

Ngai Tahu Land Report

Chapter 17

MAHINGA KAI

Toi tu te marae a Tane
Toi tu te marae a Tangaroa
Toi tu te Iwi
If the world of Tane survives
If the marae of Tangaroa survives
The people live on (J10:10)

17.1. Introduction

In this part of the report the tribunal looks at Ngai Tahu's traditional relationship with the natural resources of their tribal territory. In dealing with Kemp's purchase, the tribunal found that the expression "mahinga kai" meant to Ngai Tahu "those places where food was produced or procured" (8.9.12). As an extension of this definition we were told by the claimant Henare Rakihiia Tau that his pukorero explained mahinga kai to him as:

Nga hua o te whenua

Nga hua o Tane me nga uri

o Tangaroa

This interpreted means the resources of the land, the resources from the bush and forests which includes all birds and animals dependant upon these resources, and the uri o Tangaroa refer to all living things within the waterways which include all water be it lake, river, lagoon or sea water. (J10:5)

The tribunal, in examining the meaning of mahinga kai, also dealt with the lack of provision made under the Kemp purchase to reserve and protect Ngai Tahu rights over mahinga kai. The tribunal found three breaches of the Treaty had occurred (8.9.19–21). We shall later refer to these findings. In addition, the tribunal has looked at mahinga kai in the context of the tribe's relationship with its resources in early pre-contact times and as well the impact of events during the contact period with Europeans 1769–1840 (3.2).

In this section of the report we move on in history to look at the post-1840 period and in so doing will relate the story as given in evidence and submission.

There are two observations we must make: the story is only partly told here and the story is sad. These statements need explanation.

As to the first observation, the tribunal has decided to divide its inquiry and issue separate reports on the major land claims, the sea-fisheries claim and the ancillary claims respectively. The reasons for this decision have been given earlier (1.6.15). Needless to say kai ika and kai moana resources are inextricably linked with kai awa, kai manu, kai roto and kai rakau. The fabric of Ngai Tahu mahinga kai can only be fully produced by interweaving all sources of kai. Also, in reporting separately on the hundred or so ancillary claims of Ngai Tahu, which deal mainly with specific grievances over such matters as loss of reserves, legislative omissions and errors, there will be instances in which mahinga kai will be involved, for example the fishing reserves at Lakes Wanaka and Hawea, Lake Tatawai and Lake Wainono. This report may also be inadequate in that it is difficult to portray in written form the total picture as seen by tribunal members, not only from the comprehensive evidence presented, but also from the on-site inspections of the polluted and depleted mahinga kai areas and the visual impact from inspecting artifacts and other taonga in various museums. Despite these inadequacies, which regrettably are unavoidable and do not allow the tribunal to adopt a holistic approach to all land and sea resources, we shall try hard to keep the overall scene before us.

As to the second point, this narration is sad, not only because it depicts what has happened to Ngai Tahu food resources as a result of settlement but because it also paints a sorry picture for all New Zealanders. When Hana Morgan, at Te Rau Aroha Marae at Awarua, on 20 April 1988, spoke for her marae regarding the depletion of kai moana by pollution and over fishing, none of those present could have remained untouched by her moving and compelling plea. She clearly and frankly explained how Maori had been dispossessed of their mana and rangatiratanga over mahinga kai and predicted that:

Within twenty years, the sea garden will be bare, just as our land is bereft of the native forests and birds that once abounded. (H13:55)

Hana Morgan's full submission will be reported in the sea fisheries report. It contains a message for all New Zealand.

Ngai Tahu's deeply-felt grievances can be traced back to the failure of the Crown's representatives to provide the tribe with adequate reserves, including specific kai resources. This omission has already been discussed at some length and will be dealt with again later.

We shall also be looking at the impact of settlement on mahinga kai. There can be no doubt that settlement has added to the pain of Ngai Tahu in the deprivation of mahinga kai. But settlement has also brought environmental damage affecting the whole community. In the end, not only will there be a need to find a compromise between the Crown and Ngai Tahu so as to restore mana and rangatiratanga to the tribe and honour to the Crown, but there will also be a need to find a compromise between people and nature for the good of all New Zealand. We hope the observations and findings of this tribunal may guide the parties towards achieving both these goals.

The tribunal held a number of hearings at which the mahinga kai grievances were raised by the claimants and responded to by the Crown. At some of these hearings sea fishery evidence was also tendered by the parties and by the New Zealand Fishing Industry Board and the New Zealand Fishing Industry Association. Over an unbroken 10 day period, 11–20 April 1988, the tribunal dealt specifically with mahinga kai issues, including some sea fishery matters, and travelled extensively over the South Island inspecting mahinga kai areas. The tribunal also had a brief opportunity to make an aerial inspection of traditional trails across the Southern Alps. Evidence was given to the tribunal by kaumatua and by an impressive array of professionals in the fields of archaeology, history, zoology, geography, biology and languages. Visits were also made to the Canterbury Museum, Otago Settlers Museum and Otago Museum. Once again the tribunal must say that the Crown has responded most competently and helpfully in the introduction of historical and other research material which has enabled the tribunal to assess the issues. As the evidence will show, we must all accept some responsibility for the deterioration that has taken place in our environment since people first put their feet on the land. The tribunal sounds this cautionary note early in this chapter of the report and will deal more fully with it at the end. Notwithstanding this caveat, as the evidence unfolded before the tribunal, it became clear that Ngai Tahu have suffered greatly from the adverse effects flowing from land settlement. We shall shortly relate and examine some of the specific grievances.

In the final section of this part we will give our findings. First we will look at the post 1840 relationship between Ngai Tahu and their resources.

17.2. Ngai Tahu and Their Mahinga Kai After 1840

17.2.1 As we have seen in earlier evidence, Ngai Tahu led a highly mobile life. For hundreds of years they pursued a seasonal round of hunting and food gathering over their huge territories. Survival largely depended on hunting and gathering kai. Movement and an understanding of the resources available over a wide territory were crucial for life (J10:99). We have already seen the map locating 3919 archaeological sites (H3:1) and which in effect traced out the entire South Island (figure 3.1). Professor Anderson described the hunter-gatherer economy and how the population dispersed during late spring to autumn and then retreated to long term settlements in winter and early spring. Various sections of the tribe would move to where resources were seasonably abundant, preserve the food and take it back to their more permanent settlements (H1:76–77). We have seen evidence of Ngai Tahu moving from the east and south, utilising resources during inland trails and while journeying to collect pounamu. There was the great annual migration south to the Titi Islands in autumn to obtain mutton bird. We have also seen earlier numerous examples of the fresh-water fishing activities of the tribe. Of one thing there can be no doubt: mahinga kai in its various forms was an integral part of the Maori economy and culture before contact with Europeans. Even after the land purchases, Ngai Tahu continued to gather their traditional food not only from areas near their settlements but also in journeys to far places. Despite the development of pastoral farming by the new settlers many Ngai Tahu continued to rely on their traditional hunting grounds for their existence.

17.2.2 However, European settlement inevitably began to impinge on Ngai Tahu mahinga kai resources. In 1865, some Canterbury farmers moved to stop Ngai Tahu families from trespassing on their land to hunt weka (J48:24).¹ Evidence given to Commissioner Mackay in 1891 often stressed the loss of mahinga kai. By the late nineteenth century most sources of mahinga kai in the Otakou block had been destroyed or enclosed by settler occupation. Ngai Tahu fell back on eeling and whitebaiting but these sources of food soon became threatened (F11:51).²

The following extract from the evidence of claimant Rakiihia Tau is quoted in full because it is a graphic illustration of just one Ngai Tahu family in the post World War 2 period:

I was brought up at Tuahiwi and my father was a seasonal worker with shearing as his main occupation. Because his work was seasonal, there were often periods when he was unemployed. When he was shearing the job would take him away from home and into the foothills and the high country. In his

absence or at times when he was unemployed we depended on what we could catch to feed our family.

Dad and other relatives taught us the ways of catching food at very early ages. The people of Tuahiwi would camp for extended periods on the banks of the Ashley, Waimakariri and the Cam rivers near the sea and spend the days fishing both for personal use, barter or for sale. We hunted for Whitebait, Eels, Salmon, freshwater Crayfish, Flounder, Mussels and Pipis. These were some of the fish caught. If we were lucky we would also get duck and geese eggs. We would cook and eat a lot of this food on the spot and some would be taken back to Tuahiwi for those who remained there.

We routinely fished all the creeks and drains around Tuahiwi for Eels and Flounders. It is important to understand that the Eels, Flounders and Crayfish which were such an important part of our diet flourished in the side streams, drains and lagoons, which were much more important to us than the main rivers. These smaller water bodies are the first to disappear when farmers or Catchment Boards start land drainage or river management works. This is well illustrated by my earlier evidence which shows that all the fishery easements awarded to us last Century now no longer provide access to water.

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

By the time I was a teenager the birds which our people had relied on for food, had largely disappeared so there was not much birding. Map 7 indicates bush in 1860 on Banks Peninsula which in turn identifies forest bird habitat. Today almost all of this forest cover has disappeared. We would catch the odd Kereru (wood pigeon) which could be found in odd pockets of bush in the Waipara area or among the cherry trees at Lowburn. I was grown up before anybody told me that it was illegal to catch the Pigeons. Occasionally Dad would bring Kereru or other birds home for food. I did not know the names of some of the birds he brought, they were just food. An example, my parents, Taua and Poua, made use of various roots as medical remedies. In our wanderings as children to quench our thirst we would eat certain parts of certain flowers. These no longer can be found. I like many other Ngai Tahu have tasted some potent home brews made out of the resources from the bush. However, none of these ever tasted as bad as that Pakeha medicine called castor oil. Suffice to

say, I can understand the preference that many of us have made when having to decide between the two.

It is important to stress that the Kai which we got in this way formed the basis of our diet. It was not a case of catching food to supplement what we could buy, rather it was the other way round; we bought food to supplement what we caught. This practice was unquestioned among my family, it was the way that my parents and their grandparents had always lived.

I was brought up to believe that the Mahinga Kai was all ours. This was such a fundamental belief that it did not have to be stated except to pass it on to our children, or to explain it to the rare politician who bothered to ask us about our attitudes or beliefs. This belief was and is the most important that I have. It was the reason for the way my family lived for several generations and it has played an important part in the way I have lived.

I am now 46 years old. I was brought up to believe that Kemp's Deed gave us ownership of all the Mahinga Kai resources. For that reason I have felt free to hunt and fish wherever I liked. I spent 1 year at Canterbury University studying for a B. Com Degree but gave that up to become a Freezing Worker. Partly that decision was based on the fact that in an Accountant's office I earned 3.7.6 per week whereas, in the Freezing Works I could earn 19.0.0 per week. There was more to it than that though. I realised that living as my father had, I would be able to take jobs that would enable me to be in the right places at the right times to enjoy the pursuit of and the eating of Mahinga Kai.

For the last 28 years I have been a seasonal worker. In the summer and early autumn I would work in the Freezing Works at Canterbury or Bluff. Some evenings and weekends I would go fishing for recreation and for food. From April to the first half of May. I would go mutton birding on the Titi Islands. I would always catch enough to feed my family for the year with enough left over to sell. In the winter I got jobs in forestry work, either bush work or planting trees. This took me out into the countryside where I could catch fish and sometimes birds, which I would eat on the spot and, when there was enough, take some home to my family. This also allowed me to spend a season with my family in South Westland fishing commercially for Whitebait and living off what nature provided.

Living the seasonal way I am repeating the pattern of my father's life, except that he went shearing in the summer whereas I went to the freezing works. In a modified way we have both followed a seasonal cycle around the countryside just as our ancestors did before the Pakeha arrived.

In recent years the Mahinga Kai has got scarce. Rivers are now managed and their water is extracted for irrigation and used to carry effluent to the sea. The creeks, drains and lagoons have largely dried up, and where they still have water, the fish and eels have largely gone. There is little point in launching a small boat to go fishing off the coast, those fish are gone too. When I go to the Titi Islands I can no longer rely on Paua for food, nearly all the beds have been fished out by large boats in the last ten years.

The Mahinga Kai which was our principal source of food is in the process of disappearing and there does not seem to be anything we can do about it.
(J10:21–25)

We shall now look at other evidence and submissions from the people of Ngai Tahu.

Kaikoura

17.2.3 Trevor Hapi Howse told how in his early childhood he was influenced by his grandparents who taught him the traditional way of gathering, preparing, storing and conserving natural resources – skills he still practices today. This witness said his generation, with some possible exceptions, was probably among the last to have been taught the art of survival with the use of traditional methods of conservation.

Mr Howse believed Maori history and oral traditions proved conclusively that coastal waters, rivers, lakes and forest were as important spiritually as they were physically to their well-being as a people (H7:32). A list of mahinga kai resources which were in common use by his Tupuna was put in evidence. He said these food resources were relied on heavily in his early childhood but now, under government legislation, such rights have virtually vanished (H7:32). A second witness, Wiremu Solomon, gave extracts from legends to illustrate the location and abundance of food resources used by Ngati Kuri and their right through whakapapa to these resources. He claimed that most rivers within the Ngati Kuri rohe have been depleted of kai, that kanakana and mountain trout have not been seen in the rivers for years, and that weka and kereru are rare and kaka and kiwi are no longer sighted as a result of the loss of areas of native forest (H7:6). The following is a summary of details of the maps supplied by this witness.

- A map, which is marked confidential, lists key pa sites and also mahinga kai sites. There are approximately 200 place names indicated on this map throughout the Kaikoura district going up as far as Parinui o Whiti (White Bluffs) (H28).

- A further confidential map which lists all the kai manu that were taken in the same area, from Parinui o Whiti, down to the Waiau. It also lists some of the estuarine shellfish (H29).
- Another map which relates mainly to pa sites around the Kaikoura peninsula (H30).
- There is a comprehensive map of rivers and springs in the same area of the Waiau down to the Hurunui. It indicates kai awa for tuna, inanga, pakiki, kakapu and koura (H32).
- A further map lists kai roto throughout the Kaikoura area. It sites all of the particular kai roto by way of a key and the names that are listed are harakeke, raupo, taramea, kiekie, pingao, tikumu. Then it shows the gardens and trees. No date is shown on the map but it was presented as traditional evidence of Ngati Kuri on sources of mahinga kai available on the land (J11).

The tribunal was deeply impressed by the efforts made by Ngati Kuri in the production of this material on mahinga kai.

Canterbury

17.2.4 Rawiri Te Maire Tau of Ngai Tuahuriri claimed that Ngai Tahu of Canterbury sold their land because they believed, among other things, that their mahinga kai would be reserved for their use. However, he said the Crown failed to honour this promise. He identified traditional areas of mahinga kai including a reference to Banks Peninsula which has the Maori name of “Te Pataka a Rakaihautu” as evidence of its reputation as being abundant with resources. Mr Tau asserted that Ngai Tahu of Canterbury were not allocated adequate reserves to support their people by cultivation nor were adequate mahinga kai reserves created. He argued that as a result, Ngai Tahu could not live either within the economy of the Maori or the non-Maori. In addition to this, land was being modified by settlers, and the creation of farms on the plains and run-holdings in the high country led to both lack of access to traditional areas of mahinga kai and the depletion of kai manu and kai aruhe in those areas. He further suggested that areas which were set aside as fishing reserves were unfit for use by as early as 1891 (H6:33).

It is evident that Ngai Tuahuriri, even after the sale of Canterbury, continued to use the waterways. We were told that the Rakahauri (Ashley), Waimakariri and Rua Taniwha (Cam) were three prominent waterways which continued to sustain the tribe. They also relied heavily on the lagoon Tutae Patu from

which large quantities of tuna were taken. We shall see later how settlement ended this lagoon as a resource. A number of witnesses also spoke of Waihou and its importance. Waihora (Lake Ellesmere) and Wairewa (Lake Forsyth) will be dealt with separately.

South Canterbury

17.2.5 We were told by the people of Arowhenua how all the lakes and rivers in the area were once a source of food.

Jack Reihana told of camping for a week or more with his grandmother to catch and preserve eels at Lake Wainono and remembers another old lady bringing home large quantities of dried eels from the Waitarokaoa (H10:2).

William Torepe reviewed past and present availability of mahinga kai from Waitaki to Rakaia (H10:4). He briefly commented on the presence or absence of such kai as tuna, fish, watercress, wild fowl and acclimatised species in the Opihi, Waihi and Temuka Rivers, Milford Lagoon, Hae Hae Te Moana, Kakahu, Lakes Tekapo, Alexandrina (McGregor), Wainono, Benmore and Aviemore, the beach in the vicinity of Pareora River and Waimate Creek. This witness sadly related the diminution of “Maori kai”, which he listed at the beginning of his submission, and how this has affected traditional hospitality to guests on the marae (H10:8).

Kelvin Anglem, who has lived all his life at Arowhenua, spoke of the past abundance of eels in the Opihi and of his many trips made alone or with his grandparents to catch eels which were preserved or bartered. Like other witnesses he recorded the depletion of tuna, whitebait and kanakana (H10:19).

The tribunal was most interested in a thoughtful and sympathetic submission from Murray Bruce, a third generation New Zealander whose great grandfather emigrated from Scotland in 1860 and commenced farming in Cheviot in 1869. Mr Bruce spoke of his family’s association with the Maori people of the area. He said that he had studied historical records which indicated the Waihou area once supported 8.3 per cent of the Maori population of the South Island and was a major natural food supply district. He said that the tangata whenua lived permanently at the pa on the terrace above the mouth of the Willowbridge Creek and were able to obtain from the Waihou the following resources: fernroot, cabbage tree, raupo, purau, patiki, hau eels, whitebait, silveries, kokopu, grayling, giant bully, kaka, pigeon, weka, tui, parakeets, pukeko, ducks and teal. He referred to a book by E C Studholme, *Te Waimate*, which said the area was:

a veritable paradise for natives, on account of the wonderful supply of food.³

Mr Bruce stated that use would have been made of the estuary at the mouth of the river and of the nearby 2500 acre Waimate bush which contained totara, matai, miro, broadleaf, kahikatea, rimu, flax, cabbage trees, fernroot and raupo. He was strongly in favour of granting local Maori reserves for access to mahinga kai so that the kaumatua were not strangers on their river (H10:25).

Another witness from Arowhenua, Kelvyn Davis Te Maire, noted that the areas of mahinga kai known to him from childhood. He stressed that the areas were not merely mahinga kai but areas of historical importance to himself and his people (H10:33–34). Of most concern to Mr Te Maire were the streams of Wainono and its tributaries, the Waituna Creek, Hook Stream, Makikihi River, Waihou, and its tributaries the Dead Arm, the Box, Maori Lake and Waimate.

The Waitaki River was also important. Mr Te Maire gave a very detailed account of the fish, fowl and vegetable foods of mahinga kai known to him. Water fowl of several different species were caught without the use of a firearm. The swans were cared for by the elders and by his father in a way that one would look after hens. He recalled an elderly cousin remarking to his father about being a nurseryman. He also remembered being sent down to the beachfront, the nesting area, and collecting driftwood and raupo to strengthen the nests, thus stopping eggs and young swans from falling into the water and destroying the young. Whilst this was being done eggs were taken for food, but the young people were told firmly that “when the first bird sat, were not to return”. He complained, “we had that role of Kaitiaki removed by way of regulation and new managers” (H10:33).

He blamed the acclimatisation society for mismanaging the wildlife because they did not care for it the way his people did. He spoke of his affinity with the rivers and lakes, similar to that of his father and of the importance of this area for mahinga kai to the runanga of Waihao (H10:32).

Two further witnesses, Rangimarie Te Maiharoa and Te Ao Hurae Waaka, related past history of the district and how the whole area from the eastern seashore to the main divide was the stamping ground of Arowhenua (H10:47;H47.1). We were told by Rangimarie Te Maiharoa of the reliance of his people on the Waitaki river mouth and the resources such as whitebait, paraki, mullet, kahawai, the eggs of marten and terns, and kaio, which he gathered as a boy. He also spoke of the importance of Lake Wainono and of a visit with his father in 1936–37 when they speared many eels at Parihaka.

