly or dishonourably and their actions had resulted in grave injustices to Ngai Tahu.

In this report the predominant theme is one of Crown neglect and failure to consult and protect iwi in the retention of their Treaty sea fishing rights. In part this neglect arose from a concern to put in place measures intended to conserve or replenish the fisheries resource and in part from an assumption that, the clear provisions of the Treaty notwithstanding, the Crown owned or at least had the sole right to control and even dispose of sea fisheries which belonged to Maori.

In the early chapters of this report the tribunal will explain the nature of the claim first in relation to the land claim and then its particulars and how it was heard. There will be reported some of the personal expressions of grievance from members of the tribe as given in evidence to the tribunal as it moved around the South Island tribal area of Ngai Tahu. The poignant plea of ordinary people particularly in relation to pollution and the deprivation of traditional sea foods could not fail to affect tribunal members.

In chapter 3 the tribunal commences its survey of the huge volume of evidence covering the period before, up to, including and immediately

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after the Treaty as presented by the claimants, the Crown and the fishing industry. In this appraisal the tribunal looks at traditional, archaeological and scientific evidence. We examine the fishing capacity of Maori, the geographical limits of their fishing, their equipment, technology and expertise. We also examine the bartering and commercial dealings and Ngai Tahu relationship with European newcomers. In the following chapter (chapter 4) the tribunal considers Ngai Tahu Treaty rights at 1840. This report is not the first time the Waitangi Tribunal has inquired into Maori fishing rights. In its *Muriwhenua Fishing Report* of 1988 the tribunal, in addition to reporting on the factual nature and extent of Maori sea fisheries in the far north, also looked at modern fisheries administration, management and direction with emphasis on the Quota Management Scheme. The Muriwhenua Tribunal also looked at comparative overseas development. As will be seen we have drawn extensively on the *Muriwhenua Fishing Report*, making observations and distinctions where necessary and updating the legislative and administrative changes since 1988. Our tribunal has not considered it necessary to traverse those areas in the *Muriwhenua Fishing Report* which are common to all Maori fisheries such as ethnographic and comparative studies of people and laws in other countries. We hope that both reports taken together will provide a useful analysis of Maori sea fishing activity and Treaty rights which will assist in the resolution of this area of Maori grievance. In chapters 5, 6 and 7 the tribunal reviews the total scene within the Ngai Tahu rohe from 1840 to 1988. In doing so the history of Ngai Tahu and Pakeha involvement in the industry is explained as is the gradual assumption of legislative control by the Crown. We see in this section of the report the development of Ngai Tahu attitudes and responses to Crown intervention and the lack of any consideration of Ngai Tahu rights under the Treaty. The report moves from consideration of Crown regulation to the Crown disposition of sea fishing rights and comprehensively examines events in the critical 1983 to 1988 period. In this period the quota management scheme was introduced followed by an interim finding of the Waitangi Tribunal (*Muriwhenua Fishing Report*). It led to strong Maori response and subsequent High Court proceedings and to interim declarations of Mr Justice Greig in 1987.

Government acted swiftly after the issue of the High Court declarations and pursuant to an agreement with the New Zealand Maori Council set up a Joint Working Group with four members on each side. This committee could not agree on the major issues and each side made a separate report. We shall look more particularly at these two reports in chapter 7. On 31 May 1988 the Waitangi Tribunal issued its *Muriwhenua Fishing Report*. Following this report the Crown and Maori again negotiated but could only reach limited agreement. On 22 September 1988 the Minister of Fisheries moved the introduction of a Maori Fisheries Bill. This Bill in its long title spelt out certain terms of agreement reached between Maori and the Crown which inter alia provided over a 20 year period for the Crown to acquire and then hand to Maori in each year from 1989 to the

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year 2008 quota representing 2.5 percent of the total allowable catch thus giving Maori a 50 percent interest in sea fisheries. A grant of \$10 million spread over 5 years was also to be made to assist Maori tribes engage in the business of fishing.

The 1988 Bill was referred to a select committee and the fishing industry strongly contested its enactment. Maori also criticised several proposals in the Bill. Further proceedings were filed in the High Court and there was strong debate in the media. This report traces these steps and how finally an interim agreement was reached by a working party set up by the (then) Deputy Prime Minister. In effect an interim arrangement was proposed and agreed to which allowed enactment of a substantially amended Maori Fisheries Act (passed on 20 December 1989). It was agreed by those parties before the courts namely, Maori, the Crown, and the New Zealand fishing industry to adjourn all proceedings sine die to give the new Act a chance to establish a transfer mechanism by which the Crown would issue quota to iwi and establish taiapure fishery reserves. The transition period is to expire on 31 October 1992. In chapter 8 we look at the content of the Maori Fisheries Act 1989 and the operation of the Maori Fisheries Commission. Under that Act Maori are to be given quota in four equal tranches of 2.5 percent over the period from April 1990 to October 1992. It was made clear to the tribunal by Ngai Tahu claimants that Maori did not accept the 10 percent quota as representing a full settlement of Maori fisheries claim. The object of the Act was to facilitate Maori entry into the business and activity of fishing and to allow a settling down period. It also allowed further time for the Crown and Maori to negotiate a settlement rather than have the issues pursued in the adversarial setting of the courts. It also allowed time for this tribunal to report so that its findings would be available to the parties and to the courts if it was found necessary to resume the adjourned court hearings.

In chapter 9 the tribunal reviews the modern day South Island fishery. In this study the tribunal was greatly helped by the detailed evidence called by the Crown. The tribunal, in written report and by video presentation, was given by a number of MAFFish scientists and marine biologists a most interesting and comprehensive survey of the NZ modern fishery.

The tribunal expresses its gratitude to the Crown for the tremendous effort put into the preparation and presentation of this evidence. Whilst this report only captures the main statistics and details, we have on record and available for more detailed study by persons interested in the sea harvest a wealth of important data. The tribunal is most sympathetically supportive of the pleas made by these scientists for the provision of adequate resources to enable their important research to continue. Since our inquiry started a major improvement in resource occurred with the commissioning of the research vessel Tangaroa. It is imperative in the preservation and protection of our fishery resource that research facilities

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be provided so that accurate assessment can be made and proper decisions made.

It was appropriate that the tribunal receive this detailed evidence which clearly showed the extent of the deep water fisheries catch within Ngai Tahu rohe.

In chapter 10 the tribunal considers the nature and extent of Ngai Tahu sea fishery rights under the Treaty at the present time. As will be seen these are more extensive than in 1840. In chapters 11 and 12 the tribunal looks at Treaty principles applicable to the Ngai Tahu claim, and then reports on its findings as to Crown breaches of the Treaty.

A summary of the tribunal's findings and conclusions is given in chapter 13 and in the final chapter the tribunal makes its recommendation to the minister. It will be noted that there are six recommendations two of which relate to eel fisheries at Waihora (Lake Ellesmere) and one to the creation of fishery reserves generally. The principal recommendation is brief. It simply recommends that Crown and Ngai Tahu negotiate a settlement on the basis of the tribunal's findings.

As this report develops the reader will see explained the various steps and decisions reached in trying to find an acceptable settlement of the Ngai Tahu tribal claim and perhaps with it a settlement of the broader sea fisheries claim from all iwi. It is a complex issue involving numerous actions in the courts, hearings and inquiries of select committees of Parliament, negotiation and private discussion behind closed doors, hearings before the Waitangi Tribunal and considerable public debate. Although this report records the nature and extent of Ngai Tahu fishing activities and that tribe's Treaty rights it also necessarily traces the developments on the national scene particularly over the past five years. During this period there have been various percentage figures suggested as Maori entitlement rights under the Treaty. We shall refer to those figures and to the bodies recommending them. This tribunal for reasons given later has not recommended a percentage figure but it believes it has now provided a factual background that will allow presently adjourned negotiations to reopen and be satisfactorily concluded by agreement.

What now follows is the record of this tribunal's long inquiry into the nature and extent of Ngai Tahu fishing activities and Treaty rights and our findings and recommendations under the statutory jurisdiction conferred on the tribunal by the Treaty of Waitangi Act 1975.

Chapter 1

About the Claim

1.1 The Claim and the Proceedings

The structure of the claim

- 1.1.1 For the reasons explained in the preface to this report the tribunal found it necessary to sever the sea fisheries claim from the land based claim and deal with that question separately. In order to understand fully the nature and extent of the Ngai Tahu claim it is necessary to read both reports. As will be seen later in this report the omissions and failures of the Crown in respect of its dealings with Ngai Tahu over the eight regional land purchases from 1844 to 1864 left that tribe in no position either to protect or develop its sea fisheries. In the first report the tribunal dealt quite extensively with mahinga kai – the food resources of Ngai Tahu. Fish of course formed a very important part of those resources and as the tribe found its access to the food resources of the land and forests disappear with land settlement it relied more heavily on its fisheries. Although dealing only with fisheries in this report the tribunal has very much in mind the facts and findings of the *Ngai Tahu Report 1991*.

1.2 What the Claim is About

- 1.2.1 Unlike the land claim, the fisheries claim is not presented as a series of specific grievances against the Crown. Rather, in its final form, it is a strongly-worded declaration on the nature and scope of Ngai Tahu fishing rights under the Treaty of Waitangi. It is a claim which the claimants say is “prosecuted to the fullest”. It identifies Treaty principles which provide and protect the rights so claimed and it sets out the terms on which Ngai Tahu would be willing to negotiate a settlement of their claim with the Crown.

Ownership

- 1.2.2 In essence Ngai Tahu say that article 2 of the Treaty guarantees protection of tribal tino rangatiratanga over their fishery and that there can be no restriction of any kind on the exercise of that rangatiratanga in the seas off the Ngai Tahu coast line. Accordingly, Ngai Tahu claim ownership of the entire marine fishery adjacent to their tribal lands, including all property and user rights, commercial and otherwise, inherent in the business and activity of fishing. They claim the absolute right to fish in those waters without any restriction whatsoever by whomsoever and claim further that they are entitled to have that right protected by the Crown.

Species

- 1.2.3 The fishery they own, the claimants say, includes all species of fish

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without exception. It includes all the species known to have been fished by Ngai Tahu before 1840 as well as all species that have been discovered since 1840 or may be discovered in the future.

Ngai Tahu say their fishery includes all equipment, methods and technology that were, are, or may be used, in fishing. The extent of the fishery claimed is not limited by past technology nor by restrictions on the use of modern knowledge.

Protection of taonga

- 1.2.4 The claimants say their fishery is a taonga and that there are cultural and spiritual values associated with it. Ngai Tahu claim they are entitled to recognition and protection of those values free from outside control or interference.

Boundaries

- 1.2.5 On the question of boundaries Ngai Tahu recognise a northern boundary which separates their claim area from the offshore waters of the tribes which traditionally inhabited the northern end of Te Waipounamu. This boundary is marked by Parinui-o-Whiti on the east coast and Kahurangi on the west. Ngai Tahu also acknowledge the mana moana of the Chatham Islands people and make no claim in respect of that fishery. With these exceptions no seaward boundaries are recognised nor any limit as to fishing grounds and fishing depths. "We have the right to go to sea as far as we must, or are able, in order to obtain the fish that we require." (appendix 1)

Control

- 1.2.6 Ngai Tahu claim the exclusive right to manage and control their fishery, which includes the authority to grant (or revoke) fishing rights to others. Historically, Ngai Tahu say, they have always been generous in meeting the reasonable needs of manuhiri who wish to fish within their tribal waters.

Conservation

- 1.2.7 The claimants address the issue of conservation. They say that Ngai Tahu fully recognise their responsibility to manage their fishery in such a way that continuing benefit to themselves and all New Zealanders is assured. They suggest that modern expertise, when coupled with traditional Maori principles, will prove far more effective than the conservation management hitherto undertaken by the Crown. In the Ngai Tahu view, attempts by the Crown to manage the fishery have been "disastrously ineffective".

One of the main assertions by the claimants is the statement in their claim that:

The management and control of their fishery is guaranteed exclusively to Ngai Tahu by the Treaty of Waitangi, and further by s88(2) of the Fishing Act in our view of the law. Ngai Tahu were also entitled to the income and other benefits that may from time to time accrue from the activity and business of fishing in our tribal seas. Furthermore the entire property in the fishery was guaranteed to Ngai Tahu however that property title might be expressed in

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modern legal terms following legislation by the Crown whether it is now in real or such abstract forms as “quota” “licences” or any other form of title or right to fish. In our view the Crown has never had any right to interfere in the management or control of the fishery, nor to divert away from the rightful owners the income and benefits of fishing, nor to issue “quota” “licences” or other forms of purported title in property or user rights in the fisheries that in right belong to Ngai Tahu. The fishery property still belongs to Ngai Tahu. (appendix 1)

Settlement terms

1.2.8 Finally the claim restates the terms on which Ngai Tahu would be willing to negotiate with the Crown. The claimants state that the fundamental prerequisite to honest negotiation and practical results is acknowledgement by the Crown that Ngai Tahu hold “the full and exclusive property and user rights in their tribal fishery”. Once this principle is accepted by the Crown Ngai Tahu would agree to:

- equal shares in the management and control of the southern fishery;

or

- an equal or at least a very substantial share in the income and benefits of fishing;

and

- a similar share in the equity or property involved.

In this proposal for a share in the property rights Ngai Tahu say:

As long as the process of allocation of ITQ permits Ngai Tahu to achieve a total of 50% of TACC in all species offshore from our manawhenua without regard to statutory imposed seaward boundaries, Ngai Tahu would be prepared, without prejudice to its Treaty of Waitangi right for 100% of such TACC, to accept such quota in the form of ITQ and to hold them as tribal property. Ngai Tahu would not object to such an allocation being delivered via the mechanism of the Maori Fisheries Act providing that there was statutory amendment requiring the Maori Fisheries Commission to ensure its actual delivery to Ngai Tahu. (AB1:30)

These terms, the claimants say, represent a significant concession by Ngai Tahu, given that the Treaty so clearly promised them full and exclusive ownership and control of their fishery.

1.3 Development of the Fisheries Claim

First fishing claim

1.3.1 The statement of claim of 26 August 1986, which initiated the Ngai Tahu inquiry, contained no reference to fishing grievances. However during the course of the two year inquiry the claim was altered and amplified on several occasions and in the amending document of 2 June 1987 the Ngai Tahu fishing claim made its first appearance. In that claim, under the mahinga kai section, the claimants alleged that Ngai Tahu had been wrongfully deprived of their fishing resources as a result of the Crown’s acts and omissions and in breach of the principles of the Treaty. Without

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specifying the exact nature and extent of the Treaty fishing rights to be claimed, the claimants gave notice that they would be seeking a share in the southern fishery and compensation for fishing resources of which they had been dispossessed.

Second fishing claim

- 1.3.2 Greater definition of fishing grievances was given in the amended claim dated 25 September 1987. In this statement Ngai Tahu asserted exclusive ownership of the fishery adjacent to their tribal coasts out to the 12 mile limit. They stated that in accordance with the partnership principle implicit in the Treaty they would grant the Crown a 50 percent share in that 12 mile fishery. They would accept, as compensation for lost fishing resources, a negotiated share in the fishery outside the 12 mile limit and in the event that Ngai Tahu received an appropriate share in that deep sea fishery they would abandon their claim before the Waitangi Tribunal. The claimants stated that they accepted the commercial and practical reality of the ITQ system, but did so without prejudice to their position on whether the Crown was in breach of the Treaty by imposing the quota system.

Third fishing claim

- 1.3.3 At its seventh hearing at Tuahiwi Marae on 11 April 1988 Tipene O'Regan made a comprehensive statement of Ngai Tahu position on fisheries (H17). In addressing the tribunal, Mr O'Regan contended that 70 percent of the total New Zealand catch "which has produced a landed value in 1986 and 1987 of a little under \$1 billion in each year" was the property of Ngai Tahu (H17:16).

This submission was followed two months later by the claimants filing their third amended claim dated 25 June 1988. This claim was a comprehensive reformulation of the Ngai Tahu sea fishery claim, detailing in 25 numbered paragraphs the full scope of the fishing rights asserted by Ngai Tahu under the Treaty.

Fourth fishing claim

- 1.3.4 In a final statement of grievance placed before the tribunal on 21 August 1989 the claimants alleged:

3. Commercial fishing and fishery administration policies of the Crown have denied Ngai Tahu access to traditional seafoods.
4. The lack of an adequate capital base has limited the tribal right to develop its commercial fishery.
5. Ngai Tahu never sold any of their fisheries to the Crown, but the Crown has administered fisheries without reference to the Tribe and without considering Tribal needs and Tribal rights. (W6:12)

The texts of the original and amended statements of claim are set out in full in appendix 1.

The tribunal notes that the several revisions of the fishery claim were in no way due to error or omission on the part of the claimants. This inquiry coincided with a number of important developments in the national debate on Maori fishing rights and these developments had a direct

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bearing on the Ngai Tahu claim. In 1986 the Fisheries Amendment Act 1986 was passed which introduced into the management of New Zealand fisheries a system called "Quota Management System". Later in this report we shall more fully detail the consequences that flowed from that legislation, the subsequent litigation and its effect on Maori fishing rights. We shall also consider the Maori Fisheries Act 1989 and the purpose and effect of that legislation. All this legislation and litigation was taking place as our tribunal was hearing the Ngai Tahu claim. The Muriwhenua tribunal also released its report in June 1988. These combined factors led to a need for a Ngai Tahu restatement and redefinition of their sea fisheries. The changing circumstances enabled the claimants to amend their claim with growing precision but widening ambit as the scene unfolded and the Ngai Tahu inquiry progressed.

1.4 **Representation**

For the claimants

- 1.4.1 Paul Temm QC of Auckland was senior counsel for the claimants for the greater part of this inquiry. He represented Ngai Tahu from August 1987 until December 1990 and appeared at all hearings except the final two sessions in 1991 which dealt with sea fisheries. Mr Temm's departure from this inquiry resulted from his appointment as a judge of the High Court. John Upton QC of Wellington was appointed as senior counsel for the claimants in 1991 in place of Mr Temm. David Palmer of Christchurch acted as solicitor for the claimants throughout the claim. Michael Knowles also acted as solicitor for the claimants during the final series of fisheries hearings.

For the Crown

Appointment to the judiciary also resulted in changes to Crown representation on the Ngai Tahu inquiry. Shonagh Kenderdine, senior counsel from Crown Law, represented the Crown from the beginning of the claim until the end of 1990 when she became a District Court judge sitting on the Planning Tribunal. Thereafter Jennifer Lake has acted as senior counsel for the Crown. Ansley Kerr has acted throughout as assisting Crown counsel. Final submissions for the Crown were presented by Colin Carruthers QC.

For the fishing industry

- 1.4.2 The national fishing industry was represented by two organisations, the New Zealand Fishing Industry Board (NZFIB) and the New Zealand Fishing Industry Association (NZFIA). The board is a body corporate established pursuant to s3 of the Fishing Industry Act 1963. The functions of the board are as set out in s10 of the Act and are primarily as follows:

- (a) to promote the fishing industry in New Zealand;
- (b) to promote means of expanding the fishing industry in the interests of New Zealand and to ensure that full use is made of the fishing resources of New Zealand; and
- (c) to promote a greater degree of co-ordination within the fishing

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industry.

The NZFIB represents, as a statutory body, the industry in New Zealand. The New Zealand Federation of Commercial Fishermen, the New Zealand Share Fishermen's Association and the Retailers Association are represented by the board.

The NZFIA is an incorporated society registered at Wellington. The association's members have a significant investment and are major participants in the New Zealand fishing industry. Its membership accounts for over 85 percent of the catching and processing capacity of the industry in this country. The association's membership currently holds in excess of 90 percent of quota issued under the Quota Management System introduced under the Fisheries Act 1983 (as amended 1986).

Both organisations were keenly interested in the Ngai Tahu fishing claim and took an active part in proceedings. Counsel for NZFIA were Tim Castle and Bruce Scott. Counsel for NZFIB were John Marshall and Carrie Wainwright. At the seventh tribunal hearing on Tuahiwi marae, counsel for the fishing industry requested that the association and board be joined as parties to the claim. The tribunal ruled that neither body could be accorded status as parties to the claim but they would be granted leave to appear and be heard on matters relating to sea and eel fisheries. The record shows that thereafter counsel for the fishing industry appeared at 12 of the tribunal's 27 hearings beginning 11 April 1988, 27 June 1988, 7 February 1989, 10 April 1989, 29 May 1989, 3 July 1989, 2 August 1989, 11 September 1989, 28 June 1990, 20 December 1990, 17 June 1991, and 2 September 1991.

1.5 **How the Fishing Claim was Conducted**

The sequence of hearings and the procedures adopted by the tribunal during the course of this inquiry have already been described in chapter one of the Ngai Tahu 1991 report. They need not be repeated here. Fisheries evidence, being part of the mahinga kai claim, was presented on many different occasions throughout the inquiry. Major portions of the fisheries evidence were given by the claimants' witnesses at Tuahiwi marae and Te Rau Aroha marae in April and June 1988. Appended to this report as appendix 3 is a record of documents which includes not only those documents produced to the tribunal during the land claim hearing but those subsequently produced at hearings on 28 June 1990, 20 December 1990, 17 June 1991 and the final hearing on 2 September 1991. The Crown opened its case on sea fisheries on 10 April 1989 (R9).

Although some hearings dealt solely with fishing issues it was not envisaged that the fisheries claim would be separated from the rest of the mahinga kai claim. The claimants' view that their lands and seas are a "seamless whole which cannot properly be divided into parts" (appendix 1) is acknowledged by the tribunal and as earlier stated the tribunal regrets the need to now deal with the fishing claim in a separate report. However, during 1987 and 1989 the Waitangi Tribunal was only one of

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a number of forums in which Maori fishing rights were being considered and events outside the tribunal's jurisdiction ultimately made the issue of a separate report inevitable.

High Court and Court of Appeal proceedings

- 1.5.1 In 1987 and 1988 a number of High Court proceedings were brought against the Crown by Maori and fishing industry interests. These proceedings called for consideration of a wide range of matters, including Treaty principles and guarantees, and all had "a common rootstock in the question of the existence and scope of Maori fishing rights" (Q7:3).

The tribunal was mindful of the fact that these High Court proceedings involved the essential aspect of the tribunal's specialist jurisdiction, namely Treaty rights. By the latter half of 1988 the tribunal was concerned about the propriety, not to mention the cost and convenience, of continuing to hear evidence when the same, or many of the same issues, were to be addressed in the High Court.

On 10 November 1988 the tribunal issued a memorandum seeking submissions from the parties and the fishing industry on whether the tribunal should postpone its consideration of the sea fishing claim in light of the High Court proceedings.

On 16 March 1989 the tribunal directed it would continue to hear fisheries evidence, having received submissions from the claimants, Crown and fishing industry which all urged the tribunal not to defer the fishing claim. The tribunal noted that the Ngai Tahu High Court action in *Ngai Tahu Maori Trust Board v Attorney-General & Others* was adjourned by the Court of Appeal for three reasons, one of which was that the tribunal's report on Ngai Tahu could be of significance and could also shorten the hearing in the High Court.

Further evidence: sea fisheries inquiry reopened

Formal hearings before the tribunal on the Ngai Tahu claim, including fisheries, were completed on 10 October 1989. The tribunal still intended at that time to report on fisheries grievances as part of the whole claim. However an application dated 22 May 1990 was received from the NZFIA and NZFIB seeking leave to adduce further evidence. This evidence had been compiled by NZFIA and NZFIB as parties in one of the High Court proceedings in which the claimants were plaintiffs.¹ It consisted of 28 affidavits which had not been completed until after the conclusion of the tribunal's hearing in October 1989. The NZFIA and NZFIB wished to have this evidence included as part of the Waitangi Tribunal inquiry on the grounds that it was relevant to the Ngai Tahu claim and would assist the tribunal in its deliberation. Following a hearing on 28 June 1990, and with the consent of the parties and the fishing industry, the tribunal decided to reopen the inquiry into the sea fisheries claim. A large quantity of additional evidence, in the form of affidavits adduced for the High

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Court proceedings, was received from the claimants and Crown as well as from the fishing industry. Two further hearings were held from 17–22 June and 2–5 September 1991.

1.6 Ward and Habib Reports

1.6.1 In 1988 Dr George Habib was commissioned to provide an overview report of the fisheries evidence. This report was presented at the eighteenth hearing of the claim held at the Chateau Regency Hotel, Christchurch (12–16 June 1989), supplemented by three other reports. These reports provided a comprehensive overview of the fishing evidence presented by the claimants, the Crown and the fishing industry.

At the June 1991 hearing Professor Alan Ward and Dr George Habib presented overview reports on the additional fisheries evidence. These expert witnesses had been commissioned by the tribunal in 1990, pursuant to clause 5A of the second schedule to the Treaty of Waitangi Act 1975, to prepare respective reviews on the historical and fisheries evidence presented to the tribunal. The contributions made by Professor Ward and Dr Habib in reviewing the very lengthy evidence tendered by all parties for the additional sea fisheries hearings were substantial and, as noted by the tribunal in the first Ngai Tahu report, their overviews were very helpful to all concerned. As on previous occasions, counsel took the opportunity to cross-examine both witnesses.

At the tribunal's invitation, Whaimutu Dewes, Maori Fisheries Commissioner, and his counsel Joe Williams, appeared at the June 1991 hearing to make submissions on the Maori Fisheries Act 1989. Counsel for the claimants, Crown and fishing industry also made submissions on this legislation.

At the concluding hearing in September 1991 counsel for the claimants, Crown and fishing industry made final submissions.

1.7 Remedies and Recommendations

The role of the tribunal has been to determine whether, and if so to what extent, the Crown has acted in breach of Treaty principles and the extent to which the claimants' sea fishery rights under the Treaty have been prejudicially affected by any such breaches. The question of remedies and recommendations will be covered more fully later in this report.

References

- 1 In the High Court of New Zealand Wellington Registry CP559/87; see also AA12 (a)–(r)

Chapter 2

The People's Claim

2.1 Introduction

The tribunal has already explained how the overlapping nature of mahinga kai, which involves the total food resources of Ngai Tahu both sea and land-based, makes for difficulty in dealing with fisheries separately. In the *Ngai Tahu Report 1991* the tribunal extensively covered the subject of mahinga kai but with emphasis on land-based resources. As the tribunal moved throughout the South Island, however, it received at the request of the people of Ngai Tahu a great many of written and oral statements relating to the sea based resources of Ngai Tahu. In this evidence the tribunal was reminded of the importance of fisheries to the iwi and of the effect of pollution, depletion and inadequate management of the resource. This evidence was generally contemporary or was passed down to witnesses from grandparents. In some cases the witness would relate back to earlier times.

In the main the people of Ngai Tahu were strongly protesting that they had been dispossessed of a resource which was part of their personal livelihood and more importantly, a tribal requisite. It was a sadly repetitive story about the depletion and destruction of fishing resources. Time and again we were told how once plentiful seafoods from all around the Ngai Tahu tribal coastline and in the estuaries and rivers could no longer be caught or gathered. Time and again pollution and over-fishing were held responsible for the loss. Sewage outlets, industrial discharges, river water deviations and agricultural run offs have contaminated and depleted traditional beds and fishing grounds. Decades of over-fishing with no concern for renewal of the resources has meant some species of kai ika and kai moana that once "graced the table" of the marae and home have all but vanished. Poor conservation management by the Ministry of Agriculture and Fisheries was also a frequently voiced criticism by Ngai Tahu people. It was the view of many that commercial fisheries legislation and Ministry of Agriculture and Fisheries policies, notably the Quota Management Scheme (QMS), had proved quite inadequate to ensure the preservation of marine resources. In some respects government policies were held to blame by the witnesses for the damage that had occurred. At the other end of the scale, legislation restricting the quantities of seafood individuals might harvest was condemned for failing to take into account Maori values and needs. As a result the tribunal was told by claimants that Ngai Tahu people had been harassed in the exercise of customary fishing rights to the point where those rights had been denied altogether. In this chapter we relate the story told to the tribunal by the

people of Ngai Tahu, as much as possible in the witnesses' own words. In this way it is hoped that the sense of direct and tangible loss felt by them can best be conveyed. For the sake of convenience we have grouped this evidence, which came largely from kaumatua, under headings of pollution, loss of access, depletion from over-fishing and inadequate management strategies. In the last part of the chapter we present a number of suggestions given by the people to try and remedy the damage and loss. We commence first by highlighting some observations from these witnesses on the importance of this fisheries resource to them.

2.2 **The Importance of the Fisheries Resource to Ngai Tahu**

Rakihia Tau, the deputy chairman of the claimant trust board and the individual claimant before the tribunal, gave a compelling personal account of how mahinga kai had shaped the daily and seasonal pattern of his life. Mr Tau gave extensive oral and written evidence to the tribunal (J10, J45) and also produced numerous maps of fish breeding areas, ocean currents and fishing marks. His evidence forms a substantial part of the written material submitted to the High Court, as well as of the evidence filed with this tribunal (AA12(b)). Rakihia Tau stressed the importance of the availability of seafood for tribal purposes as well as for personal sustenance (AA12(b):27–28). In recounting his personal experiences Mr Tau told not only his own story, but also the story of many Ngai Tahu families of his generation and generations before. It has been quoted in full in the *Ngai Tahu Report 1991*, but portions relevant to the fisheries claim are reproduced here:

I was brought up at Tuahiwi and my father was a seasonal worker with shearing as his main occupation. Because his work was seasonal, there were often periods when he was unemployed. When he was shearing the job would take him away from home and into the foothills and the high country. In his absence or at times when he was unemployed we depended on what we could catch to feed our family.

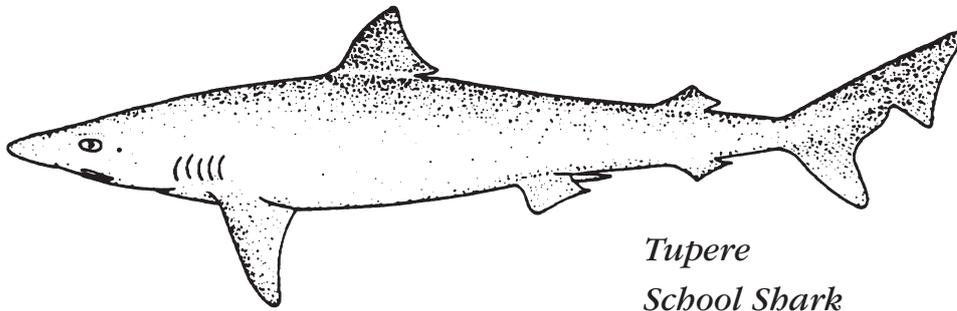
. . . Dad and other relatives taught us the ways of catching food at very early ages. The people of Tuahiwi would camp for extended periods on the banks of the Ashley, Waimakariri and the Cam rivers near the sea and spend the days fishing both for personal use, barter or for sale. We hunted for Whitebait, Eels, Salmon, fresh water Crayfish, Flounder, Mussels and Pipis. These were some of the fish caught

. . . We would regularly go fishing off the North Canterbury coast line and Banks Peninsula seeking Kaimoana (Shellfish) and Kai ika (fin fish). We would keep some of the fish for ourselves and give some to our relatives who would always give us something in return. When I was young we would dry some of the fish we caught so that we had food to eat. In particular, I remember catching and drying Shark and, also, being given dried Shark by relatives who lived on the Coast. As a schoolboy I would take a strip .of dried Shark to school for my lunch

. . . It is important to stress that the Kai which we got in this way formed the basis of our diet. It was not a case of catching food to

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supplement what we could buy, rather it was the other way round; we bought food to supplement what we caught. This practice was unquestioned among my family, it was the way that my parents and their grandparents had always lived. (J10:21–23)¹



Mr Tau referred to the process of seeding or planting of kai moana around the coast line. In his view shellfish did not just appear but were planted and cultivated by his ancestors using the traditional process of rimurapu with kelp bags (J10:9; see also J10:76–79).²

Like a number of other witnesses, Mr Tau told us about the attitude of Pakeha to kai moana. Until recently, he said, it was common for Pakeha to be dismissive of the many types of shellfish enjoyed by Maori: “If you can eat those things you can eat anything” was typical of the view expressed by Pakeha (J10:10). From this Mr Tau concluded that the the ordinary New Zealander has always recognized that the fisheries belonged to Maori (J10:10)

- 2.2.1 Trevor Hapi Howse belongs to a generation of Maori, perhaps the last, who learned in childhood the traditional ways of gathering and preparing natural resources. The knowledge and skills passed on to this witness by his grandparents were relied upon in daily living and some are still practised today. He recalled that as a boy “the gathering of those food resources filled a major part of what today may be termed leisure time”.

Mr Howse gave a list of mahinga kai resources commonly used by his tupuna. Fish and seafood – kai ika, kai moana, kai awa – make up more than half the list. He recalled that “When the tide was low we ate, when it wasn’t at times we went hungry” (H7:30). He referred to the impact of fisheries legislation, “it restricted our right to take the natural resource which we had relied on so heavily, the restrictions placed on those who could least afford it was a major catastrophe to the Maori”.

- 2.2.2 Like other members of his hapu and their tupuna, Wiremu Solomon of Kati Kuri has been a fisher all his life. For the people of Kaikoura this is

not surprising: the rugged northern coast and the sudden plunge of the continental shelf lend themselves to a life built around the sea:

My Dad started fishing commercially at 14 years of age and died at sea at the age of seventy-seven. My two brothers fish commercially and my son fished with them seven years all through his school holidays, and weekends—he is now eighteen. We believe that we have acquired a certain amount of expertise of the sea and its resources . . . we have fished and eaten these resources all our lives. (H7:4–6)

2.2.3 Kelly Davis (aka Kelvyn Te Maire) of Arowhenua spoke on behalf of the Waihao runanga. He listed the areas of mahinga kai known to him from childhood and the species of fish and shellfish taken from those areas. He recalled his father's practice, when out of work:

to fish . . . every day when possible to feed us as there was no unemployment benefit those days. He used to catch red cod mostly, blue cod was also caught, also grey shark and dogfish. (H10:34)

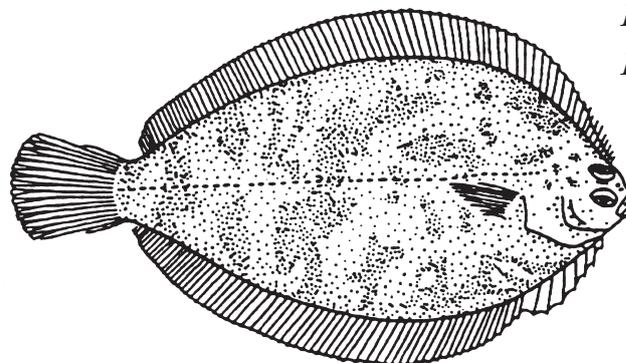
Rangimarie Te Maiharoa, also of Arowhenua, paid tribute to his tupuna and spoke of childhood experiences at Wainono and the Waitaki river mouth:

In my youth, I spent many fruitful days netting whitebait, and the latter part of the season paraki (silvery). If we caught any quantity they would be taken home and dried on the roof of the buildings then stored, we were very fond of them dried. I have taken a large number of Mullet and the elders split and dried them, also netted and speared flounders, I have seen shoals of Kahawai on the north-side of the mouth just off the beach. I have caught many. The Sea martins and terns lay on the gravel cox, their eggs are good eating. We also gathered kaio that were washed ashore. (H10:44–45)

He also remembered the gathering of tupuna at Te Hapa o Nui Tirene, the marae built by Arowhenua kaumatua in 1913 as a monument to the unfulfilled promises of the Crown. The tupuna had come to discuss the Ngai Tahu claim:

I was at school but I can remember these people coming here for this hui and several others.

We were able to feed them, *proud*, because we had plenty of eels at Washdyke. It was no trouble to get sacks of eels, watercress and mussels again and again from this region to provide for our manuhiri. (H10:42)



*Patiki/Mohoua
Flatfish*

Another Arowhenua witness, Kelvyn Anglem, spoke of changes that had occurred over many decades to the natural line of the Timaru coast and its kai moana. He described the coast just south of Timaru as unique for its proximity to many kinds of kai moana (H48:1-2).

- 2.2.4 As noted in the *Ngai Tabu Report 1991* submissions given on behalf of Otakou tangata whenua regarding past available food resources were most informative.³ Edward Ellison presented a detailed account of the types of kai, the ways they were procured and preserved, and the places where they could once be found:

Places of Mahika Kai around the Otago Peninsula (Muaupoko) were numerous.

The tidal bays providing excellent Tuaki (cockle), Patiki (Flounder), Pateke (duck), netting being practiced also produced red cod (Moka) Leather Jacket (Kokiri/Puamorua) Seals, the Kake (female sealion) was sought after from December to May as was the Whakahao (Male Sealion). A favourite site for the Whakahao was around the mouth of the Makahoe (Wickcliffe Bay) where small parties of people would kill the sealion cook the meat in large umu on the edge of Okia Flat, carrying the cooked meat back to the villages near Te-Umu-Kiri (Wellers Rock).

Barracouta were a major source of kai, the Otago Pen (Muaupoko) being a major fisheries for this fish. The calm waters in its lee allowing the sighting of schools of Barracouta to be done at regular intervals, the calm seas allowing the lures to be thrashed on the surface without being masked by other surface disturbances. This was largely a summer activity. (H12:5)

- 2.2.5 Robert Whaitiri of Murihiku said this:

Fisheries were . . . of the greatest importance to our people. Inshore fisheries being resources such as shellfish, eels and whitebait were some of the prime items or [sic] our staple diet as they were readily accessible on the foreshore and inland waterways. They had a very significant part in our lifestyle and sustenance. They were even more important in this part of the country because the climate was much harsher for growing things. (E1:1)

The tribunal was told by Harold Ashwell about the traditional fishing grounds in the rivers and surrounding seas of Rakiura (Stewart Island):

From the time the first Maori began to visit the Titi Islands they were made aware of the vast abundance of sea food available to them

Many places named by those Maori of long ago still have those names attached. They were places that could always be depended upon as places of mahi ka kai. They were known traditionally. Places such as Hopu Toroa and Tauraka Hapuka were miles out to sea and could only be used by using landmarks. They are reputed to be hundreds of years old. (H13:10)

He described some of the main species that were fished and the different ways they could be caught.

George Newton Te Au, a justice of the peace and kaumatua from Murihiku recalled this evidence from his experience:

I can recall as a child at our Kainga, Tokoro on Ruapuke, my Poua (George Newton) and my Taua (Arihi Pohe Newton nee Whaitiri) used to talk to us about how they and their parents used to live on Whenua Hou (Codfish Island), the Neck (Rakiura), Murihiku (Mainland) and (Ruapuke). They spoke of the abundance of Kaimoana, Kai Ika, Kai Manu, Kai Awa and Kai Roto and how easy it was to obtain. Poua or my Uncle Frosty would at times take me in the dinghy in to Henrietta Bay where we would be able to catch the Kai Ika that we required. We would at times catch Green Bone, Moki, Rawaru (Blue Cod), Hapuka (Groper) sometimes Tuere (Blind Eel), also at times we would set pots and catch the Koura (Crayfish). At the beach (Te Kirikiri) below our Kainga, we were able to get Kaimoana–Paua, Kina (Sea-egg), Kutai (mussel), Pupu (periwinkle), Kakihi (limpet) we were told never to Kohiti (take them out of their shell) at the place where you get them, or leave the shells there because if you did it would become a (Wahi-mahue) deserted place as the Kaimoana would shift. Also at times we would be able to get the Kaio (sea spud) these would be washed ashore, they were attached to stems, and sometimes these were in clusters of 50 or more called Pukaio. On the other side of our Kainga was Lagoon Bay (Te Awatuiāu – stream of fleas), where we would gather Tuaki (cockles) and spear Patiki (flounder) The waters around Ruapuke and Papatea used to have a plentiful supply of Kaimoana however today they are fast becoming depleted by commercial fishing and diving, to rectify this situation, a Rahui on all commercial fishing and diving should be placed around the Islands up to a two mile limit. Also along the shores at Rakiura they could get Tio-kohatu (rock oysters) Tio-paru (mud oysters). (H56:1–2)

- 2.2.6 When the tribunal sat on the West Coast to hear the Arahura grievance several witnesses referred to group fishing by whanau and hapu. James Russell, chairman of the Katiwaewae runanga, and a person deeply steeped in knowledge of his people's background and culture, gave lengthy evidence stressing how Maori life was situated and moulded around valued resources, their availability and sustainability. James Russell explained in detail the cultural and specific significance to Maori of the water resource. The tribunal was told by this witness of the many times in his youth when in early spring, summer and autumn evenings the whole of Arahura pa gathered to go drag net fishing in the sea along the coast, and of how the catch was distributed amongst the families of the pa. He spoke nostalgically of the abundance of fish at this time in the late forties and early fifties, of his leaving Arahura in 1954 and returning 20 years later to find the fish gone and that the people of the pa fished no more (H8:64–65).

Allan Russell gave evidence gathered from talking to old people from Arahura pa and related the experience of those people from 1903 up until the present. He spoke with deep concern of the present shortage of kai moana, kai ika and tuna caused by over-fishing, pollution and drainage (H8:81–82).

Kelly Wilson, aged 69, whose mother was born in Bruce Bay in 1885, said this:

Maori people had another great resource as well and this was the sea. It was not only a garden that provided much of the food. It was also a highway by which he travelled up and down the country. The coast and the coastal fishing grounds were identified like the land, marked off in tribal boundaries just as the land was. And there was no significant shellfish bed or fishing ground . . . [t]hat was not claimed, possessed or jealously guarded. The importance of Kai-Moana was very great as it is today. Seafood was the staple diet of Maori people. It was as it is now a matter of Mana for the hapu or tribe to preserve seafood on any special occasion. (H8:22)

There were other witnesses such as Iris Climo (H8:39), Emma Grooby-Phillips (L32:31) and Gordon McLaren (H8:30) who narrated their whakapapa proudly and who spoke of the abundance of kai ika in earlier times and how the people fished as whanau and hapu.

2.3 **Pollution**

During the hearing of kaumatua evidence and as reported fully in the *Ngai Tahu Report 1991*, wherever the tribunal sat there was constant complaint of the effects of pollution.⁴ Most of the evidence was directed to pollution of kai moana along the sea shore and in estuaries caused by effluent from sewerage schemes, rubbish dumps, wool scourers, freezing works, paper mills, hide tanneries and a variety of agricultural and industrial wastes. In his evidence, Rawiri Te Maire Tau spoke of the concern of Rapaki people over the pollution of Whararupo (Whakaraupo) (Lyttelton) harbour and how, in matters of tradition relevant to Maori, pollution of the sea beds was repugnant (H6:36). Witness after witness spoke of pollution of shellfish beds by noxious effluents and nutrient wastes; by dredging, erosion and silting of beds. The tribunal was told of the pollution of lakes and rivers that depleted tuna (eel), patiki (flounder) and kanakana (lamprey).

Robert Whaitiri queried the danger of effluent discharges from ships in the harbour and the effects on oyster beds and other kaimoana (H13:3). Mr Whaitiri is a member of the Southland Catchment Board and gave numerous examples of pollution in his area which have made it dangerous to eat shellfish in the Bluff estuary (H13:2-4).

- 2.3.1 In a separate submission presented on behalf of the Otakou runanga, Edward Ellison told the tribunal of Otakou people's concerns about pollution and over-fishing around the Otakou harbour. He noted the pollution of the harbour had affected the prized tuaki (cockles) of Otakou, making them unfit to eat:

Otakou has always prided itself on being able to feed their visitors with Tuaki, among the largest in New Zealand. Not to be able to do so if current pollution trends continue will further reduce our ability to properly host our guests (Manuhiri). (H53:1)

Another Otakou witness, Matt Ellison, speaking for the people of Puketeraki area, put this question:

Forty years ago you could eat the cockles and bubus in the Waikouaiti River but there is no way you would eat them now.

The same applies to Blueskin Bay. Recently signs were erected by the Health Department stating the shellfish were unfit for human consumption.

When the Waikouaiti River shellfish became inedible more importance was placed on the Blueskin Bay and Purakanui areas.

Now where do we go? (H11:3)

Another member of the Ellison family, Craig Ellison, identified six traditional mahinga kai resources in Otakou that were contaminated by sewage and other wastes (L32:42). He said this:

The Ngai Tahu have always looked at the waterways and seashores of the region as a convenient and often abundant source of food. In effect the Maori used these areas as a "refrigerator", and it is with a real sense of loss that the pakeha has used these same waterways as sewers, as receiving waters for the dilution of industrial, domestic and agricultural wastes. (C13(a):1)

Otago harbour, Papanui Inlet, Waldronville and the Taieri, Tokomairiro and Clutha rivers all suffer various forms of pollution. Domestic, industrial and agricultural discharges affected the quality of water and create health risks. Toxicity problems may exist in parts of Otago harbour because of the introduction of heavy metals such as lead, zinc and cadmium. Raw or partially treated sewage discharges contaminate shellfish beds and the gathering of kai moana is not recommended. Parts of the Otago harbour have been shown to be eutrophic. Portions of the Otago rivers are unsafe for swimming, fishing and canoeing (C13(a):1).

Craig Ellison concluded that:

There has been significant pollution in these waterways. The maintenance of water quality has in some cases been very poor. In all cases the lower river levels are significantly affected. It was these particular areas that were of importance to the Ngai Tahu. There is a crucial difference in perception to the use of a waterway, be it river or marine, between the Pakeha and Maori that is reflected in the abuse of these waters. (C13(a):2)

- 2.3.2 Kevin O'Connor spoke of pollution in four Southland rivers and the Riverton estuary. He said that plans for a paua nursery and kutai farm had had to be abandoned as a result of sewage pollution and that kelp, karengo, kai moana and other marine life half a mile either side of the outlet were dying (H13:39). In its *Ngai Tahu Report 1991* the tribunal gave detailed account of how two principal tuna and patiki mahinga kai resources in lakes Waihora (Ellesmere) and Wairewa (Forsyth) had been despoiled almost beyond recovery.⁵ The above extracts from evidence to the tribunal are a sampling only. There were a number of other complaints about pollution.

The tribunal was left in no doubt that Ngai Tahu were concerned and indignant that their fisheries resource had been so substantially destroyed

by pollution. Several witnesses such as Rakihia Tau (J10:25) and Robert Agrippa Whaitiri (H13:4) acknowledged that regional authorities had shown signs of preparedness to listen to Maori views. However, there is obviously much support for the view expressed by the claimant Rakihia Tau:

I feel a deep sense of outrage that the promise to maintain our Mahinga Kai has been broken and that what Mahinga Kai is still left is fast disappearing. (J10:25)

A similar view was expressed by Kelvin Anglem as he described the present state of the once proud Opihi river and its sea estuary as being unfit for humans and animals to swim in:

I am glad my Tupuna cannot stand on the banks of the Opihi and see what I have stood back and allowed to happen to their river. (H10:24)

2.4 **Loss of Access to Fisheries; Acclimatisation Laws and Diversion of Water**

Various kaumatua referred to loss of the fishery resources by denial of access as a consequence of land settlement, insufficient reserves, drainage of wetlands and river straightening, acclimatisation regulations and diversion of water from rivers for power-supply dams. These matters which substantially affected inland fisheries were sufficiently covered in the *Ngai Tahu Report 1991* and will not be repeated here.⁶ There is little need for the tribunal to indicate the cumulative effect of these measures on the depletion of the Ngai Tahu fishery resource.

2.5 **Depletion of the Resource**

The loss by Ngai Tahu of their fisheries resource is really what this claim is all about. In later chapters of this report we shall be looking at the crucial issues involved and of course, determining whether any act or omission of the Crown has been inconsistent with the principles of the Treaty and has thereby led to a breach of the Treaty. We shall also be looking at the nature and extent of Ngai Tahu rights to its fisheries under the Treaty. In this chapter the tribunal is simply narrating the views of individual members of Ngai Tahu as they appeared before the tribunal at the commencement of each hearing and expressed their personal grievances and feelings. Obviously, these views are relevant to the overall claim and will be considered as part of that claim, but they will also be subject to analysis and will be tested against evidence and submissions presented by the Crown and the fishing industry. This chapter is also not an examination of all the claimants fisheries evidence. There is a substantial amount of evidence and submissions outside the purview of this chapter such as the evidence of fishers and other experts in the field of history, archaeology, geography, anthropology, marine biology, law and custom and so forth, which all form part of the fabric of this claim under

the Treaty. In its inquisitorial function the tribunal needs and welcomes the contribution members of the tribe make in these individual submissions. It is an essential part of the whole. It clothes the bare form with a cloak of reality, a cloak which itself is woven from the intertwined threads of oral tradition handed down from tupuna as well as from the experience of the witness. We now see how Ngai Tahu have reacted to the depletion of their resource.

- 2.5.1 There can be no doubt that of all the factors responsible for the depletion of the fisheries, the principal culprit in Ngai Tahu eyes has been over-fishing caused by commercialisation. In a well phrased submission, Rangimarie Te Maiharoa had this to say of the first arrivals to this shore:

These ancient ones must have stood in wonderment and thanked Ihoa for his guidance to this once beautiful Te Waipounamu.

For many generations our people sustained a healthy living from land, bush, waterways and sea.

They treasured and preserved what this vast area had to offer.

Their environmentalism was second to none.

Their natural law forbade one to contaminate water where food was gathered Wahi-Mahika-Kai.

Therefore I strongly state that the loss of our traditional fishing and hunting grounds has deprived our people of a *recreational heritage* that once built a strong body and soul.

Money has brought us to the point of crying in the wilderness.

The fishing and hunting grounds, an area so vast, was always a challenge to the healthy young.

The wisdom of our elders who taught the finer points was valued knowledge and an appreciation of nature.

Most everything living on this earth is born free, but when you put a text book in the hand of man and money in his pocket then his values and priorities give wisdom a false meaning.

Recreational freedom of this nature must always be preserved for all mankind not just for untamed species.

I feel immense damage has been done to Justice. (H10:45)

A sad picture of over-fishing of shellfish on Rakiura (Stewart Island) was presented by Harold Ashwell:

Shellfish were gathered by hand and there was an old saying I recall hearing, that when the tide was out the table was laid. Paua, Kina, Tio, Bubu, Pipi, Kakahi, Koeo, Tuaki, and Kaio covered the shore in great abundance, sadly this is no longer the case, where once there were so many Tio (oysters) in Port Adventure that boats when the tide was out could lie on their bilges while the crew shovelled them aboard, then as the tide rose the boats righted themselves and the crew levelled them off in the hold before sailing off to sell them in Dunedin, now there is nothing. The same thing has happened to the Paua and the rape still goes on. When the fishery resources of Rakiura were controlled by the Maori he only took enough for his immediate needs and did not waste food.

Pakake was the general name for all Seals or Sealions and seal meat also featured in the Maori diet. Prior to the coming of the Pakeha

they were available for food on every Island and beach around Stewart Island but it took just a few short years to bring them to the point of extinction once the Pakeha found there was profit to be made from the skins. At first this created disharmony between Maori and Pakeha. The Maori who had been brought up to practice conservation could not understand why the Pakeha took only the skin and left the meat to rot. The Maori did not use the skin as an article of clothing (H13:10–11).

The Titi Islands are reserved exclusively to Maori for the taking of the mutton bird. It was suggested to the tribunal by the claimants in its *Ngai Tahu Report 1991* that the management and administration of these islands in respect of the titi was perhaps the nearest living example Maori had to rangatiratanga of its natural resources or mahinga kai.⁷ Sadly, however, the exclusivity does not apply to the kai moana lying around these islands, a resource which Ngai Tahu badly need in order to supplement their stores during their two month stay catching titi. Paddy Gilroy said:

As previously mentioned, our people complemented their stores with kaimoana, from around each island. We were taught to take only what was required and that we were not to open any shellfish below high-water mark. Up until five years ago, there was plenty of kaimoana. Then slowly we began to notice the decline in paua and more recently, with the introduction of the Quota System, the kina. I mention the kina because, although it is not in the Quota System, if a commercial fisherman has a hand-picking, he may take as much kina as he wishes, hence the rape of our Mahinga kai. I add here that because the titi islands are so far away, and the area is so large to police adequately, it is left wide open to abuse. Our people are only on the islands for two months of the year, so we are powerless to prevent such abuse. (H13:19)

- 2.5.2 But it was not only commercial fishing that caused depletion. All of the factors mentioned in paragraphs 2.3 and 2.4 (supra) were also responsible. Edward Ellison presented the Otakou runanga's *take* to the tribunal and claimed that local stocks of traditional kaimoana such as paua, kutai, kina and tuatua were now seriously depleted and that the Ministry of Agriculture and Fisheries had been totally ineffective in protecting the resource (H53:1).

Kelvin Anglem, who had lived all his life at Arowhenua, related this story of what had happened in the Opihi river:

I recall as a child from the age of four years onwards, being taken by my grandparents each year, on a night in March, across to the North bank (Milford side) of the Opihi river immediately opposite our home. We would anchor our boat under the willows and using the Moenu or Bob we would proceed to catch our winter supply of Eels. About 300 was considered sufficient for our needs and these were usually obtained from approximately 8pm until between 11pm and midnight, seldom was it necessary to return for a second night.

These Eels were cleaned, dried and preserved some being used as barter for other foodstuffs the remainder as a winter food supply. Later at age twelve or thirteen it became my task to catch our winter supply and I was usually able to do this in two nights fishing from the river bank, I recall taking 180 eels in one night and returning to the same hole the following night and taking 120 eels. I also recall in March 1944 going towards the river mouth one night and coming upon the Heke, the migration of eels to the sea to spawn, at the time the river mouth was blocked and the eels had elected to travel overland and across the shingle beach to the sea, I picked out of the grass and shingle as many as I could carry in the space of 15 minutes. Alas 1988 tells a different story, a similar expedition but covering an area from the river mouth to 3 miles up river including backwaters of which there are now only one remaining, yielded in 1986 eleven eels, 1987 nine eels, 1988 four eels, the largest of these weighed 7 lbs and a lot of the others were barely takeable.

What has brought about the depletion of the eel population between the late 1920s and today?

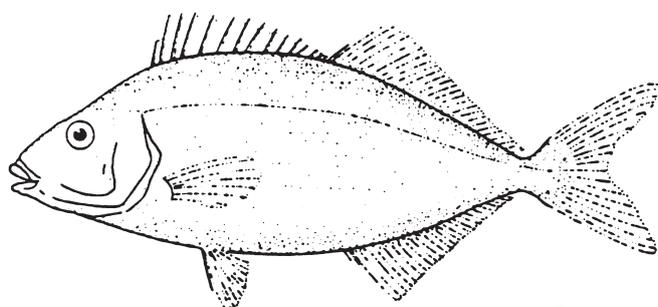
It began with eels drives designed to protect the young trout from the predatory intentions of eels, hundreds of eels were slashed with lengths of hoop iron and allowed to float down river or left on the banks to rot.

This was then followed by Catchment Board works, river re-alignment and the removal of willows from the river thus taking away their natural habitat, then followed a period of commercial fishing which reduced the eel population to less than a quarter of what it had been in 1940. Increased demand for water for town supply and irrigation then began to drastically reduce water levels, drying up most of the remaining backwaters and thereby destroying most of the habitat still left at this time.

The tuna is a fairly hardy and adaptable fish and had managed to survive thus far, albeit in severely reduced numbers, the many assaults on its existence, but the final assault that is being delivered in 1980s is maybe more than this fish along with other species can survive. (H10;22-23)

There were other witnesses who gave their personal experience. Wiremu Solomon described the fishing method taught to him by his father:

Our Dad told us that we were *never* to use those [nylon] nets – because they would eventually destroy the resource. Nets cannot discriminate between mature and immature fish. This is the reason why we do not use nets today. We were *long liners* and still are today. Long line fishermen catch a superior quality of proper. Long



Moki

Blue Moki

lines have no impact on young groper, it is therefore desirable in terms of conservation and the survival of the species. (H7:5)

He contrasted this traditional practice, and its underlying conservation principle, with contemporary fishing methods which, in his view, were based on short-term maximum economic gain rather than long-term sustainability of resources:

Nets and trawls take evrything [sic] and you have a crazy situation in that fishermen are dumping as much as they are selling I have personal experience of a fisherman dumping 20 tons strictly on the grounds of economics (H7:5)

- 2.5.3 We finish this section on depletion of the resource by setting out in full a submission made to the tribunal in April 1988 at Te Rau Aroha marae at Bluff by Hana Morgan. It is a strong statement. It comes from a marae where Maori women are trying to maintain tribal tikanga. It is a frank and pragmatic analysis of what has happened. Although strongly critical of a system that has almost bankrupted Maori of their most traditional resources it nevertheless spells out a situation with which most New Zealanders would find accord:

Within the confines of the Bluff Harbour there once lay very fertile kai-moana beds namely paua, kina, kuku, tuangi and titiko, not to mention the kai that abounded beyond the harbour. These delicacies included oysters, scallops, sole, patiki, koura, hapuku, moki and many other species of fish. Our people enjoyed the luxury of having as much kai moana as their hearts desired. Many of them have been raised on this kai, it has constituted a major part of our diet. Our dependence on the sea for sustenance goes back many generations and sadly, we are now having to compete with a faceless majority for the right to food that was traditionally ours. Our tupuna . . . [were] ever mindful and appreciative of what Tangaroa provided for their sustenance and never abused the laws of nature. They took only what was necessary. The rituals and tapu associated with the gathering of kai were strictly adhered to and so Tangaroa and our tupuna enjoyed a harmonious relationship for many generations.

The barter system used by our forebears had endured successive changes of government policy until quite recently. With the imposition of the Quota System, pollution of Mahinga Kai areas, and the depletion of our natural resource, the barter system is nearly non-existent. The supply of fish and oysters for the home people has become impossible through regulations and laws that govern the industry. These laws are imposed by a monocultural society, whose authors and advocates lack the perception and knowledge of the sea that our tupuna possessed. The governing principle is Money, at whatever cost, in terms of a way of life, and the systematic breakdown of our Maori principles and values. We have no mana over our mahinga kai. We have had no input into policy and we have no say in the decision making process. We are expected to stand by and watch the resource disappear without feeling or showing emotion. Many of our people dislike what has and is happening, but feel powerless to prevent it, to the extent that they have become quite apathetic.

It has become apparent to us that within ten years, our inshore paua and kina fishery will be exhausted. The amateur regulations, imposed by MAF to control the taking of kai-moana, are excessive.

10 paua per day per person

50 kina per day per person

250 pipi per day per person

50 kuku per day per person, and so on.

Who eats that amount of shellfish in one day or even two? I maintain that these regulations encourage abuse of the resources and has allowed a "black market" situation to be created. Furthermore, why introduce a set of regulations knowing that there are not the numbers of MAF fisheries officers to police the areas and enforce the regulations. Our people have voiced their concerns and government came up with Honorary Fisheries Officers. However, what can one person do when there are six or seven divers gathering kai-moana, all at different localities within his zone. He has no power to confiscate the catch, nor to arrest or prosecute the offenders. He is merely a voluntary "watchdog" for the MAF. All he can do is report the offence to the MAF or to the police. In remote areas, how is it possible to prove an offence when the bird has flown. Maori methods and experience in conservation could have made it possible to ensure the supply for future generations, but "who are we to tell the Pakeha scientists, economists and researchers what is best for New Zealand. We are uneducated Maoris." "we are nobody" Our knowledge and skills have been ignored, we are silently angry and frustrated and extremely saddened at the loss of one of our major resources. What was once the staple diet of the Southern people is now a luxury many of us cannot afford.

Crayfish was one of our most frequent meals until about 15 years ago. We must now settle for the bodies and claws, if we are lucky enough to receive some from the fishermen. Blue cod and hapuku are the most popular of the finfish and it was customary for them to bring in feeds for their families, neighbours and friends. The ITQ's have put paid to that tradition. Cod-heads, which were always available are hardly ever seen now, and quite often one must purchase them from the factories if one wants a feed. A turbot regularly graced the table, and now we obtain the heads and flaps from the factories, fillet them, and batter them to make the meal go further. We have been reduced to eating what the factory would normally dump.

The over-fishing of our mahinga kai areas, through mismanagement and pressure to supply overseas markets have upset the balance in the sea and we are feeling the effects of it at home and particularly on our Marae.

It has always been customary to provide the best kai available in the area for our manuhiri. Up until five years ago we managed to [do] this quite well with the help and generosity of our fishermen. However they are no longer able to provide the kai-moana anymore because of the quota system, and regulations. We must now purchase almost all the Kai-moana we require to feed our manuhiri. The oystermen traditionally provided families and the marae with oysters, not any more. The merchants and the industry stopped the practice by limiting the amount of take-home feeds. The resource now belongs to the industry, in our eyes. The depletion of our kina

and paua beds within the harbour make it difficult to gather enough for hui purposes. The mussel beds at Riverton which used to provide sufficient kuku for hui, have been depleted by recreational divers.

I hesitate to mention the struggle we had to obtain kai-moana at the time of the last tribunal sitting here at Te Rau Aroha, but it is the only way I have of illustrating the point I am trying to make. We knew that this hui was of major importance to us as a tribe, and that along with the tribunal members, there would be many of our kaumatua from all over Te Waipounamu as well as the North. To all of us here, it is most imperative that we maintain the Mana of our Marae and our reputation for kai-moana, because we are situated by the sea. so, we set about our tasks:

Kina – two days diving for 1/2 to 3/4 sack.

Pauas – two days for a feed – not enough to even make the quota – had to use other ingredients to make our patties go further

Fish – purchased from a factory

Cod Heads – purchased from a factory

Crayfish – Unable to get any at all

Toheroa – Requested a special permit, but was denied

Mussels – Purchased from Nelson farm.

The kai-moana that was once abundant and easily accessible five years ago is no longer there. It upsets me more than anything, that through laws, regulations and policies and we are finding it extremely difficult to entertain our manuhiri adequately. On the other hand, I am certain that if government wish to entertain their guests they will bend rules to provide whatever delicacies they require for their state banquets. We adhere to the laws, but we are the ones who suffer. We teach our children to abide by the MAF regulations as well as our own rules, but we are becoming so disillusioned that we are tempted to ignore the restrictions and assert our rights as Maoris. The amateur regulations although excessive to me, are nothing in comparison to what is happening in the commercial fisheries. There is no limit on kina – numbers or size – if one possesses a hand-picking licence. The Japanese market dictates the future of our kina resource. Their appetite for one particular type of kina has resulted in tons of kina being harvested some of which is not the desired type. This is dumped on the NZ market. There is also a lack of knowledge about when to gather the kina which results in more waste, because when harvested at the wrong time of the month, the kina has no kai in it. The paua export industry and more recently the interests in the shell of jewellery, has made the paua a most desirable commodity. The lifting of export restrictions on paua, has added to the decimation of that fishery. Again we see the export of our best kai. Evidence of the exploitation of our paua resource can be seen in the mountains of shell that adorn Rakiura Riverton and all around our coastline. The fisheries are no longer ours. They belong to the overseas markets, the industry and the huge conglomerates. New Zealand fishermen are the harvesters or gardeners and we, the Maori people are merely left to pick up the rubbish that no-one wants. Within twenty years, the sea garden will be bare, just as our land is bereft of the native forests and birds that once abounded.

We are angry and frustrated, but it doesn't seem to matter how loud we scream or who we go to – we are still disregarded. I even wonder how much notice the government will take of this tribunal. I feel for our tupuna who signed the Treaty of Waitangi in good faith, and I feel for our children and moreso our mokopuna who will probably never know what it is to gather Kai-moana in its natural habitat.

I wish to recommend that:

(a) An immediate review of the fishing industry, its past, present and future, be made, and that statistics and evaluations be made public, and that steps be taken to rectify the damage done to our fishery.

(b) That the amateur regulations be reviewed to take into consideration the areas that need time-out to allow for regeneration of kai-moana.

(c) That the Maori people have equal say in all matters pertaining to our fisheries and land as was intended by our tupuna when they signed the treaty. Then we will take the step to becoming a true nation. (H13:32–35)

That honest statement of concern evoked considerable emotional support from Ngai Tahu people present at the hearing. It also impacted on the tribunal and counsel before it.

We turn now to look at some of the criticism of fisheries management made by kaumatua witnesses and also their suggestions for reform.

2.6 **The People's Criticism of Present Management Systems and their Recommendations**

As stated previously in this chapter, we are looking only at views placed before the tribunal by those kaumatua and other persons who appeared at the various hearings and put forward their personal views. In later chapters we will measure these views against evidence and submissions from the Crown and the fishing industry and give our findings and recommendations. The views here expressed will also need to be examined against the views of the claimant as finally presented in September 1991 to the tribunal. Again we have grouped the witnesses' statements into sections dealing firstly with fishery regulations, secondly with the quota management scheme and thirdly with general management of fisheries. In the final section we list various suggested remedies put forward by these persons.

Fishery regulations

2.6.1 Rawiri Te Maire Tau told us:

One major problem with gathering Kai Moan[a] for the people of Tuahuriri is that MAF regulations hinder many from gathering food for their families. The Te Weehi case in Christchurch 1986 clearly shows that Maori people are continually being hindered from gathering their Kai Moana and continual harassment through imposing fines has discouraged many from using their Kai Moana. (H6:36)

This statement was made in the context of the gathering of shellfish but was also related to the difficulties faced by the tribe in the inland rivers

where they came into conflict in their fishing operations with the acclimatisation regulations. On this particular question the claimant Henare Rakiihia Tau said this:

When the European came he bought [sic] among other things sheep, gorse, stoats, wheat, fruit trees and trout. With the Pakeha Trout came his laws. They were placed in our waterways, our garden, Te Marae o Tangaroa. For me to catch a Trout, I have to pay a licence for this privilege even though it is destroying my garden. It is an offence according to the laws of this land to take property that belongs to another. I believe this to be a just law, it is why our ancestors signed the Treaty. Now, if you are Maori, and you have property, should not the same law apply? Should not the person who put the Trout in our garden pay rental for this privilege. Should not those who take from our garden obtain permission also, and if required pay for this privilege. (J10:10–11)

James Russell gives several extracts from West Coast fishing books of the abundance of inaka (inanga, whitebait) (H8:67–68). After having spoken of official concern in 1975 that the inaka was becoming extinct, the witness said that poor management of the resource, over-fishing and habitat modification had all contributed to the depletion.

Quota Management Scheme

- 2.6.2 In the evidence criticisms of the Quota Management System (QMS) were voiced. Oral evidence given by Vivian Russell blamed the QMS for over exploitation and waste of fish by commercial boats at sea (L32:36).

William Goomes claimed that the ITQ system had excluded many Ngai Tahu from the fishing industry (H5:25–31). Mr Goomes told the tribunal that many people had left the industry prior to the 12 months preceding the implementation of the ITQ system as they found it uneconomic to continue within it.

Mr Goomes said the implementation of the ITQ system was an attempt to protect full-time fishers by excluding those who sought to reap the short term benefits of fishing at peak season. He suggested that while the rule may have looked sensible in Wellington it did not work in the field; and that it had dispossessed local Ngai Tahu of their right to participate in commercial fishing while enabling the new larger scale fisher people to fish regardless of “local Ngai Tahu efforts to maintain a traditional mahinga kai area for the tangatawhenua” (H5:29–30).

It should be stated at this point that the tribunal intends to deal more particularly with the question of the exclusion of the part-time fishers later in this report. The tribunal had presented before it a paper concerning the whole question of the “80 percent rule” and this will be dealt with later on in this report.

Further evidence was given to the tribunal by Martin Taiaroa, whose evidence was also given orally, asserting that the QMS took away the ability of the individual, including local Maori, to survive in the industry and that bigger boats had depleted the inshore grounds (L32:37). Similar

evidence that individual rights had been affected by the QMS was also given by Taare Bradshaw (L32:66).

The QMS was also blamed by Wiremu Davis for the exploitation of areas of importance to the tangata whenua around Riverton and Foveaux Strait (L32:65). In every area in which the tribunal sat it received complaints about the exploitation of fish. In claiming that the deep sea fisheries were of utmost importance to Kati Kuri of Kaikoura, particularly as the deep sea species were available at easy distance from the shore, Wiremu Solomon suggested that the QMS supported those who had created the shortage of deep sea fisheries close to the shore by exploiting the resource (H7:5). The QMS had in fact “disadvantaged those who had nurtured the resource” said Mr Solomon.

We also received evidence from several Ngai Tahu people, who had formerly been fishers at Lake Waihora, who spoke of the effect of the QMS in depleting the resources of the lake as well as depriving them of the opportunity to fish the lake (H9:44–47).

Whilst in the Otakou area, several witnesses referred to the paua and kina. Matt Ellison emphasised that paua beds had been very hard hit by commercial harvesting licences to the extent that the land-based gatherer found it difficult to gather paua (H11:4). Mr Ellison referred to the same problem with mussels. This evidence was confirmed by Paddy Gilroy, also of Murihiku, who spoke again of the loss of paua and kina since the QMS system had been introduced (H13:19).

Kevin O’Connor, again of Murihiku, had this to say:

It is along this beach and others close to the township of Colac Bay that the Paua are being depleted through over fishing. These areas cannot sustain the large amounts of Paua being taken by so many small boats with such large quotas. It would be better if a Rahui were placed on these areas until they had time to regenerate, then only have smaller quotas with less boats. That way the MAF could police these areas better than they have done in the past. A similar thing is happening to the Kina Quotas that are issued. People gather them but when they are opened they are empty or have small roes, and the Japanese market only want the white ones. It is the same with the Paua they bleach them to make them white for the American market. If these markets do not want them the way they are, then leave them in the sea for those that do. It will not be long before there is a quota for the taking of what is commonly known as Sou-Westerns which thrive between the Oreti and Aparima Rivers. At the moment the only way that this shell fish is gathered is by nature. That is after heavy rains, and sou-westerly winds which dislodge, and wash them ashore, where most die. It should be left this way, or otherwise monitored closely. The whole thing is education, when to take it, how to get it, how to cook it, how to preserve it, and especially not taking any more than you should, so that there is always some left for regeneration for years to come. (H13:39–40)

We have already referred to evidence from Huhana Morgan. In addition there were numerous other witnesses who criticised the QMS and its effects.

Management by the Crown and its agencies

- 2.6.3 We have earlier referred to the problem concerning pollution of the rivers and estuaries. The tribunal was told of difficulties caused by river beds silting up at the river mouths due to lack of flow in the rivers caused largely by draw off for water schemes and other uses (H11:4). We were also informed of several instances of inadequate control of noxious discharges (H13:2). Depletion of water in the rivers was brought to notice in several areas. Ihaia Hutana reminded the tribunal of the example of the Arahura river. Over the last ten years, the West Coast Power Board and the catchment board built a power station in the Kumara area. To feed this station water was taken from the Kawhaka creek and other tributaries to the Arahura, reducing water supply downstream and causing the river mouth to retract. This was in turn affecting the ability of the people of Arahura pa to fish (L32:48).

The tribunal visited the Opihi river during the hearing at Arowhenua and witnessed the obvious deterioration in the lower river and estuary area as a result of the diminution of water flow. The area, which had previously been a great source of food for the people of that area was sad to behold; there was slime and weed apparent and obviously no sign of the various species of tuna and shellfish that were once there.

There were also complaints about the lack of adequate policing of the resources. We were told by Matt Ellison:

MAF policy now is, due to work load, policing of recreational resources has been downgraded as an objective to the stage where it is reliant on honorary Fisheries Officers who are unpaid workers doing the work outside their normal vocation. In the past, MAF laws have not worked. (H11:5)

Various other parties also referred to the inadequacy of enforcement provisions.

2.7 **Remedial Action Suggested by Ngai Tahu People**

During the course of their evidence many of the witnesses proffered their own recommendations to remedy the problem of depleted and damaged resource. Rather than set out the many and often repetitive suggestions we have grouped and summarised them. It is emphasised these are the personal views of the many witnesses who appeared before the tribunal.

(a) Fishery regulations

Eels under 150 grams should not be taken.

Specific areas to come under the manawhenua of runanga for management and control purposes.

Increase penalties for offences.

Review amateur regulations with view to imposing time-out to allow regeneration.

(b) Fisheries management

Create specific seashore and estuarine reserve areas for exclusive Maori use.

Reserve in-shore "rahui" areas for recreational and non commercial fishing.

Appoint more permanent paid inspectors.

Appoint more honorary inspectors.

Engage researchers to assist in conservation.

Specific areas to be placed under manawhenua control

Use rahui procedure to close off all fishing in depleted areas.

Carry out an immediate review of the fishing industry.

Involve more Maori representation in management.

Introduce a more regionalised management system with Maori representation.

Extend access training scheme to train young fishers.

Make fisheries inspectors accountable to local people.

Give Maori people an equal say in all fisheries matters.

Cancel all licences in Waihao estuary because of its important historical and kai resource to Ngai Tahu.

Restrict commercial in-shore fishing to areas beyond most distant rock outcrop.

(c) Quota Management Scheme

Allocate quotas to Ngai Tahu as a tribe.

Redirect resource rental to iwi.

Withdraw paua licences and develop a paua enhancement plan between Ngati Huirapa and MAF.

Terminate QMS scheme, return fisheries to local people and bar foreigners.

(d) Water use and quality

Return industrial draw off of water from Arahura river back to the river.

Government in association with regional authorities to produce a waste management plan for Opihi river.

Appoint a government body to guard against pollution.

Avoid reclamation of tidal areas.

Increase Maori representation on catchment boards to at least 2 members.

Amend mining legislation to prevent pollution by permitted discharges of debris, tailings and waste water.

Upgrade Opihi river water quality by augmenting water supply and combating illegal effluent.

(e) *Miscellaneous conservation measures*

Introduce legislation in environmental modification and conservation to embrace Maori values and traditions.

Increase public education on need to conserve.

2.8 Waihora (Lake Ellesmere)

In the *Ngai Tahu Report 1991* the tribunal determined that Waihora was an important source of mahinga kai to Ngai Tahu. It recommended:

At the option of the claimants either:

8 (a) That the Crown vest Waihora for an estate in fee simple in Ngai Tahu and contemporaneously enter into a joint management scheme with Ngai Tahu which would include such matters as:

- (i) controlling the opening of the lake to improve the fishery; and
- (ii) improving water quality by controlling bird population and use of land margins around the lake, control of lake usage and control of sewage disposal. The joint management scheme binding the Crown to provide financial, technical, scientific and management resources;

or

8 (b) That the Crown, in manner similar to the Titi Islands, vest beneficial ownership of Waihora in Ngai Tahu but remain on the title as trustee. The Crown then, in consultation with the beneficial owners, to make regulations for the future control and management of the lake in manner similar to the Titi Islands regulations and to provide the resources of the kind mentioned in the first alternative to improve the fishery and water quality.⁸

The tribunal was of the view that the lake should be returned to Ngai Tahu and that the tribe be significantly involved in future decision making concerning the lake both in regard to management and use.

Despite its importance as a food resource, no fishery reserves were created over it to protect its use by Ngai Tahu. The tribunal heard evidence from a Ngai Tahu fisherman that, as a result of mismanagement and over-fishing the lake was almost fished out of eels and that local Ngai Tahu had been squeezed out under the 80 percent of income requirement to qualify for a licence because they traditionally fished the lake only seasonally (H9:39).

The tribunal was asked by the claimants to recommend that existing commercial eel licences for Waihora be cancelled. This question was deferred in the earlier land claim report as the fishing industry notified its intention to call evidence from some of the commercial fishermen. The industry later presented affidavit evidence from five persons, three of whom held current fishing licences. Kenneth Nordstrom said he had fished for flounder and eels on the lake for 36 years and now had an ITQ for flounder and an annual licence with quota (not transferable) for eels (Z23). He supported an ITQ system for eels.

Neville Climo claimed he was Ngai Tahu and although not now holding a licence, he had fished for three years commercially (Z22). He was in favour of a QMS and opposed exclusive Maori use. Trevor Gould stated he and his family had fished Waihora for 20 years, built a fish export packing house and their home at the lake, and had invested about \$600,000 in buildings and a plant (Z24). Mr Gould said the present annual catch had been reduced from 650 tonnes in 1978 to 130 tonnes in 1986. He claimed the commercial fishers there had been led to believe they would be granted ITQs in perpetuity. The fourth deponent, Clem Smith, in an extensive affidavit, said he was born and raised on the lake and had fished it commercially for 14 years (Z25). He explained some of the history of fishing on the lake from the 1960s and gave reasons for the issue of transferable and perpetual quota and the retention of an ITQ system. Mr Smith refuted certain earlier evidence given to the tribunal by a number of witnesses. He also claimed that Maori and non-Maori had fished the lake for recreation and commercial purposes side by side for years.

The final industry witness was deponent William Wards (Z26). Mr Wards said he was of Ngai Tahu and born and raised at the lake. In a brief statement he disagreed with the claimant trust board and queried why those who seemed to be complaining had never been on the lake.

The tribunal understands the concern that the present holders of eel licences must have, particularly as eels have not been brought under the QMS and individual transferable licences issued. The fishermen have no security for the investment they have in the industry. The commercial eel fishers are therefore vitally interested in acquiring perpetual licences, one advantage of which gives them a valuable monetary interest arising from the grant.

This tribunal has on an earlier occasion noted the enthusiasm of individual fishers for the ITQ system. The tribunal does not intend to diminish the arguments put forward by the commercial fishers of Waihora but simply to record, as was done in the *Muriwhenua Fishing Report*, that perhaps Maori rather ironically might view the QMS as a process that presented a valuable right to those who might well have contributed to the shortage. That is not the ground upon which this tribunal moves. In the case of Waihora the tribunal, having recommended the return of the lake to Ngai Tahu, considers it also desirable that the

tribe should have exclusive fishing rights from this resource. Further fishing activities must be planned and developed to fit in with the management processes needed to improve the quality of the lake. Waihora for long prior to 1840 and subsequent thereto has been an important food resource of Ngai Tahu. The tribunal has recommended it be returned to the tribe. Consistent with the right of ownership it is appropriate that user rights also be returned to the tribe. Ngai Tahu have shown in the past that they have been prepared to share resources with settlers. In the tribunal's view, and as expressed in the *Ngai Tahu Report 1991*, the tribunal would expect Ngai Tahu to continue that sharing in the provision of public facilities for the enjoyment of the lake by all.

The recommendation that this tribunal now makes pursuant to s6(3) of the Treaty of Waitangi Act 1975 is that all existing eel fishing licences on Waihora (Lake Ellesmere) be not renewed on expiry so that the lake can be returned to Ngai Tahu as a Ngai Tahu eel fishery. The tribunal further recommends that existing licence holders be compensated by the Crown for any consequential loss.

2.9 Summary

This report is written at the end of a series of claim hearings which commenced on the 17 August 1987 and concluded with final submissions on 2 September 1991. Much has happened in the fishing scene over those four years. In this chapter, apart from the affidavit evidence of the commercial fishermen filed in the High Court in 1990 and to the tribunal in 1991, most of the evidence recorded was given during 1988. In later chapters of this report we will specifically refer to the legislative and judicial proceedings and background events following the introduction of the QMS in 1986. We shall also consider whether there have been any breaches of Treaty principles by the Crown. However in the dynamics of this claim it is quite significant and worthy of note at this point that government has already legislated certain changes in fisheries control and is contemplating further policy changes. These changes and potential changes have no doubt been generated by earlier decisions of the Waitangi Tribunal, by the impact of High Court and Court of Appeal decisions and by continuing discussions between government, fishing industry and Maori. To that extent the claimants' recommendations listed above (see para 2.7) have been largely overtaken by later government action. In particular we have seen the passing of the Maori Fisheries Act 1989. This statute and its content will be examined closely further on in this report. Of more recent origin, the tribunal notes the report of the Fisheries Task Force set up by the Minister of Fisheries in August 1991 to review and make recommendations on the future development of fisheries legislation and associated structures in New Zealand. The task force released its report *Sustainable Fisheries, Tiakina Nga Taonga a Tangaroa* in April last.⁹ The report is at this stage a discussion paper only and not yet government policy. It is worthy of note that one of its recommendations under the heading of mahinga kaimoana favours the

setting up of small areas of the sea (estuary, reef or coastline) with exclusive rights to local iwi. This particular question of exclusive Maori use of traditional areas is also raised later in this report.

The task force report also addresses taiapure reserves, wahi tapu and a large range of environmental and conservation issues and goals. The report looks at over-fishing not only from the need to ensure long term sustainability of the fishery resource, but also so as not to compromise the interests of other harvesters such as Maori and recreational fishers.

It is a most timely report, coming as it does on the eve of the issue of this report. If the recommendations of the task force are implemented, and the tribunal would support such action, then the apprehension and concern of Maori, as expressed so strongly to this tribunal, would be allayed in the areas of traditional tribal fisheries, consultation and control, conservation and environment. Because many of the peoples' recommendations have now been addressed in legislation or subject to review as part of the task force report recommendations we do not propose to examine them seriatim in this report.

The tribunal does however urge the respective Ministers of Fisheries, Conservation, Maori Affairs, Environment and Internal Affairs to take note of these expressed concerns of the people so that they may be considered in the policy decisions of their respective departments.

This tribunal has in its *Ngai Tahu Report 1991* looked at the effect of such things as pollution and has already recommended processes for better consultation with Ngai Tahu in planning and environmental matters.¹⁰ The main thrust of this sea fisheries report, as will be evident from following chapters, is to address the issue of Ngai Tahu fishing rights as affected by breaches of the Treaty.

We now commence the historical review by turning to Ngai Tahu use of the sea in earlier times.

References

- 1 *Ngai Tahu Report 1991 (Wai 27)* Waitangi Tribunal Report 3/4 WTR pp 844–846
- 2 For a discussion on Nga Tahu conservation practices see also *Ngai Tahu Report 1991* pp878–880
- 3 *Ngai Tahu Report 1991* pp850–852
- 4 *ibid* pp897–898
- 5 *ibid* pp850–852
- 6 *ibid* pp888–897
- 7 *ibid* pp814–815
- 8 *ibid* p1063
- 9 *Sustainable Fisheries, Tiakina Nga Taonga a Tangaroa: Report of the Fisheries Task Force to the Minister of Fisheries on the Review of Fisheries Legislation* April 1992

Chapter 3

The Bounty of Tangaroa

3.1 Introduction

Fishing in fresh water lakes, river and streams, and in estuaries, harbours and the sea was an important part of the economy of all iwi throughout New Zealand at the time of the signing of the Treaty. Fishing technology was highly developed, and apart from the selective adoption of iron barbs and hooks, and at times European fishing vessels, Maori fishing techniques had been little changed by European contact. This contrasts with the dramatic transformation of Maori agriculture or warfare, for example.

As there were many tribes in New Zealand, so were there many fisheries. The actual fishing circumstances of tribes differed substantially from one part of New Zealand to the other. During this claim inquiry contrasts were often made between the experience of fishing in Muriwhenua, the one other area where the tribunal has undertaken an extensive investigation of a Maori fishery, and that of Ngai Tahu. From Muriwhenua to Murihiku there were, and still are, distinct relationships between the people of these regions and Tangaroa and his resources. The tribes of Muriwhenua used these resources in a manner consistent with the surrounding marine environment and with their social, economic and even spiritual needs. Ngai Tahu had a different climate. Their seas were inhabited by other marine species and had a distinct potential for exploitation. They had their own distinctive resources at their backs when they faced the sea. And they had their own social structure and tribal traditions. The tribunal was able to develop a picture of the nature of Maori use of marine resources in Ngai Tahu prior to 1840, thanks to the considerable efforts of professional and other witnesses for the claimants, the Crown and the fishing industry. It is to this evidence that we now turn.

3.2 The Seas of Ngai Tahu

- 3.2.1 In 1840 Ngai Tahu rights to sea resources were tied, among other things, to their rights to land and the extent of their coastal domain. The tribe's coastal territory was defined by the claimants as all land below Pari-nui-o-Whiti (White Cliffs, just south of Blenheim) on the east coast and below Kahurangi Point on the west coast. Kahurangi and Pari-nui-o-Whiti are joined by a boundary that runs along the northern limits of the Kaikoura and Arahura purchase boundaries. Ngai Tahu territory also includes Rakiura (Stewart Island) and all other islands off these shores. Ngai Tahu do however recognise the separate mana of Ngati Kahungunu from the north and Maori from the Chatham Islands, and they reserve the right to

determine sea boundaries with these tribes. During the claim inquiry the customary rangatiratanga of Ngai Tahu over northern areas of the South Island was challenged by other tribes from Tauihu o te Waka, who have brought overlapping claims in that area. This issue was referred by way of case stated to the Maori Appellate Court, under s6A of the Treaty of Waitangi Act 1975. At the court the assertion by Ngai Tahu to have exercised rangatiratanga over the whole of the area claimed was upheld. A detailed discussion of this part of our inquiry is included in our previous report, as is the Maori Appellate Court's decision.

The Ngai Tahu land claims involved over half the land area of New Zealand. Their sea fisheries claim has even larger significance. While the South Island fisheries surrounding this territory have always been important, since 1977 when the 200 mile Exclusive Economic Zone (EEZ) was introduced, an even more substantial proportion of the New Zealand fishery lay off the Ngai Tahu coast line.

No suggestion was ever made during the hearing of this claim that Ngai Tahu fished to the limit of the current EEZ in traditional times. Nor was it argued that a number of the deep water species now being exploited in this area were caught or even known by the pre-1840 Ngai Tahu fisher. Ngai Tahu maintain, however, that their rangatiratanga still extended over these seas and the resources in them. We shall leave this issue for the next chapter.

The marine environment

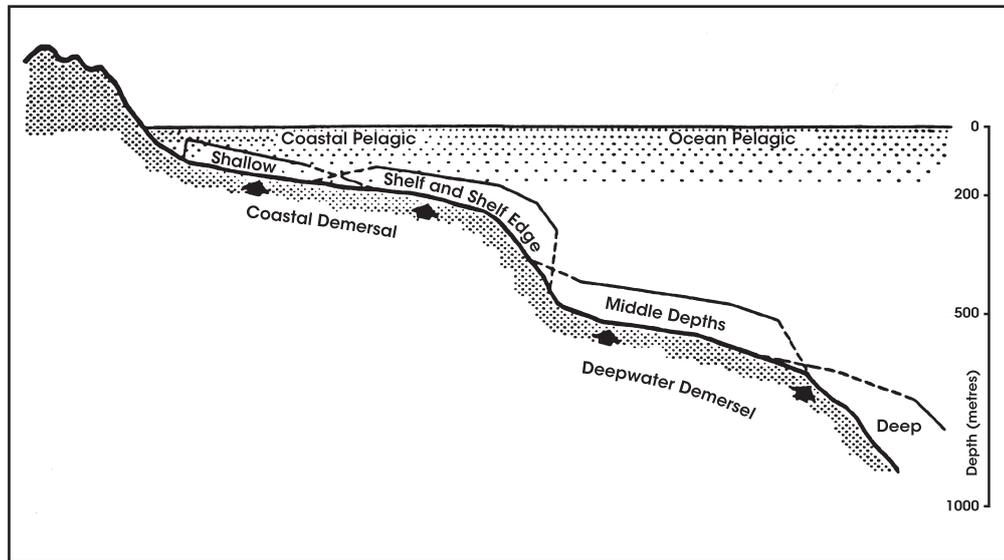
- 3.2.2 The key factor in describing the marine environment around Te Waipounamu is depth. While witnesses sometimes had different things in mind when they used the terms inshore and offshore fisheries, we have for this report adopted the broad categories used by Dr Colman and expanded by Drs McKoy and Habib (R11; T4(a); Z47). These describe the inshore or coastal fisheries as those which lie within the bounds of the continental shelf; and the offshore fisheries as those which occur beyond the shelf in middle and deep water areas. The continental shelf is far from uniform around the South Island coastline. For Ngati Kuri at Kaikoura the offshore fishery began only a few kilometres out, while further south, the continental shelf off Ngai Tuahuriri's coast extended around 80 kilometres out. The shelf goes a considerable distance out past Stewart Island only to come in again close to the shoreline up the southern portion of the West Coast.

Fisheries categories

- 3.2.3 The inshore and offshore fisheries can be subdivided according to the habitats the fish occupy. Evidence given by various expert witness on the identification of these categories, and which species belonged in them, was not always consistent. To a large degree these differences simply reflected the migratory habits of some species and their persistent refusal to recognise boundaries, rather than any substantial discrepancies

in the evidence. Although capable of creating confusion these differences were not material.

The first division is between demersal and pelagic fisheries. Demersal fish live on, or close to, the seabed, while pelagic fish live in mid-water or near the surface. Both of these groups can then be divided according to their coastal or deepwater habitats.



Map 3.1 Distribution of fishery types by depth

Dr Colman, fisheries scientist from MAFFish, identified a total of four demersal sub-groups, two each in the coastal and deepwater zones (see figure 3.2). Many of New Zealand’s more traditional species, such as snapper, hapuku, tarakihi, flounder and blue cod are coastal demersal species and are caught on the continental shelf or near the top of the continental slope down to about 200 to 300 metres. Middle depth and deepwater demersal species include ling, orange roughy and hoki (R11:9).

Dr Colman divided pelagic fisheries into two subgroups: coastal and oceanic. Well-known coastal pelagic species include kahawai, trevally, mackerel and barracouta. Oceanic pelagic fisheries rely on the tuna and billfish species such as albacore and skipjack tuna, swordfish and marlin (R11:10).

The Exclusive Economic Zone

3.2.4 The Exclusive Economic Zone (EEZ), which now encompasses the Ngai Tahu marine claim area, covers more than three million square kilometres of South Pacific ocean. Of the many thousands of fish species living within this vast area less than 200 are well known or commercially fished.

By world standards fish resources within the EEZ are considered significant but not particularly plentiful. The offshore fisheries are far more abundant than the inshore ones and now account for approximately 80

percent of all finfish managed under the Quota Management System (QMS). Some 73 percent of the total QMS allocation comes from the Ngai Tahu area (see chapter 9).

All this is, however, very much a modern development, and one with little significance to the much more limited fishery of 1840.

3.3 **The Customary Fishery**

Evidence about the nature and extent of Ngai Tahu use of this extensive marine resource up to the time of the Treaty was presented from a variety of different perspectives. The claimants called archaeological evidence from Professor Atholl Anderson of the University of Otago, himself of Ngai Tahu descent. Professor Anderson's evidence has already proved valuable to the tribunal in its examination of the mahinga kai claim as it related to land based resources. Historical evidence on the relationship between Ngai Tahu and early whalers and sealers was presented by James McAloon. David Higgins, also Ngai Tahu, gave evidence from a fisher's perspective, based on his research into the inherited techniques and expertise of a large number of active and retired Ngai Tahu fishers. In turn, a number of Ngai Tahu fishers, such as Bill Solomon of Ngati Kuri at Kaikoura, George Newton Te Au of Murihiku and Rangimarie Te Maiharoa from Arowhenua gave evidence of their own use of the fishery resources, which often included reference to how their tupuna had fished before them. The Crown responded by calling archaeological experts Drs Foss Leach and Murray Bathgate, historians Tony Walzl and David Alexander, as well as providing scientific evidence with a bearing on the pre-1840 situation from a number of MAFFish scientists. The fishing industry called evidence from Richard Holdaway on the depletion of the species prior to European contact, as well as evidence on sealing and whaling from Dr Harry Morton, an expert in this area, and from Kevin Mckoy. In addition the tribunal had the assistance of Dr George Habib, fisheries consultant of Auckland, who provided a comprehensive overview of the claim from the viewpoint of a fisheries scientist. Dr Habib prepared a number of reports, a fair portion of which dealt with traditional use of the marine environment by Ngai Tahu. All these experts were able to draw on an extensive literature, particularly on Ngai Tahu archaeological sites. The tribunal was particularly well served in having such a comprehensive range of evidence presented to it.

3.4 **Ngai Tahu Ability to Fish**

In our Ngai Tahu 1991 report we considered the relationship Ngai Tahu had with their vast territory in the years of early contact with Pakeha, just prior to the Treaty. A relationship with Tangaroa and the sea was just one of the dimensions of Ngai Tahu life. Ngai Tahu lived primarily on the coast, travelling inland seasonally to harvest a diverse range of foods and other resources. They took eels from the rivers and lakes of the island, weka from its plains and a wide assortment of plants and fresh water fish for their sustenance and for trade amongst themselves and with other

tribes. Food from the islands, harbours, estuaries, river mouths and from the sea formed only part of their overall resources. Their population was also relatively small, perhaps somewhere between two and three thousand. In exploring the Ngai Tahu relationship with marine resources, it is necessary to keep in mind the total dimensions of Ngai Tahu life, based around the varied seasons of food gathering, sometimes from the sea, sometimes from the shore and sometimes from inland lakes or forests; all based on both inland and sea travel. Southern Maori could little rely on agriculture since the southernmost point of pre-European agriculture was Taumutu. Below this point kumara and other Maori crops could not be cultivated.

Despite their vast hinterland, the majority of Ngai Tahu permanent settlements were along the coast. Two to three thousand people could not have intensely utilised the resources of the sea any more than they could the resources of the land. Nonetheless, their experience and their technology was accumulated over many centuries of taking kai moana and kai ika from the wide variety of waters around their lands.

Ngai Tahu presence along the coastline was determined by the location of their marae and settlements. The evidence presented on Ngai Tahu mahinga kai was given on behalf of a number of Ngai Tahu hapu/marae communities. There was evidence from Ngati Kuri of Kaikoura, from Ngai Tuahuriri of Kaiapoi, from Tai Poutini, the West Coast, from Waihora, from Arowhenua, from Puketeraki and Otakou and finally from Murihiku (H6–13; J10). These broad areas reflect the lands which were reserved to Ngai Tahu from the various mid-nineteenth century land purchases, as well as reflecting more long term habitation of the island. The disruptions of war and disease, the opportunities provided by new crops and trade with Europeans led many Ngai Tahu to relocate in the years just prior to the signing of the Treaty. There was a shift in the early nineteenth century from settlements at river mouths to those near harbours and whaling stations (H1:11, 17), while the threat of northern invaders had pushed many Ngai Tahu into defensive clusters on Banks Peninsula (H1:35) and around Foveaux Strait. Despite these changes, the general areas of Ngai Tahu concentration were: Kaikoura, Kaiapoi, Banks Peninsula, Waihora, Arowhenua, Puketeraki, Otakou, and Foveaux Strait. These areas correspond with archaeological evidence of intensive habitation and with both modern and traditional evidence of fishing. In our *Ngai Tahu Report 1991* we reproduced a map made up of the location of known archaeological sites throughout the South Island.¹ While almost the whole coastline is clearly outlined, there is a marked concentration of sites around Kaikoura, Kaiapoi, the harbours of Banks Peninsula, Waihora, from the Waitaki to Otakou and along the northern coast line of Foveaux Strait (H1; see also figure 1). Maps showing Ngai Tahu fishing grounds based on fishing marks which were used until quite recently show a similar concentration around these localities. Fishing grounds on these maps are concentrated around Kaikoura (J13; J33; J51), the north Otakou coastline (J34) and Foveaux Strait (J35).

Fishing was clearly more intensive around Ngai Tahu settlements, particularly those with a permanent and comparatively large population. The location of these settlements appears to be linked, among other things, to the availability of marine resources. Kaikoura, Waihora, Moeraki and Waikouaiti were all places of major significance to Ngai Tahu fishers; they show up clearly in the archaeological record, and since 1840 they have become important ports in the development of the South Island inshore fishery. Professor Atholl Anderson has argued that marine fishing, and barracouta fishing in particular, played an important role in locating the Maori population on the east and south coast peninsulars of Te Waipounamu following the demise of the moa (H2).²

While Ngai Tahu fishing efforts may have been concentrated in such areas, they were far from confined to them. Seasonal settlements took Ngai Tahu to a variety of different locations, both inland and along the coast. Bill Solomon of Ngati Kuri provided the names of 160 places along the Kaikoura coast from Parinui-o-Whiti to the Hurunui. While these were concentrated around the Kaikoura peninsula, named places were spread well up the coastline towards Parinui-o-Whiti (H28). In 1879 and 1880, when Ngai Tahu prepared lists of mahinga places to support their claims before the Smith Nairn commission, they listed a large number of mahinga kai places throughout the area of the Kemp purchase, many of which were located on the coast. A surviving map shows 15 such places along the coast from the opening of Waihora to the Ashburton river (H28). While not all of these places related to marine resources, many did.

The West Coast was far less populated than the east and Ngai Tahu control of Te Tai Poutini was comparatively recent, extending back only to the end of the eighteenth century. Estimates of population in the 1840s and 1850s suggest Maori numbers to be less than one hundred, located in three areas, Kawatiri (Buller), Mawhera/Arahura and in small groups in South Westland at Mahitahi and Okahu (Jackson's Bay) and other small settlements.

“Vikings of the South”

- 3.4.1 In the seventeenth century when Europeans first ventured into the South Pacific, the descendants of earlier Polynesian explorers were settled across much of the breadth of the Pacific ocean. From Easter Island to Nukuoro and from Hawaii to Rakiura, Polynesians were fishing. At roughly the same time Ngai Tahu followed earlier venturers across Cook Strait and southward to the southern extremities of Te Waipounamu. Even in these latitudes, Maori had made reminders of their tropical origins in Eastern Polynesia. In Foveaux Strait they named one island Rarotonga (or Raratoka in the southern dialect).

When Cook circumnavigated the islands of New Zealand in 1769–70, he found Maori fishing at the southernmost point of Polynesian occupation of the Pacific, in Ngai Tahu territory. Ngai Tahu had an ability to travel the seas to exploit their resources and to maintain the links of trade and kinship. Cook was met by four canoes off Kaikoura containing 57 men

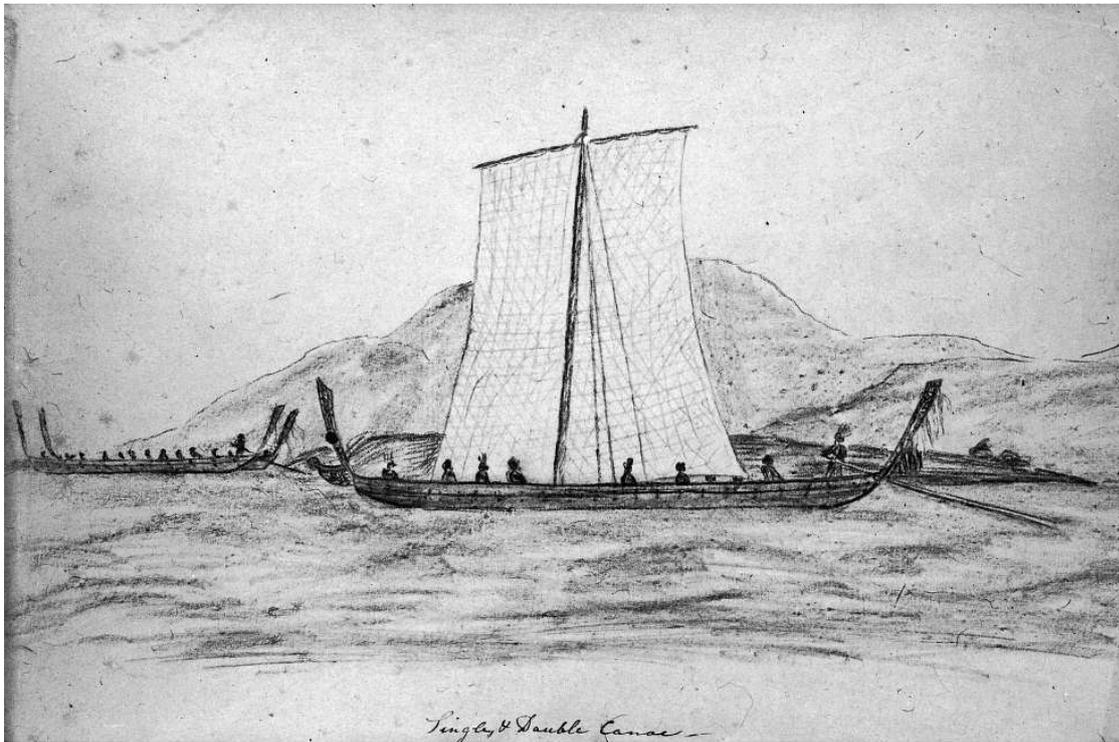


Figure 3.1 Single and double canoes [ca 1827] in J Boulton *Journal of a Rambler* [ca 1845]. Original Manuscript in the Alexander Turnbull Library

on 15 February 1770.³ They were at least 12 miles from shore (H1:39). Mr Temm, counsel for the claimants, commented that:

The Ngai Tahu have always been great sailors. They go annually to the titi Islands [sic] far off shore to gather mutton bird, and the traditional evidence that we have put before you in such abundance records how they went from Southland through Foveaux Strait to Fiordland, from Ruapuke up to Kaikoura, Banks Peninsula and elsewhere, from the northern West Coast down to the southern parts of that side of the Island, and from the South Island through Cook Strait far to the North. (W1:302)

When discussing mahinga kai in our *Ngai Tahu Report 1991* we recounted how Ngai Tahu ventured across the breadth and depth of their island following the seasonal resources of their scattered economy. They took titi in Rakiura, tuna at Wairewa and weka from the inland plains. They travelled and traded across the inland passes of the Southern Alps and up and down the broad rivers which gouged their way from the mountain ridges to the sea. The mana of the tribe rested on this seasonal pattern of resource exploitation, and the resources of Tangaroa were an essential part of this mana. Most Ngai Tahu lived on the coast, allowing them to take resources from both land and sea as they came into season.

Settlement was, as Crown counsel commented, “intricately interwoven with Ngai Tahu’s use of the resources available to them” (X4:17).

Much of the exploration of the Pacific by Polynesian peoples had been carried out in double-hulled canoes. At the time of Cook’s arrival in New Zealand waters these were still in use, but had disappeared from the North Island two generations later. Because of their greater stability, such craft were still being taken to sea in the early nineteenth century on the turbulent and often perilous Ngai Tahu waters. On capacity to travel long distances at sea, the claimants maintained that their wakaunua (double-hulled) and taratahi (single-hulled) canoes were used to make substantial sea voyages that went well beyond “rock hopping”. Tipene O’Regan argued that because of the dangerous nature of much of the South Island’s coast line any vessel with the capacity to travel along the coast also had the capacity to travel out to sea:

It is the Ngai Tahu position that our ancestors had the capacity to voyage extensively and did so. They had the capacity to fish where they needed to and sometimes that meant some distance from the shore. When better vessels became available they acquired them and then they built them for themselves. They did this both prior to the Treaty and after it. (H17:12)

The claimants rejected the whole concept of a seaward boundary to their fisheries, saying this was a Pakeha concept foreign to their understanding. Given their maritime expertise, the claimants argued that they had a potential to fish where they wished. They regarded the limits to their exploitation of the fisheries off their coasts as being imposed not by technological considerations, but by their economic and social needs.

Mr O’Regan filed transcripts and translations of documents by Hariata Whakatau Pitini-Morera (H22(a)) written at the end of the nineteenth century which describe the use of double-hulled canoes in the traditional history of the tribe.

Rakiihia Tau mentioned traditions which indicated a knowledge of Antarctic waters (T4(a):61). While we make no comment on the accuracy or otherwise of such traditions, it is indisputable that Ngai Tahu were well able to travel large distances by sea in their journeys around the coastline, over waters that were often treacherous. Images of canoes and of voyaging are common in their traditions, and the island itself is identified as a canoe, Te Waka a Maui.

Yet despite the obvious seamanship and valour evident in Ngai Tahu sailing traditions, it is difficult to accept that extensive deliberate sea voyaging was made at a considerable distance from the coastline, apart from those necessary to travel from island to island. Travel by sea was not without considerable risk, and even in the period when more seaworthy whale and sealing boats were being introduced, death by drowning was common. Tuhawaiki, the upoko ariki of Ngai Tahu at the time of the Treaty, drowned at sea; so too did many other men of rank.⁴ Professor Anderson considered that Ngai Tahu canoes were too flimsy to allow extensive use of fisheries many miles off shore (S3:Doc 13:158–159). In one recorded account 40 people were drowned in the 1820s when a fleet of four double-hulled canoes encountered trouble in



Figure 3.2: Collection of fish hooks from Waipapa Bay, from Barry Brailsford *The Tattooed Land* (Wellington, 1981) p108

Foveaux Strait.⁵ Two of the canoes were swamped and became detached from the smaller canoes lashed to them. There can be little doubt that because of the dangers involved, Ngai Tahu sailed less on the rougher seas of the west coast and in the far south than they did on the comparatively safer waters off Canterbury and Otago. It was in these safer seas that the bulk of the Ngai Tahu fishing effort was concentrated.

As the evidence will show, the ability of Ngai Tahu to sail canoes around their territory gave them a foundation on which to develop a canoe based fishery off the confines of the beach, and it is to the evidence of Ngai Tahu fishing up to the time of the Treaty that we now turn.

Fishing technology

- 3.4.2 Like other tribes Ngai Tahu had a sophisticated array of fishing technology available to them prior to European contact. There have been numerous studies of fish hooks found in the Ngai Tahu rohe. They show both a developing technology and an adaptation to the specialised needs of taking specific species. In 1967 Jan Hjarno divided southern hooks into three varieties of lure hooks: minnow lures, barracouta lures and kahawai lures; and three forms of bait hooks: unbarbed, one piece bait hooks, two-piece bait hooks and barbed one piece bait hooks (S3:Doc 10).⁶ Dr Bathgate described how archaeologists have differing opinions over the use of these hooks, demonstrating just how difficult it can be to determine whether specific species were caught with lures, hooks or nets (S2:52–59).

Maori fish hooks developed over the generations of occupation of Te Waipounamu. Studies have been undertaken which show how Maori fish

hooks developed. Helen Leach and Jill Hamel's detailed and specific investigation of the Long Beach site in Otago demonstrated how bone fish hooks developed over the long term habitation of the site from the archaic to classic Maori period.⁷ This showed a continuity of technology developed over time, despite waves of Ngati Mamoe and Ngai Tahu invasion (S3:doc25). By replacing one-piece fish hooks with composite hooks, and developing more sophisticated hooks and lures, Maori fishing demonstrated adaptability and an accommodation to southern species and local conditions. Atholl Anderson confirmed the chronological development of fish hooks in the Otakou area (S3:doc22: 211–213).

In contrast with tribes in the North Island, Ngai Tahu use of nets appears to have been more limited. Despite one historical reference to the use of a seine net two miles in length this is generally dismissed as unlikely (H1:9; H2:22). Professor Anderson rejected the suggestion that southern Maori did not have the technology to use such nets, arguing that making and using such nets required a considerable amount of labour (H2:25).⁸ Given the size of the Ngai Tahu population such technology was simply inappropriate. There is, however, evidence of the use of small sein nets, scoopnets and bagnets (H2:22), small kaka or tata nets (H57:12) and hoopnets (J19:32; H57:13).

Given the population of Te Waipounamu in pre-European times, southern Maori were well able to exploit the marine resources found on and off their shores. They had developed a specialised and locally appropriate fishing technology. With the coming of Europeans there were developments. Oars were used on canoes. Nails were used as barbs for hooks, and sealing and whaling boats eventually replaced canoes. These developments can be seen as complementing existing Ngai Tahu technology and extending the range of their existing fishery.

The naming of fish

- 3.4.3 Studies of the names given by Maori to fish species have been used to describe the breadth of Maori knowledge of species and also to illustrate gaps in Maori knowledge of species. Collectors such as Herries Beattie recorded lists of names of species identified by their Maori names from his Ngai Tahu informants (H27:Doc2). More recently R Strickland and Chris Paulin have analyzed lists of species from a number of published sources.⁹ From this Paulin concluded that Maori knowledge of species from the coastal and inshore area was extensive, but that knowledge of species found below 50 metres was limited and that no species found only below the 100 metre mark was known by Maori in pre-modern times. Some deep water species such as hoki were known, but these inhabited shallow waters for some time of the year (S3:Doc 5).

Drs Leach and Bathgate questioned an over reliance on such information (S4:44; S2:25–6). Dr Leach pointed out that the species lists compiled by collectors such as Best and Beattie were the products of imperfect cross cultural dialogue. European and Maori had different taxonomies for fish, they did not necessarily have a common language to classify species. In

such a dialogue confusion was almost unavoidable. Europeans simply knew too little about the fish in New Zealand waters, as Paulin himself acknowledged (S3:doc 5:5), to be able to ask accurate questions or identify specific species named by Maori informants. Europeans were unlikely to have recorded the names of deepwater species which were entirely unknown to them.

Dr Habib considered Drs Bathgate and Leech's criticism of identifying fish species known and used by Maori from linguistic evidence to be "over vigorous" (T4(c):97). The wide variety of species identified in the linguistic records does provide an indication of the breadth of Maori knowledge of marine resources. A multiplicity of names for individual species, is certainly some indication of that species' cultural and economic significance. As Strickland pointed out, there are 152 terms of reference and varieties of eel and nine for snapper.¹⁰ While this linguistic evidence shows in total a broad knowledge of fish species, it is not possible to conclude from this evidence alone that a specific species was neither known nor fished because it now has no known Maori common name. Despite this it must be thought unlikely that an unnamed species had as much economic or social significance than another commonly referred to on numerous occasions.

Fishing grounds and fishing marks

- 3.4.4 David Higgins, a Ngai Tahu fisherman, presented evidence on fishing grounds and fishing marks based on interviews with a large number of Ngai Tahu fishers past and present (J10). These fishers provided him with a series of fishing marks and fishing grounds used by them, and passed down from generation to generation. The fishing marks were based on marks books recording land marks which, when aligned, allowed fishers to relocate specific fishing locations with considerable accuracy (J10:53). Marks were particularly valuable in fishing for hapuku, as they located specific reefs where these large and valuable fish could be seasonally found. The marks were charted on a trawler at sea. Maps created from these charts were filed with the tribunal (H23–H26; J32–J35). The marks ranged from just off the shore to about 30 kilometres out. Mr Higgins argued that this evidence showed fishing grounds discovered from the 1850s and 1860s when Ngai Tahu fishermen were able to extend their range of fishing due to the adoption of whaling boats, reassigned to fishing when shore whaling went into decline. The Crown's witness, Dr Bathgate, also accepted that these grounds were developed from the second half of the nineteenth century (S2:201).

