

Ngai Tahu Sea Fisheries Report

05 The Crown Assumes Control of the Fishery, 1840 to 1908

5.1 Introduction

5. THE CROWN ASSUMES CONTROL OF THE FISHERY, 1840 TO 1908

5.1. Introduction

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

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

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5.2 Ngai Tahu Fishing

5.2. Ngai Tahu Fishing

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

They were now an impoverished people largely confined on uneconomic patches of land ... neglected by government at both central and provincial level, marginalised and struggling to survive both individually and as a people. {FNREF|0-86472-103-X|5.2.1|1}

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

As we have there indicated, from the early 1850s the effects of settlement steadily encroached on Ngai Tahu on all sides as land was progressively fenced and drained by Europeans and access to mahinga kai steadily decreased. {FNREF|0-86472-103-X|5.2.1|2} Tribal structures and tribal communal activities were undermined as both access to resources and the resources themselves diminished. For centuries Ngai Tahu had used fleets of canoes crewed by a substantial number of whanau or hapu. But the change in technology resulting from the increasing use of whaleboats (or their equivalent) equipped with sails meant that large numbers of Maori to paddle or row boats were no longer required. This contributed to a decrease in hapu involvement.

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

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

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

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

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

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

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

Taking all the evidence together it may be concluded that Fiordland was frequently visited by Maoris, mainly from Foveaux Strait, throughout the century 1770-1870. Sealing seems to have been a major attraction, both for food and the trade in pelts.

One other important reason was exploitation of the takiwai (bowenite) at Anita Bay, Milford Sound. Heaphy (1846) commented that Ngaitahu from Otakou were known to visit the south Westland and Fiordland pounamu sources and there is an account of Aparima people taking a load of takiwai from Anita Bay, by an inland route and down the Waiau, in 1838 or 1839

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

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

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

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

(a) THE CLOSE INSHORE ZONE running from the edge of the sea out to the range of a rowing boat, ie about half a mile to one mile offshore. Mr Higgins said this was the Maori traditional, ie pre 1850/60, fishery.

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

(c) THE DEEP SEA ZONE beyond the continental shelf.

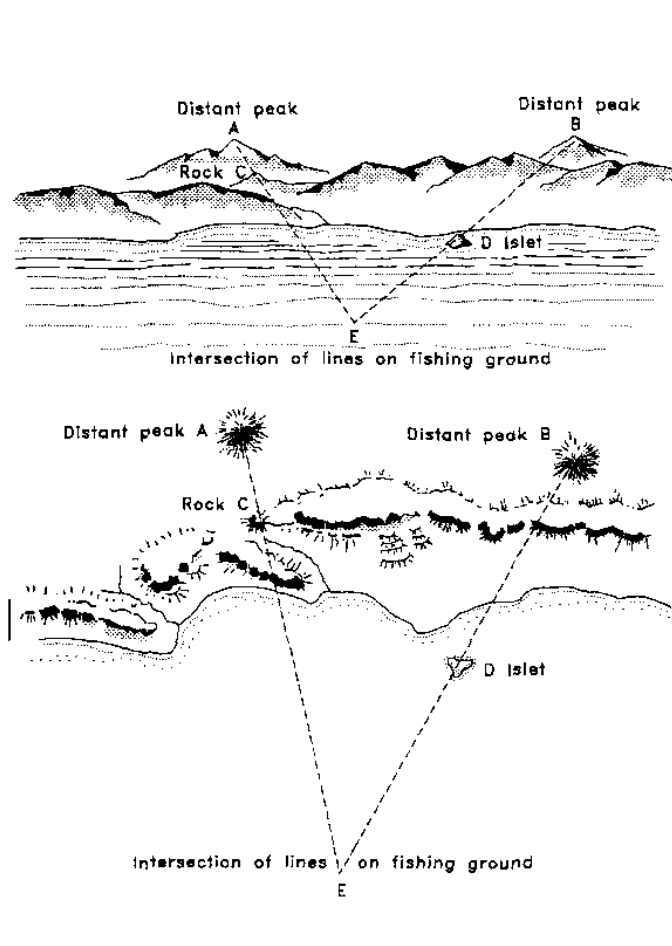
5.2.6 With the arrival of settlers from the early 1850s and their increasing numbers in the next two decades, especially in Otago and Canterbury, a viable market for a Ngai Tahu commercial fishery developed. At that time the various reef species were

available in the inshore zone year round, while the pelagic species were caught in that zone between December and May (J10:52).

Marks books

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

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



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

Copies of some of his family marks books were produced in confidence by Mr Higgins. Some of these dated from the 1850s. Marks books belonging to some other

Ngai Tahu families went back to the 1860s. Each family jealously guarded its marks, as these identified their best fishing grounds.

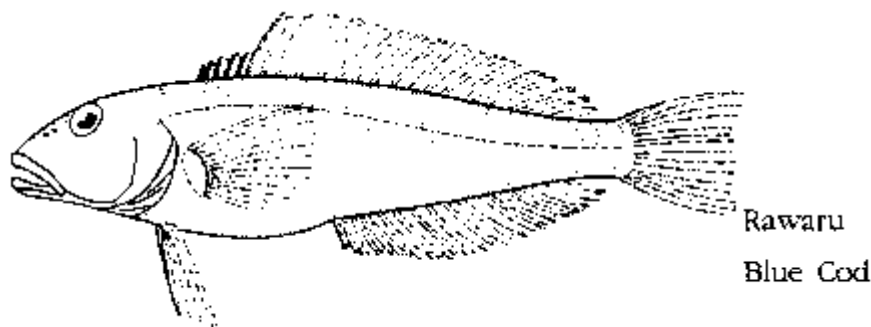
In recent times modern technology in the form of radar and echo sounders have had the advantage that they can do the same job in all weathers and with equal accuracy as the books.

Accuracy of marks books

5.2.8 Mr Higgins described the accuracy of the marks books as "quite astonishing":

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

5.2.9 The increased reliance on modern technology persuaded the families owning marks books to make them available to Mr Higgins for the purpose of plotting fishing grounds. This enabled the claimants to put before us a series of transparencies on which was plotted the Ngai Tahu commercial fishery as disclosed by the marks books from as early as the 1850s through to 1875. Most of the marks shown were plotted by taking the marks book to sea on board a trawler and there lining the boat up with the marks. A radar fix was then obtained, plotting the marks on the charts to an accuracy of the order of 25 to 50 feet. The marks as plotted show fishing grounds scattered throughout the shelf zone, with the outer most stopping just short of the deep sea zone (J10:55). The marks are more concentrated around a number of Ngai Tahu settlements, particularly those at Kaikoura, off the Otakou coast and in Foveaux Strait. None were provided for the West Coast.



Specific charts (J12; J13 and J14) were also put in evidence by Mr Higgins, disclosing hapuku (groper) grounds on the continental shelf zone plotted from "patch marks" (J10:54). Mr Higgins explained that when the hapuku are there, they swim in schools known to fishermen as "patches". The position of these patches varies with the tides and the time of the year but:

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

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

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

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5.3 Crown Evidence as to Ngai Tahu and European Fishing

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

5.3.2 Walzl records the observations of various European observers. Thus William Haberfield, who lived on the east Otago coast in the late 1830s, is noted as having seen a dozen and sometimes as many as 20 Ngai Tahu canoes go out fishing for barracouta. They would take their double canoes outside the heads; sometimes they went in European built boats when they could get them (S7:6). Edward Shortland, who visited many Ngai Tahu kaika during 1843-1844, later noted various instances of their fishing "activities" at Moeraki, the Taieri river, the mouth of the Waitaki river and the "ninety-mile beach" (S7:6-7).

Frederick Tuckett in 1844 recorded fishing activity in a bay south of Moeraki where a large quantity of fish was being cured (S7:7). The Reverend Wohlers, a missionary at Ruapuke for some years, reported in the early 1850s that there was good fishing off the island when the weather was calm. In relation to fishing around Ruapuke he inferred in later reminiscences that the sea there was rich in fish, as were the rest of

New Zealand waters. If the sea was calm enough to allow deep water fishing, a somewhat infrequent event, fish weighing 50 pounds and over could be caught (S7:9). Heaphy, while noting in 1846 the importance of river and estuarine fishing, thought the Arahura Ngai Tahu did relatively little sea-fishing. In April 1849 The Otago News reported that by far the greater number of Otakou Ngai Tahu lived on the reserve near the harbour entrance where they cultivated potatoes for the supply of the new town of Dunedin, which, "with fishing, forms their principal occupation" (S7:10). Walzl also noted that in relation to the 4800 acre Maungamaunu reserve sought by Ngai Tahu on the Kaikoura purchase, Alexander Mackay, while agreeing that the land was "very worthless", added that Ngai Tahu sought it "in order to secure them the right of fishing along the coast" (S7:11).

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

Sea fishing was, of course, a principal source of food supply to the coastal Natives. At Pigeon Bay they used to catch large numbers of fish which they suspended in the sun to dry. Shark was one of their favourites. It was customary in the "forties" for the Pigeon Bay and Port Levy Maoris to carry tons of these dried fish inland, meeting halfway the Natives from Little River laden with eels. On the summit both parties held a korero, and after exchanging their burdens, returned respectively to their homes. (S7:12){FNREF|0-86472-103-X|5.3.4|3}

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

The natives used to travel over the hills easily in those days of no roads. White has known a party to take two tons of dog fish to Little River, the Maoris there bringing in exchange two tons of eels. (S7:13){FNREF|0-86472-103-X|5.3.3|4}

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

3.3.4 Mr Walzl gives various examples of Ngai Tahu trading in fish with European settlers in the 1850s and 1860s. This was especially so in Otago but also occurred in Canterbury. A later comment by R A Sherrin confirms the substantial trade at Dunedin:

In the early days of the Otago settlement, when the colonists depended solely on the Maoris for the supply of fish, it [barracouta] was very extensively used. (S7:16){FNREF|0-86472-103-X|5.3.4|5}

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5.4 European Fishing Begins

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

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

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5.5 Ngai Tahu Fishing 1861 to 1880

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

Stewart Island oyster fishery

5.5.1 The exact date when the commercial oyster fishery centred on Rakiura (Stewart Island) commenced is not known. In an 1871 report W H Pearson, commissioner of Crown lands for Otago, noted that the oyster trade in the area was "carried on at first almost exclusively by Maoris and Half-Castes ..." (S7:27). {FNREF|0-86472-103-X|5.5.1|6} Subsequently, as Walzl noted, several Europeans became involved. In a later report of 1877, Pearson referred to a cutter of 18 tons sailing into Oyster Cove, Port Adventure, and filling up in a very short space of time by shovelling the oysters up into the hold. According to Pearson, the Maori who lived in a Maori reserve "used to fill their boats in a similar manner" (S7:28). {FNREF|0-86472-103-X|5.5.1|7}

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

This cove has obtained its name from the fecundity and excellence of its oyster beds, which, I am sorry to say, have become almost depopulated, owing to the want of protection from abuse; though I have little doubt that, with judicious supervision, they will become, in a few years, as prolific as formerly. (S7:31) {FNREF|0-86472-103-X|5.5.1|8}

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

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

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

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5.6 Other Ngai Tahu Fisheries

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

- an enormous quantity of crayfish caught by Maori being landed at a Dunedin jetty in December 1863 (S7:34);
- an unusually large quantity of rock oysters being brought to Christchurch from Lyttelton in September 1866 (S7:35);
- Ngai Tahu being chiefly employed in the Stewart Islands fishing company's exports of fish to Melbourne and the West Coast in 1866 (S7:35);
- in March 1867 the principal avocation of Otakou Ngai Tahu was reported as "barracouta fishing with which they supply the Dunedin market" (S7:36); {FNREF|0-86472-103-X|5.6|9}
- in May 1870 the fisheries commission was advised that only two white men had been regularly employed in fishing at Kaikoura, "the trade having generally been carried on by the Maoris", Ngai Tahu fishing being largely for barracouta (S7:36); {FNREF|0-86472-103-X|5.6|10} and
- in November 1872 a Dunedin newspaper noted that Ngai Tahu supplemented their earnings by fishing, but described them as gaining a precarious living by fishing and as being "seldom rewarded by success for the hardships they endured" (S7:37). {FNREF|0-86472-103-X|5.6|11}

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5.7 European Fishing 1860 to 1880

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The Canterbury fishery

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

- about 1864 the Europeans first began to take flounder-fishing at Waihora (Lake Ellesmere) out of the hands of Ngai Tahu: "one shot of the net often provided more marketable fish than could be sent down by coach to Christchurch" (S7:38-39). {FNREF|0-86472-103-X|5.7.1|12}
- the Canterbury fishery was mainly coastal, being principally confined to the bays of Port Lyttelton, Port Levy and the outlying rocks at their heads, the Avon estuary and the mouths of the Waimakariri river and Saltwater creek together with Lake Ellesmere (S7:39).
- only 12 boats were operating full-time in 1889 with two men on board each. The number of casual fishermen was not known. Most of the full-time fishermen were said to be English, with some Italian (S7:39).
- the commissioners considered the fish supply of Canterbury fell far short of that of the neighbouring provinces both in quality and quantity. As late as 1871 an Akaroa correspondent to a newspaper was reporting that the Akaroa harbour was "absolutely swarming with fish, and no one takes the trouble to catch them" (S7:41). {FNREF|0-86472-103-X|5.7.1|13}
- in 1872 a new Deep Sea Fishing Company was launched to bring a regular supply of fish to Christchurch. Early in 1873 its cutter Nautilus discovered more productive grounds. According to the North Otago Times of 11 March 1873 the cutter returned with upwards of two tons of fish:

They comprise barracouta, trumpeters (over three feet in length), habouka [sic], blue cod, butter fish, moki, &c. It is fully proved that there is plenty of fish on the coast, and as the men seem to have found out the beds, there can be no doubt that Christchurch will soon be provided with a constant supply of fish. (S8(1):31){FNREF|0-86472-103-X|5.7.1|14}

- and by 1874 13 fishermen were listed for the whole of Canterbury. Four years later the number had shot up to 37 (S7:42).

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5.8 The Otago Fishery

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

5.8.2 Useful information was contained in the 1869 report of the commissioners for the province of Otago to Dr Hector. As was the case with the Canterbury commissioners, no reference is made to any fishing activities of Ngai Tahu, although it is apparent from other sources that they were actively engaged in fishing at the time. By contrast, as we have previously noted, the trade at Kaikoura was almost entirely carried out by Ngai Tahu.

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

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

5.8.3 By 1872 however, some progress was made. On 1 October 1872 the Christchurch Press reported that three fishing companies had recently been formed in Otago. Their efforts were said to have "brought to light no less than fifty varieties of edible fish before unknown" (S8(1):29). {FNREF|0-86472-103-X|5.8.3|15} In 1873, European fishermen at Moeraki were active (S8(1):31){FNREF|0-86472-103-X|5.8.3|16} and the following year fishery operations were reported at Oamaru (S8(1):32). {FNREF|0-86472-103-X|5.8.3|17} Walzl notes from census information that by 1874 there were 67 fishermen in Otago (including Southland) and 17 fishmongers. Two fish-curing establishments were listed. By 1878 there were 105 fishermen, 38 fishmongers and two curing establishments (S7:45). {FNREF|0-86472-103-X|5.8.3|18} We understand Maori were not included in the census at this time.

5.8.4 In September 1877 however, James MacAndrew, an Otago MP, sounded a warning that the fishing resources in Otago harbour were in danger. In the House of

Representatives he sought legislation to protect fisheries from seine netting within harbours and to impose a closed season of three months each year:

Attention had been directed during the last few years to the wanton destruction of fish which had taken place in the waters of Dunedin and in other parts of the colony. Ground fish, such as flounders and soles, were being rapidly exterminated, and he put the question in the hope that the Government would pass a measure dealing with the subject this session. (S7:45){FNREF|0-86472-103-X|5.8.4|19}

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5.9 The Southland Fishery

5.9. The Southland Fishery

Oysters

5.9.1 As we have seen, the Port Adventure bed was exhausted by 1867. In the following year, some beds were discovered off Port William in deeper water. They needed to be dredged, rather than collected or shovelled. By August 1872, as Mr Walzl relates, the Port Adventure beds were so depleted that government intervention was necessary to close them against dredging. The Port William beds were also in danger. New beds were, however, discovered in 1872 off Halfmoon Bay. This relieved the pressure from the Port William beds which were all but exhausted. By 1877 the Halfmoon Bay beds were showing signs of being overworked and at Pearson's request they were closed for a period (S7:46-48). {FNREF|0-86472-103-X|5.9.1|20}

Fishing

5.9.2 Mr Walzl related in some detail the efforts made early in the 1870s to establish on Rakiura a "special settlement" to promote the fishing industry and timber trade. In 1874, a contingent of Shetland and Orkney Island settlers who had arrived the previous year found fishing unrewarding and some preferred to seek the "high wages" available at Dunedin. Others took up employment in oyster cutters. The scheme was not a success (S7:50-53).

West Coast fishery

5.9.3 It appears that European commercial fishing on the West Coast did not begin until 1866 when the crew of a vessel awaiting favourable conditions to enter port with nothing better to do dropped a few handlines. Within a short time they landed a large number of groper (S7:54). Walzl refers to heavy hauls off Hokitika in 1867, including landing 500 codfish in a few hours. Few other references to West Coast fishing are available (S7:54). An attempt in 1875 at fishing and curing at the new settlement at Jackson's Bay failed two years later (S7:55).

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05 The Crown Assumes Control of the Fishery, 1840 to 1908

5.10 Ngai Tahu Fishing 1881 to 1908

5.10. Ngai Tahu Fishing 1881 to 1908

5.10.1 In 5.3.1 we noted that the Crown historian Mr Walzl was unable to continue his detailed research of historical sources, particularly newspapers, beyond 1880. But we accept that the ongoing expression of concern by Ngai Tahu on the loss or diminution of their fishing resources, to which we will later refer, is evidence of their continuing interest in fishing. Fishing, as a hapu activity, necessarily diminished with the breakdown in Ngai Tahu tribal structures, the enforced dispersal of tribal members from inadequate reserves and the draining and depletion of many of their limited number of fishery reserves. The importance of fishing undoubtedly persisted for hui and other special occasions, just as it has continued as a whanau activity down to the present day despite the frustrations of greatly depleted resources. At the same time, as David Higgins' evidence shows, some individual Ngai Tahu engaged in commercial fishing from the 1860s on, as they have continued to do ever since. Further evidence on this from Dr George Habib will be noted in the next chapter.

European fishing 1881 to 1908

5.10.2 While, when compared with the present, fish abounded in many parts of the South Island, by the 1880s there appeared a few signs of pending depletion. Flounder became very scarce during the winter on Lake Ellesmere (S7:73). In 1882 a local Dunedin newspaper (The Echo) deplored the scarcity of fish in the Dunedin harbour. It attributed this shortage to excessive trawling throughout the year without respite (S7:73). {FNREF|0-86472-103-X|5.10.2|21} Mr Walzl also testified that overfishing occurred in Akaroa harbour in 1885. In 1915, J Hay wrote that the flounder, which were numerous in his youth, had disappeared from Banks Peninsula years ago (S7:74). {FNREF|0-86472-103-X|5.10.2|22} We will consider the legislative measures to protect the fishing resource later in this chapter.

