

Ngai Tahu Sea Fisheries Report

10 Ngai Tahu Sea Fisheries Treaty Rights Today

10.1 Introduction

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In chapter 4 we considered the nature and extent of the Ngai Tahu sea fisheries at the time of the Treaty. In 1840 their sea fisheries extended some 12 miles or so from the foreshore from the northernmost eastern boundary, Pari-nui-o-Whiti, around the South Island coast to the northernmost western boundary at Kahurangi. We have not accepted the Ngai Tahu amended claim that there was at the time no seaward limit to their fishery.

But it is by now a truism that Maori Treaty rights are not frozen as at 1840. All lay in the future and there would be developments that could not have been foreseen or predicted at that time. As has been made only too evident in preceding chapters of this report, the impact of settlement and the assumption by government of the control and power to dispose of the sea fisheries has had a devastating effect on the rangatiratanga of Maori in general and Ngai Tahu in particular over their sea fisheries.

Since 1840 there have been notable advances in the size and means of propulsion of fishing vessels, in fishing technology, and in the discovery of species unknown to Maori and non-Maori at the time of the signing of the Treaty. One consequence of these developments has been the recent dramatic shift in fishing effort from the confines of the continental shelf to the offshore deepwater fisheries.

A critical question much debated before us is whether, and if so, to what extent, Ngai Tahu Treaty fishing rights encompassed these new developments including the extension of fishing out to the 200 mile limit of the exclusive economic zone.

A related question is whether Maori Treaty sea fishing rights were limited by the Crown's capacity to implement its Treaty guarantee.

In this chapter we propose to consider these and other issues bearing on Ngai Tahu's sea fisheries Treaty rights today.

Waitangi Tribunal, Department of Justice, Wellington.

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10.2 The Development Right

10.2. The Development Right

10.2.1 It is common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development. This was recognised by the Muriwhenua tribunal in the context of a discussion of new technology and the right to development. The tribunal found:

- (a) The Treaty does not prohibit or limit any specific manner, method or purpose of taking fish, or prevent the tribes from utilising improvements in techniques, methods or gear.
- (b) Access to new technology and markets was part of the quid pro quo for settlement. The evidence is compelling that Maori avidly sought Western technology well before 1840. In fishing, their own technology was highly developed, and was viewed with some amazement by early explorers. But there is nothing in either tradition, custom, the Treaty or nature to justify the view that it had to be frozen.
- (c) An opinion that Maori fishing rights must be limited to the use of the canoes and fibres of yesteryear ignores that the Treaty was also a bargain.

It leads to the rejoinder that if settlement was agreed to on the basis of what was known, non-Maori also must be limited to their catch capabilities at 1840.

Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other.

(d) The Treaty offered a better life for both parties. A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty. (The Crown has generally accepted these principles ...).

(e) The right to development is recognised in domestic and international law, in domestic law in *Simon v the Queen* (1985) 24 DLR (4th) 390, 402, for example. {FNREF|0-86472-103-X|10.2.1|1}

10.2.2 As the tribunal noted, the Crown generally accepted points (a) to (d) but not point (e). Before us, counsel for the Crown Mr Carruthers set out the Crown's position as follows:

One of the principles *Sinclair op cit* [Treaty interpretation in British Courts 12 ICLQ 508, 510-11] refers to, namely the principle of subsequent effectiveness, states that "Treaties are to be interpreted with reference to their declared or apparent objects and purposes." On this basis the right to continue to catch fish, which was an important object of the Treaty, must be interpreted as including the right to develop the fishery in accordance with new fishing techniques, increased knowledge of the fishery and modern fishing equipment. The Crown by the Treaty agreed to protect that right to development. It accepts that as the traditional Maori fishing right included a commercial element (to a greater or lesser degree depending upon the practices of each Tribe in various areas of New Zealand) the right to develop the fishery also includes the right to employ these new techniques, knowledge and equipment for commercial purposes. However, because of the large scale of modern commercial fishing, when the Tribes choose to undertake development of the commercial element of their traditional fishing rights it is an obligation of the Crown in exercise of its rights of sovereignty and its duty to protect the fishing resource of the nation to introduce, maintain and enforce appropriate programmes of conservation. Therefore the choice made by Maori to develop the commercial element of their fisheries brings them within the conservation and management techniques of the day applicable to the scale of commercial use. {FNREF|0-86472-103-X|10.2.2|2}