The earliest verifiable date for any particular mark was the mid 1850s (J10:53). Mr Higgins considered that until the 1860s the main area of Ngai Tahu fishing activity was undertaken in what he called a "close inshore" zone, from the edge of the sea to the limits of a row boat, about half a mile to a mile off shore (H5:6). In this zone reef species were caught all year round, while pelagic species were only caught when they ventured close to shore, between December and May. They were then preserved to provide food over the winter months. The main vessel used for fishing

was a small single-hulled canoe, sometime used with a sail, which was unstable and not suitable for fishing far from shore. However Higgins also suggested that double-hulled canoes may have occasionally been used for in-shore fishing (H5:8).

- 3.4.5 Crown counsel, in her final submissions, stressed the difficulties of establishing the antiquity of these grounds and the methods used for locating them. She emphasized Mr Higgins' statement that most of these grounds had been located after 1840. Her submission also argued that there had been insufficient "traditional evidence" presented by the claimants or by the tribunal's commissioned researcher Dr Habib, to show that these grounds were known and frequented at any time prior to the Treaty (X4:53, 60–61).
- 3.4.6 We agree that it is difficult to establish the antiquity of all individual grounds and marks. Collectively they show the cumulative knowledge and experience of the fishery as Ngai Tahu commercial fishers operated it until the 1960s. The fishery expanded as Ngai Tahu sought to provide fish to the settler markets. By pursuing pelagic species beyond the close inshore zone, Ngai Tahu increased the period when they could supply fresh fish into the period July to December (S2:206). It must, however, be considered extremely unlikely that the practice of fishing for hapuka, using marks, sometimes several miles from shore, emerged only in the period after 1840. It is much more reasonable that the search for new grounds after 1840 built on existing knowledge and practices, as H K Taiaroa's account suggests (S3:37).

If Ngai Tahu development of its fishery did not cease in 1840, neither did it begin at that date. The use by Ngai Tahu of fishing marks to locate such fishing grounds is recorded sufficiently close to 1840 to completely support the iwi view that in some areas grounds were fished some miles off the coast well before 1840 and the introduction of whaleboats. Such knowledge must have been accumulated by their more distant tupuna. Without long traditions of finding and recording these often small but prolific places unseen beneath the surface of the sea, Ngai Tahu could not have developed the fishing ability that they had immediately after the Treaty.

Ancient offshore grounds

- 3.4.7 While David Higgins had no evidence of specific fishing marks being used by Ngai Tahu prior to 1840 he did identify four particular grounds which he said appeared to be of considerable antiquity. All four grounds were understood to have been used by Ngai Tahu long before 1840. Tauraka Hapuka was a ground with Ngati Mamoe origins 12 miles south east of Ruapuke Island in Foveaux Strait. Also associated with Ngati Mamoe was Tuhaitara, 12 miles north-east of Moeraki point. Te Ika Whataroa was situated close to Kaikoura. Finally there was Tahitotarere some 30 to 60 miles west south west of Preservation Inlet. If these grounds were fished

before 1840 they would have to have been fished from double-hulled canoes.

Mr Higgins commented that reference to these grounds comes up again and again in his discussions with Ngai Tahu fishers. Harold Ashwell, a Murihiku and Rakiura fisher, commented on a number of these offshore grounds:

Many places named by those Maori of long ago still have those names attached. They were places that could always be depended upon as places of mahi ka kai. They were known traditionally. Places such as Hopu Toroa and Tauraka Hapuka were miles out to sea and could only be used by using landmarks. They are reputed to be hundreds of years old. (H13:10)

- 3.4.8 There is some historical support for the use of such fishing techniques prior to the introduction of whale boats. While this evidence confirms the practice of locating specific fishing grounds some distance from the shore, it is silent as to how far from the coast these grounds may have been. Edward Shortland identified one ground as early as 1843, which he described as “Taki-a-maru” located off Moeraki and “a celebrated fishing ground for the “hapuka” (S2:202).¹¹ Dr Bathgate, the Crown’s principal witness in this area, filed an account written in the late nineteenth century of Ngai Tahu fishing for hapuku which describes a form of fishing predating the whaling boat.¹² The account has been variously attributed to H K Taiaroa and Tare Tikao, but, according to Dr Bathgate was most likely written by H K Taiaroa. It was published in Maori and English by Elsdon Best in his *The Fishing Methods and Devices of the Maori*.¹³ Some whale boats were used by taua in the 1830s, but it was not until the 1840s, when whaling was in severe decline, that these boats became more generally available to the tribe for fishing:

Fishing-canoes began to go out to the *hapuku* fishing-grounds in the sixth month (November or December). The larger canoes would contain thirty men, more or less, and the small canoes a lesser number. The large and small canoes would go out together to the fishing; the larger vessels proceeded to the more distant fishing grounds, those furthest from the shore. When going to the outermost grounds canoes started during the night, hence many persons were taken to serve as paddlers, so that abundant paddling-power was available, should an offshore wind arise, to bring the vessel to land. *Hapuku* were numerous at some places in the sixth month, at other places they were scarce; still, all people dwelling in villages near the sea commenced fishing operations at this time. In some places fishing began prior to the sixth month. Should canoes proceed to the fishing at the proper time, when the fish would bite well, then a canoe would soon be filled and so would return to land. . . . The hapuku fishing ceased in the Maruaroa season [about June], the month when Orion appeared well above the horizon; at that time the tail of the hapuku becomes red, and so during the latter days of June the fishing ceases. (S2:152)¹⁴

As Dr Bathgate pointed out, this seasonal description of the hapuka fishery is closely tied to the migratory pattern of the fish. Hapuku inhabit shallower in-shore waters and outlying reefs from October to May. In

June and July they shift out to deeper water to spawn. Dr Bathgate accepted that Taiaroa's account confirms that offshore fishing grounds were visited as part of the pre-whaling and sealing boat fishery (S2:152). Taiaroa's account described fishing by canoe, where the size of the canoe dictated the distance fished from shore – clearly this refers to the period prior to the adoption of the more standardised whaleboat. This is despite the fact that hapuka could have been caught in comparatively shallow water and in Otago harbour in the mid-nineteenth century.

Dr Bathgate could find only three references to such grounds in the extensive writings of Herries Beattie (S2:202). Given the secrecy with which such information was surrounded, this may not be surprising, as Dr Bathgate admits. When Beattie was collecting his information, non-Maori fishers were competing for these grounds.

Canterbury “wakawaka”

- 3.4.9 The general tenor of the claimants' evidence supported David Higgins' view of the pre-1840 fishery as largely limited to the “close inshore” zone of about a mile out, with a number of specific fishing grounds up to about 12 miles off the coast. The one exception to this being Tahitotarere, some 30 to 60 miles from the coast. However two witnesses did maintain that in pre-European times, Ngai Tahu did fish a considerable distance further from the shore. Rakihia Tau filed a map showing how in his view, mahinga kai areas, known as wakawaka, extended from the land well out to sea (J28, J40, J41). The wakawaka outlined in one map were said to define fishing grounds up to 150 miles from shore. The maps were also said to define conservation areas and the means whereby the resource was owned and fished by different Ngai Tahu hapu as allocated by the rangatira of Kaiapoi (J10:32). This evidence was supported by Pita Ruka using the same map, who described trolling in Pegasus Bay at a considerable distance from the coast (J10:89–90).

Mr Ruka's evidence was later withdrawn by the claimants, when it was confirmed by claimants' counsel that much of his evidence was taken from David H Graham's *A Treasury of New Zealand Fisheries*, and not from an unnamed kaumatua informant as stated by Mr Ruka (AA37:4).¹⁵

No other evidence was presented by any witness, professional or claimant, to support the possibility of substantial fishing expeditions undertaken so far from shore. Nor was there any evidence to suggest that the Pegasus Bay area could have been divided into numerous extensive “wakawaka”, fished by different hapu. Professor Anderson argued that the whole concept of wakawaka was of much more limited scope and was largely a post-European concept (AA37). He also described the evidence that Ngai Tahu hapu were systematically fishing so far off the Canterbury coast as a “number of wildly improbable claims” (AA37:4). In presenting final submissions on behalf of the claimants Mr Upton stated that, “Ngai Tahu is not suggesting that [at] any stage in or before 1840 they were fishing 150 or 180 miles off the coast” (AB15:5). Other traditional evidence did not support the use of these grounds. Mr Higgins,

having discussed the Ngai Tahu fishery with upwards of one hundred fishers, provided no indication of the fishing grounds named or of the marks mentioned. None of the more distant and ancient grounds named by Mr Higgins are in this area (J51).

In the light of this we consider any suggestion that Ngai Tahu were systematically fishing between 15 and 150 miles from shore unproven and contrary to the weight of the evidence. Nor is there any convincing evidence that large areas of the sea were divided into complex ownership zones, or wakawaka.

3.5 **Archaeological Evidence**

Professor Atholl Anderson, the claimants' expert witness, presented an overview both of archaeological and historical evidence relating to fishing in a detailed paper on mahinga kai (H1). In response the Crown commissioned Dr Foss Leach, another noted New Zealand archaeologist, to provide a survey of archaeological evidence relating to fishing. This was accompanied by the broader investigation of Dr Bathgate. Dr Bathgate's evidence, like that of Professor Anderson, was extremely helpful in its detailed and comprehensive analysis of evidence on pre-Treaty fishing. The archaeological evidence of Ngai Tahu, particularly as it applied to the southern coast from Otakou/Otago to south west Murihiku has already proved a fruitful ground for investigation. All three witnesses had considerable expertise in the area and they were in turn able to share a body of knowledge already well developed by a large number of postgraduate and professional investigations.

The archaeological record

- 3.5.1 From the outset all the archaeological witnesses stressed the particular limitations of the archaeological record. In seeking out information about the diet and social economy of earlier societies archaeologists examine the refuse of past generations. They carefully sift through the rubbish thrown aside in middens, attempting to date the material they find and trying to reconstruct something of the social and economic conditions of the people concerned from the remains of what they ate. To achieve this archaeologists have derived a variety of specialist techniques for sorting through the debris, for recording, classifying and counting it and for analysing the results.

Trying to determine what fish people caught – sometimes many hundreds of years ago – from the refuse of their rubbish heaps, has its difficulties. There are two major problems. First, everything that was caught may not have found its way into the midden. Some species of fish may have traditionally been cleaned, beheaded or preserved away from the site, their remains never finding their way into the local rubbish heap. The same would have occurred for fish traded for other items required by the community.

Secondly, a midden may no longer contain the remains of all the fish which were cast into it. While bone and shell can remain, softer less

durable material will have long decayed. Cartilaginous fish, sharks, skate, and dog fish, for instance, do not have skeletons of bone, and their remains decay much more quickly than do the remains of other fish. As a result sharks and dogfish, which were definitely fished by Maori, are poorly represented in midden sites. An example was given by Professor Anderson of the Potikohua cave on the West Coast, where excavations have found no trace of dogfish, either bone or skin denticles, and yet the cave was known to be a place where dogfish were processed during the nineteenth century (H1:6).

Dr Leach outlined something of the essential techniques used to measure the different species located in middens. An “assemblage” is the area from a particular level of the excavation which defines a single unit of the midden from a single time period. Each piece of bone is collected from the assemblage and an attempt is made to determine what is called the *MNI*, the minimum number of individual fish “which is necessary to account for all of the skeletal elements of a species in a faunal assemblage” (S4:14). Each bone has to be identified according to the species of fish from which it came. Techniques for correctly classifying fish bones by species are still evolving and this means that many earlier collections need to be reclassified.

- 3.5.2 Professor Anderson described middens as the main source of evidence about pre-European use of marine resources (AA16 (k):2), although he tempered his conclusions about the reliability of this evidence by broad reference to historical, anthropological and other sources when they are available. Dr Leach was more emphatic about the value of the evidence of the middens and the bone counts, regarding it as a test of less reliable forms of evidence:

Anthropologists and culture historians are very familiar with the fact that in recording human behaviour there are two dimensions which are important – what people say they do and what people really do in practice. These two categories do not immediately coincide – it is not that humans are inveterate liars, but that our perceptions of our own behaviour are not always as objective as we first think. (S4:9)

Because the archaeological record is not interfered with by “belief systems” it can be relied on as “a chronicle of what really did occur in the past” (S4:10). Dr Bathgate was similarly impressed with the effective picture that the archaeological record produced. While using documentary evidence Dr Bathgate commented that gaps in the oral and documentary record do not provide information on the full range of species caught or on the comparative importance of these species:

In using documentary evidence we are required to *accept* what people say about the fish they caught: in using the archaeological record we are, with certain provisos, in the better position of actually *knowing* what was caught. (S2:9, emphasis in the original)

- 3.5.3 Dr Habib was particularly critical of too much dependence on this evidence (T4(c):94–115). He saw a concentration on the lists of species and their comparative frequency within the midden as severely under-

recording the breadth and range of what he saw as the more likely and expansive Maori use of the marine resources. From Dr Habib's view the archaeologist was severely limited without an appreciation of Maori traditional evidence, documentary evidence and an extensive grounding in marine biology. The concentration on a narrow range of species within middens was seen not as a random sample of the actual Maori catch, but as possibly no more than a socially selected and heavily skewed sample of a much broader range of resources harvested and eaten by Maori. In addition to the absence of sharks, skates and other cartilaginous fish, Dr Habib pointed to the absence of eel remains as a sign of the major limitations of the archaeological record. Given decided Ngai Tahu taste for tuna (eel) – well recorded both in the nineteenth century material and in the pleasures of mahinga kai described to the tribunal by many members of the tribe – the absence of eel remains in the middens poses something of a puzzle. Dr Habib also finds the failure to take into account the comparative biomass of different species of fish a major limitation on the conclusions being drawn about the comparative taking of small wrasses and large hapuka.

The Crown archaeologist and anthropologist was in turn critical of what he saw as a tendency of Dr Habib to assume that current fisheries' knowledge could be projected uncritically back to the pre-1840 situation (V6:2–3). According to Dr Bathgate, Dr Habib's evidence was an unquestioning endorsement of the claimants' traditional evidence, suggesting that he was probably "unaware of the techniques for analysing traditional information" (V6:4).

We note that caution is required in drawing conclusions from any particular kind of evidence. Dr Bathgate commented that while:

a social scientist cannot be expected to have an adequate understanding of marine ecology . . . nor can a zoologist expect to understand the methods of social anthropology and ethnohistory and the techniques of archaeology required to examine all the various traditional, historical and archaeological evidence placed before the Tribunal. (V6:8)

The tribunal was fortunate to have had presented to it a large range of different kinds of evidence, from traditional tribal evidence, historical eye witness accounts, archaeological evidence, zoological evidence and anthropological accounts. All of these have value in their own terms, and where different specialist evidence provides mutual corroboration then this is all the better. The archaeologists were themselves cautious about aspects of their research, given the acknowledged limitations imposed by the vagaries of the survival of these ancient inventories of fish catches. Nonetheless, the archaeological evidence, which we now move on to discuss in detail, provided an extremely valuable picture of Maori fishing in the South Island over many centuries.

Archaeological studies of the South Island

- 3.5.4 There are, according to Professor Anderson, 947 middens identified by the New Zealand Historic Places Trust inventories, while other historical sites may also contain middens. Although these are located all along the

Ngai Tahu coast line, they are concentrated on the south and south east coasts, with few on the West Coast. There have been three major studies of collections of fish assemblages, those of P J F Coutts, the findings of which were published throughout the 1970s, followed by those of Professor Anderson and Dr Leach, published through the 1980s.¹⁶ Because of developing techniques and the fairly recent establishment of an agreed system of conserving fish bone collections, there are discrepancies between the different studies (AA16(k):17). Whereas Professor Anderson's 1986 investigation, revised in 1988, was based on 50 sites, that of Dr Leach was on 43 sites, using a slightly different methodology. To some extent the differences between these studies have been resolved in Professor Anderson's later evidence presented to the High Court (AA16(k):10, table 28).

The sites examined by Professor Anderson's study range from 200 to about 1000 years in age with most from between 200–400 years ago. A comparison of the minimum number of individual species (MNI) for each species found in these sites, shows two predominant species, barracouta and red cod (H1:7). These fish were found in 96 and 92 percent respectively of all sites. A group of very commonly found species including wrasses, blue cod, ling and hapuka was located in 31 to 36 percent of sites. Commonly caught species found in 9 to 16 percent of sites consisted of tarakihi, sea perch, trumpeter and black cod, blue fish gurnard, southern kingfish, snapper, stargazer, flounder, leatherjacket, sole, marblefish and blue moki. A group of five species, conger eel, scorpion fish, warehou, trevally and brill were each found in only two percent of sites (H3:table 3).

From these studies it seems the main species caught from canoe at sea were barracouta by trolling, and red cod and hapuka by bait hook. Wrasses and blue cod were seen as being caught largely from the shore over rocky ground. Professor Anderson concluded from this that specialised canoe fishing was undertaken off the Ngai Tahu coast line at least from the fourteenth century, using a diverse and sophisticated range of technology. This included the use of bait hooks, lure hooks and seine nets. Professor Anderson commented that the lures used for barracouta fishing were so successful that they were adopted by European fishers in the nineteenth and twentieth centuries (H1:7).

Associated with this evidence of Maori fishing for kai ika, other remains were also found in middens including paua, mussels, cockles, pipi and crayfish.

- 3.5.5 Ngai Tahu undoubtedly used the very wide variety of shellfish which can be found along their coastline. Midden evidence was presented by Professor Anderson in a number of tables showing the types of different shellfish in different sites based on an analysis of 246 exposed middens. Professor Anderson concluded from this material that the main species caught were cockle (*Chione stutchburyi*), pipi (*Paphies australe*), and blue mussel (*Mytilus edulis*). Also commonly taken were paua (*Haliotis iris*), catseye (*Turbo smaragda*), Cooks turban (*Cookia sulcata*), green

mussel (*Perna canaliculus*) and mudsnail (*Amphibola crenata*) (AA16(k):5).

Crown archaeological evidence

- 3.5.6 Dr Foss Leach presented the Crown's archaeological evidence (S4), although this was expanded and integrated into a broader overview of Maori fishing by Dr Murray Bathgate (S2). Dr Leach placed the evidence from the Ngai Tahu area in the context of the New Zealand evidence as a whole. There are 84 sites throughout the country where there is sufficient evidence to reliably count the relative number of species found in the middens. Of these, 63 have been further restudied "using strictly comparable methods, and data entered into the National Museum computer database" (S4: 22–24). Just over half of these apply to the Ngai Tahu region. In total all these sites represent 57,711 identified fish bones from exactly 1000 different archaeological assemblages. For middens in the northern South Island and southern South Island, table 3.1 shows Dr Leach's findings on the comparative percentage of species identified from midden remains.

As Professor Anderson pointed out the table is skewed by the inclusion of the Glen site in Nelson outside the Ngai Tahu area. This site includes the significant number of snapper specimens (the 22.77 percent of *Chrysophrys auratus*). These were not found further south in any great numbers (AA16(k):9–1)

- 3.5.7 Local variation within the Ngai Tahu area is also important. Restructuring Dr Leach's figures, Professor Anderson provided an indication of the way midden species showed variation between various Ngai Tahu areas, table 3.2.

- 3.5.8 The table shows barracouta to be the most common species found in east coast sites, still of importance in Foveaux Strait, but of little significance in Fiordland. Ling specimens were found more in the south than on the east coast, and to an even lesser extent in Fiordland. Red cod show a similar distribution, although making up double the number of ling. Wrasses made up a very small part of the sample on the east coast, rising to 14.6 percent of those in Foveaux Strait but increasing to 40.4 percent of specimens for Fiordland.

One of the most notable features of these figures is the insignificance of hapuka in the archaeological record for this area. Only Kaikoura sites show significant numbers of this species. We have already seen in the evidence on fishing marks that hapuka was a highly valued fish caught on the east coast of the island in historical and pre-historic times. A number of reasons were provided for its comparative absence from the middens.

Dr Leach argues that hapuka did not play a significant role in the economy of Ngai Tahu, but had an important place in the social and cultural life of the tribe. In his view, the smaller, less valued and more easily caught fish were more likely to provide the staple food for day to day living. In contrast the larger and harder to land fish made up a smaller part of the

The Ngai Tahu Sea Fisheries Report 1992

Table 3.1: Midden Remains by Species.

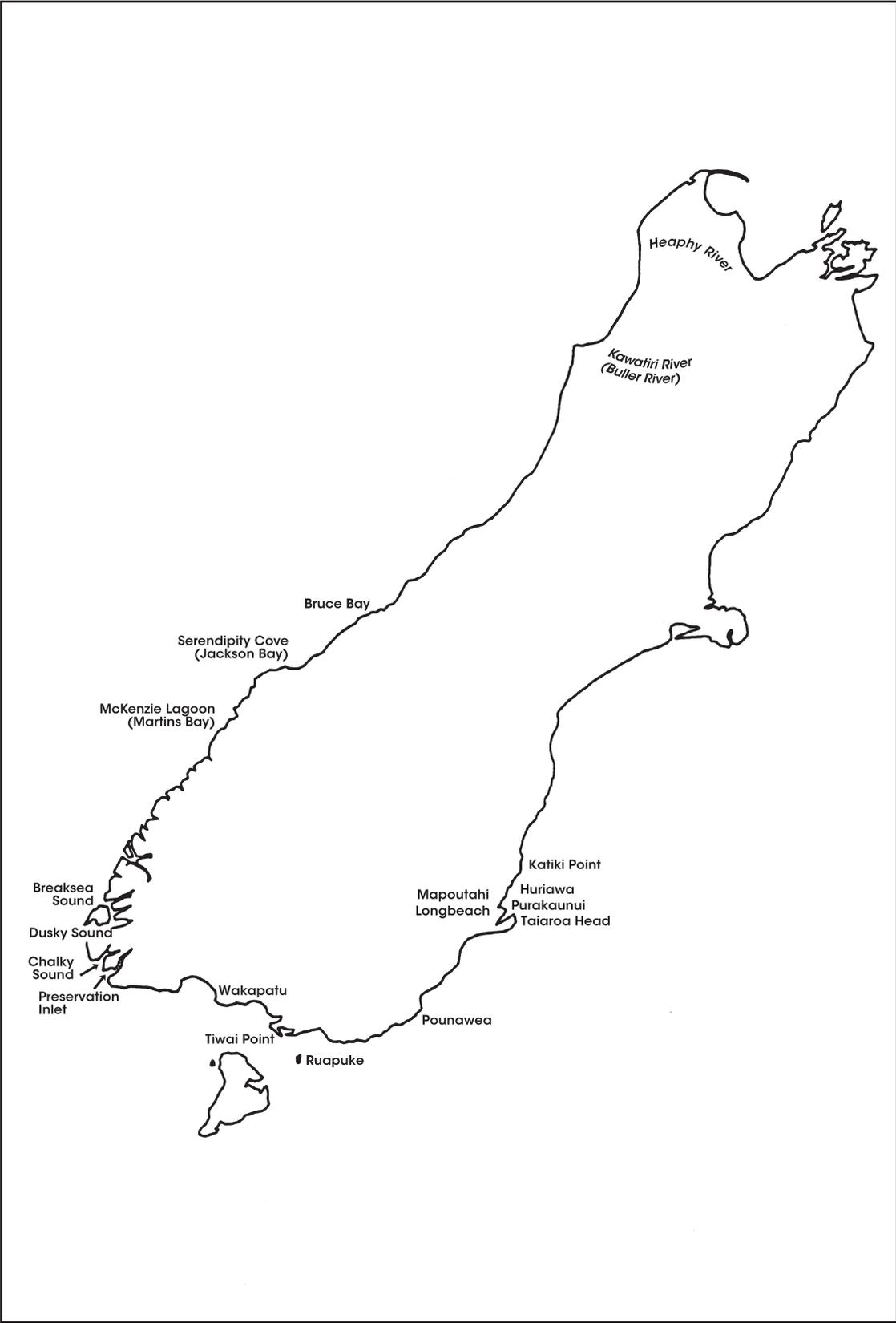
Taxa	NSI (%)	SSI (%)
Thrysites includes barracouta	47.49	54.62
Pseudolarbus sp various wrasses	1.54	13.40
Pseudophycis bachus includes red cod	16.74	11.17
Parapercis colias includes blue cod	0.70	6.24
Chrysophrys auratus includes snapper	22.77	0.10
Genypterus blacodes includes ling	3.49	3.97
Others	7.27	10.5

diet, but received more cultural attention. These were the prestige fish taken at some risk, often further from the shore, and were likely to increase the mana of the fisher. Hapuka was often also a communally caught species. Dr Leach provides no evidence for this specific to the Ngai Tahu fishery, as his hypothesis was based on his knowledge of other Pacific fishing societies and on his own experience as a recreational fisher (S4:12–13, 43–44).

A further explanation for the absence of hapuka in evidence involves the food value obtained from the various species. Dr Habib commented that

	Fiordland	Foveaux strait	East coast S	East coast N	Total
Barracouta	198	599	7547	311	8655
%	7.1	53.3	82.1	78.5	64.3
Red cod	138	115	860	17	1130
%	5.0	10.2	9.3	4.2	8.4
Wrasses	1116	164	77	6	1363
%	40.4	14.6	0.8	1.5	10.1
Blue cod	480	102	37	0	619
%	17.4	9.0	0.4	0.0	4.6
Ling	72	79	374	22	547
%	2.6	7.0	4.0	5.5	4.0
Hapuku	5	7	71	19	102
%	0.2	0.6	0.8	4.8	0.8
TOTAL MNI	2009	1066	8966	375	12416

Table 3.2



Map 3.2: Some archaeological sites in the Ngai Tahu area

the archaeological measurement of the MNI takes no account of the relative size and food value of the respective species. One hapuku could weigh over 100 pounds, and such fish were very common until well into the nineteenth century – in the period prior to extensive exploitation. Because larger fish could be easily filleted, Dr Habib also argues that their bone remains were less likely to be found in middens (T4(c):110). Unfortunately we were given no figures on the comparative food value of the different species.

Variation over time

3.5.9 The archaeological sites have been divided into three periods; the archaic or early period, up until the fifteenth century; the classic or middle period; and the late period, following European contact. As Dr Leach points out, since the national figures show the predominance of barracouta in the southern South Island archaeological remains, the fact that most of these sites were from the archaic period may give a false impression that barracouta were declining in significance over the period of Maori inhabitation of the island. Nationally the figures show a dramatic decline in the importance of the four main species of fish – barracouta, red cod, snapper and ling – over the early, middle and late periods. Barracouta, which made up 62 percent of fish in archaic sites, fell to 37 percent of middle sites, and only 8 percent of late sites. With red cod the fall was from 11 percent, to 10 percent to 5 percent of sites. Snapper makes up 8 percent of early sites, rises slightly to 9 percent of middle

Table 3.3: Changes in the composition of midden remains over time

	Early	East Coast Middle	Late	Early	Foveaux Middle	West Coast Late
Barracouta	76.6	67.2	–	26.4	30.9	8.3
Red Cod	12.1	17.6	–	12.8	9.9	4.9
Various wrasses	0.8	1.1	–	25.5	17.6	47.1
Ling	3.7	5.5	–	7.0	3.0	2.1
Snapper	3.2	0.0	–			
Black Cod	0.8	0.3	–			
Blue Cod	0.6	0.4	–	15.6	13.3	15.1
Easmobranchii	0.3	0.7	–			
Trumpeter	0.1	0.3	–			
Hapuku	0.8	0.1				
Tarakihi			–	2.9	4.0	6.9
Scorpaenidae			–	4.5	15.0	10.5
Totals	99	94.2	–	94.7	93.7	94.9

sites, falling to 1 percent of modern sites. Finally ling fell from 4 percent in early sites to 3 percent in middle sites and only 2 percent of modern sites (S4:33).

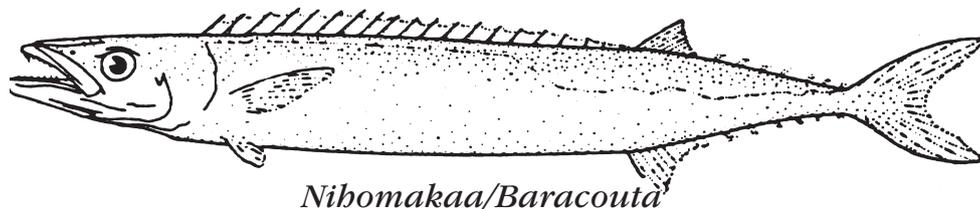
These declines have given support to arguments made by archaeologists that conditions in New Zealand became somewhat harsher from the fourteenth century, due largely to changes in climatic conditions. Colder conditions, rougher seas and pressure on resources are seen as combining to force Maori to increase their diet of shellfish and less preferable species.

Dr Bathgate argued that change in climatic and sea conditions seriously affected the ability of Maori to fish in the Fiordland-West Coast and Foveaux Strait region during the middle to late period:

The rise in the importance of wrasses and scorpion fish from 30 to 58 percent of the catch, suggests it was in the Fiordland–West Coast–Foveaux Strait region in particular that climatic deterioration may have had its greatest impact on fishing behaviour in the South Island. This region is exposed to southerlies associated with the movement of low pressure systems from the lower latitudes, and such systems would have been more frequent during the cold climatic phase between 1600 and 1850. (S2:112)

Dr Bathgate based this conclusion on the figures provided from the data produced by Dr Leach, comparing change over time for the east coast on the one hand and for the Fiordland – West Coast – Foveaux Strait regions on the other, table 3.3.

Dr Bathgate's tables do not support his view that there was a significant increase in the amount of more easily caught, lower value species in the middle or classic period. The change over time for the east coast shows that a decline in barracouta was largely made up for by an increase in red cod and ling, and in a greater breadth in the variety of species. The more significant evidence is for the south and west. Here Dr Bathgate found the increase in wrasses and scorpion fish to be from 30 percent in the archaic period to 58 percent in the modern period. However, the figures for the classic period give quite a different picture. Far from increasing, the percentage of wrasses actually declined significantly from 25 percent to 18 percent. Barracouta, the high value pelagic species of the period, is also increasingly evident in the classic period. Professor Anderson provided a much more plausible explanation for the increase in wrasses in the modern period. He commented that many of these later sites contained evidence of European as much as Maori fishing:



Nibomakaa/Baracouta

It would not be surprising to find that transient Europeans, with no local knowledge of fishing, caught a great many more wrasses (Labridae) as the data indicate, than had earlier Maori fishermen. (AA16 (k):11–12)

After revisiting data which suggested a discrepancy between Professor Anderson and Dr Leach's figures for changes in the extent of the barracouta evidence – Dr Leach argued for a 10 percent decrease while Professor Anderson favoured a 10 percent increase – Professor Anderson concluded that there is no apparent change in the taking of barracouta over time. There is in fact little evidence of significant change over time:

Taking these matters together it seems fair to conclude that essentially the same range of species, and in about the same relative proportions of abundance, were caught in the Ngaitahu territory throughout the pre-European era and probably, by Maori fishermen, into the post-European era. (AA16 (k):12)

If there is any conclusion to be drawn about the impact of deteriorating weather and sea conditions, then it could only be that despite these eventualities, Maori fishing was able to adapt and must have been comparatively unaffected.

Some specific investigations in the Ngai Tahu area

- 3.5.10 Dr Bathgate surveyed a number of different sites which have been investigated in the Ngai Tahu region. These consisted of Huriawa (Karitane), Taiaroa Head, Long Beach, Purakaunui, Pounaweia, Tiwai point, and various sites in South Westland such as Breaksea Sound, Dusky Sound, Chalky Sound and Preservation Inlet.

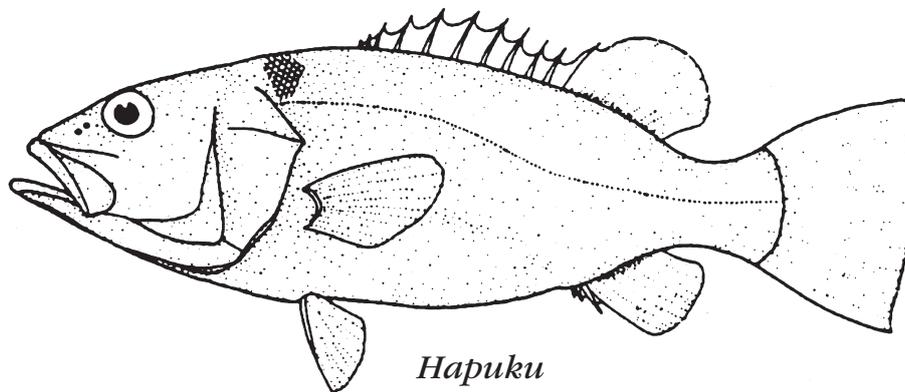
Long Beach was a seasonal fishing camp occupied intermittently in the thirteenth, fifteenth and seventeenth centuries.¹⁷ The barracouta catch declined from 82 percent in the thirteenth and fourteenth century to 70 percent in the seventeenth century. The decline was caused largely by an increase in the red cod and hapuka catch. Such changes were explained by technical advances in hook design and an increase in the use of hook and line fishing. Red cod was caught in conjunction with barracouta, while ling and hapuka were caught together (S2:120–125).

Pounaweia, in South Otago, was examined in the 1940s and 1950s by Leslie Lockerbie.¹⁸ The site provides information about the hunting of sea mammals and moa from the twelfth century. While the site shows a predominance of barracouta among fish caught (85 percent) followed by red cod and ling, there has been no analysis of the changing nature of the catch over time. The extensive dependence on barracouta suggests that such change could not have been significant (S2:128).

The Katiki Point, Huriawa, Mapoutahi and Taiaroa Head sites were all occupied during the eighteenth century (S2:129).¹⁹ Barracouta were again the most significant fish caught. Huriawa and Taiaroa Head showed 67 percent and 74 percent of their catches dedicated to this species (S2:130). Taking hapuku also seems to have increased from the kaika (kainga) inhabited in the later period. The species of fish caught here, as

in most other sites, suggest a highly specialised and selective fishery dominated by only four species: barracouta, hapuka, red cod, and ling. Dr Bathgate commented that this level of specialisation contrasts with the wide variety of bird species recorded in middens, which suggest that birds were taken non-selectively (S2:131). As a consequence he concluded that:

fishing along the Otago coastline was a highly specialised activity in which the return in terms of the types of fish caught were known in advance. Fishing was *not* a random activity carried out in a haphazardous way. When people went fishing they knew what they were looking for. If they hadn't, it would have shown up in the archaeological record wherein a wide range of species would have been represented. (S2:131)



Dr Bathgate pointed out that Helen Leach and Gill Hamel have discussed the possibility that in pre-European times red cod, ling and hapuka could be caught in harbours and even from lines from the shore (S2:132).²⁰ This conclusion, however, was discounted because of the size of the fish caught and the absence of the bones of other fish which would have inevitably been caught if lines had simply been cast from the shore. Dr Bathgate then agreed with Professor Anderson's conclusion that the eighteenth century Otago sites suggest a "specialised canoe-fishing strategy" (S2:133).²¹

In the case of the Foveaux Strait sites there has also been considerable research. While this area has a distinctive and in some areas abundant marine fauna, the range of species, according to Charles Higham, is limited (S2:133).²² At Tiwai point, used in the early archaic period, sealing and moa hunting were more important than fishing, although barracouta were caught (S2:133–34). At Wakapatu, fishing was more significant, and in contrast to the Otago area, there was a higher proportion of wrasses, with spotties (*pseudolabrus* spp) being the most common fish caught (S2:134).²³ Late sites have been examined at Ruapuke showing a predominance in the taking of seal meat, with only one of the three sites examined showing sea fish as an important contribution to the diet. Barracouta, although still present, constituted 11 to 15 percent of the

total catch. Blue cod accounted for 33 to 40 percent of the total catch (S2:135).²⁴

The southern Fiordland area was studied by Peter Coutts in the 1960s (S2:137).²⁵ Rich in marine life Ngai Tahu used this area for sealing, crustacea, fishing and gathering shellfish. Many of the species of fish caught inhabited deep water during winter, returning to the close inshore environment in spring and summer. Fishing was important, with fishers appearing to concentrate “on exploiting the shallow inshore rock platform areas” (S2:140).²⁶ Barracouta and ling were also caught from lines.

Much less work has been done on the West Coast. A Heaphy river site going back to the eleventh century, and a site at the mouth of the Buller river have not been analysed. The recovery of 19 minnow lures at the Heaphy site shows evidence of trolling (S2:142). Ray Hooker, who gave evidence on South Westland for the claimants, investigated an archaic site at Bruce Bay and found evidence of the taking of *pseudolabrus*, red cod, tarakihi, ling and barracouta, but Dr Bathgate noted that the proportions and completeness of the species list is not known (S2:142).²⁷ Other sites investigated include the McKenzie lagoon in Martins Bay and two caves of the middle period, one at the Fox river and the other Serendipity cave at Jackson’s Bay. Some fish remains were found in the Fox river cave and the Serendipity cave yielded 27 barracouta lure hooks, nine composite bait hooks and two large composite bait hooks.²⁸ Dr Bathgate considered it premature to come to significant conclusions about the nature of Maori fishing on the West Coast from the archaeological evidence unearthed so far. Only with more extensive investigations and detailed analysis of all the fish bones recovered could the changing story of fishing be told as it related to varying environmental and climatic conditions.

Seals, dolphins and whales

- 3.5.11 Ngai Tahu also used seals, dolphins and whales, not only for food but also for their bone. Mr Tau described how the carcasses of whales were divided between the different hapu of the tribe (J10:42). The head and backbone were given to Ngai Tuahuriri and the rest of the whale divided between Tai Poutini, Ngati Kuri, Ngati Moki, Ngati Wheke and Ngati Mako, and Murihiku and Waitaha. Beached whales were a major resource for Maori pre-contact with Europeans. Whether Ngai Tahu actually hunted small whales is not a clear matter. Dr Harry Morton, an expert on European whaling in New Zealand and a witness for the NZFIA and the NZFIB, was sceptical about the possibility of using traditional canoes for the capture of whales (U1:5). There is, however, evidence of the capture of dolphins and small whales in the archaeological evidence. Professor Anderson commented that finds of harpoons and dolphin remains suggest the possibility of the hunting of small whales (AA16(k):15). Whatever the means of acquiring the resources prior to the introduction of European styled whaling ventures in the early decades of the

nineteenth century, Ngai Tahu had an ongoing relationship with whales and dolphins for as long as they have inhabited the island.

- 3.5.12 Seals, like whales, have been shown, particularly the work of Dr Ian Smith of Otago University (S2:247–8), to have been an essential resource to many southern pre-European Maori communities.²⁹ Seals were a significant resource for Maori throughout much of the country, but as pointed out by Richard Holdaway, the over-exploitation of these mammals in the north had reduced them to the south of Te Waipounamu, Rakiura and offshore islands (S17:13). Ngai Tahu were able to use this resource until the European sealers exploded onto the area in the first decade of the nineteenth century. Te Maire Tau gave the tribunal a waiata describing Matenga Taiaroa's sealing activities at Preservation Inlet in the mid-nineteenth century:

Te Tuia Ki te Katikati
Te Whakekeu moe i a au
Te Whiuwhiu taku tatari
Kei Parakiwitini
E patu mai ra a Taiaroa
I te Kekerangi
E Takoru ra

Kei te Moana
Fleas with their biting
Disturb my sleep
How my bird snare swung
At Preservation Inlet
Where Taiaroa is killing the seals
That splash about in the ocean. (H6:29)

Dr Habib summarised his view of the extent of traditional use of seals, describing the:

longterm ongoing nature of sealing in *Maori terms*, the taking of seals in low to moderate numbers over many centuries, for food, bone and other products. While much of that activity was undoubtedly directed at satisfying particular hapu and whanau subsistence needs, we can also be fairly certain that as with most other products of the Maori subsistence economy, seal products were traded back and forth among hapu and whanau. For many centuries, that was the way things were done in Ngaitahu land . . . (T4(d):6–7)

There are four kinds of seals which inhabit various areas of the South Island: the New Zealand fur seal, the New Zealand sea lion, the southern elephant seal and the leopard seal (S2:249). Seal bone has been found in over 100 sites in the South Island, predominantly in the Otago–Foveaux Strait area, with fur seal being the most common species found (S2:249). Citing Smith, Dr Bathgate argued that the importance of seal meat in the diet in the East Otago area rose from 27 percent in the fourteenth century to 45 percent in the sixteenth century and then fell to only 11 percent in the eighteenth century (S2:258). While this overall decline was matched elsewhere in Otago, seal continued to have an important place in the Foveaux Strait diet until into the nineteenth century.³⁰

Conclusions on archaeological evidence

3.5.13 There are a number of conclusions that can be made from the archaeological evidence presented to us:

(a) *Specialisation.* The traditional Maori fisheries show a high level of specialisation, in that specific species, such as barracouta, red cod, ling and hapuka, were individually targeted and caught to ensure the largest return for the least effort.

(b) *Species.* Heavily targeted species such as barracouta, tarakihi, red cod, blue cod, and wrasses and ling were caught in large numbers. Other species known to have been caught include hapuka, flounder, sea perch, trumpeter, black cod, butterfish, gurnard, snapper, southern kingfish, leatherjacket, marblefish, sole and blue moki (H3: table 3). However many of these fish are found only rarely in the archeological record. The list of species found in the archaeological record should not be regarded as exhaustive. As is further discussed in this report, a wide range of other species are either known to have been taken or are very likely to have been taken. These species include dogfish, sharks, hoki, frostfish and flounder. For biological reasons the bone, cartilage or skin may not have survived. Social practices particular to different species may have prevented their remains from finding their way into middens.

(c) *Distance from shore.* Little can be said from this evidence about the distance from shore the fish were taken. The level of specialisation evident in the midden remains is indicative of a canoe based sea fishery. However the distance from the shore required to take the species concerned is difficult to determine. Changes in the distribution of many of these species due to the development of the modern fishing industry and recreational fishing now mean that many of the fish once obtained close to shore and in harbours are no longer so easily caught. At the same time, while these species could have been caught close to shore, many species have a seasonal range that also takes them well out to sea and to considerable depths.

(d) *Variation over time.* There is little evidence of change over time in the South Island's marine resource. The changes elsewhere which led to declining availability of seals and high value species do not appear to have occurred here.

(e) *Regional variation.* The evidence does suggest that different Ngai Tahu hapu or communities took different species depending on the nature of the seas adjoining them and the species available. The east coast fishery had a different potential than the Foveaux Strait and Fiordland fishery. It would seem that Maori fishers were able to exploit canoe fishing to a greater extent on the east coast than on the West Coast or in Foveaux Strait.

This evidence adds considerably to our understanding of the way in which Ngai Tahu and their predecessors in Te Waipounamu related to their marine environment. We now look at some of the other evidence

presented which provides another perspective on the regional nature of the Ngai Tahu fishery.

3.6 Ngai Tahu Fishing at 1840: Written Accounts

Considerable historical evidence was presented by Professor Anderson, Dr Bathgate and Dr Habib which also provides an indication of the way Ngai Tahu were using their fishery about the time of the Treaty and before. The earliest written evidence comes from Cook's voyages. We have already noted how the first experience by Ngai Tahu of European explorers occurred some distance off the Kaikoura coast. Banks recorded fish being preserved in Ngai Tahu territory in March 1770. In 1773 Cook traded nails for fish in Dusky Sound and was able to observe nets and lines used for fishing (T4:iii).

Barracouta fishing

- 3.6.1 At the same time he prepared the account of hapuka fishing which we have already noted, H K Taiaroa recorded the methods of catching barracouta. He described the way the fish were driven into a feeding frenzy, and caught with a wood and bone lure:

Barracouta-fishing commenced in the seventh month – about November – and continued until April, when it ceased. The principal thing in connection with this fish is that it is not fished with hooks in the ordinary manner, but is taken by means of a *pa*. This *pa* consisted of a piece of beech wood, in the end of which a bird-bone, or some other strong and suitable bone, was inserted; the length was 6 in., the width 1½ in. One end of a cord was fastened to this, and this cord was also secured to a carefully fashioned rod, one end of which was curved so as to be suitable for forcing to and fro in the water. Such was the form of lure used in taking that fish. When fishermen went out in their canoes to take barracouta with this implement, on seeing a school of fish this implement was thrust into the water and dashed violently to and fro. This method is known as *kaihau*, or *kaihau manga*. A canoe would stay with the school until many fish had been taken by this kaihau method. (S3(35):3)

Early European accounts of the South Island abound with descriptions of Ngai Tahu fishing for barracouta.³¹ A later account shows how the technology had developed slightly from European contact:

The Maoris have quite an original way of catching barracouta. They prepare a piece of "rimu" (red pine) about three inches long, by an inch broad, and a quarter of an inch thick. Through one end of this they drive an inch nail bent upwards, and filed to a sharp point. The other end is fastened to about a fathom of stout fishing line, which is in turn secured to the end of a five-foot pole. Seated in a boat with sail set, they slip along until a school of barracouta is happened upon. Then the peak of the sail is dropped, so as to deaden the boat's way, while the fishermen ply their poles with a sidelong sweep that threshes the bit of shinning red through the water, making it irresistibly attractive to a struggling horde of ravenous fish. One by one, as swiftly as the rod can be wielded, the lithe forms drop off the barbless hook into the boat, till the vigorous arm can

no longer respond to the will of the fisherman, or the vessel will hold no more. (S2:150)³²

Other fishing

- 3.6.2 Dr Bathgate pointed out that European accounts, though prolific on barracouta, are less helpful in describing Ngai Tahu use of other resources. Barracouta fishing was a notable activity, a major collective fishing expedition and one likely to attract European attention. While H K Taiaroa's account of hapuka fishing supports evidence of the use of fishing marks, Dr Bathgate noted the absence of hapuka in the accounts of Ngai Tahu life collected by Herries Beattie.³³ One of Beattie's main informants, Teone Tikao, for instance, is recorded as describing fishing for a wide variety of different fishes, but hapuka was not among them (S2:154).³⁴

3.7 **Regional Profiles**

Professor Anderson and Dr Bathgate both summarised historical evidence about fishing along regional lines.

Kaikoura

- 3.7.1 There are few descriptions of the Kaikoura area around the 1840s. Following the sacking of Omihi by Te Rauparaha and his allies, the area was largely deserted. Shore whaling commenced in 1843 and in 1854 a painting of Mikounui shows whata (fish drying racks) and small craft (H1:40).

W J Elvy's 1949 account is the most commonly referred to European source.³⁵ It described ancient disputes over fishing grounds at sea from the period of Ngati Mamoe – Ngai Tahu conflict several centuries ago. It was Elvy who described why Ngai Tahu had retained the Maungamaunu reserve, which to James Mackay's eyes was a barren and worthless strip along the coast. For Ngati Kuri the land at Maungamaunu was ideal for its access to a wide range of kai moana (S2:162–163).

Banks Peninsula

- 3.7.2 French whalers noted fish drying on whata along with other foodstuffs at Whangaraupo about 1840 (H1:34). In his discussion with Herries Beattie, Teone Tikao made what Dr Bathgate describes as a "comprehensive account of the nature of Maori fishing activity in this area" (S2:163).³⁶ Tikao portrayed trolling for barracouta; hook fishing for kahawai with paua shell lures; taking big sharks, ururoa, kaupane and taniwha with large baited hooks; and catching conger eel at sea with a bob made of dressed flax around a bait called a whakapuku. He described catching koura in basket pots and in open-mouthed net bags called poraka, as well as netting for patiki. White bait were taken in a very close weave net, a koko. Small sharks, such as karaerae, tutahunga and huarau were caught in large nets. Tikao considered these large nets to be a Ngai Tahu introduction to the fishery of Te Waipounamu. While Tikao's evidence points to fishing largely being carried out close inshore and in harbours and estuaries, H C Jacobson recorded Maori fishing a hapuka ground some two to three miles from shore (S2:164–5).³⁷ James Hay described

Maori dependence on fishing on Banks Peninsula in his reminiscences published in 1915. Hay noted both the quantities involved and the dependence on trade:

At Pigeon Bay they used to catch large numbers of fish which they suspended in the sun to dry. Shark was one of their favourites. It was customary in the “forties” [1840s] for the pigeon bay and Port Levy Maoris to carry tons of these dried fish inland, meeting halfway the natives from Little River laden with eels. On the summit both parties held a korero, and, after exchanging returned respectively to their homes. (H1:37)³⁸

In the 1950s W A Taylor recalled Akaroa Maori catching 350 barracouta on 19 March 1884 and 1000 individual barracouta in that week (S2:165).³⁹ In a book on Waihora, Taylor described Ngati Moki taking one hundred weight of patiki from the lake in each haul from their flax nets (S2:166).⁴⁰

Otakou

3.7.3 One of the first European reports of the Otakou harbour involved the trade of a ship’s boats for fish and potatoes in 1813 (H1:18). Dr Bathgate acknowledged the significance of the Otakou fishery to Ngai Tahu. He suggested that sharks were not caught here, in contrast to the situation in Banks Peninsula, attributing this to what he understood to have been an absence of these fish prior to European inhabitation.

Early European accounts support the archaeological view of the major significance of barracouta in this area. William Haberfield, who was in Otakou in the 1830s, recalled:

They used to be great hands at fishing. I have seen a dozen and sometimes as many as twenty canoes go out of a morning fishing for barracouta; and they would take their double canoes outside the Heads without fear of being blown off. Sometimes, too, they used to go in [whale] boats when they could get them. (S2:168)⁴¹

At this time too, whaleboats were beginning to replace canoes and by 1852, when the Reverend James Stack visited the region, they had become commonplace. Stack noted that the fishing was taking place “at certain times of the tide just outside the bar” (S2:169).⁴²

The fish were also plentiful and easy to catch not far from shore. Jacquinot, who visited the harbour with Durville in 1840, recorded that:

The beaches of the neighbourhood offer all the conditions required for seine-net fishing and fish is so plentiful that the net nearly always comes in full. The first time we used this method here, we caught such a lot that we had to throw several hundred-weight back into the sea. (S2:170)⁴³

Dr Bathgate also notes that H K Taiaroa stressed that the harbour itself had not been sold to Wakefield and the New Zealand Company at the time of the Otakou purchase in 1844, saying that the “Otakou sea River” was “not ceded to Wakefield, nor said to have been thus ceded” (S2:171).⁴⁴ From this Dr Bathgate concluded that:

the *Otago Harbour* itself and other estuaries were the important fishing areas for a wide variety of kai moana, and the Ngai Tahu

fishing interests were being registered in emphasising these areas had not been sold. (S2:171 emphasis in original)

Foveaux Strait

- 3.7.4 According to John Boulton nails were replacing bone points on barracouta lures by the mid 1820s.⁴⁵ In 1810 Mr Murray, leader of a sealing gang operating in Foveaux Strait, noted the dependence on fish of Maori in this area (S2:172).⁴⁶ Dr Bathgate also cited the traditional account of Tu-Wiri Roa's chase of Tuki-Auau to Masons Bay on Rakiura, where there is reference to the killing of a party fishing for hapuka from canoes near the shore (S2:173).⁴⁷ The Reverend Wohlers, who lived at Ruapuke from the 1840s, noted the taking of hapuka and cod, and commented that hapuka caught near the shore were about two to three pounds but those taken further from shore could be 50 pounds (S2:173).⁴⁸ Wohlers also noted that fishing was often restricted by the weather in "this windy district" keeping people onshore for a week or more (S2:173).⁴⁹ While citing de Blossville's statement of 1826 that nets of one to two miles in length were used in the Foveaux Strait area, Dr Bathgate, like Professor Anderson (H1:9), is dismissive of this (S2:174). There are no other accounts of nets of this scale being used. James Cook saw nets in Dusky Sound, but these were small and likely to have been used from canoes (S2:175).⁵⁰ While it is accepted that such nets were used in the North Island, Dr Bathgate concludes, as did Professor Anderson, that the lack of population in the South would have made it impossible to bring together sufficient numbers to manage the large nets of many hundred of metres in length found elsewhere.

The West Coast

- 3.7.5 Dr Bathgate quotes Helen Leach on the historical sources describing Maori food gathering on the West Coast in the nineteenth century.⁵¹ While the river mouths and salt water estuaries were identified as having rich supplies of flat fish, the open beaches were largely barren, although between Greymouth and Westport rocky reefs allowed some protection for shellfish. The marine species available differed from those on the east coast. Barracouta was less plentiful, but John Dory and snapper more common. However Leach concluded that large seas and difficult bars restricted the Ngai Tahu fishers to the shore and made fishing a distinctly summer activity. The reports of Charles Heaphy and Thomas Brunner, who ventured onto the coast in the 1840s, support this view. Heaphy wrote of Poutini Ngai Tahu at Mawhera in 1846:

They fish in the shallow parts of the Teramakau and Mawhera rivers in the summer, catching eels, soles, and whitebait, the first of which they preserve . . . There are no canoes large enough to proceed to sea, and the only salt-water fish they obtain are sharks, from the Potikohua. (S3(42))⁵²

Heaphy concluded that sea fishing was impossible on account of the surf (S3(42)). At Hokitika, Brunner was shown a canoe once used for hapuka fishing in fine weather, but learnt that this was no longer possible because of deterioration in the condition of the bar (S3(42)).⁵³ From all of this Helen Leach concluded that while kai moana did provide an important food resource for West Coast Maori, it was much more tied to the shore

and to river mouths, with the notable exception of dogfish which were taken from a reef at the mouth of the Potikohua (Fox) river. Shellfish resources were limited in the southern part of the coast.⁵⁴ Information collected by Roberts and published by H D Skinner also supports the general picture of a largely coast bound and fresh water fishery (S3(43)).⁵⁵

Dr Anderson summed up the situation for the West Coast as he saw it:

Marine resources, with the exceptions of rocky shore shellfish, were very difficult to obtain. Some rocky shore fish were caught in baited nets and flatfish were speared or netted in the lagoons, but open sea species such as groper, ling and dogfish were rarely able to be sought and seem to have been regarded as somewhat of a delicacy. The dogfish caught near Potikohua Cave, for example, were dried and then [taken] 80km to the south for consumption at the Mawhera (Grey River mouth) village. Fish remains are poorly represented in the West Coast archaeological sites and fishing gear seems to have been dominated by trolling devices which could have been used in sheltered estuaries to take kahawai. (S3:(32):6)⁵⁶

So few West Coast archaeological sites have been fully studied that final conclusions on the extent of fishing may well not be possible. Ray Hooker, a Department of Conservation archaeologist, suggested that sites in southern Westland do show evidence of more significant Maori economic activity than previously assumed (H8:1–7).⁵⁷ These excavations have yet to be completely analysed. Nonetheless Hooker argued that the Tai Poutini coast could be divided into a number of different sectors for the sake of examining fishing activity. In the Heaphy–Karamea region, settlements were clustered around lagoons and river mouths, partially dependent on shellfish and fish (H8:3). In the Barrytown–Awatiri area there is considerable evidence of Maori settlement, with evidence of fishing for ling, barracouta, horse mackerel, warehou and tarakihi as well as shellfish (H8:4). The third area, the Mawhera–Hokitika area, shows much less marine activity, with settlement sites mainly inland (H8:4). There is evidence of shellfish being taken from sites at Okarito, and sea fishing further south at Karangaru–Paringa. Here also were taken barracouta, red cod, tarakihi and wrasses. Finally in the Haast–Piopiotahi area there is new evidence of Maori habitation. A wide variety of shellfish were taken along with tarakihi, red and blue cod, barracouta and wrasses (H8:5–6).

While in conclusion the extent of Maori fishing on Te Tai Poutini must have been limited, in pockets where conditions were favourable, beside lagoons and river mouths, and where there were reefs, sea fishing did undoubtedly take place.

Preservation of fish

- 3.7.6 The preservation of fish was an essential part of the Ngai Tahu economy throughout their rohe. Most Europeans commented on the Ngai Tahu use of preserved eels. As for sea fish, Dr Bathgate identifies three major reasons for their use. First the great quantity of fish which could be caught in season allowed Ngai Tahu to take much more than required for immediate consumption when the fish were running. The accounts of

huge quantities of fish taken make it very clear that there was a surplus. Secondly, many fish were only easily available at specific times of the year, and in some areas weather conditions severely limited the possibilities for winter fishing. Thirdly, Dr Bathgate considers that preserved fish were ideally suited for trading. Dr Bathgate provides several accounts of preservation techniques which make it clear that highly specialised practices were used for different species, in processing these fish for drying or for storing in fat (S2:185–190).

The social and commercial use of fish

- 3.7.7 Fish were used for dog feed according to Paora Taki of Rapaki, with better fed dogs producing better pelts for mats and providing good meat (S2:190).⁵⁸ Trade in preserved fish was an essential part of iwi economic and social life. According to Dr Bathgate “the gift and trade of preserved surplus fish helped some communities fulfil social obligations, thereby contributing to the social integration and cohesiveness of the Ngai Tahu tribe as a whole” (S2:191). Different communities exploited different resources, or had varying access to the same resources. J W Stack provides an account of just how sophisticated the trade could have been, as different communities transported large amounts of foodstuffs across great distances to their relatives. Stack describes convoys of porters travelling with large heavy loads from north to south and back again, establishing depots along the way (S2:193).⁵⁹ One European recollected long lines of people extending over a mile or two carrying goods between Waikouaiti and Moeraki (S2:193).⁶⁰ Dr Bathgate submitted that these land-based treks were gradually replaced as whaleboats became more common (S2:194).

Kaihaukai, the exchange of foods, of which fish played an important part, was described by Teone Tikao to Beattie:

The people would send word of a proposed kaihaukai some weeks beforehand. The people from Kaiapoi might go to Rapaki carrying tuna (eel), kiore (rat), kauru (cabbage tree), kuri (dog), aruhe (fernroot), kumera [sic] (sweet potato) and so on, while the home people would prepare pipi or kuku (shellfish), shark, maraki (dried fish), and other sea products as a return gift. The food was not eaten at the time but was exchanged, and some of the Rapaki people would assist the Kaiapoians to carry the Kaiapoi share to that place to feast on. The stuff taken to Rapaki would be stored there until the carriers returned, and then would be enjoyed by all. In two or three years time Rapaki would carry food to a kaihaukai at Kaiapoi and bring back inland food in exchange. It was an act of courtesy to enable people to vary their foods a bit. (S2:195)⁶¹

Those with an abundance of seafood exchanged their kai moana with others better endowed with agricultural products or with inland mahinga kai. Since pre-European agriculture was largely limited to the north of Taumutu, northerners swapped the produce of their gardens for the fish, shellfish and titi of the south.

Stack describes how Turakautahi, who chose the site for Kaiapoi, did so not because of the abundance of food nearby but because of its potential as a source for trade, the incoming “potted birds from the forests of

Kaikoura in the north, fish and muttonbirds from the sea coasts of the south, kiore and weka and kauru from the plains and mountains of the west” (S3:(44)).⁶² The ability of communities to participate in these exchanges was an important element of the mana of the hapu concerned. The provision of a surplus was a social as well as an economic imperative, allowing hapu to maintain and enhance their status with other parts of Ngai Tahu whanui.

The technology used to prepare and transport preserved foodstuffs was an essential part of Ngai Tahu social life. Not only did it ensure that food was available during times of shortage, but it provided commodities that could be traded, hapu to hapu, or by Ngai Tahu with other iwi further afield. Rakihihia Tau described, for example, how the rimurapu, a bag made from kelp, was used for preserved fish as well as for titi (J10:8). Trade and barter were essential to Ngai Tahu culture (J10:7).

Fish trade with Europeans

- 3.7.8 Maori at Queen Charlotte Sound sold fish to Cook in 1770 on their own initiative (T4(a)(ii)). Until 1840 Ngai Tahu traded portions of their surplus fish, some of which found their way across the Tasman (H1:23). Octavius Harwood, the Otago storekeeper, purchased a boatload of fish from Maori in 1839 and T A Pybus records 22 barrels of salt fish being consigned to the Sydney market some time in the 1830s.⁶³ Dr Bathgate could find no evidence that prior to 1840 Ngai Tahu increased their fishing activity to accommodate trading opportunities. However, after 1840 as European settlements took hold of the shoreline of the island, Ngai Tahu extended their fishery and caught fish specifically for trade with Europeans. The settlements of Dunedin and Christchurch offered good markets for Ngai Tahu catching their traditionally favoured species, with the added advantage of newly acquired whaleboats (S2:194).

Seeding of shellfish beds

- 3.7.9 According to Rakihihia Tau, Ngai Tahu also used rimurapu to transport live shellfish from one location to another and so seed new beds either with new varieties or to assist the build up of existing depleted stocks. This practice, he maintained, is continued to the present day, although more modern containers are used. He stated that toheroa were being seeded along Karorokaroro (South Brighton) beach, with stocks from Kahurangi Point and Waikawa (J10:9).

Mr Tau maintained that the location of different species of shellfish in varying parts of Te Waipounamu was largely due to artificial planting by Maori:

Sea food did not just appear around our coast line waterways and lakes. In most instances, these foods were planted there by our ancestors and by the living of today. (J10:9)

He continued by giving the example of tuatua in Pegasus Bay, and cockles in the Ihutau Estuary, which he maintained are of the same stock as those at Otepoti and Kaikoura.

3.8 **The Habib Report**

Dr George Habib was commissioned to attend hearings, comment on the reliability of the evidence being presented, point out any deficiencies in that evidence, provide any alternative interpretations where necessary and to provide overview summaries of the evidence presented to the tribunal. Dr Habib was present during the presentation of evidence by the claimants, the Crown and the NZFIA and the NZFIB. He filed four extensive reports with the tribunal. The first (T4(a)) provided a detailed and comprehensive summary of the claimants' evidence, supplemented by Dr Habib's own research in the South Island. This first report runs to over 360 pages. This was followed by a short report on the mahinga kai lists prepared in the 1880s (T4(b)). The third volume is an overview and analysis of the Crown's evidence (T4(c)) and was followed by a review of the evidence on sealing and whaling presented by the Crown and the fishing industry (T4(d)).

Dr Habib's first report presents a very broad statement about the nature of the Ngai Tahu relationship with its marine environment from the perspective of a fisheries biologist. In common with Professor Anderson and Dr Bathgate, Dr Habib relied on a wide variety of evidence from historical reports, archaeological conclusions, and his professional understanding of the habits and habitat of a wide variety of fish and other marine species. Dr Habib was concerned that too narrow a focus on archaeological evidence, or on any specific documentary evidence, would fail to provide a detailed and comprehensive view of the way Ngai Tahu interacted with the complex and considerable range of resources provided by their fresh water and sea fisheries.

The bulk of Dr Habib's first report was divided between a survey of the Ngai Tahu traditional fisheries and an examination of the commercial fisheries. The sections on fisheries were divided into four subsections, (a) inland fisheries, (b) marine fisheries, (c) shellfish fisheries and (d) other fisheries.

The section on inland fisheries reviewed the location, species and fishing methods used and then examined a number of specific fisheries. These included eel fisheries, whitebait fisheries, smelt fisheries and lamprey fisheries.

Marine fisheries were also discussed in terms of their location, species and the fishing methods used by Ngai Tahu and other Maori to exploit these resources. Dr Habib also reviewed the wide range of nets, hooks and lures available to Ngai Tahu fishers despite the lack of large seine nets found in parts of the North Island.

Cartilaginous fish species

- 3.8.1 In a section on cartilaginous fisheries Dr Habib concluded that Ngai Tahu caught a wide range of such fish including sharks, dogfish, skates, rays, elephant fish and rig. Sharks included the tiger shark, white pointer (tupa), blue shark, mako shark, ururoa (large open sea shark), karaerae,

tatuna, kaupane, and tarere, the grey shark, the seven gilled shark (tuatini), carpet shark (mako pekapeka) and thresher shark (mango ripi) and the mud shark (pioke).

Dr Habib concluded that:

evidence presented to the tribunal by the Ngaitahu Maori indicated that in traditional times, their ancestors (tupuna) made extensive use of their cartilaginous fisheries. Most of the species were close at hand and readily caught. The fish were eaten in fresh form, or stored for later use. The larger species provided significant quantities of protein, but they also represented an energy cost in that a considerable amount of energy was required to secure the catch. (T4(a):80–81)

Bony fish fisheries

- 3.8.2 The New Zealand seas are described as containing some 900 of the world's 12,000 bony fish (Teleostei) species. Of these only 150–200 are commonly caught or seen (T4(a):81). The species common to the Ngai Tahu area are largely from the cool/temperate and sub-Antarctic regions, rather than from the warmer/temperate or tropical zone. Dr Habib further divided these into (a) inshore rocky reef dwellers inhabiting tidal pools, the sub-tidal zone to depths of 25 metres and the zone in depths of 25–200 metres, (b) inshore demersal fish living on the sea floor, (c) inshore mid to surface water dwellers – pelagic fish, (d) offshore continental slope demersal fish in the upper zone in depths of 200–800 metres and (e) offshore mid to surface water dwellers – pelagic fish (T4(a):82).

The inshore rocky reef dwellers consist of a large number of species. These include butterfish, parore, marbledfish, spotty, wrasses, red moki, snapper, scorpion fish, rock cod, parrotfish, pigfish, perches and cod. These fish were readily taken by line and net. Snapper, less frequently found in these waters other than on the West Coast, must have been comparatively rarely taken in the south. In deeper water from depths of about 25 metres out to the end of the continental shelf, other species were available and taken by Ngai Tahu fishers. On deeper reefs, but still inshore, are found leather jackets, goatfish, red moki, john dory, large snapper, hapuka, bluenose, bass and warehou, marine eels, roughies, big eyes, perches and groupers (T4(a):84). Even hoki, now caught largely when spawning in deep water, were caught here, often, as suggested by Syd Cormack, while Ngai Tahu were fishing for the hapuka who fed on the hoki (T4(a):125).

Dr Habib argued that inshore demersal fishes were also commonly exploited by Ngai Tahu, including tarakihi, red gurnard, flounder, red cod, warehou and to a very limited extent snapper. The gear used to catch red gurnard would also have taken spotted and scaly gurnards from time to time. Ngai Tahu certainly took four species of flounder, as well as brill (horoti), turbot (horo), lemon sole (patiki) and common sole (patiki rori and horihori). Flounder fisheries were found in harbours, estuaries, lagoons, river mouths, or in rivers and lakes. They were speared, netted and even caught by hand. Red cod was another fish actively pursued by

Ngai Tahu and known by the name hoka. This is a schooling fish, most common at depths of 100 to 300 metres but it can be found from the shoreline down to 700 metres. Hoka migrate offshore during winter to spawn and then return inshore for the rest of the year to feed. Stargazers, moki and monkfish make up some of the other species Dr Habib said were taken by traditional Ngai Tahu fishers (T4(a):90–101).

Inshore pelagic fish spend much of their time swimming in mid water or near the surface. Some species – maomao and butterfly perch – stay close to their home reefs. Others move around more but still range within a limited area of coastal sea. These include kingfish, blue mackerel, kahawai, trevally, koheru, jack mackerel, pilchards, sprats, anchovies and possibly also barracouta (T4(a):102). A few inshore pelagics – grey mullet, yellow-eyed mullet and garfish – are limited to sheltered bays, harbours and estuaries.

The significance of barracouta to the tribe has already been discussed in some detail. The species occurs over a wide depth and in a wide range of habitats and varies in size from 60 to 90 centimetres. Another similar fish, kahawai, although more common in the north, also ventures south depending on summer water temperatures. Dr Habib was critical of Professor Anderson's dismissal of this fish's importance to Ngai Tahu. However, it can be noted that Professor Anderson's archaeological samples were skewed towards southern sites, where kahawai were more rarely seen. Their usual domain was Kaikoura and down the West Coast (T4(a):109). Trevally, jack mackerel, pilchards (mohimohi), sprats (kupae) and anchovies, yellow mullet (aua or awa or kawae-awa or ana) were also taken, to name a few of those discussed by Dr Habib (T4(a):110–115).

In the upper pelagic zone or epipelagic zone, from the surface down to about 150 metres, live the flying fishes, sauries and small tunas. Dr Habib described these as being:

preyed on by larger species like dolphinfish and the bigger tunas, which are themselves preyed on by the large marlins, swordfish and pelagic, oceanic sharks (mako, blue). All these species are fast, powerful swimmers which undertake extensive annual migrations as part of their normal life. (T4(a):115)

Below these are wide varieties of strange fish with equally strange names – snaggletooths, viperfish – in the mesopelagic habitat down to 1000 metres. Still further down are the bathypelagic fishes, living in total darkness and under enormous pressure. Mesopelagic and bathypelagic fish were not mentioned in the Ngai Tahu evidence and the upper pelagic species were rarely mentioned. Dr Habib considered that Ngai Tahu had little reason to seek these highly mobile fish (T4(a):115).

Offshore demersal fish live beyond the boundaries of the New Zealand continental shelf on the continental slope which lies between 200 and 800 metres. This slope occurs from 10 to 100 kilometres off shore. It is a rich area where inshore and offshore currents converge. Dr Habib

identified common species here as hoki, hake, many species of rattails and morid cods, ling, gemfish, bluenose, silver and white warehou, frostfish and in sub-Antarctic waters southern blue whiting. In addition he identified roughies (orange and silver), the true dories (lookdown, mirror and silver), the oreo dories (block, smooth spiky), and sea perch. These are now key species in New Zealand's commercial fisheries, comprising 76 percent of all finfish within the Quota Management System. It was Dr Habib's view that Ngai Tahu knew of few of these species until the 1970s (T4(a):118–127).

There were however, some notable exceptions, because some of these fish are found at various times of the year close to the shore and at much lesser depths. Frostfish, which is found in waters down to 500 metres or more, beaches itself on the shore during cold winter nights. Ling, which can be found down to 700 metres, was a popular fish for traditional fishers, and as we have seen its bones were often found in middens. Hoki were often taken in conjunction with hapuka. Dr Habib discussed his conversation on this with Syd Cormack, a noted Ngai Tahu fisherman:

In the early years of this century, Mr Cormack used to fish in the Kaikoura area. At certain times of the year, he and others would go hapuku fishing. The grounds were in deep water not far off the Kaikoura coast. A common by-catch in certain places were hoki, which were taken on baited hook, put down on the fishing grounds to catch hapuku. At such times, the hoki were removed from the hooks, cut up and used to bait the hooks for the capture of hapuku. (T4(a):125)

It was also considered that hoki must have been taken by fishers on the West Coast. Of other species such as orange roughies, Dr Habib was convinced that these were not known by Ngai Tahu.

In conclusion, Dr Habib considered that the importance of marine fisheries to Ngai Tahu could not be emphasised enough.

Shellfish fisheries

3.8.3 Shellfish provided a significant part of the Ngai Tahu diet. Paua was described by Larry Paul as:

Exploited since earliest times, both for flesh and the colourful shell. It was a regular food for coastal Maoris, and the shell was widely used for decorative inlay work in carvings and in fish hooks and spinners. (T4(a):134)

This shellfish was commonly mentioned by Ngai Tahu as an essential resource, from Kaikoura to Rakiura.

Mussels were similarly taken in large quantities. Dr Habib understood Ngai Tahu to have known about most New Zealand species of mussel with the exception of those with a northern distribution or those found only in deep water (T4(a):137). All these species have slightly different texture and taste and as Dr Habib commented:

old time Maori were aware of, and attracted to, those variable qualities. Indeed they sought out that variation and took great joy in finding it. (T4(a):137)

Dr Habib surveyed the claimants' frequent mention of mussels in their evidence; from Trevor Howse of Kaikoura, to Edward Ellison of Otakou and over to the West Coast.

Rock lobster, or koura, was clearly an important resource and the food has lent its name to an area where the crayfish was abundant, Kaikoura. Kaikoura is a condensation of the fuller "Te ahi kai koura a Tama-ki-te-raki". Marine crays were taken by diving and by pots, taruke koura. Milford Whaitiri of Ruapuke provided a description about how these pots were made:

cray pots were constructed from hoops of supplejack vine, weighted with stones, and let down to the sea bottom on flax rope. After the arrival of the Europeans, sealed discarded food tins were used as floats. (T4(a):141)

Remains have been found in middens, and crayfish harvesting is discussed in Herries Beattie's account of nineteenth century Ngai Tahu life. In Beattie's view, traditionally made flax traps were superior to European models. Many Ngai Tahu witnesses described their continuing concern about access to koura. These included Trevor Howse at Kaikoura, Gordon McLaren for Arahura, Rewi Brown for Waihora, Kelly Davis and Harold Ashwell for Arowhenua, Paddy Gilroy for the Titi Islands and Huhana Morgan for Bluff (T4(a):142-143).

Kina inhabits shallow waters and rock pools around the Ngai Tahu coast line, as it does elsewhere throughout the country. Kina, in Dr Habib's view, was as popular in ancient times as it is today (T4(a):147).

Rock oysters were prized according to Herries Beattie, although there is a dearth of other evidence on this shellfish, and the species is not commonly found in the south. Dr Habib considered that the distribution of these oysters may have changed dramatically (T4(a):148).

Bluff oysters, tio pati, also received little attention in the claimants' evidence as a traditional food (T4(a):147-8). Intertidal populations once existed but these were soon fished out with the development of an oyster fishery in the 1860s. Oysters were the first marine resource to be controlled by legislation of the New Zealand Parliament. Since that time Bluff oysters have been taken only by dredging in 25 to 50 metres of water. The traditional access of Ngai Tahu to such delicacies in the intertidal zone has long since disappeared (T4(a):148-149).

While scallops have become a major commercial fishery today, and the shellfish is known to Ngai Tahu as kopa, tupa or tipa, it was little mentioned in the claimants' evidence. There is some traditional evidence of the use of scallops – the name Te Rae-o-Tupa is a place name at Otakou heads. However Dr Habib concludes that:

the most one can say is that there appears to have been some limited interaction between scallops and the Ngaitahu people, in limited areas in Ngaitahu land in traditional times. (T4(a):152)

Dr Habib's section on clams covers the bi-valves, more commonly known in New Zealand by their individual Maori and English names. These

include cockles, pipi, tuatua and toheroa. All these shellfish in general terms were commonly known and used by Ngai Tahu. The simple common names overlay a much more complex interaction of a large number of different species. Dr Habib makes the point that there are at least 23 species of venus clams, all of which could be categorised as cockles. Cockles were noted in the 1820s as one of the major foods of Ngai Tahu in Foveaux Strait (H1:10). The Otakou cockle beds were renowned. In lamenting the depletion of these beds in recent years, Edward Ellison echoed a concern of claimants throughout the island (H53:1). The Otakou cockle beds were divided into wakawaka marked out by stakes, according to Otakou kaumatua Boyd Russell. Pipi were also a traditional food, and like cockles, were collected for hui and tangihanga. Tuatua, while receiving little attention in the claimants' evidence, was in Dr Habib's view, still commonly eaten by Ngai Tahu (T4(a):158–160). The largest of the New Zealand clams, the toheroa, was also found and relished by Ngai Tahu on southern beaches, until over-exploitation placed it out of reach. So valued was this resource that Maori attempted to transplant the shellfish. Other shellfish exploited by Ngai Tahu included limpets, shield shells (rori), pupu (winkles) and crabs (T4(a):165–168).

Cephalopod fisheries

- 3.8.4 Cuttlefish, squid, octopods and argonauts make up the cephalopods, the most active and most specialised of the living molluscs. The arrow squid is the best known in New Zealand, and is distributed in water between 5 and 500 metres deep. Squid are quick growing and short lived, reaching maturity in about twelve months and with a life span thought to be between a year and eighteen months. Today they are part of an extensive commercial fishery. There was little evidence of the taking of squid in traditional times from the claimants, and Dr Habib concluded that Ngai Tahu may have had little use for squid, although he thought that knowledge of this fish and its taking may have been lost to present generations. Octopus, on the other hand, was eaten and there are historical records of this, despite there also being only occasional evidence of this in the claimants' evidence. Tradition has it that octopus was a special food, only eaten by an ariki in the eldest line of descent (T4(a):172).

In a section on other fisheries, Dr Habib drew attention to the taking of other marine resources including starfishes, sea anemones and seaweeds, as well as a brief section on sea mammals. There were few references to starfishes and sea anemones in the claimants' evidence; seaweed (rimu, rimurimu, rimurapa) on the other hand received a good deal of attention. Rimu or rimurimu was commonly used for a number of purposes. Rimurapa is the large brown bull kelp used to make containers for the storage of titi, fish and other foods. Rakiihia Tau referred to the rimurapa as "the traditional equivalent of the modern-day refrigerator" noting that not only was it used to store food, but was itself a tradeable commodity (J10:8–9). Karengo or parengo was an edible species, still popular today.

Dr Habib's final reference to the use of kelps expresses a feeling he had about much of the evidence he examined:

Much more could be said about the many and varied relationships which once existed between Maori people in different places in New Zealand and the wide range of seaweeds which were available to them. The seaweeds were, at once, sources of food and tools of utility. They held a position of great significance in certain places, particularly in the south. (T4(a):177)

- 3.8.5 While Dr Habib's reports were concerned with the particular nature of Ngai Tahu use of a very wide range of different species, his argument falls into two major themes. He argued that there was still a considerable danger that the Ngai Tahu traditional relationship with specific species would be underestimated due to the loss of traditional evidence and use to the tribe. He also argued that an emphasis on the biology of species and their habitats avoids the narrow focus provided by archaeological evidence and fills in much more of the picture of the traditional fishery. Given the technology available to Maori, including Ngai Tahu, and considering the southern marine environment, Dr Habib sought to identify which species Ngai Tahu would reasonably be expected to take. His evidence was complimented by that provided by MAFFish scientists.

MAFFish scientists' evidence on species taken before 1840

- 3.8.6 The tribunal requested MAFFish scientists to answer the following question:

Could the MAFFish scientists assist the Tribunal in the understanding of the nature and extent of Ngaitahu fishing rights by indicating whether, in their view, the various fish and shell fish species in the following list might or might not have been caught by Ngaitahu fishing people in traditional times, that is in pre-European times and up until 1840? (R31:1)

MAFFish scientists had provided a very extensive review of the biology, value and role in the modern fishery of a wide range of species – a substantial proportion of which were managed under the ITQ system. There was, however, little indication from this evidence as to whether Ngai Tahu would have known or taken these species prior to the development of the modern fishery.

The MAFFish scientists who had given species by species evidence provided individual answers to this question and these were presented in evidence as document S14. A rearranged table of the same evidence was filed in the High Court proceedings and with this tribunal as document Z47.

The scientists concluded that “traditional Maori would have caught the principal inshore species, both demersal and pelagic” and that even offshore species which have a depth tolerance of less than 200 metres would also have been caught by Maori (Z47:10–11). The only categories where Ngai Tahu ability to catch particular species was either limited or non-existent were deepwater species, with the exception of hoki, and oceanic species, such as the large tunas, bill fish and marlin. Most

deepwater species are adapted to survive at great pressure, and so could not be taken by traditional line or net (Z47:10–11).

The evidence also noted that despite the limitations of the linguistic evidence these conclusions were consistent with recorded Maori knowledge of fish species (Z47:12).

Archaeological and biological evidence

- 3.8.7 It would appear that there was some conflict between the archaeological evidence and the biological evidence. While the biologists argued that Maori fishers had the capacity to take all species of fish which were not exclusively deep water or oceanic, the archaeologists emphasised a selective and highly specialised fishery. The midden evidence suggests that less than ten species made up the vast majority of the Ngai Tahu catch, and that all the rest were, to use Professor Anderson's words, occasionally or rarely caught (H3:table 3). The problem of the varied durability of fish remains in middens accounts for some of this difference. Sharks, dogfish and crayfish were certainly taken, as the historical evidence shows, and these must be added to the list of species favoured by Ngai Tahu fishers. The debate over why eel remains are not evident in middens will undoubtedly continue, but we consider it extremely unlikely that Ngai Tahu, or any other Maori tribe, acquired their taste for tuna only recently. Cultural practices may also account for under representation of some other species. Estimates of the relative biomass of species, which were unavailable to us, may also have accounted for the relative unimportance in some of the biological evidence of hapuka. Nonetheless despite these qualifications, some discrepancy between the two kinds of evidence still remains.

What is clear from all the biological evidence is that despite the limitations of population and fishing technology, and a fishery which for the most part needed to operate only a few miles from the shore, Ngai Tahu were able to exploit a very wide range of species should they have chosen to do so. This wide range of species included those found some distance from the shore. What the scientific evidence cannot tell us, however, is whether particular communities of Ngai Tahu actively chose to take this wide range of species, regularly and in any abundance. In contrast, the archaeological evidence makes it clear that certain species were heavily targeted by southern Maori fishers over many centuries. For these species we can be certain that Ngai Tahu did take them, in substantial numbers and at regular intervals. For those species well within the Ngai Tahu fishing capability but failing to survive in the middens, the answer is only marginally less certain. Ngai Tahu took such fish as were available to them as and when they were required. Larger scale tribal fishing accounted for the high level of barracouta, and was also undertaken to take hapuka some distance from the shore. Shark fishing was also a group activity. These specialised fisheries reflect a selectivity born of many generations of interaction with the seas of Te Waipounamu.

3.9 **Sealers and Whalers: The Coming of the Pakeha**

3.9.1 From the end of the eighteenth century the fishery which Ngai Tahu had found in Te Waipounamu on their arrival and developed since that time underwent dramatic changes. A new era, unheralded and unforeseen, began in the 1790s when European sealers and whalers first appeared in Ngai Tahu waters. Early contact with the newcomers was fleeting, sporadic and occasionally marked by violence. During the next 40 years the rapacious growth of the sealing and whaling industries brought hundreds of Europeans. They came in dozens of Australian, American, European and English ships to work, trade and sometimes settle around the Ngai Tahu coasts. Contact which began as brief and intermittent became regular, sustained and more complex. While early encounters may have been memorable to the participants, they left no indelible mark on Ngai Tahu society nor disruption to the equilibrium of their way of life. Rapidly though, the growing presence of the Europeans prompted significant change, demonstrated by the large scale cultivation of potatoes, trade and the provisioning of ships, population increases and settlement relocation.

The sealers

3.9.2 Sealing activity, based on ships operating out of Sydney and Hobart, took off dramatically after 1800. Although sealers were normally reticent about the location of their camps, the evidence suggests that they quickly found and exploited rookeries over the entire South Island–Rakiura coastline (U2(a):14). By the early 1810s the mainland rookeries had been severely depleted and most skins were coming from Rakiura and the sub-Antarctic islands south of New Zealand (S6(a):4).

Ships deposited their gangs near known or likely rookery sites and camps were established. Some were merely temporary while others were set up for stays of several seasons. In some areas, particularly on Rakiura, Whenua Hou and in Murihiku, there were permanent settlements where about 100 sealers lived with their Maori wives and families. The shore parties, commonly numbering between six and eighteen men, roamed over large areas of the coast, sometimes for hundreds of miles, skinning the seals where they were killed. Skins were treated and preserved at camp sites awaiting the return voyage (U2(a):10–12).

The extent to which Ngai Tahu were involved in the European sealing industry is uncertain. Kevin Molloy for the fishing industry suggested that Ngai Tahu involvement was found “at almost all levels, provisioning of ships, crewing and directly in gangs” (U2(a):45). Certainly it is clear, he says, “that without Maori provisioning of ships and gangs, sealing may have been far more limited and costly than it was”. (U2(a):46)

3.9.3 Relationships between these manuhiri and Ngai Tahu ranged from the co-operative to the calamitous. James McAloon, giving evidence for the claimants, documented a series of encounters between Ngai Tahu and sealing parties from 1792 to the mid 1820s. He observed that on occasions where “ships . . . bothered to establish their credentials” relationships were cordial and mutually beneficial (J39:3). On other occasions,

where the Europeans “had given no gifts as a sign of good faith, refused to pay for what they had used, and had overstayed their welcome” the Ngai Tahu response was to attack, kill and eat – the normal penalty, Mr McAloon said, for hostile trespass (J39:5).

In his analysis of the relationships between Europeans and Ngai Tahu, Mr Molloy stated:

the contact period reveals three stages of social and cultural interaction between Maori and sealer. In the first period, up to 1810, relations were friendly, co-operative and mutually advantageous. The second period, from 1810 to the early twenties, marks a period of deterioration, cultural abuse by sealers... misunderstandings and conflict... and the transgressing of tribal prohibitions. This led to a swift Maori response that was answered in kind by the sealers... By the early to mid 1820s both Maori and European were endeavouring to talk, both to end indiscriminate killing and to ensure the furtherance of expanding trade relations. (U2(a):37–38)

The annual harvest of seal skins was huge – an estimated average of 70,000 to 80,000 per year between 1810 and 1820 – and was far in excess of sustainable limits (S6(a):5). By 1820 the seal population had been decimated and the industry was in decline. By the 1830s seal skins were mostly an off-season by-catch of the whaling operations, whose decade of greatest activity and prosperity had just begun.

The whalers

- 3.9.4 Substantial whaling grounds lay off Ngai Tahu tribal territory, extending down the length of the east coast, around the Chatham Islands, around Rakiura and Fiordland and further north, and west of Kawatiri (Westport). These whaling areas were part of a vast whale fishery encompassing grounds off South Africa, Australia, Japan, the west coasts of North and South America, and the Falkland Islands. The majority of ships arriving in New Zealand waters came from Australia, Britain and North America, with some also coming from France, Germany and Denmark. They migrated with their prey, following the seasonal routes of the sperm, humpback and right whales they sought. No precise estimate of the number of ships operating around New Zealand was given, but it is clear that the whaling presence was substantial. In 1836 there were 151 vessels in the Bay of Islands, carrying many hundreds of whalers (U2(b):5). The American fleet alone had 100 ships operating on the New Zealand coast in 1840, with more than 3000 crew aboard (U2(b):6).
- 3.9.5 For the economies of nineteenth-century Britain, Europe and North America, where industrialisation was gathering pace, the whale was a precious commodity. An extraordinary variety of goods was manufactured from whale products and whale oil played a vital role in the entire mechanisation of production (U2(b):6). Like the petroleum industry today, whaling was then an essential industry. Its importance can be measured by the very substantial size and level of activity of the whaling fleet operating in New Zealand waters.
- 3.9.6 Different types of whaling operation developed. Deep sea whaling, the earliest type, involved the catching and processing of whales well out at

sea with the ships coming to shore for refitting, reprovisioning and recruiting. Bay whaling developed after 1830 and targeted species which travelled closer to shore. Although bay whalers sometimes set up a base on shore the whales were processed at sea.

The type of operation on which much of the evidence for this report focused was shore station whaling. Sydney whalers initiated shore whaling in 1829 when a station was established at Preservation Inlet. Other stations followed; approximately 35 were set up in the early 1830s around Murihiku, Otakou and Banks Peninsula (S6(a):9). For a relatively brief period, from 1830 to 1845, shore station whaling was immensely prosperous. Its significance lay less, however, in the quantities of whales caught than in its impact on Ngai Tahu society. Shore whaling, according to Mr Molloy:

broke new ground in Maori-European relations, requiring a more permanent relationship with Maori, and a more formal understanding regarding the nature and rights of permanent location for the whaling 'villages' and the large number of men they employed. (U2(b):18)

We now consider the issue of whether the evidence on sealing and whaling helps disclose whether Ngai Tahu held exclusive property rights in fisheries prior to 1840, and whether some or all of these rights had been conveyed to Europeans.

Ngai Tahu proprietary rights in seal and whale fisheries

- 3.9.7 In essence the claimants said that Ngai Tahu clearly held property rights in the sea's resources, including seals and whales, and they referred to the history of the European sealers and whalers in support of their claim. The Crown and the fishing industry took the opposite view, submitting that the available evidence did not substantiate such a claim. Witnesses for the Crown and fishing industry stated that nothing in the evidence showed either that Ngai Tahu objected to, or required payment for, the use of those resources by Europeans.

Shortland's statements

- 3.9.8 Much of the parties' debate focused on two statements made by Edward Shortland in the 1840s concerning land claims brought by whalers and sealers before the Land Claims Commission in 1843. The commission, appointed to determine the validity of land purchases by Europeans prior to 1840, considered a number of claims relating to Ngai Tahu land apparently bought by whalers and sealers in the 1830s. In his *Report to the Chief Protector of Aborigines* (1844), Shortland recorded that:

individuals found it necessary to purchase exclusive rights of fishing along an extent of coast, and hence the vast tracts of land claimed in this island by Europeans.⁶⁴

In the second of his statements Shortland wrote:

It appeared, at the same time, from observations made by the natives, even when they shewed a desire to give evidence favourable to the claimants, that most of the monster claims had originated simply in the purchase of a right to occupy sufficient

ground ashore for the requirements of a whaling station, and to fish along a certain extent of coast, to the exclusion of all others, within a reasonable distance of the station.

The nature of their tenure was, in the first place, what the natives term “he noho noa iho”, which is about equivalent to what is called a “squatting license” in New South Wales; in fact, one expression is almost a translation of the other. When it seemed probable that New Zealand would, at no distant time, become a British Colony, there naturally arose a desire to substitute for this holding a more permanent claim; and, by the payment of property of comparatively trifling value, it was not very difficult to obtain the signatures of a few chiefs, who, in some instances, were at the time on a visit at Sydney, to deeds of the above nature described.

It was indeed affirmed by the natives, on several occasions, that the coast boundary, set forth by the claimant, only defined the extent of his right by sea; whereas he would have it to serve for the base line, which was to determine the extent of his property on shore. (S3(58):7)⁶⁵

The claimants' view

- 3.9.9 For the claimants, James McAloon endorsed Shortland's statements as an accurate record of the Ngai Tahu position: “Shortland quite clearly shows that Kai Tahu had and exercised the right to allocate fisheries” (J39:12). Mr McAloon was sceptical about the evidential value of the land deeds. Most of these documents dated from the late 1830s, some years after shore whaling operations had begun, and were written in standard form without variation. According to Mr McAloon, this reinforced the view expressed by Shortland – that what the whalers later claimed to have acquired was not what Ngai Tahu had earlier granted.

Mr McAloon also documented the occasions where, far from granting away rights to marine resources, Ngai Tahu jealously defended them against trespassers. Mr McAloon referred to the traditional account of a feud over fishing grounds that erupted between Ngati Mamoe and Ngai Tahu hapu in the 1760s. He then reviewed the quite numerous instances of conflict between Ngai Tahu and Europeans on the southern coasts in the early nineteenth century. Close reading of these disputes, he said, revealed that the conflict was about the protection of Ngai Tahu property rights.

It was the claimants' position that parts of their property right, relating not only to land which the sealers and whalers wanted to use but also to the marine resources and areas of sea, were granted to sealers and whalers. Those grants might be conditional or absolute but in either event it was the Ngai Tahu expectation that they would benefit from such grants.

Mr McAloon referred to the establishment of shore whaling operations, the first being at Preservation Inlet in 1829. These operations were subject to clear and precise agreements with Te Whakataupuka, then leading chief in the area. The deed of 1832, which set out the terms of the agreement and was confirmed by Tuhawaiki in 1835, specifically refers to the grant of fisheries (J39:10).⁶⁶

Shore-based whaling necessarily required negotiation with Ngai Tahu. Whalers negotiated for the right to occupy land needed for whaling and “backup services” and for them to exploit the fishery in a certain area.

The Crown's position

- 3.9.10 David Alexander, giving evidence for the Crown, agreed that the establishment of shore stations would have in every instance required agreement with local Ngai Tahu. He acknowledged also that Shortland's statements clearly suggest that these agreements were not about land, or only about land, but also concerned the granting of rights for use of the sea and the taking of whales from it.

He too had reservations about the land deeds. He observed that the legalistic wording of these documents was likely to have made them unintelligible, to European claimants and Ngai Tahu alike, and they could not be regarded as a reliable guide to what either party might have thought the transactions were about. However in Mr Alexander's view, the right to go whaling would have been part of a wider right to be on Ngai Tahu territory, and the underlying acceptance of the European presence was based on either trade relationships or marriage. Shortland's statements were to be interpreted as meaning that the whalers acquired:

the right to occupy the site of a shore station, a right to go fishing, and a right of exclusivity, that no other shore stations could be established along a certain length of coastline. (S6(a):21)

They were not to be interpreted as suggesting that:

the arrangements included a right to actually catch the whales, in the sense that Ngai Tahu had some possessory right in the whales themselves as they swam through Ngai Tahu territory or passed by Ngai Tahu territorial land. (S6(a):21)

Mr Alexander noted the lack of evidence on a number of relevant points. There was no record of payments by ship-based whalers for the right to take whales and there was nothing to show whether trade transactions for food supplies from Ngai Tahu also covered whaling rights. Nor was there evidence, one way or another, as to whether Ngai Tahu might have adopted or acquiesced to the customary European concept that no-one could claim ownership of a whale until it was caught.

Mr Alexander concluded that whaling rights, as part of a larger bundle of rights, consisted of:

a right to go out whaling *from the land*. It was based upon the right to the land, and ensured that there would be no dispute when a whale was brought ashore. I distinguish this land based whaling right from another right, that of being able to chase and kill whales once out at sea, as I have found no evidence of such a right being claimed. (S6(a):22–23, emphasis in original)

The fishing industry's position

- 3.9.11 Evidence on whaling and sealing was presented by Dr Harry Morton and Kevin Molloy. Dr Morton, retired professor of history from Otago University, has written and researched extensively on the New Zealand whaling

and sealing industries between 1800 and 1850. In this inquiry he presented a summary of his conclusions on “the known circumstances” of early nineteenth-century whaling and sealing industries in order to determine whether those circumstances were consistent with a claim by Maori to proprietary rights in fisheries. His evidence represented an introduction to, and endorsement of, the more detailed evidence which followed from Mr Molloy.

- 3.9.12 Dr Morton emphasised that whalers and sealers were not isolated from local Ngai Tahu, and in fact there was constant contact between the two groups. As a result:

by the 1830s at least, the Europeans would have gained considerable insight into the Maori perspective, and Maori customs, traditions and way of life generally. (U1:3)

Dr Morton stated there was nothing in the contemporary record to suggest Ngai Tahu thought they owned, and could therefore alienate by sale or lease, the sea and its resources. And there was nothing to suggest that Europeans thought they were purchasing exclusive user rights. In Dr Morton’s view, a claim by Maori to ownership of the sea and its resources would have been “of such overwhelming importance” that it would have certainly been noted in contemporary accounts. He stated he had found no record of any such claim. Similarly, if ocean and bay whalers were required to pay for use of sea resources, as most shore whalers paid for land, ships’ logs would have recorded that fact (U1:4).

- 3.9.13 According to Dr Morton, Shortland’s statements are to be interpreted as referring to the purchase of land so as to gain rights to the adjacent sea. Shortland’s account does not refer to the direct sale or lease of the sea or fishing rights and there is no indication that rights which whalers did acquire were exercised to exclude other users of the sea, such as bay whalers.

Dr Morton agreed that Ngai Tahu exercised rights of control over shore whaling stations but in his view the evidence clearly showed that Ngai Tahu control was limited to the Europeans’ circumstances on *land*, not at sea. The harbour dues charged by Maori related to control of access to the shore and to land-based resources not to control of whaling operations at sea. There was no suggestion that Maori expected to control off-shore activity and in Dr Morton’s view any attempt to do so would have been ignored by whalers.

- 3.9.14 Mr Molloy, in his evidence on European sealing (U2(a)), stated that on the basis of available information, he knew of no negotiations between sealers and Ngai Tahu for sealing rights or access to grounds. He observed that the European practice of taking only the skins and leaving the meat was completely at odds with traditional Maori use, but there was nothing to indicate that Maori objected to the sealers’ practice or placed any restriction on the Europeans’ access to rookeries. Mr Molloy stated that any prohibition would have come to light in correspondence regarding conflict between Ngai Tahu and sealers. That it had not, indicated that access to rookeries “was not an issue of any major concern” (U2(a):39).

Mr Molloy underlined his point by contrasting the apparent absence of negotiation over this issue with the obvious negotiations and restrictions on trade and the taking of titi. (U2(a):30–33)

3.9.15 In relation to Shortland's statements Mr Molloy reiterated the view expressed by Dr Morton: the rights obtained by the whalers were land based rights which were intended to exclude others from setting up on land but not from whaling at sea (U2(b):30–35).

3.9.16 Counsel for the fishing industry, Carrie Wainwright, provided a useful analysis of the different witnesses' interpretations of Shortland. She submitted that the views expressed by the parties' witnesses led to a number of alternative conclusions, namely:

(a) Shortland was simply mistaken as to the whalers' motives or intentions: they purchased rights in the land (whether absolute or qualified) in order to erect their whaling stations, and have access to what Mr McAloon has called "backup services": no rights to the sea were contemplated or obtained; or

(b) the whalers did purchase rights in the land (whether absolute or qualified), but specifically in order to purchase from Maori the exclusive use of the adjacent sea, and in an attempt to outflank the competing users of the whale industry; or

(c) the whalers purchased rights in the land (whether absolute or qualified) with a view primarily to obtaining a land base, but the Maori traditional view that rights to land and sea went hand in hand meant that along with the land the whalers necessarily also, in Maori eyes, obtained fishing rights in the adjacent waters; or

(d) the whalers bought no land, but merely a fishing right. Later, after whaling had begun to decline, they claimed retrospectively that their purchase of a fishing right had actually been a purchase of a landholding, and drew up purpose-specific deeds to substantiate this claim. (V1:46–47)

In counsel's submission it was not necessary to decide which of these alternatives, all credible to a degree, was the most plausible. The key issue, in her submission, was that Shortland's statements suggested a "fundamental link between the purchase of land and 'exclusive rights of fishing' along a particular stretch of coast" (V1:48). The important question, of whether the sale of land, and the consequent loss of mana whenua, implied a loss or diminution of mana moana, is dealt with in chapter five.

Dr Habib's overviews

3.9.17 Included in Dr Habib's overviews were reports on the whaling and sealing evidence (T4(a);T4(d)). Dr Habib submitted his own evidence on the traditions of customary Maori sealing and whaling fisheries as well as a summary of the European industries. In addition he gave his assessment of the evidence presented by Messrs McAloon and Molloy and Dr Morton.

3.9.18 Dr Habib emphasised traditional Ngai Tahu association with seals and whales:

There had been longstanding, if low-key interaction over centuries between Maori and the marine mammal resources. Those resources

had, for centuries, yielded meat, pelts, bone, teeth and other products. (T4(a):178)

In particular he was adamant that Ngai Tahu actively hunted the whale, not in the manner that European deep sea whalers later developed, but by the pursuit and beaching of whales found in semi-enclosed areas of sea such as inlets, sounds and bays.

- 3.9.19 Dr Habib’s commentary on the claimants’ evidence was a brief endorsement of their position. He reinforced Professor Anderson’s suggestion that Ngai Tahu attacks on sealers in Fiordland in the early 1820s “seem to have involved . . . competition over sealing rights” (H1:50). And he accepted without amplification Mr McAloon’s evidence relating to Ngai Tahu proprietary rights in the whale fishery.

Dr Habib did not, on the whole, find the Crown and fishing industry evidence persuasive. To a large extent, his criticism of this evidence was based on what he described as its reliance on “Pakeha sources and mind-sets” (T4(d):21) and its failure to inject a Maori perspective. In particular he rejected the Crown and fishing industry’s argument that whaling rights acquired by Europeans related to their circumstances on land but not to the sea. In his concluding remarks Dr Habib observed:

the shore-based whalers went ‘fishing’ under the mana of the local Maori tangata whenua. As for other fisheries resources, Maori mana extended over the largest of those resources, the whales. That was what was in the Maori mind . . . so far as Ngaitahu were concerned . . . the land, the fisheries, and all the other resources and resource areas belonged to them. (T4(d):41)

Professor Ward’s overview

- 3.9.20 Professor Ward agreed with the claimants’ that:

European captains’ purchases of rights for shore stations in the 1820s and 1830s, were an acknowledgment of Maori rights in the area concerned, including, in part, their chiefs’ claims to control access to resources (AA26:10).

He noted, however, that Ngai Tahu did not appear to have asserted “exclusive possession” of their fisheries, including seals and whales, in the sense of zealously protecting resources against others on all occasions. Professor Ward doubted that pre-contact Maori were involved in open-sea whaling and knew of no record of Maori attempting to control European whaling on the open seas (AA26:10).

He was doubtful too that conflict between Ngai Tahu and sealing gangs was largely about fisheries protection: the episodes referred to by Mr McAloon in fact showed a wide range of causes of violence with only a very small number clearly shown to have involved unauthorised taking of marine resources (AA26:10).

Professor Ward summarised his conclusions on the question of “exclusive possession” before 1840 by saying that Ngai Tahu leaders undoubtedly:

sought by a variety of means to maintain their rangatiratanga over their land and the adjacent sea resources . . . [they] certainly did try to control access to bay whaling through control of rights to set up

shore stations. This does not necessarily imply a clear claim to property in the whales themselves, as they passed through local waters, nor that the assertion of control would have been fully effective. (AA26:12)

Summary of whaling and sealing

- 3.9.21 Whalers who took their whales at sea did so with no recorded interference from Ngai Tahu. Ngai Tahu appear to have been little concerned by the activities of these distant visitors, although if they ventured into harbours to reprovision, they provided a source of trade. As Professor Ward suggests, if Ngai Tahu had wished to assert some ownership rights over the whales, or to control their taking, they were not in a position to do so. These whalers had large vessels, were well armed and were not dependent on the shore for their operation. When whalers did venture ashore, they had to come to terms with Maori landowners, who were also fishers.

The lack of detailed evidence about the negotiations between early European visitors and Ngai Tahu prior to the Treaty makes it difficult to be entirely clear about what kind of deals were struck over access to land and whether these included access to fishing. The Land Claims Commission did not examine rights to fisheries and therefore made no attempt to examine the issue. Even investigations into the old land claims were limited, since a great many of these were abandoned by the claimants themselves. A large number of these claims were far too extensive to have been taken seriously by the commission. The claimants and the Crown have argued that the wording of the deeds cannot be relied upon as an indication of the nature of these agreements. We agree that deeds written in English, often in Sydney, were hardly reliable indicators of Maori intent. Many were retrospective. They were entered into at a time when Crown intervention in New Zealand appeared likely or even inevitable. They were designed to give Europeans interests in land in the new colony, whereas many of these early whaling and sealing visitors had initially come not as settlers, but to hunt. Edward Shortland was one of the most knowledgeable Crown agents to visit the South Island in the 1840s. He was sensitive to Maori perceptions of their relationship with Europeans and as interpreter to the Land Claims Commission had a first hand opportunity to ascertain Ngai Tahu understanding of their arrangements with Europeans, and also to hear first hand from the European claimants themselves. Shortland was convinced of two things, first that the original transactions between whalers and Ngai Tahu concerned a right to hunt:

most of the monster claims had originated simply in the purchase of a right to occupy sufficient ground ashore for the requirements of a whaling station, and to fish along a certain extent of coast, to the exclusion of all others⁶⁷

Secondly, Shortland interpreted these agreements not as a permanent alienation of either the land or the right to fish. He described these agreements as “he noho noa iho”, or a “squatting license”. Only when New Zealand appeared to be on the verge of becoming a British colony

did whalers attempt to transform these licences into a property right to land which could be recognised by law.

While there is little positive evidence to corroborate Shortland's statements, his first hand knowledge of the situation and his understanding of Maori language and tikanga give his account of these agreements great authority. We conclude that European shore whalers, in negotiating with Ngai Tahu for rights to shore stations, were actively seeking a right to take whales.

The evidence of sealers and the conflicts which arose between them and Ngai Tahu are too fragmentary and lacking in detail to provide us with any concrete conclusions about the nature of the agreements struck, or the causes of resulting conflict.

At the same time, as Dr Morton and messrs Molloy and Anderson have pointed out, there is no evidence that Ngai Tahu claimed ownership of the creatures in the sea, be they whales or any other species. We do not find this surprising. Whales, like fish, were in Maori terms the children of Tangaroa, they were not owned as property. They were an essential part of the natural world, a resource made available to the tribe, through beaching or for smaller whales through capture. Ngai Tahu did not see themselves as owning whales, or any fish for that matter, as they swam freely in the sea. While the mana of the tribe was seen as extending over their taking and use, this did not imply ownership of the sea, or of sea mammals or fish, but it did reflect the exercise of rangatiratunga over the resource.

3.10 **Conclusions**

We now summarise our conclusions on the evidence as to the extent of Ngai Tahu sea fisheries at 1840.

- 3.10.1 Fishing in lagoons, in harbours, in river mouths, in estuaries and at sea formed an essential part of the Ngai Tahu economy prior to the Treaty, as did the taking of seals, shellfish, whales and marine flora. The use of marine resources was a fundamental feature of Ngai Tahu mahinga kai, and played a key role not only in the tribe's economy, but in its social and spiritual life. Marine resources formed a significant part of the diet of Ngai Tahu communities, and some hapu, such as Ngai Kuri at Kaikoura, were heavily dependent on the resources of Tangaroa.
- 3.10.2 The major constraint on the Ngai Tahu ability and need to fully exploit the abundant marine resources of their territory was a limited population. Ngai Tahu developed their fishing operations according to their needs. Any more extensive or labour intensive exploitation of their sea fisheries was simply not necessary.
- 3.10.3 Ngai Tahu had developed a sophisticated fishing technology that was adapted to the various marine environments of Te Waipounamu and to the particular species which can be found in them. The development of barracouta lures and composite hooks, as well as the use of a variety of

small nets, allowed Ngai Tahu to take species not readily available to North Island Maori.

- 3.10.4 Ngai Tahu use of shellfish resources, lagoons, estuaries, harbours and river mouths was intensive in the vicinity of permanent settlements, particularly at Kaikoura, at Kaiapoi, and at the mouths of the Ashley, Waimakariri and other Canterbury rivers, in the harbours of Banks Peninsula, at Waihora and Wairewa, along the South Canterbury and North Otago coast, in Otago harbour, and on the northern shore of Foveaux Strait. Use of the sea fisheries in these areas was considerable up to a mile or so from shore. Seasonal and less frequent use was made of the seas beyond this distance, particularly to take hapuka. This fishing extended to some 12 miles or so from shore. Fishing beyond this distance could have taken place. Ngai Tahu did have the craft to fish beyond 12 miles from shore in good sea conditions, however it is unlikely that they fished beyond this distance on a regular basis. There was little need for them to do so and the risks to life involved increased the further out they went.
- 3.10.5 Fish and other marine resources were taken elsewhere along the extensive Ngai Tahu coastline as part of Ngai Tahu seasonal foraging expeditions. These expeditions allowed Ngai Tahu to utilise marine resources along most of the shoreline from Parinui-o-Whiti south on the east coast of Te Waipounamu. Residential mobility, the technology available to the tribe, and their knowledge of the fishery allowed Ngai Tahu to take whatever species they wished along their shoreline. They were also able to fish off the shore where necessary, and several miles from shore if desired. The evidence suggests that given their limited population they were able to concentrate on places where marine resources were abundant and easily acquired.
- 3.10.6 On the West Coast Ngai Tahu use of marine resources was more limited than on the east. There were significantly fewer Ngai Tahu and substantial parts of the coast provided only limited resources. However Ngai Tahu settlements, in the north and in the south, were dependent on shellfish and other shoreline, estuarine and lagoon resources. They also fished in the sea around their settlements. Areas which were intensively fished were limited and could not have extended far out to sea. The sounds and fiords of western Murihiku were also fished by Ngai Tahu, largely on a seasonal basis. While this fishing was very important to those concerned, it cannot be regarded as intensive.
- 3.10.7 Fishing for barracouta was a major tribal activity which was undertaken by southern Maori from their earliest habitation of the island. Barracouta fishing had a role in Ngai Tahu social and economic life not evident elsewhere.
- 3.10.8 The archaeological record shows a specialised fishery which was concentrated on barracouta, red cod, wrasses, blue cod, ling and hapuka. Other species found in this record – although to a considerably lesser extent – include tarakihi, sea perch, trumpeter, black cod, butterfly, gurnard, southern kingfish, snapper, stargazer, flounder, leather jacket,

sole, marblefish, blue moki, conger eel, scorpion fish, warehou, trevally and brill.

- 3.10.9 The archaeological record understates the varieties of fish taken, and cartilaginous fish such as dogfish, sharks and skates, and crayfish were clearly taken by Ngai Tahu in substantial quantities – given the tribe's size.
- 3.10.10 Ngai Tahu fishing expertise and technology allowed the tribe to take all species of fish inhabiting depths less than 50 metres, including deep sea species which frequent shallower seas at some times of the year. Ngai Tahu undoubtedly caught all of these species some of the time, but the frequency with which these fish were caught and the quantities taken remains unknown. Ngai Tahu are most unlikely to have known about or taken deep water species such as orange roughy, alfonsino, silver and white warehou, hake and the deep water dories. They are also unlikely to have taken, except by chance, oceanic pelagic species such as large tunas, marlins and swordfish.
- 3.10.11 Ngai Tahu were aware of and did take hoki and other deepwater fish which can be found in shallower waters seasonally or periodically.
- 3.10.12 European contact allowed Ngai Tahu to adopt technological advances suited to their fishery such as iron barbed hooks, oars and rollocks and eventually sealing and whale boats. This process was well under way prior to the Treaty, and continued in the decades immediately following.
- 3.10.13 Ngai Tahu traded fish amongst themselves and with other tribes and they preserved fish for their own consumption and for trade. With the coming of Europeans they had the opportunity to trade fish with visiting vessels and to supply European shore stations. Some Ngai Tahu fish may have been exported at least as far as Australia by the late 1830s.
- 3.10.14 Off-shore whalers were able to take whales without interference from Ngai Tahu, and Ngai Tahu had little ability to control this fishery, even if they had had the inclination. Shore or bay whaling was, in contrast, extensively controlled by the tribe. There is no evidence of any permanent waiver of a Ngai Tahu right to fish or hunt to European whalers and sealers prior to 1840. Periodic negotiations appear to have been undertaken between whalers and their Ngai Tahu landlords over the establishment and maintenance of shore whaling stations, including the right to fish or hunt. Ngai Tahu did not assert an ownership of whales, nor is there any evidence of their attempting to exclude either sealers or whalers. While these negotiations may have allowed for individual whalers to monopolise the use of particular stretches of coastline, there is no evidence that these agreements involved or implied any permanent waiver of rights. On the contrary, they were consistent with, indeed a reflection of, Ngai Tahu tino rangatiratanga over their sea fisheries.

