

# Ngai Tahu Sea Fisheries Report

## 12 Crown Breaches of the Treaty

### 12.1 Introduction

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In our Ngai Tahu Report 1991 we dealt with the adverse effects of the Crown purchase of Ngai Tahu lands and the substantial deprivation of their land based mahinga kai. We deferred their sea fisheries claims for this further report. In doing so we recognised we were making an artificial distinction for Ngai Tahu tribal life in the widest and deepest sense encompassed both land and sea; they drew sustenance from both; each was the source of profound spiritual experience. Ngai Tahu tino rangatiratanga extended alike over land and sea and the creatures on, above and below the earth and water. All were part of the bounty of their gods, held in trust for present and future generations.

We have recounted in some detail in earlier chapters the centuries long relationship of Ngai Tahu with the sea and their sea fisheries. We have recorded their substantial dependence on the sea, a dependence which remains to this day. We have seen how their skills and knowledge led to the growth of a prosperous trade in the supply of fish to the steadily growing numbers of Europeans who came to settle on Ngai Tahu land acquired for this purpose by the Crown. Ironically, it was these very land purchases which were to result, soon after the completion of the last such purchase in 1864, in Ngai Tahu being compelled as a tribe to abandon their commercial sea fishing activities. Thereafter, some individuals excepted, the iwi was restricted to taking fish for sustenance and ceremonial purposes only.

Ngai Tahu tribal sea fishing rights were adversely affected by various Crown acts and omissions. We propose to consider these under three broad heads:

- The eight Crown purchases.
- Crown legislation 1866 to 1982.
- The Quota management system.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Sea Fisheries Report

## 12 Crown Breaches of the Treaty

### 12.2 The Eight Crown Purchases

#### 12.2. The Eight Crown Purchases

In the overview of the eight Crown purchases in our Ngai Tahu Report 1991 we noted that with the Rakiura (Stewart Island) purchase in 1864 the Crown completed its acquisition of Ngai Tahu land first begun 20 years earlier. {FNREF|0-86472-103-X|12.2|1} As a result, all but an insignificant fraction of Ngai Tahu land was gone. We then summed up the condition to which Ngai Tahu were reduced:

By 1864 Ngai Tahu were in a parlous, some might say pitiable condition. They were now an impoverished people largely confined on uneconomic patches of land, almost entirely isolated from mainstream European development, neglected by government at both central and provincial level, marginalised and struggling to survive both individually and as a people. Their rangatiratanga greatly diminished, their communal way of life and the cultural and spiritual values associated with it seriously undermined. As settlement steadily encroached on them from all sides, as land was progressively fenced and drained, as their access to mahinga kai steadily decreased, Ngai Tahu eked out a bare subsistence on land incapable of sustaining them. No wonder their voices came to be heard more and more in protest. {FNREF|0-86472-103-X|12.2|2}

The reason for this transformation in the Ngai Tahu situation was, as we have found, that the Crown failed time and again to honour the principles of the Treaty of Waitangi. {FNREF|0-86472-103-X|12.2|3}

12.2.1 The evidence establishes that during the 1840s and 1850s and part at least of the 1860s Ngai Tahu fished commercially to meet the growing demands of the settlers. But following their post land sales impoverishment most Ngai Tahu whanau or hapu lacked the necessary capital and resources to continue in commercial fishing. The rate and timing of the transition from tribal to individual fishing varied from place to place. It dates from the 1860s and was almost certainly completed by the end of the 1880s.

We are satisfied that this situation was the direct and inevitable result of the condition to which Ngai Tahu as a tribe were reduced following the Crown acquisition of virtually all their land. It was a direct consequence of the various Treaty breaches we have detailed in our first report. {FNREF|0-86472-103-X|12.2.1|4}

12.2.2 Some of the consequences of these Treaty breaches are related in a statement of grievances by the complainants in relation to Ngai Tahu marine fishing. They include the following claims for which there is considerable support in the evidence:

6. Multiple breaches of the Treaty obligations of the Crown to Ngai Tahu in regard to land acquisitions in Te Waipounamu, and exclusion from or destruction of their traditional mahinga kai resources based in the lands and waters, which grievances the Tribunal has already investigated and found to be well founded, directly affected the ability of Ngai Tahu to continue their own protection of their sea fisheries as they had actively done during early stages of European settlement and commercial joint venturing between Ngai Tahu and Pakeha.