10.2.3 Crown counsel challenged the Muriwhenua tribunal's reliance on the Canadian case of *Simon v The Queen* (1985) 24 DLR (4th) 390 as authority for the proposition that the right to development is recognised in domestic law. We agree with Mr Carruthers that unless the principles of a case such as *Simon v The Queen* are adopted by the New Zealand courts it cannot be said they have been recognised in New Zealand domestic law. But having said that, we believe, were the question of whether the Treaty must be interpreted as including the right to develop the fishery to become justiciable in the New Zealand courts, that the right to develop would be recognised in our domestic law. The Crown itself concedes that it is a right inherent in the Treaty of Waitangi. This being so, if the issue were to fall within the jurisdiction of a New Zealand court the Crown would be bound to support recognition of such a right just as it does before us in the context of our jurisdiction.

10.2.4 The Crown further challenged the Muriwhenua tribunal's statement in paragraph (e) that the right to development is recognised in international law. The Muriwhenua tribunal's statement should, however, be read in the light of the further discussion in the report which immediately follows paragraph (e). There the Muriwhenua tribunal notes:

That all peoples have a right to development is an emerging concept in international law following the Declaration on the Right to Development adopted on 4 December 1986 by 146 states (including New Zealand) in resolution 41/128 of the United Nations General Assembly. {FNREF|0-86472-103-X|10.2.4|3}

Mr Carruthers may well be correct in asserting that the right is not yet new customary international law. He is supported in this view by Dr Benedict Kingsbury who characterises the United Nations resolution as being:

rather a mixture of established principles of law and of desiderata. It may nonetheless point to eventual developments in international law of importance to indigenous

peoples, whether or not these are ultimately characterized as collectively constituting a 'right to development'. {FNREF|0-86472-103-X|10.2.4|4}

Given the growing support in the United Nations for the recognition of the rights (including a right to development) of indigenous people we believe that such a right may become part of customary international law in the foreseeable future.

10.2.5 Counsel for the claimants strongly supported the Muriwhenua tribunal findings on the right to development. Counsel for the fishing industry submitted that the extent to which individual members of the tribes have developed rights in the fishery must be subtracted from any right to develop claimed by the tribes (an issue which we consider later (10.5) and further, that the Maori Fisheries Act 1989 should not be taken as some kind of concession by the Crown of a Ngai Tahu or Maori development right. In all other respects the fishing industry adopted Crown counsel's submissions.

Commercial fishing

10.2.6 We have noted that the Crown in its statement on the right to development accepts that the traditional Maori fishing rights included a commercial element and that the right to develop the fishery also included the right to employ new techniques, knowledge and equipment for commercial purposes. This was concurred in by the fishing industry. It was also the view of the claimants.

The Crown, however, further maintained that when the tribes chose to undertake development of their commercial interest in the fisheries they are amenable to appropriate programmes of conservation and management techniques introduced by government from time to time. Crown counsel said nothing in this context as to any obligation on the Crown to consult with Maori before instituting any such measures. We consider the question of the need for consultation with iwi on this and related matters later in this report.

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10.3 Fisheries Beyond Those Fished in 1840

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As we have seen the Ngai Tahu business and activity of fishing in 1840 extended out to some 12 miles or so from the shore and in one instance between 30 and 60 miles offshore.

By the mid-1860s if not earlier, Ngai Tahu, with the aid of marks books, were fishing commercially some 20 to 30 miles from the shore. They were now using whale boats or similar vessels with sails. Over time their fishing operations extended out to the edge of the continental shelf. If the claimants' contention that there were no seaward limits to their sea fisheries was sound and Ngai Tahu rangatiratanga extended indefinitely seawards from either side of the island within given latitudes, then these waters constituted part of their exclusive sea fisheries. But we have found that Ngai Tahu sea fisheries in 1840 did not extend to these distances.