Finally it needs to be said that this survey of the Ngai Tahu fishery up to the time of the Treaty is based on the evidence which has survived over 150 years. In the case of archaeological evidence modern techni-

ques have enhanced our understanding of past fishing. At the same time a great deal of traditional evidence has been lost. The ravages of dispossession have taken their toll on Ngai Tahu culture. Language has for many been lost in the pressure to assimilate, and with this loss has gone knowledge of many of the traditional practices. For these reasons our overview should be taken as a conservative assessment of the extent of Ngai Tahu use of marine resources.

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Chapter 4

Ngai Tahu Sea Fisheries Treaty Rights at 1840

4.1 Introduction

In the previous chapter we have described how the bounty of Tangaroa provided in abundance for Ngai Tahu. There were infinitely more fish in the seas adjacent to their shores than Ngai Tahu required for their daily needs. They took all they needed and in the late 1830s were supplying visiting ships and it seems Sydney traders with fish. The rest they left to multiply.

In this chapter we consider the provision made in the Treaty of Waitangi to protect Maori sea fisheries. In doing so we largely adopt the discussion of this topic in chapter 10 of the *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim 1988*. We then state our findings on the nature and extent of Ngai Tahu sea fishing Treaty rights at 1840 in the light of our conclusions on the evidence discussed in chapter 3.

4.2 The Words of the Treaty

English Text

4.2.1 Article 2 of the English text begins:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess . . .

That Maori may keep or part with those properties they possessed is emphasised in the clause that follows:

. . . so long as it is their wish and desire to retain the same in their possession.

The article then grants to the Crown an exclusive right of pre-emption in respect of lands.

Maori Text

4.2.2 To facilitate a suggested translation of the Maori equivalent the Muriwhenua tribunal severed the words as follows:

Ko te Kuini o Ingarani ka wakarite ka wakaae . . .
The Queen of England assures and agrees [to give]
ki nga Rangatira ki nga hapu – ki nga tangata katoa o Nu Tirani . . .
to the chiefs, the sub-tribes and all the
[Maori] people of New Zealand
te tino rangatiratanga . . .

the full authority
o o ratou wenua . . .
of their lands
o ratou kainga . . .
those places where their fires burn
me o ratou taonga katoa.
and all those things important to them.¹

The Muriwhenua tribunal notes that estates, forests and fisheries are not specifically mentioned but “taonga” covers them all. And further, that while exclusivity is not expressed it is inherent in both “taonga” and “rangatiratanga”. The qualification “so long as it is their wish and desire to retain the same in their possession” is implied. The Muriwhenua report continues:

‘Kainga’ is new and stresses that occupancy continues. It derives from ‘ahi kaa’, the fire that is always alight, for by use of the right wood, though burnt and buried it is used to rekindle flame.

Mainly we are introduced to a concept of full chieftainship over lands and all things important or highly prized.

We prefer “full authority” to the literal full chieftainship. Essentially, Maori authority is personified in chiefs but derives from the people. Maori understood ‘rangatiratanga’ to mean ‘authority’. Accordingly, when discussing the Treaty, Maori often substituted mana which includes authority but has also a more powerful meaning . . .

Similarly, “those things important to them” is used to emphasise that something more than tangibles (or taputapu) was intended.²

4.3 Contexts

English Text

- 4.3.1 The Muriwhenua tribunal gave detailed consideration to the English law of fisheries since it was assumed by the Crown from an early stage of settlement in New Zealand that the English law, not the Treaty of Waitangi, governed the rights of both Maori and non-Maori to sea fishing. It came to the conclusion:

first, that the Crown’s presumptive title to the foreshore was capable of being displaced by, or made subject to customary rights on proof of long term user. Secondly, however, there is no strong evidence that anyone held some special right to fish the open seas by virtue of long term user, but only by actual Crown grant. Thirdly, the private foreshore fisheries were regarded as properties. Fourthly, there was a Court procedure whereby people’s claims to private fisheries could be upheld as against the Crown.³

In the English text of the Treaty of Waitangi, Maori fisheries are called properties too. This led the Muriwhenua tribunal to consider whether the drafter of the English text might have had English foreshore fisheries in mind. On the evidence it concluded, as does this tribunal, that that was not so. The Treaty was prepared in New Zealand and the article on fisheries was drafted by James Busby who was fully aware of Maori fishing activity. He had lived in the Bay of Islands as British Resident since 1833. He well knew that every acre of land in New Zealand was appropriated among the different tribes; that Maori fishing was practised well beyond

the foreshore and that Maori would not have understood the more limited arrangements of English law.⁴ We concur in the view of the Muriwhenua tribunal that the English experience places no gloss on the Treaty's plain words and that the text was drafted with the New Zealand context in mind. We turn then to the Maori version.

Maori Text

4.3.2 Under this heading the Muriwhenua tribunal gave a full and informative exposition of the significance of such key Treaty words as 'taonga' and 'tino rangatiratanga' in the context of Maori cultural values with particular reference to fisheries. We set this out in its entirety and subject to some additional observations, adopt it as our own:

- (a) There are obvious distortions when Maori concepts are translated in Western terms. It must be understood that the division of properties was less important to Maori than the rules that governed their user. These criteria underline Maori thinking
 - (i) A reverence for the total creation as one whole;
 - (ii) A sense of kinship with fellow beings;
 - (iii) A sacred regard for the whole of nature and its resources as being gifts from the gods;
 - (iv) A sense of responsibility for these gifts as the appointed stewards, guardians and rangatira;
 - (v) A distinctive economic ethic of reciprocity; and
 - (vi) A sense of commitment to safeguard all of nature's resources (taonga) for the future generations.

To meet their responsibilities for these taonga, an effective form of control operated. It ensured that both supply and demand were kept in proper balance, and conserved resources for future needs.

Maori extended their deep sense of spirituality to the whole of creation. In their myths and legends they acknowledged gods and other beings who bequeathed all of nature's resources to them. There was a system of tapu rules which combined with the Maori belief in departmental gods as having an overall responsibility for nature's resources served effectively to protect those resources from improper exploitation and the avarice of man. To disregard or to disobey any of the rules of tapu was to court calamity and disaster.

To the pre-European Maori, creation was one total entity – land, sea and sky were all part of their united environment, all having a spiritual source. It was by divine favour that the fruits from these resources became theirs to use. The first fruits taken were invariably offered back to the gods.

In Maori terms these resources were possessed. Before European contact Maori had no system of buying and selling. Rather their economy was based principally on the giving of gifts upon which were attached the obligations of reciprocity.

All resources were 'taonga', or something of value, derived from gods. In a very special way Maori were aware that their possession was on behalf of someone else in the future. Their myths and legends support a holistic view not only of creation but of time and of peoples.

Maori involvement with fish and fisheries is as ancient as the creation. The North Island is a fish in their legends.

Tangaroa is the God of the fish, allowing Maori to gather fish after the appropriate ritual and karakia have been observed. He is known throughout Polynesia. Fish were referred to as “the progeny of Tangaroa” (Buck 1949:458). There was absolutely no way a sale or a purchase could have been negotiated under Maori law.

Taonga were either gifted or wrested, never sold. To buy and sell was an entirely western practice and when finally Maori engaged in buying and selling, they were behaving in a Western way within the colonial design and system. In the western pattern they sold only what was listed on the English bill of sale, no more, no less. When Te Kawau said “the land I sold, the sea I did not sell” he was making a genuine un-Maori statement backed by English documentation and was acting in an un-Maori way in order to comply with an un-Maori situation In their own cultural terms they would have known that access to the fisheries was gained from Tangaroa in return for the observance of the appropriate rites.

(b) To understand the significance of such key Treaty words as ‘taonga’ and ‘tino rangatiratanga’ each must be seen within the context of Maori cultural values. In the Maori idiom ‘taonga’ in relation to fisheries equates to a resource, to a source of food, an occupation, a source of goods for gift-exchange, and is a part of the complex relationship between Maori and their ancestral lands and waters. The fisheries taonga contains a vision stretching back into the past, and encompasses 1,000 years of history and legend, incorporates the mythological significance of the gods and taniwha, and of the tipuna and kaitiaki. The taonga endures through fluctuations in the occupation of tribal areas and the possession of resources over periods of time, blending into one, the whole of the land, waters, sky, animals, plants and the cosmos itself, a holistic body encompassing living and non-living elements.

This taonga requires particular resource, health and fishing practices and a sense of inherited guardianship of resources. When areas of ancestral land and adjacent fisheries are abused through over-exploitation or pollution the tangata whenua and their values are offended. The affront is felt by present-day kaitiaki (guardians) not just for themselves but for their tipuna in the past.

The Maori ‘taonga’ in terms of fisheries has a depth and breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future which colours their thinking, attitude and behaviour towards their fisheries.

The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or ‘belonging’, but also of personal or tribal identity, blood and genealogy, and of spirit. This means that a ‘hurt’ to the environment or to the fisheries may be felt personally by a Maori person or tribe, and may hurt not only the physical being, but also the prestige, the emotions and the mana.

The fisheries taonga, like other taonga, is a manifestation of a complex Maori physico-spiritual conception of life and life’s forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

This vision provided the mauri (life-force) which ensured the continued survival of the iwi Maori. Maori fisheries include, but are not limited to a narrow physical view of fisheries, fish, fishing grounds, fishing methods and the sale of those resources, for monetary gain; but they also embrace much deeper dimensions in the Maori mind, as referred to in evidence by Miraka Szaszy in the context of spiritual guardianship

(c) “Te tino rangatiratanga o o ratou taonga” tells of the exclusive control of tribal taonga for the benefit of the tribe including those living and those yet to be born. There are three main elements embodied in the guarantee of rangatiratanga. The first is that authority or control is crucial because without it the tribal base is threatened socially, culturally, economically and spiritually. The second is that the exercise of authority must recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. Thirdly, the exercise of authority was not only over property, but of persons within the kinship group and their access to tribal resources.

[This tribunal would add a fourth main element as being the creation of the necessary conditions for the survival of the species.]

In the Maori text authority is represented in rangatira, or chiefs who led by virtue of their mana, or personal and spiritual prowess. It was usual for Maori to personalise authority in that way, so that the one word ‘mana’ applies to both temporal authority and personal attributes.

Accordingly it would be said that a certain chief held the mana of a particular place, or that the authority over tribal seas was vested in a specified person. . . . R H Matthews described the position at Rangaunu in terms of the usual Maori idiom.

At the time I am speaking of [1857], the mana or authority over the kopua (the deep) was solely exercised by Popata te Waha, who had inherited it from his ancestors . . . Popata te Waha’s mana over the kopua was acknowledged by all the surrounding tribes.

The petition of Arama Karaka of 1879 . . . shows that Arama saw Maori as having mana over “deep-sea fisheries”.

‘Mana’ is the more usual Maori word for ‘authority’. It is likely that Rev Henry Williams avoided using the word in the Treaty because of its particular connotations (see *Manukau Report* at 8.3). The missionaries were rarely keen on the word, for mana is said to have been inherited from heathen Maori gods. Nonetheless in debating the Treaty in 1879, it was ‘mana’ that Maori consistently used to describe that which they thought the Treaty had reserved

(d) Accordingly, the Maori order related primarily to how resources were used, rather than to how they were owned, and human leadership was combined with spiritual beliefs for the maintenance of control. It does not follow that there was no concept of private rights. There is no doubt that particular subgroups had special use rights of various places and resource areas, and that areas of sea were as much their properties as cultivations on land But they did not own them; they stayed in the bloodline; they were not transferable; and all were subject to the oversight of the tribe.

Again it is necessary to understand that while particular areas of the land and sea were defined, and prior use rights were apportioned, the key to Maori ownership is not survey definitions but kinship. People moved about the resource areas and had use rights in many places based on kinship or marriage.⁵

- 4.3.3 The Muriwhenua report translated 'te tino rangatiratanga' as 'the full authority'. In paragraph (c) of the preceding passage reference is made to the need for the exercise of authority to recognise the spiritual source of taonga (and indeed of the authority itself) and the reason for stewardship as being the maintenance of the tribal base for succeeding generations. We believe that an extremely important element in rangatiratanga is trusteeship. This implies a relationship between the rangatira as trustee and his or her kin group – the trustee's beneficiaries. So the kin group is a closed definable group. In general terms the function of the rangatira as trustee is to sustain the group of beneficiaries – whanau, hapu, iwi – by any means available. The means are the group's estate both material and non-material. Rangatiratanga is the reciprocal relationship between the trustees of a kin community and the beneficiaries and the community's estate provides the means for exercising rangatiratanga. It is people specific and territory specific. We cannot talk about rangatiratanga in a vacuum.

Tribal territories were generally well defined and acknowledged between tribes. Each tribe had complete dominion over the land and foreshore – mana whenua – and over such part of the sea as they exercised mana moana. As between tribes, consent had to be obtained to enter the land or fisheries of others. Tribal wars were caused by invasion of exclusive rights. Through the tribe the rangatira exercises the autonomy of the tribe. Each tribe has its own rangatiratanga which could be called tribal sovereignty. In the context of the Treaty, rangatiratanga was to be exercised in a similar way to that of local bodies who may be said to have a form of limited self-government, which is of course subject always to the sovereignty of the Crown, that is, of the nation.

While rangatiratanga is best defined in its own context, there are some principles of general application. The point of reference for those principles is the relationship between the people and their gods and between the people and their resources which are all sourced from their gods. Rangatiratanga operates within the kin relationship between these concepts – gods, people, resources. With regard to fisheries the reference point is Tangaroa. There are no limitations to the bounty of Tangaroa except respect for the resource and sustainability of the resource. Rangatiratanga includes management and control of the resource and reciprocal obligations between those who actually harvest the resource.

Some legal perspectives of the Maori context

- 4.3.4 Difficulties arise in expressing Maori concepts in British legal language. For instance in paragraph (d) of the lengthy passage quoted in 4.3.2 the Muriwhenua tribunal emphasised that the Maori order related primarily to how and by whom resources were used, rather than to how they were owned, and human leadership was combined with spiritual beliefs for

the maintenance of control. Particular sub-groups had special use rights of various places and resource areas, and areas of the sea were as much their property as cultivations on land. But they did not own them, they stayed in the descent group; they were not transferable, and all were subject to the oversight of the tribe.

As we have earlier indicated a tribe wishing to enter the land or foreshore of another tribe in peace was obliged to obtain consent of the other tribe. The Muriwhenua report, after citing from a Maori Land Court decision in 1957 and the adoption of certain passages from the decision by the High Court in *Keepa v Inspector of Fisheries* [1965] NZLR 322, 328 cited Mr Justice Hardie Boys as saying:

One knows from history that it was the invasion by one tribe of another tribe's exclusive rights that led to tribal wars. The appellants support their claim by evidence that, even as between these two tribes, consent had to be obtained by one to enter the part of the foreshore in the *dominion* of the other.(emphasis added)⁶

The Muriwhenua tribunal went on to point out that:

The missionaries who translated the Bible also saw rangatiratanga in these terms. In the Book of Genesis, chapter 1, verse 26, God said "Let us make man in our own likeness" and "Let them have *dominion* over the fish of the sea, etc". The Maori translation of this verse is "Kia hanga tatau, te tangata. Kia rite kia tatau" and "kia waiho ratou, hei *rangatira* mo nga ika".

In this example, 'rangatira' equates with 'dominion'.⁷

We agree that the judicial findings correctly locate 'dominion' as the nearest British cultural equivalent to the tribal overright. In that same context, the tribal resources were also properties that were owned.

The Muriwhenua tribunal rejected, as does this tribunal, a suggestion by the Crown and the fishing industry that rangatiratanga denoted something less than ownership.⁸ It was suggested that stewardship was more significant in the mores of Maori society. But neither "rangatiratanga" nor "mana" excludes ownership. Stewardship was an aspect of the Maori way, but not one that meant tribal resources were automatically shared with all comers. Indeed, it was the essential part of rangatira stewardship or trusteeship that they did not permit an intrusion at will. We endorse the conclusion of the Muriwhenua tribunal that:

Maori ranked those properties much higher than mere commodities, holding them with profound spiritual regard for a vast family, of which many are dead, few are living, and countless are still unborn. That cultural peculiarity cannot be used to deny ownership, however, or to imply that because of it, the resources must be shared.

In more simplistic terms it can be said that, 'mana moana' (authority over the seas) applied in the same idiomatic form to land–mana whenua—and yet it has never been suggested that Maori land rights amounted to less than ownership when expressed in English terms.⁹

This relatively brief discussion and the much larger section in the Muriwhenua report on which it is based, serve to highlight the problems

and potential pitfalls in attempting to formulate Maori concepts such as rangatiratanga and taonga in the form of British legal constructs. But we are left in no doubt that Ngai Tahu, along with all other Maori iwi, in British legal language *owned* their tribal land and sea fisheries.

We turn next to a discussion of the nature and extent of the Ngai Tahu sea fisheries in the light of this discussion and the preceding chapter 3.

4.4 “Their Fisheries”

4.4.1 The reference to “their fisheries” in the English version of the Treaty occasioned considerable debate during the course of this inquiry over what exactly the drafters of the Treaty had in mind. The Muriwhenua tribunal found that “their fisheries” could be defined as:

their activity and business of fishing, and that must necessarily include the fish that they caught, the places where they caught them, and the right to fish.

‘Taonga’ . . . includes all of these things, and had other dimensions too.¹⁰

It further found that Maori fisheries could not be limited to site specific grounds, favourite fishing places or a mere right of access to the sea.¹¹ The tribunal in that claim based these findings on searches of four dictionaries which provided a variety of meanings, and applied those meanings in the light of the particular experience of the New Zealand situation.

This definition was challenged during the course of hearings into this claim by Tim Castle, counsel for the fishing industry. Counsel called evidence from Professor Ian Gordon, a retired professor of English from Victoria University of Wellington and a noted linguist. In Professor Gordon’s view the Muriwhenua tribunal had erred in relying on dictionaries which did not put the definition of “fisheries” in the correct historical context. He argued that the meaning of “their fisheries” could only be accurately determined by examining dictionaries which were contemporaneous with the Treaty. While three of the four dictionaries examined by the Tribunal provided definitions which post-dated 1840, one, the *Oxford English Dictionary of Historical Principles* 1933, provided an historical definition which predated 1840. This source defined fisheries as “the business, occupation or industry of catching fish or of taking other products of the sea”.

The same dictionary gives the following definitions for “business”:

“The state of being busily engaged in anything; industry, diligence”; “Diligent labour, exertion, pains”; “The object of anxiety or serious effort”; “In a general sense: action which occupies time, demands attention and labour; *especially*, serious occupation, work, as opposed to pleasure or recreation”. (Z43:5)

Occupation is self-explanatory. The following definitions are included for “industry”:

“Diligence or assiduity in the performance of any task, or in any effort; close and steady application to the business in hand; exer-

tion, effort”; “Systematic work or labour; habitual employment in some useful work”(Z43:5)

We agree with the observation of Dr Loveridge, a Crown witness, that all of these usages point to a broad definition of “fishery” which encompasses non-commercial as well as commercial forms, including fisheries conducted for subsistence and barter (Z43:5).

Using dictionaries from the early nineteenth century, Professor Gordon argued that the definition of “their fisheries” as the business and activity of fishing was inappropriate. He rejected the proposition that British drafters of the Treaty intended the protection of Maori fisheries to include fishing grounds “in the no-man’s land of the open sea” (S16:10). Based on his understanding of English definitions of the term fisheries, he concluded that the protection of fisheries in New Zealand could only have meant the protection of fisheries in rivers and lakes surrounded by Maori land and along the shorelines adjacent to those lands.

On the basis of this evidence the fishing industry submitted that a correct definition of “their fisheries”, using proper linguistic analysis and contemporaneous evidence, should be “their fishing grounds” (V1:3; S23:2–3).

- 4.4.2 The Crown, in accepting the definition of “their fisheries” given in the Muriwhenua report, called the evidence of Dr Loveridge (Z43; AA17). Dr Loveridge presented an historical rather than linguistic interpretation of the genesis of the Treaty’s provisions. While Professor Gordon’s understanding of “fisheries” may have been appropriate in reaching an agreement with British fishers, according to Dr Loveridge the New Zealand situation compelled Hobson to deal on a broader framework more appropriate to the experience of Maori fishers and Maori negotiators. Because the Treaty was not drafted exclusively by Hobson but was significantly enlarged by James Busby, the text of the Treaty can be seen as reflecting local circumstances. Hobson was new to the region, inexperienced in dealing with Maori, and likely to use language untempered by a first hand knowledge of tikanga Maori. Busby on the other hand had been in New Zealand since 1833 (Z43:3, 6). He was the British resident and had become very familiar with iwi at least of the Bay of Islands and probably well beyond. He had also been considering the whole question of aboriginal title to resources within New Zealand. He knew how extensively fisheries were valued by Maori and the extent to which Maori had developed these fisheries to their own needs for self sufficiency and internal trade and how clearly they were regarded by Maori as tribal property. It was Busby who included the reference to fisheries in article 2, as the surviving draft of the Treaty referred to the British resident by Hobson has no reference to fisheries at all (Z43:6–7). There are other substantial differences. The original draft provides little of a property guarantee at all, but emphasises pre-emption:

2d The United Chiefs of New Zealand yield . . . to Her Majesty the Queen of England the exclusive right of Preemption over such waste Lands as the Tribes may feel disposed to alienate. (Z43:6)

It was Busby who then produced a much enlarged draft which included all but one word of the final version of article two. He included reference to “full exclusive and undisturbed possession” and it was he who listed “Lands and Estates, Forests Fisheries and other properties”. The only subsequent change to Busby’s draft of article two was the alteration of “collectively or severally” to “collectively or individually” (Z43:7; X4:8). On the basis of this Crown counsel submitted that:

when Maori signatories were promised “the full exclusive and undisturbed possession of their . . . Fisheries” – that is, of any and all fisheries “which they may collectively or individually possess” – the English drafters of the Treaty took into account the manner in which these things would have been defined and understood *by Maori*. (X4:9) (emphasis in original)

The Crown further agreed that Hobson’s instructions made it clear that he was to disclaim:

every pretension to seize on the islands of New Zealand, or to govern them as a part of the dominion of Great Britain, unless the free and intelligent consent of the natives, *expressed according to their established usages* should be first obtained. (X4:10, emphasis added by Crown counsel)¹²

From this the Crown concluded that the definition of “their fisheries” which most appropriately takes into account the use of Maori fisheries in New Zealand at 1840 was that applied by the tribunal in its Muriwhenua report.

4.4.3 The Crown has already made statutory use of this definition in the Maori Fisheries Act 1989. The long title of the Act states that its purpose (inter alia) is:

- (a) To make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi; and
- (b) To facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing.

The Act establishes the Maori Fisheries Commission. Among its principal functions are first, a requirement to facilitate the entry of Maori into, and the development by Maori of, “the business and activity of fishing”. Secondly, to grant assistance to any Maori or groups of Maori to enable them to “enter into or to continue in or to develop the business and activity of fishing”.¹³

It is clear that these functions of the fisheries commission which are concerned to facilitate entry and development of Maori into the business and activity of fishing, are intended to be among the means by which better provision is to be made for the recognition of Maori fishing rights secured by the Treaty of Waitangi. While it may perhaps be going too far to say that this constitutes an express legislative recognition of the Muriwhenua tribunal definition of Maori fisheries it is nonetheless significant that the statute has chosen to employ the same language in the context of Maori Treaty fishing rights.

- 4.4.4 In answer to a question from the tribunal as to how the fisheries confirmed and guaranteed to Ngai Tahu under article 2 of the Treaty should be defined counsel for the claimants responded:

The fish in the sea off-shore from the manawhenua of the tribe without restriction as to species, depth or seaward boundary. To avoid any possible confusion or ambiguity, those fisheries must include the activity and business of fishing and the potential for development in existing or future fisheries. But that development right in those water[s] is exclusive to Ngai Tahu being the tribe which fished those waters pre-Treaty. Where that right overlaps with the development rights of Chatham Islands and Ngati Kahungunu, the exercise of those rights is a matter to be negotiated between those tribes.(AB1:54)

Therefore, while the claimants incorporate the Muriwhenua tribunal definition of “the activity and business of fishing” they add claims as to the absence of any restriction as to species, depth or seaward boundary, and the potential for development.

- 4.4.5 We are unable to accept the restricted definition of Maori Treaty fishing rights as referring only to “their fishing grounds” as claimed by the fishing industry. The difficulty with the industry’s approach is that it concentrates almost exclusively on what was thought to be in the minds of the English drafters of the Treaty. But even were that approach justified, it fails in our view to take any or adequate account of the input of James Busby. And even more seriously, it fails to take any or adequate account of the Maori understanding of the Crown’s guarantee of their tino rangatiratanga over their taonga, one of the most valued of which was their fisheries. As we have seen tino rangatiratanga in relation to fisheries encompasses much more than simply fishing grounds.
- 4.4.6 We agree with counsel for the Crown that Hobson’s instructions that Maori “usages” should be taken into account in drafting the Treaty were addressed in the substantial changes made to Hobson’s draft by Busby. Moreover, the use of the term “taonga” in the Maori text of the Treaty would not have given Maori any comprehension that an English text, which almost all did not see and could not have understood, might have significantly reduced their rights to their fisheries on the basis of a narrow definition in accord with principles of common law unknown to Maori. While the English drafters could, through ignorance of Maori fisheries, have had a narrow common law definition in mind, the Crown has convincingly argued that this was not the case. Hobson referred his draft of the Treaty to the British resident, the Crown’s agent in New Zealand prior to Hobson’s arrival. Busby recommended modifications based on his wide experience of local Maori usage and these recommendations were accepted and incorporated into the Treaty.
- 4.4.7 Accordingly, we reject the fishing industry’s first submission that the Muriwhenua tribunal erred in defining “their fisheries” in the

Muriwhenua report as “their business and activity of fishing” instead of “their fishing grounds”.

4.4.8 We turn now to the industry’s second and alternative submission that:

the definition “their business and activity of fishing”, on the reasoning process adopted by the Waitangi Tribunal in the *Muriwhenua Fishing Report*, is fact-specific to that case and, because of the important factual discrepancies between the Muriwhenua circumstance and the Ngai Tahu circumstance, should not be applied in the Ngai Tahu claim. (V1:3)

In support of this submission Mr Castle for the fishing industry emphasised a statement by the Muriwhenua tribunal that:

A major finding is that “their fisheries” refers to the business and activity of fishing, *in the context of the case*, and that the Maori business and activity in fishing ought not to have been impinged upon without some prior agreement. In this context, taonga means the same. (V1:8, emphasis added by Mr Castle)¹⁴

This passage, said Mr Castle, shows how the tribunal’s inquiry moved from consideration of the facts of that case to the meaning and application of the Treaty to those facts. In particular, it was said, the definition of “their fisheries” arrived at was the one appropriate “in the context of the case”. Counsel went on to submit that the phrases “their fisheries” or “o ratou taonga” might well have a different meaning and application in relation to a different set of facts providing the facts were materially different. It was Mr Castle’s contention that the facts in the Ngai Tahu claim are materially different from those in the Muriwhenua claim (V1:8–9).

Before we discuss Mr Castle’s analysis of the evidence in the two cases we should make it clear that in our opinion Mr Castle’s submission is tenable only if by a ‘material’ difference he means a difference in kind and not simply one of degree. We accordingly approach Mr Castle’s analysis with this in mind. We also bear in mind the definition of ‘business’ already referred to above which includes (among other matters):

“The state of being busily engaged in anything”, “Diligent labour, exertion . . . “and “In a general sense: action which occupies time, demands attention and labour, especially serious occupation, work, as opposed to pleasure or recreation.”

We note too, the definition of “activity” in the Concise Oxford Dictionary as follows:

Exertion of energy; state or quality of being active; diligence . . . actions, occupations

Mr Castle referred first to various findings in the Muriwhenua report as to the Muriwhenua tribes’ use of their fishing resource and then compared these with what he submitted were the facts relating to Ngai Tahu use of their fishing resource. We will consider each of the findings as listed and discussed by Mr Castle in turn. Paragraphs (a) to (f) relate to the Muriwhenua use of their fishing resource.

(a) “Full and extensive use”¹⁵

By contrast Mr Castle submitted that the Ngai Tahu user having regard to the size of the coastline and the relatively small population did not constitute a full and extensive use of the resource. While it appears the Ngai Tahu user of their plentiful resource was not as full as that of the more populous Muriwhenua tribes particularly on the West Coast where few Ngai Tahu lived it was nonetheless widespread on the east and southern coasts. As our earlier findings indicate, Ngai Tahu certainly made substantial if not extensive use of their fisheries. Obviously had their population been greater, as earlier it had been, their use would have been correspondingly greater. The mere fact that a tribe makes less use of a larger resource than a more densely settled tribe makes of a smaller resource cannot surely result in the one engaging in a business and activity and the other not. Such differences as exist here are no more than differences in degree; they are in no sense critical to the question of whether Ngai Tahu were engaged in the business and activity of fishing. Because the extent of one tribe’s fishing is less than that of another does not mean that it cannot constitute the business and activity of fishing. Each instance must be looked at on its own set of facts and not in relation to that of another tribe.

(b) Muriwhenua fishing was said to be “intensive all year round to about 3 miles off-shore”.¹⁶

By contrast, Ngai Tahu fished intensively out to about one mile from the shore, reef species being available in the onshore zone the year round and pelagic species being caught between December and May. Understandably, given their greater density of population and perhaps greater dependence on sea fish for their sustenance, the Muriwhenua tribes fished more intensively than did Ngai Tahu. Again, this is simply a matter of degree. This in no way affects the question of whether Ngai Tahu was engaged in the business and activity of fishing. The facts show that Ngai Tahu fished regularly and actively. They were dependent to a significant degree on sea fish for their sustenance, large quantities being dried for later use over the winter months and also for barter and trading. It was not a mere pastime. It was an essential and almost daily occupation. It was serious and skilled work.

(c) Muriwhenua fishing was “intensive and regular but mainly seasonal” from 3–12 miles off-shore.¹⁷

As we have indicated in the preceding chapter Ngai Tahu fishing beyond a mile or so out to some 12 miles from the shore was less frequent. Hapuka was a favourite catch. Fishing out to this distance occurred not only off the main settlements but, during their periodic sojourns, off other parts of the coastline.

Once again and for the same reasons as in (b) the Muriwhenua tribes appear to have fished more extensively out to 12 miles than did Ngai Tahu. Again it is a matter of degree. Fish were plentiful. Ngai Tahu caught all they required.

(d) refers to Muriwhenua tribes fishing “at distances up to 25 miles from shore” and (e) to possibly further out again – a ground 48 miles from shore was described.¹⁸

Ngai Tahu appears to have fished on occasions in a ground some 30 to 60 miles off-shore. Such difference as may exist between the Muriwhenua and Ngai Tahu off-shore fishing relates only to their relative infrequency. Neither ventured out to these distances often.

Counsel for the fishing industry also referred to other characteristics of the Muriwhenua fishing resource (V1:11). Those characterisations in the following paragraphs (i), (ii) and (iii), Mr Castle agreed applied similarly in the Ngai Tahu circumstances (V1:20):

(i) “The *hapu* and tribes of Muriwhenua hold the *mana* of the whole of the inner band – ie out to 12 miles”. Likewise we have found that Ngai Tahu held the *mana* of the sea fisheries out to a distance of at least 12 miles (4.5.7).

(ii) “Their [f]ishing equipment, methods and biological knowledge were highly competent and involved a variety of specialised techniques”. The same statement may also be made of Ngai Tahu.

(iii) “[C]atch quantities were small but not when viewed in terms of contemporary population, size and distribution”. This is equally true of Ngai Tahu.

(iv) “The common cultural characteristic of the Maori tribes was the paramount dependence upon the products of an aquatic economy”.

The Muriwhenua tribunal noted that the lack of comparable inland resources in Muriwhenua made the sea resource more important for them than most others. Their dependence on the sea was greater.

It may have been that the Muriwhenua tribes’ dependence on their sea fisheries resources was greater than that of Ngai Tahu. But as we have seen, sea fisheries were a highly important and essential part of the Ngai Tahu diet throughout much of the year. Unlike the climatic conditions experienced by Muriwhenua, those of Ngai Tahu did not allow cultivation or agricultural pursuits in much of Ngai Tahu territory. The great effort put into catching and preserving fish for consumption over the winter months testifies to the central part *kai maoana* and *kai ika* played in their daily sustenance. Any difference here is one of degree only.

(e) As far as commercial user of the resource by the Muriwhenua tribes was concerned:

In the decade before the Treaty, Maori fishing generally increased to accommodate a new demand for local non-Maori consumption and for export, as well as to provide money to purchase introduced commodities.

... The Muriwhenua fish trade was limited to visiting boats and the pre-1840 settlements.¹⁹

Mr Castle conceded that “the commercial involvement of Ngai Tahu in supplying settlers and other markets would have been greater than in the far north” (V1:20).

4.4.9 In conclusion Mr Castle submitted that in relation to “their fisheries” and “o ratou taonga” critical factual differences between the Muriwhenua tribes’ use of the fishing resource and that of Ngai Tahu means that, in the Ngai Tahu context, the phrases “their fisheries” and “o ratou taonga” do not mean “their business and activity of fishing”. But counsel omitted to elaborate on which factual differences were “critical” or in what way they were “critical”. It would be extraordinary if the facts relating to the use of the fishing resources in Muriwhenua and Ngai Tahu (or anywhere else) were identical. They were not. But in fact there is a quite remarkable similarity. Both were dependent on sea fisheries for their sustenance. Both fished close inshore intensively. Both fished out to 12 miles or so less frequently. Both ventured even further on relatively rare occasions. Both were actively and frequently engaged on the serious, indeed essential, work of providing for their daily sustenance and for gift exchange and trade.

4.4.10 Bearing in mind the factual circumstances of the frequent and regular access of Ngai Tahu to their abundant sea fisheries, and bearing in mind also the commonly accepted meaning of “business” and “activity”, we are satisfied that Ngai Tahu Treaty fishing rights, that is “their fisheries” refers to *their activity and business of fishing, and that must necessarily include the fish that they caught, the places where they caught them, and the right to fish. They are not limited to site specific grounds, favourite fishing places or a mere right of access to the sea.*

4.5 **The Nature and Extent of Ngai Tahu Sea Fisheries Treaty Rights in 1840**

4.5.1 In chapter 3 we considered in some detail the evidence from the various parties as to the nature and extent of Ngai Tahu sea fisheries prior to and as at 1840. We reached certain conclusions on this evidence. At the same time we noted that when dealing with events going back many centuries, and at the latest some 150 years ago, it is unrealistic to expect a precise assessment of the factual situation. If our conclusions err we believe they err in the direction of understating rather than overstating the full nature and extent of the Ngai Tahu sea fisheries. Not everything so long ago in the past can be remembered or reconstructed.

In this chapter we have considered Ngai Tahu sea fishing rights under article 2 of the Treaty of Waitangi as at 1840. It now remains for us to state our findings on the nature and extent of such Treaty rights in the light of our conclusions on the evidence discussed in chapter 3.

No seaward Boundary?

4.5.2 In an amended claim of 2 June 1987 the claimants indicated that since the issue of Treaty rights to mahinga kai, especially in respect of fisheries, was subjudice in the Muriwhenua claim then proceeding in the Waitangi

Tribunal it would be inappropriate to detail it further at that stage. But notice was given that a claim would be pressed for a share in the fisheries, including the commercial fisheries of Te Waipounamu.²⁰

On 25 September 1987 the claimants filed a further amended fisheries claim. It correctly anticipated that the sea fisheries component of its claim would be dealt with separately pending the outcome of the Muriwhenua claim then before the tribunal. In this amended claim:

- Ngai Tahu claimed sole ownership of the fishery off their tribal coasts out to the 12 mile limit under the Treaty of Waitangi.
- In the light of the Treaty partnership principle Ngai Tahu agreed to grant the Crown a full half share in that fishery including the right to 50% of all ITQ within the 12 mile limit.
- By way of compensation for losses arising from the serious depletion of its sea fishing within the 12 mile limit agreed to accept an allocation of ITQ in the fishery beyond the 12 mile limit, the question of such allocation to be negotiated.
- The amended claim was filed without prejudice to its substance being filed in a more formal way at a later date.²¹

4.5.3 The Muriwhenua report is dated 31 May 1988. On 25 June 1988 the claimants filed a further amended claim in respect of fisheries (J7).²² As it is central to this claim before us we annex a copy as appendix 1 of this report. For present purposes we refer to the following salient parts of the amended claim.

- Ngai Tahu own the marine fishery adjacent to their tribal territory. That fishery is their property and has been since time immemorial.
- The geographic extent of their fishery is said to be bounded laterally by perpendicular projection into the sea off their tribal land boundaries with other tribes at the coast at Pari-nui-o-whiti on the east, and at Kahuraki (Kahurangi) on the west, and sweeping southwards around the coast of Te Waipounamu and offshore islands including those to the south of Rakiura.
- No seaward boundary offshore is recognised. Their traditional and customary tribal fishery is not limited by any past or present law or custom of Britain or of the Crown in New Zealand as regarding three, 12, 200 or any other number of miles offshore, nor the alleged projectile strength of their cannon. They claim the right to go to sea as far as they must, or are able, in order to obtain the fish they require.
- The Ngai Tahu fishery is said to include the rights to fish without any interference or restriction whatever by the Crown or by other British subjects or New Zealand residents or by foreign persons.

4.5.4 We pause here before referring to other aspects of the claim. If we correctly understand the Ngai Tahu claim it is that their sea fisheries extend indefinitely seaward on either side of the South Island without limitation within the parameters specified. These parameters we believe would be within the latitudes 40° and 48°. Taken literally this would imply

that the Ngai Tahu sea fisheries extend without limit around the world within these latitudes. Such a suggestion is clearly untenable and is in conflict with the sea fishing rights of a number of other nations.

The full implications of such a claim need only to be stated for their fatally flawed nature to become apparent. The Maori version of article 2 of the Treaty guaranteed to Ngai Tahu *te tino rangatiratanga* over their sea fisheries. The Muriwhenua tribunal referred to three main elements embodied in the guarantee of *rangatiratanga*. First, authority or control, since without it the tribal base is threatened. Secondly, the exercise of that authority must recognise the spiritual source of the *taonga*; thirdly, the exercise of authority was not only over property but over persons within the kinship group and their access to tribal resources. In addition to these this tribunal has emphasised that an important element in *rangatiratanga* is trusteeship. But this trusteeship does not operate in a vacuum; it is people and territory specific. Further, a tribe's authority extended over the land and foreshore and over such part of the sea as it exercised *mana moana*. And, while there are no limits to the bounty of *Tangaroa* except respect for the resource and sustainability of the resource, *rangatiratanga* includes management and control of the resource.

- 4.5.5 Notwithstanding the apparently global nature of its sea fisheries claim, we believe that the claimants have recognised that there must be more defined limits both in terms of people and the sea territory involved. Later in their claim of 25 June 1988 Ngai Tahu recognised “the conservation and management duties inherent in their rights of ownership usage and control of their fishery, for the continuing benefit of themselves and all other citizens of New Zealand” (see appendix 1; J7:3). Clearly such duties of management and control could not extend world-wide whether in 1840 (the period with which we are now concerned) or at present. In speaking of duties of management and control Ngai Tahu is referring to important elements of *rangatiratanga*. Those duties can only relate to territories, whether on land or sea, over which they can be effectively implemented.
- 4.5.6 We turn then to examine the extent to which Ngai Tahu in 1840 were able to exercise *rangatiratanga* over the abundant fisheries which surrounded their tribal *rohe*. The evidence establishes that Ngai Tahu fished in diminishing degrees of intensity out to 12 miles or so off many parts of the eastern and southern coasts and appreciably less so off the western coast of *Te Waipounamu*. Some waters, particularly in the west, were inhospitable and were seldom if ever frequented. It is clear however that Ngai Tahu had the capacity to fish out to 12 miles or so from the shore or further had it been necessary and in at least one instance they went appreciably further. There is no evidence that in 1840 any other tribe was challenging their right to fish wherever they chose off their coastline or that, had their fishing been so challenged, they lacked the will or the ability to defend it. It so happened that Ngai Tahu had no need to fish intensively in all available fishing grounds. It is clear they took all the fish they required, and their needs were considerable, within the broad

confines of an outer limit of some 12 miles or so from the shore. They fished regularly, in substantial quantities and with discrimination as the archaeological evidence testifies. They were familiar with a wide range of fish as their naming of so many fish demonstrates. We have no hesitation in finding that in 1840 Ngai Tahu exercised effective tino rangatiratanga over the sea fisheries out to a limit of not less than 12 miles from the shore off the whole of the land boundaries of their rohe. They had full exclusive and undisturbed possession of these sea fisheries. They carried on their business and activity of fishing within such parts of these waters as were practicable and suited their convenience and needs. The fact that for various reasons they chose not to fish in some areas in no way diminished their mana and rangatiratanga over their sea fisheries. They took all they needed where and when it suited them to do so.

4.5.7 No doubt on occasions they ventured beyond the 12 miles or so which was normally a sufficient distance for their requirements. We can understand the reluctance of the claimants to admit to any seaward boundary to their fisheries for Tangaroa's bounty did not stop at any arbitrary line. Nor do fish recognise any boundaries. While, on the basis of the evidence before us the only reasonable conclusion is that Ngai Tahu rangatiratanga encompassed the sea fisheries to the approximate limit we have specified, it does not follow that Ngai Tahu could have no future interest in the fisheries beyond 12 miles or so from the shore. In a later chapter we discuss the right of development which is inherent in the Maori sea fishing rights protected by the Treaty. But this critically important issue is best discussed in the light of developments which followed the Treaty and the new nation founded by the Treaty. Accordingly in chapter 10 we consider the nature and extent of Ngai Tahu sea fisheries Treaty rights at the present time having regard to post 1840 developments.

4.5.8 In reaching our conclusions on the nature and extent of Ngai Tahu exclusive sea fishing rights under the Treaty at 1840 we have been mindful of the views of the Crown and the fishing industry. Neither considered the question from a Maori perspective. They concentrated on what they saw to be the factual position with little if any consideration of the nature of Ngai Tahu rangatiratanga over Ngai Tahu fisheries. Thus, after a lengthy discussion on the nature and extent of the fishing at 1840 Mr Carruthers for the Crown said:

All in all it is submitted that the evidence adduced indicates Ngai Tahu fisheries were far less extensive, intensive and controlled in comparison with Muriwhenua. Large expanses of the offshore seas were inhospitable and incapable of use. The evidence is not at all compelling that Ngai Tahu worked the whole of the inshore seas surrounding their tribal territories, let alone the offshore seas. (AB2:35)

Nothing that is said here on behalf of the Crown is inconsistent with the tino rangatiratanga of Ngai Tahu over their sea fisheries out to 12 miles or so from their coastline. We have earlier discussed the comparison with the fishing operations of the Muriwhenua tribes in the

context of the fishing industry submissions. We have concluded that while, as is to be expected, the Ngai Tahu sea fisheries differed from those of the Muriwhenua tribes, both were actively and regularly engaged in the business and activity of fishing. Both exercised rangatiratanga over the fisheries in the waters off their respective rohe. Rangatiratanga over these waters did not extend only to those more favoured areas where Ngai Tahu chose to fish. As we have earlier indicated Ngai Tahu had the ability to travel the seas and exploit their resources and to maintain the links of trade and kinship. Cook was met by four canoes off Kaikoura containing 57 men on 15 February 1770. They were at least 12 miles from shore. Ngai Tahu travelled annually to the Titi Islands beyond Rakiura (Stewart Island). They journeyed through the Foveaux Strait to Fiordland and up and down both the east and west coasts within their rohe and on occasions to the north beyond. They no doubt fished as they journeyed on these various occasions. To find rewarding fishing grounds they doubtless had to travel over less fruitful and on occasions, inhospitable waters. Ngai Tahu rangatiratanga extended to all the waters within their rohe over which they travelled or could travel to engage in fishing. In short, their rangatiratanga encompassed the whole of the sea territory extending 12 miles or so from their lengthy coastline notwithstanding that, for various reasons, not all of it was fished or that some parts were fished more intensively or extensively than others. As we will see in chapter 10 Ngai Tahu Treaty sea fisheries today are more extensive than those at the time of the Treaty.

References

- 1 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) (Muriwhenua Fishing Report)* 1988, pp 173–174
- 2 *ibid* p 174
- 3 *ibid* p 177
- 4 *ibid* pp 177–178
- 5 *ibid* pp 179–181
- 6 *ibid* p 182
- 7 *ibid* p 182
- 8 *ibid* p 183
- 9 *ibid* p 183
- 10 *ibid* p 203
- 11 *ibid* p 204
- 12 *British Parliamentary Papers* 1840 (238) p 38; see also X4:10.
- 13 Section 5, Part 1, Maori Fisheries Act 1989
- 14 see also *Muriwhenua Fishing Report* p 196
- 15 *ibid* p 196; see also V1:9
- 16 V1:10; see also *Muriwhenua Fishing Report* p 196
- 17 V1:10; see also *Muriwhenua Fishing Report* p 197
- 18 *ibid*

- 19 *Muriwhenua Fishing Report* p201
- 20 *Ngai Tahu Report 1991 (Wai 27)*, Waitangi Tribunal Report 3/4 WTR 1991 appendix 3 p1109
- 21 *ibid* p1113
- 22 *ibid* appendix 3.8, p1114

Chapter 5

The Crown Assumes Control of the Fishery, 1840 to 1908

5.1 Introduction

5.1.1 The first legislative intervention in fisheries did not occur until 1866. By 1908 the Fisheries Act of that year consolidated then existing legislation. This Act remained the basis of all subsequent fisheries legislation until 1983. In this chapter we will record the nature and extent of Ngai Tahu fishing from 1840 to 1908 along with the steadily growing involvement of Europeans. We will examine how the Crown came to control fishing during this period. We will describe the Crown's attitude to Ngai Tahu fishing rights and the Ngai Tahu response to the Crown's actions and inaction. Necessarily the Ngai Tahu situation will need to be viewed in the wider context of Crown fishery legislation which for the most part was of general application throughout New Zealand. The Crown's legislative and administrative conduct during the period will be measured in the light of the Treaty fishing rights of Ngai Tahu.

In the next chapter we will continue the account up to the early 1980s, shortly before the Fisheries Act of 1983 replaced the 1908 Act. In the subsequent chapter we will complete the account up to the present time.

5.2 Ngai Tahu Fishing

5.2.1 In chapter 3 we have described the extensive involvement of Ngai Tahu sea fishing over several centuries up to 1840. Needless to say, this involvement continued for some years after the signing of the Treaty. During the 1840s and 1850s, prior to the various land purchases by the Crown discussed in our *Ngai Tahu Report 1991*, Ngai Tahu continued much as before, harvesting kai moana and kai ika for their own consumption, for gift exchange and for commercial sales. Yet, as we have found in our *Ngai Tahu Report 1991*, by 1864 Ngai Tahu were in a parlous condition:

They were now an impoverished people largely confined on un-economic patches of land . . . neglected by government at both central and provincial level, marginalised and struggling to survive both individually and as a people.¹

This was the direct, indeed inevitable, result of the Crown's breaches of its Treaty obligations we have chronicled in our 1991 report.

As we have there indicated, from the early 1850s the effects of settlement steadily encroached on Ngai Tahu on all sides as land was progressively fenced and drained by Europeans and access to mahinga kai steadily decreased.² Tribal structures and tribal communal activities were under-

mined as both access to resources and the resources themselves diminished. For centuries Ngai Tahu had used fleets of canoes crewed by a substantial number of whanau or hapu. But the change in technology resulting from the increasing use of whaleboats (or their equivalent) equipped with sails meant that large numbers of Maori to paddle or row boats were no longer required. This contributed to a decrease in hapu involvement.

- 5.2.2 The tribunal heard evidence from both Ngai Tahu and Crown witnesses of the involvement of Ngai Tahu in sea fishing in the decades following the signing of the Treaty. In chapter 3 we have discussed Professor Anderson's evidence on Ngai Tahu mahinga kai prior to 1840. His evidence extended beyond 1840 by several decades. We here record his authoritative evidence as to Ngai Tahu sea fishing during the three decades 1840 to 1870. This forms a small part of Professor Anderson's comprehensive discussion of Ngai Tahu access to a wide variety of mahinga kai. Ngai Tahu involvement in whaling has already been described. It was in decline soon after 1840. Ngai Tahu activities in East Otago from 1832–1853 included involvement in whaling. But according to Anderson the major economic activity in the 1830s and 1840s was the cultivation of substantial quantities of potatoes for shipment to Sydney. Pork, muttonbirds and dried and salted fish were also sent from Otakou (H1:21).

Fishing was in part a commercial activity. While Anderson says it is not entirely clear that the consignments of salted and dried fish sent to the Sydney market in the mid 1830s had been obtained from Otakou Maori, this seems very likely in the light of their expertise in catching and preserving the local species, particularly barracouta. In 1848 Ngai Tahu demonstrated to the first Dunedin settlers, who also purchased from the Maori, their technique for catching barracouta (H1:23). Anderson tells us that fishing continued as a major activity into the 1860s. He cites from an article in the *Illustrated New Zealander* of 18 March 1867, which reported that the Otakou people:

cultivate about sufficient land to grow their own vegetables and corn, they rear pigs and poultry to a considerable extent, but their principal avocation is barracouta fishing, with which they supply the Dunedin market. They also cure great quantities for their own consumption, and it may be considered their staple trade and principal food . . . they are caught outside the heads. (H1:24)

It is apparent from this report that Ngai Tahu were actively engaged in fishing as a commercial activity, in addition to supplying their personal requirements.

In the mid-Canterbury area, eels were a major resource and Professor Anderson confirms that sea-fishing was a major activity on Banks Peninsula. Fish were exchanged for eels by Pigeon Bay and Port Levy Ngai Tahu with Ngai Tahu at Little River (H1:37). Professor Anderson confirmed that fishing in the Kaikoura district was important.

In the 1840s there were two main areas of settlement on the West Coast; one at Kawatiri (the Buller mouth area near Westport) and the other on the central West Coast known generally as Arahura (H1:41). Apart from seasonal mobility, the main change in the 1846–1863 settlement pattern noted by Anderson was an apparent movement north into Kawatiri and a concentration of the remaining Westland Ngai Tahu into the central area between Mawhera and Arahura, with small groups remaining at Poerua, Bruce Bay and Jackson’s Bay. A wide variety of indigenous foods were collected. In the late 1840s fish included eels, native trout and grayling, sprats, sole and other small estuarine and riverine species, whitebait, dogfish, ling and hapuka. Mussels, paua and seals were taken on the shore. In the spring, the main river fishing began with whitebait, and in December and January the population was widely dispersed along the coast and up the rivers eel fishing (H1:45–46). Anderson notes that the “whole diverse and extensive economic system was operated by no more than 100 people”, including numerous children, living along the 250 kilometre coastline from Kawatiri to Okahu in the 1840s (H1:47). He notes Mackay’s estimate of 116 Ngai Tahu for the West Coast in 1868 (H1:47). Professor Anderson told us that while he may have said in a book published in 1982 that Ngai Tahu off-shore fishing was not significant on the West Coast, the available evidence on this matter was “somewhat deficient”.

5.2.3 Few if any Ngai Tahu lived permanently in Fiordland in the century 1770–1870. Anderson summarises his discussion as follows:

Taking all the evidence together it may be concluded that Fiordland was frequently visited by Maoris, mainly from Foveaux Strait, throughout the century 1770–1870. Sealing seems to have been a major attraction, both for food and the trade in pelts. One other important reason was exploitation of the takiwai (bowenite) at Anita Bay, Milford Sound. Heaphy (1846) commented that Ngaitahu from Otakou were known to visit the south Westland and Fiordland pounamu sources and there is an account of Aparima people taking a load of takiwai from Anita Bay, by an inland route and down the Waiau, in 1838 or 1839

Settlement seems, on the whole, to have been temporary but habitation extending over some years can be inferred in two instances: the pa at Matauira Island and Martins Bay. (H1:52)

5.2.4 We were impressed with the evidence of David Higgins, a Ngai Tahu commercial fisherman living and working at Moeraki. Mr Higgins took upwards of nine months away from his commercial activities to undertake on behalf of the claimants a comprehensive review of Ngai Tahu participation in sea fishing from 1840 down to the present time. In the course of his investigations he interviewed all kaumatua with knowledge of Ngai Tahu involvement in fishing. In particular he obtained access to hitherto closely held marks books, owned and treasured by various Ngai Tahu whanau, which recorded a great many fishing places to which they and their tupuna had access over many decades. Following the marginalisation and impoverishment of so many Ngai Tahu as a result of the Crown’s breaches of its treaty obligation to ensure they were left with

an adequate endowment, few Ngai Tahu had the resources to engage in extensive fishing operations. At the same time the need for Ngai Tahu to continue to fish for their sustenance and other obligations remained.

Mr Higgins stressed the importance of the adoption of whaleboats. They were very seaworthy and capable of holding about one tonne of fish. They were greatly prized by Maori and Pakeha fishermen. They were often fitted with sails. Along with near copies, they were the basis of the South Island fishery until at least early in the twentieth century (J10:52).

5.2.5 Mr Higgins told us the South Island fishery could be divided into three zones (J10:49). Working out from the coastline the zones are:

(a) *The close inshore zone* running from the edge of the sea out to the range of a rowing boat, ie about half a mile to one mile offshore. Mr Higgins said this was the Maori traditional, ie pre 1850/60, fishery.

(b) *The continental shelf zone* (“the shelf zone”)—this covers the area from very close inshore out to the edge of the continental shelf. The shelf varies in distance from the coastline at Kaikoura, where it is only two or three hundred yards out from the shoreline, to the southern end of the island where it is up to 30 miles from the coast. Mr Higgins advised that until the advent of deep sea fishing in the 1970s this was the fishing ground used by Maori and Pakeha commercial fishers.

(c) *The deep sea zone* beyond the continental shelf.

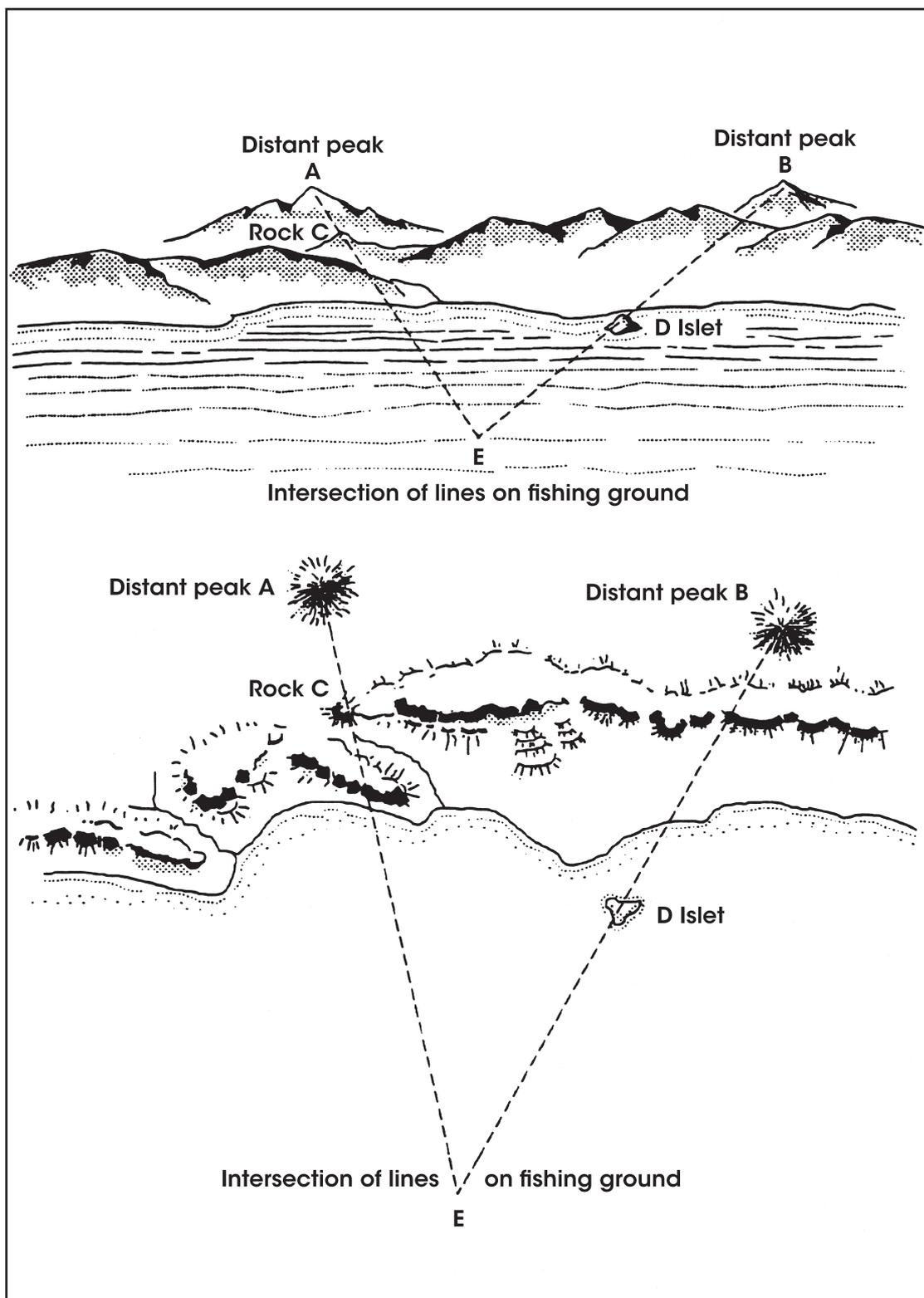
5.2.6 With the arrival of settlers from the early 1850s and their increasing numbers in the next two decades, especially in Otago and Canterbury, a viable market for a Ngai Tahu commercial fishery developed. At that time the various reef species were available in the inshore zone year round, while the pelagic species were caught in that zone between December and May (J10:52).

Marks books

5.2.7 Mr Higgins’ research strongly suggested that as early as the 1850s and certainly by the mid-1860s Ngai Tahu commercial fishing extended out as far as 20 to 30 miles from the shore. The evidence for this was to be found in the “Marks Books” which he collected from Ngai Tahu families with a long history of involvement in the commercial fishery. Ngai Tahu traditional history, Mr Higgins said, had always maintained that by the 1860s their commercial fishermen were fishing well out to sea. That this was so is confirmed by the marks books (J10:53).

Mr Higgins demonstrated to us the use of marks. He explained that by identifying a number of topographical features, and dividing them up so they bear a particular relationship to each other when seen from a boat at sea, the boat could be placed at a particular spot on the sea with a great degree of accuracy. The system is known to fishermen and sailors as a “running fix”, and is based on trigonometry (J10:53).

Copies of some of his family marks books were produced in confidence by Mr Higgins. Some of these dated from the 1850s. Marks books belonging to some other Ngai Tahu families went back to the 1860s. Each



Map 5.1: Illustration of the use of marks books, sketch by B Osborne in Elsdon Best "Fishing Methods and Devices of the Maori" *Dominion Museum Bulletin* number 12 1929, cited in evidence as S3

family jealously guarded its marks, as these identified their best fishing grounds.

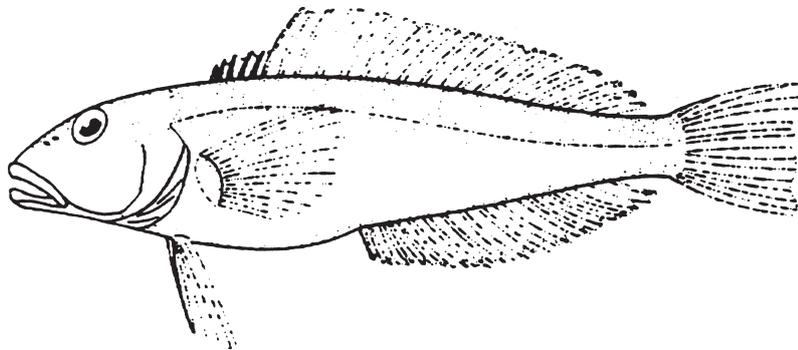
In recent times modern technology in the form of radar and echo sounders have had the advantage that they can do the same job in all weathers and with equal accuracy as the books.

Accuracy of marks books

- 5.2.8 Mr Higgins described the accuracy of the marks books as “quite astonishing”:

Some of them are good enough to place a boat with an accuracy of 20 feet at 12 miles from the shore, and an accuracy of 10 feet at 6 miles. This accuracy enabled our people to invariably find patches of fish, some as small as 30 feet across, at a distance of up to 20 miles from shore. The marks were so accurate that the best ones would enable a fisherman to place his boat right on top of a patch which was only 30 feet across and at a distance of up to 20 miles from shore. (J10:54)

- 5.2.9 The increased reliance on modern technology persuaded the families owning marks books to make them available to Mr Higgins for the purpose of plotting fishing grounds. This enabled the claimants to put before us a series of transparencies on which was plotted the Ngai Tahu commercial fishery as disclosed by the marks books from as early as the 1850s through to 1875. Most of the marks shown were plotted by taking the marks book to sea on board a trawler and there lining the boat up with the marks. A radar fix was then obtained, plotting the marks on the



*Rawaru
Blue Cod*

charts to an accuracy of the order of 25 to 50 feet. The marks as plotted show fishing grounds scattered throughout the shelf zone, with the outer most stopping just short of the deep sea zone (J10:55). The marks are more concentrated around a number of Ngai Tahu settlements, particularly those at Kaikoura, off the Otakou coast and in Foveaux Strait. None were provided for the West Coast.

Specific charts (J12; J13 and J14) were also put in evidence by Mr Higgins, disclosing hapuka (groper) grounds on the continental shelf zone plotted from “patch marks” (J10:54). Mr Higgins explained that when the hapuka are there, they swim in schools known to fishermen as “patches”. The

position of these patches varies with the tides and the time of the year but:

given any combination of time of year and state of tide, the Groper will always be in the same places. Because Blue Cod like the same feeding conditions as Groper, the patch marks also serve to locate that species. (J10:54)

- 5.2.10 The tribunal accepts Mr Higgins' claim that the marks books are important to establishing that Ngai Tahu commercial fishermen were operating regularly between the coastline and points 20 to 30 miles offshore as early as the 1860s (J10:55). We also accept his contention that the books provide contemporary evidence which corroborates the traditional evidence given by the older fishermen and kaumatua (J10:56).

We will discuss Mr Higgins' evidence about the South Island fishery between 1900 and 1975 in the next chapter.

5.3 **Crown Evidence as to Ngai Tahu and European Fishing**

- 5.3.1 Detailed evidence of both Ngai Tahu and European fishing was given by the Crown historian Tony Walzl. This evidence was based on historical sources, especially newspapers. Unfortunately, as Mr Walzl explained, the examination of newspapers, especially over an area as large as the Ngai Tahu tribal area, was a time and labour-consuming task which occupied many months. The research team involved was able to cover newspapers from the beginning of publication of the various newspapers, which in most cases was in the 1850s or 1860s, to 1880. Thereafter Mr Walzl's evidence, which extended to 1908, showed fewer actual examples of Ngai Tahu fishing, although as he says, it is evident from their comments, complaints and responses to government that fishing was still important. Mr Walzl suggested that the fewer examples of actual Ngai Tahu fishing after 1880 resulted less from any change in Ngai Tahu fishing than from the inability to research newspaper sources after 1880. Accordingly, the emphasis of Mr Walzl's evidence for the period 1880 to 1908 changed from observations of Ngai Tahu fishing to recording the expressions of concern by Ngai Tahu on the loss of their fishing resources (S7:71). It should also be noted, as Mr Walzl made explicit, that his sources for the first two post-treaty decades were mainly European and tend to be generally superficial. After European settlement began in the late 1840s, Ngai Tahu and European contacts tended to be intermittent. Ngai Tahu settlements were generally separate from those of Europeans. Much of the daily routine of Maori life may have proceeded unobserved (S7:5). This is consistent with our earlier finding of the marginalisation of Ngai Tahu and their confinement on minimal reserves at some remove from European settlements.

- 5.3.2 Walzl records the observations of various European observers. Thus William Haberfield, who lived on the east Otago coast in the late 1830s, is noted as having seen a dozen and sometimes as many as 20 Ngai Tahu canoes go out fishing for barracouta. They would take their double canoes outside the heads; sometimes they went in European built boats when they could get them (S7:6). Edward Shortland, who visited many Ngai Tahu kaika during 1843–1844, later noted various instances of their

fishing “activities” at Moeraki, the Taieri river, the mouth of the Waitaki river and the “ninety-mile beach” (S7:6–7).

Frederick Tuckett in 1844 recorded fishing activity in a bay south of Moeraki where a large quantity of fish was being cured (S7:7). The Reverend Wohlers, a missionary at Ruapuke for some years, reported in the early 1850s that there was good fishing off the island when the weather was calm. In relation to fishing around Ruapuke he inferred in later reminiscences that the sea there was rich in fish, as were the rest of New Zealand waters. If the sea was calm enough to allow deep water fishing, a somewhat infrequent event, fish weighing 50 pounds and over could be caught (S7:9). Heaphy, while noting in 1846 the importance of river and estuarine fishing, thought the Arahura Ngai Tahu did relatively little sea-fishing. In April 1849 *The Otago News* reported that by far the greater number of Otakou Ngai Tahu lived on the reserve near the harbour entrance where they cultivated potatoes for the supply of the new town of Dunedin, which, “with fishing, forms their principal occupation” (S7:10). Walzl also noted that in relation to the 4800 acre Maungamaunu reserve sought by Ngai Tahu on the Kaikoura purchase, Alexander Mackay, while agreeing that the land was “very worthless”, added that Ngai Tahu sought it “in order to secure them the right of fishing along the coast” (S7:11).

- 5.3.3 Tony Walzl gives examples of traditional gift exchange transactions by Ngai Tahu in the 1840s and 1850s. He cites J Hay in his *Reminiscences of Earliest Canterbury* on the importance of sea-fishing and its role in traditional gift-exchange for Banks Peninsula Ngai Tahu:

Sea fishing was, of course, a principal source of food supply to the coastal Natives. At Pigeon Bay they used to catch large numbers of fish which they suspended in the sun to dry. Shark was one of their favourites. It was customary in the “forties” for the Pigeon Bay and Port Levy Maoris to carry tons of these dried fish inland, meeting halfway the Natives from Little River laden with eels. On the summit both parties held a korero, and after exchanging their burdens, returned respectively to their homes. (S7:12)³

Thomas White, an early colonist who moved from Otago to Banks Peninsula in the mid-1850s, told a similar story:

The natives used to travel over the hills easily in those days of no roads. White has known a party to take two tons of dog fish to Little River, the Maoris there bringing in exchange two tons of eels. (S7:13)⁴

Tony Walzl refers to an observation by Brunner in 1847 of a gathering of Ngai Tahu at Mawhera where a poha of dried dogfish was exchanged for one of preserved wekas (S7:13). He also cites an anonymous Dunedin newspaper correspondent in 1859, who reported that when visiting the north, Otakou Ngai Tahu commonly took barracouta as a present, this being the most acceptable gift there (S7:13).

- 5.3.4 Mr Walzl gives various examples of Ngai Tahu trading in fish with European settlers in the 1850s and 1860s. This was especially so in Otago

but also occurred in Canterbury. A later comment by R A Sherrin confirms the substantial trade at Dunedin:

In the early days of the Otago settlement, when the colonists depended solely on the Maoris for the supply of fish, it [barracouta] was very extensively used. (S7:16)⁵

5.4 **European Fishing Begins**

- 5.4.1 The abundance of fish in South Island waters, as well as in the north, was readily apparent to European observers. While their principal interest was in the land, some commentators envisaged the development of a fishing industry in New Zealand waters. Charles Heaphy, for instance, saw a ready market for cured fish in South America. He envisaged the employment of Maori in such an industry (S7:21–22). In evidence before a British parliamentary committee in 1844, a Mr Earp foreshadowed the employment of Maori, supervised by “an European overlooker”, as fishermen (S7:21–22). As Mr Walzl observes, the New Zealand fisheries were seen as being open to European enterprise, capital and management with the assistance of a Maori workforce known to be experts. The Treaty was not mentioned. It was simply assumed that the sea was open to all (S7:22–23).

While in the first two decades after the signing of the Treaty Europeans fished on occasions for their personal needs, there appears to be no evidence of any European commercial fishing prior to 1860 (S7:24).

5.5 **Ngai Tahu Fishing 1861 to 1880**

Walzl gave us various instances of Ngai Tahu fishing on both the east and west coasts during this period. These included large catches, often for their own consumption, including storing for future use (S7:25–26).

Stewart Island oyster fishery

- 5.5.1 The exact date when the commercial oyster fishery centred on Rakiura (Stewart Island) commenced is not known. In an 1871 report W H Pearson, commissioner of Crown lands for Otago, noted that the oyster trade in the area was “carried on at first almost exclusively by Maoris and Half-Castes . . .” (S7:27).⁶ Subsequently, as Walzl noted, several Europeans became involved. In a later report of 1877, Pearson referred to a cutter of 18 tons sailing into Oyster Cove, Port Adventure, and filling up in a very short space of time by shovelling the oysters up into the hold. According to Pearson, the Maori who lived in a Maori reserve “used to fill their boats in a similar manner” (S7:28).⁷

It is not known whether Europeans or Maori were principally responsible for the near exhaustion of the Port Adventure beds which had occurred by 1867. Commissioner of Crown Lands Pearson, in a report of 26 December 1866 discussing Stewart Island and its various amenities, noted in relation to Oyster Cove:

This cove has obtained its name from the fecundity and excellence of its oyster beds, which, I am sorry to say, have become almost depopulated, owing to the want of protection from abuse; though

I have little doubt that, with judicious supervision, they will become, in a few years, as prolific as formerly. (S7:31)⁸

Mr Walzl and his research team were unable to discover any historical evidence as to the rights which Ngai Tahu exercised over the Port Adventure oyster beds. Maori both consumed them as food and traded them with Europeans. Europeans also engaged in the oyster trade. Mr Walzl commented:

We do not know if Ngai Tahu saw the beds as exclusively belonging to them, or if they were willing to share them with European interests or even whether there had been some arrangement made allowing European interests to proceed. As noted many of the Europeans involved with the oyster industry, were connected with Ngai Tahu through marriage. (S7:32)

Nor, it seems, is there any record of any attempt by Ngai Tahu to protect the oyster beds when the Crown opened negotiations with Ngai Tahu for the purchase of Rakiura. Nevertheless Ngai Tahu retained their links with the oyster industry. After the Port Adventure beds became no longer viable Ngai Tahu became involved in the working of deeper water beds, as we will later relate (S7:33).

5.6 Other Ngai Tahu Fisheries

Mr Walzl gave various examples of Ngai Tahu fishing activities in the 1860s and 1870s. They were directly involved in supplying fish to European markets. Among the instances cited by Mr Walzl were:

- an enormous quantity of crayfish caught by Maori being landed at a Dunedin jetty in December 1863 (S7:34);
- an unusually large quantity of rock oysters being brought to Christchurch from Lyttelton in September 1866 (S7:35);
- Ngai Tahu being chiefly employed in the Stewart Islands fishing company's exports of fish to Melbourne and the West Coast in 1866 (S7:35);
- in March 1867 the principal avocation of Otakou Ngai Tahu was reported as "barracouta fishing with which they supply the Dunedin market" (S7:36);⁹
- in May 1870 the fisheries commission was advised that only two white men had been regularly employed in fishing at Kaikoura, "the trade having generally been carried on by the Maoris", Ngai Tahu fishing being largely for barracouta (S7:36);¹⁰ and
- in November 1872 a Dunedin newspaper noted that Ngai Tahu supplemented their earnings by fishing, but described them as gaining a precarious living by fishing and as being "seldom rewarded by success for the hardships they endured" (S7:37).¹¹

5.7 European Fishing 1860 to 1880

The Canterbury fishery

5.7.1 The Canterbury fishery was by no means as flourishing as the Otago fishery. Mr Walzl, relying on a report by the fisheries commissioners of May 1869 and other sources, has noted that:

- about 1864 the Europeans first began to take flounder-fishing at Waihora (Lake Ellesmere) out of the hands of Ngai Tahu: “one shot of the net often provided more marketable fish than could be sent down by coach to Christchurch” (S7:38–39).¹²
- the Canterbury fishery was mainly coastal, being principally confined to the bays of Port Lyttelton, Port Levy and the outlying rocks at their heads, the Avon estuary and the mouths of the Waimakariri river and Saltwater creek together with Lake Ellesmere (S7:39).
- only 12 boats were operating full-time in 1889 with two men on board each. The number of casual fishermen was not known. Most of the full-time fishermen were said to be English, with some Italian (S7:39).
- the commissioners considered the fish supply of Canterbury fell far short of that of the neighbouring provinces both in quality and quantity. As late as 1871 an Akaroa correspondent to a newspaper was reporting that the Akaroa harbour was “absolutely swarming with fish, and no one takes the trouble to catch them” (S7:41).¹³
- in 1872 a new Deep Sea Fishing Company was launched to bring a regular supply of fish to Christchurch. Early in 1873 its cutter *Nautilus* discovered more productive grounds. According to the *North Otago Times* of 11 March 1873 the cutter returned with upwards of two tons of fish:

They comprise barracouta, trumpeters (over three feet in length), habouka [sic], blue cod, butter fish, moki, &c. It is fully proved that there is plenty of fish on the coast, and as the men seem to have found out the beds, there can be no doubt that Christchurch will soon be provided with a constant supply of fish. (S8(1):31)¹⁴
- By 1874 13 fishermen were listed for the whole of Canterbury. Four years later the number had shot up to 37 (S7:42).

5.8 The Otago Fishery

5.8.1 Walzl gave details from newspaper accounts of the activities of the ketch *Radcliff* from Melbourne. In January 1868 it began trawling along the east coast of Otago. By mid-March it was fishing between Moeraki and the Otago heads. Fishing was conducted out further than usual and proved successful. Sole, trumpeter, blue and red cod, hapuka, ling, skate and crayfish were caught (S7:42–43).

5.8.2 Useful information was contained in the 1869 report of the commissioners for the province of Otago to Dr Hector. As was the case with the Canterbury commissioners, no reference is made to any fishing activities

of Ngai Tahu, although it is apparent from other sources that they were actively engaged in fishing at the time. By contrast, as we have previously noted, the trade at Kaikoura was almost entirely carried out by Ngai Tahu.

The Otago commissioners annexed to their report evidence taken from several European fishermen. From this they inferred there were no regular fishing grounds on the Otago coast, attributing this to the apparent absence of reefs, banks or natural spawning grounds “known at present”. It was thought that there must be some large banks many miles off the coast which the fish frequented in the breeding season (S7:44).

By contrast, David Higgins’ evidence demonstrated that Ngai Tahu fishermen were much better informed, as their marks books confirmed.

5.8.3 By 1872 however, some progress was made. On 1 October 1872 the Christchurch *Press* reported that three fishing companies had recently been formed in Otago. Their efforts were said to have “brought to light no less than fifty varieties of edible fish before unknown” (S8(1):29).¹⁵ In 1873, European fishermen at Moeraki were active (S8(1):31)¹⁶ and the following year fishery operations were reported at Oamaru (S8(1):32).¹⁷ Walzl notes from census information that by 1874 there were 67 fishermen in Otago (including Southland) and 17 fishmongers. Two fish-curing establishments were listed. By 1878 there were 105 fishermen, 38 fishmongers and two curing establishments (S7:45).¹⁸ We understand Maori were not included in census at this time.

5.8.4 In September 1877 however, James MacAndrew, an Otago MP, sounded a warning that the fishing resources in Otago harbour were in danger. In the House of Representatives he sought legislation to protect fisheries from seine netting within harbours and to impose a closed season of three months each year:

Attention had been directed during the last few years to the wanton destruction of fish which had taken place in the waters of Dunedin and in other parts of the colony. Ground fish, such as flounders and soles, were being rapidly exterminated, and he put the question in the hope that the Government would pass a measure dealing with the subject this session. (S7:45)¹⁹

5.9 The Southland Fishery

Oysters

5.9.1 As we have seen, the Port Adventure bed was exhausted by 1867. In the following year, some beds were discovered off Port William in deeper water. They needed to be dredged, rather than collected or shovelled. By August 1872, as Mr Walzl relates, the Port Adventure beds were so depleted that government intervention was necessary to close them against dredging. The Port William beds were also in danger. New beds were, however, discovered in 1872 off Halfmoon Bay. This relieved the pressure from the Port William beds which were all but exhausted. By

1877 the Halfmoon Bay beds were showing signs of being overworked and at Pearson's request they were closed for a period (S7:46–48).²⁰

Fishing

- 5.9.2 Mr Walzl related in some detail the efforts made early in the 1870s to establish on Rakiura a “special settlement” to promote the fishing industry and timber trade. In 1874, a contingent of Shetland and Orkney Island settlers who had arrived the previous year found fishing unrewarding and some preferred to seek the “high wages” available at Dunedin. Others took up employment in oyster cutters. The scheme was not a success (S7:50–53).

West Coast fishery

- 5.9.3 It appears that European commercial fishing on the West Coast did not begin until 1866 when the crew of a vessel awaiting favourable conditions to enter port with nothing better to do dropped a few handlines. Within a short time they landed a large number of groper (S7:54). Walzl refers to heavy hauls off Hokitika in 1867, including landing 500 codfish in a few hours. Few other references to West Coast fishing are available (S7:54). An attempt in 1875 at fishing and curing at the new settlement at Jackson's Bay failed two years later (S7:55).

5.10 Ngai Tahu Fishing 1881 to 1908

- 5.10.1 In 5.3.1 we noted that the Crown historian Mr Walzl was unable to continue his detailed research of historical sources, particularly newspapers, beyond 1880. But we accept that the ongoing expression of concern by Ngai Tahu on the loss or diminution of their fishing resources, to which we will later refer, is evidence of their continuing interest in fishing. Fishing, a hapu activity, necessarily diminished with the breakdown in Ngai Tahu tribal structures, the enforced dispersal of tribal members from inadequate reserves and the draining and depletion of many of their limited number of fishery reserves. The importance of fishing undoubtedly persisted for hui and other special occasions, just as it has continued as a whanau activity down to the present day despite the frustrations of greatly depleted resources. At the same time, as David Higgins' evidence shows, some individual Ngai Tahu engaged in commercial fishing from the 1860s on, as they have continued to do ever since. Further evidence on this from Dr George Habib will be noted in the next chapter.

European fishing 1881 to 1908

- 5.10.2 While, when compared with the present, fish abounded in many parts of the South Island, by the 1880s there appeared a few signs of pending depletion. Flounder became very scarce during the winter on Lake Ellesmere (S7:73). In 1882 a local Dunedin newspaper (*The Echo*) deplored the scarcity of fish in the Dunedin harbour. It attributed this shortage to excessive trawling throughout the year without respite (S7:73).²¹ Mr Walzl also testified that overfishing occurred in Akaroa harbour in 1885. In 1915, J Hay wrote that the flounder, which were numerous in his youth, had disappeared from Banks Peninsula years ago

(S7:74).²² We will consider the legislative measures to protect the fishing resource later in this chapter.

In 1884 however, Sir James Hector remained optimistic. On 21 December 1884 he reported to Sir Julius Vogel:

The natural wealth of the New Zealand fisheries is as yet almost undeveloped, and the efforts in this direction have been very crude and entered on without the least regard to the knowledge of the subject which is necessary. The establishment of small fishing communities in connection with fish-curing factories is what is required. The local supply is very capricious and irregular in all the centres of population, and might be regulated by the application of the freezing process for preserving the fish. (S7:75)²³

5.10.3 By 1890, the Canterbury fishery was beginning to move further afield into deeper waters. The Christchurch *Press* reported at the end of December 1890:

The list of fish brought into Christchurch is not very long, the commonest kinds being flounders, mullet, moki, kahawai, butterfish, warehou, mackerel, garfish, barracouta, cod, ling, trumpeter, and conger eels. Mr Warnes has two cutters and a whaleboat engaged [in] fishing for the Christchurch market. The cutters, fitted with wells for the conveyance of fish, cruise between the Ninety Mile Beach and Kaikoura, their principal grounds, however, being about the Amuri Bluff and the Trumpeter Bank, off Kaikoura. These boats bring in nearly all the varieties of fish mentioned, and, besides these, large numbers of crayfish The three boats move about according to the direction of the wind, for fish are particularly susceptible to changes of the weather, and have a roving life on account of our variable climate

Great quantities of moki and blue cod are caught on the coast south of Christchurch, men fishing them from bank to bank as far as Moeraki. Off the beach at Kaituna and at Peraki on Banks' Peninsula large hauls of fish are made, but both places are bad for boats and the wind rarely suits.

Dunedin sends us our principal supply of dried barracouta and haddock, the latter fish being simply the common rock cod. In winter time we get garfish and flounders from Akaroa, but hot weather stops this supply. Strictly speaking, Canterbury has nothing but deep sea fishing.²⁴

5.10.4 Walzl notes that by 1894 the fishery around Otago was suffering some decline, with the *Otago Witness* reporting "a great falling off compared with those to be seen fishing on any fine day four or five years ago" (S7:77).²⁵

In its annual report of 1900 the Marine Department noted:

There has been a scarcity of fish in Canterbury during the year, especially at Sumner, New Brighton, and Kaiapoi, and most of the fish sold by auction in Christchurch came from outside the district. There are three smokehouses in Christchurch and two in Lyttelton, but they were not all being used.

In the Otago District the principal centres of fishing are Catlin's, Molyneux, Taieri Mouth, Port Chalmers, Waikouaiti, Moeraki, and Oamaru, and the principal fish taken are flounders, hapuka, blue-cod, and travalli; and it is stated that notwithstanding the un-

seasonable weather experienced much larger catches were taken than during the previous year. There has been a considerable improvement in the boats and gear used in the industry The Inspector states that there are 827 persons employed in connection with the industry in the district, 359 being in fishing-boats

The principal fish caught by the Bluff fishermen are blue cod in Foveaux Strait and Stewart Island, and flounders in Bluff Harbour, and large quantities of oysters are taken from the beds in the Strait. There are five freezing-plants on the mainland and at Stewart Island. (S7:78–79)²⁶

5.11 The Impact of Land Sales

5.11.1 By 1864 the Crown had completed the acquisition of Ngai Tahu land first begun 20 years earlier. For little more than a nominal gratuity the Crown had acquired over half the land mass of New Zealand being some 34.5 million acres of Ngai Tahu land. In return for the transfer to the Crown of most of the South Island, Ngai Tahu were left with a mere 37,492 acres. These were in mainly small, scattered reserves some of poor or indifferent quality. None of the reserves were capable of supporting at more than the barest subsistence level those now forced to eke out a livelihood on them. Ngai Tahu lacked capital and any opportunity as a tribe, or for the most part individually, of establishing an economic base, whether through the cultivation of such little land as remained in their possession or by fishing at sea. Ngai Tahu were left isolated and largely neglected by the Crown, which showed almost complete indifference to the condition to which its land acquisition practices had reduced them. The same indifference was shown to the need to protect Ngai Tahu sea fishery Treaty rights.

5.11.2 The question of the impact of land sales was considered at a late stage of hearings by the Muriwhenua tribunal. But as that tribunal did not have the benefit of a full debate it made it clear that its opinions on the matter were tentative. For reasons which the Muriwhenua tribunal gave, it excluded from its consideration land sales prior to 1840 and sales after 1865 under the Maori Land Court system. As the purchases of land from Ngai Tahu by or for the Crown all fall within the period 1844 to 1864 its comments could be applicable to this claim.

The tentative conclusions expressed in the *Muriwhenua Fishing Report* were:

(i) Whatever the customary expectation, we have also to ask what Maori would have expected of the Treaty. The Treaty introduced a new regime. Land sales were unheard of in custom.

(ii) Though the guarantee in respect of fisheries was the same as for the land, the Treaty provided a separate protection for each. It was not suggested that fisheries might pass upon some side-wind, as upon a sale of land in which fisheries were not mentioned. The implication was rather that each would require an agreement, for both were separately mentioned in the Treaty. Access rights to both had to be negotiated for

(iii) Nonetheless some fisheries are patently connected to the land, and in particular the fisheries associated with swamps, streams,

ponds and foreshores. That the larger rivers, lakes and seas were differently seen, is apparent in certain Parliamentary petitions.

(iv) There is evidence of a general nature that Maori expected to retain access to their inland fisheries after land sales, particularly following the sales of vast areas. Exclusive rights were still claimed in some cases, especially with regard to eeling.

(v) It still appears unlikely to us, that non-Maori would have been seen as without the right to fish from the ceded lands for domestic purposes.

(vi) We therefore consider that a land sale, between 1840 and 1865, may carry an implication that a tribe no longer sought *exclusive* rights to the *whole* of the fisheries connected to the land sold.

(vii) The sale of land would not have affected the fisheries of the larger water areas, in rivers, lakes, and seas.²⁷

In effect the Muriwhenua tribunal tentatively thought that as a result of land sales within the period noted non-Maori would have been seen as having a right to fish for domestic purposes in fisheries associated with swamps, streams, ponds and foreshores. But this did not extend to larger water areas, in rivers, lakes or the seas.

Unlike the Muriwhenua tribunal we have had the benefit of lengthy submissions from the claimants, the Crown and the fishing industry. We propose to summarise the main points made by each.

5.11.3 In her closing address counsel for the Crown, Shonagh Kenderdine made very detailed submissions on this and related questions (X4:73–109). In essence she submitted:

- that what Ngai Tahu anticipated and achieved when they sold their lands was a sharing of their fisheries with the new order;
- this did not involve them in abandoning or losing the right they had always had;
- they asked for large reserves in some instances and did not get them – reserves which would have provided access to their fisheries;
- they did not anticipate retaining an exclusive right to the fisheries off the lands they did sell;
- in selling land there would be no loss of their own rights. They would be modified to accommodate the transferee;
- tribal authority over the sea must have been related to the ability to express rights of use and control;
- when Ngai Tahu owned all the land along the coast line they had the land base needed to control the adjacent seas;
- while the physical limits of the ‘control’ rights might be in question, it was conceded that portions of the inner seas at least were subject to physical control;
- the nature of this control must have varied from place to place. An example cited was that of the West Coast where Tai Poutini Ngai Tahu were relatively few in number and therefore their control must have been relatively limited;

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- however, the Crown noted that the reality was that over large areas of the Ngai Tahu coast there was no great need to exercise control because there was no one there to contest it;
- Ngai Tahu retained the right to go fishing offshore from coastline which was sold. But they no longer expected to control on an exclusive basis an area which they could no longer in physical terms police;
- once physical power was lost or reduced by physical circumstances it logically followed that some right to exclude and to restrict was likewise lost or reduced. To this extent there was a consequential modification of the power over the seas; and
- what in fact had practically happened was the emergence of concurrent rights by both non-Maori and Ngai Tahu to the fisheries with Ngai Tahu retaining exclusivity over their fisheries adjoining their lands.

5.11.4 The foregoing submissions were in essence repeated by Crown counsel, Colin Carruthers, in later additional submissions (AB2:36–41). These Crown submissions were in turn adopted by Tim Castle, counsel for the fishing industry (AB6:25). Mr Castle also referred to earlier industry submissions (V1:27–64) on the effect of land sales. There the impact of land sales on Ngai Tahu mana whenua and mana moana had been considered. The fishing industry had posed the question: did Ngai Tahu mana moana and the power, control, authority and right to exclusive use that went with it, continue to subsist in the waters surrounding their tribal area after all the adjacent and nearby land had been sold? The fishing industry concluded that it did not – some diminution in the rights flowing from mana moana was a necessary result of the loss of mana whenua that resulted from the sale of land. In particular, exclusive rights to the fishery in the seas adjacent to the lands sold were forfeited. The lengthy submissions made in support of this contention at the hearing occasioned considerable questioning from those members of the tribunal having an intimate knowledge of the distinctively Maori concepts of mana whenua and mana moana. It was pointed out then, and is reiterated here, that mana whenua is not dependent on the continued ownership of land. Ngai Tahu, the tangata whenua prior to the sale of their lands to the Crown, remain the tangata whenua and retain the mana whenua over the lands within their rohe to this day. Nor does it necessarily follow that because Maori sell rights to land adjoining the sea they are ‘selling’ anything at all of their mana to the sea. The sale of such land does not mean they have willingly abandoned their mana over the sea and their sea fisheries.

5.11.5 In his reply to the Crown’s closing address Mr Temm for the claimants dealt with various Crown arguments. He emphasised that Ngai Tahu never agreed that when they sold land they sold their fisheries (Y1:131). We would agree with this contention and note that in the Kemp purchase Ngai Tahu mahinga kai was reserved to them. In no deed of sale of their land did Ngai Tahu purport to sell their sea fisheries. Nor has there been any evidence of any subsequent sale of their sea fisheries by Ngai Tahu.

In response to the Crown submission that, because Ngai Tahu could no longer police the seas following the land sales, they could no longer control them on an exclusive basis, Mr Temm contended this proposition

suggested that the right to a fishery remained only so long as Ngai Tahu could keep others from using it. Mr Temm pointed out that the Treaty provided Ngai Tahu could keep their fisheries for as long as they wished to do so and, furthermore, the Crown guaranteed their exclusive use of them. From the time the Treaty was signed it was the duty of the Crown to protect Ngai Tahu sea fisheries (Y1:128–130). This contention is soundly based.

- 5.11.6 We would add that Ngai Tahu ceded sovereignty to the Crown in exchange for the Crown's guarantee their rangatiratanga over their fisheries. The power of government and responsibility for law and order, including the active protection of Ngai Tahu Treaty fisheries rights, lay with the Crown not Ngai Tahu. They could no longer take the law into their own hands. It was the clear duty of the Crown to protect what it had guaranteed. The Crown's argument proceeds on the erroneous assumption that if, due to circumstances totally beyond their control, after the Treaty Ngai Tahu no longer had power to exercise active control over their sea fisheries, this had in some way reduced or adversely affected their exclusive ownership of their fisheries. We come back to the claimants' contention that it was the Crown's Treaty responsibility to maintain such oversight over Ngai Tahu sea fisheries as was necessary to ensure that Ngai Tahu rights to their fisheries were not adversely affected.
- 5.11.7 The duty became even more evident following the failure of the Crown, as we have recounted in our earlier report, to ensure that Ngai Tahu was left with sufficient land and mahinga kai following the land purchases to ensure they could function effectively in the new economy. Ngai Tahu were critically weakened by the cumulative effect of successive serious Treaty breaches of their rangatiratanga over their lands by the Crown and their progressive reduction to poverty and eventual dispersal. Their influence with government in their greatly impoverished condition was minimal. It is surely ironical that the Crown, having by its own actions reduced Ngai Tahu to such a condition by the mid 1860s, should now seek to rely on the consequence of its grave Treaty breaches as supporting an argument that Ngai Tahu exclusive rights to their fisheries had somehow been reduced to no more than concurrent rights alongside non-Maori.
- 5.11.8 We also note Crown Counsel's contention that, while as a result of Ngai Tahu selling their lands there would be no loss of their rights, these would be modified to accommodate the new owners. This is presumably so because Ngai Tahu made no objection to non-Maori taking fish from the sea in the early years after the Treaty when fish were plentiful and the Pakeha population still relatively small. But when pressure on the available supply developed, Ngai Tahu chose to assert their rights. There is nothing to suggest that Ngai Tahu, when not objecting to non-Maori taking sea fish, were thereby waiving their Treaty fishing rights. Nor does it follow that because some protests by Ngai Tahu were site specific and not general in nature, that they had abandoned their claim to the remainder of their sea fisheries. We agree with the Muriwhenua tribunal that if the Crown is to seek the benefit of a waiver, the onus is on the

Crown to establish it. As in that case, so here, it has not done so. There is no evidence before us supporting a waiver by Ngai Tahu of their rights. Nor, as the *Muriwhenua Fishing Report* says, was there any duty on Maori constantly to proclaim that they ought to have the right guaranteed by the Crown; the duty was on the Crown to ensure it was protected.²⁸ Nor does the non-Maori use of Ngai Tahu sea fisheries demonstrate that the tribe no longer wished exclusively to retain their rights to their fisheries. An implied permission is not a waiver.²⁹ Nor we would add does it signify any diminution in their tino rangatiratanga over their sea fisheries.

- 5.11.9 We are unable to hold that Ngai Tahu at any time in the period under discussion (1840–1908) nor, as will later emerge, at any subsequent time, have waived their Treaty rights to their sea fisheries or willingly accepted any diminution in their tino rangatiratanga over their sea fisheries.

5.12 **The Crown Assumes Control of Fishing**

- 5.12.1 As our *Ngai Tahu Report 1991* demonstrated, land and its acquisition from Maori was a paramount concern of governors and settler governments for much of the period from the signing of the Treaty to at least the turn of the century. By comparison fisheries scarcely if at all came to the notice of the Crown in the first two decades. The first legislative intervention was in 1866. But whereas the Crown's representatives in New Zealand (although not always their political masters in England) accepted that Maori owned all land in New Zealand, from an early stage they took a markedly different view of fisheries. As the Law Commission has said:

But what was accepted for land was not applied to fishing grounds below the high tide mark, nor in the long run to fishing rights that might be independent of ownership of the underlying soil. These fell foul of the common law rules that land below high tide mark was the property of the Crown, unless it had been granted to others, and that there was a public and general right to fish in both tidal and offshore waters. These rules were taken by courts and governments to prevail over any Treaty promises or principle of aboriginal title. To many Pakeha New Zealanders this did and does seem part of the natural order of things. However, to many Maori it was novel and alien. It lies at the heart of many Maori grievances over fishing rights.³⁰

Such a view could be held only if article 2 of the Treaty was ignored or held to be of no legal effect.

- 5.12.2 This view persisted. As recently as 1986 the Fisheries Amendment Act 1986 authorised the quota management system and allocated quotas to certain holders of fishing permits. This Act is based on the premise that no fisheries belonged to Maori but all to the Crown and were, with Parliament's assent, the Crown's to give away or otherwise dispose of as it chose. Again, the Law Commission put the matter succinctly:

But considered historically and conceptually, what the 1986 legislation signifies is this. For more than a century the Crown consistently declined to recognise any exclusive right of the Maori in their sea fisheries. The ground was that the common right of everyone

to fish below high water mark was a matter of basic legal doctrine and public policy, albeit subject to licensing and other regulatory regimes. On the Crown's initiative Parliament has now "fenced the watery common", established exclusive commercial fishing rights and given them to those operators who in the immediately preceding years had caught substantial quantities of fish.³¹

Not until 1989, with the passage of the Maori Fisheries Act 1989, have the Treaty rights of Maori, including Ngai Tahu, obtained a measure of recognition. But we must resume our narrative at 1866, when the Crown enacted the first fishery legislation.

5.13 Fisheries Legislation 1866 to 1908

Oyster Fisheries Act 1866

- 5.13.1 This Act provided for the establishment of artificial oyster beds on shores adjacent to Crown lands bordering the sea or any estuary. Licences to do this were for a maximum of 14 years. It also prohibited the taking or sale of oysters between December and March. The governor was empowered to declare natural oyster beds closed for any period. The taking of oysters from natural beds below the level of the lowest water of spring tides without a licence was prohibited. No exception was made for Maori. The Act did not apply to "rock" oysters between high and low water marks.

The original Bill aimed at totally regulating the domestic and commercial use of oysters by Pakeha within Pakeha districts. Maori were to be totally exempt (Z49:41). As enacted, both Maori and Pakeha required a licence to take deep water oysters either commercially or domestically. The Act, through its licensing of natural and artificial beds, presumes Crown ownership of the foreshore and, in the case of artificial beds, the right to lease these for exclusive use for a period of up to 14 years.

It appears the Act was in part a conservation measure. As we have seen, the beds at Port Adventure were by 1864 becoming stressed. It is possible this is the origin of the 1866 Act. The exemption of rock oysters (much more common in the north) appears to have concentrated its effect to Ngai Tahu tribal territory. Susan Butterworth has pointed out that the enforcement clauses were inadequate to prevent poaching, and the closed season was little more than a guess at the spawning season of the oysters. Not until 1874 was James Hector able to report that he had narrowed this down "from the middle of December until the end of February, or as the Maoris put it, during the time when the Pohutukawa is in flower" (Z17:26).³² Walzl comments that it is not known whether any Ngai Tahu applied for a licence for oystering or whether they disregarded the requirement and continued to collect oysters regardless (S7:57).

- 5.13.2 There is no evidence of any consultation with Ngai Tahu within whose rohe was to be found a rich and extensive oystery. Nor is there any

recognition of any Ngai Tahu interest in the oysters whether under the Treaty or otherwise. The Treaty is simply not adverted to.

Salmon and Trout Act 1867

- 5.13.3 This legislation was introduced by one W D Murison, Member of the House of Representatives for Waikouaiti, presumably at the instigation of the Canterbury and Otago Acclimatisation Societies who were about to introduce their first batch of salmon and trout ova into certain rivers. They sought legal protection against poaching. The governor was given power to make regulations as to closed seasons, the definition of mouths of rivers and streams, allowable fishing tackle, and methods and prevention of poaching. Under s4 the Act could be extended to protect any fish in any part or all of New Zealand (Z17:26–27). The Act applied equally to European and Maori. It clearly constituted an encroachment on the treaty rights of Ngai Tahu by banning access to the native fisheries during a closed season.

Oyster Fisheries Act Amendment Act 1869

- 5.13.4 This Act authorised the issue of an exclusive licence for up to five years for the use of oyster beds to the discoverers of such beds. In the Legislative Council debate it was said that the Bill was prompted by the discovery of some oyster beds at Stewart Island (R10:2–3). Provision was made for an inquiry to be held into any objection to the issue of such a licence.

Mr Walzl, in commenting on this provision, noted:

Although there is no evidence that Maori suffered in particular as a result of the introduction of the Act, it is interesting to see that the 1869 Act, in common with the previous 1866 measure, was brought in seemingly without consultation with Maori, without reference to any Crown responsibilities under the Treaty to preserve Maori fisheries and at a time when it was known at an official level that Maori and more specifically Ngai Tahu were commercially involved in the Stewart Island oyster industry. A Maori discoverer would have to either conform to European legislation, or run the risk of being excluded from the fishery when European [sic] became involved. (Z49:45)

The legislature assumes that if someone other than Maori discovers a new oyster bed, Maori may, notwithstanding their treaty rights, be entirely excluded from any such oystery, at least for the term of the exclusion licence.

Oyster Fisheries Act Amendment Act 1874

- 5.13.5 This amendment authorised the governor to make a four month closed season for rock oysters, which were previously exempt from the 1866 Act but which were now at risk. It would be an offence for any person to take rock oysters during the closed season for sale. Consumption for domestic purposes was not therefore prohibited. The colonial secretary, Dr Daniel Pollen, gave the following explanation for the amendment:

The proposed legislation was an intervention in favour of the “natives” of his own province – Auckland – which were being very largely sacrificed to supply the appetites, principally of the people

of the Empire City. In season and out of season, all the year round, large shipments of oysters were made from the Province of Auckland to the South, and the consequence was that the supply had fallen off very materially, and would, if protection were not afforded, in the course of a very few years cease altogether. The object of the Bill was simply to give rock oysters the same kind of protection that was extended by the Act of 1866 to oysters of another description. If honourable members would refer to that Act, they would find these words as the interpretation of the word oyster: "Shore oysters, excepting rock oysters between high and low watermark." The exception, he thought, was made out of consideration for the aboriginal natives, who were fond of oysters, and who might not understand the necessity of preserving them in the way proposed, and probably offend against the law. Since that time the Natives had acquired other tastes, and the preservation of those oysters in the districts where this law would apply was not now subject to such objections as before. The object of the Bill, then, was to give protection to rock oysters between high and low watermark. (Z17:28)³³

Susan Butterworth comments that, moved perhaps by the absurdity of Dr Pollen's suggestion that Maori had lost their taste for oysters in just a few years, Mr Mantell, Member Legislative Council (MLC), explained that rock oysters "were excepted in the original measure so as not to put a stop to pleasant picnic parties held on the sea beach, and at which the consumption of oysters was very great" (Z17:28). No exception other than for domestic consumption was made for Maori.

Maori who were taking oysters commercially would have to comply with the Act. Walzl notes that there is some evidence that Ngai Tahu were selling rock oysters in Canterbury (Z49:48).

- 5.13.6 As with the earlier Oyster Acts there is no recognition of any Maori treaty fishing rights. Ngai Tahu are treated on precisely the same basis as non-Maori.

Fish Protection Act 1877

- 5.13.7 Previous legislation, as we have seen, was concerned either with the oyster fisheries or the newly introduced freshwater salmon and trout. The Fish Protection Act 1877 was the first legislation on general fisheries. It extended government control over both fresh and saltwater fisheries by authorising the governor to make regulations:

- declaring fishing districts;
- defining a fishery;
- reserving any area from fishing;
- controlling the seasons and size of nets and seines; and
- granting exclusive licences to fish any fishery.

- 5.13.8 Having passed through all stages in the House of Representatives, the Bill was sent to the Legislative Council. During the committee stage Captain

Thomas Fraser, a member of the Legislative Council from Otago, proposed a new clause:

Nothing in this Act contained shall apply to persons of the Native race capturing fish with spears in any estuary.³⁴

This modest proposal in favour of Maori was rejected by the council and the Bill was passed by the House of Representatives, with minor amendments by the council, on 30 November. Apart from Fraser's motions, there was no debate on the Bill at all from either Maori or European members of the House or council. Fraser did not succeed in having the Bill translated into Maori (S7:60). At the time of its passage, what has become well-known as s8, was not part of the Act. We are indebted to Mr Walzl for his account of how the section came to be inserted and for his discussion of its possible implications. On 6 December 1877, John Sheehan, the Native Minister, delivered the following message to the House from the governor, Lord Normanby:

Pursuant to section 56 of the New Zealand Constitution Act, the Governor returns to the House of Representatives the Bill intituled "An Act for the Protection of Fish and Fisheries in New Zealand," with the following amendment, for the consideration of the House:-

To add the following additional section at the end of the Bill:

"Nothing in this Act contained shall be deemed to to repeal, alter, or affect any of the provisions of the Treaty of Waita or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder." (Z49(a):265)³⁵

Both the House of Representatives and the Legislative Council accepted the governor's amendment, which was duly incorporated as s8 (Z49:56-57).

5.13.9 We have noted that Sheehan, the Native Minister, introduced the governor's message into the House, which resulted in the enactment of s8. Three years later, Fraser, the legislative councillor from Otago, during a debate on another Fisheries Bill which concerned Maori fishing rights, observed:

When the Act of 1877 was under consideration he had drawn attention to the omission of any saving clause so far as the Maoris were concerned, and the result was that a message was sent down by the Government inserting the 8th clause. He contended that the Maoris had every right to fish wherever their forefathers had fished, and he altogether objected to any encroachments upon those privileges. (Z49(a):313)³⁶

After the 1877 Bill was introduced, but before its second reading, the Ngai Tahu member for Southern Maori, Hori Kerei Taiaroa, asked a parliamentary question about fishing rights at Mangahoe Inlet in Otago. Taiaroa inquired:

- 1.) By what authority Europeans exercised fishing rights over the Mangahoe Inlet in the Provincial District of Otago, while the Native title thereto has not been extinguished?
- 2.) If the Government will cause a stop to be put to such acts on the part of Europeans until some arrangement for the extinguish-

ment of the Native title has been made? The inlet he referred to was situated in the midst of his land. The lands adjacent to the place had all been granted, and an application was also sent in for an investigation into the title to this inlet. The Native Affairs Committee recommended that the case should be heard before the Native Land Court, and application was sent in; but the hearing had not taken place. The Europeans were in the meantime plundering all the oysters and fish from the place, and selling them in Dunedin; and the second part of his question asked that a stop should be put to that proceeding, until the Native title was extinguished. The Natives were not receiving any benefit from what was obtained from the place, but were remaining quiet until the matter was settled, while the Europeans were getting all the advantage. (S8:175)³⁷

Sheehan, in replying, observed that “under the Treaty of Waitangi certain rights were reserved to the Natives in regard to their fisheries” (S8:175). He did not specify the nature or extent of such rights. He went on to say that there was a legal difficulty in the way of this matter being heard in the Native Land Court which he expected would be removed by a Bill then before the Legislative Council. This would enable Tairaroa to bring the matter before the court “in the ordinary way”. He added:

He did not know by what right the Europeans complained of took fish from this inlet, but the Government had no power to stop them. If the honourable gentleman proved his title to the property, he could bring an action against the people in the ordinary Courts, and restrain them from the trespass of which he complained. (S8:175)³⁸

Sheehan here seems to be suggesting that if Tairaroa could establish his treaty rights before the Native Land Court (when existing difficulties were removed) he could then bring an action in the ordinary courts and obtain an injunction restraining the Europeans’ trespass. What effect the decision of Chief Judge Prendergast in the *Wi Parata* case, given only a few weeks earlier, might have on this suggested remedy is by no means clear.³⁹ It was unlikely to have helped. Mr Walzl has suggested that one reason Sheehan may have thought the government had no power to stop the Europeans may have been the *Wi Parata* decision (Z49:61). Susan Butterworth considers that “the historic ‘Prendergast judgment’ a month earlier”, may have influenced the decision to include s8 in the 1877 Act (Z17:30).

5.13.10 The Act was to become operative by regulations. The first general regulations were made on 1 April 1878.⁴⁰ Regulation 4 provided:

These regulations shall not extend to any Maori, nor to any mode of catching or taking fish otherwise than by net.

The regulations:

- in the first schedule defined nine districts. These corresponded with the coastline of the nine provinces, including Canterbury, Otago and Westland. They included the “tidal water” bounding each province and extended out three miles from the coastal high water mark;
- prohibited the catching or taking of fish in any fishery subject to the regulations by means of any net without a licence;

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- licences were obtainable for a fee of 20 shillings and were for one year's duration;
- up to five persons could be employed by a licensee. A further licence would be necessary if over five were employed; and
- a size restriction was imposed on the taking of flounder and sole.

As noted, none of the regulations affected Maori, whereas they applied to all net fishing by Europeans whether personal or commercial. Although s4 of the 1877 Act empowered the governor to grant an "exclusive right to any fishery", the prescribed form of licence under the 1878 regulations is non-exclusive.

5.13.11 While this Act is evidence of the assumption by the Crown of its right to control European net fishing and flounder and sole sizes, it expressly preserves the provisions of the Treaty and Maori rights to fisheries secured to them by the Treaty. The first general regulations implementing the Act expressly exempt all Maori from their provisions. But as the *Muriwhenua Fishing Report* has said:

The scheme of the Act was to regulate the general public exploitation of the fish resource and in so doing, it assumed that the public was entitled to exploit it, and Maori interests would not encroach unduly.⁴¹

We will consider further the protection (if any) afforded by s8 and later versions when we consider the Fisheries Act 1908.

Seals Fisheries Protection Act 1878

5.13.12 This Act was enacted for conservation purposes. Its long title is "An Act for the Protection and Preservation of Seals". It imposed a closed season for seal hunting between 1 October and 1 June. The governor also had power to extend the closed period for up to three years. There was no exception for Maori.

Fisheries Conservation Act 1884

5.13.13 The genesis of this legislation was a motion passed by the Legislative Council on 16 September 1884:

That, in the opinion of this Council, the administration of the law for the protection of young fish is anything but satisfactory. (S8:244)⁴²

Some members opposed the motion on the grounds that there was still a plentiful supply of fish in the seas. Others drew attention to small fish being caught. Captain Fraser said that when last in Dunedin flounders served in his hotel "were not more than two inches long". Colonel Brett pointed out that in Bellamy's:

they would find flounders put before them four or five inches long with only a solitary mouthful of meat in the whole fish. (S8:244)⁴³

Whether such undersized flounder were being supplied because of the unavailability of mature flounder or because they were being caught in nets having a very small mesh is not known. The motion was carried by the council.

5.13.14 Tony Walzl gives a detailed account of Fisheries Bills introduced in 1880, 1881, 1882 and 1883. While none were passed, they are of interest in terms of the provisions made for Maori fisheries.

The 1880 Bill proposed to consolidate and repeal all the previous fisheries legislation. It had some new provisions:

- included in those exempted from the measure was “Any aboriginal native taking fish for his own use”; and
- s8 of the 1877 Act protecting Maori treaty rights was omitted.⁴⁴

Captain Fraser from Otago criticised the Bill as interfering with the privileges guaranteed to Maori under the Treaty. He then made his claim to be the originator of the 1877 treaty clause (Z49:67).⁴⁵ The Legislative Council later removed the exemption for Maori taking fish for their own use and subsequently a new clause was adopted:

No aboriginal native of New Zealand nor half-caste shall be sued for any penalty, fine, or forfeiture under this Act, unless and until authority to take proceedings, signed by the Native Minister, has been filed in the Court in which such proceedings are intended to be taken. (Z49(a):321)⁴⁶

The Bill lapsed in the House of Representatives. It is of interest as showing that the Crown, in the person of Whitaker, the attorney-general responsible for the Bill, saw no need to retain the earlier provision protecting Maori treaty rights. Instead, Maori exemption was originally limited to non-commercial usage. The later provision indicated that Maori treaty rights would be decided on a case by case basis at the discretion of the Native Minister of the day. He presumably would be influenced by the perceived merits of the particular case and government policy of the day.

In 1881, the Fisheries Bill was again introduced into the Legislative Council. It appears there was no exemption for Maori but Whitaker’s “Native Minister” discretionary clause was retained. Subsequently, on the motion of Attorney-General Whitaker, a new “Treaty” clause identical with s8 of the 1877 Act was added to the Bill (Z49(a):346)⁴⁷ Again it lapsed in the House of Representatives. If the Treaty clause meant what it appeared to mean and gave full protection to Maori of their fisheries, it is difficult to see what effect the “Native Minister” discretionary provision would have.

The 1882 and 1883 Fisheries Bills each repeated the exemption clauses of the 1881 Bill. Both the “Treaty” and “Native Minister” clauses were included. Both Bills lapsed.