During the hearing the claimants produced in evidence a book written by Buddy Mikaere entitled *Te Maiharoa and the Promised Land*. In chapters 7 and 8 Mikaere describes the Maori prophet's heke to, and the settlement at, Omarama in 1877. He relates how the people fed themselves by growing potatoes and vegetables, grazing cattle, pigs and fowls, taming a flock of karoro, and catching weka, putakita, parera, tatoa and whio. Fish were a major item of diet. As the author says:

The Omarama district had long been known as an eeling centre; the northern end of nearby Lake Hawea was the site of an ancient pa built to protect the eel weir on the lake . . .

Other places in the area had even stronger associations with the past, especially for the descendants of Rakaihautu. Take Karaka, now Ram Island, in the middle of Takapo (Lake Tekapo), was the home of the ancestors of the Arowhenua people. In those days the haumata (snow grass) grew over one and a half metres high, and abounded with weka and succulent kiore (native rats). Such was the reputation of Takapo as a mahika kai that people came from as far away as Kaiapoi, several hundred kilometres to the north, to trade for food. (J48)4

This then was the evidence received by the tribunal from and about the people of Arowhenua.

Otakou

17.2.6 The tribunal received quite detailed traditional information on behalf of the tangata whenua of Otakou on the past available food resources.

Edward Ellison's carefully prepared and well-presented submission, (H12 and H53) not only annotated the various types of kai that were found in the area, but also carefully detailed the way they were procured and processed, where the mahinga kai sites were found and the routes that were traversed to reach them. For example:

A coastal track from the mouth of the Mataau passes up the coast north to the peninsula passing several villages on the way. On overland journeys sustenance could be got from several types of plants. When travelling through rich pliable soils the fernroot was dug. The best type being crisp enough to break easily when bent. The roots were roasted on a fire, then bruised by a flat stone, the long fibres being drawn out, the remaining substance being pounded to a tough dough then eaten. While travelling on dry open plains or away from the coast the old Maori would often during the season of the tutu fruit (summer)

pick the ripe berry of the tutu plant, strain the fruit through a bag, this would produce a refreshing juice on a hot day.

It was interesting to note the diverse routes and in particular the special foods of some areas. He spoke of one such mahinga kai:

There were many Career nesting areas around the cliff faces facing the ocean. It was a favourite pastime to gather the eggs of the Career to supplement the diet. This was a dangerous task as it meant scaling the cliff faces in search of nests. In order to get fresh eggs a regular run of nests would be harvested every other day so that the eggs were no more than two days old. This activity took place from Pukekura at various points to Pikiwhara (Sandymount) up until recent times. (H12:50)

Edward Ellison's submission contained a wealth of information about the ways mahinga kai was processed and preserved. The following account describes the manufacture of poha for preserving titi:

Four or five poha can be got from a good length of bull kelp. The kelp is koko'd (opened) by pushing the hand through and care is taken not to push in the edges but a fair margin is left to avoid any tendency for edges to split when drying. The sun and wind also koko the bag. Pupuhi (blow it up) when green and hang it up in the wind and sun (not in the rain). It can be blown up with the mouth also or with a pupuhi pipe. A flax coop being round the poha mouth ready to tighten when blowing ceases. The tighter it is blown the better. It usually takes 2–3 days to dry. It is hung up inside for a day then deflated to whakahau (soften it).

Usually laid on the grass Taritari and covered with grass to take the hardness out of it. Water must not be let on it when hard and dry or it will be ruined. When the bag is pliable the edges are trimmed and the bag rolled up for future use. In earlier times the bags were buried in the earth (tapuke covered with earth) to soften them. The bag was then worked until like elastic. The mouths were stretched and the birds rammed in them. Small poha hold 18–20 birds but some large poha hold as many as 110 birds, 40 or 50 was the average . . . In the poha the hard "cord" of kelp where there is no fringe is called taha rakau (wooden edge). Young searchers were [encouraged] to look for this edge. These poha were often traded to the Rakiura Maori for Poha full of titi. (H12:4)

Edward Ellison claimed that very few traditional resources have been available since the turn of the century as most mahinga kai have disappeared. He instanced woodhen, ti root and fern root, and referred to kai moana as an over-exploited resource, affected also by pollution.

Matthew Ellison dealt more fully with the devastating depletion of mahinga kai in the Otakou region (H12). He expressed concern about the pollution of the waterways within the Puketeraki area, claiming that nutrient waste, fertiliser runoff and raw sewerage have rendered the kai moana within the Waikouaiti River and Blueskin Bay inedible. Local bush clearance has led to the disappearance of kai moana and root and berry food, and access by tangata whenua to the remaining bush is impossible. Matthew Ellison claimed that paua beds have been depleted from over-exploitation which the fishing regulations fail to control. He argued that the taking of water, land reclamation and bush clearance have caused the silting and destruction of pipi beds, and the remaining two mussel beds were over-exploited. He also referred to legislation which denied Maori rights to take woodpigeon, weka, and out of season game such as native duck, swan, pukeko and swan eggs. He asserted that as equal partners to the Treaty, the manawhenua of Ngai Tahu should be recognised and that specific areas should come under the control and management of the tangata whenua.

The last witness we refer to from this region was David Marama Miller, a kaumatua and a shareholder of the Purakanui Incorporation (H52). He recorded past hunting and gathering in the Purakanui area from his father's knowledge and from archaeological records. Mr Miller referred mainly to the over-fishing and pollution of mussel, paua and cockle beds, and asks that stringent protection measures be introduced.

Murihiku and Rakiura

17.2.7 At its sitting on Te Rau Aroha marae at Awarua (Bluff), the tribunal heard submission from people of Murihiku and Rakiura. Taare Bradshaw (H13:22) claimed that with the aid of old whakapapa he had identified areas of mahinga kai and in particular the seasonal round of titi, weka kanakana and eel catching. In his submission he referred in great detail to the food resources of Murihiku including the bird life obtained from the forests and the fruits from karaka, kowhai, totara, manuka, koromiko, tupare, teteaweka, ngaio, hinau and other trees. The leaves of the koromiko, manuka, and kokomuka were prescribed for medicinal purposes. He detailed the areas that were used for mahinga kai.

The tribunal was impressed by the knowledge of this witness who had, prior to making his submission and over a long period, spoken to numerous kaumatua and used the knowledge of some of the tupuna who had left behind their work. He detailed the yearly calendar of food gathering as explained to him by three of these people, essential to the well-being of the tribe as a whole.

Kevin O'Connor gave evidence concerning the depletion of kai moana in and around Riverton (H13:37). This witness provided a list of commonly used plants for medicinal purposes (H55). He also referred to pollution and to the silting from bush clearance depleting kai awa in the Waiau. He went on to describe other obstacles impeding the flow of rivers and drains resulting in kai awa being prevented from reaching their breeding grounds.

Mr Harold Ashwell, in addition to documenting the traditional and present use of the Titi Islands, gave a very useful review of mahinga kai within and around Rakiura (H13). He spoke of the profusion of birds in the bush on Rakiura, including penguins, kiwi and kereru, and those nesting on the islands offshore, such as the Titi Islands. He referred to the depletion of this birdlife and to what he described as the "deplorable" destruction by the Department of Internal Affairs of the weka population on Whenua Hou. It was a most useful submission, which described his own experience of traditional activities including mahinga kai expeditions with his grandfather. These activities included the preparation and maintenance of poha, various methods of fishing, uses of plants and animals for medicinal purposes and the construction and use of the wharerau.

Mr Terence Gilroy, known as Paddy Gilroy, in speaking of titi-catching expeditions, again brought to the tribunal's notice the abundance of food resources which were present on the islands in the late 1800s and early 1900s (H13:16). He instanced weka, tui, kaka, kereru, rakuraku, korere, kina, paua, oysters, crayfish and other finned fish and lamented the present-day necessity to take food to the islands. We shall refer to this witness again when we deal with the Titi Islands.

George Newton Te Au gave evidence of his grandparents' access to abundant kai moana, kai ika, kai manu, kai awa and kai roto on Whenua Hou, Rakiura, Murihiku and Ruapuke. He recalled trips to the various islands to gather food and described various methods of catching weka and titi and preserving titi. He observed that these resources have diminished and blamed rats, pollution and over-fishing for the loss. He recommended an extension of the present rahui for at least two miles around the Titi Islands (H56:2).

Arahura

17.2.8 At the hearing in Hokitika on 15 April 1988 the tribunal heard the first evidence on west coast mahinga kai from an archaeologist Mr Ray Hooker (H57). Mr Hooker summarised the evidence of pre-European Maori settlement, occupation and subsistence in the area and augmented his submission with ethnographic material. He pointed out that changes in the coast line and

river mouths had destroyed a large part of the Poutini archaeological record. He also said that dense coastal vegetation also hindered location and identification of archaeological sites. However within these limitations he was of the view that there was evidence of early settlement on the Poutini coast. In indicating there were six favourable economic zones which supported settlement, Mr Hooker confirmed that preferred settlement was coastal, especially near lagoons and swamps. He stated that a wide range of resources from coast to mountain were used but that onshore, inshore and offshore biota were of notable importance within the Maori diet.

17.2.9 The evidence which followed confirmed that Poutini Ngai Tahu still relate strongly to the forest, rivers and sea through their mahinga kai. Evidence was given concerning the past abundance of mahinga kai within the rohe of South Westland people. Gordon McLaren stated that the tupuna lived throughout the land; permanently where resources were especially abundant and replenishable, and nomadically where they were not. We were told:

The whole of the land from Waitaha to Piopiotahi was clothed in Tane's forest, and few spots would have gone untrodden by our early hunting parties. Unlike other areas of Aotearoa, birds and fish were prolific everywhere. From the forests came the manu – kiwi, kaka, tui, kereru, kakapo, makomako and a host of others; and the hua rakau from the karaka, kotukutuku, moro, matai, rimu, kahikatea, koromiko, hinau, totara, ti, pikopiko, katoke, kurau, mamaku and others.

Other products gathered were kareao for naki, toetoe for tukutuku, pingao, harakeke, kie kie, raupo, kuta for weaving. With manu there was little waste – the flesh was eaten, feathers were used for decoration and the bones were fashioned into fish hooks and spear heads.

Some had dual uses, such as harakeke which also had a medicinal value and an edible nectar, and others were universal in their use, such as the ti – the dried leaves were ideal for paraerae, the fruit was eaten and the roots, when cooked in umu, were a principal source of sugar.

Then there was the puha and watercress – both still taken frequently – the aruhe.

The swamps, lakes and rivers writhed with fish life, especially tuna – once a staple diet – and yielded other food sources such as weka, pukeko and whio . . . Tuna formed a big part of the diet in our tupuna, and hinaki were set all around the Makawhio–Maitahi area up until recent years. They are still taken, but no longer in great numbers. (H8:30–31)

The tribunal was told by Iris Climo, secretary of the Rata Branch of the Maori Women's Welfare League and involved in numerous Maori organisations, that her childhood was spent at Makawhio and that as a child her family virtually lived off the land as there were no roads. Supplies by sea came in every three months.

She spoke of being given her "survival kit" (H8:39). Both men and women knew how to weave kono, kete, korowai, hinaki, snares, and fishing nets. She said:

We learned how to gather our materials, practising Conservation (although we did not call it that at the time) in taking only as much as we required and returning our scraps to the Source. The Moon was our calendar and we gathered food accordingly especially Kai Moana. We all knew how to kohikohi the birds and cook them in a variety of methods. We learnt how to cook in flax and hot ashes. Medicines using natural resources were also common. We lived as a Whanau looking after each other, taking only as much as we needed and bartering when necessary. Drying and smoking fish for out of season especially Inanga, gathering seagull eggs was also a Whanau event. Hand trawling involved the whole population. In fact fishing was a major occupation.

Living was almost communal, in that so much of what we did and learned were as a group rather than individual.

Everyone participated at Hui, held in the hall and I can remember being put on the mattresses to sleep.

My mother made flax cups to drink from, when we were near streams (H8:39).

Another witness, Kelly Russell Wilson was born at Hunts Beach in 1919 and he spoke of his mahinga kai expeditions in 31 different locations:

Martins Bay, Big Bay, Browns Refuge, Gorge River, Sand Rock Point, The Hope River, Barn Bay, Cascade, Red Hills, Cascade Plateau, Smoothwater, Jacksons Bay, Niels Beach, Waiatoto, Mussel Rock, Okuro, Waipa Maori Lake, Whakapoi, Abbey Rocks, Paringa, Ohunemaka, Heretaniwha, Makaawhio Bluff, Hunts Beach, Karangaroa, Gilesbies, Lake Matheson, Oamaroa, Okarito, Whataroa and Saltwater (H8:21).

He identified the coast and coastal fishing grounds as providing the staple diet of kai moana and spoke of the importance of mana which resulted from the ability to provide sea food on a special occasion.

Traditional accounts of the use of lagoons and bush surrounding the Kowai River and the Arahura river mouth for gathering kai were given by James Mason Russell (H9:42). He said that depletion of inshore fisheries around the Arahura pa is noted to have occurred about 1960. Mr Russell blamed drainage or conversion of wetlands as the single biggest factor in depletion of whitebait because it altered their habitat.

Descriptions were given by this witness of fishing for tuna, mullet, flounder, trout, pateke, parera, putakiki and whitebait as well as watercress gathering and the catching of pukeko, weka, bush pigeons and wild ducks. This evidence was supported by Alan Lester Russell who gave statistics of fish caught some years ago but which now were depleted. He attributed this to the drainage of creeks, rockwalling of river, gold dredge tailings, sewage, and over-fishing.

Before looking at the impact of settlement, we shall deal with three traditional mahinga kai areas of great importance to Ngai Tahu: the Titi Islands, Waihora (Lake Ellesmere) and Wairewa (Lake Forsyth). We shall also deal briefly with two other aspects of importance: Ngai Tahu commercial activities and conservation.

Titi and the Titi Islands

E tangi te Hakuwai
I runga i o Moutere
Whakamataku taku
ana au
Te kai tiaki nga titi
Nga mahinga kai

17.2.10 Ngai Tahu's relationship with the Titi Islands is undoubtedly a most important cultural, social and political facet of Ngai Tahu tribal identity. The group of islands are made up of both Crown islands and beneficial islands. The latter are beneficially owned by Ngai Tahu and collectively administered by those who have whakapapa rights. The individual rights of succession cannot be alienated by will or by any gift or sale. Upon the death of the holder the rights pass down to the children. Although there are regulations in force, these are to protect the resource for the owners. The following assessment of the situation was provided by Rakihihia Tau:

Our relationship management and administration as Ngai Tahu Whanui of the mutton bird or Titi Islands is perhaps the nearest living example we have to the

meaning of Rangatiratanga to our natural resources or mahinga kai. For example:

1 The decisions are made to the allocation of catching areas or wakawaka, the siting of houses, the welfare of the mutton birders and the protection and rules governing the environment. These decisions are determined by those who possess whakapapa or genealogy rights to our Titi Islands. These decisions are collective decisions.

2 Our social order can be seen. We live in our houses as whanau groups. We work collectively, to ensure good town planning, allocation of wakawaka (birding areas) fairly and equitably, ensuring our provisions are transported and catch returned to our points of departure, as well our collective responsibility for the health of those of our people on the Island. More importantly, to discuss and determine policies for the protection of the environment, rules for catching Titi for the retention of our manu kai and their environment. These are unwritten laws, laws we live by, laws that are taught to learner birders, and for this reason we have maintained our environment and manu kai. From this point each individual is at liberty to exercise his skills in hunting the Titi. The working or dressing of these birds for future use, can be worked individually, by whanau, or a mingling of whanau groups.

All options are working on our Island of Pohowaitai. However, the catch is the property of that individual, or the whanau to do with as he or she determine. The importance of our social order is that all must contribute individually for the well-being of our collective responsibility, the retention of our resources for our future generations. If the individual does not desire to work this is also shown in the results when returning home. No work, no benefit. We were denied our mahinga kai. What could not be denied us was our Whakapapa kupenga o Ngai Tahu Whanui. *Property rights* to our mahinga kai, that is:

“Nga Hua o te Whenua

Nga hua o Tane

me nga uri o Tangaroa”

is a fact, it did exist, it still exists, and the property rights, customs and practices are to be found on our Titi Islands.

Travelling by sea to the Titi Islands, areas were set aside for general tribal use to gather mahinga kai and Titi as well to berth the canoes of old or the boats of today. Puai landing on the Island of Taukihepa (South Cape) is one such landing place. There are many others. This principle I have shown with Map 1.

Those of our people with the correct whakapapa proceed to where they possess their property rights. On the Island that I take my Titi, Pohowaitai, we determine our wakawaka, that is areas to take. These are identified by cut tracks. Where cut tracks do not exist, string is laid on the ground to ensure no poaching by your relations take place. Our property rights are guarded jealously. The strings and tracks are there to remind us of our responsibility to respect property rights as well as to prevent conflict. These customs that we still maintain on our Titi Island were the same customs applied to all our mahinga kai which are tied together by Te Aka o Tuwhenua as mentioned in my son's evidence. This gives rise to our statements, "we have one foot on land and one foot in the water".

3 The retention of this mahinga kai resource is the most important value we have. Our conservation measures can only be maintained by recognising these Islands under a collective title, customary Maori land, and not as individual property. (J10:25)

Catching Titi

17.2.11 The importance of the Titi Islands as a past and present mahinga kai for Ngai Tahu was spelt out by many witnesses. Mutton birding was and is an integral part of the life of the people of Te Wai Pounamu and one which has survived through the enterprising skills of the people. People travel from many parts of the South Island and indeed from the North Island to take up their birding rights inherited according to whakapapa.

Those coming from the north and other parts of Te Wai Pounamu would cross over to Ruapuke where they would meet up with the iwi from Bluff before moving on to the outlying islands. On the return journey to Ruapuke they would be met by their whanau from other hapu who had travelled down to hoko for titi. Some would bring pawhara eels, kanakana and other delicacies for this purpose (H13:16).

We were told of the various methods used to catch titi. The season opens on 1 April, known as nanao. The catching of titi is done during daylight hours and the method is to locate the bird in the rua with a stick and then to reach in and pull it out of the rua. In some cases it is necessary to dig because the titi are too far in. When this occurs the hole is repaired by means of a puru, thus ensuring that the rua will be serviceable for the following season, and that the parent bird will return to it. From about 20–28 April a different method of catching titi is used. This was called rama or as it is commonly called now, torching. In the past the old people used bark, shaped like a cone,

with burning fat inside a torch. This method was used by some right up to the late 1940s:

When I was a child, going with my parents, the poha was still being used but not as much as in my Taua's time. As children we still had to help with the gathering of harakeke (flax) and rimu, but barrels were introduced and the poha slowly vanished. (H13:17)

We were also told of how mutton birding had gradually become a more costly exercise. There was no longer time to gather and prepare harakeke and rimu for poha so that the people had to buy barrels and tins. Stores and provisions were paid for in titi at the end of the season.

The excess of titi were sold so that our parents could provide us with what we needed eg, our educational needs, health, clothing and a roof over our heads. (H13:18)

Although some witnesses considered that titi numbers had declined and blamed rat infestation, air and sea pollution, we were assured by Mr Harold Ashwell that the annual take of 250,000 titi would be more than compensated for by the annual natural increase from some of the outer islands such as Snares Island which was not used by Maori for mutton birding and has an estimated titi population of 10 million (tape H12:2210).

Application of Treaty principles to the Titi Islands

17.2.12 We have examined the grievance of Rakiura Maori in respect of the Titi Islands and also considered the legislation and regulations governing the administration of the islands (15.6). We also looked at the response of the Crown to the complaint that the tribe had been deprived of the full administration of the islands. The tribunal has earlier found that there was no breach of Treaty principles in the action taken by the Crown to issue regulations governing the administration of this resource. Indeed the Crown argued, and its principal witness Ronald Tindal, then district conservator for the Rakiura district of the Department of Conservation, claimed that rather than breach the Treaty, the Crown had upheld and applied at least three established Treaty principles, namely:

- protection of the food resource;
- benefit to Rakiura Maori and the Crown in safeguarding taonga by mutual action; and

- full consultation with the beneficial owners in introducing regulations and ensuring ongoing protection of the resource.