10.3.1 It does not follow, however, from this circumstance that Ngai Tahu Treaty fishing rights were frozen for all time within the range of 12 miles or so. Implicit in the recognition of the Treaty right to make use of new sea fishing technology is a right to take full advantage of it. If improvements in the design and means of propulsion of fishing vessels enabled fishers to go further out to sea to exploit new fishing grounds, to stay there longer, and to employ more sophisticated catching equipment, it follows that Ngai Tahu as a Treaty partner are entitled to a reasonable share of the new fisheries thereby opened up. The Treaty must be interpreted as including this right. This necessarily applies not only to fishing operations out to the edge of the continental shelf but to the recent extension over the past 25 or so years into offshore or deepwater fisheries.

To deny that this is so is to assert that the rights of one Treaty partner (Maori) but not the other party (the Crown) are confined to those existing in 1840. It is surely idle to recognise on the one hand that the Treaty provides a right of development in the future and on the other to circumscribe its effective operation to the factual situation pertaining at 1840. The two Treaty parties are required to act reasonably and in good faith towards the other. Ngai Tahu raised no objection to the new settlers sharing in the abundance of their fisheries so long as such use did not impinge unduly on their own requirements. Likewise, as technology opened up access to new fishing grounds off their tribal rohe the Crown's duty to act reasonably and in good faith towards Ngai Tahu required it to ensure that a reasonable share of the new available fisheries were secured to its Treaty partner, Ngai Tahu. In this regard there can be no distinction between an extension of fishing out to the edge of the continental slope and further offshore into deepwater fisheries. There was to be a mutual benefit to both parties to the Treaty.

10.3.2 We adopt, with the addition indicated, the following propositions in the Muriwhenua Fishing Report:

- (a) There is no rule of the Treaty that Maori are confined to the fishing bands or grounds proven to have been used by them.
- (b) There is nothing in the Treaty to suggest that Maori could not expand upon their fishing capabilities to develop [further the inshore fishery and also] the offshore fishery.
- (c) Neither party was involved in the offshore fishery at 1840, except for whaling. Both parties were involved in whaling. Trawlers were not introduced until the end of the 19th century. Major offshore fishing did not develop until the 1970s.
- (d) Allowance must be made for the lack of any funding to tribal authorities for the development of their fisheries, comparable with the substantial loans and incentives provided for the industry as a whole.
- (e) Further allowance must be made for the disincentives that came with laws restrictive of Maori fishing. With state help, Maori trusts and incorporations enormously expanded Maori farming capabilities. It is readily imaginable that with state encouragement, not discouragement, Maori would have developed an offshore capability. The pre-1840 experience is indicative of that. {FNREF|0-86472-103-X|10.3.2|5}

We note once again that Ngai Tahu as an iwi was prevented from actively developing its fisheries from the late 1860s on because of the crippling economic effect of the Crown land purchases and accompanying breaches of the Treaty by the Crown which we have recounted in the Ngai Tahu Report 1991.

10.3.3 Mr I N Clark, Chief Fisheries Economist with MAFFish argued in a lengthy affidavit that the business and activity of offshore fishing is so different from the business and activity of inshore fishing that it cannot be concluded that Maori inshore development would have led to the substantial development of offshore fisheries. He noted that from 1978 until 1982 New Zealand's involvement in deepwater fishing was largely limited to joint venture arrangements. Only a very limited number of New Zealand companies had the resources to enter into such ventures. Mr Clark stressed that large vessels with highly specialised electronic navigation and other gear and substantial crews operating up to 24 hours a day were needed. He concluded that development into the deepwater was not a natural and logical extension of inshore fishing but was a different fishing activity. In his view it does not necessarily follow that the claimant tribes would have developed an offshore, deepwater capability but for some lack of support or opportunity (Z48:22-24).