In 1884 however, Sir James Hector remained optimistic. On 21 December 1884 he reported to Sir Julius Vogel:

The natural wealth of the New Zealand fisheries is as yet almost undeveloped, and the efforts in this direction have been very crude and entered on without the least regard to the knowledge of the subject which is necessary. The establishment of small fishing communities in connection with fish-curing factories is what is required. The local supply is very capricious and irregular in all the centres of population, and might be regulated by the application of the freezing process for preserving the fish. (S7:75) {FNREF|0-86472-103-X|5.10.2|23}

5.10.3 By 1890, the Canterbury fishery was beginning to move further afield into deeper waters. The Christchurch Press reported at the end of December 1890:

The list of fish brought into Christchurch is not very long, the commonest kinds being flounders, mullet, moki, kahawai, butterfish, warehou, mackerel, garfish, barracouta, cod, ling, trumpeter, and conger eels. Mr Warnes has two cutters and a whaleboat engaged [in] fishing for the Christchurch market. The cutters, fitted with wells for the conveyance of fish, cruise between the Ninety Mile Beach and Kaikoura, their principal grounds, however, being about the Amuri Bluff and the Trumpeter Bank, off Kaikoura. These boats bring in nearly all the varieties of fish mentioned, and, besides these, large numbers of crayfish The three boats move about according to the direction of the wind, for fish are particularly susceptible to changes of the weather, and have a roving life on account of our variable climate....

Great quantities of moki and blue cod are caught on the coast south of Christchurch, men fishing them from bank to bank as far as Moeraki. Off the beach at Kaituna and at Peraki on Banks' Peninsula large hauls of fish are made, but both places are bad for boats and the wind rarely suits.

Dunedin sends us our principal supply of dried barracouta and haddock, the latter fish being simply the common rock cod. In winter time we get garfish and flounders from Akaroa, but hot weather stops this supply. Strictly speaking, Canterbury has nothing but deep sea fishing. {FNREF|0-86472-103-X|5.10.4|24}

5.10.4 Walzl notes that by 1894 the fishery around Otago was suffering some decline, with the Otago Witness reporting "a great falling off compared with those to be seen fishing on any fine day four or five years ago" (S7:77). {FNREF|0-86472-103-X|5.10.4|25}

In its annual report of 1906 the Marine Department noted:

There has been a scarcity of fish in Canterbury during the year, especially at Sumner, New Brighton, and Kaiapoi, and most of the fish sold by auction in Christchurch came from outside the district. There are three smokehouses in Christchurch and two in Lyttelton, but they were not all being used.

In the Otago District the principal centres of fishing are Catlin's, Molyneux, Taieri Mouth, Port Chalmers, Waikouaiti, Moeraki, and Oamaru, and the principal fish taken are flounders, hapuka, blue-cod, and travalli; and it is stated that notwithstanding the unseasonable weather experienced much larger catches were taken than during the previous year. There has been a considerable improvement in the boats and gear used in the industry The Inspector states that there are 827 persons employed in connection with the industry in the district, 359 being in fishing-boats

The principal fish caught by the Bluff fishermen are blue cod in Foveaux Strait and Stewart Island, and flounders in Bluff Harbour, and large quantities of oysters are taken from the beds in the Strait. There are five freezing-plants on the mainland and at Stewart Island. (S7:78-79){FNREF|0-86472-103-X|5.10.4|26}

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05 The Crown Assumes Control of the Fishery, 1840 to 1908

5.11 The Impact of Land Sales

5.11. The Impact of Land Sales

Waitangi Tribunal, Department of Justice, Wellington.

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05 The Crown Assumes Control of the Fishery, 1840 to 1908

5.12 The Crown Assumes Control of Fishing

5.12. The Crown Assumes Control of Fishing

5.12.1 As our Ngai Tahu Report 1991 demonstrated, land and its acquisition from Maori was a paramount concern of governors and settler governments for much of the period from the signing of the Treaty to at least the turn of the century. By comparison fisheries scarcely if at all came to the notice of the Crown in the first two decades. The first legislative intervention was in 1866. But whereas the Crown's representatives in New Zealand (although not always their political masters in England) accepted that Maori owned all land in New Zealand, from an early stage they took a markedly different view of fisheries. As the Law Commission has said:

But what was accepted for land was not applied to fishing grounds below the high tide mark, nor in the long run to fishing rights that might be independent of ownership of the underlying soil. These fell foul of the common law rules that land below high tide mark was the property of the Crown, unless it had been granted to others, and that there was a public and general right to fish in both tidal and offshore waters. These rules were taken by courts and governments to prevail over any Treaty promises or principle of aboriginal title. To many Pakeha New Zealanders this did and does seem part of the natural order of things. However, to many Maori it was novel and alien. It lies at the heart of many Maori grievances over fishing rights. {FNREF|0-86472-103-X|5.12.1|30}

Such a view could be held only if article 2 of the Treaty was ignored or held to be of no legal effect.

5.12.2 This view persisted. As recently as 1986 the Fisheries Amendment Act 1986 authorised the quota management system and allocated quotas to certain holders of fishing permits. This Act is based on the premise that no fisheries belonged to Maori but all to the Crown and were, with Parliament's assent, the Crown's to give away or otherwise dispose of as it chose. Again, the Law Commission put the matter succinctly:

But considered historically and conceptually, what the 1986 legislation signifies is this. For more than a century the Crown consistently declined to recognise any exclusive right of the Maori in their sea fisheries. The ground was that the common right of everyone to fish below high water mark was a matter of basic legal doctrine and public policy, albeit subject to licensing and other regulatory regimes. On the Crown's initiative Parliament has now "fenced the watery common", established exclusive commercial fishing rights and given them to those operators who in the

immediately preceding years had caught substantial quantities of fish. {FNREF|0-86472-103-X|5.12.2|31}

Not until 1989, with the passage of the Maori Fisheries Act 1989, have the Treaty rights of Maori, including Ngai Tahu, obtained a measure of recognition. But we must resume our narrative at 1866, when the Crown enacted the first fishery legislation.

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05 The Crown Assumes Control of the Fishery, 1840 to 1908

5.13 Fisheries Legislation 1866 to 1908

5.13. Fisheries Legislation 1866 to 1908

Oyster Fisheries Act 1866

5.13.1 This Act provided for the establishment of artificial oyster beds on shores adjacent to Crown lands bordering the sea or any estuary. Licences to do this were for a maximum of 14 years. It also prohibited the taking or sale of oysters between December and March. The governor was empowered to declare natural oyster beds closed for any period. The taking of oysters from natural beds below the level of the lowest water of spring tides without a licence was prohibited. No exception was made for Maori. The Act did not apply to "rock" oysters between high and low water marks.

The original Bill aimed at totally regulating the domestic and commercial use of oysters by Pakeha within Pakeha districts. Maori were to be totally exempt (Z49:41). As enacted, both Maori and Pakeha required a licence to take deep water oysters either commercially or domestically. The Act, through its licensing of natural and artificial beds, presumes Crown ownership of the foreshore and, in the case of artificial beds, the right to lease these for exclusive use for a period of up to 14 years.

It appears the Act was in part a conservation measure. As we have seen, the beds at Port Adventure were by 1864 becoming stressed. It is possible this is the origin of the 1866 Act. The exemption of rock oysters (much more common in the north) appears to have concentrated its effect to Ngai Tahu tribal territory. Susan Butterworth has pointed out that the enforcement clauses were inadequate to prevent poaching, and the closed season was little more than a guess at the spawning season of the oysters. Not until 1874 was James Hector able to report that he had narrowed this down "from the middle of December until the end of February, or as the Maoris put it, during the time when the Pohutukawa is in flower" (Z17:26). {FNREF|0-86472-103-X|5.13.1|32} Walzl comments that it is not known whether any Ngai Tahu applied for a licence for oystering or whether they disregarded the requirement and continued to collect oysters regardless (S7:57).

5.13.2 There is no evidence of any consultation with Ngai Tahu within whose rohe was to be found a rich and extensive oyster. Nor is there any recognition of any Ngai Tahu interest in the oysters whether under the Treaty or otherwise. The Treaty is simply not adverted to.

Salmon and Trout Act 1867

5.13.3 This legislation was introduced by one W D Murison, Member of the House of Representatives for Waikouaiti, presumably at the instigation of the Canterbury and Otago Acclimatisation Societies who were about to introduce their first batch of salmon and trout ova into certain rivers. They sought legal protection against poaching. The governor was given power to make regulations as to closed seasons, the definition of mouths of rivers and streams, allowable fishing tackle, and methods and prevention of poaching. Under s4 the Act could be extended to protect any fish in any part or all of New Zealand (Z17:26-27). The Act applied equally to European and Maori. It clearly constituted an encroachment on the treaty rights of Ngai Tahu by banning access to the native fisheries during a closed season.

Oyster Fisheries Act Amendment Act 1869

5.13.4 This Act authorised the issue of an exclusive licence for up to five years for the use of oyster beds to the discoverers of such beds. In the Legislative Council debate it was said that the Bill was prompted by the discovery of some oyster beds at Stewart Island (R10:2-3). Provision was made for an inquiry to be held into any objection to the issue of such a licence.

Mr Walzl, in commenting on this provision, noted:

Although there is no evidence that Maori suffered in particular as a result of the introduction of the Act, it is interesting to see that the 1869 Act, in common with the previous 1866 measure, was brought in seemingly without consultation with Maori, without reference to any Crown responsibilities under the Treaty to preserve Maori fisheries and at a time when it was known at an official level that Maori and more specifically Ngai Tahu were commercially involved in the Stewart Island oyster industry. A Maori discoverer would have to either conform to European legislation, or run the risk of being excluded from the fishery when European [sic] became involved. (Z49:45)

The legislature assumes that if someone other than Maori discovers a new oyster bed, Maori may, notwithstanding their treaty rights, be entirely excluded from any such oyster, at least for the term of the exclusion licence.

Oyster Fisheries Act Amendment Act 1874

5.13.5 This amendment authorised the governor to make a four month closed season for rock oysters, which were previously exempt from the 1866 Act but which were now at risk. It would be an offence for any person to take rock oysters during the closed season for sale. Consumption for domestic purposes was not therefore prohibited. The colonial secretary, Dr Daniel Pollen, gave the following explanation for the amendment:

The proposed legislation was an intervention in favour of the "natives" of his own province - Auckland - which were being very largely sacrificed to supply the appetites, principally of the people of the Empire City. In season and out of season, all the year round, large shipments of oysters were made from the Province of Auckland to the South, and the consequence was that the supply had fallen off very materially, and would, if protection were not afforded, in the course of a very few years cease

altogether. The object of the Bill was simply to give rock oysters the same kind of protection that was extended by the Act of 1866 to oysters of another description. If honourable members would refer to that Act, they would find these words as the interpretation of the word oyster: "Shore oysters, excepting rock oysters between high and low watermark." The exception, he thought, was made out of consideration for the aboriginal natives, who were fond of oysters, and who might not understand the necessity of preserving them in the way proposed, and probably offend against the law. Since that time the Natives had acquired other tastes, and the preservation of those oysters in the districts where this law would apply was not now subject to such objections as before. The object of the Bill, then, was to give protection to rock oysters between high and low watermark. (Z17:28){FNREF|0-86472-103-X|5.13.5|33}

Susan Butterworth comments that, moved perhaps by the absurdity of Dr Pollen's suggestion that Maori had lost their taste for oysters in just a few years, Mr Mantell, Member of the Legislative Council (MLC), explained that rock oysters "were excepted in the original measure so as not to put a stop to pleasant picnic parties held on the sea beach, and at which the consumption of oysters was very great" (Z17:28). No exception other than for domestic consumption was made for Maori.

Maori who were taking oysters commercially would have to comply with the Act. Walzl notes that there is some evidence that Ngai Tahu were selling rock oysters in Canterbury (Z49:48).

5.13.6 As with the earlier Oyster Acts there is no recognition of any Maori treaty fishing rights. Ngai Tahu are treated on precisely the same basis as non-Maori.

Fish Protection Act 1877

5.13.7 Previous legislation, as we have seen, was concerned either with the oyster fisheries or the newly introduced freshwater salmon and trout. The Fish Protection Act 1877 was the first legislation on general fisheries. It extended government control over both fresh and saltwater fisheries by authorising the governor to make regulations:

- declaring fishing districts;
- defining a fishery;
- reserving any area from fishing;
- controlling the seasons and size of nets and seines; and
- granting exclusive licences to fish any fishery.

5.13.8 Having passed through all stages in the House of Representatives, the Bill was sent to the Legislative Council. During the committee stage Captain Thomas Fraser, a member of the Legislative Council from Otago, proposed a new clause:

Nothing in this Act contained shall apply to persons of the Native race capturing fish with spears in any estuary. {FNREF|0-86472-103-X|5.13.8|34}

This modest proposal in favour of Maori was rejected by the council and the Bill was passed by the House of Representatives, with minor amendments by the council, on 30 November. Apart from Fraser's motions, there was no debate on the Bill at all from either Maori or European members of the House or council. Fraser did not succeed in having the Bill translated into Maori (S7:60). At the time of its passage, what has become well-known as s8, was not part of the Act. We are indebted to Mr Walzl for his account of how the section came to be inserted and for his discussion of its possible implications. On 6 December 1877, John Sheehan, the Native Minister, delivered the following message to the House from the governor, Lord Normanby:

Pursuant to section 56 of the New Zealand Constitution Act, the Governor returns to the House of Representatives the Bill intituled "An Act for the Protection of Fish and Fisheries in New Zealand," with the following amendment, for the consideration of the House:-

To add the following additional section at the end of the Bill:

"Nothing in this Act contained shall be deemed to repeal, alter, or affect any of the provisions of the Treaty of Waitangi, or to take away, annul, or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder."
(Z49(a):265){FNREF|0-86472-103-X|5.13.8|35}

Both the House of Representatives and the Legislative Council accepted the governor's amendment, which was duly incorporated as s8 (Z49:56-57).

5.13.9 We have noted that Sheehan, the Native Minister, introduced the governor's message into the House, which resulted in the enactment of s8. Three years later, Fraser, the legislative councillor from Otago, during a debate on another Fisheries Bill which concerned Maori fishing rights, observed:

When the Act of 1877 was under consideration he had drawn attention to the omission of any saving clause so far as the Maoris were concerned, and the result was that a message was sent down by the Government inserting the 8th clause. He contended that the Maoris had every right to fish wherever their forefathers had fished, and he altogether objected to any encroachments upon those privileges.
(Z49(a):313){FNREF|0-86472-103-X|5.13.9|36}

After the 1877 Bill was introduced, but before its second reading, the Ngai Tahu member for Southern Maori, Hori Kerei Taiaroa, asked a parliamentary question about fishing rights at Mangahoe Inlet in Otago. Taiaroa inquired:

- 1.) By what authority Europeans exercised fishing rights over the Mangahoe Inlet in the Provincial District of Otago, while the Native title thereto has not been extinguished?
- 2.) If the Government will cause a stop to be put to such acts on the part of Europeans until some arrangement for the extinguishment of the Native title has been made? The

inlet he referred to was situated in the midst of his land. The lands adjacent to the place had all been granted, and an application was also sent in for an investigation into the title to this inlet. The Native Affairs Committee recommended that the case should be heard before the Native Land Court, and application was sent in; but the hearing had not taken place. The Europeans were in the meantime plundering all the oysters and fish from the place, and selling them in Dunedin; and the second part of his question asked that a stop should be put to that proceeding, until the Native title was extinguished. The Natives were not receiving any benefit from what was obtained from the place, but were remaining quiet until the matter was settled, while the Europeans were getting all the advantage. (S8:175){FNREF|0-86472-103-X|5.13.9|37}

Sheehan, in replying, observed that "under the Treaty of Waitangi certain rights were reserved to the Natives in regard to their fisheries" (S8:175). He did not specify the nature or extent of such rights. He went on to say that there was a legal difficulty in the way of this matter being heard in the Native Land Court which he expected would be removed by a Bill then before the Legislative Council. This would enable Tairaroa to bring the matter before the court "in the ordinary way". He added:

He did not know by what right the Europeans complained of took fish from this inlet, but the Government had no power to stop them. If the honourable gentleman proved his title to the property, he could bring an action against the people in the ordinary Courts, and restrain them from the trespass of which he complained. (S8:175){FNREF|0-86472-103-X|5.13.9|38}

Sheehan here seems to be suggesting that if Tairaroa could establish his treaty rights before the Native Land Court (when existing difficulties were removed) he could then bring an action in the ordinary courts and obtain an injunction restraining the Europeans' trespass. What effect the decision of Chief Judge Prendergast in the *Wi Parata* case, given only a few weeks earlier, might have on this suggested remedy is by no means clear. {FNREF|0-86472-103-X|5.13.9|39} It was unlikely to have helped. Mr Walzl has suggested that one reason Sheehan may have thought the government had no power to stop the Europeans may have been the *Wi Parata* decision (Z49:61). Susan Butterworth considers that "the historic 'Prendergast judgment' a month earlier", may have influenced the decision to include s8 in the 1877 Act (Z17:30).

5.13.10 The Act was to become operative by regulations. The first general regulations were made on 1 April 1878. {FNREF|0-86472-103-X|5.13.10|40} Regulation 4 provided:

These regulations shall not extend to any Maori, nor to any mode of catching or taking fish otherwise than by net.

The regulations:

- in the first schedule defined nine districts. These corresponded with the coastline of the nine provinces, including Canterbury, Otago and Westland. They included the "tidal water" bounding each province and extended out three miles from the coastal high water mark;

- prohibited the catching or taking of fish in any fishery subject to the regulations by means of any net without a licence;
- licences were obtainable for a fee of 20 shillings and were for one year's duration;
- up to five persons could be employed by a licensee. A further licence would be necessary if over five were employed; and
- a size restriction was imposed on the taking of flounder and sole.

As noted, none of the regulations affected Maori, whereas they applied to all net fishing by Europeans whether personal or commercial. Although s4 of the 1877 Act empowered the governor to grant an "exclusive right to any fishery", the prescribed form of licence under the 1878 regulations is non-exclusive.

5.13.11 While this Act is evidence of the assumption by the Crown of its right to control European net fishing and flounder and sole sizes, it expressly preserves the provisions of the Treaty and Maori rights to fisheries secured to them by the Treaty. The first general regulations implementing the Act expressly exempt all Maori from their provisions. But as the Muriwhenua Fishing Report has said:

The scheme of the Act was to regulate the general public exploitation of the fish resource and in so doing, it assumed that the public was entitled to exploit it, and Maori interests would not encroach unduly. {FNREF|0-86472-103-X|5.13.11|41 }

We will consider further the protection (if any) afforded by s8 and later versions when we consider the Fisheries Act 1908.