Not only have the beneficial owners unrestricted right of entry to their islands but they have regulatory protection from trespass or interference with their rights. We agree that this is a perfect application of the view expressed by the President of the Court of Appeal, Sir Robin Cooke, in *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, 664:

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.

Counsel for the Crown, Mrs Kenderdine, argued that the regulations contained a number of conservation measures and further provided for annual election of a committee of management from the beneficial owners and their spouses. Counsel went on to argue, persuasively as we have earlier seen, that there was no breach of Treaty principle but rather an application of the principles of protection, partnership and consultation, and kawanatanga of the Crown as envisaged in the Treaty.

The tribunal accepts the view that the present arrangement reflects the principle of partnership. It also indicates the possibilities in an exercise of rangatiratanga guaranteed and protected by the Crown. The fact that regulations were drawn up by beneficiaries in the land is a point not to be overlooked in the application of the principles of partnership in resource management.

It is unfortunate other mahinga kai were not regarded or protected in the same way. We shall shortly be looking at two other prime mahinga kai resources in Waihora and Wairewa. The tribunal takes the view that if specific resources such as tuna and kai moana had been set aside by those original Crown negotiators, and protected by reservation and regulation in the same way as the titi, we would not be concerned today in considering this general grievance of Ngai Tahu.

Ownership of the Crown Titi Islands

17.2.13 Before leaving the Titi Islands there was one question that arose from the evidence. There was obviously strong feeling among Ngai Tahu, and not necessarily just Rakiura Ngai Tahu, that the Crown Titi Islands be similarly vested for a beneficial interest in Ngai Tahu. We recall that in addition to the islands reserved for Raikura Maori there are additional islands scattered around Rakiura (Stewart Island). These Crown islands passed into

Crown ownership under the Rakiura purchase deed of 29 June 1864. The islands are more widely distributed than the beneficial islands and are generally reported to be less popular nesting areas of the titi. Both the beneficial islands and the Crown islands are used for catching titi and both sets of islands are subject to the Titi (Mutton Bird) Regulations 1978. The regulations provide, inter alia, that no-one may enter to take titi or their eggs unless that person is a Rakiura Maori or the spouse or widow or widower of a Rakiura Maori. "Rakiura Maori" as defined in the regulations is a member of Ngai Tahu or Ngati Mamoe and a descendant of the original Maori owners of Stewart Island. Whilst Rakiura Maori have unrestricted right of access to the beneficial islands for bird-taking purposes, it is necessary for written consent to be obtained from the Minister of Conservation or the minister's delegate before any person may land upon any Crown island.

Jane Davis gave evidence that when the Native Land Court, in February 1910, determined the persons entitled to titi rights on the beneficial islands, several families were not included in the ownership lists and these families as a result established greater ties with the seemingly unoccupied, unclaimed islands used less frequently by their tupuna, and considered Crown land (E31). Jane Davis called for a return of the Crown islands to the families who have maintained long association with them and claim that her family have rights to Putauhinu through seasonal association since 1930.

Other witnesses, such as Paddy Gilroy (H13:16), Harold Ashwell (L32:63) and George Te Au (E6:5) claimed that the Crown islands were never sold to the Crown and were not the islands "adjacent to the shore" referred to in the purchase deed or alternatively, that these islands belong to Rakiura Maori through long association.

The tribunal has earlier found that there is no evidence the islands were inadvertently sold or that those who took part in the sale were unaware of the inclusion of these islands. Jane Davis has available to her family the provision of section 452 of the Maori Affairs Act 1953 to rectify any error or omission made by the Native Land Court in 1910. It is a fact however that Ngai Tahu have been using the Crown islands for many years – in the case of Jane Davis's family, for something like 60 years. So there has been a continuous and long association between the people and at least some, if not all, of the Crown islands. We can only presume that permission has been applied for and granted to these families.

Conservation values

17.2.14 The tribunal received valuable and important evidence from Mr Ronald Tindal, already referred to earlier. Mr Tindal listed in respect of both the Crown and beneficial islands a number of endangered birds, plants, animals and insects which exist on these islands and described the islands as “the last arks of many endangered species”. Mr Tindal emphasised succinctly how these species are not only a taonga for Ngai Tahu but also a treasure of the people of New Zealand and of the earth, “as a large refuge for many species from whom we inherited this world”. Mr Tindal’s plea in respect of Whenua Hou (Codfish Island) was also raised in his submission dealing with the Titi Islands (P8B).

The tribunal is sympathetic to this entreaty from a person who, by his actions as district conservator, has demonstrated he has the interests of Maori at heart in relation to their traditional food source.

We also note from Mr Tindal’s evidence that some of the Crown islands, such as Big Island, have certain birds and insects not present on the beneficial islands although the latter islands do also appear to have a wide range of endangered and rare species. We make this observation because ownership and access by the beneficial owners do not appear to have prevented coordinated control and protection of the endangered species present on both the Crown and beneficial island groups. The tribunal certainly understands the danger involved and recognises the need for a continuing protection regime, but wonders whether ownership of the islands is crucial to this question in the light of existing conservation and management controls. We shall return to this point very shortly but must respond to another argument presented against change of ownership. This appeared not in Mr Tindal’s submission concerning the Titi Islands but in an appended background note whose author was not given. This note concludes by saying:

These islands other than the beneficial islands have been properly paid for and we would be opposed to their return to any other party. However management control of birding (as per Regulations 1978) could be given to the Rakiura Maori people provided that control of access for other values rest with the Department of Conservation for the Crown. These are Islands of international importance. (P8:1:2)

Two points arise from this statement, which appears to be postulating a government position on the Crown islands. First it argues that as the islands were paid for by the Crown they should not be returned. Second, provided control of access for other values remains with the Department of Conservation, birding rights could be given to the Rakiura Maori people.

We do not propose to deal with the first argument at this point. It is inconsequential to the issue and would bear inquiry from a number of points of view including whether sufficient reserves were awarded or whether the purchase price in the deed was an adequate consideration for the land sold. In this connection we point out earlier sales in which the purchase price was a gratuity rather than an ascertained value. The second point however seems to make it clear that there need be no bar to controlled access and issue of titi rights to Rakiura Maori.

The tribunal notes from an answer given by Mr Tindal, when being questioned on Whenua Hou, that he had strong misgivings that change of ownership of that island would threaten effective and permanent control – a matter which was of vital importance nationally and internationally. We have already suggested an alternative for Whenua Hou (15.7.4). It is certainly now a most vital island in conservation management of rare and almost extinct species such as the kakapo.

Future Ownership

17.2.15 Returning to the Crown islands, the tribunal sees no reason for retention of Crown ownership and can see strong grounds for recognition of Ngai Tahu mana by returning beneficial ownership to Rakiura Maori. The tribunal must or course make it clear that it has not found any breach of Treaty principle in the Crown's dealings with Ngai Tahu in 1864. The tribunal therefore has no jurisdiction to make any recommendation under section 6(3) of the Treaty of Waitangi Act 1975. However the tribunal feels that there is considerable merit in the request made by Rakiura Ngai Tahu for beneficial ownership of the Crown islands to be vested in the tribe. The involvement of the tribe in titi gathering expeditions to the islands over a long period with Crown consent, although bestowing no legal rights, recognises a Ngai Tahu need and a government desire to cooperate. We feel the Rakiura people, with limited provision made for them in granted reserves, would warmly respond to the Crown transferring back beneficial ownership in the Crown islands. There would be a continuing need for protection by regulation. We do not intrude further by suggesting the form and method of re-vesting, except to note that section 437 of the Maori Affairs Act 1953 may be an appropriate vehicle. That particular section may be useful in responding to the request made by Mr Ashwell (H32:63) that the islands be vested in the runanga rather than individuals, while yet allowing provision to be made for existing users.

The tribunal makes no recommendation regarding the transfer of full legal title of either the beneficial or the Crown Titi Islands. That is a matter for the

beneficial owners to consider should they wish to. They may have reasons for leaving legal ownership of the islands in the name of the Crown, who is there really in a trustee position. On the other hand Rakiura Maori may consider that full title to all the islands, both beneficial and Crown islands, should be vested in the persons found to be entitled, leaving the Crown to safeguard the public interest in the protection of endangered species by regulation. The restoration of full ownership to Ngai Tahu would not, in the tribunal's view, be inconsistent with the continued protection of endangered species and if Ngai Tahu seek the legal title to all the Titi Islands the tribunal would support that goal. As a first step in the process the Crown Islands could be put on the same basis as the beneficial islands by vesting beneficial ownership in such persons or bodies as may be nominated by Ngai Tahu. We respectfully draw the minister's attention to our views on this matter.

Waihora (Lake Ellesmere)

17.2.16 In chapter 8 we said that although Waihora fell within the boundaries of the Kemp purchase of 1848, Ngai Tahu would have never contemplated disposing of this most vital mahinga kai (8.7.7). We examined the high-handed actions of Mantell in totally rejecting Ngai Tahu requests for eel reserves. We concluded that it was clear Ngai Tahu did not intend to part with this treasured fishery and recommended that the Crown remedy the situation by vesting ownership of Waihora in Ngai Tahu. We will now look more particularly at this lake and its importance to the tribe as a continuing food source.

Waihora was once known by its more ancient name of Te Kete Ika o Rakaihautu or, at the Wairewa end, as Te Kete Ika o Tutekawa. Now it is more commonly referred to as Lake Ellesmere (H9:39). The lake itself was one of Ngai Tahu's most precious taonga, renowned for the quantity and variety of its fish, bird and other resources. The rights to these resources were shared by many different hapu, with Ngai Tuahuriri having access to the norther reaches, Ngati Ruahikihiki to the southern waters, while the hapu of Banks Peninsula had access to the fishery where the lake reached the bottom of the peninsula's hills. Other Ngai Tahu from more distant regions could call on its resources through the complex network of tribal whakapapa. In the mid-nineteenth century the lake was much larger than it is today. Drainage, reclamation and the more frequent opening of the lake to the sea have lowered its level and reduced its expanse. The foreshores which were once swampy wetlands rich in indigenous fauna, have long since been turned into pasture. Fish once present in abundance, such as tuna and patiki are now scarce. Runoff and pollution are seriously damaging the quality of the water.

Waihora: past and present

17.2.17 The importance of Waihora as a source of food was emphasised by several witnesses. At the time of giving evidence, Morris Te Whiti Love was an investigating official in the surface hydrology section of the North Canterbury Catchment and Regional Water Board. This board was formerly charged to administer Waihora as part of its territory under the Water and Soil Conservation Act 1967. These responsibilities have now passed to the Canterbury Regional Council. Mr Love gave evidence in his personal capacity (H9:20). He explained that Maori spiritual values associated with the lake were not easy to define fully:

The lake is seen by the Maori as in the form of the Patiki – the flounder with its mouth where the eels are said to enter the lake (Selwyn River) in the early morning, with the outlet at the pito (navel) which is seen traditionally as being somewhere nearer the middle of Kai-Torete Spit, as opposed to the present outlet to the southwest of the lake near Taumutu. (H9:30)

Mr Love said that in the past lake levels were much higher and the spit development may have meant the lake could be opened at a different place than is presently the case.

Mr Love stated that the lake margins were closely settled from early times with the inhabitants of many small villages living on the food from the lake and the surrounding area. The principal food resources were tuna, patiki, piharau, aua and inanga. The lake was opened to the sea by a channel dug through the shingles of the spit in much the same way it is today (except the location of the cut was probably different, and now machines are used). The lake was left to fill to a higher level. One of the reasons for opening the lake was to effect drainage and prevent inundation of the area around Taumutu, although the lake was opened for fisheries purposes as well.

Waihora was also used by Maori for birding. Water birds were gathered in great drives when they were moulting and unable to fly. Many of the foods were dried and stored for winter, including inanga, aua, kanakana, and koura. As well as the food resource, raupo, wiwi and harakeke grew in abundance in the swamps on the lake margin and on the sandy spit where there are large areas of pingao, a native sedge used for traditional crafts. Today with the revival of traditional crafts the demand for these materials has increased but many of the areas where they grew have been changed by stock or other developments.

Mr Love went on to say that Waihora was of prime importance as an eel fishery. This has been recognised by the Pakeha in recent times with 847 tonnes

of eels being taken in 1976: 56 per cent of the national total. Flounder were and are an off-season catch and fishermen switch to flounder fishing when the eel activity reduces in May. He asserted that its use today as a commercial fishery indicates the continuing importance as a food gathering area, although indications show that the lake is declining as a food resource.

Mr Love said that the water quality had traditionally been of serious concern to Maori because of the many Maori values which are sustained by the lake. From the mid-1970s considerable research had been carried out to identify the causes of this problem and the then North Canterbury Catchment Board started to prepare an investigative report on water quality.

Unfortunately the lake is now highly eutrophic: nutrients have run into the water and provide food for various kinds of water plants and algae which flourish and absorb oxygen, making the lake less able to support fish and the micro-organisms on which fish feed.

Further despoliation has occurred from the use of fertiliser on the catchment area feeding the lake. Mr Love considered it difficult to see the condition of the lake improving and stated that any wise management regime could only hold nutrient inputs at their current levels. Although it would incur great cost, Mr Love suggested that significant improvement of water quality would only occur with the removal of all phosphorus, nitrogen and other nutrients found in fertiliser from the entire catchment area of the lake.

Mr Love went on to deal with Wairewa to which we will refer later. He pointed out the similarities between these two lakes. Wairewa is now completely eutrophic with high phosphorous and nitrogen loadings and sometimes the water is lethal to stock and humans. The problem is caused by a blue green algae which appears to flourish in water that is slightly saline, as is the case with both these lakes. In addition to the poor quality of water in the lake, there is a further difficulty in that the weedbeds from the lake were badly damaged in the Wahine storm of 1968 and are not recovering.

Mr Love gave evidence on the effect of the Water and Soil Conservation Act 1967 and on hearings of applications for rights to take water, or to discharge effluent into the lake. He referred to the hearing of an application in 1983 by the Canterbury Frozen Meat Company Ltd to discharge effluent into the lower Waimakariri near Belfast. There was no Maori input into the hearing and it was suggested that the cost of legal representation has contributed to lack of any Maori involvement in such hearings which are proceeding all the time.

In the view of this witness, legislation governing water use rights should provide for the recognition of Maori values at all water right hearings and in all catchment plans and further, that when experts are preparing any reports for hearings, they should be required to consult with relevant Maori interests and supply their reports to the relevant tribal authorities well in advance of any hearing. This would at least give Maori a better knowledge of what is going on.

The tribunal felt that this was a most helpful statement from a well-informed witness. Mr Love concluded that management of the lake from a Maori viewpoint would involve:

opening the Lake to enhance the fishery; promotion of the regeneration of the weedbeds; any action that could improve the water quality of the Lake; including the control of bird numbers; control of the land use of the Lake margins and control of the use of the lake or inflow streams as a place to discharge sewage. (H9:31)

17.2.18 Rewi Brown of Waitaha, Ngati Mamoe and Ngai Tahu descent and a farmer at Lakeside, formerly fished the lake until he was prevented from doing so by the review of fishing licences which required him to prove that 80 per cent of his income was derived from fishing.

He gave a submission on behalf of the Taumutu Runanga, asking for the return of the lake. Mr Brown voiced his concern about how the lake had been allowed to deteriorate and the way it had been over-fished without any regard for the future.

Mr Brown claimed that drainage of the lake and over-fishing had led to the disappearance of shellfish beds and depletion of fish. Commercial fishing of eel and the consequent depletion of eel population was of concern. Mr Brown suggested that the lake was once about twice the size it is today and that both Mantell's and Captain Thomas' maps have it extending to the foot of Gebbies Pass. He said the resources of the lake, its tributaries and the surrounding area included many varieties of tuna, patiki, herring, pipi, large cockle beds, kanakana, inaka, fresh and sometimes saltwater koura, whitebait and paradise ducks (H9:39). He gave in evidence extracts from a paper prepared by the late Riki Ellison detailing the various species of eels and patiki.

Mr Brown stated that as a result of commercial fishing the lake was almost fished out of eels. Waihora has a Total Allowable Catch (TAC) of 36.5 tonnes divided among 11 fishermen and this witness claimed that no local Maori were involved in the fishing industry in the lake. He said this was

partially due to the fact that Maori traditionally fished seasonally and this did not fit in with the 80 per cent of income provision (H9:39).

Another ex-fisherman excluded from the 80 per cent of income requirement, Donald Brown of Ngai Tahu, said both his father and his grandfather before him had fished the lake. He spoke of his school holidays as a child with his grandparents, uncles and aunts at the lake and of the changes that had occurred since the lake was drained. He said his father had been forced to leave the area because of insufficient reserves and that this had hurt the old people (H9:47).

Mere Teihoka spent her childhood with her family at Taumutu and ate food that was gathered around the area: puha, watercress, eels, herring, flounders, inaka, smelts and whitebait. She recalled that there used to be a large pipi bed in the lake when she was young and that the lake itself was very different from what it is now; much higher, with clear water and a shingle bottom.

She referred in her evidence to taking eels from the Koru, the creek that feeds the lake. Because she has lived at Taumutu all her life Mrs Teihoka has witnessed the change in Waihora and her submission noted the lack of eels, the reduction in size of flounder, the occurrence of slimy water, even trespass notices, all of which mean less access to these once abundant traditional resources. She charged the Crown with being an inefficient caretaker and objected to the lack of attention given to conservation of the resources and ensuring their survival. She gave this precis of what the eel resource once meant to her family:

When we went eeling some of the pakeha families – The Gullivers, Jock Patterson and Ron Morton used to go with us. Three families, us, the Nutiras and the Martins used to go out together. Jack Te Koa . . . had so many whatas over there, dad here and old Peti over there. The three families used to work together to pawhara them. They were left to dry – covered at night – the moon mustn't get on them at all. Beautiful – they were beautiful (H9:11).

Despite the importance of Waihora as a food resource, no reserves of any kind were created over it to protect its use by Ngai Tahu.

17.2.19 We now look at Ngai Tahu reaction to the lack of reserves generally. Although eel weirs had been requested at the time of the purchase none were reserved. Kemp later acknowledged that there had been discussion of landing places and eel weirs, though he did not understand the reservation of eel weirs to be an exclusive one (T1:138). Mantell by his own account turned down Ngai Tahu's request for eel weirs. We have dealt fully with this in 8.9.13. Mantell was adamant that the rights of the Crown to control the level

of the lake should not be interfered with. As we have earlier seen, not only did Mantell deny the tribe's request to have this right acknowledged, but he also placed the whole issue of European settlement above any reservation of Ngai Tahu's mahinga kai. All that was reserved to Ngai Tahu at the lake were two reserves at Taumutu, one around the kaika including its immediate cultivations – reserve no 43, and another close by enclosing existing cultivations – reserve no 44. Together the reserves totalled 80 acres.

17.2.20 We turn now to look at developments after the purchase. These were discussed in submissions made by a Crown historian Mr Tony Walzl. He referred to changes taking place in the 1860s:

The market in which Ngai Tahu had been involved began to fail. Pastoralism became the dominant form of farming in the Island. Ngai Tahu, with their inadequate reserves and lack of capital were not able to increase their land holdings. In addition to this, the population rose fairly steadily through this decade putting further strains on the economy. Subsistence food-gathering would have gained increased importance. However this occurred at a time when the European settlement of the countryside began to intensify resulting in decreased access to traditional sites, or the loss of these sites through European land improvement schemes such as drainage. Ngai Tahu began to react and bring claims before the Government.

It was not until the mid-1860s that Ngai Tahu began to complain in a public sense about the loss of certain resources. (P10:69)

Mr Walzl quoted Waruwarutu's letter to the superintendent of Canterbury of 9 September 1865:

and now the water is being let off by the Pakehas, that is to say by the Government, so as that land may be made a sheep station by the Europeans, and now there is very little (or no) water, it has to be left for two or three years before there is sufficient water to overflow so as to enable us to catch eels; but no, it is being drained off by the Government, so as to be a source of emolument for them. (P10:70)⁵

The government and Waruwarutu differed as to whether the lake had been drained. No future action then occurred as the Native Land Court had been directed to investigate the claim to Kaitorete Spit and during this hearing several land claims brought the eel fishing question to light. During the hearing, evidence was given on the importance of the lake and spit for Ngai Tahu fishing.

