

## CHAPTER 9

# ISSUES: TREATY GUARANTEES AND KAWANATANGA

### 9.1 INTRODUCTION

In chapter 8, we dealt with the argument of the Crown: namely, that members of the claimant hapu sold their riparian lands and with them their rights to the rivers. The Crown continued its submission with the proposition that the appropriation of the right to generate power by the Crown was a reasonable exercise of kawanatanga. We note that the word 'kawanatanga' is a transliteration of the word 'government'.<sup>1</sup> In article 1 of the Maori text of the Treaty of Waitangi, 'te Kawanatanga katoa o o ratou wenua' was given absolutely by the chiefs to the Queen. The Ngai Tahu Tribunal accepted that this means 'complete government' and 'all the government', and that this is less than the supreme sovereignty conferred in the English text.<sup>2</sup>

The issue we now have to determine is not whether the Crown's control and management of the rivers of Te Ika Whenua for hydropower generation is a justifiable exercise of kawanatanga but whether or not the exercise of kawanatanga was reasonable and proper, having regard to the Treaty guarantee of tino rangatiratanga and the Crown's associated duties and obligations.

### 9.2 TITLE AND TREATY GUARANTEES

In the English text of the Treaty of Waitangi, the Crown confirmed and guaranteed to the chiefs and tribes 'the full exclusive and undisturbed possession of their lands . . . and any other properties' so long as they wished to retain them. Notwithstanding this undertaking, the Crown undertook no inquiry as to the establishment of any particular rights or title in accordance with Maori custom that would accord protection to those properties that Maori regarded as having special significance. Instead, the Native Land Court was established to investigate title to Maori customary land and to issue certificates of title based on English law. The Torrens land transfer

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1. Compare with Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed, Wellington, Department of Justice: Waitangi Tribunal, 1989, sec 8.3; *The Ngai Tahu Report 1991*, 3 vols, Wellington, Brooker and Friend Ltd, 1991, vol 2, sec 4.6.6; and *The Te Roroa Report 1992*, Wellington, Brooker and Friend Ltd, 1992, p 26.

2. *The Ngai Tahu Report 1991*, vol 2, sec 4.6.6

system, subsequently introduced from the colony of South Australia as a means of recording and simplifying proof of title, reinforced the English law.

Consequently, no consideration was given to a system of title that might recognise or protect Maori customary rights (or do both). In the case of rivers, instead of a composite title that reflected such rights, the separate entities at common law of bank, bed, and water were introduced. Under this regime, in the case of non-navigable rivers, when Maori sold riparian lands, the title to the bank and bed and rights to the use of the waters passed to the purchaser.

In our view, this was clearly a consequence of ‘the tendency of rendering native title conceptually in terms which are appropriate only to systems which have grown up under English law’ referred to by the Court of Appeal in its decision in *Te Runanganui o Te Ika Whenua Incorporated Society v Attorney-General* [1994] 2 NZLR 20 (see sec 7.4).<sup>3</sup> The failure of the Crown under its power of kawanatanga to put into effect a form of title that recognised customary and Treaty rights of Maori to their rivers is an underlying factor in the present claim.

The effect of the application of English law, which was applied to New Zealand under section 1 of the English Laws Act 1858, is not confined to this claim but has been widely felt and recognised. The Treaty gave to the Crown the right of pre-emption in the purchase of land. When land was acquired, property rights were taken in accordance with English law. As we have seen, notwithstanding the Treaty, rights to rivers were determined under those laws. Beds of navigable rivers belonged to the Crown. Other rivers and streams belonged to riparian owners. Through such application of law, the Crown has appropriated lands, properties, and fisheries that belonged to Maori. At times, the Crown has recognised the injustice of this, as, for example, in the recent fisheries settlement contained in the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

The claimants contend that by exercising its right of kawanatanga to create title based on English law, the Crown has been able to assert ownership over large areas of the beds of Te Ika Whenua’s rivers and thereby to expropriate their wai tipuna for power generation. Consequently, they claim to have been denied the right to exercise an inherent element of tino rangatiratanga: namely, to develop their rivers for their own social, cultural, and economic benefit.

