

REPORT OF  
THE WAITANGI TRIBUNAL  
ON THE  
MURIWHENUA FISHING CLAIM

1988



## PREFACE

Karanga ra, e Rata  
Te hiku o te ika e  
Whakaripo ake nei e

Tenei a Tai  
Whakamana te Tiriti e  
Te ope nei e

Tainui e  
E tama Rawiri  
Paora e  
Whakaterehia ra

Maranga mai  
Te iwi ohoake ra  
Tau-iwi tahuri mai e

Whatungarongaro  
Toitu te whenua e

*[The clarion voice of Rata calls  
The movement in the tail of the fish responds.]*

*In our midst we now have Tai  
Now is the time to give strength to the Treaty.  
Here too is the ope, all members of the Tribunal.*

*Tainui (Koro, Minister of Maori Affairs),  
Rawiri (David, Prime Minister) and  
Paora (the Governor-General)  
Through you, this fish can swim.*

*Maori people rise and be vigilant;  
Tau-iwi (Pakeha and others)  
The time is now to face each other.*

*As the light of the eye and the life of things living  
fade from sight,  
only the land is seen to remain,  
constant and enduring.]*

(A waiata by the Waitangi Tribunal, given at Te Hapua, December 1986).

Waiata have a cultural function, to preserve the stories of great events and noble people in tribal history and lore.

The first visit of this Tribunal to the people of the North was an occasion of special significance, not just for us or the claimant tribes but for all Maori. We sought then, for this generation, a waiata that would do what others have done for the people of more ancient times.

Our waiata pays tribute to the Honourable Matiu Rata, principal claimant, son of Te Hapua and father of the Tribunal. From his distant village he was to become Minister of Maori Affairs, and while he was in office, the Tribunal was established and its current chairman, Taihakurei (Chief Judge Durie), was appointed to the Maori Land Court. In the time honoured way, we acknowledge Matiu, our chairman, ourselves, and then our task to uphold the Treaty. We acknowledge too, Matiu's ancestral lands, representing as they do the tail of the fish.

North is south in the Maori world view. The North Island is a fish, the fish of Maui, and the people of Muriwhenua occupy the nether end of the fish's tail. They look 'up' to the rest of the fish, its lateral fins spreading to East Cape on one side, Taranaki on the other, its dorsal spine of rugged ranges tracing a line to the head, Te Upoko o te Ika. There, at Wellington, the seat of Government now resides.

The waiata builds upon the traditional image of the fish. As we looked to the harbour beside the marae, we were reminded that the tranquil setting belied the major claim soon to follow.

. . . Whakaripo ake nei e . . .

Look to the surface of a placid sea. A ripple that breaks an otherwise calm, tells of a movement below.

One elder of that place then referred to an ancient saying

Kia timata ra ano te hiku o te ika i te akiaki, i te upoko o te ika katahi ano ka tika te haere.

We knew then why the first major fishing claim had to come from the North; for as he said, when the tail of the fish moves, the rest of the fish is not lacking for direction.

So the song is taken to the head of the fish, and to those of that place with important roles in responding to this movement; and recognises the two main parties from their respective ends of the fish.

Still, unity of movement is important in any creature, and so our waiata calls upon the people of our country to face one another, not to turn away, or to stand apart, remembering our own short time on earth, and that while we pass on, it is the land that endures.

## LETTER OF TRANSMITTAL

To the Minister of Maori Affairs  
Parliament Buildings  
WELLINGTON

To matou Rangatira

Te Minita Maori tena koe. Tena koe i o tatou mate huhua e hinga mai na e hinga atu nei. Haere o tatou mate haere, haere.

Koia tenei ko ta matou hoenga ki waho hoenga mai ki uta nga aho, nga kupenga ika o Muriwhenua.

In 1986 the Muriwhenua tribes of the far North brought to us a claim which encompassed a wide range of matters affecting both land and waters, and which included a request for definition of their treaty fishing rights.

Shortly after the claim commenced events occurred which resulted in our giving the fishery aspect of the claim some priority. It soon became clear that this urgency was to continue. It would not have been our choice to consider the Muriwhenua claim other than in the way in which it was first brought to us, a comprehensive claim covering all matters of concern to these people. However, other matters of national importance intervened which made it imperative that we consider and report on the fishing claim in the interim. This course of action was by agreement of all affected parties.

As you know well, Maori involvement with fish and fishing is as ancient as the creation and Maori fishing embraces not only the physical but also the spiritual, social and cultural dimensions. We thought it symbolic that the initiative for the determination of the full Treaty fishing interest should come from those at the Tail of the Fish of Maui. We also consider it appropriate that the matter should first fall for consideration in the context of the Muriwhenua situation because as the evidence and our researches show, the Muriwhenua people's dependence on the fisheries resource was, in times past, very extensive.

This is not surprising given the shape and nature of their coastline and the smaller land mass that forms their ancestral area. What is surprising is that a people who once depended so heavily on the sea resource should now find themselves almost totally shut out of an economic activity which was so much a part of their way of life.

Discovering how this came to be forms a substantial part of our work, and we now report to you on the nature of the Muriwhenua fisheries and of the impact of the Treaty's principles. This is an interim report only providing no more than a working base through our findings of fact and interpretation, to aid negotiations now proceeding between Maori and Crown, and presented in the hope that it will assist these negotiations to reach appropriate outcomes.

Our analysis indicates that a radical re-appraisal of national directions is called for. We are mindful of a similar exercise in the United States. The broad definition of Indian Treaty Right Fishing in the State of Washington took nine years to determine and yet, that was only the beginning of a continuing exercise to re-establish Indians in fishing. In this country too, the formulation of programmes to restore Maori fishing, must also take some time.

We consider that some temporary arrangements will be required, so that the final stage can be completed in a way that recognises the significance of the matters now under negotiation.

We are only too well aware of the impact our findings may have, and we have considered it important not only for the sake of the parties directly concerned but also for the well-being of the nation as a whole that such an important issue be given as full and comprehensive consideration as has been humanly possible.

Tou ti tou rea tangaroa  
te ware o to waha  
Kei te heke atu  
Kume kumea  
To toia  
Kia tupato to kauae  
E Koe tena tena

‘Tipu ake te pono i te whenua  
I titiro iho te tika i te Rangi’

*‘Truth springs out of the earth  
and righteousness looks down from Heaven’*

Psalm 85 verse 11

Heoi.

## SUMMARY OF REPORT

S1.1 It was a solemn pledge, in the Treaty of Waitangi, that the Crown guaranteed to Maori the full, exclusive and undisturbed possession of their lands, estates, forests, fisheries and other properties for so long as they might wish and desire to retain the same in their possession. The principle was that despite settlement, Maori would not be relieved of their properties without some further agreement. It was a high ideal when pitted against the certainty of European settlement at the time, but sensible, necessary and proper all the same. The principle survives in the international instruments to which most modern states adhere, that all peoples have the right to retain their properties for so long as they like, and to develop them along either or both customary or modern lines.

The Maori text of the Treaty said much the same, adding another dimension the right of Maori to exist as Maori under their own regimes. That too describes an emerging opinion in the modern international arena that would replace integration as a concept with a policy of mutual respect and autonomous development. New Zealanders however seem set to develop a variation of their own, embodied in a partnership with mutual responsibilities.

S1.2 To develop a partnership we need first to understand one another, and to repair some mistakes of the past. Few New Zealanders, we suspect, appreciate the extent of early Maori fishing activities, that by state action their development of those fisheries was discouraged, or that Maori have never abandoned their claims to their original fishing entitlements. Only through understanding the nature and extent of their fishing activities in former years, can we understand why the Treaty, in referring to fisheries, ranked them alongside such important properties as lands. The reality is that the products of an aquatic economy provided Maori with their only animal food apart from birds, dogs and rats, and any portion of sea could hold for them much higher value than any equal area of land.

Lands are different from fisheries of course, though the Treaty guarantee for each was quite the same. Yet in a sense they are both properties. There is a property of a sort in the right to take fish, as modern commercial fishermen well know. 'Fisheries' may refer to the place of fishing, the types of fish caught, the right to catch them or even the methods used but four dictionaries we referred to give the activity or business of fishing as the first meaning, and in the Treaty, that meaning cannot be denied. Fish were important to Maori too, not just for survival but for the economy that went with inter-tribal trade. No cash was involved of course, in pre-European days, but it was a business all the same.

S1.3 These things were known well enough to those who drafted the Treaty. Early explorers and settlers expressed amazement at Maori fishing standards and the industry and ingenuity displayed. 'They were very great consumers of fish' wrote Colenso, the seas around their coast 'swarming' with excellent varieties. They knew the proper seasons, the best places and the best manner in which to take them, he recorded, adding 'sometimes they would go in large canoes to the deep sea fishing, five to ten miles from the shore, or with large drag nets would ensnare great numbers of those fish which swim in shoals'. Joseph Banks, botanist on the Endeavour, thought fishing to be 'the chief business' of those Maori visited in the Bay of Islands in 1769. 'About all their towns' he wrote 'are abundance of nets laid upon small heaps like hay cocks and thatched over and almost every house you go into has nets in its making'. The Maori 'a little laugh' at the Endeavour's seine, and produced one of theirs, wrote Banks. 'It was 5 fathom deep and its length we could only guess, as it was not stretched out, but it could not from its bulk be less than 4 or 500 fathoms.'

Settlers were able to provide more detail in later times. In 1886 Captain Gilbert Mair measured a net in use at Maketu in the Bay of Plenty, at 1900 metres long, and he observed the catch of 37,000 'good sized' fish and 'many smaller but uncounted'.

Muriwhenua was no exception. R H Matthews who visited there in 1855 and 1875 described in detail a shark fishing expedition involving over 1000 of the tribe, and a fleet of fifty canoes and two boats. About 7000 shark were taken. On one large canoe, no less than 265 were caught or about 6 tons in weight. Included were the bigger tiger sharks that dragged the canoe until they could be hauled in and clubbed.

Well before the Treaty however, Europeans were fully aware of Maori fishing capabilities. Anderson, another voyager with Cook was of opinion that 'their cordage of fishing lines is equal, in strength and evenness, to that made by us, and their nets not at all inferior'. J L Nicholas in 1814 considered 'their nets are much larger than any that are made use of in Europe . . . One of them very often gives employment to a whole village.'

S1.4 For the people of Muriwhenua such stories came as no surprise. The libraries of their minds are replete with an enormous treasure trove of ancient practices, customs, beliefs and laws telling of the huge reliance upon the seas in days gone by. Several hundred fishing grounds were named and identified in detail, up to 25 miles at sea, with descriptions given of their locations as fixed by cross bearings from the land, the fish species associated with each, and the times to fish there. It was soon obvious to us, from the spread of such grounds, that Muriwhenua fishermen had worked the whole of the inshore seas and that all workable depths were known.

S1.5 How could it be then that we have come to associate Maori fishing with the gathering of a few shellfish at the seashore? In this report we examine the extent of original fisheries and the source of our modern prejudice; but one opinion, extant in fishing laws for over 120 years, is that Maori traditional fishing has no commercial component. That is particularly at odds with Maori custom and with what the first European observers saw.

Maori traded widely in pre-European times, coastal tribes taking the produce of their fisheries to distant tribes inland and receiving in due course those goods not so readily accessible to them. This form of trade continued, and its continued existence was commented upon in the Supreme Court as late as 1914.

The desire for trade was endemic, being built into the Maori way. In 1838 Polack observed 'Few nations delight more in trading and bargaining than this people, a native fair or festival best illustrates this fact. To such an excess are the feelings of the people carried in bartering with each other that during war, though the belligerent parties seek for the annihilation of each other, yet at intervals a system of trade, as we have already stated is carried on, that can scarcely be credited by strangers to their customs . . . Any persons having dealings with them are aware of their passion for commercial pursuits'.

There are many similar accounts of a Maori trading bent. It is sufficient to say here that by the 1820's Maori were substantially involved in the provisioning of ships and the supply of whaling settlements. By 1830 ships were carrying large quantities of their produce to Sydney. Thus were Maori involved in export, even before the Treaty, and their enterprise continued well after it.

It is also well documented that Maori were the main suppliers to the first post-Treaty settlements in both islands, and there is commentary upon their virtual monopoly of the fish trade. 'The trade of Auckland' wrote the Rev R Taylor, 'is perfectly surprising, the number of small coasters, most of which belong to the natives and are laden with their produce, cannot fail striking the stranger who visits the port with astonishment'.

S1.6 British Resident, James Busby, lived in New Zealand for eight years before the Treaty. Of the Maori reliance on fishing he was well aware. He is generally credited with the insertion of those words in the Treaty whereby 'their fisheries' were guaranteed. He was also aware that Maori claimed extensive rights over the coastal seas. Before 1840



some 2000 visits to New Zealand had been made by British ships alone, and Maori had begun the practice of levying boats entering 'their harbours'. Shortly before the Treaty, Busby had urged the British Government to buy off the right to harbour dues lest the Americans or French should do so, but there was no need for concern once British sovereignty was proclaimed. Though Maori protested for at least 59 years, the Crown claimed the seas after 1840, refused to meet the Maori harbour dues and 'imposed levies of its own. Still, at least 'their fisheries' were protected.

S1.7 Or were they? For some 25 years post-Treaty, fishing was not an issue. The settlers were concerned with land. Maori were unrestricted in their fishing and fish trade and they in turn had no reason to seek limits on the settlers' fishing, for the settlers fished mainly for their subsistence and personal needs. Then, somewhere in the historical process, the roles became reversed. In this report we identify the 1860s as marking the turn of the tide.

It was then that the numerical superiority of the settlers was achieved. It was also at that time that Britain passed over to them its political control, and war with certain Maori was declared. Racial attitudes hardened. In the wake of the wars came a series of laws destined to break the Maori control of the resources of the land and sea, and significantly, to put an end to their competitive trading habits.

S1.8 In the area of fishing those laws related first to oysters. The Oyster Fisheries Act of 1866 was targetted at the supply of oysters to Auckland. Less than one year beforehand, the House of Representatives had been furnished with a return showing that Maori had supplied to the settlement literally thousands of kits of oysters. Government forbade the commercial exploitation of oysters by Maori, and leased Maori oyster beds to non-Maori commercial interests. By subsequent Acts, Maori would be protected, it was considered, for provision was made for Maori oyster reserves. But none was reserved, at least not before 1913 and only after the local beds had been severely depleted by non-Maori pickings.

The more significant feature was that Maori were prohibited from selling oysters from beds reserved for them. Those beds were for personal needs alone, for that was what tradition was said to imply. So was the view first established that the Maori interest in fisheries was non-commercial, and could be provided for by the reservation of a few fishing grounds.

The assumptions made at that time permeated subsequent fishing laws as inland fisheries (from 1867) and then marine fisheries and fisheries as a whole (from 1877) were brought within the purview of statutory regulation. The regime was continued in all fishing laws, thereafter, to the present day.

The assumptions were basically that Maori fisheries were restricted, both as to the area of sea used and the species caught, that Maori fishing should be limited to satisfying personal needs, and that fisheries could be managed by the state as though Maori had no systems of their own. Nothing could have been further from the truth. 'Honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion' said Mr Justice Richardson in 1987 in relation to Treaty claims, and yet until today, there has never been in the Departments of State responsible for fisheries, an adequate programme to ascertain the nature and extent of Maori fishing entitlements.

It is not at all surprising that Maori objected most strongly, starting from a major conference of tribes in 1879. Generally their fisheries covered the whole of the inshore seas and the inshore seas were claimed. 'It was only the land I gave over to the pakeha' said Te Kawau, whose people of Manukau had been most affected by the curtailment of their oyster trade, 'the sea I never gave, and therefore, the sea belongs to me'. Such was the understandable reaction of those who had earlier shown no objection to a non-Maori user.

Nor is it surprising, from one point of view, that the Crown reacted in an equally vehement way. The Maori were claiming the whole of the seas and that could not be permitted, but what was allowed to them was extremely small indeed. From 1900 to 1962 there was a law that on application to the Department of Marine, Maori fishing grounds could be reserved in particular areas, though of course for no more than meeting personal needs. Though reserves were many times applied for, we cannot find one that was ever agreed to, although the statutory provision was in force for 62 years. It was only through a welter of Parliamentary petitions that some small areas were set aside, by special or under other legislation.

That was not the only respect in which the law was made to appear as an empty shell. Some general words in the fishing laws purported to exempt Maori from fishing regulations in certain cases. Save for a brief period some such general provisions existed in law from 1877 to the present day, but it was not until a court hearing in 1986 and after numerous prior court cases, that the provision was seen to have any practical consequence. In the interim, Maori had taken a large number of cases to the courts, seeking to prove their customary fishing rights by laying claim to lakes, rivers and foreshores. The Muriwhenua people for example, claimed the exclusive ownership of the Ninety Mile Beach in a case that proceeded to the Court of Appeal. Some of these cases dragged on for many years, one for twenty-four, but none met with success. To a large extent the issue was confused by associating fishing entitlements with rights associated with land.

So it was that for over a century the Treaty partners adopted their own positions, simply talking past each other, the Maori sometimes accepting whatever it was they could obtain but often demanding the whole, the non-Maori occasionally ceding something, but in all, very little. There is now, on both sides, a weight of entrenched prejudice to overcome, but at least this much is clear – Maori have never abandoned their claims to full fishing entitlements.

S2. The circumstances were special for the Muriwhenua tribes of New Zealand's Far North. By virtue of their remoteness, their smallish land mass but expansive coast-line, Muriwhenua Maori have had a greater dependence on the seas than those of many other tribes, and Maori fishing activities were prominent there much longer than in various places elsewhere. There where the land ends and oceans divide on a long narrow isthmus, the traditional pathway home for the spirits of the Maori dead, the people have always lived in close association with the sea.

Progress has not dealt kindly to them. There has always been a marked lack of alternative industries. Gum digging provided seasonal work over a long period, but infertile soils gave little profit to their small farms, and with incomes barely above subsistence levels for most of this century, effort was divided between the land and seas.

For a time there was a prospect of developing a significant Maori fishing industry. Northern Maori were the main suppliers of grey mullet to many canning factories that were established in the North. But in the 1890s, over-fishing was alleged. Their gear was outlawed by regulations and the grey mullet fishery was overtaken by non-Maori groups who fished even more. For Muriwhenua fishermen to survive, it was necessary for them to join in the new order.

S3.1 State enforcement action against Maori exercising their claimed treaty right to fish has caused many Maori to discontinue their fishing activities at several of their usual and accustomed places, but the main problems for Maori arose from the promotion of a national fishing industry.

Statutes to encourage fishing began from 1885 with special loans to meet establishment costs and with incentives to encourage expansion into an export trade.

No special consideration was given, however, to those Maori communities that were already well established, that depended on fishing and which had the potential to develop a fishing trade.

Even had a Treaty fishing right been provided, the provision of a right is not the same as its guarantee. In this context, it was the activity in fishing that the Treaty protected, and full rights of development were implied. Once general commercial activity was promoted, it was essential, in our view, that every assistance should have been given to Maori to fully participate within it. But no special arrangements for Maori were made. The position was rather that they were constrained, save to the extent that they might assimilate into the non-Maori fishing way.

As a national industry in fishing grew, the need for regulation became plain. Early visitors to New Zealand had been most impressed by the abundant fish life in all places, but by the 1920s at least, and especially where trawlers were in operation, measures to combat overfishing were required. From 1937 to 1963, restricted licensing applied. Increasingly, however, larger trawlers found the need to extend their activities to places more distant from their home ports.

Serious overfishing in the inshore fishery (or roughly, the fishery of the continental shelf) can be traced back to 1963 when the restrictions on licensing were removed and Government introduced new policies to provide for major fishing expansion. More and more people were encouraged to spend more money to catch more fish, and open access management applied.

Maori objected but to no avail. For the Muriwhenua people it meant simply that the whole of 'their' fisheries were invaded, as both small and large operators worked their way north to the extensive Muriwhenua coastline.

S3.2 It was essential for the Muriwhenua people that they should seek to survive as individual fishermen within the alternative fishing regime that was imposed. Their livelihoods, families and communities depended upon their doing so. In the time honoured way however, they were part-timers, sharing commitment between their ancestral lands and seas.

By 1980, the overfishing of the inshore fish stocks was abundantly clear, and the time for re-appraisal had arrived. Drastic action seemed necessary to reduce the fishing effort and the small and part-time fishermen were the first to be removed.

So it was that the Muriwhenua Maori lost not only 'their' fish to outside fishermen, as the grounds they had nurtured for centuries were largely fished out, but their fishing livelihoods too, and their ancient association with the seas was virtually ended.

S4.1 It is time to go back to basics and to the Treaty that began it all. At the time, Maori were in the majority but the need for their protection was foreseen. When the numerical balance changed and war broke out there were at least some in Britain to recall the significance of its essential terms. The Home News of 26 May 1864 recorded as follows the address of Mr Selwyn MP in the British House of Commons

'In 1845 the Maori of New Zealand had good reason to doubt whether Britain intended to preserve inviolate the provisions of the Treaty of Waitangi; and on the 30th June in that year Lord Derby, then Secretary of State for the Colonies, addressed a letter to Sir G Grey, the Governor of New Zealand, strongly urging the necessity of honestly and unconditionally maintaining that Treaty, by which it was distinctly stipulated that the possessions enjoyed by the natives were to be granted to them by Her Majesty, to be held by them so long as they might desire to retain them. Now, he would ask, had the Government ever acted up to that declaration, which he would remind the House was much more essential now than it was

then. . . . Let us say ‘we entered into this Treaty while you were strong, and you honestly and fairly maintained it, and now that we are the stronger, we also will respect the Treaty’. . . . In former times we had been rapacious and hasty in New Zealand and at home indifferent and careless. Let us, then, be wise, and having been unjust before, let us be merciful now.’

That expresses, in our view, precisely the situation that the Treaty drafters had foreseen. Even before then, on a visit to America in 1831, de Tocqueville had warned of the need for particular arrangements to protect special interest groups from what he called ‘the tyranny of the majority’.

‘When an individual or a party is wronged in the United States, to whom can he apply for redress? If public opinion, public opinion constitutes the majority; if to the legislature, it represents the majority and implicitly obeys it; if to the executive power, it is appointed by the majority, and serves as a passive tool in its hands. (Democracy in America, 1956 edition, 114).

S4.2 Though many complex arguments were mounted in this claim to reduce the Treaty’s clear terms, the basic principles of justice inherent in the Treaty, cannot be denied. A primary principle for the settlement of New Zealand was that Maori would not be relieved of their important properties without their clear assent. Their fisheries were included. ‘Their fisheries’, we find, means their business and activity in fishing (though it also includes much more), but in the context of this case, it was their interest in maintaining and developing their fisheries that was mainly protected.

On the evidence the fishing activities of the Muriwhenua people involved the whole of the adjacent continental shelf. Commercial fishing by others must necessarily have interfered with their full, exclusive and undisturbed right to maintain and develop their fishing capabilities. Accordingly, in Muriwhenua no commercial fishing could have taken place on the continental shelf without the agreement of the local tribes. There is no evidence of any such agreement.

The Treaty created no impracticality in our view. The principle was no different in relation to the land. In the case of both an agreement was required before free access to either could be obtained. Any impracticality today results not from the Treaty but from our failure to heed its terms. The important point is that there was, and still is, room for an agreement to be made.

Nor, in our view, was the bargain in the Treaty over-generous to the Maori side. Maori have profited in various ways from the settlement that ensued, but the solemn guarantees in the Treaty, were a small price to pay for the acquisition of sovereignty and for a legitimate right of entry for large numbers of settlers.

S5.1 It is all too clear that over the years, numerous and serious breaches of the Treaty have occurred. The effects have been enormous. A long struggle for the recognition of Treaty fishing rights has involved the claimant tribes in protracted and expensive proceedings and negotiations involving the bureaucracy, Parliament and the courts. It has cost them income, jobs, trade and opportunities to develop their own tribal fishing industry. It is scandalous in our view, that following the long denial of those just rights and property interests that the Crown was obliged to uphold, and despite their former initiatives and industry, unemployment amongst the claimant tribes should rank with the highest in the country.

It is of particular concern to the Muriwhenua claimants that most of their tribal members have had no option but to leave the area in search of work. The maintenance of the tribal base, represented in their small communities, is highly important to them. There are hopes that many will return to the area if job opportunities can be found. Only a brief survey of

their landed position is required to underline once more, the significance that fishing has for them if work is to be found.

S5.2 The final irony for the Muriwhenua people was the Quota Management System, introduced for the management of fisheries in 1986 and which apportions the total commercial catch that might be taken of various fish, to individual commercial fishermen. Its main intention was to limit the commercial fishing effort, as is very much required, but the by-catch was to privatise the greater part of the fishing resource, and to gift property rights, of some value, to those who had been responsible for overfishing. The value of the exclusive rights of commercial fishing so far apportioned to individual fishermen is worth over one billion dollars on the quota exchange. The annual rental return to the Crown is currently some \$21 million.

The system, we find, is in fundamental conflict with the Treaty's principles and terms, apportioning to non-Maori the full, exclusive and undisturbed possession of the property in fishing that to Maori was guaranteed. Like the right envisaged by the Treaty, the quota right of fishermen is held in perpetuity but may be sold, or some other agreement or arrangement may be settled upon.

The system has not only excluded the Muriwhenua people, but it has placed real difficulties upon new fishermen getting in.

The Quota Management System may be contrary to the Treaty, but only as it is presently arranged. As we have said, the Treaty contemplated that new agreements may be made. There are many good features to commend the quota system, and if agreement can be reached, it appears that Maori interests could be accommodated within it.

S6.1 A new agreement or arrangement is now essential in our view. Rightly or wrongly, new circumstances now apply and a number of conflicting private interests, honestly obtained, must be weighed in the balance. It is out of keeping with the spirit of the Treaty, this Tribunal has earlier said, that the resolution of one injustice should be seen to create another.

We do not venture far into these matters in this report, for we are advised that Government has established a working group of Crown and Maori interests, through which some agreements may be reached. Our concern has therefore been, at this stage, to expand upon the data base that the working group may need, by considering the nature and extent of Treaty fishing interests, and by drawing particular attention to the Muriwhenua circumstances and needs, and having regard to the national scene.

S6.2 It is the restoration of the tribal base that predominates amongst the Muriwhenua concerns. Any programme would be misdirected if it did not seek to re-establish their ancestral association with the seas, providing for their employment, the development of an industrial capability, the restoration of their communities and the protection of their resource. Their own current programmes directed to those ends are grossly under-funded and much assistance is required.

We briefly review in that context some steps taken in Canada and the United States for the restoration of the commercial fishing activities of the indigenous people there. 'It makes more sense' it was said in a Canadian report 'to enhance the ability of Indian people to support themselves through the fishing industry than it does to spend increasing amounts of federal revenue supporting them on social assistance'. An Indian Fishermen's Development Corporation was proposed, with substantial funding recommended as well as the allocation of a defined catch share.

Were those sentiments to be endorsed in Muriwhenua, we expect they would still add a rider, that somewhere in this great scheme of things, in the changing economies and technologies of our day, there must still be a place for tribal communities.

Many other issues are considered in this report and findings are made to assist the negotiations that are already underway. We consider there is little profit to be had in some of the debates that rage, over who owns what fish and in which zone, or which people can sell fish and which must simply survive. None of those arguments have much relevance to the Treaty. The sooner they are buried, with obtuse points of law, the quicker will substantive justice be regained.

## PART I THE INQUIRY

# 1. THE PROCEEDINGS

## 1.1 THE FISHING CLAIM

1.1.1 The Muriwhenua Claim began with a letter of 7 June 1985 from the Hon Matiu Rata for Te Hapua 42 Incorporation and the people of Ngati Kuri and Te Aupouri. It was alleged, amongst other things

. . . that the Ministry of Agriculture and Fisheries acting on behalf of the Crown has failed to meet its obligation in the terms of the Treaty of Waitangi by presuming that all our customary and traditional fishing rights and interests have been completely extinguished' (Doc A1).

Shortly before hearings commenced, we received a claim in substitution for that first filed, extending the claims made as well as the number of claimant groups. This arose partly from the widening of our jurisdiction to enable a review of past events.

In the course of proceedings leave was given several times to amend the substituted claim, and not only because the requests to amend were unchallenged. It seemed to us inevitable, where claims are made for tribal groups of indeterminate and scattered membership and counsel have no prospect of briefing the evidence of all who wish to give support, that other issues within the general ambit of the claim should emerge from the evidence and submissions, or that there should be some conflict of opinion within a claimant group. We are also aware that marae discussions invariably occupy adjournments and result in further instructions to counsel. We therefore accepted amendments with more readiness than usual, where satisfied that the additional issues were or could be notified without prejudicing the preparation of replies. The final form of claim, incorporating later amendments, is printed as appendix 1. (As we shall see, a similar flexibility was also extended to other parties and in particular to the Fishing Industry which appeared at a late stage.)

1.1.2 The claim covers a range of issues affecting both land and waters. Water issues cover matters of management, control, pollution and fishing. By agreement, and because of certain pressures, this report deals only with fisheries. Land claims and many other issues have been deferred and are not considered in this report except where findings on treaty fishing 'rights' consequentially affect other areas.

It became necessary to sever the claim in this way. The disposal of fish 'quotas' to private fishing interests, which forms part of the complaints, is a current policy of major national importance that has been partially implemented and is still proceeding. Further decisions are required on the quota programme, and it became important that those affected should be advised as soon as practicable of the nature of the Muriwhenua fisheries as disclosed by evidence and research, and of the impact of the Treaty's provisions.

1.1.3 Essentially the fishing part of the claim alleges that a number of Acts and policies are inconsistent with the principles of the Treaty in that they derogate from the claimants' treaty fishing interests. The claimants maintain they are prejudiced as a result through the effective loss or impairment of what they say are substantial treaty fishing 'rights'. The disposal of fish quota causes them particular concern for it involves, in their contention, the transfer by the Crown of fishing rights that the Muriwhenua people have not relinquished.

1.1.4 Paragraph 7 of the claim refers to the Quota Management System and seeks, by way of relief, recognition of the claimants 'exclusive rights' in the areas described in paragraph 2. In paragraph 2 it is said that the land areas 'traditionally possessed by the claimant Tribes . . . are held together with the traditional fishing grounds within a 25 mile band off



the coast of the Muriwhenua mainland and Manawatawhi Three Kings Islands . . .'. For reasons given at paragraph 1.7.8 below, we consider the Tribunal is able to make findings on the customary Muriwhenua fisheries and treaty fishing interests on the basis of the evidence, research and submissions, and though that could establish interests beyond a 25 mile zone.

## **1.2 THE REPORT**

1.2.1 As mentioned above this report deals only with the fishing aspects of the claim. It must be added that it is not conclusive of them.

Counsel for the claimants argued that if we considered the fishing claims to be well founded, we should define the nature and extent of the claimants' treaty fishing interests before considering the action to be taken to compensate for or remove any prejudice that the claimants have suffered, and because such a report would assist negotiations with the Crown that have already begun. Despite the inherent difficulties of that task, we support that approach. It is necessary to settle the extent of any treaty rights in order to assess the loss, or to consider the breadth of any policies or laws that might be needed to maintain them. We also consider that an exhaustive inquiry into the nature of treaty fishing interests is a necessary prelude to negotiations.

As a result this is an interim report, directed to establishing whether the fishing claims are well founded, in terms of section 6 of the Treaty of Waitangi Act 1975, and if they are, to defining as near as can be the nature and extent of Muriwhenua treaty fishing interests to assist the claimants and the Crown to negotiate satisfactory arrangements.

The report therefore makes findings of fact and interpretation on the fisheries questions. It then urges that negotiations proceed in the light of our findings; but the question of specific recommendations is reserved in case an agreement should not be reached. We have adopted this approach because, in our view, reasonable discussions and a committed search for solutions are essential in a case like this, if the Treaty is still to work well.

We emphasise however that Counsel have not been heard on the remedies appropriate to the case.

We nonetheless regret that it was necessary to sever the land and sea claims, and that negotiations might proceed on the basis of one without the other. In the Maori manner of thinking, all things relate and connect as Atihana Johns of Muriwhenua made clear. Reparation for any wrongful acts involves more than compensation. At the heart of many claims is the hope that tribes will be restored and that more members will be able to live and work in their ancestral areas. A programme of tribal restoration requires, in our opinion, a review of the total tribal resources and the inter-relationships between the tribes. Muriwhenua has a small land mass and, poor soils but an extensive coastline. There the resources of the sea have special significance, and land and sea have traditionally been worked together.

## **1.3 THE CLAIM AREA**

The claim area contains the northernmost peninsula of New Zealand. It extends from Whangape Harbour on the west coast to Mangonui on the east, and includes the outlying islands (the claim mentions particularly the islands of Manawatawhi, or Three Kings, and Motu-o-Pao). These are the ancestral lands of the five Muriwhenua tribes.

The fishing claim relates to the inland waters and surrounding seas of the claim area.

#### **1.4 THE CLAIMANTS**

The claimants are recognised kaumatua (leading elders) of the tribes of the Muriwhenua area, claiming for themselves and for the members of the tribes they represent. They are, in particular,

The Honourable Matiu Rata representing Ngati Kuri;  
Wiki Karena for Te Aupouri;  
Simon Snowden for Te Rarawa;  
Reverend Maori Marsden for Ngai Takoto; and  
MacCully Matiu for Ngati Kahu.

The claim is also on behalf of certain Maori Incorporations and authorities of the district with responsibility for the administration of assets and the promotion of the interests of their shareholders, beneficiaries and the Muriwhenua Maori generally.

They are

Muriwhenua Incorporation  
Te Runanga-o-Muriwhenua Incorporation  
Murimotu II Trust  
Parengarenga BC3 Trust  
Te Aupouri Trust Board  
Ngati Kahu Trust Board  
Ngai Takoto Tribal Executive, and  
Te Rarawa Tribal Executive

## **1.5 THE CLAIMANT TRIBES**

As is usual amongst adjoining tribes, the five tribes of Muriwhenua are at once fiercely independent and inextricably interrelated. Appendix 2 which records the ancestral relationships between them is a precis of extensive evidence compiled by Tribunal staff.

It also establishes the ancestral entitlement of the five tribes to the Muriwhenua lands.

The evidence was gleaned from the oral histories given by elders, much of it on the slopes of the Muriwhenua hills during site inspections, and as recorded on tapes. Needless to say, the elders' stories of the ancient origins of the Muriwhenua people vary in detail, and those we heard depart also, on occasion, from certain published works. The elders however, presented no books to us as having their authority, and as it has not been necessary for us to determine the correctness or otherwise of conflicting historical versions, assuming that were possible, the accounts given are from them.

It is enough for us to record that from the testimony as a whole, we are more than satisfied that the five tribes of Muriwhenua share a sufficient inter-relationship, sense of common identity and community of interest as to be seen as one group, and that no purpose would be served in compelling separate claims.

Rather, it considerably assisted proceedings that a common claim was brought, allowing us to concentrate on the main issues without the distraction of tribal cross-claims. To achieve that result some old feuds had first to be resurrected and resettled, to remind those affected of the need to maintain unity. Our hearing at Ahipara was preceded by a significant event; twelve Aupouri youngsters ran an 80 kilometre relay down the Ninety Mile Beach carrying a gift of potatoes to Te Rarawa, to reinter an allegation of some 160 years standing that the former had once stolen from the food stores of the other. The gift was recognised and a united claim was presented.

## **1.6 OTHER TRIBES**

It is important, in the Maori order, that ancient connections with more distant tribes are also recognised and maintained. Accordingly, in the course of our hearings the claimant tribes received on their marae the representatives of other tribal groups, the latter then appearing before us to make known their support.

Two neighbouring tribes, Nga Puhi and Ngati Whatua were both represented. They also share significant historical and genealogical links with the claimant tribes, but they are more distinctive groups whose fishing claims must constitute a separate cause of action.

A Tainui delegation from Waikato also came and presented most helpful data on the descriptions of Maori traditional fisheries from early European travellers. The close relationship between Waikato and Muriwhenua is illustrated in the famous story of Reitu and Reipae, two eminent women of Waikato, as related to us by the Muriwhenua elder, Ephraim Te Paa, on the Ahipara marae. The meeting house there is adorned with a bird carving to commemorate the legendary manu (bird) of Ue-oneone, of Nga Puhi, which flew to the Waikato to deliver the two young women as his wives. En route, Reipae tarried too long at Onerahirahi, and later married Tahuhupotiki. Whangarei Harbour is named after her, the original name being Whanga-a-Reipae. Her sister Reitu, arrived at Te Tomo pa, to marry the northern rangatira Ue-oneone. The descendants of Reitu and Reipae evidence the close ties between the Northern and Waikato tribes.

Ngai Tahu and Ngati Mamoe were represented though they come from the distant Te Waipounamu (South Island). They also share genealogical and ancestral canoe connections with the Muriwhenua people. Indeed, to the present day, a major hapu (subtribal group) of Ngai Tahu is called Kati Kuri and is a branch of Ngati Kuri of Northland.

But it does not follow that the tribes beyond the Muriwhenua district could join in the claim as holding a common cause. The position is rather the reverse. The South Islanders in particular stressed to us that their circumstances were substantially different. They urged that we should not make findings and recommendations on the Muriwhenua claim so as to imply that these might have national application to all New Zealand's tribes. The Fishing Industry made the same plea, contending that Muriwhenua may not be representative of other tribal situations.

## **1.7 THE HEARINGS**

### **1.7.1 First Hearing and State-Owned Enterprises**

Our first hearing began on the Te Reo Mihi marae, Te Hapua, on Monday 8 December 1986 when the mana of the marae was handed over to the Tribunal (see para 1.8). Despite the remoteness of that place, the orderly development of the claim was nevertheless disrupted by the passage of other business in Wellington. Counsel for the claimants drew attention to the State-owned Enterprises Bill then before the House of Representatives and about to pass to a third reading. The claimants, he said, laid claim to Crown lands in the district. The Bill, he claimed, would pass those lands to certain State Enterprises about to be established, to the prejudice of the claimants' prospects of recovering them. He submitted that the Bill was contrary to the Treaty, which envisaged protection for the just rights and interests of Maori people, and he urged an immediate report on the Bill, with a recommendation that the Bill should not proceed.

The Bill involved a matter of major national policy and careful studies and representations were properly required. Neither the exigencies of time nor the facilities at Te Hapua permitted that course, but conscious of the urgency of the matter, and being of opinion that counsel's submission was not without substance, we reported that day to Government, through the Minister of Maori Affairs, urging that the responsible Ministers of the Crown decline to transfer Crown lands in Muriwhenua pending the completion of our inquiries and a final report. We also expressed doubts that the Bill itself was consistent with the principles of the Treaty without at least some amendment that continued the responsibility of the Crown to return Crown land upon proof of a proper claim. The full text of our report is printed as *appendix 3.4.1*.

We have since been relieved from further inquiries into that aspect of the claim, at least at this stage. On 18 December 1986 the Bill was enacted with amendments providing, amongst other things, that nothing in the State-owned Enterprises Act should permit the Crown to act inconsistently with the principles of the Treaty of Waitangi. The effect of that and other provisions has since been adjudicated on by the Court of Appeal (*see New Zealand Maori Council v Attorney-General* 1987 1 NZLR 641), resulting in a settlement between the Crown and Maori parties now reflected in the Treaty of Waitangi (State Enterprises) Bill currently before the House.

### **1.7.2 First Hearing and Fish Quota Allocations**

Site visits arranged for the second day enabled local people to introduce the land and seas of their inheritance but their opportunity to make full submissions thereafter was thwarted a second time by yet another urgent matter involving a policy of national importance. Counsel for the claimants referred to the Government's fish quota allocation proposals as provided for in the Fisheries Amendment Act 1986. Substantial fish quota were about to be allocated, he claimed, and Counsel for the Ministry of Agriculture and Fisheries confirmed that that was so. The allocations, counsel for the claimants contended, would effectively sell Maori fishing rights which had not been relinquished. That step was contrary to the principles of the Treaty in his view, for the Treaty envisaged the protection of Maori fishing interests. He also claimed that it was contrary to law. Section 28C, as enacted by the Fisheries Amendment Act 1986, required that an account be taken of Maori fishing interests before quota were assessed and section 88(2) of the principal Act, the Fisheries Act 1983, provided that nothing in the relevant legislation should affect any Maori fishing rights. In assessing quota, no proper account had been taken of Maori fishing interests, he maintained. Contending that the allocation would cause irreparable damage, he moved for a further urgent report with a finding that the implementation of the fish quota policy was inconsistent with the principles of the Treaty. He sought a recommendation that the allocation of fish quota be not proceeded with, or at least, not without substantial amendments to the Act and to the assessments on which those allocations had been based.

The Tribunal determined that it had insufficient evidence of the nature and extent of any Maori treaty fishing rights, or of the considerations given to Maori fishing interests before the quota allocations were assessed, to enable it to give any determinative report. But after hearing both counsel for the claimants and for the Ministry of Agriculture and Fisheries, and after the latter had obtained further instructions, the Tribunal also considered that the allocation of quota would seriously prejudice the claimants if the claimants' contentions as to the extent of treaty fishing interests were substantially correct. The Tribunal has no jurisdiction to restrain action by interim injunction. Having no detailed evidence either, at that stage, on the extent of treaty fishing interests, we did not report to Government, but by memorandum to the Director-General of Fisheries of 10 December 1986, we warned against the allocation of quota before the matter had been fully investigated and reported on. The full text of that memorandum is printed as *appendix 3.4.2*.

Thereafter, the claimants led us through various other concerns and gave evidence of their tribal history and relationship to the Muriwhenua lands, but it became obvious that we would need to give priority to the fishing concern. On 15 December 1986, shortly after the first hearing, the chairman issued directions that the Tribunal would inquire into the fishing claim before all other of the Muriwhenua concerns, with the prospect of a separate report issuing upon that aspect (see appendix 3.4.3). On 23 December 1986, the Director-General of Fisheries formally responded to our memorandum, advising that our request for the postponement of fish quota allocations could not be acceded to (see appendix 4). The allocation of further fish quota was subsequently notified.

During the course of our proceedings we met with an international group led by Captain Jaques Cousteau which was visiting Te Hapua on inquiries of its own into matters of fish conservation.

To assist our inquiries on the fishing issues, and having regard to the need to do so promptly, the Tribunal commissioned Dr G Habib, Fishing Consultant of Auckland, to inquire and report on various aspects of the claim.

### **1.7.3 Second Hearing**

Having begun on the principal marae of Ngati Kuri at Te Hapua, the public hearings resumed, on 2 March 1987, on the main tribal marae of Te Rarawa at Ahipara, situated near Ninety Mile Beach (Te Wharo-oneroa-a-Tohe) and to the west of Kaitaia. The sitting concluded with a statement from the Tribunal recording the Crown's advice that certain evidence would not be challenged, and in particular, the evidence that Maori traditional fisheries carried a commercial component (see appendix 3.4.4).

### **1.7.4 Third Hearing and Motion for Case Stated**

At the third hearing in Kaitaia commencing 7 April 1987, Dr Habib tabled his first report.

Also at that hearing Ms S Elias for the claimants moved that the Tribunal state a case to the High Court on the meaning and application of section 88(2) of the Fisheries Act 1983, that 'nothing in this Act shall affect any Maori Fishing rights.' In the allocation of fish quota, she maintained, the Crown presumed first, that 'Maori fishing rights' were limited to non-commercial rights of access and secondly that Maori fishing rights were not exclusive. The evidence, which the claimants wanted appended to the case stated, showed that those presumptions were wrong, in her submission. If the wider rights contended for had the benefit of section 88(2), a justiciable cause of action arose, in her view, and if not, the Tribunal had the benefit of an authoritative opinion in determining whether the law was contrary to the Treaty in failing to provide for treaty fishing interests. Counsel for the Crown opposed that motion and we reserved our decision upon it.

We subsequently indicated that we would not state a case, upon the single ground that it was not necessary for us to do so in order to discharge our functions. We now amplify upon that decision.

The Tribunal is deemed to be a Commission of Inquiry by paragraph 8 of the second schedule to the Treaty of Waitangi Act 1975. Subject to the provisions of the Treaty of Waitangi Act, all the provisions of the Commissions of Inquiry Act 1908 apply (except sections 11 and 12 relating to costs).

Section 10 of the Commissions of Inquiry Act reads

- (1) The Commission may refer any disputed point of law arising in the course of an inquiry to the High Court for decision, and for this purpose may either conclude the inquiry subject to such decision or may at any stage of the inquiry adjourn it until after such decision has been given.
- (2) The question shall be in the form of a special case to be drawn up by the parties (if any) to the inquiry, and, if the parties do not agree, or if there are no parties, to be settled by the Commission.
- (3) The decision of the High Court shall be final and binding upon all parties to the inquiry and upon the Commission.

Nothing in the Treaty of Waitangi Act qualifies the provisions of section 10 and accordingly the Tribunal has the power to refer a point of law to the High Court by way of case stated. Indeed, by excluding sections 11 and 12 but not 10, the legislature clearly intended that the Tribunal should have the right to state a case. It is of course a very different question whether that right should be exercised in any particular instance.

We consider that any Maori fishing interests contemplated by the Treaty are not necessarily the same as the fishing rights protected by section 88(2); but we need not speculate or seek a High Court determination upon the possible correlation between them.

In our consideration of the claim that current fish laws and policies do not take adequate account of treaty fishing interests, we need do no more than inquire whether treaty fishing interests are so expounded in the law as to provide as near as may be a guarantee of their continuance, and if they are not, or if there is any uncertainty, then to recommend amendment.

#### **1.7.5 Fourth Hearing**

At a further hearing in Auckland which opened on 15 April 1987, Dr Habib read and was cross-examined upon two reports, both of which had been previously circulated to parties. Counsel for both claimants and Crown expressed satisfaction with Dr Habib's reports and with his responses in cross-examination, commending the objectivity and helpful nature of his evidence. We endorse those comments.

Counsel concluded the hearing with their final submissions.

#### **1.7.6 Fifth Hearing**

Then the claimants became aware of an intention to issue yet further quota in respect of more species. Counsel contended that the claimants learnt of this by chance, at a meeting in another part of the country, and that the intention was contrary to an undertaking given by the Ministry in the course of earlier proceedings. At the request of counsel for the claimants an urgent hearing was arranged at Wellington for 30 September 1987, to consider counsel's plea that the Tribunal report immediately. We found it impracticable to so report, but after hearing counsel, the chairman outlined some major findings of fact upon which the Tribunal members were agreed, together with our opinion that to proceed further with the issue of quota in the Muriwhenua district would be contrary to the principles of the Treaty, and our hope that the Crown would negotiate immediately with the Muriwhenua tribes before taking further steps to allocate additional quota. The full transcript of the chairman's observations is at appendix 3.4.5.

To prompt a move to negotiations before the allocation of further quota, and at the suggestion of counsel for the Crown, the transcript of the chairman's comments was sent that day to the Honourable the Minister of Fisheries.

#### **1.7.7 Quota Injunctions**

We were subsequently advised that later in that day, the High Court had issued a temporary declaration to restrain the issuing of further quota in the Muriwhenua district (see *New Zealand Maori Council and Runanga-o-Muriwhenua Inc v Attorney-General (Ministry of Agriculture and Fisheries)* High Court, Wellington, CP 553/87, Greig J.). As a result of a separate action, on 2 November 1987 the High Court issued a similar declaration restraining the allocation of certain further quota throughout the country (see *Ngaitahu Maori Trust Board and others v Attorney-General and others*, High Court, Wellington, CP 559/87, 610/87, 614/87, Greig J). (Both judgments are printed in appendix 5).

#### **1.7.8 Sixth Hearing and Ambit of Claim**

In opening the main part of the fishing inquiry, at Ahipara on 2 March 1987, the Chairman drew attention to the constitution of the Tribunal as a Commission of Inquiry, with a function to inquire and report, adding,

Accordingly, while we are presented with a statement of claims expressing specific concerns about certain matters, current fish policy for example, we see the allegations as constituting for us certain terms of reference for an inquiry, and we read the allegations in this case as calling for a full inquiry, on our part, into the whole current fishing policies as they affect, or may affect the Muriwhenua people; and we see it as our function to then assess those policies against the principles of the Treaty. Simply put, persons responding to this claim should not limit themselves to specific allegations in the statement, but should remember that this Tribunal is embarking upon an inquiry into how current fishing laws, practices and policies affect the Muriwhenua people, and whether in terms of the Treaty, some action ought to be taken.'

It is recorded that the principal claimant, Hon M Rata, then referred to para 2 of the claim in which it was stated, or contended, that the claimant tribes 'traditionally possessed . . . the traditional fishing grounds within a 25 mile band off the coast of the mainland and Manawatawhi Three Kings Islands.' He advised that no fixed offshore distance or zone should be settled. Muriwhenua fishermen freely pursued fish up to and beyond 25 miles from shore, he said, and in particular, whales and migrating shoals of tuna were followed without restriction. He claimed knowledge of a hapuku fishing ground 48 miles out.

Counsel for the claimants then advised that the evidence would show Muriwhenua fishermen were never limited to specific grounds within the 25 mile band, but made a full fishing use of all the waters in that zone, and perhaps beyond it. He then reserved the right to make a claim in respect of an area beyond 25 miles, if such a claim was justified on the evidence.

No amendment was subsequently sought to the claim, but by a letter of 2 December 1987, well after closing submissions had been made, the solicitors for the claimants wrote to the Registrar stating, inter alia,

Had the Crown honoured its Treaty obligation it would be the Maori tribes of Muriwhenua who would have used modern techniques to extend their fisheries in practice out to 200 miles.

Therefore in accordance with the reservation made the claimants invite the Tribunal to treat the claim on the basis of its extending to the 200 mile exclusive economic zone boundary.

Counsel for the Crown objected and sought an opportunity to be heard. We directed a hearing on the ambit of the claim and the matter was heard at Wellington on 8 March 1988. The New Zealand Maori Council, the Fishing Industry Board, the Fishing Industry Association and the Ngaitahu Maori Trust Board were also represented by counsel at that hearing and were granted leave to be heard in the matter, in addition to counsel for the claimants and the Crown. After hearing all counsel we recorded our decision to consider, in this report, the nature and extent of the Muriwhenua tribes' fisheries at 1840, although that could involve an area beyond 25 miles, and the nature and extent of any treaty 'rights' and interests, including whether or not any developmental right accrued. The full text of the decision is recorded as appendix 3.4.6. Subsequently the claimants notified an intention to amend their claim to include the fishery out to 200 miles, in the event that it is necessary for the Tribunal to reconvene (doc H2, 5.32).

Also at the hearing, counsel for the Fishing Industry Board and counsel for the Fishing Industry Association sought leave to appear and an opportunity to make submissions at a later hearing. Leave to appear was granted, and for the reasons given in the decision printed as appendix 3.4.6, directions were given for them to be heard at a further hearing in Wellington on 5 April 1988. The Board and Association, and also the Crown, made submissions on that day, and counsel for the claimants was heard in reply.



As the Fishing Industry Board and Fishing Industry Association made joint submissions for the most part, they are collectively referred to in this report as ‘the Fishing Industry’.

### **1.7.9 Final Hearings**

The Fishing Industry presented submissions at Wellington, with the Crown being heard in reply on 5–7 April 1988.

This extended to an eighth hearing at Wellington on 28–29 April 1988 to complete the Crown’s submissions and to hear final replies. A submission was also received from the New Zealand Maori Council.

We concluded by granting leave to the Muriwhenua claimants and the Crown, to move at any time after completion of our interim report, that the Tribunal make final recommendations after further hearing.

Appendix 3 details the record of our inquiry and in particular

- The persons constituted as the Tribunal to hear this claim, and other appointments made
- The public and individual notices given of the claim and of the various hearings
- Counsel and others appearing in a representative capacity
- The written and oral submissions received
- Other documents received in evidence
- The hearings and sittings of the Tribunal and
- The Tribunal’s directions, memoranda and interim reports.

## **1.8 PROCEDURES**

1.8.1 Our inquiries involved hearings in both Maori and non Maori settings, the Tribunal sitting at marae at Te Hapua and Ahipara respectively for its first two hearings, and subsequently in public buildings in Kaitaia, Auckland and Wellington. The greater part of the Maori evidence was given on ancestral lands, in the Maori language and in a manner with which the elders were accustomed. Those parts of our proceedings were also chaired by Tribunal member Mr Monita Delamere, an acknowledged kaumatua and expert on Maori protocol. Official responses and legal submissions enjoyed, for the most part, the haven of their own familiar surroundings, under conduct of Tribunal member, Mr Bill Wilson, a barrister of Wellington, and, the chairman.

It ought always to be remembered, when proceedings open on a marae, that consultation begins, and the framework for discussion is forged, before the introduction of submissions. From the first karanga of the women of the marae, to the exchange of whaikorero and waiata, the karakia and the traditional offer of hospitality in eating, sleeping and speaking together, we were reminded that mutual respect and understanding are born out of the bonds of kinship, and survive the best laid plans conceived in isolation, or the most enlightened of independent judgements. Yet the home people, conscious of the restrictions on a Tribunal charged with an official inquiry in accordance with state laws, and concerned lest the inquiry be prejudiced by the ancestral laws of that marae, presented the Tribunal with a parchment conveying the authority of the marae to the Tribunal for the duration of its sittings, enabling the Tribunal to maintain such other rules of procedure as might be

needed. The covenant conveying that authority, given with some trepidation (and humbly received), and the return of that authority to the people, is printed as *appendix 3.5*.

It was most helpful to us that the marae people extended the courtesy described. Though we have the authority of our Act to ‘adopt such aspects of te kawa o te marae’ as we think appropriate, and may regulate our procedures in such manner as we think fit (clause 5(6), second schedule, Treaty of Waitangi Act 1975 as amended), the procedure adopted enabled us to balance marae and legal proceedings.

1.8.2 It is not an easy task to capture elders’ recollections of the past and the descriptions passed on to them. It requires a patient researcher spending time in people’s homes. We adapted our procedures as far as we could to accommodate the many Maori witnesses who spoke, and to remove some constraints, we restricted the cross-examination of elders’ evidence, requesting counsel to state their concerns so that we ourselves might invite a reply. We accepted group evidence and allowed some discussion as tribal members assisted elders in their recall of events and matters of oral tradition. We dispensed with sworn testimony having regard to the nature of the evidence, the inevitable mixture of fact and opinion, and the presence of kinfolk on a marae to provide the necessary sanction against errors or slanted accounting. We also listened to elders during site visits, in the company of counsel, for it was easier for them to talk of former villages, past events, fishing grounds and practices when standing on the land that recalled those matters to mind.

1.8.3 Some groups also insisted that their evidence remain confidential to the Tribunal and counsel and it was given on condition that their evidence of the precise location of favoured fishing grounds, the time to fish there and the methods employed would not be disclosed, save to a court of law upon review. Confidential submissions on fishing grounds, navigation and traditional knowledge are marked by asterisks in appendix 3.3, and that confidentiality extends to the associated oral testimony recorded on tapes.

These techniques, we consider, and the encouragement given by Maori members, exposed a wealth of information that might not otherwise have reached us. Especially however, we were grateful to many younger tribal members who had earlier briefed certain evidence and who, without leading, encouraged elders to talk on certain matters that might otherwise have passed mention.

For the most part then, the Maori evidence was freely and willingly given. Other affected parties in our view were not without the opportunity to respond or to offer evidence or opinions in rebuttal. Nor was it beyond our wit to treat with caution, evidence requiring a lengthy recall or dependent upon oral transmission, or beyond the wit of counsel to make submissions on the weight to be attached to certain contentions or on the need to distinguish matters of fact and opinion.

PART II NEW ZEALAND FISHERIES

## 2. THE CLAIMANTS' ACCOUNT OF FISHING

Ruia, ruia  
Opea, opea  
Tahia, tahia  
Kia hemo ake te kakoakoa  
Kia herea mai ki te kawau koroki  
E tataki mai ana i tana pukaro whaikaro  
  
He kuaka marangaranga  
Kotahi te manu i tau atu ki te tahuna  
Tau atu! tau atu! tau atu!\*

### 2.1 RECOLLECTIONS

Fish stories are apocryphal, in anyone's language, but those we heard in Muriwhenua were too often affirmed and corroborated too well to defy belief. They tell of native communities so bound to the sea with a wealth of laws, customs and skills, and who once enjoyed a supply of fish so bountiful, that it sometimes seemed we were in another country.

I remember my parents . . . leaving early in the morning to go fishing) for no more than two hours. Then to awaken to hear and smell fish frying for breakfast, and later to become involved in this venture myself. Today this can only take place with unusual good-luck on the fisherman's side . . .

Any other residents of Te Hapua who were around there in the 1960's and earlier will, I am certain, vouch for the abundant fish-life in the Parengarenga Harbour mullet jumping and splashing continuously, schools of kahawai appearing in the foam-filled waters, trevalli, parore, kingfish and all kinds of fish beneath the Te Hapua wharf, piper and karehe, or herrings visible all around the shores. Floundering was an everyday past-time for us children. Shell-fish life was used only when needed, or a change of diet was called for . . .

I recall going spear-fishing with boys of my age. Spears used were either double or four-pronged. Many fish became targets for those spears, mullet, flounder, parore, trevalli, tuna-moana and snapper. Many weekends were spent in this way . . . (Wiremu Paraone, docB33).

In fact we were visiting the past. The handful of tribal members who can live from fishing today, and the dearth of fish now to be found, belie a vastly different age. Yet fragments of former years survive in the memories of elders, and a mass of detailed data on fishing beliefs and methods, serves to embellish the faded parts.

MacCully Matiu described the tree used to fashion a wooden fish, providing a soft outer and hard centre. The lure, inlaid with paua shell, was used at distant fishing grounds . . . location described . . . noted for particular shark, and was lowered to a certain depth. Once taken by the shark, it was played with until the teeth came out embedded in the lure. It was not Maori

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\* \* This northern tauparapara (welcoming call) invokes the image of the kuaka (godwit), a migratory bird whose visits to other lands, and regular return to the north signifies the importance of food resources in providing hospitality to visitors. The kuaka has been adopted as a symbol of the unity of the five tribes joined in the Muriwhenua claim. 'When one comes (to the sand bank), all come'.

practice to take life needlessly. The shark's teeth would grow again. Those extracted were for ear pendants (from a translation of the oral evidence of M Matiu).

Tradition lives on in Muriwhenua though the tribal land and sea resource is sadly depleted and many people have moved away. Here where the land ends and oceans divide on a long narrow isthmus, the legendary path home for the spirits of Maori dead, past and present linger on grounds enveloped by a timeless sea.

To understand the foundation upon which our people lived their lives, we must first understand their spiritual beliefs as practised by their leaders, priests and people as a whole, in their time. In regards to our fishing rights and traditional grounds, we must first examine their spiritual concepts before we can understand how they were able to control their fishing areas, and all that that entails (Wiremu Paraone).

Others recalled more recent times.

Being the youngest in the family, I accompanied my father and friends on many boating trips both in the harbour and offshore. The species of fish sought was mainly snapper, hapuka and shark when running, fished with hand-lines. Main fishing spots and marks and pointers by which they could be found was given to me, which I still find quite baffling and hard to remember . . .

Twine nets were in evidence in our area as far back as I can remember. They were used on mullet and piper mostly . . .

Cray-fish was fished for, trapped in pots or dived for. Cray-fishing with a line and a short piece of manuka sharpened on both ends with paua bait on the stick was the method used . . .

[I recall] snapper being herded up the Waiuhua channel, to be blocked off at the top, and enough taken to meet the needs of those present. Members of our community will tell you that not only is this true, but some of them even took part in this venture (Wiremu Paraone).

Most school breaks were spent with parents accompanied by other families and friends in traditional shell-fishing areas. Transport was by horse or horse-drawn vehicles. Camps would be set-up close to mussel or paua beds, and still be within an hours ride from other species of marine life. Preserving shell-fish was an art in itself. Many hours were spent cooking and opening mussels, paua, toheroa, tuatua for preserving in jars . . . (Ratima Petera).

In the 1920s, we used to have a boat here called Tero-Mangu. This was built by the people of Te Rarawa for 12 people – six on each side, and each with oars. At that time, old Mutu Kapa used to have Tero-Mangu at his place. Before him, Eruera Wahapu's father looked after the boat. Tero-Mangu used to be taken out when the people needed a lot of fish for a hui, either a mate funeral, or a wedding or something like that. When the people used to go out, they used to have to dress in Maori clothes, and weren't allowed any kai (food) with them on the boat. They were not even allowed to smoke. We used to launch the Tero-Mangu from Te Kohanga<mr>it would take a long time to get out to Panguru (a fishing ground), and it wasn't until you could see the tip of the Panguru mountain come up between the tips of the mountains on each side of the Manukau Gorge (Te Rangituhituhi and Mongero) that you knew, you were in the right place. We would only fish for about half an hour and then we would have enough to come back with.

One time when I was 16, me and two other boys went out with Tero-Mangu. . . . When it was time to come back, I did what my father had told me – to tie all the fish and other things to the boat.

When we were nearly back in at Te Kohanga, me and my mates waited for the three waves to go in on.

Old Mutu Kapa yelled out to go in, but we waited, and so he took Tero-Mangu in. We waited for the three waves that all came together, and our boat ended up on the beach without us getting wet.

On that day, the Tero-Mangu tipped up in the waves and they lost a lot of their fish. I'll always remember that, and how my father told me to tie everything to the boat.

There used to be a puta (hole) for crayfish that our old people would take us to, at some time. At first, one of the boys would dive in and report back what he could see.

When I was 16, I had to do it. At first I saw nothing, but then I saw a white shark. It was a big one. When I reported I had seen the shark, all the old people then started getting into the sea to get crayfish. All this time the shark was swimming around. When it left us, we all had to get out of the water and back into the boat.

I cannot remember the name of the place now. In those times we never feared the sharks – not like the people of now.

I remember one time, when I was swept out in a rip off Tauroa Point. I did as my father told me – never fight the rip or the tide. So I went with it out into the sea. After a long time, I landed back in at Te Kohanga. That was the only other time I saw the white shark. It was so close to me, I tried to grab it, but it swam away. . . .

There was plenty of sharks in those times, but we never used to worry about them. If we were fishing in a good place and there were people who would come by us to catch fish, we would wound a shark and let it go. When it's wounded, a shark will go around with its mouth open and it used to scare the other fishermen away.

We used to fish all the time for kai, but when gumdigging – we would go out and dig gum for three days, that would be enough to buy our supplies, and the rest of the time we would fish and collect kai moana. Two of the people I remember knew a lot about fishing was Waaka Iraia and Tarengaroa Mehana. These kaumatua knew all about fishing.

Another place for catching tamure was six or seven miles out from Waimimiha. Only 2 or 3 miles out from Waimimiha – there was a good place for catching whapuku.

I can't remember the names of these toka(fishing grounds) (Rapi Williams).

The remoteness of the Far North may account for the survival of some traditional practices.

Having no electricity until around 1978, many methods of preserving fish were used by our people. Catches in most cases were shared to prevent waste. Pipers were threaded together with flax through the eyes and hung up to dry. Mullet was smoked and kept in this way. Most other fish like trevalli, schnapper, parore and kahawai was filleted, salted and dried hanging on rails hung at about 7 to 8 feet high. Shark was also hung out to dry. Anybody who has tasted dried roasted shark will never forget it, that I can assure you . . . Fresh shell-fish was preferred – so many fast horse-back trips were taken for this purpose . . . oysters, huwai, kokota, karahu and tipa (were) in the harbour, (and)easily gathered by boat (Wiremu Paraone).

Many recalled times when the people of the land belonged to the land in a way that was then more real.

It was happy days for us children, for our people were all working together for our survival. We used to trail after our kani-papa, grandfather William Subritzky, whom we loved dearly, on his trips to the bush for wild honey or birds and gooseberries. Our uncle Hone Neho was superb in his agricultural knowledge and mastery of horses and bullocks and deep-sea fishing.

All these qualities of leadership were natural heritage to my father also, and kani-papa and the rest of my people (Saana Murray).

They are not such happy days now. These are people who have always lived one foot on land, the other in the sea, but what is left to them of either is little enough indeed. And they complain. They object to what they see as their forced severance from the ocean life, the raiding of 'their' sea resources and now, the final blow, the 'sale' of what they claim as 'their' fisheries. For one thing was clear from the evidence adduced, the tribal fisheries covered the whole of the surrounding seas, and the traditional user, the established practices handed down, were far more extensive in character than most of us had guessed.

## **2.2 FISHING GROUNDS**

To assess the extent of the former sea user, Dr Habib provided a synopsis of the evidence of those who referred to the favoured fishing grounds of their tribal areas and to the fish species with which they were familiar. Generally, Maori names were used to describe those fish, but the Muriwhenua, English and scientific names for each are recorded in appendix 6.

We mention at the outset that witnesses spoke for their own hapu or tribes, and did not presume to describe areas to which they did not belong. Though the five tribes had merged to bring their claims the separate accounting of fishing grounds, methods, expeditions and traditional knowledge lent credence to the oft-repeated assertion, that although some fishing grounds were shared with one or more neighbouring groups, the far greater number were accepted by all as the exclusive territory of one tribe.

Reverend Harold Petera represented the Ngai Takoto people of the shores and islands of Rangaunu Harbour. He referred to the Harbour's shark resources, to pakoki, the January-February shark fishing period, to other food gathering processes in the area, to rahui systems and to the signing of the Treaty of Waitangi by Ngai Takoto tupuna (doc B30).

This harbour has sustained our people for centuries, it has been admired, envied, sung about and fought over. . . . The harbour is particularly noted for its shark. Great quantities of shark have been taken over the years. People from all over the North gathered on the shores of the Rangaunu to participate in shark fishing excursions. . . . Food gathering activities in the Rangaunu were conducted under the control of various rangatira. They were responsible for ensuring that the food resources were not ravaged (doc B30).

Wiremu Paraone of Ngati Kuri and Te Aupouri described fish resources on Parengarenga Harbour in the 1940s. The fish were of great abundance, he said, with large schools of mullet, kahawai, trevally, parore, kingfish, piper (kareha) and herrings being visible all the time, and other species like snapper, flounder and shark being freely caught. Shellfish were plentiful – oysters, huwai, kokota, karahu, mussels, paua, toheroa and tuatua. Salting, drying and other means of preserving were routinely used. He recounted harbour and offshore fishing trips, locating and relocating grounds time after time, from landmarks, and described the best grounds for snapper, groper, shark or crayfish (docs B33, B34).

Wiremu began commercial fishing in the area in the 1970s and claimed he and his partners were catching up to five tonnes of product each week. He left the industry voluntarily in 1978 in the interests of resource conservation. Briefly he described a box-net operation offshore from Parengarenga Harbour and oyster farming inshore. Both operations he considered to have merit (doc B33).

In a later address Wiremu gave further evidence of particular fishing spots and the associated fish and shellfish species to be found. He identified in Karatia Estuary 9 grounds, in Waitiki Estuary 20 grounds, in Waihuahua Channel 8 grounds, in open waters 17 grounds, in Poroporo Estuary 14 grounds, on the open coastline from Parengarenga Harbour entrance to Cape Reinga 27 grounds, and at Te Oneroa-o-Tohe, 4 grounds.

Species given specific mention were snapper, tuna-moana, kahawai, trevally, mullet, flounder, parore, maomao, kingfish, shark, butterfish, brown moki, ahurere, ngakoikoi, maratia, gurnard, skates, herrings, mackerel and snappers, which the people preserved by sun-drying methods.

Toi Murray and others spoke of the Whangape Harbour area. Toi listed snapper, mullet, trevally, karati, kowaitai, flounder, kaahu, oyster, paua, kina, pupu, kotore moana, tuatua and koura as species with which he had been involved.

Toi was once an Honorary Maori Fisheries Officer for the Whangape which, he said, enabled him to enforce constraints on visitors to the area, Maori and Pakeha alike, and including young Maori brought up to city ways knowing little of their tribal law. His licence was taken from him, he said, and he still does not know why. All he had was a letter.

Mr Murray's size, robust personality and obvious great love and respect for the local sea, suggested to us he needed no papers to exercise an influence in the remote Whangape and yet we could only regret that official enforcement agencies have lost such a good ally or that it might have seemed inappropriate for control to be vested in local Maori people.

Still, Toi continues to 'police' fishing activities on the Whangape despite the lack of official authority. He believes his activities help to control many abuses although some illegal activities still continue. Local people, Maori or Pakeha, were not a problem, he said. Those with trailer-borne boats from other areas regularly visit the Harbour to fish, he claimed, and sell their catches in distant centres, like Kaitaia and Whangarei. This, he considered a major problem in the conservation of the Harbour's fish resources along with the large trawlers that, he claimed, fished close to shore in the vicinity of Whangape Harbour. He attributed the noticeable decline in fish stocks along the coast to this type of activity.

Some 22 named fishing grounds were identified between Herekino and Hokianga Harbours. The area in the vicinity of Herekino is rocky and accessible mainly by boat whilst the area to the south is more open and sandy.

In the past, we were told, these grounds and sea areas were treated with great respect and some grounds are still tapu to Muriwhenua people. In the manner of past generations, elders still monitor the amounts of seafood taken, so that the sea will always be plentiful in its bounty, but, they complained, they can no longer count or control the losses from 'outsider raiding'.

Te Rarawa were represented by Koro Snowden and others. Koro said he has fished in the vicinity of Ahipara for over 40 years. The fish have become very scarce, he said, due, in his view, to massive overfishing, particularly by large trawlers from outside the area.

In earlier times, Koro recounted, he and his colleagues fished widely throughout the area, using both inshore fishing reefs and others some 6–9 miles rowing distance in open seas. Fish such as snapper, tarakihi, groper, mullet, kahawai, mackerel and herring were plentiful as were the shellfish, toheroa, tuatua, kina, paua, mussels and koura (doc B42).



Ngair Morrison spoke of Herekino Harbour, listing eight specific fishing grounds and the wide range of species characteristic of each. They included mullet, snapper, flounder, kahawai, whitebait, herring, kariwaka, tuna, huai and kokota (doc B42).

Extensive evidence was given by members of the group on the Herekino shoreline, the history of its occupation, useage and current circumstance. Forty-one distinct fishing locations were described. Taken regularly from those grounds were snapper, trevally, maomao, mullet, tamure, parore, rimurimu, flounder, papaka, kahawai, stingray, piper, shark and dogfish; also tuatua, mussels, toheroa, kina, paua, crayfish, cockles and pupu; and seaweed.

Freshwater waterways and lakes were described where tuna (eel), mullet, and kutai were harvested. Twenty-five inland fishing locations were listed.

Finally, 12 offshore fishing spots were described. They included Kaiwaka, a sandbar 20 minutes rowing time off the entrance to Herekino Harbour where hapuku were taken; the north bank off Panguru, a hapuku, tarakihi and snapper ground some 10–11 miles offshore; Parenga Kota, a hapuku ground 13 miles off Reef Point; and Tauroa to Waipapakauri, where at a distance of two miles from shore, shark fishing predominated (doc B42).

Rapi Williams told of canoe fishing expeditions to the Panguru ground in the 1920s. The trips took several hours, but the fishing was so good that with only a brief stop, once the site was reached, the canoe was full of hapuku. Fishing is not like that now he said (doc B46).

A joint account was given by Niki Conrad, Ratima Petera, Piri Paraone, Nina Subritzky and Paihere Paraone who came as a group on behalf of Ngati Kahu, Te Aupouri, Ngai Takoto and Ngati Kuri (doc B61).

Extensive evidence, supported by marine charts, showed fishing grounds and landmarks around the entire Aupouri isthmus. Some doubling up of evidence arose for some witnesses were heard separately and out of hearing of each other. People knew of the same fishing grounds and gave the same names and descriptions for them.

Niki Conrad described fishing grounds, fish species and tribal traditions at Wharemaru, Maungaripiripi, Titirangi, Kohupotaka, Te Ana-A-Puta, the mouth of Parengarenga Harbour, Ngakahika, from Heruariki to Spirits Bay, Parengarenga Channel (12 distinct fishing locations), Ngakeno, Whareana, Takapoukura, Rerenga Wairua, Te Werahi, Rehia, Kahokawa, and along Ninety Mile Beach.

Species taken included groper, dogfish, blue cod, kingfish, snapper, trevally, stargazer, red parrotfish, moeone, kawerai, kupara, mullet, piper, flounder, stingray, shark, kahawai, ahuriri, koura, paua, kina, mussels, toheroa, tuatua, cockles, kokota, karahu and oysters.

Ratima Petera and Piri Paraone gave independent evidence covering many of the same grounds including Wharemaru, Maungaripiripi, Titirangi, Ngakeno and Whareana. Particular reference was made to the grounds of Matirirau, Tohureo and Manawatawhi.

Ratima Petera gave further locations at Te Wharau Te Kohue a Kupe, Ohai-Pai, Te Huahua, Te Paraunga-a-Kupe, Te Kanakana Waihi, Te One-o-Waikuku, Kararoa, Titirangi, Ngatuatua, Waihi, Mahurangi, Takapoukura, Kurahaupo, Ngatuio i te Huka, Te Pakohu, Wharuanui i Kapowairua, Te Tuporo, Ngataea, Motu Pananehe, Waitahora, and the fishing grounds inside and outside Parengarenga Harbour.

In addition to the species listed by Niki Conrad, all of which were found on the grounds mentioned by Ratima and Piri, the latter referred also to blackfish, maomao, small herrings, koheru, sprats, and freshwater eels (at Waitahora).

Another presenter outlined the traditional fishing grounds on Te Rarawa beach, Ninety Mile Beach south to Matapia, Waikanae, Waipakaru, Te Karaka, Te Whakatenaua and Te Arai. He added to the species listed above porae, hoki, mako shark, sandfish, toiki, conger eel, repo, ngakoikoi, butterfish, moki, aue, seahorse, sea anemone, crabs and periwinkles.

Nina Subritzky made particular reference to traditional fishing grounds outside Parengarenga Harbour, at Murimotu Island, in Spirits Bay, along East Beach and within Houhora Harbour. The fish and shellfish she mentioned were groper, snapper, maomao, tarakihi, flounder, tuatua, koura, cockles, kokota, paua, kina and sea snails.

Finally, Paihere Brown described fishing grounds along the beaches southeast of Parengarenga Harbour where the main activities were netting, tuatua gathering, spearing and longlining for fish, crayfish diving, collecting kina, paua, periwinkles, and trapping octopus. The fish he mentioned were snapper, shark, dogfish, octopus, ngoiro (conger eel), maomao, snapper, kahawai, kingfish, flounder, mullet, sole, kapeta, toiki, tarakihi and rori. Shellfish described were mussels, tuatua, tuangi, paua, periwinkles, crayfish and crabs. The grounds he named were Whakamatau, Te Kahika, Orongorae, Waitaha and Wharekapu.

Paihere also described at great length some of the fishing spots with which he was most familiar at Te Awapoka in Parengarenga. In that area he identified 21 distinct traditional fishing locations. He described a further seven grounds in Te Kaunga Estuary. Mention was made also of Lake Wahakari and the Te Kao River that connects the Lake to the sea via Tangaoke and Te Karaka. The fish species taken on those grounds were mullet, flounder, sprats, kahawai, snapper, trevally, piper, stingray, bronze whaler and eels, while the shellfish included mud snails, oysters, periwinkles, kokota, cockles and scallops.

## **2.3 LOCATING GROUNDS**

The identification of fishing ground locations was an exercise in itself. The elders described the method of finding them by visual bearings and alignments from prominent features of the land. The information was transcribed to maps and charts showing land and seabed contours. We were surprised as alignments drawn from various landmarks honed in on small shallow grounds many miles at sea but totally surrounded by depths, the summits of underwater mountains. These were all identified though some were 10 to 20 miles in a straight line from the shore, and much further than that in a line from the points of departure, the local villages.

The calculation of distances depended mainly on the identification of fishing grounds on marine charts. Some witnesses had their own assessments, given in mileages or travel time; others spoke much more generally.

When we were living at Spirits' Bay, Tipene Paraha and others used to go out on their own boats to fish for groper, out on the groper fishing ground.

We would be watching the sea on shore. When it shows signs of getting rough we would light fires to warn them to return. They return loaded with fish. Only smoke can be seen from out there – that indicates the distance the grounds are from shore (Nina Subritzky doc B61).

K Te Hau referred to navigation beyond the sight of land using the seagull and penguin as guides, and noted that at dusk the birds returned to their nesting places on dry lands. Currents were known too, he said, and relied upon not only for navigation, but to speed the journey (doc B74).

Matiu Rata recalled handed down accounts of tuna and whales being pursued along the coast from Rangaunu, without restriction as to the distance from shore the boats might travel. Maori were heavily involved in whaling, he claimed, both before and after the advent of Europeans. MacCully Matiu added that penguins, and also mutton birds (oi), were part of the northerners' diet (oral, 2.3.87).

Inshore fishing grounds were regularly verified by separate presenters in independent accounts. Grounds coincided with particular depth contours and sea bottom configurations that Dr Habib and Ministry of Agriculture and Fisheries officials confirmed were known to be associated with fish aggregations.

In some cases, the route to certain grounds had been memorised in measured poetic form as these translations suggest -

From the sea, look at the white cliffs on shore. A vein of quartz can be seen sparkling in the rocks. Now look towards your port-side, the island of Murimotu appears to move and join the mainland. No sea-space is seen between. That is your spot (N Conrad, doc B57);

and

Look back from the sea to the top of (Mt) Ngatehe, then directly to the top of (Mt) Rangitane – there is a hollow at the top of Ngatehe. Fill it with Rangitane so that a round top results on Ngatehe. Look again from the sea at the Pohutukawa at Whareana, until the third rock at Nganuhi appears (N Conrad, doc B57).

We were given the names of the grounds, the hapu associated with them, and the old names of various landscape features used for bearings. Sometimes, where hapu boundaries merged and fishing grounds were common to both, groups used different cues to reach the same spot.

Our maps became cluttered with the markings made. It was soon obvious that Muriwhenua fishermen had explored all workable depths around the coast to locate the prized grounds<mr>but the evidence kept coming in.

## **2.4 BIRDS**

Not only fish were gathered at the seashore, but birds too.

The most important bird eaten in . . . this region, was the kuaka (godwit), when they came to the sand-hills of Parengarenga. They came from the other side of the world . . . and landed here during the end of September, remaining here to fatten themselves until February when they are caught.

Now look at their nests. At high tide when all the sand-banks are covered, these birds gather on the sand-hills of Parengarenga and Maruru. They wait here until low tide, only then do they fly on to the sand-banks, there to feed until the tide comes in again.

Nets were used . . . to catch them in the past. At dusk their resting places on the sand-dunes (were) located. Before they fly to the sea to feed on the sand-banks, the nets are put out.

When heard crying and rising in flight towards their feeding grounds, and when they arrive in great numbers and are settled, torches are lit. Then they fly towards the torches and into the nets. This was the method used in those days to catch them (N Kanara and others doc B57).

## 2.5 PRACTICES

Interwoven with the accounts of fish and fishing grounds were stories of expeditions, glimpses of communal life, particulars of fishing methods and pickings from what appeared to be a hidden treasure trove of ancient practices, customs, beliefs and laws as these excerpts from the evidence of Niki Conrad show.

Those expert at catching groper, are recognised. Whoever pulls in the first fish is given the title of 'Mata-Ika' . . .

But there are people, no matter how good their lines, bait or hooks, (who) never catch fish. They are called 'Tangata-Puhore', meaning 'people without luck'. They are given the task of dis-entangling lines, baiting hooks, and on return home of gutting and scaling the fish . . .

Blue cod are always the first to take the bait – always before groper. There are three varieties of groper well known to our people. They are moeone, kuparu and kawerai . . .

The particular shark called koinga has a (sharp spike above the dorsal fin. The oil from this fish is very precious. It was used on new-born babies and on the bodies of the dead.

The korohunga is a very smelly fish, but it too has a very precious oil from it's liver and like koinga the oil is used on newly born babies and the dead . . .

Kingfish is a sacred fish in some respects, according to traditional stories. It is said that a chief hungers for this fish, just prior to death. This request for 'warahenga' becomes a forecast of his demise . . .

Similarly, before dying some people hunger for karahu, the mudsnails of Te Waimahe at Ngamangu, just below the Moetangi cemetery at Ngatekawa. No mudsnails from other areas are acceptable. The sick always knows . . .

Some data were given sparingly, perhaps because full accounts have been lost, but we detected a reluctance to part with too much of tribal lore or to permit outsiders to probe too deeply. Nonetheless, accounts were peppered with snippets of other information. We learnt a little of the association of particular fish movements with the growth stages of various plants on shore, and with phases of the moon at different times of the year; the prediction of weather changes from the behaviour of certain finfish, shellfish and birds; the preferred lures and bait for different species at different times; the main species peculiar to particular fishing grounds; the months of the year for catching various species and the preferred days within those months; optimum fishing times according to the phases of the moon; the line and netting techniques to be employed during the spring tides of full and dying moon; the fish to be caught at various tides; the fish caught, best locations and techniques needed according to wind directions; the migratory, breeding and feeding habits of various fish, and also of certain birds; and the lures appropriate to some species.

We were told that fishing expeditions were mounted with a specific catch at a particular place in mind, the bait being carefully apportioned to crew so that only the required catch was taken and no excess bait was discarded. Lines were measured in advance so that fishing was conducted at the proper depth for the species sought at the chosen ground.

Some of the early nets were thought to have run to amazing lengths. Stories were told of places where stakes were said to have been driven into the ground, covering long distances from the land to the shore, for the making, mending or checking of nets, and of how some nets were said to have spanned the distance several times over. (These stories we found to be corroborated in the reports of early European explorers quoted later.)

Some places on land, it was said, were named for the extensive fishing activities of the vicinity, and we were taken to several locations, where gorse and scrub now reign, that once supported coastal villages. Many who spoke at such places had been born and raised there. They pointed to the sites of various homes and amenities, to the horse routes that linked many villages, and they recalled the families that followed them. (On a commanding ridge which marks a former main track to which several trails converged, we met the 'the money tree', a pohutukawa whose gnarled trunk is gradually consuming hundreds of coins left in its twisted recesses. It began, we were told, because those who had been 'to town' left tobacco and the like in the hollows of the tree for others, who deposited coins for what they took, the coins to be collected later. When people left the area they deposited spare coins to record their faith in the simple honesty of the villagers who stayed on. Now only the coins remain, many embedded in that old trunk.)

The laws of Tangaroa (God of the fish) are still observed by many. We were told that incantations must be offered to Tangaroa before going out to fish. Only certain days are suitable for fishing, according to the Maori calendar, and only if approved by the tohunga (experts or priests). When someone drowns at a particular place the spot is prohibited for fishing. No seafood is taken until Tangaroa returns the dead. 'Only then can the tapu be lifted', said Niki Conrad, 'indeed, three months must pass' (doc B57).

Some rules, we thought, were basically directed to the maintenance of clear waters and balanced fish habitats. It is forbidden to gut fish in the open seas, or to dispose of small fish, excess bait, food or rubbish. We were told that crews and expeditions did not take food with them and sometimes were not allowed to carry cigarettes. Bait was carefully apportioned in baskets for each member so that it might be sparingly used. It was thought by some that the disposal of waste advantaged mainly certain predators and upset the natural balance of species at particular grounds.

There are particularly strict rules for the maintenance of habitats, feeding and breeding areas. Nets and lines must not drag on the sea-bed. 'The dragnet', it was alleged, 'kills the toka' (fishing ground). The underwater contours and characteristics of some grounds are well known and must be maintained and the waters should not be muddied. 'Does the weka go back to the trap?' we were asked, 'does the tarakihi return to a stirred up area where he escaped death?'

On shore, sacks and baskets must be lifted, never dragged over shellfish beds. When diving, a dislodged rock must be returned to its exact position, and if the feeler of a crayfish is snapped off, the feeler must be recovered and removed from the water before further crayfish can be taken. Not surprisingly, it was the view of many witnesses that the disappearance of toheroa from Ninety Mile Beach was due to the use of that beach as a road.

Those days things like toheroa, no-one would get them if they weren't fat. . . . they had a radar station up in Te Paki and these Durfora trucks belting up and down (the Ninety Mile Beach), the toheroa disappeared . . . But after the war they came back, and they were big. But they went with the vehicles and came back after they stopped the vehicles . . . Now, if the vehicles are stopped from going over the beds today, the toheroa may return (Ken Tepania, oral, 3.3.87).

(Ministry of Agriculture and Fisheries officials did not agree that the disappearance of toheroa was due to the large numbers of cars and tourist buses that now regularly ply Ninety Mile Beach.)

Nonetheless, we considered, these rules showed the degree of care taken for essential renewable resources, and the extent of the Muriwhenua people's reliance upon the bounty of the sea. Without that explanation, it can only appear odd that a people who live on a

comparatively small land mass surrounded by huge oceans, and who had come from even smaller islands in a never ending sea, should hold to rules of hygiene and conservation that by Western standards are extreme.

Regrettably, we had no complete account of the northerners' laws and practices for the maintenance of fish cycles and species, but references were made to the care taken to fashion gear to ensure species – selective fishing, so that the wrong fish were not taken at the wrong time and place, to the need to maintain the balance of species and to the practice of retiring grounds that showed signs of depletion. Some current fish laws were challenged. It was thought preferable to take the 'undersized' of some species and much more sensible to maintain the larger breeding stock. The trawling practice of capturing fish during shoaling drew hostile reactions when the effect is to capture all the shoals and prevent replenishment.

## 2.6 COMPLAINTS

While there was an obvious reluctance to talk too much of the people's ancient traditions and beliefs, witnesses had no hesitation at all in making known their complaints.

The most regularly heard complaint, as has already been mentioned, was the allegation that in recent years the fish have been stripped from the waters, and the northern seas virtually denuded.

The old people used to have tree fences full of dried fish . . . fishing was a standard way of life . . . That would be in the 30s and 40s. Things depleted since then. The trawlers cleaned out the sea . . . Punguru, (location explained) gave snapper mostly and tarakihi . . . now that area has had it, no longer a fishing ground. Punguru . . . about 12 miles out . . . has been lost about 15–20 years but I used to load the boat (there) in about half an hour (Ken Tepania, oral, 3.3.87).

At Tapara, just out from here, and Tokanui, we go out early in the morning and the place is red with crayfish. Today we never see one. And it was no trouble to take two or three snapper for a meal, in just moments (Hemi Adams, oral, 3.3.87).

When we wanted the fish we didn't have to buy the poles, we just go down the beach here and catch it . . . (with) handlines . . . You remember Jack Pangai? He used to go spear fish down the beach. They were so plentiful he would go into the surf and spear them. I've seen lots of fish swimming along surf feeding on tuatua's now I've never seen one (Ken Tepania, oral, 3.3.87).

Though land development must surely have contributed to the deterioration of rivers, lakes and harbours, there was at least one view that the destruction of fish life affected habitats too.

Our rivers, in the early days, we could row through, even at low tide. Now we can't even drag a boat over. It has all filled in, and at Owata there are now sandbars in the middle of the harbour. I think pair trawling got rid of all the fish – the fish cleared and kept those channels open. Now the channels change all the time in a way they never did in my time (Hemi Adams on Herekino Harbour, oral, 3.3.87).

We heard no complaints against recreational fishermen, save some regrets that Pakeha did not seem to understand the necessary laws of nature. Nor were small-time commercial fishermen the target of attack, except for allegations that non-local fishermen did not all respect important breeding grounds away from their homes and had no care to ensure the

continuity of supply for local people. Some thought the establishment of local commercial fishing families brought about a respect for conservation once they sought to maintain a fishing tradition. They did not seek to make their children unemployed or to have them move away, and they had to live with their neighbours and respect their interest in the local sea.

But many were the complaints against the larger operators and the trawlers in particular. Several reported on trawlers operating close inshore, on massive dumping at sea (with claims that beaches have been littered with dead fish), and there were complaints of nets dragging the beds and destroying habitats, of gutting at sea and of the dumping of waste, garbage and spent gear. A number expressed real grievance with limitations placed upon their traditional fishing, whether through laws or the simple lack of inshore fish, while almost daily they witnessed (and we witnessed too), fishing boats from distant places plying the waters of their forbears, with no apparent regard whatsoever for the interest of the local people.

Specific reference was made to crayfishermen depleting grounds 'belonging' to particular hapu.

I would see 20 or so boats there at a time, taking 20 sacks or more each, and the reef was soon fished out. Some survived, but now I see about 7 boats have started there (Koro Snowden, oral, 3.3.87).

The importance of the fish life to the claimant people, their culture and economy was stressed too, of course. They claimed that through strict laws and sea knowledge they had preserved the rawa moana (the bounty of the sea) over many generations without diminution of the resource. Their communities were dependent upon the sea life but, they claimed, strangers had destroyed that life within a few decades. We survived the depression, said Koro Snowden, through living on seafood, and he hinted that his people would need to do the same again, if the seafood is still around. Others added that tribal members had no substantial record as full-time commercial fishermen, as it was their tradition to work both land and sea, and those who fished commercially did so usually on a part-time basis, being also farmers, or agricultural contractors using fishing to supplement their incomes. Many farms were small, uneconomic in themselves, and only fishing enabled some families to continue in the area it was said. Others fished for their household needs, and all fished for local marae gatherings and major hui, where the traditional manaaki (hospitality) for visitors required a substantial supply of local foodstuffs. The loss of a commercial fishing income was claimed to have forced the closure or amalgamation of some farms.

Ever since I was a child, my livelihood was involved around the land struggle of our people. Our lifestyle depended mostly on our natural resources for our survival.

In 1949 the gumdigging was phased out, and that part of our livelihood was being affected.

When the land was being incorporated in about 1968, the Auckland people were advised to come home, as there will be job opportunities.

These included working in the forestry, land development, and also fishing.

My brother and I applied for a fishing licence. We purchased the necessary fishing gear, a boat, etc., thus to establish ourselves in the fishing industry.

This did not last very long as we were refused the renewal of our licence by the Fisheries Department. Their reason for refusal – that, we did not comply to the requirements – not fulfilling the requirements for quota. I find that very unfair – being a small time fisherman.

With regards to the Parengarenga Harbour, I refer to the constant exploitation of some deep fishing boats, which are still operating there (Rapata Romana, doc B64).

Walter Murray of Te Hapua claimed to be one of nine fishermen of Te Hapua excluded from commercial fishing by regulations (doc A70). Each, he said, wished to come back in. He personally had applied, appealed, instructed lawyers and consulted the Ombudsman but to no avail. He had bought some quota but it was not enough to provide a living income. Their problem, he said, was that they were part-time fishermen and part time fishermen were being pushed out.

Peter Waapu of Waiharoa related a similar experience, of the constant restricting of the fishing methods he could employ, his eventual loss of a licence, successful appeal, of the advice that he could not continue fishing, his petition to the Minister of Fisheries, his subsequent application for fishing rights and the failure to receive any reply. ‘Now I am on the dole’ he said ‘I had borrowed and I can’t make ends meet’.

Paihere Paraone claimed to be the only commercial fisherman left in the Aupouri Tribe. ‘I have a quota’, he announced proudly, then added that it took him only two days to fill it. Similar complaints came from P Neho and J Adams.

We were advised that the people would engage in full time fishing or major fishing operations if they could, and if it meant the return of tribal members to the home area. A box net was established in Parengarenga Harbour by one of the Maori Incorporations, with support from the local village, and operated successfully for a while. Many wanted to see more of such ventures that brought income and work to the area.

Fish laws and policies were therefore the subject of criticism. Who made these laws to apply to the North as if Maori had no laws of their own it was asked, and were the Government’s laws any better? What bureaucrat could claim access to a greater knowledge than theirs, when the record of bureaucratic advice is that it results in the destruction of the fish life? Why had Maori to go cap in hand to the bureaucrat for a licence to fish, to feed families or supply the home marae when for centuries, Maori had done these things well enough, without Government control. Why were others permitted to fish the grounds of the Maori and why were the Maori restricted in doing that themselves? Why was no account taken of Maori conservation experience, and why had Maori to prove the wisdom of centuries to sceptical public servants whose experience was more questionable than theirs? Why were Maori excluded from full-time and part-time commercial fishing and why were others assisted into the industry but not them? What account was taken of their local economy and dependence on the resource? Why were no Maori engaged to enforce the regulations in the remote northern harbours? Had not the Maori honorary fishing officers been summarily dismissed? Who allowed the Government to sell the fishing rights of ‘their’ fisheries when they had a Treaty with the Crown that guaranteed those rights to them? Who said the bureaucrat could decide what Maori fishing interests were, and then, apparently, ignore them? Why was there no consultation on these things?