Seals Fisheries Protection Act 1878

5.13.12 This Act was enacted for conservation purposes. Its long title is "An Act for the Protection and Preservation of Seals". It imposed a closed season for seal hunting between 1 October and 1 June. The governor also had power to extend the closed period for up to three years. There was no exception for Maori.

Fisheries Conservation Act 1884

5.13.13 The genesis of this legislation was a motion passed by the Legislative Council on 16 September 1884:

That, in the opinion of this Council, the administration of the law for the protection of young fish is anything but satisfactory. (S8:244) {FNREF|0-86472-103-X|5.13.13|42 }

Some members opposed the motion on the grounds that there was still a plentiful supply of fish in the seas. Others drew attention to small fish being caught. Captain Fraser said that when last in Dunedin flounders served in his hotel "were not more than two inches long". Colonel Brett pointed out that in Bellamy's:

they would find flounders put before them four or five inches long with only a solitary mouthful of meat in the whole fish. (S8:244) {FNREF|0-86472-103-X|5.13.13|43 }

Whether such undersized flounder were being supplied because of the unavailability of mature flounder or because they were being caught in nets having a very small mesh is not known. The motion was carried by the council.

5.13.14 Tony Walzl gives a detailed account of Fisheries Bills introduced in 1880, 1881, 1882 and 1883. While none were passed, they are of interest in terms of the provisions made for Maori fisheries.

The 1880 Bill proposed to consolidate and repeal all the previous fisheries legislation. It had some new provisions:

- included in those exempted from the measure was "Any aboriginal native taking fish for his own use"; and
- s8 of the 1877 Act protecting Maori treaty rights was omitted. {FNREF|0-86472-103-X|5.13.14|44}

Captain Fraser from Otago criticised the Bill as interfering with the privileges guaranteed to Maori under the Treaty. He then made his claim to be the originator of the 1877 treaty clause (Z49:67). {FNREF|0-86472-103-X|5.13.14|45} The Legislative Council later removed the exemption for Maori taking fish for their own use and subsequently a new clause was adopted:

No aboriginal native of New Zealand nor half-caste shall be sued for any penalty, fine, or forfeiture under this Act, unless and until authority to take proceedings, signed by the Native Minister, has been filed in the Court in which such proceedings are intended to be taken. (Z49(a):321){FNREF|0-86472-103-X|5.13.14|46}

The Bill lapsed in the House of Representatives. It is of interest as showing that the Crown, in the person of Whitaker, the attorney-general responsible for the Bill, saw no need to retain the earlier provision protecting Maori treaty rights. Instead, Maori exemption was originally limited to non-commercial usage. The later provision indicated that Maori treaty rights would be decided on a case by case basis at the discretion of the Native Minister of the day. He presumably would be influenced by the perceived merits of the particular case and government policy of the day.

In 1881, the Fisheries Bill was again introduced into the Legislative Council. It appears there was no exemption for Maori but Whitaker's "Native Minister" discretionary clause was retained. Subsequently, on the motion of Attorney-General Whitaker, a new "Treaty" clause identical with s8 of the 1877 Act was added to the Bill (Z49(a):346){FNREF|0-86472-103-X|5.13.14|47} Again it lapsed in the House of Representatives. If the Treaty clause meant what it appeared to mean and gave full protection to Maori of their fisheries, it is difficult to see what effect the "Native Minister" discretionary provision would have.

The 1882 and 1883 Fisheries Bills each repeated the exemption clauses of the 1881 Bill. Both the "Treaty" and "Native Minister" clauses were included. Both Bills lapsed.

5.13.15 The Fisheries Conservation Act 1884 incorporated, that is, maintained in force, the Oyster Fisheries Act 1866, the Fish Protection Act 1877, the Fisheries (Dynamite) Act 1875 and the Seals Fisheries Protection Act 1878. The effect of this unusual drafting device was that the earlier statutes were to be read in conjunction with the new Act. One result of this was that the "Treaty" provision in s8 of the 1877 Act would continue in force and extend to the Fisheries Conservation Act. The Act enabled regulations to be made:

- providing for the better protection and improvement of fish and the management of any waters;
- protecting any fish, oysters or seals by prescribing closed seasons, extending or varying such closed seasons for terms up to three years;
- prohibiting the buying, selling or possession of any fish, oyster or seal;
- prescribing the minimum size or weight of any fish, oyster or seal;
- limiting the size of net and seine mesh or prohibiting the use of nets of any sort;
- prohibiting dredging at certain times or the use of any particular equipment or apparatus for taking any fish or oysters;
- reserving from public use any natural oyster-beds so as to prevent their destruction;
- protecting the propagation of fish in any harbour or bay by prohibiting the use of nets during specified times;
- protecting young fish or fry or spawn at all times;
- prohibiting or restricting fishing in any waters, rivers or stream in which young fish or spawn are placed or deposited; and
- prohibiting casting sawdust or any saw-mill refuse into any waters, rivers or streams.

5.13.16 On 27 March 1885, regulations were made prescribing, among other matters, the minimum weight or length of each species before they could be commercially sold. Closed seasons were prescribed for oysters and seals. The regulations were not to apply to any Maori nor to the taking of fish with rod and line.

On 8 May 1885, the collector of customs, Invercargill, wrote to the secretary of marine about the regulations:

The Maories [sic] and half caste Maories [sic] here are in doubt as to the full meaning of this clause, that is can they catch seals and dredge for Oysters and consequently make a trade of the same irrespective of closed season, or does it mean they can fish catch or hunt seals and dredge for oysters sufficient for food for their own use [illegible] but not for purposes of trade. (Z49:84){FNREF|0-86472-103-X|5.13.16|48}

The secretary's reply is unavailable. We agree with the Crown historian Tony Walzl that this inquiry probably led a month later to regulation 2, which exempted Maori from their scope, being repealed and its substitution by the following:

Nothing in these regulations shall be deemed to prevent any Maori from taking oysters or indigenous fish (exclusive of seals and other amphibious mammalia) for consumption by himself and family, and not for sale. (Z49:84){FNREF|0-86472-103-X|5.13.16|49}

Given that s8 of the Fish Protection Act 1877 preserving Maori treaty fisheries was still in force, this new provision limiting their rights was, it seems, incompatible with their treaty rights and ultra vires. Nonetheless it appeared to set the pattern for the future until a similar 1888 regulation was repealed and not replaced by order in council of 11 December 1894.

Te Oti Pitama and other Ngai Tahu petitioned Parliament on 31 July 1885, praying:

that no obstacles may be placed in their way in obtaining fish, &c., from the sea, rivers, and lakes; and birds and animals from the earth; which produce is their chief means of subsistence. (Z49(a):398){FNREF|0-86472-103-X|5.13.16|50}

In 1886 the Native Affairs Committee reported:

the petitioners refer to regulations made under "The Fisheries Conservation Act, 1884." Since the petition was written the following regulation has been made under date the 2nd June 1885, which seems to meet the case: "(2.) Nothing in these regulations shall be deemed to prevent any Maori from taking oysters or indigenous fish (exclusive of seals and amphibious mammalia) for consumption of himself and family, and not for sale; nor shall they extend or apply to the taking of indigenous fish with rod and line." (Z49:85){FNREF|0-86472-103-X|5.13.16|51}

This reply is either confused or evasive as this provision had been substituted for the earlier regulations exempting Maori from the regulations. Unfortunately, information as to the exact nature of Ngai Tahu objections is not known. The original document has not been found.

In 1888 the 1885 regulations were revoked insofar as they were at variance with new regulations made in 1888 under the Fisheries Conservation Act 1884. They repeated the earlier 1885 provision that nothing in the regulations was to prevent Maori from taking oysters and indigenous fish for their personal consumption and not for sale. The inference is that if they wished to take oysters or fish for commercial purposes they had to conform with the regulations prescribing this activity. This despite the 1877 Act provision preserving Maori treaty rights which was still in force.

Fisheries Encouragement Act 1885

5.13.17 This legislation, as its name indicates, was designed to encourage the establishment of fisheries in New Zealand. It authorised:

- the governor to set aside Crown land adjoining any coastline, harbour, bay, estuary, saltwater creek or other sea inlet fishing townships;
- it authorised payment of bonuses to exporters of canned and cured fish over a period of seven years; and
- it empowered the governor to regulate or prohibit the export of fish caught in New Zealand.

Ms Butterworth in discussing this legislation notes:

The first proposal caused no controversy, but the second became embroiled in the greatest economic debate of the times between 'free trade' and 'protectionism'. The tone of debate suggests that a bonanza mentality had possessed a significant number of speakers, blinding them to the lack of real economic basis for the proposition. Extravagant statements abounded such as Sir Julius Vogel's 'we shall find, for any fish we preserve, or cure, or tin, boundless markets in Catholic countries' or James MacAndrew's 'Our waters are replete with golden sovereigns, and we have only to take them out and they will fill the Treasury'. (Z17:40) {FNREF|0-86472-103-X|5.13.17|52}

The tribunal, in its Muriwhenua Fishing Report, stated:

Though we have found only one settlement established under this Act, Government did provide funding for roads, wharves, jetties, buildings, and freshwater supplies to new coastal townships. No similar provisions were made for Maori villages or to assist the establishment of fishing industries within them. {FNREF|0-86472-103-X|5.13.17|53}

Oyster Fisheries Act 1892

5.13.18 This Act repealed all previous legislation relating to oysters and replaced it with much more comprehensive provisions, the most important of which are noted:

- Extensive powers to make regulations for the protection of oysters included;
- generally regulating all oyster fisheries;
- prescribing conditions and restrictions for taking oysters and the definition of oyster-beds;
- providing closed seasons over any term up to three years;
- prohibiting the sale or purchase of oysters in breach of the Act;
- defining the minimum size or weight of oysters that may be taken;
- fixing times when dredging is prohibited and prohibiting the use of any particular engines, tackle or apparatus for taking oysters;

- reserving from public use any natural oyster beds so as to prevent their destruction;
- prohibiting altogether for such time as the governor thinks fit the taking of any oysters; and
- setting apart tidal waters for the natural, or artificial propagation of oysters.

Section 8 required all boats engaged in "oyster" taking to be licensed and registered. Provision was made for inspection of boats and tackle and gear to ensure that licensing and other regulations were being complied with. The governor could declare any bay, estuary or tidal waters to be an oyster-fishery and prescribe parts from which oysters might or might not be taken. He could also grant licences for taking oysters from natural beds. It was an offence to take oysters from any such bed lying below the level of the lowest spring tide or to dredge for oysters without a licence.

Special provisions were continued for farming artificial oyster beds, with a right of occupancy for up to 20 years.

5.13.19 Section 14 was the only provision relating to Maori. It provided:

The Governor may, by Order in Council, from time to time declare any bay, or portion of a bay, estuary, or tidal waters in the colony in the vicinity of any Native pa or village to be an oyster-fishery where Natives exclusively may take oysters for their own food at all times, irrespective of any of the provisions of this Act, and may from time to time revoke the same; and may prescribe regulations for preventing the sale by Natives of any oysters from such beds, and for protecting any such bay, estuary, or tidal waters from trespassers, and the oysters therein from destruction.

This is the clearest possible indication that the Crown was prepared to do no more than, at its discretion, provide for the setting aside of exclusive oyster fisheries for Maori only in the vicinity of any Maori pa or village. But oysters so taken were to be for their personal consumption and regulations could be made preventing their sale. If Maori wished to sell oysters, they would have to obtain a licence and take them from prescribed places with a licensed and registered boat with approved gear and tackle. The Act contains no reference to Maori treaty rights to their fisheries.

5.13.20 The Crown historian, Mr Walzl, made the following comment on s14. It seems s14 was never operative:

The Act reserved oyster beds for domestic use only. The evidence shows that Maori were involved in several ways in the commercial oyster industry. The reservation of oyster beds in 1892 has drawn much comment as to its intention and effectiveness, yet by 1900 no reserves had been gazetted under the Act. It has been suggested that this may have been due to a stringent application procedure [sic] that in practice precluded any possibility of gaining a reservation. However no evidence has ever been uncovered of any applications being made to either the Native (later Justice) or Marine Department. This may reflect instead that some of the protest over European trespass on oyster beds had been to save a commercial resource and not a food resource. When Maori were given the choice of protecting the beds for domestic use only, or taking a risk against trespass which allowed them to treat what they

considered were their beds in any way they wished, they chose the later option.
(Z49:109)

5.13.21 So far as the tribunal is aware, no oyster-fishery was set aside for Ngai Tahu under s14, notwithstanding that oysters were a prolific and valuable part of the fisheries in and around Rakiura (Stewart Island). Instead Ngai Tahu were left with no greater rights than non-Maori and were required to comply with registration and licensing requirements as if they had no rights in the oyster fisheries. There was no doubt then, as today, of the need for conservation of the oyster resource and reasonable measures would not be incompatible with the Crown's treaty obligations. Effectively however, the Crown recognised Ngai Tahu as having no greater right than non-Maori to access to, and the right to sell, oysters which were such a notable part of their traditional fishery.

Sea-fisheries Act 1894

5.13.22 This Act repealed the Fish Protection Act 1877 and the Fisheries Conservation Act 1884 insofar as they related to sea fishing, and completely repealed the Seal Fisheries Protection Act 1878 and the Oyster Fisheries Act 1892.

The new Act was in large part a consolidation of the earlier repealed legislation. Thus wide regulatory making power for the protection of fisheries was continued, as were the 1892 Act provisions for licensing the taking of oysters in natural oyster-beds. An important new provision in ss21 and 22 authorised the making of regulations for an exclusive right to take oysters, either from the sea bed or lands below high water mark for any period up to 14 years. Such a licence was to be sold by public tender or auction, was not to exceed five acres in area, nor a frontage of more than 110 yards on the foreshore. Any such licence could be revoked for improper or excessive user. The 1869 amendment to the Oyster Fisheries Act 1866 had authorised the issue of an exclusive licence for the use of natural oyster beds to the discoverer of such beds. This provision was omitted from the Oyster Fisheries Act 1892. The new provision makes no mention of discoverers of oyster beds. Anyone might tender for an exclusive licence. Section 41, also new, authorised regulations for licensing seal-fisheries, such licences to be obtained by public tender or at auction for a term of up to 14 years. Under s30 all oysters in any oyster-bed held under an exclusive licence were to be the absolute property of the licensee.

5.13.23 Two sections related specifically to Maori. The first (s17) repeated s14 of the Oyster Fisheries Act 1892 which authorised the governor to make orders giving Maori the exclusive right to take oysters in the vicinity of their pa or village. We were informed by Crown counsel that they had no knowledge of any such order being made under either the 1892 or 1894 Acts in any part of the Ngai Tahu fisheries claim area. From 1901 on some oyster reserves were set aside for Maori but only in the North Island. The second provision, s72, required the consent of the Native Minister to any proceedings being brought under the Act against any Maori. This provision was in substitution for regulation 3 of the regulations made on 10 January 1888 under the Fisheries Conservation Act 1884 whereby nothing in the regulations prevented any Maori from taking oysters or indigenous fish for personal consumption and not for sale. Regulation 3 and even the definition of Maori in the 1888 regulations were revoked by regulations under the Sea-Fisheries Act 1894, made on 11 December

1894. The requirement that the Native Minister assent to proceedings being brought against Maori for breaches of the Act meant that in practice the Act applied to Maori and it rested on the whim of the minister whether a prosecution of Maori in any individual case would be sanctioned.

Even more significant however, in repealing the Fish Protection Act 1877 insofar as it affected sea fisheries, was the omission of s8 of that Act which preserved Maori treaty fishing rights. That provision was not re-enacted in the 1894 Act.

The net result of the 1894 Act on Maori was that there was no longer any statutory recognition of their treaty rights in relation to sea fisheries. On the contrary, the new Act authorised regulations by which a successful tenderer or bidder at an auction could obtain a licence giving an exclusive right to take oysters in a defined area for up to 14 years. All oysters in any such oyster-bed became the absolute property of the licensee irrespective of any Treaty or other right Ngai Tahu might have in such oystery. Given the reduced state to which Ngai Tahu had been reduced by the land purchases of the Crown, the prospects of Ngai Tahu being able to compete successfully against non-Maori for an exclusive licence would have been minimal. From the Ngai Tahu perspective, this must have been seen as expropriation of their fishery rights. It was incompatible with any recognition of rangatiratanga over their fisheries.

Another new provision (s36), moved by Ward in the committee stage, made it an offence to obstruct or prevent anyone from lawfully taking oysters from any oyster-bed. As the Crown historian, Mr Walzl, pointed out, with this measure the Maori lost the right to restrain trespass on their oyster beds (Z49:117). With the law completely protecting licensed fishers, Maori lost their only remaining recourse to law to protect their rights.