### **9.3 CONTROL OF NATURAL RESOURCES AND TREATY GUARANTEES: THE CROWN’S CASE**

The Crown says that it must have the right under article 1 to provide for the protection, management, and exploitation of natural resources where it is in the national interest, although article 2 rights will be accommodated wherever that is practicable. In the case of utilisation of water resources for electricity generation, the Crown considers that this is undoubtedly an area where its rights of kawanatanga

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3. Document c1; for the original judgment, see doc c14(b)

must prevail. Mr Arnold referred to evidence on the importance of electricity to the New Zealand economy and the advantages of generation by water power. He submitted that the Crown took control of electricity generation for sensible reasons of social policy, with widespread benefits to all members of the New Zealand community.<sup>4</sup>

We do not doubt that under the Treaty the Crown has the overriding right to exercise its power of kawanatanga in the national interest. It is not, however, our brief to consider whether or not the Crown was justified in assuming the right of overall management and control of the water resource of Te Ika Whenua, having regard to the importance to New Zealand of hydroelectricity. What we do have to consider is how far the Crown had a duty and obligation to qualify its exercise of kawanatanga, having regard to the guarantees contained in article 2 of the Treaty.

## 9.4 DUTIES AND OBLIGATIONS IN THE EXERCISE OF KAWANATANGA

### 9.4.1 Reciprocity

In the *Ngai Tahu Report 1991*, the Tribunal dealt with the principle that the cession of Maori sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. The Tribunal declared:

This concept is fundamental to the compact or accord embodied in the Treaty. Inherent in it is the notion of reciprocity – the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands and all other valued possessions.<sup>5</sup>

The Tribunal in the *Ngai Tahu Sea Fisheries Report 1992* saw this principle as of paramount importance and as overarching and far-reaching, being derived directly from the provisions of articles 1 and 2 of the Treaty. On the notion of reciprocity, the Tribunal said:

It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga.

The Crown in obtaining the cession of sovereignty under the Treaty therefore obtained it subject to certain limitations upon its exercise. In short, the right to govern which it acquired was a qualified right.<sup>6</sup>

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4. Document D5, p 23

5. *The Ngai Tahu Report 1991*, vol 2, sec 4.75; see also Waitangi Tribunal, *Ngawha Geothermal Resource Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 5.1.2; *Maori Development Corporation Report*, Wellington, Brooker's Ltd, 1993, sec 6.3; *Te Whanganui-a-Orotu Report 1995*, 1st ed, Wellington, Brooker's Ltd, 1995, sec 12.2.1

6. Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report 1992*, Wellington, Brooker and Friend Ltd, 1992, sec 11.5.1

As our outline of the historical background to the present claim shows, right from the beginning there was conflict between the two systems and the two parties, the indigenous people, who had their own customary laws and protocols, and the colonising power, which they welcomed (see chs 3–6). The belief of the indigenous people was that the Treaty would establish ‘a settled form of Civil Government’ and secure ‘Peace and Good Order’ to ‘avert the evil consequences which must prevail from the absence of necessary Laws and Institutions’ (see the preamble to the Treaty). They could not foresee that this new system of kawanatanga would not always provide the protections promised and would at times preclude them from exercising their tino rangatiratanga.

In our *Te Ika Whenua – Energy Assets Report 1993*, we outlined how the Crown under the Water and Soil Conservation Act 1967, the Public Works Act 1928, and the Electricity Act 1968 allowed the Aniwhenua and Wheao power schemes to be constructed by local power authorities. We found that the Crown granted the required water rights for power generation without giving thought or consideration to the general overarching Treaty principle of exchange and the other principles inherent in it. More particularly, we found that the Crown failed in its associated fiduciary duty to consult with ‘the people directly concerned ... such as the claimants’.<sup>7</sup>

#### 9.4.2 Consultation

In the Court of Appeal decision *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, Sir Ivor Richardson at page 683 described the duty to consult as follows:

In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and cannot be regarded as implicit in the Treaty. I think that the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision which is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation, it will have discharged the obligation to act reasonably and in good faith.

The Court of Appeal has similarly held in other cases that, where the Government under its powers of kawanatanga seeks to deal with interests of Maori that are otherwise protected by the Treaty of Waitangi, there should be full consultation with the Treaty partner.