These questions arose from the people’s account of their fisheries. Officials, of course, were not without rejoinder but though some claimants could see that the Quota Management System had potential to manage and hopefully rebuild a threatened fish resource, most felt more keenly their own exclusion from it. Little wonder then that the claimants sought the treaty right to ‘the full exclusive and undisturbed possession of their fisheries’, with less tolerance perhaps than their forbears had shown.



## **2.7 REACTIONS OF OTHER PARTIES**

Certain non-Maori also appeared at our hearings in support of some aspects of the claim. Conservation, protection of the marine and estuarine ecosystems, and in particular the need to preserve breeding stock for regeneration of the fisheries, were major concerns of Professor Morton (doc B72) and the Houhora Riding Residents Association (doc B39). There were objections to over-fishing, to trawlers intruding into near-shore waters, and complaints that the Ministry of Agriculture and Fisheries regularly failed to enforce its own regulations, provided no rangers or enforcement officers to record evidence of illegal fishing, and failed to prosecute offending commercial fishing operators even when eye-witness evidence was provided to them (doc B39). Such alleged inaction led some witnesses to advocate a complete ban on trawling, seine netting, or even all forms of commercial fishing activity, in the harbours and coastal zones (doc B39).

There was also support for the view that local Maori should have guardianship or trusteeship rights, with some form of local regulation or control to conserve coastal and harbour fishing grounds for all (doc B72).

We were provided with the views of Mr N Jarman, then general manager of the Fishing Industry Board (doc D4). He stressed that different interest groups must work together recognising each other's traditions, hopes and needs (doc D4, paras 1–7).

Similarly a position paper of the New Zealand Federation of Commercial Fishermen Inc, included in the evidence (doc B91, a) disclosed that the Federation recognised that Maori had 'a legitimate role' in the consultative process (p1). There had been 'a failure to honour the clear words of the Treaty of Waitangi or to make provision for Maori fishing grounds in earlier enabling legislation in its view, despite 'a clear intention by the British settlers to allow Maori fishing rights to continue', but 'at the end of the day it will be a Government decision whether the Maori are granted any form of exclusive fishing rights' (doc B91, a, pp4–5). The Federation represents mainly individual fishermen or small partnerships with owner-operated boats. We were addressed by its then president, Mr R Martin. As explained in chapter 1, the New Zealand Fishing Industry Association, which represents major fishing interests, and the Fishing Industry Board did not join in the proceedings until much later, although we had been supplied with opinions of the then general manager for the latter.

Dr O Sutherland for ACORD (doc A 89) was more forthright, referring specifically to the Auckland Region Marine Reserve discussion papers and plans that had precipitated this claim. A reserves policy had been proposed, he said, without reference to the Treaty and with scant acknowledgement of Maori throughout its six page statement; a prohibition on fishing from Kapowairua to Waitangi omitted to recognise the existence of Ngati Kuri; and the emphasis throughout was on non-Maori commercial and recreational interests.

The Crown, the Fishing Industry Board and the Fishing Industry Association made extensive submissions on matters of interpretation and custom. They did not challenge the people's account of their fisheries though only the Crown, with officers of the Ministry of Agriculture and Fisheries, attended the presentation of their evidence. In fact the Crown formally acknowledged 'that the evidence as to extent of the fisheries was correct in all material respects and that there was a commercial component in (their pre Treaty) fishing in that some fish were sold or bartered'.

## **2.8 IN CONCLUSION**

Counsel for the claimants reminded us of many associated claims that had been barely touched upon in the fishing evidence – the claims to recognition of the spiritual status of Cape Reinga (Te Rerenga Wairua) and to the ownership of Ninety Mile Beach, the allegation of habitat despoliation through land usages, the claim to an interest in silica sands extracted from Parengarenga Harbour and the objections to certain proposed Marine Reserves. Counsel dwelt also on the essential economy for the survival of the Muriwhenua people, encapsulated in the proverb given by Rev M Marsden – Toi te kupu, Toi te mana, Toi te whenua, given to mean in this context, that when work is established for the people, status is established too and thus is the land secured (doc A14).

So were we introduced to a people whose way of life and ancient values have borne and continue to bear the effects of a long siege. Their communities, dissipated over many years as families moved south in search of work, are under greater threat today for now it is even harder for them to supplement an income from the sea or to gain a living from it at all, while southern-based trawlers and fishermen continue to dominate ‘their’ coastlines. Other values forced upon them are seen as having no benefit to them. New laws are drafted by strangers who appear to know nothing of theirs and who seem to believe that Maori traditional fishing means the gathering of a few shellfish on the sea shore.

These laws give no encouragement to Muriwhenua leaders who still plan to find work for their people ‘at home’ and who hope to recover the young ones from distant towns where today, their work prospects are not much better. To rebuild their people they greatly hope that the sea will once again provide a place for the Maori too. Somewhere in this great scheme of things they say, in the changing economies and technologies of our day, there must still be a place for tribal communities.

Not surprisingly the necessary testimony came mainly from elders, those who could talk of times past and describe the oral traditions handed down. The resilience of that tradition in the face of every influence to destroy it was amply proven. As we visited the tiny hamlets of the Muriwhenua people who addressed us, we could only be amazed and humbled that places so small could accommodate such knowledge, or that a people so few could be the only heirs to the lifestyle of so many.

Still, despite the vicissitudes of time and changing circumstances their culture survives. We have recorded only a summation of the main oral testimony. It took nearly two weeks to hear. But a reconstruction of fisheries as they existed long ago must necessarily come from other sources too, not just to supplement the elders’ accounts, but frankly, to test them. Research in anthropology, biology, fish management and early records are all relevant to our enquiry. Counsel for the claimants called evidence in these areas or produced as exhibits various extracts from relevant reports. In addition we commissioned Dr G Habib to undertake independent studies.

### **3. RESEARCH ACCOUNTS OF FISHERIES BEFORE 1840**

Dr Habib, a senior fisheries consultant in private practice, has had a long involvement with New Zealand and other fisheries. His overseas experience has included work in the Solomon Islands, Fiji, Kiribati, Vanuatu, the Cook Islands, American and Western Samoa, the United States of America, Indonesia, Pakistan and the Philippines. New Zealand clients have been the Ministry of Foreign Affairs, the Department of Maori Affairs, the Department of Justice and numerous private firms and individuals. The greater part of his research for the Tribunal was not challenged. On the contrary it won praise from Crown and claimants' counsel alike.

In the course of our hearings many references were given to the works of various scholars, and a number of extracts were put in. Amongst other things we asked Dr Habib to review all of the books, articles and dissertations to ensure that the quoted extracts represented a fair sampling of the authors' opinions, and to research additional works for other views. Dr Habib found a consistency of opinion and description amongst the various writers. The following overview of traditional fishing and fish resources as gleaned from written sources is based largely on Habib's work.

We first add a caution in referring to 'traditional fisheries'. Maori tradition, like Western tradition, is always changing, adapting and responding to new needs, challenges and ideas. There is no rule that things handed down cannot be passed on with improvements. In providing a description of 'traditional' fishing, we do not thereby imply that the dynamics of tradition ceased in 1840, or that that which is about to be described must represent Maori traditional fishing today. Obviously major changes were required when Maori arrived from other Polynesian Islands, and again, when the European came.

We also add a rider. The following accounts relate mainly to Maori fishing as a whole. The evidence is however, that Maori fishing practices, customs and beliefs were substantially the same for all tribes, there being a common Polynesian heritage and a continuing communication and exchange of ideas amongst them. Local variations are due mainly to the distinctive geography of some places. The evidence specific to Muriwhenua confirms that their fishing practices, customs and beliefs were not broadly different from elsewhere. What differs is that the Muriwhenua continental shelf is more extensive in comparison with its land mass than elsewhere in New Zealand; and that soils of indifferent quality led to a greater sea dependence and a distinctive post-European experience.

#### **3.1 ETHNOGRAPHIC ACCOUNTS**

##### **3.1.1 Legend**

At least the tribes are all agreed that New Zealand was born through fishing. The story may be less probable than even Jonah and the whale but there is a good explanation for it. Local history begins with the exploits of Maui, a culture hero renowned throughout Polynesia who pulled New Zealand from the depths in a fishing expedition, forbade his brothers to destroy the catch, and left it stunned at the surface, its continuing life apparent in occasional tremors.

Te Rangi Hiroa (Sir Peter Buck) presented this concise description of the Maui myth.

(Maui once) forced his brothers to continue the course of the canoe (on a fishing trip) until they evidently sailed out of Polynesia into the unknown waters of the South . . . . He at last decided where they should fish. He evidently had a line . . . used as a hook the lower jawbone of his grandmother . . . and smeared the hook with . . . blood (from his nose). With such a hook and bait, symbolic of supernatural power, he hooked a fish . . . . This huge fish termed Te Ika a Maui . . . became the North Island of New Zealand . . . . Some traditions state that the South Island was named originally Te Waka a Maui (the Canoe of Maui), which carries the implication that the fish was caught from that canoe . . . . The Maui myth of fishing up islands is widely spread throughout Polynesia . . . . The fishing up of islands is a Polynesian figure of speech, for the discoverer of an island did fish it up out of an ocean of the unknown . . . . So, Maui fished up New Zealand (Te Rangi Hiroa 1949:4–5)

With Maui came a host of Polynesian gods with their own record of wonderful deeds including Tangaroa, god and father of the fish, Punga, the father of the shark, and Ru, the father of lakes and rivers. In Maori tradition, the fish belong to Tangaroa, and it is only by respecting Tangaroa and his sea-home that anyone may take of his bounty.

Most traditions, though they vary in detail, say Kupe discovered New Zealand. He too was in the pursuit of fish, discovering New Zealand during a lengthy chase of the great octopus of Maturangi. He named this place Aotearoa, the land of the long white cloud. Upon his return to Hawaiki he informed his people of Aotearoa advising them that

the soil smelt good and food abounded in the streams, sea, and margin of the ocean (Te Rangi Hiroa, 1949:7).

It seems unlikely to us that a maritime race who peopled the Pacific, and eventually came here, and whose myths and legends are bound up with fishing stories, could ever have had only limited involvement with the sea. That theme is developed by Te Rangi Hiroa in *The Coming of the Maori*, (1949). Fish images describe the course of Maori settlement, the people of Tauranga being called Purukupenga (full net) for example, through the local abundance of fish, while those of Rangitaiki and Matata were called Wai o Hua (waters of abundance) because of the plentiful supply of freshwater fish in their rivers (1949:12).

### **3.1.2 Species, Customs and Techniques**

Te Rangi Hiroa's main descriptions are of the early fishing culture. Fish from the sea (ika moana) and from the rivers, lakes and streams (ika wai whenua) provided a rich food supply. Sea fish and eels were cleaned, split and hung to dry. Sharks, mainly dogfish species, were beheaded and also hung to dry this way. Small freshwater fish were dried and packed in baskets for future use. Small fry like whitebait were cooked in leaf packages, dried in the sun and stored. Freshwater koura were cooked, shelled and dried. Shellfish such as paua, sea mussels (kuku) and pipi were cooked, shelled and threaded onto long strips of flax, dried and kept as reserve food. The drying in all cases was by sun. The preserved food was stored in specially built storehouses (pataka) (Te Rangi Hiroa 1949:106).

Maori were compelled to be expert fishermen for New Zealand was indifferently provided with animal food. They possessed dogs and rats, introduced from Polynesia. Bird-snaring and fishing were therefore essential activities. Fortunately, the seas surrounding New Zealand teemed with fish and the freshwater areas were well supplied with eels, whitebait, koura, freshwater mussels (kakahi) and other species (Best 1924:258–259).

Dr Firth lists 35 kinds of sea fish that Maori used for food in addition to eel, freshwater fish and koura taken from lakes, rivers and streams (Firth, 1959:56-research since has increased this number to over 120). Maori knew the seasons of spawning and maturity for

the species they utilised including crayfish (Firth 1959:60). Fish were thoroughly understood in terms of their habits and movements. Offshore fishing grounds, located by cross bearings from landmarks, were visited at appropriate times according to periods of seasonal abundance or when fish condition was best. Religious ceremonies were an essential part of fishing. Gear was arranged on the day before and various karakia (incantations) were offered. The first fish taken, Te Ika Tuatahi, was returned to the sea with an appropriate karakia to invite the gods to bring an abundance of fish to the hooks. The first fish taken belonged to the tohunga (Taylor 1855:83–86).

Tapu, makutu and rahui were applied to control human behaviour and protect natural resources. Objects of importance to the community, large canoes and eel weirs for example, attracted considerable tapu. The tapu attached to objects and objectives intensified according to their degree of social importance. The construction of a large fishing net attracted full tapu to the net, the net makers and the surrounding shore for some considerable distance, ensuring that the workers' energies were kept concentrated on their tasks and that the area remained clear of the distractions of others. Tapu and makutu also protected fish resources by restraining the manner of use and extent of user. Rahui was applied to prohibit the use of fishing grounds under pressure or to prevent fish being taken out of season (Firth, 1959:245–281).

Several texts describe the fishing gear and methods of the early Maori. Notable references are Te Rangi Hiroa, 1926, 1949; Hamilton, 1908; Best, 1924; Polack, 1840, Vol 1; and Downes, 1917. The following paragraphs drastically abbreviate the resultant data. A well developed fishing technology brought from Polynesia had still to be adapted to local conditions. Indigenous materials were used to capture a largely new range of species. That the Maori adapted successfully is well shown in archaeological evidence, with middens around the country documenting the nature of Maori fishing activities, and gear. But adaptation to new experiences necessarily took time. Archaeological evidence suggests that in the interim, seal fisheries were brought near to extinction by Muriwhenua Maori centuries ago.

Widespread fishing encompassed most of the coastline, offshore islands, freshwater lakes, rivers and streams. Coastal fishing was, for the most part, concentrated in a band of only a few miles from shore but special grounds at a distance of tens of miles from shore were also visited. Almost all species of fish within the range of Maori fishing gear and methods of capture were used. The shoreline, estuarine and freshwater species were particularly well known and all species were utilised in one form or other. In Best's opinion, fishing was a national industry in Maoriland (Best, 1924:397).

Techniques were also well established with kupenga (nets), kaharoa (seines), aho (lines), matira (fishing rods), matau (hooks), hinaki (traps) and pa (fish weirs). Flax was used for nets and lines and as lining for traps and weirs; local aerial tree roots and other timber provided additional material for traps and weirs. Paua shell was used for fish lures; bone, shell and other materials were fashioned into hooks.

There were a host of nets and seines. The rangatahi was a small seine; korohe, a bag net; puhoro, a large net; while hutu, kukuti, matiratira, porohe, takeke, tarahou, tauwhatu, tawauwau, tiheru, turangaapa and whakawhiu were other net names. The tarawa was a conical net, the purangi a bag net for lampreys, the korapa a scoop or landing net for warehou, the koko a small scoop net for taking kehe, the koko kahawai or tikoko a landing net for kahawai. Horapa was a small hand net while the atata, toemi and pouraka were hoop nets or traps. The whakapuru was a fixed-frame shrimp net, the titoko a hand net arranged on a forked stick, and the toere, rohe and aruaru were also hand nets. The kaha

was a net for whitebait and the tata a small bag net. The auparu was a net used in the mouth of rivers, fastened to poles called pou-tahaki.

The mataurau was a funnel-shaped net used on rocky coastlines, the purangi a huge bag net used in tidal rivers. All fish nets and traps which were set, and not handled, were termed kawau moe roa. The toemi, a small hoop net or trap, was used to take lobster.

Some seine nets were extraordinarily large. The first explorers described some as up to five fathoms (nine metres) deep and 500 fathoms (900 metres) long. Later commentators were to observe nets double that length! These were used to herd schooling fishes like kahawai into shallow water. Some particularly large ones were recorded at Te Kaha and Maketu in the Bay of Plenty.

Line fishing (hi ika) was a favourite method of capturing fish. A great number and variety of hooks and fragments have been unearthed at archaeological sites throughout the country. Hooks (matau) varied in size, shape, material and construction. They ranged from simple one-piece hooks to complex composite hooks. In the Northland area, many small hooks were made of paua shell in U-shape and sub-circular forms.

Duff (1977), in his narrative on the moa hunter period of Maori culture, describes three types of lure fish-hooks; the kahawai lure, comprising a bent wooden shank faced with paua shell, and fitted with a barbed point on the upper surface of the distal extremity; the barracouta lure, a straight, massive, four-sided wooden shank in which the unbarbed hook was thrust right through the shank; and the minnow shank of stone, bone or shell.

The first two were a local evolution of the pearl shell lure of the tropics, and like that lure, were trolled from a rod in canoes through shoaling fish. Duff also described bait fish-hooks (Duff 1977:198–217).

The fishing lines were made of dressed flax fibre which was rolled on the thigh into two-ply twisted cord. Lines varied in thickness and hooks ranged in size, shape, material and construction depending on the fish species sought.

More has been written on gorges, traps, weirs, dredges, spears, sinkers and other types of nets which also formed part of the Maori fishing equipment. Collectively they point to a vast amount of thought, study and innovation in the Maori capture of a wide range of species.

Maori legends indicating the fecundity of fish in the pre-European period are confirmed by later writings of the early Europeans. Savage for example, an early visitor to New Zealand, reported,

This bay (Bay of Islands) abounds in fish of all descriptions . . . The snapper and bream are uncommonly fine – the crayfish and crabs excellent, and the oysters . . . well flavoured and . . . in great abundance (Savage 1807:20–21)

The colonists will find the greatest abundance of fresh and salt water fish . . . (T)he fisheries of this country would be an invaluable source of wealth . . . (pp162,168).

In 1803 George Bass, explorer and entrepreneur, sought from Governor King of New South Wales an ‘exclusive privilege or lease’ for seven years of a part of New Zealand’s seas to supply the Australian colony with salted fish, advising

I have every proof short of actual experiment that fish may be caught in abundance near the south part of the South Island of New Zealand or at the neighbouring islands

but Bass disappeared with his ship on the voyage to New Zealand (McNab 1908, 243–5).

### 3.1.3 Traditional 'Ownership' Rights

In the relationship of the ancient Maori to the natural resource, a system of definite individual rights obtained. But there were also whanau, hapu and iwi rights. The Maori tribe (iwi) was the sum total of its hapu, the hapu an aggregation of whanau, and the whanau an association of close relatives, as for example, several brothers with their wives, children and grandchildren.

Individual rights obtained to personal property, tools, weapons, clothing and ornaments. Occasionally, private use rights attached to an agricultural plot, fishing ground, or birding tree but more commonly, rights to resources were owned by a number of people in common, such as a whanau group.

To the whanau group usually 'belonged' the dwelling house, stored food, the small eel weirs on branch streams, small fishing canoes, and some gardens, fishing grounds and shellfish beds in the immediate vicinity. Though they did not formally 'own' the fishing grounds and beds, at least their prior rights of use were respected.

The hapu exercised control over larger units, meeting houses, food storage pits and pataka, the large eel weirs on main rivers, the central gardens, war canoes, larger fishing or seafaring vessels, and some specific fishing grounds.

The tribal property was made up of the lands of the various hapu, the lakes, rivers, swamps and streams within them and the adjacent mudflats, rocks, reefs and open sea. The tribe, as the greater social group, incorporated the rights of the lesser groups. Major fishing expeditions, journeys, trade arrangements, peace pacts and war were undertaken at tribal level. Cohesion was maintained through an intimate knowledge of bloodlinks, the constant deference to tribal ancestors on formal occasions and regular tribal gatherings, especially to mourn for the dead.

In practice each whanau was self-contained and controlled. The larger group would not interfere unless the matter was of wider concern. Territory and resources were jealously and exclusively maintained unless there was good reason to open these up to the wider community.

Boundary marks were common to delimit both land and water areas, but more usually the knowledge of boundaries was simply passed down. The boundaries were minutely known and natural features, streams, hills, rocks, or prominent trees, served to define both land borders and the location of fishing grounds at sea. Smaller and more specific 'private properties' were often indicated by a sign or mark of some kind, named and placed by the owners and sometimes said to carry their mauri (life-force).

But the rights of small units were always subject to the override of the hapu or tribal group on matters affecting the people as a whole. A whanau could not vacate its patch for strangers, for example, for the admission of strangers to tribal ranks affects everyone, and it could be calamitous to village life if that were done without general assent.

The nature of traditional land and fishing rights has been the subject of judicial determinations, particularly in the Maori Land Court but also in the Supreme Court. The ownership of fishing grounds was considered by the High Court in *Keepa v Inspector of Fisheries* [1965] NZLR 322 (Hardie Boys J) where it was said

Gresson P pointed out in *In re the Bed of the Wanganui River* [1962] NZLR 600 that the Maori recognised no individual or personal right of title or ownership of land. All land was held on a communal basis. So, too, I believe with rights such as fishing rights : they were at a human level exercised by individuals but they were the right of the whole tribe . . .

But it must necessarily have been an exclusive tribal right. I cannot conceive of a Maori fishing right enjoyed by Maoris generally. As the Chief Judge (Maori Land Court) said in his findings of fact:

It is well known that the Maoris had their fishing grounds at sea and that these were jealously guarded against intrusion by outsiders.

There are problems, nonetheless, in accommodating Maori customary concepts in Western terms. These problems are considered at 9.3.

### **3.1.4 Traditional Fishing Areas**

The location of traditional fishing areas is known by Maori today and was much commented on by early European visitors. Polack, for example, wrote

The sea-side is often tapued by certain tribes who possess the sole right of fishing for shell-fish on the beach (1840:275).

Best, (1909:476), observed

Thus in former times the Ngai Turanga hapu of the Urewera had rights to the waters of the Tauranga river between Otara and Okehu . . . they had the fishing privileges of the stream.

Beattie, (1920:53), noted that in Southland the natives assembled every October and November to catch lamprey. The best stations on the river were well known, and only certain hapu had the right of working them.

Nicholas, (1817:235), commented on the existence of sharply defined fishing rights at Kawakawa in Northland, the limits being marked out by stakes driven into the water. He observed several rows of these stakes belonging to different hapu, each having their prescribed boundaries beyond which they did not venture to trespass for fear of punishment from their neighbours.

White, (1889:117), referred to disputes over shark-fishing grounds off Puponga Point and elsewhere in Manukau Harbour thus

Ngati-kahu-koka claimed these grounds, as also did the Nga Iwi of Maungawhau . . . This was the cause of strife between them. At times intervals of peace obtained, when both hapu would go fishing together, but this rarely lasted long . . .

As with land, fishing grounds were clearly included as part of the Maori asset base and within the concept of traditional ownership rights. To the casual observer of the time the impression that Maori fisheries were site-specific was most commonly gained. Fisheries were seen to have functioned on a site-specific basis, whether used by individuals, whanau, hapu, or even the whole tribe.

However, so far as the tribe was concerned, it controlled not only the site-specific grounds but the whole of the inland waters and seas adjacent to its tribal lands.

An exception to that general rule relates to specifically arranged inter-tribal rights.

There were also rights of another kind; in former times, it was almost necessary for the support of life to pay a visit to the sea coast during the scarce months; thus each inland tribe claimed a right to visit the sea shore, though included in another tribe's district, and even to have a fishing station close to those of others (Taylor 1870:357).



### 3.1.5 Comparative Studies

The people of Polynesia constitute one family, the family of Hawaiki, populating a large area of the Pacific Islands in a series of migrations that began with the voyagers of Austronesian origin, thousands of years ago.

Not surprisingly then, many concepts are not the exclusive preserve of the Maori. Johannes, (1978:350), in a dissertation on traditional marine conservation methods in Oceania, wrote

The right to fish in a particular area was controlled by a clan, chief, or family, who thus regulated the exploitation of their own marine resources. Fishing rights were maintained from the beach to the seaward edge of the outer reefs. In some areas where the fishermen sought tuna in offshore 'holes' . . . fishing tenure included deep waters beyond the reef . . . until early this century, when the custom of shark fishing miles offshore died out, fishing rights extended to where the islands were barely visible from a canoe (about 40 miles).

Traditional fishing rights are still maintained in many places in the Pacific and again, we quote Johannes (1978:351).

Today each of 16 municipalities in the Palau district has the right to limit access to the fishing grounds in its vicinity. Within at least one municipality there are further subdivisions so that each of several villages has control of the adjacent fishing grounds.

According to Johannes (1982:241) this is also the case in Papua New Guinea.

Traditional inter-village fishing boundaries in Papua New Guinea are often marked by lining up obvious features along the reef edge- such as a channel mouth or protruding boulder – with a particular islet or river mouth or a large tree along the coast . . . Seaward boundaries are often held to extend out to the customary limits of fishing activity. In some Manus villages this boundary is held to be where the water depth reaches the limit of bottom fishing – 100 to 200 metres. Where pelagic fishing (fishing in the upper layers of the open sea) is important, seaward boundaries may extend to the point where land is barely visible from a canoe.

There are some interesting parallels between the nature of traditional fishing rights in Papua New Guinea and early Maori perceptions. Johannes (1982:244–245) noted that in the islands just north of Manus the rights to use certain fishing techniques, to fish in certain areas, and to catch certain species are owned by particular individuals, families or clans. The nature of the rights is often complex and Johannes noted a case of hundreds of different rights spread among 100 to 200 villagers, and sometimes relating to fishing grounds of only a few square kilometres. Fish surplus to local requirements were given away and a system of reciprocation applied. This was an integral part of an exchange system that formed the basic framework around which traditional society was formally organised.

In a paper on fishing practices in Tokelau, Hooper (Johannes, 1983) argued that the multitude of customary restrictions surrounding fishing were primarily directed to maintaining the authority of the elders and the stability of the social order. The people made extensive use of their available marine resources, both in the lagoons and the immediate surrounding ocean. Like pre-European Maori, Tokelauans used lines, hooks, lures, rods and nets of various kinds as well as traps and stone weirs. The elders were responsible for maintaining the seasonal calendar by which all fishing activities were regulated, as was also the case with the Maori. Their knowledge of fishing technique and particular fishing grounds was very closely guarded and was taught, most commonly at sea, to selected children only. The elders directed the fishing operations which were typically conducted on a communal basis and with the chiefs apportioning catches.

This applied also in Maoridom with large fishing operations being common. Gilbert Mair (1923:49) described such an example of communal fishing. The chief Te Pokiha at Maketu, directed the operation of a large seine net 1900 metres long. Several hundred were required to haul this net and the many thousands of fish caught were apportioned by Te Pokiha himself.

Richard Matthews (1910) also described a large fishing expedition by the Te Rarawa of Muriwhenua under the chief Popota Te Waha. It involved over 1,000 persons from several villages using 50 fishing canoes and lasted over two days. Popota had the ultimate control of the whole affair, the right to declare the fishing days and to control all aspects of the operations. The fisheries expertise was distributed among the crews of the fishing fleet in the form of what Firth called 'minor executive heads' (Firth 1972:230).

Tokelau fishing expeditions were highly elaborate being both a public celebration and a ritual performance, replete with taboos (tapu), anxiety, an air of high seriousness and a display of passionate concern.

Similar traditions applied to early Maori fishing expeditions. Te Rangi Hiroa (1921:444–449) described early dredging for koura and kakahi in Lake Rotorua as being conducted from large canoes, often war canoes, by elaborately dressed fishing crews who indulged in spectacular body movements during manipulations of the dredges.

An extensive literature exists on traditional fishing rights and practices and there are great similarities between those of the Maori and other Pacific peoples. Ruddle and Johannes, 1983, and Anderson, 1986, provide useful compilations. (See also 9.3).

## **3.2 ARCHAEOLOGICAL ACCOUNTS**

3.2.1 A prominent New Zealand archaeologist, Dr Janet Davidson, has emphasised the importance of fishing in New Zealand's prehistory. Fish bones in archaeological sites throughout the country confirm the extent of fishing and often reflect the fishing methods used. Detailed investigations of fish remains at different sites provide information on regional variations and strategies.

Dr Davidson has presented region-specific information for Northland, Coromandel, Hauraki Gulf, Bay of Plenty, Cook Strait, Otago and Fiordland, and has discussed the importance of various freshwater fisheries in inland areas at Taupo, Rotorua, Waikato and South Island locations. She was called by the claimants to explain the results of surveys in the Muriwhenua region and put in several submissions and documents (Nos A5, A43, A44 and A45). Once more, Muriwhenua typifies the extent of fishing everywhere, Dr Davidson describing fishing in other places for comparative purposes.

Dr Davidson's archaeological evidence reveals a long and rich history of Maori occupation in the Far North, extending back in time at least 700 years. The great importance of marine resources is shown by the wealth of shellfish remains on the surface of former pa and living sites, as well as by numerous items of fishing gear found in sand dunes and elsewhere over the years. She reported on the remains of a weir or fish trap on Parengarenga Harbour, on large quantities of shellfish in pa sites at Te Toi, Puponga and Pokere, and on the remains of kina and paua in sites along the northern shores of Te Pahi and around North Cape Peninsula. The discovery of large numbers of fish hooks made from shell and bone also provided indications of the importance of kai moana. In particular, she said, the catching of fish, and the making of fish hooks from moa bone were among the principal activities in the North. The archaeological record indicates as well, a widespread capture and use of freshwater eels.

In a 1984 publication, Dr Davidson described evidence of a wide range of fish at a Mount Camel site including a catch consisting of some 2,352 snapper, about 100 trevally, 50–80 kahawai, and 60 others of assorted species including barracouta, porae, rays, kingfish, parrotfish, porcupinefish, rock cod, john dory, groper, perch, red snapper and tarakihi. Line fishing with baited hooks and lures was an important fishing technique. From North Cape to the Bay of Plenty, she said, snapper was the main catch of fishermen of all periods.

The preservation of fish by drying was an important aspect of life for the early Maori. Fish were baked or simply hung from poles or rocks to dry. Large quantities of preserved fish were stored. The archaeological evidence is that preservation of fish was practised from at least the fourteenth century. It was probably a regular aspect of subsistence in most regions from earliest times.

3.2.2 In a further report on Northland archaeology, Maingay (1986) considers the environment of the Far North was New Zealand's equivalent to the tropical homeland of the prehistoric Polynesian settlers. Since the 1960s, systematic and extensive surveys have been carried out of more than 1,000 archaeological sites in the Muriwhenua area. There was evidence that the area was populated throughout prehistoric times, that specialised forms of agriculture were developed, and that the coastal resources were 'enthusiastically exploited'. Specific reference was made to predominantly shell middens along the beaches and dunes of Karikari Bay, East Beach and Houhora Harbour, to shell and fishbone deposits along the Kaimaumau shoreline on Rangaunu Harbour, and to middens containing toheroa and tuatua along the west coast of the Aupouri sandspit. The first prehistoric occupants at Mount Camel inside the north head of Houhora Harbour pursued a broadly based economy with fish and marine mammals as the most important items of food. Further reference was made to sealing, fishing, shellfish collecting and fish hook manufacture near Cape Maria Van Diemen, and to remains which indicate that there was large scale collection and preservation of shellfish along the coast adjacent to the Aupouri sand dunes. Other key areas, Parengarenga, Mangonui and parts of Rangaunu Harbours are unsurveyed in terms of their archaeology, but there are obvious signs to indicate that Te Hapua, Spirits Bay and Parengarenga Harbour were active settlement areas. Parts of Ninety Mile Beach and the area from Ahipara to Herekino Harbour and Whangape were densely settled as were parts of Doubtless Bay.

3.2.3 The dependence upon the sea was obvious from the archaeological reports but of some interest to us was the evidence of resource depletion. While the amount of good horticultural land was limited, as was the variety of suitable crops, the evidence suggests quite substantial environmental modification had occurred along the whole peninsula, due to soil exhaustion and destruction of the forest cover. This change over several centuries had greatly limited the agricultural potential of the area by the eighteenth century, creating a greater dependence on fish than, in say, the twelfth century, as illustrated by the Mt Camel excavations. Increased pressure on the fishery may have caused a severe reduction in the number of mammals such as seals. The orthodox archaeological view is that in many places the variety of fish caught became increasingly limited from the fifteenth century. Very large populations were known to exist in the far north, and to sustain them, sophisticated management and harvesting techniques were required, but these may not have developed until the sixteenth or seventeenth centuries.

### **3.3 HISTORICAL ACCOUNTS**

We need a constant reminder that the fish life of today is no indicator at all of what it once was. The decline is obvious, but what is not apparent is the extent of the former bounty.

Counsel had referred to some early eye-witness accounts that taxed credulity. We asked Dr Habib to seek a wider sampling of early opinion. This merely affirmed that which Counsel for the claimants had provided. While the extracts below do not all relate to Muriwhenua, collectively they describe the state of New Zealand waters in early times and the extent of native user. Such accounts as relate to Muriwhenua tell that the North was no exception. The following comes mainly from Habib's work, using ships' journals, logs and publications cataloguing the records of many travellers to New Zealand from the time of Abel Tasman. The record shows that Maori were indeed fine fishermen and were capable of operating on a very large scale, with enormous seine and trap nets used to great effect. The accounts corroborate too, the observations made in the archaeological reports.

An excellent summary of historical accounts on Maori fishing was prepared by the University of Waikato's Centre for Maori Studies and Research. That summary, (doc B51), was a valuable guide to much of the historical record, but other sources were also enquired into.

Abel Tasman reported people and gardens on the Three Kings Islands in 1643 (McNab 1914 cited in Maingay 1986), but the first reference we quote is from the journal of Captain James Cook's initial voyage. The date of the entry was 5 December 1769 when Cook's vessel was in the Bay of Islands. The visit was to survey the bay and take on supplies. They found many Maori in the bay who were most adept at catching fish.

Some few we caught our selves with hook and line and in the saine but by far the greatest part we purchass'd of the Natives, and these of Various sorts, such as Sharks, sting-rays, Breams,. Mullet, Mackerel, and several other sorts; their way of catching them are the same as ours, (viz) with hooks and lines and with saines, of these last they have some prodigious large made all of a Strong kind of grass (flax) (Beaglehole 1955:Vol 1 p219).

Joseph Banks, a botanist on Cook's ship Endeavour, made an entry in his own journal on 4 December 1769

. . . (The Maori) after having a little laught at our seine, which was a common kings seine, shewd us one of theirs which was 5 fathom deep and its length we could only guess, as it was not stretchd out, but it could not from its bulk be less than 4 or 500 fathom (700–900 metres). Fishing seems to be the cheif business of this part of the countrey; about all their towns are abundance of netts laid upon small heaps like hay cocks and thatcd over and almost every house you go into has netts in its making (Beaglehole 1955:Vol 1 p444).

While in Mercury Bay (Coromandel Peninsula) on 8 November 1769, James Cook observed

The Natives brought of to the Ship and sold us for small peeces of Cloth as much fish as served all hands, they were of the Mackarel kind and as good as ever was eat, . . . Thursday 9th . . . As soon as it was day light the Natives began to bring off Mackarel and more then we well know'd what to do with (Beaglehole 1955:Vol 1 0p195).

In January 1770, Joseph Banks made the following observations in Queen Charlotte Sound

We saw a man in a small canoe fishing . . . he took up his netts . . . about 7 or 8 feet in diameter extended by 2 hoops; the top of this was open and to the bottom was tied sea Ears (paua) . . . as bait; this he let down upon the ground and when he thought that fish enough were assembled over it he lifted it up by very gentle and even motion, so that the fish were hardly sensible of being lifted till they were almost out of the water. By this simple method he had caught abundance of fish and I believe it is the general way of Fishing all over this coast, as many such netts have been seen at almost every place we have been in (Beaglehole 1955:Vol 1 p456).

The small net for individual fishing that Banks described is now known to have been a very effective fishing method widely used in the Marlborough Sounds.

Early visitors were high in their praise of the Maori as a fisherman and of Maori fishing equipment and methods. Anderson, who travelled with Cook on his third voyage to New Zealand, remarked of Maori fishing gear

Their cordage of fishing lines is equal in strength and evenness to that made by us, and their nets not at all inferior (Beaglehole 1955:Vol 1 p893).

He marvelled as to how fish could be caught with the odd native hooks, but admitted that the Maori was a much better fisherman than his seamen.

In Narrative of Voyage to New Zealand, entry of 29 December 1814, J L Nicholas recorded

Their nets are much larger than any that are made use of in Europe . . . . (O)ne of them very often gives employment to a whole village (1817:Vol 1 p235).

Nicholas reported seeing Maori in the Bay of Islands hauling ashore an immense net containing snapper and other fish, which they readily agreed to exchange for a few nails. He noted that the people were very industrious in attending to their fisheries which were numerous and well supplied. His narrative also records that Maori observed certain fishing rights with limits to areas marked out by stakes driven into the water. Several rows of stakes were in evidence, with the stakes delimiting areas belonging to the different tribes. Trespass on areas belonging to others was resented and instantly attracted retribution.

Savage, who spent two months at the Bay of Islands in 1806, described the excellent quality and construction of Maori nets, lines, hooks and lures. The nets and lines were made of flax which he noted were of great strength and durability. He described their quality as being

. . . so excellent that it is desirable to obtain some of them for the purpose of taking bonitas (marine tuna), albacore (marine tuna) or dolphin (dolphinfish, marine, pelagic), on the passage to Europe. The natives will receive our fish-hooks in exchange for them (Savage, 1807:64).

Savage made two useful observations. First, the strength and durability of flax was considered greater than that of European materials used at the time for line construction, hence Savage's desire to secure some flax lines for the purpose of taking tuna and dolphinfish, large, pelagic (surface-dwelling) species with strong fighting qualities. Second, barter between travellers and Maori was well established at that time. Later Savage referred to Maori women being

. . . as expert at all the useful arts (of fishing) as the men, sharing equally the fatigue and the danger with them upon all occasions . . . (1807:65).

There are several useful references in the historical record to the Muriwhenua area, in addition to those quoted earlier.

In April 1772, the two ships of Marion du Fresne, Mascarin and Marquis de Castries, anchored in Spirits Bay off the north coast of the North Island. Jean Roux, an ensign aboard Mascarin, reported seeing several storehouses containing nets 80 to 100 fathoms long (140–180 metres) and 5 to 6 feet wide (1-2 metres), weighted at the bottom by stones, and fitted at the top with light pieces of wood for flotation. He noted

It was not only these nets that made us think these natives must be industrious: it was apparent in everything we saw (Ollivier 1985:133).

In 1793, a French expedition led by Commander Antoine de Bruni d'Entrecasteaux, recorded Maori occupation of Three Kings Islands (Manawatawhi) and speculated that such occupation was chosen

. . . because they easily find means to fish in the midst of the shoals . . .

Later in the day d'Entrecasteaux approached shore near North Cape and traded iron for fish hooks, lines, sinkers and fish. He noted that Maori possessed

. . . lines and hooks of different shapes; to the end of some they had put feathers, a bait which they make use of to attract voracious fishes. Several of the lines were very long, and had at their extremity a piece of hard serpent-stone, to sink them in the water to great depths . . . the sea furnishes them with food in great abundance. They sold us a good deal of fish which they had just caught; there is so great a quantity along the coast, that, in the little time that we continued lying to, we saw several very numerous shoals, which rising to the surface of the sea, ruffled it at different times for a very extensive space . . . (Labillardiere, 1802:Vol 2 82–4).

Colenso (1868:9) described the fishing at about 1840.

They (the Maori) were very great consumers of fish . . . The seas around their coasts swarmed with excellent fish and crayfish; the rocky and sandy shores abounded with good shellfish . . . The rivers and lakes contained . . . plenty of small fish and fine mussels and small crayfish; the marshes and swamps were full of large rich eels . . . In seeking all of these, they knew the proper seasons when, as well as the best manner how, to take them . . . Sometimes they would go in large canoes to the deep sea-fishing, to some well known shoal or rock, 5 to 10 miles from the shore and return with a quantity of large cod, snapper, and other prime fish; sometimes they would use very large drag nets, and enclose great numbers of grey mullet, dogfish, mackerel and other fish which swim in shoals; of which (especially of dogfish and of mackerel) they dried immense quantities for winter use. They would also fish from rocks with hook and line, and scoop nets; or singly, in the summer, in small canoes manned by one man and kept constantly paddling, with a hook baited with mother-of-pearl shell, take plenty kahawai; or with a chip of tawhai wood attached to a hook, as bait, they took the barracouta in large quantities. Very fine crayfish were taken in great numbers by diving, and sometimes by sinking baited wicker-traps. Heaps of this fish, with mussels, cockles, and other bivalves, were collected in the summer, and prepared and dried; and of eels also, and of several delicate fresh water fishes, large quantities were taken in the summer, and dried for future use.

### **3.4 ACCOUNTS OF THE MAORI ECONOMY**

#### **3.4.1 Introduction**

Counsel for the claimants produced records of a Maori fish trade that quickly expanded from the barter of fish for European goods from early explorers, to the sale of fish to all the main but rudimentary settlements established from the early 1800s. Though the Muriwhenua record is restricted to the early form of barter, the evidence of substantial fish sales to pre-treaty settlements was so extensive that the Crown readily conceded that Maori pre-treaty fisheries had a commercial component.

We were nonetheless dissatisfied that a commercial component should be held to exist simply because Maori sold fish to Europeans before 1840. We understood that tribes traded fish and other goods in a very large way before Europeans arrived, in accordance with their

own practices. The modern koha system where cash, though formerly goods, is laid on marae with an expectation in certain cases of the eventual return of an equivalent is no mere matter of social form in our view, but is the remnant of a fabric that once clothed a considerable trade. Trade applied generally in our view, just as the koha system applies in Muriwhenua as everywhere else.

Dr Habib collated evidence of the pre-European fishing trade. We have summarised the result in this chapter. It begins with an examination of the origins and practice of what has been called gift-exchange, then proceeds to consider the rapid adaptation of that system to Western trade forms.

The study points to a widely prevalent and substantial ‘exchange of merchandise’ (to adopt a dictionary definition of commerce) amongst the pre-contact tribes, but the association of the customary practice with social and political objectives, on lines peculiar to Polynesia though not dissimilar from Amerindian potlatching, ought not to disguise that it was trade nonetheless, or prevent us from thinking that business is the sole prerogative of the Western World and that nothing is commerce if it is not conducted on Western terms. The essential point is that in accordance with their own mode of doing things, Maori capitalised on their tribal resources and traded the profit of their labours for goods not readily available to them, for the benefit of their livelihoods and to their economic advantage. In the light of what follows, it seems hard to imagine that Maori should be considered as having no greater interest in fish than in obtaining that necessary for personal needs.

### **3.4.2 Resources for Trade**

The natural environment and its biological resources formed the basis of Maori economic activity, but the environment was not the same in all places nor, as archaeologists have shown, was it the same in one place at all times, due to climatic shifts and human activity.

Throughout the country lakes and rivers abounded and the extensive coastline was nearly everywhere at hand. The forests were dense and rich and the flora of great diversity. But apart from the birds, animal life was scarce. The only indigenous land mammal was the bat; lizards and tuatara represented the reptiles; the rat and dog arrived with the Maori settlers. Birds were well represented with over 200 species.

The moa existed in both the North and South Islands and sea mammals, such as seals, were much more numerous and widely distributed when the Maori arrived. This was fortunate, for the transplanting of tropical agriculture to a temperate climate must have been a difficult and haphazard task. By the fifteenth century larger species of moa had become extinct and seals were being driven to the bottom extremities of the South Island and its off-shore islands. With the moa and the seal gone from the menu for most Maori, fishing became even more important, and over 120 species are known to have been used as food along with numerous shell fish and fresh water types.

After possibly more than a 1,000 years of living in Aotearoa, and despite mistakes, the pre-European Maori had come to understand the relationship of one resource to another and of each to the environment as a whole.

The forests provided much of the raw material for their economic activity. It provided timber for a wide range of purposes, bark for roofing, raupo for thatching, toetoe for lining, aka creepers for eel pots and lashings, harakeke or native flax for clothing, cordage and nets.

The forest also provided food. Edible berries were collected from kahikatea, rimu, matai and miro trees. Hinau yielded an edible pulp. The Maori also cultivated vegetable food.

Mineral resources were utilised to manufacture tools. Basalt, different varieties of greywacke and other rocks provided stone for adze blades, pounders and sinkers. Obsidian flakes were fashioned into knife-like implements. Greenstone supplied material for adzes and chisels. Sandstone was used for grinding.

Animal products were used in a wide variety of ways. Whalebone was used for combs, ornaments, pins, fish-hook barbs and weapons. Dog skins and bird feathers were utilised for cloaks. The rat, dog, many species of birds and virtually all accessible species of fish and shell fish were drawn upon for flesh food.

Fishing and shellfish gathering were predominant activities for coastal tribes and featured highly in the economic life of inland tribes with access to freshwater lakes, rivers and streams. Marine and freshwaters were well supplied. Taylor, (1855:410–418), lists 35 species of sea fish, 15 species of fresh water fish, six of marine crustacea, seven of marine shell fish, two of marine molluscs and one freshwater shell fish, all used by the Maori. (Later studies have added more. We have identified 120 species known to Maori but continuing research is constantly finding more. Appendix 6 records the Maori, English and Scientific names for the species referred to in this report.)

But Aotearoa was also a land of great diversity, from the warm bays and inlets of the North, to the volcanic lava-stream landscapes of the central North Island, to the high ranges of the Southern Alps and the vast reaches of the Canterbury Plains. The predominant resource varied considerably from place to place and the range of life was not evenly spread. Tribes boasted of those resources for which they were best known, as appears even today in the manner in which tribes entertain their visitors. Through the possession of different resources the scene was set for exchange, but the work ethic of the Maori, which contrary to some presumptions involved much more than subsistence, ensured that the act was played.

The economic activities of the Maori were developed, according to Firth, within a framework set by the family, the tribe, the institution of property and the powers and duties of the chiefs. Maori society was far from being the victim of economic helplessness. Nor was it relieved by the wealth of natural endowments from the necessity for strenuous work. It was compelled by its environment to work, and it worked, on the whole, with success. Society attained a high excellence in individual craftsmanship, and carried out major undertakings demanding leadership and organisation. The forces at play were economic: food had to be secured, birds snared and fish caught. But the economic motive was intertwined with those that were social and religious. The social motives were the influence of tradition, religious sanctions, emulation and the search for prestige, pride in achievement, pleasure in work, the public condemnation of idleness and the recognition of leadership. Thus effort directed to economic ends derived its vigour and achieved its success partly from social and economic forces combined. The activity was at once intensified and lightened by the ritual that surrounded it, and the emotions which that ritual evoked.

Taylor considered

The New Zealander . . . is acquainted with every department of knowledge common to his race: he can build his house, he can make his canoe, his nets, his hooks, his lines; he can manufacture snares to suit every bird; he can form his traps for the rat; he can fabricate his garments, and every tool and implement he requires . . . (It was not a single individual or a few that were adept in these various arts, but everyone. The implements they made, they also knew how to use; they could hunt, they could fish, they could fight . . . It would be no easy matter to find any European who, in so many respects, could equal the despised savage of



New Zealand. Such general knowledge makes the native at home wherever he may be (1870:4–5).

#### Firth added

In matters affecting animals, minerals, plants, or the heavenly bodies the economic lore of the native was full and varied . . . . (T)he specialists in each craft . . . possess a very wide knowledge of natural phenomena . . . . The wealth of vocabulary of the Maori in dealing with trees, birds, shrubs, plants, stones, fish, clouds, winds, and stars is truly surprising (1959:58).

More significantly, Firth noted that major undertakings were conducted communally as a series of tasks. Fishing practices, being tied to seasons, illustrated this well.

The coastal tribes around East Cape, for example, fished for hapuku and snapper in March to May, for warehou and moki in June–July, and for tarakihi, kehe, nguturu, porae, rawaru and kumukumu (gurnard) in August–October. Inland fisheries also had their seasons. In Autumn, fresh water eels migrated downstream to the sea and consequently in February, when streams were low, tribes in Wanganui and Waikato put out their eel weirs, traps and baskets in anticipation of the eel runs. In March to May, downstream migrating eels were caught. In May to July lamprey were taken, a species that migrate in the opposite direction. The Rotorua lakes people fished for toitoi in May–September, began fishing for koura in November, and for inanga and kokopu in December. In Taupo, inanga trapping began in September and was continued through to January, while inanga netting was conducted in a season extending from September to March. In sea fishing, there was also much variation in the season for taking the same species on different grounds (Firth 1959:81–82).

In the construction of the giant seine nets, arduous and constant labour was demanded. Operating the nets required similar labour inputs. The construction of large eel weirs was also hard work. Eels were an important item in the diet of many tribes and in certain districts great labour was expended in digging out large canals to facilitate capture of the eels during their seaward migrations. Firth (1959:197) refers to canals 10 to 12 feet wide, 2 to 3 feet deep, and over 12 miles long in the Wairau district of the South Island.

Many undertakings in the Maori economy were beyond the working power of an individual or family, and were performed by necessity or for reasons of greater efficiency by a large party of people drawn from the village or from several villages. The construction and operation of major fishing nets and weirs were undertaken by large scale communal efforts. This approach was also dictated by the biological periodicity of fish migrations and the abundance of certain species at particular locations in certain seasons. Organised communal effort was needed for the most efficient capture of temporary fish concentrations.

The communal effort was followed by a division of the spoils. Firth (1959:285) referred to an event on the Whanganui River when large numbers of eels were caught in traps set from weirs. It was the chief's job to apportion a share of the catch to each whanau group. A similar distribution mechanism applied when other large catches were made.

Shawcross (1967:330–352) expands upon the seasonal divisions of effort in this description relating to the Bay of Islands

That fish, a term which was often used broadly to include sea and freshwater fish and shell-fish as well, was the second essential constituent of the Bay of Islanders' typical daily meals (the first was fern root) was made very plain by the first explorers and early 19th century visitors. The Bay of Islands harbour abounded in fish of many varieties in the summer months, the annual coast fishing season, and the Maoris there caught and dried for winter use great quantities of these, including sharks. Shell-fish of several sorts were simultaneously collected in quantity and dried for winter storage. Rivers supplied eels and in the Bay interior

there existed a large lake, Omapere (not seen by the earliest explorers), which was rich in fresh water mussels, eels, and other species of fresh water fish. In the early 19th century the Maoris living in the immediate vicinity of this lake had no need ever to visit the coast for fishing; some two thousand Maoris apparently obtained all the fish they required from Lake Omapere. Other tribes who exploited the extensive fern-root bearing and fertile agricultural land of the Bay Interior were forced to move to the coast for their fish supplies, leaving their interior lands once their crops were planted and their year's fern-root supplies were dug, usually in late November to early December, fishing and shell-fishing on the coast till early or mid March, then returning to the interior to harvest their crops, and remaining there until next summer's fishing season. This seasonal migration from interior to coast involved about one third of the total early 19th century Bay population; another third were involved in continual movement within districts adjacent to the coast, from fern-root and cultivation lands to favoured fishing inlets; the final third, including those of the south east Bay coast seen by the earliest explorers, were fortunate enough to have plenty of good fern and agricultural land right next to favoured fishing grounds and thus had no need to move far for economic purposes (forest land also being immediately available to them). These patterns of seasonal movement show just how essential, how basic, starchy mealy roots and fish (including shell-fish) were to this people.

The article cited tables the eighteenth century seasonal activities in the Bay of Islands as follows: June–July, fishing and mussel gathering at Lake Omapere; October, coastal dwelling tribes begin sea fishing; November, interior tribes move to the coast and begin sea fishing, shell fish are also gathered at this time; fish and shell fish are caught and dried through till March (Shawcross 1967:347–349).

Other early reports also noted the seasonal variation of food preparation activities.

As the winters are very stormy, the natives are reduced to inactivity for a large part of the year, and Orokaoua (sic) is a big fishery where fish are smoked and dried for winter provisions. (Extract from *Voyage Round The World on the Corvette La Coquille*, Rene Prima Lesson, 1824:66, cited by Sharp, 1971).

As mentioned elsewhere, great emphasis was placed on preserving (usually sun-drying) and storing for later use, seasonal catches and the catches resulting from major tribal expeditions.

From a dedication to industry, the organisation of labour and the preservation of large excesses of supplies, trade was a natural consequence.

### **3.4.3 Exchange as Trade**

Dr Raymond Firth's book, *Primitive Economics of the New Zealand Maori*, first published in 1929, was the earliest comprehensive attempt to expound the customary form of Maori trade. Since then his work has received much criticism, it being said that he idealised the economic adaptation to Western trade forms to suit his thesis that Maori could be assimilated into a Western economy. It is also contended that conclusions were drawn with insufficient regard for significant regional variations. Nonetheless, the examples he gives of tribal exchanges in the precontact period remain valid and his explanation of the widely practiced method, which he called gift exchange, has not been seriously challenged.

Firth distinguished exchanges within communities ('intra-communal exchange') and between communities ('extra-communal exchange'), each of which involved all manner of goods and services.

Intra-communal exchange was limited and was principally to transfer items or services between specialists within the community, e.g. tattooing or the services of the tohunga for choice fish.

Exchange between communities ('extra communal' or inter-tribal) was more common (p403), and involved mainly foodstuffs and tools. Coastal dwellers exchanged fish, shellfish, shark oil, karengo (edible seaweed), paua shells and the like, with inland people, who responded in turn with preserved birds, eels, rats, cakes made from the meal of the hinau berry, feathers, bird skins and various forest products.

There are many recorded examples of this exchange. Colenso (1880:20) records baskets of dried seaweed being carried inland to be traded for forest products. In the Whanganui district preserved kaka (parrots), esteemed as a great delicacy, formed one of the staples of exchange with coastal tribes who sent dried fish in exchange (Shortland 1856:p214). The people of Rotorua and other inland lakes of the north exchanged large quantities of inanga (whitebait) and koura (crayfish). Marine crayfish were also fermented or dried and used as an item of trade with inland tribes. Waikato and Whanganui tribes traded large numbers of eels (Firth 1959:406). Firth concludes that the exchange of coastal for inland products was one of the major types of exchange to characterise the Maori economy.

Trade also extended great distances. Maori travelled widely and ancient connections exist today between tribes of distant places. Found artefacts can be shown to have come from afar.

Dr Davidson described the archaeological evidence

Stone adzes and other tools, and fine personal ornaments are indications of the wealth of the traditional communities of the Far North. One striking feature of the material is the quantity of artefacts and raw materials brought to the North from far afield. Stone adzes have been made from South Island greenstone, from D'Urville Island argillite or from Coromandel basalt. Ornaments, also, have been made from greenstone . . .

There can be little doubt that the communities of the Far North were wealthy in traditional terms . . . (doc A5:4).

### **3.4.4 Nature of Exchange**

It is, however, the nature of Maori exchange that is unique to tribal societies, for each was made after the manner of gift and counter-gift. The loose use of the word 'barter' has merely confused, for barter implies agreement on rates of exchange. That was not the case of the early Maori trade, nor, for that matter, the position throughout Polynesia and many parts of North America.

Buying and selling for a price, as practised by us, was unknown to them . . . They had, however, a kind of barter or exchange; or, more properly, a giving to be afterwards repaid by a gift. Dried sea-fish, or dried edible sea-weed, or shark oil, or karaka berries, would be given by natives living on the sea-coast to friendly tribes dwelling inland; who would afterwards repay with potted birds, or eels, or hinau cakes, or mats . . . (Colenso 1868:354).

The significant word in that passage is 'afterwards'. No stipulation was made by the donor on the amount of the commodity to be given back and no bargaining or haggling took place between Maori and Maori. The donor had subtle ways to indicate what was desired in return but quantity was unspecified. The general principle of Maori exchange was that for every gift given, another of at least equal value should be returned.

This was the principle of utu or compensation in the wide sense, of obtaining an equivalent. The concept of utu pervades the Maori social, legal, political and economic order but the assessment of what was required, for accord and satisfaction, was left to the other side, be it the related family, the party that did the wrong or the donee tribe (Firth 1959:409–413).

In many cases, each party to the transaction knew what the other sought, and gave accordingly. Thus coast dwellers naturally presented fish to inland tribes and expected inland goods in return. In an essay by Colenso (1880:42) a footnote observes that ‘crawfish’ (crayfish) when caught and preserved

. . . were greatly prized, especially by the Natives in the interior, to whom presents of them were sometimes sent, who gave potted forest birds in return.

Shortland observed the same.

The inhabitants of the villages on the upper parts of the river Wanganui are celebrated parrot catchers . . . . Every evening, the birds taken during the day are roasted over fires, and then potted in calabashes in their grease . . . . Thus preserved, parrots and other birds are considered a delicacy, and are sent as presents to parts of the country, where they are scarce; and in due time a return present of dried fish, or something else not to be obtained easily in an inland country, is received. This was the sort of barter formerly most in vogue in New Zealand (Shortland 1856:214).

According to Stack (1877: 183–186), a regular system of trade between Kaiapoi and coastal villages had been in operation since 1700. Reverend Stack described the reported accounts of Moko, a Ngai Tahu chief about the middle of the sixteenth century, and the purpose of the stronghold he set up at Waipara

. . the choice of the spot being determined by the existence of a cave in close proximity to the highway, along which a regular trade was carried on up and down the coast; the preserved mutton-birds, dried fish, and kauru (edible stem of tupara tree) from the south being exchanged for preserved forest-birds, mats, etc, from the north (Stack 1877:62).

This report illustrates that which we would expect, namely, that exchange activities were conducted amongst coastal tribes as well.

Firth doubts if this was as well established and as formal an arrangement as Stack makes out, but says

. . . it is clear that some method of exchange of products was widely practised by the South Island tribes . . .

With reference to the North Island however

Certain localities were noted for the production of special kinds of food. Thus by the people of Rotorua and other inland lakes of the North, the inanga (whitebait) and koura (crayfish) were preserved in large quantities; they were sent to the dwellers in other districts by way of presents or exchange, and were greatly appreciated (Firth 1959:405).

Supporting evidence has been found in case reports from New Zealand courts, as for example in *Hone Te Anga v Kawa Drainage Board* (1914) 33 NZLR 1139. The case dealt with the Kawa swamp, where large numbers of eels ‘were caught by the Maoris from time immemorial by means of eel pas and weirs’ (p 1144). At page 1145 Mr Justice Cooper noted

Sometimes the catches were exceptionally heavy and the surplus eels were sent as presents to other tribes, sometimes to Natives residing at Rotorua, sometimes to those at the Thames, and presents in return of other kinds of fish were received from these Natives.

In the North again, Native Under-Secretary Donald McLean noted at the 1860 Kohimarama conference

The Ngatituahu and Ngatihinga in times past claimed the totaras and the produce of the Waitara river. Ngatikura and Ngatituiti recognised their right, and some Wtimes exchanged other produce with them for totaras and lampreys (1860 AJHR E-9 p 14).

This is some indication that the practice applied also in Muriwhenua.

The principle of utu, while not dependent on open discussion as to the value of goods, was nevertheless likely influenced by certain expectations on relative exchange values, based upon past transactions. In that respect 'barter', in a slightly modified sense, could probably be applied to the mechanism of gift exchange.

Reciprocity in gifts thus involved continuing obligations and delayed repayments. A tribe could receive preserved birds in their season and reciprocate by sending parcels of dried fish during the fishing season. As Firth (1959:422) observed, the second gift was often larger than the first which gave due recognition to the fact that the first party to the transaction had had to wait some time for reciprocation. Firth calls this a system of 'credit in exchange'. (We rather suspect that reciprocation in the repayment of obligations was usually more lavish than the original gift for another reason – to enhance a group's social reputation and prestige or in a word, its mana.)

As in the case of goods, so with services – an equivalent return was always required. The tattooer, who was a specialist of some importance, expected to be well treated for his services.

Various mechanisms ensured reciprocity. Social disapproval and loss of mana were probably the most effective in the context of the Maori psyche, but a failure to deliver would soon have acquired notoriety. It could well have resulted in the exclusion of the debtor from future deals and the loss to recalcitrant tribes of desired goods and services. There was also the fear of witchcraft, an influential tool in the early Maori world. The supernatural punishment for those who did not honour their obligations was said to be accomplished through the medium of the hau or vital essence of the gods. A fear of punishment was said to accompany the hau of gifts, a supernatural sanction for debt enforcement.

Some exchanges were more ceremonial but the principle of utu still applied. Gifts at marriage and funeral ceremonies had also to be reciprocated. Firth (1959:415) described one example thus

When a person dies some of the relatives at a distance come to kawē nga mate, bring their affliction. On such occasions the bereaved are the recipients of taonga (valued heirlooms) such as garments, greenstone articles, etc. At a subsequent time, on a death occurring among the people of the donors, the process is reversed, and the taonga are returned. Hence during a period of generations, heirlooms pass many times between related peoples.

The value of such heirlooms, in the eyes of Maori, was, and still is, very great. Their whereabouts, the circumstances of their transference, and the obligations still outstanding from them are kept in mind by the old people of the tribe and the information is passed down from generation to generation. These ceremonial exchanges were also of great importance in the Maori community life. Gifts and counter-gifts served to bind the different whanau or iwi concerned; the taonga themselves acted as the tohu, the tokens or

material symbols of the social ties which provided the link between the groups (Firth 1959:416).

The principle of reciprocity, was fundamental. Firth (1959:421) pointed out that the principle permeates the social life of a great number of Pacific peoples. He cites examples from Melanesia, the Andaman Islands and other places.

To summarise then, an outstanding feature of gift-exchange, as outlined by Firth and others, was that each transaction had the appearance of being free and spontaneous, the donors giving with good grace, apparently of their own volition and without stipulation as to a return gift. In reality, a strict system of obligation applied, involving not only a requirement to give when the situation arose and an obligation to accept, but an imperative to repay the gift by providing another of at least equivalent value. Failure to repay attracted certain penalties, ostracism and doom. Mana required that repayment be somewhat in excess of equivalence. The purpose was not only to effect the transfer of goods to mutual advantage, but to establish continuing bonds and obligations between tribal and sub tribal groups (Firth 1959:423).

In 1976, in a paper to a seminar on fisheries for Maori leaders (doc D6, p3), Dr Pat Hohepa said

1[S]ince many inland peoples had iwi or waka links with coastal dwellers, . . . trade was not formalised into commercial compacts but (was) more in the nature of reciprocal gift-giving and all which these terms imply in cementing whanaungatanga (relationships).

#### **3.4.5 Post-contact trade**

Though trade in a modern sense was lacking amongst the ancient Maori, the rapid adaptation to barter was indicative of some experience in the field. That experience lay in the practice of gift exchange. The basic concepts were the same and the difference not much more than that with barter, and modern trade, value is more defined and a settlement date is arranged.

The Maori gift-exchange required an understanding of equivalents, relative worth and reciprocity. These were also the essential elements of barter. Other Western norms that took longer to grasp – the emphasis on possessions, absolute ownership, contracts without continuing obligations and the equation of personal wealth with status and social power were not essential to any effective early trade.

. . . and so we find that he (the Maori) began to engage in trade with avidity not many years after the coming of the white man. After his first unpleasant experiences with adulterated goods, he became a careful judge of materials, a keen bargainer with an eye to his profit, and would spend long hours in chaffering over the price to be received in return for his pigs and potatoes. Scrutiny of the early records of the contact of Europeans with the native people of New Zealand would soon convince anyone that the various concepts embodied in the notion of trade did not have to be laboriously implanted by the white man in the native, but, once given the stimulus of novel economic and social conditions, sprang up and flowered from a soil which had long contained their seed (Firth 1959:431–432).

Adaptation to western norms passed through two stages. During the phase of initial contact, the Maori traded food and native products for goods of a utilitarian nature such as iron and cloth. Till the end of the eighteenth century, transactions were spasmodic and were carried on between mainly coastal Maori and such European vessels that called.

The journals of early European explorers to Aotearoa are littered with references to trading with Maori. Fish seem to have been one of the first items of trade and the most prominent.

Possibly the first recorded instance of fish trading between Maori and Europeans is that provided by Cook on 15 October 1769

At 8 am . . . some fishing boats came off to us and sold us some stinking fish, however it was such as they had and we were glad to enter traffick with them upon any terms . . . in a very short time they returned again and one of the fishing boats came along side and offer'd us some more fish . . . (Beaglehole 1955:177).

(Then followed the attempted kidnapping of one of Cook's crew, for which he named the place Cape Kidnappers. 'Stinking fish' probably refers to dried shark, a Maori delicacy).

On the 25 October 1769, between Cape Kidnappers and Tolaga Bay, Cook records

The natives gave us not the least disturbance, but brought us now and then different sorts of fish . . . which we purchased of them with Cloth beads (sic) etc (Beaglehole 1955:184).

At Tolaga Bay Cook noted

During our stay in this Bay we had every day more or less traffic with the Natives, they bringing us fish and now and then a few sweet potatoes . . . (Beaglehole 1955:186).

Also in 1769 the French vessel, Saint Jean Baptiste, under de Surville, sailed past the North Cape of Muriwhenua. The journal noted (as here translated)

. . . much surprised to see a boat with five or six men coming towards us. They gave us the little fish and shell-fish which they had, and in exchange we gave them a little calico. . . . Shortly after, three big canoes came within gun-range of the vessel. From that distance they showed us now and then their fish. . . . they gave us a wonderful quantity of fish for some little pieces of calico . . . (McNab 1908:Vol 2 267).

Three years later another French ship, the 'Mascarin' captained by Lt M le St Jean Roux, had recorded in its journal (as here translated).

25 April 1772, (Tom Bowling Bay Far North):. . . I found some men who were terrified at first. . . . They made me a present of excellent fish, and I gave them some trinkcets. Among them they had an old man who invited me into his house . . . . He called over a canoe which was coming back from fishing and he gestured to me to choose the fish that I liked most. I gave him a second present. . . .

5 May 1772, Bay of Islands: Very early in the morning of the 5th the vessel was surrounded by over 100 canoes, some with fish, others with potatoes. We traded with them; for an old nail they gave us as much as we wanted (translation by Ollivier 1985:143).

It was a beautiful day on the 11th. The natives did not miss the opportunity and came in droves. They exchanged their fish for nails or pieces of old iron (Ollivier 1985:145).

The next year we find in the journal of William Bayly of the HMS Adventure, captained by Furneaux, (Cook's second voyage)

9 April 1773: . . . they all presently withdrew to the other side of the Bay, where they continued fishing until evening when they came along side with great quantities of fish which they were desirous of giving us . . . (McNab 1908:202).

And in Bayly's Journal of Cook's third voyage, aboard HMS Discoverer,

14 February 1777, Charlotte Sound: The Indians (Maoris) visit us every day in great numbers both on board and on shore bringing plenty of fish to sell, which we purchase for nails and pieces of old cloth etc (McNab 1908:219).

Joseph Banks, Marion du Fresne and d'Entrecasteaux have recorded similar accounts.

With the arrival of whalers, sealers and traders, beginning from the 1790s and with European settlers from the 1810s, European trade took hold. The manner and extent of Maori trade before 1840 is reviewed at 3.5 relating to whaling and sealing; and after 1840 in chapter 4. It is sufficient to say here that with the need to provision the boats of whalers and traders, aided by the introduction of new plants and livestock, and later, missionary advice, and with the exchange of goods for a whole new range of European items, Maori entered into the new form of trade with such enthusiasm that they were soon exporting to Australia. Trade was all around with the range of goods exchanged increasing greatly for both non-Maori and Maori. Maori produced crops of potatoes, flax, timber, pigs, fish and articles of native workmanship, and received metal tools, iron, blankets, clothing, tobacco, muskets, tea, sugar and other items.

Polack (1838:Vol 2 111), observed

Few nations delight more in trading and bargaining than this people; a native fair or festival best illustrates this fact. To such an excess are the feelings of the people carried in bartering with each other, that during war, though the belligerent parties seek for the annihilation of each other, yet at intervals a system of trade, as we have already stated, is carried on, that can scarcely be credited by strangers to their customs . . . . Any person having had dealings with them, are aware of their passion for commercial pursuits.

During the period to 1840, the interplay of cultures was between Maori and the European trader and missionary. Maori were then ascendant, outnumbering the Pakeha several-fold and controlling the natural resources of the land, forests and fisheries. The change in the Maori economic system was largely external comprising mainly the acquisition of new accessories. The internal workings of the Maori economy remained, nonetheless, intact. Production was still by ordinary native methods and the organisation of activity was continued on the usual lines. The whanau or hapu worked under the leadership of the head man, and the Maori system for the distribution of goods remained practically unaffected. In brief, the native economic structure was preserved but there were enormous technological changes, though affecting some tribes more than others.

New foodstuffs, new clothes and new habits had all been introduced with some impact. By 1840 some Maori had acquired their own whaling boats and stations and were travelling great distances.

It is in his conclusions that we part company with Firth. He considers that from their experience with gift exchange Maori made a smooth transition to trade in Western terms. Although they still retained their traditional system of gift-exchange, their liking for European goods, their facility to produce goods for trade, and their penchant for European trading practices meant they were well primed to enter the Western cash economy which was increasingly to dominate New Zealand life.

Undoubtedly Maori avidly pursued trade and new forms of endeavour with great alacrity, but we consider their success in doing so was tenuous, bolstered by a superiority of numbers and access to the major resources (despite the claims that were made that huge areas had been sold), and time was to show that once numbers changed, land was lost and the old tribal power was defeated, Maori were disadvantaged in economic competition, and their early economic initiatives have never since been so successfully repeated.

### **3.5 SEALING, WHALING AND NON-MAORI FISHING**

Counsel for the Fishing Industry submitted



In the use of and guardianship over the fishing resource, Maori did not, as a matter of fact, exclude Europeans from fishing for domestic or commercial purposes. As at 1840, the Europeans fished in common with Maori throughout the zone which is the subject of this claim. Maori never questioned the right of Europeans to fish. The right of Maori to fish guaranteed by the Treaty is accordingly a non-exclusive one. There is no conduct to show that it was ever contemplated by either Maori or Europeans that it might be otherwise;

To support that contention reference was made to a number of texts on whaling and sealing in New Zealand. It was said

We have not found a single reference with even a suggestion that Maori held the 'mana', control or authority over these greater coastal waters so as to require the Europeans to first seek their authority before entering these waters to fish, either commercially or for non-commercial purposes.

It was added

. . . whalers often purchased land from the Maori tribes for their whaling stations, but there is no record of any suggestion by Maori that they should at the same time negotiate the right to fish in the waters adjacent to that land. Clearly, therefore, they did not consider their rights in respect of their land and the fishery to be the same.

Counsel could point to very little data specific to Muriwhenua other than the fact that European whaling occurred there. Muriwhenua oral tradition records stories of whaling in pre-European times and accounts of whaling post-Treaty but very little in between. Our own researches revealed little more. Indeed the greater bulk of material refers to the South Island where the main whaling took place, and since there is a current fishing claim in respect of the South Island, we do not wish to make specific findings on this claim that might have greater significance for that. Nonetheless, the issue having been raised, and there being a dearth of material on the Muriwhenua position, we have sought a broad overview of the whaling and sealing activity as generally applying. The following brief account relies on Morton 1982, Richards 1982, Rickard 1965, Tod 1982, Coutts 1969, Bathgate 1969, Starke 1986, McNab 1907, McNab 1913 Dawbin 1954 and the specific reports that we particularly mention below.

Seals were caught by early Maori for meat, high energy fat and skins. European sealing began in the South Island, in the 1790s, dried skins being sent to China and salted skins to Europe; but there was probably no European seal exploitation in Muriwhenua, Maingay's studies suggesting that the Muriwhenua seal fisheries had collapsed as early as 1300. Certainly we could find no record of European sealing there.

Abuses by European sealers led to the rapid extinguishment of the seal fisheries in other places. Sealing gangs killed on the rookery grounds disrupting the colonies, and every seal was taken including the breeding females. Maori protested for in those districts where Maori had not themselves destroyed the fishery in the early years of occupation, elaborate management systems had come to apply. There is evidence however that Maori later joined with the sealing gangs, splitting profits.

The fate of the Chatham Islands seal fisheries, one of the largest in the country, illustrates a national pattern. Sealing began there in 1804, peaked in 1826 and had come to a complete end by 1844.

Whales were captured for meat, fat, oil and milk; whalebone artefacts were more highly valued than greenstone. Most whales were captured through natural or enforced strandings.

In our broad overview, the first whaling ships in the period to about 1807 had little contact with Maori, operating predominantly at sea and risking a visit to shore mainly to take on

supplies from local Maori. It is not clear when or where it began but there was some very early activity involving sperm whale around North Cape and the Three Kings Islands. The *William-and-Mary* is recorded as being there in 1792 and the *Britannia* in 1793. There were probably some 15 whaling ships, mainly British, operating around New Zealand in this first stage.

From 1807 there was intense competition amongst the whaling ships of France, America, Norway, Spain and the East India Company, with some 16 boats arriving each year by about 1813. By then Maori were benefitting considerably, having a monopoly on providing supplies. From imported seeds, huge gardens were planted out. The excess was exported, treated flax, timber, potatoes, sweetcorn, preserved fish and pork being sent with the main shipments of seal skins, whale oil and bone. In return Maori were exposed to all manner of European goods and commodities. They also became accustomed to trading with cash.

The competition continued. In 1836, 151 whaling vessels visited the Bay of Islands, the numbers being even higher in the following six months. On another account 861 British whalers came to New Zealand between 1775 and 1844, on 2,153 voyages. Soon, the greater interest in whaling had shifted to the South Island and the East Coast of the North Island, although the Bay of Islands remained important.

During this second stage, from about 1807, Maori became attracted to whaling seeking to extend their role from that of produce suppliers. European whaling technology was far superior to theirs and this was to become the only area in fishing where Maori were to be keen to acquire Western skills. Non-Maori were eager to treat, numerous whaling stations being established amongst the tribes though again, principally in the South Island. Whaling was to become mainly shore-based, particularly from the 1820s.

It was in the context of much whaling competition that whalers had come to seek from local tribes, exclusive whaling rights in the seas off their lands and the sole right to establish a whaling station upon them. As we shall see the resultant deeds were eventually to come under official scrutiny, but it is apparent that Maori approached these arrangements from the standpoint of their own cultural experience.

As was custom between tribes seeking an alliance, selected women of high status were married to station managers and sea captains to seal the deals. Tod considers that in the South Island, the arrangement of marriages was seen as the first essential item of negotiation before whaling operations were settled. Other negotiated arrangements included the right of the tribe to catch and flag whales for towing and processing by the whaling company; conversely to render the carcasses to oil; alternately to have the head in return for processing the whole carcass. Rights to work the boats as seamen, or in the case of a young chief, as harpoonist or steersman, were also arranged. Some were to become navigators and ships officers and many Maori were eventually to travel to distant parts of the Northern Hemisphere.

Such arrangements were not confined to the South and many remain embedded in Maori oral tradition throughout the country. A French enterprise for example sought a deal with the local tribe at Te Kaha resulting in the marriage of a leading lady of that place and Captain Delamere. It was to result in a long involvement of the Delamere family and the local tribe in shore based whaling.

In the result, some Maori became protectors of whaling stations in their tribal territories warning off not only other Maori but the boats of other nations. They then began the practice of levying boats entering their harbours, and once again that practice was very widespread as shall later be referred to. Thus it was that Maori became not only the suppliers (and exporters) of local produce, but protectors of certain whaling stations. In the South Island there is a record that Maori even supplied coal to station blacksmiths.

From their trade Maori acquired that which was most coveted, their own whaling boats. It was known that these were used to traverse great distances at sea, to islands off the South Island in particular, one, over 1000 miles from Bluff. Also in this period, in the Bay of Islands though more especially in the South, Maori established their own whaling stations. Koro Snowden advised of the whaling boat still held by his whanau at Te Kohanga in Muriwhenua.

Those acquisitions increased after the British acquired sovereignty in 1840. Many foreign companies, without the same easy access to ports, were soon to leave. In many instances their Maori partners were to acquire or inherit their gear and many more stations became Maori owned. That happened, for example, at Te Kaha, and gives emphasis to another aspect of Maori arranged marriages as being directed not only to peace but to the acquisition of status and property. A large number of the Bay of Islands stations also became Maori owned.

There were three interesting results. In the South Island in particular, but not exclusively, some whalers claimed to have purchased huge areas on account of these arrangements; but in the opinion of Edward Shortland, Protector of Aborigines, given in 1844 in many cases Maori had sold no more than an exclusive right of fishing for whales along their coastlines 'to the exclusion of all others' and the right to establish whaling stations (BPP IUP NZ Vol 5 p 313, Shortland 1851; 86–87). As this is a matter that could be an issue in the South Island claim we will not go further into it.

In the second result, the practice of Maori claiming levies on boats entering 'their' harbours had become widespread, from the bottom of the South Island to the top of North. The spread of the practice may have been due to the large number of Maori engaged on whaling boats journeying to many ports. In 1835, Busby, British Resident, reported on levies 'pretty regularly' imposed on ships entering the Bay of Islands and twice urged the British Government to buy off the Maori right, noting in his second letter, that the French or Americans might do so (Busby to Colonial Secretary, 1835 and 1836 letters 65/2 and 89, Alexander Turnbull Library, q MS Bus 1935/345). The significance is that after 1840, the Crown denied the Maori practice on the basis that by Treaty it now owned or had sovereignty over the harbours. Maori claimed that by the same Treaty existing Maori rights had been affirmed. Continual Maori attempts to levy boats was to be a contributing factor to the wars in the Far North and the Waikato and Maori still claimed the right to harbour dues as late as the Orakei Conference in 1879. This is referred to again, later in this report.

The third result is that Maori whaling was to continue long after the collapse of the main whaling industry by about 1845 due to unrestrained pressure on whale populations. Tribunal member Mr Delamere advises, of his own knowledge, that the Te Kaha station continued to operate into his lifetime, the last whale killed there being in 1934. There are records of Maori conducting whaling operations in Muriwhenua in the 1890s, and a little to the south of there, to about 1940.

These circumstances were once better known. In *Baldick v Jackson* (1910) 30 NZLR 343, Stout CJ was to consider that an Imperial Act recognising whales as 'royal fish' owned by the Crown, could not have application in New Zealand. He observed in the process that to recognise the application of the Act would be to assert a claim against the Maori who, 'were accustomed to engage in whaling and the Treaty of Waitangi assumed that their fishing was not to be interfered with'.

That is a broad overview and we do not seek to be more particular because the matter may be crucial in the South Island claim. In any event, the data on particular whaling arrangements is not from Muriwhenua. In that area the chief evidence is of the hunting of

sperm whales, and mainly in that very early period when whaling operations were conducted offshore.

In Muriwhenua, ocean currents were known to swing in-shore at a certain time of the year at Rangaunu Harbour. Whales following the current were harried by canoes and beached in the confusion, or calves were forced to the shore in the knowledge that the mothers would not leave them. It is known that whales were pursued by canoes along the eastern beaches of Muriwhenua and many were taken at North Cape.

Some stories were told to us of whales in the early days. Haimona Snowden for example, described how Ngati Kuri hid inside a whale stranded at Te Kohanga (Wreck Bay today) in order to surprise Te Aupouri when the latter came to claim it. On another occasion a whale harpooned by Te Aupouri escaped into Ngai Takoto waters to be taken by the people there, giving rise to the Aupouri proverb

Taihoa te tohatoha, kia whakauungia ra ano te tohoraha ki uta

(Leave the talk of apportioning the prize until the whale is safely hauled ashore.)

In pre-European times we were told, whale calves were called by blowing under-water, resembling the mother's sound; also that between certain rocks dolphins were caught in nets on the eastern Muriwhenua coast and were another prized delicacy.

Lookouts were stationed on Whakapouka rise at Karikari to sight pods of migrating whales, and an island nearby (Whale Island today) was called Tuputupu-ngahau, for the whales that spouted there as they came up for breath.

A section of the people called Te Kari shifted from the mainland to Manawatawhi (Three Kings Islands). Local elders believed they went there in about the 1790s and became involved in whaling from that base. It is not clear whether they were whaling there before the Europeans came, or whether they went there to be involved in the early European whaling activity that centred on those islands. In any event the Te Kari people were known to be whalers. One of them, Pataea, or Tom as he was later called, was renowned for his skill as a harpoonist, and also for his ropework and use of the bow-line knot. Tom Bowline became his name, and Tom Bowling's Bay off North Cape (Takapauaka to Maori) is named for him. It appears however that Pataea was active in the later period, about say 1860–1880. The last of the Te Kari people did not return to the North Cape until the early 1900s, after a sojourn of over a century on Manawatawhi.

We can find no record of any shore based whaling in Muriwhenua before 1840. From such evidence as we can find, the most northerly whaling stations pre-Treaty, were at Hokianga on the West Coast and Whangaroa on the East. Mangonui, which is in Muriwhenua, was regularly used to rest crews and take on supplies, many Maori being attracted to the area to trade, as a result, but it was not a whaling station. It seems to have been preferred by some Captains as a rest and recreation area because the Bay of Islands had achieved some notoriety. One reference to ships calling in to Mangonui does suggest however that the position in Muriwhenua may not have been different from elsewhere. The log of the whaler Cadmus in 1833, records the demand that a local Maori pilot should guide the ship to anchorage in return for a pilotage fee.

The main recorded accounts of Muriwhenua whaling relate to the post Treaty period, when Maori predominated the whaling scene. A half caste whaling Captain, J Thoms, whose father was from a Cook Strait whaling station, appears to have led some considerable Maori activity in hunting humpback whales that became economically important after the sperm whale fishery off North Cape declined. This was probably in the mid 1800s. A shore-station was established at the tip of Karikari Peninsula. Temporary camps where oil

was boiled out in try-pots were common, wherever there was a convenient landing, on the Ninety Mile Beach, Parengarenga and Karikari for example. After Thoms retired, the enterprise was continued into the 1890s (see Dawbin 1954:6–8). Whaling activity was centred also in Matai Bay, Mimiwhangata and Whangamumu. The station at Whangamumu closed in 1932 and an attempt to restart the industry in 1940 failed, marking the end of commercial whaling in Northland (Dignan 1985).

In view of some evidence applicable to other places, and the dearth of material on Muriwhenua, we consider it unsafe to assume that because of whaling, Muriwhenua Maori could be taken to have abandoned exclusive tribal rights before the Treaty. We consider rather that the record is indicative of a Maori desire to secure trade, and later to establish their own whaling businesses. It is the sovereign right of all people to seek progress in that way, and the record does not seem to us to indicate any waiver of that sovereignty.

The same must apply to other forms of pre-treaty non-Maori fishing. Except that other evidence may come to light, for we have found nothing on other forms of early European fishing in Muriwhenua, we incline to the broad description of a Northland settler's life in the 1830s, as given in Maning's *Old New Zealand*. In those days, Maning considered, Pakeha lived on Maori terms. So it was that he called himself 'a Pakeha–Maori'. A consent to use may be implied, but control should be implied too for numerical superiority gave the tribes the final say.

In 1840 we conclude, the Maori had a bounteous fishery which seemed to be under no immediate threat and they could afford to allow the few local settlers in their midst access to that fishery, provided they heeded the mana of local chiefs and any tapu or rahui in force.

### **3.6 MURIWHENUA FISHERIES AT 1840**

The archaeological record, early European eye-witness accounts and the oral evidence of the elders leave us in little doubt that the Muriwhenua region was once heavily populated and that the tribes were largely reliant on the resources of the sea. But we have little documented evidence on their use of those resources in 1840. It seems that they had suffered considerable de-population since the late eighteenth century, due largely to the introduction of infectious diseases and an exacerbation of warfare. Indeed their population could well have been substantially reduced in some parts of Muriwhenua, and an overall decline continued until the late nineteenth century. It does have to be accepted that population estimates are difficult to make and subject to much debate. The introduction of pigs, potatoes and other crops led to a concentration of settlement on more fertile land, for instance around the mission station at Kaitaia and Henry Southee's farm at Awanui, and less reliance on sea foods (Dieffenbach 1843:Vol 1 pp197–221). Although local settlers and visiting whalers at Mangonui provided a small local market for Maori produce, the tribes lacked the considerable opportunities of those closer to the thriving markets at the Bay of Islands and, after 1840, Auckland. Yet, despite the concentration on land and cultivation, fishing remained an important activity, largely, it would seem, for domestic consumption but also as an item of exchange with inland hapu and Europeans.

The Muriwhenua tribes still took large quantities of fish from their harbours. In 1840, Ernst Dieffenbach, naturalist to the New Zealand company, began an exploration of the northern North Island. He noted that a great quantity of fish was being taken in Parengarenga Harbour, especially skates, herrings, mackerel and snapper and that 'the natives were

preserving them in great quantities by simply drying them in the sun'. (Dieffenbach, 1843:Vol 1 p209).

In the late 1830s J S Polack referred to certain Muriwhenua tribes fleeing to Three Kings Islands and subsisting largely on the innumerable shoals of fish that were abundant on those shores. Polack also referred to the range of fishing gear used by the northern Maori as being of excellent quality, some of the seine nets of enormous size and all gear being very effective. He noted that fishing consumed much of the time of the people. They undertook fishing in large parties, often involving inhabitants of several villages (Polack, 1838 and 1840:Vol 1 196–203).

It ought to be noted also that Muriwhenua Maori had access to larger swamps and lakes than exist today. Large areas to the east of Kaitaia in particular were once covered by freshwater.

## 4. FISHING IN THE PERIOD 1840–1870

### 4.1 INTRODUCTION

Preceding chapters have reviewed the people's account of fishing as passed down to modern times and research on the pre-treaty character of Maori fishing and tribal economies. This chapter considers the first three decades after the Treaty was signed. Once more the national scene is considered before the Muriwhenua position is explained.

### 4.2 THE FIRST THIRTY YEARS

Maori fishing carried on in much the same mode as before but a declining population and the introduction of new foodstuffs meant there was less dependence on the sea for domestic consumption. However the steady influx of new settlers provided a ready market, especially for those tribes with easy access to the new settlements.

It was not apparent then that settlement would impose any major restrictions on Maori fishing, at least not before 1866, when the first oyster laws were made. Nor were there any suggestions that Maori should be restricted in developing their fishing capabilities, or that their involvement in the fish trade might need to be constrained. Nevertheless in this first thirty years, the development of fisheries was not the main focus of Maori effort. They found an even more lucrative market for agricultural produce.

Pigs and potatoes had been introduced from Sydney soon after the turn of the century. As early as 1813, Ruatara, a protege of Marsden, was harvesting wheat at the Bay of Islands (Hargreaves 1963:106). In 1830, 28 ships averaging 110 tons made 56 voyages between Sydney and New Zealand carrying Maori grown potatoes and milled grain (McLauchlan 1981:64,66). By the 1840s, the tribes had thousands of acres in crops and were rapidly extending their trade. By the 1850s there were numerous Maori-owned flour mills throughout the northern half of the North Island. Though the missionaries and later Governor Grey did much to encourage agriculture and trade, the initiatives came mainly from the Maori who were keen to capitalise on the new settler markets, and take advantage of new technology.

Quotations from early accounts illustrate the position. The first is from the Austrian geologist, Dr Ferdinand von Hochstetter, who visited the Waikato in 1859 when nearly all the land there was still Maori owned.

At 5pm we reached Rangiawhia, situated in the fertile plain of the Waikato and Waipa. Extensive wheat, maize, and potatoe-plantings surround the place, broad carriage-roads run in different directions; numerous horses and herds of well-fed cattle bear testimony to the wealthy condition of the natives; and the huts scattered over a large area are entirely concealed among fruit trees. A separate race-course is laid out, here is a court-house, there a store, further-on a mill on a mill-pond, and high above the luxuriant fruit-trees rise the tapering spires of the Catholic and Protestant churches . . . Such is Rangiawhia – the only Maori settlement, among those I have seen, which might be called a town – a place, which by its central position in the most fertile district of the North Island, and as the central point of the corn-trade, bids fair to rise ere long to the rank and size of a flourishing staple-town (Hochstetter:1867:453).

The second quotation is taken from Lady Martin, wife of the first Chief Justice, and also refers to Rangiaowhia in the 1850s.

Our path lay across a wide plain, and our eyes were gladdened on all sides by sights of peaceful industry. For miles we saw one great wheat field. The blade was just showing, of a vivid green, and all along the way, on either side, were peach trees in full blossom. Carts were driven to and from the mill by their native owners, the women sat under trees sewing flour bags and babies swarmed around, presenting a floury appearance . . . We little dreamed that in ten years the peaceful industry of the whole district would cease and the land become a desert through our unhappy war (1884:116).

In more prosaic style, William Swainson, the first Attorney-General, assessed that in 1857 some 8,000 Maori of Bay of Plenty, Taupo and Rotorua

. . . had upwards of 3,000 acres of land in wheat, 3,000 acres in potatoes, nearly 2,000 acres in maize and upwards of 1,000 acres planted with kumaras. They owned nearly 100 horses, 200 head of cattle and 5,000 pigs, four water mills and 96 ploughs. They were also the owners of 43 small coastal vessels, averaging 20 tons each, and upwards of 900 canoes (Swainson, 1859:65).

The following accounts refer to the consequential Maori trade.

From a distance of nearly a hundred miles, the natives supply the markets of Auckland with the produce of their industry; brought partly by land carriage, partly by small coasting craft, and partly by canoes. In the course of the year 1852, one thousand seven hundred and ninety-two canoes entered the harbour of Auckland, bringing to market by this means alone two hundred tons of potatoes, fourteen hundred baskets of onions, seventeen hundred baskets of maize, twelve hundred baskets of peaches, twelve hundred tons of firewood, forty-five tons of fish, and thirteen hundred pigs; besides flax, poultry, vegetables . . . They are the owners also of numerous small coasting craft . . . (Swainson, 1853:142).

The Maoris also supplied nearly all the fish that came into town (Auckland) . . . Snapper was almost the only kind procurable. It was carried around at 'one herring' a shilling a bundle. A bundle contained anything from three to half-a-dozen or more according to supply and size (Morton 1925:24 with reference to about 1860).

The trade of Auckland is perfectly surprising; the number of small coasters, most of which belong to the natives, and are laden with their produce, cannot fail striking the stranger who visits the port with astonishment . . . (Taylor, 1855:214).

The trade was not confined to Auckland. Hector, Mantell and Travers (AJHR 1870 D-9) referred to the Maori of the Hutt and Te Aro Pa supplying fish to the Wellington market. Sherrin (1886:12) considered the Otago settlers depended solely on the local Maori for their fish supplies. Taylor, (1855:216), described the produce sent to town in large canoes by the Wanganui tribes. He added

. . . already is their trade of such value as to have chiefly contributed to the prosperity of the town; besides several small vessels, which constantly trade with neighbouring provinces, it has two larger ones which sail direct to Sydney, and other Australian ports.

Maori entered into this trade with great enthusiasm and were eager to develop their own sailing boats and schooners. Governor Grey made loans available to them for shipbuilding and they soon dominated the North Island coastal shipping trade supplying Auckland from places as distant as Gisborne. Swainson records 53 small vessels registered in native ownership in the port of Auckland in 1858. The Waikato tribes opened their own bank.

An overseas journal on the other hand assumed that Maori, far from running their own industries, would be willing employees of non-Maori traders. On 25 November 1843 a London newspaper, the *New Zealand Journal*, (p305) noted that a fishing trade in New Zealand



(held) bright prospects . . . and, there would be the assistance of the natives in furnishing the nets and manning the boats . . .

In 1847 the same paper published extracts of evidence given in 1844 to the New Committee dealing with fish curing and salting. Mr Earp, a Wellington businessman was asked

Do you believe that . . . the export of cured fish would be carried on to a great extent?

He replied in the affirmative, and was then asked: Could you employ the natives advantageously as fishermen?

Yes.

Are they used to the occupation?

Yes, and they are very expert in it, it is a favourite amusement of theirs. The natives in that respect have been of the greatest benefit to us in Wellington; it was a common thing, even when I left the colony, to see a man come down with an arabuka (hapuku), one of the most delicious fish in existence weighing 60lbs, for 2s (The New Zealand Journal 16 January 1847 p19).