Mr Walzl, in referring to Chief Judge Fenton's judgment, quoted this passage:

The evidences of occupation by the claimant and his ancestors all indicate that the tribe have always regarded this place as a valuable fishery. And Mr. White clearly proves that they have exercised their rights since the contract of sale. And it is quite consistent with that contract that they should have done so. And, no doubt, in acting under the order of reference, the Court will recognise the fisheries (included in the phrase mahinga kai) as the most highly prized and valuable of all their possessions. (P10:72)⁶

Fenton obviously recognised the significance of the Waihora fisheries to the Ngai Tahu economy; an understanding he brought to his Kauwaeranga judgment a few years later.

Fenton dismissed the claim against the validity of the Kemp deed but expressed the view that a fishery easement could be made over the whole of the spit without compromising the ownership of the Crown. Despite this assurance and although the court did create a number of fishing reserves, no easement was granted over the spit itself. Mr Walzl went on to examine the extent of the reserves actually awarded by the court and possible reasons for the number not granted or reduced in size. He made the point that the list and location of the easements asked for and given at Canterbury showed that 20 years after the sale of the land, Ngai Tahu were still involved in certain traditional activities such as weka hunting. Mr Walzl said of Ngai Tahu:

They still knew the places where food could be gathered and it seems that they were still using these places even though some appear to have gone over into European hands. This is an interesting point. An examination of the list also shows that the easements given, even those requested were located close to Ngai Tahu settlement area. This supports the contention noted earlier that had the reserves been of adequate size initially, important food-gathering sources would have been included. (P10:83)

17.2.21 What emerged from this study of Waihora was that there were two economic systems with different priorities over natural resources in conflict with each other. As Ngai Tahu saw the position they had been promised that their rights to their traditional economy, which relied so heavily on mahinga kai, would be reserved for them. On the other hand the Crown was clearly of the view that this economy must not obstruct the demands of land settlement. Even when clear rights to the fishery were recognized in 1868, these were seen to run counter to the requirements of settlement. The agricultural and pastoral economy won the conflict. Ngai Tahu would have well understood that the resources of Waihora should be shared with the settlers. But as far as

this tribunal can ascertain from the evidence submitted to it, Ngai Tahu themselves never agreed or wished to be excluded from the resources of that lake. This happened as a result of Kemp's, Mantell's and other Crown agents' omission in failing to create the specific reserves sought by the tribe.

Indeed, as Crown witness Ronald Little pointed out, as recently as 1979 the Maori Womens Welfare League petitioned the Minister of Fisheries for an exclusive Maori eel reserve in the lake. The request was rejected because of the importance of the area to commercial fishery for eels and the possibility that a precedent would be created. Mr Little confirmed, as did other evidence from Dr Peter Todd, that Waihora is highly eutrophic and its poor water quality has been of concern for 30 years (P16b:8).

17.2.22 It is important at this point to consider the evidence of Professor Walter Clark, vice-president of the North Canterbury Acclimatisation (NCAS) and convener of that society's water resources committee (P16c). His submission was made on behalf of the society which has responsibility under the Wildlife Act 1953 and the Fisheries Act 1983 for the day to day management of the acclimatised fish and wildlife resources in the North Canterbury district. This includes Waihora and Wairewa.

Professor Clark's submission was divided into three main matters, the first of which dealt with "The Maori as a conservationist". The second matter was directed to the non-participation by Maori in conservation matters regarding fish and game. We shall look at these questions later. The third related to Waihora. Professor Clark listed activities undertaken by the society since 1960 concerning the lake. These included objections to the discharge of sewage effluent, appearances before the Planning Tribunal, discussion on walkways, management of lakeside reserves, lake shore erosion and ranger patrol of the lake. Research has also been carried out on weed re-establishment, monitoring trout population in the Selwyn and the recruitment of black swan.

Professor Clark said the society was ready to cooperate with others in promoting a better understanding of the lake and its reserves. In 1980 the society convened a public symposium on Waihora. He concluded by saying the society had championed the cause of Waihora as a biological asset of great worth which it has tried to protect from environmental degradation.

The tribunal acknowledges the effort the society has made in respect of environmental preservation in the lake and indeed in other waterways around Canterbury but notes Ngai Tahu and other evidence which highlighted the substantial deterioration and damage to the waterways. We shall be looking at the work of the acclimatisation societies generally in a later section when

we consider their relationship with tangata whenua and the impact of European-introduced fisheries on Maori mahinga kai.

Tribunal's recommendations

17.2.23 Despite all their requests, petitions, commissions and court hearings, the story is that Ngai Tahu have been completely disregarded over 150 years in respect of their mahinga kai rights to Waihora. A few small reserves were granted for other freshwater fisheries in 1868 but as Mr Walzl concluded:

Despite the intent, the Land Court easements were unsuccessful. They didn't return all that was asked for and over the next decade and a half were allowed to be destroyed. (P10:97)

For the reasons earlier set out in this report it is only fair that Waihora be handed back and that the tribe be significantly involved in future decision-making concerning the lake (8.7). It is necessary to define with some accuracy what area of the lake is included in this recommendation. The tribunal observes that the question of remedies generally is being held over for direct negotiation between the claimants and Crown consequent upon determination of the issues and findings by this tribunal. The tribunal however firmly considers that Waihora should be returned to Ngai Tahu and wishes to make that view clear. We consider that the land identified as parcels 19 and 22 on map SO17138 and recorded on the accompanying schedule M36 as R4385 Blk 1 Ellsmere SD and Pt R959 Blk Ellesmere SD should be returned to Ngai Tahu. An indication of the extent of this land is given in figure 17.1.

The tribunal leaves the question of the final area to be returned as a matter to be negotiated between the parties. There may need to be compromise reached on both sides because of matters not presently within the knowledge of this tribunal.

17.2.24 We now return to look at what the tribunal means by ownership of the lake which is presently Crown land. As has been shown earlier in this report, Waihora was an important source of mahinga kai to Ngai Tahu. Not only did it provide fish and shellfish, it was also used for birding. The swamps provided raupo and harakeke and the sandy spit produced pingao. The waters of the lake were once clear and the lake bed shingly. Today it is in a sorry plight and the tribunal has some reservations that the return of ownership will of itself restore what has been lost. As we have seen from the evidence of Morris Love as well as Crown witnesses Ronald Little and Dr Peter Todd, both Waihora and Wairewa are in a highly eutrophic state and their poor water quality gives grave concern. Mr Little, as we shall shortly see,

indicated some of the steps that must be taken to restore Wairewa. Mr Love considered that further deterioration of Waihora might be arrested but any improvement could only be effected at substantial cost. There is no advantage in returning ownership if it is not accompanied by significant and committed Crown action to improve the water quality so as to restore the lake as a tribal food resource. The tribunal considers that the Crown has a distinct duty to take an active role in the provision of financial, technical, scientific and management resources to save Waihora. The tribunal offers these following alternatives for consideration by Ngai Tahu and for discussion between the parties in the negotiations to follow this report. There may be others. We recommend that the Crown vest Waihora as an estate in fee simple in Ngai Tahu and transfer ownership of Waihora to Ngai Tahu and contemporaneously enter into a joint management scheme with Ngai Tahu which would include such matters as:

- opening the lake to improve the fishery; and
- improving water quality by controlling bird population and use of land margins around the lake, control of lake usage and control of sewage disposal.

The joint management scheme should bind the Crown to provide the financial and other resources mentioned above.

Alternatively we recommend that the Crown, in manner similar to the Titi Islands, vest beneficial ownership of Waihora in Ngai Tahu but remain on the title as trustee holding the legal estate. Regulations for the future control and management of the lake in manner similar to the Titi Island regulations could then be invoked to protect the resource. In both the above alternatives there would be partnership between Ngai Tahu and the Crown.

As trustee the Crown, in consultation with the owners, would be required to manage and provide resources to control the use of the lake. Provision for certain public facilities would no doubt be made by Ngai Tahu.

There is ample provision for ownership determination and also owner representation to be ordered by the Maori Land Court under the Maori Affairs Act 1953. The tribunal leaves the alternative that Ngai Tahu prefer as a matter to be selected by Ngai Tahu and then settled with the Crown.

The claimants stated that a move was afoot to create a wildlife reserve and that the Taumutu people objected. It is time that this lake, which is taonga to Ngai Tahu was returned and attempts made to stem the over-exploitation. Unless drastic remedial action is taken very shortly, another resource will

disappear. Ngai Tahu must be consulted and involved in that action. The tribunal was requested to recommend the cancellation of commercial eel licences for Waihora and indeed in other districts. This question will be addressed in the later report as certain further evidence concerning the lake fisheries has been notified but not yet heard. We shall also deal later with action that needs to be taken over future administration of this lake.

Kaitorete Spit

17.2.25 Kaitorete, or the Ellesmere Spit, is an isthmus consisting of approximately 4860 hectares stretching 24 kilometres at the northern end of Ninety Mile Beach between Banks Peninsula and Taumutu, separating Waihora from the sea.

The spit is important to Ngai Tahu for several reasons in addition to its value for eeling. It provides access to Waihora and is of significant historical and archaeological importance (H9:16). Most of all it has national importance because it contains the largest continuous pingao plantation in the country.

Catherine Brown, Chairperson of the Taumutu Runanga and the Mid-Canterbury Maori Committee, addressed the tribunal on the subject of pingao (H9:14). A member of Te Waipounamu District Maori Council, and the Aotearoa Te Moana Nui a Kiwa weavers, she was concerned that this resource be protected. She quoted Te Aue Davis' submission to the Planning Tribunal regarding pingao:

Pingao is used extensively all over the country for weaving. The demand for it is greater now than ever before. It is used for weaving kete, whariki, and tuku panels. The decorative tukutuku panels are woven with pingao and kiekie. When used in tukutuku panels it acquires a spiritual dimension, the patterns it fashions tell of the tribal history and legends of the area and its people . . .

Kaitorete has the largest continuous pingao plantation in the country. Apart from Kaitorete, Te Waipounamu has very little pingao. (H9:17)

Catherine Brown also mentioned Riki Ellison's report on the Ellesmere coastal area prepared in response to a Department of Lands and Survey investigation of the area. The report pointed out the scarcity of pingao in the North Island, and the consequent importance of Kaitorete Spit as a national taonga.

17.2.26 A plea for the protection of such an important resource as this should not be disregarded. The tribunal asks that this matter be brought to the notice of the Minister of Conservation with a view to the setting aside of the area

comprising the principal pingao plantation as a local purpose reserve under the Reserves Act 1977.

Although neither the claimants nor the Crown provided the tribunal with factual information on the exact location of the pingao it would appear from a map handed in by Crown counsel, which is colour coded to designate various ownership, that the sand dune area on which the pingao is located is either Crown land, DOC stewardship land, DOC scientific reserves or Landcorp land. It should therefore be possible within the framework of this ownership to find an effective way to protect and even develop the pingao for Ngai Tahu use.

Wairewa (Lake Forsyth)

17.2.27 The tribunal visited this lake on 16 April 1988 and inspected the eel drains at the most southern end. We journeyed around the lake inspecting it from various locations. Upon our arrival we were greeted by several kaumatua and told of the history and importance of the lake to Ngati Irakehu.

Monteiro James Daniel (H:45) said Wairewa was the sanctuary of the tuna and that for generations Ngati Irakehu had looked after and fished this lake. As is the case with Waihora, Wairewa is a coastal lake where access from the sea is blocked by a shingle bar and the lake is opened by digging a channel through to the sea. During the autumn migration, eels congregate in the outlet area. Eel fishing in the lake is restricted to Maori.

Very helpful scientific evidence about the eel fisheries on both Waihora and Wairewa, including details of the species and their habits, was given by a Crown witness Dr Peter Todd. Dr Todd has been employed as a fisheries scientist with MAF for 18 years and is an expert in eel biology. He has been particularly interested in Maori fisheries for eels and lampreys on which he has published papers. As an appendix to his submission, Dr Todd showed a photograph of a fisherman hanging a large number of eels to cure on a drying frame in the traditional method. The photograph was taken in 1948. The tribunal had explained and demonstrated to them, the 10–15 metre long and 1–2 metre wide trenches that were dug into the shingle from the lake and towards the sea. At night the eels move into the trenches and are caught there. Dr Todd's article further explained that certain traditions are still adhered to by the tangata whenua. Eels moving around the mouth of the trench are not caught unless they move into the trench and no-one steps or jumps across the trench during fishing operations. (P16b:appendix 1).

The reason for this action became apparent both from our inspection of the eel trenches at Wairewa, where we saw a number of them side by side, and from the evidence of Trevor Howse (J10:70). Mr Howse explained that a hapu system of ownership based on whakapapa set out the wakawaka or drains of each group and their rights to fish. Mr Howse gave his whakapapa which proved his rights to the use of these wakawaka and provided a map which illustrated where the family drains were located (J36). We were informed that these family wakawaka were “positioned by star-sightings between three tapu drains of Taua-nui, Taua-iti and Taua-toa” (J10:70). The mountain Te Ahu Patiki plays its part in the positioning of these three wakawaka.

There are three reserves around the lake and these will be looked at in our later report on ancillary claims. Suffice to say at this point that although there are these three small reserves around the lake at certain sites, the most important area containing the eel wakawaka is Crown land without any reserve status. Although the iwi has the right to take tuna from the lake, further measures may be needed to ensure consultation takes place over issues that affect eeling, such as water quality and access to the lake bed and the shingle bar which blocks the lake from the sea. It would seem to the tribunal that this is another area which should be investigated so that user rights can be secured to the iwi.

17.2.28 This is more important when we turn back to Dr Todd’s evidence and recall that Wairewa is highly eutrophic and has periodic toxic algae blooms during the summer and autumn. The water can become so toxic that over the past 18 years farmers have been warned on three or four occasions to remove stock. Our visit to the lake in question in April gave proof of the deteriorated water quality. On this question Ronald Little had this to say:

Dr Todd in his evidence describes the environmental problems facing Lake Forsyth. I would like to add that in my estimation the problems facing this lake are as acute, or even more so, than the problems facing Ellesmere. The removal of forests, followed by years of intensive farming have led to Lake Forsyth being overly enriched. The lake warms up considerably in summer due to its relatively shallow nature, and a fair portion of the lower lake levels will be stripped of oxygen. Large scale fish deaths have been reported, and it was surmised (T Eldon, MAFFish, Christchurch), that deaths were caused by wind created tidal action stranding fish in oxygen depleted water. Most serious has been the presence of toxic blue-green algae that have resulted in the death of stock drinking the lake water. That occurrence resulted in many restrictions being imposed on water use. Toxic blue-green algae has caused serious problems in Europe, both to stock and humans, but is still a rare problem in New Zealand. Remedial measures are possible but require catchment wide

measures. A similar situation arose several years ago in Lake Tutira which lies just north of Napier. The Ministry was involved in a study over several years involving everything from artificially mixing the entire lake to the introduction of algae eating fish from China.

At this time the degradation of Lake Tutira has been stopped based on a total management plan created by the Catchment Board aided by other agencies. The solution lay in the interception and diversion of the nutrient rich incoming water, isolation of most of the lake from stock animals, provision of vegetation buffer strips around the lake to soak up run-off and forest planting on all slopes leading directly to the lake. I fear the Lake Forsyth is in need of a similar approach and perhaps similar remedies. (P16a:3)

17.2.29 The existing Maori fishery in Wairewa is authorised by the Fisheries Act 1983 and more particularly by the Fisheries (South-East Area Commercial Fishing) Regulations 1986 – regulation 11(1) and the Fisheries (South-East Area Amateur Fishing) Regulations 1986 – regulation 7.

Mr Little advised us that the exclusive Maori eeling right over the lake resulted from submission made by the late Joe Karetai in 1961. It was very clear from the evidence of the local people and also Crown witnesses that continuing to allow commercial taking of eels from tributaries and creeks around the lake has had an effect. Mr Little explained that commercial fishing of the tributaries has now stopped because of a general decline in eels but nevertheless he recommended that the tributaries of the lake be included in the regulatory restriction. We consider that is a desirable extension and should be implemented forthwith. The tribunal also agrees with Mr Little that to have an effective input into management control Maori need to have representation on catchment boards, district and regional councils, harbour boards and other local bodies. Certainly there does exist a need for these territorial bodies and societies to consider a Maori perspective. In addition, however, Maori commitment to take an active role in water right applications, town planning hearings etc, is also necessary.

It is easy enough for this tribunal to express the need for Maori representation on all these bodies dealing with conservation and environmental matters. Indeed we were urged by Mr Temm to make a strong statement as to the right that Ngai Tahu have to be consulted on matters that affect them and that Ngai Tahu must also be accorded a decision-making place in the way resources are managed (W1:299).

Strong statements may well be needed but effective implementation is more important. We shall deal with the question of consultation and representation generally at the conclusion of this chapter.

Tribunal finding and recommendations

17.2.30 The tribunal is of the view that the failure of the Crown to set aside eeling reserves to protect this resource at the southern end of the lake is in breach of the Crown's duty to protect Ngai Tahu rangatiratanga under the Treaty. In 1961 as a result of Ngai Tahu representation, an exclusive right to take eels from Wairewa was given to Maori and the lake became the only Maori eeling reserve in the South Island. The Crown have therefore come some distance in recognising the importance of this mahinga kai but this action has not conferred on Ngai Tahu exclusive rights to that eeling resource as it should have. The tribunal finds this omission to provide fishing right for Ngai Tahu is also in breach of Ngai Tahu rangatiratanga under article 2. The tribunal accordingly recommends that the regulations be amended to substitute "Ngai Tahu" for the word "Maori".

The tribunal also recommends that the Crown reserve an area around the southern outlet which will secure the tribe's right to have access to the shingle beds and wakawaka. The present two reserves known as Te Pourua at the outlet end of the lake are not so handily located to the eel-trapping site as was a previous reserve MR1279. This latter reserve according to Crown researcher David Alexander was sold in error and later replaced by the Te Pourua reserves (Q10:12). There should be consultation between the Crown and tribe to ensure Ngai Tahu can continue with this fishery. In addition the tribunal recommends that all commercial eel fishing be prohibited in the waters leading into the lake and the regulations reserving Ngai Tahu rights be amended so as to include these streams.

The longer term problem of water quality also needs to be addressed. It is not an easy matter but measures suggested by Crown witness Ronald Little as undertaken at Lake Tutira (P16a:3) should be considered. If such action is not already underway it would seem that Ngai Tahu, the Department of Conservation, the Canterbury Regional Council and the Ministry of Agriculture and Fisheries should be jointly preparing a management plan. Ngai Tahu should be taking part in such investigations and should be involved in the decision making process. The tribunal considers that similar action is needed for Wairewa. The Crown through its agencies must provide the resources to do this work. These two lakes are treasured resources of Ngai Tahu but as evidence has shown, also have public interest. Therefore it is imperative that the process to save them begins immediately.

Commercial activity of Ngai Tahu since 1840

17.2.31 In other parts of this report dealing with the interaction of Maori and settler we have seen that considerable trading activities took place between Ngai Tahu and the settlers. This matter will also be discussed in chapter 18 when we look at the social and economic position of Ngai Tahu after the purchase. Our discussion here will therefore be brief. At the beginning of the hearing on mahinga kai the tribe spoke about the importance of trade and barter. The claimant Rakihia Tau said:

Trade was and still is the base of our culture and our social order, as it is to all cultures. Map 3 [J26] identifies our major trails throughout the South Island to our greenstone deposits. Our culture did not stand still, our ancestors and we the present accept and innovate for progress, the use of technology to provide for a quality of life. For those who believe that our culture remains in a grass skirt era, know not their history or the reasons for the Treaty of Waitangi. There is sufficient evidence recorded by the Europeans as to Trade between us and them. (J10:12)

As the tribunal moved around the South Island we were told by many witnesses of how hapu bartered food with other hapu or sold on the local market. Some examples of this appear in the evidence as follows.

Alan Russell told of catching in one day 500 kerosene tins of whitebait and of railing these and other fish to Christchurch for sale (H8:80). Paddy Gilroy spoke of bartering titi for smoked eel and Iris Climo of bartering various foods (H13:16,H8:39).

As will be seen from other sections of this report the opportunity for Ngai Tahu to continue to barter and sell the food resources available to them was reduced as the resources, and access to them, diminished.