7. Deprivation of the land and mahinga kai resources which the Crown ought to have ensured Ngai Tahu retained under the Treaty obligations also undermined and eventually destroyed the Ngai Tahu economy, reduced most of the Tribe to poverty and poor health, and made it impossible for the tribal community to participate as they expected and should have done in the newly developing economic ventures based on both land and sea resources. This deprivation and effective exclusion from participation in the developing economy was a further failure of the Crown to honour its promises under the Treaty.

8. In so doing the Crown deprived Ngai Tahu of both the marine fishery resource itself, and the opportunity to share their resource with immigrants and strangers under their own rangatiratanga, as was their right according to their own customs and practices. There have often been occasions when it was not possible to feed visitors on marae with traditional sea foods as expected, and sometimes the tribe has been forced to purchase sea food for the marae from outsiders, to their shame. This material and cultural deprivation undermined the mana whenua and mana moana rights of the tribe and their leadership, and broke the Crown's promise to protect and sustain Ngai Tahu tino rangatiratanga.

9. The loss of the benefits of the sea fisheries, as well as their lands and mahinga kai resources, severely reduced the opportunity for Ngai Tahu individuals or hapu to follow their traditions and customary tribal way of life to the degree they wished and would have preferred, which free choice was part of the Treaty promise that was broken. (AA49:1)

12.2.3 In addition to these various forms of deprivation resulting from the Crown's Treaty breaches Ngai Tahu were prejudicially affected as an iwi in that:

- they were deprived of the opportunity to further develop and expand their successful domestic and overseas commercial trade in fresh and preserved fish which they had initiated prior to the Treaty and subsequently successfully developed for a period;
- they were deprived of the opportunity to take advantage of developing technology in fish and fishing vessels and in particular to exploit new grounds in waters further out from their rohe including ultimately the deepwater fishing grounds;
- they were deprived of the profits and accumulation of capital which would have resulted from an expanding commercial fishery and from acquiring the resources necessary to update fishing equipment and vessels and thereby further develop their business and activity of fishing;

- they consequently suffered severe and continuing material and social damage from the lack of material resources and income to maintain their tribal economy and culture; and

- they were reduced to fishing for sustenance and ceremonial purposes only and then not always successfully due to depletion and pollution of their fisheries both inland and marine.

12.2.4 Subsequent Treaty breaches by the Crown, soon to be described, exacerbated the adverse effect on Ngai Tahu sea fisheries. But it is readily apparent that grievous and irreparable harm resulted from the Crown's breaches of its Treaty obligations when acquiring vast Ngai Tahu land holdings. For not only had the tribe lost virtually the whole of its land and economic base, it was as a direct consequence unable to continue its thriving and expanding business and activity of sea fishing. More than a hundred years was to elapse before its protests were listened to in a meaningful way.

Coincidentally, at about the time Ngai Tahu was being forced to withdraw from its commercial fishing operations, the Crown initiated its first legislative intervention. It is to that and later legislation we now turn.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Sea Fisheries Report

## 12 Crown Breaches of the Treaty

### 12.3 Crown Legislation 1866 to 1982

#### 12.3. Crown Legislation 1866 to 1982

12.3.1 In chapters 5 and 6 we have given a detailed account of the sea fisheries legislation during this lengthy period. We do not propose to traverse that discussion in any detail. It became apparent that Maori, including Ngai Tahu, Treaty rights were breached by this legislation in various ways. These we will now consider.

12.3.2 The sea fisheries legislation during the period 1866 to 1982 had three main characteristics:

- a principal concern was to conserve the sea fishery resources;
- an underlying assumption was the right of the Crown to provide for the general public exploitation of the sea fisheries subject only to the conservation measures enacted from time to time, notwithstanding the fishing rights guaranteed to Maori under the Treaty; and
- the failure by the Crown throughout almost the whole period to afford adequate legislative protection or recognition of Maori sea fishing rights guaranteed by the Treaty.