5.13.24 Not surprisingly, Maori members of the House of Representatives were concerned with the 1894 Bill. During the second reading, Mr Parata, the member for Southern Maori, asked Ward, the colonial treasurer in charge of the Bill, how it would affect the Maori on Stewart Island. It seemed to him that it might be injurious to them, as it might prevent them from having the same privileges as they enjoyed in the past, for if the foreshore were let to other people they would be debarred from fishing. Ward, in reply, interpreted this inquiry as relating to seals, although that is not apparent from the Hansard report. Ward said that the Bill provided that the areas should be put up for auction in the ordinary way. For some time past seals had been utterly destroyed by outsiders going to the islands and killing them. It was just as much in the interests of the Natives as of the Europeans to protect the seals. Of course, he said, anyone who obtained a lease of the islands for sealing purposes would doubtless recognise the skill of the natives and, in his own interest, give them employment (R10:8). {FNREF|0-86472-103-X|5.13.24|54}

At the commencement of the third reading of the Bill in the House, Mr Heke, member for Northern Maori, placed his protest to the Bill on the record. The passage, although lengthy, merits quotation in full:

There were clauses in the Bill which, it was quite clear, were inconsistent with the treaty that was made between Her Majesty the Queen and the Native chiefs of New

Zealand. This, of course, related to any property the Natives might hold either individually or in common, which were confirmed to them by Article 2 of that Treaty. It was his desire to send a protest to Her Majesty through the Governor in respect of all Bills appertaining to the property of Natives, so as to get an understanding as to the real effect of this treaty. It seemed to him that the whole treaty, according to the action of the House, was being treated merely as waste-paper, and he wished to come to an understanding, not for himself, but for the Natives of New Zealand as a whole. It did not appear to be out of place for him to assume that the Natives had been deceived in the first place in 1840 into signing such a document as that, if it was not to be recognised by the Government or Parliament. If that was so, it would be far better that the Natives should come to an understanding as to whether Her Majesty on the one part or the Government of New Zealand on the other part should recognise that treaty, which was made in good faith, and which was signed by the chiefs of New Zealand in 1840 in good faith. The whole thing meant nothing more than this: that it would be far better for the Natives to come to a distinct understanding that the Treaty was neither more nor less than waste paper, or else it was something. If it was nothing, all he could say was that the Natives had been deceived by Her Majesty's representative who came to the Bay of Islands and induced the Natives to sign that treaty. Under the Instructions that were issued in 1892 to the Governor of New Zealand, under the heading of Bills not to be assented to by the Governor in Her Majesty's name, no Bill that should be inconsistent with any obligation imposed on the Queen by the treaty was to be assented to by the Governor of New Zealand, but such a Bill was to be sent Home for the direct assent of Her Majesty before the Governor could do anything in the matter. If the Bill was urgent the Governor could give his assent, but he must immediately notify the fact to the Secretary of State. It was his desire that the natives should come to a better understanding in reference to this treaty. He must again repeat that it would be better for the Natives to understand thoroughly whether they had been deceived in the first place or not. Under this Bill, if the natives wished to sell oysters they had to obtain a licence, and that provision was contrary to an Article in the Treaty of Waitangi. {FNREF|0-86472-103-X|5.13.24|55}

We record in full Hansard's text of Mr Ward's brief and dismissive reply to the despairing plea of the member for northern Maori:

Mr. WARD had one word to say in reply to the honourable gentleman who had last spoken. This Bill was a consolidating Bill, and the clause objected to by the honourable member was the law at the present time. He had explained the position to the honourable gentleman in Committee. If what the honourable member asked were done, they would have to cancel the granting of licences to Europeans. The honourable gentleman must not expect impossibilities to be done. {FNREF|0-86472-103-X|5.13.24|56}

Ward's reply was plainly wrong and misleading. It overlooked the new and objectionable provisions for exclusive licences of oyster-beds and the vesting of ownership of all oysters in such beds in the successful tenderer or bidder. And it failed to recognise that in repealing the Fish Protection Act 1877 insofar as it affected sea fisheries, it had removed s8 of that Act which up to then preserved Maori treaty fishing rights. This provision was not re-enacted in the 1894 Act as it would have been had the new Act been no more than a consolidating Act, as Ward erroneously claimed.

5.13.25 Not content with removing the statutory recognition of Maori Treaty rights in relation to sea fisheries, on 11 December 1894 by order in council, the Crown repealed the definition of "Maori" and regulation 3 of the Fisheries Regulations 1888. This regulation had continued earlier regulations which provided that nothing in the fishing regulations was to prevent Maori from taking oysters or indigenous fish for their personal consumption and not for sale or the taking of indigenous fish with cod or line only. As Crown historian Mr Walzl pointed out, as a result of this action Maori were now completely brought under the operation of the fisheries law subject only to such protection as might be offered by the discretion of the Native Minister (Z49:118).

Sea-fisheries Act Amendment Act 1896

5.13.26 This short Act extended the governor's discretionary powers concerning oysters to all other species of edible shellfish and to sponges and sponge-beds, subject to two qualifications. The first provided that when shellfish in the Middle (South) Island were required for food by the Maori population they were to be exempt from the provisions of the Act. The second enabled the Native Minister by order to relax the provisions of any order in council as regards the North Island if he considered it injuriously affected aboriginal natives by limiting or depriving them of food-supplies. The minister could vary or cancel any such order from time to time and apply it to any part or parts of the North Island. This latter provision, as we will show, was the result of a compromise between the House of Representatives and the Legislative Council.

5.13.27 For some time prior to the introduction of this Bill into the House, Ngai Tahu (as will later appear), were becoming increasingly concerned at the erosion of their treaty rights in the fisheries legislation. The Reverend Teoti Pita Mutu, who had protested to Native Minister Cadman during Cadman's visit to the South Island in 1894 that Maori "had not parted with their fishing rights" (S7:97), wrote to the Honourable H K Taiaroa in July 1896:

I see that the House has a Bill before it dealing with Sea Fisheries. It would perhaps be advisable to have a clause inserted therein applicable to our "Hapuku" "Conger eel" and other fish, fishing grounds, providing that no Europeans are to fish on such fishing grounds where floats have been laid (that have been buoyed) but to have a distance of a mile therefrom where they may fish, because these fishing grounds have been used as such from a long time back, I am well acquainted with the land marks indicating those fishing grounds come within the meaning of the expression "mahinga kai" cultivations (food producing places) in the Ngaitahu Deed). I told Wi Pokuku a short while back about two weeks ago that when he returned to Moeraki he had better tell Mauhana to send some of his young people to go and lay floats at the Hapuku fishing grounds that he was acquainted with and that after that was done that he had better then petition Parliament to have a Bill prepared debarring the Europeans from fishing on those Hapuku fishing grounds. (S8:321-322){FNREF|0-86472-103-X|5.13.27|57}

On 6 July, Taiaroa sent the note on to Seddon, then Minister for Native Affairs, asking him to quickly look into the matter. Seddon's reply of 8 July simply noted that he regretted he was unable to introduce legislation in the direction desired by Mr Mutu (S7:99).{FNREF|0-86472-103-X|5.13.27|58}

5.13.28 When the Bill was being read for a second time in the House of Representatives, Heke asked the Minister-in-Charge (Hall-Jones) to:

take into consideration some suggestions made by a Native gathering in Wellington respecting shell-fish. The suggestions were given to the Premier two or three weeks ago. The effect was that the Natives should be exempted from the operation of the Act so long as they gathered shell-fish for their own use. {FNREF|0-86472-103-X|5.13.28|59}

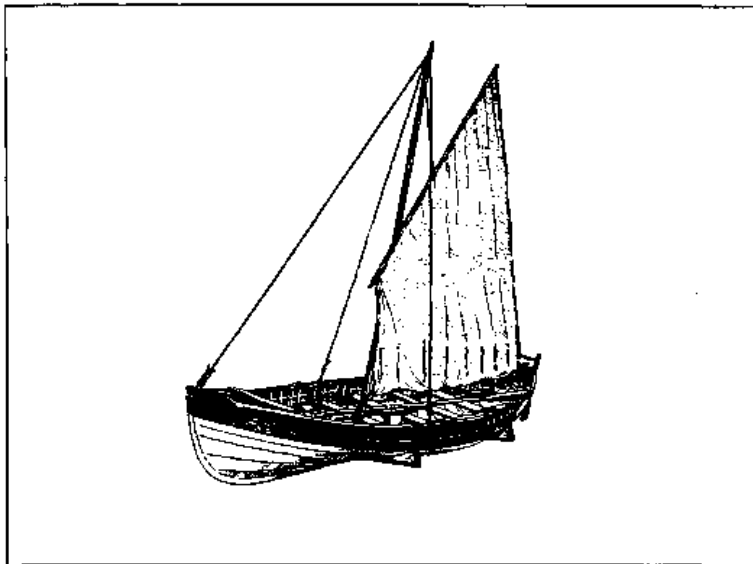


Figure 5.1 Sketch of a whale boat in Murray A Bathgate "Maori River and Ocean Going Craft in Southern New Zealand: A Study of Types and Change in Relation to the Physical, Social, and Economic Environment, 1773-1852" in *Journal of the Polynesian Society* volume 38 number 3 September 1969, cited in evidence as S3

We agree with the suggestion in the Muriwhenua Fishing Report that Heke, for practical reasons, had become willing to abandon his earlier contention that under the Treaty Maori should have free rights of commercial exploitation. He was seeking an unrestricted right to gather for home use. {FNREF|0-86472-103-X|5.13.28|60}

Hall-Jones replied that the Act "had been introduced at the request of the Natives themselves, who complained that the shell-fish beds from which they obtained food for sustenance and bait for fishing were being destroyed." {FNREF|0-86472-103-X|5.13.28|61}

In the committee stage of the Bill a proviso was added that when shellfish were required as food by the native population they were to be exempt from the operation of the Act. An amendment declaring that pipis were not deemed shellfish was also carried. But the House rejected a proposal by Heke that:

Nothing in the principal Act or this Act shall prohibit any aboriginal native or natives of New Zealand from taking or gathering any oysters or any edible shell-fish or seaweed for their own use and consumption: Provided that such oysters or edible shell-fish or seaweed are not taken or gathered by such aboriginal native or natives for the purposes of sale: Provided also that this section shall not authorise the taking of oysters from any artificial oyster beds. {FNREF|0-86472-103-X|5.13.28|62}

When the Bill came before the Legislative Council, the Honourable W C Walker moved that the amendments in favour of Maori made in the House be not agreed to. He thought it "would be very dangerous indeed if this exemption were to be added to the Bill, as it was necessary to protect our shell-fish" (S7:100). {FNREF|0-86472-103-X|5.13.28|63} This prompted the Honourable H K Taiaroa from Otago to point out that:

In some places Natives were dependent to a great extent upon some of these shell-fish for their maintenance, and in some localities they had been dependent for generations past upon these shell-fish, and it was here provided that they were not to gather them for sale, but only for their own consumption, so that he thought it only fair to allow this provision to remain. (S7:100) {FNREF|0-86472-103-X|5.13.28|64}

Notwithstanding this plea, the motion to delete the House amendments was approved. The Honourable W C Walker then said he had no desire to propose anything oppressive to Maori, his concern was that "shell-fish were protected for the benefit of all, Natives included". He would be perfectly prepared at the conference between the House and the council to see any proper relaxation made in favour of Maori. {FNREF|0-86472-103-X|5.13.28|65} The conference duly agreed to the two provisos relating to the Middle (South) Island and the North Island being inserted in the Bill, which was duly passed (R10:11). The net result was that Ngai Tahu, being resident in the Middle Island, were exempt from the provisions of the Act as and when they required shellfish (excluding oysters) for their own consumption. But as Susan Butterworth has noted, the main significance of this provision is "that it continued the practice of giving CONCESSIONS for Maori fishing rather than acknowledging RIGHTS" (Z17:64).

Maori Councils Act 1900

5.13.29 The purpose of this Act was to grant a limited measure of local self-government to Maori. It established Maori District Councils. Its chief concern was with welfare and village administration. For our purposes, its chief interest is s16(10) which enabled district councils to make by-laws, subject to the governor's approval, for the control of all oyster-beds, pipi-grounds, mussel-beds, and fishing grounds used by Maori or from which they obtained food. Power of closure for conservation purposes was included. But any such by-laws were not to conflict with "the provisions of any other Act dealing with the same subject matters".

5.13.30 The 1903 amendment to the 1900 Act empowered the governor, for the purpose of s16(10) of the Act, on the recommendation of a council, to reserve any oyster, mussel or pipi bed or any fishing ground, exclusively for the use of Maori of the locality or of such Maori hapu or tribes as might be recommended. The Muriwhenua Fishing Report stated that "Several bylaws had been gazetted by 1903 but none that related to fishing grounds. A search of the gazettes for all subsequent years has revealed neither by-laws nor reserves". {FNREF|0-86472-103-X|5.13.30|66} The Muriwhenua Fishing Report goes on to record that in 1930 Sir Apirana Ngata supported a Maori request to reserve a part of Kawhia harbour. He was advised that:

It is recognised that under the Treaty of Waitangi the Chiefs and Tribes were to have the full exclusive and undisturbed possession of their fisheries.

The fact is however that there never could have been any exclusive right to fisheries, and in any case the lands which the Natives want set aside is mostly tidal land. These tidal flats are, as you are aware, Crown property in its common law right. {FNREF|0-86472-103-X|5.13.30|67}

Sea-fisheries Amendment Act 1903

5.13.31 This was an amendment to the Sea Fisheries Act 1894 which in relation to sea fisheries had repealed the 1877 Act, including s8 saving Maori treaty rights to their fisheries. This Act made a number of miscellaneous amendments, including the requirement that the owners of licensed sea-fishing boats and fish curers were to make returns to the Marine Department of all fish caught or cured by them. The Act was notable however, for its inclusion of s14, which stated:

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

This clause was inserted in the Bill when it was in committee before the House of Representatives. No reason for its inclusion was given then or at any later stage of the progress of the Bill through the House, nor was it even mentioned. On the question that this and other amendments made by the committee be agreed prior to the third reading of the Bill in the House, the Right Honourable Richard Seddon expressed the hope there would be no adjournment. The "amendments" he said, "were not of a very important character". {FNREF|0-86472-103-X|5.13.31|68} The Bill later passed through the Legislative Council without any mention being made of the new s14.

5.13.32 The only possible explanation for the insertion of this provision during the committee stage of the Bill in the House might be in a speech during the earlier second reading stage by Tame Parata, member for Southern Maori. After pointing out that the Bill would have an immediate effect on Maori in Stewart Island, Ruapuke, Bluff and Colac Bay, he said:

In those parts of the Colony there were certain reservations made in the deed of sale of Murihiku which provided that the natives should retain the right to their fishing-grounds at sea and inland. This was one of the conditions the old RANGATIRA Maoris insisted upon when that deed was executed. I want to protect the fishing rights of the Maori people. Ruapuke was never included in that deed of sale, and there were so-many miles out to sea around the Island of Ruapuke, and including the smaller adjacent islands, reserved to the Maoris out of the sale. A few months ago a resolution was passed by the Araitoura Council that a distance of so-many miles around that island should be reserved for the fishing rights of the natives of Ruapuke, Stewart Island, and the Bluff. I hope the Minister will see his way to put a clause in the Bill to carry out the resolution of this Council, as the resolution is a reasonable one. {FNREF|0-86472-103-X|5.13.32|69}

Later in the same speech he said:

Now, along the coast of Otago, and right up to Akaroa, there are a number of fishing-grounds that have been handed down to the Maoris by their ancestors, but have been overrun and made use of by everybody, including Europeans, in recent years. I do not object to the Europeans fishing at these places, but these reefs should be to some

extent protected for the benefit of the Maoris; and there are other parts of the sea which are available for European fishermen to make use of. If the Bill goes into Committee I shall move certain amendments to provide for the protection of the Maori fishing-rights. The House should uphold the promises made by the representatives of the King, and carry them out. {FNREF|0-86472-103-X|5.13.32|70}

The amendment which resulted in s14 was not moved by Parata in committee but by the Minister of Marine, Hall-Jones. While we have no firm information on the point, it may well be that Parata's second reading intervention was influential in s14 being added. It is noteworthy that the previous reference to Maori fisheries rights under the Treaty was omitted. Neither the minister, the premier, Seddon, or any other member of government felt it necessary to explain what "existing Maori fishing rights" might be encompassed by the new provision. We will later consider other evidence which points to the Crown's very limited view of such rights.

Fisheries Conservation Amendment Act 1903

5.13.33 This set an open season for trout fishing and gave the governor additional power to make regulations for the issue of uniform licences to fish for trout and perch, to regulate the export of trout and to prevent the pollution of streams in which trout or salmon were present.

In the House, Tame Parata, the member for Southern Maori, opposed the Bill because there was nothing in it to provide for conserving fishing rights for Maori in their own streams. He went on:

Now under the deed of sale by Ngaitahu the Maoris were allowed to retain the rights to their fisheries - their sea-fishing grounds, and their eel and other freshwater fisheries, in the rivers and lakes - and there is also a clause in the Treaty of Waitangi which assures to them the fishing rights in their rivers, lakes, and seas Why should this House pass legislation to ask the Maoris to pay for a license [sic] when the rivers belong to them and the fish belong to them? I shall move in Committee that there be a provision allowing the Natives the right to fish in their own rivers for such as eels, whitebait, flounders, lampreys and all other fish. The acclimatisation societies hold meetings to discuss these questions, but why do they not ask the opinions of the Maoris? You bring in a Bill that is one-sided. {FNREF|0-86472-103-X|5.13.33|71}

In fact, Parata may have been unnecessarily anxious as the legislation did not prevent Maori fishing for indigenous fish. Parata was supported by Mr Field, member for Otaki:

I am one of those who hold that the provisions of the Treaty of Waitangi are too apt to be forgotten in the legislation of this Parliament. It is unmistakable that in that treaty there is preserved to the Natives the right to fish freely in all rivers, streams, and lakes of the colony; and in dealing with legislation on fishing matters we should bear that clearly in mind. The Natives, as has been truly said, depend very largely on the fish of the Colony for their food, and it is only right that the terms of that great treaty, under which the Natives practically gave up their lands to the Europeans, and which they regard, and rightly regard, as the Magna Charta of their rights and liberties so far as land is concerned, should be strictly adhered to. The Natives should undoubtedly have

the free right to fish for native fish, at any rate, in the streams of the colony; and if it is true that the imported fish voraciously devour the native fish, then I am not sure the natives ought not to be allowed to fish for imported fish in the same way as they do the native fish, without having to purchase licences. {FNREF|0-86472-103-X|5.13.33|72}

5.13.34 In fact Parata did not subsequently move any amendment. The most likely explanation is that he may have recalled or been reminded that s8 of the Fish Protection Act 1877 (protecting Maori treaty fishery rights) was still in force in respect of freshwater fisheries and that provision was "incorporated" with the Fisheries Conservation Act 1884. If so, such protection as this afforded was to be short-lived. Four years later the Fish Protection Act 1877 was wholly repealed by the Statutes Repeal Act 1907.

Sea-fisheries Act 1907

5.13.35 This Act gave the minister power to employ oyster pickers for any oyster-fishery in the North Island. It did not apply to the South Island so Ngai Tahu were unaffected. It is mentioned, however, to record that during the debate on this legislation notable speeches were made by Apirana Ngata, member for Eastern Maori, and Hone Heke, member for Northern Maori, on Maori treaty fishery rights. These we discuss later (5.15.6).

Fisheries Act 1908

5.13.36 This consolidated and repealed the previous legislation including the Fisheries Conservation Act 1884. Part I of the new Act dealt with sea fisheries and part II with fresh water fisheries. As it added nothing new, we refrain from categorising its contents which remained substantially unchanged until the 1940s. We record that the previous prohibition against the bringing of proceedings for a fishing offence against a Maori habitually living with Maori, without the consent of the Native Minister for those proceedings, was repeated in s76.

5.13.37 Section 77(2) stated:

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

Section 77 was in part I, dealing with sea fisheries. No equivalent provision was made in part II, which was concerned with fresh water fisheries. As there does not appear to have been any debate on this Act since it was part of a general consolidation of all Public Acts, no reason was given for the provision not extending to fresh water fisheries.

In the Fisheries Act 1983, s77(2) was re-enacted but with the omission of the word "existing" so that the new s88(2) read:

Nothing in this Act shall affect any Maori fishing right.