That court, in *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142 at page 152, stated:

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7. Waitangi Tribunal, *Te Ika Whenua – Energy Assets Report 1993*, Wellington, Brooker and Friend Ltd, 1993, sec 5.2

In the judgements in 1987 this Court stressed the concept of partnership. We think it right to say that the good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues. That is really clear beyond argument.

In *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 at pages 683 and 684, the Court of Appeal, speaking generally on the requirement to consult but not with direct reference to the Treaty, said:

If the party having power to make a decision after consultation holds meetings with parties it is required to consult, provides those parties with relevant information and with such further information as they request, enters the meetings with an open mind, takes due notice of what is said, and waits until they have had their say before making a decision, then the decision is properly described as having been made after consultation. It is immaterial that those parties may have had other concerns which for their own reasons they chose not to put forward.

The Tribunal in various reports extending over a longer period has likewise held that the Crown has a duty to consult its Treaty partner and has reflected upon the consultation process in particular claims. The need for early consultation was set out in the 1985 *Report of the Waitangi Tribunal on the Manukau Claim*. Sir Ivor Richardson's reasoning in the 1987 *New Zealand Maori Council* case was explored in the *Ngai Tahu Report 1991*, where the following observations were made:

in some areas more than others consultation by the Crown will be highly desirable, if not essential, if legitimate Treaty interests of Maori are to be protected. Negotiation by the Crown for the purchase of Maori land clearly requires full consultation. On matters which might impinge on a tribe's rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources – mahinga kai – also require consultation with the Maori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may impinge on Maori interests, will often give rise to the need for consultation. The degree of consultation required in any given instance may, as Sir Ivor Richardson says, vary depending on the extent of consultation necessary for the Crown to make an informed decision.<sup>8</sup>

With regard to the duty to consult, the Tribunal made precisely the same statement in both its *Ngawha Geothermal Resource Report 1993* and its *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*:

Before any decisions are made by the Crown, or those exercising statutory authority on matters which may impinge on the rangatiratanga of a tribe or hapu over their taonga, it is essential that full discussion take place with Maori. The Crown obligation actively to protect Maori Treaty rights cannot be fulfilled in the absence of a full appreciation of the nature of the taonga including its spiritual and cultural dimensions. This can only be gained from those having rangatiratanga over the taonga.<sup>9</sup>

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8. *The Ngai Tahu Report 1991*, vol 2, sec 4.7.17

9. *Ngawha Geothermal Resource Report 1993*, sec 5.1.6; Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, Wellington, Brooker and Friend Ltd, 1993, p 32

In the present claim, the Crown did not contest that consultation was required. Mr Arnold said:

While the Crown accepts, as a matter of general principle, that tangata whenua have a right to be consulted about proposed developments, and modifications that can sensibly be made to meet their concerns should be made, Maori interests protected by Article II cannot give tangata whenua the right to veto or prevent power developments on the rivers.

Ultimately there must be a practical accommodation of the two sets of rights, although there may be circumstances where one set must prevail over the other and, where that must occur, it is the Crown's right of kawanatanga that must prevail. In relation to water resources the Crown says that s 8 of the Resource Management Act does provide for an appropriate recognition of Treaty values.<sup>10</sup>

## **9.5 DID THE CROWN FAIL TO MEET ITS TREATY OBLIGATIONS TO TE IKA WHENUA?**

### **9.5.1 Inadequate consultation over local power schemes**

The Crown and the local power supply authorities point to consultation with the claimant hapu over the power schemes, notwithstanding that power boards were not the Crown or its agents and were under no Treaty or other obligation to consult with tangata whenua (see secs 6.3.2–6.3.3). The Crown submitted that such consultation constituted a reasonable exercise of kawanatanga. Mr Arnold said that in such exercise of kawanatanga there needed to be a practicable accommodation of the two sets of rights: the existing objection procedures, 'although arguably not adequate to meet the Crown's Treaty obligations, did provide an opportunity for Te Ika Whenua to raise at least some of their concerns, yet they did not do so'.<sup>11</sup> By virtue of those circumstances, he argued, it could not be said that the Crown's Treaty obligations had not been fulfilled.

The claimants, on the other hand, criticised the nature and extent of consultation and contended that it fell far short of the requirements of the Treaty (see secs 6.3.1, 6.3.5, 6.4.1, 6.4.3).<sup>12</sup> Further, that the Crown's disregard of their tino rangatiratanga over the rivers constituted a breach of the provisions of the Treaty.