We will discuss each of these characteristics in turn.

The concern for conservation

12.3.3 It is apparent from the provisions of the legislation, which commenced with the Oyster Fisheries Act 1866, that a principal objective was to put in place measures designed to assist in protecting and conserving the resource. The name of the first general sea fisheries legislation, the Fish Protection Act 1877, reflects this concern.

The claimants quite properly acknowledged the right of the Crown to legislate for this purpose. Indeed, they saw the Crown as having an active duty to protect and conserve the resource in the interest of the new nation founded by the Treaty (AB13:1). They have strongly objected, however, to the failure of the Crown to recognise that it was their fisheries not the Crown's which were being regulated without any recognition of the Ngai Tahu right as a Treaty partner to participate in the management and control of their fisheries. The concerns of Ngai Tahu were expressed in this way:

11. The Crown has prevented Ngai Tahu from exerting their tino rangatiratanga in the fisheries to use and conserve their fishery resources according to their own traditions

and customary laws with a consequential depletion and damage to the fishery resources.

12. By excluding their Treaty partner from active participation as between good faith Treaty partners in the highly important matter of resource protection and conservation, and imposing instead different regimes under the Crown's own officials, there has been serious damage to Ngai Tahu fishery properties, and the customary law and mana of the tribe has been undermined by the Crown, in contravention of its duties under the Treaty. (AA49:2)

12.3.4 In guaranteeing Ngai Tahu tino rangatiratanga over their sea fisheries the Treaty guaranteed the tribal rights of self-regulation or self-management of their resource, this being an inherent element in tino rangatiratanga. This right was totally usurped by the Crown without any consultation with Maori and without any recognition of their Treaty rights in the sea fisheries. It would be difficult to find a clearer case in which the principle of partnership required the Crown to recognise Ngai Tahu interest in their fisheries and to consult with them over their management. To refuse or neglect to do so was to deny Ngai Tahu rangatiratanga over their sea fisheries and was clearly in breach of article 2 of the Treaty.

12.3.5 Regrettably, over time, the various statutory regimes intended to protect and conserve the sea fisheries failed to prevent serious depletion of the resource to the detriment not only of Ngai Tahu but Maori generally. The resulting material and cultural deprivation, as Ngai Tahu have claimed, undermined their mana whenua and mana moana tribal rights and was the result of the Crown's breach of its Treaty duty to protect and sustain Ngai Tahu tino rangatiratanga.

The basic assumption underlying the legislation

12.3.6 Subject to some limited or partial exceptions discussed later it is apparent that the sea fishery statutes reflected the Crown's assumption that non-Maori had equal rights with Maori in the whole of the sea fisheries. While the Acts placed various restrictions on the method and times for taking fish, they for the greater part made no distinction between Maori and non-Maori, notwithstanding that article 2 of the Treaty guaranteed Maori rangatiratanga over their fisheries. For instance, the very first statute, the Oyster Fisheries Act 1866, while in part at least intended as a conservation measure,

- was enacted without any consultation with Ngai Tahu in whose rohe were some of the finest oysteries in the world;

- was based on the assumption, if not of Crown ownership of the resource, at least of its right to regulate access to the oysters without consultation with Ngai Tahu or any recognition of their rights to manage the oysters within their rohe;

- did not recognise in any way that oysteries were part of Ngai Tahu fisheries;

- made no distinction between Maori and non-Maori in the rights of access to the oysteries; and

- by an amendment in 1869 provided for exclusive 5 year licences to be issued to discoverers of oyster beds notwithstanding that these might be part of Ngai Tahu or other tribal fisheries. This Act assumed the right of the Crown to exclude Ngai Tahu from access to any such oyster notwithstanding their Treaty rights.

Later, the Sea Fisheries Act 1894 provided for the sale by public tender of an exclusive right to take oysters for any period up to 14 years. All oysters in any such oyster bed held under an exclusive licence became the absolute property of the licensee. The Crown assumed the right to sell them to the highest bidder presumably on the basis that somehow the Crown, and not Ngai Tahu, was the owner. There was no provision protecting or saving Maori Treaty rights in this Act. So much for the Treaty guarantee of Ngai Tahu fisheries and the Crown's duty to protect them.