Conservation

17.2.32 The oral traditions of Maori have played a most significant part in handing down from generation to generation an understanding of the need to conserve food resources. During this claim the tribunal heard repeatedly many of the rules that governed the gathering or taking of mahinga kai. Conservation measures included not only just taking sufficient to meet requirements but also procedures to help the creation of further supplies. In some cases procedures were followed to thin out an overpopulated resource. Peter Ruka Korako said:

It was my grandfather's understanding that all the whanau were training two or perhaps three children per fishing family to the lore of the Marae o Tangaroa. I was one such person along with my brother McNelly Teoti William Ruka. We were taught the ancient rites of seeding the lakes, rocks, river beds and banks and the sea beds, rocks and river mouths . . .

Just an example of some of the practices of our tupuna, if a pipi bed was becoming overpopulated and the kai was not getting "fat" they would bring in a particular whelk and it would soon thin down the beds, eating only the weakest. (J10:74)

This witness gave a detailed account of how the spat would be collected at the time the kai moana released their seeds. The ovid/graavid seeds would be placed in poha, punched with holes and buried in the third and fourth wave line at low tide or placed carefully on rocks or in crevices where the wave pressure would slowly disperse the eggs into the surrounding area (J10:78). These rituals of seeding were accompanied by karakia.

Kelly Wilson from South Westland stated:

Conservation was also part of Maori culture. Elaborate laws – at times very detailed – governed use of the sea as they did use of the land.

We were made very aware of the rule that was strictly enforced. That in gathering shellfish, a flax Kete would be used no larger than was necessary to provide two meals for the household and one more strictly enforced was the rule that such a Kete should always be carried – never dragged over the mud flats or shellfish beds. To do so would expose other shellfish to the sun or to the ravages of the sea birds that would deplete the resource.

Even when whitebaiting it was the custom in some areas for children to be given the task of separating and throwing back some of the females – easily distinguishable by the dark stripe that keen young eyes could quickly pick out.

It is not remarkable that conservation was so important to our way of life. Protection of the resource is not a new idea, it's no more than common sense readily recognised by any intelligent people. (H8:23)

Rakiihia Tau told of how the seine and trawl nets of the commercial fishermen catch the titi or parent bird. He said:

This of course causes two sins, the parent bird is lost as well as their young. It is an offence to kill a parent bird on the Titi Island. Punishment is that you are required to eat it. This maintains our customs regarding conservation and

retention of our resources. I kill mutton birds with my hands. In this way parent birds are easily identified from young birds. (J10:11–12)

Edward Ellison explained how strict tapu was placed on all kai at certain times of the year. He said atua or protective gods were incorporated in the maintenance of the tapu. This was done to avoid over-exploitation (H12:6).

We saw earlier in Trevor Howse's evidence how conservation applied in the taking of eggs and how well the philosophy of conservation and preservation was ingrained in him from his parents and grandparents (H7:30).

James Russell said this:

In a historically hand to mouth society, it is difficult to consider anything other than a conservation ethic. Wilful pollution or destruction of a waterway or a food resource would probably have an immediate and significantly detrimental effect on the community as a whole. Consequently, an elaborate set of rules, restrictions and guidelines were enforced, often by means of quasi-religious concepts such as "tapu", "rahui", "utu", and "muru" to ensure that such resources were indeed maintained as appropriate for community needs, resource management, or "rakatirataka" or "kaitiakitaka". (H8:51)

Iris Climo said how she learned to practice conservation in taking only as much as was required "and returning our [scraps] to the Source" (H8:39).

17.2.33 There is no doubt that Ngai Tahu adhered to strict rules of conduct in which tapu and rahui played an important role. The need for a preservation and conservation ethic is of great importance to people directly dependent on the limited food resource for their subsistence. But as has already been observed in previous tribunal reports, in the Maori mind concerning the conservation of food resources there is very much a spiritual content. This is no less the case for Ngai Tahu.

We have previously said how the tribunal was impressed with the restraint shown by almost all the witnesses as they spoke of their ancestors, of the trust their ancestors reposed in them to cherish their taonga and hand them on to their children. Their kainga nohonga were situated near and depended upon their mahinga kai. Marae were sited in prime locations for water and food gathering. As person after person outlined the present depleted position and related it to the ill effects of land settlement it was apparent there was a deep feeling of dismay and concern that the trust placed in them as kaitiaki had been thwarted.

17.2.34 Mr Ronald Little, in addition to his evidence on Waihora and Wai-rewa, (P16a), also described the nature of the South Island during early habitation. He voiced concern at a statement made during the hearing that “Pakehas always exploit – The Maoris always conserve” He accepted that this was a generalised observation but responded that there were “a large body of Pakeha New Zealanders who have as deep and abiding love of the land as do the Maori”. He said:

The reason I raise this rather emotional issue is threefold:

- 1 Considerable detrimental environmental alteration has occurred in this country due to human activity and there is considerable potential for more damage to occur.
- 2 Past change has been mainly due to the Pakeha settlers, but the Maori must share a major share of the responsibility as well.
- 3 Preservation and enhancement of the fishery habitat in the future, will require the combined energies and determination of all people. (P15a:2)

Mr Little proceeded to outline what had happened to New Zealand forests since 800AD and we shall look at that question shortly. This witness sought to make three points. First, that both Maori and Pakeha had contributed to environmental change by destroying forests and by introducing noxious animals and plants. Secondly, that not all actions and introduced things have been bad and some are now vital to the economy base. He referred to sheep, cattle, pasture grasses, trees, grains and the like. Third, he saw the need for legislative reform and for Maori values to be adequately considered when processing water rights (P15a:12).

As part of the evidence presented by the fishing industry we heard from Mr R N Holdaway (S17). His submission has been already referred to (3.2.17). He is presently completing a doctorate in zoology and has undertaken research on extinct indigenous birds of New Zealand. His paper looked at the effects of Polynesian colonisation and resource management practices on the marine and terrestrial fauna and flora of New Zealand. The following is an extract:

The long and sad record of environmental damage which has accompanied the migrations of Europeans around the globe is well known. Unfortunately, the dramatic effects on island environments resulting from the progressive colonisation of the Pacific Islands, including New Zealand, by Polynesian peoples in the past 3000 to 4000 years are not yet generally appreciated.

The main theme of this submission is that the Polynesian peoples had, throughout the period of their occupation, no more or less claim to have lived in harmony with their environment, or to have a greater environmental or conservation awareness, than do the Europeans who followed them. It is based on published evidence of environmental alteration and deterioration, faunal extinction, and resource depletion in prehistoric and protohistoric New Zealand, especially the South Island . . .

It is not the object of this submission to try and apportion blame for past environmental damage, but to point out that the first priorities of all colonists are for food and shelter and that the need for these necessities overrides other considerations. Resources are exploited in descending order of return for effort; as one resource is depleted, the next is tapped. In island ecosystems, particularly where, as in New Zealand and other Pacific islands, the indigenous animals and plants are extremely sensitive and vulnerable to disturbance, the effects of human colonisation can be devastating. In New Zealand, the resource base was limited by the small range of food sources; plants and birds from the forests, fish, shellfish, and seals from the sea. The history of the Maori people in New Zealand is one of continuous adaptation; adaptation at first to an environment vastly different from the home islands of the tropical South Pacific, then adaptation to the changes in resources and environment through the centuries. The final phase of this adaptation had probably been reached some time before European contact, when the major protein sources were fish and shellfish, supplemented by small bird fowl, and the staple diet was fern root or ti root, varied at least north of Banks Peninsula, by horticultural crops such as kumara.

Many of the changes wrought in prehistory can now only be perceived in outline, from varied, often conflicting, evidence. It is, however, a painful truth that new colonists everywhere have abused their new environment, and only come to terms with the problems of resource management and conservation of resources when there were no alternatives. It is easy to see the mistakes of the past two centuries for they are all around us and many of the changes have been documented; the mistakes of earlier times are much less visible.

The idea of a Golden Age in human affairs, where people lived in harmony with their environment persists: it is a mistaken idea, based on a lack of knowledge of the real effects of human colonisation. The weight of evidence suggests that the earliest colonists exploited the stocks of indigenous vertebrates until most, if not all, were extinct or reduced to remnants of no economic value. Exploitation patterns of marine resources have been more difficult to quantify, but results presented in this submission suggest that the same patterns of overexploitation were present. The marine resource was simply more difficult to overexploit with the available technology.

Conservation practices which were introduced, such as rahui, were controls placed on resource exploitation after the main environmental damage had occurred and when the alternative to conserving the remaining resources was starvation for individual communities. These restrictions applied only to those essential resources which provided the staples of diet, or clothing, or other raw materials. Other resources such as forests, which were perceived as being inexhaustible and which held fewer resources, were destroyed when the necessity arose.

The burning of large tracts of forest in the early 19th Century for potato cultivation is evidence that the intrinsic value of forests did not transcend desire for a new source of food and exchange. The present attitudes to forest remnants such as the Waitutu block in western Southland or to the Cook's petrel on Codfish Island (Te Au 1988) seem to indicate that the idea of conservation or preservation of a rare resource for its own sake, is not of great importance.

New Zealand was the last major land mass settled by humans. It is now clear that the pattern of exploitation of resources and initiation of major environmental change which can be discerned here had a history stretching back through eastern Polynesia to the islands of Western Polynesia and Melanesia. As well as overexploiting the natural food sources, the colonists altered the environment of each new island by removing the natural vegetation cover to plant crops or for other cultural activities. They also introduced, deliberately or accidentally, animals such as the kiore, or Pacific rat, the dog, pigs, and various lizards (Crombie and Steadman 1986), snails, and plants (Kirch 1982a), all of which had actual or potentially deleterious effects on the environment. (S17:2-4)

Professor Walter Clark, whose background and submission we referred to earlier (17.2.22) canvassed similar material to that given by Mr Holdaway. He said that since human settlement of New Zealand, more than 40 bird species had become extinct and about 20 of these since Europeans arrived. He gave instances of the species lost and attributed it to deforestation during the course of using fire in moa hunting. Professor Clark considered that conservation was in fact a rare notion until very recent times.

17.2.35 The evidence of Mr Holdaway and Professor Clark certainly places a share of the responsibility on Maori for the change in the environment. But those changes took place over a period of 1100 years. Looked at in isolation it is not easy to draw comparable conclusions between what has taken place between the two periods 800-1840 and 1840-1990. In one case we are dealing with a period of 1100 years and in the other a mere 150 years. It must also be remembered that the people who inhabited this country in the pre-contact period had to live off the land. It would have been helpful to have had

before the tribunal a similar analysis of what has taken place over the past 150 years. There is no yardstick by which to measure the relative responsibilities of Maori and Pakeha. Nor does that matter. The cold hard situation is that there are ominous signs we have not yet learned from history. It is not the task of this tribunal however to measure blame for what has happened to our environment and what needs to be done. There are encouraging signs of awareness and desire to act by others. The tribunal's jurisdiction is to determine whether any act or omission of the Crown is inconsistent with the principles of the Treaty. The important line to draw is the one that divides any Crown breach of Treaty principles on the one side from grievances of dissatisfaction that arise out of the process of change in a developing society on the other side. These latter matters will not be matters strictly within the jurisdiction of the tribunal to recommend for remedy. The tribunal considers however that having had those issues placed before it, it may be helpful for the minister to receive a statement of our views. We shall therefore continue to comment on some of these matters and at the end of this chapter will look at the conclusions to be drawn.

We now move on to look more directly at the impact of settlement on Ngai Tahu.

17.3 The Impact of Settlement

Introduction

17.3.1 In chapter 18 we shall be looking at the social and economic condition of Ngai Tahu following the Crown purchases. To some extent therefore there is an overlap with this section which looks at the impact of settlement on mahinga kai. We shall endeavour to restrict the subject matter to mahinga kai and in so doing look at specific matters such as deforestation, clearing and drainage, water use and quality, acclimatisation, lack of access and pollution. As we have already reported, the tribunal has listened to many grievances of Ngai Tahu concerning the loss of their food resources. Most of these arise as a consequence of the development of New Zealand after the arrival of settlers. Some of them are of comparatively recent origin. Many of them will evoke a supporting sigh from other New Zealanders. In the end it will have to be the collective voice of the majority of New Zealanders that will direct change. Here is what one witness said:

I look at these areas which I have mentioned here in the lakes, the mountains, the rivers, wetland areas, the forests, the estuaries and the sea, with saddened

heart and misty eyes, at the rape, pillage and destruction of the national assets of this beautiful land of ours.

Our rivers, lakes and wetlands or what is left of them, most of our wetlands have been drained, nearly all of our rivers have been interfered with, or would meddled with be a better phrase to use at this time. I see raw sewerage, dead livestock, and other obnoxious materials, pouring down our waterways out to the open sea, little wonder that these areas of mahi kai are no longer fit for human consumption.

Our forests, practically non-existent, and our native timbers, that is the chips, piled up in mountains along the quay sides of our ports awaiting export to foreign parts. I wonder at the mentality of all this carnage.

Is this the heritage that we of this generation are going to bequeath to our future descendants? Who is responsible?

I ask, where is the legislation that should be protecting these environments, and how good is it? (H13:29)

Several witnesses spoke of how the loss of traditional food resources and lack of land contributed to loss of culture. In a frank analysis of land loss and prejudicial effect on the people of Otakou, Bill Dacker cited this statement given by Hoani Tukao Wira to the 1891 Mackay inquiry:

The Natives have suffered since 1848 . . . in the loss of their mahinga kai and other privileges. Prior to that they were able to procure all their old descriptions of food. Now the rivers are stocked with trout, and the lagoons and lakes are dried up, their fish killed, and the wekas and other birds destroyed by the progress of civilisation . . . In former times their storehouses were full of food, but they had no use for whatas now. Have to obtain our supplies from the storekeepers now, which causes us to incur debts, as we are unable to maintain ourselves off the land. (F11:65)7

It is true that new foods were available to Ngai Tahu, but as Mr Dacker said, these became:

a matter of necessity rather than choice and a major measure of wealth in Maori terms was lost. From this loss the cultural bonds that were expressed through the exchange of foods, at hui, tangi and, formerly, kaihaokai, that bound the people to each other and to the land, began to suffer. (F11:66)

We were told by Rakiihia Tau:

I have tried to keep this evidence objective and unemotional but I would not like to leave the tribunal with the impression that the Mahinga Kai issue is just that. I feel a deep sense of outrage that the promise to preserve our Mahinga Kai has been broken and that what Mahinga Kai is still left is fast disappearing. I am also conscious that those who make the decisions to clear the bush, control river flows, extract water for irrigation and discharge effluent into the rivers, do so with little or no consideration for our feelings or our traditions. To be fair, there are some signs that some of the decision makers, especially the North Canterbury Catchment Board are now prepared to listen to our views. Nevertheless, apart from the Town and Country Planning Act, there is almost no statutory requirement that they do so. (J10:25)

Crown historian Tony Walzl reported that in the years following the Native Land Court grants in 1868 the availability of resources to Ngai Tahu decreased, but there is little evidence available to document this process (P10:85). The Smith–Nairn commission in 1879 opened up the subject and many Ngai Tahu detailed the loss of their food gathering places. Mr Walzl conjectured that by this time Ngai Tahu were generally realising that many of their land-based resources could not be returned and began to concentrate on fishing matters. Mr Walzl referred to Mackay’s summary of the position in 1881:

The increase of civilisation around them, besides curtailing the liberties they formerly enjoyed for fishing and catching birds, has also compelled the adoption of a different and more expensive mode of life . . .

A matter that has inflicted a serious injury on the Natives of late years, and for the most part ruined the value of the fishery easements granted by the Native Land Court, is the action of the Acclimatisation societies in stocking many of the streams and lakes with imported fish. These fish are protected by special legislation, consequently the Natives are debarred from using nets for catching the whitebait in season, nor can they catch eels or other Native fish in these streams for fear of transgressing the law. They complain that, although they have a closed season for eels, the Europeans catch them all the year round. In olden times the Natives had control of these matters, but the advent of the Europeans and the settlement of the country changed this state of affairs and destroyed the protection that formerly existed, consequently their mahinga kai (food-producing places) are rendered more worthless every year, and, in addition to this, on going fishing or bird-catching, they are frequently ordered off by the settlers if they happen to have no reserve in the locality. This state of affairs, combined with the injury done to their fisheries by the drainage of the country, inflicts a heavy loss on them annually and plunges them further into debt, or keeps them in a state of privation. All this is very harassing to a people who not long since owned the whole of the territory now occupied by

another race, and it is not surprising that discontent prevails, or that progress or prosperity is impossible. (P10:85)8

We will now look more specifically at some of those developmental consequences.

Deforestation

And a like carpet at your feet, in endless gradation of light and shade, the New Zealand bush spreads out in green waves downwards to the edge of the sea.⁹

A forest land of dull shade and tangled growth . . . a land of silence and mystery save for the voice of many waters.¹⁰

17.3.2 With these two quotations Hemi Te Rakau opened his evidence to the tribunal at Hokitika. Mr Te Rakau is not Maori but has an adopted Maori child. He changed his name because of his child. In a thoughtful submission he stated:

The plain facts are that without this massive forest presence and protection man would not have survived on Te Tai o Poutini coast.

The sad facts are that in spite of this massive presence, few examples remain of continuous forest from the mountains to the sea.

One fine sample is south of Okarito Lagoon stretching from the sea beach to the hills and valleys of the hinterland.

Another is in the area of Karamea Whakapohi in the north of the district, a superb stretch of continuous growth cover from alpine to marine vegetation, encompassing all stages in between.

All the other thousands and thousands of acres have been destroyed or modified in some form or other by fire, axe, chainsaw or diggers and bulldozers.

The diet of old time Maori would indeed be different today if they sought subsistence living off these denuded and altered lands.

This is not the place, in my view, to record the detailed destruction piece by piece; there are too many. Too many causes; too many reasons; too many cases of individuals; too much greed; too much carelessness.

It is the place, I feel, to reflect calmly, slowly, and peacefully without malice or retribution upon the tremendous loss to Maori traditional ways of this removal of forest cover and all the ecosystems that it once supported – gone forever, how do you place a cost co-efficient formula on that!

The only really obvious and sure fact in this whole episode is the reality that so much is now reduced to so little and with it the traditional ways and rights of a whole people.

I feel that the forests must be viewed not as a piece of real estate for use regardless, but also as a living being itself, living out its lifetime too alongside us, the human content.

Although we know the physical value in cubic metre terms, production yields and recreational throughputs we should take great note and awareness of the spiritual concept of this great life form. Our only advantage is that we are cunning and mobile, but can end up in a desert of depression without spiritual values.

The forests are not there for man's sole use, were not created solely for his benefit. Like the food in the vegetable garden they keep us alive; they produce the very air we breathe and if you destroy the planet's lungs then we are very, very dead.

The destruction of forests destroys the spiritual values of Maori people and those of other races and colours who recognise such things as Wairua.
(H36:10)

17.3.3 During the course of evidence given by Mr Ronald Little (P15a:4) showing the adverse effect of deforestation on fisheries, a graph was tabled and is now reproduced in figure 17.2

The line drawings illustrate the changing vegetative cover of New Zealand from the period 800 to 1840 and from 1840 to 1980. The original native forest was reduced by 20 per cent over the first 100 years and by a further 40 per cent between 1840 and 1980. Mr Little went on to examine the damage caused by the consequential land erosion and he outlined the chain of events that follow the need to cope with resultant flooding. Mr Little referred to the straight line engineering concept of river control with the resultant loss by draining of wetlands, lagoons and waterways which were fishery habitats. In answer to the question he posed himself as to why the increased erosion, flood intensity, reduced food availability, reduced cover and an unduly variable habitat for fisheries were allowed to happen, Mr Little said:

Perhaps the easy answer is that in any developing country with a struggling economy and a rapidly increasing population, an environmental conscience is a bit of a luxury. (P15a:4)

17.3.4 But as the forest disappeared so too did mahinga kai. One witness said this of North Canterbury:

Today almost all of the forest cover has disappeared. We would catch the odd Kereru (wood pigeon) which could be found in odd pockets of bush in the Waipara area or among the cherry trees at Lowburn. (J10:23)

The tribunal was given a map of Banks Peninsula showing the situation at about 1860 which is entitled “Rahua o te whenua manu kai” (J27). It shows outlined in green, the forest on Banks Peninsula which has been cleared off. The map shows a very large area of the central and north eastern parts of the peninsula which are covered in forest and bush. The map also shows 20 sites of sawmills, which is rather significant.