10.3.4 Mr Clark's opinions were strongly challenged by Dr Habib. In an overview report Dr Habib said:

If Maori had been allowed to continue to dominate the fisheries as they did in the period immediately following the signing of the Treaty, and were maintained, properly supported, and promoted by the Crown in their fishing activities, it could be

argued that Maori would have adopted new technology to their fisheries over time, and used their proven flair in fishing and their long-held knowledge about resources and fishing grounds to maintain a position of pre-eminence in this most traditional of industries.

This is not merely speculation. We only need to take a look at reports of Maori Economic Development in the mid-1800s to appreciate that Maori had every capability to keep up with technological innovations in the fishing industry. In the 1850s, Maori were the major purveyors of foodstuffs in New Zealand, dominating the agricultural sector, and producing most of the commodities for export. In all of this, there was a good deal of adaptation of European technology to Maori circumstances. Much of that Maori economic development was actively supported and encouraged by Government

With continuing support of the kind guaranteed in the Treaty, Maori interests may well have arrived in the 1960s as one or more of the larger fishing entities, albeit ones taken up mostly with inshore fisheries, as was then the case for every other business in the fishing industry. (AA29:28-29)

In his final submissions (AB6) Mr Castle for the fishing industry took issue with the Crown. He submitted that the Crown was not correct in asserting that no New Zealanders developed the valuable deepwater fisheries. Mr Castle claimed that the New Zealand fishing industry, although perhaps not the discoverer of all the deepwater fisheries, has played a major and active part in the development of them. We accept that this is so.

While there can be no absolutely certain answer, this tribunal considers it reasonable to accept that Ngai Tahu, given the abundance of its sea fisheries and its long and successful experience in the business and activity of fishing, would have emerged as a dominant force in sea fishing in the South Island. As such it would have taken its place alongside the other New Zealand companies referred to by Mr Castle in the active development of the deepwater fisheries. That the tribe had no possibility of doing so was due in large measure to the Crown's action in depriving it of an economic base at a time when it was engaged in a prosperous fishing enterprise and in failing actively to protect Ngai Tahu sea fisheries.

New species

10.3.5 The claimants adopted with one qualification the discussion of this topic in the Muriwhenua Fishing Report. In particular, the claimants referred to the tribunal's first proposition:

The tribal treaty interest is not limited as to species of fish, the origin of fish, the location of fish or the purpose or use to be had of them. Maori harvested all types of fish at every type of location but had no need to explore the wider seas. Through non-Maori overfishing, they now have a special interest in "new" species. {FNREF|0-86472-103-X|10.3.5|6}

Ngai Tahu referred to traditional and historical evidence as showing that they did in fact "explore the wider seas". They crossed Cook Strait. Captain Cook noted double

canoes some 12 miles offshore from the coast at Kaikoura. They travelled regularly to the Titi Islands and carried out extensive coastal voyages.

10.3.6 Crown counsel Mr Carruthers agreed that Ngai Tahu fisheries were not limited as to species, origin and location known to them as at 1840. In defining the Ngai Tahu Treaty fishing rights the Crown suggested the tribunal would need to evaluate the nature and extent of the fishing at the date of the Treaty, identify any subsequent changes in the pattern of fishing, the course of such changes and finally, translate the result of that analysis into a modern context. In this regard, Crown counsel submitted that the initiatives in the Maori Fisheries Act 1989 and current MAFFish policies would provide a model for the modern context (AB14:7).

10.3.7 The fishing industry through its counsel Mr Castle took a restrictive view and re-affirmed its submission that in contrast to the Muriwhenua situation the Ngai Tahu sea fisheries meant "their fishing grounds". In short, their fisheries were confined to those fish caught in particular fishing grounds in 1840 and further, that Ngai Tahu retain exclusive possession only of specific grounds adjacent to land owned by Ngai Tahu (AB6:17-18). While re-affirming that the fishing industry does not resile from its earlier submissions as to how Ngai Tahu fisheries should be defined, Mr Castle suggested that the Maori Fisheries Act 1989 has contributed to the substantial remedying of any prejudice suffered by Ngai Tahu in respect of "their (site-specific) fisheries" (AB6:20).