We adopt the tribunal view expressed in the Muriwhenua Fishing Report that:

these were general words, making no specific provision for the protection or advancement of Maori fishing interests, and leaving it very much to the administrators to make of them what they would. Not unexpectedly, that task fell also to the courts. {FNREF|0-86472-103-X|5.13.37|73}

5.13.38 We will defer further analysis and evaluation of the Crown's legislative intervention in Maori treaty fishing rights pending a closer examination of the Crown attitude to those rights. In 5.12.1 we referred to the influence of English common law rules that land below high tide mark was the property of the Crown and that there was public and general right to fish in both tidal and offshore waters. We now look more closely at why these rules came to be taken by the courts and successive governments to prevail over Maori treaty rights to their fisheries, notwithstanding the express provision in s8 of the Fish Protection Act 1877 and later statutes which on their face preserved such treaty rights. We will also consider the Maori and more specifically Ngai Tahu attitude to the Crown's legislative and administrative attitude to their treaty fishing rights as evidenced by protest and other intervention. Having done this, we will then evaluate, as at 1908, the effect of Crown legislative and other acts on Ngai Tahu treaty rights.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

05 The Crown Assumes Control of the Fishery, 1840 to 1908

5.14 The Crown Attitude to Maori Fishing Rights

5.14. The Crown Attitude to Maori Fishing Rights

The common law

The settlers had brought in their mental baggage the belief that the foreshore and the sea were common to all for the purpose of getting fish. {FNREF|0-86472-103-X|5.14|74}

5.14.1 The tribunal is indebted to the Law Commission's valuable discussion paper on The Treaty of Waitangi and Maori Fisheries; Mataitai: Nga Tikanga Maori Me Te Tiriti o Waitangi in which the foregoing graphic phrase appears. We propose to draw on the commission's paper in our discussion of the Crown attitude to Maori fishing rights.

The settlers' belief that they were entitled as of right to access to the foreshore and the sea for the purpose of fishing was no doubt based on their understanding of the English common law. They assumed that they had brought this law with them to New Zealand. The Crown's right to the foreshore is discussed in Halsbury's Laws of England:

By prerogative right the Crown is prima facie the owner of all land covered by the narrow seas adjoining the coast ... and also of the foreshore, or land between high and low water mark There is a presumption of ownership in favour of the Crown, and the burden of proof to the contrary is on a claimant. {FNREF|0-86472-103-X|5.14.1|75}

As we have seen in our Ngai Tahu Report 1991, the Crown accepted that Maori owned all land in New Zealand and accordingly treated with them for its acquisition. But the question arose as to what was meant by "land". As the Law Commission has said, after some initial uncertainty, the Crown adopted the view that land for that purpose stopped at high-water mark. {FNREF|0-86472-103-X|5.14.1|76} Maori ownership of and rights in respect of the foreshore were not admitted. The tribunal, in the Muriwhenua Fishing Report found the view that the foreshore belonged to the Crown, and no right title or interest, customary or otherwise, could be held by any person save for some specific land grant or legislative provision was soon received and became increasingly entrenched. {FNREF|0-86472-103-X|5.14.1|77}

A good illustration of the Crown's attitude is to be found in its argument in the Kauwaeranga case decided by Chief Judge Fenton in 1870. {FNREF|0-86472-103-X|5.14.1|78} There the Crown contended that by the law of England, the foreshore

belonged to the Crown and could only be held by a subject by grant from the Crown, either existing or presumed. This seisin of the Crown was claimed to be an incident of sovereignty. Consequently Maori could not own the foreshore according to their customs and usages, as such ownership would be in derogation of the Crown's prerogative. As will be seen, this view came to prevail in subsequent decisions.

While it was not in dispute that the Crown owned the foreshore by virtue of its paramount title, except to the extent it may have granted it to other such ownership, this was not inconsistent with the legal recognition of Maori property rights as the indigenous people. The question was whether the Crown's title was subject to a legal burden recognising the right of the indigenous people to the occupation of and enjoyment of their land and whether this extended to the foreshore.

5.14.2 The customary rights of Maori over their land were recognised at a very early stage by the Land Claims Ordinance 1841. This provided that:

All unappropriated lands, subject to rightful and necessary occupation and use by the aboriginal inhabitants, are and remain Crown or domain lands. {FNREF|0-86472-103-X|5.14.2|79}

"Unappropriated lands" appear to be those not Crown granted.

But an early authoritative decision of the New Zealand Supreme Court was soon after to uphold the Maori customary title irrespective of the provisions of the Lands Claims Ordinance 1841. In the leading judgment in *R v Symonds* [1840-1932] NZPCC 387, given in 1847, Chapman J held:

Whatever may be the opinion of jurists as to the strengths or weaknesses of the Native title ... it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers ... It follows ... that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi ... does not assert either in doctrine or in practice anything new and unsettled. {FNREF|0-86472-103-X|5.14.2|80}

And later he said:

It is not at all necessary to decide what estate the Queen had in the land previous to the extinguishment of the Native title ... the full recognition of the modified title of the Natives, and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects. {FNREF|0-86472-103-X|5.14.2|81}

We agree with the Law Commission's observation that nothing in the judgments in *Symonds* suggests that Maori property rights were not justiciable or that they were only justiciable because of statutory recognition in the Land Claims Ordinance 1841. {FNREF|0-86472-103-X|5.14.2|82}

5.14.3 The Public Reserves Act 1854 was an early statute reflecting the Crown's view of its right to vest land below high water mark in a provincial superintendent. With a

view to facilitating a system of local management of lands required for local purposes, this Act authorised the governor to vest any Crown lands in each province in its superintendent and his successors (s1). In addition, s2 conferred power to grant and dispose of land reclaimed from the sea and any land below high-water mark to a provincial superintendent. Section 12 said that nothing was to prejudice or affect the rights of anyone except the Crown in those lands. This would have included Maori.

In 1874 H K Tairaroa, member for Southern Maori, asked whether the reclamation of land below high water mark in the North Island was not in contravention of the Treaty of Waitangi. Sir Donald McLean replied that land below high water mark was granted to provincial superintendents under the 1854 Act and that when Maori ceded land to the Crown, all rights connected with them, such as rivers and streams, were also ceded. But this answer left unanswered the question of what had in fact been ceded. It did not refer at all to the foreshore, which was the point of the question and made no mention of the saving rights in s12 of the Act. The parliamentary debates are replete with evasive or unresponsive answers such as this to questions by Maori members as to Maori fishing rights.

5.14.4 In the *Kauwaeranga* judgment already referred to (5.14.1), Chief Judge Fenton implicitly rejected the Crown's contention there set out. But for reasons which appear in the tribunal's *Muriwhenua Fishing Report*, that is, for purely policy (or political) reasons, Fenton resiled from applying his findings. We adopt what the *Muriwhenua* tribunal had to say about this decision:

The *Kauwaeranga* Judgment represents a change in the Native Land Court's direction, and is in fact a reversal of a decision of the same Judge only a few weeks earlier (*Whakaharatau* Judgment). In the *Kauwaeranga* case the Court upheld earlier Native Land Court opinion that the Crown's right to the foreshore, like its nominal ownership of the land, was held subject to customary usage until that usage was extinguished. The Court had simply to ask whether it was held according to native custom at 1840. However after a most lengthy and erudite statement of the law as the Court saw it, and after some comments on the importance of fisheries to Maori, it was held that for reasons of "public policy" (and although the Maori claimants were held to be entitled to the mudflats) the Maori claimants should receive no more than a title to exclusive fishing rights over the area in question.

What were the issues of public policy? They were not explained in the judgment. Reality lay in the fact that beneath the mudflats lay gold, as the Court well knew. The *Goldfields Amendment Act 1868* had opened Maori land for goldmining but it had also provided in section 9, that the foreshore adjoining Maori land opened for gold mining was deemed to be Maori land too. The *Thames Sea Beach Bill* (eventually the *Shortland Beach Act 1869*) proposed to delete that provision and gave rise to much debate and legal opinion in the House on native foreshore rights The *Kauwaeranga* claim came at the same time as the parliamentary debate and involved the very lands then hotly in dispute.

The convenience of the *Kauwaeranga* Judgment was that it protected the Crown's interest in gold, which was the main concern at the time. But it also had the inconvenience of specifically rejecting the strong contention of Crown counsel that no

Maori could own the foreshore according to custom and usage, in derogation of the Crown's prerogative.

In the event the Government suspended the authority of the Native Land Court to deal with land below high water anywhere in the Auckland Province (where the Chief Judge had his circuit) South of the Auckland province the Judges of the Maori Land Court had become reluctant to issue foreshore titles anyhow, in view of the non-Maori reaction, even where the Maori customary use was clearly established - see for example *In re Porirua Foreshore* (1873) Wellington Minute Book 157. Section 147 of the Harbours Act 1878 finally resolved the matter. It forbade the granting of any part of the seashore or land under the sea 'without the special sanction of an Act of the General Assembly'.

That Act put an end to the Native Land Court's involvement with fisheries. More significantly it put paid to any contention that the Crown's common law right to the foreshore was subject to customary usage, at least until 1986 when the doctrine of aboriginal title was revived. {FNREF|0-86472-103-X|5.14.4|83}

5.14.5 Ironically, only a year after the *Kauwaeranga* judgement was to come the high-water mark of judicial recognition of Maori title by the New Zealand Court of Appeal of five judges. This recognition was made irrespective of either the Treaty or subsequent legislation. The court in *Re Lundon & Whitaker Claims Act 1871* (1871) 2 NZCA 41, 49 held:

The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it.

5.14.6 But this view of the legal status of Maori rights was soon to be gravely undermined. This occurred only six years later in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72. Chief Justice Prendergast delivered the judgment of himself and Richmond J. The judgment is best known for its reference to the Treaty of Waitangi as a nullity, although it is not always remembered that this was said of it in so far as it purported to cede sovereignty. The court rejected the concept of legally enforceable Maori property rights. It commented in a derogatory fashion about existing legislation concerning rights and native customs. It made no reference to possible common law Maori rights. Of such rights as the Maori might have it said:

in the case of primitive barbarians, the supreme executive Government must acquit itself as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exists no known principles whereon a regular adjudication can be based. {FNREF|0-86472-103-X|5.14.6|84}

At the heart of the judgment is the conviction that:

Transactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State and therefore NOT EXAMINABLE BY ANY COURT. (emphasis added){FNREF|0-86472-103-X|5.14.6|85}

In short, the state and not the courts was to be the sole arbiter of whether the state had properly discharged its obligations to respect all Maori proprietary rights. {FNREF|0-86472-103-X|5.14.6|86}

5.14.7 Wi Parata's view of the legal status was upheld by the Court of Appeal in *Nireaha Tamaki v Baker* (1894) 12 NZLR 483. The court treated all dealings with Maori for the purchase of land as acts of state beyond the law and approved the decision in *Wi Parata* as authority for the proposition that:

the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony. There can be no known rule of law by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested The Crown is under a solemn engagement to observe strict justice in this matter, but of necessity IT MUST BE LEFT TO THE CONSCIENCE OF THE CROWN TO DETERMINE WHAT IS JUSTICE. (emphasis added){FNREF|0-86472-103-X|5.14.7|87}

Thus did the Court of Appeal abnegate all power to review the legality of Crown action in relation to Maori proprietary rights. That its trust in the conscience of the Crown to determine what is justice was fatally misplaced has been repeatedly demonstrated in our *Ngai Tahu* Report 1991.

The Court of Appeal's judgment came before the Privy Council some seven years later in *Nireaha Tamaki v Baker* [1840-1932] NZPCC 371. Not surprisingly, the Privy Council reversed the decision of the Court of Appeal. It held that it could not be maintained that there was no customary law of the Maori of which the court could take cognisance. If the Maori appellant could succeed in proving that he and members of his tribe were in possession and occupation of the lands in dispute under a native title which had not been lawfully extinguished, he could take appropriate legal proceedings to restrain an unauthorised invasion of his title. Yet in the later case of *Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655, the New Zealand Court of Appeal in effect rejected the Privy Council decision and followed the decision in *Wi Parata*.

5.14.8 Whatever uncertainty remained as to the right of Maori to invoke the aid of the courts in relation to their customary land rights was put beyond doubt in the Crown's favour in 1909. In that year a major restatement of Maori land law was enacted. Sections 84 to 87 of the Native Land Act 1909 provided:

- that Maori customary title to land was not available or enforceable against the Crown in any court proceedings or in any other manner (s84);
- that a proclamation that any Crown land was free from Maori customary law was conclusive in all courts (s85);

- that no alienation of land by the Crown could be questioned or invalidated in any court on the ground that Maori customary title had not been extinguished (s86); and
- that Maori customary title was deemed to have been lawfully extinguished in respect of all land which in the previous ten years had been continuously in the occupation of the Crown whether by tenants or otherwise (s87).

5.14.9 Likewise in 1914, whatever doubts there might have been as to the ability of Maori to assert a customary fishing right in court proceedings were also put to rest in favour of the Crown. In *Waipapakura v Hempton* (1914) 33 NZLR 1065 a Maori woman had been fishing in the tidal waters of the Waitotara river. Hempton, a fishery officer, seized her nets on the grounds that she was using them in breach of a fisheries regulation made under the Fisheries Act 1908. Ms Waipapakura claimed she was using the nets in exercise of a Maori fishing right and that such right was saved from the operation of the Fisheries Act by s77(2) of the Act. This subsection provided that nothing in part I of the Act "shall affect any existing Maori fishing rights".

The Crown's view of the appellant's position was succinctly stated by the Solicitor-General (J W Salmond QC):

The plaintiff's claim is for a non-territorial fishery in the tidal waters of the Crown. The land [under the tidal waters] has belonged to the Crown since the Crown came to New Zealand. The principle that tidal waters belong to the Crown is in force here unaffected by the Treaty of Waitangi or Native land legislation. Native customary title is limited by high-water mark and does not include tidal waters. It is illegal for the Crown to make a grant that would interfere with the public right of fishing and navigation There can, therefore, be no territorial fisheries in the sea. **APART FROM LEGISLATION, THE TREATY OF WAITANGI IS MERELY A BARGAIN BINDING UPON THE CONSCIENCE OF THE CROWN AND IS NOT A SOURCE OF LEGAL RIGHTS.** There is no legislation giving to Maoris the right to fish in non-territorial waters ... Section 77, subsection 2, of the Fisheries Act 1908 ... is merely a saving clause and does not create rights. (emphasis added){FNREF|0-86472-103-X|5.14.9|88}

The Supreme Court (a full court comprising three judges), in a judgment delivered by Chief Justice Stout, upheld the Crown's contentions. It affirmed that s77(2) was a saving clause not the grant of a right and, relying on the Privy Council decision in the *Nireaha Tamaki* case, that until there was some legislative provision as to the carrying out of the Treaty, said "the Court is helpless to give effect to its provisions". Stout CJ went on to say that all the Fisheries Act 1908 did was to regulate all fisheries so as to preserve fish for all. There were concessions given, but those concessions were to Maori and did not affect the question in this case. He held:

In the tidal waters - and the fishing in this case was in this area - all can fish unless a specially defined right has been given to some of the King's subjects which excludes others. It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give such an expansive right to the Maoris, but if it meant to do so no legislation has been passed confirming the right and in the absence of such both *Wi Parata* and *Nireaha Tamaki v Baker* are authorities for saying that

until given by statute no such right could be enforced. {FNREF|0-86472-103-X|5.14.9|89}

In the result, the appellant failed in her bid to regain possession of her nets. As the Law Commission has noted:

The overall themes and policy of the decision were the public right to fish in the sea and tidal waters, elevated virtually to a constitutional principle, and the concept that there should be no special privileges for Maori in this regard. {FNREF|0-86472-103-X|5.14.9|90}

Te Weehi's case

5.14.10 The decision in *Waipapakura v Hempton* stood intact until the recent High Court decision in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680. The tribunal in the Muriwhenua Fishing Report made the following observations on this case which we adopt:

In *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680, Mr Justice Williamson distinguished the earlier cases in that Te Weehi's claim was not based on a question of land ownership, and nor was he seeking an exclusive right. The Court concluded that as a result of the general provision in (now) s88(2), customary Maori fishing rights exercised in a customary way are exempt from regulations under the Fisheries Act, and that customary fishing rights continue until they are expressly taken away. In that case the Court considered Te Weehi was exercising a customary right. He was not claiming an exclusive right and was taking only for personal needs.

Effectively the Court recognised what is often referred to as the doctrine of aboriginal title, about which Dr McHugh had written, possibly for the first time since *R v Symonds* [1840-1932] NZPCC 387. The Court followed, in that respect, a long line of Canadian decisions.

Thus it was that for the period 1900-1987, no general right of Maori fishery was recognised at law, until the Te Weehi case in 1986. Even that case may have limited scope, for while the fishing industry has expanded enormously, the customary right referred to related to gathering for personal needs in a customary way. {FNREF|0-86472-103-X|5.14.10|91}

Te Weehi's case was not taken on appeal by the Crown. It remains to be seen, should its correctness be challenged in future, whether it will be upheld. It may be that, to do so, the Court of Appeal will need to overrule *Waipapakura v Hempton*.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

05 The Crown Assumes Control of the Fishery, 1840 to 1908

5.15 Maori Complaints and Protests

5.15. Maori Complaints and Protests

5.15.1 For the first 30 years or so following the signing of the Treaty Maori felt in no way threatened by the relatively minor intrusion of non-Maori in their traditional fisheries. In the mid to late 1870s however, there developed some pressure on oyster and other shellfish reserves from Europeans. Also from the first legislative intervention in 1866 in the form of the Oyster Fisheries Act - passed without any consultation with Maori - it became clear the Crown assumed it had the right to restrict or deny access to fisheries by both Maori and non-Maori alike. This intervention, as will be seen, generated a continuous stream of complaints and protest by Maori in various parts of the country during the remainder of the nineteenth century and down to the present time.

5.15.2 The tribunal in its Muriwhenua Fishing Report has recorded many of the protests by Maori in the last three decades of the nineteenth century and into the twentieth century. The tribunal did not confine its discussion solely to grievances and protests by the Muriwhenua tribes but extended it to Maori throughout New Zealand. These complaints and protests took a variety of forms. Some were made direct to the Native Department or the Native Minister. Others took the form of petitions to the House of Representatives. The Muriwhenua Fishing Report records in appendix 8 some 46 Maori fishing petitions referred to the Native Affairs Committee in the period 1869 to 1910. Of these some nine were from Ngai Tahu. Yet other protests were made by Maori members of Parliament, including H K Taiaroa and Tame Parata from Ngai Tahu, during debates on various fishing Bills before the House of Representatives or Legislative Council. Court proceedings by Maori were yet another form of protest. These latter became more frequent during the 20th century.