A consequence of this bush clearance was the loss to Canterbury Maori of the titi; farming destroyed the natural habitat, Ngai Tahu lost another mahinga kai.

Matthew Ellison spoke of the clearance of bush in the Puketeraki area and the loss of birds, berries and root food (H12).

Another witness, Kevin O’Connor, was concerned with the depletion of kai manu in and around Riverton. In general he attributed this to the loss of the areas of bush for timber and land clearance. He said that kaka had become very rare and the only place with weka within close proximity was at Pig Island. This witness also referred to the reckless killing of weka on Whenua Hou and submitted that tangata whenua should have been notified so that the meat, feathers and most importantly the oil which was highly prized for medicinal purposes would not have been wasted (H13:38).

Perhaps once again the needs of settlement prevailed but at a cost to both Maori values and future generations. We now look at the problem Maori faced in retaining access to their mahinga kai.

Loss of access

17.3.5 For some time after settlement began and before pastoral farming got underway, Ngai Tahu continued with their pattern of tribal foraging. Gradually however, land was cleared and livestock was introduced and Maori

began to understand better the European concept of ownership as fences and gates were erected and trespass warnings appeared. Many of the new settlers denied access to Ngai Tahu. Rawiri Te Maire said this to the commission in 1891:

All former sources of food-supply were cut off. If they went fishing they were threatened to be put in jail, and if they went catching birds they were turned off. The winter was the most suitable time to catch the Weka, and the Maori in olden times used to catch the weka, and . . . set up a rahui to protect the birds. The Europeans will not allow the Natives to kill the woodhens now, as it is said they are useful to kill the young rabbits. The tuis and all other birds are gone, and the roots of the kauru and the fern have been destroyed by fire . . . Wekas and other birds were also preserved, to be used during the period while reserves were protected. The people did not kill the birds out of season in those days, but now the European destroy them at all times. (H6:32)11

Rawiri Te Maire was supported by Tamati Toko who stated:

Some of us were nearly put in gaol for catching wekas on some of the runs. Donald McFarlane, of Hakataramea, and Mr. Hoare, of Station Peak, turned us off while catching wekas. Put a notice in a newspaper that Natives would not be allowed to catch wekas on their runs; wanted to preserve wekas for game, and to kill the rabbits; but afterwards the wekas were killed on these runs by dogs and poison. Have seen the wekas lying dead on the runs in numbers, but the station-owners would not allow the Natives to kill or catch them; they threatened to shoot us if we went on their land. All our old mahinga kai are destroyed, and we are left without the means of obtaining the food we used formerly to depend on. (H6:32)12

Rawiri Te Maire Tau referred to this evidence in his submission on mahinga kai and emphasised that the situation Tamati Toko described was totally alien to Maori thought and philosophy (H6:32). As a result of this gradual process of being denied access, Ngai Tuahuriri by the turn of the century had given up attempting to catch weka and kai moana except during the shearing season. The high country no longer offered weka and pigeon because the forests had been replaced by farms. We were also told that today high country mahinga kai are virtually nonexistent and those that do exist are protected by legislation.

17.3.6 The issue of restrictive laws and regulations being imposed on Ngai Tahu was raised by several witnesses. Mr Tau claimed Ngai Tuahuriri understood “that much of our birdlife must be retained by using modern equivalents of rahui”. He emphasised that the shortage of bird life was caused

“through European destruction”, implying the advent of settlement and its effects (H6:33).

There were the same touch of irony in this attitude as that in the Muriwhenua fishing claim when Northern Maori questioned the goodwill values being received by commercial fishermen for ITQs they owned under a quota management scheme set up to deal with a shortage created by the fishermen themselves.

Thus the claimants submitted that access was denied not only by the owners and occupiers of the land but also by legislation. We have already noted that the fishing easements granted in 1868 were ineffective and had disappeared either by drainage, sea encroachment or diversion.

17.3.7 The following details of more recent happenings were contained in Rawiri Tau’s submission (H6:33). Evidence was given by Rima Te Ao Tukia Bell, a leading kaumatua of Ngai Tuahuriri, who has since passed away.

Kua hahaea te ata
i runga o Rekohu
tiro tiro noa ana
Poua ma
Ka ngaro koutou i runga i o Otautahi

She recalled that Ngai Tuahuriri continued to use the Waimakariri during her childhood. However Ngai Tuahuriri stopped using the river as they were being continually fined for catching salmon and a type of eel which was unique to the river. She also recalled using the lagoon Tutae Patu and the river Rua Taniwha (Cam). Tutae Patu and Rua Taniwha were two waterways once in continual use by Ngai Tuahuriri. Mrs Bell elaborated on how, during the summer time after school, all the families would journey to Rua Taniwha to catch eel, trout, wai kakahi and wai koura. The children would remain upon the river until evening and, having obtained their dinner, would return to their homes. The waterways sustained many Ngai Tuahuriri families during the depression. This continual use of the river slowly come to an end as the water quality declined and the once abundant food became virtually non-existent. Today eeling activities on the Rua Taniwha have all but ceased for lack of eels. Any that are caught are not held in high regard as the quality of the food has declined. Wai kakahi and wai koura no longer exist (H6:35).

Tutae Patu is no longer used: the lagoon and surrounding area having been drained. Furthermore the low water quality from farm runoff has meant that tuna is no longer available to Ngai Tuahuriri in sufficient quantities.

W A Taylor in *South Island Maori* recalls how annual competitions were held in Tutae Patu to see who caught the most eel. Large quantities were caught from the lagoon but the practice stopped in the mid-1970s as the quality of the tuna declined (H6:35).

During the hearing the tribunal was told of certain instances in which reserves created for mahinga kai purposes lacked access as they were surrounded by privately owned land. The tribunal has indicated to several witnesses that there is provision in sections 415 and 418 of the Maori Affairs Act 1953 to apply for access to such reserves. In any event in a later volume the tribunal will be examining all these specific complaints.

Acclimatisation

17.3.8 Under this heading we look at the relationship between Maori and settler as each sought to fish in the fresh waters of the South Island and to take wildlife. We should perhaps refer first to the submission of Mr W B Johnson, director of the national executive of the New Zealand Acclimatisation Societies since 1970 (P15b).

His submission stated that these societies, which were formally established throughout the country, were primarily concerned with the creation of self-sustaining populations of introduced fresh water fish and wildlife of interest and benefit to the public. He stated that the general rationale for their activities arose from the perceived unsuitability of the indigenous fauna, both aquatic and terrestrial, to provide food, sport and industry in a manner which settlers desired and were familiar with. He emphasised that whilst the societies were undeniably of European origin, the end result of their endeavours has been egalitarian, and remains so to this day.

We were told that New Zealand is presently divided into 24 districts of which 22 are run by locally elected councils. The societies derive their present statutory origin and role from the Wildlife Act 1953 and the Fisheries Act 1983. We were told that the societies are not user groups in the popular sense, but rather fish and game management agencies of the Crown which are run on a day to day basis by the users and more akin to local government.

In his outline of the societies' work, which includes the employment of rangers, Mr Johnson emphasised the development of their role from species introducers to habitat conservers, habitat protection now being the primary ethos (P15b). He referred to the societies' use of the Water and Soil Amendment Act 1981 (P15b). We have already referred to Professor Clark's submission

(17.2.22) which criticised the “traditional non-participation by Maori in conservation matters” (P16c:1).

17.3.9 The emphasis of the societies has been historically on introduced species, based on European views of what was suitable for food and sport. Herein lies the reason for a divergent view between Maori, who saw the need to retain their own food resource, and the settlers and their descendants who had their own fishing customs to introduce into their new homeland. It is little wonder therefore, that there has been no cooperation between parties with such opposing views. The tribunal is sure that Professor Clark and the societies are motivated by the highest awareness of the need to preserve the quality of waterways. But we think that one of the reasons why there has been no cooperation, is that the activities of the society have been at the expense of the food resources of Ngai Tahu, a point clearly apparent from the evidence produced. This has probably precluded cooperation on matters of common interest because there is a fundamental disagreement between the parties on what constitutes that common interest, Professor Clark’s denouncement regarding the lack of Maori conservation ethic and non-participation in conservation matters is capable of being turned just as nicely by Ngai Tahu against settlers and their descendants for lack of conservation ethic and non-participation in conservation of Maori resources. Dealing more specifically with Waihora there is evidence of Maori complaints and grievances. There is also evidence of disregard by the Crown and indeed opposition from the settlers.

17.3.10 Crown witness Ronald Little referred in some detail to the introduction of certain fish species well known to the settlers:

In the aquatic environment the same range of good and bad introduction exist. Most damaging have been certain aquatic plants such as one of the oxygen weeds that can clog lakes and waterways. A great many aquatic invertebrate animals have gained entry, spread widely and have replaced native species. It is probable that this latter category were all accidental introductions, and largely unknown to most people. Many fish have been introduced successfully, many have been tried and failed. Overall introductions have been successful and now tend to dominate the native species.

The reason for this success was probably that New Zealand was long isolated and as native fishes developed without severe competition or without the presence of major predators they presented little competition to exotica. Native fish fauna was fairly scarce and many ecological niches existed that new entrants could fill. This was especially so as the nature of the rivers, lakes and streams was rapidly altering due to river control and forest removal. Introductions of sporting fishes first occurred as follows:

Brown trout 1867/68 (very successful over both islands, especially in the South);

Tench 1867 (localised occurrence only);

Perch 1868 (widely dispersed in the North Island, a few in the South);

Brook trout 1877 (a few locations only);

Rainbow trout 1878/83 (widely spread, especially in the North Island);

Quinnat salmon 1901–1907 (South island success, but mainly on the southern east coast);

Red Salmon 1902 (land locked stocks in the Waitaki River only);

Atlantic Salmon 1908–1911 (originally successful but now almost gone).

As well there have been various other introductions of varying success, from lake trout confined to Lake Pearson, to large goldfish populations in the Waikato basin. Unfortunately illegal introductions have occurred in recent years such as the rudd and koi carp, final effect of these species is still unknown. The effect these newcomers have had on native species, and especially those species of importance to the Maori, is of interest.

There is no doubt that salmonids and a few others, out-compete native species generally and can seriously affect native invertebrate populations. Eels on the other hand do well in the presence of trout and utilise them for food to some extent. The general consensus of scientific workers is that the decline in native species was due to changing land use rather than from competition from exotic fish.

The one doubtful case is that of the New Zealand grayling, now extinct yet present in large numbers at first European settlement. Allan (1949) did not consider the primary cause to be exotic fishes but rather altering land use. McDowall (1868) believed that the spread of trout and human exploitation also played a part.

The advantages of some introductions are also great. The biomass and availability of trout and salmon are very high today and present a valuable food source previously unavailable. It is true that licences are required to fish for trout or salmon yet they represent resources additional to those originally present and monies from licence purchase are used for fisheries management. (P15a:8–9)

Although Mr Little's views above would seem to indicate that eels and trout are compatible river residents, there was some evidence that the introduction of trout and salmon had some effect on eel populations, particularly at the elver stage of upstream spring migrations (T4a:47). The reverse may probably be said of the eels' propensity to take fingerling trout and thus again we see an area of possible conflict in the interests of Ngai Tahu and the acclimatisation societies. We have already seen the feeling generated by the prosecution of Ngai Tahu fishermen in the rivers and waterways. No doubt many of those prosecutions have been brought by rangers performing their inspection duties.

The Maori koaro or mountain trout was commonly found inland in mountain streams and the main upland alpine lakes. Koara populations have declined as a result of habitat loss, but in addition many lake populations have declined by the predation of the introduced trout (T4a:50). Maori smelt, known alternatively as parohe, paraki (parariki), pipiki, tiki-hemi and inangi or maneanea, are prized as a food, yet these too have suffered through the attentions of trout (T4a:53). There are also other freshwater species that were affected by the introduction of trout such as grayling and koura.

17.3.11 How did Ngai Tahu react? Here is one claimant's view:

When the European came he brought among other things sheep, gorse, stoats, wheat, fruit trees and trout. With the Pakeha Trout came his laws.

They were placed in our waterways, our garden, Te Marae o Tangaroa. For me to catch a trout, I have to pay a licence for this privilege even though it is destroying my garden. It is an offence according to the laws of this land to take property that belongs to another. I believe this to be a just law, it is why our ancestors signed the Treaty. Now, if you are Maori, and you have property, should not the same law apply? Should not the person who put the Trout in our garden pay rental for this privilege. Should not those who take from our garden obtain permission also, and if required pay for this privilege. (J10:10)

The tribunal was told by Ngai Tuahuriri that they had always utilised their area in a conservative manner. They resented being fined for taking more than the limit of kai awa and kai moana when their food was intended for distribution over a wide family base. Many families survived the depression years by the distribution of kai awa and kai moana according to custom. An old saying of the tribe was "Silver and Gold have we none, but what we have we will share" (H6:23).

We referred earlier to the evidence of Kelyyn Te Maire who was critical of the management of water fowl by the acclimatisation society (H10:33).

Kelvin Anglem spoke of the shortage of eels in the Opihi River which once supplied in one night their whole winter's supply. He told us of eel drives designed to protect young trout, when hundreds of eels were slashed with lengths of hoop iron and allowed to flood down the river or left to rot on the banks (H10:23).

The following was reported to the Mackay commission in 1891:

The Natives complain that they are now debarred from eeling in the Taieri River in consequence of its being stocked with imported fish and they are badly off for a fishing-place. They used to do eeling at a lagoon near the Waipouri Lake but were turned away from there, by surrounding European land owners and have nowhere to go now. They are very desirous that the lagoon should be secured as a fishing-place for them. (F11:52)¹³

Finally we refer once again to an extract from Mackay in 1881, incorporated in Crown historian Tony Walzl's evidence:

A matter that has inflicted a serious injury on the Natives of late years, and for the most part ruined the value of the fishery easements granted by the Native Land Court, is the action of the Acclimatisation societies in stocking many of the streams and lakes with imported fish. These fish are protected by special legislation, consequently the Natives are debarred from using nets for catching the whitebait in season, [n] or can they catch eels or other native fish in these streams for fear of transgressing the law. (M14:85a)¹⁴

17.3.12 May we therefore refer back to Professor Clark's criticism of lack of Maori involvement in fish and game management (P16c:1) and suggest that he has perhaps not understood how the activities of acclimatisation societies may have been anathema to Maori. Not only were the introduced fish seen as decimating the indigenous species but the accompanying legislation, regulations and trespass notices greatly restricted the centuries old access to the waterways. That the Ngai Tahu Trust Board in 1986 invited the National Council of Acclimatisation Societies (NCAS) to meet with them to discuss Waihora was a clear indication that Ngai Tahu accepted a need to consult with others. Time did not permit NCAS to attend and the society was concerned at the suggestion raised as to "mismanagement in our recent past". Perhaps the society may have taken an unduly defensive reference from the word "mismanagement" No doubt discussion around a table would have helped everybody.

Our trout and salmon recreational fisheries are an important part of this country's resources and they are well protected. The tribunal however, considers

it important that consultation takes place with Ngai Tahu regarding decisions which affect their mahinga kai.

Although there may be marked differences of view, Ngai Tahu should be part of the policy-making process. They have strong grounds for their grievance that they have lost much of their mahinga kai and that what they do have left is certainly not well safe-guarded.

Water supply

17.3.13 The tribunal journeyed up through inland Canterbury from Timaru through Fairlie to Lake Tekapo and across to Lake Pukaki and Lake Ohau, thence to Twizel, Te Ao Marama (Omarama) – the place of Te Maiharoa's settlement – down past Lakes Benmore, Aviemore and Waitaki and on to Oamaru. We were each presented with a brochure produced on behalf of Ministry of Works and Electricorp explaining how this network of lakes had become one of the country's major sources of electricity. A system of man-made canals was constructed to ensure maximum utilisation of every drop of water.

Neither Maori nor settler could surely have contemplated in the last century what development would take place with these lakes.

Evidence from Mr J P Robinson, Hydro Group Manager of Electricorp was presented by Mr M France (Q16). A map of all power stations in the South Island was produced. The evidence explained how the corporation was committed to ensuring that the clean pure water used for power generation remained in that state after use. Emphasis was laid on the recreational uses created by artificial lakes and the need for strict observance of environmental principles. Mr Robinson stated that Electricorp welcomed full consultation with Ngai Tahu on the issue of water right renewals. A full explanation in very clear terms was given at the Waitaki generating system and its main features.

Proposals for lake levels and recreational pursuits were also explained. Reference was made to the Opihi River and to a public statement that if the transfer of water to augment the Opihi River was genuinely and clearly in the overall public interest, it would not be opposed by the corporation. Further evidence was given of measures taken to avoid pollution at camping sites by the installation of removable tanks.

It was apparent the corporation was anxious to avoid any human pollution of water. We were particularly pleased that these firm assurances were given

and that the corporation looked forward to a better process of consultation with Ngai Tahu.

17.3.14 The tribunal inspected the Opihi River having heard submissions from William Torepe about the lack of water in this important mahinga kai of the Arowhenua people (H10:2). It was very evident that there is a lack of water in this river. Mr Torepe attributed this to the issue of permits by the Regional Water Board to allow the Timaru City Council to draw off water for domestic supply. Permits have also been issued to farmers for irrigation of farmlands. Apparently this drains off the lower Opihi River which is dry for at least three months of the summer with the consequent effect on the food resources.

Mr P M Sagar, a fishery scientist with MAF, was charged with researching the effects of irrigation, hydro electric development and other water management practices on the freshwater environment (P16d).

The report's purpose was to provide us with information regarding the potential effects on fish of increasing the flows of the Opihi River. At the same time Mr Sagar explained to us the effects of the current low flows on the fish in the river. This river has been affected by interruption of its flow since about 1936, when the Levels Plain Irrigation Scheme began operation. These interruptions have created a number of problems for fish stocks which were explained in detail to us. This evidence confirmed what was evident to us from visual inspection.

Mr Sagar recommended there should be modest increases in the flow of the Opihi which would improve the fisheries values of the river, but he said some caution was necessary with respect to the input of glacial flour (silts) if the river was to be augmented by water from Lake Tekapo. He said that the Opihi River is clear and contains no silts and that moderate to low silt loads could have a significant and deleterious impact. For this reason the river flow should fluctuate.

Mr Sagar believed that changes in land use within the catchment of flood protection works had all contributed to modifying the character of the river by changing the flow pattern and substrates in the river. Obviously the solution is not an easy one.

There can be no doubt that the extraction of water from rivers for irrigation, power generation, domestic demand, factory use and stock watering have resulted in dramatic reduction to a great many waters.

Mr Little stated that not only does the water loss reduce fisheries habitat, migration routes and cover, but it results in changes in temperature, increased weed growth and even destruction of the river (P15a:10). Water intakes at the dams also affect fish and invertebrate fauna as well as creating barriers for fish movement.

Many early dams have inadequate protection for fish although this is being provided for in recent constructions (P15a:10). The evidence we heard from Electricorp about the creation of new opportunities is unfortunately offset by the loss of traditional fisheries in rivers and streams. The demands on the water supply for so many uses, coupled with river alignment and the drainage of creeks and swamps, have all adversely affected Ngai Tahu's access to mahinga kai. It has also contributed to a much more serious consequence – the problem of pollution.

Pollution

17.3.15 There should be little need for this tribunal to awaken any New Zealand conscience on this issue. Wherever we went around Te Wai Pounamu this subject came before us as witness after witness recounted the sad effect of pollution on mahinga kai. Nor is it just a problem for Ngai Tahu. We went to several sites to see evidence of what we were being told. As good a summary as any was provided by Kelvin Anglem of Arowhenua as he indicated the factors such as sewerage disposal, wool scour effluent, dairy factory discharge, aerial spraying and topdressing, farm waste and irrigation diversion which had all succeeded in reducing the once proud Opihi and its estuary from an important breeding and feeding ground for migratory birds and fish into something unfit for humans and animals to swim in. Mr Anglem was strongly moved as he concluded his evidence:

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

We were given many instances covering the whole tribal area of Ngai Tahu and the whole range of human activity both past and current. The following table provides a few examples of these complaints from different parts of Ngai Tahu's territory.