12.3.7 Notwithstanding such provisions, which were confiscatory in nature and in clear breach of article 2 of the Treaty, the first general sea fisheries legislation did recognise Maori Treaty rights in their fisheries. As we have seen s8 of the Fish Protection Act 1877 provided that:

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.

The effect of this provision was that no provision in the Act which was inconsistent with or in any way adversely affected Maori Treaty fishing rights could have any affect on such Treaty rights. It was, we believe, more than a mere saving clause. It gave positive recognition to Maori rights under the Treaty which were deemed to take effect in preference to those of the Act where there was any conflict between the respective provisions. The Act, a very brief one, was to become operative by regulations. Regulation 4 of the first general regulations made in April 1878 expressly said that none of the regulations were to apply to any Maori. In this way Maori Treaty sea fishing rights were recognised and respected.

12.3.8 Regrettably this freedom from Crown fishing legislation was to be shortlived. In 1885 an amended regulation purported to limit Maori exemption to taking oysters or indigenous fish for their personal consumption only and not for sale. As a strict matter of law the regulation was almost certainly ultra vires as s8 of the 1877 Act was still in force.

The Crown's failure to afford adequate legislative protection of Maori sea fishing rights under the Treaty

12.3.9 The Fish Protection Act 1877 was repealed by the Sea Fisheries Act 1894 and no new provision to replace the former s8 was enacted. In December 1894 the earlier regulation permitting Maori to take oysters and indigenous fish for personal consumption only was also repealed. There was no longer any statutory recognition of Maori Treaty rights to their fisheries. It was as if their rights had disappeared. No explanation was given for the repeal of these protective provisions. We are unable to reconcile with good faith on the part of the Crown as a Treaty partner the total repeal

and failure to replace these provisions in 1894. In our opinion this action was in clear breach of the Crown's treaty obligation actively to protect the rangatiratanga of Maori, including Ngai Tahu, in their sea fisheries.

In 1903 the Crown reinstated in substantially modified form the former s8 of the 1877 Act which had disappeared in 1894. But whereas s8 had expressly referred to and protected Treaty of Waitangi fishing rights, the new s14 in the 1903 amendment simply said 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. In 1914 the full Supreme Court in *Waipapakura v Hempton* (1914) NZLR 1065 accepted the argument of the then Solicitor-General for the Crown that, apart from legislation, the Treaty of Waitangi was merely a bargain binding on the conscience of the Crown and was not a source of legal rights. Nor did s77(2) of the Fisheries Act 1908 help. It was merely a saving clause which did not create rights. Only legislation confirming the Treaty rights would be recognised by the courts and there was no such legislation.

The tribunal considers that the Crown, by omitting to take appropriate legislative action to protect Maori sea fishing rights under the Treaty and to thereby honour the "bargain binding on the conscience of the Crown", failed in its Treaty obligation to protect Ngai Tahu rangatiratanga over its sea fisheries and acted contrary to its obligation as a Treaty partner to act reasonably and in good faith. Instead, it elected to continue to exercise legislative control over the sea fisheries from 1894 to 1982 and later, without regard to its Treaty obligations to Maori and in breach of Treaty principles.

We note here that the question of the extent to which, if at all, s88(2) may save aboriginal rights under customary law is a matter within the jurisdiction of the High Court. We express no opinion on the question.

12.3.10 It remains to refer to certain provisions which had they been implemented might have been seen as an implied if very limited recognition of Maori Treaty rights:

- in 1892 the governor was given power to set aside in the vicinity of any Native pa or village an oyster-fishery for the exclusive use for their personal consumption at all times. This provision was continued in the 1894 Act and on into this century. No such oyster-fishery was ever set aside for Ngai Tahu and only a few were established in the North Island;

- the Maori Councils Act 1900 and its 1903 amendment made provision for oyster and mussel beds and pipi and fishing grounds to be reserved EXCLUSIVELY for Maori use. The right proved to be a hollow one. None were ever granted. These provisions were repealed and replaced in 1945; and

- section 33 of the Maori Social and Economic Advancement Act 1945 replaced the earlier 1900 and 1903 provisions with minor changes. Under s33 EXCLUSIVE Maori fishing grounds could be reserved on the recommendation of the Minister of Marine.