5.15.3 In 1860 Governor Browne convened a hui of some two hundred chiefs, including many from the north, to discuss the Waitara dispute. The Treaty was discussed at considerable length. {FNREF|0-86472-103-X|5.15.3|92} Those who spoke at this great gathering at Kohimarama were not recorded as saying anything about violations of fishing rights. {FNREF|0-86472-103-X|5.15.3|93} Yet as the Law Commission noted, by 1879 these were a "burning issue". {FNREF|0-86472-103-X|5.15.3|94} As the Tribunal indicates in the Muriwhenua Fishing Report Maori complaints at the hui held in 1879 (known as the first Maori Parliament) concerning their fisheries and their Treaty fishing rights were voluble. This is demonstrated by some 14 extracts of such complaints and protests by leading rangatira recorded in the tribunal's Muriwhenua Fishing Report (Z17:42-45). {FNREF|0-86472-103-X|5.15.3|95}

Professor Ward has noted that some of the complaints also referred to loss of control by the chiefs, of the mana of the lands, forests and fisheries, guaranteed by the Treaty. He went on to say:

This implies more than concern for traditional resources as such. It led to objections to the requirement to require licences even for the shooting of introduced birds such as pheasants, or the taking of introduced fish, for that implied a loss of the mana of forests, streams and foreshores: Maori apparently felt that kawanatanga was intruding upon rangatiratanga without adequate consultation and consent. Susan Butterworth has commented that, though politicians were aware in principle of the duty to protect Maori fishing rights, they seemed to have had no practical grasp of the way the new [conservation] laws would interfere with Maori traditional use of rivers, lakes and estuaries. (AA26:19-20; Z17:39,43)

5.15.4 The Muriwhenua tribunal noted that in many of the Maori fishing petitions referred to the Native Affairs Committee the Treaty of Waitangi was invoked and, more often than not, specific fish laws were alleged to be contrary to the Treaty. {FNREF|0-86472-103-X|5.15.4|96}

5.15.5 The Crown historian Tony Walzl said (Z49:86) in reference to Maori fishing protest in the years 1880 to 1885:

At a time when European legislators were passing statutes relative to the fishery, the Maori protest over lost fisheries and fishing rights began building to a crescendo which forced the Crown to re-evaluate its stance. The Maori fishery petitions of the 1870s had mainly referred to inland waters, the navigation of rivers and the protection of eel-weirs. One of the first petitions relative to sea-fisheries was one sent in during 1879, after the Orakei Parliament by Arama Karaka, who had been a delegate to the conference. His petition directly referred to European legislation over the fisheries and echoed the sentiments of Ngatata that only Maori had a right to manage and control their fishery

That the laws of the Europeans should not affect the deep-sea fisheries and pipi-beds, because the Europeans have only a right to the dry land.

Mr Walzl proceeded to give further examples including some initiatives by Ngai Tahu to which we refer below. Walzl demonstrated that the protests continued beyond 1885 (Z49:101-106).

The 1907 Fisheries Amendment Bill and the question of Maori consent

5.15.6 Earlier in this chapter (5.13.35) we noted that during the debate on the Sea-fisheries Act 1907 notable speeches were made by Apirana Ngata, member for Eastern Maori, and Hone Heke, member for Northern Maori, on Maori Treaty fishing rights. These speeches were the subject of detailed evidence (Z16(a)) by Graham Butterworth, a Wellington historian whose evidence was originally filed in the High Court in proceedings brought by the Ngai Tahu Maori Trust Board against the Attorney General, the Fishing Industry Board and the New Zealand Fishing Industry Association. This, along with other evidence including that of Susan Butterworth

(Z17), was later put before this tribunal at the request of the fishing industry parties to those proceedings.

5.15.7 The evidence of Graham and Susan Butterworth on this topic was fully considered by Professor Alan Ward who was commissioned by the tribunal to present an "overview" of the evidence in the Ngai Tahu sea fisheries claim. In what follows we draw heavily on Professor Ward's consideration of the implications of the speeches of Apirana Ngata and Hone Heke.

We recall that under the Sea-fisheries Act 1907 the Crown took control over the picking and sale of all North Island oysters. Both domestic and commercial consumption became illegal without a licence. Debate on the Bill saw notable speeches by Hone Heke and the recently elected Apirana Ngata. These were reproduced in full by Susan Butterworth (Z17:67-70).

5.15.8 Ngata at the outset indicated that he had already discussed Maori Treaty fishing rights with the Minister of Marine (J A Millar) and urged that the minister should take into consideration the "alleged" rights of the Maori people under the Treaty to their fishing grounds. He referred to s16 of the Maori Councils Act 1900 which, as we have seen, gave extensive powers to councils over shellfish beds and fishing grounds used by Maori for food. Whether this constituted a definite recognition by Parliament of Maori Treaty fishing rights he was not sure. He pointed out that the Thames Harbour Board Bill (s38) then before the House authorised the appointment of a Supreme Court judge to ascertain "the just claims and rights of the aboriginal Natives under the Treaty of Waitangi, which have not been satisfied and discharged" in respect of the foreshore granted under the Act. Ngata then made it clear that he and his Maori colleagues in the House were not claiming that Maori were by virtue of the Treaty entitled to exercise rights over all the fishing grounds off the New Zealand coast: {FNREF|0-86472-103-X|5.15.8|97}

We recognise that at this late day it is impossible, even if Parliament recognises the validity of the claim of the Maoris under the Treaty of Waitangi-that it is impossible and unreasonable to grant to the Maoris the full measure of the rights guaranteed by that treaty. {FNREF|0-86472-103-X|5.15.8|98}

Ngata next observed that in some places in the Wairarapa and the Hawkes Bay fishing reserves on the coast had been provided for when land was purchased by the Crown. But further up the east coast, where practically the whole of the lands along the coast are owned by Maoris, there is no necessity to make shore reserves of this nature. Ngata continued:

Along the coast there are well-recognised fishing-grounds. Tradition has handed down from father to son, from the chief of the tribe to the next chief, and so on, for generations past, and right down to the present day, the secret of certain marks by which the more famous fishing-grounds could be identified; but beyond these well-recognised fishing-grounds the Maoris claim no rights whatever. They do not claim exclusive fishing-rights along the coast, but they do claim that the Government recognise, even at this late hour in the day, their exclusive right to certain of these fishing-grounds, because at the present time there is no doubt that in the Bay of Plenty, for instance-from Cape Runaway down to Torere-one of the chief articles of

diet of the Maoris along the coast is the fish they get from their ancient fishing grounds. We do not want to stand in the way of the exploitation of the sea-fisheries at all, but we want a recognition by the State that certain rights were given to the Maori people by the Treaty of Waitangi to the fisheries, and that Parliament should so affirm not this year, but next year, after the whole matter is fully considered. I suggest how it might be done: that the Governor be empowered from time to time to declare that any fishing-grounds defined and located by reference to certain land-marks should be reserved for the use of the Maoris in the neighbourhood. That might be put on the statute-book, and those Maoris who chose to take advantage of it could apply to the Governor. Then, the only Maoris who claim the rights to fisheries are those who take advantage of the power on the statute-book. Perhaps a time may be fixed in which to make claims {FNREF|0-86472-103-X|5.15.8|99}

Hone Heke later spoke. He drew the minister's attention to s8 of the Fish Protection Act 1877 which had recognised Maori Treaty fishing rights:

I do not think any of the Native members would urge that all the fishing-rights along the foreshore of New Zealand where the lands have been sold by the Natives to the Crown or to private individuals should be preserved to them, because by the sale of those lands necessarily the Natives have lost their rights to that foreshore; but we do ask the Minister and this House that in the case of those Native lands which run down to the sea the rights conferred by the Treaty of Waitangi, as recognised by the Act of 1877, should be given some consideration. {FNREF|0-86472-103-X|5.15.8|100}

In reply to Ngata, the Minister of Marine assured him that nothing in the Bill would take away the Treaty rights of Maori having earlier said he was making enquiries into what are the rights of Maoris under the Treaty of Waitangi-thereby admitting that, despite his latest assurances, he did not know what they were. Ms Butterworth has pointed out that the response to the minister's enquiry cannot now be found (Z17:71).

5.15.9 Professor Ward accepts, as we do, Ms Butterworth's contentions that the Maori members at the time, plus the Legislative Councillors (one being the Maori King, Mahuta) and James Carroll (who represented a non-Maori constituency) were an outstanding group of people with great authority in Maori society. Equally he accepts Ms Butterworth's suggestion that:

Ngata in particular had chosen to renounce wide, vague claims to fishing rights the better to insist upon the active protection of smaller, specific ones: known traditional sea fishing grounds, existing reserves and foreshores adjoining land still in Maori hands. (Z17:72).

Graeme Butterworth in his paper on the significance of the two speeches by Ngata and Heke gives his central finding as being "that both were men of national standing who were sufficiently representative of the Maori tribes and their leaders to be able to speak for the majority of Maori in this period" (Z16(a):1).

Professor Ward considers that this might be true "in GENERAL terms" and recognises that Ngata in particular had great influence over important Maori meetings in the late 1890s and early 1900s. But, Ward says, "it does not tell us very much about the attitude of "the majority of Maori leaders" about their views on Ngata's or Heke's

stance on any PARTICULAR matter, such as the 1907 fisheries debate" (AA26:29). While fully acknowledging the great contribution of Ngata and his colleagues to Maoridom, Professor Ward says:

Yet none of their efforts were fundamentally searching, none squarely addressed the question of the status of the Treaty in the law and constitution, or the question of Maori rights under it. Ngata and his colleagues' strategy in the face of settler adamancy precluded that. It was not their fault-they could do little else at that time. But the strategy itself was fundamentally repudiated by the Ratana movement and by the great upsurge of the 1960s and beyond, which demands that the fisheries' questions shelved by Ngata and Heke in 1907 (NOT as a matter of right, for they never at bottom conceded that, but as a matter of expediency) remain to be addressed

For all of these reasons it is not possible, I believe, to read into the tactics of the Maori parliamentarians of 1907 a fundamental and on-going consent by Maori generally (or any local group in particular) to the fisheries legislation of the period or to the principles which underlay it. In respect of Ngai Tahu attitudes on this question I accept Mr O'Regan's points in his submission of 26 February 1990 (AA26:30-31)

5.15.10 Tipene O'Regan, in an affidavit dated 26 February 1990, a copy of which was produced to the tribunal, said, in discussing Ms Butterworth's evidence said:

On behalf of my Tribe I would say that speeches made in Parliament by Members who are Maori and members of Tribes other than Ngai Tahu did not in 1907, do not today, nor will they in the future, in any way bind Ngai Tahu as Maori individuals or as a Tribe or corporate body, unless Ngai Tahu gave their fully informed agreement specifically in advance on each such occasion. The same rule would apply to speeches even of Members of Parliament who happened themselves to be Ngai Tahu members of the Tribe, unless they were speaking with specific permission or instruction and with the fully informed consent of Ngai Tahu expressed through the proper traditionally validated tribal procedures and through the properly constituted and recognised Iwi Authority representing our Tribe

The Maori speakers whose work and speeches have been studied and reported on by Mr Butterworth were indeed outstanding individuals, with a well deserved place in the history of our country, and they have earned very high standing with maori [sic] of all Tribes as well as their own. However they had no mandate and did not themselves presume to speak for the Tribal interests of Ngai Tahu, or the other Tribes, and such should not be imputed to them in retrospect. (AA12(n):6)

5.15.11 Mr Carruthers, QC senior counsel for the Crown, in his final submissions (adopted by Mr Castle for the fishing industry as to this part) discussed Professor Ward's review of the submissions of Susan Butterworth and Graeme Butterworth on the Ngata and Heke speeches. He concluded that Professor Ward may well be right in his conclusion (above quoted) concerning consent to fisheries legislation, for neither Ngata nor Heke managed to obtain the provisions they wished to be inserted in legislation in all instances. But he went on to suggest that there were striking similarities between the requests of Ngai Tahu in the 1870s to early 1900s (and

subsequently) for the protection of their fishing rights, as compared with the provisions Ngata and Heke suggested.

5.15.12 Substantially for the reasons advanced by Professor Ward and Mr O'Regan, the tribunal considers that Ngai Tahu cannot be bound by the political speeches made by Ngata and Heke in 1907 or at any other time, there being no suggestion that they did so with the specific instructions or permission of Ngai Tahu and with its fully informed consent.

Moreover it must be remembered that the Crown had for years paid little more than lip-service to Maori Treaty fishing rights and the courts had stripped them of any legal efficacy. In the prevailing environment Ngata, Heke and their Maori colleagues had no real option but to face the political reality of the day and to strive for what might be attainable rather than the full extent of their Treaty rights.

5.15.13 We now propose to review specifically the reaction of Ngai Tahu both to the participation by non-Maori in fishing and to the various legislative initiatives of the Crown up to 1908 when the legislation was consolidated. Later events will be covered in the next chapter.

Waitangi Tribunal, Department of Justice, Wellington.

Ngai Tahu Sea Fisheries Report

05 The Crown Assumes Control of the Fishery, 1840 to 1908

5.16 Ngai Tahu Complaints and Protests

5.16. Ngai Tahu Complaints and Protests

5.16.1 In 1865 Natanahira Warawaratu on behalf of the whole of the runanga of Kaiapoi wrote to Native Minister Fitzgerald complaining about the drainage of Waihora (Lake Ellesmere) which he said Ngai Tahu had not sold to the Crown. We recorded his letter in our Ngai Tahu Report 1991. {FNREF|0-86472-103-X|5.16.1|101} Warawaratu's letter was referred to Mantell who in a letter to Rolleston of 12 April 1866 said in relation to the claim:

At Lake Ellesmere (then called Waihora) I showed Maopo, Pohau, and others of the Kaiteruahikihiki interested at Taumutu that although years might elapse ere their old style of breaking the dam might be interfered with, the stoppage of the outlet must so seriously affect the drainage of so large an extent of country that the Government must be quite free to do as it pleased with regard to it.

All that I promised at any place to the Maoris on this subject was, THAT THEIR RIGHTS OF FISHING ON AND BEYOND THEIR OWN LANDS SHOULD BE NEITHER LESS NOR MORE THAN THOSE OF EUROPEANS (A8(I):242, emphasis added) {FNREF|0-86472-103-X|5.16.1|102}

Here we see at an early stage the attitude of the Crown's agent to Ngai Tahu fishing rights. They were to be on a par with those of the European settlers. It is unlikely that Mantell adverted to the Treaty of Waitangi. To remedy a great wrong the tribunal in its Ngai Tahu Report 1991 has recommended that Waihora be returned to Ngai Tahu. {FNREF|0-86472-103-X|5.16.1|103}

5.16.2 In 1874 a difference of opinion arose between Ngai Tahu at Riverton and the local government over the use of the foreshore contiguous to the Maori reserves. Alexander Mackay was sent to investigate. He noted that Ngai Tahu claimed ownership of the foreshore under the Treaty (S7:65). {FNREF|0-86472-103-X|5.16.2|104} Discussion took place over the status of the reserves and whether they were native lands excluded from the sale or given back after the sale. {FNREF|0-86472-103-X|5.16.2|105} Mackay reported:

It transpired during the discussion that the idea to claim the foreshore had been engendered in their minds by rumours that had reached them from the North Island of similar claims having been preferred by the Natives at the Thames and other places, and that this had led them to assert what they deemed to be their rights in the matter. In reply to this, it was pointed out that the custom hitherto respecting land between high and low watermark had been to consider that when the Native title was

extinguished over the main land, that any supposed rights which the Native owners had over the tidal lands ceased. The rumours that had reached them from the North Island on the subject had reference to cases where the mainland was held under Native tenure; but even then the usufructuary rights of the Natives over the tidal lands had not been allowed to interfere with the Crown's prerogative, which included, inter alia, the dominion over the foreshore. The Natives, on the assumption of British sovereignty over the Islands of New Zealand, became British subjects, and thereon all former dominion, if any existed, was extinguished; it was clear, therefore, that it was useless on their part to assert any rights antagonistic to the Crown's prerogative, which could only end in being upset before a proper tribunal.

My arguments, however, met with considerable opposition, and after two days' discussion, finding it would avail nothing to prolong the subject, I consented as a matter of policy to abandon the question, giving them to understand at the same time that they could not maintain an exclusive right to the foreshore, and that if they were unwise enough to take any action to interfere with the general use of the beach by the public, they would do it at their own risk, and must abide by the consequences. All they could claim was a right in common with others to the use of the beach as a landing-place, or for any other legitimate purpose, but they must not attempt to fence it in. With reference to their assertion that they were entitled to the foreshore by the original plan of the reserve, the one produced at the meeting simply gave them a right to high watermark. {FNREF|0-86472-103-X|5.16.2|106}

This is an interesting illustration of the views, no doubt representative, of a senior government official, concerning Ngai Tahu rights to the foreshore and inferentially to their fisheries. Mackay clearly takes the view that when Maori sell land adjoining the coast any rights they might have in the adjoining foreshore are likewise extinguished.

5.16.3 As Tony Walzl, Crown historian, put it, Ngai Tahu sought to pursue the issue further through their parliamentary representative (S7:67). In August 1874 H K Taiaroa, Member for Southern Maori, although apparently speaking of the North Island, may well have had the Riverton situation in mind when asking in Parliament a question relating to reclaimed land:

By what authority any land below high watermark has been reclaimed for public purposes on the North Island, and whether such reclamations are not in contravention of the rights reserved as to fisheries to the Native race by the Treaty of Waitangi; and if infringement of the treaty has taken place, how the Maori people can obtain compensation? [reads extract from article 2 of Treaty]

Those fisheries had nevertheless been gradually reclaimed by the Government, who had been taking away from the Maoris those places which were reserved by the Queen for the benefit of the Native race. He did not know whether these reclamations were contemplated by the Treaty of Waitangi; but he understood that the Government had leased certain portions of the foreshore in the vicinity of Auckland. {FNREF|0-86472-103-X|5.16.3|107}

The Native Minister, Sir Donald McLean responded:

for the information of the House, that land below high-watermark was granted to Superintendents under the Public Reserves Act of 1854, and was also leased under the authority of that Act. In regard to all territories ceded by the Maoris to the Crown, it had been held that when the lands were ceded, all the rights connected with them were also ceded such as rivers, streams, and whatever was either on the surface of the land or under the surface. Almost all the deeds of cession contained a clause to that effect, and all the conditions of the deeds had been adhered to strictly by the colony. There had been no breach of the Treaty of Waitangi and every Government of New Zealand had carefully preserved the rights of the Natives. {FNREF|0-86472-103-X|5.16.3|108}

McLean's bland and complacent statement masks either his indifference to or misconception of Maori Treaty rights but was no doubt representative of the Crown view.

Earlier in this chapter at 5.13.9 we have recorded a further Parliamentary question which Tairaroa put to Native Minister Sheehan in November 1877. Tairaroa there asks by what authority Europeans were exercising fishing rights over the Mangahoe Inlet in Otago while the Native title remained unextinguished. He appears to accept however that while a stop should be put to the practice until the Native title was extinguished the Europeans might be able to resume fishing thereafter.

5.16.4 The draining of lakes and the consequential destruction of their fisheries was a source of serious anxiety to Ngai Tahu. As Mr Walzl points out, evidence at the Smith-Nairn Royal Commission noted that Ngai Tahu had begun to experience the loss of fishing resources because of drainage or pollution (S7:79).