Reference	Nature of Activity	Effect
H8:114 H8:43	Gold mining on west coast.	Destruction of eel habitat.
H13:2	City sewerage and rubbish dump, wool scouring, paper mill, freezing works.	Destruction of kai moana
H11.2	Nutrients from hospital and sewerage.	Pollution of cockle bed
H13:39	Sewerage discharge. Discharge from freezing works, paper mills, hide tannery.	Destruction of kelp and kai moana
H6:22	Wastage from forest mill debarking plant, piggery effluent.	Pollution of water
C13	Discharge of industrial wastes, sewerage discharge, agricultural waste, textile mill.	Pollution of kai moana

17.3.16 We referred earlier to evidence given by Mr W Torepe (17.2.5). This witness said that dirty and greasy effluent is also discharged into the Waihi River at Winchester (H10:2). He claimed that the majority of streams and creeks within Canterbury, notably those mentioned in his submission, are now just flood channels. The supply of fish in the Opihi River is now depleted as a result of water reduction.

Mr Torepe also referred to the effect of heavy land stocking around Lakes Tekapo, Alexandrina and McGregor, for which the Maori names are Takapo, Taka Moana and Whaka Ruku Moana respectively. He claimed also that wild fowl droppings at Lake Wainono had made the water quality suspect. The beach in the vicinity of the Pareora River may be polluted by freezing works discharge of untreated remains.

The witness tabled a report from the water resources manager of the South Canterbury Regional Water Board (H49). This report is dated 8 April 1988 and was supplied to Mr Torepe. It is a report on water quality concerning the Waihou River, Lake Wainono, Opihi River, Temuka River, Orari River, Rangitata River and the coastal zone. Of importance in this document is the problem of eutrophication within the Waihi–Temuka River system, notably in the lower Orari River. It is stated that eutrophication results mainly from the introduction of nitrogen and phosphorus. The application of fertiliser on farmland is considered the major source of nitrogen and is therefore regarded as difficult to regulate. Domestic sewerage is believed to be the major source of phosphorous. It is proposed that upgrading the oxidation ponds at the Geraldine and Temuka treatment plants will greatly reduce phosphorous levels. Any tertiary treatment, such as the discharge of effluent from oxidation ponds into the specially constructed wetland area would be of immense benefit. These areas, comprised of raupo or other species, would successfully retain the effluent for a period of up to 10 days and strip it of nutrients. It is felt that little would be gained in regulating the effluent at the two

woolscouring plants within the Waihi/Temuka River system because although detergents used in woolscouring increase phosphorous levels, it is only the rinse water which is legally allowed to be discharged and this has low nutrient loadings. However, the heavy liquors produced, if illegally discharged, would greatly increase the phosphorous loading. The policing of woolscouring discharge is felt to be a possible problem.

17.3.17 It is clear from the Regional Water Board's report that there are certainly serious water quality problems that are likely to arise in the Temuka River and indeed in other rivers in the future. There is no doubt in the tribunal's mind after viewing the scene in the lower Opihi River, that diverse sources of nutrients from adjacent farmland and the shortage of water in the river generally have changed the structure of this river with a serious effect on the mahinga kai qualities.

There is no doubt that the South Canterbury Catchment and Regional Water Board is aware of the problem but it is also apparent that the sources of the problem are difficult to regulate against. The board reported that policing the activities of the two woolscourers that discharge into the river system will continue to be a problem since the board has neither the staff nor equipment to continuously monitor the quality of the effluent.

The tribunal considers that this is just one of the many areas of the South Island where pollution of various kinds have affected water quality and mahinga kai. The effect of it all is that the tuna have been reduced, the kanakana have become extinct and whitebait have been depleted by the destruction of breeding grounds due to river works.

17.3.18 Although British colonisation has taken its toll on land based resources it was not surprising that most of the current pollution complaints were directed at fisheries. For many years following European settlement Ngai Tahu had reasonable access to tuna and other kai moana, which were regarded by the newcomers and indeed down through two or three generations of their descendants, as unacceptable to their palate. Recently a change in the eating habits of New Zealanders has occurred. Smoked eel and other kai moana such as paua, mussels and pipi are now considered delicacies. The entrepreneurs who saw potential export markets in these foods have contributed to depleted resources of Maori traditional food. Faced with the effects of both pollution and exploitation, it is not surprising that Ngai Tahu grieve over their difficulty in offering their traditional kai at tribal hui.

We have not felt it necessary under this topic to refer to the spiritual significance that is attached to water. The tribunal, in earlier reports dealing with the Manukau Harbour, Kaituna River and the Mangonui Sewerage Report

and Motunui Waitara, has dealt with the spiritual aspect as well as the biological base which is part of the strong cultural attitude towards water quality. We can report that several witnesses raised this matter with us and their submissions were well understood by the tribunal.

17.3.19 In conclusion on this particular question, counsel for the Crown suggested that present day pollution did not exist until comparatively recently and is not a problem endured peculiarly by Ngai Tahu. Counsel submitted there were limits to what any government could have done and can do about it. It was submitted that programmes for the eradication of pollution were being put in place and that more are needed but these are costly and could have economic side effects for Maori as for the public generally. The tribunal does not agree that pollution is of recent origin. Pollution of Maori food resources can be traced back to early settlements, as for example in the gold mining activities in the Westland rivers (H8:14). A Crown witness, Mr Rob Cooper, said the most notable early pollution was caused by the sawmilling industry (P12:9). He stated that sawdust in waterways was quite common last century.

We do agree that there has been a change in the extent of pollution as development has taken place. We acknowledge there is a much more active interest being taken in anti-pollution measures and the maintenance of water quality. In this section we are simply assessing that pollution along with other contributing factors affected Ngai Tahu mahinga kai.

In our view the evidence shows that pollution has certainly damaged the food resource.

17.4 Ngai Tahu Grievances and the Crown's Response

Statement of grievances

17.4.1 In the previous section we looked at the impact of settlement on Ngai Tahu and examined the various grievances expressed by a number of witnesses. We now record the general mahinga kai grievance as stated by the claimants:

According to the Treaty of Waitangi and later specifically confirmed by the Kemp Deed the Ngai Tahu people were guaranteed "the full, exclusive and undisturbed possession" of their *kainga* and their *mahinga kai*, but the acts and omissions of the Crown and agents of the Crown have in fact dispossessed

Ngai Tahu of their *mahinga kai*. Ngai Tahu have thus been deprived of a major economic and sustaining resource in their *mahinga kai*. (W6)

As can be seen from this statement, the *mahinga kai* claim was based upon the duty owed by the Crown under article 2 of the Treaty and, in the case of the Kemp purchase, on the contractual terms of the deed.

From this very general statement of the claim the claimants developed five heads of grievance. They were as follows:

1. That the Crown has failed to ensure the adequate protection of the natural resources of Banks Peninsula; that it has allowed the wholesale destruction of the forests and other natural vegetation to the detriment of native fauna, water quality and soil conservation, and that the resulting siltation of stream beds and tidal waters has been to the detriment of fish and birdlife; that the Crown has allowed excessive pollution of Wairewa (Lake Forsyth) so that this great inland fishery and eel resource is now almost extinguished; and that it has allowed the depletion of *kaimoana* in the bays, harbours and coasts through pollution and excessive exploitation. (W3:3)

2. That the Crown to the detriment of Ngai Tahu failed to fulfil the terms of the agreement between Kemp and Ngai Tahu in respect of Kemps Purchase, in particular—

(a) Ample reserves for their present and future benefit were not provided; and

(b) Their numerous *mahinga kai* were not reserved and protected for their use. (W4:2)

3. The denial of access to certain *mahinga kai* accentuated the effects of landlessness. (W6: *mahinga kai*)

4. The drainage of swamps and lakes, the felling of bush, the conversion of land to agricultural use, and the introduction of acclimatised species destroyed or reduced the value of *mahinga kai*. (W6: *mahinga kai*)

5. The Tribe has been denied effective participation in resource management and conservation, such as administration of protected areas and of waterways. It also, on a smaller scale, has meant that such Tribal rights as those to the bones of stranded whales have been ignored. There has been no attention paid to the preservation of resources of special tribal significance, such as *pikao*. (W6: *mahinga kai*)

17.4.2 Counsel for the claimants made the following points in relation to mahinga kai, which we have summarised from his extensive closing address (W1):

- Ngai Tahu have always asserted that the term mahinga kai means “a place where food is gathered”;
- Governor Grey had full knowledge of the importance of a wide range of hunting and gathering areas to Maori and that a sudden reduction to a cultivating economy would involve hardship and loss;
- Grey, Eyre and Mantell applied a policy to leave Ngai Tahu with as little land as possible so that they would be encouraged to take up work for the settlers;
- mahinga kai was a necessity of life to Ngai Tahu. In 1880 there were or had been 2000–3000 places where food was gathered in seasonal activity and in some cases over long distances;
- Waihora and Wairewa were important lakes and Kaitorete contained the largest pingao plantation in the country. These lakes were polluted and over exploited by commercial fishing;
- there has been large scale pollution of food resources everywhere and settlement has destroyed, and affected access to, mahinga kai. Ngai Tahu has lost access to the food resources as well as protection of that resource;
- there has been no consultation with Ngai Tahu over drainage, irrigation and reclamation, and decisions of central government and local authorities entirely lack a Maori dimension;
- mahinga kai still has immense cultural significance to the iwi in the gathering and sharing of food. There is still a need not only for food resources, but for natural dyes and fibres and wood for carving; and
- the fresh water and sea fisheries are of great importance.

The Crown's response

17.4.3 In her opening submission on mahinga kai (P9a) Crown counsel, Mrs Kenderdine, looked at the land purchase deeds in trying to ascertain the details of what Ngai Tahu sold. She noted that the only deed to which any reservation of mahinga kai was made was in Kemp's deed.

Mrs Kenderdine endorsed Tipene O'Regan's statement that:

The key point is, of course, that if there is a duty to protect then the person charged with that duty should be able to state the nature, shape and the extent of what he is charged with the care of. (H17:2.6)

Crown counsel went on to say that in a great many instances the Crown did not understand the nature, shape and extent of what it was charged to protect for the simple reason that the tribe itself had varying definitions of mahinga kai and was in the process of great change.

Crown counsel suggested that a valid approach was to look at reserves which were asked for and not given and assess the significance of those areas to the preservation of traditional resources where those requests were realistic and reasonable.

The Crown agreed that Ngai Tahu were in competition with the settlers and were increasingly prejudiced by the settlers' activities, in particular by drainage and by denial of access to water ways. The Crown said that this produced complaints which led, in 1868, to the determination of the Native Land Court, presided over by Chief Judge Fenton, which made awards of so-called fishery easements to meet the need which had arisen, thereby attempting to fill a gap which had appeared in the Mantell reserves.

Mrs Kenderdine referred to the fishery easements made by the court. It was contended that the creation of the fishing easements, which in most cases were implemented by the grant of reserves adjacent to lakes and rivers, was in fulfilment of the Crown's duty under the Treaty of Waitangi to meet the need of Ngai Tahu arising as a consequence of European settlements following the sale of lands. The Crown therefore argued that through the Native Land Court in 1868, a remedy appropriate to the circumstance was granted.

Mrs Kenderdine stated that the passing of the Water and Soil Conservation Act 1967 was in response to the nationwide modern problem that there was not enough water available for all users and that the system of control or rationing had been necessary. She also submitted that as yet there had been no judicial consideration of the position of aboriginal titles rights or Treaty rights apart from *Huakina Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

Omission of mahinga kai from deeds of purchase

17.4.4 Crown counsel went to considerable trouble to analyse all the purchase deeds. Kemp's deed is the only one that mentions mahinga kai. Mrs Kenderdine submitted that the Crown would expect to take the land unencumbered and without attached aboriginal rights.

The important question that then arises is whether in all the purchase deeds other than Kemp's, Ngai Tahu not only agreed to part with their lands but also with their mahinga kai.

Elsewhere in this report and in other reports of the tribunal there are references to Lord Normanby's clear injunction that Crown representatives were not to purchase any lands, "the retention of which by Maori would be essential, or highly conducive to their own comfort, safety or subsistence" (A8:I:15).¹⁵

In the light of knowledge by Crown officials that Ngai Tahu needed access to these resources there was an obligation on their shoulders to make adequate provision for these needs.

Only in the Rakiura purchase, relative to the taking of titi, and in the Kai-koura deed, where a reserve was set aside as suitable for traditional needs, were Ngai Tahu interests recognised. To the extent therefore that the deeds of purchase did not set aside specific mahinga kai reserves or provide adequate lands to ensure Ngai Tahu had access to their traditional resources the Crown negotiators were in breach of the Treaty. The tribunal does not accept that in entering into the various purchase deeds Ngai Tahu were doing so on the understanding they were thereby surrendering all future access to traditional food resources which they needed for subsistence and trade. The evidence which this tribunal has heard clearly shows that the tribe continued to exercise its mahinga kai rights after the respective sales and in most cases relied on those resources to live.

Crown's closing submission on mahinga kai

17.4.5 The Crown addressed two issues in closing submissions (X3:28–72). The first inquired into the meaning of the words "mahinga kai" as used in the Kemp deed.

It was important to the Crown's argument to limit the definition of the term "mahinga kai" to mean "cultivations" because if that meaning was fixed, the Crown was only thereafter required to reserve and protect cultivations. In

chapter 8 the tribunal found against that limited use of the term and interpreted those words as meaning “those places where food was produced or procured by them” (8.9.12).

As an alternative the Crown argued that if the tribunal applied the wider definition, the evidence showed that post-1848 Ngai Tahu continued to have user access for some time and that as indicated by the claimants’ witness, Professor Anderson, Ngai Tahu’s traditional economy would have disappeared by the late nineteenth century (X3:41). Crown counsel was seeking to establish that Ngai Tahu had abandoned voluntarily their traditional mahinga kai.

We cannot accept this alternative argument, and we doubt that Professor Anderson would agree to that interpretation of his statement. We believe he was inferring that the consequences of settlement would be to effectively remove access by Ngai Tahu to their food resource. We have seen in the previous section how that in fact did occur. It was not a matter of choice.

17.4.6 In the second issue addressed in closing submissions, Crown counsel examined the Crown’s general responsibility under the Treaty to ensure Ngai Tahu were left with an adequate resource base from which their society and economy could be sustained and developed.

Mrs Kenderdine made the following points:

- the claimants had not given full weight to the words “so long as it is their wish and desire to retain the same in their possession” in article 2 of the Treaty;
- the term “resources” must be seen in relative terms. Ngai Tahu habits changed after settlement. They adopted some European foodstuffs and had abandoned or were in the course of abandoning mahinga kai;
- The Crown’s obligation to preserve and protect applied only to those resources which Ngai Tahu had used in the years immediately preceding the purchase and which they wished to continue using, ie, those which they did not wish to abandon;
- the claimants have wrongfully sought to protect resources once used but now discarded. This approach denies the dynamics of history and the subtleties of human interaction;
- the claimants’ food gathering activities over 1840–49, from evidence supplied by their witness Dr Anderson, were limited to gardening and eeling;

- Ngai Tahu had moved into the European resources and technologies and were using these in place of other traditional vegetables such as fern root. Alternations had taken place in Ngai Tahu lifestyle;
- there was little real knowledge or evidence of Ngai Tahu economy in the 1840s; and
- an analysis of each sale reveals Ngai Tahu awareness and involvement with the European economy and Ngai Tahu had abandoned all but the most important traditional resources.

The thrust of the Crown's argument therefore was that Ngai Tahu had abandoned their traditional resources and had moved voluntarily into the changing society and economy with its new food resources. Presumably therefore there was no ongoing responsibility or need on the Crown's part to protect old food resources and there could be no breach of Treaty principles.

This argument is founded on the notion that Ngai Tahu at the time of signing the agreement could foresee the future and were prepared to relinquish their mahinga kai – apart from the most important resources – in anticipation of other benefits to come from European settlement.

The evidence shows clearly that Ngai Tahu had no such perception or desire. It is of course correct that Ngai Tahu moved to adopt the introduced resources, but they continued their traditional food gathering and relied on it for sustenance. By 1868 however, pressure was coming on the food resources particularly those near to settlement (P10:96). Ngai Tahu did not abandon their own resources, rather they were shut out from those resources by the impact of settlement and were compelled to adopt a different, more expensive life style. We have also dealt with this Crown submission in chapter 3 (3.3.10–13).

By the end of the nineteenth century Ngai Tahu had lost most of their inland and forest resources and their fisheries were under threat. Their relinquishment of mahinga kai was not the result of any deliberate decision by the tribe but directly due to the inadequacy of reserves and exclusion by the needs of settlement. There is no evidence that they willingly parted with their rights and considerable evidence that they wished to retain them.

17.5 The Tribunal's Conclusions

Reasonable expectations of the parties at the time of sale

17.5.1 It may be useful at this point to assess what reasonable expectations and attitudes Ngai Tahu and the Crown respectively would have had when the purchase deeds were signed in Te Wai Pounamu. We draw these attitudes from the evidence and will then look at them in relation to the Treaty principles.

Looking first at Ngai Tahu we consider these factors would have been important to them:

- retention of rangatiratanga over the resource in the form of specific and adequate reserves;
- protection of the resource by the Crown and consultation with the Crown in matters concerning preservation of the resource;
- sharing of their food resources with the new settlers; and
- sharing the settlers' resources with Ngai Tahu.

We consider the Crown may have had in mind:

- that Ngai Tahu should have access to their mahinga kai as long as that access was not an interference with the occupational rights of the settlers; and
- that some reserves should be set aside for mahinga kai but that in time Ngai Tahu would take up pastoral farming and commercial activities which would with intermarriage lead to assimilation of Maori and (by) European.

Bearing these considerations in mind we must now look at what happened to these expectations and measure these consequences against the Treaty itself.

Grievance no 2: loss of rangatiratanga

17.5.2 In earlier parts of this report we examined very fully the duty of the Crown under article 2 to ensure that Maori were left sufficient land for their present and future needs. The retention of sufficient land for mahinga kai purposes is therefore an important corollary of that principle. It was incumbent

on the Crown to set aside specific reserves to protect those rights. As we see the position, it was not only necessary for the Crown to protect the principal food resource areas, it was also the duty of the Crown to provide the tribe with extensive land so that it could adapt itself to the new pastoral and agricultural economy. This new economy brought with it the new resources that were in time to replace some of the traditional mahinga kai. To take part in this process Ngai Tahu had to have reserved to them substantial areas of land which could be developed and farmed. We described this process and principle in detail in 10.7.12 when dealing with the Murihiku sale. It has been conceded by the Crown that inadequate reserves were granted by the Crown and Ngai Tahu were also gradually denied access to food resources (X3:72).

The Crown suggested that perhaps these inadequate reserves were explainable by the Crown's prediction that Ngai Tahu would disappear as a tribe through intermarriage and assimilation and that the tribe was also numerically small. The evidence presented to this tribunal certainly suggests these may have been pertinent matters in the mind of Governor Grey and his negotiators. But these persons also knew that Ngai Tahu travelled far and wide in their gathering of kai. Not only were they wrong in their prediction about the disappearance of the tribe, they were also wrong in applying that belief by reducing the size of reserves. They were acting quite contrary to the policy laid down so clearly by Lord Normandy and article 2 of the Treaty. As we stated when dealing with Waihora, the lack of an adequate land base to enable Ngai Tahu to develop as farmers and commercial people, left Ngai Tahu as a disintegrated tribe without any power to take a visible part in the political economy of the nation. This lack of reserves – the landlessness of Ngai Tahu – was also the reason they were not heard properly on further loss of their mahinga kai as settlement developed. In the end, Ngai Tahu finished up with major loss of their mahinga kai and virtually no land. The inadequacy of reserves left Ngai Tahu on a most unequal footing to compete in the growing economy. As Mr Walzl pointed out, Ngai Tahu by 1891 held their land in a confused jumble of 'legal' holdings, few of which were of use to the individual. The Crown suggested that the fishery reserves set aside by Chief Judge Fenton following the 1868 hearings were in fulfilment of the Crown's Treaty obligations. We have seen that despite Judge Fenton's emphasis on the importance of Waihora, not one fishery reserve was created over the lake. As to the other reserves, the Crown's own witness informed the tribunal that these had been destroyed over the next 15 years (P10:97). In 1879 the Smith–Nairn commission in respect of the Kemp purchase reported as follows:

The evidence before us shows that lands which, by the terms of the Ngaitahu deed should have been expected, have been Crown-granted to European settlers; that reserves that were promised which have never been made; and that

eel preserves, kauru groves, and other sources of food supply, which, under the term “mahinga kai”, were not to be interfered with, have been destroyed. In many ways the terms of contract have been violated. To restore is impossible. (M14:88)16

With the loss of their land and food resources, Ngai Tahu faced extinction as a tribal people. Individualisation of title after the Native Lands Act 1865 contributed greatly to the disintegration of their political system and brought extinction even closer. Ngai Tahu were victims of settlement because it appears it was not intended by the Crown’s agents that they should have ever have a stake in it.