#### **4.3 THE CONTINUANCE OF MAORI FISHING**

As indicated in several of the quotations above, Maori fishing continued in the first three decades following the Treaty, in response to new market demands, and with virtually no settler competition. The following contemporary accounts provide further graphic illustration of their continuing use and development of their resource. (The years in brackets after author's names are publication dates, but each refers to this period).

The natives catch large quantities of them (kahawai) with a bone hook at the end of a fish-shaped piece of wood, inlaid with the shell of the mutton-fish, or haliotis, which bears the lively colours and brilliancy of mother-of-pearl.

This hook requires no bait, and a dozen of them are dragged along the water by a canoe which pulls at full speed through the shoal . . . There are many other sorts of fish, including the tamure, or snapper: the manga, or the barracouta: the mango, or dogfish of which the natives catch and store large quantities by drying them in the sun; and the hapuku. This fish is caught in pretty deep water, near reefs and rocks . . . the moki is also a well-flavoured fish . . . (Wakefield 1908:68, with reference to 'adventures' in New Zealand, 1839 to 1844).

The natives go fishing more often (than the non native), and get abundant food. Their nets are as tall as a man, but much taller in the middle, and one thousand and twelve hundred metres long. Sometimes, they are even longer . . . It is not unusual to see the natives taking twenty, twenty-five, and even thirty hundred weight of fish (1–1.5 tonnes), in a single cast of the net . . . The fish the natives do not have time to eat while they are fresh, are split open and dried in the sun, to be eaten at times when fishing is not so good (Chouvet 1985:9, with reference to 1843–1846).

Sherrin, an early Commissioner of Trade and Customs, compiled a handbook on New Zealand fish, first published in 1886 but with reference to fish resources in the mid-nineteenth century. He described a pre-eminent Maori role in fisheries throughout the period. Extensive Maori fisheries in many places were referred to but the following is a sampling of comments applying to the north.

The grey mullet is a very familiar fish to residents in the northern part of the Colony, where it forms a staple article of food among the natives at certain seasons, and is one of the commonest fish sold in Auckland . . . The Natives frequently capture them on still, moonless nights . . . (52).

In the north of Auckland the Natives make great preparations for fishing tawatawa (blue mackerel) . . . and capture immense numbers . . . The appearance of mackerel shoals is of more frequent and regular occurrence . . . It was . . . Maori habit . . . to station men on cliffs to watch the shoals coming to land (61–2).

The mango was also found at Muriwhenua (the North Cape). The season for catching extended from November to February. The fish was not eaten by the captors, though it may have been dried and sent inland, as was the custom of shore Natives . . . (118).

The Journal of Ensign Best (Taylor, 1966:p396) recounted an experience at Tauranga in 1843 involving 70 men and ten canoes. The expedition was under the conduct of the chief Tai Pari

(who) sat on a little sand hill attended by three or four old Chiefs giving directions as to the grounds to be fished on that day and observing the skill exhibited by the different canoes.

The conduct of fishing under the directions of chiefs occupying prominent land points features in many reports, but unique to this account is the reference to the use of sails The Canoes having all crossed the surf spread their sails and ran away in different directions to the banks most frequented by the Taragehe (Tarakihi).

Sherrin (1886:80) described a catch at Maketu in the 1860s involving ‘a haul of 20 tons’ of snapper. Later, he described the importance of seafoods for tribal gatherings (1886:133).

The (freshwater) eel (tuna) entered largely into Maori diet, and the numbers collected and eaten at gatherings of the tribes seem almost incredible. One instance must suffice. At a feast given by Te Waharoa . . . to the people of Tauranga . . . there was upwards of 20,000 dried eels; several tons of sea-fish, principally young sharks; a large quantity of hogs; 19 calabashes of shark oil; 6 albatrosses; and baskets of potatoes, sweet and common, without number.

Colenso wrote,

Of fish they made large store in the summer season by drying them for winter use. Of these I would especially mention the mackerel (tawatawa to the Maoris), which they caught in great numbers in their big seine nets . . . Of the smaller kinds of shark ( . . . mango), and also of fresh-water eels ( . . . tuna), the old Maoris caught and dried great numbers for winter use, and perhaps this is still being done by them in several suitable localities at the North . . . A small delicate river fish the inanga . . . was also . . . caught in large quantities . . . They also dried . . . large quantities of bivalve shellfish . . . But the most curious mode of preparing and drying was that practised on their crayfish (koura) (1891:462).

#### **4.4 AN EXAMPLE FROM MURIWHENUA**

It will be recalled that at Ahipara, Rev Petera described the shark fishing excursions at Rangaunu bay, as passed down to him. We found corroboration of what he said in an address by R H Matthews given to the Auckland Institute in 1910 (Transactions and Proceedings of the New Zealand Institute 43, 598). Set out below is an extensive extract from that address. It described the continuance of Muriwhenua fishing along customary lines, in 1855, and again in 1875, and suggested that the interest in the traditional form of shark fishing had declined from 1885. It also provided a graphic description of the extent,

nature and competence of Maori fishing, about which, it seemed to us, most New Zealanders are almost totally unaware.

For the last twenty-five years (prior to 1910) the Maoris have lost all interest in the old-time institution of shark-fishing. Most of the kaumatuas (or elders) have passed away, and many of the traditional customs have gone with them. The younger generation devote their attention more to gum-digging and other pursuits, and appear to prefer tinned mullet and salmon to evil-smelling shark as a kinaki (relish).

Fifty years ago shark-fishing was considered and looked forward to as a national holiday by the Rarawas and all the surrounding hapus. The traditional customs and regulations were most strictly observed and rigidly enforced. The season for fishing the kapeta (dogfish) was restricted to two days only in each year. The first time was about full moon in January, and by preference during the night named in the Maori lunar calendar rakaunui, or two evenings after the full moon. This fishing was always by night. The second time of fishing, called the pakoki, was two weeks later, just after new moon (whawha-ata), and was always held in daylight. This closed the season for the year. Any one who killed a shark after this would be liable to the custom of muru, and would be stripped of his property. No one was permitted to commence fishing before the signal to start was given; a violation of this rule would lead to the splitting-up of the canoes of the offenders. So far as I can ascertain, the two days' restriction was a local custom, obtaining more particularly in Rangaunu Harbour, which was the great shark-fishing centre of the north, and it specially applied to the kapeta, or dogfish. Large sharks might be taken at any time in the open sea, but they were not to be killed inside the harbour for fear of frightening away the kapeta: 'Kei oho te kapeta'.

At the time I am speaking of, the mana, or authority, over the kopua (the deep) was solely exercised by Popata te Waha, who had inherited it from his ancestors. It was he who issued the panui, or notice, of the date of the maunga (or catching), and who fired the signal-gun from his headquarters at Okuraiti to notify the camps at Te Unahi and Pukewhau that sharks would be caught that night. Popata te Waha's mana over the kopua was acknowledged by all the surrounding tribes within a line extending from Taemaro (on the coast between Berghan's Head and Whangaroa) to Kohumaru, to Victoria Valley, Herekino, Ahipara, Parengarenga, and Rangiwahia, and all the numerous kaingas, or settlements, within this boundary. Maoris from all these places were represented at the great maunga. There would probably be a muster of not less than fifty canoes, each with an average crew of about twenty. This would make a total of at least a thousand, beside many that remained in camp cooking and drying pipi.

About a week before full moon in January 1855, I received an invitation from one of the principal chiefs of Pukewhau to go shark-fishing with him. I gladly accepted this invitation, as I had heard a good deal about the curious customs attending the fishing, and wished to see the sport. He told me that I was to be one of his kaiwhangai (feeders). Later on I found that most of the wives accompanied their husbands as kaiwhangai, thus doubling the number of each man's catch.

For many days prior to the fishing crowds of Natives were to be seen going to Te Unahi on the Awanui River, Okuraiti, and Pukewhau, the three principal rivers flowing into Rangaunu Harbour. All were bent on having a good holiday, and on getting plenty of kinaki (relish) – pipi and fish; also looking forward to a plentiful supply of dried mango (shark) for kinaki during the winter.

We arrived at Pukewhau about noon, a ride of over ten miles across country. After a hearty snack I took a stroll through the village, which was humming like a swarm of bees, everybody being busily engaged in preparations for the maunga. Some of the old dames were scraping muka (flax-fibre), others were making it into twine by rolling the fibre on the calf of the leg with the palm of the hand. Some of the twine would be used for seizing the hooks; some for

pakaikai, in lengths of about 3 ft, for tying on the bait. Altogether the kainga presented a busy and animated scene, full of life and good-humoured fun.

All along the tauranga (landing-place) were canoes of all sizes, from the large wakataua (war-canoes) to the small tiwai. Several of the wakataua were surrounded by a busy crowd of workmen: some were lashing on the bow-piece with its ornamental panel and figurehead, called a pitau; others were fastening on the tall elaborately carved rapa (stern-post); while others again were fitting and lashing the rauoa (top strake). This plank is called oa when free, but rauoa when fastened in position. Carefully selected leaves of raupo (Typha) were placed over the joints inside and outside, and were clamped firmly together by means of the pokai, or battens, which were then securely lashed by cords of three-plait flax-fibre. All holes were filled or caulked with hune (down from the seed of Typha). The tauare, or thwarts, were placed in position, and carefully lashed. A separate gang of workers was employed in making the raho, a moveable platform on which the sharks are killed. This was fitted in sections under and between the thwarts, extending from stem to stern, and forming a kind of deck, under which there is room for stowing the sharks which may be caught. Standing apart from the rest was a particularly fine specimen of a war-canoes, named 'Kaipititi', newly painted with kokowai (red ochre), and adorned with a beautifully carved figurehead and stern-post. The outside battens were dressed from end to end with the white feathers of the toroa and karake (albatross and gannet). While their elders were at work on the canoes the young people usually amused themselves with various games, such as wrestling, playing draughts on an extemporised board of flax-leaves plaited in squares on which shells and slices of potato were used for pieces, or, it might be, spinning loud humming-tops carved from the hard resinous core of the kahikatea tree (kapara) from which the sap had rotted away, or else some sport that happened to be fashionable at the time.

During the evening I strolled to a large whare where the kaumatuas and principal visitors were assembled. They were for the most part engaged in resnooding their hooks, and in discussing the merits of shape and bend. The shape of a hook was considered a very essential matter. Maoris in those days preferred their own make, short in the shank, never exceeding the breadth of three fingers, the standard measure. I handed over my hook to an old fellow, and asked him to overhaul it. It was given to me by the Aupouri chief Paraone, who was an acknowledged expert. I was told that it was not necessary to resnood it, as kouaha had been used on the seizing. Kouaha I should say, is a poisonous gum which exudes from the bark of the pukapuka (*Brachyglottis repanda*), especially when the tree grows in a littoral situation. It was formerly collected by the Maoris and preserved in paua shells. It was rubbed over the seizing of the hooks, which it not only preserved, but also prevented the shank of the hook from rusting. For snooding a shark-hook a four-plait is used, made of the fibre of the tuara-whitu, or bronzed-leaved *Phormium*. The cord is about  $\frac{3}{4}$  in. in diameter and about 2 ft 8 in. in length, and is tightly bound round with twine, except 6 in. at each end. It is then bent in the middle, thus forming a loop; the two loose ends are placed evenly round the shank, and firmly seized, leaving about 3 in. of the loose ends beyond, which are afterwards doubled back over the seizing, and tightly bound round with twine to protect the inner seizing from being cut by the teeth of the sharks. The seizing is continued along the rest of the loop, to make it as rigid as possible, for it is by this that the shark is securely held whilst being killed. Another plaited cord, about 2 ft in length, but not seized, is made with a loop worked on each end. One end is slipped over the loop that carries the hook; the other is made fast to the fishing-line itself.

Next day several canoes, with nets, were sent down the river to catch mullet for bait, and also as food for the kainga. (Papua is the term used when a net is stretched across a creek or inlet just before high water, so that the fish are caught as they return with the ebb. When a net is simply hauled, it is called hao.) A visitor from Popata's camp arrived with the welcome news that the fishing was to be the next day, if our camp were well furnished with bait. (It was the custom to postpone the fishing until all the camps were well supplied). About mid-day the canoes returned with a big haul of mullet, which was at once served out. The fish were quickly cleaned, split into halves, the backbone taken out, and, if a large fish, cut into four

parts. By this time the canoes had had a final overhauling, and were pronounced ready for sea. The large smooth oval stones used as anchors were now sorted out, netted over, and each supplied with 10 or 12 fathoms of rope. Others of the Maoris were employed in making short wooden clubs, called timo, with which the sharks are killed. The jawbone of a horse or an ox makes a most effective timo, and later on I saw several of these used on our canoe.

The report of the signal-gun fired at Okuraiti at once caused a commotion in the camp, followed by a shout of 'Tarahuna nga hangi' (Light the oven-fires). The canoes were quickly launched, hooks and lines and bait put into paros and poihevas (small quickly made baskets) and stowed by each thwart, with the timo placed alongside. Soon after sunset the order was given to go on board, and off we started to the refrain of 'Huka ka huka' (this is a light and rather quick stroke of the paddle, intended more to churn the water into foam rather than to gain speed). The canoes paddled along leisurely, reserving their strength for the great race and struggle later on. When we arrived at the rendezvous at Te Ureroa (roughly, about half-way to the Heads) we found the kaupapa (fleet) in position, facing the Pukewhau River. We took up our station, and kept it, as all the rest did, by aid of a toko, or long pole stuck in the mud, the stern of the canoe resting against a mangrove-tree. Here we waited for high water, the Natives in the meantime indulging in loud talking and laughter. The Maori believed that the strong tides swept immense numbers of sharks into the harbour and far up the rivers and creeks, and that when the tide ebbed the returning sharks were intercepted by the fleet.

As the time of high water approached, the talking ceased, and there was a dead silence through the fleet. Presently our chief whispered, 'Kua whati te mata o te tai'. (The tide has turned). Almost immediately after Popata stood up in his canoe and shouted out in a stentorian voice 'Hua kina' (Charge). Then followed a most exciting race for the fishing-ground and the mataika (first fish). All through the fleet the Maoris were shouting 'Hoea, tiaia, toia, pehia, ana kumea'. Roughly translated, these words are hoea (pull), tiaia (stick it in), toia (drag it along), pehia (press it down), kumea (haul it along). The last two mark deep, strong strokes of the paddle. The word ana is intended to make the stroke more strenuous; thus at the words ana toia, ana pehia, ana kumea & c. every ounce must be put into the stroke. It was a brilliant moonlight night, and the whole fleet could be plainly seen paddling furiously for the channel. The shouting, yelling, and cheering, together with the noises that only the old-time Maoris could make, were indescribable.

As soon as the channel was reached anchors were let go, ngeris and kokas (waterproof cloaks made out of the prepared leaves of the ti (cordyline) were quickly tied round the waist, others were thrown over the shoulders, and then the ready-baited hooks were thrown overboard. Almost immediately, 'Kohi kohia' (Haul in) was shouted from a canoe close to us, followed by a loud splashing and cries of 'Mataika' (First fish). Then came the blows of the timo clubbing the snout, which is the vulnerable part of a shark. Presently one of our crew called 'Kohi kohia', for it was the invariable custom when any one hooked a shark to give warning, so that those sitting near could haul in or shorten their lines, and so save them from being bitten off or entangled. Eventually my turn came to give warning. I pulled the shark up to the gunwale, my friend then took charge and landed it on board by the old-time method known as whakaepa. The stiff looped cord is held about 4 in. above the shank of the hook with the left hand, whilst the right steadies and guides the shark as it is hauled in-board. At the critical moment it is promptly set upon, and several smart blows with the timo close to the end of the snout soon quieten it. A corner of the raho is then lifted up, and the shark is passed to the bottom of the canoe. Within five minutes from the time of anchoring, and for the space of at least three hours, the sound of the timo could be heard incessantly all around us, accentuated by shouting and loud splashings. The scene was simply indescribable. All this time the fleet was gradually working down towards the mouth of the harbour, and sunrise found us anchored near the Heads. As the tide flowed we pulled up-river, and filled up at Te Mutu, a celebrated sharking-ground. The rahos were thrown overboard to make more room, and other preparations made for our return.

By half-tide the fleet, consisting of fifty canoes and two boats, were working up the harbour to the respective camps, apparently all deeply loaded. Any canoe had the right to continue work until high water, when the fishing closed till the pakoki, two weeks later. When a tiger-shark was hooked, or a large toiki (a much larger species than the dogfish), the lines and anchor were quickly hauled in, and the 'canoe paddled to the nearest sandbank. Sometimes the shark itself would tow the canoe into shallow water, and roll about in the endeavour to rid itself of the hook. It was quickly killed by spearing and by blows on the nose.

We landed at our camp before high water, and, now that the excitement was over, I felt stiff and tired, but was all right after a wash and a change into dry clothes. On returning to the river-side to see what was going on, I found that the sharks were all landed and laid out in separate heaps. I noticed that many of them had notches cut out of the fins and tails. This was done to enable individual owners to identify their fish. The catch in our canoe totalled 180. (On referring to my diary, I find that on the 27th January 1875, no less than 265, or about 6 tons in weight, were caught on one large canoe). The cleaning of the sharks had now commenced. The pane (heads) were first removed; then a strip was cut following the curve of the belly. This strip, called the whauaro, was considered a great delicacy. The bodies were hung by the tails to a tarawa (a tall scaffolding), or thrown across a top rail, belly side up. There they remained until thoroughly dried by the sun and wind. The heads and tapiki (entrails) were generally left on the scene of operations. In a day or two the stench would be intolerable. The livers were thrown into a large funnel, made of green flax leaves with a lining of soft fern-leaves, and suspended in a rough frame work of tea-tree. Large stones were then heated and placed on them, and the oil was caught in calabashes. Surplus livers were put into the stomachs of the sharks, and hung up in the sun until the oil exuded from them. The total number of sharks caught by the fleet, including those taken at the pakoki held a fortnight later, was about seven thousand, an average of about sixty-five per canoe for each of the two trips . . . .

A few general notes on the subject of sharks may prove to be of interest. The dried sharks were stacked in food-houses, or whatas, just like so much firewood. Narrow strips were cut and cooked on hot stones, and beaten with a paoi (pestle for pounding fern-root) to soften the flesh. Sometimes the cooking was done in a hangi, or steam-oven. In this case the flesh was cut in chunks, and not pounded.

Shark-oil was used in a variety of ways and for a number of purposes. It was mixed with kokowai (red ochre) for painting war-canoes, urupas, and the ornamental portions of the principal houses, as well as the carved work about the pas. The urupa was a graveyard, or, more correctly, a carved monument, usually standing on two posts, erected in memory of some great chief. They were usually beautifully carved, and very tapu. The oil was also used to anoint the bones of their deceased friends after the ceremonial scraping, or hahunga. In this case it was often mixed with a small quantity of kokowai, just enough to give the bones a light tint. As a cosmetic for the body and hair, the oil was used either with or without an admixture of kokowai, and it was often scented with kopuru moss, with raukawa (*Panax Edgerleyi*) manakura (*Melicytus micranthus*), or some other scented shrub.

The koinga shark was closely preserved at Ahipara. This is a small species, rarely exceeding 3 ft in length. Its flesh was considered more delicate and better eating than that of the kapeta. The liver produced a finer oil, not nearly so rank, and was held in high esteem for anointing purposes. This species has two dorsal fins, and in front of each is a strong bony tusk, or spine, which gives it the distinctive name of koinga (a sharp point). The front tusk is about 2 1/2 in. in length, and the hinder one a little shorter. The livers were cut into halves and put into calabashes, heated stones being placed on the top, to try out the oil.

The teeth of the mako shark were greatly-prized.

They were called ngutukao, and were worn suspended from a hole bored in the lobe of the ear. If sold they always fetched a high price, and I saw two bullocks given for a pair of medium size in 1855. In the north the mako is usually caught at or near the North Cape. The canoe pulls out to the mako ground, when a lot of fish is thrown overboard as a poa (attraction). The mako, which is a tame fish, is attracted alongside by the bait, when a strong mahanga (noose) is passed over its head below the dorsal fin and then pulled tight around the small of the body. It was never caught with a hook, for fear of injuring the teeth. Four teeth only were considered of special value, two in the upper and two in the lower jaw. The best-shaped teeth had the points bent slightly outwards, the others were bent sideways more or less according to their position. The mako attains a length of from 7 ft to 10 ft. While mostly found near the North Cape, stray specimens are occasionally met with between Rangaunu Heads and Cape Karikari. We once captured a medium-sized fish in this locality, and lost another – a large one – owing to the line breaking . . .

#### 4.5 THE CONTINUANCE OF THE FISH SUPPLY

Many references point to an abundance of fish during the first thirty years after the Treaty. The following is but a selection.

Polack (1840:202).

The coasts, rivers, creeks . . . of New Zealand abound in fish of infinite variety . . . large shoals of various species visit . . . the coasts . . . of which the natives take advantage to procure an abundant supply for the winter season, by drying them in the wind, sun and smoke . . . Among the piscivorous tribes . . . are . . . shark, . . . pilots (scomber); flying fish . . . and an infinity of others, besides a great variety of testaceous and crustaceous fishes that almost cover the rocks under water, such as clams, mussels, oysters, crays, cuttles, limpets, welks, gigantic mussels, a foot in length, cockles, sea eggs, star fish, mutton fish . . .

Sherrin (1886:41).

I never saw . . . the sea more alive with fish than I have seen around the Hen and Chickens, where in fine weather were constant shoals of fish, stretching as far as the eye could see in every direction . . .

The abundance appears to have been general. Hursthouse related the opinion of a Wellington settler.

I consider Billingsgate could show a dozen good table fish for New Zealand's one. Some colonists, however, might differ from me here: one gentleman, writing from Wellington, says: – The books may well tell us that the harbours abound with fish; abound is a poor word – they are literally alive with fish . . . they are delicious, and in great variety . . . On a sunny morning the surface of the harbour is a complete mass of fishy life (1857:122–3).

These further extracts are from Sherrin (1886).

Immense shoals (of jack mackerel) . . . are occasionally driven on the beaches round the harbour (Wellington) (p46).

The Maoris resident on Cook Strait set nets and catch moki in abundance . . . (p68).

. . . off Cape Saunders and Otago Heads seems to be a central gathering ground for countless millions of these fish (barracouta) . . . (p12).

Heaphy reported with reference to hapuku,

It is generally of great size, but the flesh is of much delicacy of flavour. A considerable quantity of it is cured at the whaling stations for winter provision, and is very fine. I have seen this fish being carried along the beach of Wellington, on a pole, borne by two natives, who found its weight fully equal to their united strength (1842:48).

Heaphy added,

In the various settlements of the Company about Cook's Straits an abundance of fish can at all times be procured; and this is of much service when the price of other fresh provisions is high. Shell-fish are also in great quantity on every part of the New Zealand coast. At Wellington there is always a good supply of cray-fish, oyster and giant mussel, which the natives obtain on the adjacent shore of the Strait.

The curing of fish will, no doubt, soon become an important and profitable occupation in the Company's settlements, as there is every facility for it at present existing; and in South America will always be found a ready market. It is an employment to which the natives would industriously apply themselves (p49).

MacKenzie noted, referring to Great and Little Barrier Islands and the Firth of Thames, '... that fish in countless millions frequent the neighbourhood ...'. Of the Kaipara Harbour he said, '... the whole harbour ... a distance of 80 miles, seemed to be actually swarming with the largest and finest mullet in the world'. With reference to the coastline from Kaipara Heads to Waitara, '... large shoals of snapper, mullet, and Kahawai are to be found here ... I found soles or flounders, kelp-fish, mullet and bream everywhere inshore, and also many varieties of small fish but very excellent fish that I cannot name ...' (1885:1).

#### **4.6 ASSESSMENT OF THE MURIWHENUA POSITION**

As has been indicated above (at 3.6), Muriwhenua tribes were too remote from the markets that emerged in and after 1840 to take much advantage of the lucrative trade in agriculture and fish products.

In addition, the whaling ships which had for two decades regularly called at Northern ports to replenish their stores reduced in number as the industry declined after the 1840s. However, as indicated above (3.5) there was some Maori involvement in whaling in this period. The whole of the North entered a period of economic stagnation compounded by the transfer of the capital to Auckland. Heke's war was as much a response to this economic decline as to the introduction of British sovereignty.

Gum digging, which was later a significant Maori enterprise, did not get started in Muriwhenua until the mid 1850s. Accordingly, while the matter must be speculative, it seems likely that during this period there was some reversion to the old way of life, a return to original villages and a revived interest in fishing. Matthews' account of the large scale tribal fishing effort in 1855 is one example of this.



## **5. NON-MAORI CONTROL OF FISHERIES, 1870–1900**

### **5.1 INTRODUCTION**

5.1.1 In our research on the first twenty-five years after the Treaty we uncovered no evidence that Maori saw non-Maori fishing as a matter of any major concern. By the 1870s that position had changed, but Maori complaints resulted not so much from an increased non-Maori user as from the passage of certain fish laws that severely restricted Maori fishing interests. In this chapter we examine those laws. We also record some Maori complaints.

5.1.2 The first fish laws referred to, we find, made certain assumptions – that Maori fisheries were limited in scope, both as to the area of sea used and the species caught; in purpose, it being assumed that Maori fishing should be limited to satisfying personal needs; and in their management, the Crown presuming to regulate the Maori use of Maori fisheries. Those assumptions became ingrained in fishing administration, and have survived to modern times, as we first observed in the Te Atiawa Report (1983:4.7–4.8).

5.1.3 The laws referred to were enacted at a time of considerable hostility between the partners to the Treaty. We therefore review in this chapter, the political and social climate of the time, for we consider the basic assumptions that were made in those laws, and which yet survive, should be seen in the context of contemporary attitudes.

5.1.4 Finally, Maori fishing activities waned in the last thirty years of the nineteenth century. At the same time, a small non-Maori interest in commercial fishing began to grow. This chapter considers the extent of non-Maori fishing in the period, and speculates on the causes of the Maori fishing decline.

### **5.2 BACKGROUND TO THE PERIOD**

Crown laws and policies affecting the land and fishing interests of Maori have their genesis in the last 40 years of the nineteenth century. Decisions made then have had a lasting and almost irreversible influence in shaping modern opinion on Maori land and fishing rights. The climate in which those decisions were made is therefore important.

When the Treaty was signed and sovereignty was proclaimed New Zealand was firmly under imperial control. We examined the situation in the Orakei Report (1987, and see especially 4.5–4.7) and need not repeat everything here. We found, however, that despite some inevitable clashes at the distant frontier, the imperial intention was by and large benign. Successive Governors were directed, as Governor Grey was, ‘to honourably and scrupulously’ fulfill the conditions of the Treaty of Waitangi and to adhere to its stipulations ‘as a question of honour and Justice no less than of policy’ (Wards 1968:171). Change came with the influx of more and more settlers and the waning of imperial influence.

During the first eighteen years following the signing of the Treaty of Waitangi, Maori were in the majority and a good measure of circumspection was evident in dealing with them. Maori initiatives in trade and fishing were pursued with considerable freedom, utilising, (as noted in 4.2 and 4.3 above), the customary organisation of labour under traditional tribal control. Butterworth (1987) adds,

Throughout the 1840s, Europeans were too numerically weak to be able to enforce their own law. Indeed, reassurance needed to be given at various points in time about their willingness to support the Chiefs and to accept Maori custom.

Governor Grey however, saw the tribal authorities as a threat to the sovereignty of the Crown. Butterworth (*supra*) thus refers also to

Grey's whole approach of forcing the pace of amalgamation by trying to destroy the authority of the Chiefs and in endeavouring to supplant Maori custom with common law.

Population balances were changing however, with immigration swelling the ranks of non-Maori, disease ravaging the numbers of the other, and as the settler population waxed, imperial influence waned.

By 1855 New Zealand had its first Colonial Parliament. By 1860 Maori were outnumbered and the country was on the verge of war. We have tended to call those wars the Land Wars for issues concerning land were predominant, but modern historians emphasise that they were really about power and control, the concern of the tribes to uphold their own tribal authority in respect of their particular lands, resources and interests, and the anxiety of Governors to uphold the sovereignty of the Crown which was felt to be threatened by tribal controls.

Belich (1986:17–20) considers initially relationships were relatively peaceful because Maori were keen on trade, but the maintenance of Maori authority and the use of the tribal base to claim a measure of independence and control as well as a substantial section of the economy, was the main cause for conflict. Not land, but '(Maori) determination to uphold chiefly authority against arbitrary British interference, and a desire for interaction with Europeans', was the motivating cause for the Governor's resolve to engage in war (p30, 73–80).

It had not been easy for the settlers to compete on the economic side. As early as 1845 one commentator had said Maori produced food so cheaply they would ruin the settlers' market. McLauchlan (1981:69) considered their success as farmers contributed to their own undoing. He cites Alley and Hall (1940),

The white settler had his own place for the Maori in the scheme of things and it was certainly not that of competitor. The Maori was expected rather to be the willing accomplice in converting his forests into the white man's farms . . .

The war, and the confiscation of land that followed, had immediate effect.

The British army officers engaged in the campaigns were wont to accuse the colonists of prolonging the wars for the sake of their pockets. Certainly the market for fat stock was vastly improved by army purchases. The northern settlers benefited in another way. The destruction of the military power of the Maoris meant their elimination as competitors in food production, a result partly due to the voluntary retirement of the Maoris after the wars.

The ferocity of the war, or as Belich (*supra*) suggests, the narrowness of victory, led to a hardening of racial attitudes reflected even in the courts. Thirty years before, Mr Justice Chapman had spoken of 'aboriginal natives' and 'Maori New Zealanders', and the Treaty of Waitangi was seen as expounding what was already law – *R v Symonds* (1847) (1840–1932) NZPCC 387. In 1877 however, when a Maori plaintiff relied upon the Treaty in a claim to land, the Treaty was declared 'a simple nullity' and the judgment of the Court was peppered with references to 'savages', 'barbarians' and 'primitive barbarians' – *Wi Parata v Bishop of Wellington* (1877) 3 NZLR 72.

Britain, which had earlier declined approval of enactments considered contrary to the Treaty, relinquished control of native affairs in 1861. A dramatic rearrangement of Maori interests followed immediately to destroy the tribal basis of power, starting with the individualisation of Maori lands in the Native Land Act 1862, and the confiscation of lands as provided for in the New Zealand Settlements Act 1863.

Many of those in Britain were appalled. In a speech in the House of Lords on 30 May 1864 Lord Lyttelton observed,

It was a fact that the Treaty of Waitangi, upon which alone we could found our claim to sovereignty, was adhered to only by a portion of the native chiefs. He did not doubt that if we had really governed the island in the spirit of that Treaty the Maoris would have acquiesced in our rule. The fact, however, was, that they had never received that protection for life and property which they had a right to expect . . .

Earl Grey

. . . contrasted the present state of New Zealand with its happy and prosperous condition 10 years ago; and traced the causes which had, in his opinion, led to the present unsatisfactory condition of affairs. Before representative institutions were established in New Zealand the colony enjoyed a great degree of prosperity. But the effect of our having established not only representative Government, but democratic institutions, had been to throw the whole power of governing the colony into the hands of the settlers, who had used it for their own exclusive benefit, and had thus alienated the affections, and lost us the confidence, of the natives. No attention had of recent years been paid to the interests of the Maoris. . . . (*The Home News* May 26, 1864 pp9–10).

The effect of those laws was considered in the Orakei Report (1987) and the results need not be further reviewed here. What is generally not so well known is that the first fish laws were enacted in the same period. Maori fishing interests suffered similarly.

Inevitably the social and economic order changed too. Ward (1974:305) describes the final decade of the last century.

By 1893 then the Maori had, in the main, been subordinated to the settler political and legal system and asked to assume its obligations, while being steadily parted from their lands by processes which favoured speculation and deviousness and hindered Maori farmers. The Maori culture was widely denigrated. At best it was regarded as a hindrance to Maori participation in the new order; at worst as depraved and obscene . . . (L)ittle encouragement was . . . given to Maori participation in a wide spectrum of Pakeha vocations . . . Economic opportunities everywhere seemed to be closed off to the Maori. Meanwhile discrimination against Maori in public places, accommodation and the real estate trade increased . . . (T)he rule of law was no clear safeguard of Maori rights. It was markedly the rule of the majority, shaped to suit settler convenience . . .

### **5.3 NON-MAORI USE OF THE SEAS**

Throughout this period, land preoccupied the settlers' attentions. We found no evidence of any substantial non-Maori fishing during this time but there were some indications of a growing interest. Sherrin (1886:54) described a fish curing station at Helensville in the 1870s but noted 'the Maoris are the only fishermen who bring supplies to the factory'. He mentioned also john dory being caught in a trawl in Otago Harbour in 1884 (p49) and, at about the same time, non-Maori net fishing for snapper in Wellington Harbour (p85).

But the commercial potential was known. On the enactment of the Fisheries Encouragement Act 1885 to promote canned fish exports, one speaker in the House was moved to remark

Our waters are replete with golden sovereigns, and we have only to take them out and they will fill the Treasury (52 NZPD 586).

Still the main non-Maori fishing interest was in recreation and gathering for personal needs, the inland recreational waters receiving special interest. Brook trout introductions were tried in the 1880s in Auckland and Canterbury. The acclimatisation of quinnat salmon began in 1875 and by 1900 had been tried in many parts of New Zealand including Auckland, Coromandel, Waikato, Taranaki, the Bay of Plenty, Hawkes Bay, Canterbury, Manawatu, Wellington, Nelson, Marlborough, Motueka, and the west coast of the South Island. Californian trout liberations occurred in the Auckland district in 1877–1886. *Salmo salar* (Atlantic salmon) and *Salmo trutta* (brown trout) were introduced from 1867. Both species became widely established.

The acclimatisation of the exotic species had a major impact on Maori interests and led to voluble complaints. Sherrin (1886:141) had noted that at Taupo and other inland places, small fish (inanga or native whitebait) formed the food of the Maori for many months in the year ‘and are obtained in such abundance as to yield an ample supply both for daily use and to preserve for other seasons’. But trout and salmon were partial to them too.

Some acknowledgement of Maori interests was given in the Fisheries Conservation Act 1884. It provided for regulations affecting the recreational fisheries and added that nothing in them ‘shall be deemed to prevent any Maori from taking . . . indigenous fish . . .’. The best regulation in the country however, could not amend the palates of the exotic species, and the indigenous fish on which Maori relied were virtually wiped out. This was not the only time by far that general words of little effect were enacted to cover Maori interests.

The first fish laws however came from the growing settler interest in shellfish, and in oysters in particular.

## **5.4 THE FIRST FISH LAWS**

5.4.1 The Oyster Fisheries Act 1866, the first fish law in New Zealand, followed concern that oystereries near Auckland and other major settlements showed signs of depletion. The Act provided for the leasing of oyster beds for commercial purposes and artificial propagation, and for the protection of natural beds by enabling closures. No specific provisions were made for Maori (there were then no Maori representatives in the House) but the Act did not apply to foreshore oystereries. Later, that exclusion was thought to have been 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 who would probably offend against the law (Pollen, 1874 16 NZPD 478).

Eight years later foreshore oystereries were brought into the Act but still without provision for Maori. It seemed sufficient to say in the debate in the House

since that time (1866) the Natives had acquired other tastes (Pollen, 1874 16 NZPD 478).

The discovery of more extensive beds near the remote Stewart Island led to 'exclusive' commercial licence grants by a notice and objection procedure, in the Oyster Fisheries Amendment Act 1869.

When a new Oyster Fisheries Act was proposed in 1892, Maori had separate Parliamentary representation and Northern Maori MP Kapa voiced his concern that commercial licences had been granted over beds customarily exploited by Maori (75 NZPD 364). It was then provided (in section 14) that

The Governor may . . . declare any . . . portion of a bay . . . or tidal waters . . . in the vicinity of any Native pa or village to be an oyster-fishery where Natives exclusively may take oysters for their own food . . . and may prescribe regulations for preventing the sale by Natives of any oysters from such beds, and for protecting . . . the oysters therein from destruction.

The full text of this and other provisions for Maori is in *appendix 7*.

Thus were the first assumptions made about the nature of Maori fishing interests. They were to become so ingrained in over a century of subsequent fishing laws as to make virtually incomprehensible any other view.

- (a) The oyster laws assumed the unrestricted right of the Crown to dispose of inshore and foreshore fisheries. Inherent in that assumption was the view that the foreshore and the seas beyond them were held by the Crown without encumbrance. There was some uncertainty about that at first, but the opinion was soon almost sacrosanct that the Crown owned all the foreshores, including that adjoining Maori lands.
- (b) It was assumed that no examination of the Treaty was required. That does not mean the Treaty was overlooked. It was central to nearly every Parliamentary address by the Maori members on the fishing question (e.g., Tairaroa 1877, 27 NZPD65, Kapa 1892, 75 NZPD 364, Heke 1886 NZPD 885).
- (c) It may have been assumed that Maori fishing had had no commercial component. If that were so it was a clear contradiction of fact. The first Oyster Fisheries Act of 1866 proposed controlled sales through the lease of oysteries to commercial interests, though, denying Maori the right of sales from their oyster beds. Yet just one year before, the House had been furnished with a return of produce sold at the ports of Onehunga and Auckland between 1852 and 1858. It showed that Maori had provided literally thousands of kits of oysters annually (1865 AJHR E-12).  
The 1892 Act also made it clear that native oysteries were 'for their own food' and regulations could be made to prevent any sales.
- (d) The alternative assumption may have been that Maori were stripping the beds and state regulation was necessary to control them. But total prohibition is not the regulation of trade especially when the right to trade is given to others. If that was understood, then the assumption must have been that Maori fishing carried no commercial rights, or alternatively, it may have been considered that Maori should be displaced in their domination of the fish market.  
No specific allegation of Maori overfishing was in fact made at this time, but the view that Maori fishing was other than commercial was soon ingrained.
- (e) It was assumed the control of even Maori reserves should remain with the Crown, the Crown alone having the power to regulate them. It was not until the next century that thought was given to the control of these reserves by tribal authorities, although such power was rarely if ever given.

- (f) In any event a regime was assumed whereby non-Maori interests could be licensed for commercial exploitation, while Maori interests should be provided for in non-commercial reserves near to their major habitations.

It added much to Maori grievance that few Maori oysteries were created while non-Maori secured exploitation rights over traditional Maori beds (see 4.5.10). From a Maori point of view that was the inherent weakness of the reservation system. Once it was settled that the Crown alone could recognise Maori fishing grounds the danger arose that it might not recognise very many (as indeed it did not), and that particular fishing rights would be non-existent in areas removed from major Maori habitations.

So it was that the reservation of fishing grounds came to depend not upon proof of customary entitlement before an independent body, as has been the case in England, but upon the whim of political and administrative opinion.

5.4.2 The Salmon and Trout Act 1867 that followed soon after was to protect the fledgling salmon and trout fisheries created by acclimatisation societies. The Governor had wide powers to protect 'any other fish' (section 4), but even Governors were powerless to amend the tendency of imported fish to feed off native species. The provision of savings clauses that may salvage conscience, but not Maori interests, was to be a feature of future legislation. The Maori interest in fresh water fisheries was at that time barely addressed.

5.4.3 The Larceny Act 1869 adopted with little change an English Act that codified some common law fishing rules. It became an offence to take fish from 'any water which shall be private property or in which there shall be any private right of fishery' or to take oysters from any bed 'being the property of any other person and sufficiently marked out or known as such'. It is apparent from the Act that Maori fisheries were not included except to the extent that they had been specifically reserved or granted. The Larceny Act affirmed the assumption that customary fisheries had no status unless provided for by statute or in some deed or grant.

5.4.4 An exception to the opinion that Maori fisheries were dependent upon Parliamentary enactment was the recognition given to fisheries reserved to Maori in the cession of Maori land.

The Williamson Compensation Act 1868 gave damages to a settler whose land was flooded through the construction of a Maori eel weir. The weir was built under rights reserved on the sale of the land to the Crown. Although the purpose of the Act was to provide compensation for the settler, it also recognised that eeling rights could be reserved in sale deeds.

In a subsequent court case, *Mohi v Craig*, (unreported but see 15 NZPD 1172) a Thames Maori successfully prevented the floatage of logs on a river that would destroy his eel weirs. In that case however, the Floatage of Timber Act 1873 nullified the decision, despite the opposition of Maori members, and allowed the timber to pass. The Act provided compensation to the Maori for the loss of their constructions, but not for the loss of their fishing rights (refer 14 and 15 NZPD 1006–7, 1171–73, 1263–65).

Accordingly Maori fishing rights gained legal force when reserved in land sales, but Parliament could, and did, remove those rights. The opposite approach, that fishing rights associated with land continue unless in the cession of the land they are specifically given away, was not considered, though that approach has now been accepted in Canada – *R v Taylor and Williams* (1981) 62 CCC (2d) 227, 34 OR (2d) 360 (CA).

5.4.5 The view was soon received and became increasingly entrenched, 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. Some officers of the Native Land Court however, were not convinced. They were fully aware of the importance of tidal fisheries to Maori (thus see evidence of Commissioner McKay, 1869 AJHR F-7, p7 and his report at 1874 AJHR G-5C).

Chief Judge Fenton, referring to large tidal mudflats in the Hauraki Gulf near Thames, added,

It is very apparent that a place which afforded at all times, and with little labour and preparation, a large and constant supply of almost the only animal food which they could obtain, was of the highest possible value to them; indeed of very much greater value and importance to their existence than any equal portion of land on terra firma (*Kauwaeranga Judgment* 187 see (1984) 14 VUWLR 227:240).

The Native Land Court considered that Maori claims to fisheries were no different from their claims to land and depended solely upon proof of long term user. In the 1860s the Court awarded some important tidal areas to various Maori as property rights and not merely as rights to fish. As noted in the *Manukau Report* (1985:6.2), Crown Grants were issued for them.

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 (*Whakaharatau 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 (6 NZPD). 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 the 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) (1872 NZ Gazette 347). 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.

5.4.6 The Fish Protection Act 1877 was the first comprehensive fisheries control measure in New Zealand. It recognised the Treaty of Waitangi but the manner in which it did so illustrates a recurring theme, apparent also in Maori land laws (the Native Land Act 1862 for example) that Maori concerns for the recognition of Treaty interests could be met by mentioning the Treaty in the Act, in a general way, and although nearly everything else in the Act might be contrary to Treaty principles.

Section 8 of the Fish Protection Act 1877 provided that nothing in that Act was to affect any of the provisions of the Treaty of Waitangi, or to take away Maori rights to any fishery secured by it.

The full text is in *appendix 7*.

Just what rights were thus protected was unclear even in the minds of Members who enacted that provision. Southern Maori MP Taiaroa immediately enquired of the Minister of Justice and Native Affairs, Sheehan, what authority Europeans had to fish over the Mangahoe Inlet in Otago, an area he claimed, that Maori had regularly used. Mr Sheehan replied

. . . under the Treaty of Waitangi certain rights were reserved to the Natives in regard to their fisheries. . . . 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 honorable 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 (27 NZPD 65).

The Minister may have considered that despite the Treaty Maori fishing interests depended on Maori ownership of the foreshore, but the earlier oyster laws had employed a different presumption, that all foreshores belonged to the Crown without restriction. The more likely event is that section 8 was really window dressing, inserted in the face of claims by Maori members that the Treaty should be recognised and fishing rights upheld, while no one really knew or very much cared what section 8 entailed.

In any event the 1877 Act, in broad terms, assumed that Treaty fishing rights were limited in some way. 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.

The Fisheries Encouragement Act 1885 came next and enabled the Governor to set apart Crown lands on the coastline, or on any bay, harbour, estuary, saltwater creek, or other sea inlet, for the purpose of forming fishing towns or villages. Fishermen licensed to occupy the villages and operate their business there would also qualify for export incentives. Provision was also made for bonuses based on the quantity of canned and cured fish prepared and exported.

In Sherrin's summation, (1886:297), the Act provided

Free lands for homesteads and free fishing for fishermen and their descendants.

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.



5.4.8 In 1892 Maori members of the House voiced strong opposition to a Bill proposing to limit the size of patiki (flounder) that might be taken from Lake Ellesmere. It was a traditional fishery they claimed, protected not only by the Treaty but by the original deed of purchase when the land was sold by its Ngai Tahu owners. The Maori had also their own rules of conservation by which small fish might be taken at a time of depletion, not the larger breeding stock. European members replied that patiki were taken by Maori and non-Maori alike and there ought to be no separate law for Maori. In this case however, though for other reasons, the Bill was discharged (75 NZPD 438–43).

5.4.9 The Sea Fisheries Act 1894 consolidated and amended earlier legislation. It covered

- the administration, regulation and protection of fisheries;
- the licensing of vessels, export rights, fishing rights (including exclusive licences), and oyster farming; and
- the licensing of seal fisheries by public tender.

Fishing regulations included provisions for closed seasons, closed areas, minimum fish sizes, minimum mesh size of nets, and to prohibit certain fishing gear. They were directed to preventing depletion, protecting the young and maintaining reproduction. In the opinion of one Ministry of Agriculture and Fisheries official at our hearings, the controls envisaged by the Act were not always well based, but were well intentioned and all that was possible in the absence of scientific information (Boyd, B70:4–5).

The Act was not passed without protest, Northern Maori MP Heke claiming that many clauses were inconsistent with the Treaty but specifically referring only to the requirement that Maori wishing to sell oysters required a licence (86 NZPD 886). In fact, although Heke appears to have missed the point, section 8 of the 1877 Act, which may have given the Treaty an overriding force, had been omitted from the 1894 Act and nothing was put in its place. Joseph Ward, the Minister in charge of the Bill, nonetheless, replied

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 (86 NZPD 886).

Ward three times assured the House that the Bill was merely a consolidation. The First Report of the Interdepartmental Committee on Maori Fishing Rights comments that this statement was ‘extraordinary’ and ‘egregiously’ misleading (doc A30).

It was a fact however that the 1894 Act specifically forbade the sale of oysters from those beds reserved for Maori. It did provide for Maori to engage in commercial fishing, but subject to their obtaining a licence. It also imposed penalties against Maori for any unlawful use of oystereries.

5.4.10 In 1895 Manukau Harbour was declared an oyster fishery for leasing purposes and by 1897, 18 leases had been issued, all to non-Maori. Only one area was reserved for Maori and even then, after protests, not until 1901. Through farm run-off and other pollutants, it was ‘dead’ by 1924. In his evidence (doc B69) R W Little, Senior Scientist for the Ministry of Agriculture and Fisheries, provided some information on the leases. It suggests they included several tribal beds. He recorded that a Mr M H Kaihau wrote to the Minister of Public Works for the return of certain oyster beds to Maori, Mr Little commenting ‘. . . the beds in question . . . seem to be mostly forfeited commercial leases close to Maori communities.’

There is evidence of extensive non-Maori commercial oyster picking in several northern harbours in the 1890s and later. Most of these harbours had long supported large Maori populations but it was only after much protest that Maori oyster reserves were established. The first was in Kaipara in 1913 but the harbour had been well worked by commercial operators much earlier and even by 1910 the beds were so depleted that they were closed to commercial picking. Later four more Maori oyster reserves were set aside in the Kaipara. Others were provided for in Whangaroa and Whangaruru harbours and Mangonui Inlet in the Bay of Islands, all before 1933 when the last Maori oyster reserve was established.

Closed seasons were also introduced, but perhaps for quality control rather than conservation, another Ministry of Agriculture and Fisheries official before us commenting that

The use of closed seasons for rock oyster prior to the turn of the century was to avoid the poor quality and wastage which occurred at certain times of the year (Boyd doc A70:6).

The closed seasons applied to Maori reserves as well as to commercial and general public areas.

5.4.11 The Sea Fisheries Act was extended in 1896 to provide for the regulation of all shellfish fisheries. Prior to its enactment Heke asked the Minister in charge of the Bill

... to take into consideration some suggestions made by a Native gathering in Wellington respecting shellfish. 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 (96 NZPD 236).

This suggests 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 now seeking an unrestricted right to gather for home use.

The Minister did not respond and Heke proposed his own amendment, 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 . . . (96 NZPD 258).

The amendment was unacceptable to Government and other Maori MPs proposed an alternative, that

when shellfish are required as an article of food by the Native population they shall be exempt from the operation of this Act (96 NZPD 258).

That too was rejected after non-Maori MPs expressed concern with an apparently unlimited exemption to Maori inhabitants. The final section read

Provided that when shell-fish in the Middle (South) Island are required as an article of food by the aboriginal native population they shall be exempt from the operation of this Act: Provided also that the Native Minister may . . . relax the provisions of any Order in Council as regards the North Island if he is of the opinion that such Order in Council injuriously affects aboriginal natives by limiting or depriving them of food supplies . . . (The full text is printed in appendix 7.)

Maori fishing interests might have remained restricted in that way had it not been for the later protests of Southern Maori MP Parata. The Sea Fisheries Amendment Act 1903 resurrected something of the broad protection of the 1877 legislation. It will be recalled

that section 8 of the 1877 Act had specifically protected fishing rights secured by the Treaty. Section 14 of the 1903 Amendment provided that

Nothing in this Act shall affect any existing Maori fishing rights.

The provision was re-enacted as s.77(2) of the Fisheries Act 1908 but was restricted to sea fisheries. In the Fisheries Act 1983 it is found at s.88(2) but reads simply,

Nothing in this Act shall affect any Maori fishing rights.

## 5.5 MAORI COMPLAINTS

In 1860 Governor Gore-Browne convened a hui of 200 chiefs from throughout New Zealand, at Orakei, Auckland to consider the Waitara dispute. The Treaty of Waitangi was discussed at great length over several weeks but significantly we consider, fishing rights received virtually no attention (see Kohimarama Conference AJHR 1860, E-9); but when a later hui was summoned (in 1879) after the first fish laws had been enacted, Maori complaints were voluble (see First Maori Parliament AJHR 1879 Sess II G-8). These extracts from the report of that hui were quoted in the *Manukau Report* (1985:8.3)

The Queen stipulated in the Treaty that we should retain the mana of our lands, the mana of our forests, fisheries, pipi grounds and other things . . . (Eruena Paerimu)

The words of the Queen were that the mana of the chiefs would be left in their possession, that they were to retain the mana of their lands, fisheries, pipi grounds, forests . . . (Te Hemara)

The Queen in the Treaty of Waitangi promised that the Maoris should retain their mana. That word is correct because the Queen accepted us as her subjects and she said to the Maori people belonged the mana over his pipi grounds . . . the Queen also said that the Maori should have the mana over the sea . . . (Waata Tipa)

By the Treaty of Waitangi we were to continue in possession of our lands and fisheries and forests. I ought to have the mana over my fishing grounds (Arama Karaka Haututu).

We ought to have the authority over all our lands as well as the foreshore and over all the fisheries (Hori Tauroa)

What is meant by the rivers in which fish are caught? and which are the fish? Do the words of the Treaty mean fresh water rivers or the sea? When a Maori says 'ika', we know that he means fish – that he means those animals that have breath in the seas. Now, do you suppose that we still possess those fisheries that were to remain with us by the words of that Treaty? I think not. They have been taken away, in spite of the words of this Treaty. I do not know how they went. They are not like lands or forests. You have to make an agreement before they can be handed over or taken (Paora Tuhaere)

It was only the land that I gave over to the pakehas. The sea I never gave, and therefore the sea belongs to me. Some of my goods are there. I consider the pipis and fish are my goods. I have always considered them my goods up to the present time (Apihai Te Kawau)

I object to the Europeans taking the fisheries where the flounders were caught and stealing my mussels (Wi Tamihana Tukere)

We should ask the Government to allow us to retain our claims over the foreshore. I have seen for the last two years that the Europeans at Kaipara have gone over our beds and have taken our fish, shells and oysters without our permission. We only look on. I think that every tribe should watch carefully what this Government will do in regard to these things (Mihaka Makoare)

Another matter in respect to which I say that the Government did wrong was the Manukau. I was not aware of the Government taking all my large pipi-banks and shoals in the Manukau. Those large banks have all gone to the Government. I was not told why these were taken. I wish to know now whether they belong to the Queen or remain my property (Hori Tauroa)

By the Treaty of Waitangi the fisheries were secured to the Maoris, but they are now in possession of the Queen. Therefore, as we returned to the oath we had taken under the Treaty of Waitangi, I think those things which were taken from us should be restored under that Treaty (Tare)

Therefore I say that the Maoris should ask Mr Sheehan to investigate those claims to land which the Maoris think they have. Their grievances are the sea and the fisheries. These were the original possession of ours. The payment from vessels anchoring goes to the Queen; we do not get any of it. We should speak to Sir George Grey and Mr Sheehan about these matters, in order that they might give us some consideration for the loss of our mana over the sea-fisheries (Pataromu)

The Queen also said that the Maori should keep their mana over the sea . . . When vessels anchor they have to give money to the Queen but none of it is given to the Maoris (Waata Tipa)

I think Sir George should restore the foreshores to us (Arama Karaka Haututu)

We noted too, in the *Manukau Report*, that claims to fisheries, foreshores and harbours continued from then to the present time.

We do not of course have a complete account of Maori fishing complaints. In the *Manukau Report* (1985:6.2) we referred to the efforts of Maori Councils to establish Maori fishing reserves in the 1950s. In this report, at 5.4, we have recounted the opposition of Maori Members of Parliament to the first fish laws introduced. To gain an indication of the level of complaint we searched the Appendices to the Journals of the House of Representatives for Maori Fishing Petitions referred to the Native Affairs Committee, considering that if complaints reached that stage it must indicate a widespread concern. Appendix 8 records the result. Ninety three petitions were found, most on behalf of many persons, one on behalf of 11,976. In most of them, the Treaty of Waitangi was invoked, and more often than not, specific fish laws were alleged to be contrary to the Treaty.

Counsel for the Fishing Industry pointed out that many petitions sought the preservation of site specific fishing grounds. That is not surprising. A major contention at the time of those petitions, was that fishing grounds were not being reserved though the reservation of such grounds was provided for in law. It is not an indication that Maori claimed no more, but of the level to which they had been reduced.

The appendix, which provides brief particulars of each claim, is a telling record of Maori grievance, for though by statutes and state enforcement action for over more than 100 years substantial Maori fishing rights were regularly denied, and though the relief sought in petitions was rarely granted, yet were petitions still filed. If the protest was at any stage muted, it was likely to have been for no other reason than that redress was rarely available.

## 5.6 MAORI FISHING DECLINE

5.6.1 Tribal fishing activity had been considerably reduced by the end of the nineteenth century. No exact date marks the end of tribal fishing of course and no doubt there were regional variations in the decline. R H Matthews' account of shark fishing in Muriwhenua under Popata te Waha, given above at 4.4, refers to two expeditions in 1855 and 1875, conducted on tribal lines, the first involving some 1,000 tribal members. His opening comments suggest that the large scale fishing expeditions at Rangaunu Bay declined from about 1885, and that large communal efforts had virtually ceased by 1910.

Matthews' account does not stand alone. Captain Gilbert Mair recounted a major expedition at Maketu, Bay of Plenty, involving several hundred Ngati Pikiāo under Te Pokiha, with numerous canoes and a seine net 1,900 metres long. The catch was some 37,000 'good sized' fish and many smaller but uncounted ones (Mair 1923:19–22). The date was New Year's Day 1886.

But throughout the period 1870–1900, and even before then, many factors were at work to diminish both tribal fishing and smaller scale Maori fishing for family needs.

5.6.2 Except in the case of whaling, Maori had not developed any major new fishing technology.

We considered in chapter 4, that Maori fishing modes continued on customary lines despite the development of a fish trade. We quoted some accounts at 3.3, indicating that Maori saw their fishing gear and capabilities as superior, declining some offers of Western equipment. In the same section we referred to the remarks of earlier explorers and travellers who were more than surprised at the effectiveness of Maori tackle, some considering their nets to be 'larger than' (Nicholas) or 'not at all inferior to' (Anderson) those of Europe. Iron, sought avidly for hooks was shaped to Polynesian styles (Best 1929:43) and there was certainly nothing comparable with the acceptance of western technology in developing land.

But for the greater part of the nineteenth century the settlers were not major utilisers of the seas, and save for the introduction of canning, exotic freshwater fish and some artificial propagation of oysters, they had little in the way of fishing gear or methods that might have tempted Maori. Steam trawlers came mainly this century. Refrigeration was introduced about 1880, but mainly for the export of mutton, and only later for fish produce.

Although large scale tribal fishing activities had become less frequent, Maori fishing was still essentially a group rather than an individual activity whereby Maori fishermen sustained family livelihoods from personal efforts.

5.6.3 Maori tribal society was undergoing significant change throughout the nineteenth century, but we must be careful not to assume, as some historians have been inclined to do, that by 1840 as Sinclair (1957:17) put it, Maori society was shaken, even tottering on its foundation. We prefer the view of Owens (1981:29) who considers that in 1840,

The cultural framework in New Zealand was . . . still essentially Polynesian; all European residents absorbed Maori values to some extent; some Europeans were incorporated, however loosely, into a tribal structure; and the basic social divisions were tribal, not the European divisions of race, class or sect. The history of these years is of tribal societies interacting with each other and with Europeans: societies still traditional but undergoing major cultural change.

There can be no doubt that settlement brought many surface changes, in clothing, habits and beliefs and that many were attracted to working for wages. It appears to us however that the essential tribal structure remained largely intact through the nineteenth and into the twentieth century. Maori fought the New Zealand Wars of the 1860s and '70s for example,

in relying upon tribal organisation (Belich 1986). Nonetheless some decline in tribal effort can be assumed, and with it, a decline in traditional fishing activities.

5.6.4 Likewise the rapid expansion of Maori agriculture and trade described in para 4.2 must surely have distracted attention from the seas and traditional harvesting.

5.6.5 Population losses would have affected the number of Maori involved in fishing. Although major losses occurred pre-treaty, the decline continued thereafter and was not reversed until the 1890s.

5.6.6 The New Zealand Wars severely curtailed Maori prosperity and led to the eventual loss of large areas of land by confiscation and by settler purchase under the Native Land Acts. The tribal system and with it the ability to progress on tribal communal lines was weakened by the individualisation of Maori land titles and the licence given to individuals to sell land.

Much subsequent Maori history revolves around attempts to maintain tribal authority, to regain land lost and to keep that which remained. With the passing of the old order however, the Maori economic initiatives of the first decades were never again to be repeated. Maori communities reverted to subsistence agriculture and fishing, occasionally relieved by short-term commercial ventures like gum digging, or by paid employment.

When the land was lost to settlers, Maori lost the initiative in harvesting the seas too.

5.6.7 Then of course there were the fish laws, enacted during the period of open hostilities. They gave legal force to the dispossession of the Maori of their fisheries and introduced the basic assumptions on which subsequent fish laws were founded. In essence, the fisheries and the foreshore were held to belong to everyone. Maori had at best, some vague and undefined right and at worst, no special rights at all except those that Parliament might provide.

Those laws laid the scene for the decades to follow, in which non-Maori fishing became pre-eminent, and Maori fishing nearly disappeared.

## **5.7 THE POSITION IN MURIWHENUA**

While we have sought a national picture for comparative purposes, it may be that none is possible since local variations are so many. Certainly the Muriwhenua position is different, as has been seen at 3.6 and 4.6.

The Muriwhenua tribes had lost most of their land by 1870, and much of it had passed to the Crown. The failure of early agricultural schemes had underlined the unsuitability of the area for future settlement, and, as we suggested at 4.6, probably led to a return to tribal ways and a revived interest in fishing. It is this dependence on the sea through having a land resource that was comparatively poor (as well as reduced by land sales) that most distinguishes the Muriwhenua circumstance. We shall see in later chapters that the people were to renew their land development interests in the next century, but while developing the land, they still depended upon the sea for sheer survival, and remained committed to both.

As we have seen the early boom in Maori agriculture was barely a burp in Muriwhenua. The wool and gold booms that fuelled national growth in the 1850s to 1890s also passed them by. Early on they had the benefit of kauri gum and timber, but even then, though gum was traded from the 1830s, it was not until the 1850s that the gum industry flourished and any appreciable diggings reached the Far North.

Gum digging was readily adapted to the Muriwhenua seasonal subsistence economy and to their social organisation. English settlers dug as individuals; the Austrians dug as teams; but for Maori, gum digging was a whanau activity. Whole families trooped to the fields, adults digging, children sorting and cleaning.

Unless prices were particularly high, gum digging was also a seasonal activity, fitting in with planting, harvesting and fishing cycles. Digging supplied cash for commodities and new foodstuffs like tea, flour and sugar.

Gum provided not so much a new life style as a hedge against crop failures or natural disaster, though it was far from uncommon in the latter decades of the century for schools to be closed and whole villages deserted when the people moved to the gum fields.

By the turn of the century Maori social conditions in the Far North had improved measurably, through gum digging. There were better houses, the people were better clothed, they ate better than before and for the first time in a century their numbers were beginning to improve. Timber milling too, had assisted in raising Maori social and economic conditions, providing work and an income from otherwise uneconomic Maori land. But the exploitation of gum and timber was not replaced by a more sustainable economic activity. From 1900, when the timber and the gum began to run out, the whole region slipped into a depression, from which Maori communities suffered more dramatically than did their Pakeha neighbours. Most of the turn of the century gains were lost during the next two decades, though there was some relief from the late 1920s when Ngata's land development schemes came to the Far North.

But gum digging did not replace fishing activities. It was seasonal work and fitted in with fishing practices. The change in fishing activity was represented mainly in a decline of large tribal expeditions and the substitution of fishing by extended families, in much the same way as it is done today. R H Matthews' account (at 4.4) points to a decline in the large expeditions from about 1885.

Subsequently, Muriwhenua (and other northern Maori) were engaged in a new fish trade. An abundance of grey mullet recorded throughout Northland in the late nineteenth century was to form the basis for a northern mullet fishery. With reference to Kaipara harbour, McKenzie had recorded that . . . the whole harbour . . . a distance of 80 miles, seemed to be actually swarming with the largest and finest mullet in the world (1885:1).

A substantial grey mullet fishery was firmly established from the 1870s and continued well into the twentieth century with canning factories being opened at Helensville, Batley, Russell, Kerikeri, Unahi, Rangiputa, Purerua, Awanui and Houhora. They were not Maori owned but in the 1870s Maori were the main suppliers (Sherrin 1886:54). By the 1880s many non-Maori were fishing too.

However, the Marine Department became concerned with the state of the mullet resource and in 1895 recommended a closed season. But fishing continued at high levels and by 1906, with severe over-fishing, several plants had closed. A downward trend continued for over a decade but plant closures meant reduced fishing and less pressure on the resource, so that by 1920 the mullet had recovered and several plants reopened.

Maori were blamed for the decline in the mullet resource. It was said in an 1895 report to the House of Representatives that

Representations having been made to the (Marine) department that it would be desirable to prescribe a close season for mullet in all waters between Cape Wiwiki and the North Cape, and also to prohibit the Maoris from using certain methods of fishing which had the effects of depleting the fishery, in consequence of their taking small mullet in large quantities (it is

recommended that) . . . Maoris be made amenable to the fishery regulations . . . (AJHR H-29, 1895).

Dr Habib (docs C1, D1) considered that two points of view had properly to be brought into account. He thought the taking of quantities of undersized fish was likely to harm stocks and ‘informing the Maori people of that fact was a proper action’. But capture of excessive numbers of adult fish was equally a cause. In the Maori view it was the main cause for adults are the breeding stock. Habib thought non-Maori fishermen were primarily responsible for the depletion of adult stocks.

In any event, on 21 December 1896 regulations under the Sea Fisheries Act 1894 set the style of nets and minimum mesh sizes according to non-Maori standards. With their old nets outlawed, Maori involvement in the mullet fishery was reduced. Non-Maori fishing increased but the mullet resource continued to decline.

These laws and those earlier reviewed laid the scene for the twentieth century in which non-Maori fishing became pre-eminent, and Maori fishing, eventually, nearly disappeared.



## 6. SEA COMMERCIALISATION, 1900–1987

### 6.1 INTRODUCTION

6.1.1 Twentieth century fish laws are primarily directed to the management of the fish resource, in the public interest, and the promotion of a viable fishing industry. Maori have had little involvement in the industry. Such laws as were made for them tell mainly of their displacement from the overall fishing scheme.

6.1.2 This chapter opens with an examination of the Maori experiences. Throughout this century, Maori fishing interests have been barely acknowledged. The Maori involvement in fishing, though more extensive in Muriwhenua than some places elsewhere, was generally in a state of decline.

Maori became caught in a vicious circle of thinking. In its legislation to manage the fisheries and promote their commercialisation, the Crown gave no more than a vague acknowledgement that Maori had particular fishing interests. The courts held early in the century, that without more explicit provisions, Maori fishing interests could not be recognised, and the Crown, rather than exercising its power to change the situation, left matters as they were, as though the courts were to blame.

In recent years, the courts have taken initiatives to break this deadening cycle.

Throughout the greater part of this century, Maori have expended much time and money to gain recognition for their fishing interests through both Parliament and the courts. When the courts declared they had no rights without Parliamentary sanction, and Parliament declined to move, Maori laid claim to lakes, rivers and foreshores to establish their fishing rights by those means. Those cases were to pass through several courts, one such running for 24 years; they culminated in the Muriwhenua claim to the exclusive ownership of the Ninety Mile Beach.

The result was no more than an unfortunate confusion of land and fishing entitlements. The real problem was the lack of any proper provision for treaty fishing interests.

Maori protests then focussed on a law that provided for fishing grounds to be reserved through an administrative procedure. Attempts were made to have many reserves set aside. The result is an indicator of the political mindset. Though the law providing for fishing reserves was in existence for 62 years, we can find no reserves ever created pursuant to its provisions.

The protests nonetheless continued to the present day. Maori objected when, in 1963, the Government encouraged a large expansion in commercial fishing efforts. They objected again when the resultant overfishing led to the removal of small and part-time fishermen from the fishing industry. Most of the remaining Maori fishermen were in that category.

There are now few Maori fishermen in the industry, but their claim to treaty fishing rights has never been abandoned.

6.1.3 The development of the modern fishing industry is then examined along with the policies employed to both contain and promote its growth. We find the industry developed slowly until the 1960s. Subsequently, and particularly in the 1970s, it underwent a spectacular expansion, and in the process, stocks in the inshore fishery were considerably depleted and are now under serious threat. This has impacted on all New Zealanders but has affected Maori fishing interests in a special way, for traditionally, it was the inshore

fishery that Maori mainly exploited, and in the lay-off of fishermen that was needed to reduce the fishing effort, Maori fishermen were the first to go.

## **6.2 MAORI FISHING RIGHTS**

Throughout the century there has been a virtual denial of Maori fishing rights. Though rights have been provided for in law, in practice they have amounted to almost nothing, at least, until very recently, after Dr McHugh drew attention to the doctrine of aboriginal title.

In statutory law, Maori fishing rights have been provided for in two ways, first by a broad and general statement, and secondly by specific provisions. We will refer to each in turn.

### **6.2.1 The Broad Statutory Statement**

As has been seen, section 8 of the Fish Protection Act 1877 was a broad statement protecting Maori fishing interests as contemplated by the Treaty. The section was continued in the Fisheries Conservation Act 1884 but was omitted altogether from the Sea Fisheries Act 1894. There was no provision for Maori in that Act.

Nine years later, section 14 of the Fisheries Amendment Act 1903 re-introduced a general provision, but omitted reference to the Treaty. It provided simply

Nothing in this Act shall affect any existing Maori fishing rights.

Those same words were re-enacted as section 77 (2) of the Fisheries Act 1908 but the provision was made applicable to sea fisheries alone.

Section 77(2) was re-enacted with slight amendment, as section 88(2) of the Fisheries Act 1983. It provides

Nothing in this act shall affect any Maori fishing rights

the significant amendment being the change from ‘any *existing* Maori fishing rights’.

As we considered earlier however (5.4.6), 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.

### **6.2.2 The Statement as Seen by the Courts**

The broad statutory statement has been the subject of much litigation involving Maori. Most of those cases are unreported. They did not proceed to a high court, and mainly for the reason that as early as 1914, the Supreme Court had made it clear that by itself the section did nothing to provide for fishing rights. That was the standard view throughout most of this century. It was not until 1986 that new light was shed upon the significance of the provision.

At first it seemed the courts would be sympathetic, using the broad statement to clothe with legal authority customary fishing practices as acknowledged in the Treaty. In *Baldick v Jackson* (1910) 30 NZLR 343 (Stout CJ), the Supreme Court considered whether an English statute conferring certain whaling rights was applicable in New Zealand. It was held not to be, upon the ground, among others, that the whaling right

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

It seemed that in considering English law, existing Maori fisheries would be brought into account.

Some comfort may also have been taken from a prevailing legal opinion on Maori land rights. It was considered that while the cession of sovereignty passed all land to the Crown, the Crown's nominal title was held subject to native customary rights. Thus,

Customary lands owned by Natives which have not been ceded to His Majesty or acquired from the Native owners on behalf of His Majesty cannot in my opinion be said to be land vested in His Majesty by right of his prerogative. It is true that, technically, the legal estate is in His Majesty, but this legal estate is held subject to the right of the Natives recognised by the Crown to the possession and ownership of the customary lands which they have not ceded to the King and which His Majesty has not acquired from them – per Cooper J in *Tamihana Korokai v Solicitor-General* (1912) XV GLR 95, 109.

This had been the position since Governor Hobson's Land Claim Ordinance of 1841, which presumed the Crown to hold the nominal title to all land. It was also settled soon after, that there were no waste lands or lands not used by tribes. It was accepted that the tribes could account for every part of the territory. This was considered to be so, even with regard to river beds,

. . . it appears to me to be impossible to infer any dedication by the Crown so long as the soil in the river remained Native land . . . To do so would be to assume that the sovereign power has not respected, but has improperly invaded, the Native proprietary rights – per Edwards J in *Mueller v Taupiri Coal Mines Ltd* (1902) 20 NZLR at 123.

It might therefore have been taken for granted that if the Crown was nominal owner of lakes, rivers and seas, its title in each case would also be subject to existing customary claims. Chief Justice Stout added in *Tamihana Korokai supra*, at 105,

It is not necessary to point out that if the Crown in New Zealand had not conserved the native rights and carried out the Treaty a gross wrong would have been perpetrated.

Soon after however, section 77 (2) was directly before the full court of the Supreme Court in *Waipapakura v Hempton* (1914) 33 NZLR 1065, when a Maori convicted of breaching whitebait regulations appealed on the ground that she was exercising a customary fishing right protected by that section. It was open to the Court to hold that fishing rights accrue from the maintenance of custom and are therefore 'existing fishing rights' in terms of the section, but that point was not considered. Instead the Treaty of Waitangi was reviewed and the Court, being bound by an earlier opinion of the Privy Council that the Treaty conferred no legal rights without legislative enactment, concluded that section 77 (2) created no rights either, but merely protected those Maori fishing practices specifically provided for by statute. The dicta in *Baldick v Jackson* were not considered. It was said,

Now, in English law – and the law of fishery is the same in New Zealand as in England, for we brought in the common law of England with us, except insofar as it has not in respect of sea fisheries been altered by our statutes – there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast.

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.

In 1956, section 77 (2), a similar set of facts and the same whitebait regulations were before the Court again in *Inspector of Fisheries v Ihaia Weepu and others* (1956) NZLR 920 (Adams J). The only difference was that the *Waipapakura* case had involved tidal waters while *Weepu* concerned a river. In contrast to the decision in *Waipapakura*, it was considered 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.

This decision followed the reaction of the Courts to the 'land based' claims, and a claim to the Wanganui river in particular where the Court of Appeal held that river rights passed with the transfer of the adjoining land.

Following *Weepu's* case another 'land based' claim was heard, this time, the claim of the Muriwhenua tribes to the ownership of the Ninety Mile Beach. Once more it was held, in the Court of Appeal, that the Maori lost the beach foreshore on the sale of their adjoining land. It still left open the prospect that when the foreshore passed to the Crown, the Crown would own it subject to customary fishing rights held from pre-Treaty times. Even were it accepted that Maori no longer owned the foreshore, and could not claim exclusive rights, there was still the prospect that they had particular traditional rights. That opinion was rejected in *Keepa and Wiki v Inspector of Fisheries* (1965) NZLR 322 (Hardie Boys J).

*Keepa and Wiki* had taken out of season, undersized toheroa from the Ninety Mile Beach. They claimed exemption from the regulations as they were exercising an existing Maori fishing right. 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.

There the matter rested for many years until Tom Te Weehi, in catching undersized paua in 1985, unwittingly bagged a place in history as well.

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) section 88(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.

So also for the period 1900–1987, and with the exception of *Te Weehi* in 1986, it was generally considered that the only fishing rights peculiar to Maori were those given by statute. That being so, in assessing the Crown's performance we must now consider the specific statutory provisions that were made.

### **6.2.3 Specific Provisions and Fishing Reserves**

Absent amongst the specific provisions for Maori were any procedures whereby customary rights could be proven and recognised through the Courts, other than by inviting prosecutions. There were, however, provisions to reserve Maori fishing grounds. With the advantage of hindsight we can see them as restrictive, given the extensive Maori fishing practices in a not too distant past, for they implied that Maori fishing interests were, or should be, limited to site specific areas near Maori villages and used for no more than meeting family needs. Yet they showed some concern for Maori for there was a popular view at that time that there ought to be no special provision for Maori at all. It may be therefore, that politically, governments went as far as they could go.

The real problem for Maori was that, unlike the Englishman who could establish a private fishing right through the courts by proof of long term use, Maori were totally dependent upon political and administrative whim. The statutory provision to reserve fishing grounds was on the statute books from 1900 to 1962, but despite many requests, and a welter of Parliamentary petitions throughout that period, we have not found one fishing ground reserved under those particular provisions.

The Tribunal has reviewed this matter in previous reports – *Te Atiawa Report* (1983) and *Manukau Report* (1985). From the experience of those cases, and this, it is difficult to escape the conclusion that even the best of laws for Maori fishing reserves were no match for the departments that administered them, for not only was the political climate unfavourable, but when it came to Maori fisheries the departments also had policies of their own! We think it significant that those departments have never had an ample Maori staff, and neither has there ever been an adequate program to assess the nature and extent of original Maori fisheries or the needs of contemporary Maori in utilising them, even as late as 1987.

In 1900 a Maori Councils Act was passed 'to confer a limited measure of local self-government upon Her Majesty's subjects of the Maori Race' (long title). It was primarily concerned with matters of welfare and village administration but section 16 (10) enabled the Councils to make by-laws, subject to the Governor's approval, for the control of Maori fishing grounds; provided those by-laws did not conflict with general fishing laws. (The full text of that section is printed in appendix 7.)

Councils or committees, an adaptation of the traditional *Runanga*, had been provided for in legislation since 1858 (*Native Districts Regulation Act 1858*) but the 1900 Act represented the most important step in providing for Maori local self government.

An amendment of 1903 provided that for the purposes of section 16(10), the Governor-General, on the recommendation of the Council, could at his discretion reserve fishing grounds exclusively for Maori use provided that in doing so 'the Governor may take into consideration the requirements of the residents of the locality.' (The full text is in appendix 7).

It appears the reservation of a particular area was not a condition precedent to the making of by-laws in respect of established grounds, but be that as it may, both the making of by-laws and the reserving of grounds required the Governor's approval.

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.

A problem was that the twenty-five Councils eventually established were notoriously lacking for funds and were often in recess. The Maori parliamentarians, Sir Apirana Ngata and Sir Peter Buck, made several efforts to revive them for particular programmes, especially in health reform, but through lack of funding they were often inactive or unable to cope with other than health, housing or law maintenance programmes. A further problem, perhaps the main one, was that the Marine Department was unsympathetic. In 1930 Sir Apirana Ngata supported a Maori request to reserve a part of Kawhia Harbour. He was advised,

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. (Marine Department files M1 2/12/429 National Archives, Wellington).

Section 33 of the Maori Social and Economic Advancement Act 1945 replaced the 1900 provisions with minor changes. Exclusive Maori fishing grounds could still be reserved but only on the recommendation of the Minister of Marine, and the Tribal Councils, as they were now called, could make fishing regulations in respect of reserved fishing grounds only.

There was some debate on this in the House. The necessity of informing local Pakeha before any fishing grounds were reserved was stressed, so that any differences could be resolved. Some members were simply opposed to the concept of fishing grounds for Maori (272 NZPD 470). But the honourable members need not have been concerned. Though several tribes sent requests for reserves to be created under this provision, we can find no record that any were ever made.

Indeed, it was apparently a policy of the Marine Department that the section should not be given any effect. In 1948 the Secretary of Marine wrote to the Under-secretary for the Department of Maori Affairs with reference to five requests for reserves. He advised of his concern that

these are but the forerunners of many that will follow until practically the whole coastline and coastal waters will have been affected. . . .

It was thought to be sufficient that

(t)he policy of this Department has always been that where a pipi bed, mussel bed, or shellfish bed was situated near to any Maori village commercial exploitation was prohibited. . . .

Other regulations enabled that to be done, the Secretary of Marine considered, and accordingly he advised that the Marine Department had never supported section 33, wanted to limit its operation and would be seeking to change it as soon as practicable. The Department's own policy was clear enough.

Should any area have the sole fishing rights reserved, I can perceive difficulties arising from time to time together with much duplication . . . The Fisheries Regulations quoted . . . set out the principle this Department has adopted namely, 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 or shell 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 (M1 2/12/517, Part I National Archives, Wellington).

In hearing evidence in both the Te Atiawa and Manukau inquiries, in 1983 and 1985, this Tribunal was given several accounts of the efforts of the Maori Councils to have reserves made about the 1950s. The tribes were canvassed to select and submit particulars of chosen fishing grounds and many responded. We were told that the Minister declined to reserve any (see Te Atiawa Report 1983:4.7, Manukau Report 1985:6.2).

Section 33 was eventually repealed by the Maori Welfare Act 1962 and there were no subsequent provisions to reserve fishing grounds for Maori until 1983.

Section 89(3)(b) of the Fisheries Act 1983 enables regulations to '... apply special conditions or confer special rights in relation to fishing by specified communities'. Section 89 (3)(a) enables those regulations to apply to specific areas. Regulation 7 of the Fisheries (Amateur Fishing) Regulations 1983 provides

The Director-General may, by notice given in that behalf, confer on specified communities special rights or privileges or apply special conditions relating to boundaries, species, gear or methods, period of time, quantities, or any other measure for the management or conservation of finfish, shellfish, or aquatic life in the area in which the specified community resides.

On the hearing of this claim, officials for the Ministry of Agriculture and Fisheries did not refer to any provisions made for Maori under this regulation; yet in 1985 the Tribunal had commented upon the regulation as follows

This appears to provide a doorway for the recognition of Maori fishing grounds but who has the key to the door? What is the password for entry and why is the legislation reluctant to refer to Maori fishing grounds or the Treaty of Waitangi? If the Ministry of Agriculture and Fisheries is to retain the key, past experience suggests that Maori fishing grounds will not be reserved. If the password is the policy outlined by officers of the Ministry, that fisheries belong to all and no one section of the community (apart from commercial fishermen) can have a preferred interest, Maori communities will face a closed door (*Manukau Report*, 1985:6.2).

It should be added that section 232 of the Native Land Act 1909 enabled the Maori Land Court to recommend the reservation of Maori lands, for, amongst other things, fishing grounds. The provision was repeated in subsequent Acts and now survives in section 439 of the Maori Affairs Act 1953. We presume the provision was mainly intended to reserve lands used as a fishing base, for the Harbours Act had already determined that no reserves could be made of foreshores without parliamentary sanction. Possibly it was considered applicable to the beds of certain lakes, the title to which had been determined as Maori land, or to the beds of non-navigable rivers.

The Maori Land Court has no list of the Maori reservations it set apart for the purposes of fishing grounds but we have uncovered some recent examples – five blocks at

Whangamata (gazetted in 1959), Te Motu Island, Kawhia North (1963), one block near Oeo Pa, Taranaki (1963), a portion of the bed of Lake Owhareiti near Kawakawa (1964), and Kuia-Rongouru (Taylor's Island) in Northland (1964). These are not fishing grounds however. They are lands that have been used for the purpose, amongst others, of providing a fishing base or camp.

The First Report of the Interdepartmental Committee on Maori Fishing Rights (1985:2) considers the Maori Land Court made a number of reservations for fishing and implies these may have included areas offshore,

. . . despite an apparent wide variation from district to district a considerable but unknown number of such reservations have been made. For instance, only two fishing grounds were identified to us along the Hawkes Bay and Wairarapa coasts, whereas on that part of the South Taranaki coast between the Waingaroro and Taungatara rivers (about 35 km) there are ten.

It epitomises the confused and uncertain state of the whole subject (of Maori fishing grounds) that jurisdiction to make such reservations in respect of off-shore areas is highly doubtful.

Our research was here not so successful. We have uncovered some Maori oyster reserves reserved under the early oyster fishing laws, and some tidal areas awarded by the Native Land Court before 1878. We also found many Maori Land Court Reservations for the purpose, amongst others, of fishing grounds, though made in respect of dry land. But we have found no fishing grounds reserved through the Marine Department under the Maori Council provisions that applied from 1900 to 1962. Mr R W Little, staff scientist for the Ministry of Agriculture and Fisheries, gave evidence of the Maori reserves of which his Ministry was aware but he gave no fishing grounds reserved under the Maori Councils provisions either.

More specifically, we can find no record of oyster reserves, tidal titles or fishing ground reserves for the people of Muriwhenua.

#### **6.2.4 Other Specific Provisions**

Mr Little gave particulars of other specific provisions for Maori in various statutes (B69).

- (a) Regulation 106K (5A), of the Fisheries (General) Regulations 1950 enabled Maori to harvest certain shellfish in excess of daily and personal limits for use at particular tribal gatherings. This provision is now contained in regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986. In the Te Atiawa Report (1983:4.8) we recorded Maori complaints that this system was cumbersome, impracticable and overly restrictive in its application. Similar complaints were made during the Manukau hearing. In this claim, J Elkington, a Maori consultant to the Ministry of Agriculture and Fisheries, outlined a pilot permit system in use in the South Island, that, he thought, would overcome many of the former delays and deficiencies.
- (b) Regulation 9 of the Fisheries (Auckland and Kermadec Area Amateur Fishing) Regulations 1986, recognises certain Maori oyster reserves in the Manukau, Whangaroa and Kaipara harbours, and the Mangonui Inlet in the Bay of Islands. These are the Maori oyster reserves established between 1913 and 1933 under the early oyster laws as referred to at 4.5.10. At least one is known to have been 'dead' since about 1924.



- (c) Some eel fisheries have been recognised, according to Mr Little's evidence, from 1950. In 1896 the Maori Appellate Court determined Lake Horowhenua and part of the Hokio stream to be Maori land. The Horowhenua Lake Act 1905 declared the lake to be a public reserve but preserved the fishing rights of the Maori owners. The owners' eel fishing rights were recognised in the Maori Purposes Act of 1950 and are now provided for in regulations 3 and 15 of the Fisheries (Central Area Commercial Fishing) Regulations 1986.

According to Mr Little, Lake Forsyth was also established as a Maori eel fishery in 1950, the arrangements being continued in regulation 7 of the Fisheries (South-East Area Amateur Fishing) Regulations 1986 and regulation 11 of the Fisheries (South-East Area Commercial Fishing) Regulations 1986.

- (d) Mr Little referred to two other areas known to have special significance for Maori and which have been partially provided for. Commercial fishing was prohibited along a part of the Waimarama coast (see now regulation 3 Fisheries (Central Area Commercial Fishing) Regulations 1986), and no commercial fisherman may take eels from a part of Lake Ellesmere (regulation 11 (2), Fisheries (South-East Area Commercial Fishing) Regulation 1986).
- (e) Lake fishing rights, and in particular the right to catch (but not sell) indigenous fish caught in Lake Taupo and several Rotorua lakes, were preserved in settlements with the Crown over the ownership of those lakes, and are provided for in section 27 (2) of the Native Land Amendment and Native Land Claims Adjustment Act 1922 and section 14 of the Native Land Amendment and Native Land Claims Adjustment Act 1926. Rentals and royalties are also payable to the relevant tribes in terms of those settlements.

Lake Rotoaira is Maori land. Section 22 of the Maori Purposes Act 1938 prohibited fishing by other than certain Maori in that lake, and the Maori Purposes Act 1950 vested control of the fishing in trustees for the owners. We understand a similar provision has been made for the Maori owners of Lake Rotokakahi (Green Lake, Rotorua).

We think Mr Little's evidence may not provide a complete account of the particular statutory provisions made from time to time for particular Maori fisheries. A check would be required of numerous special Acts passed over a long period and each of the Maori Purposes Acts that have appeared almost annually, but we have been unable to undertake that task.

We have been unable to locate any particular statutory provisions for any fisheries in Muriwhenua.

Appendix 9 records a number of statutes currently in force that impact in one form or another on Maori fishing interests. That list does not purport to be complete. It also records some of the more important but now repealed Acts of the past.

### **6.2.5 The Maori Protest**

- (a) Maori were well aware of the general state of the fishing laws. Their opposition to those laws, and their complaints through various hui and petitions, and through their parliamentary representatives has been referred to (5.4, 5.5 and appendix 7).

- (b) Not all those complaints related to the laws restricting the use and management of traditional fisheries. The floatage of logs was the cause of much disquiet last century (see 5.4.4) as was also the opening up of waterways to river steamers and the extraction of

gravel for roads. By way of illustration, in 1906 a Maori petition to Parliament complained of the effects of goldmining on the Ohinemuri River, alleging

That formerly the Ohinemuri river was a good fishing-place for eels and whitebait, and fish constituted an important part of their sustenances; now the cyanide deposits have destroyed the river as a fishing ground; that by the Treaty of Waitangi the fisheries of the Natives were specifically reserved . . . (1906, AJHR I-4:2).

(c) Land drainage and flood control operations posed problems for traditional eel fisheries throughout the country, the developments affecting Lakes Wairarapa and Ellesmere for example, leading to protracted arguments and negotiations with the Government. In the Lake Wairarapa case it eventually resulted in an agreed resettlement of a large section of the tribe at Mangakino, north of Lake Taupo.

(d) Developments around the margins of lakes, harbours and estuaries had also a profound effect. The Te Atiawa and Manukau Reports serve as case examples, documenting the impact of several land developments on the adjoining seas.

(e) For most of this century the Maori protest has been mainly characterised by claims through the courts. We have reviewed the major cases made in reliance upon the general statutory exemption in the Fisheries Act. It appears that the exemption was of little practical effect. As the Crown showed no willingness to provide much more, the Maori protest was exemplified in a series of extended cases claiming the ownership of lakes, rivers and foreshores. These cases were to tax Maori energies and pockets over several decades.

(f) Those claims relating to lakes need not concern us. for they 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 Native Land Court. The Crown moved to prevent that Court from even hearing such a claim but the Court of Appeal held that the Native Land Court could indeed inquire whether the Crown's nominal title was subject to a Maori customary right (see *Tamihana Korokai v Solicitor-General* (1913) 32 NZLR 321).

But no final determination resulted. The matter was settled out of court as we have said, the Crown receiving the greater number of the lakes, and Rotorua Maori obtaining that which they had first sought, statutory recognition of their lake fishing rights. (Subsequently, the Maori Land Court did issue Maori land titles for other lakes, without objection from the Crown. Lakes Omapere, Rotoaira, Rotongaio, Rotokakahi, and Rotokawau are examples, but it seems that in each case, Maori owned the surrounding land at the time the Court Order was made.)

In *Re The Bed of the Wanganui River* (1962) NZLR 600 relates to most complicated proceedings, begun by Mr Titi Tihu in the Maori Land Court in 1938 and ended in the Court of Appeal in 1962. (A Maori petition on the same matter has since remained before Parliament). The land along the Wanganui river had been variously sold or awarded to individual Maori, but the bed, it was claimed, was still owned by the tribes. In the course of many related proceedings it was held (in *The King v Morison* [1950] NZLR 247) that any customary tribal ownership could not withstand section 14 of the Coal Mines Amendment Act 1903 which vested the bed of navigable rivers in the Crown. The Crown, not wishing to take advantage of its own Act on this occasion, established a Commission of Inquiry under a Supreme Court Judge, to determine who would own the river but for the Coal Mines Act. It was reported that the Maori did. The Crown was dissatisfied and passed special legislation enabling ownership to be determined in the context of customary law, and the Court of Appeal, after seeking the opinion of the Maori Appellate Court on the

nature of Maori custom, determined that as a matter of customary law, the bed of the river belonged to whoever owned the adjoining land.

(The proceedings that were begun in 1938 and were continued in a petition before the House, were led throughout by a respected elder, Titi Tihu, whose long involvement in this matter for precisely 50 years, ended with his death in May 1988, at age 103 years. He may have created a record in legal endurance. *Haere e Koro, haere ki o tupuna.*)

It could very well have followed the Wanganui River finding, that river fishing rights also went once the land was sold, according to the general courts as a matter of general law, and according to the Maori Appellate Court as a matter of Maori custom.

Whether the general law principle applied to the sea shore was soon to be considered in *In Re the Ninety Mile Beach* (1963) NZLR 461. It followed the claim of certain Muriwhenua Maori to ownership of the beach foreshore. The Crown contended it had owned the foreshore, as a matter of English law, from the proclamation of sovereignty in 1840. The Court of Appeal was divided on whether that was so, but was agreed that for a short while, until the Harbours Act 1878 the Native Land Court could have awarded titles to the low water mark. But, the Court of Appeal ruled any native foreshore rights were extinguished when freehold titles were issued for the adjoining land.

To non-lawyers the decision might be explained this way. The Maori once owned, with their land, all the lakes, rivers and foreshores, in accordance with their communal customs. Some of the land was sold, given or confiscated. In 1865 a Native Land Court was established to determine who owned which parts what of the Maori land then left, and to issue certificates of title to individual Maori for various divisions. As a matter of law, the new titles ended the 'customary title'. It was taken to mean that any customary rights would then have been ended too.

The Court of Appeal assumed that the land adjoining the beach had been dealt with through the Maori Land Court. In fact a large part of it had not been, for it was sold much earlier. But that would appear to make no difference for on the Court of Appeal's reasoning, customary rights would also have ended when land was sold. Effectively, though this is not expressed in the judgments, when Maori opted for non-Maori titles, they could not thereafter hold greater rights to an adjoining coast than any other British subjects owning land.

More specifically, in the Court of Appeal's decision, if the Native Land Court had awarded title to the low water mark (which was rare), it passed the foreshore to the Maori, and if to the highwater mark, the Crown kept the foreshore freed of any customary claims to it. If the Court did not specify which mark applied (which was usual), the foreshore belonged to the Crown (by section 12 of the Crown Grants Act 1866). Then if after 1872 there was any coastal Maori land that had not been through the Maori Land Court process, the adjoining foreshore would again belong to the Crown because of a proclamation of that year, and subsequently, by virtue of section 147 of the Harbours Act 1878 which reserved all foreshores for the Crown.

Of the three Court of Appeal judges only two gave full decisions. One of them (North J) appears to have considered that the Maori Land Court process described was voluntary and done at the request of the customary owners, for he added that once a certificate of title was given 'the Crown was freed of any obligation it had undertaken under the Treaty of Waitangi'. No reasons are given for that view but we presume it was considered that by applying for a 'new' type of title, the Maori were foresaking not only the old customary one, but any customary rights that went with it, and were therefore indicating, to use the words of the Treaty, that it was no longer 'their wish and desire to retain (their fisheries) in their possession'. By opting for the new titles, they were effectively accepting land

ownership with the same rights, and only the same rights, as applied to all British subjects. (We doubt very much that the Maori Land Court process was voluntary. In the Orakei Report the Tribunal considered that most tribes were opposed to it.)

On this occasion, as in nearly every early case, the Crown argued against the Maori claimants. That, of course, it was entitled to do, as a matter of law, but it had still to consider its obligations under the Treaty. Following the Ninety Mile Beach case, it may have seen no need to do so, for it was the opinion of one judge, that Treaty obligations were extinguished when freehold titles issued.