While the royal commission was still sitting the Native Affairs Committee of the House of Representatives received a Ngai Tahu petition from Te Oti Pita Matu and 25 others relating to the drainage of three lagoons over which fishery easements have been granted to Ngai Tahu in 1868. In 1876 Ngai Tahu found the lakes in which they had speared eels had been drained; they protested and filled the drains to one lake so as to trap the water. The opinion of Alexander Mackay was sought after the petition was presented in 1879. He responded in November of that year:

The loss they complain of is a very serious one, as there can be no doubt that of all the property the Natives possess, fisheries are the most valuable, and the application they now make to have the bottom of these lakes granted to them should certainly be conceded.

It is very unfortunate that the drainage of the Country necessitates the destruction of these places, but it is questionable nevertheless if the Natives interested are not entitled to demand large compensation for the destruction of these properties, more especially as the awards were made in conformity with the terms of the Deed of Sale of 1848. {FNREF|0-86472-103-X|5.16.4|109}

It appears the committee recommended that the petition receive favourable consideration and the Native Minister promised the beds of the dried lagoons would be vested in Ngai Tahu as compensation (S7:83).

5.16.5 On 8 July 1880 Tairaroa, by now a member of the Legislative Council, moved a formal motion:

That, in the opinion of this Council, the action of this Government in draining Lake Ellesmere (Waihora), and thereby interfering most seriously with the fishing rights enjoyed by the Natives residing in the neighbourhood, which rights have ever been jealously guarded by themselves and their ancestors, is unjust towards the Natives; and such drainage ought not to be allowed to proceed, either now or hereafter, without fair compensation being awarded them. {FNREF|0-86472-103-X|5.16.5|110}

Tairaroa's motion was strongly opposed by Attorney-General Whitaker, and by Mantell who reiterated what he had earlier said about the need to ensure drainage when the country came to be settled. The council declined to pass the motion despite Tairaroa's final plea that it be agreed to so as to afford relief to Taumutu Ngai Tahu who had been given inadequate reserves by Mantell (S7:84-86).

5.16.6 In 1882 Tairaroa questioned the Native Minister about the effects of a road on the Port Levy reserve. He asked by what authority the foreshore of the reserve was taken by the governor without the consent of the natives interested. He believed the reserve made by Mantell included the foreshore:

They had the map in their possession, and it showed that the boundary of their reserve extended to high-water mark. When the Court sat the Maoris were told that the Crown grant was to be issued; but in the grant a strip of about a chain wide was deducted, the quantity of land promised to the Natives thus having been reduced. Under the Treaty of Waitangi the Maoris had the right to land between high- and low-water mark, but, in addition to the claim previously referred to, all the land between high- and low-water mark was reserved, and as a consequence the Maoris had lost their fishing-ground. If this land was to be taken, the Maoris had a right at least to compensation. {FNREF|0-86472-103-X|5.16.6|111}

Native Minister Bryce maintained that the deed of sale allowed for the right of way: "As to the land between high-and low-water mark, he did not know that the Natives had any right to it". {FNREF|0-86472-103-X|5.16.6|112}

5.16.7 With his report of 9 July 1891 Royal Commissioner Mackay annexed notes of evidence he had taken from Ngai Tahu. Hoani Hapi of Kaiapoi testified:

Waihora (Lake Ellesmere) was of great value to the Natives as an eel-preserve; but now it is destroyed by drainage. In other places the lagoons are spoiled. {FNREF|0-86472-103-X|5.16.7|113}

At the same hearing G P Mutu also of Ngai Tahu complained that:

most of the fishery easements allotted us by the Court are destroyed. The one at Rotoroa has been drained. Waimaiaia has been rendered useless by sea encroachment, and Houhoupounamu has been drained. We cannot obtain eels from these easements now; formerly we used to get them in quantities. {FNREF|0-86472-103-X|5.16.7|114}

5.16.8 Earlier in this chapter (5.13.6) we have discussed the circumstances giving rise to a parliamentary petition by Te Oti Pitama and other Ngai Tahu on 31 July 1885 in which Ngai Tahu asked that no obstacles be placed in their way in obtaining "fish etc from the sea, rivers and lakes". This petition followed the making of a new regulation in June 1885 permitting Maori to take oysters or indigenous fish for personal consumption but not for sale (S7:91). Previously a March 1885 regulation had generally exempted Maori from the operation of the Fisheries Conservation Act 1884. As we have earlier indicated, the June 1885 regulation ignored s8 of the 1877 Fish Protection Act saving Maori Treaty fishing rights and was almost certainly ultra vires. Ngai Tahu objections were brushed aside.

5.16.9 Crown historian Tony Walzl drew our attention to a further observation by Tame Parata on behalf of Ngai Tahu in 1888. This arose during a debate on a Salmon Protection Bill. Parata feared the Bill would encroach on the rights of Ngai Tahu to catch fish in Waihora (Lake Ellesmere) as they pleased (S7:93-94).

Mr Walzl went on to say that Lake Ellesmere was not long out of the limelight. In 1891 a Bill amending the 1884 Act was brought before Parliament by the Pakeha member for Ellesmere. The Bill sought to increase the minimum size for flounder to 11 inches. In the end the Bill was withdrawn but not before a response from Ngai Tahu. Wi Naihira and 15 others signed a petition against the Bill. The original has not survived (S7:94).

Mr Walzl states that the following year, 1892, the Bill was introduced by one Wright but this time it affected only the flounders of Lake Ellesmere. Parata on behalf of Ngai Tahu strongly criticised the Bill which appears to have lapsed. A commission of inquiry was held the following year (S7:95-97).

It appears that Wright's 1892 Bill prompted a further protest from Ngai Tahu in the form of two petitions in August 1892 from Wi Naihira and 62 others. These said:

[No 292] That their fishing rights and other privileges under the Treaty of Waitangi and the Ngaitahu Deed may be conserved to them

[No 352] That their fishing rights may be conserved in any legislation dealing with fish protection. (S7:97) {FNREF|0-86472-103-X|5.16.9|115}

Neither petition has survived.

5.16.10 As we have seen, the introduction of the Sea-fisheries Act 1894, which among other things removed s8 of the 1877 Act preserving Maori Treaty fishing rights, resulted in an intervention by Tame Parata on behalf of Ngai Tahu at Rakiura (5.13.22).

5.16.11 Earlier (5.13.26) we have related in some detail how in 1894 Rev Teoti Pita Mutu had protested to Native Minister Cadman that "Maori had not parted with their fishing rights" and how in 1896 Mutu wrote to H K Taiaroa concerning the Sea-fisheries Bill then before the house. This Bill dealt with shellfish and sponges. Taiaroa objected to the restrictive provisions of the Bill. In the result the Middle (South)

Island was exempted from the operation of the Act, insofar as they required shellfish for their personal consumption.

5.16.12 Crown historian Mr Walzl was unable to discover any evidence on how Ngai Tahu viewed the Maori Councils Act 1900 and its 1903 amendment or the Fish Conservation Act Amendment Act 1902. The Sea-fisheries Amendment Act 1903 did however draw comment from the Ngai Tahu parliamentarian Tame Parata (S7:101). As we have recorded (5.13.32) Parata expressed concern that the Bill would have an immediate effect on Maori in Stewart Island, Ruapuke, Bluff and Colac Bay. He asked that a recent resolution of the Araitoura Council that a distance of so many miles around the island should be reserved as fishing rights of the Ruapuke, Stewart Island and Bluff Maori. {FNREF|0-86472-103-X|5.16.12|116}

Parata went on to point out that along the Otago coast and right up to Akaroa there were a number of traditional fishing grounds which "have been overrun and made use of by everybody, including Europeans in recent years". He next said that he:

[did] not object to the Europeans fishing at those places, but these reefs should be to some extent protected for the benefit of the Maoris; and there are other parts of the sea which are available for European fishermen to make use of. {FNREF|0-86472-103-X|5.16.12|117}

Parata indicated that he would move certain amendments to provide for the protection of the marine fishing rights. "The House", he said, "should uphold the promises made by the representatives of the King and carry them out". {FNREF|0-86472-103-X|5.16.12|118}

As we have earlier indicated, s14 was later added to the Bill to provide that "nothing in this Act shall affect any existing Maori fishing rights". While we cannot be certain that this was a direct result of Parata's intervention it seems likely that it was and that it constituted a recognition of Maori Treaty fishing rights whatever they might be.

5.16.13 In an earlier discussion of the Fisheries Conservation Amendment Act 1903 (5.13.33) we noted a passage from the speech of Tame Parata in which he objected to the requirement that Maori take out a licence when fishing in rivers. In fact the requirement for a licence extended only to introduced not indigenous fish. We now note a further passage from Parata's speech in the House:

I contend that the Natives ought to be allowed to fish for their own maintenance, and when the Minister replies I hope he will say that some provision will be made in the Bill to secure to them that right. The Maoris do not catch fish for sale, but simply for their own use. Instead of going to the butcher for mutton or beef, they catch the fish in their own rivers and live upon them. This custom has been handed down to them by their ancestors. If they were asked to pay a license fee there might be serious trouble The Maoris should be exempt from the operation of this Bill when they desire to fish to obtain food for themselves, and when the Bill is in Committee I shall move a clause to exempt the Maoris from the payment of license fees in any part of New Zealand. That will bring the matter into line with the Treaty of Waitangi, and I trust the Minister will agree to my proposal. {FNREF|0-86472-103-X|5.16.13|119}

In fact Parata did not move any amendment. As we have earlier suggested he may have learned that s8 of the Fish Protection Act 1877 was still in fact in respect of freshwater fisheries and the provision was 'incorporated' with the Fisheries Conservation Act 1884.

In the passage noted Tame Parata appears to be speaking only of freshwater fisheries and not sea-fisheries.

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5.17 Acclimatisation

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In our Ngai Tahu Report 1991 we have discussed the problems experienced by Ngai Tahu as a result of the introduction of exotic fish such as trout and salmon into inland waters in the South Island. As we have there found a variety of indigenous fish prized by Ngai Tahu were adversely affected by the introduced species. {FNREF|0-86472-103-X|5.17|120}

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Ngai Tahu Sea Fisheries Report

05 The Crown Assumes Control of the Fishery, 1840 to 1908

5.18 Ngai Tahu and the Government

5.18. Ngai Tahu and the Government

5.18.1 Crown historian Tony Walzl has noted that from 1880-1908 Ngai Tahu was often in communication with the government over fishing rights. Many related to fresh-water fisheries (S7:118):

As fishery resources were lost to Ngai Tahu, the need for reserves became more apparent with the result that Ngai Tahu sought more protection for the fisheries they still used. Evidence given before Judge Mackay at the 1891 Middle Island Commission noted the importance of securing reserves to protect existing resources and ensuring the future availability. (S7:121)

Before the same commission Taiaroa noted how access to sea fisheries was also beginning to be lost:

All the coast-line has been disposed of to the Europeans, and the Natives have no place to go to fish. (S7:121){FNREF|0-86472-103-X|5.18.1|121}

In his further report of 16 July 1891 Commissioner MacKay said in relation to sea-fisheries:

There is another question relative to fishery rights which the Natives desire should be submitted for the consideration of the Government, as they consider they are entitled to protection under the terms of the Treaty of Waitangi-I allude to sea-fishing. They assert that under Kemp's deed they are entitled to the full and exclusive right to their sea-fisheries, as there is a distinct stipulation that they shall retain their mahinga kai, which includes, besides cultivations, pipi grounds, eel-wiers [sic], and fisheries; consequently, in their opinion, they never voluntarily ceded their rights over their fishing-grounds. They do not wish to cause any complications; but what they desire to obtain is the sole right to fish along the sea frontage of their reserves where such lands abut the coast, as they have no authority at present to prevent European fishermen from catching all the fish near their settlements. The privilege they ask for could be secured to them under clause 4 of "The Fish Protection Act, 1877". (S7:122){FNREF|0-86472-103-X|5.18.1|122}

Ngai Tahu Sea Fisheries Report

05 The Crown Assumes Control of the Fishery, 1840 to 1908

5.19 Summary and Conclusions

5.19. Summary and Conclusions

5.19.1 In the foregoing review we have:

- recorded the available evidence of the involvement of both Ngai Tahu and non-Maori in fishing in the period 1840 to 1908;
- considered whether the land sales to the Crown diminished Ngai Tahu rangatiratanga over their sea fisheries;
- investigated the assumption by the Crown of legislative control of fishing during this period and noted the common law and court decisions bearing on this control; and
- recorded Maori and more specifically Ngai Tahu reaction to the Crown's action and inaction.

It remains now to draw these various elements together and to assess them in the light of the fishing rights reserved to Ngai Tahu under the Treaty.

Ngai Tahu and European involvement in fishing

5.19.2 At the risk of oversimplification the following appear to be the principal conclusions to be drawn from the evidence:

- for the two decades immediately following the signing of the Treaty, Ngai Tahu continued fishing without any significant involvement by Europeans apart from the European's diminishing activity in sealing and whaling;
- during the 1840s and 1850s as settlers arrived in Otago and Canterbury in increasing numbers Ngai Tahu actively traded with them in the supply of sea fish. Ngai Tahu also continued to trade on a gift-exchange basis among themselves;
- as European settlement built up in the 1850s and 1860s a viable market for a Ngai Tahu commercial fishery developed. Various reef species were caught in the inshore zone year round and the pelagic species in that zone between December and May;
- by the mid 1860s, if not earlier, Ngai Tahu commercial fishing extended out as far as 20 to 30 miles from the shore in some locations with the aid of marks books. Whaleboats or adaptations of these were used often fitted with sails. These came to be

favoured by European commercial fishermen also. They were the basis of the South Island fishery until early this century;

- European commercial fishing began slowly in the 1860s. For some time the settlers lacked the detailed knowledge possessed by Ngai Tahu of the location of good fishing grounds. European involvement accelerated in the 1870s and continued to grow thereafter;

- as early as the late 1860s the Port Adventure oyster bed was seriously depleted. A decade later the Halfmoon Bay oyster beds were in similar danger. Whether Ngai Tahu or the Europeans were chiefly at fault is not known. We suspect both must accept responsibility; and

- by the 1880s there were a few signs of overfishing, examples being a scarcity of fish in the Otago harbour in 1882 with a further decline in the 1890s. Overfishing in Akaroa harbour was reported in 1885.

- throughout the whole of this period Ngai Tahu whanau or hapu continued to fish for their own sustenance and for special tribal occasions. In the first two or three decades it is clear they also fished commercially to meet the growing demands of the settlers. But following the catastrophic effects of the Crown acquisition of virtually all their land, commercial fishing came increasingly to be carried on by individual Ngai Tahu. They fished commercially for their livelihood either singly or in association with family members, and with the aid of closely guarded marks books. The individual Ngai Tahu who were so engaged were often descended from European whalers and had access to whale boats and associated fishing equipment, whereas following their post land sales impoverishment, most Ngai Tahu whanau or hapu lacked the necessary capital to engage in commercial fishing. While the rate and timing of the transition from tribal to individual fishing would have varied from place to place it dates from the 1860s and would almost certainly have been completed in the 1880s.

Ngai Tahu attitudes to fishing

5.19.3 As we found in our Ngai Tahu Report 1991, Ngai Tahu were prepared to welcome settlers amongst them. They saw advantages in being actively involved in the new economy which would come with settlement. But as our earlier report has made clear Ngai Tahu, while willing to part with substantial acres of land to facilitate settlement, did so on the understanding that they would be left with adequate access to their mahinga kai and with sufficient land to enable them to participate fully in agricultural and pastoral activities and to prosper as a tribe in the new society.

In chapter 3 we have shown that for centuries Ngai Tahu had relied for an important part of their sustenance on their sea-fisheries. There is nothing to suggest they intended to surrender this traditional and highly valued resource, guaranteed to them by the Treaty, when they agreed to British settlement and sold their land to the Crown. They contemplated that they would continue to have access to all sea fish they required for their own sustenance and other needs and to continue to trade commercially with the settlers. Subject to this essential pre-condition we believe Ngai Tahu, in the spirit of partnership, were prepared to share their abundant fishery with the settlers. But their willingness to sell their land and to share their sea fisheries did

not constitute a diminution or modification of their tino rangatiratanga over their sea fisheries. On the contrary, it was an exercise or expression, indeed an affirmation of their rangatiratanga and was entirely consistent with it. While they wished to retain exclusive possession over all the fish they required for their present and future needs, both general and commercial, they were willing that non-Maori should also have access to the fishery. But that access should be subject to the prior rights of Ngai Tahu. The evidence before us shows that it was at the point where non-Maori usage began to deplete the sea-fishery that Ngai Tahu protested and sought to invoke their Treaty rights. We will look more closely at the nature of their protests shortly.

Settler attitudes to fishing

5.19.4 As the Law Commission has noted (5.14.1), the settlers brought as part of their mental baggage the belief that the foreshore and the sea were common to all for the purpose of getting fish. This belief stemmed from the common law doctrine that the Crown is prima facie owner of the foreshore. The settlers and indeed successive settler governments simply assumed that the Crown prerogative overrode or qualified the fishing rights guaranteed to Maori by the Treaty.

For several decades the supply of fish in and around the South Island was bountiful enough to allow uninhibited access by Europeans to Ngai Tahu fisheries. But as settlement built up and Ngai Tahu came to be heavily outnumbered, the pressure on sea-fisheries was felt and gave rise to protest by the tangata whenua. In the meantime the Crown assumed the right to legislate.

The Crown's legislative intervention

5.19.5 The Crown's legislative initiatives fell into three broad categories; oysters and later, other shellfish; introduced species such as trout and salmon and sea-fisheries generally.

An important reason for this legislation was the conservation of resources. The Crown appears never to have entertained any doubt about its right thus to assume control over Maori fisheries. Nor is there any evidence that in doing so it believed it should be mindful of the fishing rights guaranteed to Maori by the Treaty. As a consequence no effort was made first to consult with Maori before exercising legislative control over their fisheries. As we have observed this total disregard of Maori fishing rights is in marked contrast to the Crown's attitude to Maori land rights notwithstanding both were protected by article 2 of the Treaty. At least in the case of land the Crown recognised that Maori owned the land and it was necessary to negotiate with Maori for its acquisition. Despite the Treaty guarantee of Maori fisheries the Crown for the most part acted as if it, not Maori, owned this extremely valuable resource.

We have discussed the sea fisheries legislation from 1866 to 1908 in some detail. Here we briefly recapitulate the main elements of that legislation.

Oyster fisheries

5.19.6 The Oyster Fisheries Act 1866 was the first fisheries legislation.

We need hardly emphasise its importance for in Foveaux Strait and surrounding Ngai Tahu waters were to be found oysters of world class standard.

This Act was no doubt, in part at least, a conservation measure and to that extent a legitimate intervention by the Crown. But no consultation took place with Ngai Tahu or other Maori. The Crown appears in this and all subsequent legislation to have acted on the assumption if not of Crown ownership, at least of its right to control the fisheries. As a result of this Act, Ngai Tahu found they were prohibited from taking oysters during the four-month closed season and in future would require a licence to take oysters below low spring tide. There was no recognition the oyster beds were part of their fisheries. Ngai Tahu Treaty rights were not adverted to in any way. It is unlikely the Act had any great effect in practice as there was no provision for its enforcement.