5.13.15 The Fisheries Conservation Act 1884 incorporated, that is, maintained in force, the Oyster Fisheries Act 1866, the Fish Protection Act 1877, the Fisheries (Dynamite) Act 1875 and the Seals Fisheries Protection Act 1878. The effect of this unusual drafting device was that the earlier statutes were to be read in conjunction with the new Act. One result of this was that the “Treaty” provision in s8 of the 1877 Act would continue

in force and extend to the Fisheries Conservation Act. The Act enabled regulations to be made:

- providing for the better protection and improvement of fish and the management of any waters;
- protecting any fish, oysters or seals by prescribing closed seasons, extending or varying such closed seasons for terms up to three years;
- prohibiting the buying, selling or possession of any fish, oyster or seal;
- prescribing the minimum size or weight of any fish, oyster or seal;
- limiting the size of net and seine mesh or prohibiting the use of nets of any sort;
- prohibiting dredging at certain times or the use of any particular equipment or apparatus for taking any fish or oysters;
- reserving from public use any natural oyster-beds so as to prevent their destruction;
- protecting the propagation of fish in any harbour or bay by prohibiting the use of nets during specified times;
- protecting young fish or fry or spawn at all times;
- prohibiting or restricting fishing in any waters, rivers or stream in which young fish or spawn are placed or deposited; and
- prohibiting casting sawdust or any saw-mill refuse into any waters, rivers or streams.

5.13.16 On 27 March 1885, regulations were made prescribing, among other matters, the minimum weior length of each species before they could be commercially sold. Closed seasons were prescribed for oysters and seals. *The regulations were not to apply to any Maori* nor to the taking of fish with rod and line.

On 8 May 1885, the collector of customs, Invercargill, wrote to the secretary of marine about the regulations:

The Maories [sic] and half caste Maories [sic] here are in doubt as to the full meaning of this clause, that is can they catch seals and dredge for Oysters and consequently make a trade of the same irrespective of closed season, or does it mean they can fish catch or hunt seals and dredge for oysters sufficient for food for their own use [illegible] but not for purposes of trade. (Z49:84)⁴⁸

The secretary's reply is unavailable. We agree with the Crown historian Tony Walzl that this inquiry probably led a month later to regulation 2, which exempted Maori from their scope, being repealed and its substitution by the following:

Nothing in these regulations shall be deemed to prevent any Maori from taking oysters or indigenous fish (exclusive of seals and other amphibious mammalia) for consumption by himself and family, and not for sale. (Z49:84)⁴⁹

Given that s8 of the Fish Protection Act 1877 preserving Maori treaty fisheries was still in force, this new provision limiting their rights was, it

seems, incompatible with their treaty rights and ultra vires. Nonetheless it appeared to set the pattern for the future until a similar 1888 regulation was repealed and not replaced by order in council of 11 December 1894.

Te Oti Pitama and other Ngai Tahu petitioned Parliament on 31 July 1885, praying:

that no obstacles may be placed in their way in obtaining fish, &c., from the sea, rivers, and lakes; and birds and animals from the earth; which produce is their chief means of subsistence. (Z49(a):398)⁵⁰

In 1886 the Native Affairs Committee reported:

the petitioners refer to regulations made under "The Fisheries Conservation Act, 1884." Since the petition was written the following regulation has been made under date the 2nd June 1885, which seems to meet the case: "(2.) Nothing in these regulations shall be deemed to prevent any Maori from taking oysters or indigenous fish (exclusive of seals and amphibious mammalia) for consumption of himself and family, and not for sale; nor shall they extend or apply to the taking of indigenous fish with rod and line." (Z49:85)⁵¹

This reply is either confused or evasive as this provision had been substituted for the earlier regulations exempting Maori from the regulations. Unfortunately, information as to the exact nature of Ngai Tahu objections is not known. The original document has not been found.

In 1888 the 1885 regulations were revoked insofar as they were at variance with new regulations made in 1888 under the Fisheries Conservation Act 1884. They repeated the earlier 1885 provision that nothing in the regulations was to prevent Maori from taking oysters and indigenous fish for their personal consumption and not for sale. The inference is that if they wished to take oysters or fish for commercial purposes they had to conform with the regulations prescribing this activity. This despite the 1877 Act provision preserving Maori treaty rights which was still in force.

Fisheries Encouragement Act 1885

5.13.17 This legislation, as its name indicates, was designed to encourage the establishment of fisheries in New Zealand. It authorised:

- the governor to set aside Crown land adjoining any coastline, harbour, bay, estuary, saltwater creek or other sea inlet fishing townships;
- it authorised payment of bonuses to exporters of canned and cured fish over a period of seven years; and
- it empowered the governor to regulate or prohibit the export of fish caught in New Zealand.

Ms Butterworth in discussing this legislation notes:

The first proposal caused no controversy, but the second became embroiled in the greatest economic debate of the times between 'free trade' and 'protectionism'. The tone of debate suggests that a bonanza mentality had possessed a significant number of speakers, blinding them to the lack of real economic basis for the proposition. Extravagant statements abounded such as Sir Julius Vogel's 'we shall find, for any fish we preserve, or cure, or tin, boundless markets in

The Crown Assumes Control of the Fishery, 1840 to 1908

Catholic countries' or James MacAndrew's 'Our waters are replete with golden sovereigns, and we have only to take them out and they will fill the Treasury'. (Z17:40)⁵²

The tribunal, in its *Muriwhenua Fishing Report*, stated:

Though we have found only one settlement established under this Act, Government did provide funding for roads, wharves, jetties, buildings, and freshwater supplies to new coastal townships. No similar provisions were made for Maori villages or to assist the establishment of fishing industries within them.⁵³

Oyster Fisheries Act 1892

5.13.18 This Act repealed all previous legislation relating to oysters and replaced it with much more comprehensive provisions, the most important of which are noted:

- Extensive powers to make regulations for the protection of oysters included;
- generally regulating all oyster fisheries;
- prescribing conditions and restrictions for taking oysters and the definition of oyster-beds;
- providing closed seasons over any term up to three years;
- prohibiting the sale or purchase of oysters in breach of the Act;
- defining the minimum size or weight of oysters that may be taken;
- fixing times when dredging is prohibited and prohibiting the use of any particular engines, tackle or apparatus for taking oysters;
- reserving from public use any natural oyster beds so as to prevent their destruction;
- prohibiting altogether for such time as the governor thinks fit the taking of any oysters; and
- setting apart tidal waters for the natural, or artificial propagation of oysters.

Section 8 required all boats engaged in "oyster" taking to be licensed and registered. Provision was made for inspection of boats and tackle and gear to ensure that licensing and other regulations were being complied with. The governor could declare any bay, estuary or tidal waters to be an oyster-fishery and prescribe parts from which oysters might or might not be taken. He could also grant licences for taking oysters from natural beds. It was an offence to take oysters from any such bed lying below the level of the lowest spring tide or to dredge for oysters without a licence.

Special provisions were continued for farming artificial oyster beds, with a right of occupancy for up to 20 years.

5.13.19 Section 14 was the only provision relating to Maori. It provided:

The Governor may, by Order in Council, from time to time declare any bay, or portion of a bay, estuary, or tidal waters in the colony in the vicinity of any Native pa or village to be an oyster-fishery where Natives exclusively may take oysters for their own food at

all times, irrespective of any of the provisions of this Act, and may from time to time revoke the same; and may prescribe regulations for preventing the sale by Natives of any oysters from such beds, and for protecting any such bay, estuary, or tidal waters from trespassers, and the oysters therein from destruction.

This is the clearest possible indication that the Crown was prepared to do no more than, at its discretion, provide for the setting aside of exclusive oyster fisheries for Maori only in the vicinity of any Maori pa or village. But oysters so taken were to be for their personal consumption and regulations could be made preventing their sale. If Maori wished to sell oysters, they would have to obtain a licence and take them from prescribed places with a licensed and registered boat with approved gear and tackle. The Act contains no reference to Maori treaty rights to their fisheries.

5.13.20 The Crown historian, Mr Walzl, made the following comment on s 14. It seems s 14 was never operative:

The Act reserved oyster beds for domestic use only. The evidence shows that Maori were involved in several ways in the commercial oyster industry. The reservation of oyster beds in 1892 has drawn much comment as to its intention and effectiveness, yet by 1900 no reserves had been gazetted under the Act. It has been suggested that this may have been due to a stringent application procedure [sic] that in practice precluded any possibility of gaining a reservation. However no evidence has ever been uncovered of any applications being made to either the Native (later Justice) or Marine Department. This may reflect instead that some of the protest over European trespass on oyster beds had been to save a commercial resource and not a food resource. When Maori were given the choice of protecting the beds for domestic use only, or taking a risk against trespass which allowed them to treat what they considered were their beds in any way they wished, they chose the later option. (Z49:109)

5.13.21 So far as the tribunal is aware, no oyster-fishery was set aside for Ngai Tahu under s 14, notwithstanding that oysters were a prolific and valuable part of the fisheries in and around Rakiura (Stewart Island). Instead Ngai Tahu were left with no greater rights than non-Maori and were required to comply with registration and licensing requirements as if they had no rights in the oyster fisheries. There was no doubt then, as today, of the need for conservation of the oyster resource and reasonable measures would not be incompatible with the Crown's treaty obligations. Effectively however, the Crown recognised Ngai Tahu as having no greater right than non-Maori to access to, and the right to sell, oysters which were such a notable part of their traditional fishery.

Sea-Fisheries Act 1894

5.13.22 This Act repealed the Fish Protection Act 1877 and the Fisheries Conservation Act 1884 insofar as they related to sea fishing, and completely repealed the Seal Fisheries Protection Act 1878 and the Oyster Fisheries Act 1892.

The new Act was in large part a consolidation of the earlier repealed legislation. Thus wide regulatory making power for the protection of

fisheries was continued, as were the 1892 Act provisions for licensing the taking of oysters in natural oyster-beds. An important new provision in ss 21 and 22 authorised the making of regulations for an *exclusive* right to take oysters, either from the sea bed or lands below high water mark for any period up to 14 years. Such a licence was to be sold by public tender or auction, was not to exceed five acres in area, nor a frontage of more than 110 yards on the foreshore. Any such licence could be revoked for improper or excessive user. The 1869 amendment to the Oyster Fisheries Act 1866 had authorised the issue of an exclusive licence for the use of natural oyster beds to the discoverer of such beds. This provision was omitted from the Oyster Fisheries Act 1892. The new provision makes no mention of discoverers of oyster beds. Anyone might tender for an exclusive licence. Section 41, also new, authorised regulations for licensing seal-fisheries, such licences to be obtained by public tender or at auction for a term of up to 14 years. Under s 30 all oysters in any oyster-bed held under an exclusive licence were to be the absolute property of the licensee.

5.13.23 Two sections related specifically to Maori. The first (s 17) repeated s 14 of the Oyster Fisheries Act 1892 which authorised the governor to make orders giving Maori the exclusive right to take oysters in the vicinity of their pa or village. We were informed by Crown counsel that they had no knowledge of any such order being made under either the 1892 or 1894 Acts in any part of the Ngai Tahu fisheries claim area. From 1901 on some oyster reserves were set aside for Maori but only in the North Island. The second provision, s 72, required the consent of the Native Minister to any proceedings being brought under the Act against any Maori. This provision was in substitution for regulation 3 of the regulations made on 10 January 1888 under the Fisheries Conservation Act 1884 whereby nothing in the regulations prevented any Maori from taking oysters or indigenous fish for personal consumption and not for sale. Regulation 3 and even the definition of Maori in the 1888 regulations were revoked by regulations under the Sea-Fisheries Act 1894, made on 11 December 1894. The requirement that the Native Minister assent to proceedings being brought against Maori for breaches of the Act meant that in practice the Act applied to Maori and it rested on the whim of the minister whether a prosecution of Maori in any individual case would be sanctioned.

Even more significant however, in repealing the Fish Protection Act 1877 insofar as it affected sea fisheries, was the omission of s 8 of that Act which preserved Maori treaty fishing rights. That provision was not re-enacted in the 1894 Act.

The net result of the 1894 Act on Maori was that there was no longer any statutory recognition of their treaty rights in relation to sea fisheries. On the contrary, the new Act authorised regulations by which a successful tenderer or bidder at an auction could obtain a licence giving an exclusive right to take oysters in a defined area for up to 14 years. All oysters in any such oyster-bed became the absolute property of the licensee irrespec-

tive of any Treaty or other right Ngai Tahu might have in such oystery. Given the reduced state to which Ngai Tahu had been reduced by the land purchases of the Crown, the prospects of Ngai Tahu being able to compete successfully against non-Maori for an exclusive licence would have been minimal. From the Ngai Tahu perspective, this must have been seen as expropriation of their fishery rights. It was incompatible with any recognition of rangatiratanga over their fisheries.

Another new provision (s 36), moved by Ward in the committee stage, made it an offence to obstruct or prevent anyone from lawfully taking oysters from any oyster-bed. As the Crown historian, Mr Walzl, pointed out, with this measure the Maori lost the right to restrain trespass on their oyster beds (Z49:117). With the law completely protecting licensed fishers, Maori lost their only remaining recourse to law to protect their rights.

5.13.24 Not surprisingly, Maori members of the House of Representatives were concerned with the 1894 Bill. During the second reading, Mr Parata, the member for Southern Maori, asked Ward, the colonial treasurer in charge of the Bill, how it would affect the Maori on Stewart Island. It seemed to him that it might be injurious to them, as it might prevent them from having the same privileges as they enjoyed in the past, for if the foreshore were let to other people they would be debarred from fishing. Ward, in reply, interpreted this inquiry as relating to seals, although that is not apparent from the Hansard report. Ward said that the Bill provided that the areas should be put up for auction in the ordinary way. For some time past seals had been utterly destroyed by outsiders going to the islands and killing them. It was just as much in the interests of the Natives as of the Europeans to protect the seals. Of course, he said, anyone who obtained a lease of the islands for sealing purposes would doubtless recognise the skill of the natives and, in his own interest, give them employment (R10:8).⁵⁴

At the commencement of the third reading of the Bill in the House, Mr Heke, member for Northern Maori, placed his protest to the Bill on the record. The passage, although lengthy, merits quotation in full:

There were clauses in the Bill which, it was quite clear, were inconsistent with the treaty that was made between Her Majesty the Queen and the Native chiefs of New Zealand. This, of course, related to any property the Natives might hold either individually or in common, which were confirmed to them by Article 2 of that Treaty. It was his desire to send a protest to Her Majesty through the Governor in respect of all Bills appertaining to the property of Natives, so as to get an understanding as to the real effect of this treaty. It seemed to him that the whole treaty, according to the action of the House, was being treated merely as waste-paper, and he wished to come to an understanding, not for himself, but for the Natives of New Zealand as a whole. It did not appear to be out of place for him to assume that the Natives had been deceived in the first place in 1840 into signing such a document as that, if it was not to be recognised by the Government or Parliament. If that was so, it would be far better that the Natives should come to an understanding as to whether Her Majesty on the one part or the

Government of New Zealand on the other part should recognise that treaty, which was made in good faith, and which was signed by the chiefs of New Zealand in 1840 in good faith. The whole thing meant nothing more than this: that it would be far better for the Natives to come to a distinct understanding that the Treaty was neither more nor less than waste paper, or else it was something. If it was nothing, all he could say was that the Natives had been deceived by Her Majesty's representative who came to the Bay of Islands and induced the Natives to sign that treaty. Under the Instructions that were issued in 1892 to the Governor of New Zealand, under the heading of Bills not be assented to by the Governor in Her Majesty's name, no Bill that should be inconsistent with any obligation imposed on the Queen by the treaty was to be assented to by the Governor of New Zealand, but such a Bill was to be sent Home for the direct assent of Her Majesty before the Governor could do anything in the matter. If the Bill was urgent the Governor could give his assent, but he must immediately notify the fact to the Secretary of State. It was his desire that the natives should come to a better understanding in reference to this treaty. He must again repeat that it would be better for the Natives to understand thoroughly whether they had been deceived in the first place or not. Under this Bill, if the natives wished to sell oysters they had to obtain a licence, and that provision was contrary to an Article in the Treaty of Waitangi.⁵⁵

We record in full Hansard's text of Mr Ward's brief and dismissive reply to the despairing plea of the member for northern Maori:

Mr WARD had one word to say in reply to the honourable gentleman who had last spoken. This Bill was a consolidating Bill, and the clause objected to by the honourable member was the law at the present time. He had explained the position to the honourable gentleman in Committee. If what the honourable member asked were done, they would have to cancel the granting of licences to Europeans. The honourable gentleman must not expect impossibilities to be done.⁵⁶

Ward's reply was plainly wrong and misleading. It overlooked the new and objectionable provisions for exclusive licences of oyster-beds and the vesting of ownership of all oysters in such beds in the successful tenderer or bidder. And it failed to recognise that in repealing the Fish Protection Act 1877 insofar as it affected sea fisheries, it had removed s8 of that Act which up to then preserved Maori treaty fishing rights. This provision was not re-enacted in the 1894 Act as it would have been had the new Act been no more than a consolidating Act, as Ward erroneously claimed.

5.13.25 Not content with removing the statutory recognition of Maori Treaty rights in relation to sea fisheries, on 11 December 1894 by order in council, the Crown repealed the definition of "Maori" and regulation 3 of the Fisheries Regulations 1888. This regulation had continued earlier regulations which provided that nothing in the fishing regulations was to prevent Maori from taking oysters or indigenous fish for their personal consumption and not for sale on the taking of indigenous fish with cod or line only. As Crown historian Mr Walzl pointed out, as a result of this action Maori were now completely brought under the operation of the

fisheries law subject only to such protection as might be offered by the discretion of the Native Minister (Z49:118).

Sea-Fisheries Act Amendment Act 1896

5.13.26 This short Act extended the governor's discretionary powers concerning oysters to all other species of edible shellfish and to sponges and sponge-beds, subject to two qualifications. The first provided that when shellfish in the Middle (South) Island were required for food by the Maori population they were to be exempt from the provisions of the Act. The second enabled the Native Minister by order to relax the provisions of any order in council as regards the North Island if he considered it injuriously affected aboriginal natives by limiting or depriving them of food-supplies. The minister could vary or cancel any such order from time to time and apply it to any part or parts of the North Island. This latter provision, as we will show, was the result of a compromise between the House of Representatives and the Legislative Council.

5.13.27 For some time prior to the introduction of this Bill into the House, Ngai Tahu (as will later appear), were becoming increasingly concerned at the erosion of their treaty rights in the fisheries legislation. The Reverend Teoti Pita Mutu, who had protested to Native Minister Cadman during Cadman's visit to the South Island in 1894 that Maori "had not parted with their fishing rights" (S7:97), wrote to the Honourable H K Taiaroa in July 1896:

I see that the House has a Bill before it dealing with Sea Fisheries. It would perhaps be advisable to have a clause inserted therein applicable to our "Hapuku" "Conger eel" and other fish, fishing grounds, providing that no Europeans are to fish on such fishing grounds where floats have been laid (that have been buoyed) but to have a distance of a mile therefrom where they may fish, because these fishing grounds have been used as such from a long time back, I am well acquainted with the land marks indicating those fishing grounds come within the meaning of the expression "mahinga kai" cultivations (food producing places) in the Ngaitahu Deed. I told Wi Pokuku a short while back about two weeks ago that when he returned to Moeraki he had better tell Mauhana to send some of his young people to go and lay floats at the Hapuku fishing grounds that he was acquainted with and that after that was done that he had better then petition Parliament to have a Bill prepared debarring the Europeans from fishing on those Hapuku fishing grounds. (S8:321-322)⁵⁷

On 6 July, Taiaroa sent the note on to Seddon, then Minister for Native Affairs, asking him to quickly look into the matter. Seddon's reply of 8 July simply noted that he regretted he was unable to introduce legislation in the direction desired by Mr Mutu (S7:99).⁵⁸

5.13.28 When the Bill was being read for a second time in the House of Representatives, Heke asked the Minister-in-Charge (Hall-Jones) to:

take into consideration some suggestions made by a Native gathering in Wellington respecting shell-fish. The suggestions were given to the Premier two or three weeks ago. The effect was that the Natives should be exempted from the operation of the Act so long as they gathered shell-fish for their own use.⁵⁹

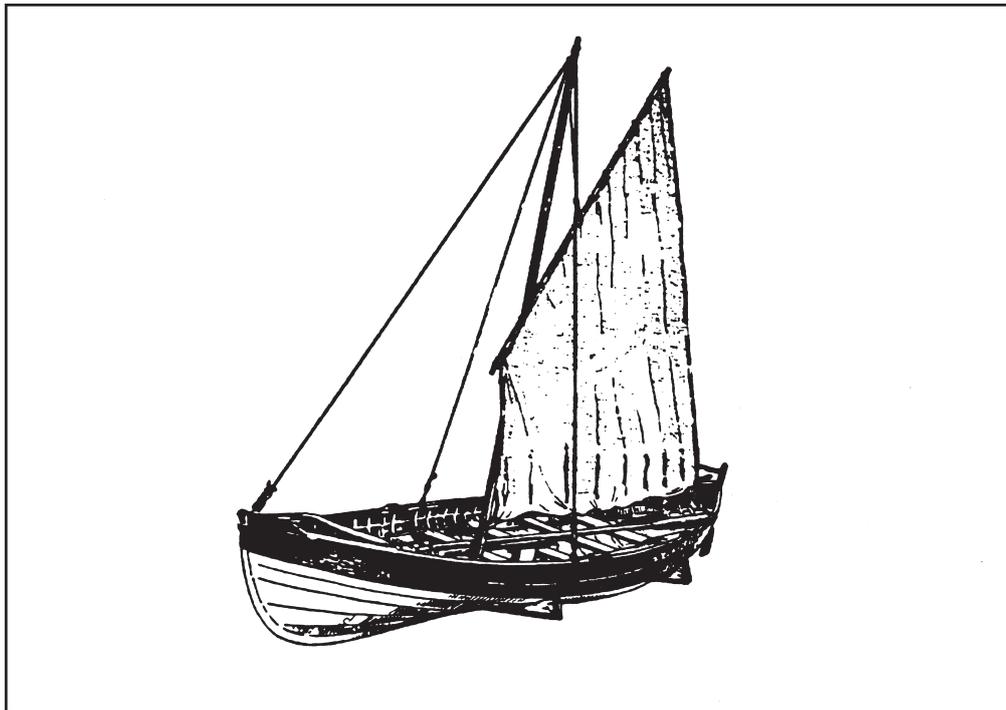


Figure 5.1 Sketch of a whale boat in Murray A Bathgate “Maori River and Ocean Going Craft in Southern New Zealand; A Study of Types and Change in Relation to the Physical, Social, and Economic Environment, 1773–1852” in *Journal of the Polynesian Society* volume 38 number 3 September 1969, cited in evidence as S3

We agree with the suggestion in the *Muriwhenua Fishing Report* that Heke, for practical reasons, had become willing to abandon his earlier contention that under the Treaty Maori should have free rights of commercial exploitation. He was seeking an unrestricted right to gather for home use.⁶⁰

Hall-Jones replied that the Act “had been introduced at the request of the Natives themselves, who complained that the shell-fish beds from which they obtained food for sustenance and bait for fishing were being destroyed.”⁶¹

In the committee stage of the Bill a proviso was added that when shellfish were required as food by the native population they were to be exempt from the operation of the Act. An amendment declaring that pipis were not deemed shellfish was also carried. But the House rejected a proposal by Heke that:

Nothing in the principal Act or this Act shall prohibit any aboriginal native or natives of New Zealand from taking or gathering any oysters or any edible shell-fish or seaweed for their own use and consumption: Provided that such oysters or edible shell-fish or seaweed are not taken or gathered by such aboriginal native or natives for the purposes of sale: Provided also that this section shall not authorise the taking of oysters from any artificial oyster beds.⁶²

When the Bill came before the Legislative Council, the Honourable W C Walker moved that the amendments in favour of Maori made in the House be not agreed to. He thought it “would be very dangerous indeed if this exemption were to be added to the Bill, as it was necessary to protect our shell-fish” (S7:100).⁶³ This prompted the Honourable H K Taiaroa from Otago to point out that:

In some places Natives were dependent to a great extent upon some of these shell-fish for their maintenance, and in some localities they had been dependent for generations past upon these shell-fish, and it was here provided that they were not to gather them for sale, but only for their own consumption, so that he thought it only fair to allow this provision to remain.(S7:100)⁶⁴

Notwithstanding this plea, the motion to delete the House amendments was approved. The Honourable W C Walker then said he had no desire to propose anything oppressive to Maori, his concern was that “shell-fish were protected for the benefit of all, Natives included”. He would be perfectly prepared at the conference between the house and the council to see any proper relaxation made in favour of Maori.⁶⁵ The conference duly agreed to the two provisos relating to the Middle (South) Island and the North Island being inserted in the Bill, which was duly passed (R10:11). The net result was that Ngai Tahu, being resident in the Middle Island, were exempt from the provisions of the Act as and when they required shellfish (excluding oysters) for their own consumption. But as Susan Butterworth has noted, the main significance of this provision is “that it continued the practice of giving *concessions* for Maori fishing rather than acknowledging *rights*” (Z17:64).

Maori Councils Act 1900

- 5.13.29 The purpose of this Act was to grant a limited measure of local self-government to Maori. It established Maori District Councils. Its chief concern was with welfare and village administration. For our purposes, its chief interest is s16(10) which enabled district councils to make by-laws, subject to the governor’s approval, for the control of all oyster-beds, pipi-grounds, mussel-beds, and fishing grounds used by Maori or from which they obtained food. Power of closure for conservation purposes was included. But any such by-laws were not to conflict with “the provisions of any other Act dealing with the same subject matters”.
- 5.13.30 The 1903 amendment to the 1900 Act empowered the governor, for the purpose of s16(10) of the Act, on the recommendation of a council, to reserve any oyster, mussel or pipi bed or any fishing ground, exclusively for the use of Maori of the locality or of such Maori hapu or tribes as might be recommended. The *Muriwhenua Fishing Report* stated that “Several bylaws had been gazetted by 1903 but none that related to fishing grounds. A search of the gazettes for all subsequent years has revealed neither by-laws nor reserves”.⁶⁶ The *Muriwhenua Fishing Report* goes

on to record that in 1930 Sir Apirana Ngata supported a Maori request to reserve a part of Kawhia harbour. He was advised that:

It is recognised that under the Treaty of Waitangi the Chiefs and Tribes were to have the full exclusive and undisturbed possession of their fisheries.

The fact is however that there never could have been any exclusive right to fisheries, and in any case the lands which the Natives want set aside is mostly tidal land. These tidal flats are, as you are aware, Crown property in its common law right.⁶⁷

Sea-fisheries Amendment Act 1903

5.13.31 This was an amendment to the Sea Fisheries Act 1894 which in relation to sea fisheries had repealed the 1877 Act, including s8 saving Maori treaty rights to their fisheries. This Act made a number of miscellaneous amendments, including the requirement that the owners of licensed sea-fishing boats and fish curers were to make returns to the Marine Department of all fish caught or cured by them. The Act was notable however, for its inclusion of s14, which stated:

Nothing in this Act shall affect any existing Maori fishing rights.

This clause was inserted in the Bill when it was in committee before the House of Representatives. No reason for its inclusion was given then or at any later stage of the progress of the Bill through the House, nor was it even mentioned. On the question that this and other amendments made by the committee be agreed prior to the third reading of the Bill in the House, the Right Honourable Richard Seddon expressed the hope there would be no adjournment. The “amendments” he said, “were not of a very important character”.⁶⁸ The Bill later passed through the Legislative Council without any mention being made of the new s14.

5.13.32 The only possible explanation for the insertion of this provision during the committee stage of the Bill in the House might be in a speech during the earlier second reading stage by Tame Parata, member for Southern Maori. After pointing out that the Bill would have an immediate effect on Maori in Stewart Island, Ruapuke, Bluff and Colac Bay, he said:

In those parts of the Colony there were certain reservations made in the deed of sale of Murihiku which provided that the natives should retain the right to their fishing-grounds at sea and inland. This was one of the conditions the old *rangatira* Maoris insisted upon when that deed was executed. I want to protect the fishing rights of the Maori people. Ruapuke was never included in that deed of sale, and there were so-many miles out to sea around the Island of Ruapuke, and including the smaller adjacent islands, reserved to the Maoris out of the sale. A few months ago a resolution was passed by the Araiteura Council that a distance of so-many miles around that island should be reserved for the fishing rights of the natives of Ruapuke, Stewart Island, and the Bluff. I hope the Minister will see his way to put a clause in the Bill to carry out the resolution of this Council, as the resolution is a reasonable one.⁶⁹

Later in the same speech he said:

Now, along the coast of Otago, and right up to Akaroa, there are a number of fishing-grounds that have been handed down to the

Maoris by their ancestors, but have been overrun and made use of by everybody, including Europeans, in recent years. I do not object to the Europeans fishing at these places, but these reefs should be to some extent protected for the benefit of the Maoris; and there are other parts of the sea which are available for European fishermen to make use of. If the Bill goes into Committee I shall move certain amendments to provide for the protection of the Maori fishing-rights. The House should uphold the promises made by the representatives of the King, and carry them out.⁷⁰

The amendment which resulted in s14 was not moved by Parata in committee but by the Minister of Marine, Hall-Jones. While we have no firm information on the point, it may well be that Parata's second reading intervention was influential in s14 being added. It is noteworthy that the previous reference to Maori fisheries rights under the Treaty was omitted. Neither the minister, the premier, Seddon, or any other member of government felt it necessary to explain what "existing Maori fishing rights" might be encompassed by the new provision. We will later consider other evidence which points to the Crown's very limited view of such rights.

Fisheries Conservation Amendment Act 1903

5.13.33 This set an open season for trout fishing and gave the governor additional power to make regulations for the issue of uniform licences to fish for trout and perch, to regulate the export of trout and to prevent the pollution of streams in which trout or salmon were present.

In the house, Tame Parata, the member for Southern Maori, opposed the Bill because there was nothing in it to provide for conserving fishing rights for Maori in their own streams. He went on:

Now under the deed of sale by Ngaitahu the Maoris were allowed to retain the rights to their fisheries – their sea-fishing grounds, and their eel and other freshwater fisheries, in the rivers and lakes – and there is also a clause in the Treaty of Waitangi which assures to them the fishing rights in their rivers, lakes, and seas . . . Why should this House pass legislation to ask the Maoris to pay for a license [sic] when the rivers belong to them and the fish belong to them? I shall move in Committee that there be a provision allowing the Natives the right to fish in their own rivers for such as eels, whitebait, flounders, lampreys and all other fish. The acclimatisation societies hold meetings to discuss these questions, but why do they not ask the opinions of the Maoris? You bring in a Bill that is one-sided.⁷¹

In fact, Parata may have been unnecessarily anxious as the legislation did not prevent Maori fishing for indigenous fish. Parata was supported by Mr Field, member for Otaki:

I am one of those who hold that the provisions of the Treaty of Waitangi are too apt to be forgotten in the legislation of this Parliament. It is unmistakable that in that treaty there is preserved to the Natives the right to fish freely in all rivers, streams, and lakes of the colony; and in dealing with legislation on fishing matters we should bear that clearly in mind. The Natives, as has been truly said, depend very largely on the fish of the Colony for their food, and it is only right that the terms of that great treaty, under which the Natives practically gave up their lands to the Europeans, and which

they regard, and rightly regard, as the Magna Charta of their rights and liberties so far as land is concerned, should be strictly adhered to. The Natives should undoubtedly have the free right to fish for native fish, at any rate, in the streams of the colony; and if it is true that the imported fish voraciously devour the native fish, then I am not sure the natives ought not to be allowed to fish for imported fish in the same way as they do the native fish, without having to purchase licences.⁷²

5.13.34 In fact Parata did not subsequently move any amendment. The most likely explanation is that he may have recalled or been reminded that s8 of the Fish Protection Act 1877 (protecting Maori treaty fishery rights) was still in force in respect of freshwater fisheries and that provision was “incorporated” with the Fisheries Conservation Act 1884. If so, such protection as this afforded was to be short-lived. Four years later the Fish Protection Act 1877 was wholly repealed by the Statutes Repeal Act 1907.

Sea-fisheries Act 1907

5.13.35 This Act gave the minister power to employ oyster pickers for any oyster-fishery in the North Island. It did not apply to the South Island so Ngai Tahu were unaffected. It is mentioned, however, to record that during the debate on this legislation notable speeches were made by Apirana Ngata, member for Eastern Maori, and Hone Heke, member for Northern Maori, on Maori treaty fishery rights. These we discuss later (5.16.6).

Fisheries Act 1908

5.13.36 This consolidated and repealed the previous legislation including the Fisheries Conservation Act 1884. Part I of the new Act dealt with sea fisheries and part II with fresh water fisheries. As it added nothing new, we refrain from categorising its contents which remained substantially unchanged until the 1940s. We record that the previous prohibition against the bringing of proceedings for a fishing offence against a Maori habitually living with Maori, without the consent of the Native Minister for those proceedings, was repeated in s76.

5.13.37 Section 77(2) stated:

Nothing in this Part of this Act shall affect any existing Maori fishing rights.

Section 77 was, in part I, dealing with sea fisheries. No equivalent provision was made in part II, which was concerned with fresh water fisheries. As there does not appear to have been any debate on this Act since it was part of a general consolidation of all Public Acts, no reason was given for the provision not extending to fresh water fisheries.

In the Fisheries Act 1983, s77(2) was re-enacted but with the omission of the word “existing” so that the new s88(2) read:

Nothing in this Act shall affect any Maori fishing right.

We adopt the tribunal view expressed in the *Muriwhenua Fishing Report* that:

these were general words, making no specific provision for the protection or advancement of Maori fishing interests, and leaving

it very much to the administrators to make of them what they would. Not unexpectedly, that task fell also to the courts.⁷³

5.13.38 We will defer further analysis and evaluation of the Crown's legislative intervention in Maori treaty fishing rights pending a closer examination of the Crown attitude to those rights. In 5.12.1 we referred to the influence of English common law rules that land below high tide mark was the property of the Crown and that there was public and general right to fish in both tidal and offshore waters. We now look more closely at why these rules came to be taken by the courts and successive governments to prevail over Maori treaty rights to their fisheries, notwithstanding the express provision in s8 of the Fish Protection Act 1877 and later statutes which on their face preserved such treaty rights. We will also consider the Maori and more specifically Ngai Tahu attitude to the Crown's legislative and administrative attitude to their treaty fishing rights as evidenced by protest and other intervention. Having done this, we will then evaluate, as at 1908, the effect of Crown legislative and other acts on Ngai Tahu treaty rights.

5.14 **The Crown Attitude to Maori Fishing Rights**

The common law

The settlers had brought in their mental baggage the belief that the foreshore and the sea were common to all for the purpose of getting fish.⁷⁴

5.14.1 The tribunal is indebted to the Law Commission's valuable discussion paper on *The Treaty of Waitangi and Maori Fisheries; Mataitai: Nga Tikanga Maori Me Te Tiriti o Waitangi* in which the foregoing graphic phrase appears. We propose to draw on the commission's paper in our discussion of the Crown attitude to Maori fishing rights.

The settlers' belief that they were entitled as of right to access to the foreshore and the sea for the purpose of fishing was no doubt based on their understanding of the English common law. They assumed that they had brought this law with them to New Zealand. The Crown's right to the foreshore is discussed in *Halsbury's Laws of England*:

By prerogative right the Crown is prima facie the owner of all land covered by the narrow seas adjoining the coast . . . and also of the foreshore, or land between high and low water mark There is a presumption of ownership in favour of the Crown, and the burden of proof to the contrary is on a claimant.⁷⁵

As we have seen in our *Ngai Tahu Report 1991*, the Crown accepted that Maori owned all land in New Zealand and accordingly treated with them for its acquisition. But the question arose as to what was meant by "land". As the Law Commission has said, after some initial uncertainty, the Crown adopted the view that land for that purpose stopped at high-water mark.⁷⁶ Maori ownership of and rights in respect of the foreshore were not admitted. The tribunal, in the *Muriwhenua Fishing Report* found the view that the foreshore belonged to the Crown, and no right title or interest, customary or otherwise, could be held by any

person save for some specific land grant or legislative provision was soon received and became increasingly entrenched.⁷⁷

A good illustration of the Crown's attitude is to be found in its argument in the *Kauwaeranga* case decided by Chief Judge Fenton in 1870.⁷⁸ There the Crown contended that by the law of England, the foreshore belonged to the Crown and could only be held by a subject by grant from the Crown, either existing or presumed. This seisin of the Crown was claimed to be an incident of sovereignty. Consequently Maori could not own the foreshore according to their customs and usages, as such ownership would be in derogation of the Crown's prerogative. As will be seen, this view came to prevail in subsequent decisions.

While it was not in dispute that the Crown owned the foreshore by virtue of its paramount title, except to the extent it may have granted it to other such ownership, this was not inconsistent with the legal recognition of Maori property rights as the indigenous people. The question was whether the Crown's title was subject to a legal burden recognising the right of the indigenous people to the occupation of and enjoyment of their land and whether this extended to the foreshore.

5.14.2 The customary rights of Maori over their land were recognised at a very early stage by the Land Claims Ordinance 1841. This provided that:

All unappropriated lands, subject to rightful and necessary occupation and use by the aboriginal inhabitants, are and remain Crown or domain lands.⁷⁹

"Unappropriated lands" appear to be those not Crown granted.

But an early authoritative decision of the New Zealand Supreme Court was soon after to uphold the Maori customary title irrespective of the provisions of the Lands Claims Ordinance 1841. In the leading judgment in *R v Symonds* [1840–1932] NZPCC 387, given in 1847, Chapman J held:

Whatever may be the opinion of jurists as to the strengths or weaknesses of the Native title . . . it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers . . . It follows . . . that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi . . . does not assert either in doctrine or in practice anything new and unsettled.⁸⁰

And later he said:

It is not at all necessary to decide what estate the Queen had in the land previous to the extinguishment of the Native title . . . the full recognition of the modified title of the Natives, and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects.⁸¹

We agree with the Law Commission's observation that nothing in the judgments in *Symonds* suggests that Maori property rights were not justiciable or that they were only justiciable because of statutory recognition in the Land Claims Ordinance 1841.⁸²

5.14.3 The Public Reserves Act 1854 was an early statute reflecting the Crown's view of its right to vest land below high water mark in a provincial superintendent. With a view to facilitating a system of local management of lands required for local purposes, this Act authorised the governor to vest any Crown lands in each province in its superintendent and his successors (s 1). In addition, s 2 conferred power to grant and dispose of land reclaimed from the sea and any land below high-water mark to a provincial superintendent. Section 12 said that nothing was to prejudice or affect the rights of anyone except the Crown in those lands. This would have included Maori.

In 1874 H K Taiaroa, member for Southern Maori, asked whether the reclamation of land below high water mark in the North Island was not in contravention of the Treaty of Waitangi. Sir Donald McLean replied that land below high water mark was granted to provincial superintendents under the 1854 Act and that when Maori ceded land to the Crown, all rights connected with them, such as rivers and streams, were also ceded. But this answer left unanswered the question of what had in fact been ceded. It did not refer at all to the foreshore, which was the point of the question and made no mention of the saving rights in s 12 of the Act. The parliamentary debates are replete with evasive or unresponsive answers such as this to questions by Maori members as to Maori fishing rights.

5.14.4 In the *Kauwaeranga* judgment already referred to (5.15.1), Chief Judge Fenton implicitly rejected the Crown's contention there set out. But for reasons which appear in the tribunal's *Muriwhenua Fishing Report*, that is, for purely policy (or political) reasons, Fenton resiled from applying his findings. We adopt what the Muriwhenua tribunal had to say about this decision:

The *Kauwaeranga Judgment* represents a change in the Native Land Court's direction, and is in fact a reversal of a decision of the same Judge only a few weeks earlier (*Whakabaratau Judgment*). In the *Kauwaeranga* case the Court upheld earlier Native Land Court opinion that the Crown's right to the foreshore, like its nominal ownership of the land, was held subject to customary usage until that usage was extinguished. The Court had simply to ask whether it was held according to native custom at 1840. However after a most lengthy and erudite statement of the law as the Court saw it, and after some comments on the importance of fisheries to Maori, it was held that for reasons of "public policy" (and although the Maori claimants were held to be entitled to the mudflats) the Maori claimants should receive no more than a title to exclusive fishing rights over the area in question.

What were the issues of public policy? They were not explained in the judgment. Reality lay in the fact that beneath the mudflats lay gold, as the Court well knew. The Goldfields Amendment Act 1868 had opened Maori land for goldmining but it had also provided in section 9, that the foreshore adjoining Maori land opened for gold mining was deemed to be Maori land too. The Thames Sea Beach Bill (eventually the Shortland Beach Act 1869) proposed to delete that provision and gave rise to much debate and legal opinion in the House on native foreshore rights The *Kauwaeranga* claim

came at the same time as the parliamentary debate and involved the very lands then hotly in dispute.

The convenience of the *Kauwaeranga Judgment* was that it protected the Crown's interest in gold, which was the main concern at the time. But it also had the inconvenience of specifically rejecting the strong contention of Crown counsel that no Maori could own the foreshore according to custom and usage, in derogation of the Crown's prerogative.

In the event the Government suspended the authority of the Native Land Court to deal with land below high water anywhere in the Auckland Province (where the Chief Judge had his circuit) . . . South of the Auckland province the Judges of the Maori Land Court had become reluctant to issue foreshore titles anyhow, in view of the non-Maori reaction, even where the Maori customary use was clearly established – see for example *In re Porirua Foreshore* (1873) Wellington Minute Book 157. Section 147 of the Harbours Act 1878 finally resolved the matter. It forbade the granting of any part of the seashore or land under the sea 'without the special sanction of an Act of the General Assembly'.

That Act put an end to the Native Land Court's involvement with fisheries. More significantly it put paid to any contention that the Crown's common law right to the foreshore was subject to customary usage, at least until 1986 when the doctrine of aboriginal title was revived.⁸³

- 5.14.5 Ironically, only a year after the *Kauwaeranga Judgment* was to come the high-water mark of judicial recognition of Maori title by the New Zealand Court of Appeal of five judges. This recognition was made irrespective of either the Treaty or subsequent legislation. The court in *Re Landon & Whitaker Claims Act 1871* (1871) 2 NZCA 41, 49 held:

The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it.

- 5.14.6 But this view of the legal status of Maori rights was soon to be gravely undermined. This occurred only six years later in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72. Chief Justice Prendergast delivered the judgment of himself and Richmond J. The judgment is best known for its reference to the Treaty of Waitangi as a nullity, although it is not always remembered that this was said of it in so far as it purported to cede sovereignty. The court rejected the concept of legally enforceable Maori property rights. It commented in a derogatory fashion about existing legislation concerning rights and native customs. It made no reference to possible common law Maori rights. Of such rights as the Maori might have it said:

in the case of primitive barbarians, the supreme executive Government must acquit itself as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exists no known principles whereon a regular adjudication can be based.⁸⁴

At the heart of the judgment is the conviction that:

Transactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State and therefore *not examinable by any Court*. (emphasis added)⁸⁵

In short, the state and not the courts was to be the sole arbiter of whether the state had properly discharged its obligations to respect all Maori proprietary rights.⁸⁶

5.14.7 *Wi Parata's* view of the legal status was upheld by the Court of Appeal in *Nireaha Tamaki v Baker* (1894) 12 NZLR 483. The court treated all dealings with Maori for the purchase of land as acts of state beyond the law and approved the decision in *Wi Parata* as authority for the proposition that:

the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony. There can be no known rule of law by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested . . . The Crown is under a solemn engagement to observe strict justice in this matter, but of necessity *it must be left to the conscience of the Crown to determine what is justice*. (emphasis added)⁸⁷

Thus did the Court of Appeal abnegate all power to review the legality of Crown action in relation to Maori proprietary rights. That its trust in the conscience of the Crown to determine what is justice was fatally misplaced has been repeatedly demonstrated in our *Ngai Tabu Report 1991*.

The Court of Appeal's judgment came before the Privy Council some seven years later in *Nireaha Tamaki v Baker* [1840–1932] NZPCC 371. Not surprisingly, the Privy Council reversed the decision of the Court of Appeal. It held that it could not be maintained that there was no customary law of the Maori of which the court could take cognisance. If the Maori appellant could succeed in proving that he and members of his tribe were in possession and occupation of the lands in dispute under a native title which had not been lawfully extinguished, he could take appropriate legal proceedings to restrain an unauthorised invasion of his title. Yet in the later case of *Hohopa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655, the New Zealand Court of Appeal in effect rejected the Privy Council decision and followed the decision in *Wi Parata*.

5.14.8 Whatever uncertainty remained as to the right of Maori to invoke the aid of the courts in relation to their customary land rights was put beyond doubt in the Crown's favour in 1909. In that year a major restatement of Maori land law was enacted. Sections 84 to 87 of the Native Land Act 1909 provided:

- that Maori customary title to land was not available or enforceable against the Crown in any court proceedings or in any other manner (s84);
- that a proclamation that any Crown land was free from Maori customary law was conclusive in all courts (s85);

The Crown Assumes Control of the Fishery, 1840 to 1908

- that no alienation of land by the Crown could be questioned or invalidated in any court on the ground that Maori customary title had not been extinguished (s86); and
- that Maori customary title was deemed to have been lawfully extinguished in respect of all land which in the previous ten years had been continuously in the occupation of the Crown whether by tenants or otherwise (s87).

5.14.9 Likewise in 1914, whatever doubts there might have been as to the ability of Maori to assert a customary fishing right in court proceedings were also put to rest in favour of the Crown. In *Waipapakura v Hempton* (1914) 33 NZLR 1065 a Maori woman had been fishing in the tidal waters of the Waitotara river. Hempton, a fishery officer, seized her nets on the grounds that she was using them in breach of a fisheries regulation made under the Fisheries Act 1908. Ms Waipapakura claimed she was using the nets in exercise of a Maori fishing right and that such right was saved from the operation of the Fisheries Act by s77(2) of the Act. This subsection provided that nothing in part I of the Act “shall affect any existing Maori fishing rights”.

The Crown’s view of the appellant’s position was succinctly stated by the Solicitor-General (J W Salmond QC):

The plaintiff’s claim is for a non-territorial fishery in the tidal waters of the Crown. The land [under the tidal waters] has belonged to the Crown since the Crown came to New Zealand. The principle that tidal waters belong to the Crown is in force here unaffected by the Treaty of Waitangi or Native land legislation. Native customary title is limited by high-water mark and does not include tidal waters. It is illegal for the Crown to make a grant that would interfere with the public right of fishing and navigation . . . There can, therefore, be no territorial fisheries in the sea. *Apart from legislation, the Treaty of Waitangi is merely a bargain binding upon the conscience of the Crown and is not a source of legal rights.* There is no legislation giving to Maoris the right to fish in non-territorial waters . . . Section 77, subsection 2, of the Fisheries Act 1908 . . . is merely a saving clause and does not create rights. (emphasis added)⁸⁸

The Supreme Court (a full court comprising three judges), in a judgment delivered by Chief Justice Stout, upheld the Crown’s contentions. It affirmed that s77(2) was a saving clause not the grant of a right and, relying on the Privy Council decision in the *Nireaha Tamaki* case, that until there was some legislative provision as to the carrying out of the Treaty, said “the Court is helpless to give effect to its provisions”. Stout CJ went on to say that all the Fisheries Act 1908 did was to regulate all fisheries so as to preserve fish for all. There were concessions given, but those concessions were to Maori and did not affect the question in this case. He held:

In the tidal waters – and the fishing in this case was in this area – all can fish unless a specially defined right has been given to some of the King’s subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an expansive right to the Maoris, but

if it meant to do so no legislation has been passed confirming the right and in the absence of such both *Wi Parata* and *Nireaha Tamaki v Baker* are authorities for saying that until given by statute no such right could be enforced.⁸⁹

In the result, the appellant failed in her bid to regain possession of her nets. As the Law Commission has noted:

The overall themes and policy of the decision were the public right to fish in the sea and tidal waters, elevated virtually to a constitutional principle, and the concept that there should be no special privileges for Maori in this regard.⁹⁰

Te Weehi's case

5.14.10 The decision in *Waipapakura v Hempton* stood intact until the recent High Court decision in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. The tribunal in the *Muriwhenua Fishing Report* made the following observations on this case which we adopt:

In *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, Mr Justice Williamson distinguished the earlier cases in that Te Weehi's claim was not based on a question of land ownership, and nor was he seeking an exclusive right. The Court concluded that as a result of the general provision in (now) s88(2), customary Maori fishing rights exercised in a customary way are exempt from regulations under the Fisheries Act, and that customary fishing rights continue until they are expressly taken away. In that case the Court considered Te Weehi was exercising a customary right. He was not claiming an exclusive right and was taking only for personal needs.

Effectively the Court recognised what is often referred to as the doctrine of aboriginal title, about which Dr McHugh had written, possibly for the first time since *R v Symonds* [1840–1932] NZPCC 387. The Court followed, in that respect, a long line of Canadian decisions.

Thus it was that for the period 1900–1987, no general right of Maori fishery was recognised at law, until the *Te Weehi* case in 1986. Even that case may have limited scope, for while the fishing industry has expanded enormously, the customary right referred to related to gathering for personal needs in a customary way.⁹¹

Te Weehi's case was not taken on appeal by the Crown. It remains to be seen, should its correctness be challenged in future, whether it will be upheld. It may be that, to do so, the Court of Appeal will need to overrule *Waipapakura v Hempton*.

5.15 Maori Complaints and Protests

5.15.1 For the first 30 years or so following the signing of the Treaty Maori felt in no way threatened by the relatively minor intrusion of non-Maori in their traditional fisheries. In the mid to late 1870s however, there developed some pressure on oyster and other shellfish reserves from Europeans. Also from the first legislative intervention in 1866 in the form of the Oyster Fisheries Act – passed without any consultation with Maori – it became clear the Crown assumed it had the right to restrict or deny access to fisheries by both Maori and non-Maori alike. This intervention, as will be seen, generated a continuous stream of complaints and protest

by Maori in various parts of the country during the remainder of the nineteenth century and down to the present time.

- 5.15.2 The tribunal in its *Muriwhenua Fishing Report* has recorded many of the protests by Maori in the last three decades of the nineteenth century and into the twentieth century. The tribunal did not confine its discussion solely to grievances and protests by the Muriwhenua tribes but extended it to Maori throughout New Zealand. These complaints and protests took a variety of forms. Some were made direct to the Native Department or the Native Minister. Others took the form of petitions to the House of Representatives. The *Muriwhenua Fishing Report* records in appendix 8 some 46 Maori fishing petitions referred to the Native Affairs Committee in the period 1869 to 1910. Of these some nine were from Ngai Tahu. Yet other protests were made by Maori members of Parliament, including H K Taiaroa and Tame Parata from Ngai Tahu, during debates on various fishing Bills before the House of Representatives or Legislative Council. Court proceedings by Maori were yet another form of protest. These latter became more frequent during the twentieth century.
- 5.15.3 In 1860 Governor Browne convened a hui of some two hundred chiefs, including many from the north, to discuss the Waitara dispute. The Treaty was discussed at considerable length.⁹² Those who spoke at this great gathering at Kohimarama were not recorded as saying anything about violations of fishing rights.⁹³ Yet as the Law Commission noted, by 1879 these were a “burning issue”.⁹⁴ As the Tribunal indicates in the *Muriwhenua Fishing Report* Maori complaints at the hui held in 1879 (known as the first Maori Parliament) concerning their fisheries and their Treaty fishing rights were voluble. This is demonstrated by some 14 extracts of such complaints and protests by leading rangatira recorded in the tribunal’s *Muriwhenua Fishing Report* (Z17:42–45).⁹⁵

Professor Ward has noted that some of the complaints also referred to loss of control by the chiefs, of the mana of the lands, forests and fisheries, guaranteed by the Treaty. He went on to say:

This implies more than concern for traditional resources as such. It led to objections to the requirement to require licences even for the shooting of introduced birds such as pheasants, or the taking of introduced fish, for that implied a loss of the mana of forests, streams and foreshores: Maori apparently felt that kawanatanga was intruding upon rangatiratanga without adequate consultation and consent. Susan Butterworth has commented that, though politicians were aware in principle of the duty to protect Maori fishing rights, they seemed to have had no practical grasp of the way the new [conservation] laws would interfere with Maori traditional use of rivers, lakes and estuaries. (AA26:19–20; Z17:39,43)

- 5.15.4 The Muriwhenua tribunal noted that in many of the Maori fishing petitions referred to the Native Affairs Committee the Treaty of Waitangi was

invoked and, more often than not, specific fish laws were alleged to be contrary to the Treaty.⁹⁶

- 5.15.5 The Crown historian Tony Walzl said (Z49:86) in reference to Maori fishing protest in the years 1880 to 1885:

At a time when European legislators were passing statutes relative to the fishery, the Maori protest over lost fisheries and fishing rights began building to a crescendo which forced the Crown to re-evaluate its stance. The Maori fishery petitions of the 1870s had mainly referred to inland waters, the navigation of rivers and the protection of eel-weirs. One of the first petitions relative to sea-fisheries was one sent in during 1879, after the Orakei Parliament by Arama Karaka, who had been a delegate to the conference. His petition directly referred to European legislation over the fisheries and echoed the sentiments of Ngatata that only Maori had a right to manage and control their fishery

That the laws of the Europeans should not affect the deep-sea fisheries and pipi-beds, because the Europeans have only a right to the dry land.

Mr Walzl proceeded to give further examples including some initiatives by Ngai Tahu to which we refer below. Walzl demonstrated that the protests continued beyond 1885 (Z49:101–106).

The 1907 Fisheries Amendment Bill and the question of Maori consent

- 5.15.6 Earlier in this chapter (5.13.35) we noted that during the debate on the Sea-fisheries Act 1907 notable speeches were made by Apirana Ngata, member for Eastern Maori, and Hone Heke, member for Northern Maori, on Maori Treaty fishing rights. These speeches were the subject of detailed evidence (Z16(a)) by Mr Graham Butterworth, a Wellington historian whose evidence was originally filed in the High Court in proceedings brought by the Ngai Tahu Maori Trust Board against the Attorney General, the Fishing Industry Board and the New Zealand Fishing Industry Association. This, along with other evidence including that of Susan Butterworth (Z17), was later put before this tribunal at the request of the fishing industry parties to those proceedings.

- 5.15.7 The evidence of Graham and Susan Butterworth on this topic was fully considered by Professor Alan Ward who was commissioned by the tribunal to present an “overview” of the evidence in the Ngai Tahu sea fisheries claim. In what follows we draw heavily on Professor Ward’s consideration of the implications of the speeches of Apirana Ngata and Hone Heke.

We recall that under the Sea-fisheries Act 1907 the Crown took control over the picking and sale of all North Island oysters. Both domestic and commercial consumption became illegal without a licence. Debate on the Bill saw notable speeches by Hone Heke and the recently elected Apirana Ngata. These were reproduced in full by Susan Butterworth (Z17:67–70).

- 5.15.8 Ngata at the outset indicated that he had already discussed Maori Treaty fishing rights with the Minister of Marine (J A Millar) and urged that the

minister should take into consideration the “alleged” rights of the Maori people under the Treaty to their fishing grounds. He referred to s16 of the Maori Councils Act 1900 which, as we have seen, gave extensive powers to councils over shellfish beds and fishing grounds used by Maori for food. Whether this constituted a definite recognition by Parliament of Maori Treaty fishing rights he was not sure. He pointed out that the Thames Harbour Board Bill (s38) then before the house authorised the appointment of a Supreme Court judge to ascertain “the just claims and rights of the aboriginal Natives under the Treaty of Waitangi, which have not been satisfied and discharged” in respect of the foreshore granted under the Act. Ngata then made it clear that he and his Maori colleagues in the House were not claiming that Maori were by virtue of the Treaty entitled to exercise rights over all the fishing grounds off the New Zealand coast.⁹⁷

We recognise that at this late day it is impossible, even if Parliament recognises the validity of the claim of the Maoris under the Treaty of Waitangi—that it is impossible and unreasonable to grant to the Maoris the full measure of the rights guaranteed by that treaty.⁹⁸

Ngata next observed that in some places in the Wairarapa and the Hawkes Bay fishing reserves on the coast had been provided for when land was purchased by the Crown. But further up the east coast, where practically the whole of the lands along the coast are owned by Maoris, there is no necessity to make shore reserves of this nature. Ngata continued:

Along the coast there are well-recognised fishing-grounds. Tradition has handed down from father to son, from the chief of the tribe to the next chief, and so on, for generations past, and right down to the present day, the secret of certain marks by which the more famous fishing-grounds could be identified; but beyond these well-recognised fishing-grounds the Maoris claim no rights whatever. They do not claim exclusive fishing-rights along the coast, but they do claim that the Government recognise, even at this late hour in the day, their exclusive right to certain of these fishing-grounds, because at the present time there is no doubt that in the Bay of Plenty, for instance—from Cape Runaway down to Torere—one of the chief articles of diet of the Maoris along the coast is the fish they get from their ancient fishing grounds. We do not want to stand in the way of the exploitation of the sea-fisheries at all, but we want a recognition by the State that certain rights were given to the Maori people by the Treaty of Waitangi to the fisheries, and that Parliament should so affirm not this year, but next year, after the whole matter is fully considered. I suggest how it might be done: that the Governor be empowered from time to time to declare that any fishing-grounds defined and located by reference to certain landmarks should be reserved for the use of the Maoris in the neighbourhood. That might be put on the statute-book, and those Maoris who chose to take advantage of it could apply to the Governor. Then, the only Maoris who claim the rights to fisheries are those who take advantage of the power on the statute-book. Perhaps a time may be fixed in which to make claims⁹⁹

Hone Heke later spoke. He drew the minister’s attention to s8 of the Fish Protection Act 1877 which had recognised Maori Treaty fishing rights:

I do not think any of the Native members would urge that all the fishing-rights along the foreshore of New Zealand where the lands have been sold by the Natives to the Crown or to private individuals should be preserved to them, because by the sale of those lands necessarily the Natives have lost their rights to that foreshore; but we do ask the Minister and this House that in the case of those Native lands which run down to the sea the rights conferred by the Treaty of Waitangi, as recognised by the Act of 1877, should be given some consideration.¹⁰⁰

In reply to Ngata, the Minister of Marine assured him that nothing in the Bill would take away the Treaty rights of Maori having earlier said he was making enquiries into what are the rights of Maoris under the Treaty of Waitangi—thereby admitting that, despite his latest assurances, he did not know what they were. Ms Butterworth has pointed out that the response to the minister’s enquiry cannot now be found (Z17:71).

5.15.9 Professor Ward accepts, as we do, Ms Butterworth’s contentions that the Maori members at the time, plus the Legislative Councillors (one being the Maori King, Mahuta) and James Carroll (who represented a non-Maori constituency) were an outstanding group of people with great authority in Maori society. Equally he accepts Ms Butterworth’s suggestion that:

Ngata in particular had chosen to renounce wide, vague claims to fishing rights the better to insist upon the active protection of smaller, specific ones: known traditional sea fishing grounds, existing reserves and foreshores adjoining land still in Maori hands. (Z17:72).

Graeme Butterworth in his paper on the significance of the two speeches by Ngata and Heke gives his central finding as being “that both were men of national standing who were sufficiently representative of the Maori tribes and their leaders to be able to speak for the majority of Maori in this period” (Z16(a):1).

Professor Ward considers that this might be true “in *general* terms” and recognises that Ngata in particular had great influence over important Maori meetings in the late 1890s and early 1900s. But, Ward says, “it does not tell us very much about the attitude of “the majority of Maori leaders” about their views on Ngata’s or Heke’s stance on any *particular* matter, such as the 1907 fisheries debate” (AA26:29). While fully acknowledging the great contribution of Ngata and his colleagues to Maoridom, Professor Ward says:

Yet none of their efforts were fundamentally searching, none squarely addressed the question of the status of the Treaty in the law and constitution, or the question of Maori rights under it. Ngata and his colleagues’ strategy in the face of settler adamancy precluded that. It was not their fault—they could do little else at that time. But the strategy itself was fundamentally repudiated by the Ratana movement and by the great upsurge of the 1960s and beyond, which demands that the fisheries’ questions shelved by Ngata and Heke in 1907 (*not* as a matter of right, for they never at bottom conceded that, but as a matter of expediency) remain to be addressed

For all of these reasons it is not possible, I believe, to read into the tactics of the Maori parliamentarians of 1907 a fundamental and on-going consent by Maori generally (or any local group in particular) to the fisheries legislation of the period or to the principles which underlay it. In respect of Ngai Tahu attitudes on this question I accept Mr O'Reagan's points in his submission of 26 February 1990 (AA26:30–31)

- 5.15.10 Tipene O'Reagan, in an affidavit dated 26 February 1990, a copy of which was produced to the tribunal, said, in discussing Ms Butterworth's evidence said:

On behalf of my Tribe I would say that speeches made in Parliament by Members who are Maori and members of Tribes other than Ngai Tahu did not in 1907, do not today, nor will they in the future, in any way bind Ngai Tahu as Maori individuals or as a Tribe or corporate body, unless Ngai Tahu gave their fully informed agreement specifically in advance on each such occasion. The same rule would apply to speeches even of Members of Parliament who happened themselves to be Ngai Tahu members of the Tribe, unless they were speaking with specific permission or instruction and with the fully informed consent of Ngai Tahu expressed through the proper traditionally validated tribal procedures and through the properly constituted and recognised Iwi Authority representing our Tribe

The Maori speakers whose work and speeches have been studied and reported on by Mr Butterworth were indeed outstanding individuals, with a well deserved place in the history of our country, and they have earned very high standing with maori [sic] of all Tribes as well as their own. However they had no mandate and did not themselves presume to speak for the Tribal interests of Ngai Tahu, or the other Tribes, and such should not be imputed to them in retrospect. (AA12(n):6)

- 5.15.11 Mr Carruthers, QC senior counsel for the Crown, in his final submissions (adopted by Mr Castle for the fishing industry as to this part) discussed Professor Ward's review of the submissions of Susan Butterworth and Graeme Butterworth on the Ngata and Heke speeches. He concluded that Professor Ward may well be right in his conclusion (above quoted) concerning consent to fisheries legislation, for neither Ngata nor Heke managed to obtain the provisions they wished to be inserted in legislation in all instances. But he went on to suggest that there were striking similarities between the requests of Ngai Tahu in the 1870s to early 1900s (and subsequently) for the protection of their fishing rights, as compared with the provisions Ngata and Heke suggested.

- 5.15.12 Substantially for the reasons advanced by Professor Ward and Mr O'Reagan, the tribunal considers that Ngai Tahu cannot be bound by the political speeches made by Ngata and Heke in 1907 or at any other time, there being no suggestion that they did so with the specific instructions or permission of Ngai Tahu and with its fully informed consent.

Moreover it must be remembered that the Crown had for years paid little more than lip-service to Maori Treaty fishing rights and the courts had stripped them of any legal efficacy. In the prevailing environment Ngata, Heke and their Maori colleagues had no real option but to face the

political reality of the day and to strive for what might be attainable rather than the full extent of their Treaty rights.

- 5.15.13 We now propose to review specifically the reaction of Ngai Tahu both to the participation by non-Maori in fishing and to the various legislative initiatives of the Crown up to 1908 when the legislation was consolidated. Later events will be covered in the next chapter.

5.16 Ngai Tahu Complaints and Protests

- 5.16.1 In 1865 Natanahira Warawaratu on behalf of the whole of the runanga of Kaiapoi wrote to Native Minister Fitzgerald complaining about the drainage of Waihora (Lake Ellesmere) which he said Ngai Tahu had not sold to the Crown. We recorded his letter in our *Ngai Tahu Report 1991*.¹⁰¹ Warawaratu's letter was referred to Mantell who in a letter to Rolleston of 12 April 1866 said in relation to the claim:

At Lake Ellesmere (then called Waihora) I showed Maopo, Pohau, and others of the Kaiteruahikihiki interested at Taumutu that although years might elapse ere their old style of breaking the dam might be interfered with, the stoppage of the outlet must so seriously affect the drainage of so large an extent of country that the Government must be quite free to do as it pleased with regard to it.

All that I promised at any place to the Maoris on this subject was, *that their rights of fishing on and beyond their own lands should be neither less nor more than those of Europeans* (A8(I):242, emphasis added)¹⁰²

Here we see at an early stage the attitude of the Crown's agent to Ngai Tahu fishing rights. They were to be on a par with those of the European settlers. It is unlikely that Mantell adverted to the Treaty of Waitangi. To remedy a great wrong the tribunal in its *Ngai Tahu Report 1991* has recommended that Waihora be returned to Ngai Tahu.¹⁰³

- 5.16.2 In 1874 a difference of opinion arose between Ngai Tahu at Riverton and the local government over the use of the foreshore contiguous to the Maori reserves. Alexander Mackay was sent to investigate. He noted that Ngai Tahu claimed ownership of the foreshore under the Treaty (S7:65).¹⁰⁴ Discussion took place over the status of the reserves and whether they were native lands excluded from the sale or given back after the sale.¹⁰⁵ Mackay reported:

It transpired during the discussion that the idea to claim the foreshore had been engendered in their minds by rumours that had reached them from the North Island of similar claims having been preferred by the Natives at the Thames and other places, and that this had led them to assert what they deemed to be their rights in the matter. In reply to this, it was pointed out that the custom hitherto respecting land between high and low watermark had been to consider that when the Native title was extinguished over the main land, that any supposed rights which the Native owners had over the tidal lands ceased. The rumours that had reached them from the North Island on the subject had reference to cases where the mainland was held under Native tenure; but even then the usufructuary rights of the Natives over the tidal lands had not been allowed to interfere with the Crown's prerogative, which included,

inter alia, the dominion over the foreshore. The Natives, on the assumption of British sovereignty over the Islands of New Zealand, became British subjects, and thereon all former dominion, if any existed, was extinguished; it was clear, therefore, that it was useless on their part to assert any rights antagonistic to the Crown's prerogative, which could only end in being upset before a proper tribunal.

My arguments, however, met with considerable opposition, and after two days' discussion, finding it would avail nothing to prolong the subject, I consented as a matter of policy to abandon the question, giving them to understand at the same time that they could not maintain an exclusive right to the foreshore, and that if they were unwise enough to take any action to interfere with the general use of the beach by the public, they would do it at their own risk, and must abide by the consequences. All they could claim was a right in common with others to the use of the beach as a landing-place, or for any other legitimate purpose, but they must not attempt to fence it in. With reference to their assertion that they were entitled to the foreshore by the original plan of the reserve, the one produced at the meeting simply gave them a right to high watermark.¹⁰⁶

This is an interesting illustration of the views, no doubt representative, of a senior government official, concerning Ngai Tahu rights to the foreshore and inferentially to their fisheries. Mackay clearly takes the view that when Maori sell land adjoining the coast any rights they might have in the adjoining foreshore are likewise extinguished.

- 5.16.3 As Tony Walzl, Crown historian, put it, Ngai Tahu sought to pursue the issue further through their parliamentary representative (S7:67). In August 1874 H K Taiaroa, Member for Southern Maori, although apparently speaking of the North Island, may well have had the Riverton situation in mind when asking in Parliament a question relating to reclaimed land:

By what authority any land below high watermark has been reclaimed for public purposes on the North Island, and whether such reclamations are not in contravention of the rights reserved as to fisheries to the Native race by the Treaty of Waitangi; and if infringement of the treaty has taken place, how the Maori people can obtain compensation? . . . [reads extract from article 2 of Treaty]

Those fisheries had nevertheless been gradually reclaimed by the Government, who had been taking away from the Maoris those places which were reserved by the Queen for the benefit of the Native race. He did not know whether these reclamations were contemplated by the Treaty of Waitangi; but he understood that the Government had leased certain portions of the foreshore in the vicinity of Auckland.¹⁰⁷

The Native Minister, Sir Donald McLean responded:

for the information of the House, that land below high-watermark was granted to Superintendents under the Public Reserves Act of 1854, and was also leased under the authority of that Act. In regard to all territories ceded by the Maoris to the Crown, it had been held that when the lands were ceded, all the rights connected with them were also ceded such as rivers, streams, and whatever was either

on the surface of the land or under the surface. Almost all the deeds of cession contained a clause to that effect, and all the conditions of the deeds had been adhered to strictly by the colony. There had been no breach of the Treaty of Waitangi and every Government of New Zealand had carefully preserved the rights of the Natives.¹⁰⁸

McLean's bland and complacent statement masks either his indifference to or misconception of Maori Treaty rights but was no doubt representative of the Crown view.

Earlier in this chapter at 5.13.9 we have recorded a further Parliamentary question which Tairaroa put to Native Minister Sheehan in November 1877. Tairaroa there asks by what authority Europeans were exercising fishing rights over the Mangahoe Inlet in Otago while the Native title remained unextinguished. He appears to accept however that while a stop should be put to the practice until the Native title was extinguished the Europeans might be able to resume fishing thereafter.

- 5.16.4 The draining of lakes and the consequential destruction of their fisheries was a source of serious anxiety to Ngai Tahu. As Mr Walzl points out, evidence at the Smith–Nairn Royal Commission noted that Ngai Tahu had begun to experience the loss of fishing resources because of drainage or pollution (S7:79).

While the royal commission was still sitting the Native Affairs Committee of the House of Representatives received a Ngai Tahu petition from Te Oti Pita Matu and 25 others relating to the drainage of three lagoons over which fishery easements have been granted to Ngai Tahu in 1868. In 1876 Ngai Tahu found the lakes in which they had speared eels had been drained; they protested and filled the drains to one lake so as to trap the water. The opinion of Alexander MacKay was sought after the petition was presented in 1879. He responded in November of that year:

The loss they complain of is a very serious one, as there can be no doubt that of all the property the Natives possess, fisheries are the most valuable, and the application they now make to have the bottom of these lakes granted to them should certainly be conceded.

It is very unfortunate that the drainage of the Country necessitates the destruction of these places, but it is questionable nevertheless if the Natives interested are not entitled to demand large compensation for the destruction of these properties, more especially as the awards were made in conformity with the terms of the Deed of Sale of 1848.¹⁰⁹

It appears the committee recommended that the petition receive favourable consideration and the Native Minister promised the beds of the dried lagoons would be vested in Ngai Tahu as compensation (S7:83).

- 5.16.5 On 8 July 1880 Tairaroa, by now a member of the Legislative Council, moved a formal motion:

That, in the opinion of this Council, the action of this Government in draining Lake Ellesmere (Waihora), and thereby interfering most seriously with the fishing rights enjoyed by the Natives residing in the neighbourhood, which rights have ever been jealously guarded

by themselves and their ancestors, is unjust towards the Natives; and such drainage ought not to be allowed to proceed, either now or hereafter, without fair compensation being awarded them.¹¹⁰

Taiaroa's motion was strongly opposed by Attorney-General Whitaker, and by Mantell who reiterated what he had earlier said about the need to ensure drainage when the country came to be settled. The council declined to pass the motion despite Taiaroa's final plea that it be agreed to so as to afford relief to Taumutu Ngai Tahu who had been given inadequate reserves by Mantell (S7:84–86).

- 5.16.6 In 1882 Taiaroa questioned the Native Minister about the effects of a road on the Port Levy reserve. He asked by what authority the foreshore of the reserve was taken by the governor without the consent of the natives interested. He believed the reserve made by Mantell included the foreshore:

They had the map in their possession, and it showed that the boundary of their reserve extended to high-water mark. When the Court sat the Maoris were told that the Crown grant was to be issued; but in the grant a strip of about a chain wide was deducted, the quantity of land promised to the Natives thus having been reduced. Under the Treaty of Waitangi the Maoris had the right to land between high- and low-water mark, but, in addition to the claim previously referred to, all the land between high- and low-water mark was reserved, and as a consequence the Maoris had lost their fishing-ground. If this land was to be taken, the Maoris had a right at least to compensation.¹¹¹

Native Minister Bryce maintained that the deed of sale allowed for the right of way: "As to the land between high-and low-water mark, he did not know that the Natives had any right to it".¹¹²

- 5.16.7 With his report of 9 July 1891 Royal Commissioner MacKay annexed notes of evidence he had taken from Ngai Tahu. Hoani Hapi of Kaiapoi testified:

Waihora (Lake Ellesmere) was of great value to the Natives as an eel-preserve; but now it is destroyed by drainage. In other places the lagoons are spoiled.¹¹³

At the same hearing G P Mutu also of Ngai Tahu complained that:

most of the fishery easements allotted us by the Court are destroyed. The one at Rotoroa has been drained. Waimaiaia has been rendered useless by sea encroachment, and Houhoupounamu has been drained. We cannot obtain eels from these easements now; formerly we used to get them in quantities.¹¹⁴

- 5.16.8 Earlier in this chapter (5.13.6) we have discussed the circumstances giving rise to a Parliamentary petition by Te Oti Pitama and other Ngai Tahu on 31 July 1885 in which Ngai Tahu asked that no obstacles be placed in their way in obtaining "fish etc from the sea, rivers and lakes". This petition followed the making of a new regulation in June 1885 permitting Maori to take oysters or indigenous fish for personal consumption but not for sale (S7:91). Previously a March 1885 regulation had generally exempted Maori from the operation of the Fisheries Conservation Act 1884. As we have earlier indicated, the June 1885 regulation

ignored s8 of the 1877 Fish Protection Act saving Maori Treaty fishing rights and was almost certainly ultra vires. Ngai Tahu objections were brushed aside.

- 5.16.9 Crown historian Tony Walzl drew our attention to a further observation by Tame Parata on behalf of Ngai Tahu in 1888. This arose during a debate on a Salmon Protection Bill. Parata feared the Bill would encroach on the rights of Ngai Tahu to catch fish in Waihora (Lake Ellesmere) as they pleased (S7:93–94).

Mr Walzl went on to say that Lake Ellesmere was not long out of the limelight. In 1891 a Bill amending the 1884 Act was brought before Parliament by the Pakeha member for Ellesmere. The Bill sought to increase the minimum size for flounder to 11 inches. In the end the Bill was withdrawn but not before a response from Ngai Tahu. Wi Naihira and 15 others signed a petition against the Bill. The original has not survived (S7:94).

Mr Walzl states that the following year, 1892, the Bill was introduced by one Wright but this time it affected only the flounders of Lake Ellesmere. Parata on behalf of Ngai Tahu strongly criticised the Bill which appears to have lapsed. A commission of inquiry was held the following year (S7:95–97).

It appears that Wright's 1892 Bill prompted a further protest from Ngai Tahu in the form of two petitions in August 1892 from Wi Naihira and 62 others. These said:

[No 292] That their fishing rights and other privileges under the Treaty of Waitangi and the Ngaitahu Deed may be conserved to them

[No 352] That their fishing rights may be conserved in any legislation dealing with fish protection. (S7:97)¹¹⁵

Neither petition has survived.

- 5.16.10 As we have seen, the introduction of the Sea-fisheries Act 1894, which among other things removed s8 of the 1877 Act preserving Maori Treaty fishing rights, resulted in an intervention by Tame Parata on behalf of Ngai Tahu at Rakiura (5.13.22).
- 5.16.11 Earlier (5.13.26) we have related in some detail how in 1894 Rev Teoti Pita Mutu had protested to Native Minister Cadman that “Maori had not parted with their fishing rights” and how in 1896 Mutu wrote to H K Taiaroa concerning the Sea-fisheries Bill then before the house. This Bill dealt with shellfish and sponges. Taiaroa objected to the restrictive provisions of the Bill. In the result the Middle (South) Island was exempted from the operation of the Act, insofar as they required shellfish for their personal consumption.
- 5.16.12 Crown historian Mr Walzl was unable to discover any evidence on how Ngai Tahu viewed the Maori Councils Act 1900 and its 1903 amendment or the Fish Conservation Act Amendment Act 1902. The Sea-fisheries Amendment Act 1903 did however draw comment from the Ngai Tahu parliamentarian Tame Parata (S7:101). As we have recorded (5.13.32)

Parata expressed concern that the Bill would have an immediate effect on Maori in Stewart Island, Ruapuke, Bluff and Colac Bay. He asked that a recent resolution of the Araiteura Council that a distance of so many miles around the island should be reserved as fishing rights of the Ruapuke, Stewart Island and Bluff Maori.¹¹⁶

Parata went on to point out that along the Otago coast and right up to Akaroa there were a number of traditional fishing grounds which “have been overrun and made use of by everybody, including Europeans in recent years”. He next said that he:

[did] not object to the Europeans fishing at those places, but these reefs should be to some extent protected for the benefit of the Maoris; and there are other parts of the sea which are available for European fishermen to make use of.¹¹⁷

Parata indicated that he would move certain amendments to provide for the protection of the marine fishing rights. “The House”, he said, “should uphold the promises made by the representatives of the King and carry them out”.¹¹⁸

As we have earlier indicated, s 14 was later added to the Bill to provide that “nothing in this Act shall affect any existing Maori fishing rights”. While we cannot be certain that this was a direct result of Parata’s intervention it seems likely that it was and that it constituted a recognition of Maori Treaty fishing rights whatever they might be.

5.16.13 In an earlier discussion of the Fisheries Conservation Amendment Act 1903 (5.13.33) we noted a passage from the speech of Tame Parata in which he objected to the requirement that Maori take out a licence when fishing in rivers. In fact the requirement for a licence extended only to introduced not indigenous fish. We now note a further passage from Parata’s speech in the House:

I contend that the Natives ought to be allowed to fish for their own maintenance, and when the Minister replies I hope he will say that some provision will be made in the Bill to secure to them that right. The Maoris do not catch fish for sale, but simply for their own use. Instead of going to the butcher for mutton or beef, they catch the fish in their own rivers and live upon them. This custom has been handed down to them by their ancestors. If they were asked to pay a license fee there might be serious trouble The Maoris should be exempt from the operation of this Bill when they desire to fish to obtain food for themselves, and when the Bill is in Committee I shall move a clause to exempt the Maoris from the payment of license fees in any part of New Zealand. That will bring the matter into line with the Treaty of Waitangi, and I trust the Minister will agree to my proposal.¹¹⁹

In fact Parata did not move any amendment. As we have earlier suggested he may have learned that s8 of the Fish Protection Act 1877 was still in fact in respect of freshwater fisheries and the provision was ‘incorporated’ with the Fisheries Conservation Act 1884.

In the passage noted Tame Parata appears to be speaking only of freshwater fisheries and not sea-fisheries.

5.17 **Acclimatisation**

In our *Ngai Tahu Report 1991* we have discussed the problems experienced by Ngai Tahu as a result of the introduction of exotic fish such as trout and salmon into inland waters in the South Island. As we have there found a variety of indigenous fish prized by Ngai Tahu were adversely affected by the introduced species.¹²⁰

5.18 **Ngai Tahu and the Government**

5.18.1 Crown historian Tony Walzl has noted that from 1880–1908 Ngai Tahu was often in communication with the government over fishing rights. Many related to fresh-water fisheries (S7:118):

As fishery resources were lost to Ngai Tahu, the need for reserves became more apparent with the result that Ngai Tahu sought more protection for the fisheries they still used. Evidence given before Judge MacKay at the 1891 Middle Island Commission noted the importance of securing reserves to protect existing resources and ensuring the future availability. (S7:121)

Before the same commission Taiaroa noted how access to sea fisheries was also beginning to be lost:

All the coast-line has been disposed of to the Europeans, and the Natives have no place to go to fish. (S7:121)¹²¹

In his further report of 16 July 1891 Commissioner MacKay said in relation to sea-fisheries:

There is another question relative to fishery rights which the Natives desire should be submitted for the consideration of the Government, as they consider they are entitled to protection under the terms of the Treaty of Waitangi—I allude to sea-fishing. They assert that under Kemp's deed they are entitled to the full and exclusive right to their sea-fisheries, as there is a distinct stipulation that they shall retain their *mabinga kai*, which includes, besides cultivations, pipi grounds, eel-wiers [sic], and fisheries; consequently, in their opinion, they never voluntarily ceded their rights over their fishing-grounds. They do not wish to cause any complications; but what they desire to obtain is the sole right to fish along the sea frontage of their reserves where such lands abut the coast, as they have no authority at present to prevent European fishermen from catching all the fish near their settlements. The privilege they ask for could be secured to them under clause 4 of "The Fish Protection Act, 1877". (S7:122)¹²²

5.19 **Summary and Conclusions**

5.19.1 In the foregoing review we have:

- recorded the available evidence of the involvement of both Ngai Tahu and non-Maori in fishing in the period 1840 to 1908;
- considered whether the land sales to the Crown diminished Ngai Tahu rangatiratanga over their sea fisheries;
- investigated the assumption by the Crown of legislative control of fishing during this period and noted the common law and court decisions bearing on this control; and

The Crown Assumes Control of the Fishery, 1840 to 1908

- recorded Maori and more specifically Ngai Tahu reaction to the Crown's action and inaction.

It remains now to draw these various elements together and to assess them in the light of the fishing rights reserved to Ngai Tahu under the Treaty.

Ngai Tahu and European involvement in fishing

5.19.2 At the risk of oversimplification the following appear to be the principal conclusions to be drawn from the evidence:

- for the two decades immediately following the signing of the Treaty, Ngai Tahu continued fishing without any significant involvement by Europeans apart from the European's diminishing activity in sealing and whaling;
- during the 1840s and 1850s as settlers arrived in Otago and Canterbury in increasing numbers Ngai Tahu actively traded with them in the supply of sea fish. Ngai Tahu also continued to trade on a gift-exchange basis among themselves;
- as European settlement built up in the 1850s and 1860s a viable market for a Ngai Tahu commercial fishery developed. Various reef species were caught in the inshore zone year round and the pelagic species in that zone between December and May;
- by the mid 1860s, if not earlier, Ngai Tahu commercial fishing extended out as far as 20 to 30 miles from the shore in some locations with the aid of marks books. Whaleboats or adaptations of these were used often fitted with sails. These came to be favoured by European commercial fishermen also. They were the basis of the South Island fishery until early this century;
- European commercial fishing began slowly in the 1860s. For some time the settlers lacked the detailed knowledge possessed by Ngai Tahu of the location of good fishing grounds. European involvement accelerated in the 1870s and continued to grow thereafter;
- as early as the late 1860s the Port Adventure oyster bed was seriously depleted. A decade later the Halfmoon Bay oyster beds were in similar danger. Whether Ngai Tahu or the Europeans were chiefly at fault is not known. We suspect both must accept responsibility; and
- by the 1880s there were a few signs of overfishing, examples being a scarcity of fish in the Otago harbour in 1882 with a further decline in the 1890s. Overfishing in Akaroa harbour was reported in 1885.
- throughout the whole of this period Ngai Tahu whanau or hapu continued to fish for their own sustenance and for special tribal occasions. In the first two or three decades it is clear they also fished commercially to meet the growing demands of the settlers. But following the catastrophic effects of the Crown acquisition of virtually all their land, commercial fishing came increasingly to be carried on by individual Ngai Tahu. They fished commercially for their livelihood either singly or in association with family members, and with the aid of closely guarded marks books. The individual Ngai Tahu who were so engaged were often descended from European whalers and had access to whale

boats and associated fishing equipment, whereas following their post land sales impoverishment, most Ngai Tahu whanau or hapu lacked the necessary capital to engage in commercial fishing. While the rate and timing of the transition from tribal to individual fishing would have varied from place to place it dates from the 1860s and would almost certainly have been completed in the 1880s.

Ngai Tahu attitudes to fishing

- 5.19.3 As we found in our *Ngai Tahu Report 1991*, Ngai Tahu were prepared to welcome settlers amongst them. They saw advantages in being actively involved in the new economy which would come with settlement. But as our earlier report has made clear Ngai Tahu, while willing to part with substantial acres of land to facilitate settlement, did so on the understanding that they would be left with adequate access to their mahinga kai and with sufficient land to enable them to participate fully in agricultural and pastoral activities and to prosper as a tribe in the new society.

In chapter 3 we have shown that for centuries Ngai Tahu had relied for an important part of their sustenance on their sea-fisheries. There is nothing to suggest they intended to surrender this traditional and highly valued resource, guaranteed to them by the Treaty, when they agreed to British settlement and sold their land to the Crown. They contemplated that they would continue to have access to all sea fish they required for their own sustenance and other needs and to continue to trade commercially with the settlers. Subject to this essential pre-condition we believe Ngai Tahu, in the spirit of partnership, were prepared to share their abundant fishery with the settlers. But their willingness to sell their land and to share their sea fisheries did not constitute a diminution or modification of their tino rangatiratanga over their sea fisheries. On the contrary, it was an exercise or expression, indeed an affirmation of their rangatiratanga and was entirely consistent with it. While they wished to retain exclusive possession over all the fish they required for their present and future needs, both general and commercial, they were willing that non-Maori should also have access to the fishery. But that access should be subject to the prior rights of Ngai Tahu. The evidence before us shows that it was at the point where non-Maori usage began to deplete the sea-fishery that Ngai Tahu protested and sought to invoke their Treaty rights. We will look more closely at the nature of their protests shortly.

Settler attitudes to fishing

- 5.19.4 As the Law Commission has noted (5.14.1), the settlers brought as part of their mental baggage the belief that the foreshore and the sea were common to all for the purpose of getting fish. This belief stemmed from the common law doctrine that the Crown is prime facie owner of the foreshore. The settlers and indeed successive settler governments simply assumed that the Crown prerogative overrode or qualified the fishing rights guaranteed to Maori by the Treaty.

For several decades the supply of fish in and around the South Island was bountiful enough to allow uninhibited access by Europeans to Ngai Tahu fisheries. But as settlement built up and Ngai Tahu came to be heavily outnumbered, the pressure on sea-fisheries was felt and gave rise to

protest by the tangata whenua. In the meantime the Crown assumed the right to legislate.

The Crown's legislative intervention

- 5.19.5 The Crown's legislative initiatives fell into three broad categories; oysters and later, other shellfish; introduced species such as trout and salmon and sea-fisheries generally.

An important reason for this legislation was the conservation of resources. The Crown appears never to have entertained any doubt about its right thus to assume control over Maori fisheries. Nor is there any evidence that in doing so it believed it should be mindful of the fishing rights guaranteed to Maori by the Treaty. As a consequence no effort was made first to consult with Maori before exercising legislative control over their fisheries. As we have observed this total disregard of Maori fishing rights is in marked contrast to the Crown's attitude to Maori land rights notwithstanding both were protected by article 2 of the Treaty. At least in the case of land the Crown recognised that Maori owned the land and it was necessary to negotiate with Maori for its acquisition. Despite the Treaty guarantee of Maori fisheries the Crown for the most part acted as if it, not Maori, owned this extremely valuable resource.

We have discussed the sea fisheries legislation from 1866 to 1908 in some detail. Here we briefly recapitulate the main elements of that legislation.

Oyster fisheries

- 5.19.6 The Oyster Fisheries Act 1866 was the first fisheries legislation.

We need hardly emphasise its importance for in Foveaux Strait and surrounding Ngai Tahu waters were to be found oysters of world class standard.

This Act was no doubt, in part at least, a conservation measure and to that extent a legitimate intervention by the Crown. But no consultation took place with Ngai Tahu or other Maori. The Crown appears in this and all subsequent legislation to have acted on the assumption if not of Crown ownership, at least of its right to control the fisheries. As a result of this Act, Ngai Tahu found they were prohibited from taking oysters during the four-month closed season and in future would require a licence to take oysters below low spring tide. There was no recognition the oyster beds were part of their fisheries. Ngai Tahu Treaty rights were not adverted to in any way. It is unlikely the Act had any great effect in practice as there was no provision for its enforcement.

In 1869 an amendment provided for exclusive five year licences to be issued to the discoverers of oyster beds. The legislation assumes the right of the Crown to exclude Maori from access to any such oyster notwithstanding their Treaty rights. A later amendment in 1874 extended the closed season provisions to rock oysters then said to be at risk.

Acclimatisation

- 5.19.7 The Salmon and Trout Act 1867 and subsequent legislation dealt with fresh water fisheries rather than sea fisheries. Regulations made under the Act intruded on the free and uninhibited access by Maori to the indigenous fish in rivers and lakes and was resented by Maori as an invasion of their rights. Nor did Maori appreciate that trout in particular fed upon certain native fish which were left unprotected.

General sea fisheries legislation including oysters and other shellfish

- 5.19.8 The Fish Protection Act 1877 was the first legislation on general fisheries. It extended Crown control over both fresh and sea fisheries by authorising regulations reserving areas from fishing; controlling seasons and net and seine sizes and granting exclusive licences to fish. Its most noteworthy feature was the addition of s8 at the instigation of the governor protecting the rights of Maori to their fisheries secured to them by the Treaty of Waitangi. The first regulations implementing the Act were made in 1878. Consistently with s8 they did not apply to Maori. Maori were thus able to continue sea fishing free of any constraints imposed by the 1877 Act and the regulations. At the same time however, the Act provided for the general public exploitation of the fish resource and was based on the premise of the Crown's right to provide for this notwithstanding the fishing rights guaranteed to Maori under the Treaty. How any conflict between the Maori and non-Maori interests was to be resolved appears nowhere.

The Fisheries Conservation Act 1884 incorporated certain earlier Acts including the provisions of s8 of the 1877 Act which extended to the 1884 Act. The 1884 Act included extensive regulation making powers for the protection of fish. Fresh regulations made in March 1885 expressly exempt Maori from the operation of those regulations. But later in the year an amended regulation purported to limit Maori exemption to taking oysters or indigenous fish for their personal consumption only and not for sale. Given that s8 of the 1877 Act preserving Maori Treaty fishing rights remained in force, this last regulation was clearly ultra vires and invalid. Not surprisingly it met opposition from Ngai Tahu.

The 1892 Oyster Fisheries Act repealed the earlier legislation and contained comprehensive regulation making powers with continued provision for licensing. The Act applied equally to Maori and non-Maori. The only provision relating particularly to Maori enabled the governor to set aside an oyster in the vicinity of a Maori kaika for the exclusive use of Maori for their own consumption. No such oyster-beds appear ever to have been set aside in the South Island. This largely inoperative provision is the only indication that Maori fishing rights might be entitled to some recognition. It did not extend however to commercial transactions. There, Maori were on the same basis as non-Maori.

The Sea Fisheries Act 1894 repealed the 1877 and 1884 acts so far as they affected sea fishing and also repealed the earlier 1892 oyster legislation. The new Act was largely a consolidation of earlier repealed legislation.

The previous wide regulatory powers were continued as were the 1892 Oyster Act provisions. But it contained new provisions permitting the issue of an exclusive licence to take oysters for up to 14 years. Such a licence would be sold by the Crown by public tender or auction. These oysters became the absolute property of the licensee. There could be no clearer indication that the Crown considered it owned and had the right to dispose of such a resource. Again there is no evidence of consultation with Maori. Rights of Maori were further diminished. The earlier 1888 regulation permitting Maori to take oysters or indigenous fish for personal consumption only was repealed by order in council in December 1894. It was replaced by s 72 requiring the prior consent of the Native Minister to any proceedings against Maori. Even more serious was the omission of s 8 of the 1877 Act which preserved Maori Treaty fishing rights. There was no longer any statutory recognition of Maori rights and their fisheries. They could be prosecuted for breaches along with Europeans subject only to the Native Minister concurring.

Two years later an amendment to the 1894 Act extended the governor's discretionary power concerning oysters to all other species of edible shellfish and sponges. But any shellfish (other than oysters) required for food by Maori in the South Island were exempt from the provisions of the Act. The main significance of this provision was to continue giving concessions for Maori fishing rather than acknowledging their rights.

The Maori Councils Act 1900 was designed to grant a measure of local self-government to Maori. Among other powers it permitted Maori District Councils to make by-laws for the control of oyster and mussel beds, pipi and fishing grounds from which Maori obtained food. Under a 1903 amendment any such beds or grounds could be reserved exclusively for Maori use. None were ever granted. Not even a representation by Sir Apirana Ngata for the reservation of part of Kawhia harbour in 1930 had any success. The right proved to be a hollow one.

A 1903 amendment to the Sea Fisheries Act 1894 made a number of miscellaneous changes. It was notable however for the reinstatement in significantly modified form of the former s 8 which disappeared in 1894. But whereas s 8 of the 1877 Act expressly referred to and saved Maori Treaty of Waitangi fishing rights, the new s 14 in the 1903 amendment Act simply stated that:

nothing in this Act shall affect any existing Maori fishing rights.

This provision with the later omission of the word "existing" has remained in subsequent legislation down to the present. What its full scope and effect is remains to be authoritatively determined by the High Court. In practice, until the recent Te Weehi decision it has been of no significant benefit to Maori.

The Fisheries Act 1908 was purely a consolidating measure; s 77(2) repeated s 14 of the 1903 amendment. It applied however only to sea-

fisheries. No equivalent provision was then or has since been made in respect of fresh water fisheries.

5.19.9 The effect of the legislation on Maori Treaty fishing rights can now be briefly stated:

- the Crown assumed the right not only to regulate and control the taking of oysters but to dispose of their ownership without Ngai Tahu consent;
- the acclimatisation statutes and regulations worked to the prejudice of Maori;
- the general sea fisheries legislation and regulations between 1877 and 1885 exempted Maori from their control provisions. This constituted some recognition of their Treaty rights. But the 1885 ultra vires regulations sought to limit Maori exemption to the taking of oysters and fish for personal consumption only;
- the 1892 and later provision for exclusive oyster reserves near Maori villages were inoperative in the South Island. The later 1900 and 1903 provisions for Maori District Councils to control or make exclusive fishery reserves for Maori were not implemented anywhere in New Zealand;
- the 1894 Act entirely removed all protection of Maori Treaty sea fishing rights;
- the 1903 reinstatement of a watered down saving provision omitting all reference to the Treaty has continued since and with one recent exception has so far proved of little if any benefit to Maori;
- the exercise of legislative control over Maori fisheries and their regulation equally in favour of non-Maori has been characterised by a failure of the Crown to consult with Maori at any stage, and not infrequently, when challenged in Parliament, by evasive or erroneous responses by ministers of the Crown;
- For a brief period of eight years (1877–1885) Maori were wholly exempt from the control provisions of the sea fisheries legislation. But from the first Act of 1866 onwards the legislation provided for the general public exploitation of the fish resource and was based on the premise of the Crown's right to provide for this notwithstanding the fishing rights guaranteed to Maori under the Treaty. Nowhere is any reference made to how any conflict between Maori and non-Maori interests was to be resolved; and
- the rangatiratanga of Ngai Tahu in and over their sea-fisheries has, except for some eight years (and then only to a limited extent), been denied or ignored by the Crown.

The Crown's attitude to Maori fishing rights

5.19.10 Perhaps the best evidence of the Crown's attitude to Maori fishing rights is to be found in the provisions we have just reviewed. But as we have seen, from a relatively early stage the Crown adopted the widely held settler view that the fisheries belonged to the Crown and no rights, whether under Maori customary law or treaty could be held by any person, Maori or non-Maori, without a specific land grant from the Crown

or by legislative provision. This view came to be held despite the fact that the Land Claims Ordinance 1841 recognised that non-Crown granted lands could be subject to “rightful and necessary occupation and use by the aboriginal inhabitants”. The New Zealand Supreme Court in *R v Symonds* (1847) recognised that such rights could be extinguished only by the free consent of the Maori occupiers.

In 1870 the Crown argued before Chief Judge Fenton in the Kauwaeranga case that the foreshore belonged to the Crown and Maori could not use it in accordance with their customary usages as this would be inconsistent with the Crown’s prerogative. While Fenton appears to have rejected this contention, he held for reasons of “public policy” that the Maori claimants should be entitled to no more than a title to exclusive fishing rights over the area. The underlying (but unstated) public policy was that to have recognised Maori customary title to the foreshore in addition to exclusive fishing rights would have jeopardised the Crown’s interest in gold which was believed to be present in the subsoil. The reaction of the Crown was to suspend the jurisdiction of the Maori Land Court to deal with land below high water anywhere in the Auckland province.

The very next year in *Re Landon & Whitaker Claims Act 1871* (1871) the New Zealand Court of Appeal held the Crown to be bound both by English common law and by the Crown’s “own solemn engagements” to a full recognition of native proprietary rights. These the Crown was bound to respect.

Six years later the view of the legal status of Maori rights was gravely undermined in *Wi Parata v Bishop of Wellington* (1877) in which the Supreme Court rejected the concept of legally enforceable Maori property rights. The Crown and not the courts was to be the sole arbiter of Maori Treaty or other fishing rights. *Wi Parata* was followed by the Court of Appeal in *Nireaha Tamaki v Baker* (1894), the court holding that it must be left to the conscience of the Crown to decide what is justice to Maori. It was not a matter for the courts. Such an extreme proposition was reversed by the Privy Council in 1901 when the Court of Appeal’s judgment came before it on appeal. The Privy Council held that the New Zealand courts could not hold there was no Maori customary law of which the courts could take cognisance. Yet in the following year the New Zealand Court of Appeal in effect declined to follow the Privy Council and applied the *Wi Parata* decision.

- 5.19.11 Any remaining doubts about the right of Maori to have their customary land rights recognised or enforced by the courts were effectively removed in the Crown’s favour by ss84–87 of the Native Land Act 1909.
- 5.19.12 Likewise in 1914 any lingering uncertainty about the right of Maori to invoke a customary fishing right in court proceedings were resolved in the Crown’s favour by three judges of the Supreme Court in *Waipapakura v Hempton*. The court accepted the argument of the then Solicitor-General for the Crown that apart from legislation the Treaty of Waitangi was “merely a bargain binding upon the conscience of the

Crown and is not the source of legal rights". Nor did s77(2) of the Fisheries Act 1908 help. It was merely a saving clause and did not create rights. Only legislation confirming the Treaty rights would be recognised by the courts and there was no such legislation. How far the 1986 High Court decision in *Te Weehi's* case has modified this finding remains to be authoritatively decided by our Court of Appeal. It must be remembered that Te Weehi, although found to be exercising a customary right (which the court recognised) was not claiming an exclusive right and was taking for personal needs only.

- 5.19.13 With the limited exception of the case of Te Weehi the New Zealand courts for the whole of this century have declined, in the absence of express legislation, to recognise either Maori customary fishing rights or Maori rights under article 2 of the Treaty of Waitangi. In so doing they have upheld the Crown arguments which have consistently for more than a century denied that any such Maori rights are entitled to legal recognition or enforcement.

Maori response to Crown control of sea fisheries

- 5.19.14 We have recounted Maori and more particularly Ngai Tahu complaints and protests about the assumption by the Crown of control over their fisheries.

While not overlooking the widespread complaints by Maori in various parts of New Zealand to which we have referred and which are more fully recorded in the *Muriwhenua Fishing Report* we propose here briefly to summarise the Ngai Tahu reaction to Crown control of their fisheries up to 1908. We have rejected the views advanced by fishing industry witnesses Susan and Graham Butterworth that leading Maori politicians Sir Apirana Ngata and Hone Heke had in 1907 or at any other time a mandate to speak for or bind the tribal sea fishing interests of Ngai Tahu or indeed of other tribes. We recall that in the circumstances of the time Ngata, Heke and their Maori colleagues had no real option but to face the political reality of the day and to strive for what might be attainable rather than the full extent of their Treaty rights. It is not legitimate to conclude that they had abandoned or surrendered such rights.

In our earlier account of Ngai Tahu protests we have discussed some 18 separate complaints made by or on behalf of Ngai Tahu concerning their fisheries in the period up to 1908. Of these eight related principally to the drainage of Waihora (Lake Ellesmere) or other inland waters while the remaining ten were concerned with sea-fisheries. These latter we briefly recall:

- in 1874 Ngai Tahu at Riverton claimed ownership of the foreshore and inferentially of the marine fishery in and adjacent to it. Alexander MacKay in response asserted the Crown's prerogative right to the foreshore and informed Ngai Tahu they could not claim an exclusive right. Having sold their land adjoining the foreshore any rights Ngai Tahu might have had in the foreshore were now extinguished;

- in the same year H K Taiaroa MP and a prominent Ngai Tahu rangatira, prompted perhaps by the Riverton complaint, suggested that the reclamation by the Crown of land below high-water mark in the North Island, was contrary to Maori Treaty fishing rights. Native Minister Donald McLean claimed this was authorised by the Public Reserves Act 1854 and was not in breach of the Treaty;
- in 1877 Taiaroa, in a parliamentary question, challenged the right of Europeans to fish in the Mangahoe Inlet in Otago while the Maori title was unextinguished. He sought a halt to this fishing in the meantime. Sheehan, then Native Minister, while recognising that Maori had certain (unspecified) rights to their fisheries under the Treaty urged resort to the Native Land Court when existing legal difficulties to that course were removed by a Bill then before Parliament;
- in 1882 Taiaroa questioned the Native Minister about taking part of the Port Levy foreshore for a road when under the Treaty Maori had the right to land between high and low water mark. As a consequence he claimed Ngai Tahu had lost their fishing-ground. Native Minister Bryce claimed the deed of sale allowed for the right of way and questioned whether Ngai Tahu had any right to the land below high water mark;
- in 1885 Te Oti Pitama and other Ngai Tahu petitioned parliament asking that no obstacles be placed in their way in obtaining fish from the sea, rivers and lakes. This petition followed a new June 1885 regulation exempting Maori from sea fisheries legislation constraints only when taking fish or oysters for personal consumption but not for sale. The Native Affairs Committee's reply was either confused or evasive and did not adequately advert to the issue raised by the petitioners;
- in 1892 Wi Naihira and 62 other Ngai Tahu in two petitions to Parliament asked that their Treaty fishing rights and privileges under the Treaty and Kemp's deed be conserved to them and, further, that their fishing rights be maintained in any fish protection legislation. The fate of these petitions cannot be ascertained;
- in 1894 Teoti Pita Mutu of Ngai Tahu verbally protested to Cadman (then Native Minister), that Maori had not parted with their Treaty fishing rights. Again in 1896 Pita Mutu wrote to H K Taiaroa, protesting the restrictive provisions of the Sea-fisheries Bill. Taiaroa passed on these objections to the minister. Subsequently the South Island Maori were exempted from the operation of the Act in respect of shellfish taken for their own consumption;
- in 1903 Tame Parata, member for Southern Maori, expressed concern in Parliament that the Sea-fisheries Amendment Bill would adversely affect Maori in Rakiura, Ruapuke, Bluff and Colac Bay. He sought a fishing reserve for Ngai Tahu in the locality. He also complained that all along the Otakou coast and right up to Akaroa, a number of Ngai Tahu traditional fishing grounds had been overrun and were being used by everyone including Europeans in recent years. While he did not object to Europeans fishing at these places he asked that some reserves be protected for Ngai Tahu, there being other parts of the sea available to European fishermen. It seems likely that the later addition of s14 providing that nothing in the Act should affect any existing Maori

fishing rights was a direct result of Parata's intervention on behalf of Ngai Tahu;

- in 1891 H K Taiaroa, in evidence before Commissioner Alexander MacKay, complained that all the Ngai Tahu coast-line had been disposed of to Europeans and Ngai Tahu had no place to go fishing; and
- in his second 1891 report Commissioner MacKay noted that Ngai Tahu claimed protection of their sea-fisheries under the terms of the Treaty saying they had never voluntarily ceded their rights over their fishing grounds. MacKay went on to say that Ngai Tahu sought the sole right to fish along the sea frontage of their reserves where these abutted the coast, as they had no present authority to prevent Europeans from catching all the fish near their settlements.

5.19.15 Approximately half of these complaints by Ngai Tahu are of a general nature, the remainder being in varying degrees site specific. This reflects both a general concern at the failure of the Crown to protect Ngai Tahu Treaty fishing rights and a particular concern that fisheries in specified locations were being adversely affected by European fishing.

5.19.16 In protesting the Crown's failure to protect their fishing rights Ngai Tahu representatives did not assert that non-Maori should not be fishing. They were however well aware of the attitude of the Crown to their Treaty guaranteed rights. This became increasingly apparent from 1866 on into the present century. The Crown's stance took various forms:

- it would legislate as it saw fit in respect of Maori sea fisheries without any consultation with Maori and on the assumption that the Crown, not Maori, owned the fisheries or had the right to control and dispose of them;
- it failed to implement its own legislative provisions for exclusive oyster reserves in the South Island and in only a few instances in the North Island. It failed to grant a single application for an exclusive Maori fishing ground anywhere in New Zealand under the Maori Councils Acts of 1900 and 1903;
- in court proceedings by Maori seeking recognition of their Treaty fishing rights the Crown invariably opposed such recognition on the ground that the Treaty conferred no legally enforceable rights. The Crown in common with the settlers, notwithstanding the clear words of the Treaty, assumed that the foreshore and the sea were common to all for the purpose of taking fish and that the Crown prerogative overrode the fishing rights guaranteed to Maori by the Treaty; and
- while s8 of the Fish Protection Act 1877 protected the Treaty rights of Maori to their fisheries, in 1885 regulations purported to restrict their rights to take oysters and fish for their personal consumption only. All legislative protection was removed in 1894. In 1903 a greatly watered down provision omitted any express reference to Maori Treaty rights being protected.

Given the Crown's attitude to Maori Treaty fishing rights it is understandable that Ngai Tahu representatives and, indeed, leading Maori members of Parliament such as Ngata and Heke should realistically seek

not total protection for Maori sea fisheries but partial or specific recognition. We do not consider it legitimate or reasonable or indeed consistent with the good faith of a Treaty partner, for the Crown to claim that because, in the then current circumstances, Maori sought something less than they were entitled to under the Treaty, they had thereby waived or surrendered the remainder.

5.19.17 We conclude from the foregoing that what emerges is a willingness on the part of Ngai Tahu that non-Maori should be able to share the resources of the sea provided adequate protection is given to Ngai Tahu fishing rights guaranteed by the Treaty. Implicit in this approach is an assertion by Ngai Tahu of the priority which attaches to their Treaty fishing rights accompanied by a recognition that, provided these are respected and protected, non-Maori should be free to engage in fishing in the Ngai Tahu rohe. We are unable to distinguish in this regard between commercial and non-commercial fishing by either Maori or non-Maori.

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108 *ibid*

109 Petition of Te Oti Pita Mutu and Others, 1880, Native Affairs Committee
Le 1/1880/6, National Archives (NA); see also P11(7):348

110 JLC 8 July 1880 p78; see also S7:83; S8:239

111 NZPD 1882 vol 43 p567; see also S7:87–88; S8:242

112 *ibid*

113 AJHR 1891 G-7 p57; see also S7:88; M17(3):57

114 *ibid* p56

115 AJHR 1892 Schedule of Petitions; see also S8:440

116 NZPD 1903 vol 126 p17; see also S7:102

117 *ibid*

118 *ibid*

119 *ibid* p115; see also S7:102–103; S8:275

120 *Ngai Tahu Report 1991* at 17.3.10–17.3.12 pp892–895

121 AJHR 1891 G-7 p57; see also M17(3):57

122 AJHR 1891 G-7A p7; see also M17(3):7

Chapter 6

The Crown Maintains Control of the Fisheries 1908 to 1982

6.1 Introduction

The Fisheries Act 1908, as we have seen, added nothing new to the earlier legislation which it consolidated. It proved remarkably durable. Apart from a small amendment in 1923 it was not further amended until 1945. It seemed sufficient to successive governments to rely on the 1908 provisions which encapsulated earlier powers to regulate such matters as closed seasons, minimum fish sizes, minimum mesh size of nets, prohibition of certain fishing gear and the appointment of inspectors. By these means it was hoped to avoid depletion of stocks. Given the absence of any significant scientific information there could be no certainty that such measures were adequate.

Meanwhile Ngai Tahu, for the most part impoverished, scattered and landless, continued either individually or in family groups to fish for their sustenance and to meet the demands of iwi occasions. In chapter 2 we have recounted what we were told by various Ngai Tahu of how, in earlier years, they relied on kai moana and kai ika as a staple part of their diet and of how, in recent years, the previously bountiful supplies have sadly been greatly diminished through over-fishing, pollution and faulty management by the Crown. Yet as early as the turn of the century new technology, in the form of the steam trawler had begun to revolutionise fishing practices. Until then fishing throughout New Zealand had used time-honoured methods of line fishing, net fishing, traps and weirs and hand gathering. As Crown witness Robert D Cooper put it, the advent of powered vessels hauling nets through the sea heralded the end of an era (P13:20).

It is appropriate at this point briefly to review developments in the New Zealand commercial fishery from the early 1900s to 1982 when the ground was laid for the present fisheries regime.

6.2 Overview of the Commercial Fishery 1900 to 1982

In outlining significant developments during this period we have drawn on the evidence of witnesses called by the claimants, the Crown and the fishing industry and on the *Muriwhenua Fishing Report*.

- 6.2.1 The first steam trawler commenced fishing in New Zealand in 1899, and over the next 40 years steam and oil trawling steadily grew. From the 1920s Danish seining became increasingly important as a means of taking

fish from around the New Zealand coast. The impact of trawling was particularly serious in shallow coastal waters. Commercial and non-commercial net fishers and the general public were quick to express anxiety at the effect on fish stocks (P13:20). As a result, regulations were issued prohibiting trawling in various harbours and bays. For example, in the Ngai Tahu rohe regulations were made in 1906 prohibiting trawling in Lyttleton harbour, Pegasus Bay; in 1907 trawling or the use of a net for fishing in portions of Otago harbour was prohibited (repeated in 1909); and in 1915 regulations prevented fishers from hauling or using a trawl-net in part of Akaroa and in part of Le Bon's Bay, Banks Peninsula.

6.2.2 In the first two decades of this century fishing effort in the Ngai Tahu rohe as elsewhere was handicapped by a lack of refrigerated facilities and by inadequate transport. Consequently it was difficult to ensure fish remained fresh when delivered to the main population centres. The lack of a regular steamer service between Stewart Island and Bluff and proper railway facilities between Bluff and northern markets caused problems ensuring fish arrived at Dunedin and Christchurch in good order. Similar problems were experienced in Canterbury, Kaikoura and elsewhere (S9:3-4).