So it was that customary fishing rights were seen to disappear – for there are no records of any customary land remaining and indeed, the Native Land Court conversion process was mainly completed before the turn of the century. Similarly, section 77 (2) had come to mean that only statutory Maori fishing rights were protected.

(g) With the failure of the court cases, either with regard to the general provision or by seeking fishing rights through land claims, it became quite common for Maori simply to plead the Treaty when charged with breaches of the fishing laws. It would help the assessment of the Maori protest, if the fishing prosecutions involving Maori were compiled and those cases where the Treaty was pleaded were marked. It was beyond our resources to complete those tasks, but we unearthed a large number of examples, from 1901 when a Maori was prosecuted for selling oysters from a Maori reserve, to 1985 when Te Weehi was charged with possessing undersized paua.

Though the law seemed settled by 1914, that the Treaty gave no protection to Maori fishing interests, numerous cases subsequent to that date, where the Treaty was pleaded, point to the consistency of Maori endurance, or obstinacy, according to one's point of view. Members of this Tribunal are personally aware of a large number of Maori fishing prosecutions over the last several decades. It was not until 1986 however, that a customary right of fishing was upheld, although based upon an old law of aboriginal title – and not upon the Treaty.

But those pleas were likewise to no avail.

(h) As has been seen the Maori Councils then made a concerted effort in the 1950s to have fishing reserves declared, the Councils canvassing the tribes for that purpose. That too failed and in 1962, the fishing reserve laws were repealed.

(i) The subsequent years have been marked by a series of national hui. We do not have a record of them all, but one in 1966, was primarily to protest the removal of restricted licensing and Government incentives for the fullest exploitation of the fisheries. Another was held in 1968, and following a further hui in 1971, the New Zealand Maori Council was to present extensive submissions on fisheries to a Parliamentary Select Committee.

The Minister of Fisheries was to attend a hui in Auckland, in 1976, entitled a Seminar on Fisheries for Maori Leaders. A full report was furnished but again, nothing appears to have happened.

(j) In 1983, Government proposed the removal of small and part-time fishermen following reports of much overfishing. Many of these were Maori. On that occasion the protest was continued by Sir Graham Latimer, as President of the New Zealand Maori Council, in a letter of 19 October 1983 to the Ministry of Agriculture and Fisheries. 'Whatever legal ways may have been employed to avoid the responsibilities and obligations of the Treaty', he wrote, 'we still regard it as a binding document.' He added, 'In this case it is not only Maori that could benefit from the protection provided by the Treaty. Many small fishermen who are in danger of losing their licences could also benefit . . .'

(k) Most recently, the Runanga-a-Tangaroa hui was held at Takapuwahia in 1985, mainly funded by the Ministry of Agriculture and Fisheries.

The report of the 1985 hui (A41) 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.

We mean no criticism of the many Maori who had earlier sought the recognition of some particular fishing ground. It is not surprising that many of the later Maori petitions sought that limited relief. They suggest a substantial retreat from the position of the nineteenth century elders when ownership of whole coasts and harbours was claimed, but, in our opinion, they do not amount to an abandonment of the former position. They reflect no more than the politics of a people whose bargaining position had become no better than that of Oliver Twist.

### **6.3 THE COMMERCIAL FISHING INDUSTRY**

In evidence, R O Boyd, Fisheries Scientist with the Ministry of Agriculture and Fisheries said,

Since the turn of the century especially, major changes have taken place in fisheries the world over, and not least in New Zealand. This dynamic situation has required major changes to adapt management to new problems and to the changing emphasis on what has always been the objective of fishery management and conservation : to obtain from the exploitation of the resource the greatest possible benefits to society as a whole, and more particularly to assure the economic welfare of fishermen, fishing communities, and the fish processing industry (Boyd, B70:3).

We consider this overstates the case, and prefer the opinion of the then General Manager of the New Zealand Fishing Industry Board who noted,

For almost 120 years following the signing of the Treaty of Waitangi, the New Zealand fishing industry was a small industry concentrating mainly on bottom dwelling fish and providing this to the local market (Jarman, doc A41:78).

It appears to us the fishing industry underwent only slow growth through to the 1960s.

The statutory provisions for fishing settlements in the late nineteenth century probably represent the formal beginning of proposals to establish a fishing industry, but fishing was still conducted in the time honoured way, with lines, nets, traps, weirs and hand gathering.

The turn of the century saw the introduction of steam trawlers, heralding the beginning of a new era. From 1899 until the Second World War, there was a steady increase in the use of powered vessels trawling nets through the sea and from the 1920s, Danish seining was introduced.

From the beginning, recreational and commercial fishing interests expressed concern about the effect of the new technology on fish stocks. It led to progressive prohibitions on trawling and Danish seining in shallow coastal waters (Boyd B70:5).

Partly because of the conservative legislative policies, the industry remained quite small throughout the early part of the twentieth century. Its rate of growth can be gauged from port landing statistics, though wide fluctuations in annual returns prevent clear trends

emerging except on long term reviews. An example is Thames, where total fish landed in 1905–6 was 744 tonnes, in 1920, 870 tonnes, and in 1923, 1,420 tonnes. Bluff landings were 321 tonnes in 1906–7, 807 tonnes in 1909–10, and 335 tonnes in 1920. Napier landings in 1911–12 were 1,239 tonnes, and in 1920, 888 tonnes.

The size of the industry at 1920 can be assessed from these port landing statistics (tonnes of fish):

*Northern Waters*

Bay of Islands	175	Whangarei	41
Auckland	3,220	Kaipara	418
Thames	870		

*East Coast*

Tauranga	6	Gisborne	110
Napier	888		

*West and South Coasts*

New Plymouth	10	Wanganui	18
Foxton	10	Wellington	869

*Southern Waters*

Bluff	335	Kaiapoi	17
Kaikoura	367	Rangiora	5
Hokitika	45	Greymouth	6
Westport	74	Akaroa	198
Lyttelton	482	Timaru	152
Oamaru	166	Moeraki	157
Invercargill	52	Chatham Is	160
Otakou	2,082	Stewart Is	198
Southbridge	211	Wairau	27
(Lake Ellesmere)		Nelson	42
		Picton	1071

The total fish landings for the year were about 11,520 tonnes.

Further support for the industry was proposed through the Fishing Industry Promotion Act 1919. It empowered the Minister of Finance to borrow 25,000 pounds in each of the financial years, 1919 and 1920, to promote the fishing industry by providing for the purchase and equipment of fishing boats and the establishment of cool storage plants.

Between 1920 and 1940, total annual fish landings rose by close to 60 per cent, to 17,234 tonnes. In the period to 1937 however, there were few restrictions on entry to the fishing business. Vessels had to be licensed but there were no restrictions on the number of vessels that might be employed.

By 1937, the need to conserve the resource was apparent. A Sea Fisheries Investigation Committee recommended the introduction of restricted licensing, a system which was to apply until 1963 (1934 AJHR H-44A).

Restricted licensing sought the conservation of fish resources by controlling the number of licences, the fishing methods, and the areas open to fishing vessels. It provided a means of maintaining the distribution of fishing vessels and regulating catch, effort and conservation, port by port, firstly, by granting a licence for particular fishing methods, and secondly by enforcing a system of ‘one port landing’. This required a vessel to operate

from, and to land fish only to, the port specified in the licence. It ensured that boats fished port by port around the country, and in reasonable proximity to their bases.

Catches were maintained at steady levels, but Mr G D Waugh, the first director of fisheries research in New Zealand, considered the effect of the policy was to under-exploit the fish, though it did protect the livelihoods of those fishermen lucky enough to have licences (Waugh, 1979). Reviews of the licensing regime were conducted in 1956 and 1963. The first opted for the status quo, but later technological innovations and exploratory fishing surveys of new species in deeper waters suggested the licensing system was leaving a large resource untapped. There was also a growing awareness of the activities of foreign fishing vessels off the New Zealand coast catching a range of fish including species little known, or unknown, to the local industry.

The second review led to a delicensing of the fishing industry in 1963, opening the door to a gradual, and later, an accelerated fishing expansion. Commercial fishing licences became available on demand.

Government embarked on a specific policy to promote the fishing industry. The export of fisheries produce was encouraged. Government loans were made available for vessels, plant, equipment, and other items. There was considerable investment to improve upon fishing technology.

Fisheries management and conservation became dependent on regulations controlling fish sizes, the types of gear, the mesh size of nets and the imposition of closed and restricted seasons. Conservation was considered to be achieved if maximum yields could be sustained on a continuing basis.

With delicensing came a significant expansion of effort in the inshore fishery (the fishery on the continental shelf extending from the shore to a depth of approximately 200m). Landings in 1960 totalled 27,560 tonnes, in 1977, 58,860 tonnes, and in 1980, 82,187 tonnes (domestic returns only).

By the late 1970s, signs of overfishing in the inshore fishery emerged. The record catches of the mid 1970s levelled off, or declined, and the economic performance of the industry began to fall. Increased catches were threatening many species. Dr Allen, Deputy Group Director, MAFFish described the position as serious.

For example, commercial snapper catches reached their peak in 1978 of nearly 18,000 tonnes but declined to half of that figure by 1983. The reduction in stock size which caused that decline in catch has become evident in many other important inshore species such as moki, groper, rig, school shark and trevally (Allen B66:3).

From the mid 1960s, there was also an increase in foreign fishing activity exploiting both inshore and offshore fish stocks. Their catches steadily increased (as New Zealand adopted the Law of the Sea Convention) to reach record levels in the mid 1970s. In 1977, Japanese trawlers caught 21,782 tonnes of finfish, Japanese bottom longliners a further 35,710 tonnes of fish and squid, Russian trawlers 123,000 tonnes of the same, and Korean vessels took away about 46,000 tonnes. The total demersal marine fish landing for that year was 285,398 tonnes, of which the New Zealand fleet caught a mere 21 per cent (Paul and Robertson 1979). 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.

In 1978 New Zealand declared a 200 mile Exclusive Economic Zone (EEZ), resulting in a policy of controlled development of the deepwater fishery, and eventually, a sharing of that resource between foreign licensed vessels, foreign vessels in joint ventures with New Zealand companies, and domestic vessels. This also began the provision of Government

incentives to the fishing industry to meet foreign competition by expanding into deeper offshore waters.

There was at first a rush, followed by disillusionment, and a quick move back to inshore waters, exacerbating the pressure on inshore fish stocks already in a state of serious decline.

The overall picture of the industry then, is that even as late as 1980, it was relatively small. Although fish catches had increased in the preceding two decades, in 1980 fishing generated a mere \$160m in export earnings. A massive metamorphosis has since been undertaken, led by large fishing companies, in a concerted effort to fish the deepwater resource. It has required a large investment in vessels and gear with deepwater capacity, and a substantial upgrading of onshore processing facilities. By 1986 export earnings were \$660m. They were projected to rise to \$1 billion by 1990. In the process however, the inshore fishery has been seriously depleted.

## **6.4 THE MAORI FISHING DECLINE**

(a) Few would have thought, in this century, that Maori fishing had been as extensive as it had been in the last. Writing of his own time, in the 1940s, Sir Peter Buck considered that

Owing to the inevitable changes of economic conditions, the Maori has to earn his living from farming, dairying, manual labour, and office work. The people have not the time to devote to fishing, as their ancestors did of old. Our fathers learned of the migration of eels from their fathers as they assisted them in preparing the weirs for the annual catch but future generations will learn about it as a biological fact from the printed pages of books on natural science. Old methods are ceasing to function and we as a people, like the Pakeha, now buy our fish from the fishmonger (Buck 1949:237).

(b) Changed economic circumstances and inevitable acculturation were not the only factors however. The hostile environment after the New Zealand wars, rankling over the successful Maori trade initiatives of the pre-war period, the losses of Maori land and the general Maori retreat following the fighting (see 5.2) provided the opening for a series of fishing laws that eventually conditioned the view, now popularly held, that Maori fisheries had no commercial component and could relate to only small bags of fish to be found on a few local reefs and grounds (5.4).

These opinions became entrenched policies in the twentieth century, leading to the severe limitation of reserved fishing grounds, the displacement of Maori fishing laws and the state's assumption of total control; all reinforced by findings of the courts that rivers, harbours and foreshores were the Crown's, without the encumbrance of customary rights, and by an opinion that due to some accident of land title creation, the Crown held the rivers and foreshores freed of even treaty obligations.

(c) State laws came to restrict Maori catches and gear, and traditional management controls were increasingly irrelevant. Dr Habib considered that

In the Crown's efforts over the last 120 years to administer, regulate and protect fisheries, little attempt has been made to consider fisheries from a Maori perspective. This was, in my view, one of the prime reasons for the decline in Maori fishing activities to its present low level (doc D1).

(d) With the addition of the gradual, and later, the accelerated development of a state subsidised fishing industry that now dominates the fishing scene, it is little wonder that there is today a popular view, that if Maori fishing rights exist at all, they must presumably



relate to paua, kuku, kina and such other shellfish that Maori 'traditionally' gather. The truth is, in our view, that paua, kuku and kina are regarded as Maori items only because non-Maori were not, until recently, attracted to them. Dr Hohepa we consider stated the position correctly in 1976

... as it is in England where winkles and whelks are categorised as lower class foods, shellfish – being Maori food also – gained the same stigma. Changes in attitude came with international travel, scarcity value, export value, continental cuisines and the like. The toheroa, later the dredged oyster, entered the gourmet and luxury food field from 1950. More and more non-Maori New Zealanders began regarding shellfish as a delicacy, and rather than using pipis or mussels for bait they were being gathered by Maori and Pakeha alike for home consumption (Hohepa:1976).

(e) In more recent years, fishing policies have been directed to the removal of small and part-time fishermen. Most of the remaining Maori fishermen were in that category. This is reviewed more fully at 6.5.1.(f) In their northern remoteness the Muriwhenua tribes probably fared better than others in the maintenance and control of their fisheries. Large scale tribal fishing did not continue much beyond 1885, but whanau still relied on fishing for their subsistence. Gum digging had been the main source of cash, but it was seasonal work and small scale fishing and cropping continued. The Far North's slow economic development also meant that local fish habitats were spared the pollution and reclamations that affected more prosperous places.

At the turn of the century many Maori from Muriwhenua were involved in the commercial grey mullet fishery (5.7). They were not without competition however, and opposition to their fishing techniques was accompanied by laws that prevented the use of nets on which they relied.

The fragile prosperity from gum digging and forestry disappeared in the 1910s, for when the trees and gum had gone, there was little to take their place. Collecting and selling gum had disguised the extent to which land sales had seriously compromised the economic viability and independence of the Muriwhenua Maori communities. When the gum was all but gone, there was little land left to fall back on. Maori communities were often left almost landless, and yet they were still dependent through a cycle of debt on a few Pakeha land holders. In good times it had not been difficult to get credit with the store owner (who bought the gum in return for goods sometimes at three times their Auckland prices). In bad times keeping out of the red was impossible. Te Aupouri of Te Hapua were economically dependent on a single Pakeha family. There was still a good deal of Maori owned land, but most was of poor quality, and much had been leased to meet debts or survey liens. The situation was worst on the Muriwhenua Peninsula where there were few labouring or casual jobs. At Te Hapua, a community of about 300 was hemmed in on 700 acres of unproductive land, largely flooded in winter and drought stricken in summer. As in the past there was the reliance upon the sea, but many left. There were no 'roaring twenties' for Muriwhenua. The depression began before World War I and continued beyond the Second, abated only by the establishment of dairy development schemes in the late 1920s.

Most New Zealanders were unaware of the plight of the northern-most tribes. The Auckland Weekly News carried pictures of smiling faces and neatly dressed children but nothing was said of the endemic tuberculosis, of the houses without floors or windows, or that one in four children died before age 5. But official awareness grew and in the late 1920s Muriwhenua became a major target for development funding, when for the first time since the 1850s, Government actively assisted Maori communities to develop their own land. Sir Apirana Ngata, in an attempt to stay major Government policies for the acquisition of Maori land, had called upon Maori throughout New Zealand to develop their

land, or run the risk of losing it. Many land development schemes were begun by Ngata from the beginning of the century, but it was only from 1928 that any adequate Government funding was made available (Orakei Report, 1987:5.7; Waiheke Report, 1987:4).

In the Far North the principal scheme was located at Te Kao, but development farms spread also from Ahipara to the Karikari Peninsula.

The plan was to subdivide the land into family farms, provide finance for grass, fencing, fertilizer, stock and amenities and to extract repayments from cream cheques. The Government contribution was substantial, the Te Kao scheme costing over 30,000 pounds by 1934.

The schemes gave a new purpose to the local economy but were beset with difficulties. No sooner had development begun than the Depression destroyed the level of prices making the new farms uneconomic. Too much money was spent too soon, and too little attention was paid to the ability of the land to return its investment. In 1934, a Commission was critical of the way the schemes were administered and it attacked Ngata's attempts to make the state bureaucracy bend to Maori needs (AJHR, 1934, G-11).

Perhaps more justly, the schemes can be criticised for their inability to improve Maori social conditions. While developing their land, Maori farmers were paid little more than a pittance. In the late 1930s those Maori communities which had benefitted from development were still suffering from poor diet, shanty-town housing and crippling health standards. Through all of this the dependency on the sea persisted.

The schemes were continued rafter the war, but changes in the economics of dairying made much of the development pointless. The farms were altogether too small and the land too poor. All over the Far North, families were forced to abandon their uneconomic holdings. A study in the 1950s showed Maori farmers had been harder hit than Pakeha due mainly to the smallness of their holdings and the size of the debt loading (Frazer:1956).

By the 1960s the people were much healthier and better housed. The Welfare State had brought benefits. Major farm amalgamations then occurred, large trusts and incorporations were formed and exotic forestry ventures were begun. There was a hope of economic revival, but this did not eventuate and the main economic opportunities were in the growing towns and cities to the south. In the 1950s and 1960s the people of Muriwhenua became part of the new labour forces of Kaitaia, Whangarei and Auckland.

For those who remained, income maintenance and survival still depended largely on the harvesting of the sea. A number became full-time commercial fishermen but did not operate in any major way. For the majority however, it was necessary that both the lands and the seas be worked together; but that is how things have always been for the people of Muriwhenua.

So it is then, and we accept, that the Muriwhenua tribes, though not major exploiters of the sea in this century, were probably more dependent on sea produce than most tribes elsewhere. Seafoods continued to form a most essential part of their economy.

So it is also, that these people stood to suffer enormously from any depletion of the fish resource in their waters.

By virtue of circumstance, though it may also have been their choice, the Muriwhenua people became predominantly part-time land workers and part-time fishermen. These were the very people who were most at risk when national overfishing in fact resulted in the depletion of the fish resource.

## 6.5 OVERFISHING AND THE IMPACT ON MAORI

6.5.1 As noted above (para 5.7), as early as 1895 the Marine Department recorded concern with the depletion of the grey mullet fishery of Northland. Fishing regulations provided for controls on gear, closed seasons and closed areas, severely limiting Muriwhenua fishing activity and their involvement in commercial fishing. It also provided for the licensing of vessels. From Marine Department annual reports, however, beginning early this century, it is apparent that except in some local circumstances, fish resources generally remained reasonably abundant. The report for 1922–23 for example, described the principal market fish as plentiful in all places except Auckland and Wellington where overfishing had occurred. A closed season was suggested for Auckland.

Auckland overfishing was attributed to the activities of six steam trawlers based in the port. They began operations in about 1916, introducing a very efficient fishing method to the fishery and landing large quantities of snapper, flounder and other species from local grounds in the Hauraki Gulf. By 1918, local depletion had forced them to travel to more distant grounds at Great and Little Barrier Islands, Mokohinau, Mercury Island, and Alderman Islands. By 1922, the trawlers had extended their operations to the Bay of Plenty and the west coast of the North Island.

Overfishing in the Hauraki Gulf was compounded in 1923 when Danish seine nets were introduced. Although the Government implemented regulations closing areas and seasons to ‘power-fishing methods’, and brought in controls on net mesh sizes, overfishing continued to be an issue. Conflict arose between the small-boat, set net, line and amateur fishermen and the trawl/seine operators. It is a conflict that still continues in a number of New Zealand’s fishing areas.

6.5.2 As has been seen (6.3) there were few restrictions on entry to the fishing business before 1937. Thereafter and until 1963, restricted licensing applied. Fisheries close to major ports showed signs of depletion, but with the facility of larger boats to fish more distant places and with some technological innovation, catches were maintained. As G D Waugh explained, the restricted licensing system under-exploited the fish but protected the licensed fishermen (Waugh 1979). R O Boyd on the other hand, gave a different emphasis (B70:17). He considered the conservative management practices and restrictive licensing applying to 1963, ‘kept the lid on’ the fishing industry and prevented ‘any major biological collapse’.

6.5.3 Serious overfishing in the inshore fishery can be traced back to 1963. It was Government opinion that the fish resource was under-utilised, and policies were set in place to promote a major expansion in the industry. Export incentives were provided, along with concessionary loans to fishermen to enter the business and buy new gear, or to improve upon that already held. Investment was made in research. More and more people were encouraged to spend more money to catch more fish as licences became available to all comers and open access management applied. It was reminiscent of a statement in Parliament about 80 years before

Our waters are replete with golden sovereigns, and we have only to take them out and they will fill the Treasury (52 NZPD 586).

Maori protested but to no avail. By the end of the decade overfishing was apparent and the cases of overfishing multiplied. Some examples were the Chatham Islands rock lobster, the Bluff oyster, the Tasman Bay scallop, the dredge mussel, paua and eel fisheries and important finfish resources like snapper, trevally and groper.

It is obvious, with the advantage of hindsight, that when delicensing came, and state incentives for expansion were introduced, there was no recognition that new controls would be needed to maintain effort at reasonably sustainable levels. Even while Government was encouraging further development, individual fishermen were finding their own businesses under increasing stress (Jarman 1985), and were needing to work all areas that they could possibly reach.

Under increasing pressure, both small and large operators worked their way up the coast, ranging from trawlers at sea to small trailer borne boats on land. Muriwhenua was not exempted, despite its remote position. There is evidence to support the Muriwhenua claim that fish remained relatively plentiful in the Far North until the 1960s but that it has since been substantially depleted. Their coastlines are now dominated by trawlers and fishermen based in the south.

By 1980, overfishing of inshore fish stocks was recognised and the time for appraisal for the effectiveness of fisheries management had arrived. As Mr Boyd put it (doc B70: 13)

After over a century of fisheries management it had become clear that a range of fishery management techniques had all ultimately failed.

Dr Habib (D1) considered

That the failures were not of calamitous proportions, was in my view, more good luck than good management.

It also appeared to us in reviewing the evidence, that there has been a decided lack of proper scientific information on the nature of fish cycles, species characteristics and the inter-relationships of marine life. Fisheries research is a new science in the Ministry of Agriculture and Fisheries there having been no fisheries scientific research division within the Ministry before 1963. Even now, in our view, decisions are made on an inadequate data base, lending credence to the claims of Muriwhenua Maori that the Ministry might do better to listen to them.

We need not judge who is right and who is wrong. The claimants point to a good track record in resource maintenance and complain that decisions are made affecting them by persons who presume to know better but appear to know a great deal less. We agree that Maori management systems show an almost inordinate regard for species maintenance, at least after 1300, but we could also say cynically, that Muriwhenua folk maintained the fishery through a lack of opportunities in modern commercial exploitation. The difference appears to be that Maori operated mainly from a biological base, while the Industry has relied largely on management planning.

It was further apparent that by the 1980s, the viability of small fishing ventures was very much in question and that only the bigger species – the larger trawlers – with the facility to explore further afield, might survive in the competition. In fact, Government decided that the smaller fisherman must go.

Drastic action was called for. The catch of some fish stocks had dropped dramatically. National commercial landings of snapper for example, plummeted from 17,660 tonnes in 1978 to 8729 tonnes in 1983. Not only were financial returns down but the survival of some species appeared in jeopardy. In brief there were too many fishermen chasing too few fish, and most had invested too much money. It was necessary to reduce the fishing effort and provide for the more efficient deployment of the capital involved.

In 1983 the decision was taken to place a moratorium on issuing new licences, and to cancel the licences of those not then in use. From 1984 the small and part-time fishermen,

those whose catches were under a certain amount, or whose income was mainly from other sources, had their licences removed.

Muriwhenua people have been small time fishermen since the gum digging days. It has been seen that when the 1920s land development schemes started they lived at virtually subsistence level. They persisted with the land, in order that it might be retained but depended on the sea to supplement their income.

Of course they were part-timers! They had been that way since time immemorial, living one foot on the land, the other in the sea. They had commitment to both, it was part of their traditional way, and the modern world had not brought alternative industries to their region. Yet the Muriwhenua Maori who had retained their people's long tradition in fishing were finally to be excluded.

The 1983 moratorium affected them from the start. The licences of many lapsed while they were spending a year or two in Auckland or a season at distant freezing works or other factories. For not all Muriwhenua people had jobs on the land, and even those who did found it convenient to save for particular projects by working away for a time. Their licences could not be recovered and it appears many then stayed away. Others who may have hoped for a start in fishing on their own, were likewise kept out.

The programmes to reduce the fishing effort continued through to 1987. For those who remained a greater security of tenure was provided than fishermen have ever known in post European times, through the introduction of a tradable quota system (reviewed in chapter 8); but the Industry as a whole was saved by the discovery and development of new deepwater species by the fewer but larger operators.

Fairgray (doc A40:48) notes that between 1984–1985 nearly 300 fishermen lost their licences in Northland alone. He thought most of them were Maori but it is difficult to say for the Ministry of Agriculture and Fisheries, which doubted that that was so, does not keep separate figures for Maori. Dr Habib (doc A27:52) scheduled the names of 29 Maori fishermen in the Muriwhenua area whose permits had recently expired or been cancelled.

There can be no doubt however that the policy that led to overfishing, and the policies taken to redress it, impacted on Muriwhenua Maori in more than one way. They lost not only 'their' fish, to outside fishermen, but their fishing livelihoods too; nor had they the facility to explore further off-shore, for they were geared to exploit no more than the depleted inshore fishery that they had traditionally used. Strange to say, as shall be seen in the next chapter, the North is suited to small time fishing.

Their capital loss, compared nationally, was small, but was worth twice as much to them for they have never had much capital to lose, and they depended more on fishing than many other Maori tribes in the country, possibly even as much or more, as the people of the Chatham Islands. The social cost can only have been much greater. The Muriwhenua people have depended on the sea not only for their own sakes but for the sakes of their families, marae and communities.

The Fairgray Report of September 1986 (doc A40) made this assessment, with regard to Northland generally.

A number of small towns and settlements in Northland have fishing as a major part of their economy. These townships are characterised by a narrow economic base and dependence on primary sector and Government employment. Many have problems in providing enough jobs for the needs of the population. Unemployment is already high, and the paucity of job opportunities in pastoral farming or forestry, and the tightening in Government spending suggests that prospects are limited for employment growth. . . . High unemployment . . . demonstrates that there are few job opportunities for fishers and others displaced from the

industry. Therefore the loss of jobs will directly and indirectly result in population loss, with the consequent decline in the living standards of those remaining in the depleted communities. This will be either through direct population loss, if fishers leave in search of work, or through reduced income levels if fishers have to take further cuts in their catch, or leave the industry and remain on the dole. The decline in their spending power contributes to a pattern evident in many areas of New Zealand, the gradual attrition of services and facilities in rural areas.

The greatest sacrifice of all was the ultimate loss of a people's 'just rights'. That was made even more apparent in the formulation of a new tool for fish management in 1986, the Quota Management System which is described in chapter 8.

## PART III MODERN FISHERIES

## 7. RESOURCES AND POTENTIAL

### 7.1 INTRODUCTION

(a) This chapter compares the Muriwhenua fish resource with that of the country as a whole. The continental shelf which supports the inshore fishery is not as extensive in Muriwhenua as elsewhere, but because the Far North is a narrow peninsula bounded by the sea on three sides, the shelf is large in relation to the land mass. Accordingly the Muriwhenua fish catch, in the inshore fishery, which is some 5 per cent of the national inshore total, compares favourably with other places having regard to the region's size. Since most fish are caught off the South Island coast, Muriwhenua catches compare more than favourably with the inshore take of other North Island places.

In terms of value, the Muriwhenua inshore catch is higher again. Much of the north-east coast does not lend itself to trawling and the longlining method that predominates, presents a fish of higher quality and appearance. The value of the Muriwhenua catch is about 5.3 per cent of the national total value of the fish taken inshore. The slightly higher percentage for value disguises the calculation that the average value per tonne of the Muriwhenua catch exceeded the national average by about 60 per cent.

(b) However, the inshore fishery, that sustained the fishing industry for over 100 years, has been largely fished out, mainly as a result of Government policies to expand the fishing effort that began in the 1960's and continued for over a decade. In the result, and at least while inshore stocks are recovering, the offshore fishery now provides by far the greater return, about 75–80 per cent of the total catch and 80–85 per cent of the catch value.

In Muriwhenua however, the returns from the valuable deepwater species is virtually nil. Commercial quantities of those species have yet to be found in that area, although thorough investigations have still to be completed. Some longlining for the less valuable pelagic species is undertaken off the Muriwhenua coast by foreign vessels but the catch taken there is not a significant proportion of the national total.

In addition some stop was placed on offshore longlining. In granting licences to foreign vessels the Ministry had failed to take proper account of the established use rights of big game fishing interests, and following protests, a moratorium on foreign longlining was granted.

The Muriwhenua fishery is characterised by smaller vessels operating from small ports, and with some trawling mainly on the west coast. The trawlers, and many of the small vessels operating in Muriwhenua are based outside the district.

Unlike many other areas, there is little commercial potential in the Muriwhenua freshwater fisheries.

(c) The country as a whole is then considered and we notice it has benefited from a rapid increase in the value of the export fishery, which rose from \$26 million in 1975 to \$657 million in 1986 due mainly to deepwater fishing.

But few benefits accrued to Maori from the business expansion and profits. They are now at the blunt end of the Fishing Industry, despite their one time pre-eminence in fishing and the early fish trade. Partly as a result of the recent exclusion from the industry of small and part-time fishermen, they are now mainly labourers involved as crew or factory workers.

(d) Accordingly, we then take a brief look at the prospects of re-establishing the time honoured association of the Muriwhenua people with the seas. We are aware that the



people have arranged for feasibility studies to be undertaken. There is no doubt that the potential is there but we see the need for a continuing programme of financial, advisory and supervisory assistance if the tribes are to be restored to a proper economic base founded upon their fisheries.

Particulars of fish catches in the Muriwhenua district are provided in appendix 10

## **7.2 RESOURCES**

New Zealand, as an isolated and island nation, has the benefit of a fishery many times the size of its land mass. Our Exclusive Economic Zone stretches between 25deg and 55deg south to cover 1.2 million square miles of sea or 3.1 million square kilometres. The zone supports a substantial and varied commercial fishery based on some 80 species ranging from tropical to subtropical in the north, to subantarctic in the south.

Maori and scientific names for various species are given in appendix 6.

### **7.2.1 Inshore Fisheries**

(a) Until about ten years ago, the inshore fishery was the only fishery of any interest for commercial fishing. Although only a small fraction of fishing returns comes from the inshore area today, the fishing industry was founded upon the inshore fishery, and the inshore fishery sustained the industry for over 100 years.

Through past overfishing, an overall catch reduction of about 20 per cent has been required, and enforced, in the inshore fishery, starting from 1986–1987. To rebuild stocks a low catch level will need to be maintained for many years, up to ten years depending on the species. Until then, production increases in the inshore fishery will need to come from the under utilised species such as jack mackerel, blue mackerel and the small bait fishes, or from aquaculture or shellfish harvesting.

The inshore fishery is described by the continental shelf, or that part of the seabed that extends from the foreshore to a depth of 200 metres. In Muriwhenua, it approximates a line about 12 miles out around the coastline. In other North Island places it is much larger, in the Hauraki Gulf, Bay of Plenty and the North and South Taranaki Bights for example. In the South Island the continental shelf balloons out to encompass enormous sea areas. Needless to say, most fishing is in the South Island.

That is not to say that Muriwhenua lacks for a fair share of the continental shelf, at least in relation to its land mass. Muriwhenua is a long narrow peninsula with an inordinate length of coastline for its size, and with a continental shelf on its eastern, northern and western margins. At our request, Dr Habib estimated the proportionate size of the Muriwhenua district, and the area of the continental shelf from the shore to the 200m depth contour. Muriwhenua, in his estimate, comprises 1.7 per cent of the North Island, 1.3 per cent of the South Island and 0.7 per cent of the New Zealand land mass. Its continental shelf is 12.9 per cent of the equivalent North Island shelf measurement, 12.3 per cent of that of the South Island and 6.3 per cent of the total. The Muriwhenua share of the total land and continental shelf area he gives as 3.6 per cent.

(b) The inshore fishery is supported by some 30 major fish species. Commercially, the demersal species (bottom dwelling) are generally more valuable than the pelagic or semi-pelagic variety (surface or near-surface dwelling).

The principal demersal species in the inshore fishery are snapper, red cod, school shark, rig, tarakihi, gurnard, flatfish (flounder and sole), hapuku and trevally. Others, less abundant, include john dory, blue cod, blue moki, bluenose, bass, elephantfish, grey mullet, stargazer and dogfish.

The main pelagic or semi-pelagic coastal fish of commercial importance are barracouta, kahawai, shark, trevally, and the jack mackerels. Those of lower status are blue mackerel, pilchard, anchovy, sprat, blue maomao, trumpeter and various perches.

A number of non-pelagic reef dwelling fish species are exploited at low levels. These include kingfish, parore, porae, red moki, leatherjacket, butterfish and yellow-eye mullet. With a coastline extending over 13 degrees of latitude there is considerable variation in the faunal composition from north to south. Snapper and trevally are mainly in the north; red cod, barracouta, kahawai and sole are more abundant in the south. Other species are more widespread.

Most species are to be found in Muriwhenua, but the main ones are snapper, trevally, hapuku, tarakihi, school shark and gurnard.

(c) New Zealand has only one species of crustacean of major commercial importance, the red rock lobster or marine crayfish (koura). It is widespread throughout the country and provides the basis for a valuable export-oriented fishery. Rock lobster landings for Muriwhenua, about 150–200 tonnes per annum, are about 3 per cent of the national total of about 5,000 tonnes.

Oysters are to be found in many parts of the country but the main dredge fisheries for oysters are in the south of the South Island. The New Zealand abalone or paua is gathered by divers and forms a small but valuable resource, but again, the larger paua are mainly in southern areas. Dredging for scallops occurs in various localities.

Included among the other shore-based or nearshore crustacean and shellfish resources are sea urchin or kina, native rock oysters, the introduced Pacific oyster, blue and green-lipped mussels, packhorse lobsters, tuatua, toheroa, pipi, cockles, mud snails, paddle crabs, octopi and a number of small marine shrimps. The Muriwhenua interest in these resources is included in the summary that follows.

(d) The character of the Muriwhenua fishery may be gleaned from Dr Habib's assessment with regard to Northland (doc C1:15–20), here summarised. A variety of finfish and shellfish fisheries operate at a minor scale from small fishing ports and settlements scattered along the Northland coast. But, the western and eastern aspects of Northland have distinctive fisheries.

The open waters of the west coast are fished mainly by trawlers operating from Onehunga and occasionally by vessels from Mangonui. The trawl grounds are extensive and support fisheries for snapper, trevally, gurnard and barracouta.

On western beaches there is some beach seining for grey mullet off Muriwai and Dargaville with commercial tuatua gathering along the Dargaville and Ninety Mile beaches.

The western harbours contain setnet fisheries for flounder, mullet and rig. Some lining for school shark also occurs. Harbour fishing is either from local launches or from small trailer-borne boats that move freely throughout the area.

Recreational fishing comprises mainly surfcasting, with the main species caught being snapper and trevally. The west coast beaches are also popular for shellfish gathering, mainly tuatua and mussels, and, seasonally, toheroa. Within the harbours, line fishing and

netting for snapper, flounder and mullet, and the gathering of pipis, cockles, mussels and oysters are popular activities.

Maori fishing occurs throughout the west Northland area and involves shellfish gathering and line and net fish for a wide range of finfish.

The eastern coastline is characterised by numerous small harbours separated by long stretches of rocky coastline and opening out into several long exposed beaches.

On this coast, line fishing for snapper and groper is the most important commercial activity with numerous small longline vessels moving in and out of the many safe ports. This method is best suited to the predominantly rocky bottom fishing conditions.

Trawling is mainly to the north of Doubtless Bay, involves usually vessels from Auckland, and snapper, trevally and tarakihi are the main target species.

Some purse-seining for trevally, kahawai, mackerel and skipjack tuna is undertaken by vessels based at Tauranga and Gisborne.

There is setnetting for grey mullet and flounder within the harbours and for snapper, trevally, and reef fish along the coast. The zone also contains major fisheries for rock lobster and scallops.

The northeast coast attracts a great number of tourists and holiday-makers. Fishing, diving and shellfish gathering are major recreational activities. A wide range of finfish is sought including snapper, trevally, kahawai, flounder, kingfish and other inshore species, and more distant waters are plied in pursuit of tunas and the big-game marlins and sharks.

Maori of the northeast coast have retained a strong relationship with the sea. Numerous small Maori communities, especially in the far north, remain significantly dependent on seafood as part of their diet (doc A40:45).

(e) A significant feature of the Northland and Muriwhenua fishery is the dominance of small vessels deploying longline gear. This method puts a premium on landing fish of high quality in order to fetch a high price. Accordingly, while the quantity of snapper landed in the north appears modest, the earnings per kg are higher than in the trawl fisheries which operate elsewhere and where the emphasis is on making large, low value catches.

Gross landing statistics are therefore not an indicator of value when comparing the Muriwhenua fisheries with other places. As Muriwhenua is comparatively small, the inshore catch is correspondingly small as a proportion of the total New Zealand inshore catch. But the value of the catch is high because fish are taken on hook and line gear which preserves the quality and appearance of the fish. The snapper catch in particular is treated with special care as it is destined for the high-priced Japanese market. Gross landings statistics do not tell the whole story. (Comparative landings and values are considered at 7.3, 7.6 and 7.7).

(f) The following is a summary of Dr Habib's assessment of the current Muriwhenua potential (doc C1;15–17). In the Muriwhenua district as elsewhere in the North, several finfish resources not under stress could well be further investigated for their commercial fishing viability. These include john dory and the pelagic marlins, sharks, tunas (albacore, skipjack, yellowfin, bigeye), blue and jack mackerels.

The annual landing of rock lobster for the whole of Northland is about 200 tonnes and this fishery is apparently not under stress. The green or packhorse rock lobster is important only in Northland and the Bay of Plenty.

Scallop beds are scattered along the northeast coast in areas of open sand. Commercial fishing for scallop is carried out in Rangaunu Bay, Doubtless Bay, Whangaroa Bay,

Cavalli Passage and Bream Bay. Scallop landings to northeast coast ports have risen sharply in recent years from 49 tonnes in 1976 to 703 tonnes in 1983. The scallop landings in Muriwhenua have ranged from 110–560 tonnes per season in recent years (appendix 10). The size of the northern scallop resource is unknown although there are indications that the level of commercial fishing might be near the optimum.

Pipis and cockles are amongst the most abundant shellfish on the intertidal sand and mudflats along the Northland coast and generally, stocks of these shellfish are only lightly exploited.

Tuatua occur in great abundance along the sandy beaches, usually buried subtidally in the sand and aggregated into beds. Commercial handpicking occurs but the great bulk is harvested by recreational fishermen.

Toheroa, the largest of the beach clams, provides the basis for an important amateur fishery with the exposed west coast beaches holding the major populations. Heavy fishing pressure in the late 1960s and early 1970s contributed to drastic depletions. Closed or limited seasons must now be routinely applied as management measures. There is an opinion that toheroa losses have resulted not from overfishing but for environmental and biological reasons. Dr Habib considers that vehicular traffic on beaches like Ninety Mile Beach also damages toheroa stocks.

Paddle crab populations have dramatically increased in recent years, coinciding with the decline in inshore fish stocks which prey upon them. Paddle crabs are abundant and represent a commercial opportunity with crab meat now fetching good prices in local and overseas markets.

Kina or sea urchin are common from intertidal rock pools down to depths of about 10 metres. They are hand-gathered by commercial and amateur fishermen throughout the year. The kina fishery is relatively undeveloped in Northland and catch levels are low. Stocks are considered to be underexploited.

Paua are abundant but those of legal size are scarce. There is some evidence that the size limit is too large for northern paua and should be altered.

Mussels occur in isolated shallow areas where occasional spat settlements occur. Prolific beds exist around Cape Maria Van Diemen. Mussels also occur in many of the northern harbours.

Oysters are found in many harbours and in sheltered places along the rocky shoreline. Wild stocks are generally in good abundance and great potential exists for oyster farming. Parengarenga Harbour is the site of a number of oyster farm leases as are other northern harbours. Maori oyster fisheries exist to the south of the claim area.

Karahu or mudsnail live in sheltered mudflats and are most abundant in the mangrove areas of Northland. They are gathered for local consumption by Maori communities throughout Northland.

The seaweed *Pterocladia lucida* is a commercially important perennial red alga producing a high quality agar. Distributed widely on the New Zealand coast, this seaweed is commercially harvested in several areas in Northland. Plants gathered as driftwood or harvested from intertidal rocks are then dried. Purchasing agents are based in Te Kao, Panguru, Ahipara, Opononi and Paihia. A modest wage can be made from seaweed picking over a limited season. Resources of this seaweed are considered to be in good abundance.

The seaweed *Gracilaria secundata* also occurs in commercial quantities. It grows best in sheltered harbours and bays, particularly where there is local enrichment as from sewage

outlets. This weed is also converted to high grade agar. It lends itself to pond culture and this should be investigated for some of the northern harbours.

Large quantities of the seaweeds *Ecklonia* and *Durvillaea* grow along the New Zealand coastline. A Maori family in Opononi has established a factory to process large quantities of these weeds into fertiliser. This type of activity could have application elsewhere in Northland.

## **7.2.2 Offshore Fisheries**

### **(a) National**

New Zealand's deepwater (200 to 1,300m) fish stocks represent a large resource. Estimates have been made of sustainable annual yields of deepwater demersal species of 600,000 to 1.4m tonnes. The major deepwater fishing grounds lie around the South Island, to the east along the Chatham Rise, and in the southern part of the New Zealand zone.

It is in the deepwater trawl fishery that the greatest potential for increased production lies. The present catches of deepwater finfish and squid are of the order of 290,000 tonnes annually, which is well below the estimated total catch that could be taken (see appendix 5 of Bevin, 1987:48).

The principal species taken in the deepwater trawl fishery are orange roughy, hoki, ling, barracouta, oreo dories, gemfish, warehou, hake, alfonsino and southern blue whiting. Barracouta is widespread in the shallower part of the deepwater range; southern blue whiting is caught mainly in depths of 300 to 600m on the Bounty Platform and the Campbell Plateau; hoki and ling are wide ranging both in distribution and depth down to 900m. In the deeper waters, oreo dories occur from 600m down to at least 1,000m, and orange roughy, the most valuable of the deepwater species, occurs in the depth range 700 to 1,300m, although commercial operations are limited to less than 1,100m. Oreo dories are caught off the east coast of the South Island and on the Chatham Rise. The principal orange roughy grounds are on the Chatham Rise, along the south-east coast of the North Island, and on the Challenger Plateau.

On the southern plateau the catching cost is high and the main species, southern blue whiting, is comparatively low in value. Orange roughy has provided much of the industry's profitability but there are now some signs of overfishing for this species in some areas. We understand lower quota levels are now being negotiated.

New Zealand's commercial squid resources are also located in the deepwater. Two species of arrow squid comprise almost the whole of the commercial fishery. A third species, the broad squid, is taken in small quantities in North Island waters.

Arrow squid are widespread and very abundant throughout the southern waters. Squid are both demersal and pelagic and are taken by surface jigging and bottom and midwater trawling. Jigging vessels fish in waters adjacent to the coasts of the South Island and in some seasons as far north as the Taranaki coast; trawling is mainly done around the southern outlying islands.

It is not known whether the squid resource can sustain larger catches. As squid has a life cycle of a little over a year, considerable variation in stock size and catches can be expected. Most of the squid catch is taken by foreign joint venture and licensed vessels.

Other pelagic species in offshore waters include the various tunas such as skipjack, albacore, southern bluefin and yellowfin, the billfish (black, blue and striped marlin),

swordfish and sailfish, and the large pelagic sharks (mako, blue, thresher, bronze whaler, tiger, hammerhead).

Because of the mobility of these pelagic or semi-pelagic species, they are sometimes found in inshore waters. Their latitudinal distribution varies from year to year according to water temperatures.

The tuna resources, except for southern bluefin, are presently under-utilised. In the skipjack fishery, there seems little prospect of the chartered United States seiners returning to the seasonal fishery in New Zealand waters now that an established year round fishery has been proven in the western and central tropical Pacific. There is thus room for an expanded effort by domestic vessels but this is only likely to occur if prices for skipjack improve. There is potential for increased catches of albacore, both by domestic vessels and foreign longliners but the economics of this fishery make expanded catches difficult to see. The fishery for highly valuable southern bluefin tuna is presently almost entirely carried out by Japanese vessels, although there has been a domestic industry interest in the fishing for some years.

(b) Muriwhenua

The deepwater fishery has so far produced little of value in the Muriwhenua region but investigations need to continue. Species like the marlins, pelagic sharks and tunas occur in seasonal abundance in both inshore and offshore areas, but commercial concentrations of the valuable hoki, ling, orange roughy, deepwater dories, hake and squid have yet to be found.

In 1985–86, and with declining catches in the inshore fishery, the Ministry of Agriculture and Fisheries arranged a year long survey of the deepwater potential throughout the northern half of the North Island, entering into a charter-for-quota arrangement for that purpose with a private company. Orange roughy quantities taken off Muriwhenua were small, 1–49 kg per hour trawled, compared with rates of 250–499 kg/hr off East Cape and Hawkes Bay. (Catch rates on the main commercial grounds near the Chatham Islands measure several thousand kg/hr).

Hoki at 1 tonne per hour trawled, off Three Kings in spring and autumn, compared with or exceeded rates achieved elsewhere but was still considerably less than that considered as an economic proposition, commercial concentrations yielding 7–12 tonnes per hour in southern places, sometimes much more.

There have been no comprehensive surveys for squid off the Muriwhenua coastline. Squid are certainly present but not in proven commercial amounts. The major commercial grounds are located along the east coast of the South Island, through Cook Strait, and off the west coasts of both the North and South Islands between about New Plymouth and Hokitika.

The above has been gleaned from and may be amplified by reference to

*Catch* May 1985, 12 (4)

*Catch* November 1985, 12 (5–9)

*Catch* March 1986, 13 (2)

*Catch* April 1986, 14–15

*Catch* April 1988, 17–19

Clarke, M.R. and K J King. In Press: Deepwater fish resources of the North Island: results of a trawl survey, May 1985 to June 1986. *NZ Fisheries Technical Report*.

That is not to say that commercial concentrations of deepwater species will not be found off the Muriwhenua coast in the future. The Ministry of Agriculture and Fisheries survey visited the Northland area for no more than one week on four occasions over a 12-month period, and the total survey area to be covered was enormous, over 60,000 square kilometres. Low catches may have coincided with low density periods. Fish populations are usually generally dispersed over a wide area, and aggregate only for particular purposes, for spawning, or to feed on concentrations of food organisms. Random surveys may or may not sample fish populations at those times they are concentrated.

In addition, the particular gear used may be inappropriate for the capture of some species. The trawl gear used in the Ministry of Agriculture and Fisheries survey would have turned up few squid for example. Squid are pelagic fish and resources need to be tested using jigging gear and lights.

There would need to be a great many more surveys using a wider range of gear and over a much wider period of time to obtain the necessary data to make a definitive statement about the distribution, abundance and seasonality of the deepwater fish resources off the Muriwhenua coast.

The main fishing in the Muriwhenua offshore involves longlining by foreign boats for pelagic species (see 7.4 (b) below).

### **7.2.3 Freshwater Fisheries**

#### **(a) National**

There are about 30 native species of freshwater fish. With the addition of introduced fishes the total freshwater resource is still quite small. Two species of eel are caught, mainly for the export market. The larger long-finned species are found mostly in rocky streams and rivers. The short-finned eel is the common species of lagoons and swamps, and is more coastal in distribution.

Small fisheries exist for various whitebait being the juveniles of five species of Galaxias, the inanga or native minnow, three types of kokopu and the native mountain trout. They migrate upstream from the sea in spring, to grow and mature. The inanga is by far the most common species in the whitebait catch.

Similar in appearance to the whitebaits are smelts, that live in coastal waters and migrate upstream to spawn, in spring. Lamprey also follow this life cycle.

Other native freshwater species include mudfish, black or river flounder, bullies, torrent fish, freshwater koura and the shellfish, kakahi.

About 30 species of exotic fish have been released into New Zealand's rivers and lakes. Few introductions were successful. Species that survive in a few populations or in restricted geographical areas include mosquito fish, catfish, goldfish, rudd, tench, Atlantic salmon, sockeye salmon, mackinaw, brook char, mollies and perch. Some are occasionally caught by anglers.

The exotic species now well established are brown trout (*Salmo trutta*), rainbow trout (*Salmo gairdnerii*), and quinnat salmon (*Oncorhynchus tshawytscha*), all popular sporting fish.

Most brown trout are river species north of Coromandel, but large numbers are present in lakes and rivers throughout New Zealand. Some river populations include sea-run stocks, fish that run from the sea to the mouths of rivers to feed. Rainbow trout is by far the most important species in the central North Island and South Island lakes. Quinnat salmon, a

migratory species, run into the rivers and streams of Otago and Canterbury in the early autumn, to spawn in the river headwaters (McDowall 1978).

(b) Muriwhenua

Freshwater bodies are few in the far North, and since they are a minor part of the landscape, freshwater fisheries do not have the pre-eminent position in tribal history accorded to the fisheries of the seas. The Te Rarawa submissions described freshwater waterways and lakes where tuna (eel), mullet and kuta were harvested and some 25 fishing locations were listed. In addition, Paihere Brown spoke of Lake Wahakari and Te Kao River connecting the lake via Tangaoko and Te Karaka to the sea. He spoke of numerous fish species taken in those areas. Nonetheless freshwater resources do not figure in Muriwhenua estimation as they do in other tribal areas in Waikato, Horowhenua or the South Island for example.

Where freshwater bodies exist however, the long and short-finned freshwater eels are abundant as are whitebait, trout, bullies and koura, and the more typically marine kahawai, flounder and mullets. Exotic species found in the north include tench, goldfish, rudd and mosquitofish.

But there are probably few commercial prospects for the freshwater resources in the region.

## **7.2.4 Aquaculture**

(a) National

Mariculture (marine aquaculture) began in New Zealand about 1967 with the first farmed production of the native rock oyster. In recent years the rock oyster has been replaced by the more vigorous Pacific oyster, a self-introduced exotic shellfish. In 1986, total production of farmed oysters was 800 tonnes. Production is mainly from the northern bays and harbours of the North Island.

Farming of the green-lipped mussel began about the same time as oysters. Development was initially slower than for oysters but has since increased. Production of farmed mussels in 1986 totalled 11,000 tonnes.

In recent years, salmon farming has become important, with ocean ranching, sea cage rearing, lake pen and pond rearing being employed in several South Island and Stewart Island localities.

Other species under investigation for mariculture, or which have only recently been propagated are red rock lobster, paua, kina), paddle crab and various seaweeds. A pilot tropical prawn farming project was underway adjacent to Kaipara Harbour but recently collapsed. Other marine species with aquaculture potential include scallops, cockles, toheroa, and dredge oysters.

Of the freshwater resources, pilot projects have investigated the feasibility of farming eels and koura. Other species with potential include trout, and some of the carps. Pilot projects are currently underway to investigate aquaculture prospects for two exotic species of crustacea, the Australian import marron, and the tropical freshwater prawn, *Macrobrachium*.

(b) Muriwhenua

The only cultured species in Muriwhenua is the Pacific oyster which has replaced the endemic rock oyster on farms in the Parengarenga Harbour. It is apparent however that the



harbours and bays in the region could sustain the culture of many other species such as mussels and scallops, and the managed rotational harvesting and re-seeding of natural beds of shellfish including tuatua, cockles and the much-prized toheroa. The people of Muriwhenua have plans to investigate the wider application of aquaculture in their region. This is considered below at 7.8.

### 7.3 PRODUCTION

#### (a) National

The most recent year for which we have complete fisheries statistics is 1986. In that year the total greenweight fish landing from New Zealand's EEZ was 412,000 tonnes. Of this total, 145,000 tonnes was taken by domestic fishermen (35 per cent), 193,000 tonnes by foreign charter or joint venture fishermen (47 per cent), and 74,000 tonnes (18 per cent) by foreign licensed vessels (Bevin, 1987:18).

Major species in the catches were hoki (100,700 tonnes, 24 per cent), squid (66,400 tonnes, 16 per cent), orange roughy (45,000 tonnes, 11 per cent), barracouta (19,200 tonnes, 5 per cent), jack mackerel (18,500 tonnes, 4.5 per cent), southern blue whiting (16,200 tonnes, 4 per cent), and oreo dories (15,400 tonnes, 3.7 per cent).

267,500 tonnes (65 per cent of all fisheries produce) was taken by foreign-flag vessels in waters outside the territorial sea (12-mile limit). In addition, an unknown but probably quite, significant deepwater catch was made by domestic vessels. This included recognised deepwater species like orange roughy (29,900 tonnes), hoki (8,000 tonnes), oreo dories (4,500 tonnes) and tunas (6,800 tonnes), which, when added to the catch made by foreign flag vessel, raises the estimated deepwater fish catch to about 317,000 tonnes, some 77 per cent of all fisheries produce in 1986.

The year 1986 also saw dramatic reductions in domestic catches of inshore species as the Quota Management System began to take effect. The snapper catch in 1986 was 6,500 tonnes, down from 9,244 tonnes in 1984. The 1986 hapuku/bass landing of 1,300 tonnes compares with 2,300 tonnes in 1984. The 1986 domestic red cod catch of 6,700 tonnes was, in 1984, 11,280 tonnes. The rig catch in 1986 was 1,600 tonnes, down from 3,560 tonnes in 1984. The total domestic finfish catch in 1986 (including marine finfish, tunas and freshwater eels) was 114,700 tonnes, down from the 1984 catch of 131,800 tonnes.

The annual production of shellfish has varied from 13,000 to 18,000 tonnes, and lobster 3,500 to 5,500 tonnes.

#### (b) Muriwhenua

The Muriwhenua catch share must be estimated. The region is defined by four statistical areas that do not quite accord the area of the claim, but the main problems arise when, for example, a vessel catches fish in one place but lands them in another, or when fish are caught in several areas but landed in only one of them, or somewhere else altogether. We were supplied with sets of estimates by Fairgray (doc A39) and by the Ministry of Agriculture and Fisheries (docs D13–17). Fairgray's results, when applied to the Muriwhenua area are lower. Both used different criteria to assess the fish that likely came from the region. Fairgray's figures are based on 1984 returns. This is updated in the Ministry's data, though using different tests.

Based on Fairgray the 1984 finfish catch for the region was 1,430 tonnes, with landings of 421 tonnes at Houhora, 380 tonnes at Mangonui, 310 tonnes at Awanui-Kaitaia, 127 tonnes at Ahipara, 60 tonnes at Unahi, and smaller landings at Rangaunu, Kaimaumau, Taipa and

south of Ahipara, with the great bulk being taken by bottom longline or setnet. With the addition of shellfish landings of 417 tonnes the 1984 fish and shellfish landings total 1,810 tonnes. These statistics do not include rock lobster landings, assessed at about 160 tonnes in 1984.

From other data put in by the Crown (doc D13–17) and further research provided by Dr Habib, we have assessed the quantity and value of the fish taken from Muriwhenua for the period 1983–1986 in appendix 10. We took the average annual landings, derived from the data submitted by the Crown, as being the best representation of fisheries production in the Muriwhenua region in recent times.

Using the Ministry's figures, Muriwhenua landings are a small proportion of the national total, as for example

Domestic fish from continental shelf (est.)	95,400 tonnes (100%)
Muriwhenua equivalent	4,800 tonnes (5%)
Domestic rock lobster	5,100 tonnes (100%)
Muriwhenua lobster	155 tonnes (3%)
Offshore fish (national)	317,000 tonnes (100%)
Muriwhenua offshore fish	0

Based upon our calculation of the Muriwhenua land and inshore sea area as 3.6 per cent of the national total, the inshore Muriwhenua fishery accords a national average; but as the South Island take is substantially greater than elsewhere, the Muriwhenua inshore fishery is probably more significant than in many other places in the North Island.

The 1983–86 average annual finfish catch in the region was over 4,200 tonnes, and of shellfish and other resources, a further 400 tonnes (see appendix 10.1). In the same period the average annual rock lobster landing was about 155 tonnes (see appendix 10.2).

Finfish landings were dominated by snapper (average landings 973 tonnes, 23 per cent), trevally (622 tonnes, 15 per cent), hapuku (419 tonnes, 10 per cent), school shark (337 tonnes, 8 per cent), tarakihi (239 tonnes, 5.6 per cent), and gurnard (226 tonnes, 5.3 per cent).

Of the shellfish, scallops dominated the landings (318 tonnes, 83 per cent). The only other shellfish of any significance was tuatua.

## 7.4 FISHING FLEET

### (a) National

The full-time domestic fishing fleet in 1986 comprised 2,266 vessels being 24 Danish seiners, 141 dredgers, 518 liners, 429 lobster potting boats, 5 purse seiners, 406 set netters, 51 pair trawlers, 284 single trawlers, 143 trolling and poling vessels, and 265 others using alternative methods.

Two hundred and fifteen foreign-flag vessels also operated in the New Zealand zone during 1986. Of these, 51 were chartered by New Zealand companies, and 164 operated under foreign licensing arrangements. Thirty-seven of the chartered vessels were trawlers and 14 were squid jig vessels. Of the licensed vessels, 83 were squid jiggers, 48 tuna longliners, and 33 trawlers. Most of the foreign vessels (152 or 71 per cent) originated from Japan, with smaller numbers from the USSR (29), Korea (27) and Taiwan (7).

(b) Muriwhenua

Some indication of the local fleet is given in Fairgray's statistics for Mangonui (doc A39 p19), although the fleet services other districts as well. He counted 121 boats engaged in fishing including 92 bottom longliners, 49 set/gillnetters, 16 dredgers, 15 longliners, 10 dropliners, and 3 trotliners. (The numbers of boats using difficult gear do not equal the total number, as some boats used several methods.) Seventeen holders of fishing licences were catching eels inland, but probably not in Muriwhenua.

The bulk of the Northland fish harvest is taken by longline and bottom lining (45 per cent), with set and gillnetting accounting for a further third (doc A39:20). Trawling accounted for only 15 per cent of landings, and trot and droplining just 7 per cent.

Trawling was much maligned in the claimants' submissions. The above figures suggest it is not in fact a major method in the North, or at least not now. Fairgray (doc A39:20) considers that trawling has declined in the north in recent years. But his figures may be misleading for they are based on the trawlers operating from Whangarei. Onehunga and Auckland based trawlers also fish off the Northland coast.

Only limited foreign fishing activity occurs in offshore waters in the Muriwhenua region. In 1985, 13 Korean and 3 Japanese longline vessels targeted for albacore tuna in the northern part of the New Zealand EEZ. A second foreign longline fleet of 34 Japanese vessels sought bluefin tuna mainly in the south, but also occasionally caught albacore and other species in the north.

The northern fishery begins in April near Wanganella Bank to the northwest of Northland. The vessels fish in an eastward direction to finish near the Kermadec Islands in September, crossing the top of the Muriwhenua region en route between 12 and 200 miles offshore.

Catch rates are high, being consistently more than 20 fish per 1000 hooks. The fishing is concentrated to the east of Wanganella Bank and towards the Three Kings Rise from May to July, and near the Kermadec Islands from July to September.

In 1985 Korean longliners took 680 tonnes of albacore, the Japanese vessels 43 tonnes. The Japanese also caught 138 tonnes of bigeye tuna and 69 tonnes of swordfish.

The southern bluefin fleet of 34 Japanese vessels also occasionally fished in the north, with some effort offshore from Muriwhenua in February-March and July-August 1985.

The catches attributable to Muriwhenua however, cannot be identified. Returns relate to the entire eastern coast between East Cape and north of the North Island. At a guess, catches between 12 and 200 miles off the Muriwhenua coast probably amounted to no more than a few hundred tonnes composed of albacore, bigeye, swordfish and other tunas and billfishes.

The longline fishery is very mobile being based on tunas and billfishes which move about and migrate between countries during the course of a year (see Catch July 1987 pp20-21).

Foreign longlining has recently been curtailed in Northland following complaints that it was affecting the Big Game Fishing tourist industry, and after the threat of legal action by the Bay of Islands Swordfish Club on the grounds that existing recreational uses had not been brought into account before the licensing of foreign vessels. A moratorium has been imposed on foreign longlining throughout the Exclusive Economic Zone of the northern half of the North Island during the summer months from October through to May (see Catch 1987:19, Evening Post 6 July 1987, Northern Advocate 7 July 1987, Dominion Sunday Times 9 August 1987).

## 7.5 MARKETING AND VALUE

### (a) National

The marketing and distribution of seafoods in New Zealand is entirely in the hands of the private sector and operates through a variety of channels from the individual level to large fishing companies. There is only one New Zealand port where fish is auctioned. Elsewhere, fish is sold by independent fishermen direct to retail outlets, wholesale buyers, fish processing companies or fish exporters. A large number of company-owned vessels supply their own outlets or factories.

Traditionally the retail sale of fish has been through small privately owned shops specialising in seafoods. Most fish is sold fresh and in a filleted form. Very little is sold whole, the New Zealand consumer being largely unaccustomed to cooking whole fish or filleting it at home. There have been increasing sales through supermarkets in recent years involving frozen fish in a variety of processed forms, from fillets to fully prepared individual meals.

On a per capita basis, retail sales of fish have not changed greatly in recent years, but there have been significant gains in the quantity of seafood consumed away from home. In addition to the staple 'fish and chips' as a takeaway meal, seafoods have been widely promoted by the restaurant trade, a high growth area in the New Zealand economy. It is estimated that sales of fish on the domestic market in 1986 amounted to approximately \$124m (Bevin 1987:16, Table 4.1).

New Zealand fish production is much greater than is required for domestic needs and the development of overseas markets has been the key to the new era of growth in the fishing industry. Exports of fisheries produce have grown spectacularly over the past decade. From 14,000 tonnes valued at \$26m in 1975, exports grew to 65,000 tonnes valued at \$98m in 1979 145,000 tonnes worth \$441m in 1984. In 1985, the same export tonnage yielded a significantly greater return of \$545m. This was reportedly due to the increased processing of finfish into fillets and the floating of the New Zealand dollar (March 1985). In 1986, the processed weight of exports totalled 158,000 tonnes worth \$657m (Bevin, 1987:44).

The growth rate of fish exports has exceeded other sectors in this period. As a share of total export receipts, it rose from 2 per cent in 1975 to 5 per cent in 1984, and 6 per cent in 1986. The most valuable export species are orange roughy,; squid, hoki, snapper and rock lobster.

New Zealand seafoods were exported to 56 countries in 1986, but the three key export markets were the United States, Japan and Australia which accounted for nearly 90<th>per cent of the trade value. The United States, which has for many years been New Zealand's most important market for rock lobster, has recently become a major buyer of finfish, particularly orange roughy. Japan is the biggest seafood buyer by volume with the most important items purchased being squid and snapper. Australia is a major market for finfish.

Sales values at the retail level on the domestic market, and on export markets, provide some of the measures of worth of New Zealand's fisheries produce. Another measure is the port price, or the price received by the fishermen at the port of landing.

According to the statistics published by the Fishing Industry Board the 1986 domestic finfish catch of 269,000 tonnes had a port value of \$229.6m. The tuna catch of 6,800 tonnes was valued at \$7.8m, and the freshwater eel catch of 1,100 tonnes, at \$1.6m. The domestic shellfish catch (including mussels, oysters, scallops, paua, lobster, squid) totalled 61,000 tonnes, and was valued at \$188m. Summing these totals, the total landing of

fisheries produce was 338,100 tonnes and this had a port value of \$427.1m (see Bevin, 1987:Appendix 3).

One might take these analyses a step further to deduce the average port price per tonne for the New Zealand catch. By dividing the total value by the tonnage landed the average value per tonne is \$1,264.00. This average encompassed port prices which ranged from \$100 per tonne for dogfish and stargazers, to \$18,000 per tonne for rock lobster.

#### (b) Muriwhenua

Unlike the national situation, where statistics were readily available on domestic and export sales, no such equivalent statistics were available for the Muriwhenua catch. Undoubtedly, the Muriwhenua catches sold for prices comparable with those from other areas in respect of the domestic market. We would expect, though, that the line-caught snapper from the North would have attracted a considerable premium over snapper from other regions on export markets. As Fairgray found in his 1984 survey, line-caught snapper was worth two to three times the price of fish caught by trawl gear (doc A40:30).

In order to obtain a measure of the worth of the Muriwhenua fish catch compared with the national values, we referred again to the FIB published port price data (Bevin, 1987:Appendix 3). We estimated the market worth of fisheries produce landed at the ports in the Muriwhenua region at about \$9.6m (see appendix 10.3). This estimate was made by multiplying the average landings statistics which we had previously calculated for Muriwhenua by FIB's port prices. The port value of the Muriwhenua catch was 2.2 per cent of the national value.

We then calculated the average value per tonne of the Muriwhenua catch at about \$2,000.00. This compared more than favourably with the national equivalent of \$1,264.00 per tonne, which the Muriwhenua value exceeded by nearly 60 per cent. This brings us back to our earlier observation, at 7.2.1, that catches must also be assessed according to value. Clearly the Muriwhenua catch, despite its small size, yields a disproportionately high return in terms of value. This is likely due, in part, to the particular species mix taken in the region containing many high-value fish and shellfish, but also to the added-value qualities of the line-caught species.

## 7.6 EMPLOYMENT

#### (a) National

The fishing industry provided employment for 9,800 people in 1986. Most were employed by the wholly domestic industry, either at sea (3,500 people) or ashore (5,000) in the fish processing houses and elsewhere in the servicing sector. The remainder (1,300) were engaged in charter fishing operations.

The involvement of Maori in various sectors of the industry was summarised by Dr Habib (see doc A27). He indicated that approximately 1,800 people of Maori descent are employed in the fishing industry, mainly in processing factories or as crew. Maori representation as vessel owners is 'modest'. In the Auckland area only 12 out of a total of 378 vessel permit holders appear to be of Maori descent. In Whangarei the number was one out of 83 but in the Bay of Plenty, 20 out of a total of 122. Dr Habib conceded that he may have failed to identify others who were Maori but he did not think the overall picture would be very different. He was particularly disturbed to find that a large number of Maori operators had recently lost their place in the fishing industry, through a Ministry of

Agriculture and Fisheries policy of non-renewal of licences of operators considered to be part-timers.

Dr Habib found few Maori involved in either offshore catching or shore fishing, e.g. for eels. Marine farming has also poor Maori representation. Very few Maori are involved in private sector management or public sector administration. One Maori, in Wellington, owns his own marketing company, and one, in Auckland, is a fisheries consultant.

On the other hand, Maori are well represented amongst crews and fish factory labourers often comprising the bulk of the unskilled workforce.

#### (b) Muriwhenua

In a survey in 1985 Fairgray (supra) found that over 200 people in the Muriwhenua region obtained part or all of their living from the fishing industry. Specifically, he located 79 such people at Mangonui, 68 at Houhora Pukenui, 49 at Awanui, 14 at Ahipara, 6 in the Taipa area, and 3 at Te Hapua. Most of these (177, 81 per cent) were employed in the catching sector, while small numbers were engaged in processing and/or marketing (32, 15 per cent) or other associated employment (10, 4 per cent) (doc A39, Attachment 2, Tables 1B, 2B, 3B, 4B, 5B, and 17B).

In the Muriwhenua region Dr Habib identified 12 Maori vessel owners out of a total register of 99, but they own mainly small vessels and it is apparent that some, if not most, are not operating. We do not have detailed particulars. Fairgray considered there were 'relatively few' Maori fishing commercially throughout the whole of Northland (doc A40:43 and see also p10).

Fairgray notes that in 1984–1985 nearly 300 Northland fishermen lost their licences under the then policy to reduce the commercial effort and the pressure on the inshore fishery by excluding part-timers. He thought most were Maori (doc A40:48). The Ministry of Agriculture and Fisheries doubted that but does not keep separate figures for Maori.

## **7.7 ON ASSESSING THE MURIWHENUA SHARE**

This report contains many statistics on fish catches and landed values on both a national and Muriwhenua region basis. The figures have been examined from many points of view in an attempt to grasp the importance of the Muriwhenua fisheries when placed in the national context. The point has been made that because of the unique small-land/large-sea area relationship which exists in the Far North, the Muriwhenua people could be said to have a disproportionately high interest in the sea resource, compared with other regions. It has also been noted that virtually the whole of the Muriwhenua catch is taken in inshore waters, that is, the area extending from the shoreline out to about the 12-mile limit.

The total national landing of fisheries produce in 1986 was 412,420 tonnes, which was worth \$781m.

The Muriwhenua landing of fisheries produce was 4,800 tonnes worth \$9.6m.

Of the total national fish landing the Muriwhenua proportion comprised only 1.2 per cent, and of the national landings value, again only 1.2 per cent.

However, the national statistics include both foreign-vessel and deep-water catches, while Muriwhenua catches are almost entirely inshore. To compare like with like, we have estimated the national inshore fishery returns.

The national landings of fisheries produce from inshore waters were about 96,000 tonnes, and had an estimated value of \$181.7m. Of those landings, the Muriwhenua contribution comprised 5 per cent, and of the landed value, 5.3 per cent. The slightly higher percentage for value related directly to the fact that by our calculations, the average value per tonne of the Muriwhenua catch exceeded the national average by about 60 per cent (see 7.5). We consider the higher average value of the Muriwhenua catch relates to the premium prices gained in the far north for line-caught fish.

Other comparisons could be made. The Muriwhenua fish catch, if sold as quota at 1987 prices, (prices from Bevin, 1987), would be worth about \$24.5m (see appendix 10.4).

Similar calculations in respect of the 1986/87 Total Allowable Catches (as listed in Bevin, 1987:Appendix 5, p48), produce a value for the national inshore catches, as quota, of about \$934m (appendix 11.3). The Muriwhenua contribution to this would be about 2.2 per cent.

We noted earlier (7.2.1) that the Muriwhenua rock lobster catch is about 3 per cent of the national total, and estimated that the Muriwhenua land and sea area might be 3.6 per cent of the national equivalent (7.2.1).

## **7.8 POTENTIAL FOR CLAIMANTS**

The re-establishment of the Muriwhenua people in fishing is an important consideration in this claim.

In recent years, when challenged by outside competition and new ways, the local people made a determined attempt to hold on and compete, and just as the people did of old, when threatened by an outside force, they did so as a community.

The local Maori incorporation began a box-net operation in the 1970s near Te Hapua and outside Parengarenga Harbour. Box-netting is another form of fishing, akin to purse-seining, or other forms of trapping such as lobster potting. It is a fixed box-shaped area of netting designed to trap schools of fish migrating along the coastline such as mackerel, kahawai, snapper and trevally. It failed. The bar entrance to Parengarenga is difficult to negotiate and limits essential servicing schedules to spells of good weather and calm seas. Lengthy delays led to a build-up of fouling on the net, thus making more difficult the maintenance, and lowering the nets effectiveness as a semi-visible trap. The un-removed gilled fish deterred other fish from entering the trap, further depressing catches, and there was not the facility to regularly remove prime fish and prepare them for the high-priced international markets.

It was basically an unsuitable sea environment, especially during easterly blows when any large fixed structure is difficult to keep at anchor.

With the considerable distance from markets, the project could have been doubtful from the start, even with a skilled and committed manpower. Also, we were told, the economic climate was not right for innovative new fisheries projects at that time.

The Muriwhenua people now have plans in respect of aquaculture and other projects. Funds have been raised to commission a range of feasibility studies in their area, to begin during 1988 and to cover such items as oyster and mussel farming, paua and scallop enhancement, koura farming, shellfish bed leasing, seaweed harvesting, and the development of a locally-based finfish industry (assuming they will have access in future, to finfish quotas in viable amounts).

At the moment oyster farming is already being attempted, but in terms of on-site farming, and in relation to farm management, product processing and marketing, much work needs to be done to make it a commercial proposition. New farming sites have been identified and will need to be applied for and developed. It seems that with a sufficient scale of development, regional processing facilities could be justified, rather than trucking the oysters south to facilities in Kaitaia, Whangarei and Auckland.

Likewise, with sufficient finfish quota, it seems likely that a viable finfish industry could be re-established in the north. At this time, rationalisation and the accumulation of quota in the hands of major companies, is drawing product away from outposts like Awanui, Houhora, Whangaroa and Mangonui, and even from Kaitaia and Whangarei.

Scallop enhancement and koura farming would appear to be second or third tier downstream opportunities, with much more research being required.

Seaweed harvesting is already carried out in the Muriwhenua region. Currently, the weed is being gathered and transported to the Coast Biologicals plant in Opotiki for processing into agar and other products. A serious constraint at present is that harvesting is limited to free diving and hand picking, which greatly limits the harvest.

It appears to us however, that the re-establishment of the Muriwhenua Maori in fishing, must depend upon a fair allocation of tribal quota in the highly viable fisheriesK species like lobster, snapper, trevally, hapuku, school shark and scallops.

Any emphasis on the lower-value species like mullet, mackerel, flatfish, pipis and cockles, would unfairly handicap them in our view.

We would also be concerned if undue emphasis were given to aquaculture. Dr Habib advises the only proven industry in this field in the north is oyster farming. Assistance in the enhancement of existing and new farms would be quite appropriate, but other aquaculture, such as paua and koura farming, are still unproven in an economic sense and being of uncertain viability, may impose an unacceptable burden on the Muriwhenua people.

The Department of Trade and Industry has provided some initial finance to enable the claimant tribes to undertake a feasibility study. It appears to us that it is but a fraction of what will be required. We see the need for a continuing programme of financial, advisory, and supervisory assistance, and help in obtaining the right gear, if the tribes are to be restored to a proper economic base. In Dr Habib's opinion there is no doubt that the potential is there.



## **8 MANAGEMENT AND DIRECTION**

### **8.1 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.

### **8.2 THE QUOTA MANAGEMENT SYSTEM**

#### **8.2.1 The Importance of the Scheme**

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.

### **8.2.2 The Rationale**

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.

### **8.2.3 The Methodology**

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).

### **8.2.4 The Biological Base**

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 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 appeared 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.

### **8.2.5 The Property Interest Created**

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).

### **8.2.6 The Favouring of Larger Operators**

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.

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 videotex 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 (e.g., National Business Review 25.1.88 p1).

### **8.2.7 The Allowance for Maori and Other Users**

(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 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.

### **8.2.8 Rentals and Properties**

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* CP 553/87, 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).

### **8.2.9 Off-shore Extensions**

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 offshore 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 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 Republic 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.

### **8.2.10 Initial Conclusions**

(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.

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.

### **8.2.11 Social Implications**

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).

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.

(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.

### 8.2.12 The Fundamental Conflict

(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 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 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.

(d) It was mentioned in chapter 1, that an international group led by Jaques 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 emphasized 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).

### **8.2.13 The Room for Negotiation**

(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.

## **8.3 STRUCTURAL ARRANGEMENTS**

### **8.3.1 Management Areas and Plans**

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 advise 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 (e.g., 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.

### **8.3.2 Industry Promotion**

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 1985. 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 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.

### **8.3.3 Marine Reserves**

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 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.

### **8.3.4 User Categories**

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.

### **8.3.5 The Maori Fishery Programme**

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 1967 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.

#### **8.4 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.

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 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. Mr 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 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.



## PART IV CONTEXTS

## 9. COMPARATIVE STUDIES

### 9.1 INTRODUCTION

9.1.1 By international standards, neither the general public nor administrators who advise on New Zealand fish laws, have given serious consideration to the fishing interests of indigenous people. It appears rather, by comparison, that they have been ignored.

In this chapter, we examine in detail a United States case. It involved the interpretation of fishing clauses in certain Indian treaties, reviewed the factual base, which is strikingly similar to that here, and deals with many of the issues facing us. The Indian catch share was quantified at 50 per cent on a treaty that provided that Indian and non-Indian fishing interests would be held 'in common'. The application of other rights in the circumstances of a modern age are also defined. The case has had a major influence in alerting Americans to aboriginal fishing entitlements.

The Hawaiian codification of traditional fishing entitlements is then briefly considered, as evidencing the nature and extent of original user of both inshore and deep-water fisheries.

Finally a significant Canadian report is touched upon. It could put paid to both legal prescriptions and traditional definitions for it proposes instead a social and economic programme to re-establish Indian tribes in commercial fishing undertakings. It is obvious, and most regrettable, in our view, that such an alternative was not considered when the quota management system was settled here.

9.1.2 In earlier reports we urged examination of North American cases on treaty fishing rights (see for example Manukau Report, 1985:9.2.8 and recommendation 6), with a study and public exposure of options chosen overseas. Our national performance in upholding the status of indigenous people must increasingly be reviewed according to international standards. Comparative studies serve also to inform local debate on treaty implications and aid the settlement of arrangements of our own.

We urged research in this fertile field in 1985, with public dissemination of the results. Amongst others, we cited an American case on the allocation of fish resources, *United States v State of Washington (Manukau Report, 1985:9.2.8)*.

We are disappointed to find that officials who advise the Minister of Fisheries have made no significant beginning on the comparative research required, while yet tendering advice on the allocation of fish resources to private commercial interests. The effect has not been to minimise the potential for conflict that we foresaw in 1985, but to increase it. It has also stimulated this present claim.

We regret too that with the limited time and resources available to us, we also could undertake no major review of the overseas developments but by way of illustration, and to advance matters a small way further, we have made some analysis of the case cited above.

We were struck by the close similarity of the Muriwhenua tribes' circumstances with those of the Washington Indian tribes in the case referred to, as described by the United States District Court in 1974. We decided to examine that case in greater detail not only because of the factual approximations, and the questions of treaty interpretation and fish allocations involved, but because the judgment, commonly called the Boldt decision, provided a comprehensive analysis of the tribal position and issues arising.

That is not to say that the case is on all fours with this claim. Particular fish were mainly involved, the anadromous species, especially salmon, that move from sea to rivers to

spawn. These fish had more importance than others for the Indian claimants and were caught inland.

Nonetheless, sea fisheries were also considered, and broad principles relevant to all treaty fishing rights were established. It is that aspect of the decision that is now reviewed.

The results are radical by New Zealand standards but in the United States, where Indian treaties form part of the law of the land and the Courts have had a long experience with them, the Boldt decision is more the culmination of a trend than a departure from the norm. We refer in particular to the decision in *United States v State of Washington* 384 F. Supp. 312 (1974), with the amendments to it by the United States Supreme Court in 1979 at 520 F.2d 676 and the District Court additions in 1980 at 506 F.Supp.187.

## **9.2 UNITED STATES V WASHINGTON**

### **9.2.1 The Claim**

In this case a declaration was sought to define Indian off-reservation treaty right fishing in the State of Washington, injunctions were sought to enforce them and compensation was claimed for the impairment of rights through state authorised action, uncontrolled logging, pollution and waterway obstruction. Fourteen tribes were involved but their separate treaties executed in 1854 and 1855, had basically the same wording.

The case followed

... more than a century of frequent and often violent controversy between Indians and non-Indians over treaty right fishing (with) deep distrust and animosity on both sides (329).

The Court noted

... root causes of treaty right dissension have been an almost total lack of meaningful communication on problems of treaty right fishing between state, commercial and sport fishing officials and non-Indian fishermen on one side and tribal representatives and members on the other side, and the failure of many of them to speak to each other and act as fellow citizens of equal standing as far as treaty right fishing is concerned (329).

That comment is apt for New Zealand too.

### **9.2.2 The Factual Base**

There was substantial agreement on the facts following exhaustive research compiled over more than three years. They disclose such a close similarity with Maori traditional fishing as to invite speculation on the relationship between Indian tribes of the Pacific seaboard and the central Pacific Polynesians. That however is for anthropologists. The Court summary included the following.

... In pretreaty times Indian settlements were widely dispersed throughout Western Washington. There was considerable local diversity in the availability and importance of specific animal, plant and mineral resources used for food or artefacts. But one common cultural characteristic among all of these Indians was the almost universal and generally paramount dependence upon the products of an aquatic economy, especially anadromous fish, to sustain the Indian way of life. The fish were vital to the Indian diet, playing an important role in their religious life, and constituted a major element of their trade and economy.

Throughout most of the area salmon was a staple food and steelhead were also taken, both providing essential proteins, fats, vitamins, and minerals in the native diet . . .

The major food sources of the Northwest Indians were the wild fish, animal and vegetative resources of the areas. It was therefore necessary for the people to be on hand when the resources were ready for harvest. The seasonal movements were reflected in native social organisations. In the winter, when weather conditions generally made travel and fishing difficult, people remained in their winter villages and lived more or less on stored food. Fresh fish and other foods were harvested during the winter but that season was devoted primarily to ceremonies and manufacturing tasks. During this time people congregated into the largest assemblages and occupied long, multifamily houses. Throughout the rest of the year individual families dispersed in various directions to join families from other winter villages in fishing, clam digging, hunting, gathering roots and berries and agricultural pursuits. People moved about the resource areas where they had use patterns based on kinship or marriage. Families did not necessarily follow the same pattern of seasonal movements every year.

At the time of the treaties and prior thereto, utilisation of the rich fishery resource required an intimate knowledge of local environments and the locally available species as well as the development of a variety of specialised techniques for taking fish. The latter involved both group and individual activity and equipment. Adequate Indian food preservation techniques had been developed by the time of the treaties and fish were able to be stored for use throughout the year and transported over great distances. However, the Indians' harvest of fish was subject to the vagaries of nature . . .

The first-salmon ceremony, which with local differences in detail was general through most of the area, was essentially a religious rite to ensure the continued return of salmon. The symbolic acts, attitudes of respect and reverence, and concern for the salmon reflected a ritualistic conception of the interdependence and relatedness of all living things which was a dominant feature of the native Indian world view. Religious attitudes and rites insured that salmon were never wantonly wasted and that water pollution was not permitted during the salmon season.

At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographic area. Fish was a basic element of the trade. There is some evidence that the volume of this intra-tribal trade was carried on among the Indian groups throughout a wide geographic area. Fish was a basic element of the trade. There is some evidence that the volume of this intra-tribal trade was substantial, but it is not possible to compare it with the volume of present day commercial trading in salmon. Such trading was, however, important to the Indians at the time of the treaties. In addition to potlatching, which is a system of exchange between communities in a social context often typified by competitive gifting, there was a considerable amount of outright sale and trade beyond the local community and sometimes over great distances. In the decade immediately preceding the treaties, Indian fishing increased in order to accommodate increased demand for local non-Indian consumption and for export, as well as to provide money for purchase of introduced commodities and to obtain substitute non-Indian goods for native products which were no longer available because of the non-Indian movement into the area. Those involved in negotiating the treaties recognised the contribution that Indian fishermen made to the territorial economy because Indians caught most of the non-Indians fish for them, plus clams and oysters (350–352).

This broad picture describes equally well the Muriwhenua fisheries save of course for some necessary name changes. For the first-salmon ceremony we would substitute te ika tuatahi. For potlatching we would substitute koha, or what Firth called gift-exchange (supra, p406).

The Court's description of post-treaty developments in West Washington has a similar ring of familiarity.

For many years following the treaties the Indians continued to fish in their customary manner and places, and although non-Indians also fished, there was no need for any restrictions on fishing (333).

For several decades following negotiation and ratification of the treaties all of the tribes extensively exercised their treaty rights by fishing as freely in time, place and manner as they had at treaty time, totally without regulation or any restraint whatever, excepting only by the tribes themselves in strictly enforcing tribal customs and practices which, during that period and for innumerable prior generations, had so successfully assured perpetuation of all fish species in copious volume. The first other than naturally caused threat to volume or species came from non-Indian population growth and non-Indian industrial development in the rapidly westward advance of civilisation (334).

At the time of the treaties, non-Indian commercial fishing enterprises were rudimentary and largely unsuccessful . . . they posed no threat to the abundance of the fish resources (352).

It was not until the last decades of the nineteenth century that

large scale development of the commercial fishing industry . . . brought about the need for regulation of fish harvests (352).

Following settlement the tribes engaged in trading with non-Indians, but the extension of their commercial fishing operations was limited by a marked population decline, 'due in large part to diseases introduced by non-Indians' (352). The court added

Employment acculturation of Indians has been a major cause of the dramatic decline from Treaty times of the number of Indians engaged in fishing. Additionally many years of state enforcement action against Indians exercising their claimed treaty right to fish have caused many members of Plaintiff tribes to discontinue such fishing activities at several of their usual and accustomed fishing places (358).

(In 1854–1855, Indians constituted approximately 75% of the case area population and accounted for most of the fishing activity. In 1974 Indians represented approximately 10.8% of the commercial fishermen netting 2.4% of the commercial catch).

State laws had made minimal allowance for Indian fishing. When fishing in the state commercial seasons, treaty Indians were not required to purchase a licence or pay a landing tax (358).

With regard to the present position the Court considered

Fish continue to provide a vital component of many Indians' diet. For others it may remain an important food in a symbolic sense analogous to thanksgiving turkey. Few habits are stronger than dietary habits and their persistence is usually a matter of emotional preference rather than a nutritional need. For some Indians, fishing is also economically important (358).

The Indian cultural identification with fishing is primarily dietary, related to the subsistence fishery, and secondarily associated with religious ceremonies and commercial fishing. Indian commercial fishermen share the same economic motivation as non-Indian commercial fishermen to maximise their harvest and fishing opportunities (358).

With the exception of full-time Indian commercial fishermen who fish in the all-citizen commercial fisheries of the State, Indian fishermen frequently have other occupations, but fish for food and to supplement their incomes (358).

Several tribes are currently involved in fish propagation programmes which benefit the tribes and the state (333).

Evidence from tribal members was said to disclose ‘. . . some, but by no means all, of their principal usual and accustomed fishing places’ (333). The Court noted that such grounds had not been identified at the time of the treaties and considered they could not now be so determined, for (with particular reference to inland waters)

—‘Indian fisheries existed at all feasible places . . .’

—‘Indian fishermen shifted to those locales which seemed most productive at any given time . . .’

—Some sites ‘are no longer extant because of man-made alterations . . .’

—‘Use of some sites has been discontinued because appropriate Indian gear for those sites has been outlawed or because [of] competing uses and users. . .’ (353).

With particular reference to marine fisheries it was found

Although not all tribes fished to a considerable extent in marine areas, the Lummi reef net sites . . ., the Makah halibut banks, Hood Canal . . . and other bays and estuaries are examples of some Indian usual and accustomed fishing grounds and stations in marine waters . . . (352)

### 9.2.3 The Treaties

That was the factual background to the Washington case. In both fact and principle the similarities with the current claim are apparent. But before reviewing the Court’s application of the Indian treaties to the fishing user described we must underline some important factors that distinguish the American approach from our own.

(a) First with regard to the treaties themselves. Unlike the Treaty of Waitangi, the Washington treaties used English alone. They reserved to the tribes an exclusive right of fishing within the area and boundary waters of their reservations and off reservation;

the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory . . . (emphasis added).

This compares with the English text of the Treaty of Waitangi which guarantees to the tribes ‘full exclusive and undisturbed possession’.

(b) In its approach to treaty interpretation, the Court, citing earlier authority, held that a treaty

. . . must be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians

that

. . . the language used in treaties with the Indians should never be construed to their prejudice and that

How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction (331).

Those words have relevance for us too, but we must have regard to two texts, one English and one Maori. It follows that in construing the Treaty of Waitangi, we should have regard to two cultures.

(c) The Indian tribes are dealt with as domestic dependent nations, retaining a measure of sovereignty. In New Zealand the Maori tribes ceded sovereignty but retained the exclusive use of or full authority over their fisheries. The different concepts compel a different terminology and approach.

(d) By Article VI Clause 2 of the United States Constitution the treaties with the Indians form part of the supreme law of the land. The United States Courts therefore provide the determinative relief that we cannot, but we have still the same duty to consider inconsistencies with the Treaty, and how any prejudice might be removed.

These differences notwithstanding the findings in the Boldt decision are persuasive and important. We make no demurrer with this conclusion of the Court, (citing with approval an earlier opinion), that

. . . The right to resort to the [usual and accustomed] fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed (331).

#### **9.2.4 The Findings**

We list the specific findings, in precis form, under headings of our own, with the amendments that were made on appeals and further hearings, but we exclude conclusions irrelevant to the Muriwhenua claim.

##### *On the nature of the Indian right*

(a) The treaties were not a grant of rights to the Indians but a grant of right from them and a reservation of those not granted (331, 407).

(b) The treaty fishing of the Indian tribes is a reserved right, not a mere privilege (332).

(c) As such, Indian treaty fishing rights cannot be qualified by the State save to the extent necessary to conserve the resource. (333, 401).

(d) Other citizens hold not a fishing right but a privilege, a privilege which the state may grant, limit or withdraw (332).

(e) The treaty clauses regarding off-reservation fishing in common with other citizens secured to the Indians, rights, privileges and immunities distinct from those of other citizens (347, 401).

(g) The treaties do not prohibit or limit any specific manner, method or purpose of taking fish, and treaty tribes may thus utilise improvements in traditional fishing techniques, methods and gear (402).

(h) The right secured by the treaties to the Indians is not limited as to species of fish, the origin of fish, the purpose or use, or the time or manner of taking (401).

(i) The Indian treaty right is constrained by the requirement not to destroy the resource (401).

##### *On the State's power to regulate*

(a) Save for the exception noted below, the State cannot pass laws that limit tribal fishing rights (401).

There is no indication that the Indians intended or understood the language 'in common with all citizens of the territory' to limit their right to fish in any way (333).

There is neither mention nor slightest intimation in the treaties themselves, in any of the treaty negotiation records or in other credible evidence that the Indians who represented the tribes in the making of the treaties at that time or any time afterward, understood or intended that the fishing rights reserved by the tribes as recorded in the above quoted language would, or ever could, authorise the 'citizens of the territory' or their successors, either individually or through their territorial or state government, to qualify, restrict or in any way interfere with the free exercise of those rights (334).

- (b) Neither Indians nor non-Indians may fish in a manner so as to destroy the resource (401).
- (c) Accordingly, the State has police power to regulate off reservation fishing to the extent reasonable and necessary for conservation of the resource i.e. the perpetuation of the fisheries species (333).
- (d) The State has no greater regulatory power in respect of Indian treaty fishing (333,401).

The State may regulate fishing by non-Indians to achieve a wide variety of management or 'conservation' objectives . . . . But when it is regulating the federal right of Indians to take fish at the usual and accustomed places it does not have the same latitude in prescribing the management objectives and the regulatory means of achieving them. The State may not qualify the federal right by subordinating it to some other state objective or policy. It may use its police power only to the extent necessary to prevent the exercise of that right in a manner that will imperil the continued existence of the fish resource . . . . To prove necessity, the State must show there is a need to limit the taking of fish and that the particular regulations sought to be imposed upon the exercise of the treaty right, is necessary to the accomplishment of the needed limitation. This applies to regulations restricting the type of gear which Indians may use as much as it does to restrictions on the time at which Indians may fish (346).