No such reserve was created despite many requests including at least four by Ngai Tahu which we have earlier described (6.9.8-6.9.11). This provision, intended to benefit Maori, was totally undermined by administrative and political intransigence. Successive ministers simply refused to implement it chiefly, it appears, because they did not agree with the law.

In refusing to give effect to these provisions, intended for the benefit of Maori, the Crown appears to have ignored article 3 of the Treaty which extended to Maori the Crown's royal protection and all the rights and privileges of British subjects. While very modest in scope the 1900, 1903 and 1945 provisions for exclusive oyster and fish reserves for Maori were in effect a very limited recognition of Maori Treaty rights to their sea fisheries. The Crown's refusal, in even a single instance over a period of 62 years when the provisions were in force, to make provision for an exclusive reserve sought by Maori, including Ngai Tahu, cannot be reconciled with reasonableness and good faith on the part of a Treaty partner. The Crown must be held to have breached its Treaty obligations.

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*Waitangi Tribunal, Department of Justice, Wellington.*

# Ngai Tahu Sea Fisheries Report

## 12 Crown Breaches of the Treaty

### 12.4 The Fisheries Act 1983

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12.4.1 The genesis of the quota management system (QMS) described in chapter 7 and at 12.5 below lay in 89(1)(g) of the Fisheries Act 1983. This section authorised the making of regulations prescribing a quota or total allowable catch for any fish or fishery in New Zealand waters. It was later superseded by a statutory scheme in 1986. Before considering the implications of the QMS we should briefly refer to some other provisions of the 1983 Act which remain in force. As noted, it repealed the previous fisheries legislation and consolidated and reformed the law concerning the management and conservation of fisheries and fishing resources.

#### Fishery management plans

12.4.2 Part I provides for the development of a comprehensive and integrated approach to managing fisheries by way of management plans for special areas. The Director-General of MAF was obliged to consult and have regard to the views of representatives of various organisations including Maori in the preparation of a fishery management plan. But the minister has discretion as to whether members representing Maori are appointed to fishery management advisory committees. These committees are to give advice on the preparation and operation of management plans. Given that such plans may well relate to Maori fisheries guaranteed by the Treaty it is surprising that Maori participation in their supervision is not mandatory. Representations by all four Maori members of Parliament that this should be so were rejected by the Crown. This is yet another illustration of the Crown's failure to protect the rangatiratanga of Maori, including Ngai Tahu, over their sea fisheries.

#### Exclusion of part-time fishers

12.4.3 As we have seen in chapter 7, the restricted definition of commercial fishermen in the 1983 Act resulted in many Maori and non-Maori part-time fishers being excluded from any further commercial fishing. Between 1500 and 1800 part-time fishers were banned from the industry. Within the Ngai Tahu claim area some 137 such fishers were excluded. It is thought that a substantial number of these were of Ngai Tahu. Given that Ngai Tahu has never waived, sold or surrendered their Treaty sea fishing rights and that in hindsight the Crown has recognised that the exclusion policy should have been restricted to those fishers not dependent on fishing, many of those excluded have a justified sense of grievance.

#### New Zealand Maori Council representations

12.4.4 In chapter 7 we outlined various representations made by the New Zealand Maori Council while the 1983 Bill was before Parliament. The council sought to have the Treaty of Waitangi formally recognised in the Act but this was not done. The omission to do so was a further instance of the longstanding failure of the Crown to protect Maori Treaty fishing rights in fishery legislation. Nor would the Crown accede to a request to acknowledge Maori rangatiratanga over their sea fisheries by recognising in the new legislation the rahui concept as a basic principle. We have discussed in chapter 8 the council's request that the former s33 of the Maori Social and Economic Advancement Act 1945 be re-enacted as part of the new Fisheries Act.