In our view, if there is to be consultation that satisfies the terms of the Treaty, there must first be recognition of the rights and interests of Maori under article 2. It is not possible for the Crown successfully to argue the proper exercise of kawanatanga in accordance with the terms of the Treaty without indicating the regard it has had to the guarantees contained in article 2. Likewise, it is not sufficient to consult without recognition of any right or interest and then argue that such consultation complies with the requirements of the Treaty.

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10. Document D5, pp 23–24

11. Ibid, p 26

12. See also doc C19, pp 5–6

The Tribunal has before it no evidence of any regard by the Crown of its guarantees under article 2 of the Treaty in its dealing with the rivers of Te Ika Whenua. It has merely accepted the common law view of ownership of rivers and acted accordingly. Consultation was conducted, essentially on an ad hoc basis, with parties at large rather than with people with special rights. Furthermore, the rights to water for power generation had already been appropriated by the Crown. Consequently, consultations were not as between Treaty partners in recognition of the special rights of Maori but as between the power boards and a group of Maori with some riparian rights and cultural and historical ties with the rivers. Consultation on such a basis could hardly be said to satisfy the Crown's obligations under the Treaty of Waitangi. Given those circumstances, the fact that the proposed developments were virtually a *fait accompli* and there was no real process for objection by tangata whenua, it is hardly surprising that Maurice Bird, when consulted, expressed little objection to the Wheao scheme (see sec 6.3.4).

The local power schemes were backed by the Government; Maori were not represented on the planning and controlling authorities; the legislation and processes under which they operated were essentially monocultural; the Treaty of Waitangi Act 1975 to 'provide for the observance and confirmation of the principles of the Treaty' had not yet taken effect. Maori at that time did not usually participate in the investigation and consent process by lodging objections, submissions, and appeals. Attitudinal as well as legislative changes were needed for more effective consultation and participation.<sup>13</sup> Furthermore, by the 1960s, forestry provided full employment for tangata whenua and the rivers were no longer an essential food source. None the less, they remained a sacred taonga. Given the mood of change and progress and the lack of any official or public recognition of any property right in the rivers, what Mr Alexander mistook for 'total silence from tangata whenua while the power schemes were being debated and constructed' is quite understandable (see sec 6.5.2). In fact, as he later discovered, Maori complaint about the serious depletion of the eel fishery predated the local power schemes and concerned both the commercial eeling activities of Pakeha and the Matahina Dam, which cut eel migration up and down the Rangitaiki River in 1963.

### 9.5.2 Impact of local power schemes

The impact of the Aniwhenua and Wheao power schemes was twofold. First, there was the physical impact, particularly as regards the Wheao scheme, which mixed the waters, shattering their sanctity and affecting the spiritual relationship of the people with the river (see secs 6.2.1, 6.2.2). Secondly, there was the effect on the traditional fishery of Te Ika Whenua. While emphasis has been placed on the eel fishery, it must not be forgotten that the claimants also complained about the diminishing numbers of native fish (see sec 6.5.1). Evidence as to the physical impact of the schemes was not disputed.

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13. Compare with the *Report of the Waitangi Tribunal on the Manukau Claim*, sec 9.2.6

The Crown, in closing submissions, referred to and acknowledged two other factors in the depletion of the eel fishery: the Matahina Dam and commercial eeling. Mr Arnold said:

the hydro scheme which seems to have had the greatest impact on the eel fishery is the Matahina Project which was completed in the 1960s. It is this project which was primarily responsible for impeding the passage of elvers up the river system from the sea and it would also have made it difficult for adult eels to migrate to the sea to breed. The Matahina Project is downstream of the area claimed by Ika Whenua but plainly affected the eel fisheries in the rivers and streams which they claim . . .