- (e) The State cannot qualify the treaty right by limiting its exercise to state preferred times, manners or purposes except as may be necessary for preservation of the resource (401).
- (f) The State has no right to determine for the Indian tribes the wisest and best use of their share of the common resource (402).
- (g) Current laws and regulations to restrict the time, place, manner and volume of off reservation harvest by treaty tribes are unlawful (333, 403).
- (h) Game fish laws and regulations which reserve the entire harvestable portion of a species of fish for a special interest and purpose, discriminate illegally against treaty Indians (403).
- (i) Regulations providing for special seasons and limitations applicable to the taking of fish by tribes, do not fully protect the treaty fishing rights of the tribes, and do not provide adequate opportunity for the tribes to take their proper share of the fish (404).
- (j) The arrest or seizure of property owned or held by a treaty right fisherman under regulations not previously established to be reasonable and necessary for conservation, is unlawful (342, 404).
- (k) State regulation of fishing rights must not discriminate against Indians (333).
- (l) If alternative methods of conservation are available, the state cannot restrict treaty right fishing, even if the only alternative is to restrict non-treaty fishermen, commercial or otherwise (342).

*On the Tribal right to regulate*

- (a) The tribes are entitled to regulate the treaty right fishing of its members without any state regulation (333, 340, 403).



(b) Tribes proposing regulations should first have competent leadership, an organised tribal government, trained enforcement personnel, expert advisers, a membership role and provision for member identity cards (340–1).

(c) Tribal regulation should be conditional upon prior consultation with fisheries officials, provision for State monitoring for conservation purposes and provision for fish catch reports (340–1).

(d) An Indian misusing a treaty fishery is to be reported to his tribe for adjudication, and only failing action there should the matter be brought to Court (411).

*On upholding the Indian right*

(a) In each specific particular in which the State undertakes to regulate treaty right fishing, all of the State officers responsible therefore must understand that the power to do so must be interpreted narrowly and sparingly applied, with constant recognition that any regulation would restrict the exercise of a guaranteed right (342).

(b) All citizens have the responsibility of seeing that the terms of the treaties are carried out, so far as able, in accordance with the meanings they were understood to have by the tribal representatives at the treaty council, and in a spirit which generally recognises the full obligation of the United States to protect the interests of a dependent people (406).

(c) Protection of treaty fishing rights must be an objective of State policy, including fish harvesting, management and propagation programmes (342–3, 346, 402–3).

(d) The state must take all appropriate steps to assist the Indians to catch a proper share of the harvestable fish (344).

(e) The State is bound to protect fishery habitats from man-made despoliation (as added by the District Court in Phase II, 1980).

*On the tribal fishing area*

(a) The Indian right in common to fish ‘all usual and accustomed grounds’, which grounds cannot now be precisely determined, is limited’ only by the geographical extent of the usual and accustomed fishing places (332, 402).

*On the right ‘in common’ and sharing*

(a) ‘In common with’ operates only to limit the exercise of the tribes’ right to a share of the resource consistent with resource maintenance and the reasonable harvest by others of such fish as are not reasonably needed by the tribe (402).

(b) The Indian right ‘in common’ requires that the Indians have the opportunity to take up to 50% of the harvestable fish in the ‘accustomed’ area (343).

(c) The 50% figure is a maximum allocation. The central principle is that the treaty right secures so much as is necessary to provide the Indians with a livelihood, i.e. a moderate living (this provision was added by the Supreme Court on appeal, at 686).

(d) It is incumbent on the State to take all appropriate steps to assure to the Indians their proper share in the ‘accustomed’ area (344).

(e) An upward adjustment is required to the Indian allocation to compensate for the substantial fish harvest in marine areas beyond the ‘accustomed’ area and for the total number of fish which, absent harvest en route, would be available to the treaty tribes in the ‘accustomed’ area (344).

(f) Hatchery-bred and artificially-propagated fish are to be included in the computation of a tribe’s treaty share (per District Court, Phase II, 1980).

(g) Excluded from fish share allocations is the number of fish required for spawning escapement and conservation (343).

(h) If alternative methods of conservation are available, the state cannot restrict Indian treaty right fishing, even if the only alternative is to restrict non-treaty fishermen, commercial or otherwise (342).

(i) An overharvest by non-treaty fishermen does not justify restriction on treaty right fishing (411).

#### *On Off-shore fishing*

Allowance must be made for fish caught in marine waters outside usual Indian fishing places, and which, absent harvest en route, would be available to the treaty tribes (344).

It was further stated amongst the findings of fact

The Northwest Indians developed and utilised a wide variety of fishing methods which enabled them to take fish from nearly every type of location at which fish were present. They harvested fish from the high seas, inland salt waters, rivers and lakes . . .

and that

Fishing methods varied according to the location but generally included trapping, dip netting, gill netting, reef netting, trolling, jigging, set-lining, impounding, gaffing, spearing, harpooning, raking . . . (352)

It was added

Aboriginal Indian fishing was not limited to any species. They took whatever species were available at the particular season and location. Many varieties, including salmon and steelhead, halibut, cod, flounder, ling . . . rockfish, herring, smelt, eulachon dogfish and trout were taken and were important to varying degrees as food and as items of trade . . . (352)

Under the Court's rulings on major issues it was found

Therefore, the amount or quantity of any species of fish that may be taken off-reservation by treaty right fishing during a particular fishing period can only be limited by . . . the number of fish required for spawning escapement and any other requirements established to be reasonable and necessary for conservation . . . (343)

This comment hit at the core of the matter

Off-reservation fishing rights secured by treaties to plaintiff northwest Indian tribes is not limited as to species of fish, origin of fish, purpose or use, or time or manner of taking, except to the extent necessary to achieve preservation of the resource and to allow non-Indians an opportunity to fish in common with treaty right fishermen outside reservation boundaries. (319)

Of additional interest to the off-shore treaty fishing right was the finding that the 1937 convention between United States and Canada, establishing the International Pacific Salmon Fisheries Commission with jurisdiction to regulate the harvest of pink and sockeye salmon . . . does not explicitly or implicitly modify the . . . treaties, but the treaty right tribes fishing in waters under the jurisdiction of the Commission must comply with the Commission's regulations.

The extent to which an International Commission may limit the treaty fishing rights was not determined.

### **9.2.5 Conclusions**

To implement its rulings and findings the Court approved an interim action programme, and reserved to itself a continuing jurisdiction to deal with matters of fact, law and necessary plan amendments.

The most salient effect of the Boldt decision was to reverse the declining Indian involvement in fishing and re-establish Indian fishing interests with a concrete programme aimed at achieving a definable resource allocation. The Supreme Court affirmed Judge Boldt's decision in nearly all significant respects, modifying only the formula for computing the equitable adjustment and the calculation of the allocable fish population. The apportionment of fishing shares between Indian and non-Indian in various species, generally around 47–50 per cent, has been a feature of many other American cases.

Further details of the case need not concern us. It is the close approximation of the facts and issues that compels its analysis, and the far reaching results cannot be ignored. And officials of the Ministry of Agriculture and Fisheries were warned. We drew attention to the case, and others too, in 1985, when the quota management policy was published only in preliminary form. We have found no evidence that the implications of the Boldt decision were even considered when the quota management system was subsequently arranged, and we had every indication that it was not. Nor was there any thought that Maori traditional fisheries might conceivably compare with those of the Amerindians. Perhaps the problem is that the Treaty of Waitangi was seen to go too far. The English text speaks not of a right in common but of exclusiveness. But the problem had still to be addressed. It has added to the potential for conflict that it was not.

It does not follow however that we should adhere to the resolution prescribed in the Boldt case. Maori tribes are not domestic dependent nations, our one nation is more bicultural, and our one Treaty presaged of a partnership.

It might nonetheless be speculated that another order would have prevailed had Maori fisheries been fully recognised in law, when settlement first began. It is instructive to consider in that context the circumstances that once pertained to Hawaii. Comparisons with other Pacific groups are considered at 3.1.5.

## **9.3 THE HAWAIIAN WAY**

9.3.1 In Hawaii, customary fishing rules were formally codified by the native Hawaiian Government during its period as an autonomous monarchy prior to the 1898 annexation by the United States. The resultant laws evidence the nature and extent of native fishing interests. There are many similarities between the Maori and Hawaiian fishing practices and concepts. It is of interest in that context that those Hawaiian laws demonstrated the native Hawaiian interest in the offshore deepwater region (as well as the inshore zone). The status of the native entitlement is not yet certain, but we understand that in the light of the clear evidence of the early Hawaiian user, native Hawaiian claims to fishing rights in the Hawaiian Fishing Conservation Zone of 200 miles from the shore, are to be tested before the United States courts (Murakami and Freitas 1987).

Maori and native Hawaiian laws and practices have similarities, for the people diverge from common roots, most probably in the Marquesas and Society Island groups. Hawaii was first settled in the 8th or 9th centuries from those islands, and by a second wave of migrants from Tahiti in the 12th and 13th centuries (Daws 1974), after the time that Kupe had discovered New Zealand.

9.3.2 As with the Maori, Hawaiian land and sea-fishing rights were closely related. The basic traditional land division in the Hawaiian islands was the *ahupua'a*, ideally a wedge having its tip at a central mountain peak, and its base in the sea just outside the reef, or absent a reef, one mile offshore. All the necessities of life existed within the *ahupua'a* 'from *uka* mountain, whence came wood, *kapa*, for clothing, *olona*, for fish line, *ti*-leaf for wrapping paper, i.e., for rattan lashing, wild birds for food, to the *kai*, sea, whence came *ia*, fish, and all connected therewith.' (cit. Lyons:Daws 1974,124). The *ahupua'a* represented the exclusive tribal land and sea domains of the various groups, but in addition, they had deep sea fishing grounds beyond the reef.

In the Hawaiian region there is no continental shelf but a grouping of oceanic volcano peaks that rise steeply from the deep ocean floor. Some reach the surface to make islands; others do not but form fish breeding and feeding grounds at various depths, each in itself a valuable fishery. These are called *ko'a* (or *toka* in Maori) and knowledge of their location is strictly guarded within the family groups that discovered them (Anders 1987). They may be found far out to sea, out of sight of land except for the mountain peaks used for navigation (Titcomb 1952:6).

The knowledge and rights of fishing over specific *ko'a* were kept within descent groups. A master fisherman (*kahuna*) could name and locate over 100 *ko'a* which were fished at appropriate times of the year; one 5 miles off shore was only 15–20 fathoms, but another was 200 fathoms deep (Kahaulelio 1902:22,24).

The Maori and Hawaiian social structures were different however. Senior chiefs (*alii nui*, or *ariki nui* to Maori) held authority on each island and *alii* and *konohiki* chiefs governed particular *ahupua'a* or districts. Similar rankings were recognised by Maori but the Maori order was less stratified. Originally *konohiki* were landlords below the *alii*, but after 1839 the term includes both, corresponding to *ariki* and *rangatira* in Maori.

The Hawaiian island group was brought under a unified government by Kamehameha in 1796, (with Kauai in 1810), the authority of the *alii nui* becoming merged with that of the King.

The monarchy embarked on remarkable reforms to the traditional *kabu* (tapu) system. By the Fundamental Law of Hawaii of 1839, and the First Constitution of 1840 King Kamehameha III ended the feudal system that prevailed, giving civil and property rights to the common people (*maka'ainana*). He also codified the duties and rights of the *konohiki* chiefs and of the Crown and Government. In 1843 the British Government affirmed its recognition of Hawaii as an independent Kingdom.

9.3.3 By statute, the fishing grounds were apportioned between the common people, chiefs and the Crown. The fisheries of neighbouring chiefly districts were bounded laterally by projection into the sea of the land boundaries between *ahupua'a*.

The Fundamental Law of 1839 recognised an explicit right of the tenants of land divisions to take fish from the '*konohiki*' fishery, the inner reef fishery entrusted to the chief of the *ahupua'a* division, subject to the right of the *konohiki* to choose any one species, or alternatively one third of the whole catch from the fishery. That share the chief could take for his own purposes and to support his regional obligations. For the support of the government, the Crown was entitled to a share of specific fishes seaward of the *konohiki* fishery boundary, the catch from certain named offshore fishing grounds and the right to certain transient shoal fishes passing through the waters of each region.

The commoners were entitled to take and keep any other fish caught in the open seas, as well as on certain inshore grounds known as *kilohe'e*, *luhe'e* and *malolo*. *Kilohe'e* grounds were shallow enough for wading or to see the bottom from a canoe, while *luhe'e* grounds

were deeper, bottom not visible, and fished by line and lure methods. The *maalolo* grounds were rough choppy seas with cross currents, in deep water but not considered open ocean, where the flying fish (*maalolo*) lived. The open ocean grounds beyond the reef extended further out to sea without limit. Thus a major significance of the seaward reef or one mile limit to the *konohiki* (chiefly district) fishery was to define a region for a common right of piscary in the deep ocean (Thurston 1904; Cohen 1982:797–810; Daws 1974:ch4).

9.3.4 In 1893, the Monarchy was overthrown (Daws 1974) and in 1898, Hawaii was annexed as a territory of the United States, achieving statehood in 1959.

Since then, the recognition of native Hawaiian fishing rights appears to have depended upon proof of ancient Hawaiian customs as evidenced by the statutory codifications described (see *Kalipi v Hawaiian Trust Co.*, 66 Hawaii 1, 10, 656 P.2d 745 (1982) and *State v Zimring*, 52 Hawaii 472, 479 P.2d 202 (1970)).

In *Damon and Carter v Hawaii* (1902) 14 Hawaii 465 the Hawaiian Supreme Court declined to recognise the *konohiki* fishing rights. On appeal to the United States Supreme Court that decision was reversed, Mr Justice Oliver Wendell Holmes stating,

A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, there is no more theoretical difficulty in regarding any ordinary easement or profit a prendre as such. The plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit. Moreover, if the statutes have erected it into a property, property it will be, and there is nothing for the courts to do except to recognise it as a right. (*Damon v Hawaii* (1904) 194 U.S. 154).

9.3.5 The similarity with the Maori circumstance is striking as the following quotation from Hori Ngatai shows, given in the course of an address to Native Minister Ballance in 1885.

Now, with regard to the land below high water mark immediately in front of where I live. I consider that is part and parcel of my own land . . . part of my own garden. From time immemorial I have had this land, and had authority over all the food in the sea . . . I am now speaking of the fishing grounds inside the Tauranga Harbour. My mana over these places has never been taken away. I have always held authority over these fishing places and preserved them; and no tribe is allowed to come here and fish without my consent being given. But now, in consequence of the word of the Europeans that all the land below high water mark belongs to the Queen, people have trampled upon our ancient Maori customs and are constantly coming here whenever they like to fish. I ask that our Maori custom shall not be set aside in this manner, and that our authority over these fishing-grounds may be upheld. The whole of this inland sea has been subdivided by our ancestors, and each portion belongs to a proper owner, and the whole of the rights within the Tauranga harbour have been apportioned among our own different people; and so with the fishing grounds outside the heads: . . . I am speaking of the fishing grounds where hapuku and tarakihi are caught. Those grounds have been handed down to us by our ancestors . . . I am not making this complaint out of any selfish desire to keep all the fishing grounds for myself; I am only striving to regain the authority which I inherited from my ancestors (1885 AJHR G-1).

## 9.4 THE CANADIAN INITIATIVE

Neither the codification of traditional use rights nor an attempt to reform a wanting law, characterised the 1982 report of Commissioner P H Pearse. Called Turning the Tide, the report proposed a new policy for Canada's Pacific Fisheries, and recommended the

promotion of Indian participation within the industry. After reviewing the relevant history, which differs only in detail from that in the Washington case or that reported here, the report concurs with the Indian position as put to the Commission:

It makes more sense to enhance the ability of Indian people to support themselves through the fishing industry than it does to spend increasing amounts of federal revenue supporting them on social assistance.

It was recognised that 'sensitive and costly programmes will be required to successfully increase the involvement of Indians in the commercial fisheries' but nonetheless an Indian Fishermen's Economic Development Program was proposed. Essential to the programme was the establishment of an Indian Fishermen's Development Corporation with federal funding, (\$20 million over five years was suggested), freedom from royalties and other dues and the allocation of a defined catch share.

We found it amazing as we read through the Pearse report, that such extensive consideration had been given to the Indian position, and yet here, though officials searched overseas before promoting the quota management system, barely a mention was made of the Maori circumstance. By way of comparison, when asked why the New Zealand policy contained little provision for Maori, a senior officer of the Ministry of Agriculture and Fisheries replied to us '... 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'. Later, on 6 October 1987 before the Primary Production Select Committee of Parliament concerning the Ministry's estimates of expenditure, the Ministry gave a written answer to a question as to the progress in identifying and recognising Maori fishing rights

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.

The Canadian example offers a social and economic solution independent of the strict interpretation of either treaty or legal rights. It appears to us essential that such a solution should be sought. It is in keeping with the spirit of the Treaty that that should be done, and as we shall see, the Treaty contemplated that the parties might negotiate for new terms.

# 10. THE TREATY OF WAITANGI

## 10.1 INTRODUCTION

For our purposes the Treaty of Waitangi is comprised of the two texts (one English and one Maori) as printed in the Treaty of Waitangi Act 1975<mr>see section 5(2). As copies were taken throughout the country, five hundred or more tribal representatives were to sign the Treaty but mainly the Maori version. Through a mishap, an English text was sent to Port Waikato-Manukau and was signed by 39. There is more than one English version, but we are bound by our governing Act to the English text that was signed.

This chapter considers the arrangements made for fisheries according to each text, by looking first to the words themselves, secondly to the separate cultures that each text portrays, and finally to the Treaty as a whole having regard to the rules for treaty interpretation and the principles of the Treaty. By our governing Act we are to assess claims against the principles of the Treaty rather than its provisions or terms.

## 10.2 THE WORDS

### 10.2.1 English Text

Article the second 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.

### 10.2.2 Maori Text

To aid a suggested translation of the Maori equivalent we have severed the relevant 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.

It is at once apparent that estates, forests and fisheries are not specifically mentioned, but 'taonga' covers them all. Exclusivity is not expressed but is inherent in both 'taonga' and 'rangitiratanga'. The qualification '. . . so long as it is their wish and desire to retain the same in their possession' is implied.

'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 'rangitiratanga' to mean 'authority'. Accordingly, when discussing the Treaty, Maori often substituted mana which includes authority but has also a more powerful meaning. (See the discussion at Orakei, 1879 quoted at 5.5, and for a full explanation see Orakei Report at 11.5.2, 11.5.19).

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

## 10.3 CONTEXTS

### 10.3.1 English Text

In this section, the English situation is examined for, in the past, fisheries have been seen in the light of an English experience. We conclude however 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.

(a) The English text stresses properties and proprietary interests. Even 'their . . . fisheries' in the context of the surrounding words, suggests that a property interest of some sort was intended. The text speaks of lands, forests, fisheries 'and other *properties*'. It refers also to a 'full, exclusive and undisturbed *possession*'. Although the word 'exclusive' is not lacking for clarity, in the English law of fisheries it has the particular meaning that no other person has a co-extensive right with the owner *Edgar v English Fisheries Special Commissioners* (1870) 23 LT 732.

Looking to the English home experience we find there was indeed a property in coastal fisheries, recognised by the people and the law, but the private fisheries were generally well inshore and mainly in the tidal zone.



In 1840 the English coastline was well endowed with weirs for example, weirs being more or less permanent structures staked to the bed, and designed to catch fish on the tidal ebb and flow (see Nets and Coracles J G Jenkins p36). Numerous weirs were scattered along the English and Welsh coasts at that time see Hall (1830) *Essay of the Rights of the Crown in the Seashores of the Realm*; S A Moore, (1888) *History and Law of the Foreshore and Seashore* 908, F G Aflalo (1904) *The Sea-Fishing Industry of England*, 71.

Moore considered (supra at 909)

The records show that . . . several [separate] fisheries existed all along the coast, the lords of manors having weirs placed upon the foreshore wherever the shore was suitable for that kind of fishery. . . . There is practically no doubt that the whole foreshore of the kingdom wherever it was fit for fishing by weirs was covered by several [separate] fisheries.

(b) From at least 1666 when Lord Chief Justice Hale of England wrote *De Jure Maris*, it was accepted that the King had ‘a right of jurisdiction . . . and a right of proprietary or ownership’ of the foreshore and adjoining sea, which Hale called a ‘primary right’ but

the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless . . . either the King or some particular subject hath gained a proprietary exclusive of that common liberty (Moore:377).

Particular subjects could obtain rights ‘exclusive of that common liberty’ by grant before Magna Carta or by immemorial usage (which presumed a grant).

The legal position stated by Hale still stands but there have been fluctuating views about the strength of the Crown’s prima facie title to the foreshore. Thus Moore (supra, 460)

After the passing of the Crown Lands Management Act 1829 the Commissioners of Woods and Forests began actively to revive the claims of the Crown to the foreshore, which had practically lain dormant for upwards of a century.

The Commissioners’ approach was to assume

. . . that the foreshore was wholly in the Crown and had never been granted out, and that it could not be held by the subject unless he could show an express grant of it.

(c) But some fisheries, including the weirs, were considered to have existed from time immemorial and that presumed a grant. They were accepted as private fisheries, even where they extended below low water. Hale (cit Moore:909) noted that ‘kiddels’ along the English coast were exempted from destruction in Magna Carta because private interests might exist in weir fisheries ‘on the coast and below the low-water mark’ (emphasis added).

Thus the English of 1840 considered that the Crown owned the foreshore but that its title was rebuttable by evidence of long term contrary user.

(d) In the Maori claim to the Kauwaeranga mudflats(see 5.4.5), Chief Judge Fenton of the Maori Land Court compared the English and Maori positions as follows

Lord Talbot De Malahide has oyster-beds at Malahide, near Dublin, which he periodically lets out to persons for money rents. And accepting the principle that all properties, rights, privileges or easements of this character are held to be derived from the King, for prima facie they are all his, yet immemorial several use having been proved, the Courts will presume the grant. And in [the Maori] case the title is older, for the ownership was before the King, and the King confirmed and promised to maintain it.

Later he added

Returning then to the point, whether the right which is the subject of our inquiry comes under the word 'land', which will warrant an order for the soil, or under the word 'fishery', which must limit the Court to a privilege or easement it is remarkable that the use to which this land has been immemorially put by the natives is exactly the same as that to which the shore at Great Crosby was put by Blundell, the plaintiff in *Blundell v Catterall*, who had 'the exclusive right of fishing thereon with staked nets, and of driving those stakes into the soil that they might support the nets' (p243).

He concluded that in that circumstance 'an order for the soil was warranted'.

(e) As to fishing in the seas beyond tidal limits, M Gray in *The Fishing Industries of Scotland 1790–1914* (1978) provides a picture of the sea fishing industry at 1840. Although Gray describes the eastern Scottish fishery at that time, it was different only in degree from others in England, Ireland and Wales. Gray depicts an industry involving small sailing boats usually owned by single families, but sometimes by several villagers of a fishing community. Many small fishing villages dotted the coastline and were devoted almost exclusively to fishing. Expeditions were undertaken by fleets of hundreds of boats at a time. For the herring fishery there are records of 800–900 boat fleets (p 27). The fishing was conducted at grounds only a few hours distance from the coast.

There was a high level of personal consumption of the catch, sales being limited to immediate local markets. This changed during the 19th century as operations became more sophisticated and as steam trawlers, rail transport and refrigeration enabled larger, more distant markets to be tapped.

(f) As a matter of law however, the Crown had authority over the seas. Crown claims to the sea were ancient.

The English kings had since the time of Edward III definitely asserted their claim to the sovereignty in the seas lying about the coasts of the kingdom. Edward III issued a proclamation making this claim, and had his right admitted by the Treaty of Paris 1360; this same right was upheld by Henry V, Henry VI and Henry VII (*The Royal Fishery Cos of the 17th Century* J R Elder, 1912, p4).

Subsequent English monarchs issued licences for foreign vessels to use these waters, but there was much uncertainty as to how far the Crown's control extended. Crown counsel in this claim drew attention to O'Connell, a recognised authority on public international law, to advise that by the end of the 18th century a three mile fishery limit had generally been accepted as a rule of international law (though it owed its origin not to the character of fish but the supposed capability of a cannon shot) (see O'Connell *The International Law of the Sea* Vol 1 p134). Counsel for the claimants refuted that any such rule had general application but at least it was settled as between Britain and France, in a Treaty of 1837, Article IX declared

[t]he subjects of Her Britannic Majesty shall enjoy the exclusive right of fishery within the distance of 3 miles from low water mark, along the whole extent of the coasts of the British Islands.

This meant exclusive of foreign vessels. It did not imply that particular British subjects had exclusive rights. Halsbury's *Laws of England*, (4th ed. vol 18, para 609) states that below low tide mark there could be common law exclusive fishing rights although there was a presumption of public user. However, we could find no cases where individuals or communities were considered to have exclusive fishing rights in the open seas by virtue of immemorial user. Large fishing fleets, like those described of Scotland, may have exercised rights of fishing from early times but although they continued to fish largely

without regulation or control until the 19th century, we can find no determination that private rights were thereby established, or no evidence that exclusive rights were claimed.

(g) Franchise fisheries over coastal waters must be distinguished. A royal privilege was sometimes granted to catch royal fish sturgeon and whales. The owner of the franchise fishery did not thereby have ownership of the fish however, but a private fishery at the spot where the fish were caught (Halsbury, *supra*, vol 18 para 619). These were grants however, and the fishing authority did not arise from ancient user.

(h) We come 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.

(i) In the English text of the Treaty of Waitangi, Maori fisheries are called properties too. It led us to ponder whether the drafter of the English text had the English foreshore fisheries in mind. On the evidence we think that that was not so. The Treaty was drafted in New Zealand and the section on fisheries by one who was fully aware of the Maori fishing activity.

Lord Normanby's instructions expressed the high ideals of his time, but he declined to provide a draft treaty in England, quite properly believing that it required local advice. On arrival at the Bay of Islands Hobson drafted a preamble incorporating those ideals and promising protection to Maori of their just rights and properties. To Busby lay the task of describing those properties that were important, and to draft the articles from Hobson's notes (see Orange 1987:37).

James Busby had been based in the Bay of Islands as British Resident since 1833. In 1835 he had drafted the Declaration of Independence of New Zealand which was signed by 34 northern and (later) other chiefs, and which led to Britain's recognition of Maori sovereignty. His concern for Maori was clear. Also in that year he advised the British Government that no part of the country could be taken as vacant or unused. He wrote

every acre of land in this country is appropriated among the different tribes; and every individual in the tribe has a distinct interest in the property; although his possession may not always be separately defined. (cit. Orange 1987:38).

One can see a good deal of this view coming forward into Busby's draft of article the second. Busby knew also of the extent of Maori fishing, that it was practised well beyond the foreshore and that Maori would not have understood the more limited arrangements in English law.

(j) Other advisers of the British Crown were likewise aware of the significance of the fisheries. Orange, (1987:116) records that George Clarke, the missionary who was to be appointed as Chief Protector of Aborigines . . . had warned the government in 1840 that Maori were not prepared to sell land indiscriminately. They wanted to retain coastal areas and swamp lands for the resources associated with them.

(k) But it is also possible that Busby, in incorporating fisheries into the text, intended to limit Maori interests in the seas to just that the fisheries. It was common amongst Maori of that time, and subsequently, to levy boats entering 'their' harbours with harbour and other dues. The important point is that Busby was fully aware of it and was concerned.

Noting that Bay of Islands Maori were ‘pretty regularly’ exacting a payment for watering ships, Busby twice urged his superiors that the Crown buy the rights to harbour dues from the chiefs (letters 65/2 and 89, Busby’s letters and despatches to the Colonial Secretary 1833–1839, Alexander Turnbull Library q. MS BUS 1935). He expressed concern that French or American interests might ‘purchase from the native chiefs the property in the harbour, and the right to levy harbour dues’ if the British government did not act (letter 89).

West African tribes had also charged harbour dues but their treaties had specifically ceded that right to the British Crown. No similar specific cession was made in the Treaty of Waitangi. Was it considered the cession of sovereignty would pass ownership of the seas and harbours to the Crown, the Treaty reserving only the right of fishing? In view of the contemporary concerns, why did the Treaty refer to fisheries and not to the ownership of tribal harbours and seas?

We need not determine that issue in this claim but it is worth noting that Maori continued to press their right to harbour dues for some long time, as late as 1879, and considered the right to be protected by the Treaty (see Orakei Conference, 1879, *supra*). The issue was important and was a contributing factor to the Northland and Waikato Wars. Tawhiao gave succinct expression to a Maori view in his response to the Crown, which, after refusing to meet his levy on Government boats entering Kawhia, challenged him to produce a title to the harbour. ‘I have a title’ he replied, ‘the Treaty of Waitangi’ (Manukau Report 1985:6.1).

### **10.3.2 Maori Text**

(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 underlie 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 (see 5.5). 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 geneology, 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 Szazy in the context of spiritual guardianship (doc A13).

(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.

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. In the extract given at 4.4 above, 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 (see *appendix 8*) 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, as the quotations at 5.5 show.

(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 (see 3.1.3). 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.

### 10.3.3 Legal Perspectives of the Maori Context

(a) The translation of the Maori concepts in Western terms presents no easy task, but at least it seems clear, that as between tribes, resources were jealously guarded and defended (see 3.1.3). The exclusivity thus maintained has been the subject of prior judicial observations, the tribal right in relation to the seas being likened to the tribes having a dominion over them.

In the Maori Land Court in 1957 (at 85 Northern MB 126) the Court found as a fact that the Te Aupouri and Te Rarawa tribes held respectively the northern and southern parts of the Ninety Mile Beach. On the evidence the Court said

It is clear beyond doubt that the land was exclusively occupied by the two tribes under their customs and usages . . .

and

These two tribes respectively had complete dominion over the dry land within their territories, over the foreshore, and over such part of the sea as they could effectively control. It is well known that the Maoris had their fishing grounds at sea and that these were jealously guarded against intrusion by outsiders.

Finally the Court held that

. . . these tribes were the owners of the territories over which they were able to exercise exclusive dominion or control. The two parts of this land were immediately before the Treaty of Waitangi within the territories over which Te Aupouri and Te Rarawa respectively exercised exclusive dominion and control and the Court therefore determines that they were owned and occupied by these two tribes respectively according to their customs and usages.

Those findings of fact were not disputed in either the Supreme Court or Court of Appeal in what came to be known as the Ninety Mile Beach case (*supra*). It was simply held there that while the beach may have been so owned as a matter of custom, it was not so owned as a matter of law. In *Keepa v Inspector of Fisheries* [1965] NZLR 322 at 328, Mr Justice Hardie Boys cited with approval the passages quoted from the Maori Land Court and commented as follows on the evidence in that case

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.

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'.

(b) The judicial findings are correct in our view, in locating ‘dominion’ as the nearest British cultural equivalent to the tribal overright. In that same context, the tribal resources were also properties that were owned.

It was submitted by the Crown and the Fishing Industry that rangatiratanga denoted something less than ownership, counsel for the Crown citing from a submission quoted with approval in the Te Atiawa Report at 11.2, that in the mores of Maori society, stewardship was more significant.

Adopting also a submission in this claim from a Tainui group, the Crown argued that in its context, rangatiratanga meant stewardship.

Neither ‘rangatiratanga’ nor ‘mana’ excludes ownership in our view. Stewardship was an aspect of the Maori way, but not one that meant tribal resources were automatically shared with all comers. Counsel for the New Zealand Maori Council was correct in contending that exclusivity is the essence of rangatiratanga, for the rangatira who welcomed people to their places, would nonetheless not tolerate an intrusion at will (doc H17 p12).

For the claimants, Mr Baragwanath referred to certain opinions as noted by the United Nations Special Rapporteur, on the conflict between two basic concepts, the Western one of individual private property and the indigenous one of co-operative communal property. The issue has become clouded by land sales. Many communities, including Maori did not recognise the right or power of alienation in customary law, but, in the opinion of FM Misfud with reference to African customary law, the test for ownership is not the right to alienate, but the right to exclude others.

It seems only proper that the opinions referred to by Mr Baragwanath should prevail. Though Maori had no concept of ownership as westerners understand it, in understanding the Maori text in Western terms, full ownership is necessarily implied. They excluded from their important properties, all those outside the kinship group.

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.

(c) Counsel for the Crown and Fishing Industry contended that the Tribunal constituted for the *Te Atiawa* and *Manukau* claims had already determined that exclusive ownership was not intended. That is not so in our view. The Tribunal contemplated that in the light of changed circumstances some new arrangements may be required. It found, in the Te Atiawa Report

We do not find that the ‘exclusive’ use envisaged by the second article of the English text of the Treaty, necessarily means that an exclusive user of Maori fishing grounds by the hapu most closely associated with them must in all cases be upheld . . .

and

We interpret this part of the Treaty to mean that the mana of the Maori people to be able to control their own fishing grounds ought to be upheld. This includes a power to regulate and restrict both the use and the class of persons who may use. It does not follow however that there must in all cases be an exclusive user but rather that that is a matter to be determined in consultation and negotiation with the hapu concerned (Te Atiawa Report 1983:4.9 and 11.2).



The *Manukau Report* dealt with a claim to a whole harbour, and not merely to the fishery in it. The English text of course refers to 'their fisheries' not 'their seas' but it was found that the harbour was a taonga of the tribes. In that case however, rangatiratanga was balanced with certain overall objectives in the Treaty. It was said

... the Treaty did promise the tribes an interest in the harbour. That interest is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership. It is [in] the nature of an interest in partnership the precise terms of which have yet to be worked out.

We do not think the Manukau Report is authority for the proposition that the important resources of the lands and fisheries had to be shared. Were that so, there would have been no need to negotiate for the purchase of land.

(d) The concept of 'dominion' over the seas, however, is only for the purpose described. Maori saw the oceans as one expansive whole. Their right to it was based on ancestral associations. The Pacific they called Te Moananui-a-Kiwa, (the expansive ocean of Kiwa) and all Polynesians who relate to Kiwa are entitled to be there. A southern portion, Te Moana-a-Kupe, is held for Kupe's people. By ancestral connections did Maori relate even to the open seas, for in a vast sea with small scattered islands, there was no need to define sea limits.

But to restrict this view today, by the concept of a territorial sea measured in miles, is once again to impose an un-Maori condition. Nature was their only constraint. Their use of their fisheries depended on no more than the patterns of the currents, the habits of sea birds, the situation of the moon and the temper of the winds.

(e) Those then were the customary values and attitudes to which concepts of ownership and dominion have been seen to apply, in an analogous way. It remains to be stressed that the customary concepts have always remained amenable to pragmatic change. Even before 1840, Maori had adapted with alacrity to sales and western trade. Gift-exchange in foodstuffs, though it continued for many years and has survived in isolated cases even today, rapidly fell prey to the mores of a cash economy. And so again, we have Te Kawau saying, in 1879, '... the sea belongs to me. Some of my goods are there. I consider the pipsis and fish are my goods' (see 5.5).

We do not think the change has fundamentally altered the Maori perspective. It has added greater weight to the Treaty given right to own but the principles are still the same. Maori seek to capitalise on nature's bounty, in the same way as of old; it is just that there are now better tools to do the job, and a greater range of 'tribes' with whom to exchange. The protection of the resource remains important, but the wholesale disposal of produce is not otherwise constrained. If there were any other customary restrictions on development, they ought to have been apparent well before 1840, when custom still reigned, but the tribes were major developers by that time.

There remains nonetheless in Maori society of today a tension between the advocates of conservation and the promoters of development, both claiming tradition on their side. It is a necessary and beneficial battle amongst any people who neither wish to stagnate, nor through depletion, to starve.

The same tension exists within our whole society of course. What we found strange was the submission for the Ministry of Agriculture and Fisheries, that Maori commercial fishing could not be countenanced for it offended the Maori way, and many Maori were opposed to it (doc D33:9.3). Of course, many are, but the argument had more the ring of convenience than conviction.

(f) For the Fishing Industry it was submitted that taonga could relate only to particular fishing grounds where Maori fished habitually and not merely occasionally. The Industry relied upon a finding in the Te Atiawa Report that tribal fishing grounds were taonga.

In that case however, the question was whether certain particular fishing grounds were taonga and the Tribunal had no need to find other than that they were. In fact the Tribunal relied upon the name for Tamaki isthmus, renowned for its fowl and fish resources, as 'Tamaki, sought as a bride by a thousand lovers'. In that example it was the isthmus as a whole that was highly esteemed.

The industry relied further on a finding in the Manukau Report that while certain fishing grounds in the Manukau Harbour should be reserved for Maori, the harbour as a whole should not be. We find however, that the Tribunal in fact considered the harbour was a taonga (it said 'the Maori text affirms . . . ownership [of the harbour] because it guarantees to Maori people the ownership of all their taonga'); but in considering the Treaty as a whole and its principal purposes, the Tribunal concluded that a Maori ownership of the harbour was not contemplated. The Industry had sought to counter that opinion on the ground that ownership of the harbour had not been sought in the formal claim. We find it was claimed in the course of hearings. The Tribunal accepted it as an issue in the proceedings and in fact dealt with it as such.

(g) It is significant in our view that the Maori text carries its own cultural understandings, using Maori terms where practicable. Rev Henry Williams and his son Edward provided the Maori text as a translation from an English draft (Orange 1987:39). Henry Williams explained

[i]n this translation it was necessary to avoid all expressions of the English for which there was no expressive term in the Maori preserving entire the spirit and tenor of the treaty. (Carleton:15872, p2).

Orange (1987:39) considered Williams may have decided to recast the English text, as translators often do, adding '[a] comparison of the English and Maori texts tends to confirm this view.' We agree.

Later, at p41 she added

The choice of terms by Williams may not have been accidental, of course. It is possible that he chose an obscure and ambiguous wording in order to secure Maori agreement, believing (as did most missionaries at the time) that Maori welfare would be best served under British sovereignty. On the other hand, like many of his contemporaries, he may have believed that Maori could not claim an internationally recognisable sovereignty; even powers of chieftainship were seriously compromised by the rapid changes of the 1830s. In ensuring that rangatiratanga was guaranteed, therefore, Williams was not only safeguarding Maori land and possessions, but reinforcing the authority of the chiefs by building into the treaty a right to exercise some control.

There is much strength in this argument. The maintenance of tribal authority, as exemplified in chiefs, was of primary importance both before and after 1840. In the days of endemic tribal warfare, ownership and all else depended on it. It was essential to the Maori conceptual framework, and has remained so. It appears to us that post-Treaty Maori history is characterised by persistent Maori attempts to uphold their own tribal status and authority. Belich (1986:pp21, 30–34, 77–80) considers this was the main cause of the New Zealand wars. The New Zealand Maori Council considers it should be the basic principle for Maori legislation (1983 New Zealand Maori Council). It is the underlying theme in the examination of Orakei history from 1840 to the present day in the Orakei Report, supra.

We consider Williams appreciated the importance of assuring to Maori that which to them ranked highest.

(h) It does not follow that tino rangatiratanga in the Maori text is the tino rangatiratanga of pre-treaty times. It was held in olden days only for so long as the tribe could maintain it against the ambitions of others. But the Queen promised peace. The Treaty would guarantee the status of the tribes without the need for war. It was obvious that to do that, the Queen's authority had to be supreme.

The concept of a national controlling authority with kawanatanga (lit. governorship), or the power to govern or make laws, was new to Maori, divided as they were to their respective tribes. But the supremacy of this new form of control was clear. The Queen as guarantor and protector of the Maori interest (preamble, articles 2 and 3) had performed an overriding power.

We accept in this respect the submission of the Fishing Industry, though made in another context, that the essentials of sovereignty were not lost on Maori in the debate at Waitangi. Ms Wainwright referred to the address of Tareha (here summarised), who, while opposed to the Treaty, underlined the different roles '... We will not be ruled over. What! Thou, a foreigner, up, and I down! Thou high, and I Tareha ... low! No, no; never, never' but the Treaty was signed (Colenso 1890:27, 24).

There were many other expressions of similar opinion but we refer particularly to that of Nopera Panekareao, the leading Muriwhenua chief who explained to his people the nature of the Queen's sovereignty in the Treaty.

Ko te atakau o te whenua i riro i a te Kuini, ko te tinana o te whenua i waiho ki nga Maori.  
(The shadow of the land passes to the Queen, but the substance remains with us) (Shortland to Hobson 6 May 1840 CO 209/7).

Thus did Nopera obtain the unanimous and immediate agreement of other Muriwhenua chiefs (Orange 1987,83).

If we assume that Nopera also considered the Crown as 'up high', his opinion is not too distanced from Chief Judge Fenton's observation in the Kauwaeranga case, that by the Treaty Maori retained their territorial rights until they wished to dispose of them and thus -

[t]he natives kept to themselves what Vattel calls the 'useful domain' while they yielded to the Crown of England the 'high domain'. ((1984) 14 VUWLR 227,240).

Sovereignty, in law, is not dependent on the Treaty but on the proclamations that followed the signings at Waitangi. It is nonetheless important to consider whether sovereignty was founded in consensus.

We considered above that Maori understood the cession of sovereignty in terms of some distal relationship. Subsequent conduct suggests that the authority Maori saw themselves; as retaining was not in conflict with that. In the early years there was much resentment among the chiefs when the Governor and his magistrates sought to bring Maori within the scope of the new laws; an important consideration for instance, in Heke's revolt in the north. Nevertheless in our view the Maori chiefs were trying to preserve a form of autonomy that did not amount to complete sovereignty but a kind of local self-government in Maori districts, which we see later in the King movement and other Maori organisations. This sort of demand for independent Maori control over Maori resources and people runs right through subsequent history. Article two has always loomed large in Maori consciousness as a result, even above article three, but Maori did not regard their rights and privileges as British subjects in matters of the franchise for instance as unimportant. In more recent times the classic restatement of the Maori position was exemplified in the 28th

Maori Battalion during World War II. It reminds us that it is possible to have a separate Maori institution still bound in loyalty to the Crown.

From the Treaty as a whole it is obvious that it does not purport to describe a continuing relationship between sovereign states. Its purpose and effect was the reverse, to provide for the relinquishment by Maori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown.

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.

Upon reading both texts we conclude that they are not so much contradictory as complementary of one another. In the English text the Crown guaranteed Maori their just rights and properties. Just rights include the maintenance of their own customs and institutions. Their properties they could own and possess for so long as they wished to retain them. In the Maori text the Crown assumed the full authority of the tribes over their important possessions. It is not a case of choosing between a British concept of ownership or a Maori form of control. Both were guaranteed for so long as Maori wished to keep them.

#### **10.4 RULES OF INTERPRETATION AND CONSTRUCTION**

Our main task is to consider the treaty as a whole, that is, the Treaty as embodied in the two texts. Some canons of Treaty construction relevant to that exercise were considered in the Orakei Report at 11.3. In this claim the Crown produced a convenient summary of rules from I M Sinclair in *Treaty Interpretation in British Courts* 12 ICLQ 508 at 510–511, but they relate primarily to treaties between European states and do not mention the special considerations required of treaties between major powers and smaller native groups. Those latter are to be found in the decisions of North American Courts.

The rules of treaty interpretation were fully debated by counsel, but much of what was said is of little relevance to our situation. The Treaty of Waitangi may be unique in international experience in that it is comprised of two texts, one not a precise translation of the other and each carrying its own cultural expectations, history and tradition. Though it happened by accident rather than design it augurs well for a partnership in which neither culture can be placed above the other.

McNair's comment (1961:432–3) that in the case of bilingual treaties neither text is superior, has primary reference to treaties between states of similar power and common origin. In the bilingual treaties of European nations for example, one is usually an adequate translation of the other, but that is not the case here. Conversely, balanced against the North American rule that treaties with Amerindians should be read as the natives understood them, is the fact that those treaties were only in the language of the coloniser while the Maori text of our Treaty carries its own native understanding. Further again, the rule against reference to context except when the words are obscure, is qualified in this case by the existence of two texts with differences between them.

The main distinction for us is in the statutory directions given in the Treaty of Waitangi Act 1975. First, in the exercise of any functions, which includes the assessment of claims, regard must be had to the two texts of the Treaty (section 5 (2)). Secondly, the Tribunal has authority to determine the meaning and effect of the Treaty, but, as embodied in the two texts (section 5 (2)). Thirdly the Act recognises there are differences between the texts and

authorises the Tribunal to decide issues raised by those differences (section 5 (2)). Finally, and more importantly, claims are to be assessed against ‘the principles of the Treaty’, not just the literal terms (section 6).

We therefore reject at the outset the suggestion of some claimants (though not pursued by their counsel) that the Maori text alone applies in their case for their forbears signed no other. Whatever the fact in any tribal area, we must deem it to be that both texts were signed at each place.

That may be the only practical course. Both texts were read at Waitangi and Maori undoubtedly relied mainly on what was said. That may have happened in other places too, for presumably Hobson’s envoys were armed with English versions. Orange (1987 chapter 4) considers the Treaty signing at other places was rather haphazardly handled and Maori were badly informed but the record is far from clear and we cannot assume that only the Maori version was referred to or explained. And if Maori understood the Maori text better, the representatives for the Crown, including Lt Governor Hobson, would have relied equally upon the English text that Hobson signed.

In the *Te Atiawa* case the Tribunal commended a submission that since section 5(2) did not require that both texts should have equal weight, extra regard should be given to the Maori in view of its pre-eminent role in securing assents. Nonetheless, in that case the Tribunal sought the ‘spirit of the Treaty’ and that, we consider below, is the primary task where the terms are not clear, are outmoded or the terms of the texts conflict.

Most significant is the fact that the Treaty of Waitangi Act, in recognising the two texts and the differences between them, directs that claims be assessed against the principles of the Treaty. That gives greater weight to what is otherwise a secondary rule in treaty interpretation, that Treaties should be interpreted in the spirit in which they were drawn taking into account the surrounding circumstances and any declared or apparent objects and purposes (see for example *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 (HL) and *Minister of Home Affairs v Fisher* [1980] AC 319).

To extrapolate principles from intentions and expectations equal regard must be had to the hopes and aspirations of both parties as represented in their respective texts. That approach enables us to blend the texts; and that is what appears to be required by section 5. Certainly that approach accords with the spirit of a treaty that sought to harmonise the interests of two people of different cultures in a new enterprise.

It also seems reasonable that the legislature has chosen to direct the assessment of claims against the Treaty’s principles and not merely its terms. The latter would be appropriate if the Treaty were a domestic contract or even a Treaty at international law but not if the Treaty is to be viewed as a basic constitutional document, as, we consider, it should be.

## **10.5 PRINCIPLES**

### **10.5.1 Objectives**

Orange (1987 chapters 3 and 4), summarises the debate on the Treaty, at Waitangi and other places where it was signed. Stress was placed upon the Crown’s protection and the maintenance of peace and good order. Those presenting the Treaty emphasised protection from ‘foreigners’, the French for example, of whom it was said they would not be as benevolent as the British, and from an unruly white element (e.g., pp 45, 70, 86–7); but Maori placed greater reliance on the Queen’s rule as protecting Maori from each other and

bringing an end to tribal fighting (e.g., pp 64, 67, 75, 81). Crown representatives emphasised that Maori would be protected against land sales and would be assured in keeping such land as they needed (e.g., pp 46, 71, 73, 74, 75) and this obviously weighed heavily with many Maori (e.g., pp 47, 79, 80, 83). Maori sought and were promised protection for their trading interests (eg pp 78, 83). It was added that Maori custom and law would be retained (e.g., pp 53, 89) and that the status of the chiefs would be upheld (e.g., pp 81 and 89).

Obviously, items of prime importance to one tribe would have had lesser significance for another, and matters not in contention at the time would not have been debated. Orange records few references to trading in the debate and none to fishing, but the Maori interest in neither was an issue at the time.

Counsel for the Fishing Industry drew attention to Parsonson (1979:149) who considered that Maori on the whole were anxious for settler communities in their midst. We are not so sure that that was so. The historical record is rather that Maori became concerned with the number of settlers emigrating to New Zealand, but at 1840, were keen to obtain not settlers, but traders, to promote their own developments. Maning's description of the 'market price of a Pakeha' is helpful in this respect (Maning 1912:17, 1863:16). Most Pakeha were taonga, being highly prized, but the Pakeha traders, in Maning's view, were especially cherished and protected, for through them the tribes most gained. This changed. Later, large numbers of settlers were seen as a threat.

In presenting the Treaty to Maori however, it was protection that was mainly stressed, to the extent that Orange considers (p46)

. . . from the emphasis on protection, Maori might have expected that they were being offered an arrangement akin to a protectorate.

That opinion is quite consistent with her main conclusion (at p89) based upon references to the retention of Maori authority (and some reticence in explaining the effect of ceding sovereignty, in her view)

The explanations given at treaty signings support the conclusion that, though Maori expected the treaty to initiate a new relationship, it would be one in which Maori and Pakeha would share authority . . . Maori were encouraged to believe that their rangatiratanga would be enhanced . . . and that Maori control over tribal matters would remain.

### **10.5.2 Broad Intentions**

The main significance of the Maori text for Maori, appears to have been the assurance of their own control. By 1840, acculturation had already occurred, and with or without a treaty, an acceleration of past developments was foreseen. There would be a greater need to change and to share, but the Treaty promised that Maori would not lose control of those things important to them.

In settling these matters we are greatly assisted by the decision of the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] NZLR 641, where, in the context of the State-owned Enterprises Act 1986, that Court had also to consider the principles of the Treaty. Reading as a whole the separate but unanimous judgments of each of the five members, it appears that the key to defining the principles of the Treaty is to be found in the idea of a partnership between Pakeha and Maori and that co-operation is at the heart of the agreed relationship of the two partners. A principle of protection is nonetheless inherent in that partnership, creating responsibilities analogous to fiduciary duties in which 'the duty of the Crown is not merely positive but extends to active protection of Maori

people in the use of their lands and waters to the fullest extent practicable ‘(per the President, Mr Justice Cooke at p664 and see also Mr Justice Richardson pp681–682).

In this case, the principles provide the fundamental motive or reason for the provisions of the Treaty. The principles were developed in the formulation of British policy in relation to New Zealand especially in the late 1830s and more particularly in Lord Normanby’s Instructions to Lt. Governor Hobson (quoted extensively in the Orakei Report at 11.9.2) which contain the seeds of the Treaty. Those Instructions were in turn much influenced by the Report of the Aborigines Committee of the House of Commons of 1836 which had drawn attention to the dangers for aboriginal peoples of uncontrolled colonisation. Normanby admitted that Britain had already recognised Maori sovereignty over New Zealand and that it was necessary for Hobson to treat with the Maori chiefs for the transfer of sovereignty to Britain. Hobson was also directed to halt further purchases of Maori land and to obtain land ‘by fair and equal contracts’.

The principles of the Instructions flow forward into the preamble and provisions of the Treaty. Thus in the English text the preamble states that to protect the ‘just Rights and Property’ of Maori and to ensure ‘Peace and Good Order’ it was necessary to treat with Maori for the recognition of ‘Her Majesty’s Sovereign authority’ over all or part of New Zealand. These statements foreshadow the provisions. In Article one the chiefs ceded to the Queen ‘absolutely and without reservation all the rights and powers of sovereignty . . .’; and in Article two the Queen guaranteed to the chiefs and individuals ‘the full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties . . .’ though they yielded to the Queen a pre-emptive right of purchase. Article three extended to Maori a ‘royal protection’ and imparted to them all the rights and privileges of British subjects. Finally, Maori acknowledged that they entered into the provisions of the Treaty in ‘the full spirit and meaning thereof’.

The intention in the Maori text is much the same except that it upholds tribal authority, which is wider than ownership and includes in our view control over persons in the kinship group and their access to resources. That may also be inferred from the English where ‘the Queen is anxious to protect the ‘Just Rights’ of ‘the Native Chiefs and Tribes’ (emphasis added).

In broad terms therefore, in return for ceding sovereignty, Maori gained protection of their persons, properties and tribal status, and individually, the rights and privileges of British subjects. On examining the verbal promises made at the signing of the Treaty, we find those terms re-iterated. The principle that emerges is the protection of Maori interests to the extent consistent with the cession of sovereignty.

A second aspect is that the Treaty envisaged European settlement. Historically, it was going to happen anyway. The preamble acknowledges that many had already settled and contemplates a ‘rapid extension of Emigration both from Europe and Australia.’ Land sales were contemplated in Article two and some had already occurred. They were halted by an ordinance predating the Treaty, and at Waitangi the Governor undertook to investigate those that had already been effected. But the intention of settlement was obvious. 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.

### **10.5.3 The Positive Approach**

The New Zealand Maori Council case went much further into the heart of the matter considering that by reference to its principles the Treaty speaks across all ages. Mr Justice Richardson referred to ‘the positive and enduring role of the Treaty’ (p673) adding

[w]hatever legal route is followed the Treaty must be interpreted according to principles suitable to its particular character. Its history, its form and its place in our social order clearly require a broad interpretation and one which recognises that the Treaty must be capable of adaptation to new and changing circumstances as they arise.

The President, Mr Justice Cooke accepted as correct a submission of counsel for the Maori Council that the Treaty is a document relating to fundamental rights; that it should be interpreted widely and effectively and as a living instrument taking account of the subsequent developments of international human rights norms.

Mr Justice Somers also noted the need for adaptation (p692)

The principles of the Treaty must I think be the same today as they were when it was signed in 1840. What has changed are the circumstances to which those principles are to apply. At its making all lay in the future.

The statutory direction to consider principles meant, in the judgment of Mr Justice Casey (p702) ‘an adoption . . . of the Treaty’s actual terms understood in the light of the fundamental concepts underlying them.’ He added

It calls for an assessment of the relationship the parties hoped to create by and reflect in that Document, and an inquiry into the benefits and obligations involved in applying its language in today’s changed conditions and expectations in the light of that relationship.

That relationship was considered by all the judges to be reflected in the concept of a partnership (Cooke p664, Richardson p682, Somers p693, Casey pp702–704, Bisson p715). The President, Mr Justice Cooke, in reference to discrepancies between the texts and to new circumstances beyond the contemplation of the signatories of 1840 made his view clear – ‘what matters is the spirit [of the Treaty]’ he said (p663). Mr Justice Bisson (p713) referred to this extract from the Te Atiawa Report

The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place.

He then referred (at p715) to this further extract from that report (as also did Mr Justice Casey at p702)

The Treaty was an acknowledgement of Maori existence, of their prior occupation of the land and of an intent that the Maori presence would remain and be respected . . . The Treaty was also more than an affirmation of existing rights. It was not intended to merely fossilise a status quo but to provide a direction for future growth and development. The broad and general nature of its words indicates that it was not intended as a finite contract but as the foundation for a developing social contract.

We consider then that the Treaty is capable of a measure of adaptation to meet new and changing circumstances provided there is a measure of consent and an adherence to the broad principles.



#### 10.5.4 General Principles

It would be imprudent for us to attempt that which the Court of Appeal chose not to, namely to enumerate the principles of the Treaty in one claim. We should restrict ourselves to those relevant to the claim before us. We have however the benefit of those principles found for by the Court of Appeal in the context of that case. Thus Mr Justice Richardson held

There is however one overarching principle . . . that considered in the context of the State-Owned Enterprises Act, the Treaty of Waitangi must be viewed as a solemn compact between two identified parties, the Crown and the Maori , through which the colonisation of New Zealand was to become possible . . . (p673, and at p680) . . . [that] called for the protection by the Crown of both Maori interests and British interests . . . (adding at p682) . . . [and which] clearly envisage[d] sales of Maori land for orderly settlement . . .

Arising out of the partnership and the fiduciary responsibilities to protect Maori interests, as earlier referred to, is an emphasis in each of the judgments on the reciprocal obligations of the partners to act towards each other with reasonableness and the utmost good faith (see especially Cooke p664, 667, Richardson pp673, 680–681, 682). The obligations of the treaty are binding on the honour of the Crown (Richardson pp673, 682, Somers pp691–692, 693, Casey p703, Bisson p714) but there is a duty in Maori of ‘loyalty to the Queen [and] full acceptance of her Government’ (per Cooke p664 and see Richardson p682, Bisson p715). There is no general duty on the Crown to consult with Maori, but regard must be had to Maori interests and that may in practice require consultation in some cases (per Richardson pp683, and see Cooke, p665, Somers p693). Similarly, the principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy (per Cooke p665).

The major finding in the NZ Maori Council case is that the principle of protection in 1840 becomes in the context of the State-Owned Enterprises Act of 1987, a duty not to restrict the just settlement of proper land claims. The protection accorded to land rights is a ‘positive guarantee’ (per Mr Justice Richardson), and as a matter of construction, we consider the same applies to fisheries.

The following principles seem important in this claim.

##### *The Principle of Protection*

Maori were protected in their lands and fisheries (English text) and in the retention of their tribal base (Maori text). In the context of the overall scheme for settlement, the fiduciary undertaking of the Crown is much broader and amounts to an assurance that despite settlement Maori would survive and because of it they would also progress.

The settlement profit to Maori derives from the tribe’s access to new technologies and markets, from Maori opportunity to adopt Western ways or from a combination of both. In terms of the Treaty none of these alternatives was denied or can be denied today, but at 1840, the former was uppermost in the minds of both sides. Lord Normanby and the Maori were of similar mind, the Maori seeking (and the Maori text assuring) the retention of a tribal right, Lord Normanby issuing instructions that each tribe should retain a sufficient land area for its needs (see Orakei Report, 11.9.2). Land could be bought cheaply, he thought, for the development of the settlers’ land would bring profit to Maori and added value to those lands they retained. For that scheme to work it was essential that Maori should in fact retain a proper share. Similarly it was thought that each Maori district would retain sufficient land to support its own communities.

That opinion flows through to the imperial legislation in the New Zealand Constitution Act 1852 which envisaged the recognition of Maori districts in which Maori law would prevail.

It is repeated in subsequent Native Land Acts providing for the reservation of sufficient land 'endowments' in each district.

We see no reason why a similar policy would not have been intended for fisheries had fisheries been considered at the time. 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.

The application of this principle at any particular past or future point, must depend upon the conditions then applying, the extent to which Maori have subsequently chosen to benefit in Western terms and the degree to which the tribal base remains preferred. The essential problem lies in balancing or blending the competing philosophies of protecting Maori as equal citizens, or upholding their distinctive heritage, as Mr Justice Richardson observed in commenting on article the third (p674).

### ***The Principle of Mutual Benefit***

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.

### ***The Principle of Options***

(a) The Treaty envisaged the protection of tribal authority, culture and customs. It also conferred on individual Maori the same rights and privileges as British subjects.

(b) Neither text prevents individual Maori from pursuing a direction of personal choice. The Treaty provided an effective option to Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partner's choices could be forced.

(c) The historical record suggests Maori have consistently sought to uphold tribal ways against policies directed to amalgamation (see Ward:1974) but there is no certainty that that preference would be maintained if the forces of amalgamation were removed.

(d) But the tribal right is also upheld. The individual, as a British subject, has the same rights (and duties) as anyone else in pursuing individual employment or gain. This may reduce the tribal need but does not necessarily displace it.

## PART V CONCLUSIONS

# 11. FINDINGS

## 11.1 INTRODUCTION

(a) This chapter begins with our findings on the nature and extent of the Muriwhenua fisheries prior to and at 1840.

(b) The meaning and application of the Treaty is then considered along with a number of arguments that counsel raised.

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.

(c) The principle was basically that in exchange for the cession of sovereignty and the acceptance of European settlement, Maori would not be relieved of their important properties, which included their interest in fishing, without their full consent.

(d) The events that followed the Treaty are then surveyed, leading to our findings, on a question of jurisdiction, that the principle described has been seriously breached.

(e) The chapter concludes with findings on a number of other issues that were raised and which are important to consider to clear the way for the prospect of a negotiated settlement.

## 11.2 ON THE PRE-TREATY USER

### 11.2.1 Pre-Treaty Fishing Area

(a) The Muriwhenua tribes made a full and extensive fishing use of the fresh waters and seas within and around their mainlands and islands, including the swamps, lakes, rivers, inlets, estuaries, harbours, foreshores, beaches and seas. That use is evidenced by the substantial knowledge of fishing lore, grounds and methods retained by Muriwhenua people of today (see chapter 2) and by various written accounts (see chapter 3).

(b) An intensive all year fishing use was made of the seas to about three miles off-shore. [This band includes the bulk of the modern rock lobster fishery, all of the paua, kina, other shell-fish and the seaweed resources, and large proportions of many of the prime fin-fish fisheries, the Northland long-line snapper fishery for example, and all set-net and seine fisheries for species like mullet, flounder, rig, school shark, moki and kahawai.]

(c) Throughout the balance of the continental shelf, to about 12 miles from the shore, fishing was intensive and regular but mainly seasonal. Expeditions coincided with the off-shore migrations of such species as hapuku, bass and snapper. Also fished were species more typical of off-shore areas such as tuna, pelagic sharks, tarakihi, piper, mackerel and squid.

[The Muriwhenua continental shelf, as fixed by a 200m depth contour, closely approximates New Zealand’s 12 mile territorial sea. The Muriwhenua people generally fished in depths not exceeding 200 m.]

(d) Where the continental shelf enlarges, or where underwater mountains rise closer to the surface, fishing occurred at distances up to 25 miles from the shore, as is evidenced by certain more isolated fishing grounds. (The continental shelf extends some 14 miles off-shore from Ahipara for example and some 25 miles off-shore from Cape Reinga). These grounds were known for particular catches and special expeditions were mounted to fish them.

(e) It cannot be presumed that fishing did not occur further out again, but such occurrences were probably rare. One fishing ground as described, was located at 48 miles from the shore.

(f) There is no evidence of expeditions to catch such deep water fish as orange roughy, hoki and oreo dories, though Maori names show that some deep water species were known.

[‘The inner fishing band’ will be used to describe an area extending 12 miles from the shore insofar as it approximates the greater part of the far North’s continental shelf where most fishing occurred. Beyond that is called ‘the outer fishing band’ where there was an occasional use of isolated grounds in some places, probably to a limit of about 25 miles, possibly beyond that. Those terms are used only to distinguish use areas before 1840 however. They are not used to imply that treaty fishing interests should be defined by bands.]

(g) Numerous fishing grounds dot the inlets and the coastal waters of both bands. They were well known, named, capable of ready identification, mainly in the inner band, and were usually associated with those particular fish species that aggregate at grounds.

The grounds of the inner band were each apportioned to at least one Muriwhenua hapu or tribe. Usually, they were associated with one. The less numerous grounds of the outer band were more usually associated with more than one group.

(h) Fishing and seine net fishing in particular, was not restricted to site specific grounds. The whole of the inner fishing band was used to catch the migratory species. There was not one part of that band that the tribes of Muriwhenua did not use. All workable depths were identified in evidence and named (including shallow spots well out to sea), telling of the general use that enabled their discovery.

[The evidence is rather compelling that Maori in many places throughout the New Zealand islands worked the whole of the inshore seas.]

### **11.2.2 Original Tribal Rights**

(a) Rights of fishing in the inner band were restricted to the hapu and tribes of Muriwhenua or others with their prior (and revocable) licence. The restriction was recognised by other tribes. Joint tribal expeditions with catch sharing were held on pre-arranged days under the mana (authority) of a local chief.

(b) Rights of passage in the inner fishing band were restricted to the hapu and tribes of Muriwhenua and those having peaceful business with them; and that restriction was enforced or was capable of being enforced.

(c) Rights over fishing and passage were claimed in respect of the outer band but may have been recognised by others only to the extent that they could in practice be enforced.

(d) In the Maori idiom the hapu and tribes of Muriwhenua held the ‘mana’ or ‘authority’ of the whole of the Muriwhenua seas to the limit described. The nearest British cultural equivalent is to consider that they exercised ‘dominion’ over that part, or ‘owned’ it as part of their territorial waters. Those words have been employed in past judicial determinations

(see 9.3.2) in a descriptive sense. Obviously 'dominion' is inappropriate to describe the period after sovereignty was proclaimed.

(e) The seas, or the fishery in them, were just as much properties as the cultivations on land. The fisheries were owned no more or no less than the land.

### **11.2.3 Early Use Rights**

(a) Fishing in both bands was restricted by the association of particular hapu and tribes with particular fishing grounds, with user rights being jealously guarded.

(b) Smaller groups or whanau held prior use rights of foreshore fisheries adjoining their habitations, and some were staked out; medium range fishing grounds more generally 'belonged' to larger hapu groups; but all use rights were subservient to the overright of the hapu, and above them, the tribe.

(c) Boundaries should not be overstressed. The key to Maori ownership is not survey definitions but kinship. People moved about the resource areas where they had use rights based on kinship or marriage.

(d) Fishing was both an individual and group activity. Families congregated for the purpose of fish harvesting at appropriate seasons. Large expeditions were undertaken at a tribal or joint tribal level.

### **11.2.4 Traditional Fish Management**

(a) Religious rites, symbolic acts, attitudes of respect and reverence reflect the Maori conception of the interdependence and relatedness of all living things, which was a dominant feature of their world view.

(b) Use of the seas in both bands was regulated and controlled by established practices or laws that were regularly observed. They required the seasonal capture of many species, the seasonal use of some fishing grounds and the imposition of tapu and rahui (prohibitions) to protect sensitive breeding areas or threatened species. These laws and practices were directed to resource maintenance.

(c) Use of the seas in both bands was also regulated and controlled by established practices or laws that were regularly observed and which were based principally on respect for life, the seabed, the water, and the gods associated with the fish and seas. These laws required the maintenance of species, habitats and water purity.

(d) There was no right to destroy the resource; there was rather a duty to protect it.

(e) Conflicts exist between traditional and modern sea laws and practices. Traditional prohibitions restrict the disposal at sea of garbage, gear, unused bait, food, human waste, fish remains, or dead fish. The seabed could not be disturbed by moving rocks or dragging nets or gear. Fish waste was not seen as feeding the fish but as polluting sensitive habitats and attracting predators to those species that needed protecting. In contrast, gutting at sea is not disapproved by non-Maori. There is evidence of extensive fish dumping by those who profit from the sea, and much waste is discharged to it, from the land.

Marked differences of opinion on the nature and importance of breeding and migratory habits are also reflected in different laws. Muriwhenua Maori exploited young mullet for example, but were careful in taking adult breed stock during shoaling and spawning. Modern regulations prohibit the taking of undersized species, while the capture of fish when shoaling is usual, and provides the most lucrative returns.

Maori maintained more specific laws for the taking of certain species at only certain times according to local conditions.

#### **11.2.5 Early Fishing Capability**

(a) Utilisation of the rich fishery resource was accompanied by an intimate knowledge of the local environment and locally available species.

(b) Fishing equipment, methods and biological knowledge were highly competent and involved a variety of specialised techniques. Catch capacity was below that of modern fishing fleets but compared most favourably with Western capabilities at 1840.

(c) The native order was directed to balancing capture with resource maintenance. Selective species capture, habitat care, sea hygiene and protection of the supply was as important as the catch. In that respect the traditional practice appears to have been more efficient than the modern regime.

(d) In today's terms Maori catch quantities were small but not when viewed in terms of contemporary population size and distribution.

(e) Maori knew of at least 120 marine species, and probably fished all of the known New Zealand fish other than the deepwater species of the offshore fishery.

#### **11.2.6 The Value of Original Fisheries**

(a) The common cultural characteristic of the Maori tribes was the paramount dependence upon the products of an aquatic economy. Their fisheries had subsistence, commercial, recreational and cultural aspects.

(b) They were essential not only for physical survival of individuals and communities but the whole economies and social networks of the hapu and tribes involved. The commercial component that existed in pre-European times, was capable of adaptation to commercial uses in Western terms.

(c) The sea resource was essential for the physical survival of the Maori people and their communities. It supplied almost the only animal food they could obtain, providing essential proteins, fats, vitamins and minerals. A fishing ground could be of much greater value and importance to their existence than any equal portion of land.

(d) Fishing was important for all tribes, but the lack of comparable inland resources in Muriwhenua made the sea resource more important for them than for most others. Their dependence on the sea was greater. The sea resource was as important for their survival as the atmosphere they breathed.

(e) Maintenance of habitats and fish supplies was equally essential for the continued survival of the Muriwhenua people. Many laws were directed to balancing capture with resource protection.

(f) An ample sea resource was important for the status of the tribes. The food available to guests is an important status criterion in Maori culture.

(g) The sea resource was essential for their intercourse with other tribes. Seafood constituted a major element of their trade and economy.

(h) Adequate food preservation techniques enabled fish to be stored throughout the year and transported over great distances.

### **11.2.7 Potential of Traditional Fisheries**

- (a) There was a commercial component in pre European tribal fisheries through 'gift exchange'. Though conducted along distinctive lines it was trade and commerce nonetheless. Artefacts show that the Muriwhenua tribes traded widely (see 3.4).
- (b) Gift exchange was capable of adaptation to new circumstances. It in fact adapted and developed to trade in Western terms.
- (c) There are no customary constraints on the development of a trade in fish save those cultural inhibitions directed to resource maintenance.
- (d) There are no traditional constraints on the use of new technologies. There is no rule that those practices handed down must be passed on without improvements.
- (e) Development was based upon an intimate knowledge of the environment and a rationalisation of exploitation and preservation. It was considered new techniques should not impair species survival or threaten life cycles. This was a learned experience. The first arrivals depleted seals for example, and only later were management practices established to protect other species.
- (f) Subject to the inhibitions described, there were no customary constraints to prevent the development of fisheries in Western terms once settlement came.

### **11.2.8 User at 1840**

- (a) We have found no evidence that at 1840 Maori objected to non-Maori use of the seas, provided that they did not interfere with Maori fishing activities.
- (b) Maori considered themselves as retaining the authority over the seas. This is considered further in the findings on the Treaty, below.
- (c) With the exception of whaling, there is no evidence of any commercial non-Maori fishing in Muriwhenua at 1840.
- (d) Despite the activities of some non-Maori whalers off-shore and purchases of land on shore, there is evidence to suggest that Muriwhenua Maori had not conceded any of their traditional authority over the sea by 1840 (see 3.5). In any event it must be deemed that they had not (see 11.3.4 (b)).
- (e) There is no evidence that settlers were forbidden to fish in Muriwhenua waters, but at 1840, non-Maori still lived in the North on Maori terms (see 3.5).
- (f) There is no evidence of any settler fishing at all in Muriwhenua at 1840, but some settlers were there and presumably they fished, at least for personal needs.
- (g) 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.
- (h) In Muriwhenua, where there were fewer opportunities fishing remained important for survival and, on a smaller scale, for trade with non-Maori (see 3.6). The Muriwhenua fish trade was limited to visiting boats and the pre-1840 settlements at Mangonui and Kaitaia. The main trade involved the supply of timber, fish and garden produce to ships provisioning at Mangonui.
- (i) The fishing areas and use rights remained as before.
- (j) Maori mainly used their own fishing gear and techniques and still relied upon group effort. As distinct from the circumstances pertaining to land, where Western tools,



methods, plants and livestock were considered superior and were avidly sought, Western fishing capabilities were regarded as inferior.

(k) By 1840 gift exchange had adapted to barter and had included sales of produce to visitors and settlers.

### **11.2.9 European Observations of Maori User**

(a) Before 1840, Europeans were aware of the Maori dependence on the seas, the extensive fishing practised, the industry devoted to it, the intricacies of their use rights, the competence of their gear and the extent of their biological knowledge. These matters are documented in many accounts from early explorers, traders and residents. Several are specific to Muriwhenua.

(b) A substantial Maori fish trade to all the major settlements is also well documented.

(c) The abundant fish life was recorded by many and a commercial potential was recognised.

(d) There is no evidence that either party sought to exclude the other from fisheries. At 1840 no one saw the need to define fishing rights or to make Regulations for conservation.

(e) Fishing was not in issue when the Treaty was signed. The concentration of both parties was on the land.

(f) Nonetheless, those involved in drafting the Treaty recognised the importance of fisheries to Maori, and fisheries were specifically included in the Treaty amongst their important properties. The contribution that Maori fishermen made to the local economy must also have been known. Maori caught most of the Europeans' fish for them.

## **11.3 FINDINGS ON THE TREATY**

We had the benefit of an ample debate on the meaning and application of the Treaty's terms and principles from counsel for the claimants, the New Zealand Maori Council, the Crown and the Fishing Industry; but it is impracticable to precis all of their arguments. It does not follow that any volume not summarised here was without weight.

The main arguments, nonetheless, were narrowly conceived. We begin this section by reviewing the issues that were raised; they are important in furthering our understanding of the Treaty but we do not thereby suggest that by reviewing the narrow presentation we accept it. We remain of the view that a broader approach is required, and a wider perspective is given at the end (11.3.6).

### **11.3.1 'Full, Exclusive and Undisturbed Possession'**

No one seriously contended that 'full, exclusive and undisturbed possession' means other than what it says. Arguments abounded that exclusive rights have been relinquished, that exclusivity relates to specific areas, and even that the intention was to provide an exclusive share. These arguments are considered below. It was apparent that the only difficulty with the words is the inconvenience they present. The meaning is altogether too clear. 'Exclusive' means 'exclusive' – that was so held by the Supreme Court in *United States v State of Washington* 384F.Supp. 312 at 390 393, in construing certain treaties that gave exclusive fishing rights on Indian reservations.

There is nothing in the Maori text inconsistent with those words. On the contrary, 'rangatiratanga' is consistent with them. In that respect, the two texts are in harmony with each other.

### 11.3.2 'Their Fisheries'

#### *(a) Categories*

The word 'fisheries' may refer to the place where fish are caught, the types of fish to be found, the right to fish or the business of fishing. We consulted four dictionaries on the meaning of 'fisheries' and each gives the business of fishing as the first meaning, thus 'the act, process [or] occupation . . . of taking fish or other sea products' (Websters third New International Dictionary 1981 USA); 'the industry of catching . . .' (*Collins Dictionary of the English Language* 2nd ed 1986); 'the activity or business of catching fish and other sea animals . . .' (*Longmans Dictionary of the English Language*); and 'the business, occupation or industry of catching fish or of taking other products of the sea . . .' (*Oxford English Dictionary on Historical Principles* 1933).

Fishing laws use 'fisheries' with reference to the species that are sought, as in trout fisheries, or orange roughy fisheries (see for example, section 2 Fisheries Act 1983). This is a subsidiary meaning in the dictionaries referred to. Webster considers 'oyster fishery' and 'salmon fishery' relates to the place of catching rather than the fish caught and distinguishes 'the technology of fishery: a branch of knowledge concerned with the methods and economics of fishery . . .'.

The private or 'several' fisheries of England refers specifically to site specific places of fishing (see especially Oxford English Dictionary on Historical Principles) but at an international level, a nation may claim its 'fishery' to be the whole of its coastal waters to a given extent.

'Fishery' is also rendered as an alternative for 'piscary' or the legal right to take fish at a particular place or in particular waters.

'Their fisheries' in the Treaty we find, 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.

'Taonga', as discussed at 10.3.2, includes all of these things, and had other dimensions too. It includes even the incantations recited to ensure success.

In many of the arguments however, one or other meaning was presumed to apply. The claimants contended that 'their fisheries' meant the whole of the band that they used, or in effect, their territorial seas. Others argued they were limited to the fish they caught or to specific fishing grounds.

In addition, it was argued that 'their fisheries' was intended to do no more than secure rights of fishing. These were likened to a profit a prendre (the right to take produce from) or a usufruct (the right to use) over property of the Crown. It was contended that the Treaty could confer no greater rights than Maori already had, as a matter of Imperial law. The Treaty right was also described as an encumbrance whereby the Crown's ownership of the sea is subject to a Maori right to use. We need not review those arguments in full. They amount to one contention that Maori had no more than a right of access to the sea, and that the right being co-existent with that of others, access had necessarily to be shared.

The Treaty intended no such limitation in our view. Reading the Treaty as though today were 1840 ‘their fisheries’ is the business they have and may develop in fishing and includes the fish they catch and the places where they catch them.

In 1840, the fish they caught in Muriwhenua, were the whole of the inshore and migratory species. The place where they caught them was the whole of the inshore seas. The business they had in fishing was extensive and capable of being developed.

We specifically reject the contention that the rights they had were merely rights of access. To reduce Maori rights over land or fisheries, to a usufruct controlled by chiefs, is an unacceptable diminution of the Maori position (and a misuse of the essay by Alan Ward that was relied upon Ward 1985:259). If we must think of things in Western terms, then as explained at 10.3.2 (f), it is proper to consider that tribes once held dominion over their land and sea territories. It is axiomatic that the tribes had rights of access, but more importantly, they had the right to exclude access by others. We also reject the view that the meaning of ‘their fisheries’ in the Treaty can be constrained by various legal categories or the current legal definition in the Fisheries Act. This may suit the convenience of fish administrators or law but it does not fit with the Treaty.

It is in any event essential to bear in mind the substantial concession that the Maori made in ceding sovereignty, and in accepting and thereby legitimizing, European settlement (see Brookfield *The Constitution* in 1985; *The Search for Legitimacy* pp6, 7). It required that those things assured to Maori should not be read down.

***(b) Site specific grounds***

It was argued that ‘their fisheries’ meant ‘their fishing grounds’ for the Treaty recognised only existing rights. It created no new ones, it was claimed, and therefore had to equate the fishing rights of England. There, fishing was exclusive at only specific fishing places.

‘Their fisheries’ means their fisheries in our view, not those of England, and the rights secured to Maori were the ‘just rights’ of Maori. If such rights were new, that is beside the point. They were not new to Maori. It was in any event a small price to pay for the transfer of sovereignty, that protection should extend not just to some of their fisheries, but to them all.

***(c) Favourite fishing places***

A further contention was that ‘their fisheries’ means not ‘wherever they fished’ but ‘those places to which they regularly resorted for fishing’. ‘Taonga’ was submitted to mean ‘favourite fishing places’.

The Queen’s guarantee should be generously construed in our view, unless the evidence favours a narrower construction. Taonga, we noted at 10.2.2, is not restricted to fishing grounds, and fishing was important everywhere, especially when seine netting for those fish that shoal or in catching migratory species. On balance, the wider definition must be upheld.

We add that as a matter of construction, ‘their lands’ were not limited to those places most usually used. That criterion must apply alike to fisheries for the guarantee in respect of each was quite the same.

### **11.3.3 ‘Fisheries and other properties’**

Does the association of fisheries with properties imply a more limited construction, connoting fishing grounds rather than fishing territories? We raised this question ourselves but are satisfied that a wider view of properties was intended than site specific places.

In one sense the word is related to the things that they ‘possess’, not ‘own’, and the fisheries of which the claimant tribes were possessed was the whole of the sea area described. The Maori text supports this construction. Rangatiratanga covers the whole of tribal territories, whether at land or sea.

In another and more important sense however, ‘properties’ relates to the business they had in fishing. We develop this point at a later stage.

### **11.3.4 ‘Wish and desire to retain’**

In terms of the Treaty, Maori are guaranteed the possession of their fisheries ‘so long as it is their wish and desire to retain the same in their possession’. By themselves these words present no difficulty but a number of issues were raised.

#### ***(a) Alienation rights***

Could fishing rights be sold? We are of opinion that nothing in the English text denies the sale of fishing rights, or any lease, licence, partnership, royalty or other arrangement in respect of them. Whaling rights were sold before 1840. The special provision in article the second affecting land sales, is to confer a pre-emptive right, not to limit alienations only to the land. Similarly, ‘full authority’ in the Maori text provides for alienations.

#### ***(b) Waiver before 1840***

It was contended, with reference to sealing and whaling, that exclusive fishing rights had been waived before 1840. It was argued that the Treaty guaranteed and confirmed no more than that which existed at the time, and exclusive possession having been waived, it cannot now be claimed.

That would require a substantial rewriting of the Treaty in our view, and if that is needed there is obviously something wrong. The Treaty did not guarantee the exclusive use of those fisheries exclusively possessed. It did not confirm the shared use of fisheries already shared. It guaranteed the exclusive possession of their fisheries.

Our view is as follows

- (i) Maori were independent before 1840. Any rights they gave they could also have taken back. The people were also numerous and able to effect their purpose at that time.
- (ii) Since 1835, Britain had recognised the independent authority of Maori as a right of sovereignty and that New Zealand was an independent state. The Crown cannot argue now against that recognition.
- (iii) The sovereignty ceded by Maori was no more nor less than the sovereignty that they possessed (see article the first). To assert that Maori had irrevocably ceded rights, or had parted with exclusive powers, is to assert a claim against the sovereignty of the Crown.
- (iv) From an abundance of caution, the Crown required that the claims of Europeans to previously acquired rights be submitted for the Crown’s approval, and none had validity if that were not done.

- (v) The record of whaling is not evidence that exclusive rights had been waived. Permission is not a waiver, and whaling rights sold, if in fact given in perpetuity, could still have been reclaimed. It was a matter of state, not private rights.
- (vi) The evidence is that Maori co-operated with whalers to secure trade. It is the sovereign right of all people to seek benefits in that way. It does not imply the abandonment of rights.
- (vii) 'Their fisheries' at 1840 were no less exclusive than ours are today, though we permit foreign fishing in our waters.
- (viii) To the extent that rights may have been waived, the Treaty restored them, guaranteeing exclusive rights.

***(c) Waiver after 1840***

The Crown contended that in any event, exclusivity had been waived after 1840. It was argued that the words 'wish and desire to retain', imposed a positive obligation on the tribes to maintain exclusive fishing rights. The tribes had not done so, it was submitted. A long record of common user without objections amounted to a waiver, or estopped the tribes from asserting exclusivity at this stage.

We regarded this submission most seriously, not because it is right but because of what it implies. It suggests that the long denial of just rights by the Crown, until protests have been quieted, will be justified by the eventual lack of objections. We compared that submission with Dr Orange's opinion, that before and after the Treaty, Maori were consistently led to believe that they could rely totally upon the honour and integrity of the Sovereign.

As a general principle of law the waiver of rights will not be effective except that it be an intentional act done with knowledge – see Spencer Bower and Turner Estoppel by Representation 3rd ed p318.

The Treaty was no more than a broad statement of intention however, and did not confer legal rights in domestic law. It also contemplated the possibility of an implied waiver. We have therefore not assumed that a waiver must be unequivocally clear in relation to the Treaty, or, that the legal rule might apply to Treaty 'rights' without legal force. But the position is grossly overstated in our view, to say that Maori had a positive obligation to maintain their exclusive fishing rights against all comers. That makes a nonsense of the royal guarantee, and implies that only might was right.

We consider

- (i) If the Crown is to seek the benefit of a waiver, the onus is on the Crown to establish it. It has not done so. There is no material before us indicative of a waiver.
- (ii) There was no duty on Maori constantly to proclaim that they ought to have the right; the duty was on the Crown to provide for it.
- (iii) The non-Maori use of the Muriwhenua fisheries is not demonstrative of the fact that the tribes no longer wished exclusively to retain them. An implied permission is not a waiver; and there can be no waiver of a right if the right is not provided for in law.
- (iv) From the 1870s Maori had no option but to accept a non-Maori user. That is not the waiver of anything.
- (v) We have referred to the circumstances that restricted Maori fishing. They included more than the omission to make laws supportive of fishing rights in the Treaty, but laws severely to curtail Maori fishing activity. Those laws have had their

effect on the ability of Maori to maintain those rights the Treaty may have intended.

- (vi) It is simply not a fact that there were no Maori objections, as this report discloses (see 5.4, 5.5 and especially 6.2.5).

***(d) The impact of land sales***

In closing submissions the Crown asked when Maori sold lands did they say to the purchaser you may own the land but you cannot have access to the fishing off your shores for that belongs to us? (doc G2 para 4.7). The point, however, was not pursued! We pursued it ourselves, but at the very end of proceedings. Since there was not a full debate we treat our opinions on this matter as tentative.

The question is whether land sales may imply a waiver of exclusive fishing rights. We discount those sales before 1840. The effect of sales may not have been understood. They were sometimes seen as simply admitting the purchasers to tribal ranks, where their use of land and fisheries would have been on Maori terms. Sales after 1865, under the Maori Land Court system, are also inapplicable. They lacked tribal assent and the whole scheme had enormous opposition. Large tribal sales were transacted in the years between, however, sometimes involving the greater part of whole provinces.

It seemed overly pretentious to us that a tribe should retain exclusive rights to the whole of its fisheries after land sales. Mana moana (authority over the seas) had depended on the exclusive possession of the adjoining land. (We exclude mana tupuna ancestral associations. That always remains as a customary fact and applies, as between Maori, in settling customary fishing entitlements.)

Our conclusions, though tentative, are as follows

- (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 (see NZ Maori Council submissions, doc H18, 3.1).
- (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.

As an illustration of the reliance that Maori placed on the distinction in the Treaty between the land and fisheries, we refer to the oft-cited statement of Apihai Te Kawau, to the effect ‘the land I gave, the sea I never gave, the sea belongs to me’. That view has often been quoted, for Te Kawau, well known as a staunch supporter of various Governors and the Auckland settlers, was considered to have held moderate views.

The Treaty refers to ‘their fisheries’ of course, not to the sea, but it seems that Te Kawau had fisheries in mind. The statement was made late in Te Kawau’s time, in 1879. Te Kawau held a traditional authority over part of the Manukau Harbour. His people there had annually sold thousands of kits of oysters to the Auckland market; but only shortly beforehand, the Government had forbidden the commercial exploitation of oysters by Maori, and had leased the Maori oyster beds of the Manukau Harbour to non-Maori commercial interests. Te Kawau was undoubtedly reacting to a clear injustice and to the loss of a substantial revenue by his people. His statement was made in the course of a Maori debate on the first fishing laws, and at a time when Maori claimed they were being forced from the sea.

Our conclusions on this issue are tentative however, being made for the sake of giving the best advice that we can at this stage. The issue may require a greater debate, especially as the opinion may impact on the claim to the Ninety Mile Beach. That is, if the issue is relevant at all.

The question really only arises because a literal approach to the Treaty suggests only Maori would have had the right to fish in Muriwhenua. Whether or not that was intended as a principle, is another matter again. The applicable principles are considered at 11.3.6.

### **11.3.5 Constructions**

A number of issues arose from various constructions placed upon the nature of the Crown’s guarantee.

#### ***(a) Aboriginal Title***

The doctrine of aboriginal title is a legal precept that customary hunting, fishing and foraging creates rights that continue, after annexation, until Parliament expressly takes them away. The doctrine was recognised in New Zealand in 1847 and again in 1987. It is supported by the Industry. In the Kaituna Report 1984 we declined to investigate the doctrine believing that to be the task of the courts. In this claim the Fishing Industry submitted that we had to, for the Treaty was expressive of the doctrine and needed to be understood in its terms. Moreover, it was said, the Treaty was declaratory of the doctrine and could not be construed to confer rights any greater than the doctrine gave. Reliance was placed on certain dicta in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, *R v Symonds* (1847) [1840–1932] NZPCC 387 and the Kauwaeranga Judgment (supra). The doctrine, it was claimed, upheld fishing rights but not exclusive rights, recognised fishing grounds but not zones, and was directed to sustaining traditional lifestyles, not to the pursuit of Western forms of trade. We were given to understand that the Treaty had therefore to mean the same.

The trouble is, it doesn’t. Once more a major rewriting would be required. Amongst other things, ‘exclusive’ would need to be changed, and Lord Normanby would need to recall his instructions. He clearly envisaged that Maori would profit from the development of those properties that they retained.

For the claimants, Mr Baragwanath argued that the doctrine was quite different from that which the Industry described; but we need not determine the point. We reject the Industry's approach. While the doctrine of aboriginal title does form part of the necessary background to Colonial Office opinions as held at the time of the Treaty, and there is some concurrence between the doctrine and the Treaty principle of protecting Maori interests, the one is not determinative of the meaning of the other, and both have an aura of their own. There are passages in Dr McHugh's writings consistent with that opinion (see especially *The Legal Basis for Maori Claims Against the Crown* Vol 18 No 1 VUW Law Review of February 1988 pp18–19 as referred to by counsel for the New Zealand Maori Council doc H17 pp4–7). The authorities cited by the Fishing Industry do not in fact support the view that Treaty rights are synonymous with rights at colonial common law, and *Simon v The Queen* (1985) 24 DLR (4th) 390, is authority for the proposition that they are not. It would be more correct to say, in our view, that the Treaty supplements the doctrine, while the doctrine upholds a right where the Treaty has no application.

***(b) Territorial Seas***

The territorial seas are the coastal waters over which sovereignty is claimed. New Zealand claims a 12 mile territorial sea which is an internationally recognised limit. Our Exclusive Economic Zone of 200 miles also accords with international criteria. We have the exclusive right to fish in that zone, but by international rules we must cede the right of other nations to catch that share that we cannot catch ourselves.

Mr Carruthers for the Crown contended that the standard territorial sea, as internationally recognised at 1840, was only 3 miles. The Crown's sovereignty could not have exceeded that limit once sovereignty was declared, it was argued. Accordingly also, the Crown's protection of Maori fisheries could have applied to no more than those within 3 miles, he contended.

Sovereignty in respect of 12 miles was not proclaimed until 1977, at which time, our Exclusive Economic Zone was also declared (see *Territorial Sea and Exclusive Economic Zone Act 1977*). In the period until 1977, Mr Carruthers argued the Crown's duty to protect Maori fisheries applied only to those within 3 miles. (He also contended that the 3 mile limit to the Crown's protective responsibilities still applied, but this is dealt

with later.)

For the claimants Mr Baragwanath contended that a 3 mile limit was not the rule in 1840. Some states claimed much more, he said. To the extent that it may have been a rule, it applied only to the European circumstance, where states abutted one another, and a wider area could have been claimed by Pacific countries like New Zealand, he contended, under a recognised local customary international law.

Much as we may need to travel in the realms of old, we decline to do so in this case. Were it necessary to determine this question, we would seek the ruling of a court, for it is strictly a matter of law. But that is not necessary in our view. We accept Mr Baragwanath's further argument that it was at all times competent for the Crown to give substantial protection for Maori fisheries beyond 3 miles. 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 fishing vessels, but it still failed to consider Maori interests.

To the extent that the claimants' losses are attributable to fishing and fishing laws, in the period before 1977, they are mainly due to New Zealand fishing laws and the fishing of New Zealand vessels. Foreign fishing began in the mid 1960s, with most of the activity in the mid 1970s.



We do not accept Mr Carruthers' next argument that the Crown's duty to Maori was fixed by the extent of the territorial sea at 1840, and that as a result, though a wider territorial sea is now claimed, the excess is free of Maori claims. We are of opinion that *New Zealand Maori Council v Attorney-General* (supra), is authority for the proposition that the Treaty is always speaking, and the duties to which the Treaty gives rise, apply to fullest extent practicable according to the circumstances from time to time prevailing.

No 3 mile or other rule is recorded as being disclosed to Maori in the Treaty negotiations. They did not agree to it and had reason to expect the protection of their fisheries wherever they might be. They measured their fisheries in fish, not miles. Were Maori Treaty fishing interests to extend beyond 3 miles, even to 200 miles or beyond, we would expect the Crown to give such protection as it can.

We do not imply that the Crown's fishing agreements with foreign nations can or should be upset. The cession of sovereignty gave the Crown full authority in respect of such matters. But in negotiating foreign arrangements the Crown has still to be conscious of its domestic Treaty undertakings. To the extent that it is not, a claim may properly lie against the Crown.

***(c) Practical constructions***

If fisheries is used in the sense of fishing grounds only, and those grounds cover the whole inshore shelf, the effect of the Treaty would be to exclude all non-Maori fishing in other than the deep blue sea. That seems to us an extraordinary result. If the Treaty intended it, we would have expected that to have been clearly said, reserving to Maori not the exclusive possession of their fisheries, but the sole right to fish the inshore seas.

Mr Baragwanath was at pains to stress that Maori had permitted a non-Maori user, and that they had not, and in his opinion still would not, revoke it. More particularly he said

The Crown and the community can be assured that recognition of Maori exclusivity would not lead to abuse by the claimants of their rangatiratanga. It would be exercised with due recognition of

—existing amateur fishing

—other commercial interests

which are at present the subject of discussion within the Joint Working Group (doc H3:7.24).

However, he added, a permission is not a waiver of their right (and we think that that is so).