Taking shellfish for use at a tangi or hui

12.4.5 We note that regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986 permits the taking of the more common shellfish in excess of the normal limits by Maori for use at a tangi or hui. This continues an earlier 1972 regulation. This is a rare acknowledgement of Maori interest in their fisheries. Its efficacy, however, is affected by the failure of the Crown to prevent depletion and pollution of the resource.

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 12.5 The Quota Management System

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This scheme originated in limited form under regulations in 1983. Species allocations were made among nine separate companies with at least 75.1 percent in New Zealand ownership. It was restricted to eight deepwater species. The statutory scheme applicable to both inshore and deepwater species was enacted in the 1986 amendment to the Fisheries Act 1983. As we have noted in chapter 7, input from Maori, including Ngai Tahu, at the tribal level to the lengthy discussions leading to the passage of the 1986 amendment was virtually non-existent. MAFFish had no experience in consulting with Maori at this most important and basic level.

#### Purpose of the scheme

12.5.1 The principal purpose of the scheme was to control and if necessary reduce fishing effort so as to conserve fish stocks at a sustainable level by a system which it was hoped would at the same time provide the most effective long term sustainable economic yield from the resource. The previous legislative regime which had admitted all-comers had resulted in serious depletion of the inshore fishery and placed the future viability of some species in jeopardy. It was apparent that drastic action was called for. The quota management system was the Crown's response.

#### The property interest created

12.5.2 While conservation was the scheme's rationale it rested on the creation by the Crown of a property interest in an exclusive right to commercial fishing in the form of an individual transferable quota (ITQ). This quota, allocated to certain fishers on the basis outlined in chapter 7, can be readily transferred by sale, lease or licence. As the Muriwhenua tribunal held, correctly in our view, the right to catch fish in terms of an ITQ has the characteristics of a property right. {FNREF|0-86472-103-X|12.5.2|5} One moreover, which was not purchased by those who qualified for the initial allocation of the ITQ. Those smaller fishers excluded by the scheme who wished to participate were required, if they could afford to do so, to purchase quota at market prices.

#### Maori reaction to the scheme

12.5.3 Maori generally, including Ngai Tahu, objected strongly to the scheme as enacted in 1986. We recall the Ngai Tahu attitude as expressed by Tipene O'Regan (7.5.12). Mr O'Regan claimed that the Crown first took away from the Maori tribes the fishing resources which belonged to Maori, not to the Crown, and then:

the Crown went on to purport to give those resources, or the beneficial usage of them, together with tradeable property rights on an individual transferable basis of title, to other persons.(AA16:11)

Mr O'Regan further claimed that the true owners were thereby deprived of their estate in fishing which under the 1986 Act was:

transferred by main force of the Crown in its right of administration in government, and given away without fee or compensation to other commercial non-Maori interests. (AA16:12)

In chapter 7 we have recorded the spate of litigation concerning the QMS instigated by Maori including Ngai Tahu against the Crown. This litigation at present stands adjourned.

12.5.4 We have found (10.6) that Ngai Tahu have:

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

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

We agree with the Muriwhenua tribunal that there is a fundamental conflict between Maori fishing rights under the Treaty and the quota management scheme. The 1986 amendment which gave statutory force to the QMS effectively guaranteed to those allocated ITQ (almost all of whom were non-Maori), the full exclusive and undisturbed possession of the property rights in fishing that the Crown had already guaranteed to Maori. The Act is based on the premise that no fisheries subject to quota belonged to Maori but all to the Crown and were, with Parliament's assent, the Crown's to give away or dispose of as it saw fit.

We have no hesitation in finding that the quota management system put in place by the Crown is in breach of the principles of the Treaty. Rather than actively protecting the rangatiratanga of Ngai Tahu in their sea fisheries the Crown has acted on an assumed right to dispose of them without Ngai Tahu consent and demonstrably against their will. This power has moreover been taken without consultation with Ngai Tahu and in the face of Maori protest. It is in clear breach of the Treaty.