In 1869 an amendment provided for exclusive five year licences to be issued to the discoverers of oyster beds. The legislation assumes the right of the Crown to exclude Maori from access to any such oyster notwithstanding their Treaty rights. A later amendment in 1874 extended the closed season provisions to rock oysters then said to be at risk.

Acclimatisation

5.19.7 The Salmon and Trout Act 1867 and subsequent legislation dealt with fresh water fisheries rather than sea fisheries. Regulations made under the Act intruded on the free and uninhibited access by Maori to the indigenous fish in rivers and lakes and was resented by Maori as an invasion of their rights. Nor did Maori appreciate that trout in particular fed upon certain native fish which were left unprotected.

General sea fisheries legislation including oysters and other shellfish

5.19.8 The Fish Protection Act 1877 was the first legislation on general fisheries. It extended Crown control over both fresh and sea fisheries by authorising regulations reserving areas from fishing; controlling seasons and net and seine sizes and granting exclusive licences to fish. Its most noteworthy feature was the addition of s8 at the instigation of the governor protecting the rights of Maori to their fisheries secured to them by the Treaty of Waitangi. The first regulations implementing the Act were made in 1878. Consistently with s8 they did not apply to Maori. Maori were thus able to continue sea fishing free of any constraints imposed by the 1877 Act and the regulations. At the same time however, the Act provided for the general public exploitation of the fish resource and was based on the premise of the Crown's right to provide for this notwithstanding the fishing rights guaranteed to Maori under the Treaty. How any conflict between the Maori and non-Maori interests was to be resolved appears nowhere.

The Fisheries Conservation Act 1884 incorporated certain earlier Acts including the provisions of s8 of the 1877 Act which extended to the 1884 Act. The 1884 Act included extensive regulation making powers for the protection of fish. Fresh regulations made in March 1885 expressly exempt Maori from the operation of those regulations. But later in the year an amended regulation purported to limit Maori exemption to taking oysters or indigenous fish for their personal consumption only

and not for sale. Given that s8 of the 1877 Act preserving Maori Treaty fishing rights remained in force, this last regulation was clearly ultra vires and invalid. Not surprisingly it met opposition from Ngai Tahu.

The 1892 Oyster Fisheries Act repealed the earlier legislation and contained comprehensive regulation making powers with continued provision for licensing. The Act applied equally to Maori and non-Maori. The only provision relating particularly to Maori enabled the governor to set aside an oyster in the vicinity of a Maori kaika for the exclusive use of Maori for their own consumption. No such oyster-beds appear ever to have been set aside in the South Island. This largely inoperative provision is the only indication that Maori fishing rights might be entitled to some recognition. It did not extend however to commercial transactions. There, Maori were on the same basis as non-Maori.

The Sea Fisheries Act 1894 repealed the 1877 and 1884 acts so far as they affected sea fishing and also repealed the earlier 1892 oyster legislation. The new Act was largely a consolidation of earlier repealed legislation. The previous wide regulatory powers were continued as were the 1892 Oyster Act provisions. But it contained new provisions permitting the issue of an exclusive licence to take oysters for up to 14 years. Such a licence would be sold by the Crown by public tender or auction. These oysters became the absolute property of the licensee. There could be no clearer indication that the Crown considered it owned and had the right to dispose of such a resource. Again there is no evidence of consultation with Maori. Rights of Maori were further diminished. The earlier 1888 regulation permitting Maori to take oysters or indigenous fish for personal consumption only was repealed by order in council in December 1894. It was replaced by s72 requiring the prior consent of the Native Minister to any proceedings against Maori. Even more serious was the omission of s8 of the 1877 Act which preserved Maori Treaty fishing rights. There was no longer any statutory recognition of Maori rights and their fisheries. They could be prosecuted for breaches along with Europeans subject only to the Native Minister concurring.

Two years later an amendment to the 1894 Act extended the governor's discretionary power concerning oysters to all other species of edible shellfish and sponges. But any shellfish (other than oysters) required for food by Maori in the South Island were exempt from the provisions of the Act. The main significance of this provision was to continue giving concessions for Maori fishing rather than acknowledging their rights.

The Maori Councils Act 1900 was designed to grant a measure of local self-government to Maori. Among other powers it permitted Maori District Councils to make by-laws for the control of oyster and mussel beds, pipi and fishing grounds from which Maori obtained food. Under a 1903 amendment any such beds or grounds could be reserved exclusively for Maori use. None were ever granted. Not even a representation by Sir Apirana Ngata for the reservation of part of Kawhia harbour in 1930 had any success. The right proved to be a hollow one.

A 1903 amendment to the Sea Fisheries Act 1894 made a number of miscellaneous changes. It was notable however for the reinstatement in significantly modified form of the former s8 which disappeared in 1894. But whereas s8 of the 1877 Act expressly referred to and saved Maori Treaty of Waitangi fishing rights, the new s14 in the 1903 amendment Act simply stated that:

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

This provision with the later omission of the word "existing" has remained in subsequent legislation down to the present. What its full scope and effect is remains to be authoritatively determined by the High Court. In practice, until the recent Te Weehi decision it has been of no significant benefit to Maori.

The Fisheries Act 1908 was purely a consolidating measure; s77(2) repeated s14 of the 1903 amendment. It applied however only to sea-fisheries. No equivalent provision was then or has since been made in respect of fresh water fisheries.

5.19.9 The effect of the legislation on Maori Treaty fishing rights can now be briefly stated:

- the Crown assumed the right not only to regulate and control the taking of oysters but to dispose of their ownership without Ngai Tahu consent;
- the acclimatisation statutes and regulations worked to the prejudice of Maori;
- the general sea fisheries legislation and regulations between 1877 and 1885 exempted Maori from their control provisions. This constituted some recognition of their Treaty rights. But the 1885 ultra vires regulations sought to limit Maori exemption to the taking of oysters and fish for personal consumption only;
- the 1892 and later provision for exclusive oyster reserves near Maori villages were inoperative in the South Island. The later 1900 and 1903 provisions for Maori District Councils to control or make exclusive fishery reserves for Maori were not implemented anywhere in New Zealand;
- the 1894 Act entirely removed all protection of Maori Treaty sea fishing rights;
- the 1903 reinstatement of a watered down saving provision omitting all reference to the Treaty has continued since and with one recent exception has so far proved of little if any benefit to Maori;
- the exercise of legislative control over Maori fisheries and their regulation equally in favour of non-Maori has been characterised by a failure of the Crown to consult with Maori at any stage, and not infrequently, when challenged in Parliament, by evasive or erroneous responses by ministers of the Crown;
- for a brief period of eight years (1877-1885) Maori were wholly exempt from the control provisions of the sea fisheries legislation. But from the first Act of 1866 onwards the legislation provided for the general public exploitation of the fish resource and was based on the premise of the Crown's right to provide for this notwithstanding the fishing rights guaranteed to Maori under the Treaty. Nowhere is any reference made to how any conflict between Maori and non-Maori interests was to be resolved; and
- the rangatiratanga of Ngai Tahu in and over their sea-fisheries has, except for some eight years (and then only to a limited extent), been denied or ignored by the Crown.

The Crown's attitude to Maori fishing rights

5.19.10 Perhaps the best evidence of the Crown's attitude to Maori fishing rights is to be found in the provisions we have just reviewed. But as we have seen, from a relatively early stage the Crown adopted the widely held settler view that the fisheries belonged to the Crown and no rights, whether under Maori customary law or treaty could be held by any person, Maori or non-Maori, without a specific land grant from the Crown or by legislative provision. This view came to be held despite the fact that the Land Claims Ordinance 1841 recognised that non-Crown granted lands could be subject to "rightful and necessary occupation and use by the aboriginal inhabitants". The New Zealand Supreme Court in *R v Symonds* (1847) recognised that such rights could be extinguished only by the free consent of the Maori occupiers.

In 1870 the Crown argued before Chief Judge Fenton in the *Kauwaeranga* case that the foreshore belonged to the Crown and Maori could not use it in accordance with their customary usages as this would be inconsistent with the Crown's prerogative. While Fenton appears to have rejected this contention, he held for reasons of "public policy" that the Maori claimants should be entitled to no more than a title to exclusive fishing rights over the area. The underlying (but unstated) public policy was that to have recognised Maori customary title to the foreshore in addition to exclusive fishing rights would have jeopardised the Crown's interest in gold which was believed to be present in the subsoil. The reaction of the Crown was to suspend the jurisdiction of the Maori Land Court to deal with land below high water anywhere in the Auckland province.

The very next year in *Re Lundon & Whitaker Claims Act 1871* (1871) the New Zealand Court of Appeal held the Crown to be bound both by English common law and by the Crown's "own solemn engagements" to a full recognition of native proprietary rights. These the Crown was bound to respect.

Six years later this view of the legal status of Maori rights was gravely undermined in *Wi Parata v Bishop of Wellington* (1877) in which the Supreme Court rejected the concept of legally enforceable Maori property rights. The Crown and not the courts was to be the sole arbiter of Maori Treaty or other fishing rights. *Wi Parata* was followed by the Court of Appeal in *Nireaha Tamaki v Baker* (1894), the court holding that it must be left to the conscience of the Crown to decide what is justice to Maori. It was not a matter for the courts. Such an extreme proposition was reversed by the Privy Council in 1901 when the Court of Appeal's judgment came before it on appeal. The Privy Council held that the New Zealand courts could not hold there was no Maori customary law of which the courts could take cognisance. Yet in the following year the New Zealand Court of Appeal in effect declined to follow the Privy Council and applied the *Wi Parata* decision.

5.19.11 Any remaining doubts about the right of Maori to have their customary land rights recognised or enforced by the courts were effectively removed in the Crown's favour by ss84-87 of the Native Land Act 1909.

5.19.12 Likewise in 1914 any lingering uncertainty about the right of Maori to invoke a customary fishing right in court proceedings were resolved in the Crown's favour by three judges of the Supreme Court in *Waipapakura v Hempton*. The court accepted

the argument of the then Solicitor-General for the Crown that apart from legislation the Treaty of Waitangi was "merely a bargain binding upon the conscience of the Crown and is not the source of legal rights". Nor did s77(2) of the Fisheries Act 1908 help. It was merely a saving clause and did not create rights. Only legislation confirming the Treaty rights would be recognised by the courts and there was no such legislation. How far the 1986 High Court decision in Te Weehi's case has modified this finding remains to be authoritatively decided by our Court of Appeal. It must be remembered that Te Weehi, although found to be exercising a customary right (which the court recognised) was not claiming an exclusive right and was taking for personal needs only.

5.19.13 With the limited exception of the case of Te Weehi the New Zealand courts for the whole of this century have declined, in the absence of express legislation, to recognise either Maori customary fishing rights or Maori rights under article 2 of the Treaty of Waitangi. In so doing they have upheld the Crown arguments which have consistently for more than a century denied that any such Maori rights are entitled to legal recognition or enforcement.

Maori response to Crown control of sea fisheries

5.19.14 We have recounted Maori and more particularly Ngai Tahu complaints and protests about the assumption by the Crown of control over their fisheries.

While not overlooking the widespread complaints by Maori in various parts of New Zealand to which we have referred and which are more fully recorded in the Muriwhenua Fishing Report we propose here briefly to summarise the Ngai Tahu reaction to Crown control of their fisheries up to 1908. We have rejected the views advanced by fishing industry witnesses Susan and Graham Butterworth that leading Maori politicians Sir Apirana Ngata and Hone Heke had in 1907 or at any other time a mandate to speak for or bind the tribal sea fishing interests of Ngai Tahu or indeed of other tribes. We recall that in the circumstances of the time Ngata, Heke and their Maori colleagues had no real option but to face the political reality of the day and to strive for what might be attainable rather than the full extent of their Treaty rights. It is not legitimate to conclude that they had abandoned or surrendered such rights.

In our earlier account of Ngai Tahu protests we have discussed some 18 separate complaints made by or on behalf of Ngai Tahu concerning their fisheries in the period up to 1908. Of these eight related principally to the drainage of Waihora (Lake Ellesmere) or other inland waters while the remaining ten were concerned with sea-fisheries. These latter we briefly recall:

- in 1874 Ngai Tahu at Riverton claimed ownership of the foreshore and inferentially of the marine fishery in and adjacent to it. Alexander Mackay in response asserted the Crown's prerogative right to the foreshore and informed Ngai Tahu they could not claim an exclusive right. Having sold their land adjoining the foreshore any rights Ngai Tahu might have had in the foreshore were now extinguished;

- in the same year H K Taiaroa MP and a prominent Ngai Tahu rangatira, prompted perhaps by the Riverton complaint, suggested that the reclamation by the Crown of land below high-water mark in the North Island, was contrary to Maori Treaty fishing

rights. Native Minister Donald McLean claimed this was authorised by the Public Reserves Act 1854 and was not in breach of the Treaty;

- in 1877 Taiaroa, in a parliamentary question, challenged the right of Europeans to fish in the Mangahoe Inlet in Otago while the Maori title was unextinguished. He sought a halt to this fishing in the meantime. Sheehan, then Native Minister, while recognising that Maori had certain (unspecified) rights to their fisheries under the Treaty urged resort to the Native Land Court when existing legal difficulties to that course were removed by a Bill then before Parliament;

- in 1882 Taiaroa questioned the Native Minister about taking part of the Port Levy foreshore for a road when under the Treaty Maori had the right to land between high and low water mark. As a consequence he claimed Ngai Tahu had lost their fishing-ground. Native Minister Bryce claimed the deed of sale allowed for the right of way and questioned whether Ngai Tahu had any right to the land below high water mark.

- in 1885 Te Oti Pitama and other Ngai Tahu petitioned parliament asking that no obstacles be placed in their way in obtaining fish from the sea, rivers and lakes. This petition followed a new June 1885 regulation exempting Maori from sea fisheries legislation constraints only when taking fish or oysters for personal consumption but not for sale. The Native Affairs Committee's reply was either confused or evasive and did not adequately advert to the issue raised by the petitioners;

- in 1892 Wi Naihira and 62 other Ngai Tahu in two petitions to Parliament asked that their Treaty fishing rights and privileges under the Treaty and Kemp's deed be conserved to them and, further, that their fishing rights be maintained in any fish protection legislation. The fate of these petitions cannot be ascertained;

- in 1894 Teoti Pita Mutu of Ngai Tahu verbally protested to Cadman (then Native Minister), that Maori had not parted with their Treaty fishing rights. Again in 1896 Pita Mutu wrote to H K Taiaroa, protesting the restrictive provisions of the Sea-fisheries Bill. Taiaroa passed on these objections to the minister. Subsequently the South Island Maori were exempted from the operation of the Act in respect of shellfish taken for their own consumption;

- in 1903 Tame Parata, member for Southern Maori, expressed concern in Parliament that the Sea-fisheries Amendment Bill would adversely affect Maori in Rakiura, Ruapuke, Bluff and Colac Bay. He sought a fishing reserve for Ngai Tahu in the locality. He also complained that all along the Otakou coast and right up to Akaroa, a number of Ngai Tahu traditional fishing grounds had been overrun and were being used by everyone including Europeans in recent years. While he did not object to Europeans fishing at these places he asked that some reserves be protected for Ngai Tahu, there being other parts of the sea available to European fishermen. It seems likely that the later addition of s14 providing that nothing in the Act should affect any existing Maori fishing rights was a direct result of Parata's intervention on behalf of Ngai Tahu;

- in 1891 H K Taiaroa, in evidence before Commissioner Alexander Mackay, complained that all the Ngai Tahu coast-line had been disposed of to Europeans and Ngai Tahu had no place to go fishing; and

- in his second 1891 report Commissioner Mackay noted that Ngai Tahu claimed protection of their sea-fisheries under the terms of the Treaty saying they had never voluntarily ceded their rights over their fishing grounds. Mackay went on to say that Ngai Tahu sought the sole right to fish along the sea frontage of their reserves where these abutted the coast, as they had no present authority to prevent Europeans from catching all the fish near their settlements.

5.19.15 Approximately half of these complaints by Ngai Tahu are of a general nature, the remainder being in varying degrees site specific. This reflects both a general concern at the failure of the Crown to protect Ngai Tahu Treaty fishing rights and a particular concern that fisheries in specified locations were being adversely affected by European fishing.

5.19.16 In protesting the Crown's failure to protect their fishing rights Ngai Tahu representatives did not assert that non-Maori should not be fishing. They were however well aware of the attitude of the Crown to their Treaty guaranteed rights. This became increasingly apparent from 1866 on into the present century. The Crown's stance took various forms:

- it would legislate as it saw fit in respect of Maori sea fisheries without any consultation with Maori and on the assumption that the Crown, not Maori, owned the fisheries or had the right to control and dispose of them;

- it failed to implement its own legislative provisions for exclusive oyster reserves in the South Island and in only a few instances in the North Island. It failed to grant a single application for an exclusive Maori fishing ground anywhere in New Zealand under the Maori Councils Acts of 1900 and 1903;

- in court proceedings by Maori seeking recognition of their Treaty fishing rights the Crown invariably opposed such recognition on the ground that the Treaty conferred no legally enforceable rights. The Crown in common with the settlers, notwithstanding the clear words of the Treaty, assumed that the foreshore and the sea were common to all for the purpose of taking fish and that the Crown prerogative overrode the fishing rights guaranteed to Maori by the Treaty; and

- while s8 of the Fish Protection Act 1877 protected the Treaty rights of Maori to their fisheries, in 1885 regulations purported to restrict their rights to take oysters and fish for their personal consumption only. All legislative protection was removed in 1894. In 1903 a greatly watered down provision omitted any express reference to Maori Treaty rights being protected.

Given the Crown's attitude to Maori Treaty fishing rights it is understandable that Ngai Tahu representatives and, indeed, leading Maori members of Parliament such as Ngata and Heke should realistically seek not total protection for Maori sea fisheries but partial or specific recognition. We do not consider it legitimate or reasonable or indeed consistent with the good faith of a Treaty partner, for the Crown to claim that because, in the then current circumstances, Maori sought something less than they were entitled to under the Treaty, they had thereby waived or surrendered the remainder.

5.19.17 We conclude from the foregoing that what emerges is a willingness on the part of Ngai Tahu that non-Maori should be able to share the resources of the sea provided adequate protection is given to Ngai Tahu fishing rights guaranteed by the Treaty. Implicit in this approach is an assertion by Ngai Tahu of the priority which attaches to their Treaty fishing rights accompanied by a recognition that, provided these are respected and protected, non-Maori should be free to engage in fishing in the Ngai Tahu rohe. We are unable to distinguish in this regard between commercial and non-commercial fishing by either Maori or non-Maori.

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Waitangi Tribunal, Department of Justice, Wellington.