Our conclusions, in summary, are as follows

- (i) A literal interpretation of the Treaty's terms undoubtedly creates an awkward result today; but there is and always was room for another arrangement to be settled upon. The Treaty provided for it. Nothing restricted the negotiation of alternative fishing arrangements. The current inconvenience arises not from the Treaty's terms, but from the Crown's past failure to seek or provide for a reasonable settlement. Instead, Maori fishing rights were simply denied. The Crown cannot now profit from the inconvenience that arises from its own wrong.
- (ii) Any uncomfortable result must still be viewed in the context of the Treaty's time. The position concerning the land provides a useful analogy. It was projected that great numbers of settlers would arrive. It was obvious that they would need land and that it would be decidedly inconvenient if none was sold. Yet the Treaty declared that land would not be acquired without clear assent. Moreover, the Crown

guaranteed that that would be so. It is apparent that a higher principle was intended.

- (iii) Shortly after the Treaty, some pressure was exerted upon the Crown to assume ownership of large areas of land that seemed to be vacant. At first the Secretary of State for the Colonies Earl Grey was sympathetic, but his successor Lord Stanley held that this restricted interpretation was 'irreconcilable with the large words of the Treaty' and 'inconsistent with the honour, good faith and policy of the Crown' (Orange 1987:99). It was thereafter agreed that the whole of the land was to be deemed to be Maori owned, whether or not it was in actual use or occupation, and that none of it could pass without an agreement.
- (iv) Were the Crown to exercise its sovereign power so as to expropriate land without compensation, it would be a gross breach of the terms of the Treaty. Fisheries are in no different position.
- (v) The inconvenience of the end result today is not a ground for importing another construction, for the Treaty was not based upon a balance of convenience. Nor was the result impracticable, for special arrangements could have been made; nor need it be impracticable today for special arrangements can still be made.
- (vi) Our main finding however, is that in the context of this claim, 'their fisheries' refers to their business and activity of fishing.

Other issues raised are considered at 11.6. For now we repeat that these matters have been reviewed in the manner in which they were presented, as being based upon a literal approach to the Treaty terms. That is not the proper approach in our view. Matters of broader construction are now considered and, in our opinion, must prevail.

### **11.3.6 Construction According to Principles**

#### ***(a) The Requirement to Consider Principles***

By our governing Act we are required to assess claims against the principles of the Treaty (section 6(1) Treaty of Waitangi Act 1975).

Counsel for the claimants and for the Crown both submitted that the application of the Treaty's principles applied to the second stage of our proceedings where, if a claim is well founded, we may consider recommendations to provide for some redress. But that is simply not so. We must determine whether there has been a breach of the Treaty's principles, as distinct its terms, at the very first stage, in deciding whether any claim is well founded. Bluntly put, if we assess a claim against the Treaty's terms without regard for the principles, we will be wanting for jurisdiction. There is in fact no reference to the principles of the Treaty in that part of the Act that deals with the second stage (section 6 (3)) (though it could be that the principles are still to be implied).

#### ***(b) Why Principles?***

In deciding that claims must be measured against the principles of the Treaty, and not merely its literal words, the legislature has clearly intended to emphasise that the Treaty is relevant to all ages. It may therefore apply in situations not contemplated when the Treaty was settled (as is apparent in the *Te Reo Maori* and *Waiheke* reports, for example, and the Court of Appeal decision in *New Zealand Maori Council v Attorney-General*, supra). In the *Te Reo Maori* claim, the Tribunal was able to consider claims relating to radio and

television broadcasting, though they were unheard of when the Treaty was signed. What mattered was not the literal words but the principles that might be applied.

There is another reason however, why principles must be considered. We begin with a quotation from the late Ruth Ross' essay, *Te Tiriti o Waitangi: texts and translations*:

However good intentions may have been, a close study of events shows that the Treaty of Waitangi was hastily and inexpertly drawn up, ambiguous and contradictory in content, chaotic in its execution. (*New Zealand Journal of History*, October 1972, p154.)

That statement appears to us to be substantially correct though the terms were not so much contradictory as complementary in our view.

Dr Orange's major book on the Treaty reinforces that opinion in greater detail.

Many of the difficulties apparent in the arguments that have been described, are a consequence of this situation. The English version, based on Lord Normanby's rather general instructions, was drafted on the spot by Lt Governor Hobson, his secretary J S Freeman, and James Busby, none of whom was a lawyer. It seems that Hobson provided little more than the preamble, taken largely from Normanby's instructions; Freeman produced a set of notes outlining the three articles; and Busby fleshed these out, adding the guarantee of forests and fisheries as well as a wordy conclusion (which was later abridged). We doubt whether any one of them knew much law. Hobson, though the son of an assistant barrister, had been at sea since the age of 10; Freeman was a 2nd class clerk; and Busby, a viticulturalist, had held a minor office in New South Wales as a collector of taxes.

But that does not denigrate the Treaty. If the drafters were not lawyers, that merely explains its brevity. The essential feature is that they captured the principles, in the light of Lord Normanby's guidelines. They were equipped for that task, especially Busby, for he knew of the local situation, and Lord Normanby had declined to draft a text himself, for the very reason that an awareness of local circumstances was required. The main point however is that, if the technical drafting had flaws, so much more the reason to focus on the broad intent, and the more so since that is how the Treaty was received by the Maori parties.

The same comments apply to Williams' translation, though he seems to have been intent on capturing those principles that he considered were most important to Maori. It is a somewhat unique Treaty therefore, in that it carries the main principles adhered to by both sides.

We think it absolutely essential to understand the Treaty in those terms. Its drafters were basically concerned that settlement should be founded on just lines. The Treaty became, for that reason, a noble compact of mutual pledges, but we severely reduce its status to read it as the definition of rights rather than the source of them. For it was not a contract of tight legal draftsmanship but a declaration of honourable intent. It did not create rights, at domestic law, but laid down the principles from which defined rights might flow.

The essential task is not to apply the Treaty's literal words but to locate the correct principle. In that respect the words are most important, of course; but they are essential, not because they define the right but because they describe the principle that gives rise to it.

In past claims, the principles enabled an expansion of the Treaty's terms, so that they applied to new situations. The most important issue in this claim however, is whether the principles can also reduce the Treaty's terms. It is a matter that has not been addressed before.

***(c) The argument on principles***

For the Crown it was submitted that the principles of the Treaty enable the Tribunal to take a broad approach to achieve a practical result (Doc D33 paras 4.5, 4.21–4.29, Doc G7, 5.0–5.7). The general purpose or objective of article the second was submitted to be that the Crown guaranteed the Rangatiratanga of Tribes in order to confirm chiefly authority over the people and their lands, estates, forests, and fisheries and other treasures within tribal boundaries. This guarantee was to ensure that Maori should retain their just rights and to assure to them that they would retain sufficient resources to enable them to continue with their traditional ways and practices and, if they wished, to develop these resources for the present and future needs of the tribes (Doc H1 para 4.1(3)).

There are several assertions in that proposition, including a right of development, a tribal as distinct from an individual right and a duty on the Crown to ensure that Maori retained sufficient resources. Each such contention is soundly based in our view, being supported by the Treaty's general terms and the initiating instructions to Lt Governor Hobson that preceded it. It appeared to us a reasonable statement of the general purpose and was accompanied by a lengthy submission in which it was clear that the proposition had been carefully researched and responsibly thought out.

It nonetheless requires some refinement, in our view, and as a principle specific to fishing, it needs to be rephrased. We restate the Crown's proposition as follows that nothing would impair the tribal interest, as from time to time apparent, in maintaining from the sea, sustenance, livelihoods, communities, a way of life and full economic opportunities.

Essential to the claimants case was the opinion that the principles of the Treaty do not enable the Tribunal to rewrite the Treaty's terms or to read down its language to achieve a result that would not give full justice to the grievance. Mr Baragwanath cited in support, the observation of Mr Justice Somers that 'a breach of a Treaty provision must . . . be a breach of the principles of the Treaty' (see *New Zealand Maori Council v Attorney-General* supra, at 693).

In the same case however, Mr Justice Casey considered (at p16), that the principles require 'an adoption . . . of the Treaty's actual terms understood in the light of the fundamental concepts underlying them'. That statement appeared to us to be particularly significant in the context of this claim.

In that case the need to balance the three objectives of providing for a new form of government under the Crown, the projected settlement of Europeans and the protection of Maori interests, was seen to give rise to reciprocal duties, as embodied in a partnership, when applying the principles of the treaty to the modern circumstances there involved. The original duty to protect Maori in the ownership of their lands, was seen to require, in the context of certain proposals to transfer Crown lands, a prior provision for the just settlement of outstanding Maori land claims.

That decision is not authority for the proposition that the principles prevail over the Treaty however, so as to amend or water down those terms that are clear. It does not indicate that a Maori right to retain their fisheries implies a duty to share them, simply because the projected settlement has now been achieved.

But nor does it mean that we are bound to a literal interpretation of the terms. We accept there may be cases where a breach of the Treaty's terms is so minor as not to constitute a breach of principle, or, where circumstances have so changed that neither party could reasonably seek strict adherence to a term and we accept that the observation of Mr Justice Somers was not intended to restrict the usual rules of law that relief is not given in trivial or vexatious cases; but in the interpretation of the Treaty there are also wider concerns, and we do not read our approach as being in conflict with Mr Justice Somers' opinion.

It may very well be that the colonial Government would have ignored the Treaty in any event, no matter how well it was framed, but it also appears that it was largely through the literal construction placed upon it that it was either ignored or conveniently misread. At first it was the latter approach that was taken. Governments simply resorted to their acquisition of sovereignty in the first article to override the guarantees to Maori property in the second. In the final result there was an almost total denial of Maori fishing rights. Maori for their part had shown some willingness to share and not to place any strict reliance on the Treaty's terms. But some were pushed to a position at the other extreme, starting from the Orakei Conference in 1879. Since then the partners have simply been talking past one another, the Maori sometimes accepting whatever it was they could obtain but often demanding the whole, the Crown occasionally ceding something but in all, extremely little. There is now, on both sides, a weight of entrenched prejudice to overcome.

Past experience should teach us of the danger of relying upon the Treaty's literal terms, or of failing to heed the advice now given by Mr Justice Casey, that the terms must be understood in the light of the fundamental concepts underlying them.

Those concepts illustrate the heights to which our British forbears had ascended in contemplating the settlement of New Zealand.

#### ***(d) Locating the principle***

The general principles were described at 9.5.5. They require that the Treaty be liberally construed that the twin objectives of securing settlement with protection for Maori interests, might bring mutual benefit to both parties. Those principles cannot obscure however, that the Treaty also expressed some fundamental rules. To understand their significance we must look to the circumstances of the time.

As indicated in our *Orakei Report* (at 11.9.2) and at 10.5.1 and 10.5.2 above, New Zealand was founded on the basis of a Treaty that contained high ideals of justice and which had been spelled out in Lord Normanby's Instructions to Hobson.

The settlement of New Zealand was foreseen, and not so much applauded as regarded as inevitable. The official Government response was not to contemplate the profit that might be gained (it was thought there would be little) but to weigh the cost, and to determine that the native interests should be protected to the fullest extent practicable.

It was considered, despite the inevitability of settlement, that neither sovereignty should be proclaimed, nor land acquired, without Maori assent.

It was determined, after some initial doubts, that the whole of the land must be deemed to be Maori owned, occupied or not, with none of it to pass without an agreement. If that created an inconvenience for the settlers, the greater convenience for the Crown was that the just rights and properties of Maori would be protected to the fullest extent. The honour of the Crown was seen to require no less, especially in the light of past experience.

Clearly, Lord Normanby hoped and expected that from the sale of lands, Maori would profit from settlement in terms of their own progress, and from the development of those lands retained. He saw it as essential to that end, that sufficient properties would in fact be kept. That objective may be stated as a principle that nothing would impair the tribal interest in maintaining personal livelihoods, communities, a way of life, and full economic opportunities. It was subject to the overriding principle of protecting Maori properties. It was even more important that settlement would not in itself be the excuse to relieve Maori of that which they wished to keep.

The essential principle was that despite the projected settlement, Maori would not be relieved of their important properties without an agreement, and for their protection, there was a duty on the Crown to ensure that they retained sufficient for their subsistence and economic well being.

That principle was reiterated several times, before and after the Treaty, as for instance in the minute from Stephens to Hope, on New Zealand affairs on 28 January 1843

... that no person, and that no Govt. can possibly contract a legal, honorary, or moral obligation to commit injustice, or to despoil others of their lawful and equitable rights (I HRNZ 95)

and as we indicated above (at 11.3.5 (c) (iii)) in quoting Lord Stanley's despatch. But in 1861 responsibility for Native Affairs, and with that, responsibility for upholding the Treaty, was transferred to the New Zealand Government.

Fisheries differ from lands only in that they are not so clearly defined or easily possessed and it is impossible to prevent land dwellers from using them when they extend from the whole line of river, lake and shore. They are important properties nonetheless, and they are described as properties in the Treaty. It recalls to mind that 'fisheries' first and foremost means the business and activity in fishing (see 11.2.5 (a)). That is an important property right.

We consider however, that the questions of whether non-Maori could fish or whether land sales implied a waiver of exclusive rights, as reviewed at 11.3.5 and 11.3.4, are rather beside the point. We do not think the intended principle was that Maori would have the sole right to fish, but rather that their business of fishing and fishing places would not be interfered with unless there was some agreement or rights were clearly waived.

We are reinforced in that opinion by reference to the Maori text and Maori culture. The text enhances ownership by emphasising authority and control. An important finding of fact that we came to was that in the culture, the sea areas that were fished, were property, in much the same way as land. They were areas over which Maori claimed an authority or control. The evidence is that Maori did not prevent the non-Maori use of the seas for their own domestic purposes but they considered themselves nonetheless as retaining their control; and they had no objections for so long as their fishing business, operations and places were not interfered with.

There was unlikely to have been any conflict then, when Europeans purchased Crown land adjoining the coasts or harbours and inland waters, provided they confined their fishing to domestic consumption and observed Maori tapu or rahui. It was only when non-Maori moved into fishing these localities for commercial purposes that Maori began to complain that their fisheries, guaranteed by the Treaty, were threatened; but that didn't occur until later in the century.

It is the protection of the property that was important. As a property right it was not limited to the business as it was or the places that were fished, but included that to which it might expand. What was to be 'full exclusive and undisturbed' was that right, the right to maintain their fishing business, activities and operations. Subject to that constraint, non-Maori fishing was allowed.

In terms of the Treaty, it is not that the Crown had a right to licence a traditional user. In protecting the Maori interest, its duty was rather to acquire or negotiate for any major public user that might impinge upon it. In the circumstances of Muriwhenua, where the whole sea was used, and having regard to its solemn undertakings, the Crown ought not to have permitted a public commercial user at all, without negotiating for some greater right

of public entry. It was not therefore that the Crown had merely to consult, in case of Muriwhenua; the Crown had rather to negotiate for a right.

A partnership in development may have resulted, but that is to apply concepts in vogue today that may not have been thought of at the time. But one concept more generally recognised now, does appear to have been understood in Britain as early as 1840 that it is the fundamental right of aboriginal people, following the settlement of their country, to retain what they wish of their properties and industries important to them, to be encouraged to develop them as they should desire, and not to be dispossessed or restricted in the full enjoyment of them without a beneficial agreement. That was the underlying concept in our view.

As we have said, the principle was that despite settlement, Maori would not be relieved of their important properties without an agreement; and for their own protection there was a duty to ensure that they retained sufficient for their subsistence and economic well being.

### **11.3.7 Summary of findings on the Treaty**

We summarise our findings thus far on the meaning and application of the Treaty.

- (a) Maori fisheries were protected in the Treaty, in the English text by express reference, in the Maori as part of those things important to them (see 9.3.2).
- (b) ‘Their fisheries’ in the English text means their business or activity in fishing and includes the places of fishing, the methods used, and the right to fish (see 11.3.2). The Maori text means the same. It is the full authority over all those things important to them (te tino rangatiratanga o o ratou taonga katoa).
  - (i) They are not determined by reference to the fisheries of England of which Maori were unaware and that do not describe the fisheries of the Maori (see 10.3.1 and 11.3.2).
  - (ii) They are not determined by presumptions of law on the ownership of foreshores or the beds of rivers, lakes or seas where those presumptions are not apparent in the Treaty (see 10.3.1).
  - (iii) They are not affected by the current definition of fisheries according to species (see 11.3.2).
  - (iv) They are not determined by reference to the legal doctrine of aboriginal title but by the doctrine of the Treaty (see 11.3.5).
  - (v) They are not diminished by any rule of international law as to the extent of territorial seas at 1840 (see 11.3.5).
  - (vi) They are not limited to foreshores or site specific grounds (see 10.3.1, 11.3.2 and 11.3.3).
  - (vii) ‘Taonga’ includes the places where they fished and is not limited to those places to which they regularly resorted for fishing (see 10.2.2, 10.2.3 and 11.3.2).
  - (viii) ‘Their fisheries’ likewise includes the places where they fished and is not limited to those places to which they regularly resorted for fishing (see 11.3.2).
  - (ix) ‘Their fisheries’ are not restricted by the association of those words with ‘properties’, in the English text. In the context, properties may refer to a wide area. More importantly it relates to the business they had in fishing

(see 11.3.3). In the Maori text, taonga is not restricted in its meaning either. It too may relate to a wide area and includes the produce of fishing (see 10.3.2 and 10.3.3).

(c) Nothing in the Treaty prevents the alienation of 'their fisheries' or 'taonga', and fishing rights, or any arrangement being made with the Crown (see 11.3.4), other than that they should retain sufficient of their fisheries for their own purpose (see 11.3.6).

(d) 'Their fisheries' and fishing interests could be abandoned, waived or given away. In Muriwhenua, they have not been abandoned, waived or given away (see 11.3.4). The value they place upon their fisheries remains the same they are still their 'taonga'.

(e) Land sales between 1840 and 1865 may imply a waiver of exclusive fishing rights in respect of the foreshore and some inland water courses, (see 11.4.4) but this does not affect the Maori Treaty fishing interest as defined.

(f) The guarantee of 'their fisheries' in the English text is of the 'full, exclusive and undisturbed possession' of them. Those words have their plain and ordinary meaning (see 11.3.1 and 11.3.5).

(g) The guarantee in the English text is consonant with the assurance in the Maori text of te tino rangatiratanga o o ratou taonga katoa (see 11.3.1).

(h) The guarantee should not be construed to diminish the honour of the Crown and the Crown's anxiety to protect Maori interests (11.3.5 and 11.3.6). Nor should it be read to diminish the honour of Maori and the Maori anxiety to forge an alliance with the Crown.

(i) The protection guaranteed applies to the fullest extent from time to time practicable (see 11.3.5).

(j) The duty to protect is an active duty and not merely passive. Accordingly,

(i) The Crown's protection is not limited today to a 3 mile coastal band if in fact the Crown's sovereignty was once so restricted to 3 miles (see 11.3.5).

(ii) To the extent that the Crown's territorial sea may have been so limited, it was still bound to give the protection that it could beyond that area (see 11.3.5).

(iii) Legal presumptions on the ownership of foreshores or the beds of rivers, lakes and seas cannot diminish the Treaty guarantee or render 'exclusive' to mean 'non exclusive' (see 10.3.1).

(iv) Any legal presumptions inherent in the doctrine of aboriginal title that may diminish the Treaty guarantee, cannot reduce it or render 'exclusive' to mean 'non exclusive' (see 11.3.5).

(v) The classification of fishing rights as profits a prendre, usufructs, encumbrances or the like can likewise not diminish the Treaty's clear words (see 11.3.2).

(vi) The guarantee is greater than a right to use or a shared right of access (see 11.3.2).

(vii) The fact that a fishery may mean either a fishery according to a species or a fishing place or zone cannot reduce the guarantee. The guarantee includes both the reservation of a right to fish and a protection of the place of fishing (see 11.3.2).



- (viii) The guarantee cannot be diminished if Maori fishing rights have in fact been subsumed into the current fishing regime without a willing consent (see 11.3.2).
- (k) The duty to protect is an active duty. It requires more than the recognition of a right. The Crown must take all necessary steps to assist Maori in their fishing to enable them to exercise that right.
- (l) The guarantee is not reduced by any current measure of inconvenience (see 11.3.5).
  - (i) The greater convenience of the time, was to uphold the honour of the Crown in assuring that the settlement of New Zealand would be founded on what was right and just that Maori would not be relieved of their just rights and properties without consent (see 11.3.5 and 11.3.6).
  - (ii) Though it may have been inconvenient for the extension of orderly settlement that Maori might not give of their lands, estates, forests or fisheries, the principle of the Treaty was that Maori would not be relieved of those properties that they might wish to keep (see 11.3.6).
  - (iii) Though it may have been inconvenient were Maori to retain the whole of their fisheries, Maori were able to sell, lease, licence or abandon the whole or any part of their interest in their fisheries, and the Crown was able to negotiate arrangements with them (see 11.3.4 and 11.3.6).
  - (iv) Though it may have been either convenient or inconvenient for the Crown had Maori disposed of the whole of their properties, it was a principle of the Treaty that the Crown would ensure that Maori retained sufficient for their needs; that despite settlement Maori would survive and because of it they would also progress (see 10.5 and 11.3.6).
- (m) An objective of the Treaty in relation to fishing was that nothing would impair the tribal interest in maintaining personal livelihoods, communities, a way of life and full economic opportunities; but that principle is subservient to the next (see 11.3.6).
- (n) The Treaty guaranteed to Maori the full, exclusive and undisturbed possession of their fisheries for so long as they wished to keep them. 'Their fisheries' means their business and activity in fishing, including the places where they fished and their property right in fishing.
  - (i) As a property right it was not limited to the business as it was or the places that existed but had every facility to expand.
  - (ii) It was not intended to exclude non-Maori from fishing. The expectation was that non-Maori fishing would not unduly impinge upon Maori fishing interests without a prior arrangement or agreement, or unless those interests were clearly waived.
  - (iii) The Treaty envisaged that agreements would be sought. In the Muriwhenua circumstance, public commercial fishing should not have been permitted without a prior agreement (see 11.3.6).
- (o) The principle was that despite settlement, Maori would not be relieved of their important properties without an agreement; and for their own protection there was a duty to ensure that they retained sufficient for their subsistence and economic well being (see 11.3.6).
- (p) It is the fundamental right of all aboriginal people, following the settlement of their country to retain what they wish of their properties and industries, to be encouraged to

develop them as they should desire, and not to be dispossessed or restricted in the full enjoyment of them without a beneficial agreement. That is the underlying concept (see 11.3.6).

It is against the above principle that this claim must now be assessed.

## **11.4 ON POST-TREATY DEVELOPMENTS**

### **11.4.1 1840–1870**

(a) For at least 20 years after the Treaty, Maori continued to fish in their customary manner and places, without regulation, restraint or the slightest shadow of impediment, save for those restrictions that came themselves from Maori law.

(b) Development and trade in Western terms were grafted onto traditional practices. Maori caught most of the fish for the domestic market including oysters.

(c) The fishing structure was still basically traditional. Maori acquired boats of western style but capture and retail still involved tribal or group effort. Resource use was still tribally arranged.

(d) Although the supply of fish to domestic markets was an important item of their trade, marked population losses, the attraction of land development, and the warfare of the 1840s and 1860s limited the extension of their commercial fishing operations, though fishing remained important for subsistence.

(e) The tribes of Muriwhenua gained few of the benefits of trade, including trade in fish, that were available to those tribes closer to the main Pakeha settlements.;

(f) We have found no evidence that Maori endeavoured to restrict non-Maori fishing before 1879. It was only after first fish laws had been made restricting Maori, and non-Maori commercial fishing expanded, that complaints were made.

(g) Before 1870 non-Maori commercial fishing was mainly rudimentary and posed no competition. Regulation was still unnecessary. Most non-Maori fishing was for personal consumption, save for the commercialisation of the northern oysters by non-Maori in the 1860s.

(h) Fish remained plentiful.

### **11.4.2 1870–1900**

(a) Maori economic welfare declined markedly after 1870. The ravages of war, land loss, population decline and hostility to Maori trading were by far the main causes.

(b) These causes and more especially the loss of large areas of land adjoining their fisheries, also affected their fishing which, with some notable exceptions (see (e) below) declined with a discontinuance of fishing at several of their usual and accustomed fishing places.

(c) The decline in tribal authority associated with the introduction of new land title systems, and the shift to wage working and personal enterprise, contributed to a reduction of tribal fishing undertakings.

(d) Muriwhenua was differently affected. The tribes suffered from land loss but, in addition, infertile soils hindered productivity of the land that was retained, and the lack of alternative work meant that they remained dependent on fishing. Gum digging provided virtually the only alternative to subsistence and could be fitted in with the planting and fishing seasons.

(e) The Muriwhenua tribes gained some commercial fishing opportunities by supplying grey mullet to local canneries from the 1870s, but their fishing was restricted from 1896 when fishing regulations imposed restrictions on their gear.

(f) Parliamentary laws seriously impacted on all Maori fishing. A series of attenuating laws followed almost immediately upon the attainment of a Pakeha majority, the outbreak of wars and the transfer of British control of Maori affairs. The first of these laws (in 1862) related to land. It ended the communal basis of land ownership and destroyed traditional tribal controls. The fish laws related first to oysters (from 1866) when the Maori sale of oysters was disallowed, to fresh-water fisheries (from 1867), and finally to all fisheries (from 1877).

(g) The presumptions fixed in those first laws permeate all subsequent legislation. They were

- (i) that Maori interests should be accommodated by reserving particular fishing grounds for Maori
- (ii) that Maori fishing has no commercial component and grounds reserved must be for personal needs
- (iii) that Maori participation in the commercial fishing industry should be on no other terms than those provided for all citizens
- (iv) that no allowances should be made for Maori fishing methods, gear or rules for resource management
- (v) That the recognition of fishing should be an act of state; only Parliament or a department of state should authorise the reservation of fishing grounds; there should be no provision for the courts to recognise rights on proof of customary entitlement
- (vi) that some acknowledgement should be made of Maori fishing interests by incorporating words of a general nature in fishing laws.

(h) Maori fishing grounds were only rarely reserved. The reserves were mainly northern oyster beds set aside after they had become depleted through non-Maori commercial picking. None has been set aside in Muriwhenua.

(i) Maori complaints have been voluble from (at least) 1879 (and to the present day).

(j) The fishing industry was still in its infancy. Provisions to promote fishing settlements were made, but none to promote existing Maori villages on the coast. Loan and other incentives were provided for the industry as a whole, but none for the support of a Maori fishing industry.

#### **11.4.3 1900–1987**

(a) Maori commercial fishing this century has been characterised by individual effort, mainly in areas less affected by land loss and with substantial Maori populations, usually on a part-time basis, and often by low income farmers and agricultural workers seeking to supplement their wages or returns.

- (b) State enforcement action against Maori exercising their claimed Treaty right to fish continued to apply and to dissuade Maori from their usual fishing activities.
- (c) State laws compelled Maori dependent on fishing to operate as individuals within the state fishing regime. Restricted licensing from 1937 to 1963, for the conservation of the resource, impacted on Maori by reducing the available licences and restricting their methods and gear.
- (d) Maori recreational fishing has focused on the capture of seafoods for a variety of hui and for personal needs. This has sometimes been necessary for subsistence but it is also a matter of dietary habit and cultural preference rather than nutritional need.
- (e) In recent years Maori have been involved in fish propagation programmes with eel, mussel and oyster farming, and in box net fishing and seaweed collection, but often unsuccessfully.
- (f) The association of farming and fishing has also characterised the Muriwhenua position but with a greater dependence on fisheries for survival. Farm development schemes begun in the 1920s, were not generally successful, incomes and living conditions were well below the national average, there were few other industries to provide alternative employment, and the tribes have been seriously affected by family migrations from the area in search of work. Maori unemployment in the Far North is well above the national average.
- (g) The fishing industry was of no major significance until the end of the 19th century when with trawlers, refrigeration and improved transport the industry became established. A noticeable decline in fish fecundity followed. There was a slow growth in the industry to the 1960s with some Government assistance but controlled through licensing (from 1937).
- (h) A significant expansion in the industry followed delicensing in 1963, concessionary loans and export incentives. Overfishing in the inshore fishery was apparent in the late 1970s and some stocks became seriously threatened. Further assistance was given to exploit the offshore fishery.
- (i) Severe overfishing led to the forced retirement of a number of small time commercial fishermen in the early 1980s. Eventually it gave rise to the Quota Management System. Though there were comparatively few Maori commercial fishermen, most were small time and were removed.
- (j) It became common for the sea areas adjoining even remote traditional villages to be increasingly worked by vessels from distant places.
- (k) Maori political efforts in the first half of this century focused on attempts to prove fishing rights by claiming the ownership of lake, river and foreshore areas in a series of long court cases. Maori sought to answer prosecutions for breaches of fishing regulations by claiming that they were exempted from those regulations by the Treaty. These claims were unsuccessful.
- (l) Much effort was spent in seeking the reservation of particular fishing grounds. Laws enabling such reserves applied from 1900 to 1962. We can find no reserves ever established under those provisions. A very few reserves were gained after petitioning Parliament but apparently none from petitioning the Department of Marine.
- (m) Apart from the provisions for fishing reserves, and the occasional statutory conferral of Maori fishing rights in particular areas, Maori fishing interests were recognised in
- (i) a provision for special licences to gather seafood for hui
  - (ii) a provision in the 1930s for Maori to receive a lesser unemployment benefit due to their access to natural resources.

(n) The special provisions for fishing reserves or the capture of seafood for hui, converted substantive rights to mere privileges. It encouraged the view that allowances for Maori, generally ought not to be made.

#### **11.4.4 The Current Muriwhenua Position**

- (a) Fish continue to provide a vital component of the Muriwhenua people's diet.
- (b) It is also an important food in a symbolic sense. It is part of the cultural dietary habit.
- (c) Fish is also important in meeting Muriwhenua cultural obligations and in maintaining status when providing manaaki to guests.
- (d) Commercial fishing is important to the Muriwhenua Maori to provide individual livelihoods, at one level, and at another, to keep people on the land and communities together.
- (e) Muriwhenua people share the same economic motivation as all commercial fishermen to maximise their harvest and fishing opportunities.
- (f) Recently, Muriwhenua fishermen have had other occupations, usually as small scale farmers or as agricultural and forestry employees who fish for food and to supplement incomes.
- (g) More recently new state policies have displaced part time Muriwhenua fishermen. Very few can compete under the new quota system. There is some prospect that without major change, the traditional association of Muriwhenua people with their ancestral seas will be non-existent, and their communities will be in disrepair.
- (h) Some of the claimant tribes are involved in fish propagation programmes. They are of uncertain viability as presently structured but have potential to benefit both the people and the country.

### **11.5 FINDINGS ON JURISDICTION**

#### **11.5.1 General Overview**

As originally understood, the Treaty offered protection for Maori in the process of colonisation. In examining the subsequent conduct of the Crown we find further emphasis of that interpretation, but as time passed and authority was transferred from the Governor to a colonial legislature, the meaning of the Treaty became subtly distorted in favour of the settlers and the interests of colonisation. Sovereignty was exercised to bring Maori and their resources within the scope of colonial made laws administered by colonial bureaucrats. Quite usually those laws purported to give a better effect to the Treaty (the preamble to the Native Land Act 1862 for example) when the ostensible purpose was at best to re-arrange Maori interests to fit the colonial framework, or at worst, to provide a mechanism to prize those resources from Maori people. That applies to both land and fishing laws which, though paying lip-service to the Treaty, transferred the resources from Maori until eventually the sovereignty ceded in article one became the authority to legislate away the provisions in article the second. Accordingly, far from the claimant tribes controlling their fisheries, from 1840 they have been progressively excluded, at one level, by all manner of recreational and commercial fishermen simply honing in on the resource, usually without reference to Maori; at another, by the granting of commercial and

other licences to catch fish under laws primarily directed to maintenance of the general public interest and the promotion of a viable national industry; and finally by the denial of Treaty fishing rights in law.

There was no adherence to the broad principle that two people might exist together, but rather a gradual ousting of one by the other. Not unnaturally, Maori turned to the English text of the Treaty and the stringent rule laid down in article the second.

### 11.5.2 Specific Findings

(a) The Crown has omitted to provide any adequate protection for Maori fishing interests. As Mr Justice Cooke stated in the NZ Maori Council case (supra at p37), ‘... 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’. The omission to provide a protection for rights is as much a breach of the Treaty as a positive Act that removes them (see Manukau Report 1985:8.3).

(b) The statutory presumptions that Maori fishing interests could be accommodated within particular fishing reserves, and that they have subsistence and cultural features only, without any commercial component, was contrary to those treaty fishing interests that were ascertainable by reference to ostensible fact. As Mr Justice Richardson commented in the NZ Maori Council case (supra at p39) ‘... honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion’.

(c) The administrative failure to provide any, or any adequate Maori fishing reserves when laws enabled that to be done, was further contrary to the Treaty.

(d) On being advised of the law that Maori had no greater fishing rights than those specifically provided by statute, the Crown failed to make any adequate inquiry as to the nature of treaty fishing interests and did not provide statutes for them (*see Waipapakura v Hempton*, supra).

(e) On being advised of the law that by various means river beds and foreshores had become owned by the Crown, the Crown failed to ensure that Maori Treaty fishing interests in those areas were protected (see *In re the Ninety Mile Beach* supra and other cases at 6.2.5).

(f) Our main finding however is that Governments rarely attempted to ascertain and enforce the Crown’s Treaty responsibilities to Maori in relation to fishing, with severe prejudice to Maori in the past, to the prejudice of the Maori position today, and to the detriment of all people.

- (i) In terms of the Treaty, non-Maori commercial fishing ought not to have begun without first ascertaining the Treaty fishing interest of Maori.
- (ii) In Muriwhenua non-Maori commercial fishing ought not to have begun without a prior agreement and an arrangement to the mutual benefit of both Treaty parties. The Crown was obliged not merely to discuss but to negotiate with its Muriwhenua partner.
- (iii) In fact the Crown encouraged new fishing settlements and subsidised commercial fishing activities, but gave no special assistance to existing Maori settlements and no incentives to Maori to expand their fishing effort.
- (iv) The duty to protect is an active duty. It requires more than the recognition of a right, or the equation of a right with a privilege. The Crown must take all

necessary steps to assist Maori in their fishing and enable them to exercise that right.

- (iv) The Crown has failed to make any provision for tribal interests in promoting a fishing industry.
  - (v) Administration generally has ignored the tribal reality of Maori life, either dealing with Maori as individuals or treating Maori as Maoris, a national group. It is not a fulfillment of Treaty obligations that during the licensing regimes, Maori like anyone else, were able to obtain a commercial fishing permit.
  - (vi) In enacting laws no adequate regard was had to the methods, gear, biological knowledge and resource maintenance rules of Maori; state enforcement action has deleteriously affected Maori fishing without an adequate inquiry into the efficacy of Maori practices; and there has been no effective attempt to enable Maori to exercise some controls to uphold their own laws in their own places or to supervise their own people.
  - (vii) No effective arrangements were made for a practical sharing of responsibilities between the Treaty parties for the exploitation, conservation and control of fish resources.
  - (viii) In enacting laws and policies no adequate regard has been had to the dependence of Maori communities on the sea for livelihoods and the maintenance of local communities.
- (g) The policies of the 1960s to encourage expansion of fishing efforts were inconsistent with the Treaty without prior inquiry into Maori interests and arrangements to protect those interests.
- (h) The exclusion of Maori from the commercial fishery was also inconsistent with the Treaty.
- (i) The prejudice to the claimant Maori has been and still is (though this list is not exhaustive)
- (i) that they have not now a viable commercial fishing industry;
  - (ii) that they have lost the opportunity they may have had to develop the offshore fishery.
  - (iii) that they have lost the capital and experience in fishing they might otherwise have had or may have developed.
  - (iv) that individuals have been excluded from the commercial fishing industry;
  - (v) that they are unemployed where they could be gainfully employed;
  - (vi) that the viability of their traditional communities has been affected;
  - (vii) that they have been restricted in their fishing even for subsistence and cultural purposes;
  - (viii) that the fisheries on which they have relied have been and continue to be subjected to commercial fishing by persons of other than their tribes;
  - (ix) that they have lost control of the exploitation, conservation and management of their fish resources;
  - (x) they have lost the facility to control the access to their resources by even their own tribal members;

(xi) they have been without the benefit of sharing responsibility with the Crown in the conservation and management of fish resources.

(xii) that it has been made to appear impractical today to give effect to their 'just rights' as provided for in the Treaty.

(j) The detriment to all people is that there is now a difficulty in maintaining the 'just rights' of one important sector of the community without prejudicing another; that both Maori and non-Maori have been driven to more extreme positions to the prejudice of reaching arrangements to the mutual benefit of both; and that an opportunity was lost for a partnership in development, a sharing of the fish resource in exchange for capital and technology.

(k) It is not contrary to the Treaty that the Crown has sought to provide laws directed to resource maintenance but it is inconsistent with the Treaty that those laws were made without adequate regard to the Crown's Treaty undertakings.

(l) It is further contrary to the Treaty that state action enabled and encouraged overfishing without adequate consideration for the impact that that has had on the Maori Treaty party. Muriwhenua Maori are severely prejudiced by the depletion of the inshore fishery.

(m) Our finding that Muriwhenua Maori have been prejudiced by the failure of the Crown to honour its Treaty obligations, does not imply that the Crown's failure is the sole cause of the decline in their fishing activity. A contributing cause was the inevitable acculturation as Western standards in food, clothing, housing, and employment came to predominate and as Maori themselves pursued new opportunities in land development.

(n) Nonetheless, the impact of acculturation did not diminish but in certain respects increased the Crown's responsibility to protect Maori Treaty interests.

(i) Massive immigration increased the responsibility of the Crown to support Maori structures and protect their resources for so long as the retention of them was desired.

(ii) Excessive land acquisition created an even greater dependence on the sea, at least in Muriwhenua.

(iii) A lack of alternative job opportunities was further relevant in the Muriwhenua circumstance.

(o) Acculturation was in any event enforced. Tribal authority was simply subsumed. Amalgamation was a stated policy applying in nearly all areas of endeavour and from the earliest of times. We find also that amalgamation was not freely and willingly accepted. It was consistently opposed. The eventual urbanisation was not so much the result of choice as a consequence of the loss of land and work opportunities.

(p) The failure to recognise the tribal right described, calls for a restoration of the tribal position. While not wishing to consider remedies at this stage, we have mooted that a comprehensive analysis of the situation of the Muriwhenua tribes is required to promote their re-establishment through their land and sea resources and through the establishment of a sound tribal economy.

(q) Land drainage, land development and waste discharges have also limited the Maori access to the local sea resource.

(r) The Quota Management System, as currently applied, is in fundamental conflict with the Treaty's principles and terms, apportioning to non-Maori the full, exclusive and undisturbed possession of the property in fishing that to Maori was guaranteed; but the



Quota Management System need not be in conflict with the Treaty, and may be beneficial to both parties, if an agreement or arrangement can be reached.

(s) Insofar as the Quota Management System is directed to the conservation of the fish resource it is consistent with the Treaty; conservation measures are in the interests of both parties.

(t) The Quota Management System places severe restrictions on Maori seeking to enter the industry; it makes no allowance for the ancient Muriwhenua practice of working land and seas together, fishing if need be on a part-time basis and it leads to a concentration of processing plants away from the local district. It is directed to the industry with insufficient regard for Maori communities and is therefore contrary to the Maori interest that was guaranteed.

(u) It is contrary to the Treaty that the Quota Management System makes no provision for tribes as distinct from their individual members.

(v) The equation of the Maori interest with non-commercial practices is contrary to the Treaty.

(w) The lack of an adequate definition of the Maori interest is inconsistent with the duty of the Crown actively to protect Maori treaty fishing interests (section 28C and section 88 (2)).

(x) The administrative action of the Crown in assessing total quota was inconsistent with the Treaty in that on the evidence, there was not sufficient information or inquiry into the Maori interest to enable its prior quantification. The programme to undertake that inquiry was barely started when quota were first issued, and is still far from complete.

(y) In general terms the Quota Management System

- (i) involves the grant of fishing rights by the Crown, to the Crown's financial advantage, without prior examination of its Treaty obligations to Maori;
- (ii) involves a Crown grant of privileged rights of commercial fishing, without providing defined rights for the Crown's Maori partner;
- (iii) creates a property right in fisheries without prior clearance of the undertaking to Maori that they may retain those properties they wish to keep;
- (iv) presumes that the Crown's sovereignty of the seas is unencumbered by any obligation to fix customary, aboriginal or Treaty fishing rights through some independent enquiry procedure.

(z) The Fishing Industry Board Act 1963 provides for the expenditure of large sums of public monies on the promotion of a fishing industry. It is inconsistent with the Treaty that large sums are not expended on the protection of the Maori fishing interest, or now, on the restoration of Maori to a proper place within the fishing industry (see 8.3.2).

(za) The arrangements for Fishery Management Plans and Marine Reserves do not presently contain sufficient provisions for consultation with affected tribal groups, and as with other proposals for fishing laws and policies there is a need to improve upon the arrangements for tribal consultation (see 8.3.1, 8.3.3 and 8.4).

(zb) The Maori Fishery Programme of the Ministry of Agriculture and Fisheries is inadequately resourced for its essential task (see 8.2.7 and 8.3.5).

The Crown has failed to properly consider and provide for Treaty fishing interests in a range of fishing policies and a variety of fishing laws including the Oyster Fisheries Act of 1866, the Fish Protection Act 1877, the Sea Fisheries Act 1894, The Fisheries Act 1908,

the Fishing Industry Promotion Act 1919 the Fishing Industry Board Act 1963, the Fisheries Act 1983 and now the Fisheries Amendment Act 1986. Some of those Acts contained provisions diametrically opposed to the principles of the Treaty, beginning with the Oyster Fisheries Act 1866, which, with its amendments, prohibited Maori from continuing their lucrative trade in the sale of oysters to Auckland and under which Maori oyster beds were leased to non-Maori commercial interests, and ending with the Quota Management System provided for in 1986. Specific statutes or regulations that directly impinged upon the Treaty fishing interest of the Muriwhenua Maori began with regulations of 1896 that outlawed their gear and restricted their continued participation in the grey mullet industry. Administrative policies contrary to the principles of the Treaty have included the failure to provide fishing reserves for the Muriwhenua people when reserves were provided for in law.

These Acts, policies and omissions have been and are inconsistent with the principles of the Treaty.

The failure to provide adequately for their Treaty fishing interests has prejudicially affected the claimant tribes in a number of ways. It has involved them in protracted and expensive proceedings and negotiations involving the bureaucracy, Parliament and the courts. It has also cost them a proper access to their fishing resource. It has meant the loss of income, jobs, trade, and opportunities to develop their own industry; and it has impacted severely on many of their important communities.

The extent of loss may be gauged by reference to the highly developed fishing technology that they once maintained, the labour they devoted to it and the fish trade that they had; and by comparing the extent of their involvement in the fishing industry today. The losses began 122 years ago with the exclusion of tribal oystereries from commercial undertakings. In later years it was extended to the removal of individual Maori fishermen from the modern fishing industry, while others within the industry were to fish out the waters that the claimant tribes had for centuries apportioned and maintained.

The Muriwhenua fishing claim we find, is well founded.

## **11.6 ON FURTHER ISSUES**

The following issues arising from our inquiry, are relevant to any negotiations for a new arrangement, and we have made certain findings upon them.

### **11.6.1 Tribes, Individuals and Regulations**

#### ***(a) Tribal rules***

- (i) Fisheries at 1840 were tribally owned. Individual use rights were subject to and flowed from the tribal oversight.
- (ii) The Maori text guaranteed a tribal control of Maori matters. That includes the right to regulate the access of tribal members to tribal resources. (Counsel for the Crown accepted there was a duty on the Crown to support the survival of Maori tribal identity and culture – see doc H6 para 6.9–6.10.)

- (iii) The tribal oversight was customarily unstructured. Long held family rights were recognised. Rules were simply known. Individual use rights were based on kinship and marriage and not merely on boundaries.
- (iv) The past Maori failure to make bylaws for fishing grounds, under enabling laws from 1900, was not due to tribal disinterest, for the Governor reserved no fishing grounds.
- (v) The right of regulation has become a duty in our time, to protect the resource and to bring a certainty to the law. This is now required through population and other changes. It is also contrary to the public interest when Maori purporting to exercise customary fishing rights cannot be made bound to their own tribal rules.
- (vi) It is the right of tribes to determine their own membership, to licence their own members and to deny tribal fishing rights to those of its members who do not observe its rules.
- (vii) It is the right of tribes to permit persons outside the tribal group to enjoy any part of the tribal fishing resource, whether generally or for any particular purpose or occasion.
- (viii) As a matter of custom, Maori individuals have no greater fishing rights than members of the general public when fishing outside their tribal areas, except to the extent that they have an authority from the local tribe and abide its rules.
- (ix) Neither custom nor the Treaty confers on any Maori the right to destroy the resource.
- (x) It is consistent with the Treaty that the Crown and the tribes should consult and assist one another in devising arrangements for a tribal control of its treaty fishing interests, that they should aid one another in enforcing them and that the tribes should furnish the Crown with all proper returns.

***(b) National Regulation***

- (i) The reservation of particular fishing areas for 'all Maori', is inconsistent with the Treaty, for all such areas were apportioned to tribes.
- (ii) There is nothing in terms of custom or the Treaty to restrict the issuing of fishing quota or licences to tribes.
- (iii) There is nothing in terms of custom or the Treaty to restrict the tribes from apportioning any tribal quota or licences to its members, or to the sale, leasing, licencing or otherwise of such quota or licences, within or outside the tribal group.
- (iv) The provision of concessionary licences or quota to individual Maori by the Crown, would not fulfil treaty obligations where the Crown, not the tribe, determines the individuals to be favoured. The position would be otherwise if the tribes agreed that the Crown could undertake that role.
- (v) The provision of quota to tribes ought not to prevent individual Maori from electing to stand outside the tribal system.
- (vi) In terms of the Treaty, Maori individuals have the same rights as all persons, and thus the same rights to seek fishing licences or quota or otherwise to be involved in the commercial fishing industry as individuals, where they

elect to stand outside the tribe. But it does not follow that because that right is and has long been open to Maori, that tribal fishing interests have been irrevocably subsumed by the current commercial fishing regime, or that an election has been made, when the tribal fishing interest has not been provided for (see 10.5 and the principle of options).

- (vii) In assessing tribal needs, it is appropriate to consider the number of Maori who have alternative employment, or who already hold fish quota for example, and who would opt to remain with the general regime.
- (viii) While it is relevant to assessing tribal needs that tribal members may be gainfully employed in non-tribal pursuits, whether within or outside of the tribal area, the tribal interest is not limited to gaining employment for its individual members. The maintenance of the tribal base, must be an important objective. The exploitation of the fish resource in Maori terms is not only for individual profit but is also for overall tribal gain.

### ***(c) State Control***

- (i) Customary fishing rights are constrained by the customary requirement not to destroy the resource.
- (ii) The cession of sovereignty or kawanatanga gives power to the Crown to legislate for all matters relating to 'peace and good order'; and that includes the right to make laws for conservation control. Resource protection is in the interests of all persons. Those laws may need to apply to all persons alike. The right so given however is not an authority to disregard or diminish the principles in article the second, or the authority of the tribes to exercise a control. Sovereignty is limited by the rights reserved in article the second (see NZ Maori Council submissions, doc H18, 3.1).
- (iii) Treaty fishing interests should not be qualified except to the extent necessary to conserve the resource. Nothing in the Treaty restricts the free exercise of fishing rights.
- (iv) The Crown has no right to determine for the tribes the wisest or best use of their fisheries for so long as the tribes regulate and enforce their own standards.
- (v) Unless absolutely necessary, the Crown should not restrict the treaty right fishing of the tribes to counter over-fishing not caused by them even if it is necessary to restrict the general public fishing, commercial or otherwise.

### **11.6.2 Tribal Fishing Reserves**

- (a) The Maori Treaty fishing interest is not restricted to specific fishing areas, but on any new arrangement there remains an important need to consider tribal fishing reserves.
- (b) Maori lands today are pepper potted widely but with significant concentrations in some places, and some important villages survive.
- (c) In such places the reservation of adjoining sea areas remains important. Few things impact so markedly on local Maori than the regular and insensitive exploitation of fisheries

that the tribes have nurtured for centuries, but are now powerless to control. This has been obvious in each of the Te Atiawa, Manukau, Kaituna (and now) the Muriwhenua claims.

(d) In other districts, some fishing areas have and continue to be relied upon by local tribes though Maori are a small minority of the local residents. Few things would impact so markedly on local non-Maori than the reservation of areas exclusively for Maori that are too wide.

(e) The variables are numerous and if the Treaty is not to be the cause of the very conflict that it sought to avoid, many special arrangements may need to be settled. Some tribal fishing reserves may need to be open to all people, others to all local residents. Some may warrant full Maori control, others a joint management. Commercial uses may be appropriate in some cases but not others.

(f) The Te Atiawa and Manukau Reports held that in respect of some important areas, whether esteemed for fishing or as breeding grounds, the tribes should retain a full authority with rights to use and control them in accordance with customary preferences and any necessary modern extensions, and to allow, regulate or restrict any use by tribal or non-tribal persons. It was held that the Crown should recognise and uphold the authority of the tribes and protect the grounds from despoliation.

(g) In Muriwhenua, we consider, large areas should be reserved under tribal control. Whether any such areas are commercially used must be a matter for the tribes concerned though special reasons may exist, or may later appear, to warrant state impositions.

(h) Tribal fishing reserves, their nature, size and number, should to the extent practicable be settled between the Crown and the tribes with ultimate recourse to an independent arbiter, like the Maori Land Court which originally dealt with such matters. (This Tribunal would likely decline to hear further claims to fishing reserves in the event that an alternative procedure was arranged.)

(i) The creation of such reserves must not depend on administrative pleasure.

### **11.6.3 Fishing Bands**

(a) Treaty fishing interests are not limited by reference to fishing bands. The extent of the original Muriwhenua fisheries is illustrated by reference to various bands describing intensive, seasonal and occasional use areas but any future arrangement must go beyond the original user in assessing current needs having regard to changed circumstances, and in particular in this case, the depletion of the inshore fishery.

(b) The evidence of original user does however emphasise that Maori have a special interest in the inshore fishery where fish may be caught with less effort or expenditure and where the associated fish species provide a customary diet.

(c) In addition, to limit tribes to the areas once fished by them is to restrict them to their 1840 capabilities. To do so is inconsistent with the Treaty. Both parties to the Treaty sought progress through change. Neither side bargained for the status quo. Maori had no reason to accept settlement if it offered no prospects for their own improvement.

### **11.6.4 Onus of Proof**

(a) It could be that the Muriwhenua fishing activities of old extended beyond that which survives in the record of oral tradition. The question was not much in issue in this claim because of the extensive evidence of fishing grounds that the elders could provide.

(b) But, we do not accept the Fishing Industry's presumption, that Maori must affirmatively prove the extent of their user, with that unproven passing to the Crown. Given the general evidence of expansive fishing activities, there would appear to be a stage at which the onus of proof shifts to the Crown, to establish those parts that were not used. At least sea-faring capabilities are manifest in the fact of the Maori arrival (and tradition suggests there was more than one return voyage).

(c) It may be however that the survival of the store of knowledge in Muriwhenua is mainly due to their remoteness. It does not follow that other tribes without the same information, did not also fish widely in the past.

(d) Save for a brief period in the Native Land Court, there were no provisions comparable with those of England enabling Maori to prove fishing entitlements in the courts, at a time when the knowledge of fishing grounds would have been fresh in people's minds. Some account must be taken of the lapse in years. If no allowance was made, and as fishing rights were denied, it would give to the Crown the advantage of its wrong.

(e) The duty was on the Crown to make an honest enquiry into the nature and extent of Maori fishing interests, in administering the fisheries. It has not done so. Archival records have not been maintained and the evidence has not been kept. Again, persons may not take advantage of their own wrongs (Broom's *Legal Maxims* 10th Ed 191; and see *Armory v Delamirie* (1722) 1 Stra. 505, a breach of duty to maintain evidence will not allow exoneration).

(f) A full programme of inquiry into Maori fisheries is now required, including the collation of such accounts in oral tradition as still survive.

(g) Doubts resulting from the loss of evidence should be construed against the Crown.

#### **11.6.5 New Technology and the Right to Development**

(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 see doc H6 para 6.8).

(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.

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. This includes the full development of their resources. Professor Danilo Turk, a leading drafter of the declaration considered

In other words, states should adopt special measures in favour of groups in order to create conditions favourable for their development. If a group claims that the realisation of its right to development requires a certain type of autonomy, such a claim should be considered legitimate.

The International Symposium of Experts on Rights of Peoples and Solidarity Rights (UNESCO, San Marino, 1982) considered

The right to development is one of the most fundamental rights to which peoples are entitled, for its realisation is the source of respect for most of the fundamental rights and freedoms of peoples (UNESCO SS-82/WS/61 Art 38).

It was added

Each people has the right to determine its own development by drawing on the fundamental values of its cultural traditions and on those aspirations which it considers to be its own. This right to authentic development is, in fact, three-pronged: economic, social and cultural (Art 40).

#### **11.6.6 Commercial Fishing**

- (a) There was a commercial component to original Maori fisheries.
- (b) There was a Maori trade on Western lines before 1840, and there is compelling evidence that Maori eagerly pursued new forms of trade.
- (c) But the right to commercial development of resources does not depend upon proof of a pre-Treaty commercial expertise. A treaty that denied a development right to Maori would not have been signed.
- (d) It is the inherent right of all people to develop and progress in all areas. No one has seriously suggested that Maori could not develop their lands on Western lines and sell the produce of their industry.
- (e) The Treaty envisaged that Maori would gain greater development opportunities from settlement and access to new markets.
- (f) There was no rule that Maori had to divest themselves of their properties in order to progress (though that opinion was once held). The Treaty envisaged rather that those things essential to their needs would be retained.
- (g) The guarantee of the undisturbed possession of fisheries for so long as Maori wish to retain them in their possession does not prevent the alienation of fishing rights by lease, licence or sale.
- (h) The Treaty imposed not the slightest shadow of impediment on the use and development of those resources that Maori chose to keep.
- (i) The Treaty imposed a duty on the Crown to ensure that each tribe retained sufficient resources from which they could develop.
- (j) The Crown's duty to protect requires that it take all necessary steps to assist Maori in their fishing and to develop their fisheries.

### **11.6.7 Offshore Fisheries**

(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 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.

(f) If Maori did not fish the offshore fishery, that was for no other reason than that they had no need to do so with an abundant fish life inshore. The inshore fishery has now been substantially depleted, and by non-Maori. To recover their losses, Maori have a further interest in the offshore fishery. Some 80–85 per cent of current fish income now comes from there (see 7.1 (b)).

(g) Maori have a further interest in the offshore fishery. Fish are mobile, species migrate, none are noted for observing inshore or offshore limits and deepwater fishing affects the passage of fish inshore. Some evidence suggests trawlers are not noted for observing man made limits either. The restriction of Maori to original use zones would be more reasonable were it feasible to fence the seas.

(h) It is also impractical to devise a system to assess the number of fish harvested in deep waters while en route inshore or to divine whether a particular fish had a future intention of moving there.

(i) The right to development is recognised at domestic and international law (see 11.6.5 (e)). Active protection of Maori fishing interests may in certain circumstances require assistance in promoting those interests (see 11.6.6 (j)). It is speculative but nonetheless legitimate to consider, that had the Treaty been honoured, and had assistance been given to Maori as it was to the Fishing Industry as a whole, there would now be a healthy Maori fishing industry that may have been at the forefront of offshore discoveries.

### **11.6.8 New Species**

(a) 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.

(b) At 1840, Muriwhenua Maori did not exploit orange roughy, but there was then no need to seek those species more difficult to catch.

(c) At 1840, non-Maori knew not of orange roughy either, but there was never a suggestion that non-Maori were restricted to catching fish that Maori did not exploit.



(d) The commercial potential of orange roughy was not apparent until the 1980s. It acquired a special value through the over-exploitation of other species, and it kept the industry afloat.

(e) Maori have a special interest in orange roughy. It replaces the lost stocks of their traditional user, through non-Maori overfishing.

(f) If the deepwater species are deemed to be 'non-Maori' fish, it would follow that the others belong to Maori, for Maori appear to have exploited some 120 species, and probably all but the deepwater varieties.

#### **11.6.9 Enforced Change**

(a) The tribal interest in the Muriwhenua seas is not to be determined by the current extent of user, when the level of use has itself been affected by enforced change.

(b) While the alternative lifestyles and other advantages enjoyed by tribal members are relevant in assessing modern tribal needs, the test of tribal interest is not the numbers left 'at home' unless the results of enforced change are discounted.

(c) It is relevant to consider however, the number without adequate livelihoods, whether at home or living elsewhere, or those who would seek work at home, if work was available.

(d) The restoration of the tribal base through the maintenance of viable villages, is also relevant. They provide the foundations for the tribal authority that the Treaty guaranteed.

(e) Technological skills possessed by the modern industry do not indicate that Maori too might not have acquired them. The initial expansive thrusts of Maori into new forms of endeavour, tell of the people's ability to progress, and their early involvement in shipbuilding and marketing presaged of other results had war not intervened. An alternative scenario would describe a fishing industry dominated by tribes, with modern equipment a natural evolution of their industry. It may also have compelled the Crown to negotiate for fishing rights or to seek joint ventures.

#### **11.6.10 Tradition**

(a) Tradition applies more to beliefs than to methods. Maori believed that resources must be protected for future generations. It was also a traditional opinion that the use rights of others must be respected.

(b) It is not traditional fishing when Maori deplete the resource.

(c) It is not traditional fishing when Maori fish outside their tribal area without consent.

(d) But Maori tradition does not prevent Maori from developing either their personal potential, or resources, for traditionally Maori were developers. In terms of the equipment at their disposal they substantially modified the natural environment. There was considerable adaptation and development when Maori first arrived here (see 3.1) and Maori adapted with alacrity to new development forms when Europeans first came (see 4.2). It is the inherent right of all people to develop their potential.

(e) There is nothing in tradition to constrain the use of new gear save that directed to resource maintenance. There is nothing in tradition to say that those practices handed down must be passed on without improvement.

(f) An opinion that Maori cannot have it both ways, the advantages of new technologies as well as privileges in traditional fishing, does not come from the Treaty for that is precisely

what Maori bargained for. In return for ceding sovereignty and accepting a British settlement, they gained full rights of citizenship in article the third, and the guarantee of their own authority and resources in the second.

(g) Maori believed that resources must be protected for future generations. That belief does not prevent commercial exploitation but underlines the need for balance and caution. Maori were major developers of resources in Western terms, even before 1840, and at a time when custom reigned (see 10.3.2 (j)).

(h) There is a tension in modern Maori society between conservation and development. Its existence does not justify the refusal of commercial development rights to Maori, until all Maori are agreed. The same tension exists in society as a whole. The tension is necessary and beneficial for all people (see 10.3.2 (j)).

(i) Maori fishing interests are reserved rights not privileges. The Treaty is not founded on the propagation of privilege but on a recognition of just rights.

In all we do not think there is any profit to be had in debate over who owns what band, who owns which fish, who can use what gear, who may sell and who may simply subsist, and all because an opinion survives that Maori should be locked into some customary past year. That opinion does not flow from the Treaty. As Mr Justice Somers said, 'At its making all lay in the future'.

## **12. CONCLUSIONS**

### **12.1 TREATY FISHING INTERESTS**

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.

### **12.2 NEGOTIATIONS**

12.2.1 It is consistent with the Treaty that agreements or arrangements on fishing should be sought. In the light of changed circumstances, new agreements or arrangements are now essential. It is in the interests of both sides that they should be made.

12.2.2 In Muriwhenua, the Crown must bargain for any public right to the commercial exploitation of the inshore fishery. In terms of the Treaty the Crown's only interest in that fishery at present, is the full protection and promotion of tribal fishing activities.

12.2.3 The Quota Management System, as currently applied, is in fundamental conflict with the Treaty's principles and terms, apportioning to non-Maori the full, exclusive and undisturbed possession of the property in fishing that to Maori was guaranteed; but the Quota Management System need not be in conflict with the Treaty, and may be beneficial to both parties, if an agreement or arrangement can be reached.

12.2.4 It is all too clear that over the years numerous blatant and serious breaches have occurred of the Treaty guarantee. The damage to the Muriwhenua tribes has included the loss of a viable industry. Very substantial relief to the claimants is required in respect of past breaches and to restore their fishing economy to what it might have been. There can be no once-and-for-all settlement in Muriwhenua without a long term programme of rehabilitation to restore their ancestral association with the seas.

12.2.5 Special account must be taken of the Muriwhenua dependence on the seas, the small land area available to them, the lack of alternative industries in the district and the need to rebuild their communities.

### **12.3 RECOMMENDATION**

12.3.1 We make this report on the first stage in our proceedings in the hope that it will assist in negotiations already well underway. We have been asked to defer the consideration of recommendations until a later stage, should it be necessary to consider them at all.

12.3.2 There is one recommendation that we nonetheless make. The unequal bargaining power of Maori has been reflected in past transactions with the Crown. These negotiations are historic, in our view, and ought not to be seen in later years as having suffered from the same impediment. We recommend, that unless it has already made provision the Crown undertakes to meet the Maori party's reasonable costs, including that necessary to obtain such legal and technical assistance as may be required.

## EPILOGUE

The Treaty is on trial. It is an historic development that Government has arranged a working party of Crown and Maori representatives to negotiate fishing terms. Such a move was contemplated by the Treaty but has not been tried before. It comes now at a time when the parties are not so much free to seek change as compelled to that course. Now, after a century of debate, extreme positions have become entrenched and there is a weight of prejudice on both sides to overcome. The question is whether the spirit of the Treaty can still be found.

It is not a question of compromise but of recognising the contribution that both Treaty parties can make to building a unified whole. The spirit of the Treaty as found in statements in the British Houses of Commons and Lords, well over a century ago, is not dead. It has simply found a new home in the universal and regional instruments of the international community.

For our part we welcome the Government's response. It is not that we would resile from undertaking a large task but rather that we do not wish to intervene, to any greater extent than need be, in the special compact that exists between Maori and the Crown; nor do we seek to take from the tribes the mana to effect their own arrangements, in accordance with the Treaty's guarantee.

Yet we would remind the Crown that in other countries, comparable moves to restore the economies of indigenous tribes through a share in the fishing resource have required many years of effort to produce even an initial plan. The working party has an unenviable task and is deserving of every support.

Dated at Wellington this 31st day of May 1988.

Chief Judge E T J Durie, Chairman

M A Bennett, Member

M E Delamere, Member

Georgina Te Heuheu, Member

M P K Sorrenson, Member

W M Wilson, Member



# APPENDIX 1 THE MURIWHENUA CLAIM

[see 1.1.1]

IN THE MATTER of the Treaty of Waitangi Act 1975

AND

IN THE MATTER of claims by the Honourable Matiu Rata on behalf of himself and of the members of the Ngati Kuri Tribe; Wiki Karena on behalf of himself and the members of the Te Aupouri Tribe; Simon Snowden on behalf of himself and of the Te Rarawa Tribe; Reverend Maori Marsden on behalf of himself and on behalf of the Ngai Takoto Tribe and by MacCully Matiu on behalf of himself and on behalf of the Ngati Kahu Tribe; all claims also being on behalf of the following groups of Maoris namely Muriwhenua Incorporation, the Aupouri Trust Board, the Ngati Kahu Trust Board, the Parengarenga BC3 Trust, the Runanga o Muriwhenua Incorporation, the Te Rarawa Tribal Executive, the Ngai Takoto Tribal Executive and Murimotu II Trust.

## STATEMENT OF CLAIMS

1. That all or any of the abovenamed claimants are likely to be prejudicially affected -

- (a) by the ordinances and Acts referred to in Appendix A
- (b) by the regulations, orders, proclamations, notices and other statutory instruments referred to in Appendix B
- (c) by the policies or practices adopted by or on behalf of the Crown or proposed to be adopted by or on behalf of the Crown recorded in Appendix C
- (d) by the acts done or omitted or proposed to be done or omitted by or on behalf of the Crown recorded in appendix D

and that such ordinances, Acts, regulations, orders, proclamations, notices, statutory instruments, policies and practices, acts and omissions were and are inconsistent with the principles of the Treaty of Waitangi and that appropriate relief by way of statutory and other amendment, change of policies and practices as proposed in such appendices and compensation or otherwise should be awarded.

2. That in the areas traditionally possessed by the claimant Tribes (being generally that area commencing at the Whangape Harbour on the West Coast and including all lands to the North including the Aupouri Peninsula, the Manawatawhi (Three Kings Islands), such areas extending on the East Coast as far south as the Mangonui River (being generally the area within the Mangonui County) together with the traditional fishing grounds within a 25 mile band off the coast of the mainland and Manawatawhi the claimants are entitled to recognition and enforcement of their customary rights and for compensation or other relief in respect of their breach.

2A. That the Claimants make claim to the whole of the lands in the regions referred to in paragraph 2.

3. That the geographic area described in paragraph 2 and the activities performed or able to be performed upon or in respect of it by way of legislation regulations and Crown policy practice acts and omissions require to be examined within the perspective of the Treaty of Waitangi, to be altered as a result of past and continuing failure to comply with it; and that

compensation be provided in respect of such failures of compliance as are not now capable of rectification.

4. That the region known as Te Rerenga Wairua be recognised as a national Taonga and be accorded due recognition in the legislation institutions and administration of New Zealand. That the Ngati Kuri and Te Aupouri Tribes be recognised as guardians of the Mauri of Te Rerenga Wairua, such recognition to be formalised by appropriate legislation and administrative procedures.

5. That exclusive title to and possession and use of the harbours, sea coasts, on-shore and off-shore fisheries (including claims to take the Rawa-Whenua and Rawa-Moana including shellfish and other marine life and other fauna) in the areas described in paragraph 2 are and should be recognised as among the Taonga of the claimants and given effect by legislation and administrative arrangements; and that since they have not been given effect in the past and to the extent that they cannot be given effect for the future that compensation be provided to the claimants.

6. That existing and past fishing legislation, policies, practices, acts and omissions on behalf of the Crown has failed to comply with and should be examined and reviewed in accordance with the principles of the Treaty, such legislation including Fisheries Act 1983, the Fisheries Amendment Act 1986, the Marine Reserves Act 1987, the Marine Pollution Act 1974, the Continental Shelf Act 1964, the Territorial Sea and Exclusive Economic Zone 1977, the Harbours Act 1950, the New Zealand Ports Authority Act 1968, the Town and Country Planning Act 1977, the Crown Grants Act 1908, the Public Works Act 1981, the Historic Places Act 1980, the Water and Soil Conservation Act 1967 and the Mining Act 1971; such policies and practices including the in shore fisheries management policies published February 1984, the Auckland Region Marine Reserves Plan published May 1985 and the Auckland Fishery Management Plan Phase I, June 1986; that the detriment caused to the claimants and their Tupuna be reviewed; that appropriate legislation and policies be adopted and that compensation or other relief for past and present breaches be provided.

6A. The Crown, in breach of principles of the Treaty of Waitangi

(a) has omitted or refused

- (i) to investigate the scope, nature and extent of Maori fisheries and fishing rights; and/or
- (ii) to record and maintain the record of the results of any such investigation; [and/or]
- (iii) to establish and maintain systems for protecting such fisheries and enforcing such rights.

(b) has embarked on and implemented legislation, policies and practices, acts and omissions calculated to interfere with such rights; and as a result the claimants are likely to be prejudiced.

7. That the creation of Independent Transferable Quotas by current policy does not provide for the claimants, contrary to the provisions of the Treaty, and that relief should be accorded the claimants as follows:

- (a) by recognising the exclusive rights of the claimants in the areas referred to in paragraph 2; and
- (b) insofar as such exclusive rights are to be interfered with or withdrawn by granting the claimants compensation, including compensation by the



grant to the claimants of quotas or other sufficient compensation in a manner conforming to maori custom and tradition

8. That the customary title and other rights of the claimants (including those of management and control) in respect of sea, harbour, coastal waters, coast line, fisheries, (on and offshore and including shellfish) lands, estates, forests, coal and other minerals in the area described in paragraph 2 together with all other rights and interests recognised by the Treaty in respect of the claimants' Tribal areas be recognised and confirmed and either restored by changes of legislation and other public documents and practices or made the subject of appropriate compensation (including compensation for past breaches) or both.

9. That in recognising the proprietary and other claims of the claimants and in determining the appropriate method of affording compensation for loss of or impairment to customary rights the concept of guardianship by the claimants be considered.

10. That the impairment to wildlife by past policies and the failure to recognise Maori interests and rights be recognised and rectified for the future by appropriate policies with compensation for past or continuing breaches.

11. That the quality of the water of the streams, lakes, harbours and coast line of the areas described in paragraph 2 be reviewed and that impairment of such quality permitted by legislation or resulting from legislation regulations policies or practice acts or omission be rectified and that compensation be provided for past losses caused by breach of the principles of the Treaty of Waitangi and for such continuing loss as cannot be avoided.

12. That in respect of the Parengarenga Harbour and other areas similarly affected land use patterns be altered so as to restore the water quality and harbour standards to their original quality.

13. That the effect on the structure of the harbour of the silica sand operations be examined and appropriate measures taken to ensure that the ecology of the harbour and its physical structure are protected. Insofar as this is not achievable compensation be provided.

14. That the legislation and practices in relation to fishing and management of coastal and harbour lands (including farming and land development practices) by parties other than the claimants be examined with a view to restoring the original extent quality and character of fish and marine life (including shellfish) and failing such achievement to provide appropriate compensation.

15. That the relationship between the Aupouri Trust Board and the Crown in relation to the taking of silica sands be reviewed and that compensation be paid for any deficiency in equitable provision for the claimants.

16. That the spiritual significance of the Ninety Mile Beach be appropriately recognised in legislation and departmental practices.

17. That the title of the claimants to the Ninety Mile Beach be recognised and given effect.

18. That the customary rights to fish and to take shellfish from the Ninety Mile Beach be recognised and given effect.

19. That the claimants' rights to control and manage the Ninety Mile Beach be recognised and given effect.

20. That compensation be paid for the damage to the claimants caused by the licensing of commercial toheroa operations and the creation of a public highway along the Ninety Mile Beach. Compensation to be paid for any shortfall in restoration and for past losses.

21. That the causes of impairment of the quality of the Ninety Mile Beach, including the afforestation of Crown land adjoining it and the passing of traffic along it be examined and

steps taken to restore the original condition of the beach, compensation to be paid for any shortfall in restoration.

22. That the depletion of fish life along the Ninety Mile Beach and elsewhere around the coast line be examined and measures taken to restore the same. Compensation to be paid for any shortfall in restoration and for past losses.

23. That the existing structure of administration, legislation and institutions including the Local Government Act, the Town and Country Planning Act, the Reserves Act, the Land Act, Water and Soil Conservation Act and the other Statutes referred to in the First Schedule be reviewed to determine the extent to which they fail to comply with the principles of the Treaty of Waitangi and that they be appropriately amended to take its principles and values into account and in order to bring Maori values into account in New Zealand life.

24. That the Historic Places Trust, Antiquities and other legislation at present in force be reviewed so as to recognise the Maori interests in Pa sites, burial sites and other features of significance (including those recorded in Regulation 38(3) of the Survey Regulations 1972 (SR 1972/264).

25. That the legislation as to Maori land tenure be reviewed and amended so as to:

- (a) give effect to Maori custom and practice
- (b) facilitate the investigation of Maori land issues

26. That the title of geographical features in the area referred to in paragraph 2 be reviewed and that any necessary amendment to the Geographic Board Act 1946 be made to facilitate such procedure.

27. That the nature of land tenure in:

- (a) Te Rerenga Wairua
- (b) the other areas of land within paragraph 2 thereof

be reviewed to give due effect to Maori values and the principles of the Treaty of Waitangi and any necessary statutory and other amendments be made in consequence.

28. That by reason of breach of the principles of the Treaty of Waitangi, lack of authority, breach of duty, unlawful or improper conduct affecting the Claimants, inadequacy of consideration the following parcels of land or shares should be restored to the Claimants and/or they be compensated for such breaches:

- (a) The area of Cown Land known as 'North Cape Scenic Reserve' including the Lighthouse Reserve; the land at Cape Reinga taken for defence purposes and for lighthouse purposes; the land at Te Reinga taken for defence purposes; Motu-o-Pao Island; Manawatawhi; the area known as 'Taylors Grant', the shares in Te Neke block and Mokaikai block.
- (b) The following parcel of land or shares in the area known as the Parengarenga lands being those lands, interests and shares in respect thereof the subject of the Parengarenga development scheme insofar as such lands, interests or shares therein were compulsorily acquired by the Maori Trustee. By way of relief the Claimants seek the return to the relevant Tribes of such lands, interests and shares without consideration.
- (c) the area formerly known as Muriwhenua Block containing originally 56,000 acres

(d) the area known as Murimotu and that its royalties be accounted for to the claimants

29. That there be an enquiry as to the extent to which and the circumstances in which the original land of the claimants and their Taonga passed into other and particularly Crown hands; for restoration of such land as ought properly to be restored to the claimants and for compensation for the deficiency and for past exclusion from the area of difference.

30. The claimants claim return of the forestry lands, together with a review of the leases to the Crown of forestry lands and the consideration receivable in respect thereof; that the vesting of such lands in the Forestry Corporation and the policy of the Crown leading to such vesting, are prejudicial to the claimants and should be reversed; a reduction of the term of the lease to the duration of a single rotation; for payment of equitable remuneration; and for compensation in respect of any deficiency.

31. The claimants claim compensation in respect of the disruption of their Iwi; the social dislocation which has occurred as a consequence of legislation and Government policies; and for the taking of measures dealing with the social issues of unemployment and loss of Mana; and for compensation by way of policies, practices and funding appropriate to restore the Mana of the Tribes; the education and training of Tribal members.

32. The claimants claim compensation for the costs of preparing and submitting the present claims.

33. If the Tribunal lacks jurisdiction to make appropriate orders as to costs and disbursements the claimants claim by way of relief amendment of the Treaty of Waitangi Act to empower such provision to be made.

DATED this 8th day of December 1986

This Statement of Claims is filed by Robert Gordon Whiting whose address for service is at the offices of Messrs Connell Lamb Gerard & Co., Rathbone Street, Whangarei.

## **APPENDIX A**

Antiquities Act 1975  
Burial & Cremation Act 1964  
Continental Shelf Act 1964  
Crown Grants Act 1908  
Deeds Registration Act 1908  
Fisheries Act 1983  
Fisheries Amendment Act 1986  
Forestry Encouragement Act 1962  
Geothermal Energy Act 1963  
Harbours Act 1950  
Historic Places Act 1980  
Land Act 1948  
Land Draingage Act 1908  
Land Transfer Act 1962  
Local Government Act 1974  
Maori Affairs Act 1963  
Maori Vested Lands Administration Act 1954  
Marine Farming Act 1971  
Marine Reserves Act 1971  
Mining Act 1971  
Ministry of Agriculture & Fisheries Act 1953  
Nature Conservation Council Act 1962  
New Zealand Constitution Act 1852  
New Zealand Geographical Boards Act 1946  
New Zealand Planning Act 1982  
New Zealand Walkways Act 1975  
Public Works Act 1928 and 1981  
Reserves Act 1977  
Rivers Board Act 1908  
Sand Draft Act 1908  
Soil Conservation & Rivers Control Act 1941  
Surveyors Act 1966  
Swamp Drainage Act 1915  
Territorial Sea and Exclusive Economic Zone Act 1977  
Town and Country Planning Act 1977  
Water & Soil Conversation Act 1967  
Animals Protection & Game Act 1921–1922  
Crown Grants Act 1866  
Harbours Acts of 1866, 1878, 1908  
Land Acquisition Emergency Regulations 1945  
Land Acts of 1892 and 1908

Native Lands Act 1862, 1865, 1867, 1873, 1886, 1894, 1909  
New Zealand Land Claims Ordinance 1841 & Victoria Session I No.2  
Native Land Courts Acts of 1862, 1865, 1867, 1873, 1880, 1886 & 1894  
Native Lands Frauds Prevention Act 1870  
Reserves & Domains Act 1953  
Waste Lands Act 1858, 1875  
State Owned Enterprises Bill (in course of enactment)

## **APPENDIX B**

### **MOTUOPAO ISLAND**

1. Action in notifying Native title extinguished over ‘the islet adjacent to and situated to the north-west of Cape Maria Van Dieman and bounded on all sides by the sea, Refer Gaz 1875 p.181.
2. Reserving to H M the Queen by order in Council pursuant to the provisions of The Waste Lands Act 1858 the island now known as Motuopai Island. Refer Gaz 1875 p.181.
3. Changing pursuant to the provisions of the Reserves & Domains Act 1953 the status of the reserve from a reserve for lighthouse or other purposes of the General Government to a reserve for the preservation of flora and fauna.

### **THREE KINGS ISLANDS**

1. Proclamation 4 July 1908 declaring Three Kings Islands as Crown Lands reference in Gazette 1908 p.1815.
2. Declaration of Three Kings Islands as a Sanctuary referenced in Gazette 1930 p.666.
3. Setting apart Three Kings (Manawatahi) as a reserve for the preservation of flora and fauna, Gazette 1956 p.39.

### **NINETY MILE BEACH**

1. Declaring beach to be a public road.

### **MURIWHENUA**

1. Acquiring Te Neke Block in 1968 and declaring land to be Crown Land pursuant to Gazette Notice 1969/107.
2. Lack of enforcement and lack of recognition of the provisions of the Native Lands Frauds Prevention Act 1870 and improper care and duty by Crown Commissioner appointed under the Act.
3. Registration of land transactions in title system by the Crown and its agents when such transactions were invalid due to lack of jurisdiction by the Crown.

4. Improper use of the provisions of the Public Works Act 1928 and the Land Acquisition Emergency Regulations 1945 refer Gazette Notices 1944 p.357, 1945 p.568 and 1945 p.1555.
5. Setting apart land for recreation reserve – refer Gazette 1984 p.2925.
6. Declaring certain lands at Cape Reinga for lighthouse purposes – refer Gazette 1983 p.485.
7. Gazetting land at Cape Maria van Dieman for lighthouse purposes – refer Gazette 1981 p.1904.

## **WHANGAKEA BLOCK**

1. Setting apart block as recreation reserve subject to the provisions of the Reserves Act 1977 – refer NZ Gazette 26.7 1984 p.2862.

## **TAYLORS GRANT**

1. Granting to Richard Taylor that area of land known as ‘Taylors Grant’ comprising some 852 acres and referred to in Deeds Index I H 600 such grants being made by the Crown and its agents without authority such land being already occupied and owned by Maoris.
2. Setting apart the land as a recreation reserve pursuant to the provisions of the Reserves Act 1977 – refer Gazette Notice 1984 p.2862.

## **MURIMOTU**

1. Actions of the Native Land Court under the provisions of s.107 of the Native Land Act 1873 ordering 1706 acres and referred to as Murimotu No.1 to be ceded in Her Majesty Queen Victoria.
2. Actions of the Native Land Court under the provisions of s.107 of the Native Land Act 1873 in limiting in number to three, the owners of the land known as Murimotu No.2.
3. Action taken in July 1879 declaring Murimotu No.1 to be waste lands of the Crown, refer Gazette 1870 p.966.
4. The reservation of the site for lighthouse comprising some 351 acres (North Cape lighthouse) – refer Gazette 1879 p.1591.
5. Issuing mining licences in the area defined by SO.54360.
6. Reserving s.l Block v North Cape S.D. as the North Cape Scenic Reserve – refer Gazette 1964 p.1179 and as a Scientific Reserve – refer Gazette 1980 p.3327.

## **MOKAIKAI**

1. Actions of the Native Land Court under the provisions of the Native Lands Act 1873 granting 10823 acres known as Mokaikai Block to Francis Sinclair.
2. Registration of land transactions in title system by the Crown and its agents when such transactions were invalid due to lack of jurisdiction by the Crown.
3. Classifying land as Scenic Reserve subject to Reserves Act 1977 refer Gazette 2.8 1984 p.2925.

## **APPENDIX C**

### 1. Auckland Region Marine Reserves Plan

Prepared by Fisheries Management Division

Ministry of Agriculture & Fisheries

Auckland May 1985

As to proposals, implementation and enforcement of proposed marine reserves contained in this document.

### 2. Auckland Fishery Management Plan

Draft Discussion Paper Phase 1: Fin Fish

Prepared by Fisheries Management Division

Ministry of Agriculture & Fisheries June 1986

As to proposals to restrict, prohibit and control the taking or management of fish as contained in this document.

### 3. Coastal Reserves Investigation

Report on Mangonui County

By Department of Lands & Survey 1980

As to reserve proposals contained in this document.

### 4. Te Paki

Lands Use Committee Report

Prepared by the Te Paki Land Use Committee

Department of Lands & Survey June 1979

As to land use and management proposals contained in this report.

### 5. New Zealand Forest Service

As to future management and utilisation options and land tenure options for the forests and associated lands and facilities under the control of the Service and/or its successor.

### 6. Ministry of Transport

As to the issuing of licences for sand extraction.

### 7. Ministry of Agriculture & Fisheries

As to the issuing of licences for catching fish, gathering seaweed and other products of the sea and to the issuing of shell fish licences.

### 8. Other Government Departments or Agencies

As to the issuing of licences in terms of minerals including coal.



## **APPENDIX D**

1. Any acts or omissions relevant to the matters pleaded being 1 to 31 inclusive in the Statement of Claims.

## **APPENDIX 2 IDENTITIES AND INTER-RELATIONSHIPS OF THE CLAIMANT TRIBES**

[See 1.5]

This appendix, prepared by Tribunal staff, summarises extensive oral evidence on the origins of the five most northern tribes of Aotearoa, Ngati Kuri, Te Aupouri, Te Rarawa, Ngai Takoto, and Ngati Kahu. It first establishes their separate identities, and then their close relationship.

We are grateful to those many kaumatua and rangatahi who spoke freely on matters of whakapapa (genealogy) and history. Only a fraction of their information is abstracted here. For help in checking staff summaries of traditional evidence we thank Niki Conrad and Viv Gregory, both recently deceased. Haere te koroua o te Muriwhenua, haere te poua o te Murihiku. We also thank Simon Snowden, Mira Szazy, Maori Marsden, Atihana Johns, Waerete Norman, Ross Gregory, Shane Jones, MacCully Matiu, Matiu Rata and Hone Aperahama. We thank also Te Aniwaniwa Hona for help in transcribing tape recordings in Maori. Tena koutou mo o koutou whakaaro pounamu.

## A2.1 NGATI KURI

Ko Maunga Piko te maunga,  
Ko Parengarenga te moana  
Ko Te Reo Mihi te marae  
Ko Ngati Kuri te iwi

The ancestors of Ngati Kuri, they claim, were already occupying the northern tip of Aotearoa before the many migratory waka (canoes) of traditional knowledge came from Polynesia.

Those people were called Te Ngaki. Some elders recited 23 generations of Te Ngaki ancestors before the arrival of Kurahaupo waka. Ngati Kuri emerges from the marriage of the Kurahaupo waka people (Ngati Kaha) with the earlier Te Ngaki inhabitants.

Kurahaupo is generally acknowledged as an ancient and sacred canoe. The sanctity of its origin may account for its name, but Wiremu Paraone recorded his kaumatua's view that 'kura' may have referred to the reddish haze of the sea at sunset or early dawn, or as perhaps recalling the dramatic end to its voyage (from Waerota Island we were told). The elders agreed that on its way to Aotearoa the lashings of Kurahaupo timbers were loosened or damaged and the vessel was nearly wrecked at Rangitahua (Kermadec Islands). Most of the crew were later brought on to Aotearoa by the larger Aotea canoe, but a few men remained to repair Kurahaupo and complete the journey. After much hardship the remnant made landfall and the circumstances of that event are well ingrained in oral tradition. During a storm at night, other elders said, their navigator Pi, saw the shining line of phosphorescence common to waves breaking at the base of cliffs, and knew there was land there; they believed the canoe name refers to that strange light in the darkness. In the attempt to beach in the dark, the canoe was wrecked on a rock (Wakura) but the crew struggled ashore.

Others believed that Po (the Captain) brought the canoe in safely, and tied it to the rock known as Te-wa-o-te-Kura (now shortened to Wakura). The people went ashore to rest and in the morning found their canoe waterlogged. With the aid of Te Ngaki people the canoe was dragged to their main village at the mouth of a stream now known as Waitangi, the first place of that name in New Zealand, signifying the lament (tangi) for the wrecking of that sacred canoe. The event is recalled by the Ngati Kuri whakatauki (proverb) 'Te tomokanga a Kurahaupo i roto i Waitangi' ['the entrance of Kurahaupo into Waitangi']

At Takapaukura we were shown the rock into which Kurahaupo is transformed, the marks of its timbers still showing on the stone surface. Some Ngati Kuri and Te Aupouri considered, however, that Kurahaupo was actually repaired and later travelled south. That account explains the many tribal connections claimed to the Kurahaupo canoe, including those in Taranaki district and even the Ngati Mamoe and others of Murihiku (Southland) at the far end of Te Waipounamu (the South Island).

The story is detailed here because others of the claimant tribes also descend from Kurahaupo and from Po-hurihanga, the principal man on that canoe. It also accounts for the first appearance of Waitangi as a place name in Aotearoa, which like other important names, was then carried with the people as they migrated, as far afield as the Waitaki (Waitangi) river in Te Waipounamu (South Island). Later, of course, the name was commemorated forever in another northern place where the Treaty was signed.

Po-hurihanga of Kurahaupo married Maieke, a chiefly woman of Te Ngaki, and their daughter was named Muriwhenua. In due time the tribe resulting were known as Ngati Kuri, although that name was adopted much later. Another elder speaking at the Te Hapua hearing claimed Po-hurihanga, Pipi and Muri-te-whenua were the three principal men on

Kurahaupo and that from their descendants there emerged the four other Muriwhenua tribes Ngati Kahu, Te Rarawa, Te Aupouri and Ngai Takoto.

It was said the first pa (defended village) of Ngati Kuri was named Mahurangi, the second Whiriwhiri, the third Te Tomokanga (near the mouth of Waitangi river), and the fourth Wharekawa. For each of these pa we were told the special source of fresh water (a vital resource in the region), the related fishing grounds and food gardens and the names of the associated urupa (sacred burial places). Each of these traditional places (and many others) were shown to us during site visits throughout the area of the claim.

Amongst others, the precursors of Ngati Kuri were closely related to a group now known as Ngati Awa. The composite group were almost destroyed in conflict with a section of Ngati Ruanui, later to be known as Te Aupouri. (For convenience we will use the tribal names ultimately taken by Ngati Kuri and Te Aupouri, though those appellations came later). Pakewa, the younger brother of the Ngati Kuri chief Papatahuri, was murdered by Te Aupouri, and a deadly struggle for utu (revenge) followed. Aupouri severely defeated Ngati Kuri, and the survivors withdrew to the valley of Whangape River, at Rotokakahi below Pangaru hills. In time the tribe regenerated its warrior force and Papatahuri sought revenge on Te Aupouri, who had by then a pa at Ahipara named Whangatauatea. To breach this stronghold by direct assault was impossible, but the attackers won victory by a ruse. They sacrificed their precious kuri (a distinctive Polynesian species of dog but now lost through interbreeding with the European dog), though the flesh of the kuri was prized as an alternative meat to fish, and though skins of kuri were used to make the most valuable and rarest kind of cloaks. The skins of their slaughtered kuri were sewn together and stuffed with fern and grass to assume the shape of a whale. When the 'whale' was launched into the sea before dawn, near the pa of Te Aupouri, the inhabitants rushed from their fortifications to seize this apparent gift from the sea. The deceived Te Aupouri were ambushed. Trapped outside their protective works, without weapons, they suffered a terrible slaughter.

In their turn the Aupouri remnants withdrew northwards into what is now known as Te Aupouri Peninsula. Their survivors also regenerated in due time to form the small but vigorous Te Aupouri tribe of today. As for Ngati Kuri, their current name was taken from that famous battle, when they sacrificed their precious dogs.

## A2.2 TE AUPOURI

Ko Mahuhu-ki-te-rangi te waka  
Ko Whakatau te tangata  
Nana ko Hau, ko Kae  
Ta Kae ko nga tupuna o Ruanui  
Ta Ruanui ko Ruatapu  
Ka puta ko Te Aupouri

Ko Ruanui te tangata  
Ko Mamari te waka  
i uu mai ki Ripino

These two sayings, taken together with the story of Pohurihanga and the Kurahaupo canoe, indicate the principal three canoes which give descent lines to Te Aupouri people, Kurahaupo, Mahuhukiterangi and Mamari. As mentioned above, Po-hurihanga was the chief man on Kurahaupo, and on the Mamari canoe the rangatira was Ruanui, while Whakatau was the chief on the Mahuhukiterangi.

Until fairly recently, shortly before the arrival of Captain Cook, the Te Aupouri people lived further south near Whangape harbour. At that time the tribe was known as Ngati Ruanui, and their chiefs were Wheeru and Te Ikanui. The tribe suffered severely through war provoked by the murder of Kupe, Wheeru's sister at Makora pa. They narrowly escaped siege and extinction through a clever tactic in which they burnt piles of scrub and household possessions to destroy their houses and burial places, and make dark dense smoke. By these means they blinded their enemies and made good their escape from the besieged pa. It was from this event that they changed their name to Te Aupouri (signifying 'dark smoke and ash clouds') and migrated north to their stronghold at Whangatauatea near Ahipara. Prolonged strife with Nga puhi and Te Rarawa forced them to move again and again.

It was their dramatic escape by a ruse from the barren island retreat of Murimotu, where they were besieged by Ngapuhi, that is commemorated now by their famous chant 'Ruia ruia, tahia tahia . . .' recorded at the start of chapter 2. Their leader Tumatahina turned to good account his unusually large feet by having his people step carefully in his outsize footprints as they quietly slipped through enemy lines at night; the sentries saw only a single track in the sand next morning and did not realise Murimotu was abandoned, leaving Te Aupouri time to reach safety. From that time with access to better lands the tribe has been able to recover and flourish, giving extra significance to their chant 'Ruia ruia . . .'.

In time, Te Aupouri married into Ngai Takoto and Ngati Kuri, and made peace with their former enemies of Te Rarawa and Ngapuhi.

## **A2.3 NGAI TAKOTO**

Ko Tuwhakaterere te tangata

Ko Kurahaupo te waka

Ko Rangaunu te moana

Ko Ngai Takoto te iwi

Through the marriage of their ancestor Tuwhakaterere, a principal tupuna of Ngai Takoto, to the chiefly woman Tu-te-rangi-a-tohia, the people of Ngai Takoto descend from the Kurahaupo canoe. The chief man of Kurahaupo, Pohurihanga, had a son Whata-kaimarie, and his grandson was Uenuku. The great grandson of Uenuku was Hikiraaiti, and Tuterangiatohia was his daughter. From her marriage with Tuwhakaterere there were three grandchildren of whom one was Maui. He in turn gave descent to Popota. Evidence directly recorded from Popota was presented at our Tribunal hearings at Ahipara. From Popota derives the Paatu hapu (sub-tribe) of Ngai Takoto. Several members of that hapu also gave oral evidence in support of the claim.

Tuwhakaterere also married Tupoia, an ariki of Ngati Kahu, explaining the close links and territorial extent of these two tribes. His favourite son, Hoka, was killed in battle, causing the deeply berieved Tuwhakaterere to pine away and die; hence the tribal name Ngai Takoto. The tribe then lived in the Hokianga region for five generations, returning in the time of Te Aupouri chief Wheeru to live in the Kaitaia, Awanui and Te Kao regions, where the descendants of one main branch are now known as Te Aupouri. Thus those tribes also are very closely related. As Te Aupouri also married into Ngati Kuri, their name became widespread in Muriwhenua by the time they were settled in their present areas, about 1720.

## A2.4 TE RARAWA

This tribe originates from three important canoes. From Nga-toki-mata-whao-rua (and from Nukutawhiti the chief man) they have affinity with Nga Puhi. They also descend from Kurahaupo waka, and further relate to the Tinana canoe linking them with Ngati Kahu.