. . . commercial eel fishing in the early 1970s seems to have been at least as significant a factor in the decline of the eel fisheries in the rivers as the hydro developments. In December 1972, before the construction of the Aniwhenua or Wheao power schemes, Mr Paul, as chairman of the Ngati Awa Maori Executive, wrote to the Minister of Maori Affairs expressing the concern of the people of the area at the serious depletion of eel stocks resulting from commercial fishing and estimating that within six months eel stocks would be exhausted – see doc C14(c) at pp 31–32. Mr Mitchell, the eel expert, agreed in cross-examination that commercial fishing was a major factor in the decline of eel stocks.<sup>14</sup>

Mr Arnold argued the relevance of these two factors to the present claim as follows:

- (a) The building of the Matahina Dam was not the subject of complaint by Te Ika Whenua, possibly because it was outside the area of their claimed rohe and there was little evidence about it before the Tribunal.
- (b) Eel depletion arose at least in part from commercial fishing. The Tribunal therefore could not make any recommendation over eels because commercial freshwater fisheries such as eel fisheries were outside the jurisdiction of the Tribunal under section 9(a) of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.<sup>15</sup>

Dealing with the first point, we are not sure what its purpose is; presumably we are expected to ignore the admitted effects of the Matahina Dam on the eel fishery if we find a breach of the Treaty. Surely, if the Crown is in breach of the Treaty and is required to remedy that breach, then it is important to identify the cause, whether inside or outside the rohe, so that if consultation or negotiations are to be undertaken the remedies needed can be fully addressed. While the claim only refers to the detriment to the fisheries through the construction of the Wheao and Aniwhenua schemes, we do not believe that any good purpose would be served by ignoring the effects of the Matahina Dam and leaving the claimants to bring a further claim on that issue.

As to the second point, based on the fishery being a commercial fishery, the Tribunal does not accept this argument. Eels were and still are primarily a much sought after delicacy to the local hapu; indeed, Te Ika Whenua were renowned for the succulence and quality of their eels, that contributed to their mana. Commercial

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14. Document D5, pp 26–27

15. Ibid, p 27

exploitation was only one brief incident which assisted in their depletion and was of such short duration that we cannot seriously regard the rivers as commercial fisheries. In any event, section 9(a) of the 1992 Act only precludes further claims in respect of commercial fishing and clearly does not apply to this claim, which is about customary and traditional fishing rights.

Comprehensive evidence of the claimants as to the effect of the dams on eel population was not contested and was supported by expert evidence from Mr Mitchell and Dr Donovan (see sec 6.5.3). Both agreed that the dams formed an impassable barrier preventing young elvers from passage upstream. Conversely, the dams also formed a barrier for adult eels ready to migrate to their breeding grounds in the sea, and most were killed in the turbines of the dams. The weight of evidence, both claimant and expert, was that the dams had a major impact on the eel population of the rivers.

The eel fishery of Te Ika Whenua was and still is a taonga. Under the terms of the Treaty, the Crown promised Maori the retention and protection of their fisheries. The rivers constituted an important fishery for the people of Te Ika Whenua and it is clear that the Crown in authorising the construction of the dams ignored any possible effect upon the eel fishery. Even if we were to accept that the construction of the dams was in consequence of a proper exercise of kawanatanga, the Crown had a responsibility to take into account their effect on the fishery and to ameliorate it. Evidence suggests that the Crown, through the Department of Internal Affairs (which administered the trout fishery), looked upon the decline of the eel fishery as something to be encouraged for the benefit of recreational trout fishing (see sec 6.5.2).

It is our view that, in permitting and encouraging the dams to be erected, the Crown has ignored their effect on this taonga and is in breach of the Treaty. It therefore has a responsibility to take all reasonable steps to protect and restore the fishery in full consultation with its Treaty partner.

Evidence of measures being taken to replenish the eel fishery is outlined in sections 6.5.2 to 6.5.4. Bay of Plenty Electricity is involved in the capture and release of both elvers and migrating eels. The Electricity Corporation of New Zealand has constructed an elver pass over the Matahina Dam, though only one of the two pick-up points in the original design has been built. Mr Mitchell, one of the designers, acknowledges that it will be far more effective when it is finally completed.<sup>16</sup>

Te Ika Whenua complain that there was and still is a lack of consultation over these measures. We share this concern. The measures seem to be undertaken on an ad hoc basis and without an overall long-term plan. Although the Electricity Corporation and Bay of Plenty Electricity are to be complimented on their initiatives, they are under no requirement or obligation to continue them or guarantee their continuance.

In our view, in accordance with the Treaty principles implicit in article 2, there should be proper consultation with Te Ika Whenua on the measures necessary to replenish and protect the eel fishery. A long-term plan should be agreed to and undertaken in a manner that satisfies them that something tangible and effective is

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16. See doc C12, p 2

being done. In the final analysis, the responsibility for protecting this fishery rests with the Crown.