6.2.3 In a 1913 report on New Zealand fisheries L F Ayson, Chief Inspector of Fisheries, emphasised that at that time only those fishing grounds within easy reach of the markets were being worked. Beyond these there was to be found "abundant supplies of our best market fishes".¹ Ayson also pointed out that as a result there had been some overfishing in these areas and fishers were finding it necessary to move further afield. Ayson called for a separate department of fisheries to be established and for the coastal waters to be scientifically prospected.² He also pointed out that some Foveaux Strait oyster beds which were very prolific had been thinned out by over-dredging. He stressed the need for conservation of the resource.³

6.2.4 A measure of the relative numbers engaged in fishing in the Ngai Tahu tribal district and elsewhere in New Zealand was given us by David Armstrong, using a detailed review of boats and people engaged at various South Island ports. In 1920 a total of 762 people were engaged on either a part or full-time occupation in the fishing industry within the Ngai Tahu rohe compared with 1331 engaged in occupations connected with the fishing industry throughout the rest of the country (S9:2-10).⁴

Unfortunately, these official figures give no indication of the numbers of Ngai Tahu people involved in commercial fishing at this time. In an attempt to remedy this problem Mr Armstrong enlisted the aid of Trevor Howse of Ngai Tahu. Through the inspection of the lists of registered fishing boats for several South Island ports (held in Marine Department files at National Archives), Mr Howse was able to identify boat owners with Ngai Tahu ancestry. Only owners of registered fishing boats were included in Mr Howse's findings, which are summarised below:

	Ngai Tahu Owners		Others	
	1913	1920	1913	1920
Timaru	3	—	20	—
Lyttleton	16	10	252	499
Greymouth	1	1	11	17
Oamaru	2	2	31	30
Dunedin	4	2	84	84
<i>Total</i>	26	15	398	630

The Marine Department files do not give details of registered boat owners for the ports of Bluff, Invercargill or Stewart Island. Customs registers for the period 1904 to 1928 were inspected by Mr Howse. During that period approximately 20 Ngai Tahu owned registered fishing and oyster boats at Invercargill, plus an additional boat which was leased. Figures for Ngai Tahu ownership at Bluff and Stewart Island during this period are not available. In 1913 a total of 34 fishing boats were registered at Invercargill. In 1915, 199 boats were registered at Bluff, Stewart Island and Invercargill. During 1920, 81 boats were registered at Bluff and Invercargill (S9: appendix i).

If these figures are substantially accurate it appears Ngai Tahu involvement in the commercial fisheries was relatively insignificant. Their numbers remained more or less static while non-Maori involvement increased substantially.

- 6.2.5 During the next decade (1920 to 1930) most if not all of the problems of the previous period continued to prevail. Mr Armstrong refers to the Board of Trade reporting in 1922 that facilities for handling the fishermen's catches throughout New Zealand were inadequate (S9:26). Adequate transport, insulated railway wagons and cool stores were still lacking. Fishing continued to be a part time activity during the winter months. A Marine Department report of 1925 showed that the total value of fish landed in all New Zealand ports for the year was £336,163. Of this sum £120,000 went to fishers operating from ports within the Ngai Tahu rohe (S9: appendix ii).⁵

An analysis by Mr Howse, of registered fishing boat owners for 1926 and 1930 revealed a similar pattern of a relatively small proportion of vessels in Ngai Tahu ownership as in the previous decade (S9: appendix iii)

- 6.2.6 Not surprisingly, by 1930 the depression had begun to adversely affect the fishing industry along with all other sectors of the economy. The Marine Department reported that in 1931 the quantity of wet fish landed was 14 percent less in quantity and 23.5 percent less in value than in the previous year. Some fishers were forced to abandon fishing and take to relief work.⁶ Government concern at problems facing the industry, along with longstanding concerns about declining fish stocks as a result of trawling, led to the first major inquiry into the state of New Zealand

fisheries and the fishing industry (P13:20).

The Sea Fisheries Investigation Committee was appointed in 1937 to investigate both the fishery and the state of fish stocks. The committee made extensive recommendations which were to shape the management of the industry for the next 25 years (P13:21). It failed however to make any mention of the Maori fishery. Among its recommendations were the need for restrictions on trawling and Danish seining. This included the abolition of Danish seine methods off the South Island coast and the curtailment of the season for Foveaux Strait oysters, including the closing of some depleted areas for three years. Also recommended was a system for licensing whitebait fisheries; provision of better cool storage facilities; and the supervision by a central authority of the entire marketing system (S9:43).

6.3 **Restricted Licensing 1937 to 1963**

Prior to 1937 there was no attempt to restrict entry to commercial fisheries. While fishing vessels had been obliged to register and obtain licences from as early as the 1880s, licensing was intended only as an aid to enforcement and administration. The idea of restricting the numbers of fishing vessels as a means of conservation and management did not emerge until 1937 when the Sea Fisheries Investigation Committee recommended a new form of restricted (limited) licensing.

Shortly before the investigation committee began its work the taking of fish for sale was licensed under the Industrial Efficiency Act 1936 as a holding measure. In its final report the committee recommended that this restricted licensing regime remain in place by an amendment to the Fisheries Act 1908. In the event, these provisions were not transferred into the Fisheries Act until 1945 (P13:21).

6.3.1 In commenting on the Sea Fisheries Investigation Committee's findings, the Marine Department noted in its 1938 annual report that:

The findings in respect of the production side of the industry dispel to a large extent the popular contention that the waters round the New Zealand coast are teeming with marketable fish. The evidence tendered by fishermen and others, together with the Marine Department's particular knowledge of the conditions, shows that depletion of certain grounds has occurred and that there is need for conservation at many points in order to ensure the continuity of supply⁷

6.3.2 In discussing the commercial fishery for the decade 1940 to 1950 the Crown historian David A Armstrong noted the avowed policy of the Marine Department as being for the conservation and management of the fisheries resource. At the same time he refers to evidence that in 1941 the scarcity of fish was seriously affecting the industry in southern waters. He cites groper and ling as being very scarce in Otago, while in 1944 the Marine Department was concerned that the average size of Foveaux Strait oysters was declining (S9:60).

In 1943, in the middle of World War Two, some 299 fishing boats were

operating from southern ports (S9: appendix V). How many were owned or operated by Ngai Tahu is not known.

Restricted licensing to achieve conservation

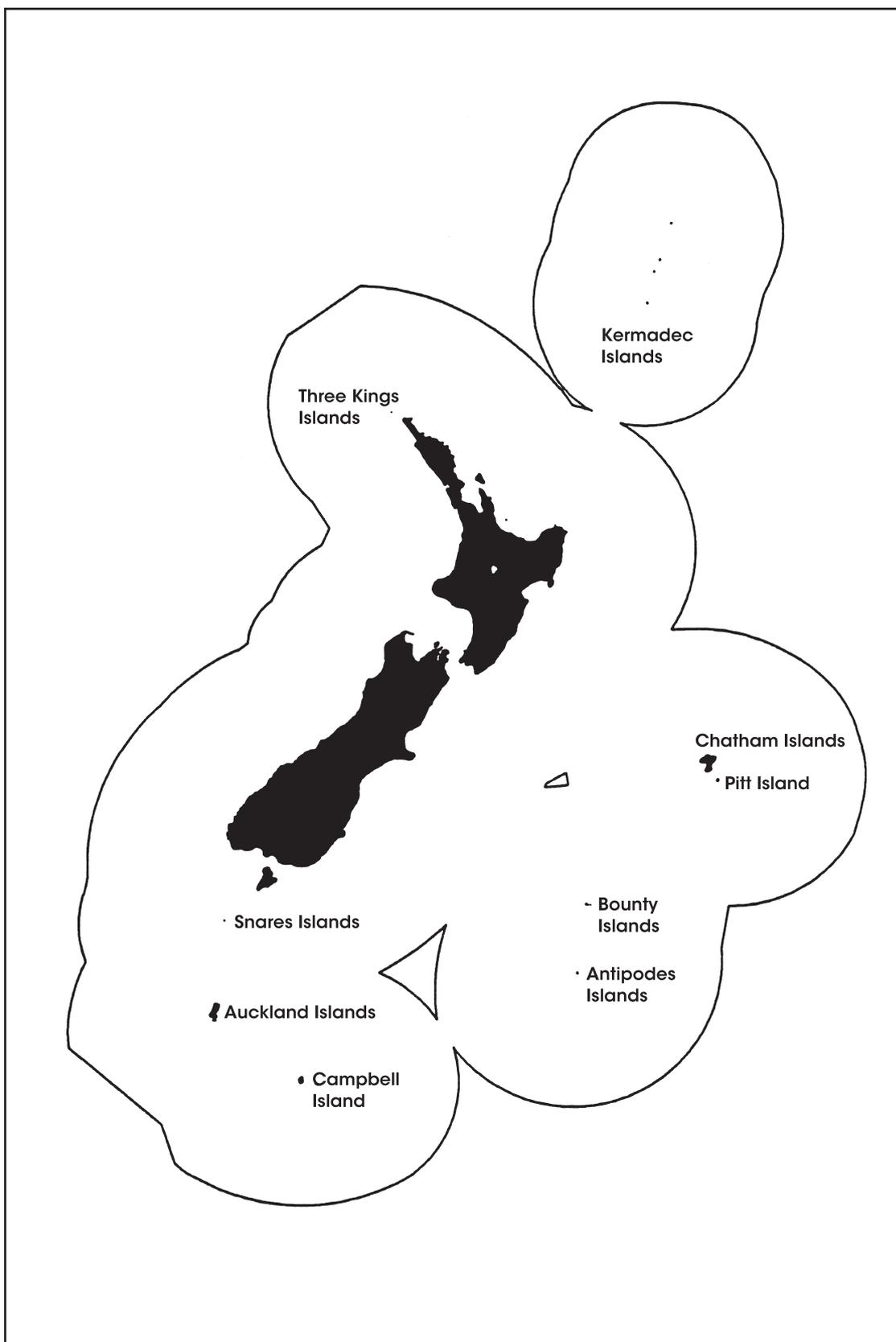
6.3.3 As Robert Cooper has commented, conditions were very different from those of today when, in 1945, the licensing regime was included in the Fisheries Act 1908. In almost all cases boats fished port by port around the country and in reasonable proximity to their home port. The licensing provisions sought to maintain the distribution of fishing vessels and to regulate catches and fishing effort port by port. Licences prescribed particular fishing methods and required vessels to operate from, and land fish at, only the port specified in the licence (P13:21). By these means it was hoped that conservation, the main matter to be considered by the Sea Fisheries Licensing Authority, would be achieved. Licensing was continued as a major basis of fishery conservation in the 1940s and 1950s supplemented by the continuation of measures such as closed areas and seasons, method restrictions and other measures introduced from 1900 onwards (P13:22).

6.3.4 In 1956 a government caucus committee review of fisheries concluded that the prevailing methods of licensing, export control, size and gear regulations should be continued as a means of conservation (P13:22). But Mr Cooper pointed out that in the years immediately following it became more apparent that certain industrial and technological developments, which had very belatedly come to affect fisheries, were now having an effect:

The cumulative effect of the improved technology enabled increasing numbers of vessels to range further afield and overlap the fishing grounds worked by boats from other ports. As well, exploration of new fisheries in deeper water and further offshore became possible with this technology. (P13:22)

Doubts about the efficacy of the existing licensing system, coupled with the advent in 1959 of Japanese fishing operations in New Zealand waters, led to government appointing a parliamentary select committee in 1961 to consider the best means of accelerating sound economic expansion of the fishing industry and to advise whether the present licensing system was in New Zealand's best interests.

The 1962 Fishing Industry Committee, while recognising the need for fisheries conservation, considered the licensing system an ineffective means of achieving this. It recommended it be abolished. When scientific investigation had determined the potential supply of fish, conservation measures should be re-examined. In the meantime instead of licensing, conservation should be achieved by the traditional techniques of regulating the size of fish, mesh size, types of gear and closed and restricted areas and seasons where desirable. The committee commented that conservation was generally accepted as meaning the control of the resources of fishing areas to allow the maximum catch that could be taken with a sustained yield by the most economic methods.⁸ The main thrust of the report was to encourage the expansion of fisheries to enable their full economic potential to be reached. Production, and hence exports,



Map 6.1: New Zealand Exclusive Economic Zone

were to be increased by greater use of modern technology such as refrigeration on vessels, echo-sounding equipment and other technology which enabled ships to cover greater areas and overlap with fishing vessels from other ports.

6.4 **Developments 1963 to 1982**

In discussing the period 1963 to 1977 Mr G C Billington, Deputy Chief Executive of the New Zealand Fishing Industry Board, made the following points (Z18:7):

- the open entry period following 1963 saw a marked change in the fishing industry. Government provided investment incentives, capital grants and tax breaks. These resulted in expansion of catching capacity and processing facilities;
- as a result of concern at the time of delicensing over the operations of foreign fishing vessels which had steadily increased their activity, the Territorial Sea and Fishing Zone Act of 1965 was passed. This established a nine mile fishing zone outside the three mile territorial sea. Part I of the Fisheries Act 1908 applied to the nine mile fishing zone;
- after two years negotiation Japan agreed to phase out her long line fishing vessels. From the end of 1970 “only domestic fishing vessels were allowed to work within the territorial sea”;
- trawling for demersal fish by the Japanese “began in 1967 when 3,000 tonnes were taken. A few years later an expanding Soviet fleet took over 10,000 tonnes”; and
- exploratory squid angling “began in 1973–74 and with the addition of Taiwanese and Korean vessels, a fleet of 130 vessels was soon established”.

The *Muriwhenua Fishing Report*, after referring to the large quantities of fish and squid taken by Japanese, Russian and Korean vessels in 1977, noted that the total demersal marine fish landing for that year was 285,398 tonnes of which the New Zealand fleet caught only 21 percent, “Included in the foreign catches were little known species, orange roughy, hoki and oreo dories, which were destined to become the saviour stocks for the New Zealand industry”.⁹

Territorial Sea and Exclusive Economic Zone Act 1977

- 6.4.1 This Act gave New Zealand power to control conservation and management of resources out to a limit of 200 miles of New Zealand (refer to figure 6.1). The previous three mile limit of the territorial sea was extended to 12 miles by absorbing the nine mile fishing zone provided for in the 1965 Act. Two important provisions allowed the Minister of Fisheries to determine the total allowable catch (TAC) for every fishery within the zone (s11) and to determine the portion of any TAC which the New Zealand industry might catch, the balance being available to foreign fishing craft (s12). Under s15 owners of such foreign craft were required to obtain a licence to fish within the exclusive economic zone

from the minister.

The passage of this Act provided a great stimulus to the New Zealand fishing industry, assisted as it was by government incentives. Unfortunately many operators found it difficult to cope. They returned to inshore waters which were then subjected to intolerable pressures. By the late 1970s it was apparent that overfishing was occurring in a number of inshore fisheries. Record catches of the mid 1970s were levelling off or declining. By 1981 catches of some of the most important species, most notably snapper, declined markedly. Commercial catches of this fish fell from 18,000 tonnes in 1978 to 12,000 tonnes in 1981. Recreational and traditional Maori fisheries began to suffer as the fishery resource became further depleted (P13:23–24).

In 1982, as a short term measure a moratorium on new entrants to the inshore fishing industry was imposed by the government while the nature and extent of the problem was investigated; in 1983 the government announced a review to consider what should be done (P13:24). The outcome of the review and subsequent developments will be the subject of the next chapter.

6.5 **Ngai Tahu Involvement in the South Island Fishery**

6.5.1 As part of his investigations, David Higgins considered the Ngai Tahu involvement in the South Island fishery in 1988 to be:

- (a) ownership of all fishing vessels – 40% Ngai Tahu
- (b) crew of all vessels – 25–30% Ngai Tahu
- (c) workforce in fish processing plants – 60–70% Ngai Tahu
- (d) workforce involved in the entire Bluff oyster operation, fishing and processing – approximately 60% Ngai Tahu.

The percentages of Ngai Tahu involvement varied from place to place; the involvement at Lyttleton, for instance, being much less than at Bluff (J10:47).

In commenting on these figures Dr George Habib stressed that they in fact represent only a small part of the overall southern commercial fishery. He pointed out that the great bulk of the southern – and New Zealand – fish catch is taken in offshore waters, including hoki, the oreo dories, southern blue whiting, orange roughy, barracouta, squid and the tunas. There is, said Dr Habib, only a very small southern Maori presence in the offshore fisheries (T4(a):228).

Dr Habib also gave evidence of interviews with some 15 or so Ngai Tahu fishers, many now retired, who had been or were commercial fishermen. A few indicated they had fished more than 10 miles offshore. Almost all were third or in some cases fourth generation fishers. Dr Habib considered these were representative of many present day Ngai Tahu fishermen who are able to trace their fishing lineage, their whakapapa, well back into last century, to the time when early relationships were being established between the Ngai Tahu traditional fishermen and the visiting

European sealers and whalers. From that time Ngai Tahu canoe fishermen adopted the whaleboat as an efficient fishing craft, followed by motorised fishing craft and bulk-fishing techniques like trawling and dredging, through to the modern day Ngai Tahu fishers now, as Dr Habib put it, “on their relatively small, motorised trawlers, line vessels, lobster boats and oyster dredgers, fishing the mixed resources throughout the continental shelf and inshore waters” (T4(a):230–234).

- 6.5.2 David Higgins, himself Ngai Tahu, confirmed that “Virtually all of the present Ngai Tahu fishermen whakapapa back to Pakeha whalers, and have an unbroken family history of involvement in the fishery since the collapse of whaling in the early 1840’s” (J10:64–65).

Mr Higgins went on to say:

Having identified most Ngai Tahu presently involved in the fishery, and having traced their family histories, it is clear that apart from members of these families, almost no Ngai Tahu or other Maori have entered the southern fishery (as distinct from the processing industry) since somewhere between the 1860’s or 1870’s. The reasons are not hard to find. Even in those days it cost money to acquire the basic equipment i.e. a converted whale boat and lines and nets. By the 1870’s Ngai Tahu had lost their land and had become impoverished. They were leading a subsistence existence. In the absence of land, they had nothing to borrow against, and no one would lend them the money to buy boats or anything else. Put bluntly, the loss of the land deprived Ngai Tahu of the ability to enter any field of endeavour where capital was the price of entry.

This inability to borrow money has carried on down until very recent times. It did not apply to those families who had got in on the ground floor of the fishing industry in the 1840’s and through the 1860’s. In their case, as the need for bigger and better equipped boats arose, they were able to purchase them with the aid of profits made from their fishing, or by borrowing on the strength of their past performance in the industry. Neither of these avenues was available to those who had not been involved in the industry. On the other hand, because of their familiarity with the business world and, because of their ability to provide security for loans, Pakeha have continually been able to enter the commercial fishery from the 1840s down to the present time and have done so.

In summary, the Ngai Tahu fishermen are individuals who owe their presence in the modern fishery to the fact that they are the descendants of Pakeha whalers. But for that accident of birth it seems certain that, as in the North Island, very few Maori would be involved in the fishery. (J10:65–66)

Mr Higgins went on to point out that some Ngai Tahu have proved to be formidable businessmen. He cited the case of a fellow Ngai Tahu who is chairman of a co-operative made up of 18 fishing boat owners. Apart from the boats operated by individual owners the co-operative owns two very large vessels and, at the time Mr Higgins gave his evidence, was negotiating to purchase a third. The co-operative owns its own processing and packaging plant employing 28 people. These business skills, Mr Higgins said, had been acquired over 5 or 6 generations – they had not been learned overnight (J10:66).

- 6.5.3 We agree with the conclusion drawn by Mr Higgins that had Ngai Tahu not been dispossessed of almost all their lands, and thereby deprived of capital or the ability to borrow, many more would have been involved in the fishery on a personal basis. Alternatively, had the tribe not been impoverished and disintegrated, its rangitiratanga seriously diminished, Ngai Tahu could have continued to engage collectively in fishing enterprise and taken advantage of fishing technology over the years. As Mr Higgins said:

That some individuals have been able to do this demonstrates that the skills and abilities are present within our people and that this is not an empty dream of what might have been. (J10:66)

6.6 **Crown Control of the Fisheries Continues – 1908 to 1982**

- 6.6.1 Crown control over New Zealand fisheries from 1908 to the present has been maintained through various legislative measures and increasing administrative involvement. It has also, until recently, been highly successful in resisting a variety of claims brought by Maori in the courts and in prosecuting Maori for alleged breaches of fisheries legislation.

Legislation 1908 to 1982

- 6.6.2 The consolidating Fisheries Act 1908 remained in force subject to some amendments until replaced in 1983 by a new Fisheries Act. Apart from relatively minor additions in 1912 and 1923 it remained unchanged until 1945.

The 1912 amendment provided for licensing of whaling vessels and whale factories. The 1923 fisheries amendment enlarged on the provision in the 1908 Act which enabled the governor to declare any tidal lands or waters in the neighbourhood of any Maori pa to be an oyster fishery where Maori exclusively might take oysters for their own food. The 1923 Act said the control of any such oyster was to be vested in a committee of resident Maori appointed according to the pleasure of the minister. The committee was to maintain the fishery in good order. Any mature oysters surplus to the food requirements of Maori in the neighbourhood could be sold to the minister and the proceeds of sale paid to the committee for the purpose of extending and conserving the oyster beds. No Maori was to sell or give to a European any oysters taken from a reserved oyster.

Susan Butterworth pointed out that although the 1908 power to create exclusive oyster reserves had existed since 1892 it was not used until after the turn of the century (Z17:chapt 3:15). Even then only a few were made, these being in the North Island. As we have seen, none were ever established in the Ngai Tahu rohe. Whether Ngai Tahu requested such a reserve is not known.

- 6.6.3 Section 33 of the Maori Social and Economic Advancement Act 1945 replaced the 1900 and 1903 Maori Councils Act provisions with minor changes. Exclusive Maori fishing grounds could still be reserved but only on the recommendation of the Minister of Marine. Tribal councils could

The Crown Maintains Control of the Fisheries 1908 to 1982

make fishing regulations in respect of reserved fishing grounds only.

The Law Commission commented on the administrative reaction to requests for exclusive reserves to be set aside for Maori:

By 1948 requests had been made for reserves in 5 areas – at Mokau, Raukokore, Waiuku Estuary, Matakana Island and Whangaruru Bay. These were not well received by the Marine Department. The Secretary of Marine saw the provision as undesirable and invidious

....

“The policy of this department”, he wrote to the Undersecretary of Maori Affairs, “has always been that where a . . . shellfish bed was situated near to any Maori village commercial exploitation was prohibited . . . [The Fisheries General Regulations 1947] do in effect reserve these fisheries for the Maori people nearby but at the same time do not reserve them exclusively . . . ”

17.120 He reiterated the principle that had been followed, that –

“the taking of fish or shellfish for one’s own domestic consumption be permitted in areas in the vicinity of Maori villages. This protects the fishery . . . from commercial exploitation and at the same time precludes the possibility of unsavoury repercussions that would most certainly arise if the area were reserved for the sole use of one section of the community only.”

17.121 No reserves were created under the 1945 Act and section 33 was repealed without Parliamentary comment in the Maori Welfare Act 1962.¹⁰

As will be seen (6.8) Ngai Tahu made several applications for reserves to be set aside under this Act. All were rejected.

The above illustrates the negative attitude of successive governments and their advisors to Maori fishing rights until very recent times.

- 6.6.4 As we noted in 6.3 the licensing regime initiated under the authority of the Industrial Efficiency Act 1936 (initially as a temporary measure) was not legislated for until 1945 in the Fisheries Amendment Act of that year. This Act prohibited the use of a boat for commercial fishing unless it was registered and the boat owner held a fishing licence from the Sea Fisheries Licencing Authority. Part III of the Industrial Efficiency Act 1936 no longer applied to fishing for the purposes of sale and fishing regulations under that Act were revoked. No exception was made for Maori from the registration and licensing provisions of the 1945 amendment.
- 6.6.5 The Fisheries Amendment Act 1963 was the result of the 1962 Fishing Industry Select Committee recommendation that the licensing regime inaugurated in the late 1930s and maintained in force under the 1945 Fisheries Amendment, should be abolished. In its place the 1963 amendment, which repealed the 1945 provisions, provided for the registration of all commercial fishing boats but substituted fishing permits for licences. Unlike the licences which they replaced the permits were available on demand. While freely available to the owners of a registered fishing boat the fishing permits did preserve the permissible methods of fishing and the kind of fishing gear which could be carried on the boat in the years for which the permit was available. Conservation would, it was thought, be maintained by these constraints. With restrictive licensing

abolished the seas were open to all who sought to go fishing and could afford to do so. Maori treaty fishing rights received no express recognition.

6.6.6 Between the 1963 amendment freeing up fishing activities and the new Fisheries Act 1983 which established the basis for the present regime, several further amendments were made to the 1908 Act and some other statutes concerned with fishing were passed. None require discussion in any detail and we mention only those having some significance:

- Fisheries Amendment Act 1965 substantially re-enacted the provisions of the 1923 amendment for Maori oyster-fishery reserves. We are unaware of any oyster reserves being made under this Act.
- Territorial Sea and Fishing Zone Act 1965 has been discussed earlier (6.4).
- Fisheries Amendment Act 1967 strengthened the ministry's policing powers. It also repealed s76 of the 1908 Act which prohibited proceedings being brought against a Maori without the consent of the Minister of Maori Affairs.
- Fisheries Amendment Act 1971 enabled the minister to set aside specified seaweed areas in fisheries below low water mark and in any area of tidal lands. Permits were required for taking seaweed from such areas.
- Marine Farming Act 1971 consolidated and amended the law relating to the farming in New Zealand waters of seafish, shellfish, oysters and marine vegetation and leasing, licensing and marketing arrangements.
- Marine Reserves Act 1971 provided for the setting up and "management of areas of the sea and foreshore as marine reserves for the purpose of preserving them in their natural state as the habitat of marine life for scientific study".¹¹
- Marine Pollution Act 1974 is intended to make better provision for preventing and dealing with pollution of the sea and to enable effect to be given to certain international conventions.
- Territorial Sea and Exclusive Economic Zone Act 1977 – this important Act has been discussed earlier (6.4.1).
- Fisheries Amendment Act 1977 gave the minister power to declare certain fisheries to be controlled fisheries, thereby modifying the free entry regime of the 1963 Act. This amendment applied only to eels and certain shellfish (scallops in certain parts of New Zealand, rock lobsters, paua, mussels and oysters in the Foveaux Strait oyster fishery). All methods of fishing could be controlled except in the case of scallops and oysters where control was confined to dredging. The minister could declare a controlled fishery to facilitate conservation or management of the fishing industry. No one could fish in a controlled fishery without a licence granted by a Fisheries Licensing Authority. The minister could limit the number of licences granted.
- Marine Mammals Protection Act 1978 is concerned with the protec-

tion, conservation and management of marine mammals within New Zealand fisheries waters. No mammal may be taken without a permit from the minister. Marine mammal sanctuaries may be established.

- Fisheries Amendment Act 1979 provided for giving effect to international agreements by regulations which could be beyond the outer limits of New Zealand fisheries waters in respect of New Zealand citizens and New Zealand ships and aircraft.
- Fisheries (General) Regulations 1950 were made under the Fisheries Act 1908 and were amended or added to on numerous occasions. They contained detailed restrictions on fishing areas and methods. Regulation 106K placed restrictions on the number of shellfish which might be taken in one day. In 1972 the regulation was amended so as to permit the taking of paua, scallops, mussels, kina, tuatua, pipi or cockles in excess of the limits by a person taking them on behalf of a Maori committee or a district Maori council for use at a tangi or hui. But the quantity to be taken and the area(s) from which they were to come had first to be approved by a Maori community officer. This provision is now in regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986.

6.6.7 In the next chapter, we will consider the Fisheries Act 1983 and later legislation. The 1983 Act consolidated and replaced the Fisheries Act 1908 which, along with all its amendments, was repealed. By authorising the making of regulations setting a quota for any fish or fishery it laid the ground for the quota management system introduced by the 1986 Fisheries Act amendment.

6.7 **Maori Complaints and Protests**

6.7.1 In 5.15.2 we noted that the *Muriwhenua Fishing Report* recorded many protests by Maori in various parts of Aotearoa in the nineteenth century. These took a variety of forms; some direct to the Native Minister or his department; others by Parliamentary petition. These continued throughout this century and have extended beyond concern at the fishing laws. The Muriwhenua tribunal discussed complaints relating to the floatage of logs; to the adverse effect on eel and other fisheries due to land drainage and inadequate flood control; and to the serious effect of developments around the margins of lakes, harbours and estuaries.¹² But the Muriwhenua tribunal noted that for most of this century the Maori protest has been mainly characterised by claims through the courts.¹³ In its discussion of litigation involving claims by Maori the Muriwhenua tribunal consider the litigation under two broad heads; those involving the general statement in most fisheries statutes which purport to save or protect Maori fishing rights; and, secondly, those concerned with the ownership of rivers and the foreshore.¹⁴ We do not propose to repeat the detailed discussion of these cases in the *Muriwhenua Fishing Report* but note here the main points made.

The broad statutory statement

6.7.2 The first head was concerned with s8 of the Fish Protection Act 1877,

which provided that nothing in that Act was to:

repeal, alter or affect any of the provisions of the Treaty of Waitangi, or to take away, annul or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.

As we have seen this provision was omitted entirely from the Sea Fisheries Act 1894. Nine years later s14 of the 1903 Fisheries Amendment Act re-enacted a general provision with the important difference that it made no reference at all to Maori fishery rights under the Treaty. It simply said that:

nothing in this Act shall affect any existing Maori fishing rights.

The same provision was included as s77(2) of the Fisheries Act 1908 with the important qualifications that it applied only to sea fisheries.

When the new Fisheries Act was passed in 1983 it included s88(2) providing that:

nothing in this Act shall affect any Maori fishing rights.

This provision omitted reference to any *existing* Maori fishing rights. The change does not appear to be a material one.

- 6.7.3 The *Muriwhenua Fishing Report* discusses two cases (*Baldick v Jackson*, (1910) 30 NZLR 343 and *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321) in which Chief Justice Stout recognised Maori Treaty rights. But it points out that in 1914 the Supreme Court in *Waipapakura v Hempton* (1914) 33 NZLR 1065, without any reference to *Baldick v Jackson* (concerned with whales), held that s77(2) conferred no legal rights and only protected those rights expressly conferred by statute. Treaty rights as such had no legal validity unless recognised by Act of Parliament. The Muriwhenua tribunal commented on this finding:

Once made aware of the meaning of the section, as determined by the Court, the Crown took no steps to amend it. We can only presume the Crown was satisfied with the result, that Maori should have only those fishing rights that the Crown specifically gave, for the section was not amended. The Crown must be presumed to have been aware of the Court's interpretation of the law. It follows that the Crown's performance in protecting Maori fishing interests, following this case, must be assessed on such particular provisions as were made.

Subsequent to that case, the Crown declined to make specific exemptions or provisions for Maori in other than a niggardly way, despite several Maori petitions asking that, it should do so. Faced with the Supreme Court's opinion, the Crown's reluctance to move, and the lack of any Court before which customary claims could be established, Maori sought to assert their fishing rights through a long series of cases claiming the ownership of various rivers, lakes and foreshores. These cases are reviewed later. It is sufficient to say here that the claims failed. They also confused the debate in later court cases when claims under the general statutory provision were revived.¹⁵

In 1956 a similar set of facts to those in the *Waipapakura* case and the same whitebait regulations came before the court in *Inspector of*

Fisheries v Ihaia Weepu and Another [1956] NZLR 920. A material difference was that the earlier case had involved tidal waters while *Weepu* concerned a river. The *Muriwhenua Fishing Report* observed that in contrast to the decision in *Waipapakura* it was considered in *Weepu* that the section protected Maori fishing rights:

“preserved by the Treaty” but that those rights lapsed, at least in the case of land based fishing, on the sale of the land. To put it in its simplest form, the Court considered that as a matter of law, when Maori sold land, they sold their fishing rights too.¹⁶

In the later case of *Keepa v Inspector of Fisheries: Wiki v Inspector of Fisheries* [1965] NZLR 322 the Maori appellants claimed exemption from the regulations as they were exercising an existing Maori fishing right in taking toheroa from the Ninety Mile Beach. The *Muriwhenua Fishing Report* commented:

It was held on this occasion that customary fisheries existing before the Treaty were protected by section 77(2), the Court following a Privy Council decision on an earlier Maori claim, *Nireaha Tamaki v Baker* (1901) NZPCC 371, that the courts were bound to recognise the prior rights of Maori until they were extinguished in accordance with law; but, it was held in the *Keepa* case, those rights were extinguished when the Maori customary title to the adjoining land was ended.¹⁷

We have already referred to the Muriwhenua tribunal’s comment on *Te Weehi v Regional Fisheries Officer* [1986] NZLR 680 in which the High Court gave effect to s88(2) of the Fisheries Act 1983 by holding that customary Maori fishing rights exercised in a customary way are exempt from regulations under the Fisheries Act 1983 and that customary fishing rights continued until they are expressly taken away (5.14.10).

The scope of this decision and earlier cases such as *Waipapakura v Hempton* remains to be settled by the Court of Appeal.

6.8 **Claims to Ownership of Lakes, Rivers and the Foreshore**

This was the second category of Maori claims covered in the *Muriwhenua Fishing Report*. After referring to the review of the foregoing cases in which Maori sought unsuccessfully until 1986 to rely on the general statutory exception in the Fisheries Acts, the Muriwhenua tribunal noted that Maori protest turned to a series of extended cases claiming the ownership of lakes, rivers and foreshores. These were to tax Maori energies and pockets over several decades.¹⁸

Lakes

- 6.8.1 The claims for lakes were settled out of court but the Court of Appeal did establish an important principle. Rotorua Maori had sought to protect their lake fishing rights by claiming ownership of the lake beds in the Maori Land Court. The court rejected a Crown contention that the Maori Land Court could not inquire whether the Crown’s nominal title was subject to a Maori customary right (see *Tamihana Korokai v Solicitor-General* (1913) 32 NZLR 321). No final determination was made, the

matter being settled out of court.¹⁹

Rivers

- 6.8.2 In protracted proceedings concerning the ownership of the Wanganui river which culminated in 1962 the Court of Appeal. In *Re the Bed of the Wanganui River* [1962] NZLR 600 rejected a claim that the bed of the river was still owned by the tribes. The court ruled that when individual titles were substituted for the general communal rights of the tribe, there attached to each grant title to the middle of the bed of the river.²⁰

Foreshore

- 6.8.3 *In Re The Ninety-Mile Beach* [1963] NZLR 461 was a case concerning the claim by certain Muriwhenua Maori to ownership of the beach foreshore. The Court of Appeal ruled that once an application for the investigation of title to land having the sea as its boundary was determined by the Maori Land Court, the Maori customary communal rights were then wholly extinguished, and as a consequence, the Crown was freed from any obligations it had undertaken under the Treaty of Waitangi.

The *Muriwhenua Fishing Report* is critical of certain assumptions on which the court appears to have based its findings, but of course they remain the law.²¹

Growing concern on the part of the New Zealand Maori Council and Maori leaders over the depletion of the fisheries as expressed at various hui over the last three decades is recorded in the *Muriwhenua Fishing Report*. The last such hui noted in the report was in 1985:

The report of the 1985 hui . . . shows Maori thinking had changed little from that of the Maori chiefs who assembled at Orakei in 1879. Both hui were representative of the tribes. There was a marked shift from the identification of particular fishing grounds for reserves. Instead, tribes defined their boundaries and claimed fishing rights along entire coasts, and it was control that was mainly talked of, not the exclusion of the public. Once again, it was a matter of mana.²²

6.9 Ngai Tahu Protests This Century

Against the above outlined background of efforts by Maori in various parts of the country to assert their fishery rights we now turn to claims and protests made by Ngai Tahu. These were recounted to us by the Crown historian David Armstrong (S9). In the first three decades they largely related to inland rather than sea fisheries. We give some examples.

- 6.9.1 In 1912 the Taieri Land Drainage Bill came before Parliament. The Bill authorised a drainage board to drain certain areas which would then be vested in the board. Lake Tatawai was in jeopardy. Ngai Tahu had fishing rights in this lake. The Bill originally sought to protect these rights by providing that nothing in the Act was to prejudicially affect any Maori fishing rights in Lake Tatawai. The Legislative Council removed this protective clause. In subsequent debate the member for Southern Maori, Tame Parata, sought to have it reinstated. Tame Parata referred to Ngai Tahu reliance on this lake for the the past “two or three hundred years”. He was strongly supported by Te Rangihiroa, the member for Northern

Maori:

there was a mutual agreement, and in the Treaty of Waitangi, which the Maori regarded as their Magna Charta, definite conditions were laid down that the rights of the Maori – fishing-rights and other rights – should be conserved. Here they had a case in which it was desired to break down that right. If the Maori people had agreed, it would be all right; but it was a case of the Europeans being willing and the Maori was not willing, therefore he thought what was proposed was an injustice to the Maori people²³

In the event, the section preserving Ngai Tahu fishing rights in Tatawai was reinstated in the Bill. Those rights were however subsequently extinguished in 1920 (the lake then being almost dry) by the Taieri River Improvement Act 1920 with a right of compensation to any Maori who could establish having made “substantial use” of the lake within the previous year. Section 20(3) of the Act provided for a six month period during which claims for compensation were to be made. This provision was one of the subjects of a petition to Parliament by the Ngai Tahu Trust Board on 7 December 1979. In submissions to the Maori Affairs Select Committee on 20 March 1980 the board stated that:

No notice other than public notice in the “Gazette” was given to the affected Maoris who were quite unaware either of the Act itself or the Section referred to above. (C2(25):16)

The board sought compensation either by the provision of an alternative fishing reserve or the payment of appropriate compensation.

- 6.9.2 In 1919 Hoani Te Hau Pere and 39 others of Wairewa petitioned Parliament that Wairewa (Lake Forsyth) be set aside as a fishing reserve for members of Ngai Tahu. The Native Affairs Committee had no recommendation to make.²⁴ In 1961, as a result of renewed Ngai Tahu representation, an exclusive right to take eels from Wairewa was given to Maori and the lake became the only Maori eeling reserve in the South Island. In our Ngai Tahu Report 1991 we recommended that Ngai Tahu, rather than Maori generally, should have exclusive rights to this eeling resource.²⁵
- 6.9.3 In 1922 and again in 1925 the right of Ngai Tahu to take imported fish from the Arahura river (which they owned) without a licence was challenged. The Native Affairs Department took the view that the Maori beneficial owners of the river appeared to have the same right but no more than Europeans owning both sides of a river would have. No regard was had to their Treaty fishing rights. In commenting on this incident Crown historian David Armstrong noted that an attitude prevailed amongst the European authorities at this time which was opposed to the granting of any special rights for Ngai Tahu (S9:31). We would agree and add that it persisted.
- 6.9.4 The use of set nets in the Ashley river which was authorised by whitebait regulations was a longstanding cause of grievance to Canterbury Ngai Tahu. As early as 1913 over 50 Ngai Tahu at Tuahiwi had objected to this practice. The Minister of Marine declined to change the regulations (S9:31–32).²⁶

The matter was raised again in July 1927 when W D Barrett and 27 other

Ngai Tahu residents of Tuahiwi again petitioned government to ban set nets in the Ashley (S9:32).²⁷ A further petition was lodged by W Genet and 36 other Europeans from the Kaiapoi area in support of the Ngai Tahu petition (S9:33).²⁸ The petitions were referred to the Native Land Court for investigation. After hearing evidence Judge M Gilfedder of that court duly recommended that set or box nets be prohibited along with a closed season of 12 months and whitebaiting be restricted for four months in each year. Notwithstanding these recommendations nothing was done. The Marine Department, on the advice of its chief inspector, refused to act. Nor were subsequent representations in 1931 any more successful (S9:36–37).

- 6.9.5 In August 1930, 201 Ngai Tahu residents of Canterbury and the West Coast presented a petition to Mr Makitanara MP. They asked for an exemption from paying licence fees to catch whitebait and from any proposed regulations restricting the taking of mussels as these had been their food for generations. The Minister of Marine confirmed earlier advice to the Honourable Mr Ngata that the proposed regulations were designed to protect the resource for everyone, Maori and European alike (S9:38–39).²⁹

Again we agree with Crown historian David Armstrong that the response with respect to whitebait further confirms the Marine Department was concerned with conservation and management and did not admit any special 'rights' claimed by Ngai Tahu (S9:39).

- 6.9.6 A petition by E M Te Aika and 105 other Ngai Tahu was presented to Parliament in 1931. It sought the:

restoration of their Treaty and tribal fishing rights according to the reservations in the Ngai Tahu or Kemp's deed (S9:47).³⁰

The petition cited article 2 of the Treaty and the parts of Kemp's deed relating to mahinga kai. It later stated that Ngai Tahu claims, and have always claimed:

an immemorial right and liberty to take from the waters of the Rivers and streams in the said lands so ceded by them as aforesaid [by Kemp's deed] at certain Reserves and places from time immemorial used by them for their sustenance as a means of living for themselves and their families and as confirmed and warranted by the said Treaty and the exceptions and reservations in the said Deed and also by the said Acts. (S9:49)³¹

The petition does not appear to seek any relief or remedy in respect to sea fisheries. It was referred by the Native Affairs Committee to government for enquiry.³² No further action appears to have resulted (S9:50).

- 6.9.7 The Native Affairs Committee received another petition in 1931 from Korerehu Mihaka and 65 other Ngai Tahu seeking legislation giving them:

free and undisturbed right of catching and fishing and torching for eels, flounders and kanakana (lampreys) on Lake Wainono and Waihao and Waitaki Rivers situated in the Canterbury Province (S9:51).³³

The petitioners claimed they were prevented from catching and torching

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eels on the Waihao and Waitaki rivers by the Waimate Acclimatisation Society. In a report to the chairman of the Native Affairs Committee of 30 July 1931, the Under-Secretary of the Marine Department advised that:

The Natives are probably basing their claim on the treaty (sic) of Waitangi which sought to preserve the original fishing rights, but the Supreme Court has held that they have got no more rights than a European landholder . . . (S9:51).³⁴

The petition was held over by the Native Affairs Committee until 1933 when it was referred to the government for further enquiry (S9:51).³⁵ Again, nothing further eventuated.

- 6.9.8 In June 1952 the Ngai Tahu Rapaki Tribal Committee applied for the whole of the bay in which the Rapaki Maori reserve and settlement was situated to be set aside for their exclusive use as a fishing ground under s33 of the Maori Social and Economic Advancement Act 1945 (see 6.6.3). The application was supported by Mr J P Tikao-Barrett, the South Island Maori District Welfare Officer who pointed out that all the other bays in Lyttelton harbour were most suitable for picnickers (S9:75–76).³⁶

The Lyttelton Harbour Board supported the application. It had no objection to the wharf, which was in a bad state of repair, being demolished as there was access to Rapaki by road and if the area was reserved privacy for Maori would be assured. The board had no objection to the whole of the pipi beds being reserved for the exclusive use of the Maori but suggested the medical officer of health might report on their condition. The board thought the Maori population at Rapaki did not exceed one hundred. While the beaches were used to a certain extent by picnickers the board considered no hardship would be caused to them or others as there were other places in the vicinity offering equal facilities (S9:77).³⁷

The Lyttelton Borough Council opposed the application as it had in mind a housing development in the adjoining Cass Bay and it would be necessary to dispose of the sewage into the harbour with the consequent danger that the pipi beds might become polluted “and my Council may be placed in the position of paying compensation to the Maoris for the loss of these beds”. We note that the council appeared to look with equanimity at the prospect of polluting the Rapaki Bay shellfish, their concern being the possibility of having to pay compensation (S9:78).³⁸ The Minister of Marine subsequently informed the borough council that it would not be permitted to discharge crude sewage into the harbour. It would have to be treated (S9:79).³⁹

Notwithstanding the support given by the Lyttelton Harbour Board, the Marine Department declined the application for a fishing reserve under the 1945 Act.

The Secretary for Marine advised the Department of Maori Affairs that because there were only upwards of one hundred Maori at Rapaki it did not seem equitable that a reservation should exclude all the Pakeha who would naturally frequent the area in the summer (S9:79).⁴⁰ This, as will be seen, was simply the first instance of the negative attitude of the

Marine Department to applications by Maori under the 1945 Act.

6.9.9 As Crown historian David A Armstrong pointed out, a similar issue arose in mid 1953 with respect to pipi beds along the foreshore of the Otakou reserve (S9:79). On 6 June 1953 J P Tikao-Barrett, the District Maori Welfare Officer wrote to the Secretary for Maori Affairs advising:

- he had recently discussed with the Chairman of the Tribal Committee at Otakou Heads the pipi beds along the foreshore of the Otakou Maori reserve;
- Mr Edmunds advised the pipi beds were being destroyed by people not familiar with the habits of shell fish. He asked whether the beds could be reserved for the exclusive use of the Maori people;
- the area which the Otakou Tribal Committee wished to reserve was within the harbour commencing from Taiaroa Heads to the end of the boundary of the Otakou Maori reserve, a distance of about three miles; and
- as he considered the request a reasonable one Mr Tikao-Barrett asked whether a reserve could be made under s33 of the 1945 Act. He stressed that the distance along the foreshore was by no means a great one.⁴¹

In acknowledging receipt of a copy of Mr Tikao-Barrett's letter the Secretary for Marine advised the Secretary for Maori Affairs on 10 July 1953 that he would obtain a report on the situation, but that he did not:

feel inclined to ban the taking of pipis by Europeans over 3 miles of foreshore, which during the summer months is used by hundreds of visitors.⁴²

Perhaps not surprisingly he received a negative report from his district inspector of fisheries who in a memorandum of 2 December 1953 to the Secretary for Marine made a number of points:

- it was cockles not pipis the Otakou Maori were trying to reserve;
- there were "no Maoris living as Maoris on the Peninsula" and there were "less than a dozen full-blooded Maoris amongst them";
- there were "no Maoris depending on the cockles as food";
- there was no evidence "as to which extend (sic) the cockles are taken by the Europeans" but his contact with local residents, Maori and Pakeha, indicated that "anybody hardly ever collected cockles";
- he talked with Edmunds, the Chairman of the Tribal Committee who said the beds were depleting in later years and it was now harder to collect a feed off them than it used to be;
- the inspector thought the possible cause of depletion could be "the great numbers of both Maoris and Pakeha, who with our modern transport are able to get to many outlying places not only there but to many other parts of the Dominion, and thereby increase the fishing effort manyfold of what it used to be";
- he believed cockles were plentiful in most parts of the harbor; and
- in view of the above he could not recommend the restriction sought

by the tribal committee. (S9:80)⁴³

We note that while refraining from saying how many Ngai Tahu were living on the peninsula he did note that none were “living as Maoris” by which presumably he meant as their tupuna had in 1840. He also noted that less than 12 were “full-blooded Maoris” and none were “depending on cockles as food”. Presumably the inspector thought these matters were relevant to the tribal committee’s application although the reason is not readily apparent.

It is not easy to reconcile his statement that “anybody hardly ever collected cockles” with his later assertion that the depletion was possibly due to the great number of Maori and Pakeha able to go to the peninsula thereby greatly increasing “the fishing effort”.

Predictably, given his initial reaction to the application, the Secretary for Marine in a letter of 10 December 1953 to the Secretary for Maori Affairs with which he enclosed a copy of the inspector’s report advised that on the basis of that report it would be quite impossible for him to advise the government to make any special reserve in the vicinity of the Ngai Tahu reserve on the Otakou peninsula.⁴⁴

6.9.10 On 12 October 1956 Invercargill solicitors for the Awarua Tribal Executive sought an order-in-council reserving certain areas under s33 of the Maori Social and Economic Advancement Act 1945. The localities were:

- (a) That part of the coast of Te Wae Wae Bay, extending generally westward, and southward, from the mouth of the Waiau River, to the south-western extremity of such Bay
- (b) That part of the coast extending southward and generally westward and north-westward from Oraka Point to Pahia Point
- (c) That part of the coast extending generally westward from the western bank of the Waikawa Estuary to Waipapa Point (S9:83).⁴⁵

The Secretary for Maori Affairs referred the Ngai Tahu application to the Marine Department who, in a subsequent letter to the Secretary for Maori Affairs, noted that it affected all pipi grounds, mussel-beds, other shellfish areas, fishing grounds and edible seaweed areas in the localities mentioned. The Secretary for Marine considered this to be:

. . . an extremely sweeping request, particularly as it comes from an area where there cannot now be any Maori people without some European ancestry. Indeed, my information is that there are now no Maori people habitually living according to Maori custom or dependent in any way for their sustenance wholly on sea products. All, or almost all, have been absorbed into European ways of living and work. Thus they share, with the notable exception of the rather specialized mutton-bird industry, all sea-products with the Europeans with whom they associate.

To grant exclusive rights to area (a), for example, would surely benefit those of Maori descent but little, and provoke resentment in other quarters. Areas (b) and (c), according to my information, are not intensively exploited by anybody. In any case, I fail to see that the Awarua Tribal Committee could effectively control any of

the areas were they given charge of them, having neither the time, staff, or experience, to deal with fisheries administration.

In the circumstances, and after careful perusal of the claims . . . I feel I cannot support the application in any way. (S9:83–84)⁴⁶

Once again we find the Secretary for Marine influenced by the apparent absence of any full blooded Maori and that none were now habitually living according to Maori custom. Even more surprising is his comment that they were not dependent for their sustenance *wholly* on sea products. Did he seriously believe that Ngai Tahu had ever lived only on sea food?

- 6.9.11 Mr Armstrong also provided the tribunal with full particulars of an application by the Otago tribal executive in August 1957 to have the Waikouaiti Maori reserve containing the cemetery and pipi beds situated at Karitane gazetted as a Maori fishing ground under the 1945 Act (S9:84–87). The tribal committee was concerned at the pollution of the pipi beds by sewage in the vicinity.

The application was referred to the Marine Department. The inspector of fisheries at Dunedin was instructed by the secretary for marine to note in his report the extent to which the pipis were taken by Europeans, the location of the sewerage discharge and to ascertain the number of Ngai Tahu “around Karitane (living as Maori and *not* as Europeans) . . .”(S9:85) (emphasis in original)⁴⁷

The Health Department warned that it was unlikely the pipi beds could ever be restored to a reasonable natural state for unqualified approval.⁴⁸ The Minister of Marine subsequently informed the secretary of the Otago tribal committee that the Health Department in conjunction with the local authority was taking steps to mitigate the pollution.⁴⁹

Notwithstanding this problem, the tribal committee persisted in its attempt to persuade the minister to gazette the reserve as requested. The committee evidently felt it would have the authority to bring pressure to have the pollution stopped. The futility of its various representations was perhaps unwittingly revealed by the Minister of Marine in a letter of 21 April 1958 to the committee secretary which appears to have concluded the matter. After dealing with various issues he wrote:

You are in error in assuming that Maori Fishing Reserves have been gazetted elsewhere. To my knowledge no such reserves have been created, anywhere in New Zealand. Indeed, to do so, would be undesirable, in that one section of the public would be debarred from a privilege another section enjoyed. There are certain areas where the commercial taking of shellfish is totally banned. This ban, however, applies equally to Maori and European, and both can take their legal quota for their own use.

I am still of the opinion that the creation of a Maori Fishing Reserve at Karitane is neither expedient nor necessary. (S9:87)⁵⁰

In effect the minister was saying that notwithstanding s33 of the Maori Social and Economic Advancement Act 1945 which expressly authorises the creation of fishing reserves for the *exclusive* use of Maori, no fishing

reserves would be created because it was “undesirable” that one section of the public should be debarred from a privilege another section enjoyed. So much for Maori fishing rights guaranteed by article 2 of the Treaty. Not even a very limited statutory recognition of such rights would be implemented by the Crown. If the Crown did not agree with the law it would refuse to give effect to it. Yet article 3 of the Treaty extends to Maori the Crown’s royal protection and all the rights and privileges of British subjects.

6.10 Summary

We now briefly note the principal matters which emerge from our discussion of the commercial fishery in the period 1908–1982.

6.10.1 *Ngai Tahu involvement in the sea fishery*

- Throughout this period Ngai Tahu continued either individually or in family groups to fish for their sustenance and to meet the demands of tribal occasions;
- over time and more particularly in recent years through a combination of over-fishing, pollution and faulty management by the Crown the previously bountiful supplies have been greatly diminished. As a consequence Ngai Tahu have found it increasingly difficult to take sufficient kai ika and kai moana for their own consumption and that of their guests;
- the advent of steam trawling and, later, Danish seining impacted seriously on sea fisheries in coastal waters including various bays and harbours where Ngai Tahu traditionally fished;
- individual Ngai Tahu continued to fish commercially throughout this century. The somewhat fragmentary available evidence suggests their involvement for much of this period was significantly less than the increasing numbers of non-Maori who took up commercial fishing;
- David Higgins’ assessment of individual Ngai Tahu involvement in the South Island fishery in 1988 shows that Ngai Tahu owned 40 percent of all fishing vessels, and that 25 to 30 percent of all crews were Ngai Tahu. The Ngai Tahu workforce in fish processing plants and in all aspects of the Bluff oyster fishery was between 60 and 70 percent;
- these figures represent only a small part of the overall southern commercial fishery as the great bulk of the southern fish catch is taken in offshore waters. There is only a very small Ngai Tahu presence in the offshore fisheries. They are very largely confined to small scale fishing throughout the continental shelf and inshore waters;
- virtually all the present Ngai Tahu commercial fishers descend from Pakeha whalers and have an unbroken family history of involvement in the fishery since the collapse of whaling in the early 1840s;
- the loss of their land and consequential impoverishment of the Ngai Tahu people has had a two-fold effect. It put an end to the involvement of the Ngai Tahu tribe or the various hapu in commercial fishing sometime before the end of the 19th century. Secondly, it resulted in

only those individual Ngai Tahu who inherited capital in the form of boats and fishing gear from their Pakeha whaling antecedents being able to participate in the commercial fishery this century; and

- as a consequence Ngai Tahu as a tribe has not had any involvement in the southern commercial fishery for at least the last one hundred years and almost certainly for longer.

Continuation of Crown control of the fisheries

6.10.2 This was achieved by various legislative measures and increasing administrative involvement. In addition the Crown proved highly successful both in defending proceedings brought by Maori to assert their Treaty fishing rights and in prosecuting Maori for alleged fishery offences. In 1986 the judicial tide turned in favour of Maori who since then have enjoyed a number of successes in the courts.

6.10.3 ***Legislation 1908 to 1982***

- the Fisheries Act 1908 remained in force subject to some amendments until repealed and replaced by the Fisheries Act 1983. Relatively minor additions were made in 1912 and 1923, the first significant change being in 1945;
- in 1937 government concern at problems facing the industry along with longstanding concerns about the depletion of fish stocks as a result of trawling led to the first major inquiry into the state of New Zealand fisheries and the fishing industry;
- the inquiry confirmed that depletion of certain fishing grounds had recurred and emphasised the need for more effective conservation measures. The Committee recommended a new form of restricted (limited) licensing;
- accordingly a new regime, initially implemented under the Industrial Efficiency Act 1936, saw the number of permissible fishing vessels being restricted. The previous practice whereby anyone who wished to fish could do so subject to registering the vessel was abandoned. The 1945 amendment to the Fisheries Act continued the 1937 scheme by prohibiting the use of a boat for commercial fishing unless it was registered and the boat owner was granted a licence by the Sea Fisheries Licencing Authority;
- neither the 1937 Committee of Inquiry nor the legislation which implemented its recommendations had any regard to Maori Treaty fishing rights;
- legislation has been in place since 1892 for setting aside exclusive oyster-fisheries for Maori; the most recent provision being in 1965. No such reserves have been made for Ngai Tahu and only a few in the North Island;
- section 33 of the Maori Social and Economic Advancement Act 1945 replaced the earlier 1900 and 1903 Maori Councils Act provisions with minor changes. Exclusive Maori fishing grounds could be reserved on the recommendation of the Minister of Marine. No such reserve was created despite many requests. The provision intended

The Crown Maintains Control of the Fisheries 1908 to 1982

to benefit Maori was totally undermined by administrative and political intransigence;

- the advent of improved technology and the arrival in 1959 of Japanese fishers in New Zealand waters led government to institute a Parliamentary select committee enquiry. It met in 1962 and recommended the abolition of the restricted licensing system. Government accepted this advice and passed the Fisheries Amendment Act 1963;
- the 1963 Act substituted fishing permits for licences. Unlike the licences, permits were available on demand. Methods of fishing and the kind of fishing gear which could be carried on boats were controlled however. These measures it was thought, would be sufficient to conserve resources;
- with restrictive licensing abandoned the seas were open to all who sought to go fishing and could afford to do so. Maori Treaty fishing rights were ignored;
- the Territorial Sea and Fishing Zone Act 1965 established a nine mile fishing zone outside the three mile territorial sea. This followed concern at the time of delicensing over the increased operations of foreign fishing vessels. From the end of 1970 only domestic fishing vessels could work within the territorial sea;
- in the late 1960s and early 1970s Russian, Japanese, Taiwanese and Korean fishers comprising a fleet of some 130 vessels were in and around New Zealand waters taking very large catches;
- the Territorial Sea and Exclusive Economic Zone Act 1977 gave New Zealand power to control conservation and management of resources out to a limit of 200 miles of New Zealand. Again, there was no recognition of any Maori Treaty rights;
- while the 1977 Act, accompanied as it was by government incentives, encouraged new entrants in fisheries many found it difficult to succeed offshore. They returned to inshore waters and subjected these waters to intolerable pressures leading to serious overfishing. From the late 1970s commercial catches fell dramatically; by 1982 it was apparent that remedial action was necessary. The result was a new Fisheries Act in 1983; and
- a 1972 amendment to the Fisheries (General) Regulations 1950 permitted the taking of the more common shellfish in excess of the normal limits by Maori for use at a tangi or hui. This provision is now in regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986. The approval of a Maori community officer is required as to quantity and location. Unlike the 1945 exclusive fishing reserve provisions, this regulation has not been sabotaged by the administration.

6.10.4 *Litigation 1908 to 1982*

- the failure of Maori in the nineteenth century to obtain any permanent recognition of their Treaty fishing rights through Parliamentary petitions or direct appeal to government led them to resort to the courts;

- these efforts met with some success in 1910 and 1912 but were fatally defeated by the 1914 Supreme Court decision in *Waipapakura v Hempton* which ruled that s 77(2) of the Fisheries Act 1908 conferred no legal rights and protected only those rights expressly conferred by statute. Treaty rights it was said had no legal validity unless recognised by an Act of Parliament. The Crown took no steps to give statutory recognition to Maori Treaty fishing rights;
- Maori turned to the courts in the hope of establishing their claims to the ownership of lakes, rivers and the foreshore. While some limited success was achieved by out of court settlement in respect of lakes, all other claims failed;
- not until the case of *Te Weehi* in 1986 in which the court gave effect to the saving provision in section 88(2) of the Fisheries Act 1983 did Maori have some success. In that case certain non-exclusive customary Maori fishing rights exercised in a customary way were recognised in law and upheld; and
- growing concern expressed at various hui in the last three decades by the New Zealand Maori Council and Maori leaders at the depletion of the fisheries is recorded in the *Muriwhenua Fishing Report*. The tribunal noted that at the last hui in 1985, Maori thinking had changed little from that of the rangatira who assembled at Orakei in 1879. Instead of identifying particular fishing grounds for reserves, tribes were defining their boundaries and claiming fishing rights along entire coasts: "It was control that was mainly talked of, not the exclusion of the public. Once again, it was a matter of mana."

Ngai Tahu protests and claims and Crown reaction

6.10.5 In 6.8 we have given representative examples of protests, whether by petition or otherwise, made by Ngai Tahu this century concerning their fisheries. These are taken from the evidence of Crown historian David A Armstrong, the only witness to deal with such matters. His information came largely from a perusal of the relevant files of the marine and Maori affairs departments and from Parliamentary journals and debates:

- all of the instances of complaints or protests discussed by us relate to inland water fisheries. None relate to sea fisheries. Nor do any of the other instances given by Mr Armstrong in his evidence relate to sea fisheries. All cover various lakes, notably Waihora, Wairewa, Onaku, and Tatawai or various rivers such as Arahura, Waihao, Waitaki, Ashley and Jacobs;
- but following the passage of s 33 of the Maori Social and Economic Advancement Act 1945 strong interest was shown by a number of Ngai Tahu hapu through their tribal committees in obtaining the reservation of fishing grounds for their exclusive use. Their chief concern was to ensure access to shellfish. Applications by tribal committees at Rapaki, Otakou, Awarua and Karitane were all declined by the Minister of Marine on the advice of his department. Applications by tribal committees in the North Island met a similar fate. Not a single request was granted throughout the period 1945 to 1962 when the provision was in force;

- It is apparent that the Marine Department, with the agreement of successive ministers of the Crown, resolutely set its face against granting any application by Maori for an exclusive fishing reserve. Among its reasons were that only one hundred Maori were involved (Rapaki); no Maori were living according to Maori custom (Otakou and Awarua); less than 12 Maori were full-blooded (Otakou) or none were full-blooded (Awarua); or none were wholly dependant for their sustenance on sea products (Otakou and Awarua);
- the one reason common to all the refusals was that to grant an exclusive fishing reserve to Maori would be unfair to the Pakeha or as one Minister of Marine said, it was undesirable that one section of the public should be debarred from a privilege another section enjoyed. The Crown's simple solution was to treat the law and the rights conferred on Maori by s33 of the 1945 Act with contempt by refusing to consider applications on their merits;
- the Crown's own historian David Armstrong put the matter concisely when he told us: "In general terms Marine Department policy seems to have been that Ngai Tahu possessed the same rights, but no more than pakeha." (S9:94)

So much for the Treaty of Waitangi.

6.11 **Conclusions**

It does not follow from the lack of involvement of the Ngai Tahu tribe in commercial fishing this century that they waived all Treaty fishing rights or their rangatiratanga over their fisheries. The reason they were not so involved but confined their activity to fishing for their personal needs and those of their guests is directly attributable to the Crown. As our Ngai Tahu Report 1991 makes clear, by serious and sustained breaches of its Treaty obligations the Crown, due to their massive land acquisitions from Ngai Tahu rendered them virtually landless and without any economic base. Given their impoverishment, Ngai Tahu were unable to maintain their commercial fishing activities so evident before the land purchases were completed in the 1860s.

It is therefore understandable that having been reduced to fishing for their own personal consumption, their recorded protests and complaints concentrated on inland fisheries with particular concern for access to eels and whitebait. Many invoked the guarantee of their fishing rights under the Treaty. Inland waters were more readily accessible and, scattered as they were across the entire Ngai Tahu territory, they served as a major source of sustenance especially in the inland areas. However when pressure from non-Maori on shellfish resources became evident in the early 1950s it is notable that various Ngai Tahu hapu applied to have exclusive fishing grounds reserved under the 1945 Act. This Act was a limited recognition by the Crown of Maori, including Ngai Tahu, Treaty fishing rights. Yet even this right was totally subverted by the Crown because to have given effect to it would, it was thought, have been seen as the Crown not treating all sections of the community equally. A similar

argument was raised by the Crown in the *Te Weehi* case. But it was not found persuasive by Williamson J who observed:

I am conscious that the same argument can be made whenever any person or class of persons are exempted from particular provisions. Viewed in a more general way, *such inequality between persons may indicate an overall justice rather than an injustice.* (Emphasis added)⁵¹

- 6.11.1 Throughout the period 1908 to 1982 the Crown continued through its various legislative measures to act on the assumption that it was entitled to disregard Maori fishing rights under the Treaty. It readily accepted, and saw no need to correct by legislative action, the Supreme Court decision in the 1914 *Waipapakura* case. Its ruling that the saving provision in s77(2) of the 1908 Fisheries Act conferred no legal rights and that Treaty rights had no legal validity unless recognised by Act of Parliament had remained the law until questioned in the *Te Weehi* case. The predecessor to the 1908 provision, s8 of the Fish Protection Act 1877, had until its repeal in 1894 given such recognition. It is difficult if not impossible to reconcile with good faith on the part of the Crown the repeal of the section and its replacement in 1903 by a watered down provision – the subject of the *Waipapakura* case and the subsequent omission of the Crown to reinstate the original provision. Not only in *Waipapakura* but also in later cases did the Crown strenuously oppose Treaty based claims advanced by Maori, thereby denying rather than affirming Maori Treaty rights.
- 6.11.2 That Maori were not to be treated differently, notwithstanding article 2 of the Treaty, was made abundantly clear by the Crown's refusal to deal in good faith with applications by Maori for exclusive reserves as provided for in the Maori Social and Economic Advancement Act 1945. This provision went a very little way towards recognising Maori Treaty fishing rights. But the Crown declined not only all Ngai Tahu applications but those of all other tribes throughout Aotearoa. Virtually the only provision for the benefit of Maori which has not been sabotaged by the administration is the 1986 regulation which authorises a Maori community officer to grant a permit to Maori for the taking of the more common shellfish in excess of the normal limits for use at a tangi or hui.
- 6.11.3 In both the restricted licensing regime which it imposed between 1937 and 1962 and the virtually free-for-all permit system which replaced it in 1963, the Crown made manifest its unfettered power and intention to regulate or deregulate sea fishing as it saw fit. Maori were never consulted. Their Treaty rights were disregarded. The very few concessions made to Maori were insignificant and administered by a department of state hostile to any differential treatment between Maori and non-Maori. Throughout much of this period the Crown acted on the premise that it had an untrammelled right to regulate or dispose of the fisheries as it saw fit. It took no worthwhile steps to protect Ngai Tahu sea fisheries.

Against this background it is little wonder that Ngai Tahu, dispersed and demoralised as they were, saw little purpose in publicly protesting the intrusion into their sea fisheries by non-Maori commercial vessels, when as a tribe they lacked the resources to engage in the fishery other than

for their own personal use.

- 6.11.4 There is no evidence that in the period 1908 to 1982 Ngai Tahu ever expressly waived their treaty rights to their fisheries. Nor is there evidence that in this period they actively protested the failure of the Crown to protect their interest in the sea fishery. They did, unsuccessfully, invoke their treaty fishing rights in various cases concerning their inland water fisheries. *Inspector of Fisheries v Ihaia Weepu and Others* (1956) (6.7.3), which involved valuable rights to whitebait in the Arahura river, was one such case.

We believe that in this period there was no material change in the Ngai Tahu position as to their sea fisheries from that which we recorded in the concluding paragraph of our last chapter. There we found:

... a willingness on the part of Ngai Tahu that non-Maori should be able to share the resources of the sea provided adequate protection is given to Ngai Tahu fishing rights guaranteed by the Treaty. Implicit in this approach is an assertion by Ngai Tahu of the priority which attaches to their Treaty fishing rights accompanied by a recognition that, provided these are respected and protected, non-Maori should be free to engage in fishing in the Ngai Tahu rohe. We are unable to distinguish in this regard between commercial and non-commercial fishing by either Maori or non-Maori. (5.19.17)

We make a similar finding for the period under consideration in this chapter.

References

- 1 AJHR 1913 H-15B p3
- 2 *ibid* p4 – at that time Ayson was the only salaried fisheries official
- 3 *ibid* p8
- 4 AJHR 1921 H-15 p 18; S10:164
- 5 AJHR 1925 H-15 p 29; S10:291
- 6 AJHR 1932 H-15 p 14; S10:422
- 7 AJHR 1938 H-44 P 27; S10:485
- 8 AJHR 1962 I-19 pp31–32, 73
- 9 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) (Muriwhenua Fishing Report)* 1988 p 112
- 10 Law Commission Preliminary Paper No9 *The Treaty of Waitangi and Maori Fisheries* (Law Commission Report) pp 176–177; see also similar effects mentioned in the *Muriwhenua Fishing Report* pp 101–102
- 11 see comments in the *Muriwhenua Fishing Report* p 153
- 12 *ibid* p 105
- 13 *ibid*
- 14 *ibid* pp 96–99 and pp 105–109
- 15 *ibid* p 98
- 16 *ibid*
- 17 *Muriwhenua Fishing Report* p 99
- 18 *ibid* p 105
- 19 *ibid* p 106 for further details

- 20 ibid
- 21 ibid p 107
- 22 ibid p 109
- 23 NZPD 1912 vol 161 p 922; S10:217
- 24 AJHR 1919 I-3 p 12; S10:277–280
- 25 *Ngai Tabu Report 1991 (Wai 27)* Waitangi Tribunal Report: 3/4 WTR p 164
- 26 M1 2/10/38 NA; S10:390–391
- 27 AJHR 1927 I-3 p 8; S10:368–371
- 28 ibid
- 29 M1 2/10/40 NA; S10:395–413
- 30 Le 1/1931/11 NA; M1 2/12/517 NA; S10:568–581
- 31 ibid
- 32 ibid
- 33 MA 1931/292; S10:582–585
- 34 ibid
- 35 NZPD 1933 pp 883–884; S10:586–587
- 36 M1 2/12/663 NA; S10:837
- 37 ibid; S10:833
- 38 ibid; S10:831
- 39 ibid; S10:829
- 40 ibid; S10:832
- 41 ibid; S10:837
- 42 M1 2/12/667; MA 43/1 pt 2; S10:840
- 43 MA 43/1 pt 3 NA; S10:846
- 44 M1 2/12/667; MA 43/1; S10:845
- 45 ibid; S10:867
- 46 ibid; S10:864
- 47 M1 2/12/696 NA; S10:888
- 48 ibid; S10:886
- 49 ibid; S10:883
- 50 ibid; S10:869
- 51 [1986] 1 NZLR 680, 693

Chapter 7

From Crown Regulation to Crown Disposition of Rights to the Sea Fisheries

7.1 Introduction

By the early 1980s it had become apparent to government officials, the industry and Maori that the inshore fisheries were being seriously depleted. As MAF official Robert Cooper told us:

The decline in the yields of the major species placed many fishermen and fishing companies under financial pressure. Coastal communities heavily dependent on fishing became at risk. Recreational and traditional Maori fisheries began to suffer as the fishery resource became further depleted. (P13:24)

As a holding measure the government imposed a moratorium on new entrants to the inshore fishing industry in 1982 while the nature and extent of the problems in the fishery were investigated.

7.2 The Fisheries Act 1983

This new Act followed the review instigated in 1982. It placed heavy emphasis on the need to conserve and enhance depleted resources and to bring a greater measure of economic security to those in the industry. We mention only the principal measures designed to achieve these objectives:

- it provided for the development of a comprehensive and integrated approach to managing fisheries by way of Fishery Management Plans for areas designated as fishery management areas (part I). The Director-General of Agriculture and Fisheries (MAF) was obliged to consult and have regard to the views and responsibilities of various organisations including Maori in the preparation of a fishery management plan;
- part III enabled any part of New Zealand fisheries to be a controlled fishery for the purposes of the management or conservation of the fishery or the economic stability of the industry. It could be defined by reference to species or class of fish, the areas to be fished and the persons who could engage in the fishery. The minister could set a maximum number of licences to be granted in respect of such a fishery. Licences could be granted only to commercial fishermen;
- commercial fishermen were defined in s2 of the Act as meaning in the case of an individual, a person who was engaged or intending to engage in fishing for sale throughout the year, or a specified part of the season of each year, and who could satisfy the director-general that during such time as he engages in fishing for sale he relies

wholly or substantially on his fishing activities for his income. As we will shortly relate, the definition was to result in a substantial number of part-time fishers being excluded from commercial fishing;

- under part IV of the Act, commercial fishing vessels were required to be registered and a fishing permit was necessary to engage in commercial fishing. Permits could be restricted to specific areas, species, quantities, methods, types of fishing gear and periods of time as fixed by the director-general;
- s88(2) provided that nothing in the Act shall affect any Maori fishing rights. The word “existing” which appeared in the 1908 Act was omitted; and
- s89(1) empowered the making of regulations generally regulating fishing in New Zealand and New Zealand fisheries waters covering a wide range of specific matters and including paragraph (g): “Prescribing a quota or total allowable catch for any fish, or in respect of any fishery or method of fishing, in any part of New Zealand fisheries waters; and authorising the Minister to allocate any such quota or total allowable catch to such commercial fisherman or fishermen as he may specify . . .”.

This provision was later to be superseded by a statutory scheme in 1986. We were informed by Mr G C Billington, Deputy Chief Executive of the New Zealand Fishing Industry Board, that in 1983 the individual transferable quotas (ITQs) were allocated on the basis of fishing company investment and catch history in deepwater fisheries, and initially were allocated for a ten year period only for seven species. Nine New Zealand companies were involved in this initial allocation in 1983 (Z18:10). Provision for royalties was made in the Fish Royalties Act 1985.

Removal of part-time fishers

7.2.1 The restricted definition of commercial fishermen caused much heart-burn among Maori and non-Maori fishers who overnight were excluded from any further commercial fishing. MAF adopted a set of criteria to be applied to applicants seeking commercial fishing vessel registration and commercial fishing permits. These were stated in evidence from Neil Martin, then a MAF officer, to be:

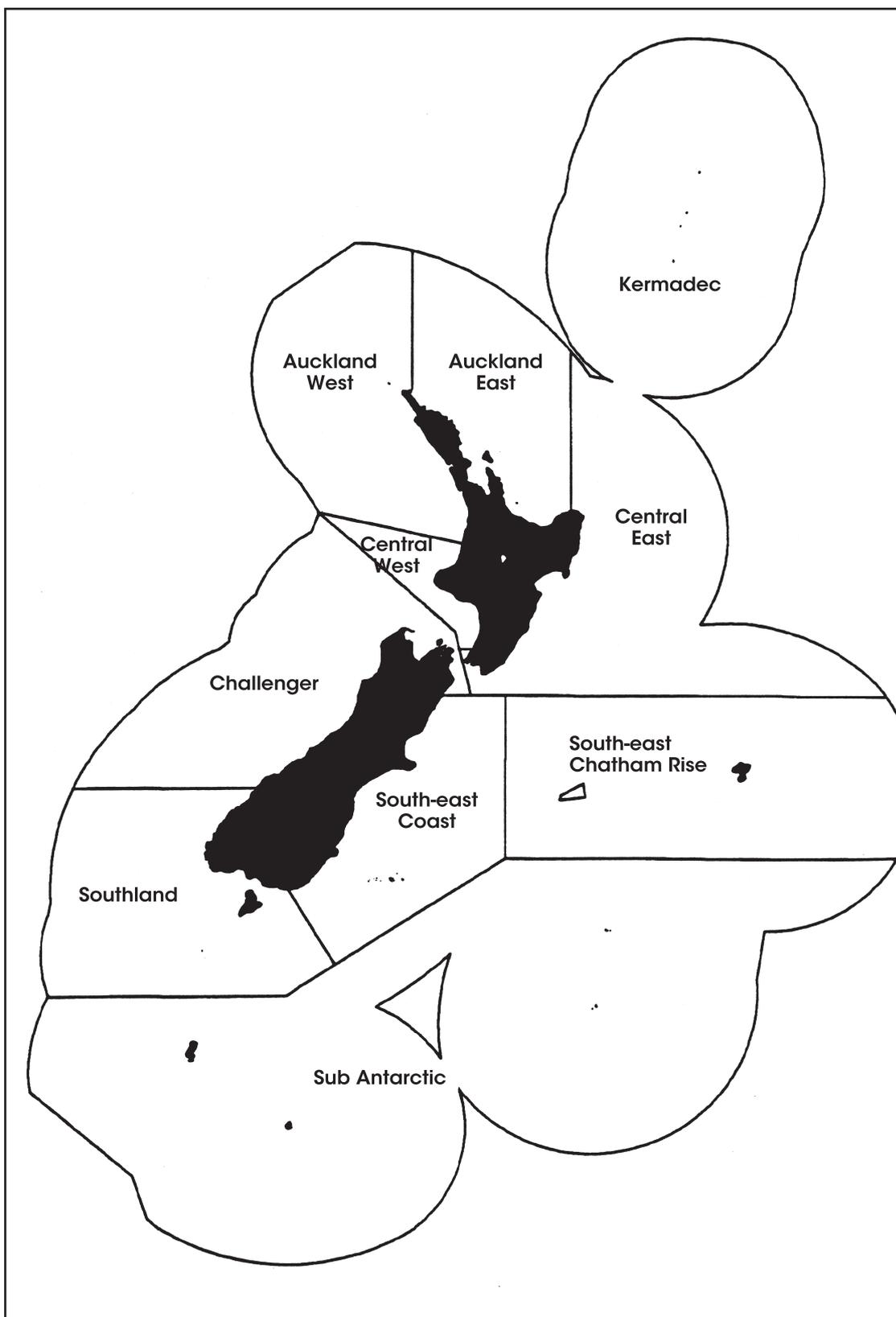
- that during 1982 the fisher had caught the equivalent of \$10,000 of fish, or
- the fisher held a controlled fishery licence, or
- approval had previously been granted in respect of the 1982 moratorium provisions and had been used or only recently granted, or
- the fisher earned at least 80% of non-investment income from fishing, or
- the fisher held a permit for the period 1 January–30 September 1983 and fishing income was a vital part of the fisher’s annual subsistence income (R32:2).

7.2.2 Mr Martin pointed out that the effect of this policy was to reduce the number of permits by removing unused and under-used permits from the fishery. The policy is commonly referred to as the removal of part-timers (R32:2). Fishing industry witness Mr Billington told us the result of this policy was that between 1500 and 1800 part-time fishers were excluded from the industry. Mr Billington considered that while the change did not have a great impact on the total catch nevertheless it was regarded as a reasonable first step in addressing a very difficult problem (Z18:13).

Mr Cooper from MAF explained that the 1982 moratorium on the issue of new commercial fishing permits remained in effect until 1986. This measure, along with the extensive cancellation of the permits of “so-called part-time fishermen” which occurred in 1983–1984, were, in Mr Cooper’s judgement, the most significant events affecting Maori involvement in the fishing industry (R23:6). Mr Martin produced statistics indicating the number of small scale fishers who may have been excluded as a result of the 1983 Act in the Ngai Tahu claim area. The information was collated for ports within the Ngai Tahu claim area and showed the total number of fishers excluded as being 137. The total tonnage for all species for 1983 was 91 tonnes (R32:6).

The tribunal has no information as to how many of the 137 or so part-time fishers excluded were Ngai Tahu. But given our knowledge of the life-style of many Ngai Tahu who relied on seasonal work and the level of objections to this policy which we heard, we believe the proportion of Ngai Tahu would have been substantial. Ironically, Crown witness Neil Martin acknowledged in hindsight that had government been able to introduce the ITQ policy in 1983 in its present form (as applicable to inshore as well as deep-sea fisheries), the removal of part-timers would not have been necessary. In the light of later information it was concluded that the policy should have been restricted to those fishers not dependent on fishing, that is to the truly part-time fishers (R32:4).

7.2.3 This belated concession will be cold comfort to those many Ngai Tahu fishers who were victims of the part time removal policy. The tribunal heard detailed evidence from William Goomes a witness called by the claimants, who was a victim of the policy while living in the Chatham Islands (H5:25–31). According to David Higgins a considerable number of Ngai Tahu paua fishers suffered in the same way around the east and southern coasts of the South Island which constitute 70 percent of the New Zealand paua fishery (J10:63). Mr Goomes, along with a colleague Sig Kamo, pioneered the selling of paua meat as a commercial product in the Chatham Islands in 1968. By 1971 five groups of Chatham Island divers were working in their own areas. Between 1972 and 1975 a further 12 divers started. All were Chatham Islanders and most were Maori. Mr Goomes was himself of Ngai Tahu. By the late 1970s the processing firms started reducing prices to the point where by 1980 Mr Goomes was unable to support his family on the prices being paid. He did not renew his permit and instead was obliged to go odd-jobbing on farms. A year or two after he had let his permit lapse MAF introduced what Mr Goomes called “the 80 percent rule”. He decided he would give paua diving one



Map 7.1 New Zealand Quota Mangement Areas, from the New Zealand Fishing Industry Board (NZFIB)

more try but was refused a fresh permit because none of his income in the previous 12 months came from paua. Having failed to regain a permit for paua harvesting Mr Goomes realised that after working for 25 years in the fishing industry there was no future for him in the Chatham Islands. He reluctantly moved to Nelson. He told us:

I am currently employed full-time by Sealord Products Nelson as a factory hand on one of their deep sea trawlers. I like the job, but Nelson is not the Chatham Islands, and I would dearly love to go back to the Chathams. I cannot do so because I cannot get into the fishing industry there. The ITQ system and the 80% Rule which went before it mean that I could not now get a permit or ITQ for paua. To me it seems quite unfair that, as a pioneer of the paua industry in the Chatham Islands, I cannot now get a permit or ITQ which will allow me to continue in the industry which I helped found (H5:31).

New Zealand Maori Council representations

7.2.4 Submissions were made by the New Zealand Maori Council on the 1983 Fisheries Bill before its enactment. The council submitted that the purpose and scope of the bill was too narrow. Among the matters it unsuccessfully sought to have included in the Bill were:

- formal recognition of the Treaty of Waitangi;
- the rahui concept as a basic principle;
- special licences to be issued to Maori authorities under the New Zealand Maori Council for the gathering of fishery foods on the occasion of rites of passage (birth, baptism, honours, memorials, weddings, death) for the purpose of a hakari;
- that s33 of the Maori Social and Economic Advancement Act 1945 be re-enacted as part of the Fisheries Act;
- provision for fishing licences to be granted to specific groups of Maori (eg Maori incorporations or trust boards);
- a right of appeal by Maori authorities against the issue of special permits in traditional fishing areas; and
- District Maori councils to be consulted before the declaration of closed seasons. (Z45:appendix a:23–24)

Among points made by the four Maori Members of Parliament, who all strongly criticised the Fisheries Bill, were the lack of recognition of the Treaty of Waitangi, the discretionary nature of Maori representation on fishery management advisory committees and a discretionary power only to seek Maori opinion on fishery management plans (Z45:appendix a:25). It is not surprising that Maoridom found the new legislation unsatisfactory.

7.3 Towards a Comprehensive Quota Management System

From the time of its enactment it appears none of those most concerned, that is the government, Maoridom or the fishing industry, considered the 1983 Act adequately dealt with the problems confronting both inshore

and deep water fisheries. Counsel for the industry, Mr Castle, submitted that from a practical point of view the 1983 Act was recognised as failing to provide for the most economically efficient conservation and management controls. Both the deep water resources and inshore stocks were under pressure.

- 7.3.1 Mr I N Clark, MAF Chief Fisheries Economist, described what came to be known as the deepwater trawl policy, which has a quota system inaugurated in 1982–1983. Species allocations were made among nine separate companies including two consortia of individual companies. Quota allocation was restricted to firms with at least 75.1 percent New Zealand ownership and quota holders were required to process 35 percent of the total deep-water catch onshore in New Zealand. Mr Clark told us both the participants and government were in general satisfied with the results of the deepwater policy and the programme was merged with the inshore ITQ programme when that was adopted in 1986 (R21:8).
- 7.3.2 The proposal for a quota management system for the inshore fishery was put forward by government in 1984. It was widely discussed, initially with fishing industry leaders, and later at a series of public meetings. As the *Muriwhenua Fishing Report* notes the 1984 discussions were preceded in 1983 by the publication of a document entitled “Future policy for the inshore fishery – a discussion paper”.¹ This paper summarised the state of fisheries and outlined options for future management, including the quota management system. It was discussed at 12 public meetings held throughout New Zealand in September 1983. The Muriwhenua tribunal noted that the meetings were widely publicised and attended by commercial fishers (including some Maori), other interested groups and the general public.²

During a three week period at the end of 1984 and the start of 1985, three MAF teams attended some 65 public hearings throughout the country during which fishers were briefed on the proposals for a quota management system. The MAF teams also sought to obtain the fishers’ reactions to the new proposals (R21:8). It appears the input from Maori at these meetings was minimal, the reasons for which are explained in the *Muriwhenua Fishing Report*.³ What was totally lacking was any discussion with Maori tribes. As the Muriwhenua tribunal put it:

the evidence was clear that at the crucial time, the Ministry had not been inclined to consult with Maori interests in their fisheries in any tribal or sub-tribal way. Marae meetings were suggested but were never held.⁴

- 7.3.3 In 1984 following the passing of the Fisheries Act 1983, MAFFish established five Fishery Management Advisory Committees. Mr Cooper recognised however that Maori and other non-commercial representation was inadequate and the ministry undertook a review. As a result tribal representation was achieved.
- 7.3.4 The development of fishery management plans provided for in the 1983 Act resulted in early drafts being produced in 1984–1985. These focused on the inshore finfishery and did not include other fisheries or a Maori

dimension. Development of these plans was largely halted in late 1985 while the quota management system was developed (Z45:7). Mr Cooper suggested that the period between November 1985 and September 1987 should be viewed as a period of consultation “at the regional but not quite tribal level” (Z45:8). While he said that the MAFFish Maori working group was aware of the need to consult with Maori at the tribal level, it lacked a tribal organisational focus. In default it utilised mainly the networks of the New Zealand Maori Council and Maori Womens’ Welfare League. He went on to point out that by contrast a major exercise was held jointly by J Elkington and MAFFish officers with Ngai Tahu. These discussions were, however, held after the 1986 amendment authorising the quota management system was passed. Nor did they relate to the quota management system. We will discuss them in the context of taiapure arrangements under the Maori Fisheries Act 1989.

- 7.3.5 In November 1985, at the initiative of the New Zealand Maori Council, a major national fisheries hui “Te Runanga a Tangaroa” was held at Takapuwhia marae. According to Mr Cooper, Maori aspirations and issues were identified for government and MAFFish. The Maori fisheries programme proposed by MAFFish was a direct result of discussions following the national fisheries hui and consultations with the New Zealand Maori Council, its district councils and other Maori organisations in 1986 (Z45:8–9).

The claimant H R Tau told us that he attended the November 1985 fisheries hui on behalf of his Runanga o Ngai Tuahuriri. He told the hui that Ngai Tahu fishing rights stemmed from Kemp’s deed as well as the Treaty and that Ngai Tahu would therefore deal directly with the Crown on its own behalf. Arising from this hui he said the MAF representative agreed to contact him “with the intention of discussing Ngai Tahu fishing rights to Tribal structures as opposed to Maori Council structures”. This, he said, did not eventuate (J10:27–28).

We conclude that the input from Maori, including Ngai Tahu, at the tribal level into the discussions leading to the passage of the Fisheries Amendment Act 1986 was virtually non-existent. MAFFish simply had no experience in consulting with Maori at this most important and basic level.

7.4 **The Fisheries Amendment Act 1986**

Mr Clark advised us that following the widespread discussions from late 1984 to early 1985 on the proposals for a quota management system, the government decided in May 1985 to start to manage the inshore fisheries under individual transferable quotas (ITQs) from October 1985. But problems in making quota allocations to individual fishers forced a postponement of the starting date to October 1986 (R21–8). Obviously the government had made its mind up on the issue some six months prior to the national fisheries hui held in November 1985.

- 7.4.1 While the 1986 Fisheries Amendment Act does not lack complexity, its essential features may, at the risk of over-simplification, be described as having the following important characteristics. These appear in a new

part 11A of the Fisheries Act 1983. The section references are to the new sections inserted in part 11A:

- the minister, after consulting the Fishing Industry Board, may specify the quota management areas and species to be subject to the quota management system (QMS) established under part 11A as from 1 October 1986 (s28B);
- the minister, after allowing for the Maori traditional, recreational and other non-commercial interests in the fishery may specify the total allowable catch (TAC) for all specified species and management areas (s28C);
- the TAC, “with respect to the yield from a fishery means the amount of fish . . . that will produce from that fishery the maximum sustainable yield as qualified by any relevant economic or environmental factors, fishing patterns, the interdependence of stocks of fish, and any generally recommended sub-regional or regional or global standards” (s2);
- the minister, after consulting the Fishing Industry Board, may reduce any TAC for any area in respect of any species where the fish stock has fallen significantly below the level that can sustain the TAC. This reduction may be achieved by reducing all ITQs on a proportionate basis, in which case compensation is payable by the Crown for the fair market value of the ITQ (s28D). We note that whereas under the 1986 provision ITQ were expressed by tonnage, the proportionate quota structure converted the holding into a percentage or proportion of the total tonnage of a given TAC. As counsel for the fishing industry noted, these changes, including the repeal of the Crown’s obligation to pay compensation, meant that while ITQ holders did not suffer a reduction in their proportion or percentage of the TAC, their effective holding was reduced because the TAC was reduced. We understand that these changes to the 1983 Act followed negotiations between the fishing industry and the Crown and the signing of an “Accord” in September 1989. In October 1990 the industry issued proceedings against the Crown in connection with the “Accord” (AA43:23–24). We believe these may have recently been settled;
- the director-general of MAF allocated a provisional maximum individual transferable quota (PMITQ) for species in each management area. This was based on the proportion of the commercial catch of each person in the area of that species in relation to the total commercial catch in that area of that species in specified previous years (s28E);
- the director-general then fixed the guaranteed minimum individual transferable quotas (ITQs) – if necessary by a reduction on a pro-rata basis of all the PMITQs so that the total of the ITQs does not exceed the relevant TAC (s28F);
- the holders of an ITQ are entitled to take specified fish within the quota area in accordance with their fishing permit (s28K). No one else may take for sale any such fish (s28ZA);

- holders of ITQs are free to permanently transfer them to any other person or to lease them (s28Q);
- ITQ holders are required to pay an annual resource rental for all quota at a rate fixed for each species. The rental is payable whether or not the fish to which the quota relates is taken (s28ZC); and
- the Crown was empowered to purchase ITQ from holders who wished to leave the industry. This was done in order to further reduce the TAC in the interests of conservation.

7.4.2 The foregoing is a brief outline of the quota management system established under the 1986 Act. The Act provided an explicit legislative framework for the deepwater ITQ system introduced in 1983 and in addition extended the system to the inshore fishery. In addition to the original eight deepwater species, 21 inshore species were included. The principal purpose of the scheme was to control and if necessary reduce fishing effort so as to conserve fish stocks at a sustainable level by a system which would at the same time provide the most effective long term sustainable economic yield from the resource.

Mr Cooper for MAFFish described to us the effort made by government to overcome the major obstacle to the success of the scheme. This was the need to reduce commercial harvests very significantly. He told us that:

For some of the more important fisheries, commercial catches had to be reduced by more than 50% to ensure conservation and rebuilding of depleted stocks. The Government was concerned to minimise economic hardship to those who would inevitably have to reduce their commercial fishing activity and also to prevent social disruption in the many fishing-dependent communities.

Consultation with the fishing industry suggested that financial aid for the catching sector would assist where enterprises reduced their dependence on fishing, or chose to leave the industry altogether. A social impact study was also commissioned to examine the implications of the proposed ITQ scheme and to assess options for the amelioration of adverse consequences on small communities. For both individual fishermen and for fishing enterprises, government restructuring assistance was made available through a voluntary tendering scheme to purchase back quota rights, allowing each individual to determine their own level of catch reduction, or to leave the fishing industry. Both larger fishing enterprises and many individual fishermen chose to accept this assistance. A total of NZ\$45 million was paid out, and two-thirds of the catch reductions required for all species were achieved through this voluntary scheme. The commitment of the Government to reducing catches to sustainable levels necessitated some additional arbitrary reductions in fishermen's quotas in order to ensure the continuation of the resource (P13:25–26).

Mr Cooper noted that a major concern is the accurate scientific assessment of the potential production of fish stocks. Present research he said is deficient and ultimately the success of the strategy will depend on an improved fishery research capability and better scientific knowledge (P13:26). It is to be hoped that the recent acquisition of a new fishing

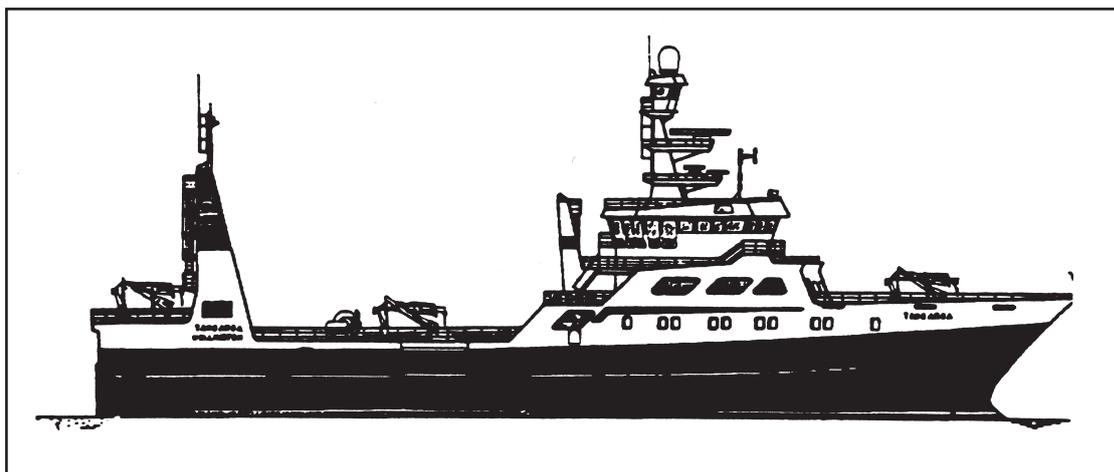


Figure 7.1 Tangaroa Fishing Research Vessel (courtesy of MAF Fisheries)

research vessel, the *GRV Tangaroa*, will materially assist in meeting this need (see figure 7.1).

7.4.3 The Muriwhenua tribunal in its 1988 report commenced its discussion of the QMS by saying:

(a) The Quota Management System provides the cornerstone of the modern fishing industry. It appears to be in fundamental conflict with the terms of the Treaty but nonetheless it has many meritorious features, and if an arrangement or agreement with Maori interests can be found, Maori concerns may well be accommodated within it.⁵

We agree with this statement. At the time it was written, the Muriwhenua tribunal had no idea that its report would have a very material influence on the passage of the Maori Fisheries Act 1989. As will be seen, that Act goes some way to recognising Maori Treaty fishing rights and to at least a partial accommodation of Maori concerns. The Muriwhenua tribunal's discussion of the QMS and its implications for Maori is almost entirely applicable to our consideration of the quota management system. At this stage we propose briefly to discuss Maori reaction to the 1986 scheme and to subsequent developments culminating to date in the Maori Fisheries Act 1989.

7.5 **Reaction of Maori to the Quota Management System**

In appendix 5 we reproduce the valuable discussion of the QMS in the *Muriwhenua Fishing Report*. Although it is primarily concerned with the Muriwhenua claim, it serves to articulate major concerns of Maori throughout New Zealand (as evidenced by subsequent proceedings issued in the High Court). It is evident that those concerns were shared by Ngai Tahu which has taken a leading role in the High Court litigation. We note here some of the main concerns of Maori about the QMS discussed in the *Muriwhenua Fishing Report*.

The importance of the scheme

- 7.5.1 The Muriwhenua tribunal had no reason to doubt that the QMS had many good qualities and was introduced for sound reasons. It was also made aware of much adverse criticism. It recognised the scheme to be important state policy. But if any aspects of the system were contrary to the Treaty its duty was to enquire if they could be remedied without affecting the overall strategy.

Because drastic action was required to halt and if possible reverse the serious depletion of fish resources, part-time fishers had their licences removed. Other fishers were paid out to retire.

The Muriwhenua tribunal found that most Maori fishers operated in a part-time or small way and were affected by the scheme. Some who had left fishing for a short time found they could not fish commercially again. Others who had hopes of starting were precluded.⁶

The property interest created

- 7.5.2 While conservation was the scheme's rationale, and the basis on which it was promoted, the Muriwhenua tribunal noted that the more radical feature of the scheme was the creation of a property interest in an exclusive right of commercial fishing:

From its initiation, the scheme had the facility to continue the policy of excluding small operators, and so to continually reduce the pressure on the overworked resource. To start with, those who fished a particular species were regarded as having a right to catch a given share, or quota, assessed according to their latest catch records. Where the sum of such quota exceeded the total that could be allowed, which was usual in the inshore fishery, the quota that each held was cut back pro rata. This left some of those at the bottom of the scale with quota that were too small. Those under a minimum figure were compulsorily purchased by the Crown.

Others chose to sell. It is an important feature of the system that individual quota can be readily transferred by sale, lease or licence. Thus the right to fish is given the characteristics of a property right. It is called an individual transferable quota (ITQ).⁷

The Muriwhenua tribunal found there to be some 1700 to 1800 quota holders, the average value of quota holdings being some \$600,000 with large holdings being held in the offshore fishery:

The initial quota holders did not purchase these rights. The [Muriwhenua] claimants graphically described it as a free gift of 'their' property to those who had destroyed their resource . . . The position will not be the same for future entrants however, they will need to buy in.⁸

The Ngai Tahu attitude to the quota management system is expressed in the following passage from an affidavit by Tipene O'Regan:

The true situation . . . is that the Crown first of all took away from Maori Tribes the fishery resources which in fact from time immemorial belonged to Maori, not to the Crown, and then the Crown went on to purport to give those resources, or the beneficial usage of them, together with tradeable property rights on an individual transferable basis of title, to other persons.

The true owners were thus deprived of their estate in fishery, which was transferred by main force of the Crown in its right of administration in government, and given away without fee or compensation to other commercial non-Maori interests. The recipients of this unearned and undeserved property and usage rights in fishery then proceeded, in many cases, to sell those rights handed out to them by the Crown, for money, and left "the industry".(AA16:11-12)

In another affidavit Mr O'Regan expressed the following view on behalf of Ngai Tahu:

12. We say that the assumption of Crown property rights in fish as distinct from a right to regulate, is a recent innovation, dating from the 1983 and 1986 Fisheries Acts introducing the Quota Management System and the allocation of ITQs to individual fishermen.

13. We did not feel the need to formally assert Rangatiratanga over sea fisheries, in the absence of any assertion by the Crown to the ownership of the sea fishery resources. There was until recently no hint that any Government would attempt, or that it could be legally possible, to alienate assumed property rights in sea fisheries into private hands. (AA12(d):annex ZA4:7)

Counsel for the fishing industry, in submissions to us, characterised as a "popular misconception" the view that those fishers who originally secured ITQ at the commencement of the QMS in 1986 "got them for nothing" or had them "gifted" (AA43:17). He submitted that while it is correct that no capital payments were made in consideration of the receipt of the quota, "quota was allocated according to the investment made in the industry by individual fishermen" (AA43:18). Mr Castle, the industry counsel, relied on statements by Mr P I Talley, President of the New Zealand Fishing Industry Association, to the effect that all allocations were made on the basis of what fishers had historically caught. Mr Talley contended that it was:

not unreasonable for someone who has fished for maybe 30 years to expect to be able to carry on fishing in the future. The historical basis of allocating (quota) reflected that reasonable expectation. To make someone buy the business they had been running in the past would have been unreasonable and would have ignored the large investment in capital and labour that had gone in, and that was represented by past catches. The original participants in the fishery had earned; had paid for the allocations they received. They did not get something for nothing. (AA43:18-19)

It seems to be implied in Mr Talley's comments that those fishers who were allocated quotas following the 1986 legislation did not receive anything more than they already had. In fact they received from the Crown a valuable asset by way of addition to their existing investment; an asset which has proved to be readily tradeable. This was recognised by Mr Talley who was quoted as saying that since the inception of the QMS over 450,000 tonnes, or in excess of 66 percent of the TACs under the quota management system, had been traded at commercial rates. We have little doubt that the original quotas for which no capital payments were made were in fact valuable additional fishery assets.

The fundamental conflict

7.5.3 The *Muriwhenua Fishing Report* states that “fishing has been corporatised”. The government, it says:

has issued shares in a resource that was once seen as publicly owned, and has backed those shares with a guarantee that a certain quantity of fish can be caught.⁹

But the Muriwhenua claimants contended that the Treaty secured the fisheries of Muriwhenua to them. Ngai Tahu have made the same claim. The Muriwhenua tribunal was in no doubt that the quota management system had created at least a property right in the quota holders to catch fish:

If it is true, as was stressed in the submissions to us, that the Crown does not own the fish resource, it has certainly created a property interest in the right to harvest it. There is undeniable truth in the opinion that unless the Crown orders otherwise, no one owns a fish until it is caught. Nonetheless, such opinions appear as fancy semantics when the right to catch is now worth many thousands of dollars, an exclusive right to catch has been established and apportioned to individuals, the quota right so given is held in perpetuity, quota are freely tradeable on a formal exchange in daily operation, and resource rentals are payable to the Crown. Subtle distinctions between ownership and access rights likewise are made academic. If a property has not been created in fish, it certainly exists now in the right to catch them.¹⁰

We agree with this conclusion.

The Muriwhenua tribunal further concluded that:

If Maori fisheries covered the whole of the inshore seas, as past records suggest, the policy was effectively guaranteeing to non-Maori, the full exclusive and undisturbed possession of the property right in fishing, that the Crown had already guaranteed to Maori.

The prospect of such a fundamental conflict should have been apparent in our view. It required no more than an inquiry into what Maori fisheries had been, when the Treaty was signed. It ought to have been obvious, even on a brief reading of the Treaty, that the Ministry’s proposals stood to be diametrically opposed to the provisions of the Treaty.¹¹

But, said the Muriwhenua tribunal, it did not follow that if the Treaty was breached, the whole scheme must be jeopardised, provided that is, a reasonable agreement could be made.¹²

In fact, negotiations did ensue but only after Ngai Tahu and other Maori iwi and organisations had issued High Court proceedings against the Crown. We now relate the circumstances which gave rise to this legislation and ensuing events which led ultimately to the passage of the Maori Fisheries Act 1989.

7.6 **Court Proceedings**

The first hearing of the Muriwhenua tribunal took place at Te Reo Mihi marae, Te Hapua, in the far north on 8 December 1986. Prior to this the

Fisheries Amendment Act 1986 had been enacted. It came into force on 1 October 1986.

7.6.1 Following representations made to them by the Muriwhenua claimants at an early stage of the proceedings, the tribunal wrote to the Director-General of MAF on 10 December 1986. This letter expressed the tribunal's extreme concern at both its own ability to make recommendations on the claim before it and the ability of the government to agree to those recommendations should the proposed allocation of ITQs take place before the tribunal had an opportunity adequately to consider the claim and report to the ministers involved. The tribunal sought the deferment of any further action on the allocation of quota until it was able to report on the claim.¹³ By letter of 23 December 1986 the director-general advised that after consulting the minister, it had been decided he should proceed to notify fishers of their ITQ. He added an assurance that this action should not be seen as in any way derogating from the ministry's acceptance of and commitment to applying the principles of the Treaty of Waitangi as they relate to fisheries.¹⁴

7.6.2 A memorandum by the Muriwhenua tribunal of its preliminary opinions as conveyed to the Minister of Fisheries on 30 September 1987 recorded that it was made on a motion by the claimants that the tribunal report then or as soon as practicable in the light of the Crown's intention to issue further ITQs. While unable to furnish a report at that stage, the tribunal was able to express certain findings and opinions including the following:

We find that the Maori hapu and tribes of Muriwhenua made a full and extensive fishing use of the sea surrounding their lands and for a distance of some 12 miles out from the shore.

Occasional fishing use was made of an area beyond that but the 12 mile limit involved a regular fishing use. It is also quite apparent that while favoured fishing grounds were well known, named and capable of ready identification, fishing occurred throughout the whole area. There was not one part of the seas within that zone over which the hapu and tribes of Muriwhenua can be considered not to have exercised some fishing user.

... to proceed further with the issue of ITQ's would be contrary to the Treaty at least insofar as the Muriwhenua tribes are concerned (for we have had no evidence with regard to any other tribes) and that we consider the Crown should negotiate now with the Muriwhenua tribes, before further steps are taken, in the light of our findings of fact and interpretation.¹⁵

7.6.3 The delivery by the Muriwhenua tribunal of its preliminary opinions on 30 September 1987 coincided with the issue on the same day of proceedings CP 553/87 in the High Court by the Muriwhenua claimants against the Crown. An appreciation of the outcome of these and subsequent legal proceedings, and various consultations between Maori and the Crown which ultimately led to the passage of the Maori Fisheries Act 1989 is necessary to an understanding of that Act. The essential background is conveniently and succinctly stated by Sir Robin Cooke, President of the Court of Appeal in *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 646-649. The following passage from the judgment

of the president commences with a reference to the issue of the proceedings referred to above:

On the same day (30 September 1987) proceeding CP 553/87, the review application, was commenced, initially orally, in the High Court in Wellington. In short this application claims that the quota management regime so far as it affects Muriwhenua is unlawful because of breaches of their fishing rights, and seeks the setting aside of various decisions already taken and declarations against further implementing the scheme. That evening Greig J heard an oral application for an interim declaration that the Minister ought not to proceed further. The Judge granted it, for reasons which he recorded on 8 October 1987. Further proceedings of the same type were subsequently commenced by the Ngai Tahu Maori Trust Board and others, representing between them the Maori tribes of most of the other coastal lands of New Zealand. The various review applications have come to be called collectively the first bracket proceedings. On 2 November 1987 Greig J made an interim declaration that the Minister ought not to take any further action to issue notices under s 28B or s 28C of the Fisheries Act or any other step in respect of the quota management system established in respect of jack mackerel and squid by notices in the *Gazette*. These interim declarations remain in force, but temporary arrangements have been made, mostly by consent, whereby commercial fishing has continued unrestricted for the time being by Maori claims.

Greig J's reasons for his interim decisions in favour of the Maori plaintiffs were emphasised by him to be tentative findings on an interim basis. He relied on s88(2) and his main reasons are best expressed in his own words in passages from his judgment in the proceedings by Ngai Tahu and others:

"I am satisfied that there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole coast of New Zealand, at least where they were living. That was divided into zones under the control and authority of the hapu and the tribes of the district. Each of these hapu and tribes had the dominion, perhaps the rangatiratanga, over those fisheries. Those fisheries had a commercial element and were not purely recreational or ceremonial or merely for the sustenance of the local dwellers. . . .

"The next question that I think arises is whether it can be said that the Maori gave away or waived any of those rights. That appears to be an issue but on the material that is before me at this stage there cannot be said to be any evidence which would satisfy me that those rights have by those means been lost. What is clear is that over the time since 1840 there has been a great diminution and a restriction in Maori fishing through circumstances, to use a neutral word, which have in the end limited the exercise of those rights.

"The next point that seems to me to arise is to ask the question whether the rights have been taken away. There is nothing pointed to in any statute as directly or expressly doing that. It is I think clear, and I would if necessary cite T A Gresson J in the *Ninety-Mile Beach* case, that there needs to be some express enactment to take away the rights; they cannot be taken away by a side wind or by some indirect implication. There is nothing, in my view, in the Fisheries Act 1983 or its amendments which could be said to have taken away the existing fishing rights. . . .

What has been done in the promulgation and the operation of the quota management system has been done without taking into account the Maori rights in fisheries, at least in the sense that I have concluded on this interim basis these rights exist. There has been an allowance made and a regard had to Maori recreational and non-commercial fishing. The Ministry has not made any serious effort yet to define Maori fishing rights but has treated them for a long time as recreational, occasional and ceremonial fishing without any commercial or indeed without any proprietary significance. What has been done and what will be done in the continuation of the quota management system is, in my view, contrary to the Act in that it will affect the Maori fishing rights.”

The next step was the establishment on 25 November 1987, pursuant to an interim agreement between the Government and the New Zealand Maori Council, of a joint working group, consisting of four members on each side, to report by 30 June 1988 on “how Maori fisheries may be given effect” and related matters. By the stipulated date the group were able to agree on some points, but unfortunately not the major ones.

Each side made a separate report. The stance of the Maori members was that in principle under the Treaty Maori were entitled without seaward boundary to 100 % of the fisheries but that as a compromise Maori would retain ownership of 50 %, making the other 50 % available to the Crown, and would participate equally with the Crown in the management and control of the fisheries. The Crown members calculated that the Maori share should be 100 % of the inshore fisheries (out to 12 miles, approximately the continental shelf) and 12.5 % of the deep water fisheries, representing approximately 10 % of the total fisheries. They calculated that in all this would amount to a total of 29 % of the fisheries. The 12.5 % was based on the Maori proportion of the total population in 1986. The two reports, which contain many more details, are conveniently reproduced as an appendix to the Law Commission paper of March 1989.

In the meantime the Waitangi Tribunal had completed their *Muriwhenua Fishing Report*, dated 31 May 1988, and transmitted it to the Minister of Maori Affairs. A work of 370 pages, it has been printed and is on public sale. For present purposes, it will suffice to quote the following passages from the Conclusions at p 239:

“12.1.1 The Treaty guaranteed to Maori full protection for their fishing activities, including unrestricted rights to develop them along either or both customary or modern lines. Save for some prior agreement or arrangement, general fishing could neither delimit nor restrict the Maori fishing interest as so described. To the extent that general fishing might do so, the Crown was bound to intervene.

“12.1.2 To guarantee to Maori the full protection described, the Crown was obliged to support their economic initiatives in fishing, or otherwise to seek arrangements whereby Maori and non-Maori fishing could proceed to the mutual advantage of both sides.

“12.1.3 On the evidence, the fishing activities of the Muriwhenua people involved the whole of the adjacent continental shelf. Those activities were capable of being developed

as a commercial industry and in fact had been developed on commercial lines.

“12.1.4 In the Muriwhenua circumstance, any commercial fishing by others must necessarily have interfered with their full, exclusive and undisturbed right to maintain and develop their fishing capabilities. Accordingly, an agreement or arrangement was necessary to permit of any other commercial fishing on the continental shelf that they used. No such arrangement or agreement was made.

“12.1.5 Had the Treaty guarantee been maintained, and had their fishing activities been properly supported and promoted by the Crown, the claimant tribes would have developed an off-shore fishing capability.”

Ministers of the Crown and the Maori representatives took up the negotiations but again were able to reach only limited agreement. On 22 September 1988 the Minister of Fisheries moved in the House of Representatives the introduction of a Maori Fisheries Bill (*Hansard*;492 NZPD 6884). The Bill had an extensive preamble reciting some of the history which we have already summarised. In introducing it the Minister said that the Government accepted that in the past there had been blatant and serious breaches of the obligation that the Crown undertook by the Treaty.