The waka Tinana (later relaunched as Mamaru) landed at Tauroa near Ahipara. The chief man, Tumoana, laid claim to the land between Hokianga and Ahipara, as far inland as the mountains Mangamuka and Maungataniwha. Later Tumoana returned to Hawaiiiki, but his daughter Kahutianui and son Tamahotu remained at Tauroa. The canoe eventually returned, adzed a second time and renamed as Mamaru, with Tumoana's nephew Parata on board.

Directly descending from Tumoana was Haupare (his great grandson) who married Paengatai; from them came Taranga. Their descendants were known as Ngati Haupare, who later became the tribe Te Rarawa.

The origins of Te Rarawa were at Hokianga. The famed explorer Kupe came to that harbour and later returned to Hawaiiiki. Many placenames in North Cape area record the gardens or actions of Kupe during his time here. His descendant Nukutawhiti returned on Kupe's canoe and his progeny included Ruanui (2nd) and Wheeru already mentioned as an ancestor of Te Aupouri, Ngati Whatua and others. This key figure also descends from Kurahaupo through Pohurihanga and Tohe (for whom 90-mile beach, Te Wharo-oneroa-a-Tohe, is named).

Under the leadership of Tarutaru his family spread to various parts of Muriwhenua, and married well, so that Te Rarawa soon was able to master a sizeable fighting force which proved irresistible. The tribe pushed northwards to take the fertile gardens and swamp land around Ahipara and Pukepoto, and part of 90-mile Beach. (One possible meaning of Te Rarawa refers to swampland, though we heard also it may refer to the ceremonial eating of human flesh to signify the destruction of the mana of those vanquished in battle.) Thus the mana of Te Rarawa extended from Hokianga to Ahipara and Pukepoto, and further to North Cape.

At their main centre Ahipara, the meeting house Te Owahaaki commemorates the mana bird of Ueoneone which brought to the district the Mataatua ariki women Reipae (who married into Ngati Whatua) and Reitu (who married Ueoneone of Ngapuhi). As noted, their descendants are found in Ngati Hine, Ngapuhi, Ngati Whatua, Te Rarawa, and it is said, all of the other northern tribes too, so relating them with Waikato, and with each other. Te Rarawa fought strongly and often to keep the related tribes mentioned above from capturing their lands, contended for by all because of their fertility in a region of generally poor soil. Their chief Pane, of the Kare Ao hapu, (and often called Nopera (noble or chief) Panekareao), was famous throughout Muriwhenua and played a prominent role before and after the Treaty signing. He it was at Waitangi who said of the Treaty and the cession of sovereignty the 'the Shadow of land goes to the Queen, the substance remains with us', but after the Northland land sales he bitterly reversed his famous saying, when he felt only a shadow remained after all. Other important Te Rarawa connections are to the Takitimu descendants of Tamatea, noted in the next section.

From early last century, Te Rarawa were dominant in the region. In the population estimates published by Dieffenbach in 1843, Te Rarawa were given as 8,000 persons, Ngati Whatua as 800, and Nga Puhi (combining several related tribes then extant) as 12,000.

## A2.5 NGATI KAHU

Ko Mamaru te waka,  
Ko Te Parata te tangata,  
Ko Kahutianui te wahine,  
Ko Ngati Kahu te Iwi.

One of the earliest known canoes, some claim the first to strike the beaches of Tai Tokerau, was Mamaru, on which Te Parata was the chief man. The canoe had earlier sailed under the name of Tinana and the authority of Tumoana, Parata's uncle. Tumoana is also known in Tai Rawhiti (East Coast) and Ngai Tahu (Te Waipounamu, South Island) genealogies. Accordingly, when the carvings intended for an East Coast house to be named for Tumoana were recovered from a swamp where they were hidden during an invasion years earlier, they were given for the construction of the present meeting house (Tamatea) on Otakou marae in the South Island.

The tribal name originates from Kahutianui, who was awaiting the arrival of the Mamaru waka and who married Parata soon afterwards. From their daughter, Te Mamangi, Ngati Kahu are descended. Her great grandson was Haititai-Marangai, for whom the Ngati Kahu meeting house at Whatuwhiwhi is named. (We are aware some report Te Mamangi as male, but leave that question to the tribe.)

The Mamaru canoe first sighted the land now known as Rangiawhia, now called Karikari Peninsular. The crew paused there to rest before exploring what they assumed was a peninsular by following the coast line past Whatuwhiwhi, Patia and Puwheke (which looked to them like a huge wheke or octopus). Soon they realised that they had circumnavigated an island because they found themselves back at Rangiawhia (originally called Te Rangi-i-Tawhiao, or The Day We Circumnavigated). The first pa was established at Rangiawhia after exploring the rest of Doubtless Bay.

Initially there were three hapu on Mamaru waka, Te Rorohuri, Patu Koraha and Te Whanau Moana. Each settled in the area around Doubtless Bay and Rangaunu Harbour. Because of the marriage of Te Parata and Kahutianui, and as Kahutianui was an influential person and an able leader, the original hapu of Mamaru in time identified collectively as Ngati Kahu. Kahutianui's children in their turn became the founding ancestors of many more Ngati Kahu hapu. The original three hapu did not lose their identity and it is still a matter of pride to know of one's descent from them.

The Mamaru waka eventually beached at Taipa where a memorial for the canoe now stands. Te Parata and Kahutianui were said to have lived mainly at Taipa and at Taemaro. Their descendants settled the east coast area around Rangaunu Harbour. Several generations later they had spread south along the coast to Whangaroa, Matauri Bay and Te Tii, and in time intermarried with all the Northland tribes. Thus Ngati Kahu also claims descent from Puhi's mokopuna Rahiri. Through this connection, and the factions created by Rahiri's sons Uenuku Kuare and Kaharau, Ngati Kahu became involved in the fighting which affected the Northland area for many generations and which continued right up to the signing of the Treaty of Waitangi.

The cradle of Ngati Kahu is Tokerau (Doubtless Bay). That name refers to the multiplicity of fishing grounds (toka) belonging to them. Their largest settlement in the eighteenth century was in Oruru-Taipa Valley. There was also Mamangi Pa at Otengi Point near Taipa, recently gifted back to the tribe by their Pakeha friends, the Adamson family, and several others extending to Kauhanga in Peria. It was said the area was so densely settled that news and messages could be shouted from Taipa to Kauhanga from one pa to the next. The earthworks of those pa are still clearly evident today.



Ngati Kahu had also an earlier name, Ngai Tamatea, but it largely dropped from usage following a severe defeat in battle in which their leading men were killed at Kohukohu. When descendants of the survivors restored their tribal mana, many years later, they decided (about 1926) to resume the name Ngati Kahu to which they are entitled as descendants of Te Mamangi, daughter of Parata and Kahutianui.

The origin of the earlier name Ngai Tamatea, records the relationship of Ngati Kahu with many other tribes. As earlier mentioned, Po-hurihanga (of Kurahaupo waka) and Maieke (of Te Ngaki) had a daughter Muriwhenua. She married Rongokapo and their son was Tamatea-urehaea (Tamatea the circumcised); he married Iwipupu and they had a son Kahungunu and a daughter Iranui. From the marriage of Kahungunu to Hinetapu came a son Kahukura-ariki, who married Mamangi of the Mamaru (and Tinana) canoes already described. Hence there are two versions, although converging and mutually strengthening, establishing the propriety of the name Kahu for the tribe, from both female and male chiefly lines of descent. The same data correlates several other tribal groups of Kahu descent well beyond the Muriwhenua district. Besides the Ngati Kahu of Tauranga for example, and the major tribe Ngati Kahungunu of Hawke's Bay, the link through the marriage of Kahungunu's sister Iranui to Hingaangaroa is also apparent to Ngati Ira (Wellington area) and cognate North Island tribes, extending again to Ngai Tahu and their Irakehu and Kati Kuri hapu in the South Island.

Ngati Kahu have yet another ancient link involving both Paoa and Po-hurihanga. Subsequent to the events described with reference to Ngati Kuri, these two chiefs went voyaging on the Riukaramea canoe. Paoa is said to have landed at Mangonui, a little south of Taipa, at about the same time as the Mamaru canoe arrived at Otengi just north of Taipa. The name Mangonui is due to their protective taniwha, a very large shark in this case, which accompanied Riukaramea into harbour. Paoa's son committed a sin (hara or breach of tapu) by attacking and attempting to kill this shark, so he was banished and left behind. There he married into the people of the recently arrived Mamaru canoe, later known as Ngati Kahu.

## **A2.6 NGA PUHI**

The relationship with adjoining Nga Puhi also deserves mention, though Nga Puhi are not a party to this claim.

Two canoes are especially important for Nga Puhi, Nga-Toki-Mata-Whao-Rua on which Nukutawhiti was the chief man, and Mataatua on which Puhi was leader when Mataatua came to Tai Tokerau in the far north. Mataatua had first landed on the East Coast, and rested in a quiet little river estuary known as Otakou. From Toroa and the crew of Mataatua come several Bay of Plenty tribes. After disputes with his older brothers, Puhi decided to take the canoe and migrate to the north with his followers. The famous Nga Puhi ancestor Rahiri was descended from both canoes, and through his wives Ahuaiti and Whakaruru his descendants are connected to all the northern tribes. One of his descendants was Ue-oneone who married Reitu of the Waikato.

It is claimed that through the marriages of the Waikato women Reitu (to Ue-oneone) and Reipae (to Tahuhu potiki) can be traced relationships of all the tribes, Ngapuhi, Te Rarawa, Ngati Kahu, Te Aupouri, and Ngati Whatua.

## **A2.7 TE KUPENGA O NGA TUPUNA**

With undeserved brevity, we have attempted to outline the particular identity (the mana motuhake) of each of the five Tribes standing to claim both separately and jointly in these Muriwhenua proceedings. Besides their individual tribal status, the claimants share so much in common that they have elected to prosecute their claims in Muriwhenua as one body of closely related peoples. This final section briefly looks again at the background to what at first sight might seem a surprising unity.

Undoubtedly much is due to the efforts of the Hon M Rata as originating claimant on behalf of all. But he is claiming in accord with ancient traditional background in the region from which, some experts assert, all Maori tribes are descended or at least related. His Tribe, Ngati Kuri, is the most ancient in the region. Several elders also claimed that virtually all of the great migratory canoes (much better known than their own cited above) landed first in the Muriwhenua region, or at least, like Mataatua, came there after first landfall.

All the claimant tribes reported prior, older, names for their ancestral tribes, and all acknowledged prior existence of Tangata Whenua living there before their own ancestors arrived. Various names of those people were given to us; whether they are alternative names for the same or differing early indigenous peoples we must leave to the tangata whenua to research. But their existence, and inter-marriage with ancestors of the five tribes now claiming, further underpin the effort of these tribes to join together in this Muriwhenua claim.

Pohurihanga referred to the ancients as He Karitehe (to others, He Turehu), and they also were known as Te Kahui-a-Ngu. We heard that the descendants of Ngu, (or, of Ngo, who some thought might be the same person), Pei, Turoi, Kauwhata and Mahuika were known to Ngati Manu, descendants of Tohe. The kaainga (home place) of Ngati Manu was at Muriwhenua, North Cape, and a descendant nineteen generations after Ngu was Tohe for whom Ninety Mile Beach is named One-roa-a-Tohe.

The people accompanying Pohurihanga on board Kurahaupo were known as Ngati Kaha, during the early generations of intermarriage with the ancient tangata whenua. We noted earlier that Ngati Kuri spoke of these ancestors as Te Ngaki. In explaining the origin of Ngati Kaha (who are long since merged into the Ngati Kuri, Te Aupouri, Ngai Takoto and Te Rarawa Tribes of the present Claim) it emerged that older name referred to the header rope (kaharoa) of the great net belonging to Pohurihanga and brought with him on the Kurahaupo canoe. Their waka was sinking, and the damage was repaired at the Kermadec islands, using Po's kaharoa to bind the loosened timbers together.

The multiple linkages in Muriwhenua are well shown by the whakapapa of Wheeru, an important ancestor claimed by most inhabitant groups in Muriwhenua. Wheeru's descendants have at least six canoe descent lines from Kurahaupo (through Pohurihanga, Tohe, Waimirirangi, More); from Tinana (Tumoana, Haupare, Taranga, Tahuhu, Pororua, Ngataiawa and Taimania who married Wheeru); from Mamari (Ruanui 1st); Matawhaorua (Kupe) and Ngatokimatawhaorua (Nukutawhiti, Ruanui 2nd); and from Mahuhukiterangi (Whakatau, Ruanui 1st and Ruatapu). Others of their tupuna, such as Tamatea or Kahu, reveal networks of similar complexity.

Hence we adopt the terminology of Tipene O'Regan (1987:21) to refer to this Kupenga-onga-Tupuna, or in other words the network of ancestry. Within that network in Muriwhenua the five Tribes of Ngati Kuri, Te Aupouri, Ngati Kaha, Ngai Takoto and Te Rarawa stood before the Waitangi Tribunal in mutual support.



APPENDIX 3 RECORD OF THE INQUIRY

[see 1.7.9]

### **A3.1 APPOINTMENTS**

The Tribunal to hear the Muriwhenua Claim was constituted to comprise Chief Judge E T J Durie (Chairman), Bishop M A Bennett, Mr M E Delamere, Professor M P K Sorrenson, Mrs G M Te Heuheu and Mr W M Wilson.

Mr W D Baragwanath QC, Auckland, was appointed as counsel to assist the claimants in respect of the whole of the claim.

Dr G Habib, Fisheries Consultant, Auckland was commissioned to investigate and report upon the fishing aspects of the claim.

Dr M P Belgrave, a member of the Tribunal's staff, was commissioned to investigate and report on certain land claim aspects of the claim.

Mrs M Szazy, Mrs V Norman and Mr S Jones were appointed interpreters to assist the Tribunal.

## A3.2 NOTICES, HEARINGS AND APPEARANCES

A3.2.1 Notice of the claim and first hearing at Te Reo Powhiri Marae, Te Hapua was despatched to the following on 5 November 1986:

Mr W D Baragwanath QC, Akld; Solicitor-General, Crown Law Office, Wtn; Hon C Moyle, Minister of Fisheries, Wtn; Dir-General, Ag and Fish, Wtn; Hon K T Wetere, Minister of Lands, Minister of Maori Affairs, Wtn; Sec, Dept Lands & Survey, Wtn; Sec, Maori Affairs, Wtn; Rt Hon David Lange, Minister of Foreign Affairs, Wtn; Sec, Foreign Affs, Wtn; Hon R Prebble, Minister of Transport, Wtn; Sec, Transport, Wtn; Sec, Min Works, Wtn; Sec, Internal Affairs, Wtn; County Clerk, Mangonui County Council, Kta; Sec, Northland Catchment Commission, Whg; Sec, Tokerau District Maori Council, Whg; Sec, Parengarenga Inc, Broadway; Chairman, Te Runanga o Te Aupouri me Ngati Kuri, Kta; Sec, Aupouri Trust Board, Kta; Dr O Sutherland, Akld; Mrs J Cashmore, Houhora; Hon M Rata, Akld; Mr J Aperahama, Te Hapua; Mr N Conrad, Te Kao; Mr V Gregory, Kta; Mr P Murray, Akld; Mrs M Szazy, Kta;

Public notice was given in NZ Herald and Northern Advocate on 12 and 26 November 1986.

The first hearing opened at Te Reo Mihi Marae, Te Hapua on 8 December 1986 and closed on 11 December 1986.

At that hearing

Mr W D Baragwanath QC appeared for the claimants.

Mr L Fergusson appeared for the Ministry of Agriculture and Fisheries and with a watching brief for the Ministry of Works and Development and the Department of Internal Affairs.

Mr R R Wells appeared for the Department of Maori Affairs and the Maori Trustee.

Mr J C M Hood appeared for the New Zealand Forest Service.

Messrs N Dixon and J Mutu appeared for the Department of Social Welfare.

Mr A Cooke appeared for the Ministry of Transport.

Mr B Gunn appeared for the Department of Labour.

Mrs S Bulmer appeared for the New Zealand Historic Places Trust.

Mrs J Cashmore appeared for the Houhora Riding Residents Association and on her own behalf.

In addition to Counsel, those who gave evidence or submissions were:

Name	Description	Oral Submission	Written Submission
McCulley Matiu	Ngati Kahu Te Rarawa	8.12.87	-
Hon M Rata	Ngati Kuri, Te Aupouri	8.12.87 10.12.87 11.12..87	-
Reverend M Marsden	Ngai Takoto,		

	Ngati Kahu	–	A14
Dr J M Davidson	Archaeologist	–	A5
Mr R D Cooper	Fisheries Officer	10.12.87	-
Mrs M Szaszy	Te Aupouri	–	A13
	Ngati Kuri		
Mr W Brown	Ngati Kuri,		
	Te Aupouri	10.12.87	-
Professor J Morton	Marine biologist & Environmental Ecologist	–	A15
I G McIntyre	Town Planner	–	A17
R Boyd	Fisheries Research Officer	11.12.87	-

Documents A1 to A73 were admitted to the record (see appendix 3.3). During the course of the hearing the Tribunal issued an interim report to the Minister of Maori Affairs dated 8 December 1986 (see appendix 3.4.1) and a Memorandum to the Director-General, Ministry of Agriculture and Fisheries dated 10 December 1986 (see appendix 3.4.2).

A3.2.2 On 15 December 1986 the Chairman issued direction as to further hearing (see appendix 3.4.3). Notice of the second hearing, at Te Owhaki Marae, Ahipara was sent on 26 January 1987 to those previously notified, and to

Mr J Priestley, Connell Lamb Gerard & Co, Solicitors, Whg; Office Solicitor, Internal Affairs, Wtn; District Office Solicitor, Maori Affairs, Whg; Director-General, Dept of Lands & Survey, Akld (N Cooper); Mr C Hood, Land Officer, NZ Forest Service, Wtn; Regional Solicitor, Transport, Akld; Ag and Fisheries, Wtn, (Mr L Fergusson); District Solicitor, Social Welfare, Akld; District Supervisor, Dept of Labour, Whg; Office Solicitor, Comm for Environment, Wtn; Dept Conservation Establishment Unit, Wtn; Northland Harbour Board, Whg; Mr S Jones, Awanui; Mr T Ihaka, Opononi. Public Notice was given in NZ Herald, Northern Advocate and Northland Times-Age on 18 and 25 February 1987.

The second hearing opened at Te Owhaki Marae, Ahipara on 2 March 1987 and closed on 6 March 1987.

At the hearing

Mr W D Baragwanath QC appeared for the claimants, and with him Ms S Elias and Mr G Wiles

Mrs S Kenderdine appeared for the Crown and with her Mr S Hughes of the Ministry of Agriculture and Fisheries

Mr R Wells appeared for the Dept of Maori Affairs and Maori Trustee

Mr M Gavin appeared for the Dept of Social Welfare, and with him Mr N Dixon

Mr T Caughley appeared for the Ministry of Foreign Affairs

Mr J C M Hood appeared for the NZ Forest Service

Mr B Gunn appeared for the Dept of Labour

Ms S Bulmer appeared for the NZ Historic Places Trust

Mrs J Cashmore appeared for the Houhora Riding Residents Assn.



In addition to Counsel those who gave evidence or submissions were

Name	Description	Oral Submission	Written Submission
Hon M Rata	Claimant	2.03.87	-
	Ngati Kuri	4.03.87	
		6.03.87	
Sir Graham Latimer	Ngati Kahu,	2.03.87	-
	Chmn, NZMC	2.03.87	
Rev. Ephraim Te Paa	Te Rarawa	6.03.87	-
Mr Hone Aperahama	Ngati Kuri,		
	Te Aupouri	2.03.87	-
Mr Mac Taylor	Ngapuhi	2.03.87	-
Mr Hori Murray Fisherman,			
	Te Aupouri	2.03.87	-
		3.03.87	
Mr Simon Snowden	Te Rarawa	4.03.87	-
Mr Toi Murray	Fisherman,		
	Te Aupouri	3.03.87	-
Reverend H Petera	Te Aupouri,		-
	Ngai Takoto		B30
Mr Shane Jones	Ngai Takoto runanga	2.03.87	-
		3.03.87	
		5.03.87	
Mr Cletus Maanu Paul	Chairman,	-	B32
	Te Runanga-a-Tangaroa (NZMC)		
Dr Bruce Gregory MP	Te Rarawa,		
	Ngai Tahu	3.03.87	-
Mr Hami Piripi	Te Rarawa	3.03.87	-
Mr Ross Gregory	Te Rarawa	4.03.87	-
Ngaire Morrison	Te Rarawa	3.03.87	-
Mr Koro Snowden	Te Rarawa	3.03.87	-
Mr James Adams		3.03.87	-
Mr H Rakihiia Tau	Vice Chmn,		
	Ngai Tahu Maori		
	Trust Board	3.03.87	B49
Mr T Howse	Ngai Tahu Maori		
	Trust Board		

	Fisheries Committee	3.03.87	B49
Mr J Te Aika	Ngai Tahu Maori Trust Board Fisheries Committee	3.03.87	B49
Mr Wiremu Herewini		3.03.87	B33, 34
Mr W Paraone	Te Aupouri, Ngati Kuri	3.03.87	
Mr Walter Erstich	Ngati Kahu, Te Rarawa	4.03.87	-
Jan Smith	Ngai Takoto	4.03.87	-
Watana Whiu	-		B63
Mr Hone Harawira	Te Aupouri, Work Trust Administration	-	B62
Marara George	4.03.87		-
Mr Rapata Romana	Fisherman, Te Aupouri		- B64
Mr Paihere Brown	Te Aupouri	2.03.87 4.03.87 5.03.87	-
Mr Nick Conrad	Te Aupouri	5.03.87	-
Mr R Martin	Commercial Fishermens Association	5.03.87	-
Mr Raymond W Dobson	Assistant Director MAF	-	B67
Dr Ngapare Hopa	Tainui Maori Trust Board	-	B50
Mrs I M Nottingham	Waikato Centre for Maori Studies & Research	-	B51
Dr Oliver Sutherland	Auckland Committee on Racism & Discrimination		- B89
Ms Irene Neho	Te Aupouri, Fisherwoman	-	B921

Documents B1 to B93 were admitted to the record (see appendix 3.3).

At the end of the second hearing the Tribunal recorded an acknowledgement by Crown counsel and gave direction for further hearing (see appendix 3.4.4).

A3.2.3 Notice of the third hearing at the Theatre, Kaitaia was sent on 16 March 1987 to those notified of the second hearing.

Public Notice was given in the NZ Herald, Auckland Star, Northern Advocate and Northland Times-Age on 18 and 25 March 1987.

The third hearing opened at Kaitaia on 7 April 1987 and closed on 9 April 1987.

At the hearing

Mr W D Baragwanath appeared for the claimants and with him Ms S Elias

Mrs S Kenderdine appeared for the Crown and with her Mr S Hughes of the Ministry of Agriculture and Fisheries

Mr J Paki appeared for the Department of Maori Affairs

In addition to Counsel those who gave evidence or submissions were

Name	Description	Oral Submission	Written Submission
Simon Snowden	Te Rarawa	7.04.87	-
John Campbell		7.04.87	-
Raymond W Dobson	Director of operations, MAF	-	B67
Richard O Boyd	Fisheries Research Officer, MAF	-	B70
Dr Robin L Allen	Director, MAF	-	B66
Ronald W Little	Fisheries Management Division, MAF	-	B69
Robert D Cooper	Fisheries Management Division, MAF	-	B68
Wiki Karena	Te Aupouri	8.04.87	-
Ross Gregory	Te Rarawa, Ngai Tahu	9.04.87	-
James Elkington	Ngati Koata, Ngai Tahu, Advisor, MAF	9.04.87	-
Neil D Martin	Fisheries Research Officer, MAF	-	B71

Further, Dr G Habib tabled the first of his commissioned reports (document C1).

Documents C1 to C38 were admitted to the record (see appendix 3.3).

A3.2.4 Notice of the fourth hearing, at the Tribunals rooms, Auckland was sent on 15 April 1987 to those notified of the third hearing.

Public notice of the hearing was given in NZ Herald and Auckland Star on 21 April 1987.

The hearing opened at Auckland on 22 April 1987 and closed on 24 April 1987.

At the hearing

Mr W D Baragwanath QC appeared for the claimants and with him Ms S Elias

Mrs S Kenderdine appeared for the Crown and with her Mr S Hughes

Dr G Habib presented and was cross examined on two reports (documents C1 and D1) and Counsel made closing submissions.

Documents D1 to D40 were admitted to the record (see appendix 3.3).

A3.2.5 On Wednesday 30 September 1987, Counsel were heard in the Chief Judge's Chambers, Wellington, on a request from the claimants that the Tribunal report urgently.

W D Baragwanath QC and S Elias appeared for the claimants,

S Kenderdine, A Kerr and M Scholtens appeared for the Crown,

and by consent, M Dawson appeared for the New Zealand Maori Council.

Hon M Rata, a claimant, was also heard.

Documents E1 to E15 were admitted to the record (see appendix 3.3).

Through its chairman the Tribunal made a statement of its preliminary opinions and directed that that statement be conveyed to the Hon Minister of Fisheries (see appendix 3.4.5).

A3.2.6 On 8 and 9 March 1988 at the Tribunal Rooms, Wellington, Counsel were heard on the ambit of the claim and the right of certain bodies to make submissions.

W D Baragwanath QC and S Elias appeared for the claimants

D A R Williams and S Kenderdine appeared for the Crown

M Dawson appeared for the NZ Maori Council

J L Marshall appeared for the NZ Fishing Industry Board

T J Castle appeared for the NZ Fishing Industry Association

D Palmer appeared for the Ngaitahu Maori Trust Board and H R Tau.

With the consent of all Counsel, the hearing on 8 March proceeded in the absence of Tribunal member, M E Delamere.

Documents F1 to F14 were admitted to the record (see appendix 3.4).

On 9 March 1988 the Tribunal issued its determination on the matters that had arisen (see para 1.7.8 and appendix 3.4.6).

A3.2.7 On 5, 6 April 1988 at the Burma Motor Lodge Wellington and at 7 April 1988 at the United Building Society (Board Room, Wellington) Counsel for the Fishing Industry Board, and the Fishing Industry Association were heard. Further submissions were also made by the Crown. Crown submissions in relation to the Fishing Industry submissions were further heard.

W D Baragwanath QC and S Elias appeared for the claimants.

C Carruthers and S Kenderdine appeared for the Crown.

M Dawson appeared for the New Zealand Maori Council.

J L Marshall and C Wainwright appeared for New Zealand Fishing Industry Board.

T J Castle and B Scott appeared for New Zealand Fishing Industry Association.

Document G 1 to G 11 were admitted to the record (see appendix 3.4).

Another hearing was scheduled for 28, 29 April 1988 for the Claimants Reply to be heard.

A3.2.8 On 28, 29 April 1988 at the Tribunals rooms Databank House Wellington final submissions were made.

W D Baragwanath QC and S Elias QC appeared for the claimants

C Carruthers and S Kenderdine appeared for the Crown

M Dawson appeared for the New Zealand Maori Council

J L Marshall and C Wainwright appeared for New Zealand Fishing Industry Board

T J Castle and B Scott appeared for New Zealand Fishing Industry Association

Documents H 1 to H 20 were admitted to the record (see appendix 3.4)

### **A3.3 RECORD OF DOCUMENTS**

[(name) at the end of each section records by whom the document was presented. \* indicates that the document, and associated taped testimony, is confidential]

- A Documents Admitted at the First Hearing 8–12 December 1986
- A1 The initial claim with attached thereto, ‘Auckland Region Marine Reserves Plan : a discussion paper’ dated May 1985, and circulation letter of 24 July 1985 from Regional Fisheries Management Officer, MAF, Auckland, (Hon M Rata).
- A2 AFMP 1986. Map, Figure 5–4: West Coast – Whangape harbour to North Cape/Northeast coast – North Cape to Cape Karikari, page 61, (full doc in A46) (W D Baragwanath)
- A3 Akld Region Marine Reserves Plan (May 1985). Map, (Cape Reinga, Hooper Point, Parengarenga harbour) page 45 (full doc in A26) (W D Baragwanath)
- A4 ARMRP, Map, (Three Kings Islands) page 44 (W D Baragwanath)
- A5 Dr J M Davidson’s evidence (‘Archaeological evidence in the vicinity of the Parengarenga Harbour’); [two maps attached, with two large maps annotated at hearing.] (Dr J M Davidson).
- A6 Evidence of Dr Bulmer (‘The archaeological sites of Muriwhenua: a review’) (with sketch map, Muriwhenua archaeological site surveys 1986) (S Bulmer).
- A7 Aerial Photo SN 5780 c/5–369–1939. [Parengarenga Harbour] (I G McIntyre)
- A8 Aerial photos (two) Parengarenga Harbour – contrasting 1939 & 1980 (I G McIntyre)
- A9 Aerial photos Parengarenga Harbour – 1980. (I G McIntyre)
- A10 Aerial photos Parengarenga Harbour – 1939, (I G McIntyre)
- A11 Plan of far North, (outline map, 1 : 50,000) [shows land blocks: Motu o Pao, Cape Reinga, Whangakea, Muriwhenua, Taylor’s Grant, Pakohu, Muriwhenuatika, Takapaukura, Takahua, Murimotu, Mokaikai, Otu, Ohau, Te Hapua, Paua, Matapia Is, Te Neke] (I G McIntyre)
- A12 Plan for far North [Ownership of Land] (I G McIntyre)
- A13 Evidence of M Szazy, [re spiritual rights, our ancestral] (M Szazy).
- A14 Evidence of Reverend Maori Marsden, ‘Te Mana O Te Hiku O Te Ika’ (Rev M Marsden).
- A15 Evidence of Professor J E Morton [re history and ecology of northern region] (Prof J E Morton).
- A16 Evidence of Prof J E Morton. Quotation from ‘The far northeast forest of Unuwahao’ by Mark Bellingham, northern regional field officer. [Extract from Journal of the Royal Forest and Bird Protection Society (May 1985)], (Prof J E Morton).
- A17 Evidence of Ian Geoffrey McIntyre [re physical description Parengarenga Harbour, 90-mile beach; Northern Regional Planning Scheme; Mangonui County Reviewed District Scheme, Ministry of Agriculture and Fisheries management plan, Marine Reserves Plan, re Maori land and Planning tribunal, refers land transactions in blocks named in Doc All; conclusion] (I G McIntyre).

- A18 Maori Affairs Amendment Bill (as reported from the Maori Affairs Committee, House of Representatives, December 1986) (Senior Research Officer)
- A19 Map of Three Kings Islands – Drawn from NZ chart 4111 (identical with Doc A4) (I G McIntyre)
- A20 Two maps – Maori Land Court sketch plan of 90 mile beach (I G McIntyre)
- A21 Old Map – ‘N Coast of N Island New Zealand taken by R Taylor & Willm King’. [citation: typescript copy Richard Taylor’s diary in vol 2 page 231] (Senior Research Officer)
- A22 Te Hapua 42 Inc Report on proposed reserve of Unuwahao area (M Rata)
- A23 Interim report of the Waitangi Tribunal to Minister of Maori Affairs dated 8 December 1986 [re State-Owned Enterprises Bill 1986]
- A24 Letter from Tai Tokerau District Maori Council with report of meeting at Te Kao of their Fisheries Committee on 27 July 1985 (filed 29 July 1985) (M Rata)
- A25 Letter L Howell, Mangonui County Council to Waitangi Tribunal (27 November 1986) with copy submission of Mangonui County Council to MAF (22 July 1985) (filed 1 December 1986) (Mangonui County Council)
- A26 Akld Region Marine Reserves Plan; Discussion paper. (publ: Fisheries Management Division, Ministry of Agriculture and Fisheries, Auckland (May 1985) (M Rata June 1985)
- A27 ‘Maori Involvement in the New Zealand Fishing Industry. Report for the Maori Economic Development Commission by Dr G Habib, Southpac Fisheries Consultants, Auckland’ December 1985, (Senior Research Officer)
- A28 Submission of Canadian Attorney J Bayly in Taipa Claim Wai-17 given at Whatuwhiwhi (October 1986, Wai-17 Doc A60) (Senior Research Officer)
- A29 Report (July 1986) on ‘Indigenous Peoples and Conservation and the World Conservation Strategy’, supplied by Bill Wahpepah, International Indian Treaty Council (Senior Research Officer)
- A30 ‘Interdepartmental Committee on Maori Fishing Rights. First report’ (Ministers G Palmer and K Wetere, Dept of Justice: Nov 1985), (Senior Research Officer)
- A31 Law Commission: Reference on Maori Fisheries (Minister of Justice, May 1986) (Senior Research Officer)
- A32 Phillips Report (July 1975); ‘Taylor’s Grant Report’ (unpubl., author: Paul J Phillips) (Senior Research Officer)
- A33 Submissions on the claim by counsel for the claimants (W D Baragwanath)
- A34 R A Sandrey, ‘Maori Fishing Rights in New Zealand, an economic perspective’. (Discussion Paper 101, Agriculture Economics Research Unit, Lincoln College, Canterbury) (June 1986) (Senior Research Officer)
- A35 Statement of Claims as amended by leave on 12 December 1986 and 20 February 1987 (Senior Research Officer).
- A36 Memorandum from the Waitangi Tribunal to the Ministry of Agriculture & Fisheries, dated 10 December 1986
- A37 Chairmans Directions for further hearing dated 15 December 1986

- A38 Ministry of Agriculture & Fisheries response to Memorandum (Doc A37) dated 23 December 1986 (MAF)
- A39 Ministry of Agriculture and Fisheries Fishery Management Planning. ITQ Implication Study – First Report (Northland Fishing Communities 1984) [FMP Series No.131] (MAF)
- A40 Ministry of Agriculture and Fisheries Fishery Management Planning. ITQ Implications Study – Second Report (Community Issues) [FMP Series No.20] (MAF)
- A41 Te Runanga a Tangaroa: Maori Traditional Fishery Hui proceedings (R D Cooper, Editor. Fisheries Management Planning, Ministry of Agriculture and Fisheries unpubl. proof copy) (MAF)
- A42 Mokaikai Archaeological Survey, prepared by Dr J Davidson, Archaeologist, Akld Institute and Museum, June 1975 (J Davidson)
- A43 Te Paki Archaeological Survey, prepared by J Davidson, Archaeologist, Auckland Institute and Museum, June 1975 (J Davidson)
- A44 North Cape, Ohao & Murimotu Archaeological Surveys, prepared by Dr J Davidson, Archaeologist, Akld Institute and Museum, June 1975 (J Davidson)
- A45 Index to Archaeological Sites (Te Paki, Mokaikai, North Cape, Murimotu, Ohao, Te Hapua) prepared by J Davidson, Archaeologist, Akld Institute and Museum, June 1975 (J Davidson)
- A46 Akld Fisheries Management Plan; Phase I: Finfish. (Draft. Discussion Paper) (unpubl draft by Fisheries Management Division, MAF, Akld June 1986) (Senior Research Officer)
- A47 Fishery Management Planning – ‘Fisheries Management Areas’ [R D Cooper, Fisheries Management Division September 1984, FMP Series No.9 (Senior Research Officer)
- A48 Fishery Management Planning – ‘Organisational Structure’ (Consultative Structures) [R D Cooper, Fisheries Management Division September 1984. FMP Series No.10] (Senior Research Officer)
- A49 Fishery Management Planning Maori Fishery Programme, programme proposal 1987–89 (draft 3) (author R D Cooper FMD, MAF, 10 February 1987) (Senior Research Officer)
- A50 Rock Lobster Fisheries – Proposed Management Policy. (publ. Ministry of Agriculture and Fisheries, Fisheries Management, November 1986) (Senior Research Officer)
- A51 Map updated with amendments; Fishery management area boundaries (publ. MAF 20 February 1987) (Senior Research Officer)
- A52 Background Note re Muriwhenua Claim : Jurisdiction over Coastal Waters: International Legal Aspects filed 25 February 1987 (Ministry of Foreign Affairs)
- A53 House of Representatives, Supplementary Order Papers 64, 65, 67 re State-Owned Enterprises Bill, 12 December 1986 (Senior Research Officer)
- A54 Orange Roughy Investigative Fishing Plan, (publ. Ministry of Agriculture and Fisheries, Akld FMA, 1986) (Senior Research Officer)



- A55 'Future Policy For The Inshore Fishery': a discussion paper (author M J Belgrave, publ. NAFMAC – August 1983) (Senior Research Officer)
- A56 'Future Policy for the Inshore Fishery': Report to the Minister of Fisheries (publ. NAFMAC – September 1983) (Senior Research Officer)
- A57 Auckland Fishery Management Area; fishery zones and liaison committee network – Introductory Paper C (publ. Ministry of Agriculture and Fisheries, 16 July 1984) (Senior Research Officer)
- A58 The Fishery Management Plan Programme : Auckland FMA – Introductory Paper D (publ. Ministry of Agriculture and Fisheries, 14 June 1984) (Senior Research Officer)
- A59 Phase 1 of the Auckland Fishery Management Plan : – Introductory Paper E (publ. Ministry of Agriculture and Fisheries, 11 June 1984) (Senior Research Officer)
- A60 Issues and Problems in the Inshore Fishery of the Auckland Region (publ. Ministry of Agriculture and Fisheries, FMD Auckland, FMP Paper No. 1 – June 1984) (Senior Research Officer)
- A61 Proposed goals and objectives for Fisheries Management in the Auckland area (publ. Ministry of Agriculture and Fisheries FMD Auckland, FMP Paper No 2, October 1984) (Senior Research Officer)
- A62 Fishery Management Options for the Auckland Fishery Management Area (publ. Ministry of Agriculture and Fisheries FMD Auckland, FMP Paper No. 3 – July 1984) (Senior Research Officer)
- A63 Management Options available for Phase One of the Auckland FMP (publ. Ministry of Agriculture and Fisheries FMD Auckland, FMP Paper No.4 – July 1984) (Senior Research Officer)
- A64 Inshore Finfish Fisheries : proposed policy for future management (publ. Ministry of Agriculture and Fisheries – 1984) (Senior Research Officer)
- A65 Inshore finfish fisheries, proposed policy for future management (publ. Ministry of Agriculture and Fisheries n.d. leaflet) (Senior Research Officer)
- A66 Memorandum of Chairman re appointment of Counsel, costs, and re paragraphs 32 and 33 of the claim.
- A67 Public Law relevant to Fisheries, and affecting Maori fishing,  
 (a) List of Public Legislation;  
 b) Summary abstracts of fisheries legislation  
 (26 February 1987) (Waitangi Tribunal Staff)
- A68 'Background papers for the 1985 Total Allowable Catch recommendations' (publ. Ministry of Agriculture and Fisheries, Fisheries Research Division & FMD; 1985) (Senior Research Officer)
- A69 'Background papers for the Total Allowable Catch recommendations for the 1986–87 New Zealand fishing year' (publ. Ministry of Agriculture and Fisheries, Fisheries Research Division & FMD; 1986) (Senior Research Officer)
- A69 'Background papers for the Total Allowable Catch recommendations for the 1986–87 New Zealand fishing year' (publ. Ministry of Agriculture and Fisheries, Fisheries Research Division & FMD; 1986) (Senior Research Officer)

- A70 Letter (12 January 1987) from W Murray, Taitokerau District Maori Council Fishing Committee, together with
- (a) Minutes of meeting 31 October 1985 on Maori traditional fishing and marine reserves at Kaitaia;
  - (b) Minutes same date of Taitokerau representatives meeting re Traditional Maori fisheries;
  - (c) Minutes of meeting 25 September 1985 re Maori Fisheries;
  - (d) Summary and Notes of 'Tai Tokerau Workshop' between representatives of Tai Tokerau District Maori Council (and Maori Executives in their area) and of Ministry of Agriculture and Fisheries (n.d.) filed 16th January 1987 (W Murray)
- A71 Marine Farming Lease, standard form under the Marine Farming Act 1971, Ministry of Agriculture and Fisheries, (filed 24 February 1987) (MAF)
- A72 Oyster Farm Leases current in the Northland area; summary data showing Lease No., Lessee, area of lease, location, term, and commencement dates (filed 27 February 1987) (MAF)
- A73 List of Marine Farming Leases in the North Island other than oyster leases [showing identity and location codes and species] (filed 24 February 1987) (MAF)
- B Documents admitted at the second hearing 2–6 March 1987
- B1 Excerpts from 'Te Whaingā i Te Tika – In search of Justice', Advisory Committee on Legal Services (Convenor P Davies, Secretary J Kelsey publ Dept of Justice, 1986). [Section D 1-8, pages 13–18, Priority Sectors and Legal Services] (Senior Research Officer)
- B2 Memorandum to the Waitangi Tribunal (26 February 1987) [re amendments to Statement of Claim, and legal arguments], (W D Baragwanath)
- B3 Opening Submissions by Counsel for the Claimants (W D Baragwanath).
- B4 Fundamental Legal Principles, an extract from W J Byrne, A Selection of Legal Maxims, London, 9th Edition, pp191–197 (W D Baragwanath)
- B5 'Research into Maori Fishing Activities – Historical Perspective' by Elaine Felgaar for University of Waikato submission on behalf of the Tainui Maori Trust Board to the Treaty of Waitangi Tribunal, March 1987, (W D Baragwanath)
- B6 Mangonui County: Excerpt from 'Initial report on Northland Archaeology', (author Joan Maingay, NZ Historic Places Trust, Akld, 1986) (Dr Sue Bulmer)
- B7 Memorandum to the Tribunal [on authority of Maori Incorporations and Trusts to contribute to costs] (R Wells)
- B8 Lake Omapere Decision of Native Land Ct, Acheson J, 1 August 1929 (unreported) with Appx (a): extracts various Minutes Books  
 Appx (b): correspondence re B8  
 Appx (c): news report Northern Advocate 16 November 1976  
 (Senior Research Officer)
- B9 'Fishing Customs of the Early Maori' (W D Baragwanath)

- B10 *Baldick and Others v Jackson* [1910] All ER 343 (SC) Stout CJ (W D Baragwanath)
- B11 Excerpts from Acts Interpretation Act 1924 (W D Baragwanath)
- B12 *Birmingham City Corporation v West Midland Baptist (Trust) Association (Inc)* [1969] 3 All ER (W D Baragwanath)
- B13 Letter Sir Graham Latimer to Ministry of Agriculture & Fisheries dated 19 October 1983 (W D Baragwanath)
- B14 Excerpt from ‘Home News for Australia – A Summary of European Intelligence’ (26 January 1864) (W D Baragwanath)
- B15 Excerpt from ‘Home News for Australia’ (26 May 1964) (W D Baragwanath)
- B16 Excerpt from ‘Racial Policies & Adjustments’, para 43, Captain George Grey’s Instructions as Lieutenant-Governor (W D Baragwanath)
- B17 Excerpt from 85 Northern Minute Book 7–67 (M Rata)
- B18 Symonds [1847] NZ PCC pg 387, SC (W D Baragwanath)
- B19 *Nireaha Tamaki v Baker* [1900–1901] NZPCC 371 (W D Baragwanath)
- B20 *In re The Landon and Whitaker Claims Act*, 1871 All ER41 (W D Baragwanath)
- B21 Compilation of cases & articles 21(a)-(o)
- 21 (a) *Coe v Commonwealth of Australia and Another* [1978] 24 ALR 118.
- 21 (b) ‘Milirrpum and the Maoris: The Significance of the Maori Lands Cases Outside New Zealand’ J Hookey [1973–76] 3 Otago LR 63.
- 21 (c) *Milirrpum v Nabalco Pty Ltd* [1971] FLR 141
- 21 (d) *Oyekan and Others v Adele* [1957] 2 All ER 785
- 21 (e) *Sunmonu v Disun Raphael* [1927] AC 880
- 21 (f) *Amodu Tijani v The Secretary Southern Nigeria* [1921] 2 AC 399
- 21 (g) *Bolton et al v Forest Pest Management Institute et al* DLR (4th) 242
- 21 (h) *United States v State of Washington* 384F. Supp. 312 (1974)
- 21 (i) *Sohappy v Smith* 302 F Supp. 899 (1969)
- 21 (j) *United States v State of Washington* 506 F Suppl. 187 (1980)
- 21 (k) *Mitchel v United States* 9P, January Term, 1835 Supreme Court
- 21 (l) *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* 107 DLR (3d) p513
- 21 (m) *Guerin v The Queen* 13 DLR (4th) p321
- 21 (n) *Kruger v The Queen* 17 DLR (4th) p591
- 21 (o) *Calder v Attorney-General of British Columbia* 34 DLR (3d) (W D Baragwanath)
- B22 Tai Tokerau Maori Council correspondence with Ministry of Agriculture and Fisheries and others
- (a) Minister of Fisheries to Latimer 3.10.84)
- (b) Minister of Maori Affairs, memo Fuohy to various re MAF, 7.1.85.
- (c) Rata to Moyle, Minister of Fisheries, 10.2.85.

- (d) 'United Council' subm to MAF, re proposed management strategy for the Akld FMA, 13.3.87.
- (e) NZ Maori Council (Parata) to Moyle, MAF 11.4.87.
- (f) MAF (Maunier) to NZMC (Parata), 6.5.85.
- (g) Minister of Maori Affairs to NZMC (Parata), 9.5.85.
- (h) Minister of Fisheries (Moyle) to NZMC (Parata), 13.6.85.
- (i) Chairman, Waitangi Tribunal, to Rata, 2.7.85.
- (j) Taitokerau District Maori Council (Booth) to MAF, 11.7.85.
- (k) Taitokerau DMC minutes of Fisheries Cttee, Te Kao, 27.7.85.
- (l) Whangaroa Maori Exec Cttee (Rapata), to TDMC, re MAF/ITQs, 30.8.85.
- (m) Registrar (O'Connor) to Rata, 12.9.85.
- (n) Rata to Waitangi Tribunal (Chairman), 6.8.85.
- (o) Lady Emily Latimer to MAF, 8.9.85.
- (p) TDMC – Fisheries Cttee, Minutes, 25.9.85.
- (q) NZMC Fisheries Cttee (Paul) to NZMC Secy, re hui, 26.9.85.
- (r) Whakarara Maori Cttee to Fisheries Cttee (NZMC) re criticise previous, 30.10.87.
- (s) File note (signature illegible), 30.10.85. re Hokianga & Pawarenga studies for NZMC/MAF hui above, (23.10.85,24.10.85)
- (t) TDMC Minutes meeting re traditional fisheries & marine reserves (31.10.85)
- (u) TDMC Minutes Fisheries Cttee 27.11.85
- (v) letter TDMC (Booth) to Moyle, Minister of Fisheries, 29.11.85  
(W D Baragwanath)
- B23 Maori Fishing Programme 1986/7/8/9 – Preliminary Scoping Meeting – (MAF)
- B24 Memorandum MAF Office Solicitor (L Fergusson) to Crown Counsel (S Kenderdine)
- B25 Renewal of Fishing Vessel Registration and/or Fishing Renewals FMD Circular 1983/76 [with attachments (A) thru (H) (W D Baragwanath)
- B26 Policy for the Gathering of Kaimoana, Kaiawa and Kairoto for Hui and Tangihanga, October 1986 (later publ in Fisheries bulletin) (MAF)
- B27 MAF memorandum of 20.2.87 (Henriques to Central FMA to Dobson, to Asst Director MAF), [including Traditional (Maori) Programme Proposal for Central FMA [1987–1988], by Ruth Marsh] (MAF)
- B28 MAF Divisional Circular – Renewal of Fishing Vessel Registration and/or Fishing Permits (5.10.84) (MAF)
- B29 Letter Office Solicitor (M C Coubrough) to Director-General (for B Shallard), 12.4.83 re attached draft Maori Fishing Rights: Fisheries Bill 1982. Draft Maori Fishing Rights (B Shallard) encl (MAF)
- B30 Submission of Rev H Petera, Chairman Ngai Takoto Trust (H Petera)

- B31 Memorandum to Waitangi Tribunal on Clause 30 of the Statement of Claim (3.3.87) (R P Wells', Solicitor, Dept Maori Affairs)
- B32 Submission of C M Paul, Chairman, Te Runanga-a-Tangaroa, NZMC
- B33 Submission by W H Paraone [re Spiritual concepts and beliefs]
- B34 \* (Confidential)  
Statement by W H (Piri) Paraone of Ngati Kuri and Te Aupouri on Fishing and Shell Fishing Rights Claim.  
[Karatia Estuary, Waitaki Estuary, Waihuahua Channel, Poroporo Estuary, Open Waters]
- B35 \* (Confidential)  
Map of Rangaunu Bay [NZ 5113] (plus markings) (S Jones)
- B36 \* (Confidential)  
Interview with Kaumatua (Wiki Popata), March 1982 (S Jones)
- B37 Matthews – Reminiscences of Maori Life 50 Years Ago, (W D Baragwanath) Vol 43 Transactions and Proceedings of the New Zealand Institute 598.
- B38 (Confidential) Native Land Court Decision re Omapere Lake 5 March 1929 (related to Doc B8) (W D Baragwanath)
- B39 Submission for Houhora Riding Residents Association (G J Cashmore)
- B40\* (Confidential) Fish Found in the Whangape Harbour (Toi Murray)
- B41 \* (Confidential) Submission of an Elder [re fishing] (H Piripi)
- B42 \* (Confidential) Dimensions of the Claim [re fishing] (H Piripi)
- B43 \* (Confidential) 'Fish, Birds and Plants used by Te Rarawa' (H Piripi)
- B44 \* (Confidential) Large Map (H Piripi)
- B45 \* (Confidential) Large Map (H Piripi)
- B46 \* (Confidential) Evidence of Rapi Williams taken at his home on 16 February 1986 (W D Baragwanath)
- B47 \* (Confidential) Interview with an Elder [re fishing] (H Piripi)
- 48 Submission by P H Noho (P H Noho)
- B49 Submission by T Howse and J Te Aika of Ngaitahu Fishing Committee and by R Tau, Deputy Chairman, Ngaitahu Maori Trust Board (17.11.86) (H R Tau)
- B50 Submission on behalf of the Tainui Maori Trust Board (Dr N Hopa)
- B51 He Whakamaarama submission to Waitangi Tribunal, Centre for Maori Studies and Research, Waikato Univ (Dr I M Nottingham)
- B52 Documents re fishing permits etc (W Murray)
- B53 Letter Taitokerau District Maori Council (Booth) to D Baragwanath 3.3.87 (W D Baragwanath)
- B54 'The Sources of Laws Affecting Maori Fishing Grounds' [prepared in Department of Justice for Interdepartmental Committee on Fishing Grounds] (Senior Research Officer)
- B55 Addition to H Piripi's evidence (H Piripi)

- B56 He Waiata : Te Tangi O Muriwhenua Mo Te Iwi (Wiremu Paraone)
- B57 \* (Confidential) Te Runanga-O-Muriwhenua, Fisheries Claim, re paragraph 7 of the Claims (B Brown)
- B58 \* (Confidential) Map NZ 51 (Piri Paraone)
- B59 \* (Confidential) Map NZS 260 – North Cape & Three Kings (Claimants)
- B60 \* (Confidential) Map NZ 41 Chart North Cape & Three Kings (Claimants)
- B61 \* Maori translation of B57 Te Tono a te Runanga-O-Muriwhenua Mo Nga Tika Hiinga a Nga Iwi E Rima O Tenei Rohe O Muriwhenua; te tono whanui wahanga 7 (B Brown)
- B62 Submission of Te Kawariki (Hone Harawira)
- B63 Submission of W Whiu, Tahae Whenua, The State Owned Enterprises Act, [in Maori] (W Whiu)
- B64 Submission by Rapata Romana (R Romana)
- B65 \* (Confidential) Map – Northland (Claimants)
- B66 Submission of Dr R L Allen, FRD, MAF [replacement filed 2.4.87] (MAF)
- B67 Submission of R W Dobson, assistant director FRD, MAF (MAF)
- B68 Submission of Robert D Cooper, FMD, MAF [replacement filed 2.4.87] (MAF)
- B69 Submission of R W Little, FMD, MAF [replacement filed 2.4.87] (MAF)
- B70 Submission of Richard O Boyd, FRD, MAF [replacement filed 2.4.87] (MAF)
- B71 Submission of N D Martin, FRD, MAF (Whangarei) plus attachment re ‘Exclusion of Part-timers’ [replacement filed 2.4.87] (MAF)
- B72 ‘The Tail of Maui’s Fish’ by Professor J Morton (M Rata)
- B73 Correspondence of W Murray to MAF re personal efforts to obtain a fishing licence (plus letters)
- B74 Submissions of K P W Te Hau [re Maori unified concepts of lands and sea resources] (W D Baragwanath)
- B75 Submission of counsel for the Minister of Agriculture and Fisheries (S Kenderdine)
- B76 Appendix to B75 entitled ‘The Sources of Laws Affecting Maori Fishing Grounds . . .’ [identical with Doc B54] (S Kenderdine)
- B77 Submission of Assistant Counsel for MAF (S Hughes)
- B78 Schedule to submission of assistant counsel MAF (S Hughes)
- B79 Annex to submissions by assistant counsel for MAF (S Hughes)
- B80 Cabinet memorandum dated 23 June 1986, re ‘Treaty of Waitangi: Implications of Recognition’ (S Kenderdine)
- B81 ‘This Earth is Precious’ [statement of Chief Seattle] (S Hughes)
- B82 Letter V Dudoward, Fisheries and Oceans Department Government of Canada, to Ruth Marsh MAF, NZ; [re Indian Fishery in British Columbia] (S Kenderdine)
- B83 Newspaper Advertisement [by non-Indian Fishermen opposing Canadian-Indian Fishing rights] (S Kenderdine)

- B84 Canadian documents [Canadian jurisdiction, British Columbia. Documents illustrating the making of fishery regulations by joint action of Government and Indian tribal authorities:
- (a) Extracts of British Columbia Fishery (General) Regulations;
  - (b) Affidavit re the Gitksan-Wet 'Suwet En' Indian Fishing By-Law of the Gitanmaax Indian Band]
    - (S Kenderdine)
- B85 'The Indian Food Fishery of British Columbia' [historical record prepared by V H B Giraud 1975] (S Kenderdine)
- B86 'The Inuit, the Dene and Metis of Canada's Northwest Territories' J U Bayly, [Report to the 12th Congress of International Academy of Comparative Law, Sydney/Melbourne, (1987) (S Kenderdine)
- B87 Submission by D B Gunn, District Superintendent, Department of Labour, Whangarei (D B Gunn)
- B88 Note of Claimants' Position as at 7 March 1987 (W D Baragwanath)
- B89 Submissions by Dr O Sutherland for Auckland Committee on Racism and Discrimination (O Sutherland)
- B90 Ngai Tahu Fishing Committee & Trust Board, Minutes of meeting at Rapaki Marae (21.9.86) [re proposal for co-operative agreement with MAF re management of the fisheries in southern regions] (H R Tau)
- B91 Note of Ministry of Agriculture and Fisheries Position as at 6 March 1987 (S Kenderdine)
- B91 (a) Paper 'Maori Fishing Rights' NZ Federation Commercial Fishermen, 1985 (B Martin)
- B92 Submission of Irene Neho, Te Aupouri Tribe (I Neho)
- B93 Statement of the Waitangi Tribunal at the conclusion of the second sitting, (6.3.87)
- C Documents admitted at the third hearing 7-9 April 1987
- C1 'Muriwhenua Claim Wai-22 before Waitangi Tribunal: re Traditional Maori Fishing Rights', by Dr George Habib (Consultant to the Waitangi Tribunal on fisheries) (April 1987) (Dr G Habib)
- C2 'A Programme for Maori Fishery Research and Management: a discussion of issues for Fisheries Management Division, MAF' by N Taylor, T Williams, G Kerr, K O'Connor (Publ Centre for resource Management, December 1986) (Senior Research Officer)
- C3 Letter Crown Counsel to Solicitors for Claimants (Messrs Connell, Lamb, Gerard & Co) dated 30 March 1987 (S Kenderdine)
- C4 Letter Crown Counsel to Waitangi Tribunal dated 30 March 1987 (S Kenderdine)
- C5 'Proposed Management Policy for Rock Lobster' Fisheries Bulletin Vol 2, No. 2, March 1987 (publ Ministry of Agriculture and Fisheries, March 1987) (Senior Research Officer)
- C6 News clipping re 'Maori Fish Permit System Revised' New Zealand Herald (Auckland) (16 March 1987) (Senior Research Officer)

- C7 'Perspectives in fisheries management: Growth has led to conflict' by Dr Robin Allen, Asst Director, FRD, Ministry of Agriculture and Fisheries, Wellington; [in Catch '83, June pp 23–25 (publ. MAF)] (Senior Research Officer)
- C8 *R v Secretary of State for Foreign and Commonwealth Affairs* Ct App, Civil division; Lord Denning MR, Kerr and May LJJ, 28 January 1982 (S Kenderdine)
- C9 *Kruger et al v The Queen* [1978] 1 SCR pp 104-117 (S Kenderdine)
- C10 'Gathering of Kai for Hui and Tangihanga' Extract from Fisheries Bulletin vol 1 No 1, December 1985(Senior Research Officer)
- C11 'New Zealand's Fisheries Management Policies – Past, Present and Future: The implementation of an ITQ – based management system' by I N Clark and A J Duncan (Ministry of Agriculture and Fisheries and NZ Fishing Industry Board, Wellington) pp 107–140 in 'Fishery access control programs worldwide: Proceedings of the Workshop on management options for the North Pacific Longline Fisheries'. Orcas Island, Washington, April 21-25, 1986. Alaska Sea Grant Report No 86–4. University of Alaska, December 1986 (S Kenderdine)
- C12 Pro forma application to High Court under Judicature Amendment Act 1972; Affidavit of Honourable Matiu Rata on behalf of Claimants (nd; Application not filed at time of Hearing Wai-22) (M Rata)
- C13 'Summary of submissions for areas proposed for marine protections', (nd) (Ministry of Agriculture and Fisheries)
- C14 'Summary of submissions on proposed national policy for marine reserves' (May 1985) (Ministry of Agriculture and Fisheries)
- C15 'Summary of submissions on draft discussion paper: Auckland Fishery Management Plan, Phase 1: Finfish' (26.2.87) (Ministry of Agriculture and Fisheries)
- C16 Extract from 'Report of Fishing Industry Committee 1970 (Mr A D Dick, Chairman) I Dredge Oysters'; Laid on the Table of the House of Representatives (publ Govt Printer, Wellington, 1970) [index to Contents, Orders of Reference only] (Ministry of Agriculture and Fisheries)
- C17 Extract of 'Report of Fishing Industry Committee 1970–71 (Mr A D Dick, Chairman) re 2 Rock Lobsters', Laid on the Table of the House of Representatives : – extract only showing 1. Contents, 2. Orders of Reference, 3. pp 9-11 Background, 4. pp 32–47 Management, 5. pp 77–79 Research, 6. pp 83–86 Summary of Recommendations (publ Govt Printer, Wellington, New Zealand – 1971) (Ministry of Agriculture and Fisheries)
- C18 Extract of 'Report of Fishing Industry Committee 1970–71 (Mr A D Dick, Chairman) re Freshwater Fish Farming'. Laid on the Table of the House of Representatives : – an extract only showing 1 Contents 2 Orders of Reference (publ Government Printer, Wellington, New Zealand – 1971) (Ministry of Agriculture and Fisheries)
- C19 Extract of Report of Fishing Industry Committee 1970–71 (Mr A D Dick, Chairman) re
- (a) Roadside Sales of Fish
- (b) Industry Representation on the Fishing Industry Board



- (c) Other Subjects an extract only showing 1. Contents, 2. Orders of Reference, 3 pp 30–82 covering (c) Other Subjects, 4 pp 83–87 Summary of Recommendations (publ Government Printer, Wellington, New Zealand 1972) (Ministry of Agriculture and Fisheries)
- C20 ‘Report of Fishing Industry Committee 1962’ (Mr W J Scott, Chairman) as Laid on the Table of the House of Representatives (publ Government Printer, Wellington, New Zealand 1962) (Ministry of Agriculture and Fisheries)
- C21 ‘Report of Sea Fisheries Investigation Committee’ as Laid on the Table of the House of Representatives by Leave. H-44A (publ Government Printer, Wellington, New Zealand – 1938) (Ministry of Agriculture and Fisheries)
- C22 ‘Report of Caucus Fisheries Committee 1956’, as Laid on the Table of the House of Representatives by Leave. (publ Government Printer, Wellington, New Zealand – 1956) (Ministry of Agriculture and Fisheries)
- C23 Amendment page 8 of R Cooper’s submission [to complete Wai-22 Doc B68] (Ministry of Agriculture and Fisheries) C24 Programme Organisational Structure. Appendix 1 (Doc B 68) (Ministry of Agriculture and Fisheries)
- C25 ‘Treaty of Waitangi: Implications of Recognition’ [Treasury Circular Letter from B V Galvin, Secretary to the Treasury, to Permanent Heads. Dated 16.4.86] (W D Baragwanath)
- C26 ‘The Maori and Social Security’. Appendix D, extract from ‘The Politics of Social Security’, by Elizabeth Hanson, 1980. (W D Baragwanath)
- C27 Form of Application to Gather – Kai-Moana, Kai-Awa, Kai-Roto (Amateur Fishing) 1986, Fishing Regulations – Reg. (27) (Senior Research Officer)
- C28 Application form for a Controlled Fisheries Fishing Licence (Part III, Fisheries Act 1983) (Senior Research Officer)
- C29 Application Form: – Boat Authority – Controlled Fisheries (Fisheries Act 1983) (Senior Research Officer)
- C30 Memorandum of Lease (Under the Marine Farming Act 1971 (Senior Research Officer)
- C31 Licence Under the Marine Farming Act 1971 [Licence to an area for term of 14 years, for the use of the area as a marine farm] (Senior Research Officer)
- C32 Form of Fishing Permit and Certificate of Registry (Senior Research Officer)
- C33 Licence to Fish in the Exclusive Economic Zone [Foreign fishing craft licensed to fish in EEZ for specified period, purposes; including schedule of conditions and map/diagram of fishing area] (Senior Research Officer)
- C34 Memorandum of R L Allen, Deputy Group Director, Ministry of Agriculture and Fisheries Management, to Minister of Fisheries, dated 2.4.86 [sic true date must be 2.4.87, by internal references] [Copies referred by Minister of Fisheries to Ministers of Finance, Justice, and Maori Affairs 3.4.87] (Ministry of Agriculture and Fisheries)
- C35 Submission of R Dobson, Acting Director (Operations), Ministry of Agriculture and Fisheries [re Status of ITQ’s and Current ITQ species] (MAF)
- C36 Counsel’s submissions on whether the Tribunal should state a case to the High Court (S Elias; S Kenderdine)

- C37 Extracts various texts [re observations of Maori and Pakeha fishing 27–29th March 1770; and re Captain Cook traded with the Maori for fish etc (Captain Cook’s expedition, on the 31st March 1770, HMS Endeavour)] (W D Baragwanath)
- C38 Extracts various texts [re observations on Maori fishing] (Captain Cook’s expedition, 31st March 1770, HMS Endeavour) and re painting by John Webber, showing ‘a Maori group bartering fish . . .’ (W D Baragwanath)
- D Documents admitted at the fourth hearing 22–24 April 1987]
- D1 Dr G Habib: ‘MAF evidence, Tribunals questions, and summary of the Muriwhenua Claim . . .’ Consultant Report 19 April 1987 (Dr G Habib)
- D2 Book review by Dr G Rogers (University of Auckland) [of ‘Fishermen of Tonga: their means of survival’ by Sitiveni Halapua (publ Institute of Pacific Studies, University of the South Pacific, Suva, 1982) in *Journal of the Polynesian Society*, vol 96 (1) March 1987 pp 123 – 125, 1987] (Senior Research Officer)
- D3 ‘National policy and minority culture: the New Zealand case’ by G V Butterworth [Unpublished internal Report, Department of Maori Affairs, Wellington 1986 (cited in Doc D1)] (Senior Research Officer)
- D4 ‘The fishing industry of New Zealand’ by N A Jarman [Address to Te Runanga-a-Tangaroa, Takapuwhia Marae, Porirua, November 1985. unpubl. NZ Maori Council, MAF and Dept of Maori Affairs, 1985 (Senior Research Officer)
- D5 *Morunga v Ministry of Agriculture and Fisheries* (M No 623/86) Unreported Judgment, McGechan J; High Court, Wellington 10 April 1988
- D6 ‘Fisheries and the Maori People’ by Dr P Hohepa, (University of Auckland) [in Seminar on Fisheries for Maori Leaders, University of Auckland, 13–15 August 1976] (unpubl 12 pp)] (S Kenderdine)
- D7 Memorandum of Counsel for the Department of Conservation [impending review of marine reserves by new Dept] (R Wells)
- D8 Fishing Quota Management Areas, Species and Fishstock Codes (Ministry of Agriculture and Fisheries)
- D9 Extract from New Zealand Gazette, Wednesday, 5 February 1986, No 15, p 412 [this is a Notice Declaring Fishery Management Areas (Ag 9/2/2; No 3669) (MAF)
- D10 Cabinet Minute (CM 86/22/7 [from Minister of Justice and Minister of Maori Affairs to all other Ministers re Treaty of Waitangi and Implications of Recognition] (23.6.86) (MAF)
- D11 ‘Auckland Regional Marine Reserves Plan – a comment from the Auckland Committee on Racism and Discrimination (ACORD)’ (Claimants)
- D12 Map showing ‘Fishing Return Area Numbers (All Methods except Rock Lobster Pots)’ (Claimants)
- D13 Codes For Species Caught in New Zealand Waters – (Fisheries Statistics Unit, Fisheries Research Division, Ministry of Agriculture and Fisheries, 7.11.86) (Claimants)
- D14 Catch Summary Extract Report – (Fisheries Statistics Unit, Ministry of Agriculture and Fisheries, 15.4.87) Ministry of Agriculture and Fisheries data file ‘TOT EXPRES83’ (Ministry of Agriculture and Fisheries)

- D15 Catch Summary Extract Report – (Fisheries Statistics Unit, Ministry of Agriculture and Fisheries, 15.4.87) – Ministry of Agriculture and Fisheries data file ‘TOT EXPRES 84’ (Ministry of Agriculture and Fisheries)
- D16 Catch Summary Extract Report – (Fisheries Statistics Unit, MAF, 15.4.87) – Ministry of Agriculture and Fisheries data file ‘TOT EXPRES 85’ [data re areas 2, 47, 46, 48] (Ministry of Agriculture and Fisheries)
- D17 Catch Summary Extract Report – (Fisheries Statistics Unit, (Ministry of Agriculture and Fisheries), 15.4.87) – Ministry of Agriculture and Fisheries data file ‘TOT EXPRES 86’ (Ministry of Agriculture and Fisheries)
- D18 ‘General Conditions to be Attached to Approved Co-operative Trawling and bottom Longlining Fishing Ventures’. (Ministry of Agriculture and Fisheries)
- D19 ‘General Conditions to be Attached to Approved Co-operative Tuna Purse Seine Fishing Ventures’ (Ministry of Agriculture and Fisheries)
- D20 Memorandum from Minister of Fisheries to Minister of Trade and Industry re the Duty Free Fishing Vessel Importation Scheme (Ministry of Agriculture and Fisheries)
- D21 Duty and Sales-Tax Free Importation of Fishing Vessels (April 1980) (Ministry of Agriculture and Fisheries)
- D22 Duty and Sales-Tax Free Importation of Fishing Vessels (October 1981) (Ministry of Agriculture and Fisheries)
- D23 Letter from Secretary of Trade and Industry to Director-General Ministry of Agriculture and Fisheries re Ship Building Industry Overview Committee : Duty Free Fishing Vessel Importation Scheme . . . dated 23 May 1984 (Ministry of Agriculture and Fisheries)
- D24 Memorandum (ref 9/6/14/1) to director, FMD, Ministry of Agriculture and Fisheries from V Hinds, scientist FMD re a Ministry of Agriculture and Fisheries advisory system to the Ship Building Industry Overview Committee with particular reference to Duty Free Vessel Importations, including recommended improvements, (dated 13.9.84) (Ministry of Agriculture and Fisheries)
- D25 Letter from Secretary Department of Trade and Industry to Director-General Ministry of Agriculture and Fisheries (Mr V Hinds), dated 21 September 1984. [attached are Terms of Reference for review of the Ship building Plan to the Industries Development Commission together with a copy of the Ministry of Trade and Industry’s press Statement] (Ministry of Agriculture and Fisheries)
- D26 Divisional Circular from Director FMD to Regional Fishery Officers and Regional Executive Officers; ‘General conditions for registration of Foreign-Owned Vessels as New Zealand Fishing Vessels by Companies holding Deepwater Trawl policy allocations’, dated 6.8.85 (Ministry of Agriculture and Fisheries)
- D27 Export Performance Taxation Incentive (EPTI) (Ministry of Agriculture and Fisheries)
- D28 ‘Revised Commercial Ship Building and Repair Industry Development Plan: Summary of Import Licensing Duty and Bounty Protection’, dated 13.3.87 (Ministry of Agriculture and Fisheries)
- D29 ‘Department of Trade and Industry Commercial Ship Building and Repair Industry Bounty Schemes’ (Ministry of Agriculture and Fisheries)

- D30 Extract from 'Maori land' by George Asher and David Naulls, Planning Paper No 29 March 1987 (Senior Research Officer)
- D31 Affidavit of Robin Leslie Allen dated 21.4.87 (S Kenderdine)
- D32 Statement by Crown [that the 'Forms for the Traditional Fisheries' as shown in Doc C27 will be modified by Maori Fisheries Programme Co-ordinator Mr Cooper in conjunction with Kaumatua and applied in Northland] (S Kenderdine)
- D33 Closing Submissions of Counsel for the Crown and for Ministry of Agriculture and Fisheries (S Kenderdine)
- D34 Statement for Claimants [re procedural application for Case Stated by Waitangi Tribunal] (W D Baragwanath)
- D35 Submission by Counsel for Claimants on Fishing Claims (W D Baragwanath)
- D36 Outline of Response to Ministry of Agriculture and Fisheries Submissions (W D Baragwanath)
- D37 Transcript of Discussion of Tribunal Chairman and Counsel re Directions
- D38 Letter to Tribunal Registrar from Tauranga Moana Maori Trust Board, E D Morgan, Secretary, dated 2.4.87 in support of claim (Senior Research Officer)
- D39 Letter from D G Garrod, (Directorate of Fisheries Research, Ministry of Agriculture, Fisheries & Food, Suffolk), to Dr R Allen, Director, Minister of Agriculture and Fisheries Research Division, Wellington dated 14.4.87; enclosed, appendix (a) article from Fishing News 'NZ opens Quota Exchange' (S Kenderdine)
- D40 Letters (i) Dobson (Ministry of Agriculture and Fisheries to S Kenderdine (Crown), dated 8 July 1987, (ii) S Kenderdine to Waitangi Tribunal, dated 10 July 1987 [re R Martin's Quota allocation] (S Kenderdine)
- E Documents admitted at hearing, 30 September 1987
- E1 Application by Counsel for Claimants for urgent hearing and interim report dated 15 September 1987 [received 21 September 1987] (W D Baragwanath)
- E2 Letter Claimants' Solicitors to Waitangi Tribunal, dated 18 September 1987 [re Doc E1 and enclosing relevant correspondence] (J Priestley)
- E3 Letter Claimants' Solicitors to Solicitor-General, dated 10 September 1987 [objecting to proposed issue new ITQ] (J Priestley)
- E4 (a) Letter Ministry of Agriculture and Fishery Fish (R L Allen, Deputy Group Director) to Counsel for claimants, dated 11 September 1987 [re Ministry of Agriculture and Fishery ITQ proposals] with enclosures (b) and (c) (MAF)
- (b) Letter Assistant Director, Fisheries Management Division (K A R Walshe) to Fishmac members, [with discussion paper re Management of Jack Mackerel Fishery, dated 3 April 1987] (MAF)
- (c) Letter National Co-ordinator, Maori Fisheries programme, Ministry of Agriculture and Fisheries (R D Cooper) to Mr B Cooper of Paekakariki, undated [re circulation of proposals re ITQ Mackerel fishery, to Maori organisations, and proposed timetable for introduction of ITQs mackerel, squid, rock lobster, eel] (J Priestley)
- E5 Letter Counsel for claimants to Ministry of Agriculture and Fisheries Fish Deputy Group Director (R L Allen) dated 15 September 1987 [response to Ministry of Agriculture and Fisheries (Doc E4)] (J Priestley)

- E6 Letter Secretary to the Treasury and Secretary of Maori Affairs to the Minister of Finance and the Minister of Maori Affairs dated 17 July 1987 [re Maori Fisheries] (Senior Research Officer)
- E7 Maori Fishery Programme 1987–1989 (Ministry of Agriculture of Fisheries Fish) (Senior Research Officer)
- E8 Ngai Tahu Fisheries Draft Claim, dated 25 September 1987 [Wai-27 Doc B13] (Senior Research Officer)
- E9 Letter Connell Lamb Gerard & Co to Registrar [re Shrimp ITQ] (J Priestley)
- E10 Letter R H Allen, Ministry of Agriculture and Fisheries, to W D Baragwanath covering various other documents, dated 21.9.87 (W D Baragwanath)
- E11 List of address of Runanga which were sent information re Squid and Jack Mackerel (S Kenderdine)
- E12 ‘Consultations with Maori Organisations’ (S Kenderdine)
- E13 Letter R L Allen to Solicitor-General dated 30.9.87 (S Kenderdine)
- E14 Affidavit of R D Cooper (Ministry of Agriculture and Fisheries)
- E15 Memorandum of Waitangi Tribunal to Minister of Agriculture and Fisheries and to the Parties
- F Documents admitted at hearing 8–9 March 1988
- F1 Letter Connell Lamb Gerard & Co to Registrar re extension Muriwhenua Fisheries claim to 200 mile EEZ dated 2 December 1987 (Connell, Lamb, Gerard)
- F2 Letter W D Baragwanath to Dr M Goodall [re proposal that land issues and Ninety Mile Beach be dealt with at separate hearing] dated 4 November 1986 (W D Baragwanath)
- F3 Letter W D Baragwanath to C J Thompson, Deputy Solicitor General, [re matters claimants intend to address dated 4 November 1986] (W D Baragwanath)
- F4 Letter Crown Law Office applying for Tribunal hearing re extension of claim dated 8 February 1988 (S Kenderdine)
- F5 Directions of Chairman re hearing of submissions on fishing claim area dated 9 February 1988
- F6 Letter Connell Lamb Gerard & Co to Registrar re Muriwhenua: 200 Mile Limit. Dated 12 February 1988. (Senior Research Officer).
- F7 Letter Crown Law Office (S Kenderdine) to Waitangi Tribunal. Dated 15 February 1988. [re Muriwhenua 200 mile claim.] (Senior Research Officer).
- F8 Letter Senior Research Officer to Crown and Claimant’s Counsel replying to F6 and F7. Dated 15 February 1988 (Senior Research Officer).
- F9 Letter Crown Counsel to Waitangi Tribunal. Dated 19 February 1988 (Senior Research Officer).
- F10 Letter Chairman Ngaitahu Maori Trust Board (T O’Regan) to Waitangi Tribunal. Dated 6 March 1988. [advising attendance (Mr D Palmer) at chambers hearing 8 March 1988]. (Senior Research Officer).
- F11 Submissions of Counsel for New Zealand Fishing Industry Board and New Zealand Fishing Industry Association. Dated 8 March 1988 [received in Waitangi Tribunal 7 March 1988].

- [(a) Application for leave to appear, to be heard, and to comment on submissions made by the Maori claimants and the Crown as parties.
  - (b) Submissions by the New Zealand Fishing Industry Board and New Zealand Fishing Industry Association re extension of the claim to limit of the 200 Mile Exclusive Economic Zone.] (J R Marshall for NZFIB and T J Castle for NZFIA).
- F12 Submissions by Counsel for the Claimants upon the Claimant's Memorandum of 9 February 1988. (D Baragwanath for Claimants).
  - F13 Submissions of Crown Counsel (S Kenderdine)
  - F14 Directions of the Waitangi Tribunal, Wednesday 9 March 1988.
  - G Documents admitted at hearing, Wellington, 5 April 1988
  - G1 Submissions on behalf of the New Zealand Fishing Industry, dated 30 March 1988. (J L Marshall, T J Castle, C M Wainwright and B A Scott) (Counsel for the New Zealand Fishing Industry).
  - G2 Letter Connell Lamb Gerard & Co to Waitangi Tribunal dated 21 March 1988. (Solicitors for Claimants).
  - G3 Letter Connell Lamb Gerard & Co to Waitangi Tribunal dated 22 March 1988. (Solicitors for Claimants).
  - G4 Letter Crown Counsel (S E Kenderdine) to Waitangi Tribunal dated 29 March 1988. (Crown Counsel).
  - G5 Speech of Hon Colin Moyle, Minister of Fisheries (17 March 1988, to open Annual Conference of New Zealand Fishing Industry AssociationI, Nelson. (Senior Research Officer).
  - G6 Extract re Sinclair: Treaty Interpretation in British Courts: 121 CLQ 508, pp510–511. (Crown Counsel).
  - G7 Submissions of Crown Counsel. (K Carruthers & S Kenderdine).
  - G8 Alienation Rights in Traditional Maori Society: A comment by Alan Ward, (1985) Journal of the Polynesian Society, pp259–265. (Crown Counsel).
  - G9 Fishing Industry Association submission re 'exclusive use' in response to WT direction (6 April 1988). (J Marshall, FIA Counsel).
  - G10 Crown Submission re the issue of interpretation of the words 'so long as is their wish and desire to retain the same', as directed by the Tribunal (6 April 1988). (Crown Counsel).
  - G11 Record of Petitions re fishing rights. (Senior Research Officer).
  - H Eighth Hearing, Wellington, 28–29 April 1988]
  - H1 Memorandum of Crown Counsel Concerning Treaty Principles (received 22 April 1988). (Crown Counsel).
  - H2 Submissions of Claimants in Reply to (1) the Crown and (2) the Fishing Industry (received 27 April 1988). (Counsel for Claimants).
  - H3 Memorandum Responding to Issues Raised in the Seventh Hearing on 5–7 April 1988. (Crown Counsel).
  - H4 Cases cited in Memorandum (Document H3).

- (a) *United States v California*. (Decided 23 June 1947 Supreme Court, [332 US 19- 461).
  - (b) *New South Wales v The Commonwealth* [1985] 135 C.L.R. 337, p 506, High Court of Australia.
  - (c) *United States & Ors v Taylor* [1887] Pacific Reporter [Wash.] pp333–337. (Heard 25 January 1887. Supreme Court of Washington). (Crown Counsel).
- H5 Historical Papers cited in Memorandum (Document H3).
- (a) Letter Russell (Colonial Office) to Palmerston (Foreign Office), dated 8 December 1840.
  - (b) Memorandum by Lord Palmerston re item (a), dated 10 December 1840 (Crown Counsel).
- H6 Summary of the Crown's Submissions in extenso in Document H1 (Crown Counsel).
- H7 \* (Confidential) Affidavit of B Kingsbury for NZMC in *NZMC v Attorney-General* [1987] 1 NZLR 641 (Counsel for Claimants).
- H8
- (a) Question 43 and Answer for Ministry of Agriculture & Fisheries.
  - (b) Turning the Tide: a New Policy For Canada's Pacific Fisheries, Ch 12, Indians in the Commercial Fisheries; Ch 13 Other Industrial Development Policies pp151–185; Commission on Pacific Fisheries Policy, Final Report, P H Pearce, Commissioner, Vancouver, 1982.
  - (c) \* (Confidential) Note on Certain Materials Concerning Indigenous Peoples and Right to Development, 6 April 1988, by B Kingsbury (Oxford University) [4pp plus 3 page addition by BK].
  - (d) Extract from The International Law of the Sea, O'Connell, vol. 1, (1982), at pages 134–135 re the Extent of the Territorial Sea.
  - (e) Extract from Principles of Public International Law, Brownlie, 3rd Edition, ex Part IV Law of the Sea, Ch IX pp 183–195, re Territorial Sea, Contiguous Zones, and Analogous Claims.
  - (f) Extract from Territorial Property of a State, Hall, 2nd Edition, ex Part II, Ch II pp136–139, re Territorial Property of a State, marginal seas.
  - (g) Extract from International Law and Historical Perspective, J H W Verzijl, Leyden, 1970, Vol. 3, sect G pp60–63, re baseline and breadth of the territorial sea.
  - (h) Extract from The Sovereignty of the Sea, 1933, Fulton, pp662–665 (Counsel for Claimants).
- H9 *Simon v The Queen* [1985] 24 DLR 390 (Counsel for Claimants)
- H10 Extract from *Tito v Waddell (No. 2)* [1977] 3 All ER Ch D, per Megarry V-C (extract pp 279–281) (Counsel for Claimants)
- H11 \* (Confidential) Additional Note of B Kingsbury re three-mile limit citations from O'Connell in International Law, vol. 1, London: Oceana Publications, 1965). (Counsel for Claimants).
- H12 *United States v Louisiana et al* SC [1959] 363 US 1. (Counsel for Claimants).

- H13 \* (Confidential) Additional Note re principles of treaty interpretation and Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969, and subsequent practice rule, by B Kingsbury, Univ of Oxford. (Counsel for Claimants).
- H14 Vienna Convention on the Law of Treaties, (dated Vienna 23 May – 30 November 1969 and New York 1 December 1969–30 April 1970; UK ratification deposited 25 June 1971 and in force 27 January 1980; NZ ratification deposited 4 August 1971 and in force 27 January 1980). publ. HMSO, London, Treaty Series No. 58 (1980). (also publ HMSO as Misc. No. 19 (1971)). (Crown Counsel).
- H15 *Washington v Fishing Vessel Assn* [1979] 443 US 658, 61 L Ed 2d 823, 99 S Ct 3055 (Nos. 77–983, 78–119, 78–139) (Argued 28 February 1979, decided 2 July 1979). [ US S Ct Deciding the three cases; *State of Washington et al v Washington State Commercial Passenger Fishing Vessel Association et al* (No. 77–983); *State of Washington et al v United States et al* (No. 78–119); *Puget Sound Gillnetters Association et al v United States District Court for the Western District of Washington* (United States et al, Real Parties in Interest). (No 78–139). ] (Counsel for Claimants).
- H16 *Oneida County, N.Y. v Oneida Indian etc* [1985] 105 S Ct 1245 (Counsel for Claimants).
- H17 Submissions for New Zealand Maori Council in response to New Zealand Fishing Industry Submissions dated 31 March 1988. (Counsel for New Zealand Maori Council).
- H18 Submissions for New Zealand Maori Council in reply to Crown Submissions and Memorandum. (Counsel for New Zealand Maori Council).
- H19 Orders-In-Council Affecting Sea Fishing (Other Than Marine Mammals and Marine Flora) 1903–1840. Draft; permission Crown to substitute when completed). (Crown Counsel).
- H20 Submissions on Behalf of Fishing Industry in Reply to Issue (of Exclusivity of Maori Fishing Rights) raised by Tribunal. (Counsel for Fishing Industry Association).



## **A3.4 REPORTS, MEMORANDA AND DIRECTIONS**

### **A3.4.1 INTERIM REPORT TO MINISTER OF MAORI AFFAIRS ON STATE-OWNED ENTERPRISES BILL, 8.12.86**

[see 1.7]

[INTITULMENT]

To The Honourable the Minister of Maori Affairs  
Parliament Buildings  
WELLINGTON

E te Minita, Tainui, tena koe.

We report to you from the very far North, from Te Hapua, which bounds North Cape. From here we began an Inquiry today into a series of claims from the five most northerly Tribes, seeking amongst other things the return to them of large areas of Crown Land. Though our enquiries are far from complete, Senior Counsel for the Claimants, Mr W D Baragwanath QC, has made certain preliminary submissions to us that compel our immediate response in the form of this Interim Report to you.

Counsel submitted that the relief sought by the Claimants is, or is likely to be, prejudiced by the enactment of the State Owned Enterprises Bill, that such prejudice is contrary to the principles of the Treaty, and that the Claimants should be granted relief in the form of some exemptions from the Bill or other amelioration of the terms of the Bill. We were informed that the Bill could pass to a Third Reading this week.

When invited to reply to Mr Baragwanath's preliminary submissions, none of the Counsel for various Government Departments who are appearing before us objected to the making of those submissions or disputed their correctness.

We are of opinion that we are able to consider the point. Section 8 of the Treaty of Waitangi Act 1975, which enables proposed legislation to be reviewed by this Tribunal on resolution of the House of Representatives, is in our view additional to, and does not derogate from the jurisdiction in section 6 to review policies or practices proposed to be adopted by the Crown, on the claim of any Maori likely to be prejudicially affected.

Without pre-judging in any way our finding as to whether or not all or part of the land in question should be returned, we consider the Claimants are likely to be prejudicially affected by the Bill. The policy proposed in the State Owned Enterprises Bill involves a transfer of Crown Land to the Forestry Corporation, the Land Corporation and other Corporations. It will then cease to be Crown Land. Although it appears Ministers will retain a power of direction to the proposed Corporations, that power, it seems to us, is likely to be limited and insufficiently wide to enable the return of Crown Land pursuant to a recommendation of this Tribunal, or might otherwise involve claimants in an additional adversary. Nor, it seems, would the Bill necessarily prevent the alienation of lands that did not provide reasonable economic return.

The Treaty of Waitangi affirmed a special relationship between the Crown and the Maori people. The guarantee, in Article Two, to the undisturbed possession of lands so long as the Maori owners wish to retain the same, must be read in the context of the preamble, that the Crown is anxious to protect their just rights and property. The element of protection was, we consider, a most compelling reason for the execution of the Treaty. We must look

to the surrounding circumstances and the expectations of those very Chiefs of the far North, and Panekareao in particular, that the Governor would remain their father and protector. His descendants are now before us. The honour of the Crown is at stake. We think it inconsistent with the principles of the Treaty of Waitangi that that particular relationship of the Maori and the Crown should in any way be diminished, or even threatened with compromise. We do not think in particular that the Crown should dispose of lands that are the subject of claims and risk thereby some prejudice to the Claimants' position.

We have therefore considered the most limited relief that could be given to maintain the current position of both the Claimants and the Crown, pending the completion of our Inquiry and the preparation of our Report. It is with that perspective that we now formally recommend to you as Minister of Lands:

That the Minister of Lands, or any other Minister involved, decline to transfer to any State Owned Corporation envisaged by the Bill the Crown Lands within the traditional territories of the Ngati Kuri, Te Aupouri, Te Rarawa, Ngai Takoto, and Ngati Kahu Tribes during the currency of the Claim before us.

Having made that recommendation we do not think it would be responsible if we were not to relay to you certain other concerns raised in the course of submissions and in our deliberations, for the issue is much wider than the claim now before us.

There are some forty further claims that have been filed with the Waitangi Tribunal, some heard, some part-heard, and some yet to be heard. Many affect, or could affect, Crown Lands in the relevant Tribal areas. We are unable to be more specific for Te Hapua facilities do not admit of ready access to official data, but we must draw your attention in particular to the claim of the Ngai Tahu Maori Trust Board in respect of certain Crown Pastoral Leases in the South Island, and to the Ngati Kahu claim involving the Karikari peninsula.

You may be minded to take similar action at your own initiative in respect of those cases pending.

And of course there may well be further claims in future. Though we have expressly refrained from commenting on the Bill, on the grounds that we can deal with the particular case without doing so, the question remains whether the Bill itself is contrary to the principles of the Treaty, at least without some amendment that continues the responsibility of the Crown for the return of land, and appropriately restricts alienations by the envisaged corporations.

Finally, and quite apart from actual or prospective claims, and the position of those many Maori who have entered into long-term forestry and farming arrangements with the Crown, we question whether the Crown title is in all cases proven. We think it relevant that you should ask whether the Crown right to land is clearly established, before it is transferred, and the source of title publicly disclosed by reference to some conveyance, or due notice under some empowering statute. More particularly, we wonder whether some of that recorded as Crown land is not in fact customary land, or land the native title to which, or usufructuary rights thereover, have not been extinguished. We sincerely hope that the Crown's most proper desire to act with due economy should not now limit the honour of the Crown that marked its advent in Aotearoa.

These are matters on which you may wish to confer further with the Minister of Finance and the Chairman of the Cabinet Committee on State Corporations. We trust you will consider them too in your several capacities as Minister of Lands, Forests, and Maori Affairs. They constitute the message to you, at the head of the fish, from the Iwi at its tail.

DATED at Te Hapua this 8th day of December 1986

[Signatures of all members]

**A3.4.2 MEMORANDUM FROM THE WAITANGI TRIBUNAL 10  
DECEMBER 1986 TO THE DIRECTOR-GENERAL, MINISTRY OF  
AGRICULTURE AND FISHERIES RE FISH QUOTA, 10.12.86**

[see 1.7.2]

[INTITULMENT]

1. The Tribunal is extremely concerned that our ability to make recommendations on a claim now before us, and the ability of the Government to agree to any such recommendations, may be prejudiced by the allocation in the interim of Individual Transferable Quotas granted under the provisions of the Fisheries Amendment Act 1986. The claim in essence is that the claimants are entitled to a share of the commercial fish resource and maintain that the allocation of that resource under the new commercial fishing regime will prejudice that claim. We consider this claim warrants the most serious and detailed consideration.

2. From the indications which have been given to us, it appears that the Quotas may be issued at any time. Counsel for your Ministry was unable to give us any assurance that their issue would be delayed until the Ministers had had an opportunity to consider our report to them. In these circumstances we consider it appropriate to advise you of our concern. We request that the contents of this memorandum be conveyed immediately to the Director-General.

3. The Tribunal has carefully considered the submissions which it has heard from counsel for the claimants and your counsel. We have had regard to the interests of all parties who may be affected. We have concluded that no Quotas should be allocated until the Tribunal has reported to the Ministers and that Report has been considered.

4. Considerable disruption may occur and very substantial compensation may have to be paid to Quota-holders if the Government were in due course to accept a recommendation of the Tribunal that certain quotas should not have been allocated and should therefore be purchased back by the Government. It would we believe clearly be preferable to avoid such a situation arising by not finalising the distribution of the quotas until we have had a opportunity to report.

5. We propose to attach a copy of this memorandum to our Report.

E Taihakurei J Durie

Chairman

WAITANGI TRIBUNAL

[A response to this memorandum is printed as appendix 4]

**A3.4.3 DIRECTION OF CHAIRMAN AS TO FURTHER HEARING,  
15.12.86**

[see 1.7.2]

[INTITULMENT]

Counsel will recall that in the week of 8 December 1986 the natural progression of the hearing of this claim was interrupted by urgent submissions that the State Owned Enterprises Bill, the Maori Purposes Bill and steps under the Fisheries Amendment Act 1986 were all pending and were said to prejudice the claim. Consideration of those submissions therefore received priority. The Tribunal is concerned that in the result evidence and submissions on the nature and extent of the traditional Muriwhenua fisheries was not completed. The Tribunal is also of opinion that while the various items in the statement of claim are inter-related and would best be dealt with as one, the implementation of fishing quota policies attaches such urgency to paragraph 7 of the statement that that paragraph should continue to receive priority at the second hearing (and with the prospect of a separate report issuing on that aspect).

Accordingly I direct that at the second hearing, paragraph 7 of the statement of claim be dealt with first. Counsel will note that paragraph 7 incorporates paragraph 2 which in turn refers to traditional fishing grounds within a 25 mile band off the coast of the mainland and Manawatawhi (Three Kings Island), the mainland being the whole of that most northerly peninsula embraced by the coastline from Herekino Harbour on the West Coast to the Mangonui River on the East.

Counsel's attention is drawn to the following matters:

1. It is not clear to the Tribunal whether the whole of the 25 mile band is claimed as a traditional fishery or whether the claim is to particular fisheries within it. Counsel for the claimants will be expected to advise, and if the latter is correct, to depict on a map the areas referred to.

2. Whether or not the claim is to the whole 'band' or particular parts of it, I would assist if the claimants were willing to identify by map any fishing areas of particular traditional significance.