#### 9.6 THE KIOREWENUA PROJECT

The Kiorewenua project involves a further dam, which Bay of Plenty Electricity proposes to build downstream from Aniwhenua. Some consultation has been held with local landowners, including Maori. At one particular meeting, a social hour was held and persons interested were invited to have discussion with the company's land purchase officer. Criticism was levelled at the nature of the consultation and at the lack of consultation with Te Ika Whenua. It was suggested that we should find that such consultation was not in accordance with the Resource Management Act 1991 and that the Act itself was 'fatally flawed' (see sec 6.4.1).

We understand that the investigation and consent process for this scheme is ongoing. Furthermore, the claim before us does not include this project. Therefore, we cannot make any such findings.

We draw to the attention of the claimants that the question of consultation is a matter to be addressed and judged under the provisions of the Resource Management Act. Several recent Tribunal reports have already addressed this question and have recommended appropriate amendments to the Act.<sup>17</sup>

#### 9.7 THE RETIRETI AND CUSTOMARY FISHING RIGHTS

A further issue raised by the claimants related to the Crown's exercise of kawanatanga through the imposition of trout fishing regulations. They say these infringe their customary fishing rights and tino rangatiratanga over their fisheries and rivers. In particular, they restrict the use of a customary fishing device, namely the retireti (board).

The retireti is made from a flat piece of timber and attached to a line (see fig 26). Hooks or lures are attached to the timber by lines and it is then cast into a river or stream. The line is played out, and when restraint is placed against it, the shape of the board is such as to work against the current and gradually make its way to the opposite side of the river or stream. Using these skills, Te Ika Whenua were able to fish both sides of their rivers and streams.

Maurice Toetoe presented evidence that the retireti was used for eeling but was 'prohibited gear' under the rules and regulations applying to trout fishing because it was possible to use it for catching trout.<sup>18</sup> He said that he had been told by rangers that he could only fish for eels with a worm between the hours of 11.00 pm and 5.00 am.

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17. See *Ngawha Geothermal Resource Report 1993*, sec 8.5.2; *Te Whanganui-a-Orotu Report 1995*, secs 9.10.5, 12.4.4

18. Document B11, pp 1-3

Maanu Paul contended that Te Ika Whenua's rights of use and control of their fisheries included the use of their methods and artefacts, such as the retireti. The retireti had been developed to catch trout and this was an integral part of Te Ika Whenua's right to development (see also sec 4.5).<sup>19</sup>

We accept that the retireti is part of Te Ika Whenua's customary fishing practices and that they are concerned at limitations on its use. Access to parts of the rivers is often difficult, and the retireti can be instrumental in opening up for fishing areas of water that might not otherwise be reached. In closing submissions, Ms Ertel requested that the Tribunal 'declare the lawfulness of the retireti'.<sup>20</sup>

While the Tribunal does not have the authority to make such a declaration, it regards the retireti as part of Te Ika Whenua's customary fishing rights and practices, which are entitled to protection under the Treaty. Regulations restricting the use of the retireti impinge upon those rights and practices.

As we have already demonstrated, the exercise of kawanatanga carries with it the fiduciary obligation of proper and full consultation. Our impression is that the fishing regulations were drafted and introduced to protect and advance the trout fishery at the expense of the customary eel fishery without consultation with Te Ika Whenua or any consideration of their rights.

We are not sure, however, that the limitations on customary fishing practices recounted by Mr Toetoe are correct and that the effect of the trout fishing regulations is properly understood.

A copy of a fishing licence was produced, but we were not referred to any legal authority by way of statutes, regulations, or bylaws, nor were any submissions advanced on this point. Notwithstanding, we find it appropriate that, as part of our recommendations, the impact of trout fishing laws and regulations be the subject of negotiation and we therefore see no need to use our investigatory powers to clarify the position further.

We should add that we do not necessarily agree with Mr Paul that the adaptation of the retireti to catch trout can be classified as a customary fishing practice. Surely specific laws could be prescribed for the taking of trout so as to leave Te Ika Whenua free to utilise their customary practices in the taking of other species.

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19. Document B16, paras 22–27

20. Document D2, p 75