The main features of the Bill were that the Government took from the Waitangi Tribunal report that the tribes should be in the business of fishing, but the Government also regarded fisheries and quota management as very important to the economy. Small local non-commercial fisheries, to which all recreational fishers irrespective of race would have access, would be placed under the management of the local tribes. As to commercial fishing, Maori were to be given an opportunity to earn up to 50 % of the quotas for the various species by allocations of up to 2.5 % annually over 20 years, conditionally on substantial fishing of the existing allocations.

Evidently the Bill containing those provisions was hoped to be a fairly long-term solution. For the other provisions included the proposed repeal of s88(2), the nullification of the interim orders of the High Court and the discontinuance of the proceedings in which they had been made. Further it was to be enacted that nothing in the principal Act or the Amendment Act was to entitle any person to rest on the Treaty or on any rule of law relating to aboriginal rights a claim made in any Court for fishing rights. There were somewhat similar clauses to preclude the Waitangi Tribunal from inquiring into fisheries claims, though that bar was to be limited to 20 years.

The Maori reaction to that Bill led to the commencement in the High Court, by virtually all the tribes with claims to fishing rights, of what have been called the second bracket proceedings. The Muriwhenua proceeding (Wellington, CP 743/88) is one of these. There are pleadings of trespass, breach of fiduciary duty and negligence against the Crown. The plaintiffs rely on their pre-Treaty “sovereignty” and proprietorship, the reservation of their rights in the Treaty, customary rights and aboriginal title. Actions of the Crown in 1986–1987 with respect to fisheries are alleged to be breaches of the rights of and duties owed to Maori. Declarations, inquiries as to damages and accounts of profits are the principal relief sought.

The Bill introduced in September 1988 was referred to a select committee, who after extensive hearings presented a majority interim report on 19 September 1989 (*Hansard*; 501 NZPD 12665). The committee made sweeping amendments to the Bill, leaving little of the original form. These were such that further submissions from interested parties and a further report to the House were seen to be called for. After some further changes and debates (*Hansard*; 504 NZPD 14406; 14522; 14628) the Bill was finally enacted. Largely the September amendments reflected a submission to the select committee dated 17 March 1989 from the Chairman of a working party who met at the request of the (then) Deputy Prime Minister. After the hearing of the present appeals, the Solicitor-General concluded that it would probably assist the Court to have the submission made by the Crown on the Bill. Accordingly he lodged a copy, with a copy of the covering letter to the select committee and also a copy of the Ngai Tahu response. From the Crown submission and the covering letter it appears that an interim arrangement was proposed:

“ . . . a permanent solution may not be achieved until final legal pronouncements on the fundamental nature of Maori fishing rights are available. For this reason, access to the Waitangi Tribunal and to the Courts of law must remain open for all to test these important questions.”

From the Ngai Tahu comment it is evident that Maori likewise well understood the proposal to be an interim one.

This concludes the passage from the judgment of Sir Robin Cooke.

- 7.6.4 That Ngai Tahu understood the Maori Fisheries Act 1989 (passed on 20 December 1989) to be an interim one subject to “continuing negotiations on certain fundamental questions” was made clear by Mr O’Regan who in affidavit evidence told us:

A final round of negotiations in late 1989 resulted in the Maori Fisheries Negotiators [of whom Mr O’Regan was one] accepting a proposal by the Ministers . . . to adjourn the High Court proceedings sine die and give the new Act a chance to establish the transfer mechanism by which the Crown would move quota to Iwi and establish Taiapure. Assurances were received from the Prime Minister and accepted that there would be continuing negotiation on certain fundamental questions . . . The Maori parties have committed themselves, subject to the Crown honouring its agreements, not to recommence proceedings in the High Court until the transition period specified in the Act is completed. That is due to have occurred by October 1992 (AA16:6–7).

We now proceed in the next chapter to consider the Maori Fisheries Act 1989.

References

- 1 *Report of The Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) (Muriwhenua Fishing Report) 1988*, p155
- 2 *ibid*
- 3 *ibid* pp 155–156
- 4 *ibid* p 156
- 5 *ibid* p 140

- 6 ibid p 141
- 7 ibid p 142
- 8 ibid p 144
- 9 ibid p 147
- 10 ibid p 148
- 11 ibid p 149
- 12 ibid p 150
- 13 ibid p 292
- 14 ibid pp 301–302
- 15 ibid pp 296–297

Chapter 8

Maori Fisheries Act 1989

8.1 Introduction

It will, we think, be apparent from the foregoing discussion that the Maori Fisheries Act 1989, by any standard a breakthrough towards Crown recognition of Maori Treaty fishing rights, had its genesis in a number of factors. Important among these was the publication of the *Muriwhenua Fishing Report* in June 1988. Among its conclusions was a finding that the QMS as currently applied was in fundamental conflict with Treaty principles. The report also concluded, however, that the system itself need not be in conflict with the Treaty and may indeed be beneficial to both Maori and the Crown if an agreement could be reached.¹

Some months after the High Court made interim declarations on 30 September 1987 and 2 November 1987, the Muriwhenua tribunal reported that the Crown should not take any further action to issue notices in respect of the QMS system in relation to certain named fish. Among Mr Justice Greig's reasons were that the QMS system was operating without taking into account Maori rights in fisheries which were protected by s88(2) of the Fisheries Act 1983. This decision also had a powerful influence on the Crown's resolve to seek a solution to the problem. These combined circumstances persuaded the Crown to enter into negotiations with Maori and ultimately led to the passage of the 1989 Act. As Sir Robin Cooke noted, the minister in introducing the Maori Fisheries Bill, said the government accepted that in the past there had been blatant and serious breaches of the obligation that the Crown undertook by the Treaty.

- 8.1.1 The Maori Fisheries Act 1989 is in two parts. Part I establishes the Maori Fisheries Commission; part II amends the Fisheries Act 1983 by declaring rock lobsters subject to quota fishing and also enacts a new part IIIA of the 1983 Act authorising the declaration of taiapure – local fisheries. We will deal with each of these three matters in turn. In our consideration of the Act we have been greatly helped by evidence and submissions of all the parties and by a submission made at the tribunal's invitation by Whaimutu Dewes, a Maori Fisheries Commissioner (AA39(a)). A number of Mr Dewes comments are incorporated in our discussion of part I of the Act.

8.2 Maori Fisheries Commission

The long title to the Act says it is an Act:

- (a) To make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi; and
- (b) To facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing; and
- (c) To make better provision for the conservation and management of the rock lobster fishery.

Mr Dewes emphasised the importance of paragraph (a) of the long title which applies to part I of the Act and to s 74 which inserts provisions into the Fisheries Act 1983 enabling the establishment of taiapure, or local fisheries. The commission has no legislative mandate with respect to taiapure. The Maori Fisheries Commission sees the significance of paragraph (a) as being a reminder to it and all who seek to make or interpret the provisions of the Act that the assets (principally ITQs) to be transferred to and managed by the commission are “taonga” within the meaning of the Treaty of Waitangi and Tikanga Maori (AA39(a):4–5).

Mr Dewes impressed on us that the recognition of Maori fishing rights secured by the Treaty requires consideration of tikanga Maori with respect to those taonga and requires the provisions of the Treaty to be applied to the transfer and management of those taonga.

- 8.2.1 The Act established the Maori Fisheries Commission comprising seven members appointed on the advice of the Minister of Maori Affairs. Among its principal functions are the duty to facilitate the entry of Maori into, and the development by Maori of the business and activity of fishing. It is required to form and be sole shareholders in a public company called Aotearoa Fisheries Limited and to transfer to that company at least 50 percent of all quota and money transferred to the commission by the Crown under ss 40 to 42. All quota and money so transferred is to be applied in paying up in full the shares in the company to be issued to the commission.

The Act provides for a “transition period” which begins on the date of commencement of the Act (20 December 1989) and ends on 31 October 1992 or such later date as the governor-general may declare. This is the period over which quota is to be transferred by the Crown to the commission.

In considering whether to grant assistance to any Maori or group of Maori the commission must, among other matters, have regard to Maori custom and economic and social considerations. By a 1990 amendment, the commission is required to consult with representatives of tribes who have a history or tradition of engagement in the business and activity of fishing and to take into account the views expressed in such consultations. We understood from Mr Dewes that the commission was actively involved in securing this amendment. The commission has held hui in some 11 separate localities as part of its consultation process. The commission is enjoined to endeavour to conduct its activities profitably.

Transfer of quota

- 8.2.2 The transfer of quota by the Crown is to be in four equal tranches of 2.5 percent of the total allowable commercial catch (TACC) (calculated at the time of transfer). The Act specifies a timetable of April 1990, October 1990, October 1991, October 1992. The calculation of the 2.5 percent at the time of transfer in each case is a sore point with Maori. Mr O'Regan claimed that the understanding with the Crown was that the 10 percent was to be of the TACC at the time the agreement was made with the Crown prior to the passage of the Act. Since that time the TACC has been reduced by the Crown and as a consequence, the 10 percent is correspondingly less than was earlier contemplated. We understand this is the subject of ongoing negotiation.

Aotearoa Fisheries Limited

- 8.2.3 The Act requires the commission to incorporate Aotearoa Fisheries Limited. Fifty percent of all quota and quota equivalent must be transferred by the commission to the company. Mr Dewes advised us that the commission and the company directors have agreed that the commission will transfer to the company all of the deepsea species and will make any cash payments necessary to maintain the value of the transfer as required by the Act. This division of responsibility for inshore and deepwater species quota respectively is seen as providing a much more effective focus for the management of the resource than if both had responsibility for the two categories.

The balance of quota retained by the commission is leased by public tender. In considering tenders a large preference is given to iwi wishing actively to participate in the business and activity of fishing. The leases are on a short term basis reflecting the commission's intention to transfer the resource to iwi after October 1992.

The commission's kaupapa

- 8.2.4 Mr Dewes, on behalf of the Maori Fisheries Commission, stressed the commission's kaupapa, founded on its understanding and application of tikanga Maori and the Treaty of Waitangi, as being that its assets belong to iwi; not the commission, not the Crown, not the fishing industry, not the general public. An important part of the commission's kaupapa is its commitment to the principle of consultation with iwi. The commission acknowledges that it holds assets transferred to it on behalf of the iwi. The commission's primary concern is to effect the allocation and transfer of quota to appropriate iwi. Pending such transfer the commission recognises that it must manage the quota in such a way that the economic value of the quota is maintained. For the next few years the commission will be operating closely with Aotearoa Fisheries Limited to develop and maintain the value of the assets transferred from the Crown. At the same time it will be preparing for the eventual transfer to iwi of ownership, management and control. The ultimate roles of the Maori Fisheries

Commission and Aotearoa Fisheries Limited will be shaped by the collective and individual wishes of the iwi – this lies in the future.

The tribunal was impressed with Mr Dewes' account of the commission's stewardship, its evident commitment to adherence to the Treaty of Waitangi in the conduct of its statutory obligations and its emphatic recognition of its trusteeship on behalf of iwi. Surely out of much travail substantial good has finally come.

We turn now to consider the two other matters covered by the Maori Fisheries Act 1989 which resulted in substantial amendments and additions to the Fisheries Act 1983.

8.3 **Rock Lobster Become Subject to Quota**

Extensive amendments were made by Part II of the Maori Fisheries Act 1989 to the principal Fisheries Act 1983 declaring rock lobsters to be subject to quota fishing.

The amendment made provision for 10 percent of the newly authorised rock lobster quota to be transferred to the Maori Fisheries Commission on an instalment basis.

8.3.1 A novel feature of the legislation was the creation of a new form of quota known as "transferable term quota". This was defined to mean:

quota that confers on the holder the right to take rock lobster at any time in the period of 25 years beginning on the 1st day of April 1990 (being quota that may be transferred as if it were individual transferable quota allocated under Part IIA of this Act).²

The amendment further provided that the taking of rock lobster in the quota management areas described is to be subject, for the period of 25 years from 1 April 1990, to the quota management system established under the Act. Thereafter no doubt the position will be reviewed.

We understand that this new "term" transferable quota was instituted for rock lobster as a result of an undertaking by the Crown, as part of its interim agreement with Maori, that it would not in the meantime create any further permanent individual transferable quotas. It appears Maori were concerned that if more permanent ITQs were created the prospects of the Crown being able, over time, to meet what Maori believe to be its obligations would be seriously diminished. Maori therefore sought a term quota of no more than ten years but the Crown insisted on the 25 year period.

8.3.2 The tribunal received numerous submissions from experienced fishing industry witnesses strongly advocating the retention of ITQs on a perpetual basis in opposition to any transformation of such ITQs into transferable term quota. These submissions were reasoned and temperate and were made by representatives of many of the major operators, the majority of whom favour the quota management system while recognising there may well be grounds for simplification and improvement. In addition to the extensive evidence from these witnesses, the industry presented affidavit evidence from Professor L G

Anderson, a professor of Economics and Marine Studies at the University of Delaware in the USA, and an academic specialist in the economics of fisheries management. He is recognised internationally as an authority in his field. In his affidavit (AA2) Professor Anderson considered the various economic merits of term and permanent quota and the implications of the introduction of term quota for the New Zealand fishing industry. He concluded that there were very few, if any, benefits to be had from using term quotas. He believed they would result in a far less effective system than operates under a permanent quota system. Some of Professor Anderson's views were questioned by Dr Habib and these were in return responded to by Professor Anderson in a further affidavit.

Whatever expertise the tribunal may have, it does not extend to adjudicating upon complex economic arguments of the kind raised by Professor Anderson. Nor, fortunately, is it necessary for us to express an opinion on the respective merits, economic or otherwise, of permanent or term quotas. They are simply not relevant to the basic questions we are concerned with which centre upon claims that the Crown has infringed Ngai Tahu Treaty fishing rights. We accept Mr O'Regan's contention that the arguments are better addressed to the government of the day and cannot have any effect upon the Ngai Tahu Treaty claim before us (AA16:15). Having said that, however, we acknowledge that the concern expressed by the various industry representatives on the question is genuinely and strongly held. No doubt they will continue to pursue it vigorously with government.

8.4 **Taiapure**

Part I of the Maori Fisheries Act 1989 recognises the commercial interest of Maori in the fisheries as do the provisions in part II bringing rock lobsters under the QMS. Section 74 in part II further amends the 1983 Act by inserting a new part IIIA of that Act dealing with taiapure – local fisheries. References to sections are to sections of the 1983 Act as added by the 1989 Act.

Objective of the new Part IIIA

8.4.1 In relation to areas of New Zealand fisheries waters (being estuaries or littoral coastal waters) that have customarily been of special significance to any iwi or hapu either:

- (a) as a source of food; or
- (b) for spiritual or cultural reasons,

Section 54A has as its object to make better provision for the recognition of rangitiratanga and of the rights secured in relation to fisheries by article 2 of the Treaty of Waitangi. We note the expressed concern to make better provision for the recognition of rangitiratanga and for Maori treaty rights to their fisheries. How well this objective will be achieved remains to be seen.

The Kaupapa of taiapure

- 8.4.2 In a joint statement by Manatu Maori and the Maori Fisheries Commission it was said that:

In recent years the Maori fish negotiators have concentrated considerable effort on traditional Maori and Iwi rights in non commercial fishing. The discussion has revolved around the establishment of non commercial fishing zones, over which Iwi would have substantial control. Whilst the Maori fish negotiators have argued for absolute Iwi control of such zones Parliament has not conceded the Crown sovereignty as the ultimate controller of the non commercial fish resource. The compromise effected by the Maori Fisheries Act offers Iwi a substantial level of control over the non commercial zones named as Taiapure by the Act. That control applies to all citizens Maori or Pakeha. The development of Taiapure management will place heavy demands on Iwi organisation and committment [sic]. It also demands the evolution of an effective management partnership between Iwi and the Crown represented by MAF. (AA34:10)

How is a taiapure established?

- 8.4.3 In the context of the Maori Fisheries Act 1989, taiapure is said by Manatu Maori and the Maori Fisheries Commission to mean a local fishery (AA34:3.3).

Any one may apply with supporting information to the director-general of MAF for the taiapure to be established in a specified locality (s 54C). If the Minister of Fisheries, after consulting the Minister of Maori Affairs, agrees in principle with the proposal, appropriate procedures for public notice and objections and a subsequent public hearing by a Maori Land Court judge are provided for. To date there has been no such hearing.

If after the appropriate procedures have been followed the minister is satisfied that the application should be approved the minister may recommend the governor-general to declare the area to be a taiapure, or local fishery (ss 54B and 54I).

The Minister of Fisheries is required to appoint a committee of management for each taiapure, who are to hold office at his pleasure. This provision does little to secure their independence. Any such management committee may recommend to the minister the making of regulations under s89 for the conservation and management of the fish, aquatic life and seaweed in the taiapure. No such regulation can provide for any person to be refused access to or the use of or to be required to leave or cease to use any taiapure by reason of the colour, race, or ethnic or national origins of that person or any relative or associate of the person. It follows that no taiapure, however great its special significance may be to any hapu or iwi, can be made exclusively for such hapu or iwi.

- 8.4.4 Robert D Cooper of MAF gave us detailed evidence of extensive meetings held by MAF officers with many tribal groups in the South Island. The purpose was to implement a Rahui Areas Programme intended to provide for the long term protection of seafoods. It appears 170 proposed non-commercial fishery areas were identified. They were distributed

throughout the South Island except in the Fiordland area, on the Stewart Island coast and in the vicinity of land near Cape Campbell. Species included eels, mussels, paua, kina and seaweed. Access was to be non-discriminating (R26:8–10). We understand, however, that this initiative has been overtaken and superseded by the taiapure provisions of the Maori Fisheries Act. Nevertheless it was a valuable initiative by MAF.

8.4.5 While Maori, including Ngai Tahu, have reservations about aspects of the taiapure provisions, in particular the overriding ministerial control, the provisions have been generally welcomed as a potentially beneficial development. It remains to be seen to what extent, if at all, effect is given to the provisions.

8.4.6 We have earlier described various attempts made by Maori and Ngai Tahu in particular to have certain reserves set aside for their exclusive use as fishing grounds pursuant to the Maori Councils Acts of 1900 and 1903 and s33 of the Maori Social and Economic Advancement Act 1945. Despite many requests, including a number from Ngai Tahu, no such reserves were created. The provision was clearly intended to benefit Maori and could be seen as an attempt by the legislature to give some modest and very particular recognition to Maori Treaty fishing rights. As we have indicated, the provision was totally undermined by administrative and political intransigence (6.10.3). It was repealed in 1962.

Notwithstanding the totally disillusioning experience of Maori with this provision, the New Zealand Maori Council, in its submissions on the 1983 Fisheries Bill sought, unsuccessfully, to have it reinstated in the new Bill. The taiapure provisions in the Maori Fisheries Act 1989 fall short of the former s33 in that they expressly exclude the possibility of taiapure being reserved solely for Maori. We believe this to be a major weakness of the taiapure scheme.

8.4.7 In his final submissions on behalf of the claimants Mr Upton advised that Ngai Tahu:

has no objection, should a *non-commercial ITQ* be developed to manage non-commercial fisheries, to incorporating such a principle into our mahinga kai and sea fisheries, as long as the associated control structures truly reflect its rangatiratanga, and in particular;

- (a) clearly protect certain zones for its exclusive tribal use,
- (b) clearly reflect its special interest in certain species and their associated ecosystems, eg. paua/kina/seaweeds
- (c) clearly permit it to hold usufructuary title to significant areas of coast and seabed so as to restore and enhance non-commercial resources by use of a rahui. (AB1:29–30)

Ngai Tahu are now seeking, among other related matters, the protection of certain zones for their exclusive tribal use, as they had previously attempted to no avail under s33 of the 1945 Act.

8.4.8 We are aware that following recommendation six in the tribunal's *Manukau Report 1982*, the Whatapaka creek, an estuary of the Manukau harbour, has been set aside pursuant to s439A of the Maori Affairs Act 1953. It has now become a Maori reservation for the purpose of a landing

place, fishing ground, catchment area, bathing place and an area of historic, spiritual and cultural significance for the common use of hapu of Whatapaka Marae o Tainui.³

- 8.4.9 We are also aware that the Fisheries Task Force in its April 1992 report to the Minister of Fisheries has proposed that rights for iwi to manage tribal fisheries should be made explicit by recognising iwi ownership over specific marine areas. The purpose of this is to give local iwi the right to exercise rangatiratanga in defined areas within their coastal rohe. It is envisaged by the Ministerial Task Force that such mahinga kaimoana would be relatively small areas of sea (estuary, reef or coastline) where an iwi has maintained a strong tradition of food gathering together with the observance of conservation practices. Local iwi would be able to exclude from harvesting all others (Maori and non-Maori) to the extent they felt this was beneficial.
- 8.4.10 We believe there is a strong case for the creation of mahinga kaimoana as envisaged by the Ministerial Task Force and as requested by the New Zealand Maori Council in 1983 and by Ngai Tahu before us. Ngai Tahu, and doubtless many other Maori tribes, are still entitled to their sea fisheries as guaranteed by article 2 of the Treaty. It is in no sense a case of discriminating in favour of Maori. It is in fact an extremely modest and entirely justifiable proposal that traditional fishing grounds which are of special significance to the tangata whenua, the ownership of which they have never surrendered, be given statutory recognition and protection. It cannot be discriminatory to restore to Maori something of special value which is in any event theirs by right.
- 8.4.11 We *recommend* that the Fisheries Act 1983 be amended to provide that in appropriate circumstances mahinga kaimoana as envisaged by the Ministerial Task Force in chapter 2 of its report of April 1992 may be reserved to an iwi or hapu.

References

- 1 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) (Muriwhenua Fishing Report) 1988 p239*
- 2 Section 48 Maori Fisheries Act 1989
- 3 *New Zealand Gazette* 27 February 1992 No 25 p 505

Chapter 9

Profile of Modern Fisheries in the Ngai Tahu Region

9.1 The National Industry

9.1.1 Modern New Zealand fisheries constitute a large, high-earning industry. In 1990 more than 578,000 tonnes of fish and shellfish were caught and earnings from this catch amounted to approximately \$1 billion with nearly \$750 million of that coming from export receipts.¹ More than 8000 people are employed in the catching and processing sectors of the industry and many hundreds of millions of dollars are currently invested in quota holdings and fishing plants (Z18:11).² Commercial fisheries have developed into one of New Zealand's leading export industries and they are managed under one of the most advanced, albeit controversial, management regimes in the world.³

Its location

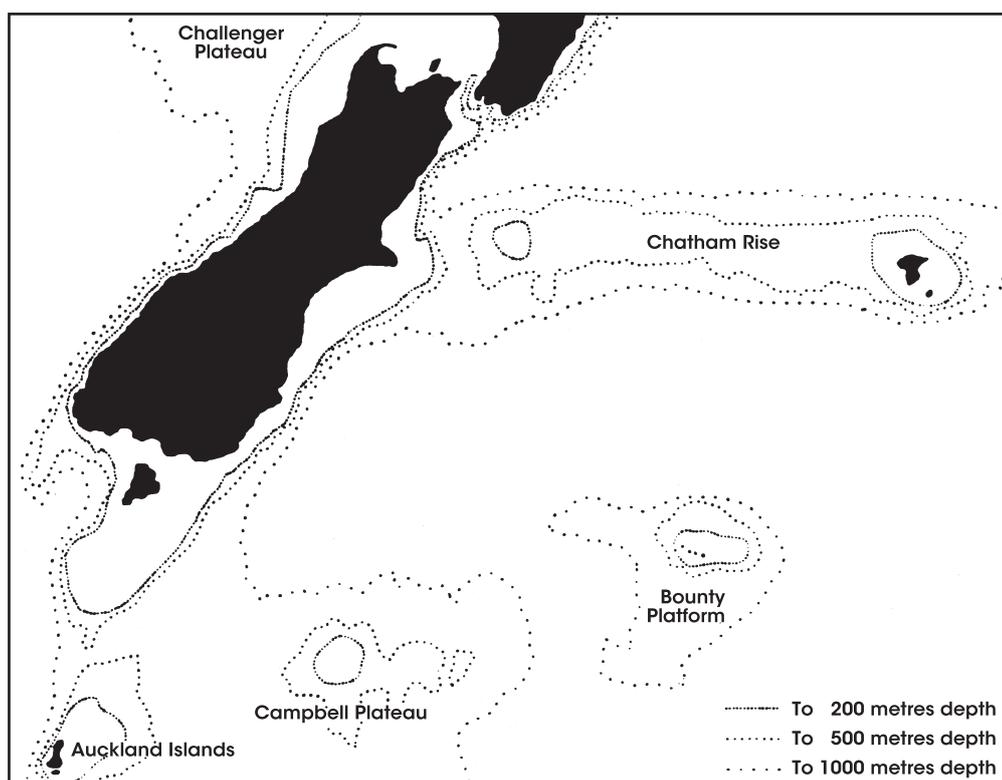
9.1.2 Stretched over more than 30 degrees of latitude in the southern Pacific ocean, New Zealand is surrounded by one of the the world's largest fishing zones, the 200 mile Exclusive Economic Zone (EEZ)(refer to map 6.1). This area covers more than three million hectares and contains a substantial range of fisheries resources. The modern commercial fishing industry is based on approximately 80 species out of the many thousands which occur in the EEZ, and operates in two distinct zones, inshore fisheries and offshore (T4(a):212).

The inshore fisheries lie on the continental shelf reaching out to a depth of about 200 metres. In the Ngai Tahu region the distance the shelf extends from the coastline varies considerably, from a mere one and a half kilometres off parts of Kaikoura up to 80 kilometres off parts of south Canterbury and north and central Westland (see map 9.1).

The offshore fisheries occur along the continental slope, beginning at 200 metres depth and extending to 1000 metres. Again, there is great variation in the distance from the shore for this type of fishery. Along the Kaikoura and south-west Murihiku coasts the 1000 metre mark occurs only 8–16 kilometres offshore, while from Banks Peninsula and the north and south Canterbury bights the continental slope extends 650 kilometres to the Chatham Islands. Off the south of Te Wai Pounamu the slope reaches out a similar distance into the sub-antarctic ocean (T4(a):212–213).

Its species

9.1.3 Of the inshore commercial species, the demersal or bottom-dwelling fish are the most valuable. These include snapper, red cod, school shark, rig



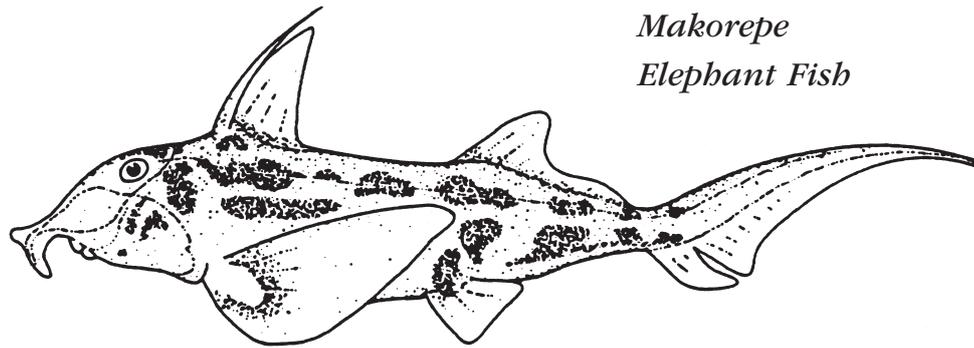
Map 9.1: Depth of water around the South Island

tarakihi, gurnard, flatfish, hapuku, bass, elephant fish, trevally, john dory, moki, blue nose, stargazer, mullet and dogfish. The major inshore pelagic species include kahawai, barracouta, shark, trevally, blue mackerel, jack mackerel, butterfish, baitfish, red moki, leatherjacket, porae, sea perch and trumpeter. Also included in the inshore fisheries are the highly prized red rock lobster, Bluff oysters, scallops and paua, as well as cockles, pipi and tuatua (T4(a):213).

The commercial species in offshore waters are generally bottom or near bottom dwellers and include hoki, orange roughy, ling, barracouta, the oreo dories, gemfish, warehou, hake, alfonsino and southern blue whiting. The principal fishing method for these species is trawling. The major pelagic offshore species include the tunas (albacore, skipjack, southern bluefin and yellowfish), the billfish (blue, black and striped marlin), sailfish, swordfish, and the large pelagic sharks (mako, blue, thresher, tiger, hammerhead and bronze whaler) (T4(a):213–214).

New Zealand's commercial squid fisheries are found in deep water and are especially abundant in the south. Squid are both demersal and pelagic and are taken either by trawling in deep and mid water or by surface jigging (T4(a):214).

Also featuring on the modern commercial fishing scene, though not to a large extent, are the eel fishery, the bulk of which is exported, and the various fish farming operations based on oysters, mussels and salmon (T4(a):213–215).



Makorepe

Elephant Fish

The participants

- 9.1.4 Participants in the New Zealand fishing industry are either domestic, chartered or foreign licensed operators. Figures on the composition of the fleet for the Ngai Tahu region were not given in evidence but the *NZFIB Economic Review 1990* states that the domestic fulltime fleet for the whole of New Zealand in 1990 consisted of more than 1500 vessels and accounted for 38 percent of the total catch for that year.⁴ Nearly three quarters of the home fleet is made up of small boats, less than 12 metres long, which reflects the dominance of domestic fishers in the coast-hugging fisheries for the inshore and shellfish species.⁵

By comparison, the charter fleet is generally made up of large deep water vessels. For the most part they are foreign owned and crewed and contracted by New Zealand quota holders. Since the 1970s the charter fleet's share of the total catch has increased dramatically. In the late 1970s the fleet took something like 15 percent of the total catch; by 1990 it was catching 61 percent.⁶ The most important species caught by the charter fleet in 1990 were hoki, squid and southern blue whiting.⁷

Foreign-licensed nations receive quota allocations from quota remaining after allocations have been made to domestic fishers. Foreign operators currently play a minor role in the industry though their participation used to be substantial. In 1977, the year before the declaration of the EEZ, a total of nearly 500,000 tonnes was caught around New Zealand in an area equivalent to the EEZ. Of this catch more than 80 percent (400,000 tonnes) was taken by foreign nations. The following year, when the EEZ came into force, the foreign fleet catch fell to about 120,000 tonnes and it presently accounts for less than 6000 tonnes or one percent of the New Zealand catch.⁸ The most important species for the foreign fleet in 1990 was tuna (R21:5(b)).⁹

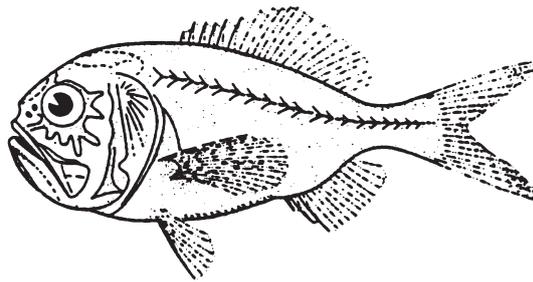
9.2 Modern Fisheries in the Ngai Tahu Region

- 9.2.1 Until the late 1970s, and the introduction of the 200 mile EEZ in 1978, the annual domestic fish catch was less than 50,000 tonnes. The fish caught were predominantly inshore and shelf species (R21:3). Since that time there have been dramatic changes in the fishing industry and the role of fisheries within the Ngai Tahu region has been transformed. As a result of developments in the last 15 years many of New Zealand's most productive and valuable fishing grounds now lie within the Ngai Tahu claim area and the fisheries of this region occupy a very prominent

position in the national fisheries profile (AB11).

There had been some substantial commercial fisheries working the inshore waters off the South Island for many decades but the outstanding importance of fisheries in the claim area began to emerge in the early 1980s and is primarily related to the development of the deep water resources. Other key factors in the emergence of these high value southern fisheries were the introduction of the 200 mile EEZ in 1978, the commercial development of the orange roughy fishery from 1981 onwards and the growth of export markets for paua and rock lobster.

The EEZ gave New Zealand fishing interests access to the lucrative deep water fisheries that foreign fleets had been harvesting since the 1960s



Nihorata
Orange Roughy

and 1970s. Until 1978 New Zealand's involvement in the deep water species had been negligible, but with the development of joint venture operations the domestic industry gained access to the large catching capacity and technology needed to harvest fish 200 miles from shore (Z18:9).

The New Zealand orange roughy fishery began in 1978 on the Chatham Rise and expanded to other fishing grounds mainly, though not entirely, within the Ngai Tahu rohe. As a result of high export demand and prices, orange roughy has become New Zealand's most valuable fin fishery. As described by Gregory Billington of the NZFIB:

orange roughy [has] been of critical importance in enabling the New Zealand industry to increase its investment and to expand its operations to include other less valuable deepwater resources such as the oreo dories and hoki. (Z18:10)

Paua and rock lobster fisheries, small by volume but two of the five highest export earners, were stimulated by dramatic growth in export markets from the late 1970s onwards. The three most valuable species caught in New Zealand's EEZ – hoki, orange roughy, and rock lobster – are all predominately or substantially fished from the Ngai Tahu region. Together these three species, contribute slightly less than half (49 per cent) of the total value of the New Zealand catch.¹⁰

Size of the catch in the Ngai Tahu region

- 9.2.2 MAFFish scientists provided a wealth of information on species within the Ngai Tahu region, their catch locations and quantities, and the size of the Ngai Tahu catch as a percentage of the national catch. As carefully explained in the evidence of Larry Paul (R38(O)), the summarising of

fisheries statistics for the Ngai Tahu claim presented some difficulties. One concern was the difference between the boundaries of the claim area and the boundaries of fishing data areas as defined by MAFFish. The northern boundaries of the claim lie at Pari-nui-o-whiti on the east and Kahurangi on the west but neither of these points coincide with the areas used by MAFFish for the collection of fisheries statistics (R38(O):2–3). In addition, the absence of a defined boundary between the Ngai Tahu claim area and the Chatham Islands made it impossible to distinguish between fisheries occurring within the Ngai Tahu claim area and those that might form part of a Chatham Islands claim. The closest approximation to the claim area was a region consisting of all coastal and offshore waters south of the Ngai Tahu northern boundaries and extending to the limit of the 200 mile EEZ. This area was defined by Mr Paul as the “Ngai Tahu region” rather than the “Ngai Tahu claim area” because it included the Chatham Rise close to the Chatham Islands where a boundary may yet be drawn at some future time and where significant quantities of important deep-water species are caught (R38(O):7).

The evidence given to the tribunal by Mr Paul, and many other MAFFish scientists, was based on data for 1985, the year before the introduction of the QMS and the last full year before the statistics recording system was changed (R38(O):4). As explained by Mr Paul, there are a number of factors which make it hard to obtain consistently reliable fisheries statistics (R38(O):6). One is the difficulty MAFFish itself has in gathering and maintaining properly updated statistics, a problem which may arise from a lack of adequate resources and which regrettably appears to have worsened in recent years. Another is the inherent reluctance of fishers to provide entirely accurate information on their activities. This tendency may have been accentuated in the period under review by the inflation of catch figures prior to the introduction of quotas in 1986. These difficulties notwithstanding, evidence given by Mr Paul undoubtedly provided an informative and reasonably reliable overview of the finfish catch in the Ngai Tahu region and its relationship to the total catch for the whole of New Zealand. By volume, catches from the Ngai Tahu region accounted for approximately 74 percent of the total EEZ catch for 1987/88 (latest available figures) (R25:5).

The value of the catch in the Ngai Tahu region

- 9.2.3 Estimates of the value of the catch from the Ngai Tahu region, like estimates for the size of the catch, are not straight forward. As explained by Ian Clark, then chief fisheries economist at MAFFish, there are a number of statistical obstacles to be overcome in making these evaluations. An estimated TAC figure for the Ngai Tahu area multiplied by perpetuity quota trading prices, or proxies thereof, provided, in Mr Clark’s view, the best assessment. This calculation, known as the quota value, gives a value of the resource over future years measured at current prices (R25:3).

Other methods of valuing the resources are based on port prices (the price fishers receive per tonne at the point of landing) and export prices. On the basis of Mr Clark’s calculations values for fisheries in the Ngai

Tahu region in 1987/88 (R25:5), using the three different methods, were:

- (a) Port value – \$305 million
- (b) Export value – \$433 million
- (c) Quota value – \$540 million

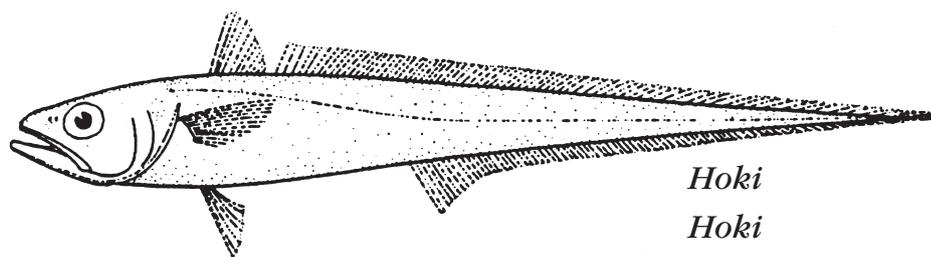
The quota value of the region's harvest in 1987/88 represented 60 percent of the total quota value of \$900 million of New Zealand's fish catch (R25:5).

The species within the Ngai Tahu region

9.2.4 Thanks to the labours of Mr Paul and Mr Clark it is possible to isolate the species of the Ngai Tahu region which contribute most significantly – both in terms of volume and value – to the overall national catch. Heading the list of major deepwater species caught in the Ngai Tahu region is hoki. Almost the entire New Zealand catch of this species is taken from within the Ngai Tahu claim area. Of the 47,166 tonnes of hoki caught by commercial fishers in 1985 no less than 45,276 tonnes – 96 percent – came from the Ngai Tahu region (R38(O): table 4). Looked at in value terms the Ngai Tahu hoki catch is no less significant. According to Mr Clark's figures, hoki within the Ngai Tahu region had a quota value of just under \$150 million dollars (R25:5).

Orange roughy is another species found disproportionately in the Ngai Tahu region. Mr Paul states that 79 percent of the national catch in volume – or 40,787 tonnes of a total of 51,543 – was taken from this region in 1985, mainly from around the Chatham Islands (R38(O):table 4). In value terms – as calculated by Mr Clark for 1987/88 – orange roughy caught in the Ngai Tahu region was worth around \$100 million (R25:5). This, in fact, is a conservative figure as Mr Clark includes only a portion of the valuable Challenger Plateau resource (R25:3).

Hoki and orange roughy are not the only lucrative species to be caught primarily in waters off the Ngai Tahu region. All but one percent of the entire New Zealand harvest of oreo dories, worth \$16.5 million dollars



in 1987/88, come from offshore grounds in the Ngai Tahu region, principally on the South Chatham Rise and off the South Canterbury/Otago coast (R25:5). Ling, hake, spiny dogfish, and silver warehou catches are also taken predominantly in Ngai Tahu waters (R38(O):table 4). These four species have a combined quota value of more than \$45 million (R25:5). The southern blue whiting catch is caught entirely within the Ngai Tahu region with a total catch of 8,011 tonnes

Profile of Modern Fisheries in the Ngai Tahu Region

(R38(O):table 4). Other major fisheries occurring in the Ngai Tahu region are red cod and barracouta, with more than 80 percent of both species being caught in the region (R38(O): table 4).

As these figures clearly reveal, fisheries within the Ngai Tahu region now form a most significant part of the modern fishing industry.

Table 9.1: *Percentage of total New Zealand catch in tonnes caught in the Ngai Tahu region in the 1985 calendar year (taken from evidence of Lawrence James Paul, R38(O):table 4)*

	Total NT Catch	Total NZ Catch	NT as % of NZ
Orange roughy	40787	51543	79
Hoki	45276	47166	96
Oreos	23599	23881	99
Barracouta	18629	22485	83
Red cod	15479	18153	85
Jack mackerel	1633	15308	11
Silver warehou	9124	9192	99
Snapper	13	9133	0
Ling	7717	8369	92
S blue whiting	8011	8011	100
Gemfish	6838	7727	88
Tarakihi	1789	4924	36
Kahawai	635	4385	14
School shark	1825	4336	42
Spiny dogfish	4017	4245	95
Trevally	3	3893	0
Albacore tuna	2182	3638	60
Rig	1331	3204	42
Gurnard	4463	088	15
Soles	1618	2150	75
Flounders	495	2126	23
Blue warehou	1584	2112	75
Alfonsino	152	1934	8
Gropers	752	1930	39
Hake	1856	1920	97
Skipjack tuna	1	1860	0
Southern bluefin	1153	1748	66
Blue mackerel	24	1699	1
Stargazers	1489	1625	92
Blue cod	1064	1594	67
Bluenose	155	1382	11
Frostfish	384	1268	30
Grey mullet	0	1003	0
Skate	744	961	77
White warehou	820	847	97
John dory	3	729	0
Elephant fish	597	691	86
Blue moki	116	659	18

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Ghost sharks	556	639	87
Bigeye tuna	1	561	0
Sea perch	410	437	94
Kingfish	4	336	1
Leatherjacket	35	305	11
Silverside	294	294	100
Cardinal fish	93	271	34
“Sharks”	217	265	82
Silver dorries	194	198	98
Butterfish	28	126	22
Yellowfin tuna	1	101	1
Porae	0	98	0
Yelloweye mullet	1	81	1
Rudderfish	79	79	100
Ribaldo	79	79	100
Butttery tuna	50	73	68
Parore	0	71	0
Brill	45	53	85
Red bait	46	46	100
Rays bream	3	3	100
Total All Species	204497	285035	72

References

- 1 *New Zealand Fishing Industry Board (NZFIB) Economic Review 1990* pp 18, 24 & 44
- 2 *ibid* p15. Figures on investment in the industry are unclear. An idea can, however, be attained by looking at the industries annual costs which for 1988/1989 were \$937.1 million (*ibid* p24); see also AA43:13
- 3 *New Zealand Official 1990 Yearbook; Te Pukapuka Houanga Whaimana o Aotearoa* Department of Statistics Wellington 1990 p603
- 4 *NZFIB Economic Review* pp7 and 22
- 5 *ibid* table 3 p22
- 6 *NZFIB Economic Review* p7
- 7 *ibid*; see also R21:5(b)
- 8 *ibid*
- 9 *ibid* pp47–48
- 10 *ibid* p17

Chapter 10

Ngai Tahu Sea Fisheries Treaty Rights Today

10.1 Introduction

In chapter 4 we considered the nature and extent of the Ngai Tahu sea fisheries at the time of the Treaty. In 1840 their sea fisheries extended some 12 miles or so from the foreshore from the northernmost eastern boundary, Pari-nui-o-Whiti, around the South Island coast to the northernmost western boundary at Kahurangi. We have not accepted the Ngai Tahu amended claim that there was at the time no seaward limit to their fishery.

But it is by now a truism that Maori Treaty rights are not frozen as at 1840. All lay in the future and there would be developments that could not have been foreseen or predicted at that time. As has been made only too evident in preceding chapters of this report, the impact of settlement and the assumption by government of the control and power to dispose of the sea fisheries has had a devastating effect on the rangatiratanga of Maori in general and Ngai Tahu in particular over their sea fisheries.

Since 1840 there have been notable advances in the size and means of propulsion of fishing vessels, in fishing technology, and in the discovery of species unknown to Maori and non-Maori at the time of the signing of the Treaty. One consequence of these developments has been the recent dramatic shift in fishing effort from the confines of the continental shelf to the offshore deepwater fisheries.

A critical question much debated before us is whether, and if so, to what extent, Ngai Tahu Treaty fishing rights encompassed these new developments including the extension of fishing out to the 200 mile limit of the exclusive economic zone.

A related question is whether Maori Treaty sea fishing rights were limited by the Crown's capacity to implement its Treaty guarantee.

In this chapter we propose to consider these and other issues bearing on Ngai Tahu's sea fisheries Treaty rights today.

10.2 The Development Right

- 10.2.1 It is common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development. This was recognised by the Muriwhenua tribunal in the context of a

discussion of new technology and the right to development. The tribunal found:

(a) The Treaty does not prohibit or limit any specific manner, method or purpose of taking fish, or prevent the tribes from utilising improvements in techniques, methods or gear.

(b) Access to new technology and markets was part of the quid pro quo for settlement. The evidence is compelling that Maori avidly sought Western technology well before 1840. In fishing, their own technology was highly developed, and was viewed with some amazement by early explorers. But there is nothing in either tradition, custom, the Treaty or nature to justify the view that it had to be frozen.

(c) An opinion that Maori fishing rights must be limited to the use of the canoes and fibres of yesteryear ignores that the Treaty was also a bargain.

It leads to the rejoinder that if settlement was agreed to on the basis of what was known, non-Maori also must be limited to their catch capabilities at 1840.

Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other.

(d) The Treaty offered a better life for both parties. A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty. (The Crown has generally accepted these principles . . .).

(e) The right to development is recognised in domestic and international law, in domestic law in *Simon v the Queen* (1985) 24 DLR (4th) 390, 402, for example.¹

10.2.2 As the tribunal noted, the Crown generally accepted points (a) to (d) but not point (e). Before us, counsel for the Crown Mr Carruthers set out the Crown's position as follows:

One of the principles Sinclair op cit [*Treaty Interpretation in British Courts* 12 ICLQ 508, 510–11] refers to, namely the principle of subsequent effectiveness, states that "Treaties are to be interpreted with reference to their declared or apparent objects and purposes." On this basis the right to continue to catch fish, which was an important object of the Treaty, must be interpreted as including the right to develop the fishery in accordance with new fishing techniques, increased knowledge of the fishery and modern fishing equipment. The Crown by the Treaty agreed to protect that right to development. It accepts that as the traditional Maori fishing right included a commercial element (to a greater or lesser degree depending upon the practices of each Tribe in various areas of New Zealand) the right to develop the fishery also includes the right to employ these new techniques, knowledge and equipment for commercial purposes. However, because of the large scale of modern commercial fishing, when the Tribes choose to undertake development of the commercial element of their traditional fishing rights it is an obligation of the Crown in exercise of its rights of sovereignty and its duty to protect the fishing resource of the nation to introduce, maintain and enforce appropriate programmes of conservation. Therefore the choice made by Maori to develop the

commercial element of their fisheries brings them within the conservation and management techniques of the day applicable to the scale of commercial use.²

10.2.3 Crown counsel challenged the Muriwhenua tribunal's reliance on the Canadian case of *Simon v The Queen* (1985) 24 DLR (4th) 390 as authority for the proposition that the right to development is recognised in domestic law. We agree with Mr Carruthers that unless the principles of a case such as *Simon v The Queen* are adopted by the New Zealand courts it cannot be said they have been recognised in New Zealand domestic law. But having said that, we believe, were the question of whether the Treaty must be interpreted as including the right to develop the fishery to become justiciable in the New Zealand courts, that the right to develop would be recognised in our domestic law. The Crown itself concedes that it is a right inherent in the Treaty of Waitangi. This being so, if the issue were to fall within the jurisdiction of a New Zealand court the Crown would be bound to support recognition of such a right just as it does before us in the context of our jurisdiction.

10.2.4 The Crown further challenged the Muriwhenua tribunal's statement in paragraph (e) that the right to development is recognised in international law. The Muriwhenua tribunal's statement should, however, be read in the light of the further discussion in the report which immediately follows paragraph (e). There the Muriwhenua tribunal notes:

That all peoples have a right to development is an emerging concept in international law following the Declaration on the Right to Development adopted on 4 December 1986 by 146 states (including New Zealand) in resolution 41/128 of the United Nations General Assembly.³

Mr Carruthers may well be correct in asserting that the right is not yet new customary international law. He is supported in this view by Dr Benedict Kingsbury who characterises the United Nations resolution as being:

rather a mixture of established principles of law and of desiderata. It may nonetheless point to eventual developments in international law of importance to indigenous peoples, whether or not these are ultimately characterized as collectively constituting a 'right to development'.⁴

Given the growing support in the United Nations for the recognition of the rights (including a right to development) of indigenous people we believe that such a right may become part of customary international law in the foreseeable future.

10.2.5 Counsel for the claimants strongly supported the Muriwhenua tribunal findings on the right to development. Counsel for the fishing industry submitted that the extent to which individual members of the tribes have developed rights in the fishery must be subtracted from any right to develop claimed by the tribes (an issue which we consider later (10.5) and further, that the Maori Fisheries Act 1989 should not be taken as some kind of concession by the Crown of a Ngai Tahu or Maori development

right. In all other respects the fishing industry adopted Crown counsel's submissions.

Commercial fishing

- 10.2.6 We have noted that the Crown in its statement on the right to development accepts that the traditional Maori fishing rights included a commercial element and that the right to develop the fishery also included the right to employ new techniques, knowledge and equipment for commercial purposes. This was concurred in by the fishing industry. It was also the view of the claimants.

The Crown, however, further maintained that when the tribes chose to undertake development of their commercial interest in the fisheries they are amenable to appropriate programmes of conservation and management techniques introduced by government from time to time. Crown counsel said nothing in this context as to any obligation on the Crown to consult with Maori before instituting any such measures. We consider the question of the need for consultation with iwi on this and related matters later in this report.

10.3 Fisheries Beyond Those Fished in 1840

As we have seen the Ngai Tahu business and activity of fishing in 1840 extended out to some 12 miles or so from the shore and in one instance between 30 and 60 miles offshore.

By the mid-1860s if not earlier, Ngai Tahu, with the aid of marks books, were fishing commercially some 20 to 30 miles from the shore. They were now using whale boats or similar vessels with sails. Over time their fishing operations extended out to the edge of the continental shelf. If the claimants' contention that there were no seaward limits to their sea fisheries was sound and Ngai Tahu rangatiratanga extended indefinitely seawards from either side of the island within given latitudes, then these waters constituted part of their exclusive sea fisheries. But we have found that Ngai Tahu sea fisheries in 1840 did not extend to these distances.

- 10.3.1 It does not follow, however, from this circumstance that Ngai Tahu Treaty fishing rights were frozen for all time within the range of 12 miles or so. Implicit in the recognition of the Treaty right to make use of new sea fishing technology is a right to take full advantage of it. If improvements in the design and means of propulsion of fishing vessels enabled fishers to go further out to sea to exploit new fishing grounds, to stay there longer, and to employ more sophisticated catching equipment, it follows that Ngai Tahu as a Treaty partner are entitled to a reasonable share of the new fisheries thereby opened up. The Treaty must be interpreted as including this right. This necessarily applies not only to fishing operations out to the edge of the continental shelf but to the recent extension over the past 25 or so years into offshore or deepwater fisheries.

To deny that this is so is to assert that the rights of one Treaty partner (Maori) but not the other party (the Crown) are confined to those existing in 1840. It is surely idle to recognise on the one hand that the Treaty

provides a right of development in the future and on the other to circumscribe its effective operation to the factual situation pertaining at 1840. The two Treaty parties are required to act reasonably and in good faith towards the other. Ngai Tahu raised no objection to the new settlers sharing in the abundance of their fisheries so long as such use did not impinge unduly on their own requirements. Likewise, as technology opened up access to new fishing grounds off their tribal rohe the Crown's duty to act reasonably and in good faith towards Ngai Tahu required it to ensure that a reasonable share of the new available fisheries were secured to its Treaty partner, Ngai Tahu. In this regard there can be no distinction between an extension of fishing out to the edge of the continental slope and further offshore into deepwater fisheries. There was to be a mutual benefit to both parties to the Treaty.

10.3.2 We adopt, with the addition indicated, the following propositions in the *Muriwhenua Fishing Report*:

- (a) There is no rule of the Treaty that Maori are confined to the fishing bands or grounds proven to have been used by them.
- (b) There is nothing in the Treaty to suggest that Maori could not expand upon their fishing capabilities to develop [further the inshore fishery and also] the offshore fishery.
- (c) Neither party was involved in the offshore fishery at 1840, except for whaling. Both parties were involved in whaling. Trawlers were not introduced until the end of the 19th century. Major offshore fishing did not develop until the 1970s.
- (d) Allowance must be made for the lack of any funding to tribal authorities for the development of their fisheries, comparable with the substantial loans and incentives provided for the industry as a whole.
- (e) Further allowance must be made for the disincentives that came with laws restrictive of Maori fishing. With state help, Maori trusts and incorporations enormously expanded Maori farming capabilities. It is readily imaginable that with state encouragement, not discouragement, Maori would have developed an offshore capability. The pre-1840 experience is indicative of that.⁵

We note once again that Ngai Tahu as an iwi was prevented from actively developing its fisheries from the late 1860s on because of the crippling economic effect of the Crown land purchases and accompanying breaches of the Treaty by the Crown which we have recounted in the *Ngai Tahu Report 1991*.

10.3.3 Mr I N Clark, Chief Fisheries Economist with MAFFish argued in a lengthy affidavit that the business and activity of offshore fishing is so different from the business and activity of inshore fishing that it cannot be concluded that Maori inshore development would have led to the substantial development of offshore fisheries. He noted that from 1978 until 1982 New Zealand's involvement in deepwater fishing was largely limited to joint venture arrangements. Only a very limited number of New Zealand companies had the resources to enter into such ventures. Mr Clark stressed that large vessels with highly specialised electronic navigation and other gear and substantial crews operating up to 24 hours a day

were needed. He concluded that development into the deepwater was not a natural and logical extension of inshore fishing but was a different fishing activity. In his view it does not necessarily follow that the claimant tribes would have developed an offshore, deepwater capability but for some lack of support or opportunity (Z48:22–24).

10.3.4 Mr Clark's opinions were strongly challenged by Dr Habib. In an overview report Dr Habib said:

If Maori had been allowed to continue to dominate the fisheries as they did in the period immediately following the signing of the Treaty, and were maintained, properly supported, and promoted by the Crown in their fishing activities, it could be argued that Maori would have adopted new technology to their fisheries over time, and used their proven flair in fishing and their long-held knowledge about resources and fishing grounds to maintain a position of pre-eminence in this most traditional of industries.

This is not merely speculation. We only need to take a look at reports of Maori Economic Development in the mid-1800s to appreciate that Maori had every capability to keep up with technological innovations in the fishing industry. In the 1850s, Maori were the major purveyors of foodstuffs in New Zealand, dominating the agricultural sector, and producing most of the commodities for export. In all of this, there was a good deal of adaptation of European technology to Maori circumstances. Much of that Maori economic development was actively supported and encouraged by Government

With continuing support of the kind guaranteed in the Treaty, Maori interests may well have arrived in the 1960s as one or more of the larger fishing entities, albeit ones taken up mostly with inshore fisheries, as was then the case for every other business in the fishing industry. (AA29:28–29)

In his final submissions (AB6) Mr Castle for the fishing industry took issue with the Crown. He submitted that the Crown was not correct in asserting that no New Zealanders developed the valuable deepwater fisheries. Mr Castle claimed that the New Zealand fishing industry, although perhaps not the discoverer of all the deepwater fisheries, has played a major and active part in the development of them. We accept that this is so.

While there can be no absolutely certain answer, this tribunal considers it reasonable to accept that Ngai Tahu, given the abundance of its sea fisheries and its long and successful experience in the business and activity of fishing, would have emerged as a dominant force in sea fishing in the South Island. As such it would have taken its place alongside the other New Zealand companies referred to by Mr Castle in the active development of the deepwater fisheries. That the tribe had no possibility of doing so was due in large measure to the Crown's action in depriving it of an economic base at a time when it was engaged in a prosperous fishing enterprise and in failing actively to protect Ngai Tahu sea fisheries.

New species

- 10.3.5 The claimants adopted with one qualification the discussion of this topic in the *Muriwhenua Fishing Report*. In particular, the claimants referred to the tribunal's first proposition:

The tribal treaty interest is not limited as to species of fish, the origin of fish, the location of fish or the purpose or use to be had of them. Maori harvested all types of fish at every type of location but had no need to explore the wider seas. Through non-Maori overfishing, they now have a special interest in "new" species.⁶

Ngai Tahu referred to traditional and historical evidence as showing that they did in fact "explore the wider seas". They crossed Cook Strait. Captain Cook noted double canoes some 12 miles offshore from the coast at Kaikoura. They travelled regularly to the Titi Islands and carried out extensive coastal voyages.

- 10.3.6 Crown counsel Mr Carruthers agreed that Ngai Tahu fisheries were not limited as to species, origin and location known to them as at 1840. In defining the Ngai Tahu Treaty fishing rights the Crown suggested the tribunal would need to evaluate the nature and extent of the fishing at the date of the Treaty, identify any subsequent changes in the pattern of fishing, the course of such changes and finally, translate the result of that analysis into a modern context. In this regard, Crown counsel submitted that the initiatives in the Maori Fisheries Act 1989 and current MAFFish policies would provide a model for the modern context (AB14:7).

- 10.3.7 The fishing industry through its counsel Mr Castle took a restrictive view and re-affirmed its submission that in contrast to the Muriwhenua situation the Ngai Tahu sea fisheries meant "their fishing grounds". In short, their fisheries were confined to those fish caught in particular fishing grounds in 1840 and further, that Ngai Tahu retain exclusive possession only of specific grounds adjacent to land owned by Ngai Tahu (AB6:17-18).

While re-affirming that the fishing industry does not resile from its earlier submissions as to how Ngai Tahu fisheries should be defined, Mr Castle suggested that the Maori Fisheries Act 1989 has contributed to the substantial remedying of any prejudice suffered by Ngai Tahu in respect of "their (site-specific) fisheries" (AB6:20).

- 10.3.8 Dr George Habib discussed Ngai Tahu acquaintance with offshore demersal fish which today are by far the most important species in the New Zealand commercial fishery (T4(a):118-127). In a later report he summarised the situation:

As I pointed out in an earlier part of this report (Part One) most of the so-called offshore fish spend at least part of their time in inshore waters. Good examples are hoki, ling, warehou, barracouta, gemfish and frostfish. The traditional fishermen did not need to venture far to catch these species because he knew when they would be available in shallow water, and where. He did, however, venture offshore for certain species, two good examples being hapuku and tarakihi. Of mainly scattered distribution when in inshore waters, these species school up and become concentrated together during offshore migrations. It made good economic sense to fish these

species in the deeper water around the edge of the continental shelf at those times. (T4(c):111, 113)

It appears, however, that almost all currently commercially significant deepwater demersal fish were probably unknown to pre-1840 Ngai Tahu fishers, hoki being a notable exception. But in our opinion this is not of critical importance. If, as we believe, Ngai Tahu had a Treaty right to employ new technology in extending their fishing operations further out from the shore, including the deepwater fisheries, it necessarily follows that they had and have a Treaty right to catch a reasonable share of all commercially viable fish whether these were earlier known to them or not. It is a right they share with their Treaty partner who had no more knowledge of the deepwater fisheries than Maori in the 1840s or indeed until quite recently.

10.4 **Territorial Seas**

10.4.1 Crown counsel Mr Carruthers submitted that international law is relevant to the interpretation of the Treaty (AB2:64). While not suggesting that international law was at the forefront of the minds of the two parties to the Treaty he submitted that the Crown must be taken to have known and to be bound by international law. Similarly he argued that if Maori are to be regarded as a sovereign state for the purpose of a grant of sovereignty to the Crown they must be bound by international law also.

Mr Carruthers suggested that by 1840 claims to areas of territorial sea had consolidated to an agreed three-mile zone which was generally accepted as a rule of the law of nations. There is no evidence that Maori were even remotely aware of any such agreement. Certainly they were not party to it. Did the governor explain this so-called rule to Maori before inviting them to sign the Treaty? There is no evidence that he did and given Mr Carruthers' admission that international law was not at the forefront of the minds of the two parties, we can safely assume that he did not advert to the question. Had he done so and at the same time explained that he could only guarantee their fisheries within a three-mile limit would Maori have signed? It must surely be questionable that they would have signed without a full guarantee of their sea fisheries.

There is a further weakness in the Crown argument. There was, in fact, far from universal acceptance of the so-called three-mile limit at 1840. Contrary to Mr Carruthers' assertion that by that time the three-mile limit was generally accepted as a rule of the law of nations, D P O'Connell in his authoritative work, *International Law* (1970) says:

During the whole of the nineteenth century the three-mile rule for fishery remained one of controversy. Spain, in deference to England's wishes, experimented with it in the 1820s' and returned to a six-mile limit. Scandinavian countries maintained a four-mile rule established in 1812. Denmark adopted the three-mile rule in 1882

In 1849 a dispute developed with Belgium over the right of Belgian fishermen to fish within three miles of the coast of England, and in 1852 it was settled on the most-favoured-nation principle. Belgium had adopted the three-mile rule in 1832 and Holland followed in

1883. Greece also adopted three miles in 1869. Following the *Franconia* case in 1876 there was an exchange of correspondence with Germany in which the latter asserted that there was no legal limit to territorial waters. In fact Great Britain was careful not to commit herself to three miles, and studiously omitted all reference to it from the Territorial Waters Jurisdiction Act 1878. In the 1880's negotiations were instituted for joint conservation measures in the North Sea, and curiously it was Great Britain that did not want to specify a limit to territorial waters and France that urged the three-mile rule. In the outcome the North Sea Fishery Convention 1882 adopted a three-mile limit but reserved the Zuider Zee, the Skagerrak and certain shoal water off the Elbe.⁷

- 10.4.2 It is apparent from the foregoing discussion that the so-called rule was a matter of controversy and uncertainty for much of the nineteenth century. If Britain chose in 1840 to assert no more than a three-mile territorial sea limit for her new colony of New Zealand that was not because of any binding rule under international law. Certainly it was not done with the assent or even knowledge of Maori. We are satisfied that the Treaty required the Crown to take all reasonable and practicable steps, should the occasion arise, to implement its guarantee to Maori of the full, exclusive and undisturbed possession of their fisheries and that this obligation did not stop at any three-mile limit.

Moreover, as the Muriwhenua tribunal pointed out:

The Crown has always possessed the constitutional power to regulate the fishing and other activities of its subjects on the high seas. It in fact did do so, in making laws that affected New Zealand vessels
.....⁸

Support for this view is to be found in O'Connell who, on the basis of a judgment of the International Court in the *Lotus Case* PCIJ (ser A) No 10 (1927), points to extensive extra-territorial jurisdiction of any state to legislate for the peace, order and good government of the state.⁹ If any event occurs outside the state's territorial limits the fact that the act or the actor was beyond the territorial boundary of the state is irrelevant provided the occurrence bears on the peace, order and good government of the legislating state. Legislation designed to ensure compliance with the legislating state's treaty obligations to its indigenous people is surely for the peace, order and good government of that state and therefore in conformity with international law.

- 10.4.3 Crown counsel recognised that in certain circumstances Ngai Tahu fished grounds which were well beyond the three-mile limit, at least as far as 12 miles and on one or two occasions much further than that. But, in reliance on his claim that the three-mile limit was the maximum recognised by international law in 1840, he submitted that once Ngai Tahu went over the so-called three-mile limit they were exercising merely the rights which every person of every nation had to conduct fishing operations on the high seas. There could, he argued, be no right of sovereignty or control over such water or the fish in it (AB2:71-74). The

right to fish in that area was non-exclusive. This is, however, not what the Treaty said.

Crown counsel's argument rests on the proposition that Maori in 1840 were bound by a so-called rule of which they had never heard, and to which, like many European nations where the rule had some limited currency only, they had not assented.

- 10.4.4 The Treaty expressly guaranteed to Maori, including Ngai Tahu, their fisheries. For Ngai Tahu these fisheries unquestionably extended beyond three miles, certainly out to 12 miles or so and in at least one place well beyond. We find Crown counsel's argument that the Treaty guarantee was simply that they would be protected when there was Crown authority to do so – that is out to three miles – unconvincing. The three-mile limit was not at the time a requirement of international law; if the Crown chose to restrict itself in this way it was a self-imposed restriction at odds with the clear and unqualified guarantee given Maori by article 2 of the Treaty. It was never communicated to Maori.

Even as recently as 1965 the New Zealand government showed a willingness to enact the Territorial Sea and Fishing Zone Act 1965 contrary to then international law because it was in the interests of this country to do so. Mr Carruthers referred to this Act as reflecting developing norms of customary international law (AB2:73). While the law may have been developing it was not developed at this time. The Right Honourable Prime Minister Keith Holyoake in his second reading speech said:

Unfortunately, we cannot claim that this action to establish the 9-miles-wide fishing zone is related to any form of international agreement. Strenuous efforts have been made in recent years to reach some general international agreement on a proposal which would give each country as of right up to 12 miles for fishing limits. New Zealand has played its part under successive Governments in trying to achieve this, the latest efforts being in 1958, and also at the 1960 conference in Geneva. On the last occasion this proposal was defeated by the narrowest of margins, and so there was no agreement at the convention on the 12 miles of fishing limits. In spite of that but having regard to the general trend, since 1960 a number of countries have claimed the extended fishing limits as we are doing for New Zealand in this Bill. Quite recently the United Kingdom did so, and many other countries in Europe, and Canada also, have claimed up to the 12 miles in recent years. It can be seen that, although there is no international convention, New Zealand has sufficient precedent which she can follow—precedent established by some quite important countries. This action has been taken because of the very rapid increase in the scale of fishing all over the world in recent years. Very many countries are showing considerable concern at retaining adequate water for their own fishing fleets.¹⁰

This is clear proof should it be needed that New Zealand and other governments feel justified in acting contrary to international convention if national interests are considered to justify such unilateral action.

- 10.4.5 When in 1965 the Crown extended the New Zealand fishing zone nine miles out from the three mile territorial sea limit it had no justification

for failing to protect Ngai Tahu sea fisheries which extended to that distance.

As we have seen, Ngai Tahu Treaty sea fishing rights included the right to extend their fisheries in accordance with developments in technology. One result of new technology was the discovery of a variety of deepwater fish. To control and protect this resource the Territorial Sea and Exclusive Economic Zone Act 1977 was passed. This gave the Crown power to control and manage the resources of the sea to a limit of 200 miles from the New Zealand shores.

Mr Carruthers for the Crown submitted that there is no warrant for a claim by Maori that international law recognises what he called “a creeping right” (AB2:74). It is not necessary for us to decide that the soundness of this submission for the Ngai Tahu claim is firmly grounded on the Treaty of Waitangi. Accordingly, the real question is whether the Treaty of Waitangi recognises the right of Maori, as a Treaty partner, to a reasonable share of the sea fisheries brought within Crown sovereignty and control. We note, in passing, that the 1977 Act, as with the earlier 1965 Act, was the result of the Crown acting unilaterally in establishing for New Zealand the 200 mile exclusive economic fishing zone. In doing so the government of the day was influenced by between 30 and 40 other countries having already taken this action notwithstanding that the International Law of the Sea Conference had yet to reach final agreement on the question.¹¹

For reasons we have given when discussing the Ngai Tahu Treaty right of development in relation to its sea fisheries, we believe that Ngai Tahu along with the Crown is entitled under the Treaty to a reasonable share in the new deepwater fisheries previously unknown and unexploited by Maori and non-Maori alike.

10.5 **Ngai Tahu Involvement in the General Fisheries Regime**

10.5.1 The Crown submitted that what it called “the high presence” of individual Ngai Tahu in the southern commercial fishery indicated that the tribal presence had the potential to be developed in the way the tribe chose. It further submitted that the chiefs had a choice and could have elected to hold wealth tribally but chose not to do so (X4:133).

It further submitted:

In reality the tribe did not seek to have a tribal commercial fishery and in our submission what this points to is either the process of acquiring rights under the Article the Third of the Treaty or an adaptation to European systems that began with the “partnerships” of sealing and whaling. Having chosen to individualise its fishing activities the tribe now asserts a tribal claim as well. (AB2:63–64)

Mr Carruthers for the Crown submitted that Ngai Tahu cannot have it both ways. He appears to be suggesting that if individual Ngai Tahu exercise their rights to go fishing, Ngai Tahu as a tribe has thereby forfeited its Treaty fishing rights.

The fishing industry did not go so far. Mr Castle put it to us that the extent to which individual members of the tribe have developed rights in the fishery must be subtracted from any rights to develop claimed by the tribe.

10.5.2 While Mr Higgins for the claimants told us that Ngai Tahu individual involvement in the South Island fishery comprised ownership of 40 percent of all fishing vessels (J10:47) this evidence was put in its true perspective by Dr Habib who stressed that in fact the individual Ngai Tahu involvement represented only a small part of the overall southern commercial fishery. The great bulk of the southern fish catch is taken in offshore waters where there is only a very small southern Maori presence (T4(a):228).

10.5.3 The Crown submissions overlook two other vital considerations. First, as David Higgins demonstrated, virtually all the present Ngai Tahu fishers are descended from Pakeha whalers and have a long and largely unbroken family involvement in the fishery since whaling collapsed in the 1840s. As Mr Higgins told us, by the 1870s Ngai Tahu had lost their land and become impoverished. "Put bluntly" he said "the loss of land deprived Ngai Tahu of the ability to enter any field of endeavour where capital was the price of entry" (J10:65).

10.5.4 The tribunal accepts as sound the following statement by Mr Higgins:

Those Ngai Tahu presently involved in the industry are there in their own personal right and as a result of their own personal endeavours. They are not there as representatives of a recognised tribal right to the resource. Their fishing rights are analogous to the rights of the owners of individualised Maori land, who now own it in their own right, free of control by the Tribe and not answerable to Maoridom for their stewardship of it. The Maori fishermen are in exactly the same position, and their presence is not an acknowledgement of a Tribal Treaty right to the fishery, rather, as the evidence will later show, it is more an accident of history. (J10:48)

Those Ngai Tahu who elected to go fishing as individuals did no more than exercise their rights as British subjects under article 3 of the Treaty. Ngai Tahu continued to fish as a tribe until after the land sales when – as we have found – impoverishment and the absence of an economic base, the direct consequences of the Crown purchases, left Ngai Tahu without the resources to actively pursue their article 2 Treaty sea fishing rights on a commercial basis. It was not, as the Crown suggests, a deliberate choice; on the contrary the disastrous consequences of the Crown's many Treaty breaches left them with no alternative other than to abandon their previously prosperous iwi fishing business.

10.6 **Summary**

The tribunal finds that Ngai Tahu have:

(a) an exclusive Treaty right to the sea fisheries surrounding the whole of their rohe to a distance of 12 miles or so there being no waiver or agreement by them to surrender such right.

(b) a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the 200 mile exclusive economic zone such right being exclusive to Ngai Tahu.

By way of an addendum we recall here the statement of counsel for Ngai Tahu recorded in 4.4.4 that where their claimed development right overlaps with the development rights of the Chatham Islands and Ngati Kahungunu, the exercise of those rights is a matter to be negotiated between those tribes.

References

- 1 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) (Muriwhenua Fishing Report)* 1988 p234
- 2 Wai 22 H1:34–35; see also AB2:77–78
- 3 *Muriwhenua Fishing Report* p235
- 4 *Waitangi, Maori and Pakeha Perspectives of the Treaty of Waitangi* ed I H Kawharu (Oxford University Press, Auckland 1989) p140
- 5 *Muriwhenua Fishing Report* p236
- 6 *ibid* pp236–237
- 7 D P O’Connell *International Law* (Stevens, 2nd ed (1970)) pp457–458
- 8 *Muriwhenua Fishing Report* p210
- 9 O’Connell pp601–602
- 10 NZPD 1965 vol343 p1842
- 11 NZPD 1977 vol413 p2395

Chapter 11

Treaty Principles

11.1 Introduction

In chapter 4 of our *Ngai Tahu Report 1991* we considered the Treaty and the Treaty principles relating to the claims concerning land and mahinga kai. Before discussing the Treaty and its application to the various claims of the Ngai Tahu people we recounted how Ngai Tahu subscribed to the Treaty in various localities within their tribal rohe. We noted that had Captain Hobson not acted precipitately in May 1840 by issuing a proclamation asserting the sovereign rights of the Crown over the South Island and Stewart Island by right of discovery, his proper course would have been to proclaim sovereignty over the South Island on the grounds of cession. This indeed was what Major Thomas Bunbury did on 17 June 1840 at Port Underwood after he had obtained the signatures of seven Ngai Tahu rangatira and those of nine other South Island chiefs acceding to the Treaty.¹ We understand why Ngai Tahu, whose Maori predecessors have occupied Te Wai Pounamu for upwards of 1000 years, reject the notion that their island was “discovered” by the British. In fact they, the tangata whenua, readily signed the Treaty of Cession and they are entitled to invoke their rights under it.

Among the matters discussed in chapter 4 of our *Ngai Tahu Report 1991* were the status of the Treaty, the rules of Treaty interpretation, the constitutional status of the Treaty and Treaty provisions. These were a necessary preliminary to our consideration of the principles relating to the claims for land and mahinga kai. All that we said on those matters applies equally to the present sea fisheries claim. However, no useful purpose is served by repeating our discussion of these topics. It is sufficient here that we briefly state our conclusions on them before moving to a discussion of the Treaty principles relevant to the sea fisheries claims.

11.2 The Status of the Treaty

- 11.2.1 We believe there is credible and persuasive support for the view that the Treaty of Waitangi was a valid treaty under international law. Certainly it was the intention of the British government to treat with the Maori people as a sovereign independent nation. Accordingly it is reasonable

to apply the general principles of treaty interpretation to the Treaty of Waitangi.²

11.3 **Rules of Treaty Interpretation**

- 11.3.1 The tribunal's task is complicated by the existence of two versions of the Treaty, one in Maori, the other in English. We are obliged to have regard to both and where differences exist, to reconcile or harmonize these differences. In so doing we should bear in mind that the broad and general nature of its language indicates the Treaty was not intended as a finite contract but rather a blueprint for the future. For all lay in the future. What matters is the spirit. It is necessary to look not only at the language of both texts of the Treaty but also to the surrounding circumstances including the Maori perception at the time of what the Treaty meant.

With very few exceptions the Maori version of the Treaty was signed by the Maori chiefs. Where there is a difference between the two versions considerable weight should, in our opinion, be given to the Maori text since this is the version assented to by all but a few Maori who signed the treaty.

We believe the Treaty of Waitangi should be seen as a basic constitutional document. In seeking to ascertain and give effect to the spirit of the Treaty as the nation's founding document we should interpret each text in a generous, ample and ultimately compatible fashion. Moreover, the Treaty must be capable of adaptation to new and changing circumstances as they arise.³

11.4 **Constitutional Status of the Treaty**

- 11.4.1 Certain legislative provisions, most notably the Treaty of Waitangi Act 1975 and its amendments have resulted in the Treaty being given effect to and, as a consequence, residing in the "domestic constitutional field." Other recent legislation requires or permits decision-makers to have regard to the Treaty. The High Court has ruled that the Treaty "is part of the fabric of New Zealand society" and in certain circumstances regard may be had to its provisions in interpreting legislation. But in the absence of express legislative provision, Treaty rights cannot be enforced in the courts. Nevertheless this tribunal senses that the central importance of the Treaty in our constitutional arrangements is likely to receive growing recognition by the courts, the legislature and the executive in the foreseeable future.⁴

11.5 **Principles**

If the tribunal finds that any claim submitted to it under s6 of the Treaty of Waitangi Act 1975 is well-founded it may recommend remedial action by the Crown. Before it can find a claim to be well-founded the tribunal must be satisfied:

- (a) that the claimant has established a claim falling within one or more of the matters referred to in s6(1) of the Act,

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(b) that the claimant has been or is likely to be prejudicially affected by any such matters, and

(c) that any such matters were or are inconsistent with the principles of the Treaty.

All three elements must be established before the tribunal can find a claim to be well-founded.

Previous reports of the tribunal have formulated a number of Treaty principles considered to be applicable to those particular claims. The Court of Appeal, notably in the *New Zealand Maori Council* case, has also formulated certain Treaty principles.⁵ Not all principles are relevant to any given claim.

In reflecting on which principle or principles are applicable to the present claim the tribunal has noted that some matters earlier characterised as principles might more appropriately be seen as inherent in or encompassed by a wider or more general principle. We believe this to be especially true of the first of the four principles we are about to discuss as being applicable to the present claim.

The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga

- 11.5.1 This principle is fundamental to the compact or accord embodied in the Treaty and is of paramount importance. We see it as over-arching and far-reaching, derived as it is directly from the provisions of articles 1 and 2 of the Treaty. Intrinsic to it are several concepts which elsewhere have been characterised as principles but which we now believe are better seen as inherent in or integral to this basic principle. Specifically we refer, in the context of the present claim, to the Crown obligation actively to protect Maori Treaty rights; the tribal right of self-regulation, the right of redress for past breaches, and the duty to consult.

Implicit in this principle is the notion of reciprocity – the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands, forests, fisheries and other valuable possessions for so long as they wished to retain them. It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Maori land but of much more, including fisheries.

Rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga – mana Maori – in terms of article 2.

The Crown in obtaining the cession of sovereignty under the Treaty therefore obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired was a qualified right.

As will appear in our discussion of the tribal right of self-regulation and of the principle of mutual benefit, the tribunal recognises that in reconciling the concepts of sovereignty and rangatiratanga some compromises will need to be made by both Treaty partners.

- 11.5.2 The Crown obligation to protect Maori rangatiratanga required it actively to protect Maori Treaty rights, including Maori fisheries rights.

The preamble to the Treaty records the anxiety of the Queen to protect the “just Rights and Property” of the Maori chiefs and tribes of New Zealand. The English version of article 2 was drafted by James Busby. He had been in New Zealand since 1833 and was well acquainted with Maori and their way of life. In particular he knew of the high value Maori attached both to their land and their fisheries. It is not surprising that he ensured that specific reference was made to both in article 2 whereby the Crown confirmed and guaranteed to Maori the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties for so long as they chose to retain them in their possession. We note that article 3 extends to Maori the Queen’s royal protection and in addition confers on them the rights and privileges of British subjects. Protection of Maori rights and property is clearly a dominant characteristic of the Treaty.

Claudia Orange has noted the assurances given by Hobson and other Crown representatives, both prior to the first signing of the Treaty on 6 February 1840 and prior to subsequent signings by Maori, that their lands and other Treaty rights would be protected.⁶ While Dr Orange does not record any specific reference to Maori fisheries as such, it cannot be disputed that the Treaty guarantee of protection of this taonga would have been of great importance to them. Seafood was a significant and indispensable element in the diet of most Maori in Aotearoa including Ngai Tahu.

The tribunal in various reports has stressed the duty imposed on the Crown under the Treaty actively to protect Maori interests. The Court of Appeal in 1987 endorsed this view. The president of the court, Sir Robin Cooke, then said:

the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal’s Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded.⁷

One of the reasons for the British government despatching Captain Hobson to negotiate a treaty of cession with the Maori was the presence in New Zealand of some 2000 British subjects and the likelihood of substantial numbers of settlers joining them. Wakefield’s determination to press on with his settlement plans was apparent with the arrival of the first contingent of colonists at Port Nicholson in January 1840 shortly before the Treaty was signed. While land was no doubt foremost in the minds of both Maori and Captain Hobson, it must have been apparent to

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both that the growing numbers of settlers would wish to take fish from the sea. Hobson, the Queen's representative, approved the express inclusion of fisheries in the English version of the Treaty. While, no doubt, the apparent plentitude of fish in the waters of Aotearoa would not have suggested to Hobson the need at that time for any special measures to protect the Maori fisheries, the Treaty guarantee was intended to operate indefinitely into the future. The duty of the Crown would become operative when the build up of the settler population began to place the Maori fisheries under pressure. At that point it was the Crown's responsibility to ensure, if the settlers were to continue to take fish from the sea, that the interest of Maori in their fisheries was fully protected. In so far as Maori were prepared to continue to share this resource with non-Maori the Crown in its protective role was obliged to ensure that the needs of Maori were first met. In discussing the principle of protection the Muriwhenua tribunal said:

The essential point was that the Treaty both assured Maori survival and envisaged their advance, but to achieve that in Treaty terms, the Crown had not merely to protect those natural resources Maori might wish to retain, but to assure the retention of a sufficient share from which they could survive and profit, and the facility to fully exploit them.⁸

The critical point is that the Treaty guaranteed to Maori their fisheries for so long as they wished to retain them. The fisheries so guaranteed were those over which Maori exercised rangatiratanga in 1840. Any diminution in the exclusive possession of such fisheries as a result of fishing by non-Maori would require the concurrence of Maori. It was the duty of the Crown to ensure that non-Maori, who were now and in the future to share the bounty of Aotearoa (including access to Maori sea fisheries), did so with the concurrence of Maori and in such a way that Maori retained a sufficient share for their present and reasonably foreseeable future needs.

The Treaty guarantee extended not merely to those sea fisheries over which Maori exercised rangatiratanga in 1840 but to such extended fisheries in which they subsequently became entitled to an exclusive share under the right to development inherent in the Treaty.

The tribal right of self-regulation or self management is an inherent element of tino rangatiratanga. This concept was discussed in the *Muriwhenua Fishing Report*. The Muriwhenua tribunal put it this way:

In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government.⁹

By way of elaboration, the Muriwhenua tribunal emphasised (among other matters) that:

- the Treaty guaranteed tribal control of Maori matters, including the right to regulate access of tribal members and others to tribal resources.
- the cession of sovereignty or kawanatanga enabled the Crown to make laws for conservation control and resource protection, being in everyone's interests. These laws may need to apply to all alike. But this right is to be exercised in the light of article 2 and should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short, sovereignty is said to be limited by the right reserved in article 2.¹⁰

The Crown in the exercise of its powers of governance in the national interest clearly has a right, if not a duty, to make laws for the conservation and protection of valuable resources such as the sea fisheries. But such power should be exercised with due regard to the interests of the owners of such resources. In the case of their sea fisheries guaranteed to Maori by the Treaty, the Crown should first consult with Maori on proposed conservation measures and ensure that Maori interests are not adversely affected, except to the extent necessary to conserve or protect the resource. Failure by the Crown to so act is inconsistent with Maori tino rangatiratanga over their sea fisheries.

- 11.5.3 The duty to consult does not exist in all circumstances. In our *Ngai Tahu Report 1991*, after citing a passage from the judgment of Sir Ivor Richardson in the *New Zealand Maori Council* case, we said:

It follows from Sir Ivor Richardson's discussion that in some areas more than others consultation by the Crown will be highly desirable, if not essential, if legitimate treaty interests of Maori are to be protected. Negotiation by the Crown for the purchase of Maori land clearly requires full consultation. On matters which might impinge on a tribe's rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources – mahinga kai – also require consultation with the Maori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may impinge on Maori interests, will often give rise to the need for consultation. The degree of consultation required in any given instance may, as Sir Ivor Richardson says, vary depending on the extent of consultation necessary for the Crown to make an informed decision.¹¹

As we indicate above, environmental matters and, we would emphasise, measures of resource control as they affect Maori access to traditional food resources – mahinga kai – require consultation with the Maori people concerned. Given the express guarantee to Maori of sea fisheries, consultation by the Crown before imposing restrictions on access to or the taking by Maori of their sea fisheries is clearly necessary. Such matters plainly impinge on the rangatiratanga of tribes over their sea fisheries.

- 11.5.4 If failure by the Crown to protect a tribe's rangatiratanga results in detriment to Maori there is an obligation on the Crown to make redress.

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This was recognised by Mr Justice Somers in the *New Zealand Maori Council* case:

The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle . . . That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.¹²

Sir Robin Cooke also accepted that if the Waitangi Tribunal found merit in a claim and recommended redress the Crown should grant at least some form of redress unless grounds existed justifying a reasonable partner in withholding it – which he thought “would be only in very special circumstances, if ever.”¹³

We turn next to consider the second principle applicable to this claim.

The principle of partnership

- 11.5.5 This principle is now well established. It was authoritatively laid down in the *New Zealand Maori Council* case where the Court of Appeal found that the Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith.¹⁴

We reiterate our earlier adoption of the following statement by the Muriwhenua tribunal as to the basis for the concept of a partnership:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty’s terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.¹⁵

The principle of mutual benefit

- 11.5.6 This principle was expounded in the *Muriwhenua Fishing Report* in this way:

Both parties expected to gain from the Treaty, the Maori from new technologies and markets, non-Maori from the acquisition of settlement rights and both from the cession of sovereignty to a supervisory state power. For Maori, access to new markets and technologies necessarily assumes a sharing with the settlers who provide them, and for non-Maori, a sharing in resources requires that Maori development be not constrained but perhaps even assisted where it can be. But neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state objectives of common benefit. It ought not to be forgotten that there were pledges on both sides.¹⁶

In the context of sea fisheries, where we believe it was envisaged from the outset that the resources of the sea would be shared, this is an important principle. It recognises that benefits should accrue to both Maori and non-Maori as the new economy develops but this should not

occur at the expense of unreasonable restraints on Maori access to their sea fisheries.

The principle of options

- 11.5.7 This principle was also enunciated by the Muriwhenua tribunal.¹⁷ In essence it is concerned with the choice open to Maori under the Treaty. Article 2 contemplates the protection of tribal authority and self-management of tribal resources according to Maori culture and customs. Article 3 in turn conferred on individual Maori the rights and privileges of British subjects. The Treaty envisages that Maori should be free to pursue either or indeed both options in appropriate circumstances. The Crown is obliged to offer reasonable protection to Maori in the exercise of the rights so guaranteed them.
- 11.5.8 We propose in the next chapter to apply these principles in testing whether and, if so, to what extent, the Crown has acted consistently or inconsistently with them in relation to Ngai Tahu sea fisheries.

References

- 1 *Ngai Tahu Report 1991 (Wai 27)* Waitangi Tribunal Report: 3/4 WTR pp 215–217
- 2 *ibid* pp 218–221
- 3 *ibid* pp 221–224
- 4 *ibid* pp 224–226
- 5 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA)
- 6 Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington 1987) Chs 3 and 4; see also *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) (Muriwhenua Fishing Report)* 1988 pp 189–190
- 7 *NZMC v AG* [1987] 1 NZLR 641 (CA) p 664
- 8 *Muriwhenua Fishing Report* p 194
- 9 *ibid* p 187
- 10 *ibid* pp 230–232
- 11 *Ngai Tahu Report 1991* p 245
- 12 *NZMC v AG* [1987] 1 NZLR 641 (CA) p 693
- 13 *ibid* pp 664–665
- 14 *ibid* p 642
- 15 *Muriwhenua Fishing Report* p 192
- 16 *ibid* pp 194–195
- 17 *ibid* p 195

Chapter 12

Crown Breaches of the Treaty

12.1 Introduction

In our *Ngai Tahu Report 1991* we dealt with the adverse effects of the Crown purchase of Ngai Tahu lands and the substantial deprivation of their land based mahinga kai. We deferred their sea fisheries claims for this further report. In doing so we recognised we were making an artificial distinction for Ngai Tahu tribal life in the widest and deepest sense encompassed both land and sea; they drew sustenance from both; each was the source of profound spiritual experience. Ngai Tahu tino rangatiratanga extended alike over land and sea and the creatures on, above and below the earth and water. All were part of the bounty of their gods, held in trust for present and future generations.

We have recounted in some detail in earlier chapters the centuries long relationship of Ngai Tahu with the sea and their sea fisheries. We have recorded their substantial dependence on the sea, a dependence which remains to this day. We have seen how their skills and knowledge led to the growth of a prosperous trade in the supply of fish to the steadily growing numbers of Europeans who came to settle on Ngai Tahu land acquired for this purpose by the Crown. Ironically, it was these very land purchases which were to result, soon after the completion of the last such purchase in 1864, in Ngai Tahu being compelled as a tribe to abandon their commercial sea fishing activities. Thereafter, some individuals excepted, the iwi was restricted to taking fish for sustenance and ceremonial purposes only.

Ngai Tahu tribal sea fishing rights were adversely affected by various Crown acts and omissions. We propose to consider these under three broad heads:

- The eight Crown purchases.
- Crown legislation 1866 to 1982.
- The Quota management system.

12.2 The Eight Crown Purchases

In the overview of the eight Crown purchases in our *Ngai Tahu Report 1991* we noted that with the Rakiura (Stewart Island) purchase in 1864 the Crown completed its acquisition of Ngai Tahu land first begun 20 years earlier.¹ As a result, all but an insignificant fraction of Ngai Tahu

land was gone. We then summed up the condition to which Ngai Tahu were reduced:

By 1864 Ngai Tahu were in a parlous, some might say pitiable condition. They were now an impoverished people largely confined on uneconomic patches of land, almost entirely isolated from mainstream European development, neglected by government at both central and provincial level, marginalised and struggling to survive both individually and as a people. Their rangatiratanga greatly diminished, their communal way of life and the cultural and spiritual values associated with it seriously undermined. As settlement steadily encroached on them from all sides, as land was progressively fenced and drained, as their access to mahinga kai steadily decreased, Ngai Tahu eked out a bare subsistence on land incapable of sustaining them. No wonder their voices came to be heard more and more in protest.²

The reason for this transformation in the Ngai Tahu situation was, as we have found, that the Crown failed time and again to honour the principles of the Treaty of Waitangi.³

- 12.2.1 The evidence establishes that during the 1840s and 1850s and part at least of the 1860s Ngai Tahu fished commercially to meet the growing demands of the settlers. But following their post land sales impoverishment most Ngai Tahu whanau or hapu lacked the necessary capital and resources to continue in commercial fishing. The rate and timing of the transition from tribal to individual fishing varied from place to place. It dates from the 1860s and was almost certainly completed by the end of the 1880s.

We are satisfied that this situation was the direct and inevitable result of the condition to which Ngai Tahu as a tribe were reduced following the Crown acquisition of virtually all their land. It was a direct consequence of the various Treaty breaches we have detailed in our first report.⁴

- 12.2.2 Some of the consequences of these Treaty breaches are related in a statement of grievances by the complainants in relation to Ngai Tahu marine fishing. They include the following claims for which there is considerable support in the evidence:

6. Multiple breaches of the Treaty obligations of the Crown to Ngai Tahu in regard to land acquisitions in Te Waipounamu, and exclusion from or destruction of their traditional mahinga kai resources based in the lands and waters, which grievances the Tribunal has already investigated and found to be well founded, directly affected the ability of Ngai Tahu to continue their own protection of their sea fisheries as they had actively done during early stages of European settlement and commercial joint venturing between Ngai Tahu and Pakeha.

7. Deprivation of the land and mahinga kai resources which the Crown ought to have ensured Ngai Tahu retained under the Treaty obligations also undermined and eventually destroyed the Ngai Tahu economy, reduced most of the Tribe to poverty and poor health, and made it impossible for the tribal community to par-

ticipate as they expected and should have done in the newly developing economic ventures based on both land and sea resources. This deprivation and effective exclusion from participation in the developing economy was a further failure of the Crown to honour its promises under the Treaty.

8. In so doing the Crown deprived Ngai Tahu of both the marine fishery resource itself, and the opportunity to share their resource with immigrants and strangers under their own rangatiratanga, as was their right according to their own customs and practices. There have often been occasions when it was not possible to feed visitors on marae with traditional sea foods as expected, and sometimes the tribe has been forced to purchase sea food for the marae from outsiders, to their shame. This material and cultural deprivation undermined the mana whenua and mana moana rights of the tribe and their leadership, and broke the Crown's promise to protect and sustain Ngai Tahu tino rangatiratanga.

9. The loss of the benefits of the sea fisheries, as well as their lands and mahinga kai resources, severely reduced the opportunity for Ngai Tahu individuals or hapu to follow their traditions and customary tribal way of life to the degree they wished and would have preferred, which free choice was part of the Treaty promise that was broken. (AA49:1)

12.2.3 In addition to these various forms of deprivation resulting from the Crown's Treaty breaches Ngai Tahu were prejudicially affected as an iwi in that:

- they were deprived of the opportunity to further develop and expand their successful domestic and overseas commercial trade in fresh and preserved fish which they had initiated prior to the Treaty and subsequently successfully developed for a period;
- they were deprived of the opportunity to take advantage of developing technology in fish and fishing vessels and in particular to exploit new grounds in waters further out from their rohe including ultimately the deepwater fishing grounds;
- they were deprived of the profits and accumulation of capital which would have resulted from an expanding commercial fishery and from acquiring the resources necessary to update fishing equipment and vessels and thereby further develop their business and activity of fishing;
- they consequently suffered severe and continuing material and social damage from the lack of material resources and income to maintain their tribal economy and culture; and
- they were reduced to fishing for sustenance and ceremonial purposes only and then not always successfully due to depletion and pollution of their fisheries both inland and marine.

12.2.4 Subsequent Treaty breaches by the Crown, soon to be described, exacerbated the adverse effect on Ngai Tahu sea fisheries. But it is readily apparent that grievous and irreparable harm resulted from the Crown's breaches of its Treaty obligations when acquiring vast Ngai Tahu land holdings. For not only had the tribe lost virtually the whole of its land and economic base, it was as a direct consequence unable to continue its thriving and expanding business and activity of sea fishing. More than

a hundred years was to elapse before its protests were listened to in a meaningful way.

Coincidentally, at about the time Ngai Tahu was being forced to withdraw from its commercial fishing operations, the Crown initiated its first legislative intervention. It is to that and later legislation we now turn.

12.3 **Crown Legislation 1866 to 1982**

12.3.1 In chapters 5 and 6 we have given a detailed account of the sea fisheries legislation during this lengthy period. We do not propose to traverse that discussion in any detail. It became apparent that Maori, including Ngai Tahu, Treaty rights were breached by this legislation in various ways. These we will now consider.

12.3.2 The sea fisheries legislation during the period 1866 to 1982 had three main characteristics:

- A principal concern was to conserve the sea fishery resources;
- An underlying assumption was the right of the Crown to provide for the general public exploitation of the sea fisheries subject only to the conservation measures enacted from time to time, notwithstanding the fishing rights guaranteed to Maori under the Treaty; and
- The failure by the Crown throughout almost the whole period to afford adequate legislative protection or recognition of Maori sea fishing rights guaranteed by the Treaty.

We will discuss each of these characteristics in turn.

The concern for conservation

12.3.3 It is apparent from the provisions of the legislation, which commenced with the Oyster Fisheries Act 1866, that a principal objective was to put in place measures designed to assist in protecting and conserving the resource. The name of the first general sea fisheries legislation, the Fish Protection Act 1877, reflects this concern.

The claimants quite properly acknowledged the right of the Crown to legislate for this purpose. Indeed, they saw the Crown as having an active duty to protect and conserve the resource in the interest of the new nation founded by the Treaty (AB13:1). They have strongly objected, however, to the failure of the Crown to recognise that it was their fisheries not the Crown's which were being regulated without any recognition of the Ngai Tahu right as a Treaty partner to participate in the management and control of their fisheries. The concerns of Ngai Tahu were expressed in this way:

11. The Crown has prevented Ngai Tahu from exerting their tino rangatiratanga in the fisheries to use and conserve their fishery resources according to their own traditions and customary laws with a consequential depletion and damage to the fishery resources.

12. By excluding their Treaty partner from active participation as between good faith Treaty partners in the highly important matter of resource protection and conservation, and imposing instead different regimes under the Crown's own officials, there has been

serious damage to Ngai Tahu fishery properties, and the customary law and mana of the tribe has been undermined by the Crown, in contravention of its duties under the Treaty. (AA49:2)

12.3.4 In guaranteeing Ngai Tahu tino rangatiratanga over their sea fisheries the Treaty guaranteed the tribal rights of self-regulation or self-management of their resource, this being an inherent element in tino rangatiratanga. This right was totally usurped by the Crown without any consultation with Maori and without any recognition of their Treaty rights in the sea fisheries. It would be difficult to find a clearer case in which the principle of partnership required the Crown to recognise Ngai Tahu interest in their fisheries and to consult with them over their management. To refuse or neglect to do so was to deny Ngai Tahu rangatiratanga over their sea fisheries and was clearly in breach of article 2 of the Treaty.

12.3.5 Regrettably, over time, the various statutory regimes intended to protect and conserve the sea fisheries failed to prevent serious depletion of the resource to the detriment not only of Ngai Tahu but Maori generally. The resulting material and cultural deprivation, as Ngai Tahu have claimed, undermined their mana whenua and mana moana tribal rights and was the result of the Crown's breach of its Treaty duty to protect and sustain Ngai Tahu tino rangatiratanga.

The basic assumption underlying the legislation

12.3.6 Subject to some limited or partial exceptions discussed later it is apparent that the sea fishery statutes reflected the Crown's assumption that non-Maori had equal rights with Maori in the whole of the sea fisheries. While the Acts placed various restrictions on the method and times for taking fish, they for the greater part made no distinction between Maori and non-Maori, notwithstanding that article 2 of the Treaty guaranteed Maori rangatiratanga over their fisheries. For instance, the very first statute, the Oyster Fisheries Act 1866, while in part at least intended as a conservation measure,

- was enacted without any consultation with Ngai Tahu in whose rohe were some of the finest oysteries in the world;
- was based on the assumption, if not of Crown ownership of the resource, at least of its right to regulate access to the oysters without consultation with Ngai Tahu or any recognition of their rights to manage the oysters within their rohe;
- did not recognise in any way that oysteries were part of Ngai Tahu fisheries;
- made no distinction between Maori and non-Maori in the rights of access to the oysteries; and
- by an amendment in 1869 provided for exclusive 5 year licences to be issued to discoverers of oyster beds notwithstanding that these might be part of Ngai Tahu or other tribal fisheries. This Act assumed the right of the Crown to exclude Ngai Tahu from access to any such oysterie notwithstanding their Treaty rights.

Later, the Sea Fisheries Act 1894 provided for the sale by public tender of an exclusive right to take oysters for any period up to 14 years. All

oysters in any such oyster bed held under an exclusive licence became the absolute property of the licensee. The Crown assumed the right to sell them to the highest bidder presumably on the basis that somehow the Crown, and not Ngai Tahu, was the owner. There was no provision protecting or saving Maori Treaty rights in this Act. So much for the Treaty guarantee of Ngai Tahu fisheries and the Crown's duty to protect them.

- 12.3.7 Notwithstanding such provisions, which were confiscatory in nature and in clear breach of article 2 of the Treaty, the first general sea fisheries legislation did recognise Maori Treaty rights in their fisheries. As we have seen s8 of the Fish Protection Act 1877 provided that:

Nothing in this Act contained shall be deemed to repeal, alter or affect any of the provisions of the Treaty of Waitangi, or to take away, annul or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder.

The effect of this provision was that no provision in the Act which was inconsistent with or in any way adversely affected Maori Treaty fishing rights could have any affect on such Treaty rights. It was, we believe, more than a mere saving clause. It gave positive recognition to Maori rights under the Treaty which were deemed to take effect in preference to those of the Act where there was any conflict between the respective provisions. The Act, a very brief one, was to become operative by regulations. Regulation 4 of the first general regulations made in April 1878 expressly said that none of the regulations were to apply to any Maori. In this way Maori Treaty sea fishing rights were recognised and respected.

- 12.3.8 Regrettably this freedom from Crown fishing legislation was to be shortlived. In 1885 an amended regulation purported to limit Maori exemption to taking oysters or indigenous fish for their personal consumption only and not for sale. As a strict matter of law the regulation was almost certainly ultra vires as s8 of the 1877 Act was still in force.

The Crown's failure to afford adequate legislative protection of Maori sea fishing rights under the Treaty

- 12.3.9 The Fish Protection Act 1877 was repealed by the Sea Fisheries Act 1894 and no new provision to replace the former s8 was enacted. In December 1894 the earlier regulation permitting Maori to take oysters and indigenous fish for personal consumption only was also repealed. There was no longer any statutory recognition of Maori Treaty rights to their fisheries. It was as if their rights had disappeared. No explanation was given for the repeal of these protective provisions. We are unable to reconcile with good faith on the part of the Crown as a Treaty partner the total repeal and failure to replace these provisions in 1894. In our opinion this action was in clear breach of the Crown's treaty obligation actively to protect the rangatiratanga of Maori, including Ngai Tahu, in their sea fisheries.

In 1903 the Crown reinstated in substantially modified form the former s8 of the 1877 Act which had disappeared in 1894. But whereas s8 had

expressly referred to and protected Treaty of Waitangi fishing rights, the new s 14 in the 1903 amendment simply said that:

nothing in this Act shall affect any existing Maori fishing rights.

This provision, with the later omission of the word “existing” has remained in subsequent legislation down to the present. In 1914 the full Supreme Court in *Waipapakura v Hempton* (1914) NZLR 1065 accepted the argument of the then Solicitor-General for the Crown that, apart from legislation, the Treaty of Waitangi was merely a bargain binding on the conscience of the Crown and was not a source of legal rights. Nor did s 77(2) of the Fisheries Act 1908 help. It was merely a saving clause which did not create rights. Only legislation confirming the Treaty rights would be recognised by the courts and there was no such legislation.

The tribunal considers that the Crown, by omitting to take appropriate legislative action to protect Maori sea fishing rights under the Treaty and to thereby honour the “bargain binding on the conscience of the Crown”, failed in its Treaty obligation to protect Ngai Tahu rangatiratanga over its sea fisheries and acted contrary to its obligation as a Treaty partner to act reasonably and in good faith. Instead, it elected to continue to exercise legislative control over the sea fisheries from 1894 to 1982 and later, without regard to its Treaty obligations to Maori and in breach of Treaty principles.

We note here that the question of the extent to which, if at all, s 88(2) may save aboriginal rights under customary law is a matter within the jurisdiction of the High Court. We express no opinion on the question.

12.3.10 It remains to refer to certain provisions which had they been implemented might have been seen as an implied if very limited recognition of Maori Treaty rights:

- in 1892 the governor was given power to set aside in the vicinity of any Native pa or village an oyster-fishery for the *exclusive* use for their personal consumption at all times. This provision was continued in the 1894 Act and on into this century. No such oyster-fishery was ever set aside for Ngai Tahu and only a few were established in the North Island;
- the Maori Councils Act 1900 and its 1903 amendment made provision for oyster and mussel beds and pipi and fishing grounds to be reserved *exclusively* for Maori use. The right proved to be a hollow one. None were ever granted. These provisions were repealed and replaced in 1945; and
- section 33 of the Maori Social and Economic Advancement Act 1945 replaced the earlier 1900 and 1903 provisions with minor changes. Under s 33 *exclusive* Maori fishing grounds could be reserved on the recommendation of the Minister of Marine. No such reserve was created despite many requests including at least four by Ngai Tahu which we have earlier described (6.9.8–6.9.11). This provision, intended to benefit Maori, was totally undermined by administrative and political intransigence. Successive ministers simply refused to

implement it chiefly, it appears, because they did not agree with the law.

In refusing to give effect to these provisions, intended for the benefit of Maori, the Crown appears to have ignored article 3 of the Treaty which extended to Maori the Crown's royal protection and all the rights and privileges of British subjects. While very modest in scope the 1900, 1903 and 1945 provisions for exclusive oyster and fish reserves for Maori were in effect a very limited recognition of Maori Treaty rights to their sea fisheries. The Crown's refusal, in even a single instance over a period of 62 years when the provisions were in force, to make provision for an exclusive reserve sought by Maori, including Ngai Tahu, cannot be reconciled with reasonableness and good faith on the part of a Treaty partner. The Crown must be held to have breached its Treaty obligations.

12.4 **The Fisheries Act 1983**

12.4.1 The genesis of the quota management system (QMS) described in chapter 7 and at 12.5 below lay in 89(1)(g) of the Fisheries Act 1983. This section authorised the making of regulations prescribing a quota or total allowable catch for any fish or fishery in New Zealand waters. It was later superseded by a statutory scheme in 1986. Before considering the implications of the QMS we should briefly refer to some other provisions of the 1983 Act which remain in force. As noted, it repealed the previous fisheries legislation and consolidated and reformed the law concerning the management and conservation of fisheries and fishing resources.

Fishery management plans

12.4.2 Part I provides for the development of a comprehensive and integrated approach to managing fisheries by way of management plans for special areas. The Director-General of MAF was obliged to consult and have regard to the views of representatives of various organisations including Maori in the preparation of a fishery management plan. But the minister has discretion as to whether members representing Maori are appointed to fishery management advisory committees. These committees are to give advice on the preparation and operation of management plans. Given that such plans may well relate to Maori fisheries guaranteed by the Treaty it is surprising that Maori participation in their supervision is not mandatory. Representations by all four Maori members of Parliament that this should be so were rejected by the Crown. This is yet another illustration of the Crown's failure to protect the rangatiratanga of Maori, including Ngai Tahu, over their sea fisheries.

Exclusion of part-time fishers

12.4.3 As we have seen in chapter 7, the restricted definition of commercial fishermen in the 1983 Act resulted in many Maori and non-Maori part-time fishers being excluded from any further commercial fishing. Between 1500 and 1800 part-time fishers were banned from the industry. Within the Ngai Tahu claim area some 137 such fishers were excluded. It is thought that a substantial number of these were of Ngai Tahu. Given that Ngai Tahu has never waived, sold or surrendered their Treaty sea fishing rights and that in hindsight the Crown has recognised that the exclusion

policy should have been restricted to those fishers not dependent on fishing, many of those excluded have a justified sense of grievance.

New Zealand Maori Council representations

- 12.4.4 In chapter 7 we outlined various representations made by the New Zealand Maori Council while the 1983 Bill was before Parliament. The council sought to have the Treaty of Waitangi formally recognised in the Act but this was not done. The omission to do so was a further instance of the longstanding failure of the Crown to protect Maori Treaty fishing rights in fishery legislation. Nor would the Crown accede to a request to acknowledge Maori rangatiratanga over their sea fisheries by recognising in the new legislation the rahui concept as a basic principle. We have discussed in chapter 8 the council's request that the former s33 of the Maori Social and Economic Advancement Act 1945 be re-enacted as part of the new Fisheries Act.

Taking shellfish for use at a tangi or hui

- 12.4.5 We note that regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986 permits the taking of the more common shellfish in excess of the normal limits by Maori for use at a tangi or hui. This continues an earlier 1972 regulation. This is a rare acknowledgement of Maori interest in their fisheries. Its efficacy, however, is affected by the failure of the Crown to prevent depletion and pollution of the resource.

12.5 The Quota Management System

This scheme originated in limited form under regulations in 1983. Species allocations were made among nine separate companies with at least 75.1 percent in New Zealand ownership. It was restricted to eight deepwater species. The statutory scheme applicable to both inshore and deepwater species was enacted in the 1986 amendment to the Fisheries Act 1983. As we have noted in chapter 7, input from Maori, including Ngai Tahu, at the tribal level to the lengthy discussions leading to the passage of the 1986 amendment was virtually non-existent. MAFFish had no experience in consulting with Maori at this most important and basic level.

Purpose of the scheme

- 12.5.1 The principal purpose of the scheme was to control and if necessary reduce fishing effort so as to conserve fish stocks at a sustainable level by a system which it was hoped would at the same time provide the most effective long term sustainable economic yield from the resource. The previous legislative regime which had admitted all-comers had resulted in serious depletion of the inshore fishery and placed the future viability of some species in jeopardy. It was apparent that drastic action was called for. The quota management system was the Crown's response.

The property interest created

- 12.5.2 While conservation was the scheme's rationale it rested on the creation by the Crown of a property interest in an exclusive right to commercial fishing in the form of an individual transferable quota (ITQ). This quota, allocated to certain fishers on the basis outlined in chapter 7, can be

readily transferred by sale, lease or licence. As the Muriwhenua tribunal held, correctly in our view, the right to catch fish in terms of an ITQ has the characteristics of a property right.⁵ One moreover, which was not purchased by those who qualified for the initial allocation of the ITQ. Those smaller fishers excluded by the scheme who wished to participate were required, if they could afford to do so, to purchase quota at market prices.

Maori reaction to the scheme

- 12.5.3 Maori generally, including Ngai Tahu, objected strongly to the scheme as enacted in 1986. We recall the Ngai Tahu attitude as expressed by Tipene O'Regan (7.5.12). Mr O'Regan claimed that the Crown first took away from the Maori tribes the fishing resources which belonged to Maori, not to the Crown, and then:

the Crown went on to purport to give those resources, or the beneficial usage of them, together with tradeable property rights on an individual transferable basis of title, to other persons. (AA16:11)

Mr O'Regan further claimed that the true owners were thereby deprived of their estate in fishing which under the 1986 Act was:

transferred by main force of the Crown in its right of administration in government, and given away without fee or compensation to other commercial non-Maori interests.”(AA16:12)

In chapter 7 we have recorded the spate of litigation concerning the QMS instigated by Maori including Ngai Tahu against the Crown. This litigation at present stands adjourned.

- 12.5.4 We have found (10.6) that Ngai Tahu have:

- (a) an exclusive Treaty right to the sea fisheries surrounding the whole of their rohe to a distance of 12 miles or so there being no waiver or agreement by them to surrender such right and
- (b) a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the 200 mile exclusive economic zone, such rights being exclusive to Ngai Tahu.

We agree with the Muriwhenua tribunal that there is a fundamental conflict between Maori fishing rights under the Treaty and the quota management scheme. The 1986 amendment which gave statutory force to the QMS effectively guaranteed to those allocated ITQ (almost all of whom were non-Maori), the full exclusive and undisturbed possession of the property rights in fishing that the Crown had already guaranteed to Maori. The Act is based on the premise that no fisheries subject to quota belonged to Maori but all to the Crown and were, with Parliament's assent, the Crown's to give away or dispose of as it saw fit.

We have no hesitation in finding that the quota management system put in place by the Crown is in breach of the principles of the Treaty. Rather than actively protecting the rangatiratanga of Ngai Tahu in their sea fisheries the Crown has acted on an assumed right to dispose of them without Ngai Tahu consent and demonstrably against their will. This power has moreover been taken without consultation with Ngai Tahu and in the face of Maori protest. It is in clear breach of the Treaty.

It is likewise inconsistent with the Crown's obligation to act reasonably and in good faith towards its Treaty partner Ngai Tahu. The prejudicial effect of these serious breaches of Treaty principles is self-evident. We will come shortly to the Maori Fisheries Act 1989 in which the Crown has taken the initial step to repair the grave infringement of Maori rangatiratanga in their sea fisheries. Before doing so we should, however, briefly advert to a submission made to us by Mr Carruthers on behalf of the Crown.