10.3.8 Dr George Habib discussed Ngai Tahu acquaintance with offshore demersal fish which today are by far the most important species in the New Zealand commercial fishery (T4(a):118-127). In a later report he summarised the situation:

As I pointed out in an earlier part of this report (Part One) most of the so-called offshore fish spend at least part of their time in inshore waters. Good examples are hoki, ling, warehou, barracouta, gemfish and frostfish. The traditional fishermen did not need to venture far to catch these species because he knew when they would be available in shallow water, and where. He did, however, venture offshore for certain species, two good examples being hapuku and tarakihi. Of mainly scattered distribution when in inshore waters, these species school up and become concentrated together during offshore migrations. It made good economic sense to fish these species in the deeper water around the edge of the continental shelf at those times. (T4(c):111, 113)

It appears, however, that almost all currently commercially significant deepwater demersal fish were probably unknown to pre-1840 Ngai Tahu fishers, hoki being a notable exception. But in our opinion this is not of critical importance. If, as we believe, Ngai Tahu had a Treaty right to employ new technology in extending their fishing operations further out from the shore, including the deepwater fisheries, it necessarily follows that they had and have a Treaty right to catch a reasonable share of all commercially viable fish whether these were earlier known to them or not. It is a right they share with their Treaty partner who had no more knowledge of the deepwater fisheries than Maori in the 1840s or indeed until quite recently.

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10.4 Territorial Seas

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10.4.1 Crown counsel Mr Carruthers submitted that international law is relevant to the interpretation of the Treaty (AB2:64). While not suggesting that international law was at the forefront of the minds of the two parties to the Treaty he submitted that the Crown must be taken to have known and to be bound by international law. Similarly he argued that if Maori are to be regarded as a sovereign state for the purpose of a grant of sovereignty to the Crown they must be bound by international law also.

Mr Carruthers suggested that by 1840 claims to areas of territorial sea had consolidated to an agreed three-mile zone which was generally accepted as a rule of the law of nations. There is no evidence that Maori were even remotely aware of any such agreement. Certainly they were not party to it. Did the governor explain this so-called rule to Maori before inviting them to sign the Treaty? There is no evidence that he did and given Mr Carruthers' admission that international law was not at the forefront of the minds of the two parties, we can safely assume that he did not advert to the question. Had he done so and at the same time explained that he could only guarantee their fisheries within a three-mile limit would Maori have signed? It must surely be questionable that they would have signed without a full guarantee of their sea fisheries.

There is a further weakness in the Crown argument. There was, in fact, far from universal acceptance of the so-called three-mile limit at 1840. Contrary to Mr Carruthers' assertion that by that time the three-mile limit was generally accepted as a rule of the law of nations, D P O'Connell in his authoritative work, *International Law* (1970) says:

During the whole of the nineteenth century the three-mile rule for fishery remained one of controversy. Spain, in deference to England's wishes, experimented with it in the 1820s and returned to a six-mile limit. Scandinavian countries maintained a four-mile rule established in 1812. Denmark adopted the three-mile rule in 1882

In 1849 a dispute developed with Belgium over the right of Belgian fishermen to fish within three miles of the coast of England, and in 1852 it was settled on the most-favoured-nation principle. Belgium had adopted the three-mile rule in 1832 and Holland followed in 1883. Greece also adopted three miles in 1869. Following the *Franconia* case in 1876 there was an exchange of correspondence with Germany in which the latter asserted that there was no legal limit to territorial waters. In fact Great Britain was careful not to commit herself to three miles, and studiously omitted all reference to it from the *Territorial Waters Jurisdiction Act 1878*. In the 1880's negotiations were instituted for joint conservation measures in the North Sea, and

curiously it was Great Britain that did not want to specify a limit to territorial waters and France that urged the three-mile rule. In the outcome the North Sea Fishery Convention 1882 adopted a three-mile limit but reserved the Zuider Zee, the Skagerrak and certain shoal water off the Elbe. {FNREF|0-86472-103-X|10.4.1|7}