It is suggested that Counsel for the claimants open the second hearings by covering 1 and 2 above.

3. The Tribunal will then receive (and would welcome) any further evidence and submission on the nature and extent of the traditional fishing grounds, any names by which they are known, the iwi, hapu, whanau or individuals traditionally associated with each, any relationship of those grounds to the inhabitants of (a) past and (b) present Maori villages, the nature of any particular fishing activity carried on in particular areas or any traditions associated with them, the continued use of those fishing grounds (if that is the case) from 1840 to the present day, any perceived restrictions on use and enjoyment through regulations, water quality deterioration, decline in tribal populations, outside competition or the like, particulars of any more recent involvement of the claimant people in the fishing industry, the extent of reliance on the fish resource for personal sustenance and tribal gatherings, any current tribal bodies or organisations that might assume some jurisdiction in respect of any particular fishing areas, and such further evidence and submissions as may be relevant to fishing and marine practices and policies.

4. Without limiting the issues that have arisen or have yet to arise on this or other aspects of the claim, and mindful that the Tribunal has yet to confer with parties to settle the issues, the Tribunal considers the following matters are in issue on paragraph 7 and subject to any submissions thereon, will ask that all Counsel affected address them.

(a) Does the Treaty of Waitangi contemplate a right to continue traditional fishing practices in a traditional way and for traditional purposes or does it contemplate as well a 'property' in fish and fishing areas, or a resource vested in tribes or tribal divisions with rights of development in commercial terms.

(b) Does the Treaty of Waitangi contemplate that fisheries refers to site specific fishing grounds or does the whole of the seas associated with tribal areas constitute Maori fisheries?

(c) Have the northern tribes or any of them indicated they no longer wish or desire to retain the whole or any part of the fisheries in their possession?

(d) Does the Fisheries Amendment Act 1986 assume the 'property' in fish and fishing areas is vested in the Crown and is capable of being divested, assigned or apportioned by the Crown?

(e) Subject to the determination of the issues in (a) – (c) above

—what steps might be taken to accommodate greater participation by the northern tribes in the fishing industry (for example through an allocation of present or future quotas, a share of revenues, assistance in establishing a local fishing industry) and how might any such measures be provided for?

—what steps might be taken to protect particular fishing areas for the use, enjoyment or development by the northern tribes?

—what institutions of the northern tribes might appropriately represent particular iwi, hapu or whanau interests in any particular fishing grounds or fishing areas?

5. In addition, Counsel for the Ministry of Agriculture and Fisheries will be asked, at the hearing

—to outline, in written submissions, the relevant law affecting the management of fishing and marine reserves in the area of the claim, and to outline any significant developments in that law over the last decade

—to advise the extent to which consultations were held with the Maori people on the quota management system introduced by the Fisheries Amendment Act 1986

—to advise the allowance made in terms of section 28C(1) of that Act for the Maori and traditional interests in the fisheries in the area of the claim before total allowable catches were set

—to produce any reports or published explanations on any present or proposed laws or policies relevant to fishing laws and marine management, including any social or economic impact assessments, and such other data as may assist the hearing

The Registrar is directed to despatch copies hereof to Counsel on the record and such other persons as he thinks fit.

DATED at Wellington this 15th day of December 1987

Chief Judge E T J Durie

CHAIRMAN

#### **A3.4.4 STATEMENT AND DIRECTIONS OF THE TRIBUNAL OF 6 MARCH 1987**

[see 1.7.3]

[INTITULMENT]

The Tribunal has this week heard considerable evidence from the claimant tribes of the North about the areas of their fisheries as at 1840 and following and the nature of their fishing activities at those times.

The Ministry of Agriculture and Fisheries, through its counsel, has now formally acknowledged that the evidence as to the extent of the fisheries was correct in all material respects and that there was a commercial component in the fishing in that some fish were sold or bartered. The Tribunal considers that this acknowledgement was properly made and was fully justified on the evidence.

In the time available this week it will not be possible for the Tribunal to hear the evidence which the Ministry wishes to present to it in respect of a number of further issues which will require consideration by the Tribunal. For this purpose, and subject to the confirmation of the claimant groups, the Tribunal proposes that:

—On Monday 6 April the Tribunal will sit at Whatuwhiwhi, or such other place as may be agreed, to hear that part of the Ngati Kahu claim which relates to the Taipa Sewage Scheme.

On the following Tuesday, Wednesday and Thursday the Tribunal will hear the Ministry's response to the present claim, the report of the Tribunal's own consultant and the final submissions of counsel on the fisheries aspects of the claim.

W M Wilson

Member for the Tribunal

#### **A3.4.5 MEMORANDUM OF TRIBUNAL'S PRELIMINARY OPINIONS AS CONVEYED TO HON MINISTER OF FISHERIES, 30.9.87**

[see 1.7.6]

PRESENT: Tribunal members

W D Baragwanath and S Elias (Claimants)

S Kenderdine, M Shelton, A Kerr (Crown)

M Dawson (NZ Maori Council)

On a motion that the Tribunal report now, or as soon as practicable, and in the light of Crown intentions to issue further ITQ's, the Chairman said:

1. The Tribunal has been unable to produce a report on the Muriwhenua Fisheries Claim through other work and commitments.
2. The Tribunal has also considered that a comprehensive analysis of the Muriwhenua tribe's situation should be made – that is, of their land and fishing claims together, so that relief might be seen in terms of a total package proposal for the restoration of the Muriwhenua tribes through their land and sea resources. The adequacy of those resources needs to be reviewed and the capability of those resources to service those needs. There must in other words be a search for a proper economic base for the Muriwhenua tribes, and a proper restoration of their status. Tribal restoration as an alternative to damages or reparation has been mooted in the Waiheke Report (1987) and is further mooted in the Orakei Report shortly to be released. We have therefore been reluctant to proceed with the Fisheries matter by itself. Our concerns however are directed

to remedies, and as Counsel for the claimants has reminded us, remedies have yet to be addressed in open forum.

3. From what has been said this morning however, it is apparent that an early report is urgent and is desired by both parties.

4. An early report, even limited to the Fisheries aspects of the claim, would still be difficult for this Tribunal. A full summary of the evidence would be needed if the public were to be properly informed of the nature of the traditional Muriwhenua Fisheries. Further research is also needed in our view, and is being arranged, on the nature of the traditional Maori economy, a tribal economy quite distinct from economies as understood in western terms, and on the history of the Maori use of fisheries in the post European period and the like.

5. But despite that, we do have some conclusions on the evidence already available.

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.

We also find that the use of those seas was regulated and controlled by established practices or laws that were regularly observed. Fishing in that area was restricted to the hapu and tribes of Muriwhenua or others with their prior (and revocable) licence. That restriction was enforced or was capable of being enforced. The overall conclusion that we would come to is that the hapu and tribes of Muriwhenua held the 'mana' of the whole of the zone mentioned. The nearest British cultural equivalent is to consider that they exercised 'dominion' over that zone, or 'owned' it. They were the tribes' territorial waters.

We find that that sea resource was essential not only for the physical survival of individuals and communities but for the whole economies and social networks of the hapu and tribes involved. Relating that to western terms there was certainly a commercial component and one that was capable of adaptation to commercial uses in western terms.

The main finding here that we come to, is that the area of seas referred to was owned, it was property in the same way as land was. The evidence is that the Maori did not prevent the non Maori use of the seas for their own domestic purposes but considered themselves, and must be considered as retaining the authority over them.

In other words the roles are reversed. It is not that the Crown had the right to licence a traditional user, but rather that the Crown had to acquire a right of commercial user by the general public. There was no difference between that and the land. If the Crown wished to develop it in a commercial way, it had to buy the right to do so, it had to negotiate. It is not therefore that the Crown must merely consult when one refers to property rights, it is rather that the Crown must negotiate for a right.

6. In this respect we both extend upon past decisions of the Tribunal, and depart from them. I must say now, that in making recommendations, there is no requirement that the Tribunal make only practical recommendations. That point is made in the recent Waiheke Report (1987). It is also being made again in the Orakei Report shortly to be published.

7. Therefore, we cannot at this stage produce the full report that we consider necessary in this matter. We are also unable to make any decision on appropriate remedies. But we can disclose our major findings of fact and interpretation of the Treaty on application to those facts. We would hold, that the ITQ's are contrary to the principles of the Treaty and that there should be rather negotiations with the Muriwhenua people for the Crown's right of commercial use. What I propose therefore in this case is that this Tribunal should formally report, in three or four pages, its major findings of fact and interpretation on the basis that its fuller report, which will contain its reasons for its findings, will be given at a later point in time. Our findings of fact and interpretation should be sufficient to enable negotiations to commence between Muriwhenua and the Crown at this stage. We would hope that appropriate agreements can be reached but if they are not, then we must consider, after we have given our full report, the remedies that we would formally recommend.

8. Our findings we feel should be sufficient to provide the claimants with the opportunity to take proceedings in other Courts should that be necessary. I make mention of this because we have a specific request to state a case to the High Court. I should disclose that we have resolved not to state a case to the High Court upon the single ground that it is not necessary for us to do so in order to discharge our functions. But we would not wish to limit in any way the right of claimants to take proceedings of their own initiative. Our findings would be limited to defining the nature of the Maori Fishery as referred to in section 88 and that other section that the Minister must consider in settling TAC's.

9. Although we have been unable to officially report at this stage, I make the statements now in the hope that they may be some guidance to the Crown pending the brief report of major findings of fact and interpretation that we hope to issue within the next four weeks or so. It seems most important however, that I disclose now our opinion that 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.

#### **A3.4.6 DECISION OF THE TRIBUNAL ON THE AMBIT OF THE CLAIM AND THE RIGHT TO MAKE FURTHER SUBMISSIONS, 9.3.88**

[see 1.7.8]

As Counsel are aware, the Tribunal proposes to issue an interim report as soon as it is able. We intend to make findings, in that report, on the nature and extent of the Muriwhenua tribes' fisheries at 1840. To do that, we will be guided by the evidence and research and may come to a conclusion that as a matter of fact, the tribal fishing extended beyond a 25 mile coastal band. We intend also to make findings on the nature and extent of any 'rights', or interests, guaranteed by the Treaty and that includes whether or not the Treaty guaranteed the use of certain resources and carried a right to develop those resources beyond the capabilities that existed at 1840. Again, we will be guided by the submissions and research and may come to a conclusion that there is a development right that extends treaty fishing interests beyond the areas customarily used at 1840.

We do not consider it necessary for any request to have been made to either amend or extend the claim to enable us to consider those findings; we understood the Crown to



acknowledge that to be so. We consider further that those issues to which we have referred and on which we intend to report, were before the parties at the hearing.

When later, however, we may come to consider remedies and recommendations, assuming we have determined the fishing claims to have been well founded, we do not consider we could make recommendations affecting an area beyond a 25 mile coastal band, without prior amendment to the claim. As parties have yet to be heard on the question of remedies, we see no reason why the claim could not be amended at the commencement of that hearing, before evidence and submissions are given, provided parties are notified of the amendments that will be sought and are forewarned of the matters that they may need to address.

Referring now to the question of whether the Fishing Industry Board and Fishing Industry Association should be given leave to be heard prior to our interim report. Mr Marshall for the Board submitted that the Board had not earlier sought to appear as it was not until after certain temporary declarations had been made in the High Court, late last year, that the Board was fully aware of the impact this claim could have upon those it represents. We do not consider that a proper ground for the admission of late representations but we are mindful of three things: the first that we have allowed considerable latitude to the claimants in the prosecution and amendment of their claim; the second that we are concerned that every person who could be affected has an opportunity to present their case where this can be done without prejudicing the interests of others; and the third that we consider the Fishing Industry Board and Fishing Industry Association are in a position to materially assist the inquiry.

We were given to understand that both the Board and the Association were, in the circumstances, content with making submissions only, at this stage, and that they could do so within three weeks provided the documentary evidence and research on record is promptly made available to them.

We suffer some temporary lack of staff and equipment but the Registrar is nonetheless directed to despatch promptly to each Mr Castle and Mr Marshall full copies of the record. (I draw to the attention of Counsel that those documents marked with an asterisk in the index, are confidential to the Tribunal and Counsel.)

Mr Castle and Mr Marshall have, of course, leave to be heard in the usual way at any resumed hearing to deal with the question of remedies. On that basis, we direct as follows:

that the Fishing Industry Board and Fishing Industry Association file such submissions as they may wish within three weeks of today, with copies to Counsel for the Crown and claimants, with those submissions to be given, and oral responses made, at Wellington on 5 April.

In addition, if the Crown also wishes to make any further submissions on the matters to be covered in our interim report they also may do so on that day.

Chief Judge ETJ Durie

Chairman

Waitangi Tribunal

### **A3.5 KAWENATA TUKU I TE MANA ME TE MAURI O TE MARAE, ME TE WHAKAHOKI (COVENANT YIELDING THE AUTHORITY OF THE MARAE TO THE TRIBUNAL, AND ITS RETURN TO THE PEOPLE)**

[see 1.8.1]

(a) Grant of Authority, and Prayer, from the Marae Trustees

Judge Edward Taihakurei Durie me o Mema o te kaiwhakawa i te Tiriti o Waitangi

Tena koe, tena koutou

Ka whakawhitia atu e ahau ki a koe te mana me te mauri o to matou Marae o Ngati Kuri,

Te Reo Mihi Marae, i tenei wa i te waru o nga ra o Tihema i te tau tekau ma iwa waru tekau ma ono.

I tona wa ka whakahokia mai e koe te Marae.

Ka tono matau kia manakitia koutou

Te Roopu Whakamana i te Tiriti o Waitangi e o tatou Ariki

Naku

Na Hone Aperahama, Hemana, Te Reo Mihi Marae

Poari kaitiaki me aku mema

Motu Rapata

Wiremu Paraone

Rata Raharuhi

Rapata Romana

Mrs Ani Tia

Dave Neho

(b) Return of the Marae, and Greeting Acknowledging Work of Ngati Kuri

Tihe Mauri Ora!! Kua toene te ra – kua tae tenei ki te wa hei hiki i te Upoko tuatahi mo nga mahi e pa ana ki te Tiriti o Waitangi me nga Whenua raua ko nga Moana tukuiho a Ngati Kuri.

Ka whakamoemiti te ngakau ki te waahi ngaro – mo ana manaakitanga kua puta mai ki te katoa i roto i nga mahi a Ngati Kuri me te Tiriti o Waitangi.

I roto i enei hua katoa me tenei wairua pai, ka whakahoki e matou, te Roopu Whakawa i te Tiriti, i te Kawenata tuku i te mauri o te Marae ki a matou.

Ka taa hoki a matau o matou ingoa hei whakamana i tenei pukapuka – i roto i te Arohanui ki a koutou katoa.

(Sgd) Taihakurei Durie Tiamana  
G M Te Heuheu Mema  
M E Delamere Mema  
W M Wilson Mema  
Keith Sorrenson Mema  
Manuhuia Bennett Mema  
Maarire Goodall Apiha Rangahaua  
Steve Gracie Apiha Whakahaere



APPENDIX 4 MINISTRY OF AGRICULTURE AND FISHERIES  
RESPONSE TO TRIBUNAL'S MEMORANDUM OF 10  
DECEMBER 1986

[see 1.7.2]

23 December 1986

Mr E T Durie  
Chairman  
Waitangi Tribunal  
C/o Justice Department  
Private Bag  
WELLINGTON

Ref: 10/6/6

Dear Mr Durie

I refer to your memorandum of 10 December 1986 which was telephoned through to me on 11 December 1986.

The Tribunal asked that I not proceed to notify commercial fishermen of their Individual Transferable Quota (ITQ) until the Tribunal had been able to report to Ministers on the claims before it and Ministers had been able to consider that report.

In considering the Tribunal's report I was mindful of the concerns expressed regarding the claim you have before you, the effects of acceding to your request, the possible effects of not acceding to your request with respect to any recommendations you may make, and my obligations under statute.

Because of the effect that any action taken by me might have on the Government's ability to act on any recommendations made by the Tribunal, having considered the claim I felt it incumbent on me to advise the Minister of your request. The Minister is also responsible for the administration and implementation of the policy enshrined in the Fisheries Act.

In the end the decision was taken that, notwithstanding your request, I should proceed to notify fishermen of their ITQ. The reasons for proceeding at this time were in essence;

- (a) The ITQ scheme was introduced on 1 October 1986 and key actions, notably the allocation of guaranteed minimum ITQ (GMITQ) against which fishermen are entitled to fish, had already been taken;
- (b) An expectation had been created that ITQ would be finally notified as soon as practicable and business decisions had been taken on that basis; and
- (c) I was under a statutory obligation to notify ITQ.

Against that was balanced the fact that the Tribunal had expressed its conclusion and the reasons for that conclusion as particular set out in your penultimate paragraph.

Finally, let me assure you 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.

Yours sincerely

M L Cameron

DIRECTOR-GENERAL



## APPENDIX 5 RECENT FISHERY CASES

[see 1.7.7]

Recent fishery cases in the New Zealand High Court, relevant to the issues in this claim, include

- (a) *Te Weehi v Regional Fisheries Officer*, High Court, Christchurch M 662/85, 19.8.86 (Williamson J)
- (b) *Morunga v Ministry of Agriculture and Fisheries*, High Court, Wellington, M 623/86, 10.4.87 (McGechan J).
- (c) *Sealord Products Limited v Hon C Moyle, Fish Packers Limited and Amaltal Taiyo Fishery Company Limited*, High Court, Wellington C P 182/87, 22.5.87, (McGechan J)
- (d) *New Zealand Maori Council, Runanga o Muriwhenua Inc v Attorney-General (MAF), Minister of Fisheries* High Court, Wellington CP 553/87, 30.9.87 (Greig J).
- (e) *Ngai Tahu Maori Trust Board v Attorney-General and Minister of Agriculture and Fisheries; New Zealand Maori Council, Raukawa Marae Trustees, Waiariki District Maori Council, Raukawa District Maori Council, The Taranaki Maori Trust Board, The Tai Tokerau District Maori Council v Attorney-General, the Minister of Fisheries; and R T Mahuta, T Mahuta, Tainui Trust Board v Attorney-General, Minister of Fisheries*, High Court, Wellington, CP 559/87, 610/87, 614/87, 12.11.87 (Greig J)

Judgements in the last two mentioned matters are directly pertinent to this claim and are printed below.

**NZ MAORI COUNCIL AND ANOR V  
ATTORNEY-GENERAL (MINISTRY OF  
AGRICULTURE AND FISHERIES) AND ANOR  
HIGH COURT, WELLINGTON, CP 553/87**

Order 30.9.87

Reasons for Order 8.10.87

Greig J: This was an oral application which I commenced hearing in Chambers at 6.20 pm. No papers had been filed and there was no evidence in strict terms. The material before me comprised some three photocopied documents and information which was tendered from the Bar. After hearing counsel I made an immediate order declaring that the Minister ought not to proceed further in the matters and I now give the reasons, which I did not then record, but which moved me to make the order.

The Minister of Fisheries is authorised under the Fisheries Act 1983, and in particular, under Part IIA of the Act, inserted by s 10 of the Fisheries Amendment Act 1986, to act in the administration of the Commercial Fishing on Quota Management System. It was accepted that in pursuance of these powers the Minister was to issue a notice in the New Zealand Gazette on 1 October 1987. It was apprehended that, unless an order was made before the Gazette went to press, it would be impossible thereafter to extract or to alter the notice to be published. This would mean that if an order were made then the whole of that issue would have to be cancelled, whereas an immediate order would allow the omission of the offending matter but leave the Gazette otherwise published and effective. It was acknowledged by counsel for the plaintiffs that any order to be made would be made subject to the undertaking or understanding that the plaintiffs would at the earliest practical time file appropriate papers in support of the oral application and the application for review which was the substantive application to be made. In the end it seemed to me to be inappropriate and unnecessary to require a formal undertaking. The second plaintiff at the hearing, described only as Muriwhenua Fisheries Claimants, is an unincorporated body comprising members of the hapu and tribes of the far north part of the North Island. The New Zealand Maori Council at the hearing was but one of the plaintiffs and seemed to be cast in a secondary or supporting role. Moreover it seemed inappropriate in the circumstances to require an undertaking from counsel then appearing for the plaintiffs.

Under the Quota Management System the procedure is for the Minister, by notice in the Gazette, to specify a Total Allowable Catch to be available for commercial fishing for each Quota Management Area in respect of each species or class of fish subject to the system. In the same notice, the Minister declares the taking of any species or class of fish in any specified Quota Management Area to be subject to the Quota Management System from a date to be specified in the notice. This procedure is the preliminary and necessary step to the grant to individual fishermen of guaranteed minimum Individual Transferable Quotas. In accordance with the system which came into force on 1 August 1986, to take effect in practical terms from the commencement of the fishing year from 1 October 1986, the Minister, as from the beginning of that fishing year, had exercised his rights and authorities and had specified the Total Allowable Catch for some 29 species of fish. ITQ's had been allocated for these various species and so the system in respect of those species had been in operation for about a year. The notices now to be given relate to the species Jack mackerel and squid and, as I understand it, as regards QMA's for the whole of the New Zealand fisheries waters.

Section 28C of the Act, subs (1) provides as follows:



‘The Minister may, after allowing for the Maori, traditional, recreational, and other non-commercial interests in the fishery, by notice in the Gazette, specify the total allowable catch to be available for commercial fishing for each quota management area in respect of each species or class of fish subject to the quota management system.’

Section 88 (s) of the Act provides:

‘Nothing in this Act shall affect any Maori fishing rights.’

For some time the second-named plaintiff has been prosecuting its claim before the Waitangi Tribunal, established under the Treaty of Waitangi Act 1975, to fishing rights in the northern part of the North Island. Hearings before the Tribunal were completed in March 1987 on the substance of the claims but it is anticipated that there will be a further hearing or hearings on the remedies that may be required before the Tribunal makes its recommendation pursuant to s 6 (3) of the Act as to any action to be taken to compensate for or to remove any prejudice so found. At this stage, therefore, the Tribunal has not made any recommendation or any findings.

In anticipation of the impending Gazette notice and the action by the Minister, the plaintiffs sought in urgent meeting before the Tribunal on 30 September 1987. The plaintiffs, the Crown and the New Zealand Maori Council were all represented. The Chairman and four other members of the Tribunal were present. A record of the Chairman’s comments made at the end of that meeting were forwarded to the Minister of Fisheries and a photocopy of that was furnished to me during the hearing. In that, amongst other things, the Chairman was recorded, speaking on behalf of the Tribunal, as follows:

‘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 . . .

We also find that the use of those seas was regulated and controlled by established practices or laws that were regularly observed. Fishing in that area was restricted to the hapu and tribes of Muriwhenua or others with their prior (and revocable) licence. That restriction was enforced or was capable of being enforced. The overall conclusion that we would come to is that the hapu and tribes of Muriwhenua held the ‘mana’ of the whole of the zone mentioned. The nearest British cultural equivalent is to consider that they exercised ‘dominion’ over that zone, or ‘owned’ it. They were the tribes territorial waters . . .

The main finding here that we come to, is that the area of seas referred to was owned, it was property in the same way as land was. The evidence is that the Maori did not prevent the non Maori use of the seas for their own domestic purposes but considered themselves, and must be considered as retaining the authority over them.’

It was further found that the use and exercise of that right of fishery had a commercial component and ‘one that was capable of adaptation to commercial uses in western terms’. Further, it was held ‘that the ITQ’s are contrary to the principles of the Treaty and that there should be rather negotiations with the Muriwhenua people for the Crown’s right of commercial use’.

The implication was that, in spite of the findings of the Tribunal, the Minister still proposed to proceed with the notice in exercise of his powers over the QMS. Therefore the plaintiffs considered that the only course was to make this urgent application for a restraining order or a declaration to prevent the action taken.

I concluded that the material before me provided a sufficient ground to show that the plaintiffs had, at the least, a recognisable claim in the form of a proprietary claim or an

interest and right in that part of the proposed QMA so far as it included the area of the claim. That was arguably then in conflict with the proposals by the Minister to declare in respect of the two fish species the TAC which would in due course lead to the allocation of ITQ's to commercial fishermen. It was arguable, therefore, that the actions of the Minister would affect Maori fishing rights contrary to s 88 (2) and that there was no or no sufficient allowance made for such Maori rights.

Although the proposed Gazette notice declared that the Minister had allowed for the matters specified in s 28C, that did not in the end conclude the question and, in particular, could not dispose of the argument under s 83[s 88 (2)].

It was plain that the rights now to be exercised by the Minister were merely a further extension of the QMS. Two additional species in the QMA's were to be brought within the control and supervision of that system. It was not contended that the absence of any action by the plaintiffs to oppose or challenge the earlier exercise of the Minister's powers in and up to September 1986 amounted to any acquiescence or waiver of their present rights. I concluded that, although this was a further additional step by the Minister, it was still arguably in conflict with the plaintiffs' rights and that relief should not be refused merely because it was only part and would not stop the equally arguably invalid actions which had occurred before.

It was argued that there was no evidence of any immediate detrimental effect or that anything would arise from the publication in the Gazette which would cause any serious harm. This was a preliminary step which merely declared certain areas and provided the bases for the applications by individual fishermen for ITQ's. It remained, however, action which arguably was in conflict with proprietary rights and, while merely a preliminary to any final action, was still something which, in my opinion, ought to be prevented.

On the other hand it did not seem that the restraining of the publication of the Gazette notice and the restraining of the Minister's actions under the Act would cause any serious or irreparable harm to the fishing industry or to those taking part in that industry. The only likely effect was a commercial effect which, in the end, might favour some commercial fishermen against others. It appeared that a delay in the declaration of the QMS over these two species might permit the commercial fisherman wishing to obtain the ITQ's to improve what would amount to their historical record of fishing which would be the bases upon which they would be entitled to an ITQ. This could not affect the TAC or the overall control of the commercial fishing of these two species. It could, however, mean that some fishermen, anticipating the final QMS for these species could improve their future rights. That did not seem to me to be a matter which should weigh against the apparent infringement of the proprietary rights of the plaintiffs.

It was intended by the plaintiffs that the restraint they sought should be total and should apply to the whole of the New Zealand Fisheries waters. The argument was that, on the basis of the Tribunal's findings about these particular claims, it should be inferred that similar claims at least of equal strength must be recognised for all Maori throughout New Zealand and throughout New Zealand's fishery waters. I was invited to take judicial notice of the fact that traditionally and historically Maori were a fishing people and that fishing had occurred in the coastal waters of all parts of New Zealand. Therefore if one claim was recognisable then all Maori must be the same and have similar rights. I could not accept this argument in logic or in common sense. The Muriwhenua claimants clearly have no proprietary rights outside their own particular area. It seems to follow from the record of the Chairman's comments that their rights are limited to a specific area. Further, it is to be noted that the Chairman recorded in his remarks that the Tribunal has had no evidence with regard to any other tribe. It seemed to be that it did not follow necessarily, or even

arguably, that because Maori fished in other areas their fishing would give proprietary rights which could conflict with the provisions of the Fisheries Act and the anticipated application of the QMS to those other areas. It seems to be the case that what is described as 'recreational fishing' which, I assume, includes fishing for private and domestic purposes, that is, not commercial, is excluded from the control and supervision of the QMS. In the end it may be that only commercial Maori fishing, in the sense that that may be extended by analogy to equate to European ideas of commerce, will be found to be in conflict with the QMS. In the result then, I concluded that the restraint to be applied must be limited to that part of any QMA which was within the area of the Muriwhenua Fisheries claim.

In the end, in face of what I accepted as evidence of findings by the Tribunal of the plaintiffs' proprietary rights, I concluded that there was at least an arguable case that the proposed actions of the Minister were in conflict with the statutory prescription and could have effect contrary to those Maori rights. To take even preliminary action contrary to such proprietary rights seemed to me to be improper. It was therefore my opinion that it was necessary, in order to maintain and to preserve the position of the plaintiffs, that an order should issue to stop any action contrary to their rights.

**NGAI TAHU MAORI TRUST BOARD AND ORS V  
ATTORNEY-GENERAL (MINISTRY OF  
AGRICULTURE AND FISHERIES) AND ORS  
HIGH COURT, WELLINGTON, CP 559/87,  
610/87, 614/87.**

Oral Judgment 2.11.87

Greig J: These are applications for orders to restrain the Minister and his officers from taking any action or any further action in carrying out the quota management system in respect of squid and Jack mackerel and any other species of fish or fishery, in particular, rock lobster, paua and eel. These applications are consequential on proceedings which were brought and the orders that I made on 30 September 1987 on applications by Runanga O Muriwhenua in respect of fishing rights claimed by the tribes in the Far North.

It is not easy to ascertain from the large mass of paper which was presented to me during Friday, 30 October 1987, precisely who or in respect of what the applications are now made. The principal application is made by Ngai Tahu and that it is pretty clear extends to claims in respect of almost the whole of the South Island.

There were also claims filed on behalf of the Tainui people. That makes claims in respect of the Kawhia and Aotea and part of the Manukau Harbours, Whangaroa Harbour and the coastline from Tamaki down to Katikati.

There are also proceedings on behalf of the Raukawa people. Their claim is, it seems, in respect of the coastline and the seas from Rangitikei down to Porirua.

There are also claims on behalf of the Mataatua tribes. That appears to make claims in respect of the coastline and the sea from Cape Colville to Cape Runaway, which is the whole of the Bay of Plenty, as well as the East Cape, or part of that.

The claims made now comprise, together with the Muriwhenua claim, a very great part of the foreshore, the coastline and the sea beyond for the whole of New Zealand. It seems from what I have been able to gather from the papers that there are no claims specifically in respect of Hawke's Bay, Wairarapa, Taranaki and Wanganui coastlines but, as it will appear, nothing turns on that.

The relief claimed is to protect the Maori fishing rights as alleged by and on behalf of all the peoples represented by the various nominal claimants.

The Ngai Tahu proceedings commenced on 8 October 1987. Some affidavits were filed with those papers and at least one other affidavit was filed on the day of the hearing, 30 October 1987. The Raukawa proceedings were filed on the day of the hearing with a number of affidavits. The Tainui proceedings were filed but were not formally processed. By the time I commenced to hear the proceedings I had before me a copy of the statement of claim. There were no affidavits filed or sworn at the time of that hearing in respect of the Tainui application.

I was presented with a great mass of material which largely purported to be exhibits to unsworn affidavits. I accepted all of this material *de bene esse*, as we say in the law, subject to one exception. In the three volumes of the principal mass of the material, pages numbered 179 to 205, appeared to be Cabinet papers or papers presented to a sub-committee of Cabinet. There was no apparent provenance of those papers and so for the time being I refused to admit or to read these papers, and I have not done so.

Much of the material that has been put before me was material that has already been referred to the Waitangi Tribunal in claims made there, particularly by the Runanga O Muriwhenua. There is it seems, however, material in support of the other claims, particularly that of the Tainui claimants who appeared before the Waitangi Tribunal at the time of the Muriwhenua hearing in support of that claim but also in support of their own claims. There are a number of Crown affidavits made and filed by officers of the Ministry.

All of the material that I have mentioned I have now read over the weekend. Admittedly I have not read it with the care and attention that would be required if I was coming to a final or substantive decision on this matter. There was not time in the weekend in any event to read all of the material carefully, as might be appropriate, but I am confident that I have understood the essence of the material contained in all these documents.

It may be noted that to some extent there is repetition in citations and quotations from the past, the historical and archaeological material in particular. Today I received some further papers, including the affidavit of Robert Te Kotahi Mahuta, which now exhibits the three volumes. I have read Mr Mahuta's affidavit quickly. With respect of him, I do not think that at this stage it adds substantially or significantly to what I have already read.

I think it is important that I say with some emphasis and in some detail that this is an interim application for a temporary restraint until the claims made by all the claimants can be dealt with in substance and, one would hope, finally. The important point that I wish to stress now is that I am not making a final decision. I am making tentative findings subject to a full review and consideration of all the material, and no doubt more material by way of evidence that would be put forward, and that applies to the law as well as to the facts. It is important to stress this because at this stage the evidence is clearly incomplete. In any event, the topic and the extent of it is massive encompassing, as it does, archaeological findings and opinions, oral and written history, as well as recent past conduct. It will, it seems, deal with matters for a number of centuries past and long before the European came to New Zealand. That is the facts, but the law too is in a developing state and it is difficult and indeed impossible for me in the time available to consider the common law aspects as they affect this whole matter in any detail or the implications of statutory law or Treaty obligations. When I use the word 'Treaty' I mean, of course, the Treaty of Waitangi.

There are as well many decisions of great variety and reasoning which are not easy to put together in any consistent way. I have, of course, read the decision of Williamson J in *Tom Te Weehi v Regional Fisheries Officer* (High Court, Christchurch, M 662/85, 19 August 1986). I have also read *Waipapakura v Hempton* (1914) 33 NZLR 1065; *Re the Ninety Mile Beach* [1963] NZLR 461; *Inspector of Fisheries v Weepu* [1956] NZLR 920; and *Keepa v Inspector of Fisheries* [1965] NZLR 322.

What is very plain is that there arises out of all these matters before me some of the very largest questions of deep complexity and difficulty which now the time is fast coming when the Court will have to grapple with all of these questions and will have to decide, at least on this question of fisheries, what is the status, the meaning and effect of Maori rights. But, as I say, that is not to be decided today.

When I dealt with the Muriwhenua application I had before me a report of the Waitangi Tribunal in an interim form made on 30 September 1987. Indeed that was the principal material before me on that day. That had a considerable influence upon me as a finding, albeit an interim one, as to the meaning and extent, so far as could then be ascertained, as to Maori rights in Muriwhenua. I could not in logic say that that ought to apply to other Maori or to other parts of New Zealand.

As I say, I have now read in abbreviated form, and with some speed, the material, a great part of which was before the Tribunal, together with a great mass of other material which

relates in particular to the claimants and the Maori represented by them. 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. Having said that, the extent of these rights and fisheries seaward and along the coastline is not clear. It is not clear to me anyway to what extent those rights might have also had a public content in the sense that others, perhaps with necessary permission, might make use of the fishing areas. As I have said already, there is no evidence before me strictly as to what occurred in the other areas outside those in which the claimants make their claim, but I am prepared now to accept that in logic the same must apply to Taranaki and Wanganui, Hawke Bay and Wairarapa, subject of course to actual proof of those rights, their extent and their scope.

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 TA 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.

It may be argued that common law has taken away or diminished those fishing rights. There is an argument that, on the assumption of sovereignty by the Crown in 1840, fishing in tidal waters and at sea became public under the control of the Crown. But even at common law private rights of fishing could continue, could be granted and can be protected. I think, however, that it would be surprising that such fishing rights which existed for centuries before the European came should be extinguished by common law, contrary to the solemn undertaking in the Treaty, particularly in the English version. However that, I think, is resolved, at least for my purposes on this interim application, by the express provision of s.88(2) of the Fisheries Act. That is in similar form to provisions in previous legislation and provides expressly that nothing shall affect any Maori fishing rights.

I agree, with respect, with the decision of Williamson J in Tom Te Weehi that that must mean, in perhaps a passive sense, that whatever is contained in the Act will not apply to the exercise of Maori fishing rights. The fishing rights then are outside the Act and unaffected by it. But I think that the phrase means more than that. It means that nothing is to be done under the Act which affects those fishing rights: no action is to be taken which would affect, restrict, limit or extinguish those fishing rights. It must be plain at all events that such a phrase as is contained in s.88(2) carries with it an implicit recognition that there are such fishing rights subject, of course, to proof of their existence, their scope and their extent.

It was not put to me during the course of the hearing, but there may be an argument that that specific and direct provision might be treated as the carrying into municipal law of the

Treaty obligation, thus making the right under the Treaty obligation enforceable directly, but that is a digression and I am not making any decision even on a limited basis on that.

It was suggested by the Crown in the submissions by the Solicitor-General that the effect of s.88(2) is cut down implicitly and necessarily by the provisions of the quota management system and, in particular, the provisions of s.28C. It is the Crown's case, and indeed the Ministry's understanding throughout, that the provisions of s.28C are referable to the quantity of fishing done by Maori and on a non-commercial basis. Assuming for the purposes of this argument that that is the effect of a s.28C, I do not accept that s.88(2) is directly or indirectly diminished by that section or indeed by the new Part IV of the Act introduced in 1986. Section 88(2) stands, in my opinion, overall with full effect to protect Maori 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.

My conclusion at this stage has not been based on the words of the Treaty or its meaning or its effect. This application is not like the applications under the State-Owned Enterprises Act 1986 which expressly required the consideration of the Treaty. I have come to my conclusion more directly on a construction of the Fisheries Act and the evidence contained in the material before me. Whether the Treaty ought to have effect in the construction of the Fisheries Act or whether because of the provisions of s.88(2) it is part of the municipal law as applied to fisheries, is something that may be argued later.

That is not to say, however, that the Treaty has no significance in my consideration of this matter. It does have importance when I come to consider the question of relief. That is because of the solemn confirmation and guarantee contained in the Treaty of the full, exclusive and undisturbed possession of the fisheries of the Maori, the tino rangatiratanga o ratou taonga katoa.

The application that I heard about Muriwhenua on 30 September 1987 was brought before, if just before, the Minister had published notices in the Gazette in pursuance of ss.28B and 28C of the Act creating and applying the quota management system to squid and Jack mackerel. At that stage, therefore, the relief sought was sought at a time before the system had come into operation. Now a further month has gone by. The system is in operation. It was done in two stages for Jack mackerel by Gazette notices on 1 October and 22 October 1987, which related to different fishing areas. In respect of the squid and the Jack mackerel system promulgated on and from 1 October 1987, provisional maximum ITQs and guaranteed minimum ITQs have been issued to a number of fishermen.

The appeal procedure under the statute is now pending. In the meantime, at least from the commencement of the QMS, and that in respect of squid commenced on 1 November 1987, it appears to me that those with PMITQ and GMITQ will be entitled to fish. Their rights will not be transferable until formal ITQs have been issued. There are a number of other procedures which may be taken in furtherance of the management system, including the restriction of the extent of it.

In respect of the Jack mackerel in the areas in the second notice of 22 October 1987 no quotas have been allocated or issued. There may be some real doubt and difficulty if an

order is made as sought by the claimants whether those fishermen would be entitled to fish at all for those two species since the system applies and the areas have been promulgated but no specific allocations made. I should acknowledge here that it was anticipated that those latter quotas would have been notified and issued on 29 or 30 October but in light of the applications made the Ministry stayed its hand.

In addition to those fishermen there are some others who have committed themselves to the purchase or adaptation of vessels for fishing for these species to whom it was intended some particular quotas would have been granted, notwithstanding the absence of any appropriate history of fishing.

I have mentioned now the lapse of time since the Muriwhenua claim and the order that I made in respect of that. There has been, of course, a lack of action such as this over many years and in recent times the evidence shows that the Ministry has given to Maoridom notice of its intentions in the promulgation of future quota management. The QMS itself is recent and it may be of little significance that it is not until September 1987 that application has been made to challenge that particular system. However, there has been Ministry control over fishing for a long time and that control, like the QMS, appears to have been undertaken without any significant consideration of Maori fishing rights.

I referred earlier to circumstances which have restricted and diminished Maori fishing. Those circumstances have had their effect on the realisation and the knowledge of Maori as to their rights and how to exercise them. I accept that in recent times there has been a failure to realise the significance of the control methods of the Ministry. It is only recently in any event that there has been the burgeoning interest and concern with the rights of Maoris and their ability to make claims that have arisen before 1975. There is further the apparent acceptance of the assurance taken from what was said or stated by the Ministry that there would be consultation at least before further steps were taken in the control of the New Zealand fisheries. Indeed, there is an appearance from the material before me that the Ministry, and indeed the Minister, has said one thing and done another. That, I think, is at least partly because the Ministry has for a very long time acted on the assumption that Maori fishing rights were non-commercial, non-proprietary, and were merely recreational and ceremonial.

I have mentioned that the application seeks to prevent any further QMS being applied to any other fishing species in New Zealand waters. In particular, rock lobster, eel and paua are in the forefront of that part of the application. It is said on behalf of the Ministry that there are no present plans or, at the least, that there is no clear evidence of any present plan to bring those or any other species within the QMS. There does seem, however, to be an intention to take some steps to control at least some of those three species under the QMS.

It can be said that the QMS merely continues what has been going on in the way of control for a long, long time. The Ministry clearly has acted in the control of the whole of the New Zealand fishery in the interest of conservation and the management of it. The intention is that all should benefit from that conservation and management. It is apparent that all may participate in it if they have the money and the history of fishing.

It is part of the Crown case that if there is eventually a recommendation from the Waitangi Tribunal to make recompense or other provision for the Maori fishing rights, and that is adopted, it would not be difficult to meet that recompense or provision through the management system and the ITQs. That will have to happen to the main part of the fishery inasmuch as the QMS applies already to all species other than those now mentioned and those perhaps to be brought within it in the future.

The claimants say that they are fearful of the continuing and the increasing derogation from their fishing rights by the QMS and its expansion. They fear that there will be



difficulty in persuading the New Zealand Government to make compensation or other provision if that becomes too expensive. I think it is plain that interests in New Zealand fisheries which are now vested in possession will become stronger and more difficult to dislodge as time passes.

Those comments, which apply particularly to any results of the Waitangi Tribunal hearings, have application too to the exercise of the discretion for relief claimed under the Judicature Amendment Act. I think that it can be said that the continuation of the system makes no immediate detriment to Maori. There are, it might be said, only two more species made subject to control and licensing. There are numerous species already subject to control which are not within the compass of the proceedings now before the Court. Equally it may be said that only two species will have little effect on those fishermen who work now in the industry. They, in broad terms, will still be free to fish for all the other species under the QMS.

I remind myself that the discretion that I am to exercise here is not simply an unfettered discretion, let alone a discretion which is to be exercised at my whim or in accordance with my sentiments or sympathies. In accordance with s.8 of the Judicature Amendment Act the relief sought can be granted, only if it is reasonably necessary for the purpose of preserving the position of the applicants. I refer here to the decision of the Court of Appeal in *Carlton v United Breweries and Sheilds* (CA 34/86, 14 March 1986).

I have given very careful consideration to all the various matters which I have now rehearsed and which are on one side or the other of this question of relief which would stop the continued operation of the QMS, at least in respect of Jack mackerel and squid, and in respect of the three other species in the future. At the end I have come to the view, on an interim basis, that what has taken place and what is to take place is in disregard of Maori fishing rights and is a denial of them.

I wish to make it very plain that it would be quite wrong to infer from what I have just said that the Minister or the Ministry have acted deliberately to defeat or to deny those rights. I have come to the conclusion that the Minister and the Ministry, Ministers in the past and Ministries in the past, have acted rather in ignorance and on a longstanding belief that Maori fishing rights were no more than recreational or ceremonial, without any commercial significance in the economy and society of Maori. Subject to those limitations, I think it ought to be recognized that the Ministry has made considerable efforts in the development of a Maori fisheries programme, albeit that appears to be a relatively recent development.

In face of what has now appeared before the Tribunal and before this Court I have come to the conclusion that what has taken place and what is to take place should stop. It cannot be just or right that what is arguably wrong and in breach of the Act should continue. It is, in my opinion, reasonably necessary in the interim to stop the process for the purpose of preventing any further inroads into those apparent rights of fishery until they are fully and finally resolved.

I make a declaration that the second respondent, the Honourable the Minister of Agriculture and Fisheries, ought not to take any action or any further action to issue notices under ss.28B and 28C of the Fisheries Act 1983, as amended, or to take any other step by himself, the Director-General of Agriculture and Fisheries, or any other officer of the Ministry in respect of the quota management system established in respect of Jack mackerel and squid by notices in the New Zealand Gazette published on 1 and 22 October 1987.

I will reserve costs.



## APPENDIX 6 FISH NOMENCLATURE

[see 3.4.2]

This list cross identifies fish named in the evidence, but is not a complete catalogue of species, or of the species known to Maori. There are many dialectical variations and alternative names in some districts which are not provided here.

English Name/Group	Scientific Name
Maori Name	

## A6.1 MARINE FINFISH

### Sharks/Dogfish/Rays

Mako Shark	<i>Isurus oxyrinchus</i>	Mako
Blue Shark	<i>Prionace glauca</i>	Mangoo-Pounamu
Bronze Whaler	<i>Carcharhinus brachyurus</i>	Tooiki
Basking Shark	<i>Cetorhinus maximus</i>	Reremai
Thresher Shark	<i>Alopias vulpinus</i>	Mangoo-Ripi
Hammerhead Shark	<i>Sphyrna zygaena</i>	
School Shark	<i>Galeorhinus australis</i>	Tupere
Gummy Shark Kapeta	<i>Mustelus antarcticus</i>	Makoo,
Rig Mangoo	<i>Mustelus lenticulatus</i>	Mangaa,
Spiny Dogfish	<i>Squalus acanthias</i>	Koinga
Grey Spiny Dogfish Pioke	<i>Squalus blainvillei</i>	Koinga,
Short-tailed Stingray	<i>Dasyatis brevicaudatus</i>	Whai Repo
Long-tailed Stingray	<i>Dasyatis thetidis</i>	Whai Repo
Eagle Ray	<i>Myliobatis tenuicaudatus</i>	Whai Repo
Chimaeras		
Elephantfish	<i>Callorhynchus milii</i>	Reperepe
Clupeoids		
Pilchard	<i>Sardinops neopilchardus</i>	Mohimohi
Sprats	<i>Sprattus antipodum</i> , <i>S muelleri</i>	Kupae
Anchovy Korowhaawhaa	<i>Engraulis australis</i>	
Marine Eels		
Conger Eel	<i>Conger verreauxi</i>	Kooiro
Cods		
Southern Blue Whiting	<i>Micromesistius australis</i>	
Red Cod	<i>Pseudophycis bachus</i>	Hoka
Hakes		
Hake	<i>Merluccius australis</i>	Tiikati
Hoki	<i>Macruronus novaezelandiae</i>	Hoki
Cusk Eels		
Ling	<i>Genypterus blacodes</i>	Hokarari
Garfish		

Garfish	<i>Hyporhamphus ihi</i>	Takeke
Saury	<i>Scomberesox saurus</i>	Karehe
Roughies		
Orange Roughy	<i>Hoplostethus atlanticus</i>	
Alfonsinos		
Alfonsino	<i>Beryx splendens</i>	
Dories		
Lookdown Dory	<i>Cyttus traversi</i>	
John Dory	<i>Zeus faber</i>	Kuparu
Mirror Dory	<i>Zenopsis nebulosus</i>	
Silver Dory	<i>Cyttus novaezelandiae</i>	
Oreo Dories		
Black Oreo	<i>Allocyttus sp.</i>	
Smooth Oreo	<i>Pseudocyttus maculatus</i>	
Spiky Oreo	<i>Neocyttus rhomboidalis</i>	
Sea Perches, Scorpion Fish		
Sea Perch	<i>Helicolenus sp.</i>	
Red Scorpionfish (red rock cod)	<i>Scorpaena papillosus</i>	Matuawhaapuku
Gurnards		
Red Gurnard Kumukumu	<i>Chelidonichthys kumu</i>	
Spotted Gurnard	<i>Pterygotrigla picta</i>	
Scaly Gurnard	<i>Lepidotrigla brachyoptera</i>	
Groper/Bass		
Groper	<i>Polyprion oxygeneios</i>	Haapuku
Bass	<i>Polyprion moeone</i>	Moeone
Sea Basses, Perches		
Spotted Black Groper	<i>Epinephalus daemeli</i>	
Butterfly Perch	<i>Caesioperca lepidoptera</i>	Oia
Pink Maomao	<i>Caprodon longimanus</i>	(Maomao)
Trevallies, Jacks		
Trevally	<i>Caranx georgianus</i>	Araara
Yellowtail Kingfish	<i>Seriola lalandi</i>	Haku
Jack Mackerels		
Jack Mackerel	<i>Trachurus novaezelandiae</i>	Hauture
Jack Mackerel	<i>T declivis</i>	Hauture
Koheru	<i>Decapterus koheru</i>	Koheru

Kahawai		
Kahawai	<i>Arripis trutta</i>	Kahawai
Goatfishes		
Red Mullet	<i>Upeneichthys porosus</i>	
Sea Breems		
Snapper	<i>Chrysophrys auratus</i>	Taamure
Drummers		
Blue Maomao	<i>Scorpius violaceus</i>	Maomao
Parore	<i>Girella tricuspidata</i>	Parore
Morwongs		
Tarakihi	<i>Nemadactylus macropterus</i>	Tarakihi
Porae	<i>Nemadactylus douglasi</i>	Porae
Red Moki	<i>Cheilodactylus spectabilis</i>	Nanua
Trumpeters		
Blue Moki	<i>Latridopsis ciliaris</i>	Moki
Trumpeter	<i>Latris lineata</i>	Kohikohi
Wrasses		
Spotty	<i>Pseudolabrus celidotus</i>	Paketi, Paekirikiri
Butterfish		
Greenbone Butterfish	<i>Odax pullus</i>	Mararii
Kelpfish		
Marblefish	<i>Aplodactylus arctidens</i>	Kehe
Mullets		
Grey Mullet	<i>Mugil cephalus</i>	Kanae
Yellow-eyed Mullet	<i>Aldrichetta forsteri</i>	Aua
Kaataha		
Sandperches		
Blue Cod	<i>Parapercis colias</i>	Raawaru
Stargazers]		
Monkfish	<i>Kathetostoma giganteum</i>	Kourepoua
Snake Mackerels		
Barracouta	<i>Thyrsites atun</i>	Mangaa
Gemfish	<i>Rexea solandri</i>	
Tunas		
Blue Mackerel	<i>Scomber australasicus</i>	Tawatawa
Albacore	<i>Thunnus alalunga</i>	
Southern Bluefin	<i>Thunnus maccoyii</i>	

Skipjack	<i>Katsuwonus pelamis</i>	
Yellowfin	<i>Thunnus albacares</i>	
Bigeye	<i>Thunnus obesus</i>	
Billfishes		
Black Marlin	<i>Makaira indica</i>	Takeketonga
Blue Marlin	<i>Makaira nigricans</i>	
Striped Marlin	<i>Tetrapturus audax</i>	
Broadbill Swordfish	<i>Xiphias gladius</i>	
Warehou		
Blue Warehou	<i>Seriolella brama</i>	Warehou
Silver Warehou	<i>Seriolella punctata</i>	
White Warehou	<i>Seriolella caerulea</i>	
Bluenose	<i>Hyperoglyphe antarctica</i>	
Flatfishes		
Lemon Sole	<i>Pelotretis flavilatus</i>	Paatiki
New Zealand Sole	<i>Peltorhamphus novae zelandiae</i>	Paatiki Rori, tarone,
pakeke		
Yellowbelly Flounder Totara	<i>Rhombosolea leporina</i>	Paatiki
Sand Flounder	<i>Rhombosolea plebeia</i>	Paatiki
Greenback Flounder	<i>Rhombosolea tapirina</i>	Paatiki
Brill	<i>Colistium guntheri</i>	
Turbot	<i>Colistium nudipinnis</i>	
Witch	<i>Arnoglossus scapha</i>	Mahue
Leatherjackets		
Leatherjacket	<i>Parika scaber</i>	Kookiri

## A6.2 MARINE INVERTEBRATES

### Crustaceans

Red Rock Lobster	<i>Jasus edwardsii</i>	Kooura
Packhorse Lobster	<i>Jasus verreauxi</i>	Kooura
Giant Spider Crab	<i>Jacquiniotia edwardsii</i>	
Swimming Crab	<i>Ovalipes catharus</i>	Papaka
Oriental Prawn	<i>Penaeus orientalis</i>	

### Molluscs

Arrow Squid	<i>Nototodarus sloani</i>	Wheketera
Arrow Squid	<i>Nototodarus gouldi</i>	Wheketera
Broad Squid	<i>Sepiateuthis bilineata</i>	Wheketera
Octopus	<i>Octopus maorum</i>	Wheke
Cockle	<i>Austrovenus stutchburyi</i>	Huuwai, Turangi
Pipi	<i>Paphies australis</i>	Pipi, Kookota
Tuatua	<i>Paphies subtriangulata</i>	Tuatua
Tuatua	<i>Paphies donacina</i>	Tuatua
Toheroa	<i>Paphies ventricosa</i>	Toheroa
Scallop	<i>Pecten novaezelandiae</i>	Tipa (Tipai)
Queen Scallop	<i>Chlamys delicatula</i>	Tipa
Rock Oyster	<i>Saccostrea glomerata</i>	Tio
Pacific Oyster	<i>Crassostrea gigas</i>	Tio
Dredge Oyster	<i>Tiostrea lutaria</i>	Tio
Blue Mussel	<i>Mytilus edulis</i>	Kuutai
Green Mussel	<i>Perna canaliculus</i>	Kuutai, Kuku
Horse Mussel	<i>Atrina pectinata</i>	Kuutai
Paua	<i>Haliotis iris</i>	Paaua
Yellowfoot Paua	<i>Haliotis australis</i>	Paaua, Karahiwa
Virgin Paua	<i>Haliotis virginea</i>	Paaua
Mud Snail Karahuu	<i>Amphibola crenata</i>	Puupuu,
Echinoderms		
Sea Urchin	<i>Evechinus chloroticus</i>	Kina



## A6.3 FRESHWATER FINFISH

### Eels

Short-finned Eel *Anguilla australis* Tuna Heke

Long-finned Eel *Anguilla dieffenbachii* Tuna

### Whitebait

Inanga *Galaxias maculatus* Inanga, inaka

Koaro *Galaxias brevipinnis* Kooaro

Banded Kokopu *Galaxias fasciatus* Kookopu, Para

Giant Kokopu *Galaxias argenteus* Taiwharu

Shortjawed Kokopu *Galaxias postvectis* Kookopu

### Smelt

Common Smelt *Retropinna retropinna* Paraki

Stokell's Smelt *Stokellia anisodon*

### Graylings

Grayling *Prototroctes oxyrhynchus* Upokororo

### Mudfish

Canterbury Mudfish *Neochanna burrowsius*

Brown Mudfish *Neochanna apoda* Hauhau

Black Mudfish *Neochanna diversus*

### Lampreys

Lamprey *Geotria australis* Korokoro, Kanakana

### Flatfish

Black Flounder *Rhombosolea retiaria* Paatiki Mohoao

### Torrentfish

Torrentfish *Cheimarrichthys fosteri*

### Salmonids

Brown Trout *Salmo trutta* (Kookopu, taraute)

Rainbow Trout *Salmo gairdnerii*

Quinnat Salmon *Oncorhynchus tshawytscha*

Brook Char *Salvelinus fontinalis*

Mackinaw *Salvelinus namaycush*

Atlantic Salmon *Salmo salar* (Haamana)

Sockeye Salmon *Oncorhynchus nerka*

### North American Catfishes

Catfish *Ictalurus nebulosus*

### Cyprinids

Tench	<i>Tinca tinca</i>	
Goldfish	<i>Carassius auratus</i>	
Rudd	<i>Scardinius erythrophthalmus</i>	
Poeciliids		
<i>Gambusia affinis</i>		
Sailfin Molly	<i>Poecilia latipinna</i>	
Percidae		
Perch	<i>Perca fluviatilis</i>	
Bullies		
Redfinned Bully	<i>Gobiomorphus huttoni</i>	Toitoi, Kopu
Common Bully	<i>Gobiomorphus cotidianus</i>	Tiipokopoko
Upland Bully	<i>Gobiomorphus breviceps</i>	
Cran's Bully	<i>Gobiomorphus basalis</i>	

## **A6.4 FRESHWATER INVERTEBRATES**

### Crustaceans

Karawai	<i>Paranephrops planifrons</i>	Kooura, Karawai
Marron	<i>Cherax tenuimanus</i>	Kooura
	<i>Macrobrachium rosenbergii</i>	Kooura
Molluscs		
Freshwater Mussel	<i>Unio menziesi</i>	Kaakahi

## **A6.5 MARINE PLANTS**

Seaweed Tupata	<i>Porphyra columbina</i>	Karengo, Parengo,
Seaweed	<i>Porphyra columbia</i>	Rimurimu
Bull Kelp	<i>Durvillea antarctica</i>	Rimurapa
Sea Grass	<i>Zostera novazelandica</i>	Rimurehia

Sources : Paul (1986); McDowall (1978); Graham (1953), Wai-22 evidence



## APPENDIX 7 STATUTORY REFERENCES TO TREATY AND MAORI SEA FISHING RIGHTS

[See 4.1]

(NB This appendix relates to sea fishing only)

(1) Fish Protection Act 1877 section 8

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.

[Repealed by the Sea-fisheries Act 1894].

(2) Fisheries Conservation Act 1884 section 5

The Governor in Council may, from time to time, make, alter, and revoke regulations which shall have force and effect only in any waters or places specified therein, -

(1) Providing for the more effectual protection and improvement of fish, and the management of any waters in which fishing may be carried on;

(2) In respect of any species of fish, oysters, or seals, respectively, -

(a) Prescribing a 'close season' or 'close seasons' in any year, month, week, or day, as may be most suitable for the whole or any part or parts of the colony, during which it shall be unlawful for any person to take any fish, oyster, or seals of such species respectively, or in anyway to injure or disturb the same; or

(b) Extending or varying any close season so prescribed, or varying any close season so extended; or

(c) Extending any such close season over any term not exceeding three years, and, before the expiration of such term, further extending the same;

(3) Prohibiting the buying, selling, exposing for sale, or having in possession any fish, oyster, or seal, or any skins, oil, or blubber from any seal, in any manner in contravention of this Act;

(4) Prescribing the minimum size or weight of any fish, oyster, or seal that may be taken;

(5) Limiting the size, when wet, of the mesh on the square, or in extension from knot to knot, of nets and seines to be used in fishing, or altogether prohibiting the use of nets of any sort;

(6) Prescribing that all nets containing fish shall be emptied in the water, and prohibiting the dragging or drawing on to the dry land any such net;

(7) Fixing the time or times during which dredging shall be prohibited, or prohibiting the use of any particular engines, tackle, or apparatus for taking any fish or oysters;

(8) Reserving from public use any natural oyster-beds, so as to prevent their destruction;

(9) Setting apart, within any harbour, any bay or bays frequented by fish for the purpose of propagation, and prohibiting the use of nets of any kind in any such bays during such time as shall seem fit; or setting apart any river or other fresh or salt waters for the natural or artificial propagation of fish, oysters, or seals;

(10) For the protection of young fish, or fry, or spawn at all times, and especially for the preservation and propagation thereof upon its importation into the colony;

(11) Prohibiting or restricting from time to time, for any period the which Governor thinks necessary, fishing in any waters, river, or stream in which young fish or spawn is placed or deposited, or at the mouth or entrance of any such waters, river, or stream;

(12) Prohibiting the casting of sawdust or any saw-mill refuse into any waters, river, or stream.

The Governor may, by such regulations, impose any penalty not exceeding fifty pounds, to be recovered in a summary manner before any two or more Justices of the Peace, and also appoint the minimum penalty for the breach of any such regulations; and all such regulations shall be gazetted, and thereupon shall be binding and conclusive upon all persons as if the same had been contained in this Act.

(3) Oyster Fisheries Act 1892 section 14

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.

(4) Sea-fisheries Act 1894 section 17

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.

[Re-enacted as s.17 of the Fisheries Act 1908.]

Section 72. No aboriginal native of New Zealand, nor half-caste who shall be habitually living with the aboriginal natives according to their customs, shall be sued for any penalty, fine, or forfeiture under this Act, unless and until the authority of the Native Minister to take proceedings has been filed in the Court in which such proceedings are intended to be taken.

[Re-enacted as s.76 of the Fisheries Act 1908, later repealed by the Fisheries Act 1983.]

(5) Sea-fisheries Act Amendment Act 1896 section 3

The Governor may from time to time, by Order in Council gazetted, declare -

(1) Any particular species or description of edible shell-fish (other than oysters); or

(2) Sponges and sponge-beds, either generally or any particular species or description thereof, to be subject to such of the provisions of the principal Act or this Act relating to oysters or oyster-beds as he thinks fit to specify in that behalf; and thereupon, and until the revocation of such Order in Council, such shell-fish, sponges, and sponge-beds shall be subject to such provisions, mutatis mutandis, accordingly:

Provided that when shell-fish in the Middle Island are required as an article of food by the aboriginal native population they shall be exempt from the operations of this Act:

Provided also that the Native Minister may, by written order gazetted, relax the provisions of any Order in Council as regards the North Island if he is of opinion that such Order in

Council injuriously affects aboriginal natives by limiting or depriving them of food-supplies. Such order by the Native Minister may be varied or cancelled from time to time, and may apply to any part or parts of the North Island.

[Re-enacted as s.46 of the Fisheries Act 1908 and later repealed by the Fisheries Amendment Act 1968.]

(6) Maori Councils Act 1900 section 16

It shall be lawful for the Council of any Maori district constituted under this Act to make, and from time to time vary or revoke, by-laws respecting all or any of the matters following, that is to say, -

. . .

(9) For the protection and management of eel-weirs and the regulation of their construction in such a manner that they shall not obstruct or impede navigation of rivers navigable by small steamers or boats; and the protection of any nets or eel-baskets from damage or destruction, and the protection of river-banks or river bush-scenery.

(10) For the control and the regulation of the management of all oyster-beds, pipi-grounds, mussel-beds, and the fishing-grounds used by the Maoris or from which they procure food, and from time to time to close such grounds or to protect such grounds from becoming exhausted, and to make reserves for the protection and cultivation of such shell-fish or eels and to prevent their extermination, and to restock such grounds as are in danger of extermination or exhaustion.

[Repealed by Maori Social and Economic Advancement Act 1945.]

(7) Maori Councils Amendment Act 1903 section 4(1)

For the purpose of subsection ten of section sixteen of the principal Act the Governor, on the recommendation of the Council, may at his discretion reserve any oyster, mussel, or pipi bed, or any fishing-ground, exclusively for the use of the Maoris of the locality, or of such Maori hapus or tribes as may be recommended:

Provided that in making such reservation the Governor may take into consideration the requirements of the residents of the locality.

[Repealed by Maori Social and Economic Advancement Act 1945.]

(8) Sea-fisheries Amendment Act 1903 section 14

Nothing in this Act shall affect any existing Maori fishing rights.

[Repealed by the Fisheries Act 1908].

(9) Fisheries Act 1908

Section 77(2) Nothing in this Part of this Act [Part I re sea fisheries] shall affect any existing Maori fishing rights

Section 17 – as per section 17 Sea Fisheries Act 1894 (supra)

Section 46 – as per section 3 Sea Fisheries Act Amendment Act 1896(supra)

Section 76 – as per section 72 Sea Fisheries Act 1894 (supra)

[Repealed by the Fisheries Act 1983]

(10) Native Land Act 1909 section 232

(1) When any Native freehold land is owned at law or in equity by more than ten owners in common, the Governor may by Order in Council set apart and reserve any part of that land



for the common use of the owners thereof as a burial-ground, fishing-ground, village, landing-place, place of historical or scenic interest, spring, well, or other source of water-supply, meeting-place, timber reserve, church-site, building-site, recreation-ground, bathing-place, or for the common use of the owners thereof in any other manner.

(11) The Fisheries Amendment Act 1923 section 10

(1) The Governor-General may from time to time, by Order in Council, declare any tidal lands or tidal waters defined in that Order and situated in the neighbourhood of any Maori pa or village to be an oyster-fishery where Maoris only may take oysters for their own food.

(2) The control of each such oyster-fishery shall be vested in a committee of such number of Maoris resident in the neighbourhood of the fishery as the Minister determines, and with respect to every such committee the following provisions shall apply:

(a) The members of the committee shall from time to time be appointed by the Minister, and shall hold office during his pleasure:

(b) The duties of the committee shall be to maintain the fishery in good order and condition to the satisfaction of the Minister, to regulate the taking of oysters therefrom by Maoris, to account to the satisfaction of the Minister for the expenditure of all moneys received by the committee pursuant to this section, and to report to the Minister any breach by any person of any of the provisions of this section.

(3) The Minister may, on the recommendation of the committee, by notice in the Gazette, declare that no oysters shall be taken from the oyster-fishery under its control during such period as may be specified in that behalf in the notice, and it shall not be lawful for any person to take oysters from such fishery during such period.

(4) If at any time it is found by the committee that there are more mature oysters in the fishery under its control than are required for the food of the Maoris in the neighbourhood and for the further propagation of the oysters, the surplus quantity may be sold to the Minister, and the proceeds of such sale shall be paid to the committee and applied by it solely for the purpose of extending and conserving the oyster-beds on the fishery. All oysters so purchased by the Minister shall be sold or otherwise disposed of in such manner as he thinks fit.

(5) Except as provided in the last preceding subsection, no Maori shall sell or give to a European any oysters taken from any such fishery.

(6) Every Maori who in contravention of the provisions of this section takes or sells or otherwise disposes of oysters from any such fishery, and every European who takes oysters therefrom, or who in any manner unlawfully obtains any oysters taken from such fishery, commits an offence, and is liable to a fine of not less than twenty pounds.

(7) The Governor-General may from time to time, by Order in Council, make regulations for carrying into effect the provisions of this section.

[This replaced s.17 of the Fisheries Act 1908 and was repealed by the Fisheries Amendment Act 1965.]

(12) Native Purposes Act 1937 section 5(1)

Upon the recommendation of the Native Land Court or of a Maori Land Board, the Governor-General may from time to time, by Order in Council, set apart and reserve any Native freehold land or any land owned by Natives as a Native reservation for the common use of the owners thereof or of any other Natives or class of Natives as a village-site, meeting-place, recreation-ground, sports-ground, bathing-place, church-site, building-site,

burial-ground, landing-place, fishing-ground, spring, well, catchment area, or other source of water-supply, timber-reserve, or place of historical or scenic interest, or in any other manner whatsoever.

[Repealed by Maori Affairs Act 1953]

(13) Maori Social and Economic Advancement Act 1945 section 33

(1) The Governor-General may, on the recommendation of the Minister of Marine and subject to such conditions (whether as to compliance with all or any of the provisions of the Fisheries Act, 1908, or otherwise) as he thinks fit, by Order in Council, reserve any pipi-ground, mussel-bed, other shell-fish area, or fishing-ground or any edible seaweed area for the exclusive use of Maoris or of any tribe or section of a tribe of Maoris.

(2) The Governor-General may by the same or any subsequent Order in Council vest in any Tribal Executive or Tribal Committee the control of any pipi-ground, mussel-bed, fishing-ground, or other area as aforesaid so reserved for the exclusive use of Maoris.

(3) The Tribal Executive or Tribal Committee in which is vested the control of any pipi-ground, mussel-bed, fishing-ground, or other area as aforesaid may take such steps as may appear to it to be necessary or desirable for the protection of the shell-fish or other fish and to prevent their extermination, and for the protection of the edible seaweed.

(4) Any Tribal Executive may make such by-laws as it thinks fit for the control, regulation, and management of pipi-grounds, mussel-beds, fishing-grounds, and other areas as aforesaid the control whereof is vested in it or in any Tribal Committee appointed in respect of any area within its district.

(5) Any Order in Council made under the foregoing provisions of this section may be varied or revoked by a subsequent Order in Council.

(6) Any person who acts in contravention of or fails to comply with any conditions imposed by an Order in Council made under this section commits an offence and shall be liable to a fine not exceeding twenty pounds.

(7) Notwithstanding anything to the contrary in section ten of the Fisheries Amendment Act, 1923, the control of an oyster-fishery defined under that section may be vested in a Tribal Executive or Tribal Committee.

[Repealed by the Maori Welfare Act 1962]

(14) Maori Affairs Act 1953 section 439(1)

The Governor-General may, by Order in Council issued on the recommendation of the Court, set apart any Maori freehold land or any European land owned by Maoris as a Maori reservation for the purposes of a village site, meeting place, recreation ground, sports ground, bathing place, church site, building site, burial ground, landing place, fishing ground, spring, well, catchment area or other source of water supply, timber reserve, or place of historical or scenic interest, or for any other specified purpose whatsoever.

(15) Fisheries Amendment Act 1965 section 12

(1) The Governor-General may from time to time, by Order in Council, declare any tidal land or tidal waters defined in the order and situated in the neighbourhood of any Maori pa or village as an oyster fishery where only Maoris may take oysters for their own food.

(2) Where an oyster fishery has been set aside for the use of Maoris under the provisions of subsection (1) of this section, the Minister shall appoint a committee of Maoris resident in

the neighbourhood of the fishery to control the fishery, and the following provisions shall apply to every committee so appointed:

(a) The members of the committee shall hold office for such period as the Minister thinks fit and may from time to time be reappointed:

(b) The committee shall have the following powers and duties:

(i) To maintain the fishery in good order and condition to the satisfaction of the Minister;

(ii) To regulate the taking of oysters;

(iii) To account to the satisfaction of the Minister for the expenditure of all money received by the committee pursuant to this section; and

(iv) To report to the Minister any breach by any person of any of the provisions of this section.

(3) The Minister may, on the recommendation of the committee, declare, by notice in the Gazette, that no oysters shall be taken during such period as may be specified in the notice, and it shall not be lawful for any person to take oysters from the fishery during that period.

(4) If at any time the committee finds that there are more mature oysters in the fishery under its control than are required for the food of the Maoris in the neighbourhood and for the further propagation of oysters, the surplus quantity may be sold to the Minister, and the proceeds of the sale shall be paid to the committee, which shall apply those proceeds solely for the purpose of extending and conserving the oyster beds in the fishery. All oysters so purchased by the Minister shall be sold or otherwise disposed of in such manner as he thinks fit.

(5) Except as provided in subsection (4) of this section, no Maoris shall sell or give to any European any oysters taken from any fishery to which this section applies.

(6) Every Maori who, in contravention of the provisions of this section, takes or sells or otherwise disposes of oysters from any such fishery, and every European who takes oysters therefrom or in any manner unlawfully obtains any oysters taken from any such fishery, commits an offence and is liable to a fine not exceeding one hundred pounds.

(7) Without limiting the provisions of section 5 of the principal Act, regulations may be made under that section for the effectual carrying out of the provisions of this section.

(8) In this section the terms 'Maori' and 'European' have the same meaning as in the Maori Affairs Act 1953.

[This replaced s.10 Fisheries Amendment Act 1923 and was repealed by the Fisheries Act 1983.]

(16) Fisheries Act 1983

Section 88 (2). Nothing in this Act shall affect any Maori fishing rights.

Section 6. Where any fishery management area has been declared, the Director-General shall, as soon as practicable after the declaration, consult and have regard to the views and responsibilities of appropriate public authorities, acclimatisation societies, the Fishing Industry Board, and such organisations and persons representing commercial, recreational, Maori, traditional, and other interests in fisheries as he considers appropriate, and prepare a proposed plan for the whole or any part of that fishery management area for the purposes specified in section 4 of this act, and the need for the co-ordination of interrelated fisheries.

Section 7. (1) For the purposes of preparing proposed plans and giving advice in relation to operative plans, the Minister may, as he thinks fit, from time to time appoint advisory committees for each management area or part thereof.

(2) Each such committee shall have as chairman an officer of the Ministry nominated by the Director-General, and may include members representing commercial, processing, wholesaling, retailing, recreational, Maori, and consumer interests in the area relating to fish and fishing.

Section 89 (3)(b)

Regulations made pursuant to this section . . . may apply special conditions or confer special rights in relation to fishing by specified communities.

(17) Fisheries (Amateur Fishing) Regulations 1983, regulations 6 & 7

6. Authority to exceed daily quotas – Notwithstanding any maximum daily numbers of finfish, shellfish, or aquatic life that may be specified pursuant to these regulations, any committee or council representing a community may, in respect of any special occasion, apply to the Director-General for permission to take more finfish, shellfish, or aquatic life than the maximum specified; and the Director-General may, in writing, allow the application subject to such conditions as he thinks fit.

7. Fishing by specified communities – The Director-General may, by notice given in that behalf, confer on specified communities special rights or privileges or apply special conditions relating to boundaries, species, gear or methods, periods of time, quantities, or any other measure for the management or conservation of finfish, shellfish, or aquatic life in the area in which the specified community resides.

(18) Fisheries (Amateur Fishing) Regulations 1986, regulation 27

27. Fish taken for hui or tangi – Nothing in these regulations or any other regulations made pursuant to the Act relating to amateur fishing imposing any restriction on the taking of fish shall apply where

(a) The fish are taken for the purposes of a hui or tangi; and

(b) The intention to take the fish has been notified to a Fishery Officer by or on behalf of a council or committee representing any Maori community before the fish are taken; and

(c) The fish are taken in accordance with any conditions relating to quantity, size, or methods of taking the fish, areas from where the fish may be taken, or persons who may take the fish that are imposed by the Director-General and considered by the Director-General to be necessary for the overall and management of the fishery.

(19) Fisheries Amendment Act 1986, section 28C(1)

The Minister may, after allowing for the Maori, traditional, recreational, and other non-commercial interests in the fishery, by notice in the Gazette, specify the total allowable catch to be available for commercial fishing for each quota management area in respect of each species or class of fish subject to the quota management system.



## **APPENDIX 8 MAORI FISHING PETITIONS**

as referred to the Native Affairs Committee

YEAR

CLAIMANTS

DESCRIPTION OF CLAIM

SOURCE AJHR

1869

Tanameha Te Moananui and others

Petition against the Thames Beach Bill – petitioners claim they will lose their authority over the foreshore and their fishing rights

F-7 p18

1869

Perehama Te Reiroa and others

Petitioners fear loss of fishing rights

F-7 p18

1879

Te Hemera

Failure of Crown to reserve Nga Puhi fishing grounds as provided in the Treaty

G-8 p18

1879

Te Hana

Crown failure to provide fishing rights

G-8 p18

1879

Herewini Mauwi

Seeks return of Ngati Whatua mana over fishing grounds and pipi beds

G-8 p20

1879

Puhata Rawiri

Seeks return of Maori authority over the foreshore; complaints re Crown restrictions

G-7 p27

1879

Apihai Te Kawau

Claims Ngati Whatua of Orekei-Manukau never sold the sea or the fish within it

G-8 p29

1879

Hamiora

Claims loss of Te Arawa authority in respect of their fisheries

G-8 p18

1879

Arama Karaka

Prays that European laws should not affect deep-sea fisheries and pipi beds because Europeans rights are to dry land only

No 21[el]I-2 p16

1880

Mahurehure Tribe

Prays for an Act to protect their enjoyment of their fisheries and pipi beds

No 21/1880[el]I-2

1880

Te Oti Pita Mutu and 25 others

Claims Ohaupounamu, Torotoroa, and Waimaiaia Lagoons drained, fisheries destroyed

I-2 p28

1881

Wi Te Wheoro

Eel weirs in Wangapae River should be included in Crown Grant

I-2 p24

1881

H K Taiaroa

Lake Ellesmere to be kept as an eel fishing ground

I-2 p26

1882

Hoepa Mataitaua

Re exploitation of foreshore shellfish beds, Te Kouma, Coromandel

I-2 p27

1883

Peneamere Tanui and others

Whitianga fisheries injured by log-floating

I-2 p12

1885

Tieke Kona & others

Return of Tatawai Reserve, as it is and eel fishery and landing place

I-2 p24

1885

Te Oti Pitama and others

That no obstacles be placed in their way to obtain fish etc from the sea rivers and lakes

I-2 p31

1885

Huirama Tukairiri

Obstruction of Mangonui River by log booms

I-2 p33

1886

Te Oti Pitama

New regulations to exempt Maori from operation of 1884 Fisheries Conservation Act

I-2 p11

1886

Wiremu Katene and 11,976 others

That their mussels and fisheries have been buried by European reclamations contrary to the Treaty of Waitangi

I-2 p27

1887

Te Amo o Te Rangi and 5 others, Reneti te Whauwhau and another

That foreshores and sandbanks be vested in them for food purposes according to the Treaty of Waitangi

I-2 p1

1887

Paora Tutaawha and 66 others

That fisheries and eel weirs are being destroyed by steamers on the Wanganui River

No 140 I-2 p6

1888

Werehiko Aterea and 162 others

That the work of deepening the Wanganui River be stopped

No 296 I-3

1888

Tipene Ruruku and 5 others

Fisheries to be protected according to the Treaty of Waitangi

I-3 p10

1888

Tutange/Waionui and 28 others

Ask for removal of restrictions against Native sustenance fishing on the Patea River

I-3 p19

1891



H T Whatuhoro and 10 others

Wairarapa Lake-settlement sought

I-3 p6

1891

Rewi Karuarua and 6 others

That the Bill re the taking of flounder be not brought into force

I-3 p17

1891

Wi Naihira and 14 others

That the Fisheries Conservation Act Amendment Act 1891 be not brought into operation

I-3 p22

1891

Wiremu Katene and 22 others

That Hararoa fishing station on the Kerikeri River was wrongfully taken into European possession

1893

Piripi Te Maari and 10 others

That rights to Lake Wairarapa be protected

I-3 p3

1895

Timoti Puhipi and 5 others

That land in Tangongi Swamp be returned

I-3 p6

1895

Irimina Tatoa Hapuku and 9 others

That lake Whatuma (Waipakarau) be returned

I-3 p7

1895

Mereaina Rauangina and 151 others

That Maori rights on the Wanganui River be not interfered with

I-3 p15

1895

Piripi Te Maari

Re Wairarapa lake and a threat that it be taken for survey costs

I-3 p19

1896

Kuini Rangipupu and others

Waokena block granted in error, was set aside as fishing reserve

I-3 p5

1896

Irimina Tutura and 62 others

Lake Whatuma to be returned

I-3 p15

1898

Ema Tini Enoka and another

That ancestral fishing places on the Waitara River be reserved

I-3 p7

1898

Henare Maire and 16 others Tare Wetere Te Kahu and 24 others

That Waiono Lagoon not be placed under Drainage Board control, or drained so as to deprive them of their fishing rights

I-3 p19

1899

Hohepa Huria and 39 others

That the rivers in Kaiapoi be exempted from Whitebait set net exemptions

No 253[el]I-3 p9

1901

Irimina Tutua Hapuku and 36 others

Praying that title of Whatuma Lake be vested with them

I-3 p6

1901

GP Mutu and 71 others

Praying that the Totorā lagoon be set aside as a Native reserve

1905

Taiaha Paurini and 137 others

That European fish not be introduced into Lake Rotoaira

I-3 p12

1906

Henare Meihana and 6 others

That compensation be paid for proclamation making Hokitika River a sludge channel

I-3 p12

1908

Tutange Waionui and 46 others

T Maui That fishing grounds in Patea district be returned to them

I-3 p18

1909

Tieke Kooua and 28 others

That sanctuary order on Lake Tatawai be rescinded

I-3 p11

1910

Eruera Waaka Tarawhata and 66 others James Blyth and 348 others

For money for roading to fishing reserves at Milford lagoon

I-3 p15

1914

Wiremu Poakatahi and 8 others

For legislation to clearly define and preserve fishing rights of Native tribes

I-3(1915) p5

1914

Rupuha Te Hianga and 5 others

For an inquiry into their interests in Whatuma lake

I-3(1915) p28

1915

Auetea Kerei of Wairoa

For an inquiry into their claims to fishing grounds at Te Maunga, Wairoa river

I-3 p29

1916

Mita Wepiha and 9 others (Whangaruru)

That fishing rights, land rights and gravel extractions be confirmed to them

I-3 p28

1916

Hema Henare and 33 others

That clause in Reserves and Other Lands Disposal and Public Bodies Empowering Bill re Hokio Stream and Horowhenua Lake be not allowed to proceed

I-3 p30

1916

Neha Kipa

That Ngati te Whiti of Moturoa, New Plymouth be given a Crown Grant for land which is their village and fishing place

HR 13 p12

1919

Hoani Te Hau Pere and 39 others (Wairewa)

That Lake Forsyth be set aside as fishing reserve for members of the Ngai Tahu tribe resident in Wairewa, Onuku and Opukutahi

I-3 p12

1919

Mohi Te Atahikoia and 47 others

For Native Land Court hearing re their claim to that part of the sea called Te Whanganui o Rotu

I-3 p18

1920

Hohepa Mataitaua

For reservation of oyster beds Te Kouma, Thames (1917)

I-3 p7

1922

Neha Kipa and 1 other

For Land Grant at Moturoa, New Plymouth for fishing and landing place

I-3 p30

1923

Kana Puhi and 37 others

That Europeans be prohibited from netting certain fish in Kawhia

I-3 p9

1924

Hakere Brown

That restrictions be placed upon fishing boats in Manaia and Coromandel district

I-3 p39

1924

Clara Titipo and 97 others

For authority to obtain oysters from the beds in the Coromandel district

I-3 p39

1924

Naera Kuao and 102 others

That Lake Kereru be reserved for their use

HR 13 p18

1925

Karena Mokoraka and 25 others

For inquiry into boundary of the Oyster reserve at Whangaruru

I-3 p5

1925

Waha Pango and 18 others

For restitution for wrongful sale of Whanganui-o-Rotu lake

I-3 p15

1927

Tamaiwhiua Rawiri and 6 others

For recognition of their fishing rights in the Hauraki Gulf

I-3 p8

1928

Te Aputa Ihakara and others

For removal of restrictions against whitebait fishing in Whakapuni lake and stream

I-3 p8

1928

Piki Kotuku and 125 others

For compensation in respect of Native rights on the Wanganui River

I-3 p10

1928

Kipa Anaru and 15 others

For return of Tutira reserve and lake

HR I-3 p7

1929

Hera Hapi and 6 others

That their claim to bed of the Awa-o-te-Atua (Ngaruroa stream) be heard and ownership determined

I-3 p9

1929

Pakete Raata and 36 others

That whitebaiting be prohibited in the Whakapuni Stream (Manawatu Heads)

I-3 p10

1929

Te Puea Herangi and 34 others

For return of Fishing rights in Waikato River

I-3 p19

1932

Aputa Ihakura and 29 others

For Maori Fishing rights

I-3 p4

1932

Hori Tupaea and 4 others

Re Whanganui-o-Rotu or Ahuriri Lagoon

HR 13 p13

1937

George Tuuta and 34 others

Re Te Whanga Lagoon, Chatham Islands

HR I-3 p3

1937[el]1938

Karanga Te Kere Ngatairua and 3 others

Re Lake Pohaere

HR I-3 p8[el]

HR I-3 p8

1943

Huitau te Hau and anothers

That Mahia Peninsula fishing rights be reserved

HR 1-3 p3

1943

Tere te Rito and others

That Muriwai fishing grounds from Paritu to Paokahu be reserved

HR 1-3 p3

1944

Te Whakawae Rimaha and others

that fishing rights to Ohiwa Harbour be preserved

HR 1-3 p11

1945

Huitau Te Hau and 13 others (Mahia)

That the fishing grounds of the Rongomaiwahine Tribe of Mahia be exclusively reserved for them

HR

1946

Eru Pou and 20 others

For a title to Lake Omapere and that the lake be made a Reserve

HR 1-3 p8

1946

Paneta Maniapoto Otene and 13 others

For an inquiry into Ahuriri lagoon

HR 1-3 p9

1946

Rori Rutene and 12 others

Re Waitahanui river-bed and adjoining land

HR 1–3 p10

1948

Paora Waina

To define relative interests in Lake Waikeremoana

HR 1–3 p9

1948

Matetu Kihirini and 8 others

for redefinition of interests in Lake Waikeremoana

HR 1–3 p17

1949

Rima Wakarua and others

Re land on the Waitotara river

HR G6 p1[el]HR 1–3 p3

1949

Hori Temautarani and others

Re Lake Rotongaio

HR 1–3 p9

1950

Titi Tihu and others

for investigation of title to Wanganui River

HR G2 p1

1953

Te Hioirangi Te Whaiti and 103 others Te Hioirangi Te Whaiti and 13 others

For complete and effective protection of Ngati Kahungunu fishing rights

I-3 p5[el]No 4[el]No 16

1959

Pakihi Peita and 23 others

For reclamation of Waihou mudflats, Panguru, Northland

HR 1–3 p3

1960

Tutuiria Wineera and 88 others (Porirua)

For compensation for loss of fishing beds of the Ngatitua tribe

HR 1–3 p3

1980

Ngaitahu Trust Board

For Commission of Inquiry into the sale and use of ancestral lands And loss of fishing rights

HR 1-3 p3

1980

Titi Tihu and Hikaia Amohia

That bed of Wanganui River be vested in nine named Maori Tribes

HR I-3 p3

1986

Rongowhakaata Tribe Te Aitanga-Mahaki Tribe Proprietors of Mangatu Blocks

For inquiry into the ownership of former Awapuni Lagoon

No 329[el]I-10 p2





APPENDIX 9 STATUTES AFFECTING MAORI FISHING  
INTERESTS

[see 6.2.4]

## **A9.1 STATUTES NOW IN FORCE**

- 1979 Coal Mines Act
- 1987 Conservation Act – Conservation areas, foreshores
- 1925 Electric Power Boards Act
- 1968 Electricity Act
- 1983 Fisheries Act (MAF)
- 1986 Fisheries Amendment Act (MAF)
- 1963 Fishing Industry Board Act (MAF)
- 1953 Geothermal Energy Act
- 1950 Harbours Act – reclamations, extractions (DoC)
- 1967 Hauraki Gulf Maritime Park Act (DoC)
- 1956 Health Act – Sewage, closure of areas
- 1908 Land Drainage Act – water courses
- 1974 Local Government Act
- 1971 Marine Farming Act (MAF)
- 1978 Marine Mammals Protection Act (DoC)
- 1974 Marine Pollution Act (MAF)
- 1971 Marine Reserves Act (DoC)
- 1953 Maori Affairs Act – fishing reservations (DoMA)
- 1971 Mining Act
- 1953 Ministry of Agriculture and Fisheries Act – administrative control (MAF)
- 1968 New Zealand Ports Authority Act (MoT)
- 1937 Petroleum Act – seabed pipelines (MoE)
- 1953 Primary Products Marketing Act (MAF)
- 1981 Public Works Act – swamp drainage, harbour works (MoW)
- 1977 Reserves Act (DoC)
- 1908 River Boards Act – catchment and water control
- 1908 Sand Drift Act (DoC)
- 1941 Soil Conservation and River Controls Act – water diversion
- 1966 Submarine Cables and Pipelines Protection Act
- 1915 Swamp Drainage Act
- 1977 Territorial Sea & Exclusive Economic Zone Act (MoFA)
- 1977 Town and Country Planning Act – Maritime plans etc
- 1967 Water and Soil Conservation Act – water licensing and classification

## **A9.2 STATUTES REPEALED**

- (1) 1866 No.57 – The Oyster Fisheries Act, 1866, [8 October 1866]
- (2) 1867 No.34 – The Salmon and Trout Act, 1867, [10 October 1867]
- (3) 1868 No.45 – The Williamson Compensation Act, 1868,[20 October 1867]
- (4) 1869 No.50 – The Oyster Fisheries Act Amendment Act1869, [3 September 1869]
- (5) 1877 No.45 – The Fish Protection Act 1877,[8 December 1877]
- (6) 1878 No.42 – The Fisheries (Dynamite) Act, 1878,[2 November 1878]
- (7) 1878 No 43 – The Seals Fisheries Protection Act 1878,[2 November 1878]
- (8) 1884 No.47 – The Salmon and Trout Act Amendment Act,1884. [8 November 1884]
- (9) 1884 No.48 – The Fisheries Conservation Act, 1884. [10 November 1884]
- (10) 1885           No.16 – The Fisheries Encouragement Act, 1885. [1 September 1885]
- (11) 1892           No.17 – The Fisheries Encouragement Act Amendment Act 1892. [31 August 1892]
- (12) 1894           No.56 – The Sea Fisheries Act, 1894. [23 October 1894]
- (13) 1895           No.39 – The Sea-fisheries Act Amendment Act 1895. [26 October 1895]
- (14) 1896           No.29 – The Sea-fisheries Act Amendment Act, 1896.[12 October 1896]
- (15) 1897           No.12 – The Fisheries Encouragement Act Amendment Act, 1897. [18 December 1897]
- (16) 1900           No.31 – The Fisheries Encouragement Act Amendment Act 1900. [9 October 1900]
- (17) 1900           No.48 – The Maori Councils Act 1900. [18 October 1900]
- (18) 1901           No.30 – The Fisheries Encouragement Act 1901. [29 October 1901]
- (19) 1902           No.9 – The Fisheries Encouragement Act 1902. [26 September 1902]
- (20) 1902           No.19 – The Fisheries Conservation Act Amendment Act 1902 [1 October 1902]
- (21) 1903           No.32 – Sea-fisheries Amendment Act, 1903, [11 November 1903]
- (22) 1903           No.68 – The Maori Councils Amendment Act 1903. [23 November 1903]
- (23) 1903           No.52 – The Fisheries Encouragement Act 1903. [17 November 1903]
- (24) 1903           No.51 – The Fisheries Conservation Act Amendment Act 1903. [18 November 1903]
- (25) 1906           No.13 – The Fisheries Conservation Acts Amendment Act 1906. [25 October 1906]
- (26) 1906           No.42 – The Sea-fisheries Act 1906. [29 October,1906]
- (27) 1907           No.36 – The Sea-fisheries Act 1907. [19 November 1907]
- (28) 1907           No.45 – Fisheries Conservation Amendment Act 1907.[19 November 1907]
- (29) 1908           No.65 – Fisheries Act 1908. [4 August 1908]
- (30) 1908           No.254 – The Fisheries Amendment Act 1908. [10 October 1908]

- (31) 1909 No.15 – The Native Land Act 1909.
- (32) 1912 No.49 – The Fisheries Amendment Act 1912. [7 November 1912]
- (33) 1914 No.31 – The Fisheries Amendment Act 1914. [27 October 1914]
- (34) 1923 No.10 – The Fisheries Amendment Act 1923 [20 August 1923]
- (35) 1931 No.31 – The Native Land Act 1931 [11 November 1931]
- (36) 1937 No.34 – Native Purposes Act 1937 [15 March 1938]
- (37) 1945 No.43 – Maori Social and Economic Advancement Act 1945, (s.33) [7 December 1945]
- (38) 1948 No.11 – The Fisheries Amendment Act 1948
- (39) 1953 No.38 – The Fisheries Amendment Act 1953
- (40) 1959 No.8 – The Fisheries Amendment Act 1959
- (41) 1962 No.68 – The Fisheries Amendment Act 1962
- (42) 1963 No.69 – The Fisheries Amendment Act 1963
- (43) 1964 No.35 – The Fisheries Amendment Act 1964
- (44) 1965 No.132 – The Fisheries Amendment Act 1965
- (45) 1967 No.49 – The Fisheries Amendment Act 1967
- (46) 1968 No.27 – The Fisheries Amendment Act 1968
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- (53) 1974 No.86 – The Fisheries Amendment Act 1974
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- (57) 1980 No.111 – The Fisheries Amendment Act 1980
- (58) 1981 No.67 – The Fisheries Amendment Act 1981
- (59) 1982 No.72 – The Fisheries Amendment Act 1982



## APPENDIX 10 MURIWHENUA FISH STATISTICS

[see 7.1]

A10.1 Commercial Landings of Major Species, 1983–1986

A10.2 Rock Lobster Landings 1983–1986

A10.3 Value of Muriwhenua Finfish and Shellfish Landings

A10.4 Estimated Value of ITQs in Muriwhenua Catch

Tables to be added

## **APPENDIX 11**

Tables to be added



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*Te Reo Maori* (Wai-11)

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Fisheries Encouragement Act 1885  
Oyster Fisheries Act 1892  
Sea-fisheries Act 1894  
Sea-fisheries Act 1896  
Maori Councils Act 1900  
Maori Councils Amendment Act 1903  
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Fisheries (General) Regulations 1950

Fisheries (Amateur Fishing) Regulations 1983

Fisheries (Amateur Fishing) Regulations 1986

Fisheries (Auckland & Kermadec Area Amateur Fishing) Regulations 1986

Fisheries (Central Area Commercial Fishing) Regulations 1986

Fisheries (South-East Area Amateur Fishing) Regulations 1986

Fisheries (South-East Area Commercial Fishing) Regulations 1986