- 12.5.5 In the course of his final submissions Mr Carruthers stated that it was not accepted that the enactment of the Quota Management system was a breach of the Treaty. Mr Carruthers argued that the Crown's position has always been that it was perfectly open for Maori to go and exercise any commercial fishing rights which Maori had. That is, he said, the Maori fishing rights preserved and protected under s88(2) of the Fisheries Act 1983. The subsection provides that "nothing in this Act shall affect any Maori fishing rights". Presumably Mr Carruthers was arguing, although he did not in terms say so, that this provision "preserved and protected" Ngai Tahu sea fishing rights under the Treaty. But if so, he omitted any reference to the decision of the full Supreme Court in *Waipapakura v Hempton* which we have discussed in 12.3.9. We reiterate that in that case the Supreme Court accepted the Crown submission that the Treaty of Waitangi was no more than a bargain binding on the conscience of the Crown and was not a source of legal rights. As for what is now s88(2) of the 1983 Act, that provision the court held was merely a saving clause which did not create rights. Only legislation confirming the Treaty rights would be recognised by the courts and there was no such legislation. Mr Carruthers did not refer us to any such legislation; nor could he because none exists in the context of sea fisheries. We find no merit in Mr Carruthers submission. Ngai Tahu sea fishing rights under the Treaty have been not merely ignored but, without Ngai Tahu consent, in large part disposed of by the Crown in the form of individual transferable quotas. Nor is it an answer to say that Ngai Tahu as a tribe had not been exercising their Treaty sea fishing rights. The Crown was responsible for reducing the tribe to a condition which made it impossible for it to do so.

The Maori Fisheries Act 1989

- 12.5.6 In chapter 8 we summarised the provisions of the Maori Fisheries Act 1989 which we characterised as a breakthrough towards Crown recognition of Maori Treaty fishing rights. We noted that the new Act had its genesis in a number of factors including the interim declarations of Mr Justice Greig in the High Court. Of considerable importance was the publication of the tribunal's *Muriwhenua Fishing Report*. A principal

finding of the tribunal was that the QMS as currently applied was in fundamental conflict with the Treaty but that it might be beneficial to both Maori and the Crown if an agreement could be reached.⁶ This tribunal endorses the view that, as enacted, the QMS is in fundamental conflict with the Treaty and, specifically, with Ngai Tahu sea fishing rights under the Treaty.

As a result of the 1989 Act the Crown is in the course of meeting its statutory obligation to transfer to the Maori Fisheries Commission ten percent of the total allowable commercial catch (TACC) for the benefit of Maori. Such transfer is to be completed by October 1992. In the meantime the Maori parties to the High Court proceedings have agreed, subject to the Crown honouring its commitments, not to recommence the High Court proceedings before October 1992.

Ngai Tahu views on the QMS and the Maori Fisheries Act 1989

12.5.7 In his final submissions Mr Upton, counsel for the Ngai Tahu claimants, made a variety of points including the following (AB1:29–31):

- Whatever its faults in terms of the Treaty Ngai Tahu has to recognise that the QMS is now a “practical reality”;
- Ngai Tahu has consistently opposed the QMS on the grounds that the permanent property right (ITQ) in its fisheries was appropriated by the Crown and given to others. But Ngai Tahu has not necessarily opposed the QMS per se as a management system although it has reservations about its efficacy in certain respects;
- Ngai Tahu accept that a durable Ngai Tahu fisheries right in the form of ITQ could reasonably represent rangatiratanga in sea fisheries. The issue it says, is one of allocation and the actual amount and type of TACC to be allocated to Ngai Tahu;
- as long as the process of allocation of ITQ permits Ngai Tahu to achieve a total of 50 percent of TACC in all species offshore from their mana whenua without regard to statutorily imposed seaward boundaries, Ngai Tahu would be prepared, without prejudice to its claimed Treaty of Waitangi rights for 100 percent of such TACC, to accept quota in the form of ITQ and to hold them as tribal property;
- Ngai Tahu would not object to such an allocation being delivered via the mechanism of the Maori Fisheries Act providing there was a statutory amendment requiring the Maori Fisheries Commission to ensure its actual delivery to Ngai Tahu; and
- on the basis of the Treaty partnership and its perception of the nature of Treaty of Waitangi based rangatiratanga in sea fisheries, Ngai Tahu believes that the tribe has a right to inclusion in the actual decision-making processes concerning its sea fisheries, which is greater than that of an ordinary quota holder and that the Crown should be required to include Ngai Tahu in management decisions affecting its interest in sea fisheries. It points to the extent of Ngai Tahu mana moana as further justification for such a belief.

12.5.8 Crown counsel Mr Carruthers in final submissions pointed to the Maori Fisheries Act 1989 as being a recognition by the Crown of Maori claims which put in place a system to implement that recognition. He urged that the tribunal should report on a further mechanism for the delivery of the sea fishing rights which Ngai Tahu may have and in this respect proposed support for the Maori Fisheries Act 1989 (AB2:87–88).

12.5.9 The fishing industry through Mr Castle made lengthy submissions on the Maori Fisheries Act (AA43). He expressed the view that the Act taken as a whole, being the delivery of ten percent of the total allowable catch together with the taiapure regime provided for in the Act “strikes a fair and reasonable middle ground consistent with the spirit and principles of the Treaty” (AA43:51). While we record this expression of opinion we also note that the appropriate allocation of quota to Maori is essentially a matter for discussion and resolution as between the Crown and Maori.

12.6 **Conclusion**

It is readily apparent that Ngai Tahu has for more than a century been seriously prejudiced by longstanding breaches of the Treaty culminating in the enactment and implementation of the quota management system. As a direct consequence of the Crown’s Treaty breaches deriving from its acquisition of Ngai Tahu land, the tribe was unable from the latter part of the last century to continue its commercial sea fishing business.

Except for a short period from 1877 to 1894 Crown legislation has failed to recognise Ngai Tahu Treaty rights to their sea fisheries. While statutory provision was in place for 62 years from 1900 on for exclusive fishing grounds for Maori, none were ever granted. Then in 1986 under the quota management system the Crown assumed the right to dispose of Maori sea fisheries in clear breach of Treaty principles.

The Maori Fisheries Act 1989 expressly states that it is intended to make better provision for Maori fishing rights secured by the Treaty and to facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing. This is a welcome step towards statutory acknowledgement by the Crown of Maori sea fishing rights guaranteed by the Treaty. By October 1992, ten percent of quota should have been transferred to the Maori Fisheries Commission for the benefit of Maori. Ngai Tahu will expect to receive the benefit of its proportional share.

This tribunal is not in a position accurately to assess the value of the sea fisheries to which Ngai Tahu is entitled under the Treaty. The tribe has never disposed of its exclusive right to the sea fisheries out to 12 miles or so from its shoreline. Its reasonable share of the fisheries beyond this distance out to the limit of the 200 mile exclusive economic zone has yet to be negotiated and settled. In so doing allowance should be made for the serious depletion of the inshore fishery. Given the very extensive ocean which surrounds their long coastline and the richness of the deep sea fishery resource within it we would expect the value of the Ngai Tahu sea fisheries to be very substantial in potential catch terms.

At present the Crown is obliged to transfer ten percent of quota to the Maori Fisheries Commission by October 1992. This is intended to be for the benefit of Maori. While we are unaware of how or when this quota will be distributed to iwi we believe if justice is to be done not only to Ngai Tahu but to all other tribes, that a substantially higher percentage of quota than ten percent of the total allowable commercial catch will need to be made available for distribution among Maori. As we have indicated, the value of Ngai Tahu sea fisheries alone must be very substantial.

12.7 **Recommendations**

Our recommendations appear in chapter 14.

References

- 1 *Ngai Tahu Report 1991 (Wai 27)* Waitangi Tribunal Report: 3/4 WTR p821
- 2 *ibid*
- 3 *ibid* pp821–840
- 4 *ibid*
- 5 *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22)* 1988 p142
- 6 *ibid* p239

Chapter 13

Summary of Findings and Conclusions

13.1 Introduction

In this chapter we record in summary form our principal findings and conclusions on the main events and issues arising in this claim. We would stress that this summary is just that. A full account of our findings and of how we reached them is to be found in preceding chapters. This summary should therefore be read in the light of and subject to those earlier chapters. In chapter 14, our final chapter, we briefly re-state our findings on treaty breaches by the Crown and we record our recommendations.

13.2 Ngai Tahu Sea Fisheries at 1840

- The tribe's coastal territory was and is all the land below the northernmost eastern boundary Pari-nui-o-Whiti (White Cliffs, just south of Blenheim) around the South Island coast to the northernmost western boundary at Kahurangi. Ngai Tahu territory also includes Rakiura (Stewart Island) and all other islands off these shores. Ngai Tahu do however recognise the separate mana of Ngati Kahungunu from the north and Maori from the Chatham Islands and they reserve the right to determine sea boundaries with these tribes;
- fishing in lagoons, in harbours, in river mouths, in estuaries and at sea formed an essential part of the Ngai Tahu economy prior to the Treaty, as did the taking of seals, shellfish, whales and marine flora. The use of marine resources was a fundamental feature of Ngai Tahu mahinga kai, and played a key role not only in the tribe's economy, but in its social and spiritual life. Marine resources formed a significant part of the diet of Ngai Tahu communities, and some hapu, such as Ngati Kuri at Kaikoura, were heavily dependent on the resources of Tangaroa;
- the major constraint on the Ngai Tahu ability and need to fully exploit the abundant marine resources of their territory was a limited population. Ngai Tahu developed their fishing operations according to their needs. Any more extensive or labour intensive exploitation of their sea fisheries was simply not necessary;
- Ngai Tahu had developed a sophisticated fishing technology that was adapted to the various marine environments of Te Waipounamu and to the particular species to be found in them. The development of barracouta lures and composite hooks, as well as the use of a variety of small nets, allowed Ngai Tahu to take species not readily available to North Island Maori;

- the Ngai Tahu use of shellfish resources, lagoons, estuaries, harbours and river mouths was intensive in the vicinity of permanent settlements, particularly at Kaikoura, at Kaiapoi, and at the mouths of the Ashley, Waimakariri and other Canterbury rivers, in the harbours of Banks Peninsula, at Waihora and Wairewa, along the south Canterbury and north Otakou coast, in Otakou harbour, and on the northern shore of Foveaux Strait. Use of the sea fisheries in these areas was considerable up to a mile or so from shore. Seasonal and less frequent use was made of the seas beyond this distance, particularly to take hapuku. This fishing extended to some 12 miles or so from shore. Fishing beyond this distance could have taken place. Ngai Tahu had the craft to fish beyond 12 miles from shore in good sea conditions. It is not likely they fished beyond this distance on a regular basis. There was little need for them to do so and the risks to life involved increased the further out they went;
- fish and other marine resources were taken elsewhere along the extensive coastline of Ngai Tahu as part of their seasonal foraging expeditions. These expeditions allowed Ngai Tahu to utilise marine resources along most of the shoreline from Pari-nui-o-Whiti south on the East Coast of Te Waipounamu. Residential mobility, the technology available to the tribe, and their knowledge of the fishery allowed Ngai Tahu to take whatever species they wished along their shoreline. They were also able to fish off the shore where necessary, and several miles from shore if desired. The evidence suggests that given their limited population they were able to concentrate on places where marine resources were abundant and easily acquired;
- on the West Coast the Ngai Tahu use of marine resources was more limited than on the east. There were significantly fewer Ngai Tahu, and substantial parts of the coast provided only limited resources. However Ngai Tahu settlements in the north and the south were dependent on shellfish and other shoreline, estuarine and lagoon resources. They also fished in the sea around their settlements. Areas which were intensively fished were limited and could not have extended far out to sea. The sounds and fiords of western Murihiku were also fished by Ngai Tahu, largely on a seasonal basis. While this fishing was very important to those concerned, it cannot be regarded as intensive;
- fishing for barracouta was a major tribal activity which was undertaken by southern Maori from their earliest habitation of the island. Barracouta fishing had a role in Ngai Tahu social and economic life not evident elsewhere;
- the archaeological record shows a specialised fishery which was concentrated on barracouta, red cod, wrasses, blue cod, ling and hapuku. Other species found in this record, although to a considerably lesser extent, include tarakihi, sea perch, trumpeter, black cod, butterfish, gurnard, southern kingfish, snapper, stargazer, flounder, leather jacket, sole, marblefish, blue moki, conger eel, scorpion fish, warehou, trevally and brill;
- the archaeological record understates the varieties of fish taken, and cartilaginous fish such as dogfish, sharks and skates and crayfish were

Summary of Findings and Conclusions

clearly taken by Ngai Tahu, and in substantial quantities considering the tribe's numbers;

- Ngai Tahu fishing expertise and technology allowed the tribe to take all species of fish inhabiting depths less than 50 metres, including deep sea species which frequent shallower seas at some times of the year. Ngai Tahu undoubtedly caught all of these species some of the time, but the frequency with which these fish were caught and the quantities taken remains unknown. Ngai Tahu are most unlikely to have known or taken deep water species such as orange roughy, alfonsino, silver and white warehou, hake and the deep water dories. They are also unlikely to have taken, except by chance, oceanic pelagic species such as large tunas, marlins and swordfish;
- Ngai Tahu were, however, aware of and did take hoki and other deepwater fish which can be found in shallower waters seasonally or periodically;
- European contact allowed Ngai Tahu to adopt technological advances suited to their fishery such as iron barbed hooks, oars and rollocks and eventually sealing and whale boats. This process was well under way prior to the Treaty, and continued in the decades immediately following;
- Ngai Tahu traded fish amongst themselves and with other iwi and they preserved fish for their own consumption and for trade. With the coming of Europeans they had the opportunity to trade fish with visiting vessels and to supply European whaling shore stations. Some Ngai Tahu fish may have been exported at least as far as Australia by the late 1830s;
- off-shore whalers were able to take whales without interference from Ngai Tahu, and Ngai Tahu had little ability to control this fishery, even if they had the inclination. Shore or bay whaling was, in contrast, extensively controlled by the iwi. There is no evidence of any permanent waiver of the Ngai Tahu right to fish to European whalers and sealers prior to 1840. Periodic negotiations appear to have been undertaken between whalers and their Ngai Tahu landlords over the establishment and maintenance of shore whaling stations, including the right to fish. Ngai Tahu did not assert an ownership of whales, nor is there any evidence of their attempting to exclude either sealers or whalers. Nonetheless, while these negotiations may have allowed for individual whalers to monopolise the use of particular stretches of coastline, there is no evidence that these agreements involved or implied any permanent waiver of rights. On the contrary, they were consistent with, indeed a reflection of, Ngai Tahu tino rangatiratanga over their sea fisheries; and
- finally it needs to be said, that this survey of the Ngai Tahu fishery up to the time of the Treaty is based on the evidence which has survived over 150 years. In the case of archaeological evidence modern techniques have enhanced our understanding of past fishing. At the same time a great deal of traditional evidence has been lost. The ravages of dispossession have taken their toll on Ngai Tahu culture. Language has for many been lost in the pressure to assimilate and with this loss has gone knowledge of many of the traditional practices. For these

reasons our overview should be taken as a conservative assessment of the extent of Ngai Tahu use of marine resources.

13.3 **Ngai Tahu Sea Fisheries Treaty Rights at 1840**

- The English version of article 2 confirms and guarantees to Maori the full, exclusive and undisturbed possession of their fisheries; and
- Ngai Tahu Treaty fishing rights at 1840, that is, “their fisheries” refers to their activity and business of fishing, and that necessarily includes the fish that they caught, the places where they caught them, and the right to fish. They are not limited to site specific grounds, favourite fishing places or a mere right of access to the sea.

13.4 **Nature and Extent of Ngai Tahu Sea Fisheries Treaty Rights in 1840**

- Ngai Tahu fished in diminishing degrees of intensity out to some 12 miles or so off many parts of their eastern and southern coasts and appreciably less so off their western coast. Some waters particularly in the west were inhospitable and were seldom if ever frequented;
- Ngai Tahu had the capacity to fish further out from 12 miles or so from the shore as necessary. In at least one instance they went out to a distance of between 30 and 60 miles;
- there is no evidence that in 1840 any other tribe was challenging the Ngai Tahu right to fish wherever they chose off their coastline or that, had their fishing been so challenged Ngai Tahu lacked the will or ability to defend it;
- Ngai Tahu had no need to fish intensively in all available fishing grounds. They took all the fish they required, and their needs were considerable, within the broad confines of an outer limit of some 12 miles or so from the shore;
- they fished regularly, in substantial quantities and with discrimination as to species caught. They were familiar with a wide range of fish;
- Ngai Tahu rangatiratanga over the waters off their rohe was not confined to those more favoured areas where they chose to fish. To find rewarding fishing grounds they necessarily had to travel over less fruitful and on occasions, inhospitable waters. Their rangatiratanga extended to all the waters over which they travelled or could travel to engage in fishing;
- Ngai Tahu in 1840 exercised effective tino rangatiratanga over their sea fisheries out to a distance of not less than 12 miles or so from the shore off the whole of the land boundaries of their rohe. They had full exclusive and undisturbed possession of their sea fisheries;
- they carried out their business and activity of fishing within such parts of these waters as were practicable and suited their convenience and needs. The fact that for various reasons not all of it was fished or that some parts were fished more intensively or extensively than others in no way diminished their mana and rangatiratanga over their sea fisheries; and

- their sea fisheries today are more extensive than those at the time of the Treaty.

13.5 **Ngai Tahu Involvement in Sea Fishing after 1840**

- For the two decades immediately following the signing of the Treaty, Ngai Tahu continued fishing without any significant involvement by Europeans apart from diminishing activity by Europeans involved in sealing and whaling;
- during the 1840s and 1850s as settlers arrived in Otago and Canterbury in increasing numbers Ngai Tahu actively traded with them in the supply of sea fish. Ngai Tahu also continued to trade on a gift-exchange basis among themselves;
- as European settlement built up in the 1850s and 1860s a viable market for a Ngai Tahu commercial fishery developed. Various reef species were caught in the inshore zone year round and the pelagic species in that zone between December and May;
- by the mid 1860s, if not earlier, Ngai Tahu commercial fishing extended out as far as 20 to 30 miles from the shore in some locations with the aid of marks books. Whaleboats or adaptations of these were used, often fitted with sails. These came to be favoured by European commercial fishermen also. They were the basis of the South Island fishery until early this century;
- European commercial fishing began slowly in the 1860s. For some time the settlers lacked the detailed knowledge of Ngai Tahu of the location of good fishing grounds. European involvement accelerated in the 1870s and continued to grow thereafter;
- as early as the late 1860s the Port Adventure oyster bed was seriously depleted. A decade later the Halfmoon Bay oyster beds were in similar danger. Whether Ngai Tahu or Europeans were chiefly at fault is not known. We suspect both must accept responsibility;
- by the 1880s there were some signs of overfishing, examples being a scarcity of fish in the Otago harbour in 1882 with a further decline in the 1890s. Overfishing in Akaroa harbour was reported in 1885;
- throughout the whole of the period 1840 to 1900 Ngai Tahu whanau or hapu continued to fish for their own sustenance and for special tribal occasions;
- following the catastrophic effects of the Crown acquisition of virtually all their land, commercial fishing came increasingly to be carried on by individual Ngai Tahu. They fished commercially for their livelihood either singly or in association with family members and with the aid of closely guarded marks books;
- the individual Ngai Tahu who were so engaged were often descended from European whalers and had access to whale boats and associated fishing equipment, whereas following their post land sales impoverishment, most Ngai Tahu whanau or hapu lacked the necessary capital to engage in commercial fishing;

- while the rate and timing of the transition from tribal to individual fishing would have varied from place to place, it dates from the 1860s and would almost certainly have been completed in the 1880s;
- throughout this present century Ngai Tahu has continued either individually or in family groups to fish for their sustenance and to meet the demands of tribal occasions;
- over time and more particularly in recent years through a combination of over-fishing, pollution and faulty management by the Crown the previously bountiful supplies have been greatly diminished. As a consequence Ngai Tahu has found it increasingly difficult to take sufficient kai ika and kai moana for their own consumption and that of their guests;
- the advent of steam trawling and, later, Danish seining impacted seriously on sea fisheries in coastal waters, including various bays and harbours where Ngai Tahu traditionally fished;
- individual Ngai Tahu continued to fish commercially throughout this century. Their involvement for much of this period was significantly less than the increasing numbers of non-Maori who took up commercial fishing;
- an assessment of individual Ngai Tahu involvement in the South Island fishery in 1988 shows that Ngai Tahu owned 40 percent of all fishing vessels and 25 to 30 percent of all crews were Ngai Tahu. The workforce in fish processing plants and in all aspects of the Bluff oyster fishery was between 60–70 percent;
- these figures represent only a small part of the overall southern commercial fishery as the great bulk of the southern fish catch is taken in offshore waters. There is only a very small Ngai Tahu presence in the offshore fisheries. They are very largely confined to small scale fishing throughout the continental shelf and inshore waters;
- virtually all the current Ngai Tahu commercial fishers descend from Pakeha whalers and have an unbroken family history of involvement in the fishery since the collapse of whaling in the early 1840s;
- the loss of their land and the consequential impoverishment of the Ngai Tahu people has had a two-fold effect. It put an end to the involvement of the Ngai Tahu tribe or the various hapu in commercial fishing sometime before the end of the 19th century. Secondly, it resulted in only those individual Ngai Tahu who inherited capital in the form of boats and fishing gear from their Pakeha whaling antecedents being able to participate in the commercial fishery this century; and
- as a consequence Ngai Tahu as a tribe has not had any involvement in the southern commercial fishery for at least the last 100 years and almost certainly for longer.

13.6 **Ngai Tahu Attitudes to Sea Fishing**

- Ngai Tahu for centuries had relied for an important part of their sustenance on their sea-fisheries. There is nothing to suggest they intended to surrender this traditional and highly valued resource, guaranteed to them by the Treaty, when they agreed to British

settlement and sold their land to the Crown. They contemplated that they would continue to have access to all sea fish they required for their own sustenance and other needs and to continue to trade commercially with the settlers;

- subject to this essential pre-condition Ngai Tahu, in the spirit of partnership, were prepared to share their abundant fishery with the settlers. But their willingness to sell their land and to share their sea fisheries did not constitute a diminution or modification of their tino rangatiratanga over their sea fisheries. On the contrary, it was an exercise or expression, indeed an affirmation, of their rangatiratanga and was entirely consistent with it;
- there is no evidence to suggest that Ngai Tahu when not objecting to non-Maori taking sea fish were thereby waiving their Treaty fishing rights. Nor did the non-Maori use of Ngai Tahu sea fisheries demonstrate that the tribe no longer wished exclusively to retain their rights to their fisheries. An implied permission is not a waiver; and
- while they wished to retain exclusive possession over all the fish they required for their present and future needs, both general and commercial, they were willing that non-Maori should also have access to the fishery. That access should, however, be subject to the prior rights of Ngai Tahu. It was at the point where non-Maori usage began to deplete the sea-fishery that Ngai Tahu protested and sought to invoke their Treaty rights.

13.7 **Settler Attitude to Sea Fishing**

- The settlers brought as part of their mental baggage the belief that the foreshore and the sea were common to all for the purpose of getting fish. This belief stemmed from the common law doctrine that the Crown is prima facie owner of the foreshore. The settlers and indeed successive settler governments simply assumed that the Crown prerogative overrode or qualified the fishing rights guaranteed to Maori by the Treaty; and
- for several decades so bountiful was the supply of fish in and around the South Island that no problem arose from the uninhibited access by Europeans to Ngai Tahu fisheries. But as settlement built up and Ngai Tahu came to be heavily outnumbered the pressure on sea-fisheries was felt and gave rise to protest by the tangata whenua. In the meantime the Crown assumed the right to legislate.

13.8 **The Crown's Legislative Intervention 1866 to 1982**

- The Crown's legislative initiatives fell into three broad categories; oysters and later, other shellfish; introduced species such as trout and salmon; and sea-fisheries generally;
- an important reason for this legislation was the conservation of resources. The Crown appears never to have entertained any doubt about its right thus to assume control over Maori fisheries. Nor, except for a short period, is there any evidence that in doing so it should be mindful of the fishing rights guaranteed to Maori by the Treaty. As a consequence, no effort was made first to consult with Maori before exercising legislative control over their fisheries;

- in the case of land the Crown recognised that Maori owned the land and it was necessary to negotiate with Maori for its acquisition. Despite the Treaty guarantee of Maori fisheries the Crown for the most part acted as if it, not Maori, owned this extremely valuable resource;
- the Crown assumed the right not only to regulate and control the taking of oysters but to dispose of their ownership without Ngai Tahu consent;
- the acclimatisation statutes and regulations worked to the prejudice of Maori;
- the general sea-fisheries legislation and regulations between 1877 and 1885 exempted Maori from their control provisions. This constituted some recognition of their Treaty rights. But the 1885 ultra vires regulations sought to limit Maori exemption to the taking of oysters and fish for personal consumption only;
- the 1892 and later provisions for exclusive oyster reserves near Maori villages were inoperative in the South Island. The later 1900 and 1903 provisions for Maori District Councils to control or make exclusive fishery reserves for Maori were not implemented anywhere in New Zealand;
- the 1894 Act entirely removed all protection of Maori Treaty sea fishing rights;
- the 1903 reinstatement of a watered down saving provision omitting all reference to the Treaty has continued since and with a few recent exceptions has so far proved of little if any benefit to Maori;
- the exercise of legislative control over Maori fisheries and their regulation equally in favour of non-Maori has been characterised by a failure of the Crown until very recently to consult with Maori;
- for a brief period of eight years (1877–1885) Maori were wholly exempt from the control provisions of the sea fisheries legislation. But from the first Act of 1866 onwards the legislation provided for the general public exploitation of the fish resource, and was based on the premise of the Crown's right to provide for this notwithstanding the fishing rights guaranteed to Maori under the Treaty. How any conflict between Maori and non-Maori interests was to be resolved nowhere appears;
- the Fisheries Act 1908 remained in force subject to some amendments until repealed and replaced by the Fisheries Act 1983. Relatively minor additions were made in 1912 and 1923, the first significant change being in 1945;
- in 1937 government concern at problems facing the industry along with longstanding concerns about the depletion of fish stocks as a result of trawling led to the first major inquiry into the state of New Zealand fisheries and the fishing industry;
- the enquiry confirmed that depletion of certain fishing grounds had recurred and emphasised the need for more effective conservation measures. The committee recommended a new form of restricted (limited) licensing;

Summary of Findings and Conclusions

- accordingly a new regime, initially implemented under the Industrial Efficiency Act 1936, saw the number of permissible fishing vessels being restricted. The previous practice whereby anyone who wished to fish could do so subject to registering the vessel was abandoned. The 1945 amendment to the Fisheries Act continued the 1937 scheme by prohibiting the use of a boat for commercial fishing unless it was registered and the boat owner was granted a licence by the Sea Fisheries Licencing Authority;
- neither the 1937 Committee of Inquiry nor the legislation which implemented its recommendations had any regard to Maori Treaty fishing rights;
- legislation has been in place since 1892 for setting aside exclusive oyster-fisheries for Maori, the most recent provision being in 1965. No such reserves have been made for Ngai Tahu and only a few have been established in the North Island;
- section 33 of the Maori Social and Economic Advancement Act 1945 replaced the earlier 1900 and 1903 Maori Councils Act provisions with minor changes. Exclusive Maori fishing grounds could be reserved on the recommendation of the Minister of Marine. No such reserve was created despite many requests, including several from Ngai Tahu. This provision, intended to benefit Maori, was totally undermined by administrative and political intransigence;
- the advent of improved technology and the arrival in 1959 of Japanese fishers in New Zealand waters led government to institute a Parliamentary select committee enquiry. As a result the restricted licensing system was abolished by the Fisheries Amendment Act 1963;
- the 1963 Act substituted fishing permits for licences. Unlike the licences, permits were available on demand. Methods of fishing and the kind of fishing gear which could be carried on boats were, however, controlled. These it was thought, would be sufficient to conserve resources;
- with restrictive licensing abandoned the seas were open to all who sought to go fishing and could afford to do so. Maori Treaty fishing rights continued to be ignored;
- the Territorial Sea and Fishing Zone Act 1965 established a nine mile fishing zone outside the three mile territorial sea. This followed concern at the time of delicensing over the increased operations of foreign fishing vessels. From the end of 1970 only domestic fishing vessels could work within the territorial sea;
- in the late 1960s and early 1970s Russian, Japanese, Taiwanese and Korean fishers comprising a fleet of some 130 vessels were in and around New Zealand waters taking very large catches;
- the Territorial Sea and Exclusive Economic Zone Act 1977 gave New Zealand power to control conservation and management of resources out to a limit of 200 miles off New Zealand. Again, there was no recognition of any Maori Treaty rights;
- while the 1977 Act, accompanied as it was by government incentives, encouraged new entrants, many found it difficult to cope offshore. They returned to inshore waters and subjected those waters to

intolerable pressures leading to serious overfishing. From the late 1970s commercial catches fell dramatically; by 1982 it was apparent that remedial action was necessary. The result was a new Fisheries Act in 1983;

- a 1972 amendment to the Fisheries (General) Regulations 1950 permitted the taking of the more common shellfish in excess of the normal limits by Maori for use at a tangi or hui. This provision is now in regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986. Approval of a Maori community officer is required as to quantity and location. Unlike the 1945 exclusive fishing reserve provisions this regulation has not been sabotaged by the administration; and
- the rangatiratanga of Ngai Tahu in and over their sea fisheries has, except for some eight years last century and then only to a limited extent, been denied or ignored by Crown legislation until very recently. The Maori Fisheries Act 1989 now gives partial statutory recognition to the Maori Treaty rights to rangatiratanga over their sea fisheries.

13.9 **The Crown's Attitude to Maori Fishing Rights**

- From a relatively early stage the Crown adopted the widely held settler view that the fisheries belonged to the Crown and no rights, whether under Maori customary law or treaty, could be held by any person, Maori or non-Maori, without a specific land grant from the Crown or by legislative provision;
- in 1914 the Supreme Court in *Waipapakura v Hempton* accepted the Crown argument by the Solicitor-General that apart from legislation the Treaty of Waitangi was "merely a bargain binding on the conscience of the Crown and is not the source of legal rights". Nor did s77(2) of the Fisheries Act 1908 help. It was merely a saving clause and did not create rights. Only legislation confirming the Treaty rights would be recognised by the courts and there was no such legislation;
- the Crown failed to take remedial action by passing appropriate legislation giving effect to the Maori sea fishing rights guaranteed by article 2 of the Treaty; and
- the Crown refused to give any effect to the legislative provisions in force between 1900 and 1962 providing for the reservation of exclusive Maori fishing grounds notwithstanding applications by Maori including Ngai Tahu.

13.10 **Ngai Tahu Response to Crown Control of Sea Fisheries**

- In the last quarter of the 19th century and increasingly during the present century the sea fisheries came under pressure from non-Maori fishing. As a consequence the resource suffered serious depletion;
- from the 1870s through to the beginning of the present century Ngai Tahu made a series of complaints to the Crown. Some reflected a general concern at the failure of the Crown to protect Ngai Tahu Treaty fishing rights and others a particular concern that fisheries in specified locations were being adversely affected by non-Maori fishing;

Summary of Findings and Conclusions

- the failure of Maori in the 19th century to obtain any permanent recognition of their Treaty fishing rights by parliamentary petitions or direct appeal to government led them to resort to the courts;
- in the present century Ngai Tahu unsuccessfully invoked their Treaty fishing rights in various cases concerning their fisheries;
- given the Crown's negative attitude to Maori sea fishing rights under the Treaty, Ngai Tahu, dispersed and demoralised as they were, saw little purpose in publicly protesting the intrusion into their sea fisheries by non-Maori commercial vessels when as a tribe they lacked the resources to engage in the fishery other than for their own personal use. Of more immediate and pressing concern was their parlous situation ensuing from the loss of their land and inland mahinga kai. Our *Ngai Tahu Report 1991* demonstrates Ngai Tahu was continually engaged in efforts to obtain relief from the Crown for its many Treaty breaches arising out of the Crown land purchases;
- Ngai Tahu have not asserted that non-Maori should not be fishing. But they have never waived their Treaty rights or willingly accepted any diminution in their tino rangatiratanga over their sea fisheries. Nor have they ever sold or otherwise agreed to dispose of their sea fisheries; and
- Ngai Tahu have throughout shown a willingness that non-Maori should be able to share the resources of the sea provided adequate protection is given to Ngai Tahu fishing rights guaranteed by the Treaty. Implicit in this approach is an assertion by Ngai Tahu of the priority which attaches to their Treaty fishing rights accompanied by a recognition that, provided these are respected and protected, non-Maori should be free to engage in fishing in the Ngai Tahu rohe. The tribunal is unable to distinguish in this regard between commercial and non-commercial fishing by either Maori or non-Maori.

13.11 Ngai Tahu Sea Fisheries Treaty Rights Today

- The Ngai Tahu sea fisheries at the time of the signing of the Treaty extended some 12 miles or so from the foreshore from the northernmost eastern boundary Pari-nui-o-Whiti around the South Island coast to the northernmost western boundary at Kahurangi. We have not accepted the Ngai Tahu amended claim that there was at the time no seaward limit to their fishery;
- but Maori Treaty rights are not frozen as at 1840. Since 1840 there have been notable advances in the size and means of propulsion of fishing vessels; in fishing technology and in the discovery of species unknown to Maori and non-Maori at the time of the signing of the Treaty. One consequence of these developments has been the recent dramatic shift in fishing effort from the confines of the continental shelf to the offshore deepwater fisheries;

13.11.1 *The development right*

- It is common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development. This was recognised by the Muriwhenua tribunal in the context of a discussion of new technology and the right to development;

13.11.2 *Commercial fishing*

- the Crown accepts that the traditional Maori fishing rights included a commercial element and that the right to develop the fishery also included the right to employ new techniques, knowledge and equipment for commercial purposes. This was concurred in by the fishing industry. It was also the view of the claimants. The evidence clearly justifies this view;

13.11.3 *Fisheries beyond those fished in 1840*

- in 1840 the Ngai Tahu business and activity of fishing extended out to some 12 miles or so from the shore and in one instance between 30 and 60 miles offshore;
- by the mid-1860s if not earlier Ngai Tahu, with the aid of marks books, were fishing commercially some 20 to 30 miles from the shore. They were now using whale boats or similar vessels with sails. Over time their fishing operations extended out to the edge of the continental shelf;
- implicit in the recognition of the Treaty right to make use of new sea fishing technology is a right to take full advantage of it. If improvements in the design and means of propulsion of fishing vessels enabled fishers to go further out to sea to exploit new fishing grounds, to stay there longer and employ more sophisticated catching equipment, it follows that Ngai Tahu as a Treaty partner was entitled to a reasonable share of the new fisheries thereby opened up. The Treaty must be interpreted as including this right;
- this necessarily applies not only to fishing operations out to the edge of the continental shelf but to the recent extension over the past 25 or so years into offshore or deepwater fisheries;
- to deny that this is so is to assert that the rights of one Treaty partner (Maori) but not the other party (the Crown) are confined to those existing in 1840. It is surely idle to recognise on the one hand that the Treaty provides a right of development in the future and on the other to circumscribe its effective operation to the factual situation pertaining at 1840;
- the two Treaty parties are required to act reasonably and in good faith towards the other. Ngai Tahu raised no objection to the new settlers sharing in the abundance of their fisheries so long as such use did not impinge unduly on their own requirements;
- likewise, as technology opened up access to new fishing grounds off their tribal rohe the Crown's duty to act reasonably and in good faith towards Ngai Tahu required it to ensure that a reasonable share of the new available fisheries were secured to their Treaty partner, Ngai Tahu. In this regard there can be no distinction between an extension of fishing out to the edge of the continental slope and further offshore into deepwater fisheries. There was to be a mutual benefit to both parties to the Treaty; and
- we consider it reasonable to accept that Ngai Tahu, given the abundance of their sea fisheries and their long and successful experience in the business and activity of fishing, would have emerged as a

dominant force in sea fishing in the South Island. As such they would have taken their place alongside other New Zealand companies in the active development of the deepwater fisheries. That the tribe had no possibility of doing so was due in large measure to the Crown's action in depriving them of an economic base at a time when Ngai Tahu was engaged in a prosperous fishing enterprise, and in subsequently failing actively to protect Ngai Tahu sea fisheries.

13.11.4 *New Species*

- If, as we believe, Ngai Tahu had a Treaty right to employ new technology in extending their fishing operations further out from the shore, including the deepwater fisheries, it necessarily follows that they had and have a Treaty right to catch a reasonable share of all commercially viable fish whether these were earlier known to them or not. It is a right they share with their Treaty partner who had no more knowledge of new species than Maori in 1840 or indeed until quite recently;

13.12 **Territorial Seas**

- We reject the Crown suggestion that by 1840 claims to areas of territorial sea had consolidated to an agreed three-mile zone which was generally accepted as a rule of the law of nations and that Maori including Ngai Tahu should be bound by it;
- there is no evidence that Maori were even remotely aware of any such agreement. Certainly they were not party to it. Nor is there any evidence that the governor explained this so-called rule to Maori before inviting them to sign the Treaty;
- there was, in fact, far from universal acceptance of the so-called three-mile limit at 1840. During the whole of the nineteenth century the three-mile rule for fisheries remained one of controversy;
- if Britain chose in 1840 to assert no more than a three-mile territorial sea limit for her new colony of New Zealand that was not because of any binding rule under international law. Certainly it was not done with the assent or even knowledge of Maori;
- we are satisfied that the Treaty required the Crown to take all reasonable and practicable steps, should the occasion arise, to implement its guarantee to Maori of the full, exclusive and undisturbed possession of their fisheries and that this obligation did not stop at any three-mile limit;
- we agree with the Muriwhenua tribunal that the Crown has always possessed the constitutional power to regulate the fishing and other activities of its subjects on the high seas. In fact it did so, in making laws that affected New Zealand vessels;
- New Zealand, in common with other states, has extensive extra-territorial jurisdiction to legislate for the peace, order and good government of the state. If any event occurs outside the state's territorial limits the fact that the act or the actor was beyond the territorial boundary of the state is irrelevant provided the occurrence bears on the peace, order and good government of the legislating state;

- legislation designed to ensure compliance with the legislating state's treaty obligations to its indigenous people is surely for the peace, order and good government of that state and therefore in conformity with international law;
- the Treaty expressly guaranteed to Maori, including Ngai Tahu, their fisheries. These unquestionably extended beyond three miles, certainly out to 12 miles or so and in at least one place well beyond. We find Crown counsel's argument that the Treaty guarantee was simply that their fisheries would be protected when there was Crown authority to do so – that is out to three miles – unconvincing. The three-mile limit was not at the time a requirement of international law; if the Crown chose to restrict itself in this way it was a self-imposed restriction at odds with the clear and unqualified guarantee given Maori by article 2 of the Treaty. It was never communicated to Maori. Nor was it what the Treaty said;
- even as recently as 1965 the New Zealand government showed a willingness to enact the Territorial Sea and Fishing Zone Act 1965 contrary to then international law because it was in the interests of this country to do so;
- when in 1965 the Crown extended the New Zealand fishing zone nine miles out from the three mile territorial sea limit it had no justification for failing to protect Ngai Tahu sea fisheries which extended to that distance;
- Ngai Tahu Treaty sea fishing rights included the right to extend their fisheries in accordance with developments in technology. One result of new technology was the discovery of a variety of deepwater fish. To control and protect this resource the Territorial Sea and Exclusive Economic Zone Act 1977 was passed. This gave the Crown power to control and manage the resources of the sea to a limit of 200 miles from New Zealand shores; and
- the Treaty right to development recognises the right of Maori, including Ngai Tahu, as a Treaty partner to a reasonable share of the sea fisheries brought within Crown sovereignty and control.

13.13 **Individual Ngai Tahu Involvement in the General Fisheries Regime**

- Those Ngai Tahu who elected to go fishing as individuals did no more than exercise their rights as British subjects under article 3 of the Treaty. Ngai Tahu continued to fish commercially as a tribe until after the land sales when impoverishment and the absence of an economic base, the direct consequences of the Crown purchases, left Ngai Tahu without the resources to actively pursue their article 2 Treaty sea fishing rights on a commercial basis. This was not, as the Crown suggests a deliberate choice; on the contrary the disastrous consequences of the Crown's many Treaty breaches left Ngai Tahu with no alternative other than to abandon their earlier prosperous tribal fishing business.

13.14 Summary of Ngai Tahu Sea Fisheries Treaty Rights Today

The tribunal finds that Ngai Tahu have:

- (a) an exclusive Treaty right to the sea fisheries surrounding the whole of their rohe to a distance of 12 miles or so their being no waiver or agreement by them to surrender such right.
- (b) a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the limit of the 200 mile exclusive economic zone such right being exclusive to Ngai Tahu.

13.15 The Quota Management System

- The restricted definition of commercial fishermen in the Fisheries Act 1983 resulted in many Maori and non-Maori part-time fishers being excluded from any further commercial fishing. A substantial number of Ngai Tahu part-time fishers were so affected;
- the genesis of the quota management system (QMS) lay in s89(1)(g) of the Fisheries Act 1983 which authorised regulations prescribing a quota or total allowable catch for any fish or fishery in New Zealand waters. It was later superseded by a statutory scheme in 1986;
- the statutory scheme applies to both inshore and deepwater species. Input from Maori, including Ngai Tahu, at the iwi level to the lengthy discussions leading to the 1986 legislation was virtually non-existent;
- while conservation was the scheme's rationale, the scheme rested on the creation by the Crown of a property interest in an exclusive right of commercial fishing in the form of an individual transferable quota (ITQ). This ITQ is readily transferable by sale, lease or licence;
- the right to catch fish in terms of the ITQ has the characteristics of a property right. Those who qualified for the initial allocation of the ITQ were not required to pay for such allocation which became a valuable monopoly right;
- Maori, including Ngai Tahu, generally objected strongly to the scheme as enacted in 1986. To Ngai Tahu, as to other tribes, it appeared that the Crown first took away from Maori tribes the fishing resources which rightfully belonged to them and not to the Crown, and then the Crown purported to give those resources, or the beneficial use of them together with tradeable property rights on an individual transferrable basis of title, to other persons;
- the passage of the 1986 legislation generated a spate of litigation concerning the QMS instigated by Maori including Ngai Tahu. This litigation at present stands adjourned in the High Court;
- as enacted, the QMS is in fundamental conflict with the Treaty and, specifically, with Ngai Tahu sea fishing rights under the Treaty;
- the 1986 amendment which gave statutory force to the QMS effectively guaranteed to those allocated ITQ (almost all of whom were non-Maori) the full exclusive and undisturbed possession of the property rights in fishing that the Crown had already guaranteed to Maori; and

- the 1986 Act is based on the erroneous premise that no fisheries subject to quota belonged to Maori but all to the Crown and were, with Parliament's assent, the Crown's to give away or dispose of as it saw fit.

13.16 **The Maori Fisheries Act 1989**

- This Act expressly states that it is intended to make better provision for Maori fishing rights secured by the Treaty and to facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing. This is a welcome statutory acknowledgment by the Crown of Maori sea fishing rights guaranteed by the Treaty;
- by October 1992, 10 percent of quota should have been transferred under the Act to the Maori Fisheries Commission for the benefit of Maori. Ngai Tahu will expect to receive the benefit of their proportional share;
- this tribunal is not in a position to accurately assess the value of the sea fisheries to which Ngai Tahu is entitled under the Treaty. The tribe has never disposed of its exclusive right to the sea fisheries out to 12 miles or so from its shoreline. Their reasonable share of the fisheries beyond this distance out to the limit of the 200 mile exclusive economic zone has yet to be negotiated and settled. In so doing allowance should be made for the serious depletion of the inshore fishery. Given the very extensive ocean which surrounds their long coastline and the richness of the deep sea fishery resource within it, we would expect the value of the Ngai Tahu sea fisheries to be very substantial in potential catch terms; and
- at present the Crown is obliged to transfer 10 percent of quota to the Maori Fisheries Commission by October 1992. This is intended to be for the benefit of Maori. While we are unaware of how or when this quota will be distributed to iwi we believe if justice is to be done not only to Ngai Tahu but to all other tribes, that a substantially higher percentage of quota than 10 percent of the total allowable commercial catch (TACC) will need to be made available for distribution among Maori. As we have indicated the value of Ngai Tahu sea fisheries alone must be very substantial. Moverover, allowance must be made for the very serious depletion of the inshore fisheries.

In our next and final chapter (chapter 14) we summarise our findings on Crown breaches of the treaty and then record our recommendations arising from those breaches.

Chapter 14

Recommendations in Respect of Treaty Breaches

14.1 Introduction

Before discussing our recommendations it is desirable that we state shortly the Crown breaches of the Treaty which we have considered in detail in chapter 12. The purpose of our recommendations is to suggest ways in which amends should be made for the serious loss and harm to Ngai Tahu resulting from the Crown's breaches of its Treaty obligations.

14.2 Crown Breaches of the Treaty

14.2.1 We have found that Ngai Tahu has been prejudicially affected by various acts, omissions, policies and Acts relating to their sea fisheries which were or are inconsistent with the principles of the Treaty in that:

- Grievous and irreparable harm resulted from the Crown's breaches of its Treaty obligations when acquiring the vast Ngai Tahu land holdings between 1844 and 1864. Not only did the tribe lose virtually the whole of their land and their economic base, they were as a direct consequence unable to continue their thriving and expanding business and activity of sea fishing.
- In legislating to protect and conserve the sea fishery resource the Crown failed to recognise Ngai Tahu rangatiratanga over their sea fisheries and in particular their tribal rights of self-regulation or self-management of their resource, this being an inherent element in rangatiratanga. Their rights were usurped by the Crown without any consultation with Maori and without any recognition of their Treaty rights in their sea fisheries. This denial of Ngai Tahu rangatiratanga over their sea fisheries was in breach of article 2 of the Treaty.
- Over time the various statutory regimes intended to protect and conserve the sea fisheries failed to prevent serious depletion of the resource to the detriment not only of Ngai Tahu but Maori generally. The resulting material and cultural deprivation undermined Ngai Tahu mana moana and was the consequence of the Crown's breach of its Treaty duty to protect and sustain Ngai Tahu tino rangatiratanga.
- Subject to some limited or partial exceptions the sea fishery statutes reflected the Crown's assumption that non-Maori had equal rights with Maori in the whole of the sea fisheries, notwithstanding that article 2 of the Treaty guaranteed Maori rangatiratanga over their fisheries. This assumption was in breach of the Treaty principle requiring the Crown actively to protect Maori rangatiratanga.
- In providing in the Sea Fisheries Act 1894 for the sale by public tender

of an exclusive right to the absolute property in oysters the Crown acted on the basis that it, not Ngai Tahu, owned the oysters within Ngai Tahu sea fisheries, contrary to its Treaty duty to protect Ngai Tahu rights to their fisheries.

- From 1894 on until recently the Crown failed to provide any statutory recognition of Ngai Tahu Treaty rights to their fisheries. This was in breach of the Crown's Treaty obligation actively to protect Ngai Tahu rangatiratanga in their sea fisheries and contrary to its obligation as a Treaty partner to act reasonably and in good faith. Instead, it elected to continue to exercise legislative control over the sea fisheries from 1894 to 1989 without regard to its Treaty obligations to Ngai Tahu and other Maori and in breach of Treaty principles.
- The refusal of the Crown to give any effect to legislative provisions in force between 1900 and 1962 providing for the reservation of exclusive Maori fishing grounds notwithstanding applications by Maori including Ngai Tahu was in breach of the Crown's duty as a Treaty partner to act reasonably and in good faith.
- The quota management system first put in place in a limited way by regulation in 1983 and in statutory form in 1986 is in fundamental conflict with the terms of the Treaty and Treaty principles. It is based on an assumed right of the Crown to dispose of Maori fisheries without Maori consent as if they were the property of the Crown. No effort was made by the Crown to ascertain the nature and extent of Maori sea fisheries guaranteed by the Treaty prior to the passage of this legislation. Nor were the tribes consulted. The legislation constitutes a virtual denial of any significant rangatiratanga of Maori in their sea fisheries; far from protecting it, the Act gives the Crown authority to dispose of the Maori right to their sea fisheries. This the Crown has proceeded to do without the consent of Maori. The Act as it stands, constitutes a serious breach of the Treaty.

14.3 **Recommendations Pursuant to Section 6.3 of the Treaty of Waitangi Act 1975**

Introductory comment

14.3.1 In earlier findings of this tribunal at paragraphs 10.6, 12.5.4 and 13.15 when summarising Ngai Tahu sea fisheries Treaty rights today we recorded our conclusion that Ngai Tahu have:

- (a) an exclusive Treaty right to the sea fisheries surrounding the whole of their rohe to a distance of 12 miles or so there being no waiver or agreement by them to surrender such right.
- (b) a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the 200 mile exclusive economic zone such right being exclusive to Ngai Tahu.

This tribunal is not in a position to accurately assess the value of the sea fisheries to which Ngai Tahu is entitled under the Treaty.

The tribe has never disposed of its exclusive right to the sea fisheries out to 12 miles or so from its shoreline. It is no doubt possible to assess

reasonably accurately the extent and value of the sea fisheries within this inshore zone of Ngai Tahu. However, the fixing of a reasonable share of sea fisheries extending beyond such inshore zone and also beyond the continental shelf into the deepwater fisheries within the 200 mile exclusive economic zone is more difficult. In assessing this share the tribunal believes that account must be taken of the serious depletion of the inshore fisheries resulting in a decline in yields of the major species and in the yields from recreational and traditional Maori fishing.

In arriving at a “reasonable” share of the extended fishery it is also necessary to have regard to the expectation of Ngai Tahu arising from its Treaty right to development (10.6, 12.5.4, 13.15). It is therefore clear to the tribunal that there is a need for Ngai Tahu and the Crown to negotiate and settle by compromise if possible, what constitutes a reasonable share of the fisheries beyond 12 miles including the deep sea fisheries. Note will need to be taken of the provisions of the Maori Fisheries Act 1989 which have introduced onto the scene a new party in the form of the Maori Fisheries Commission to which body government has transferred quota to hold and deal with on behalf of all Maori.

The findings of this tribunal are specifically in respect of the Ngai Tahu claim but the tribunal cannot ignore the legislative procedures now in place for what the Maori Fisheries Act 1989 describes (inter alia) as a process to make better provision for the recognition of Maori fishing rights secured by the Treaty. Obviously, therefore, there will be a need for the Crown and Ngai Tahu to negotiate and settle within the overarching provisions of the 1989 Act and any amendments made to that Act which provide for additional quota allocation.

During his final address, counsel for the Crown requested that the tribunal should report on a proper mechanism for delivery of any rights Ngai Tahu may have and urged support for the provisions of the Maori Fisheries Act 1989. The Crown is entitled to much credit for facilitating the passage of this Act. It is a tangible, welcome and significant step towards the full recognition of Maori fishing rights under the Treaty. This tribunal agrees that the Act can usefully be employed as the vehicle to allocate the additional quota necessary to provide a remedy for Ngai Tahu. As a prerequisite to that procedure it will be necessary for prior discussion to take place between the parties. The findings of the tribunal are intended to provide a basis for those discussions. If a compromise does not flow from negotiations the matter may once again return to the High Court where proceedings stand adjourned. Whether or not judicial proceedings will provide an answer or remedy remains a question which we as a tribunal would not seek to answer. It is however evident that there is a need for the Crown and Ngai Tahu to exercise the utmost good faith and good will in negotiating a compromise. A compromise does not always involve a settlement based solely on the issues. It may take into account a number of external circumstances such as the public conscience, the nation’s ability to meet the costs and the desirability of a

permanent solution. There are also to be measured the benefits that should flow from an agreed settlement and such intangibles as the satisfaction of a long outstanding grievance and the unity of people resulting therefrom. It must be an honourable settlement and the Crown, following the sad history of the loss of Ngai Tahu land and mahinga kai resource, has need to retrieve its honour.

We now set out our recommendations which include those in respect of eel fishing licences at Waihora (Lake Ellesmere) and provision for mahinga kaimoana to be reserved to Ngai Tahu and other iwi or hapu.

Recommendations

14.3.2 *Negotiations*

We *recommend* that the Crown and Ngai Tahu enter into negotiations for the settlement of the Ngai Tahu sea fisheries claim.

In so doing the tribunal *recommends* that the parties take into account the findings of this tribunal that Ngai Tahu have:

- an exclusive Treaty right to the sea fisheries surrounding the whole of their rohe to a distance of 12 miles or so their being no waiver or agreement by them to surrender such right.
- a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the 200 mile exclusive economic zone such right being exclusive to Ngai Tahu.
- that appropriate allowance should be made for the serious depletion of the inshore fishery off the Ngai Tahu rohe when assessing the reasonable share of the sea fisheries to which Ngai Tahu is entitled beyond the first 12 miles or so from the shoreline.

14.3.3 *Quota Management System*

We *further recommend* that the negotiations and settlement should include determination of an appropriate additional percentage of quota under the Quota Management System and that the Maori Fisheries Act 1989 be used as the mechanism to deliver that quota to Ngai Tahu.

14.3.4 *Waihora (Lake Ellesmere)*

In addition to the above recommendations affecting the major sea fishery we make the following recommendations concerning annual eel fishing licences at Waihora (Lake Ellesmere) and mahinga kaimoana reserves.

We *further recommend* that all existing annual eel fishing licences on Waihora (Lake Ellesmere) be not renewed on expiry so that the lake can be returned to Ngai Tahu as a Ngai Tahu eel fishery (paragraph 2.8).

We *further recommend* that existing annual eel fishing licence holders be compensated by the Crown for any consequential loss (paragraph 2.8).

14.3.5 *Mahinga Kaimoana Reserves*

We *further recommend* that the Fisheries Act 1983 be amended to

provide that in appropriate circumstances mahinga kaimoana as envisaged by the Ministerial Task Force in chapter 2 of its April 1992 report may be reserved to an iwi or hapu (paragraph 8.4.11)

14.4 **Conclusion**

By the time this report is presented it will be just on five years from the first hearing of the Ngai Tahu grievance claim at Tuahiwi on 17 August 1987. The hearing of sea fisheries evidence commenced in April 1988 and continued thereafter at various hearings throughout 1988 and 1989. For a period from 10 October 1989 until 28 June 1990 no further hearings took place. At this point an application was made by the New Zealand Fishing Industry Board and New Zealand Fishing Industry Association for leave to present further evidence. It was granted by the tribunal and further hearings on sea fisheries matters alone took place with the final hearing being between 2–5 September 1991.

The rather spasmodic way in which the sea fisheries claim was finally heard has not made it easy for the tribunal to maintain continuity in the hearing and assessment of the evidence. It has also not been easy for the parties before it to present their respective cases in a cohesive way. The tribunal acknowledges its indebtedness to counsel appearing for the claimants, the Crown and the fishing industry for their patience and assistance in the conduct of this major inquiry.

As pointed out earlier in this report there are several actions extant in the High Court in respect of sea fisheries. These proceedings stand adjourned by agreement between Maori and the Crown, to free the way for discussions between the Crown and Maori representatives to continue. In a Court of Appeal decision in *re Te Runanga o Muriwhenua v Attorney General* CA110/90 dated 28 June 1990 (unreported) Richardson J made this comment when referring to an earlier decision of the Court of Appeal of 27 February 1990:

There were 3 reasons for the decision to allow the appeal. The first was that the case was not ready for trial, the judicial timetable not having been complied with by any of the parties. The second was that, as our earlier judgment of 22 February (the Muriwhenua judgment) had indicated, in the light of the Maori Fisheries Act 1989 (assented to on 20 December 1989) contested litigation at this stage concerning Maori fishing rights might not be necessary or fruitful. Third, the Muriwhenua judgment had underlined that Waitangi Tribunal reports could be helpful to the Courts and provide valuable evidence and that apart from the tribunal's Muriwhenua report the forthcoming report on Ngai Tahu claims could be of significance in the High Court's consideration of the case in the event of its going to trial and could also shorten a hearing in the High Court.

This tribunal has been mindful of these comments made by the Court of Appeal. Like that court this tribunal would comment that the Maori Fisheries Act 1989 is a step in the right direction. We would also like to feel that our report will be of help, not so much in providing evidence for future contested litigation in the courts but rather in providing the

Crown and Maori with a suitable foundation for negotiation and settlement.

In this connection we refer to our introductory comments at para 14.3.1 pointing out what is involved in a compromise and we urge the Crown and Maori in the spirit of goodwill and agreement that attended the introduction of the Maori Fisheries Act 1989 to come together again and find a resolution.

In accordance with s6(5) of the Treaty of Waitangi Act 1975, the director of the tribunal is requested to serve a sealed copy of this report on:

- (a) The claimants, Henare Rakiihia Tau and the Ngai Tahu Maori Trust Board

- (b) Minister of Maori Affairs
Minister of Justice
Minister of Fisheries
Minister of Conservation
Minister for the Environment

- (c) Solicitor-General

- (d) Mr J L Marshall — counsel for New Zealand Fishing Industry Board

- (e) Mr T J Castle — counsel for New Zealand Fishing Industry Association

- (f) Maori Fisheries Commission

Recommendations in Respect of Treaty Breaches

DATED at Wellington this 6th day of August 1992



A G McHugh, presiding officer



M T A Bennett, member



M E Delamere, member



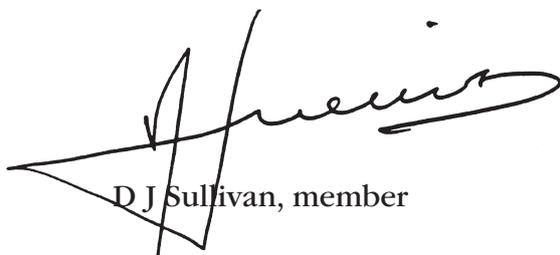
Georgina M Te Heuheu, member



I H Kawharu, member



G S Orr, member



D J Sullivan, member



Appendix 1

The Fisheries Claims

1.1 Amended Claim of 2 June 1987

WHEREAS the Claimants have already filed claims dated respectively the 24th November, 1986 and the 16th December, 1986

AND WHEREAS both those claims were accompanied by schedules

AND WHEREAS they are now requested to particularise those claims

THE CLAIMANTS SAY:

THE CLAIM

From 1840 to the present day the Crown has, in respect of the Maori people, their land, their culture and their well being, consistently acted in ways contrary to the Treaty of Waitangi, and therefore has been and remains in breach of the Treaty and its principles.

The multiplicity of the Acts complained of and the extent of the lands involved, together with the range of cultural and social grievances is such that, short of calling the evidence to be presented at the hearing of the claims, it is not possible for the complainants to succinctly state their grievances. For this reason, the complainants are concerned lest any omission from this document should be held to deny them the right to later seek redress of grievance in respect of the omitted material. They therefore give notice that in the event of matters not covered by this document arising later, they will seek leave to further amend their claims.

PARTICULARS

LAND

In 1840 the Ngai Tahu people owned virtually all the land in the South Island south of a line drawn between Cape Foulwind in the West and White Bluff just north of Cape Campbell in the East. Today they own very little land. The acquisition of this land by the Crown and the subsequent sales to other owners, were contrary to Article 2 of the Treaty of Waitangi in that Ngai Tahu did not “wish or desire” to sell, nor were they “disposed to alienate” all of the land. Further, the prices paid for the various blocks were never “agreed upon” in the manner required by Article 2.

Land purchases apart, other Crown dealings with the land were contrary to Article 2 of the Treaty. In particular the Crown has:

- (a) Failed to allocate reserves which were an integral part of the agreements for sale and purchase of Ngai Tahu land to the Crown.

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- (b) Failed to allocate all the reserves required by the South Island Landless Natives Act 1906.
- (c) Confiscated without compensation various reserves in the South Island.
- (d) Appropriated to itself Ngai Tahu land without consultation or agreement and, in at least one case, namely Greymouth, without the knowledge of its Ngai Tahu owners.
- (e) Without the consent of its Ngai Tahu owners has converted freehold land into Leases in perpetuity.
- (f) Without the consent of its Ngai Tahu owners has fixed unrealistically low rentals for their leased lands.
- (g) Without the consent of its Ngai Tahu owners has fixed unrealistically long rests between rent reviews in respect of their leased lands.
- (h) Has refused to permit registration of land in the names of the Maori tribes and/or in other ways which would reflect Maori customary land ownership.

All these actions are contrary to the preamble and Articles 2 and 3 of the Treaty of Waitangi in that the Crown:

- (i) Has failed to “protect the just rights and property” of the claimants.
- (ii) Has failed to “guarantee” to the claimants and their ancestors “the full, exclusive, and undisturbed possession of their lands and estates, forests and fisheries and other properties so long as they wished and desired to retain the same in their possession”.
- (iii) Has failed to “import” to their ancestors all “the rights and privileges of British subjects”.

The land transactions giving rise to these breaches of the Treaty occurred at Horomaka (Banks Peninsula), Te Pakihi o Waitaha (North Canterbury), Kaikoura, Otakou (Otago), Murihiku (Southland) Rakiura (Stewart Island) and on Te Tai Poutini (West Coast of the South Island). The lands which the claimants seek to have allocated to them or which they seek to be compensated in respect of are largely described in a schedule lodged with the Claim dated the 16th December, 1986. It should be noted that that schedule is as complete as the data made available by the Crown thus far permits and the claimants give notice that the schedule will be extended as further necessary data becomes available.

MAHINGA KAI

According to the Treaty of Waitangi and later specifically confirmed by the Kemp Deed the Ngai Tahu people were guaranteed “the full, exclusive and undisturbed possession” of their *kainga* and *mabinga kai*, but the acts and omissions of the Crown and agents of the Crown have in fact dispossessed Ngai Tahu of their *mabinga kai*. Ngai Tahu have thus been deprived of a major economic and sustaining resource in their *mabinga kai* including birding, cultivation, gathering and fishing resour-

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ces. Since the issue of Treaty rights to *mabinga kai*, especially in respect of fisheries, is subjudice in the Muriwhenua Claim now proceeding in the Waitangi Tribunal it would be inappropriate to detail it further at this stage, but notice is given now that claim will be pressed for a share in the fisheries, including the commercial fisheries, of Te Waipounamu and for the recovery of or compensation for birding and other traditional resources of which Ngai Tahu have been wrongfully deprived.

CULTURE

From shortly after 1840 down until the present time, all legislation affecting the Maori people, (and therefore the claimants) has reflected a policy of assimilation. As part of this process the Maori has been required to adapt to a Westminster system of Central and local government which gives little or no recognition to Maori ways of performing these functions. Wherever the Maori and Pakeha cultures have been in conflict it is the Maori who has had to bend. The result is that Maori cultural and social patterns and values have broken down and the people have become confused and dispirited, with some now tending to seek radical remedies for Maori grievances.

The claimants seek a recommendation that the policy of assimilation be reversed. This would involve a substantial programme of legislative reform to all statutes which reflect that policy.

The claimants believe that the Treaty of Waitangi can be read for the principles which it spells out and for the spirit which underlies the whole document. The former are currently under consideration by the Court of Appeal so comment on them would be presently inappropriate. The spirit which underlies the Treaty, and the instructions given to those who wrote it, is a simple acceptance of the fact that we are two races. The Treaty is a partnership between those two races and that partnership requires consultation, the absence of which is the root cause of all the grievances now held by the Maori people. The claimants therefore seek a recommendation that the Crown should now unequivocally give a public assurance that hereafter the Maori people will be consulted and listened to in all matters affecting them.

REMEDIES

Changes to Crown policies and attitudes have already been mentioned. These will need to be extensive and the detailed implementation of them will be difficult and may take a long time. The claimants believe that these changes are fundamental to the future of our country, and the only reason that they do not develop this aspect of the claims further at this stage is their belief that the changes will be largely uncontroversial if carried out with sensitivity.

The resolution of land based claims is quite another matter and is likely to be extremely controversial. For that reason it is important to state that the claimants acknowledge the sanctity of contracts and the provisions of the Land Transfer Act. Although they seek land as a partial remedy for

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their claims, they acknowledge that people who have bought or leased land for value cannot be dispossessed of it. Contracts arising from the operation of the State Owned Enterprises Act may be another matter, but that Act is currently under consideration by the Court of Appeal, so the claimants reserve their position in respect of it.

For these reasons the claimants seek the allocation of Crown Land to them. The lands which are the subject of the claims have largely passed into private ownership and so other lands are sought in substitution. Any lands allocated to the claimants should be representative of the lost land in both character and geographic distribution. It may well be that any recommendation of the Tribunal should be limited to the kind and quantity of the land to be allocated leaving the identification of particular parcels for determination elsewhere. Alternatively, if the Tribunal is minded to recommend allocation of land, it might give an interim decision to that effect. The claimants and the Crown could then consult with each other and, hopefully, reach an agreement which they could present to the Tribunal for its approval.

The claimants recognize that complete compensation in the form of land may prove impossible. In that event they would seek compensation in the form of a mix of land and money. They have also considered whether they should claim interest on the money value of all disputed land from the date of the dispute down to the present day. At this moment they have not decided whether to make such a claim but hereby give notice of the possibility, so that those potentially concerned may take such steps as they are advised in case such a claim is finally made.

DATED at Christchurch this 2nd day of June 1987.

D M Palmer

Solicitor for the Claimants

1.2 **Amended Claim of 25 September 1987**

NGAI TAHU MAORI TRUST BOARD

The Registrar,
Waitangi Tribunal,
Tribunals Division,
Justice Department,
WELLINGTON

ATTENTION: DR MAARIRE GOODALL.

I write to notify you of the basis of the Ngai Tahu fisheries Claim in respect of WAI 27 currently proceeding before the Waitangi Tribunal.

The content of this claim was communicated to the Minister of Fisheries by the Secretary of this Board by FAX on September 24.1987.

You should note that the fisheries component of WAI 27 is contained within the "Mahinga Kai" section of the case. It is anticipated that this

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component will be dealt with separately pending the outcome of the Muriwhenua Claim currently being considered by the Tribunal.

The Ngai Tahu Fisheries Claim is as follows:

1. Ngai Tahu claim sole ownership of the fishery off their tribal coasts out to the twelve mile limit under the Treaty of Waitangi.
2. In the light of the partnership principle implicit in the Treaty and developed in some detail in the recent Court of Appeal decision, Ngai Tahu are prepared to grant to their Treaty Partner, the Crown, a full half share in that fishery.
3. Without prejudice to its position on the question that the Crown may have been in breach of the Treaty in imposing both general legislation in fisheries and the recently imposed ITQ system in particular, Ngai Tahu accept that the ITQ system is now a commercial and practical reality.
4. Ngai Tahu therefore retains for itself 50% of all ITQ for all species out to the twelve mile limit and grants to its Treaty partner, the Crown, the right to 50% of all ITQ within the twelve mile limit. This retention and grant apply only to those waters offshore from the tribe's traditional boundaries. Those boundaries are currently being considered by the Tribunal.
5. On account of its Treaty partner's action in unilaterally imposing its own stewardship on the fishery described in past years with the effect that the fishery has become seriously depleted, Ngai Tahu claims compensation for its losses so sustained.
6. The tribe is prepared to accept such compensation from its Treaty partner in the form of an allocation of ITQ in the fishery beyond the twelve mile limit. The quantum of such allocation is regarded as being negotiable.
7. Should the negotiation on the quantum of ITQ beyond the twelve mile limit be acceptable to Ngai Tahu then the tribe is prepared to abandon its prosecution of the question that the Crown has acted in breach of the Treaty and the principles of the Treaty in respect of Ngai Tahu fisheries.

The above Claim is filed with you without prejudice to its substance being filed in a more formal way at a later date.

It is further filed without prejudice to Ngai Tahu consideration of a proposed MAORIFISHERY PROGRAMME currently being considered by Government but on which the tribe has not as yet been consulted.

Tipene O'Regan
Chairman

1.3 **Amended Claim in Respect of Fisheries (J7)**
25 June 1988

Tena koutou nga Kaiwhakawaa o te Taraipiunara nei, tena koutou nga Rangatira o te Roopu Whakamana i te Tiriti. Tena koutou.

Anei matou e tu ake nei ko Ngai Tahu Whanui.

Kia whakarongohia a matou tangi mo nga uri a Takaroa i ngaro ai.

In accord with our earlier reservations and notice given that we would in due time bring our fishing claim up to date with events to the time of hearing we now seek leave to amend our claim as follows.

We previously stated to the Tribunal in written and also verbal submissions the kind of negotiated agreement with the Crown we then contemplated as possible as to sharing of the resource in various zones, but that we recognise no seaward limit to our fishery nor do we concede any derogation from our tribal *tino rangatiratanga* in the seas off our coasts. Because of the many significant changes in the New Zealand fisheries and in their management since our claim was first filed, and particularly due to recent developments in the work of the Courts, Government and the Waitangi Tribunal itself, it is necessary now to reformulate the detailed principles of the Ngai Tahu fishing claim.

We have already given evidence on our inland fishing claims, and further detail relating that information to our whakapapa and land usage rights will be given at this hui. Although it will be convenient to the Tribunal to deal with our sea fishing claim as a separate and major issue in itself, we would emphasise to you that Ngai Tahu consider their lands and seas to be a physical and spiritual unity, a seamless whole which cannot properly be divided into parts. Within that unity is our *mabika kai*, which cannot be separated from our mana as a Tribe.

We therefore now assert our marine fishing claim:

Ngai Tahu Whanui encompasses all the hapu of Kaitahu, Kati Mamoe, Waitaha, and all of the earlier tangata whenua tribes or hapu of Te Waipounamu. For brevity in our claim we just say Ngai Tahu, which includes us all.

1. Ngai Tahu own the marine fishery adjacent to their Tribal territory. That fishery is our property and has been since time immemorial.
2. The geographic extent of our fishery is bounded laterally by perpendicular projection into the sea of our tribal land boundaries with other tribes at the coast at Pari-nui-o-whiti on the east, and at Kahuraki on the west, and sweeping southwards around the coast of Te Waipounamu and offshore islands including those to the south of Rakiura.
3. No seaward boundary offshore is recognised. Our traditional and customary tribal fishery is not limited by any past or present law or custom of Britain or of the Crown in New Zealand as regarding 3, 12, 200 or any other number of miles offshore, nor the alleged projectile strength

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of their cannon. We have the right to go to sea as far as we must, or are able, in order to obtain the fish that we require.

4. Our fishery includes inshore waters, beaches, inlets, fjords and tidal rivers and estuaries, as well as littoral swamps, and it includes submarine fishing grounds without any limitation as to their depth.

5. Ngai Tahu do not claim mana whenua on Rekohu-Chathams Island or the smaller offshore islands of that group, and therefore we do not claim that mana moana nor the Chathams fishery. Ngai Tahu do claim and acknowledge their blood and historical relationship with many Chathams people of mixed Moriori, Maori or Pakeha descent. Accordingly we do not ourselves claim in the Chathams fishery, instead we recognise the duty of *whanaungatanga* requiring us to support the Chathams people in making their own claim. Ngai Tahu do not wish to intrude on the mana of the Chathams and only offer their support on such terms and at such times as those people might request from the Chathams Islands community itself, so long as we are satisfied their runanga genuinely represents the Chathams community itself rather than [sic] any external mainland group. Ngai Tahu expects in due time to negotiate directly with the Chathams people agreements for the boundaries and regulation of their respective fisheries where they abut. Equally we expect to negotiate suitable agreements with the tribal authorities to the north of us on west and east coasts of Te Waipounamu.

6. The Ngai Tahu fishery includes all property and user rights inherent in the business and activity of fishing within their tribal waters defined above.

7. The Ngai Tahu fishery includes commercial sustenance and cultural aspects and is not subdivided into compartments by such categories as listed in the Fisheries Acts or Regulations made by the Crown purportedly for the general NZ fishery; instead our fishery is one whole entity or *taonga* controlled by our tribal authorities for the benefit of all and for those who come after us according to our traditional values.

8. The Ngai Tahu fishery includes the right to fish without any interference or restriction whatever by the Crown or by other British subjects or New Zealand residents or by foreign persons.

9. Ngai Tahu fully recognise the conservation and management duties inherent in their rights of ownership usage and control of their fishery, for the continuing benefit of themselves and all other citizens of New Zealand. In that respect the expensive but disastrously ineffective management methods of the Crown intruded on our fisheries during the past half century or more must be modified to include the more sophisticated approach of Southern Maori tradition.

10. Ngai Tahu are entitled to the protection of the Crown against any interference in their fishery by other citizens including Maori of other tribes, or by other residents or foreigners.

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11. The Ngai Tahu fishery comprises fish of all species finfish shellfish crustacea seals whales and sea plants existing from time to time in southern waters or on our coasts including migratory species passing through those seas, and including also anadromous and catadromous species migrating between fresh and salt waters. Certain particular species such as squid, barracouta, hoki, hapuku seals whales or shellfish had especial traditional economic importance for Ngai Tahu but all species without exception are part of our fishery.

12. The fish in our fishery include all those species now found there whether or not they were all used at any particular date in the past, and also included are any other species of fish or plant life which might be newly discovered there at any time in the future. We are conscious that various species have been newly commercially exploited after findings by independent fishermen, including foreigners in the famous case of orange roughy which we understand was first found by Japanese invited by the Crown for a substantial fee payable to themselves, into our fishery. Ownership of those fish resources has nevertheless been arrogated to itself by the Crown, in breach of the Treaty of Waitangi and our ownership and control rights guaranteed to us in the Treaty.

13. The Ngai Tahu fishery includes all those places within our tribal seas where fish can from time to time be caught whether or not they were all used at 1840 or at any other date. Our property belongs to us no matter what particular use we might choose to make of it at any time.

14. Ngai Tahu fisheries include all the gear that is apparatus nets lures pa weirs hinaki lines hooks navigational aids and the like used in fishing, and it includes all the methods of fishing which were at any time used or which may in future be used for the species and places accessible to our fishermen at any time past in the future. Our fishing property is in no way limited by past technology and we have every right to utilise modern knowledge in its development.

15. The Ngai Tahu fishery includes all the cultural and spiritual values held to be important by Ngai Tahu and its various hapu whether or not those values are recognised or considered important by the Crown in its legislation, or by other Maoris or other citizens residents or foreigners, or by corporations. Ngai Tahu are entitled under the Treaty to have those spiritual or non-material values identified by them protected by the Crown.

16. The management and control of their fishery is guaranteed exclusively to Ngai Tahu by the Treaty of Waitangi, and further by s88(2) of the Fishing Act in our view of the law. Ngai Tahu were also entitled to the income and other benefits that may from time to time accrue from the activity and business of fishing in our tribal seas. Furthermore the entire property in the fishery was guaranteed to Ngai Tahu however that property title might be expressed in modern legal terms following legislation by the Crown whether it is now in real or such abstract forms

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as “quota” “licences” or any other form of title or right to fish. In our view the Crown has never had any right to interfere in the management or control of the fishery, nor to divert away from the rightful owners the income and benefits of fishing, nor to issue “quota” “licences” or other forms of purported title in property or user rights in the fisheries that in right belong to Ngai Tahu. The fishery property still belongs to Ngai Tahu.

17. Ngai Tahu have long recognised the need to develop a conjoint Maori–Pakeha society based upon mutual respect and reasonableness as between partners in accordance with the Treaty of Waitangi. The file of submissions by the Deputy Chairman and the Chairman of our tribal Trust Board to the Minister of Fisheries clearly shows a responsible attitude, acknowledged by the Minister himself, in regard to management and sharing in the fishery resource. Such submissions have been made by our Tribe over a long period of time, but so far with no satisfactory result, requiring us now to prosecute our claim to the fullest.

18. Ngai Tahu historically as shown in evidence to this honourable Tribunal have always been generous in their view of the needs and reasonable wishes of *manuhiri* peoples coming within our tribal boundaries in peace and friendship or for trade or mutual benefit. Long before the Treaty of Waitangi our tribal leaders recognised and encouraged trading educational and religious interrelationships both with other Maori and with Pakeha. The reasonable needs of those *manuhiri* for sustenance fishing were always allowed and protected under our tribal mana, continuing right through to the landmark 1986 case acquitted from the District Court by Williamson J in which the learned Judge saw clearly that the accused person belonging to a northern tribe was in fact exercising a Ngai Tahu fishing right under our approval and control through our hapu leaders of Ngai Tuahuriri. Thus the law acknowledged that our fishing rights had not been extinguished, even though only a small part of those rights were in issue in that case. In fact that case turned on the aboriginal rights under British and New Zealand common law, and not at all upon our much greater rights reserved to us under the Treaty of Waitangi.

19. Ngai Tahu alone has the authority to give, and to revoke, fishing rights to manuhiri peoples coming into our rohe. We have in fact granted such rights since ancient times, which we call *tuku whenua* or *tuku moana* and which my colleagues will have referred to in other evidence. Any such grants are exercised under the mana of Ngai Tahu and have always been protected by us from intrusion by others, Pakeha or Maori, and equally may be revoked by us for good cause.

20. The policy of Ngai Tahu is no different today and we intend as a people to negotiate fair and reasonable arrangements with all those persons, Crown officers or foreign interests who will properly recognise our prior rights to do so, and our right to determine the best use of our inherent property in fishing. Therefore the single most essential requirement for those wishing to negotiate settlements within the Ngai Tahu

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fisheries as our Treaty partners will be that they need to acknowledge the fundamental fact that Ngai Tahu continue to hold the full and exclusive property and user rights in their tribal fishery as defined earlier and in their tribal activity and business of fishing. The Treaty of Waitangi guarantees nothing less.

21. Those who do acknowledge the proper basis to begin negotiations with Ngai Tahu as equals and as responsible Treaty partners, but only then, can expect honest negotiations for some share in the southern fishery to reach meaningful and practical results. In earlier pro forma and draft versions of this fishing claim we indicated the type of arrangement that Ngai Tahu might be willing to contemplate as a basis for negotiation.

Due to the significant developments in this field nationally following High Court orders, the issue of the Muriwhenua Fishing Report by the Waitangi Tribunal, and the executive negotiations between Crown and Maori representatives, we have reserved the right to modify our earlier offers (filed 25 September 1987) to negotiate, in light of the latest information. Hence our definition now of our full marine claim for your consideration.

However the principle earlier indicated, remains unchanged, that Ngai Tahu has always sought and still seeks proper recognition of our tribal property in the fishery, a fair and equitable negotiation with our Treaty partners in the Government representing the Crown today, and an equitable and practical arrangement in our fisheries. In seeking such a fair resolution Ngai Tahu cannot agree to abandon any of our fundamental rights, especially the clear property right in fishing guaranteed to us by the Treaty.

22. With acknowledgement of Ngai Tahu rights to at the least an equal share in the management and control of the southern fishery, an equal or at least very substantial share in the income and benefits of fishing and similarly in the equity or property involved, we foresee a constructive and peaceful relationship developing for the benefit of Maori and all others in this country. We say at least an equal share in the management and control Mr Chairman, and that is a very considerable concession by my tribe, bearing in mind that the Treaty of Waitangi guaranteed to us the total and exclusive rights to control, indeed to own, the fishery, and bearing in mind that both the English and the Maori versions of the Treaty were written by Crown agents. If there were any doubt in this matter, and it is hard for reasonable people to see how there can be, it must be construed in favour of the Maori ownership and control of the property so clearly reserved to us in Article Two of our Treaty.

If such fundamental values are to be further denied despite the Treaty of Waitangi signed in all good faith by Ngai Tahu, despite specific reservations of our *mabika kai* in our land sale Deeds in Te Waipounamu, despite findings of the Waitangi Tribunal, despite orders and determinations of the High Court and Court of Appeal, then New Zealand will be condemned to unending conflict.

The Fisheries Claims

Ka whawhai tonu matou, ake ake ake!

The best time for peaceable settlement, is now.

23. Ngai Tahu continue to reserve their right to claim compensation at law in the Courts, and under the Treaty in this Tribunal, for damages to their fishery and for the exclusion of our tribesmen from fishing and the tribal benefits of our traditional activity and business of fishing caused by the wrongful actions of the Crown during past years. While our Tribal leaders hope that successful negotiations with our Treaty partners might make it unnecessary to pursue that course we give notice that such claims will be prosecuted if no fair agreement is reached.

24. Because of its importance to all New Zealand we emphasise again the importance of conservation as raised in paragraph Nine above. Ngai Tahu acknowledge the responsibility to so manage their fisheries on soundly based conservation principles that there is assurance the fishery will provide a sustainable resource for future generations. Ngai Tahu consider they have a valid position in conservation based on traditional Maori values, and supplemented by modern scientific knowledge and expertise. We do not deprive ourselves of any technical progress or discoveries in the modern scientific world, and we are not afraid to employ the best brains of other Maori, of Pakeha, or of foreign experts when we think they will be able to assist us in the management of this most valuable resource.

You will recall the official motto in the seal of our Ngai Tahu Maori Tribal Trust Board:

Mo tatou, a, mo ka uri a muri ake nei.

Therein lies a difference from the hasty short term profits approach so prevalent today in the way fisheries are being mis-managed. You must have found amongst all the other Maori tribes which your Tribunal has heard throughout the land, the same thing that I say to you now on behalf of Ngai Tahu

Maori take a very long view.

We are grown from the seeds of Ra'iatea planted here, ours is a very great canoe, and we shall not disappear.

25. We thus look far to the future, as we do to the past when the taniwha Poutini brought to our tribal lands Waitaiki, the mother of the taonga pounamu by which we are known throughout the Maori world.

*Kia whakarere iho au ko toku mokai Tapu,
Ko Poutini tena kei te tahu o te uru
Here ai toku kupenga ki te Taramakau
Ara ki te Ara hura hei awhi e
ei ano toku whakaaro ki nga roto
tapu . . .
e aue Taiki e*

Appendix 2

Record of Inquiry

2.1 Notice of Claim

Notice of the Ngai Tahu claim was circulated extensively to ministers of the Crown and amongst government departments, Maori and regional organisations, and interest groups and individuals who had notified the tribunal of their interest, or who the tribunal considered might be affected by the claim.

Public notice was given in the media, including local and national newspapers, radio and television. For full details see the *Ngai Tahu Report 1991*, appendix 7.1, pages 1199 to 1201.

2.2 Appointments

The tribunal was constituted to comprise:

Judge Ashley G McHugh (presiding officer)
Bishop Manuhuia A Bennett
Sir Monita E Delamere
Georgina Te Heuheu
Sir Hugh Kawharu
Professor Gordon Orr
Sir Desmond Sullivan

- Paul Temm QC, David Palmer and Michael Knowles were appointed as counsel to assist the claimants. John Upton QC was appointed as counsel to assist the claimants from April 1991.
- Professor Alan Ward of the University of Newcastle, New South Wales was appointed to prepare a report on historical aspects of the claim.
- Doctor George Habib, fisheries consultant of Auckland, was commissioned to investigate and report on fisheries aspects of the claim.

2.3 Hearings and Appearances Relating to the Fisheries Claim

Evidence relating to the sea fisheries claim was heard throughout the course of the inquiry into the Ngai Tahu claim. This inquiry ran from August 1987 until 5 September 1991. Hearings dealing solely with sea fisheries evidence were reopened following the completion of the main inquiry and are listed below. Full details of all hearings are contained in the *Ngai Tahu Report 1991*, appendix 7, pages 1199 to 1216.

The Ngai Tahu Sea Fisheries Report 1992

Tribunals Division Boardroom, Databank House, Wellington,

28 June 1990

For the claimants:

Paul B Temm QC

For the Crown:

Annsley Kerr

Harriet Kennedy

Also appearing:

Tim Castle – NZFIB and NZFIA

Documents Z1 to Z40 were admitted to the record

Tribunals Division Boardroom, Databank House, Wellington,

20 December 1990

For the claimants:

Paul B Temm QC

For the Crown:

Jennifer Lake

Annsley Kerr

Also appearing:

Deborah Edmonds – Ngati Toa Rangatira

Robert Harte – Rangitane ki Wairau

John Stevens and Bruce Corkill – Te Runanganui o Te Tauihu o Te Waka
a Maui

John Marshall – NZFIA and NZFIB

Documents AA1 to AA25 were admitted to the record

Tribunals Division Boardroom, Databank House, Wellington,

17–21 June 1991

For the claimants:

John Upton QC

Record of Inquiry

For the Crown:

Jennifer Lake

Annsley Kerr

Also appearing:

Tim Castle – NZFIA and NZFIB

Joe Williams – Maori Fisheries Commission

Submissions and evidence were received from:

Professor Ward (AA26), Dr Habib (Z21, AA29–AA32), Whaimutu Dewes (AA39)

Documents AA26 to AA50 were admitted to the record

**Tribunals Division Boardroom, Databank House, Wellington,
2–5 September 1991**

For the claimants:

John Upton QC

For the Crown:

Colin Carruthers QC

Annsley Kerr

Also appearing:

Tim Castle – NZFIA and NZFIB

AB1 to AB19 were admitted to the record

Appendix 3

Record of Fisheries Documents

NOTE: Documents marked with an * are ruled confidential and are available only to counsel. Copies cannot be made.

The reference in brackets after each document refers to the person or party producing the document in evidence

A First Hearing at Tuahiwi Marae, 17 August 1987 and Rangiora High School, 17–20 August 1987

Document:

A17 Submission of Henare R Tau with attachment of Te Ngai Tuahuriri Runanga Incorporated rules

A26 Opening submissions of claimants' counsel

B Second Hearing at Tuahiwi Marae, 21–23 September 1987

Document:

B13 Ngai Tahu fishery claim, received 28 September 1987 (registrar)

C Third hearing at Otakou Marae, 2 November 1987 and re-convening at Tuahiwi Marae, 5 November 1987

Document:

C8 (a) Evidence of Dr Atholl Anderson on Maori settlement at Otakou
(b) References to C8(a)
(counsel for claimants)

C13 (a) Submission of Craig Ellison on pollution of lands and waters in Otago
(b) Documents presented with C13(a)

C23 Correspondence of Tipene O'Regan on claim of Kurahaupo Waka and aquacultural developments, (Kaparatehau Lake Grassmere), received 10 November 1987
(registrar)

H Seventh Hearing at Tuahiwi Marae and Te Rau Aroha Marae, Bluff, 11–20 April 1988

Document:

H1 Evidence of Dr Atholl Anderson on mahinga kai
(counsel for claimants)

H2 Supporting papers to H1 (see H3)
(counsel for claimants)

H3 Figures and tables supplementary to H1 and H2
(counsel for claimants)

The Ngai Tahu Sea Fisheries Report 1992

- H5 Evidence of David T Higgins and William A G Goomes on sea fishery (counsel for claimants)
- H6 Evidence of Rawiri Te M Tau and Henare R Tau on mahinga kai, Tuahuriri area (submission of Henare R Tau withdrawn and replaced by J10; see also H57) (counsel for claimants)
- H7 Evidence of Wiremu T Solomon and Trevor H Howse on mahinga kai, Kaikoura area (counsel for claimants)
- H8 Evidence of Ray Hooker, Hemi Te Rakau, Kelly R Wilson, Gordon McLaren, Albert K Te Naihi-McLaren, Iris Climo, James M Russell, Allan L Russell on mahinga hi, Arahura area (submission of Hemi Te Rakau replaced by H36) (counsel for claimants)
- H9 Evidence of James P McAloon, Mere KE Teihoka (Hamilton), Catherine E Brown, Morris T Love, Rewi Brown, Donald R Brown on mahinga kai, Waihora area (counsel for claimants)
- H10 Evidence of Jack T Reihana, Wiremu Torepe, Kelvin Anglem, Murray E Bruce, Kelvyn T A D Te Maire and Rangimarie Te Maiharoa on mahinga kai, Arowhenua area (counsel for claimants)
- H11 Evidence of Matt Ellison on mahinga kai, Puketeraki area (counsel for claimants)
- H12 Evidence of Edward Ellison on mahinga kai, Otakou area (counsel for claimants)
- H13 Evidence of Robert A Whitiri, Harold F Ashwell, Paddy Gilroy, Taare H Bradshaw, Huhana P B Morgan, and Kevin O'Connor on mahinga kai, Murihiku area (counsel for claimants)
- H15 Memorandum of counsel for the New Zealand Fishing Industry Board and New Zealand Fishing Industry Association, dated 8 April 1988
- H16 Curriculum vitae of Dr Atholl Anderson (counsel for claimants)
- H17 Submission of Tipene O'Regan on behalf of the Ngai Tahu Trust Board on mahinga kai (fisheries), (see addenda, H20)
- H21* Hoani Te Kaahu "He korero mo Kati Tuhaitara", Beattie Papers 582/F/17, Hocken Library (counsel for claimants)
- H22* (a) "He korero mo Tuteurutira raua ko Hinerongo"
(b)* "He korero mo Kati Kuri"
(counsel for claimants)
- H23* Map of Fiordland fishing marks (also J32) (counsel for claimants)
- H24* Map of Kaikoura fishing marks (also J33) (counsel for claimants)
- H25* Map of Banks Peninsula fishing marks (also J34) (counsel for claimants)

Record of Fisheries Documents

- H26* Map of Foveaux Strait fishing marks (also J35)
(counsel for claimants)
- H27* Whakapapa of Wiremu Solomon
(counsel for claimants)
- H28* Map of Kaikoura, place names
(counsel for claimants)
- H29* Map of Kaikoura, kai manu and kai moana
(counsel for claimants)
- H30* Map of Kaikoura, tohu raumati
(counsel for claimants)
- H32* Map of Kaikoura, kai awa
(counsel for claimants)
- H33* Map of Ngati Kuri kai ika
(counsel for claimants)
- H34* Key to maps H27 to H33
(counsel for claimants)
- H35 Marcus Solomon "Boatman"
(counsel for claimants)
- H37* Archaeological evidence of Te Tai Poutini Maori settlement
(counsel for claimants)
- H38* Map of Te Tai Poutini archaeological sites
(counsel for claimants)
- H41* Map of south Westland mahinga kai areas
(counsel for claimants)
- H42* Map of features of south Westland
(counsel for claimants)
- H45 Evidence of Montero J Daniel on Taumutu site visit, 16 April 1988
- H46 Material supplied for Wairewa and Waihora site visit, 16 April 1988
(counsel for claimants)
- H47 Submission of Te Ao Hurae Waaka on Arowhenua
- H48 Submission of Kelvin Anglem on Timaru and Waitarakao
- H52 Submission of David M Miller on mahinga kai, Purakanui area
(counsel for claimants)
- H53 Submission of Edward Ellison on mahinga kai
(counsel for claimants)
- H54* Map of mahinga kai, Murihiku area
(counsel for claimants)
- H56 Submission of George Te Au on mahinga kai, Murihiku area

The Ngai Tahu Sea Fisheries Report 1992

I Eighth hearing at Tribunals Division Boardroom, Databank House, Wellington, 19 May 1988

Document:

- I6 Issues raised by the evidence of the claimants as determined by the tribunal (see I1–4)
(registrar)

J Ninth hearing, held at the Tuahiwi Marae, 27–30 June 1988

Document:

- J5 Submissions of the Waitaha Management Group in association with the South Westland Runanga, Tukurua Runanga, West Coast Fishermens' Association and Maruia Society
- J7 Amended claim in respect of fisheries, dated 25 June 1988
(registrar)
- J8 Map of Fiordland taken from an 1838 admiralty chart in Edward Shortland *The Southern Districts of New Zealand* (1851). Copied from A Charles Begg & Neil Begg *The World of John Boulton, including an account of sealing in Australia and New Zealand* (Whitcoulls, Christchurch 1979) fig 15
- J9 Copies of statutes and regulations relating to Lake Waihora
(counsel for claimants)
- J10 Evidence of Henare R Tau, David Higgins, Trevor H Howse, Peter Ruka and Barry Brailsford on mahinga kai (Note: D Higgins' evidence replaces H5, B Brailsford's evidence replaces H4 and HR Tau's evidence replaces that included in H6)
(counsel for claimants)
- J11* Map of kai roto, Kaikoura
(counsel for claimants)
- J12* Map of groper grounds, Kaikoura area (1)
(counsel for claimants)
- J13* Map of groper grounds, Kaikoura area (2)
(counsel for claimants)
- J14* Map of groper grounds, Kaikoura area (3)
(counsel for claimants)
- J18 Barry Brailsford *The Greenstone Trails: The Maori Search for Pounamu* (Reed, Wellington 1984)
(counsel for claimants)
- J19 Barry Brailsford *The Tattooed Land* (Reed, Wellington 1981)
(counsel for claimants)
- J20* Map of mahinga kai, Christchurch area
(counsel for claimants)
- J21* Overlay to J20, wakawaka boundaries, Christchurch mahinga kai
(counsel for claimants)
- J22* Map of mahinga kai districts according to Matiaha Tiramorehu
(counsel for claimants)
- J23 Map of archaeological sites (see H3 Fig 1)
(counsel for claimants)

Record of Fisheries Documents

- J28 Map of te aka o tuwhenua, wakawaka ika (fishing wakawaka North Canterbury)
(counsel for claimants)
- J29* Map of Waitaki wakawaka, collected 1897 and presented to the Native Land Court 1925
(counsel for claimants)
- J30* Map of Canterbury wakawaka, collected 1897 and presented to the Native Land Court 1925
(counsel for claimants)
- J31* Map of currents, Punakaiki to Kahurangi Point
(counsel for claimants)
- J32* Map of Fiordland fishing marks and grounds (also H23)
(counsel for claimants)
- J33* Map of Kaikoura fishing grounds (also H24)
(counsel for claimants)
- J34* Map of Banks Peninsula to Otago fishing grounds and marks (also H25)
(counsel for claimants)
- J35* Map of Foveaux Strait fishing grounds and marks (also H26)
(counsel for claimants)
- J36* Map of tuku moana, tuna heke, wakawaka for Lake Forsyth (Wairewa)
(counsel for claimants)
- J37* Additional note to the evidence of Trevor H Howse on Wairewa (see J10)
(counsel for claimants)
- J39 Evidence of James P McAloon on mahinga kai, Ngai Tahu-Ngati Mamoe marine property rights
(counsel for claimants)
- J40* Overlay to J28, kohanga o kaikai oara (North Canterbury fisheries)
(counsel for claimants)
- J41* Overlay to J28, maunga karanga
(counsel for claimants)
- J42* Map of South Island ocean currents
(counsel for claimants)
- J43 Final statement of David Higgins on Ngai Tahu fisheries (see J10)
(counsel for claimants)
- J44 Additional evidence of Peter Ruka on Ngai Tahu fisheries
(counsel for claimants)
- J45 Additional evidence of Henare R Tau on Ngai Tahu fisheries (see J10)
- J51* Map of Kaikoura to Banks Peninsula fishing marks and fishing grounds
(counsel for claimants)
- J52* Map of Taiaroa Head to Nugget Point fisheries and fishing marks
(counsel for claimants)
- K On 30 June 1988 the Crown opened its response to the claim**
Document:
- K1 Opening submission of Crown counsel

The Ngai Tahu Sea Fisheries Report 1992

K2 Supporting papers to K1

L Tenth hearing at the Southern Cross Hotel, Dunedin, 25–28 July 1988

Document:

L32 Summary from the submissions of ancillary and other issues raised in the Ngai Tahu claim (registrar)

M Eleventh hearing at College House, Christchurch, 29 August–1 September 1988

Document:

M14 Evidence of Tony Walzl on Ngai Tahu reserves 1848–1890
(counsel for Crown)

M15 Supporting papers to M14
(counsel for Crown)

M16 Evidence of David A Armstrong on the Crown's reserve policy concerning Ngai Tahu 1890–1944
(counsel for Crown)

M17 Supporting papers to M16 (2 vols)
(counsel for Crown)

O Thirteenth hearing at the Student Union Building, Otago University, Dunedin, 7–10 November 1988

Document:

O27 Map of South Island used as base for overlays for Kemp's purchase
(a) Overlay to O27, Maori reserves (general use and fishing)
(b) Overlay to O27, boundaries, purchase documents (lands of Crown) distinguishing general and SOE lands
(c) Overlay to O27, boundaries of various purchases
(counsel for Crown)

O52 Memorandum of deputy-chairperson on mahinga kai – sea fisheries claims, dated 10 November 1988 (see O53)
(registrar)

O53 Memorandum of deputy-chairperson amending memorandum dated 10 November 1988, dated 14 November 1988 (see O52)
(registrar)

P Fourteenth hearing at College House, Ilam, Christchurch, 5–9 December 1988

Document:

P9 (a) Submissions of Crown counsel on mahinga kai
(b) Supporting documents to P9(a)
(c) Documents relating to fishery easements
(d) Key to maps of Banks Peninsula, the Kaikoura coast and Kemp's purchase
(counsel for Crown)

P10 Evidence of Anthony Walzl on mahinga kai (see O48, Q19, Q21)
(counsel for Crown)

Record of Fisheries Documents

- P11 Supporting papers to P10
(counsel for claimants)
- P12 Evidence of Robert D Cooper, MAFFish, on records of Maori fisheries in government archives since 1840
- P13 Supporting paper to P12
- P16 (a) Evidence of Ronald W Little, MAFFish, on the physical nature of Lakes Ellesmere and Forsyth
(b) Evidence of Dr Peter Todd, MAFFish, on eel and lamprey biology and the eel fisheries in Lakes Ellesmere and Forsyth
(c) Evidence of Professor Walter C Clark on Maori involvement in management of freshwater fisheries and game resources in the North Canterbury acclimatisation district, with specific reference to Lake Ellesmere
(d) Evidence of Paul Sager, MAFFish, on the Opihi River – potential effects on fish of flow augmentation
(counsel for Crown)
- P32 (a) Map of Christchurch land drainage, present day
(b) Map of Christchurch land drainage, c 1855
(c) Long term planning for the Avon-Heathcote estuary, Christchurch City Council, 1980
(counsel for Crown)

Q Fifteenth Hearing at Mancan Huose, Christchurch, 7–9 February 1989

Document:

- Q1 Submission of counsel for the claimants on deputy-chairperson's memorandum of 10 November 1988 on sea fisheries claims (see O52)
- Q2 Submission of Mervyn NSaddon deputy-chairperson's memorandum of 10 November 1988 on sea fisheries claims (see O52)
- Q7 Submission of Crown counsel on Ngai Tahu sea fisheries
- Q8 Evidence of Anthony Walzl on economy of Ngai Tahu
(counsel for Crown)
- Q9 Supporting papers to Q8
(counsel for Crown)
- Q12 Submissions of counsel for the New Zealand Fishing Industry Association
- Q13 Submissions of counsel for the New Zealand Fishing Industry Board
- Q21 Observations of the claimants on the evidence of Anthony Walzl on mahinga kai (see P10, P11)
(counsel for claimants)
- Q24 Interlocutory determination of deputy-chairperson on procedure relating to hearing of sea-fisheries claim, dated 10 February 1989
(registrar)
- Q27 Submissions of the Wellington District Law Society to the chairperson of the Maori Fisheries Committee, House of Representatives, Wellington on the Maori Fisheries Bill 1988
- Q31 Memorandum of Crown counsel on Ngai Tahu sea fisheries, dated 13 March 1989
(registrar)

The Ngai Tahu Sea Fisheries Report 1992

R Sixteenth hearing at the Chateau Regency, Christchurch, 10–13 April 1989

Document:

- R9 Opening submission of Crown counsel on Ngai Tahu sea fisheries
- R10 Submission of Crown counsel on legislation concerning fisheries
- R11 Evidence of John A Colman, MAFFish, on marine fish and the environment
(counsel for Crown)
- R12 Evidence of John D Booth, MAFFish, on rock lobster fishery
(counsel for Crown)
- R13 Evidence of Talbot Murray, MAFFish, on South Island paua fishery
(counsel for Crown)
- R14 (a) Evidence of Jacqui Irwin, MAFFish, on shallow water fin fisheries of the South Island
(b) Evidence of Tony Avery, MAFFish, on shoreline and shallow-water shellfisheries of the South Island
(c) Evidence of Graeme McGregor, MAFFish, on South Island blue cod fishery
(d) Evidence of Lawrence J Paul, MAFFish, on South Island shark fisheries
(counsel for Crown)
- R15 (a) Evidence of Rosemary J Hurst, MAFFish, on South Island barracouta fishery
(b) Evidence of John B Jones, MAFFish, on South Island blue warehou fishery
(c) Evidence of Alistair B MacDiarmid, MAFFish, on South Island red cod fishery
(counsel for Crown)
- R16 Evidence of Lawrence J Paul, MAFFish, on South Island groper, tarakihi and bluenose fisheries
(a) Evidence of Robert H Mattlin, MAFFish, on South Island squid fishery
(counsel for Crown)
- R17 Evidence of Mary E Livingston, MAFFish, on South Island silver warehou fishery
(a) Evidence of John A Colman, MAFFish, on South Island hake fishery
(b) Evidence of John A Colman, MAFFish, on South Island ling fishery
(counsel for Crown)
- R18 Evidence of Kevin J Sullivan, MAFFish, on hoki fishery
(counsel for Crown)
- R19 Evidence of Donald A Robertson, MAFFish, on orange roughy fishery
(a) Evidence of Peter McMillan, MAFFish, on South Island oreo fishery
(counsel for Crown)
- R20 Evidence of Robin Allen, MAFFish, on the role of fisheries research
(counsel for Crown)
- R21 Evidence of Ian N Clark, MAFFish, on development of the quota management system
(a) *Economic Review of the New Zealand Fishing Industry 1987–88* (NZFIB, February 1989)
(counsel for Crown)
- R22 Evidence of Bruce Shallard, MAFFish, on the quota management system
(counsel for Crown)
- R23 Evidence of Robert D Cooper, MAFFish, on the effect of fishery management policies on Maori involvement in fishing
(counsel for Crown)

Record of Fisheries Documents

- R24 Evidence of Grant Thomas Crowthers, MAFFish, on fisheries compliance (counsel for Crown)
- R25 Evidence of Ian N Clark, MAFFish, on the economics of the South Island fishery (counsel for Crown)
- R26 Evidence of Robert D Cooper, MAFFish, on local control and management of coastal fisheries by Maori (counsel for Crown)
- R27 Audiovisual aids to MAFFish evidence, book of slide copies (counsel for Crown)
- R28 Audiovisual aids to MAFFish evidence, box of slides used in presentation (counsel for Crown)
- R30*“Mahinga Kai List 1880” presented to Tipene O’Regan by MAFFish
- R31 Question from the tribunal to MAFFish on the nature and extent of Ngai Tahu fishing in traditional times in relation to specific fish and shellfish (registrar)
- R32 Further evidence in support of R25 on exclusion of part-time fishers (counsel for Crown)
- R37 Memorandum of counsel for NZFIB and NZFIA on timetabling and hearing dates for sea-fisheries portion of claim
- R38 (a) Evidence of John A Colman, MAFFish, on marine fish and the environment, supplement to R11
(b) Curriculum vitae of Alan Coakley, supplement to R14(a)–(d)
(c) Evidence of Kevin J Sullivan, MAFFish, on hoki fishery, supplement to R18
(d) Evidence of Rosemary J Hurst, MAFFish, on barracouta, blue warehou and red cod, supplement to R15(a)–(c)
(e) Evidence of Mary E Livingston, MAFFish, on silver warehou and red cod, supplement to R17, 17(a)–(b)
(f) Evidence of Neil Martin, MAFFish, on effect of fisheries management policies on Maori involvement in fishing, supplement to R23
(g) Evidence of Robert D Cooper, MAFFish, on local control and management of coastal fisheries by Maori, supplement to R26
(h) Evidence of Ian N Clark, MAFFish, additional data on TAC’s catch values and valuation definitions, supplement to R25
(i) Evidence of Henry J Cranfield, MAFFish, on dredge oysters
(j) Evidence of Ron Blackwell, MAFFish, on gurnard
(k) Evidence of Graeme McGregor, MAFFish, on stargazer
(l) Evidence of Rosemary J Hurst, MAFFish, on gemfish
(m) Evidence of John A Colman, MAFFish, on southern blue whiting
(n) Evidence of Talbot Murray, MAFFish, on tuna
(o) Evidence of Lawrence J Paul, MAFFish, on species composition of the modern commercial fishery for marine finfish in the Ngai Tahu region of the South Island
(p) Evidence of Lawrence J Paul, MAFFish, on South Island marine fisheries bibliography (counsel for Crown)

The Ngai Tahu Sea Fisheries Report 1992

S The seventeenth hearing at the Chateau Regency, Christchurch, 29 May–2 June 1989

Document:

- S1 Evidence of Robert D Cooper, MAFFish, on history of the New Zealand paua fishery 1860–1973
(counsel for Crown)
- S2 (a) Evidence of Dr Murray A Bathgate on the archaeological and early documentary record concerning Maori fishing in the South Island including reference to two reports by Dr Foss Leach (S4 and S5)
(counsel for Crown)
(b) Curriculum vitae of Dr Murray A Bathgate
(c) Curriculum vitae of Dr Foss Leach
- S3 Supporting papers to S2 (2 vols)
(counsel for Crown)
- S4 Report of Dr Foss Leach on the archaeology of Maori marine food harvesting (see S2)
- S5 Report of Dr Foss Leach on archaeological time trends in South Island Maori fishing (see S2)
- S6 (a) Evidence of David J Alexander on history of sealing and whaling in southern New Zealand
(b) Supporting papers to S6(a)
- S7 Evidence of Anthony Walzl on Ngai Tahu fishing 1840–1908
(counsel for Crown)
- S8 Supporting documents to S7
(counsel for Crown)
- S9 Evidence of David A Armstrong on Ngai Tahu fishing in the twentieth century, overview
(counsel for Crown)
- S10 Supporting papers to S9 (2 vols)
- S11 (a) Evidence of counsel for Tane Moana Runanga Trust Incorporated on Ngai Tahu fishing
(b) Evidence of John Solomon on Ngai Tahu fishing (including evidence of William Pacey)
(c) Evidence of Morris Jacobs on Ngai Tahu fishing (including the evidence of Charles B Harvey, Raymond F Harvey, Stewart C Harvey, Graham D Harvey)
(d) Evidence of James N Pohio on Ngai Tahu fishing (including the evidence of T M Taiaroa and Beresford Davis)
(counsel for Tane Moana Runanga Trust)
- S12 Maori language documents selected from the Taiaroa papers, Canterbury Museum Library, and their translations by Sarah M Williams
(counsel for Crown)
- S13 Evidence of Lawrence J Paul, MAFFish, on the use of “marks” to locate fishing grounds
(counsel for Crown)

Record of Fisheries Documents

- S14 Evidence of Lawrence J Paul, MAFFish, on the likely capture and use of fish species by Ngai Tahu fishing people in traditional times (see R31)
(counsel for Crown)
- S15 JR Goodwin “Some Examples of Self-Regulatory Mechanisms in Unmanaged Fisheries” FAO Fisheries Report (289) Suppl 2
(counsel for Crown)
- S16 Evidence of Professor Ian A Gordon on the meaning of “fisheries” particularly in the Treaty of Waitangi
(counsel for NZFIB and NZFIA)
- S17 Evidence of Richard N Holdaway on Maori conservation of natural resources in the pre-European and proto-historic periods of New Zealand history
(counsel for NZFIB and NZFIA)
- S19 Evidence of Alison F Mannell, partner in crayfishing venture
(counsel for NZFIB and NZFIA)
- S20 Evidence of Ralph E Brown, crayfisherman and marine farmer
(counsel for NZFIB and NZFIA)
- S21 Evidence of Steven J Anderson, crayfisherman
(counsel for NZFIB and NZFIA)
- S22 Evidence of Patrick King on the meaning of mahinga kai
(counsel for Crown)
- S25 Opening submission of counsel for the NZFIA and NZFIB
- T The eighteenth hearing at the Chateau Regency, Christchurch, 12–16 June 1989**

Document:

- T4 Dr George Habib “Ngaitahu Claim to Mahinga Kai”, June 1989, commissioned by the Waitangi Tribunal
- (a) Report on Ngai Tahu fisheries evidence
 - (b) Report on the mahinga kai lists 1880 (see R30)
 - (c) Assessment of Crown evidence on the mahinga kai fisheries aspects of the Ngai Tahu claim
 - (d) Report on evidence on sealing and whaling by the Crown and fishing industry
 - (e) Curriculum vitae of Richard O Boyd, Ika Venture Corp Ltd (registrar)
- T12 Archival material in the registers of Native Affairs Department and the Canterbury Provincial Council, prepared by Jenny Murray
(registrar)
- U The nineteenth hearing at the Chateau Regency, Christchurch, 3–6 July 1989**

Document:

- U1 Evidence of Dr Harry Morton on sealing and whaling
(counsel for NZFIA and NZFIB)
- U2 Evidence of Kevin P Molloy on sealing and whaling
- (a) “The Range and Magnitude of the European Sealing Effort in New Zealand Waters, 1790–1830”

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(b) “Whaling and Land Based Resources – A Study of Impact and Interaction within the Boundaries of South Island Ngai Tahu Occupation”
(counsel for NZFIA and NZFIB)

U4 Submission of counsel for Tane Moana Runanga Trust

U5 Evidence of Morris Jacob
(counsel for Tane Moana Runanga Trust)

U6 Submission of John Solomon
(counsel for Tane Moana Runanga Trust)

U7 (a) Submission of James N Pohio
(b)* Whakapapa tipuna of James N Pohio
(counsel for Tane Moana Runanga Trust)

U8 Evidence of William Pacey
(counsel for Tane Moana Runanga Trust)

U9 Submission of Robert Pacey
(counsel for Tane Moana Runanga Trust)

V The twentieth hearing at Tribunals Division Boardroom, Databank House, Wellington, 1–2 April 1989

Document:

V1 Submissions of counsel for NZFIB and NZFIA

V4 Transcript of Tipene O’Regan’s oral submission to the Waitangi Tribunal, 1 June 1989 (registrar)

V5 comments of Dr Murray A Bathgate on the evidence of Dr Harry Morton and Kevin P Molloy relating to sealing and whaling (see U1, U2)
(counsel for Crown)

V6 Comments of Dr Murray A Bathgate on the reports of Dr George Habib
(a) Report on Ngai Tahu fisheries evidence, June 1989 (see T4(a))
(b) Assessment of Crown evidence on the mahinga kai fisheries aspects of the Ngai Tahu claim (see T4(c))
(counsel for Crown)

V8 Further submissions of counsel for NZFIB and NZFIA on the question of the meaning and effect of “exclusive . . . possession of their . . . fisheries”

W The twenty first hearing at Tuahiwi Marae, 14–17 August 1989

Document:

W1 (a) Closing address of counsel for the claimants
(b) Supplement to W1(a)
(counsel for claimants)

W6 Claimants summary of grievances on Otakou, Murihiku, Rakiura, Arahura, mahinga kai