10.4.2 It is apparent from the foregoing discussion that the so-called rule was a matter of controversy and uncertainty for much of the nineteenth century. If Britain chose in 1840 to assert no more than a three-mile territorial sea limit for her new colony of New Zealand that was not because of any binding rule under international law. Certainly it was not done with the assent or even knowledge of Maori. We are satisfied that the Treaty required the Crown to take all reasonable and practicable steps, should the occasion arise, to implement its guarantee to Maori of the full, exclusive and undisturbed possession of their fisheries and that this obligation did not stop at any three-mile limit.

Moreover, as the Muriwhenua tribunal pointed out:

The Crown has always possessed the constitutional power to regulate the fishing and other activities of its subjects on the high seas. It in fact did do so, in making laws that affected New Zealand vessels {FNREF|0-86472-103-X|10.4.2|8}

Support for this view is to be found in O'Connell who, on the basis of a judgment of the International Court in the Lotus Case P C I J Ser A No 10 (1927), points to extensive extra-territorial jurisdiction of any state to legislate for the peace, order and good government of the state. {FNREF|0-86472-103-X|10.4.2|9} If any event occurs outside the state's territorial limits the fact that the act or the actor was beyond the territorial boundary of the state is irrelevant provided the occurrence bears on the peace, order and good government of the legislating state. Legislation designed to ensure compliance with the legislating state's treaty obligations to its indigenous people is surely for the peace, order and good government of that state and therefore in conformity with international law.

10.4.3 Crown counsel recognised that in certain circumstances Ngai Tahu fished grounds which were well beyond the three-mile limit, at least as far as 12 miles and on one or two occasions much further than that. But, in reliance on his claim that the three-mile limit was the maximum recognised by international law in 1840, he submitted that once Ngai Tahu went over the so-called three-mile limit they were exercising merely the rights which every person of every nation had to conduct fishing operations on the high seas. There could, he argued, be no right of sovereignty or control over such water or the fish in it (AB2:71-74). The right to fish in that area was non-exclusive. This is, however, not what the Treaty said.

Crown counsel's argument rests on the proposition that Maori in 1840 were bound by a so-called rule of which they had never heard, and to which, like many European nations where the rule had some limited currency only, they had not assented.

10.4.4 The Treaty expressly guaranteed to Maori, including Ngai Tahu, their fisheries. For Ngai Tahu these fisheries unquestionably extended beyond three miles, certainly out to 12 miles or so and in at least one place well beyond. We find Crown counsel's argument that the Treaty guarantee was simply that they would be protected when

there was Crown authority to do so - that is out to three miles - unconvincing. The three-mile limit was not at the time a requirement of international law; if the Crown chose to restrict itself in this way it was a self-imposed restriction at odds with the clear and unqualified guarantee given Maori by article 2 of the Treaty. It was never communicated to Maori.

Even as recently as 1965 the New Zealand government showed a willingness to enact the Territorial Sea and Fishing Zone Act 1965 contrary to then international law because it was in the interests of this country to do so. Mr Carruthers referred to this Act as reflecting developing norms of customary international law (AB2:73). While the law may have been developing it was not developed at this time. The Right Honourable Prime Minister Keith Holyoake in his second reading speech said:

Unfortunately, we cannot claim that this action to establish the 9-miles-wide fishing zone is related to any form of international agreement. Strenuous efforts have been made in recent years to reach some general international agreement on a proposal which would give each country as of right up to 12 miles for fishing limits. New Zealand has played its part under successive Governments in trying to achieve this, the latest efforts being in 1958, and also at the 1960 conference in Geneva. On the last occasion this proposal was defeated by the narrowest of margins, and so there was no agreement at the convention on the 12 miles of fishing limits. In spite of that but having regard to the general trend, since 1960 a number of countries have claimed the extended fishing limits as we are doing for New Zealand in this Bill. Quite recently the United Kingdom did so, and many other countries in Europe, and Canada also, have claimed up to the 12 miles in recent years. It can be seen that, although there is no international convention, New Zealand has sufficient precedent which she can follow-precedent established by some quite important countries. This action has been taken because of the very rapid increase in the scale of fishing all over the world in recent years. Very many countries are showing considerable concern at retaining adequate water for their own fishing fleets. {FNREF|0-86472-103-X|10.4.4|10}

This is clear proof should it be needed that New Zealand and other governments feel justified in acting contrary to international convention if national interests are considered to justify such unilateral action.

10.4.5 When in 1965 the Crown extended the New Zealand fishing zone nine miles out from the three mile territorial sea limit it had no justification for failing to protect Ngai Tahu sea fisheries which extended to that distance.

As we have seen, Ngai Tahu Treaty sea fishing rights included the right to extend their fisheries in accordance with developments in technology. One result of new technology was the discovery of a variety of deepwater fish. To control and protect this resource the Territorial Sea and Exclusive Economic Zone Act 1977 was passed. This gave the Crown power to control and manage the resources of the sea to a limit of 200 miles from the New Zealand shores.

Mr Carruthers for the Crown submitted that there is no warrant for a claim by Maori that international law recognises what he called "a creeping right" (AB2:74). It is not necessary for us to decide that the soundness of this submission for the Ngai Tahu claim is firmly grounded on the Treaty of Waitangi. Accordingly, the real question is

whether the Treaty of Waitangi recognises the right of Maori, as a Treaty partner, to a reasonable share of the sea fisheries brought within Crown sovereignty and control. We note, in passing, that the 1977 Act, as with the earlier 1965 Act, was the result of the Crown acting unilaterally in establishing for New Zealand the 200 mile exclusive economic fishing zone. In doing so the government of the day was influenced by between 30 and 40 other countries having already taken this action notwithstanding that the International Law of the Sea Conference had yet to reach final agreement on the question. {FNREF|0-86472-103-X|10.4.5|11}

For reasons we have given when discussing the Ngai Tahu Treaty right of development in relation to its sea fisheries, we believe that Ngai Tahu along with the Crown is entitled under the Treaty to a reasonable share in the new deepwater fisheries previously unknown and unexploited by Maori and non-Maori alike.

Waitangi Tribunal, Department of Justice, Wellington.

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10.5 Ngai Tahu Involvement in the General Fisheries Regime

10.5. Ngai Tahu Involvement in the General Fisheries Regime

10.5.1 The Crown submitted that what it called "the high presence" of individual Ngai Tahu in the southern commercial fishery indicated that the tribal presence had the potential to be developed in the way the tribe chose. It further submitted that the chiefs had a choice and could have elected to hold wealth tribally but chose not to do so (X4:133).

It further submitted:

In reality the tribe did not seek to have a tribal commercial fishery and in our submission what this points to is either the process of acquiring rights under the Article the Third of the Treaty or an adaptation to European systems that began with the "partnerships" of sealing and whaling. Having chosen to individualise its fishing activities the tribe now asserts a tribal claim as well. (AB2:63-64)

Mr Carruthers for the Crown submitted that Ngai Tahu cannot have it both ways. He appears to be suggesting that if individual Ngai Tahu exercise their rights to go fishing, Ngai Tahu as a tribe has thereby forfeited its Treaty fishing rights.

The fishing industry did not go so far. Mr Castle put it to us that the extent to which individual members of the tribe have developed rights in the fishery must be subtracted from any rights to develop claimed by the tribe.

10.5.2 While Mr Higgins for the claimants told us that Ngai Tahu individual involvement in the South Island fishery comprised ownership of 40 percent of all fishing vessels (J10:47) this evidence was put in its true perspective by Dr Habib who stressed that in fact the individual Ngai Tahu involvement represented only a small part of the overall southern commercial fishery. The great bulk of the southern fish catch is taken in offshore waters where there is only a very small southern Maori presence (T4(a):228).