17.5.3 Put another way, the Crown has failed primarily in its duty to set aside a sufficient endowment for Ngai Tahu in the form of land so as to allow Ngai Tahu not only reasonable access to mahinga kai but also an economic base to meet the new and changing economy. We consider there has been a breach of article 2 accordingly. Ngai Tahu were detrimentally affected by this breach.

Grievances nos 1, 3, 4 and 5: protection of resources and resource management

17.5.4 These remaining four grievances mainly relate to the Crown’s failure to protect mahinga kai resources during the continuing process of the developing economy of Te Wai Pounamu after settlement. There is an overlapping in some cases.

The tribunal believes that these grievances derive to a large extent from the Crown’s failure to create adequate reserves for Ngai Tahu. Our finding that there has been a breach of Treaty principle on this latter question, therefore, is a partial answer to complaints that later actions or omissions of the Crown such as drainage of swamps, deforestation, water quality control may not have affected Ngai Tahu so badly if the tribe had been given sufficient reserves of its own. However there are issues such as pollution and the introduction of new species that need to be looked at in relation to the Treaty principle regarding the duty to consult referred to in chapter 4, The claimants urged on us the need for a strong statement by the tribunal as to the right that Ngai Tahu have to be consulted on decisions being made by central and local government on resource management and conservation. That request was made by Mr Temm, perhaps in philosophical acknowledgement that there was more to be gained in looking forward to better things than in looking back at past failures.

We have examined in some detail how Ngai Tahu have been affected by the impact of New Zealand's developing society and there is no doubt that the many things of which the tribe complain are completely accurate. As stated by one witness, it seems to be a universal evil of colonisation that the environment suffers as a result. And it seems axiomatic that remedies come too late and are only considered when the evil has taken place. Development is not always bad and many good things flow from it that are of great communal benefit, but they may have harmful effects to a minority.

It is an easy matter to lay blame generally but it is not always easy to apportion that blame with exactitude or to get agreement that the damage complained of is worse than the benefit obtained. Ngai Tahu have suffered the destruction of their traditional food resources from all that has flowed from New Zealand's developing economy. They have much to complain about. There is certainly a need for better consultative processes to be put in place as Mr Temm so strongly stressed.

We shall come back to that important question shortly. Our present difficulty relates to the rather general nature of the four remaining grievances. The extent of the damage caused to mahinga kai by settlement was made abundantly clear in submissions and evidence and by the inspections of the tribunal. We have no problem in reaching a conclusion on that issue. It is much more difficulty however, to reach a finding that the loss of mahinga kai can be attributed solely to the Crown as a breach of its duty to protect under the Treaty. In many cases the acts or omissions have occurred as the result of individual or group activities; be they farmers, foresters, fishers, miners, contractors and indeed the whole spectrum of society including citizens, local authorities, commercial and industrial firms. We are not dealing with a single cause and effect situation as might well be the case in other specific claims such as sewerage discharge into a particular river or inshore fishery. The tribunal is charged under the Act to determine whether any particular policy or practice, act or omission is that of the Crown.

17.5.5 Most of the evidence clearly showed the harmful effects of a developing society but in many cases there have been several contributory causes, some of which may have been within existing laws and some not. What the claimants have sought to express is that governments have exercised insufficient restraint in their policies over 150 years to prevent the total disaster which has occurred to Ngai Tahu traditional food resources. That might appear to be a simple issue to respond to but it is a much more difficult matter to position that allegation within the jurisdiction given to this tribunal by section 6 of the Treaty of Waitangi Act 1975. This tribunal is required to identify with some precision the particular acts or omissions which have prejudiced Maori and which infringe the Treaty. We have no doubt that the

claimants, if put to that exacting and detailed task, may well be able to perform it in relation to many of their claims. What they have chosen to do in this huge claim is to present a general picture of how Ngai Tahu have suffered serious harm as the combined result of many different causes over which they had no control. If the tribunal had been required to examine in detail each of the contributory causes outlined by many witnesses we would never have finished this inquiry. When we later report on ancillary grievances we will be dealing with a number of specific matters which allege violation of Treaty principles. These will be examined individually but there has been a wealth of general material given by witnesses concerning mahinga kai outside specific claims advanced by the claimants. We find it difficult therefore to determine that each of the general grievances nos 1 and 3–5 inclusive are sustainable as specific breaches of the Treaty. We do however agree that the matters set out in these four general statements, when taken together with the clear breach of article 2 as found by this tribunal, add more weight to our finding that Ngai Tahu mana and rangatiratanga in respect of their mahinga kai were improperly disregarded by the Crown.

17.5.6 What Ngai Tahu are further saying is that the tribe was not consulted and did not effectively participate in policy decisions. All this has contributed to the decline of their food resource. Furthermore, they wish to be consulted in the future.

This tribunal has no difficulty with these two questions. We believe that Ngai Tahu were not consulted and did not effectively bring a Maori perspective to many issues. We say that the reason for this is that they were effectively deprived of their mahinga kai and denied an economic land base by the Crown's failure to endow them with specific and adequate reserves. This affected their opportunity to present a tribal view, a position not helped by the individualisation of title from 1865 on. That Ngai Tahu have spent more than 100 years fighting for the recovery of their rights has been due to their wairua and the tenacity of a relatively small number of people.

As we have earlier found, Ngai Tahu were wrongly deprived of their rangatiratanga and their mana. This was the breach of Treaty principles that denied them participation and consultation on policy decisions over those crucial years following the purchases.

17.6 Findings and Recommendations

17.6.1 The claimants alleged in their general claim that the Crown dispossessed Ngai Tahu of their mahinga kai and this was a breach of article 2 of the Treaty.

- We find that the grievance is made out to the extent that:
 - (a) The Crown failed to make specific reserves to protect and preserve Ngai Tahu's mahinga kai; and
 - (b) the Crown failed to provide sufficient reserves to allow Ngai Tahu to participate in the developing economy.

As a result Ngai Tahu were deprived of their rangatiratanga as guaranteed to them by article 2 of the Treaty.

- We confirm our findings in respect of grievance no 2, as given in relation to the Kemp purchase (8.9.18–21), and in particular:
 - (a) We find that the Crown failed to preserve Ngai Tahu rights to the food resources of Waihora, as required by the terms of the Kemp purchase, and thereby acted in breach of article 2 of the Treaty principle of good faith.
 - (b) We find that the Crown failed, as required under article 2 of the Treaty, to set aside specific reserves so as to protect Ngai Tahu's right of access to their eel resources at Wairewa.
 - (c) We find that the Crown failed to protect Ngai Tahu rangatiratanga under article 2 in that it granted eeling rights at Wairewa to Maori instead of to Ngai Tahu.
- We find that the grievances numbered 1,3,4 and 5 as set out in 17.4.1 are not sustainable as breaches of the Treaty for the reasons set out in 17.5.5.

Tribunal recommendations

The tribunal makes the following recommendations pursuant to section 6(3) of the Act.

Waihora (Lake Ellesmere)

17.6.2 At the option of the claimants:

EITHER

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

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

OR

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

Wairewa (Lake Forsyth)

17.6.3

- (a) That the existing fisheries regulations giving Maori exclusive eel fishing rights over Wairewa be amended to substitute “Ngai Tahu” for “Maori” so as to return the rights to the tribe.
- (b) That the same regulations be amended to give Ngai Tahu exclusive rights to fish the waters leading into the lake and to cancel any other existing licences.
- (c) That an area of land be reserved around the eel trenches at the southern outlet which will secure Ngai Tahu rights of access.
- (d) That a management plan be prepared, involving Ngai Tahu as part of the decision-making process along with the Department of Conservation,

Regional Authority, Ministry of Agriculture and Fisheries, for the improvement of the water quality with the Crown providing the same resources as recommended in respect of Lake Waihora.

Other recommendations

17.6.4 That beneficial ownership of the Crown Titi Islands be vested in such persons or bodies as may be nominated by Ngai Tahu and be subject to similar management regime as the beneficial Titi Islands.

17.6.5 That the question of reserving the pingao plantation of Ngai Tahu on Kaitorete Spit be brought to the notice of the Minister of Conservation for consideration and action.

Future consultation

17.6.6 During the hearing a number of proposals were made to improve Maori representation and to ensure better consultation with the iwi on resource management and control. In chapter 4 dealing with principles of the Treaty we referred to the views of the Court of Appeal in its 1987 decision concerning the New Zealand Maori Council on this question of consultation. In particular the observations of Sir Ivor Richardson suggest that in many cases where there seemed to be Treaty implications it may be necessary to have extensive consultation and cooperation in order to make informed decisions. This tribunal has suggested that planning and environmental matters may be notable examples. There are signs at last that central and local government have become aware of the need to involve Maori in these environmental matters and to have a Maori perspective.

The tribunal received a number of proposals from both Maori and Crown witnesses emphasising the need of improvement in the consultation process. We believe that need is now well documented and perhaps it is unnecessary for this tribunal to draw the matter to the minister's attention. We had a helpful submission from the former Director-General of Conservation, Mr Ken Piddington, assuring the tribunal that his department was very much aware of Treaty obligations and the need for Maori involvement. Mr Piddington gave details of procedures his department was putting in place and he emphasised the need to maintain regular working contact with the Ngai Tahu Trust Board.

As we see it, if the process of consultation is to be an effective one, it must be written into the various statutes and certain basic commitments made in

those Acts on the status of such important matters as water and air purity. Many of the submissions made to us addressed kai moana and these will be covered in our later report.

We propose to include in this section some of the recommendations which have particular significance for mahinga kai and then finally to express some basic problems that need to be addressed.

Some other measures sought by claimants

17.6.7

- (a) That areas of pingao, kuta, harakeke and totara should be set aside for the exclusive use of Ngai Tahu (H8:33).
- (b) That the present system of planting the wrong types of trees and plants in the rivers be changed to the planting of raupo and other species that would return the old ecosystem (H10:29).
- (c) That water boards strictly enforce the grant of any water rights (H6:36).

We make no recommendations concerning the above matters but simply wish to record them and bring them to notice.

As stated we received a large number of proposals relating to representation on regional boards. We consider the following matters are material to effective representation.

A Maori perspective in environmental matters

17.6.8 Substantial changes to our law are required to ensure that Maori have an effective say in environmental matters.

The Resource Management Bill which has been introduced into Parliament provides an opportunity for change but other statutes, regulations and procedures must also be changed. We see a need for remedial action in these four fields and make the following recommendations:

- (a) amendment to statutes to ensure that Maori values are made part of the criteria of assessment before the tribunal or authority involved;
- (b) proper and effective consultation with Maori before action is taken by legislation or decision by any tribunal or authority;

- (c) representation of Maori on territorial authorities and national bodies; and
- (d) representation of Maori before tribunals and authorities making planning and environment changes.

17.6.9 Looking first at statutes where law is created the tribunal considers it necessary that those persons drafting new law should be required by statute to assess the impact of the proposed law on Maori and include within it criteria that will ensure a Maori perspective is sought and given. This mandatory requirement could be inserted into the Law Reform Act or the Constitution Act and would act as a safeguard in the introduction of all legislation.

There is no doubt that further amendments are needed to existing legislation to ensure that there is statutory recognition of Maori values. Such recognition should occur not only in environmental and public works matters but also in social legislation such as health and education. It extends across a broad range of statute law to include procedural legislation such as the Coroners Act 1988 and the Adoption Act 1955.

17.6.10 Perhaps the most significant area for change is in the consultative field. Consultation in Maori terms involves the well-being of the tribe. Local and central government need to recognise that Maori expect to discuss proposals that affect them in their traditional way on the marae. If our Pakeha leaders are diffident about going on to marae then meetings should at least be held in circumstances more akin to marae protocol. There must be recognition of the tribal framework and of the importance of issues being orally examined by Maori. Consultation in a Maori context is far, far more important to Maori than representation on Pakeha organisations. In some instances, Maori people serving on national and territorial bodies, even tribunals, may deliberately refrain from commenting on an important issue because that may be an intrusion on the mana of another hapu or iwi. On the other hand, explanation, examination and discussion on tribal marae will be much more likely to lead to an informed and acceptable decision. In the respectful view of this tribunal there must be a much greater effort to take proposals to the people on marae.

In addition to marae hui, tribal authorities must be given the opportunity to consider the various reports that are presented to territorial bodies well in advance of any hearing of the issues, and a right of hearing if requested. This question of consultation with iwi was examined in some detail by the Waitangi Tribunal in the *Mangonui Sewerage Report* (1988). The tribunal in that report (6.3) commented on the omission of the Crown to recognise the tribal position and to provide the legal foundation and resources for tribes to contribute more fully to local affairs and protect tribal interests.

In this claim Ngai Tahu have very substantial interests and the Treaty requires the recognition and protection of their rights. Consultation is not a one party process, and as the tribunal stated in the *Mangonui Sewerage Report* (1988), tribal institutions should provide a means whereby local and central government and private interests can confer with the tribe. It is the Crown's responsibility to remedy its past failures and ensure resources are provided to involve Ngai Tahu in future consultation processes. There has to be a positive and substantial Crown commitment of resources.

17.6.11 As earlier stated consultation is perhaps the most important way to ensure Maori have input into decision making processes. To a lesser extent, but important as part of the total framework, Maori must be represented on national and local bodies if the partnership principle is to be meaningful. There remains a lot to be done in this area. The formation of the national congress of iwi shows that Maori are conscious of the need for a united central body yet respecting the mana of each of its constituent tribes. Government has expressed a will to provide resources for iwi. It remains to be seen whether these procedural first steps will develop into a stronger stride forward. The tribunal has no magical answer to the problem of ensuring effective representation of Maori interests. There is certainly an awareness of the need. Possibly the answer to better Maori representation on various bodies may come from better consultation and statutory recognition of a Maori perspective.

17.6.12 To conclude this examination of how Maori views can be brought to notice the tribunal emphasises the need for the Crown to provide adequate resources to ensure Maori are represented before planning and environmental authorities.

Hearings before tribunals and committees often involve complex matters of scientific and legal content. Maori should have access to legal aid in order to be represented by counsel and thus be effectively heard. We are aware that there is a Legal Services Bill currently before Parliament. We note that no provision has been made for legally aided representation of iwi, as iwi, before environmental and planning tribunals.

17.7 Future Protection of Ngai Tahu's Mahinga Kai – the Doctrine of Aboriginal Title

17.7.1 Apart from submissions directed by the claimants to the important question of consultation and representation, the tribunal has not received from Ngai Tahu any specific recommendations aimed towards future

protection and preservation of mahinga kai. The claimants submitted that mahinga kai still has immense cultural significance to Ngai Tahu particularly in the gathering and sharing of it. Counsel told us there is still a need not only for food resources but for natural dyes and fibres and wood for carving. The question of remedies remains to be negotiated between Ngai Tahu and the Crown and opportunity will then no doubt be taken to look at some specifics. Obviously the fresh water and sea fisheries remain very much to the fore with Ngai Tahu. We have in this chapter looked at several important fresh water fisheries such as Waihora and Wairewa and rivers such as the Opihi.

We have seen it desirable to recommend certain action in respect of Waihora and Wairewa. We will look quite extensively at the important sea fisheries in a later report and will also consider in a further later report on ancillary claims, specific claims in respect of other mahinga kai grievances such as Lakes Hawea, Tatawai and Wainono. Before we leave this chapter however it would be helpful to the parties to have the tribunal's preliminary views on the availability of existing law which might provide a frame work for remedial changes.

17.7.2 Although settlement of Te Wai Pounamu effectively cut off Ngai Tahu's access to their mahinga kai, nevertheless, as Mr Temm and several witnesses put to the tribunal, the tribe still continues to forage for their flora and still collects herbs for medicinal purposes as well as pingao, kuta and harakeke for traditional weaving and decorative art. Trees of the forests such as totara are important for carving. There are other mahinga kai resources which Ngai Tahu continue to gather such as puha and watercress. During the course of the Waitangi Tribunal hearing of the Kaituna River grievance a comprehensive legal submission was made by Dr Paul McHugh, a Fellow of Sidney Sussex College, Cambridge. This submission was favourably received by the tribunal even though its chairperson, Chief Judge Durie, said the tribunal would not make any finding on it as the tribunal already had sufficiently wide powers under its existing jurisdiction to deal with the Kaituna issues. We agree with the view of the learned chief judge that the statutory authority of the Waitangi Tribunal is to determine whether any act or omission of the Crown is inconsistent with Treaty principles. That is our guiding jurisdiction. However, since the Kaituna decision, Dr McHugh has published a number of articles on aboriginal title and one published in the *Victoria University Law Review* (1986) 16, 313 entitled *Aboriginal Servitudes and the Land Transfer Act* raises a relevant and possible procedure for the registration of aboriginal servitudes ie, mahinga kai rights against the Land Transfer Title. Aboriginal title was defined in *Calder v Attorney-General of British Columbia* 1973 SCR 313 as:

a legal right derived from the Indians historic occupation and possession of their tribal lands.

In his article Dr McHugh says that the traditional rights of collecting certain herbs and selection of flax for traditional decorations honouring ancestors are governed by customary law. The rights stem from ancestral ownership and usage and where it can be shown that the aboriginal owners of a particular territory have not by sale, cession or abandonment, relinquished their non-territorial aboriginal title over that land, the aboriginal servitudes will be unaffected by transactions in relation to the Pakeha or Crown derived title. Dr McHugh looks at matters relating to the indefeasibility of the land transfer title and suggests that although certain aboriginal servitudes may be enforceable and registrable against the title of a registered proprietor as omitted easements under section 62(b) of the Land Transfer Act 1952 nevertheless, Parliament should consider amending the Act so as to make the title of the registered proprietor subject to those subsisting traditional incidents of Maori tenure. Dr McHugh suggests registrability could be granted by an order of the Maori Land Court following an investigation of a claim to an aboriginal servitude.

17.7.3 This tribunal does not make any recommendations for such a legislative change as proposed by Dr McHugh. It will be interesting to see if this question becomes subject to judicial scrutiny. There are several tests which obviously must be met to first establish the validity of the claimed customary servitude. It is difficult to perceive that our legislature would move to set up a procedure of registering mahinga kai customary rights against privately owned land. On the other hand Parliament may be prepared to come some way in protecting Maori customary rights by providing for the registration of certain defined mahinga kai rights against Crown or state-owned enterprise land. We make no recommendation but draw this to notice. The matter may yet come before our courts.

There are several statutory provisions available for the designation and reservation of Maori freehold land, general land and Crown land. These might well be used to protect specific mahinga kai. Sections 439 and 439A of the Maori Affairs Act 1953 cover a wide field of reservation. Fishery management areas can be created under the Fisheries Act 1983. The Maori Fisheries Act 1989 provides procedures for establishment of taiapure fishery reserves. The Reserves Act 1977 contains provisions for various types of reserves and uses thereof. Within the umbrella provided by these statutes there should be sufficient shelter to protect and develop mahinga kai. Manatu Maori should be used by iwi and hapu to determine specific resources that need development and protection.

The tribunal expresses the hope that Crown agencies will meet with Ngai Tahu and evolve procedures not only in joint management of mahinga kai resources but also in preserving and developing the precious little that remains.