W8 Comments of MAFFish on report on Crown fisheries evidence by Dr George Habib (see T4(c))
(counsel for Crown)

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X The twenty second hearing at Tuahiwi Marae, 11–15 September 1989

Document:

X4 Closing address of Crown counsel, vol 4

X11 Memorandum of Crown counsel providing answers to “issues” (see I6)

Y The twenty third hearing at Tuahiwi Marae, 9–10 October 1989

Document:

Y1 Reply of claimants’ counsel to the Crown’s closing address

Z Twenty fourth hearing at Tribunals Division, Databank House, Wellington, 28 June 1990

Document:

Z1 Application by NZFIB and NZFIA for leave to adduce further evidence, received 22 May 1990 (registrar)

Z2 Memorandum of counsel for NZFIB and NZFIA in support of Z1, received 22 May 1990

Z3 Directions of deputy-chairperson as to hearing of application by NZFIB and NZFIA for leave to adduce further evidence, dated 29 May 1990 (registrar)

Z4 Memorandum of Crown counsel in response to deputy-chairperson’s directions dated 29 May 1990, received 15 June 1990 (see Z3)

Z5 Memorandum of counsel for NZFIB and NZFIA, received 28 June 1990

Z6 Submissions of Crown counsel in respect of questions raised in the deputy-chairperson’s directions dated 29 May 1990, received 28 June 1990 (see Z3)

Z7 List of affidavits of first and second defendants filed in High Court proceedings (CP 559/87) requested by the deputy-chairperson’s directions dated 29 May 1990
(counsel for Crown)

Z9 Interlocutory determination by Tribunal on an application for leave to adduce further evidence, dated 2 July 1990 (registrar)

Z15 Evidence of Professor Peter Munz on the interpretation of historical documents, with reference to Magna Carta
(counsel for NZFIB and NZFIA)

Z16 Evidence of Graham V Butterworth summarising conclusions reached on the impact of the speeches of the Maori members of parliament on the 1907 Fisheries Amendment Bill in the House of Representatives

(a) Evidence of Graham V Butterworth on the Maori political system of the 1890s and 1900s

(b) Supporting papers to Z16(a)

(counsel for NZFIB and NZFIA)

Z17 Evidence of Susan M Butterworth on the history of the New Zealand fishing industry 1840–1923

(a) Supporting papers to Z17

(counsel for NZFIB and NZFIA)

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- Z18 Evidence of Gregory C Billington, NZFIB, on the history of the New Zealand fishing industry 1963–1989
(a) Reports of the Fishing Industry Board 1965–1975 (see Z18)
(b) Reports of the Fishing Industry Board 1976–1989 (see Z18)
(counsel for NZFIB and NZFIA)
- Z19 Evidence of Gary Bevin, NZFIB, on the quota management system and the economic implications of the Maori Fisheries Act 1988
(counsel for NZFIB and NZFIA)
- Z20 Evidence of David G Anderson, NZFIA, with attachment of Paul Titchener *The Story of Sanford Ltd: The first one hundred years* (1980?) and lists of shareholders and directors of Otakou Fisheries Ltd
(counsel for NZFIB and NZFIA)
- Z21 Evidence of Peter J Stevens, New Zealand Federation of Commercial Fishermen, with attachment of rules of the federation as at 1 August 1986
(counsel for NZFIB and NZFIA)
- Z22 Evidence of Neville L Climo on the quota management system and Lake Ellesmere
(counsel for NZFIB and NZFIA)
- Z23 Evidence of Kenneth J Nordstrom, fisherman, on the individual transferable quota system and Lake Ellesmere
(counsel for NZFIB and NZFIA)
- Z24 Evidence of Trevor J Gould, fish processor, on the Lake Ellesmere fishery
(counsel for NZFIB and NZFIA)
- Z25 Evidence of Clem G Smith, fisherman, on the history of the Lake Ellesmere fishery and in the individual transferable quota system
(counsel for NZFIB and NZFIA)
- Z26 Evidence of William D Wards on Lake Ellesmere
(counsel for NZFIB and NZFIA)
- Z27 Evidence of Clifford Broad on the quota management system in relation to Stewart Island
(counsel for NZFIB and NZFIA)
- Z28 Evidence of Ian J Munro, fisherman, on the individual transferable quota system in relation to Stewart Island
(counsel for NZFIB and NZFIA)
- Z29 Evidence and supporting papers of Peter I Talley, Talleys Fisheries Limited
(counsel for NZFIB and NZFIA)
- Z30 Evidence of David C Sharp, Wilson Neil Limited
(counsel for NZFIB and NZFIA)
- Z31 Evidence of Antony D Threadwell, Pegasus Bay Fishing Company on the quota management system
(counsel for NZFIB and NZFIA)
- Z32 Evidence of Ronald T Mackay, Big Glory Seafoods Limited
(counsel for NZFIB and NZFIA)
- Z33 Evidence of Lewis L Miller, Bapods Limited
(counsel for NZFIB and NZFIA)
- Z34 Evidence of Ronald E Caughey, Mossburn Enterprises Limited
(counsel for NZFIB and NZFIA)

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- Z35 Evidence of Bruce W Urwin, Urwin and Co Limited
(counsel for NZFIB and NZFIA)
- Z36 Evidence of Ben L Calder, Johnsons Oysters Limited on the quota management system
(counsel for NZFIB and NZFIA)
- Z37 Evidence of Kypros Kotzikas, United Fisheries Limited, on the quota management system
(counsel for NZFIB and NZFIA)
- Z38 Evidence of Cameron A McCulloch, Johnson & de Rijk Packing Company Limited
 - (a) Evidence of Cameron A McCulloch, Riverton Fishermens Co-operative
 - (b) Evidence of Cameron A McCulloch, Southfish Co-operative Limited(counsel for NZFIB and NZFIA)
- Z39 Evidence of Eric F Barratt, Sanford (South Island) limited, on the history of the New Zealand fishing industry and the individual transferable quota system
(counsel for NZFIB and NZFIA)
- Z40 Memorandum of deputy-chairperson giving directions as to filing of evidence, responses thereto and timetabling of further hearings, dated 3 September 1990 (registrar)
- Z41 Further memorandum of the claimants on Z10, dated 12 September 1990
(counsel for claimants)
- Z42 unallocated
- Z43 Evidence of Donald M Loveridge, commentary on evidence of Professor Ian Gordon (see S16)
(counsel for Crown)
- Z44 Evidence of Donald M Loveridge on the deeds of sale
(counsel for Crown)
- Z45 Evidence of Robert D Cooper on the development of consultation channels and the development by MAFFish
(counsel for Crown)
- Z46 Evidence of Robin L Allen on the MAF involvement in the latest developments in Maori fisheries
(counsel for Crown)
- Z47 Evidence of John L McKoy on the definition of inshore, offshore and deepwater fisheries
(counsel for Crown)
- Z48 Evidence of Ian N Clark on the history of New Zealand's deepwater fishery: discovery and development
(counsel for Crown)
- Z49 Evidence of Tony Walzl on the Crown/Maori relationship over fisheries 1840-1900, and the Crown management of the fisheries
 - (a) Supporting papers to Z49
 - (b) Supporting papers to Z49(counsel for Crown)
- Z50 Maori Appellate Court decision on case stated re cross claim (registrar)

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Z48 Evidence of Ian N Clark on the history of New Zealand's deepwater fishery: discovery and development

(counsel for Crown)

Z49 Evidence of Tony Walzl on the Crown/Maori relationship over fisheries 1840–1900, and the Crown management of the fisheries

(a) Supporting papers to Z49

(b) Supporting papers to Z49

(counsel for Crown)

Z50 Maori Appellate Court decision on case stated re cross claim (registrar)

AA The twenty fifth hearing at Databank House, Wellington, 20 December 1990

Document:

AA1 Evidence of Paul R Roberts on behalf of the NZFIB (see AA19)
(counsel for NZFIB and NZFIA)

AA2 Evidence of Professor Lee Anderson on the Quota Management System
(counsel for NZFIB and NZFIA)

AA3 Evidence of Peter I Talley on the Quota Management System
(counsel for NZFIB and NZFIA)

AA4 Submissions of counsel for Te Runanganui o Te Tau Ihu o Te Waka a Maui

AA5 Notice of Application for Order of Stay
(counsel for Te Runanganui O Te Tau Ihu O Te Waka A Maui)

AA6 Notice of Application for Order of Stay (counsel for Rangitane ki Wairau)

AA7 Affidavit of Michael John Switzer in support of Application for Order of Stay
(counsel for Te Runanganui O Te Tau Ihu o Te Waka a Maui)

AA8 Further evidence of Professor Lee Anderson
(counsel for NZFIB and NZFIA)

AA9 Further evidence of Clem George Smith
(counsel for NZFIB and NZFIA)

AA10 Tribunal directions as to filing particulars of evidence, responses thereto and timetabling of further hearing, 26 February 1991 (registrar)

AA11 Tribunal memorandum concerning Application for Stay of Proceedings, 25 January 1991 (registrar)

AA12 Evidence of Tipene O'Regan,
Annexures:

(a) List of Ngai Tahu affidavits

(b) Affidavit of Henare Rakiihia Tau

(c) Affidavit of Wiremu Torepe

(d) Affidavit of Tipene O'Regan

(e) Affidavit of David Higgins

(f) Affidavit of Harold Ashwell

(g) Affidavit of Hana Morgan

(h) Affidavit of Matapura Ellison

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- (i) Affidavit of Edward Ellison
 - (j) Affidavit of Donald Brown
 - (k) Affidavit of James McAloon
 - (l) Affidavit of Dr Athol Anderson
 - (m) Affidavit of Ray Hooker
 - (n) Affidavit of Tipene O'Regan
 - (o) Statement by Donald Robert Brown
 - (p) Affidavit of James McAloon
 - (q) Maarire Goodall, "Translation and the Treaty", from *Now See Hear*
 - (r) Transcript of cross examination of Professor IA Gordon
(counsel for claimants)
- AA13 Evidence of James McAloon (see AA17)
(counsel for claimants)
- AA14 Tribunal direction regarding commission of Dr G Habib, 15 March 1991
(registrar)
- AA15 Correspondence from solicitors for NZFIB and NZFIA to solicitor for Ngai Tahu Maori Trust Board regarding evidence of Tipene O'Regan, 15 April 1991 (see AA12)
(counsel for NZFIB and NZFIB)
- AA16 Evidence of Tipene O'Regan, 20 April 1991 Annexures:
 - (a) Extract from Court of Appeal judgment regarding Te Runanga O Muriwhenua, 22 February 1990
 - (b) Maori Fisheries Commission background paper on the Maori Fisheries Act
 - (c) Interim proposal on Maori fisheries circulated by deputy prime minister, 26 October 1988
 - (d) Maori Fisheries Commission draft discussion paper on allocation of quota property rights to iwi
 - (e) Extract regarding barracouta fishing
 - (f) Extracts regarding Fisheries Act
 - (g) Comments by Paul Canhan on fishing evidence submitted by MAFFish and Crown witnesses
 - (h) Correspondence from Ngai Tahu Maori Trust Board to the Minister of Conservation regarding Kaikoura whale management issues
 - (i) Paper on responses of sperm whales to commercial whale watching boats off the Kaikoura coast
 - (j) Paper on pre-European Maori utilisation of marine resources in Muriwhenua
 - (k) Paper on pre-European Maori utilisation of marine resources in the Ngai Tahu territory
 - (l) Extracts on fish and shellfish species
 - (m) References for archaeological data on fishing and shellfishing in regions between Muriwhenua and Ngai Tahu territories
(counsel for claimants)
- AA17 Memorandum of Dr Donald Loveridge in response to evidence of James McAloon (see AA13; also Z43, Z44)
(counsel for Crown)
- AA18 Memorandum of Tony Walzl in response to evidence of James McAloon (see AA13; also Z49)
(counsel for Crown)

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- AA19 Memorandum of Phillip John Major in response to evidence of Paul Rex Roberts (see AA1)
(counsel for Crown)
- AA20 Correspondence from solicitors for NZFIB and NZFIA to solicitors for Ngai Tahu Maori Trust Board regarding evidence of James McAloon, 17 April 1991
(see AA13)
(counsel for NZFIB and NZFIA)
- AA21 Evidence of Tipene O'Regan, 3 May 1991
(counsel for claimants)
- AA22 Tribunal direction regarding the hearing of final submissions, May 1991
(registrar)
- AA23 Tribunal direction amending research commission for Dr G Habib, 8 May 1991
(registrar)
- AA24 Memorandum of Phillip John Major in response to the evidence of Tipene O'Regan (see AA12, AA16)
(counsel for Crown)
- AA25 Tribunal direction appointing claimant counsel, 27 May 1991
(registrar)
- AA26 Professor Alan D Ward "Overview submission in the Ngai Tahu fishing rights claim", May 1991, commissioned by the Waitangi Tribunal
(registrar)
- AA27 Tribunal direction authorising claimant research, 26 February 1991
(registrar)
- AA28 Further evidence Paul Rex Roberts, 4 June 1991
(counsel for NZFIB and NZFIA)
- AA29 Dr George Habib "Overview Report on Evidence Submitted by the Crown, the Claimants and the Fishing Industry", June 1991, commissioned by Waitangi Tribunal
(registrar)
- AA30 Further evidence of Eric Francis Barratt, June 1991
(counsel for NZFIB and NZFIA)
- AA31 Further evidence of David Goldie Anderson, June 1991
(counsel for NZFIB and NZFIA)
- AA32 Further evidence of Peter Ivan Talley, June 1991
(counsel for NZFIB and NZFIA)
- AA33 Copy of Maori Fisheries Act 1989
(counsel for NZFIB and NZFIA)
- AA34 Te Kupenga: A Guide to the Maori Fisheries Act, Manatu Maori and the Maori Fisheries Commission
(counsel for NZFIB and NZFIA)
- AA35 Correspondence from counsel for NZFIA and NZFIB to registrar Waitangi Tribunal regarding appearance by fishing industry representatives before Waitangi Tribunal, 6 June 1991
(counsel for NZFIB and NZFIA)

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- AA36 Tribunal memorandum regarding presentation of fishing industry representatives to Wa/tangi Tribunal, 13 June 1991
(registrar)
- AA38 Compilation of New Zealand fisheries legislation, Chapman Tripp Sheffield Young
(counsel for NZFIB and NZFIA)
- AA39 Evidence of Whaimutu Dewes on behalf of Maori Fisheries Commission
(a) Amended evidence of Whaimutu Dewes on behalf of Maori Fisheries Commission
(counsel for Maori Fisheries Commission)
- AA40 Tribunal direction amending claimant research authorisation, 20 June 1991
(registrar)
- AA41 Submissions of counsel for claimants on the Maori Fisheries Act 1989
- AA42 Submissions of Crown counsel on the Maori Fisheries Act 1989
- AA43 Submissions of counsel for NZFIB and NZFIA on the Maori Fisheries Act 1989
- AA44 Supplementary submissions of counsel for claimants on the Maori Fisheries Act 1989
- AA45 *Te Reo Te Tina A Tangaroa*, newsletter of the Maori Fisheries Commission
(a) Issue 1, September 1990
(b) Issue 2, November 1990
(c) Issue 3, December 1990
(d) Issue 4, March 1991
(e) Issue 5, June 1991
(f) Issue 6, July 1991
(counsel for Maori Fisheries Commission)
- AA46 Supplementary report and proposed recommendation by Waitangi Tribunal, 15 July 1991 (registrar)
- AA47 Memorandum of claimants on the issue of Ngai Tahu legal personality, 30 June 1991
(counsel for claimants)
- AA48 Tribunal directions regarding submissions on particular matters, 15 July 1991
(registrar)
- AA49 Submissions of counsel for the claimants on Ngai Tahu marine fishery grounds of complaint, July 1991
- AA50 Report of the Maori Fisheries Commission for the year ended 31 March 1990
(counsel for Maori Fisheries Commission)
- AB The twenty-sixth hearing at Databank House, Wellington, 25 September 1991**

Document:

- AB1 Final submissions of counsel for the claimants on sea fisheries claim
(counsel for claimants)
- AB2 Additional submissions of Crown counsel on sea fisheries claim
(counsel for Crown)

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- AB3 Further submission of counsel for the claimants on Ngai Tahu control over the commercial use of their sea fisheries post 1840
- AB4 Extract from Fisheries Act 1983
(counsel for Crown)
- AB5 Crown list of authorities
(counsel for Crown)
- AB6 Final submissions of counsel for NZFIB and NZFIA
- AB7 Evidence of Professor L Anderson in response to comments of Dr George Habib
(counsel for NZFIA & NZFIB)
- AB8 Peter H Pearse *Building on Progress: fisheries policy development in New Zealand*, report for Minister of Fisheries July 1991
(counsel for NZFIA & NZFIB)
- AB9 Speech by Hon Doug Kidd, Minister of Fisheries to NZFIA conference, 3 April 1991
(counsel for NZFIB and NZFIA)
- AB10 New Zealand Fishing Industry Economic Review 1990
(counsel for NZFIB and NZFIA)
- AB11 Atlas of Fishstock Codes, Maori Fisheries Commission
(counsel for NZFIB and NZFIA)
- AB12 MAFFish discussion document on implications of the Pearse Report for Maori fishing rights
(counsel for claimants)
- AB13 Submissions of counsel for claimants on Ngai Tahu rangatiratanga in sea fisheries
(counsel for claimants)
- AB14 Submissions of counsel for the Crown in response to Tribunal questions
(counsel for Crown)
- AB15 Submissions of counsel for claimants in reply to the Crown, NZFIB and NZFIA
(counsel for claimants)
- AB16 Further submissions of counsel for NZFIA and NZFIB
(counsel for NZFIA and NZFIB)
- AB17 Supplementary report of Waitangi Tribunal on Ngai Tahu legal personality, 6 September 1991
(registrar)
- AB18 Tribunal direction regarding extension of appointment of counsel, 21 August 1991
(registrar)

Appendix 4

Fish Species

Notes:

- This appendix is based on evidence supplied by MAFFish scientists during the Ngai Tahu inquiry. Reference has also been made to L J Paul *New Zealand Fishes: An Identification Guide* (Reed Methuen, Auckland, 1986) and Tony Ayling and Geoffrey Cox *Collins Guide to the Sea Fishes of New Zealand* (William Collins Publishers Ltd, Auckland, 1987)
- Percentages given are those applicable at 1985
- EPV = estimated primary value (port price)
- 1990/91 statistics are taken from *The New Zealand Fishing Industry Board Economic Review 1990*

4.1 Commercial Inshore Finfish

Jack mackerel/Hautere

Trachurus novaezelandiae

Trachurus declivis

Jack mackerel refers to two very similar species, both found in Australasia, averaging 30 to 50 centimetres in length and living for up to 30 years.

They are a schooling, mostly pelagic fish found all around New Zealand out to about 300 metres. The main fishing grounds are off the west coast of the North Island with lesser quantities found around the north of the South Island. They feed on crustaceans and small fish, including other jack mackerel.

Commercial fishing for jack mackerel only developed in the late 1970s after catches of more preferred species such as trevally declined.

The TACC for 1990/91 was just over 32,000 tonnes with an EPV of \$7.14 million. There is little information on stock size and sustainable yields but it is thought that jack mackerel are an under-used resource.

Percentage of national catch from Ngai Tahu region: 9.5%

Kahawai

Arripis trutta

Also a pelagic schooling species, kahawai average 40 to 60 centimetres in length, are slow growers and live for over 20 years. They are common throughout coastal waters, usually at less than 50 metres, but are most

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abundant in the north of the South Island and north of Cook Strait. Within the Ngai Tahu claim area the major catch is taken off the Cloudy Bay/Kaikoura area. They are streamlined, fast swimming fish which feed on smaller fishes and crustaceans.

Over the summer months huge schools of adult kahawai move into shallow coastal waters and may enter estuarine lagoons and river mouths at high tide. Recreational fisheries flourish at many river mouths as a result of this seasonal movement and within the Ngai Tahu claim area the major east coast rivers at least as far south as the Clutha support important recreational fisheries.

Commercial catches of kahawai were insignificant before the mid 1970s but more substantial fisheries have developed since 1977. Most commercial fishing is done by purse seining: dense schools of kahawai, commonly between ten and 40 tonnes, are spotted, sometimes from planes, and then surrounded by a large net. The bottom of the net is closed ("pursed") to trap the school and the fish are scooped up by hand nets into the fishing vessel.

Kahawai are not subject to the QMS and no TACs apply to this fishery. In 1990/91 the national catch was a little under 8500 tonnes with an EPV of \$2.77 million

NB kahawai is a prohibited species under s65 of the Fisheries Act.

Percentage of national catch from Ngai Tahu region: 14%

Patiki/Flatfish

Yellowbelly flounder *Rhombosolea leporina*

Sand flounder *Rhombosolea plebeia*

Black flounder *Rhombosolea retiaria*

Greenback flounder *Rhombosolea tapirina*

New Zealand sole *Peltorhamphus novaeseelandiae*

Lemon sole *Pelotretis flavilatus*

Turbot *Colistium nudipinnis*

Brill *Colistium guntheri*

There are eight commercially fished flatfish species in New Zealand: the yellowbelly, sand, black and greenback flounders; New Zealand sole; lemon sole; brill; and turbot. They are all shallow water inshore fish, fast-growing, short-lived and bottom-feeding. They are generally found in coastal waters at less than 50 metres though some species, such as the soles, occur to moderate depths (100 metres) on the continental shelf. They spawn in the sea during winter and spring months and juveniles gather for up to two years in sheltered inshore waters before moving offshore to spawn. They mainly feed on bottom-dwelling species such as crustaceans and worms.

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Important fishing areas in Ngai Tahu waters are the coastlines of Arahura, Pegasus Bay and Canterbury Bight, Otago, and Murihiku.

Flatfish are an ITQ species with a 1990/91 TACC of 6625 tonnes. The South Island inshore trawl fishery depends to a very great extent on flatfish species and approximately 70 percent of the flatfish TACC is caught in the South Island. Because of major annual fluctuations in the size of flatfish stock, TACCs are set at a high level to enable fishers to take advantage of large harvests in good years. For several years the national catch has been well below the TACC, with only a little under 3500 tonnes taken in 1990. The EPV for flatfish in 1990/91 was \$9.12 million.

Yellow-eyed mullet/Aua

Aldrichetta forsteri

The yellow-eyed mullet is common in inshore waters all around New Zealand, often in estuarine waters, harbours and bays. It is a schooling fish, averaging 20 to 30 centimetres in length, relatively fast growing and short lived.

These fish are most abundant around the South Island and Banks Peninsula, Waihora and Otago being the most important areas for this species within Ngai Tahu territory. The size of the resource stock is unknown but is thought to be small. They are not subject to the QMS and there is no TAC. There are small commercial fisheries in a number of areas but they are probably best known as the “herring” caught by wharf fishers.

Yellow-eyed mullet are an important element in the marine food chain, being a major food item for many marine fish and fish-eating birds. Because of their role in the complex estuarine food web, MAFFish is reluctant to allow any substantial exploitation of the species even though the present catch is below long term sustainable levels. The species is regulated under the Fisheries Act 1983, with restrictions imposed in the form of permits to fish and minimum net size. Since September 1988 yellow-eyed mullet on the east and south coasts of the South Island have been a prohibited species under s65 of the Fisheries Act 1983. No new permits can be issued in these areas until Ngai Tahu fishing rights have been defined.

Percentage of national catch from the Ngai Tahu region: 1%

4.2 Shark Fisheries

The main South Island shark fisheries, using a very wide definition of “non bony” fishes, consist of four species: school shark, rig, elephant fish and spiny dogfish.

Elephant fish/Makorepe

Callorhinchus milii

Apparently restricted to New Zealand, elephant fish are most common along the south and east coasts of the South Island and are particularly plentiful off the Canterbury coast. They range across the continental

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shelf, from shallow water during the breeding season in spring and summer down to about 200 metres. Unlike most of the true sharks, elephant fish appear to be relatively fast growing and short lived but their reproductive rate is thought to be slow. Named for their distinctive trunk-like snout, they average 60 to 90 centimetres in length.

Like school sharks, elephant fish were first commercially fished in the 1940s for the liver oil industry but since then they have been fished at an increasing rate for the fish and chip trade. Virtually all elephant fish are caught by inshore trawling and are an important part of the coastal Canterbury fishery.

They are a quota species, with TACC levels set low in response to an apparent decline in stock levels. The TACC for 1990/91 was about 600 tonnes.

Percentage of national catch from Ngai Tahu region: 86%

Rig/Pioke

Mustelus lenticulatus

Another common shark, usually about one metre long, rig is found on the continental shelf all around New Zealand in shallow coastal waters down to a depth of about 200 metres. During spring and summer months adult rig can be found in large numbers in wide shallow bays while in the autumn they migrate towards the outer shelf. In the Ngai Tahu area important rig fisheries are located off Kaikoura and in the South Canterbury Bight.

Rig have been one of the more valuable commercial species, once taken mainly by trawl but now heavily target-fished using long setnets. During the 1970s there was a rapid rise in the size of the catch, with increasing sales of rig under the guise of "lemon fish", and with the introduction of the QMS rig was included as a quota species. The TACC for 1990/91 was about 1730 tonnes with the actual catch reported at just under 1700. The EPV of the catch for 1990/91 was nearly \$3 million.

Percentage of national catch from Ngai Tahu region: 42%

School shark/Tupere

Galeorhinus australis

School sharks occur almost world-wide in temperate waters and are probably one of the most common sharks around New Zealand, particularly in the north. They are found across the whole continental shelf from shallow harbour waters to at least 200 metres. They are a medium sized shark, averaging slightly less than two metres, and are slow growing, thought to live to up to 50 years. As they mature late and bear relatively few offspring the rate of reproduction is low.

School sharks are caught mainly by set net and line, but with quite a significant amount (about 15 percent) taken as by-catch by large trawlers

Fish Species

working on the outer shelf. There are moderate landings of school sharks all around the South Island with no particular areas of concentration.

In the early 1940s a quite substantial fishery developed based on the production of vitamin A from shark liver oil, but the advent of synthetic vitamin A in the 1950s led to its demise. An export market for fillets to Australia developed in the late 1950s which was temporarily depressed by the discovery of high quantities of mercury in shark flesh.

From 1979 to 1984 catches rose quite significantly and in the absence of information on stock size and reproduction rates there was concern that the fishery might easily be over fished. With the introduction of the QMS it was decided to include school shark (along with rig) as a quota species. The TACC for 1991 was 3027 tonnes with an actual reported catch of nearly 2800 tonnes. The EPV of the 1991 catch was \$4.61 million.

Percentage of national catch from Ngai Tahu region: 42%

Spiny Dogfish

Squalus acanthias

Spiny dogfish are a schooling migratory species, averaging about one metre in length. They are commonly found off the east and south coasts of the South Island from shallow coastal waters to about 300 metres, but can be found as far down as 700 metres. Like other sharks they are probably slow growing with few off-spring which makes them susceptible to over-fishing despite regional or seasonal abundance.

Dogfish are not subject to quota and catch size has been increasing in recent years despite their reputation for being little more than a nuisance to commercial fishers. More than 6200 tonnes were landed in the 1991 season with an EPV of nearly \$2.5 million.

Percentage of national catch from Ngai Tahu region: 95%

4.3 **Shoreline Shallow Water Shellfisheries**

Included in these fisheries are tuatua, pipi, cockle, toheroa and kina.

Clams

Tuatua, pipi and cockle and are found throughout the South Island and are the most common shallow water shellfish. In some areas they are found in very large numbers and they represent an important food resource for fish, birds and people.

There are two New Zealand species of tuatua, one restricted to the North Island and the other found around the South Island and lower North Island. Tuatua prefer fine sand habitats, avoiding mudflats; they burrow fairly shallowly and generally live at lower tide levels. They can change location, usually at night, by emerging from the sand and moving with the current.

Pipi occur throughout New Zealand, usually at or below midtide on beaches inside harbour entrances. Pipi beds are vulnerable to changes in

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current patterns and, often being near freshwater inflows, are prone to pollution.

Cockles occur on mud and sand flats at midtide level and prefer the shelter of harbours, estuaries and confined bays. They often form dense beds and are one of the most abundant bivalves found throughout New Zealand.

The toheroa is much scarcer, being found in significant quantities only in the fine sands of the exposed beaches at Oreti and Te Wae Wae in Foveaux Strait. They are large, active burrowers and can be found 20 centimetres below the surface. They are unique to New Zealand and have acquired an international gourmet reputation, much sought after in their extremely limited open seasons. A small commercial fishery began in 1904 but ceased in the 1970s as toheroa populations declined. Today the species is fished on a recreational basis, with brief, carefully controlled open seasons.

Kina often occur in dense clumps in rocky coastal areas throughout New Zealand. They are found in intertidal pools out to about 50 metres depth, normally close to weed concentrations. Their average diameter, without spines, is 8 to 12 centimetres and they can reproduce rapidly in favourable habitats.

Fishing for these species is largely non-commercial although there are a few small-scale cockle and seaweed harvesting enterprises around the South Island coastline. There is also a commercial kina fishery in the South Island which landed about 150 tonnes in the 1987/88 fishing year. All the species are managed under non-ITQ policies which provide varying degrees of resource protection depending on the extent to which the stocks are commercially exploited or otherwise under threat.

Blue cod/Rawaru

Parapercis colias

Not a cod at all but a member of the sandperch family, the blue cod is found only in New Zealand. It is a round-bodied fish averaging 30 to 40 centimetres, moderately fast growing and living for up to 10 to 15 years. A bottom dwelling species, it occurs in rocky habitats from shallow water down to 150 metres depth. Blue cod are common throughout New Zealand but are larger and more abundant around the South Island and the Chatham Islands. Around some southern reef habitats they may be one of the commonest species. They are voracious eaters: stomach content analysis suggests they feed on almost any edible organism including weed.

Blue cod are one of New Zealand's most popular coastal species, and are the basis of important commercial and recreational fisheries in several areas. Fisheries have flourished, declined and recovered again since the end of the last century, the most recent increase being in the 1980s when cod pots were introduced to replace the traditional handline method. Blue cod fisheries are fished almost entirely by the inshore domestic fleet

Fish Species

with major fisheries in the Ngai Tahu area lying off Murihiku and Rakiura as well as a smaller one off Otakou.

Other than minimum size regulations there were few controls on blue cod fishing until the introduction of the QMS. In 1986 it became a quota species so as to prevent the transfer of effort into the blue cod fishery from other quota fisheries. The species was not thought to be overfished but expansion of the fishery, particularly in Murihiku, has not proved sustainable long term.

For the 1990/91 season the TACC was set at 2678 tonnes although only 1591 tonnes was actually caught. The EPV of the catch for that season was \$2.53 million.

Percentage of national catch from the Ngai Tahu region: 67% with a further 30% from off the Chatham Islands.

4.4 **Others**

Barracouta/Nibomakaa, haka, maka

Thyristes atun

The barracouta, a member of the snake mackerel family, is a slender semi-pelagic fish averaging 60 to 90 centimetres in length. It is relatively fast growing and short lived with most adults being three to ten years old. Barracouta gather in spawning concentrations from late winter through to autumn; known spawning grounds are in Pegasus Bay, off the Canterbury and Westland coasts and around the Chatham Islands, as well as in areas off the North Island. They are a very mobile species, capable of swimming up to 500 nautical miles, but little is presently known of their migratory movements. They feed on zoo plankton and small fish.

Barracouta are a schooling fish which can be found either on the sea bottom or in mid water or at the surface. Though virtually the whole barracouta catch is taken by bottom trawlers it can also be taken by trolling at or just below the surface. Barracouta occur in temperate waters on the continental shelf over a wide depth range, from close inshore out to 400 metres. Though widespread throughout New Zealand waters it is most abundant south of Cook Strait.

Commercial landings of barracouta have been recorded since 1936 but the domestic fleet traditionally regarded barracouta as a less preferred species, caught by accident and with only a limited market, mainly for pet food and fish meal. Large quantities began to be taken after 1967 when foreign trawlers, mostly Japanese, began fishing in New Zealand waters. Reported catches by foreign fishers peaked at about 47,000 tonnes in 1977. After the introduction of the EEZ in 1978 the national catch dropped dramatically, to less than 15,000 tonnes, with the greater share caught by domestic inshore and New Zealand chartered trawlers. A TACC limit was imposed in 1983 and the total catch for 1990/91 was 22,986 tonnes with an estimated value of \$8.27 million. Barracouta is now an important fishery nationally and especially so for the South Island.

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Since 1973 it has been ranked in the top five fin fish species caught by the inshore domestic fleet since 1973.

Percentage of national catch from the Ngai Tahu region: 83%

Bluenose/Matiri

Hyperoglyphe antartica

A member of the warehou family, bluenose is also known in New Zealand as blue-nose groper, bonita, bream and Griffin's silver fish. It is very similar to hapuku and bass, although quite unrelated, and hence is often identified as blue-nose groper.

The age and growth patterns of bluenose are unknown but it appears to be moderately fast growing. It is a large heavy-bodied fish reaching an average length of 60 to 100 centimetres. It appears to be quite migratory and feeds on pelagic organisms such as planktonic jellyfish.

Bluenose are widely distributed around New Zealand and along the Chatham Rise. Their habitat is generally over rough seabed on the central to outer shelf and upper continental slope.

Bluenose has been caught commercially since the 1930s but significant catches were not recorded until the 1980s. Mid water trawling for bluenose and alfonso off the south east coast of the North Island brought a major increase in New Zealand landings. The South Island fishery is fairly small, with the catch in the Ngai Tahu region likely to be a by-catch of the hapuku line fishery.

The national catch of bluenose in 1990/91 was 1425.5 tonnes and the TACC was 1769 tonnes. The EPV was \$3.14 million.

Percentage of national catch from the Ngai Tahu region: 11%

Blue warehou

Seriollela brama

Blue warehou, also known simply as warehou or common warehou, is a midwater fish also found off south Australia. It is closely related to the silver warehou, white warehou and bluenose, all of which are fished commercially.

It is a moderately fast growing fish, reaching an average length of 40 to 60 centimetres, and living for at least 15 years. It spawns in the winter and spring months in many mid shelf grounds and feeds mostly on plankton. It is a migratory fish with considerable variation in its seasonal appearance in different areas.

Blue warehou is a shallow water to mid shelf species and can be found in large surface-swimming schools both in open water and in harbours and bays. It is seldom found north of the Hauraki Gulf and is most common around Cook Strait and much of the South Island. Most of the catch is taken by trawlers off the east and west coasts of the South Island and off Stewart Island.

Fish Species

The fishery is not particularly large and for many years blue warehou was not highly regarded. Interest in this species grew after the introduction of the deepwater policy in 1983 and the availability of more popular species declined. Catches of blue warehou peaked in 1983/84 when nearly 5000 tonnes were caught but since then the catch has fallen. The total catch for 1990/91 was 1483.3 tonnes with an EPV of \$1.57 million.

Percentage of catch from the Ngai Tahu region: 75%

Dredge oyster/Tio

Tiostra lutaria

Also known as the Bluff, Foveaux Strait or Stewart Island oyster. Shell length averages 6 to 8 centimetres but can reach 10 centimetres. It is relatively short lived with most adults being four to eight years old.

As its alternative names indicate, the dredge oyster is most abundant in Foveaux Strait but is widely distributed around New Zealand, usually in small beds on sandy mud around harbours and bays. The only beds large enough to support commercial fisheries are found in Foveaux Strait where the oysters form dense beds on gravelly or sandy bottoms, from 25 to 50 metres. There are also small fisheries in Tasman and Golden Bays.

Bluff oysters have been fished commercially since the 1860s, and from the 1880s until deregulation in the early 1960s vessel restrictions were imposed. They are now strictly controlled by a limited season (March to August), limited fleet, seasonal vessel and total quotas and size limits.

Gemfish/Makatabaraki

Rexea solandri

Another member of the snake mackerel family, the gemfish is similar to the barracouta in shape, though thicker and deeper-bodied. Like the barracouta, the gemfish has a menacing array of teeth. Its average size is 60 to 90 centimetres, and it lives to about 12 to 16 years.

Gemfish are widespread around New Zealand on the continental shelf and slope in depths ranging from 150 to 500 metres. They are most common in South Island waters, especially south-east of Stewart Island. They are voracious carnivores, feeding mainly on fishes and squids in mid or near bottom waters. They appear to migrate northward to spawning grounds in the autumn to early spring.

The commercial fishery for gemfish was traditionally quite small, no more than a few hundred tonnes, but with the advent of larger fishing vessels the catch size rose, by the mid 1980s, to more than 8000 tonnes. Only a quarter of the catch was then taken by domestic fishers, the balance being caught by joint venture and foreign licensed vessels. In 1990/91 the TACC for gemfish was 7223 tonnes: 4170.2 tonnes were caught with an EPV of \$44.17 million. There is now no fishing for gemfish by foreign licensed vessels and about two thirds of the catch is caught by domestic fishers.

Percentage of national catch from the Ngai Tahu region: 88%

Hake/Kebe

Merluccius australis

The New Zealand hake is a large cod-like fish averaging 70 to 100 centimetres long and living to at least 25 years of age.

During winter hake gather in large numbers to spawn, mainly off the west coast of the South Island south of Hokitika at 600 to 800 metres depth. The spawning groups disperse during summer months and apparently move up into mid water. Adult hake prey on medium sized fish and squid.

Hake are most prolific off the South Island's west coast between 500 to 700 metres and the fishery there is by far the most important for the species. They are also found on the Chatham Rise and Campbell Plateau at depths of 200 to 800 metres.

Hake was little known in New Zealand until the mid 1970s when a fishery began to develop mainly off the west coast of the South Island. In 1977 20,000 tonnes were caught by Japanese and Korean trawlers, but since the declaration of the EEZ in 1978 foreign catches have been small and the size of the catch has dropped dramatically. Catches have not exceeded 6000 tonnes since 1977 and most of it is now caught by large factory trawlers under charter to New Zealand companies.

Though it appears that the New Zealand stock is not a very productive one, hake is a very high value fishery. In 1990/91 the fishery had an EPV of \$9.11 million with a total of 9113.6 tonnes caught.

Percentage of national catch from the Ngai Tahu region: 97%

Hapuku/Hapuka/Groper

Polyprion oxygeneios

There are two species commonly known as New Zealand groper (or grouper): hapuku and bass, the latter also known as bass groper. Its general appearance is similar though the hapuku is slimmer.

The hapuku is a huge solid fish, reaching maturity at about 60 centimetres, but it can grow to over 1.8 metres and can weigh at least 100 kilograms. Age and growth rates have been difficult to determine but it seems likely that it is a slow growing fish and long lived (50+ years). This is consistent with the fact that the hapuku stock can be easily fished out and not recover for many years if at all. Hapuku move in herds, from between a handful to over 100 and they migrate on a seasonal basis. Northern herds move into deeper water during summer months, while in colder southern waters hapuku spend the summer in shallow coastal waters and head for deeper water in winter. They feed probably on any moving animal they can capture.

Hapuku are distributed widely around New Zealand and occupy a wide depth and habitat range, from shallow reefs and pinnacles to the open seabed at 400 metres or even deeper. Bass have an overlapping but generally deeper range.

Fish Species

The hapuku fishery is nationwide with the largest catches coming from Northland, East Cape, Hawkes Bay and Cook Strait/Canterbury. Hapuku have been an important commercial species in the inshore fishery for many decades with catches of between 1000 and 2000 tonnes recorded since at least 1930. From the mid 1970s there was a significant rise in catch size (to about 2300 tonnes between 1980 and 1984) and TACC limits were imposed. There remains a strong probability that the stock is being overfished. In 1990/91 the national catch was 1062.5 tonnes with a TACC of 9056 tonnes. The EPV for 1990/91 was \$3 million.

Percentage of national catch from the Ngai Tahu region: 39%

Hoki

Macruronus novaezelandiae

New Zealand hoki is a deep water species from the hake family and also occurs off southern Australia.

It is an elongated fish with a long tapering body and tail, growing to an average size of 60 to 100 centimetres. Hoki grow quite rapidly and their maximum age is about 20 to 25 years. They feed in mid water on crustaceans, small fish and squid. At mid winter they migrate to spawn in deep water, the main spawning ground being the Hokitika Canyon off the west coast of the South Island. Hoki are highly fecund serial spawners, releasing over a million eggs in multiple batches in a season. Hoki can be found all around New Zealand but they are most abundant off the west coast of the South Island, where 90% of the catch is taken, and on the Chatham Rise and Campbell Plateau. They are a predominantly deep water species living at or near the sea bottom most of the time. They commonly occur beyond the shelf edge in 200 to 600 metres depth, but can also be found in shallow coastal bays and out to 900 metres.

Until the 1970s hoki had virtually no commercial value: hoki catches were considered worthless and were usually dumped. It is now New Zealand's single most valuable species. In the late 1970s it became a target species for large offshore trawlers, with the Japanese taking more than 50,000 tonnes from the South Island's west coast in 1977. Before the introduction of the EEZ the Soviet and Korean fleets were also fishing extensively for hoki. The fishery developed quickly, with New Zealand owned or joint venture vessels becoming major participants. In 1987 the TACC was raised to 250,000 tonnes but has since been lowered. In 1990/91 the national catch was 213,684 tonnes with an EPV of \$111.12 million.

Percentage of national catch from Ngai tahu region: 96%

Ling/Hokarari

Genypterus blacodes

The New Zealand ling is a large eel-like fish, not related to the northern hemisphere ling, and notable for being "one of the most repulsive of the fishes found in New Zealand"¹ It can grow to more than two metres but

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the average length is 80 to 120 centimetres. The growth rate appears to be slow and it can live to at least 25 years. It is a vigorous predator, feeding off other quite large fish, such as hoki and southern blue whiting, as well as large invertebrates such as scampi. It spawns from August to October over a number of spawning areas.

Ling are found all around New Zealand but are more abundant in the south and over the Campbell Plateau. They occur in coastal waters, probably preferring deep reefs or canyons, and out to at least 700 metres over open seabed. They are most common between 300 to 500 metres.

Ling is an important commercial species with most of the catch coming from around the South Island, Stewart Island and near the Auckland Islands. Japanese and Korean longliners took large amounts of ling (over 30,000 tonnes in the late 1970s) but the foreign catch declined sharply after the EEZ was declared, and the TACC for 1990/91 was 19,710 tonnes. Most of the catch is now taken by New Zealand chartered trawlers and the actual catch for the year 1990/91 was nearly 10,600 tonnes with an EPV of \$14.81 million.

Percentage of national catch from the Ngai Tahu region: 92%

Orange Roughy/Nihorota

Hoplostethus atlanticus

New Zealand has at least four species of roughy but the modern multi-million dollar roughy fishery is based on only one, the deep water orange roughy.

Orange roughy is a deep bodied fish with a typically large roughy head, reaching an average size of 30 to 40 centimetres. Little is known of their growth rate but it is thought to be exceptionally slow with fish reaching maturity at about 18 to 20 years. They spawn in dense concentrations once a year in the winter months of June to August. Spawning schools appear to come out of the depths below 1000 metres and after spawning they disperse, perhaps to deep canyons and pinnacles. They feed on fishes, crustaceans and squid.

Orange roughy are rich in oil which has many commercial uses and is similar to the oil produced by sperm whales and jojoba.

Orange roughy is widespread in most temperate seas from the north Atlantic to Australasia and South Africa. It is found in slope waters between 700 and 1500 metres. Its lower depth limit is not yet known and it is the world's deepest fishery.

Commercial fishing for orange roughy only occurs around New Zealand and Australia. It can be caught right around the EEZ within its depth range but the fisheries are based on specific areas of concentration — on the Chatham rise, along the east coast from Gisborne to Kaikoura and on parts of the Challenger Plateau. These fisheries are usually centred on or near irregularities in the seabed such as hills, pinnacles, dropoffs and canyons.

Fish Species

Orange roughy were first identified in the Azores in 1889 but New Zealand specimens were not discovered until the early 1970s. Commercial fishing began in 1979 on the Chatham Rise and then spread to other grounds. The annual catch in 1979/80 was 11,500 tonnes which increased to 50,380 tonnes in 1986/87. In 1990/91 the total catch was 47,612.4 tonnes with a EPV of \$95.22 million.

Percentage of national catch from the Ngai Tahu region: 79%

Oreos

Allocyttus niger

Pseudocuttus maculatus

Oreo dories, of which there are five recorded species around New Zealand, are deepwater relatives of the true dories. The New Zealand fishery is based on the black oreo, so far known only in New Zealand, and the smooth oreo.

Black oreos grow to an average size of 30 to 40 centimetres, smooth oreos a few centimetres longer. Little is presently known about their life cycles but they are thought to be slow growing with fairly low rates of reproduction. The two species appear to school together, or move in close proximity, near canyons and pinnacles and are often caught together. Oreos swim by holding their bodies rigid and undulating their fins — a method that requires very little outlay of energy. It is thought that oreos may be quite sedentary fish with no apparent migratory patterns and may therefore be susceptible to local exploitation. Both species are found between 600 to 1200 metres depth, most abundantly along the south Chatham Rise, and they form the most important fishery in that area. They also occur on the east coast of the South Island and the Campbell Plateau. Black oreos appear to prefer more southern grounds, rarely found north of Cook Strait, while smooth oreos can be found at least as far north as Hawkes Bay.

Deepwater trawling for the oreos was begun by Soviet fishers in the 1970s but they were excluded from this lucrative fishery in 1979. The foreign licensed catch is now non-existent while the domestic fleet lands most of the oreo catch using large deepwater vessels. Combined management strategies for both species were introduced in 1983 when TACs were applied. In 1990/91 the national catch was just over 14,500 tonnes with an EPV of \$10.01 million.

Percentage of national catch from Ngai Tahu region: 99%

Paua

Haliotis iris

Three species of paua exist in New Zealand but only the black footed or common paua is commercially fished.

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Paua are slow growing. The shell begins to form a few hours after larvae hatch from the fertilised eggs but it takes seven to ten years for paua to reach the legal minimum size. In some areas they do not reach legal size.

They are found on rocky coasts from low tide mark to about eight metres depth with the main concentrations in Ngai Tahu territory being along the exposed coastlines of Kaikoura, Otakou, Murihiku, and Rakiura. Other significant beds lie off the Wairarapa, the Marlborough Sounds and Chatham Islands.

Paua fishing had long been important to Maori both as a food resource and for the shell, whereas until the 1970s European fishers were mainly interested in the shell. A small, stable commercial fishery operated until the late 1960s when a bleaching process for paua meat was introduced and an export market rapidly developed. Demand rose dramatically and the fishery boomed.

An open access policy operated until 1982 and with the growth in demand the number of divers in the industry increased substantially. Over-fishing resulted and fishing stocks declined: a brief moratorium was imposed in 1982 but the quantity of paua taken reached an all time high in 1984 at about 1500 tonnes.

From 1985, following the peak harvest in 1984, the paua fishery has been managed under individual quotas. After the introduction of quotas the TACCs were adjusted both up and down as MAF endeavoured to establish an appropriate limit: in some regions fishers have been concerned that increases were unsustainable while in the other regions higher catch levels were sought. The TACC for 1990/91 was 1228 tonnes with an EPV of \$16.76 million.

After rock lobster, paua is the most valuable coastal fish resource off the South Island. About 65 percent of the TAC is harvested from the South Island's coasts.

Red cod/Hoka

Pseudophycis bachus

Morid cods, a family closely related to true cods of the northern hemisphere, include 15 New Zealand species of which the red cod is the most common.

It is a large, heavy bodied fish, averaging 40 to 60 centimetres in length, with a fairly rapid growth rate. It is generally a schooling fish with seasonal though irregular migrations from the outer continental shelf and upper slope to shallower coastal waters. It eats a wide variety of animals and spawns between July and October, peaking in August. Major spawning grounds have not yet been identified.

The red cod is found around most of New Zealand but is much more common off the South Island, particularly off the east coast. It has a wide depth range, from shoreline to 700 metres, but is most common between 100 and 300 metres. In shallow inshore waters the red cod prefers rocky

Fish Species

reef areas, emerging from caves and crevices for night feeding. It is caught mainly by bottom trawling.

There are major fisheries off the Canterbury Bight, Pegasus Bay, northern Westland and Buller. The TACC for 1990/91 was 15,783 tonnes with an actual catch of 6422 tonnes. The EPV for this catch was \$4.69 million.

Percentage of national catch from the Ngai Tahu region: 85%

Red gurnard/Puwahaiau

Chelidonichthys kumu

There are five species of gurnard in New Zealand waters, the most common being red gurnard. They average 30 to 50 centimetres in length, with a body colour of reddish-pink or brown which blends well with the open sandy bottom that is their normal habitat. They grow rapidly in the first two to four years of life, grow more slowly as adults and seldom live beyond ten years. They have unusual lower pectoral fin rays which act as food sensors, probing the sea bottom in front of them for edible crustaceans. They spawn over the spring and summer months in grounds that appear to be widespread over the inner and central shelf.

Red gurnard are common right around New Zealand except for the Fiordland coast. They are most abundant in shallow water but can occur as deep as 180 metres.

They have been fished commercially since the 1930s, when only a few tonnes were taken, and since the 1960s the catch has fluctuated between 2000 and 4000 tonnes. Although a valuable commercial species, red gurnard is to a large extent a bycatch species of other, particularly trawl, fisheries. The TACC for 1990/91 was 4747 tonnes but the recorded national catch was only 2527 tonnes, with an EPV of \$3.03 million.

Percentage of national catch from the Ngai Tahu region: 15%

Red Rock Lobster/Koura

Jasus edwardii

There are three New Zealand species of rock lobster, or crayfish, but the most important of the three, the red rock lobster, makes up about 95 percent of commercial landings.

The red rock lobster has a spiny head and body, coloured dark red and orange above and paler below. It grows by producing a new shell under the old, then shedding the old shell and inflating and hardening the new. Small juveniles moult frequently while mature lobsters moult once a year. Large red rock lobsters have been measured at about 54 centimetres in body length (male) but because of heavy fishing the average length is now only half that. Average sized lobster are probably five to ten years old, with the largest being perhaps 30 or more years old. The legal minimum length (of the tail) is 127 millimetres in Otago/Otakou and 152 millimetres everywhere else. Otago has had the smaller size limit, said to be without obvious biological justification, since 1959.

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Red rock lobsters are widespread around New Zealand, usually around reefs between five and 100 metres deep, though they can be found out to about 300 metres. The major South Island fisheries are in the north east of the South Island from Cape Campbell to Motunau and along the southern coasts from Moeraki to Jackson Head, including Rakiura.

For many years red rock lobster have been the basis of important commercial and recreational fisheries in New Zealand. The commercial fishery was small before 1945 but the development of a market in the United States after the Second World War led to greatly increased fishing effort and returns. South Island fisheries have been fished intensively since the 1950s and 1960s. They represent the most important inshore fishery in the South Island, and indeed New Zealand, and until the development of the deepwater fisheries the rock lobster fishery was equal in value to all other fisheries combined. Before coming under the QMS as a quota species, the annual landing of rock lobster was about 5000 tonnes and of that amount about half was caught within the Ngai Tahu claim area. ITQs were applied to the rock lobster fishery from 1 April 1990 with a TACC for all of New Zealand plus the Chatham Islands set at just over 3800 tonnes. The New Zealand portion of the TACC was reduced from 3200 to 3000 tonnes for the 1991/92 season.

Silver warehou

Seriollela punctata

Another member of the warehou family, this species is slightly smaller than the blue warehou, averaging 45 to 55 centimetres. It appears to grow quite rapidly and reaches maturity in its third or fourth year. The maximum age for silver warehou is thought to be about 12 to 15 years. They spawn in September and October and then appear to disperse to waters off south-east New Zealand. A major spawning ground is on the western Chatham Rise. They feed mainly on shrimps and small fishes.

Silver warehou can be found around most of New Zealand but are much more common in the south. They are most abundant on the Chatham Rise, off both coasts of the South Island and south-east of Stewart Island. Young fish are usually found in shallow water but the adults prefer the shelf edge and upper slope, from 200 to 500 metres depth.

Silver warehou was once considered rare and of little value but it is now the basis of an important fishery, particularly around the South Island. Despite its low catch size it is one of the top five deepwater species in terms of export value.

Offshore trawling in the late 1970s led to the identification of large stocks and Japanese and Russian vessels took catches of up to 20,000 tonnes. A TACC of 18,000 tonnes was imposed in 1979 which was reduced by half in 1980; for 1990/91 it was 9137 tonnes. The national catch for 1990/91 was just under 8550 tonnes with a total EPV of \$7.27 million.

Percentage of national catch from the Ngai Tahu region: 99%

Fish Species

Southern blue whiting

Micromesistius australis

Although many fishes are known as “cods”, there are only two species from the true cod family found off New Zealand, the most important being southern blue whiting. It is a rather long, narrow fish, averaging 35 to 50 centimetres with an average growth rate and seldom living beyond 14 years.

It is restricted to sub-Antarctic waters, most commonly found over the Campbell Plateau and Bounty Plateau in the 400 to 800 metre depth range. It spawns mostly in spring and appears to migrate quite rapidly and extensively, possibly beyond EEZ waters.

Southern blue whiting have been fished commercially since at least 1971 when the Soviet trawler fleet began taking substantial catches. The fishery is entirely trawl based, using large foreign owned trawlers, most of which are now under charter to New Zealand owned companies. In 1973 and 1974 catches of more than 40,000 tonnes were recorded and a TAC of 100,000 tonnes was set after the EEZ was introduced in 1978. In the early 1980s a lower TAC was set and much smaller quantities, averaging 15,000 tonnes, were caught. The 1990/91 catch totalled 24,569.8 tonnes with an EPV of \$7.62 million.

Percentage of national catch in the Ngai Tahu region: 100%

Squid/Wheketere

Notodarus gouldi

Notodarus sloanii

New Zealand has several species of squid but only a few are commonly seen and the New Zealand squid fishery is based on just two species. These are related to each other, are both known as arrow squid and are very similar in appearance but predominate in different areas. *Notodarus gouldi* occurs around the North Island and north-western South Island while *Notodarus sloanii* is found along the south-east coast of the South Island and in southern waters.

Arrow squid probably only live 12 to 18 months and spawn once. Spawning is most common in spring and autumn though some spawning probably occurs all year round. They grow rapidly, perhaps more than 30 millimetres a month and average 20 to 25 centimetres in body length. Squid are voracious predators, feeding on small fish, crustaceans and other squid. They are a huge marine resource, a vital link in the sea food chain and are now subject to intense harvesting: more than one million tonnes are caught world wide each year.

Arrow squid are found around much of New Zealand and at times are locally abundant. Both species occur in waters over the continental shelf to a depth of 500 metres, but are most plentiful in less than 300 metres. Almost all southern arrow squid are caught within the Ngai Tahu region,

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with major fishing grounds off the east coast of the South Island, Chatham Rise and off Stewart, Snares and Auckland Islands.

Commercial squid fishing was unknown in New Zealand until the arrival of Japanese squid boats in the early 1970s. A jig fishery was developed by Japanese, Korean and Taiwanese fishers from 1972 and a trawl fishery was also developed, mainly by the Soviets and Japanese. By the 1980s up to 40,000 tonnes per year were being caught. Foreign vessels no longer fish for squid within the EEZ and the great bulk of the New Zealand squid catch is now taken by the chartered fleet. In 1990/91 the total squid harvest was 48,602.8 tonnes with an EPV of more than \$44 million. Because of the short life span the arrow squid catch tends to fluctuate noticeably and economic viability is also affected by variable market demand.

Stargazer/Puwahara

Kathetostoma gigantuem

Also known as giant stargazer or monkfish, this species is a stout fish with a large, blunt, heavily armoured head. Its eyes and mouth both face upward and it averages 30 to 50 centimetres in length. They have large pectoral fins which help them to burrow into the sand or mud bottom. There they commonly bury themselves and ambush unwary fish, up to half their own length, who come too close.

They are found on the continental shelf and upper slope from 50 to 500 metres depth all around New Zealand but are most common off the southern South Island and Stewart Island.

The stargazer has become increasingly important in the South Island coastal trawl fishery, both as a target species and as bycatch. The average annual catch is a little under 1000 tonnes.

Percentage of national catch from Ngai Tahu region: 92%

Tarakihi

Nemadactylus macropterus

The tarakihi is one of six species in the morwong family, a group of deep-bodied bottom dwelling fishes mainly found in cooler Southern Hemisphere waters.

The average length of tarakihi is 30 to 40 centimetres. They have a moderate growth rate and live to at least 30 years. They spawn in the summer-autumn months, in large groups on the continental shelf, the main breeding grounds apparently being near Fiordland, off the Kaikoura coast from Cook Strait to Banks Peninsula and also in the north off East Cape. They feed on a variety of small bottom dwelling invertebrates.

Tarakihi are common all around New Zealand, and especially at their spawning grounds. Their depth range varies, from pelagic in the post-larval stage to bottom dwelling around reefs and over rough ground as juveniles to schooling over open seabed at 100 to 250 metres as adults.

Fish Species

Tarakihi has been commercially significant for many years, being the second or third most important species in the domestic fin fish catch until the mid 1970s (behind snapper and sometimes trevally). The overall domestic catch has been quite constant for a long time, between 4000 to 6000 tonnes since 1960, mostly caught by the coastal trawler fleet. Within the Ngai tahu region however there have been fluctuations. Landings declined in the early 1970s from about 1000 tonnes to about 600 tonnes, and then increased to about 1800 tonnes in the mid 1980s. This represented an increase from 15 percent to 30 percent of the New Zealand total, with most coming from the Kaikoura setnet fishery from about 1980.

There were major catches taken by foreign licensed and charter trawlers in the 1970s, the Japanese alone taking 2300 tonnes in 1977. This level of fishing undoubtedly over fished some tarakihi stocks though the national fishery now appears fairly stable.

The national catch for 1990/91 was 4123.8 tonnes, the TACC was set at 5903 tonnes and the EPV was \$6.35 million.

Percentage of national catch from the Ngai Tahu region: 36%

References

- 1 Tony Ayling and Geoffrey Cox *Collins Guide to the Sea Fishes of New Zealand* (Collins, Auckland, 1987) p 152. Ayling continues that the head is covered in odd shaped lumps and is disproportionately large with large opaque eyes and an undershot jaw; and a "sickly" orange-pink body colour along with a thick coating of slimy mucus all over the skin.

Appendix 5

Management and Direction

(The following is a reproduction of chapter 8 of the *Muriwhenua Fishing Report*)

5.1 INTRODUCTION

(a) The Quota Management System provides the cornerstone of the modern fishing industry. It appears to be in fundamental conflict with the terms of the Treaty but nonetheless it has many meritorious features, and if an arrangement or agreement with Maori interests can be found, Maori concerns may well be accommodated within it.

(b) This chapter then reviews the structural arrangements for the modern industry. It is not one in which Maori have much part to play. For the Government, fishing provides some lucrative returns – for 1986–87 from the sale of quota \$83.4 million, from resource rentals \$21 million and from foreign licences fees \$14.4 million. From those returns the Crown funds the Ministry which performs essential functions in administration and research.

It also granted \$550,000 to the Fishing Industry Board in 1986. The Board represents larger commercial fishing interests, and undertakes essential work in production, marketing and research. In 1986 the Board had an income of \$3.96 million, of which the greater part, \$2.57 million, was from a fish sales levy provided for by statute. In neither the Ministry nor the Board however is there an adequate programme to research the Maori interest in the fisheries or to assist their re-establishment in fishing.

(c) In the meantime, a dearth of understanding on the nature and extent of Maori fishing interests affects all other management arrangements and plans including those for Fishery Management Plans, the promotion of the fishing industry, marine reserves and generally in balancing the conflicting interests of different user groups. A Maori Fishery Programme is directed to bringing new light into the arena but we understand the programme has been largely curtailed.

(d) Improvements in the consultative process were an important part of the programme described and had the potential to provide for a partnership in development between the Ministry and Maori interests. Improvements in the consultative process are required, in our view.

5.2 THE QUOTA MANAGEMENT SYSTEM

The Importance of the Scheme

- 5.2.1 Much information was provided on the Quota Management System. Its promoters extolled its virtues. We have no reason to doubt that it has many good qualities and was introduced for sound reasons. We were also made aware of much adverse criticism. It is obvious that a major policy proposal like this will not suit all persons and that some will see it as fundamentally unsound. Our task however is not to judge the system except to the extent necessary in assessing it against the principles of the Treaty. We recognise it to be an important state policy. It has become the cornerstone of our commercial fishery and operates more extensively in New Zealand than elsewhere in the world. If only some aspects of the system are contrary to the Treaty we must enquire if they can be remedied without affecting the overall strategy, or whether any breach is so minor as not to justify a total overhaul.

The Rationale

- 5.2.2 It is significant, when enquiring into its purpose, that the Quota Management System arose from a concern to protect the fish resource. At 6.5, the policies of the 1960s were described as actively encouraging more people to spend more time and money to catch more fish. During the 1970s, it became apparent that the inshore fishery was seriously overfished, to the extent that the survival of some species was jeopardised. The drastic action that was needed began with the moratorium on new licences and the cancellation of those not then in use. Later, those fishermen whose catch returns were under a specified amount or whose income was mainly from other sources had their licences removed. Others were paid out voluntarily to retire.

Most Maori fishermen operated in a part-time or small way and were affected by these schemes. Some who had left fishing for a short time found they could not fish again and of course, others who had hopes of starting in fishing were precluded.

The Methodology

- 5.2.3 While these things were happening the Quota Management System was being planned. It was promoted as a conservation and management tool. It aims to prevent too much fishing by apportioning to fishermen the right to catch the total amount of any species that might be safely caught in any prescribed area at any time. The total amount of any species that may be safely caught, without impairing its continued fecundity, or its necessary recovery, is called the 'total allowable catch' (TAC).

The Biological Base

- 5.2.4 A key element in the exercise is the assessment of the total allowable catch of any species. Though much must depend upon an intimate biological knowledge of the species concerned, it was readily conceded that the state of the art was not nearly as good as it should be. There also seemed to be some lack of the necessary equipment to do the job properly. Nonetheless the urgency that arose from overfishing may have

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been enough to justify the general yardsticks deployed at the time, like the need to achieve an overall catch reduction of 20 per cent, or according to others, one-third.

It appears to us a great deal might also come to depend on the ability of the assessor to withstand pressure from commercial fishing and other economic interests to allow maximum rather than biologically sustainable catches, the more so since much is a matter of estimation. Presumably, since the system reduces competition, the industry will also be concerned to protect the resource, for the sake of its own survival and the protection of its substantial investment. Nonetheless, it would certainly change the proclaimed intention of the scheme if decisions were based on political or other non-biological considerations.

The Property Interest Created

- 5.2.5 While conservation was the scheme's rationale, and the basis on which it was promoted, the more radical feature of the scheme was the creation of a property interest in an exclusive right of commercial fishing.

From its initiation, the scheme had the facility to continue the policy of excluding small operators, and so to continually reduce the pressure on the overworked resource. To start with, those who fished a particular species were regarded as having a right to catch a given share, or quota, assessed according to their latest catch records. Where the sum of such quota exceeded the total that could be allowed, which was usual in the inshore fishery, the quota that each held was cut back pro rata. This left some of those at the bottom of the scale with quota that were too small. Those under a minimum figure were compulsorily purchased by the Crown.

Others chose to sell. It is an important feature of the system that individual quota can be readily transferred by sale, lease or licence. Thus the right to fish is given the characteristics of a property right. It is called an individual transferable quota (ITQ).

The Favouring of Larger Operators

- 5.2.6 There is some opinion that the system favours big operators better placed to buy out those with quota of uncertain viability. For that purpose, just as there are minimum holdings so also are maximum holdings presently prescribed. We are aware of criticism that these limits do not work well in practice and that the leasing and purchase of quota has introduced new economic masters for some who were once independent operators. We are only partially interested in that matter.

We are more concerned with the fact that small-scale operators were put out, and under this system, where quota are held in perpetuity, the only chance for a new entrant to get in, is to buy any available quota. It is costly to do so. It can cost well over \$10,000 to buy the minimum quota of 5 tonnes, quite apart from vessels and gear. Not unnaturally, many must lease from those better able to buy.

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Buying is competitive and the Government operates a tender system for new quota, and a quota exchange for existing quota. Undoubtedly it is the case that those with the ability to marshal and mobilise capital are best placed to tender. There is apparently a market now in quota 'futures' trading and quota are traded using videotext terminals. Nor can it be assumed that aggregation controls will remain. In a comprehensive report, Connor, Grieve & Co suggest that true efficiency will not be achieved unless the laws against aggregation are removed (National Business Review 15.5.87 p24). There is even some talk of foreign licensed nations being permitted to compete for domestic quota (eg, National Business Review 25.1.88 p1).

The Allowance for Maori and Other Users

- 5.2.7 (a) To ensure that the total allowable catches are not in excess of that required to maintain stocks, and although at present that is largely a matter of guess, it is provided that an allowance must be made for that share taken by recreational and other non-commercial users. Section 28C of the Fisheries Act 1983 provides for this, indeed, directs that it shall be done.

In that section Maori interests are grouped with the non-commercial. The Ministry of Agriculture and Fisheries admitted that when the section was drafted, Maori traditional interests were thought to have no commercial component. That is not surprising, in the sense that that had been a statutory arrangement for over 100 years. Naturally, the claimants were outraged. Not only were their fishing interests classed as non-commercial but, they claimed, no proper inquiry was made to establish the extent of their interest before the first step was taken in issuing quota. Again that is not surprising, for no such enquiry has ever been undertaken in over 100 years. But at least that enquiry was not undertaken in this case. That was admitted in the Ministry's evidence (Allen, doc B66,8-9).

(b) The failure to make proper allowance for the Maori user, though statutorily prescribed, highlights the major problem for Maori for over a century. It has seemed sufficient to consider that whatever the Maori interest is, or was, it need not be seriously regarded. Thus

(i) We were advised of the Ministry's Maori programme to inquire into the Maori interest. There is much to commend it, but it was not begun until after the total allowable catches for most species had been set! It is still far from complete, indeed has not passed beyond the most rudimentary stage (see 8.3.5). Had it been completed the foregoing part of this report might not have been required.

(ii) When asked to explain the assessment made of the Maori interest, we gained no more than this reply from a senior officer for the Ministry

Their activities that far out to sea really were so negligible, so negligible and unrealistic, and their technology, really it wasn't conceived of I think. My understanding is that the spirit, intent and words of the Treaty of Waitangi, I have some real difficulties with that . . . As a fisheries manager above all else and I am sorry to demean the law and I don't mean to, but laws only work when

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they are practical and laws only work when people want them to work . . . (Dobson, transcript pp4–5).

(iii) Later, when asked by the Primary Production Select Committee of Parliament to explain progress in identifying Maori fishing rights, the Ministry gave a written answer, on 6 October 1987, that

The Ministry does not consider that it has either the obligation or competence to identify Maori fishing rights. The Ministry is, however, working closely with the Law Commission which is examining the legislative base for the recognition and protection of such rights. It has also carried out some studies of Maori fishing practices.

(c) We ought not to go into the technicalities of the meaning and application of the section, however. That is a matter for the courts. For the purposes of the scheme, as distinct the Maori interest, it could have been intended that the section should refer to Maori fishing for the purposes of subsistence and hui.

Rentals and Properties

5.2.8 There is an aspect of the system that is not directed to the maintenance of the resource but the protection of the public purse. The Government bears a substantial cost in fisheries research, management and administration. It seems only reasonable that private concerns should pay, and not only for that reason, but for the privilege of exclusive commercial rights to utilise that which is regarded as a public resource. It is a very valuable monopoly right that is held. Our estimate of the value of fisheries as represented by declared total allowable catches is 934 million dollars, as set out in *appendix 11*, but we recognise that valuations depend on the particular versions of the multipliers being used, according to the quantities allocated. In the affidavit of F T Baird filed in *NZ Maori Council v Attorney-General* CP553/87, Wellington Registry, the total value was assessed at \$1.2–\$1.5 billion. There are some 1,700–1,800 quota holders. The average value of quota holdings is about \$600,000 with larger holdings being held in the off-shore fishery.

The initial quota holders did not purchase these rights. The claimants graphically described it as a free gift of ‘their’ property to those who had destroyed their resource (doc H2:6–7). The position will not be the same for future entrants however; they will need to buy in.

In any event, annual resource rentals are payable, based upon the amount of fish quota each fisherman holds, the rate varying considerably according to species. The return to Government from this source is approximately \$21 million, based upon current charges (Bevin 1987).

Off-shore Extensions

5.2.9 The rationale for the scheme was to relieve the pressure on the inshore fishery. It was decided to extend it to the deepwater fishery offshore, which seems sensible, for prevention is better than cure. Part of the off-shore quota is available to New Zealand registered vessels (which includes foreign vessels under charter), and part is offered to foreign fishing interests. For the 1987/88 fishing year, the greater part of the

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quota allocated for deepwater species, or 510,000 tonnes out of a total of 590,000, was allocated to New Zealand interests (Bevin, 1987:48). A great deal of capital is involved in this fishery however. Nearly 70 per cent of the quota is held by ten large companies (Bevin, 1987:52).

A government to government agreement is a prerequisite for licensed foreign fishing in New Zealand waters. Three countries, Japan, Republic of Korea and Union of the Soviet Socialist Republics have fishing agreements with New Zealand. Vessels from other countries have fished around New Zealand but only under joint venture agreements with New Zealand companies.

Initial Conclusions

- 5.2.10 (a) All in all, the Quota Management System appears to be an efficient means of controlling commercial fisheries. There is evidence that most fishermen within the industry support it, and there is quite a deal of support for it amongst Maori too. Under the old system, not only were too many fishermen seeking too few fish, but collectively the cost of all their gear and effort was disproportionate to the value of the total catch. The new method enabled rationalisation as well as restructuring.

The old limitations on gear, methods, seasons, the number of vessels and the like had not worked well either. The problem of too much competition still produced distortions. The new order eliminates competition by defining everyone's share. It enables a free choice in gear and methods and encourages the more efficient use of time and money. There are good grounds for believing that with restricted quota, fishermen will concentrate on those methods that produce the highest price for the fish caught, in order to get the best return for their share. The guarantee of a right to a certain level of catching has also engendered business confidence, encouraging investment in larger vessels, better gear, greater research and improved processing and marketing.

(b) These are early days however, and it is too soon to make a final assessment of the new system. In the meantime, there are definitely problems. The focus on higher quality catching and export is said to have made fish an expensive item at home. There is said to be some loss of fish at sea through nets bursting and some intentional dumping. Fishermen have discarded species that they have no authority to catch, or catches in excess of their quota, or lower grade fish that do not give the highest return. Once, all fish caught were sold.

For some, the main concern is the sheer waste involved. For many Maori, the wastage offends their traditional belief that the despoliation of fish habitats with dead food attracts predators and forces fish away.

The Ministry is well aware of these problems, and provisions for the purchase of by-catches, for quota overruns and for quota carry-over may help resolve them.

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It adds to problems that if the total allowable catches are set too high there could be a later difficulty in reducing them. If Government has to buy back quota already allocated, the cost could be prohibitive.

(c) In any event, a major policy decision has been made. Other countries throughout the world have applied the quota system to no more than a few species. In New Zealand it has been applied to nearly all major species and it is intended, eventually, to cover the lot, including even shellfish.

In other countries it was thought the system would be too difficult to monitor in order to keep fishermen to their proper limits. As a small and isolated nation however, with a limited number of landing places and the facility to monitor off-shore, and with many species that aggregate and are caught at limited times of the year, the problems for New Zealand are not considered to be as large.

(d) But, will it achieve the original objective of restoring the abundance of fish? It is too soon to say. Quota allocations have only recently been settled and it is thought that stock recoveries would not be noticeable until 2–10 years time depending on the species (doc B66:5). Essential to that end is the accuracy of the biological assessment of the total allowable catch, and as we have said, it is a demanding requirement; the state of the art and the gear to perfect it appears to be wanting.

(e) Our concern is with the effect of the system on Treaty fishing interests. From the foregoing discussion, that problem centres around the state of the inshore fishery, the dumping of waste, the exclusion of small time fishermen and the difficulties that face new entrants seeking to buy in. But there are also wider concerns. Not only has the process resulted in a substantial reduction in the number of vessels and fishermen, but there has also been a rationalisation in the processing sector, with small plant closures and the concentration of processing in fewer and larger plants. This development impacts on small communities.

Social Implications

- 5.2.11 Concurrent with the implementation of the system, the Ministry of Agriculture and Fisheries commissioned a study of the policy's potential effects on fishing communities in Northland. Part of the study objectives were to identify possible modifications to the policy to minimise adverse consequences, and to review alternative employment and social opportunities that might help offset any bad effects.

Fairgray's Report (doc A40) is the result. Some passages explain the Maori concern.

Fishing is a source of food, an occupation, a cornerstone of the rural mixed economy, a part of the relationship between the Maori, their ancestral lands and waters, and a source of income. It is therefore more deeply and widely entrenched in the community of the Maoris than in the non-Maori community. Commercial fishing is only one part of this whole (A40:51).

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Maori attitudes to fishing are in many ways different from those of mainstream commercial fishers. As a result the issues facing Maori people associated with the introduction of the [quota management] system encompass more fundamental concerns than the equivalent issues facing the non-Maori community. They relate not just to commercial fishing but to all fishing . . . It is difficult to accurately or adequately portray the Maori perspective on fishing from the outside. Nevertheless, the following discussion . . ., [addresses] . . . the major issues . . . To the Maori of Taitokerau [the northern tribes], the . . . changes [brought about by the system] . . . are fundamental, as the sea and kaimoana (food from the sea) have immense spiritual and cultural value of no less significance than the land itself . . . Historically much of the settlement structure and division of tribal areas has been based around harbours and bays, with Maori coastal communities having “one foot on land and one in the water” . . . Maori people are . . . concerned by questions of ownership and access, particularly as the resource . . . [is] . . . subject to private property rights. The commercialisation of the fish resource raises questions about the continued discharge of inherited responsibilities of guardianship of the harbours and bays (A40:43–44).

They [Maori] feel there is a fundamental incongruity about . . . [the ITQ] . . . system . . . They draw uncomfortable parallels with the history of Maori tribal lands where, apart from losses through confiscation, conferment of individual ownership was a major part of a process of alienation. ITQs run contrary to the concept of communal guardianship (not ownership) of and access to the fish resource . . . Moreover, fragmentation of a communal resource through the creation of individual property rights is . . . based on only three recent years of catching history, when traditional harvesting of the sea and foreshore goes back many generations. The conferral of ownership on commercial grounds at a time when there are very few Maoris fishing commercially is seen as effective alienation of the fishery in one move. Many believe this is contrary to the inalienable rights of the Maori to the fisheries guaranteed under Article 2 of the Treaty of Waitangi (A40:44).

In a more general sense the study identified the following key issues applicable to the North –

Most fishers are small scale operators who see themselves as having very little influence in terms of control of the resource or of political power.

– The Ministry of Agriculture and Fisheries is seen as having the final say over the future size and structure of the fishing industry.

– Regional versus central control is of serious concern.

– The life style connected with fishing is highly valued.

– There are no (or very few) alternative employment opportunities.

– There is a high level of uncertainty over all issues relating to the future viability of the local fisheries.

– Concern exists that the “big companies” have greater economic and political power and will win out over the small operator.

– There is significant stress within personal relationships in these communities – largely occasioned by uncertainty.

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(b) While Fairgray concluded that the quota management system would indeed have an impact on the North, his report appears to have had little impact on the introduction of the system. It belongs to that category of report that is commissioned so that it can be said all aspects have been reviewed. It would appear however that while the scheme is directed to the protection of the resource, and the state of the resource was the rationale for its implementation, the scheme had wide ranging ramifications well beyond the concerns of conservation.

The Fundamental Conflict

- 5.2.12 (a) In brief, fishing has been corporatised. The Government has issued shares in a resource that was once seen as publicly owned, and has backed those shares with a guarantee that a certain quantity of fish can be caught. And that is the central issue for us.

The claimants considered their fisheries, including the right to fish commercially, should stand outside the quota management system, or above it, for in their view, the Treaty secured the fisheries of Muriwhenua to them. Some witnesses for the Ministry on the other hand, considered that the commercial fishing rights of Maori should be no greater than that of the general public as provided for in the quota management system. That opinion however, was based upon a presumption as to what should be. We do not think it was intended to be put forward as a principle of the Treaty.

If it is true, as was stressed in the submissions to us, that the Crown does not own the fish resource, it has certainly created a property interest in the right to harvest it. There is undeniable truth in the opinion that unless the Crown orders otherwise, no one owns a fish until it is caught. Nonetheless, such opinions appear as fancy semantics when the right to catch is now worth many thousands of dollars, an exclusive right to catch has been established and apportioned to individuals, the quota right so given is held in perpetuity, quota are freely tradeable on a formal exchange in daily operation, and resource rentals are payable to the Crown. Subtle distinctions between ownership and access rights likewise are made academic. If a property has not been created in fish, it certainly exists now in the right to catch them.

(b) This Tribunal has no roving commission to intervene at any time, and must be activated by some reference or claim. It was not until 10 December 1986 that we heard the Muriwhenua claim against the quota management policy. We immediately conveyed our concern to the Director-General of Fisheries, that quota should not be allocated until the claim had been investigated (see *appendix 3.4.2*), but we were advised that the procedures for allocating quota had already gone too far (see *appendix 4*). We were concerned that that should have been so.

This Tribunal was first advised of the quota management policy proposals in 1984 during the course of the Manukau hearings. The policy was not then in issue and we had therefore no need to examine it in detail. It was

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sufficient for the purpose of that case that an intention to take steps for the conservation of the fishery resource was described (see *Manukau Report* 1985 6.3.2, 6.6 and 9.2.9). The Tribunal noted the lack of any comprehensive studies on the nature and extent of Maori fishing interests and recommended that studies be undertaken (recommendation 6 at p130). That was in May 1985.

In the course of this claim it was explained that the Ministry had been restricted in considering Maori fisheries as the government had referred to the Law Commission the whole question of providing for Maori fisheries in law. But the reference to the Law Commission was not until May 1986. By then, the legislation for the quota management scheme was well beyond the drafting stage. It was enacted in July 1986.

In the *Manukau Report* the Tribunal said (at 9.2.8)

We think it would be unfortunate if Maori fishing rights fell to be determined solely on a literal interpretation of the Treaty which guarantees an *exclusive* use of *all* Maori fisheries, for Maori fisheries are extensive and indeed, the whole of the Manukau [harbour] could be described as a traditional Maori fishery . . . There is obvious potential for conflict between Maori, private and commercial fishing interests and the potential for conflict should be minimised. Compromises will be necessary. But the answer is not in the blatant denial of Maori rights, it is not in glossing over the problem and it is not in the maintenance of a Fisheries Act that contains empty words and clearly fails to match the promises of the Treaty. Those answers merely strengthen, and probably cause Maori demands for the ownership of harbours, and exclusive fishing grounds, demands based upon a strict interpretation of the Treaty. Instead a genuine search should begin to define the options available for the recognition and protection of Maori fishing grounds and for securing compensation for Maori fishing losses.

We were further concerned that following the advice that quota allocations in the process of delivery, in 1986, could not be stopped, and having accepted that that had to be so, we later learnt that further quota for other species were in the process of being sent out. We had understood that that would not happen.

We do not wish to dwell on this matter, but we began to understand how difficult it had been for Maori to have their fishing interests examined. We had no need to look beyond our own experience to gain the impression that the Ministry was and had been intent on pursuing its own plans, *recte si possint, si non, quocunque modo* (legally if they can, otherwise, by any means).

(c) A question of good faith is involved. Our experience lends credence to the view that in presenting the policy (as an answer to the inshore fishery problem), insufficient emphasis was given to the more radical aspects of the scheme.

In Treaty terms they appear to be radical in the extreme. If Maori fisheries covered the whole of the inshore seas, as past records suggest, the policy was effectively guaranteeing to non-Maori, the full exclusive and

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undisturbed possession for the property right in fishing, that the Crown had already guaranteed to Maori.

The prospect of such a fundamental conflict should have been apparent in our view. It required no more than an inquiry into what Maori fisheries had been, when the Treaty was signed. It ought to have been obvious, even on a brief reading of the Treaty, that the Ministry's proposals stood to be diametrically opposed to the provisions of the Treaty.

(d) It was mentioned in chapter 1, that an international group led by Jacques Cousteau attended the first hearing of the Tribunal on this claim, at Te Hapua. It was a fleeting visit, but as reported in their international journal, they found

. . . the ITQ issue, though seemingly a specific biological measure, touches the core of New Zealand's social and political life as well. Maori fishermen, for example, while not objecting to the principle of a biological quota system to sustain fish populations, object to the imposition of those quotas by the government. The Maori argue that they have traditional rights to fish New Zealand waters, that they can set their own quotas, and that far from having the power to limit Maori fishing rights, the New Zealand government is bound by law and history to protect them.

. . . Such arguments emphasised again for the Cousteau team the complexity of environmental protection in today's world, as limits and rules crash into each other in an attempt to redress the imbalances human enterprise has brought to nature (Di Perna 1987:6).

The Room for Negotiation

- 5.2.13 (a) It still does not follow that if the Treaty is breached, the whole scheme must be jeopardised provided a reasonable agreement can be made. Warts and all, the scheme has many meritorious features.

Without shifting from its position that Maori should have no greater access to the commercial fishery than other citizens, witnesses for the Ministry of Agriculture and Fisheries stressed that any provision for Maori could be accommodated within the quota management system. Many Maori, it was contended, are supportive of the system, and we believe that to be so.

(b) The Ministry of Agriculture and Fisheries proposed various ways to provide for Maori fisheries under the scheme – that any increased Maori undertaking would simply reduce the future assessment of total allowable catches; that compensation could be provided from resource rentals; and that the Crown right to acquire and dispose of quota could be used to provide a 'Maori share'.

It also appeared to us that if the quota system is properly managed and is true to its original purpose, as stocks recover there should be a substantial quantity of quota available in the inshore fishery for future allocations. It could be that a Maori interest in fishing could most easily be re-established through concentrating on smaller fishing efforts in the

inshore fishery, geared either to the internal market or to high quality export catches.

(c) In the meantime, and on the action of the New Zealand Maori Council and the claimants in this claim, the High Court had ordered an interim injunction on further quota issuing for squid and jack mackerel in the far North (ex 30 September 1987); and on the action of the New Zealand Maori Council and various tribal groups, that injunction was extended to other areas and to other species (October 1987) (see *appendix 5*). On 25 November 1987, the Government and representatives for various tribes agreed that further quota should issue on a temporary basis. As a pledge of good faith, Government provided \$1.5 million to various Maori interests to meet their costs and assist them in further research. And a working group of Crown and Maori interests, that is to report on 30 June 1988, is seeking new and more permanent solutions. We consider it imperative that some agreement should be found.

5.3 **STRUCTURAL ARRANGEMENTS**

Management Areas and Plans

- 5.3.1 The Government fisheries service in New Zealand is represented in MAFFish, the fisheries business group within the Ministry of Agriculture and Fisheries, which handles all matters relating to research, administration, management and advice.

For administrative purposes the fisheries are divided into seven Fishery Management Areas (FMAs).

For each of the FMAs, Fishery Management Plans (FMPs), are to be developed and implemented. (At present only the Central Fishery Management Area has initiated a proposed plan).

Five Fishery Management Advisory Committees (FMACs) assist in the preparation of the proposed FMPs and will give advice on their subsequent operation. Their mission is to maintain relations with the many user groups at a regional level. Through them, MAFFish consults with the people.

Additionally, some 23 local liaison committees have been appointed by MAFFish to provide an input to the FMACs. They are drawn locally from the catching, processing, wholesaling and retailing sectors, recreational user groups, environment groups, local body representatives, other governmental agency groups (eg, Wildlife Service) and Maori organisations.

A Fishery Management Plan is thus, or thus will be, constituted after the advices have been given of various persons representative of numerous interest groups; whereafter it is made public, and public objections may be made until eventually a plan is finalised. At this stage, no Plans have been finalised.

Industry Promotion

- 5.3.2 Greater finality has been achieved in the commercial exploitation of fisheries. MAFFish has a role in policy formulation, policy management, monitoring and control, but here, the main thrust is provided by the private sector.

A most important body in maintaining that drive is the *Fishing Industry Board* (FIB), a statutory authority established by the Fishing Industry Board Act 1963 with both Government and private sector representation.

At present the Board consists of eight members – the Chairman, appointed by Government; a nominee of each the NZ Federation of Commercial Fishermen and the NZ Share Fishermen's Association, both representing fishermen; a nominee of each the NZ Seafood Processors' and the Exporters Association, representing processors; one member representing fish retailers; one member representing MAFFish; and one further member appointed by Government (and who is at present the Deputy Chairman).

An executive staff is controlled by a General Manager, an Assistant General Manager (Economics and Marketing), an Assistant General Manager (Administration & Technical) and a Manager (Training and Information).

The functions of the Board are to promote the fishing industry, the full use of the fish resource, the sale of fish both locally and for export, and the maintenance of standards in handling, processing, storage, packaging, transport and the like. It also co-ordinates marketing, licences exporters, resolves problems relating to economic production, promotes co-ordination within the industry, advises the Minister and persons engaged in the industry, co-operates with fisheries research, promotes the financing of the industry and recommends on loan proposals.

The Board is authorised to report to the Minister on trends and prospects in overseas markets, movements in costs or prices, and other matters likely to prejudice the economic stability of the industry.

Several advisory committees are established under the Fishing Industry Board to conduct research, gather and review statistical data, conduct promotional or planning exercises, or negotiate product freight rates and other arrangements on behalf of the industry. In 1986 ten such advisory committees worked on matters concerned with aspects of the commercial fishery: Mussel Industry, Retail, Quality and Certification, Catching Sector, Market, Fish Technology, Rock Lobster, Scallop, Oyster, and Shipping (FIB Report 1986:24). These advisory and promotional functions were funded within the Board's reported 1986 expenditure of \$3.36 million, and appear to be the major items (FIB 1986:27).

The 1986 income of the Fishing Industry Board totalled \$3.96 million, up 17 percent on 1986. It included a general \$400,000 Government grant, and a special grant of \$150,000 towards a new computer required to analyse the ITQ system (FIB Report 1986:25). The major part of the

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Board's income is from the fish sales levy on commercial operations (\$2.57 million) as provided for under the Board's Governing Act (FIB Report 1986:27). The Board also administers a trust fund from the Commercial Fishing Levy, from which grants are made to assist various national organisations in the industry. In 1986, the grants, totalling \$288,408 were applied mainly to the NZ Federation of Commercial Fishermen and the NZ Share Fishermen's Association. Distributions are made at the discretion of the Minister.

The Board has estimated the total profits of the NZ fishing industry (before tax) at \$102 million on an investment of \$405 million, representing a 25 per cent return on investment. The sharing of total profits between private industry and the Crown was estimated to shift from 50:50 per cent in 1986, to 41 per cent industry: 59 per cent Crown by 1987 (FIB 1987:53).

Other bodies with an interest in the commercial fishery include

(a) The *NZ Fishing Industry Association Inc* (FIA), which draws its membership from seafood companies who are catchers, processors, wholesalers, distributors, retailers or exporters. We were informed that the larger corporations and commercial interests were in this Association.

(b) The *NZ Federation of Commercial Fishermen* (Inc), whose membership, we were told, is comprised mainly of individual, boat or small company interests.

(c) The *NZ Fish Exporters Association* (Inc).

(d) The *NZ Fish Retailers Federation*

(e) The *NZ Share Fishermen's Association*; which, we were told, represents fishermen who share catch earnings with boat owners.

(f) and various fish farmers' associations as for example

(i) The *NZ Salmon Farmers Association*

(ii) The *NZ Oyster Farmers Association*

(iii) The *NZ Marine Farming Association*

(iv) The *NZ Aquaculture Federation* and other groups involved in marine, estuarine or inland pisciculture.

(g) The *NZ Fish Quota Exchange Ltd* and also several brokerage firms, are involved in buying and selling quota, leasing quota, and also trading in quota futures contracts.

Marine Reserves

- 5.3.3 The Marine Reserves Act 1971 provides for the establishment and management of areas of the sea and foreshore as marine reserves for the purpose of preserving them in their natural state as the habitat of marine life for scientific study. Control is vested in certain management committees and commercial and other fishing uses may be restricted. From time

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to time proposals have been made to change the Act and provide for a far greater variety of marine reserve types.

Because of the focus on commercial fishing aspects, matters relating to marine reserve planning were not prominent in the hearing of this claim; and it is necessary to recall that the claim was precipitated by proposals by the Ministry of Agriculture and Fisheries to reserve large sea areas off the far northern coastline. In brief, the claimants would be more content if the name was changed from Marine Reserves to Muriwhenua Tribal Reserves, if the reserve areas were substantially expanded, and if the control and use purposes were changed.

A submission from Dr O Sutherland for ACORD (doc B89), was acutely critical of the Marine Reserve proposals for the Far North, the whole proposals being shaped, he said, as though the northern tribes did not exist and as though the Treaty had never been written.

We have found no need to examine the proposals in detail. They were but proposals. Responsibility for the development of marine reserves has now been transferred to the Department of Conservation and no doubt new plans and even fresh legislation will emerge in due course. We wonder however how far marine or any other form of management planning can proceed without prior inquiry into the nature and extent of Maori fishing interests and the impact of the Treaty of Waitangi.

User Categories

- 5.3.4 Underlying all fisheries planning and legislation is the division of user functions to four categories, commercial, recreational, Maori and traditional. The basic philosophy is that various users have different functions, quite commonly in conflict with one another, and that a careful balancing of those interests is required in any management planning.

Though no-one was able to explain to us what the fourth category of 'traditional' entailed, the approach has obvious good sense to commend it insofar as it seeks fairness and equity for all. Nonetheless, there are at least three difficulties facing Maori. The first is that no-one in the administration or planning sector seems very much aware of what the Maori interest entails. The second is that the creation of categories in this way suggests that the Maori interest is something other than those in the other categories when it is in fact a combination of commercial, recreational, cultural and traditional aspects.

The third is that the principles of fairness and equity were already set in 1840, when the Treaty was signed. In one opinion the condition for cession of sovereignty and the acceptance of settlement was that important properties of Maori would be guaranteed, including their interest in fishing, which puts them in a category of their own, not to be balanced with but having a priority over other interested users.

The Maori Fishery Programme

- 5.3.5 Whether it be for the purpose of the Quota Management System, the formulation of Management Plans, the promotion of the Fishing Industry, the establishment of reserves or the balancing of conflicting interests, an understanding of the nature and extent of Maori fishing interests is obviously required. A Maori Fishery Programme has been established to that end, within the Ministry of Agriculture and Fisheries, and the importance of that programme cannot be over-stressed. Unfortunately however, the programme was not even started before 1985, by which time the major decisions had already been made on quota planning and the other matters mentioned. As at 1987 it had not passed beyond the stage of suggestions to define or determine the nature of traditional fishing.

The programme was begun with the organisation of a pan-tribal hui 15–17 November 1985 known as Te Runanga a Tangaroa to gain information on the traditional tribal control areas for fishing, and the past and present arrangements important to Maori fishing. Significantly, the Muriwhenua tribes were amongst those that strongly resisted any attempt to restrict the Maori interest to isolated fishing grounds. It was obvious that the past policy of providing in law for Maori fishing reserves was no longer seen as sufficient, quite apart from the reality that few were created in fact, and none in Muriwhenua.

Since then, more specific studies have been initiated. The various programmes outlined to us are impressive. The lateness in getting them started ought not to diminish their significance; it rather highlights how compelling they now are. We were therefore disappointed to be informed that the operational funding for the Maori fishery programme, originally involving about \$1 million, was taken away, but we understand that it may be or has been re-instated.

An important part of the programme was to improve upon and rebuild the liaison and prospective partnership between the Ministry and recognised Maori tribal institutions. In our view, the need for this could have been foretold.

5.4 **CONSULTATION**

Quite properly in our view, the Ministry of Agriculture and Fisheries takes pride in its recent arrangements to consult widely with all user groups in implementing new policy proposals. In September 1984 it published a booklet on the consultative structures that had been set in place for an exchange of opinion between users and management groups in fisheries management planning. Basically they involve the siphoning of views through various local, regional and area committees comprised of representatives of commercial, processing, wholesaling, retailing, recreational, Maori and consumer interests. These structures were used to explain the quota management policy, but consultation was not restricted to them.

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Yet we were faced with an enigma, the claims of administrators to wide consultation on the one hand, and on the other, Maori claims that they had not been consulted at all. We think it was a classic case of two cultures simply talking past each other, for both have consultative procedures of their own and widely different views on what fisheries involve.

Discussions amongst the many user groups go back to at least 1983 when the seriousness of overfishing was apparent. Maori were not represented as such, though presumably some Maori fishermen were present.

In August 1983, a document entitled “Future policy for the inshore fishery – a discussion paper” was released by the National Fisheries Advisory Committee. The paper, which summarised the state of fisheries and outlined options for future management, including the Quota Management System, was discussed at 12 public meetings held throughout New Zealand in September 1983. The meetings were widely publicised and were attended by commercial fishermen (including some Maori), other fishing interest groups, and the general public. No special effort was made to include Maori groups.

Specific consultations on the quota management option began in August 1984, resulting eventually in the Ministry’s publication “Inshore Finfish Fisheries–proposed policy for future management” (doc A64). It detailed the main elements of a proposed quota management system.

The “blue book”, as it was called, was circulated widely to those interested in commercial and recreational fishing. Maori interests were catered to by circulating the Maori Councils, the Maori Women’s Welfare League and Maori representatives on the various fisheries liaison and fisheries advisory committees.

For the Ministry, Mr Dobson described the further discussions. Consultation was wide ranging in his view, the Ministry being willing to meet with all interested parties. He thought there was a strong input from Maori commercial fishermen, although not from Maori groups (doc B67:5). Mr Martin held a similar view and described how the Maori representatives on the Fisheries Liaison Committee and the Fisheries Management Advisory Committee for the Auckland area were both members of the Tai Tokerau District Maori Council Fisheries Committee, a body of North Auckland Maori established by the New Zealand Maori Council for the express purpose of discussing fisheries developments.

Nonetheless we find there were few Maori representatives on the various Ministry’s committees. The Auckland Fisheries Management Advisory Committee and Fisheries Liaison Committee each had a total of eleven members and one Maori, while the Northland Fisheries Liaison Committee had no Maori at all. Of the three Committees, 31 persons represented commercial fishing interests and there were 2 Maori.

The predominance of other interests was overwhelming. The same can be said of the public meetings. It is not an easy task for any member of a

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minority group to ventilate a view diametrically opposed to those of all others, in such a situation.

We found a number of other deep-seated problems for Maori. A Maori committee member might not necessarily represent a Maori view but rather his own interest as a fisherman in maintaining his livelihood within the system. We found that some Maori representatives on local committees were not even members of one or other of the local tribes but came from elsewhere, and in those cases where representatives were in fact of local tribes, they did not necessarily have an authority to speak for that tribe.

But comparatively those points are minor. The main and recurring problem in our view, is that officials, fisheries or otherwise, have tended to see Maori as simply Maori and to have overlooked the tribe. That cannot be done in our view, when land and fisheries are involved, for few things fit so clearly within the traditional jurisdiction of tribes.

We do not wish to criticise the Ministry, in at least this respect. It is also a major problem facing all Government departments that tribal authority, or rangatiratanga it might be called, is not clearly defined and cannot readily be located, even by an official; for tribal authority survives not because of official recognition but in spite of it. It is only in very recent years that the Department of Maori Affairs has begun attempts to formalise structures based upon traditional whanau, hapu and iwi lines.

It compounds problems further that national Maori bodies, while extremely important in Maori eyes, are not necessarily representative of local tribal opinions. Dr Dobson was well aware of this, pointing out the need for an authoritative national organisation as well as authoritative tribal and regional bodies (doc B67:5). Dr Allen of the Ministry was of a similar view stating

The current representation on Fisheries Management Advisory Committees has been shown to be not adequate to properly represent Maori views in the fisheries management planning process. We have recognised the need for a more detailed level of input and are in the process of improving the consultative network to provide for tribal input into management planning (doc B66, p11).

By the same token however, the evidence was clear that at the crucial time, the Ministry had not been inclined to consult with Maori interests in their fisheries in any tribal or sub-tribal way. Marae meetings were suggested but were never held.

To its credit, the Ministry made subsequent efforts to attend some tribal meetings (it was represented at the Tai Tokerau Fisheries Committee meetings for example) but that was not until late 1985, by which time, the programmes had proceeded quite a way. But how much could the Ministry have absorbed from such meetings?

The main problem in this case, is that both parties applied entirely different criteria. It is here that there was rarely a meeting of minds. In

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the Ministry's terms, as we noted in the *Te Atiawa* and *Manukau Reports*, the problem is to reconcile the competing interests of various user groups in which none can be regarded as having a priority. In Maori terms that is the fundamental problem. Maori claim a traditional priority.

In the Ministry's perspective as well, Maori interests can be accommodated in a relatively narrow way. As Dr Allen said, with regard to Muriwhenua

It is commonsense that the cockle beds adjacent to Te Hapu[a] Wharf clearly are an important fishery to the Maori people of Parengarenga Harbour. [The Ministry] recognises that rights of access [by Maori] to this fishery may leave no room for access by others. In the same harbour mullet has historically been fished but . . . exclusive access may not be just (doc B66:9).

Maori however have an expansive view of their fisheries which, they maintain, encompass the whole of the coastline and harbours adjacent to their tribal areas, and to which are attached traditional, commercial and also control rights (docs A41:40 and C1:31).

There is yet a further problem, by no means confined to Maori but perhaps more evident in their case. We had the spectacle of the Ministry claiming that Maori showed no objections to the Quota Management System and yet we were faced with a major claim concerning that system, and clear evidence that there are objections now. We have good reasons to consider that the focus of Maori attention at the time was on the immediate problems of overfishing and the exclusion of part-timers, and the scheme may have been proposed with overfishing mainly in mind; but the reality is, in any event, that some things simply take time to be fully comprehended, especially, as here, where a radical conceptual change is involved.

Added to that is the cultural mode of operation. The Maori consensus process requires a high level of community involvement and debate. New ideas must be allowed to lie for a long time, and there are inhibitions on all tribal leaders in expressing a view that has not been tribally approved. Under the consultative processes of Maori, nothing can be hurried along.

We appreciate the problem this poses for officials and the frustrations it can cause to those of a different training. We do not pretend to have answers. For the Ministry however, Mr Cooper described an ambitious plan, as part of a Maori fishery programme described, to establish an improved consultation process with tribes. It was a tentative programme but it appears to us to hold much promise and we hope that it will proceed.

Appendix 6

Glossary of Maori Terms and Words

ahi ka roa	long burning fires ie occupation justifying title to land
ana	yellow-eyed mullet (see also aua, awa and kawae-awa)
araara	trevally
atua	god, supernatural being
aua	yellow-eyed mullet or herring (see also awa, ana and kawae-awa)
awa	yellow-eyed mullet (see also aua, ana and kawae-awa)
haka	barracouta (see also nihomakaa, maka, manga)
hapu	sub-tribe
hapuku/hapuka	groper (see also moeone)
hauture	jack mackerel (see also tawatawa)
hinaki	wicker eel-pot
hoka	red cod (see also matuawhaka-puku)
hoki	species of fish
hokarari	ling
hopuhopu	grey mullet
horihori	common sole (see also patiki rori)
horo	turbot
horoti	brill
hui	gathering, meeting
ika	fish
inanga, inaka	whitebait
inangi	smelt
iwi	tribe, people
kahawai	species of fish
kai	food
kai awa	food from rivers
kai ika	food from fish
kai moana	seafood
kai roto	food from the interior, inland food
kaihaukai	the exchange of foods
kainga nohoanga	place of residence
kainga,kaika	village, settlement, home
kaio	species of shellfish
kaitiaki	guardian, trustee, protector
kakapu	species of fish
kanakana	lamprey
kanae	mullet
karakia	prayer, spiritual incantation
kaumatua	elder
kawa	protocol, custom
kawanatanga	governance, government
kehe	hake
kekewai	crayfish, red rock lobster (see also kewai and koura)
kerema	claim

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kete	basket
kewai	crayfish, red rock lobster (see also kekewai and koura)
kina	sea egg
kiore	native rat
kiwi	flightless bird
koha	present, gift
kohikohi	to gather, to collect
kokopu	native trout
korero	discussion, speech, to speak
korokoro	lamprey
koukoupara	native trout
koura	crayfish/red rock lobster (see also kekewai, kewai)
kupae	sprats
kuparu	john dory
mahinga kai,	places where food is
mahika kai	procured or produced
makataharaki	gemfish
maka	barracouta (see also haka, manga, nihomakaa)
makorepe	elephant fish
mana	authority, control, influence, prestige, power
mana moana	customary rights and authority over the sea
mana whenua	customary rights and authority over land
manga	barracouta (see also haka, maka, nihomakaa)
mango	shark
mango ripi	thresher shark
marae	community meeting-place or surrounds
mata	species of herring
mataitai	seafood
matiri	bluenose
matuawahakapuku	red cod (see also hoka)
moeone	groper (see also hapuku/hapuka)
mohimohi	pilchard
mohoau	flounder, common sole (see also patiki)
moki	species of fish; raft
motu	island
moutere	island
ngu	squid (see also wheketere)
nui	big, great, many
nihomakaa	barracouta (see also maka, manga)
nihorota	orange roughy
pa	fortified village, or more recently, any village
pakirikiri	blue cod (see also rawaru)
paraki	smelt; fresh-water fish
parariki	smelt
parohe	smelt
pataka	food storehouse raised on posts
patete	a small fresh-water fish
patiki	lemon sole/flounder (see also mohoau)
patiki rori	common sole (see also horihori)
paua	abalone
pawhara	fish opened and dried
piharau	lamprey
pioka	shark
pioke	mud shark, rig
pipi	cockle

Glossary of Maori Terms and Words

pipiki	smelt
poha	food storage container
pounamu	greenstone
pukorero	oratory
purau	sea urchin; shrub
puwhara	stargazer
puwhaiiau	gurnard
rahui	a restriction on access, prohibition
rangatira	chief
rangatiratanga	authority, chieftainship
rawaru	blue cod (see also pakirikiri)
rimu	species of tree; seaweed, kelp
rimurapu	bag made from kelp
rohe	boundary, tribal region
runanga	assembly, council
taiapure	local fishing patches
take	issue, grievance, cause, reason
takiwa	district, region
tangata whenua	people of a given place
tangi	to cry; sound; funeral
taonga	prized possession, property
tapu	under religious, spiritual restriction; sacred
tarakihi	species of fish
taua	war party
tawatawa	jack mackerel (see also hauture)
Tauihu o te Waka	"the top of the canoe"
te ao hou	the new world
tikanga	custom
tikiheimi	smelt
tino rangatiratanga	full authority
tio	oyster
titi	mutton bird
tohunga	specialist
tuatini	seven gilled shark
tuna	eel
tupa	white pointer shark
tupuna	grandparents, ancestors
tupere	school shark
umu	oven
urupa	cemetery, burial ground
ururoa	large open sea shark
utu	recompense, revenge, response, price
waharoa	horse mussel
wahi tapu	sacred place
wai kakahi	shellfish, a freshwater bivalve mollusc
wai	water
waiata	song
wairua	spirit
waka	canoe, tribal confederation (based on common canoe traditions)
wakawaka	share, marked out division based on rights through genealogy
warehou	species of fish
whakapapa	genealogy
whanau	family
whare	house, building

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wheketere squid (see also ngu)
whenua, wenua land

6.1 Glossary of Fish Terms

(The following terms are taken from Larry Paul *New Zealand Fishes An Identification Guide* (Reed Metheun, Auckland, 1986) pp 173-177).

biomass	the total weight of all animals of one species, or a community of species, in a given area
bycatch	the part of a fish catch not primarily sought by a fisher; good quality species are retained, poorer species are either discarded, used for bait, or (on large trawlers) converted to fish meal
cartilaginous	having the skeleton composed of firm, flexible cartilage rather than hard bone, as in sharks, skates, rays and chimaeras
coastal	used in a general sense for the relatively shallow water over the continental shelf, as opposed to the open ocean. The term neritic is also given to this region
continental shelf	the shelf-like seafloor surrounding continents or islands, sloping, usually gradually, from the shoreline out to the shelf edge at about 200m depth. At this edge the slope steepens, and the seafloor down to at least 2000m is the continental slope. The continental shelf and continental slope together comprise the continental margin
crustaceans	a large and varied group of animals, having joined external calcereous skeletons; marine forms include copepods, shrimps, krill, crabs, lobsters, and barnacles
Danish seining	Danish seiners operate a little like purse seiners, and a little like trawlers. The nets are trawl or bag-shaped, with two large wings, and are worked with long ropes. One rope is set in a long curve, and then the net, followed by the second rope in a curve back to the buoyed first end of the rope. Both ropes are hauled aboard the vessel together, during which time they, plus the closing net wings, herd fish into the net's cod-end. Once used for flatfish and other demersal species, Danish seining is now largely restricted to snapper in the Hauraki Gulf
demersal	living in some association with the seafloor, either on it or in the water immediately above
drag nets or beach seines	long rectangular nets, sometimes with a central bunt or cod-end, which are either pulled along in the surf zone and then ashore, or are set by boat parallel to the beach and pulled in by ropes

Glossary of Maori Terms and Words

dredging	dredges are essentially small rigid metal nets towed along the seafloor to scrape up bottom living shellfish, while allowing smaller animals and sediment to pass out through the mesh
drift net	a gillnet which drifts with the current or tide; not often used in New Zealand
ecosystem	a unit comprising a community of organisms plus the physical environment influencing them
EEZ	the 200 nautical mile Exclusive Economic Zone in which the coastal state has extensive resource ownership and management rights
endemic	native to a region and also confined to it, not occurring elsewhere
epipelagic	the surface zone of water where light can enter and allow photosynthesis; a productive region extending down to about 200m
estuary	the region where a fresh water source meets the sea and water is intermediate in salinity; it may be a simple river-mouth, but is often expanded into a lagoon, harbour or shallow bay
fishery and fisheries	two terms often used loosely and synonymously. A fishery is the combination of people, vessels, and gear involved in catching a fish stock, species, or community of aquatic animals within a given area in a particular way, and it also includes their catch. It can be small, such as a harbour setnet fishery for flounder, or very large, as in the New Zealand inshore fishery — which is in turn a combination of several small individual fisheries. In this sense, fishery is singular and fisheries plural, although several individual fisheries can be collectively called a fishery again. Both words are also used adjectivally, as in fishery, or fisheries management plan, or management area, and here no clear distinction is apparent, even in "Fisheries" legislation
food chain	a series of organisms connected by predator/prey relationships, each organism being the potential food for another one "higher" in the chain from algae to sharks. There is seldom a simple chain, more often an interlinked food web
fry	young fishes just hatched and usually schooling together
habitat	the locality in which an organism lives, together with the physical environment (temperature, salinity, currents, etc)
hand-line	self-explanatory; a fishing line hauled in by hand, rather than fished via a rod and reel; used commercially – some-

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	times in quite deep water – as well as by recreational fishers
jigging	a method of fish (or squid) capture, involving the vertical movement of unbaited hooks (or jigs) through the water, attraction being by lures or a light source
littoral	the intertidal zone on either a rocky or sandy coast
longline	a line to which a series of hooks is attached; it may be quite short in coastal fisheries, or very long (to 80 km) in the oceanic fisheries for tuna and billfish; set either along the bottom, or at any depth in the water by using a series of floats
midwater	any part of the water column between the surface and the bottom (the seafloor, lake, or river-bed)
oceanic	referring to the open ocean, as opposed to the coastal seas
pelagic	free-swimming or drifting in the open water, not in association with the bottom
plankton	small animals or plants that float or drift with marine or freshwater currents, although some may have a feeble swimming ability. Zooplankton comprises small, often larval animals; phytoplankton small algae
purse-seining	purse seines are very long and deep encircling nets. They are set around known or suspected positions of fish schools, often with the assistance of a motorised dory holding one end; when the two ends come together the net is "pursed" beneath the fish school and then slowly winched on board. The trapped fish are concentrated into the final pocket of the net, from where they are scooped or brailed into the seiner's hold. This fishing method is used almost exclusively for schooling pelagic fishes
quota	the share of a fish catch allocated to a country, a fishing fleet, a company, or an individual fisher, usually on an annual basis
recruitment	the entrance of young fish into a fishery as they reach catchable size on the main fishing grounds
school	closely grouped fish, usually of the same species, swimming in association with one another; sometimes termed shoaling, particularly when near the surface
setnet	a net which is anchored at one locality, at a specified depth in the water, which functions either by gilling the fish (ie a gill net), or by trapping them in loose folds. Invertebrates (lobsters, crabs, etc) may also be caught in this way (tangle nets)
shelf	the seafloor zone from low tide out to a depth of about 200m, where the slope steepens. The depth of this shelf

Glossary of Maori Terms and Words

spawning ground	edge or shelf break varies regionally from 100 to 250m, and it may be either distinct or barely perceptible the area where courtship, spawning and egg fertilisation occurs; because of water movements this may be distinct from the nursery ground where subsequent development of the larvae and juveniles takes place
species	a group of organisms that is somehow reproductively isolated from other similar groups, and which has developed genetic and morphological differences of some kind; while many species are clearly distinctive and recognisable, others are more difficult to identify and overlap in many visible characters
trawling	a trawl net is cone-shaped, tapering from a wide mouth, often with projecting wings, to a smaller-meshed codend. There are several general categories of trawl net, and a multitude of designs and sizes. Single trawls are held open by the water pressure on paravane-like doors on the towing wires ahead of the net. Pair trawling is carried out by two vessels, their distance apart keeping the net open. Trawls can be towed along the bottom, or at any height in midwater
trolling	towing a dead or imitation fish (lures) behind a vessel to entice strikes from large pelagic fish (or trout in fresh water)
upwelling	the upward movement of cold, nutrient-rich water to the surface; it generally occurs near coasts where offshore winds drive surface water seaward (generally on the western coasts of continents), in the open ocean where surface currents diverge, or over irregular bottom topography
valve	one of the external shells of a bivalve mollusc, or shellfish

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