10.5.3 The Crown submissions overlook two other vital considerations. First, as David Higgins demonstrated, virtually all the present Ngai Tahu fishers are descended from Pakeha whalers and have a long and largely unbroken family involvement in the fishery since whaling collapsed in the 1840s. As Mr Higgins told us, by the 1870s Ngai Tahu had lost their land and become impoverished. "Put bluntly" he said "the loss of land deprived Ngai Tahu of the ability to enter any field of endeavour where capital was the price of entry" (J10:65).

10.5.4 The tribunal accepts as sound the following statement by Mr Higgins:

Those Ngai Tahu presently involved in the industry are there in their own personal right and as a result of their own personal endeavours. They are not there as representatives of a recognised tribal right to the resource. Their fishing rights are analogous to the rights of the owners of individualised Maori land, who now own it in their own right, free of control by the Tribe and not answerable to Maoridom for their stewardship of it. The Maori fishermen are in exactly the same position, and their presence is not an acknowledgement of a Tribal Treaty right to the fishery, rather, as the evidence will later show, it is more an accident of history. (J10:48)

Those Ngai Tahu who elected to go fishing as individuals did no more than exercise their rights as British subjects under article 3 of the Treaty. Ngai Tahu continued to fish as a tribe until after the land sales when - as we have found - impoverishment and the absence of an economic base, the direct consequences of the Crown purchases, left Ngai Tahu without the resources to actively pursue their article 2 Treaty sea fishing rights on a commercial basis. It was not, as the Crown suggests, a deliberate choice; on the contrary the disastrous consequences of the Crown's many Treaty breaches left them with no alternative other than to abandon their previously prosperous iwi fishing business.

Waitangi Tribunal, Department of Justice, Wellington.

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10.6 Summary

10.6. Summary

The tribunal finds that Ngai Tahu have:

(a) an exclusive Treaty right to the sea fisheries surrounding the whole of their rohe to a distance of 12 miles or so there being no waiver or agreement by them to surrender such right.

(b) a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the 200 mile exclusive economic zone such right being exclusive to Ngai Tahu.

By way of an addendum we recall here the statement of counsel for Ngai Tahu recorded in 4.4.4 that where their claimed development right overlaps with the development rights of the Chatham Islands and Ngati Kahungunu, the exercise of those rights is a matter to be negotiated between those tribes.

References

{FNTXT|0-86472-103-X|10.2.1|1} 1 Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) (Muriwhenua Fishing Report) 1988 p234

{FNTXT|0-86472-103-X|10.2.2|2} 2 Wai22 H1:34-35 see also AB2:77-78

{FNTXT|0-86472-103-X|10.2.4|3} 3 Muriwhenua Fishing Report p 235

{FNTXT|0-86472-103-X|10.2.4|4} 4 Waitangi, Maori and Pakeha Perspectives of the Treaty of Waitangi ed I H Kawharu (Oxford University Press, Auckland 1989) p140

{FNTXT|0-86472-103-X|10.3.2|5} 5 Muriwhenua Fishing Report p 236

{FNTXT|0-86472-103-X|10.3.5|6} 6 ibid pp 236-237

{FNTXT|0-86472-103-X|10.4.1|7} 7 D P O'Connell, International Law (Stevens, 2nd ed (1970)) pp 457-458

{FNTXT|0-86472-103-X|10.4.2|8} 8 Muriwhenua Fishing Report p 210

{FNTXT|0-86472-103-X|10.4.2|9} 9 O'Connell pp 601-602

{FNTXT|0-86472-103-X|10.4.4|10} 10 NZPD 1965 vol 343 p 1842

{FNTXT|0-86472-103-X|10.4.5|11} 11 NZPD 1977 vol 413 p 2395

Waitangi Tribunal, Department of Justice, Wellington.