It is likewise inconsistent with the Crown's obligation to act reasonably and in good faith towards its Treaty partner Ngai Tahu. The prejudicial effect of these serious breaches of Treaty principles is self-evident. We will come shortly to the Maori Fisheries Act 1989 in which the Crown has taken the initial step to repair the grave infringement of Maori rangatiratanga in their sea fisheries. Before doing so we should, however, briefly advert to a submission made to us by Mr Carruthers on behalf of the Crown.

12.5.5 In the course of his final submissions Mr Carruthers stated that it was not accepted that the enactment of the Quota Management system was a breach of the Treaty. Mr Carruthers argued that the Crown's position has always been that it was perfectly open for Maori to go and exercise any commercial fishing rights which Maori had. That is, he said, the Maori fishing rights preserved and protected under s88(2) of the Fisheries Act 1983. The subsection provides that "nothing in this Act shall affect any Maori fishing rights". Presumably Mr Carruthers was arguing, although he did not in terms say so, that this provision "preserved and protected" Ngai Tahu sea fishing rights under the Treaty. But if so, he omitted any reference to the decision of the full Supreme Court in *Waipapakura v Hempton* which we have discussed in 12.3.9. We reiterate that in that case the Supreme Court accepted the Crown submission that the Treaty of Waitangi was no more than a bargain binding on the conscience of the Crown and was not a source of legal rights. As for what is now s88(2) of the 1983 Act, that provision the court held was merely a saving clause which did not create rights. Only legislation confirming the Treaty rights would be recognised by the courts and there was no such legislation. Mr Carruthers did not refer us to any such legislation; nor could he because none exists in the context of sea fisheries. We find no merit in Mr Carruthers submission. Ngai Tahu sea fishing rights under the Treaty have been not merely ignored but, without Ngai Tahu consent, in large part disposed of by the Crown in the form of individual transferable quotas. Nor is it an answer to say that Ngai Tahu as a tribe had not been exercising their Treaty sea fishing rights. The Crown was responsible for reducing the tribe to a condition which made it impossible for it to do so.

#### The Maori Fisheries Act 1989

12.5.6 In chapter 8 we summarised the provisions of the Maori Fisheries Act 1989 which we characterised as a breakthrough towards Crown recognition of Maori Treaty fishing rights. We noted that the new Act had its genesis in a number of factors including the interim declarations of Mr Justice Greig in the High Court. Of considerable importance was the publication of the tribunal's Muriwhenua Fishing Report. A principal finding of the tribunal was that the QMS as currently applied was in fundamental conflict with the Treaty but that it might be beneficial to both Maori and the Crown if an agreement could be reached. {FNREF|0-86472-103-X|12.5.6|6} This tribunal endorses the view that, as enacted, the QMS is in fundamental conflict with the Treaty and, specifically, with Ngai Tahu sea fishing rights under the Treaty.

As a result of the 1989 Act the Crown is in the course of meeting its statutory obligation to transfer to the Maori Fisheries Commission ten percent of the total allowable commercial catch (TACC) for the benefit of Maori. Such transfer is to be completed by October 1992. In the meantime the Maori parties to the High Court proceedings have agreed, subject to the Crown honouring its commitments, not to recommence the High Court proceedings before October 1992.

#### Ngai Tahu views on the QMS and the Maori Fisheries Act 1989

12.5.7 In his final submissions Mr Upton, counsel for the Ngai Tahu claimants, made a variety of points including the following (AB1:29-31):

- whatever its faults in terms of the Treaty Ngai Tahu has to recognise that the QMS is now a "practical reality";
- Ngai Tahu has consistently opposed the QMS on the grounds that the permanent property right (ITQ) in its fisheries was appropriated by the Crown and given to others. But Ngai Tahu has not necessarily opposed the QMS per se as a management system although it has reservations about its efficacy in certain respects;
- Ngai Tahu accept that a durable Ngai Tahu fisheries right in the form of ITQ could reasonably represent rangatiratanga in sea fisheries. The issue it says, is one of allocation and the actual amount and type of TACC to be allocated to Ngai Tahu;
- as long as the process of allocation of ITQ permits Ngai Tahu to achieve a total of 50 percent of TACC in all species offshore from their mana whenua without regard to statutorily imposed seaward boundaries, Ngai Tahu would be prepared, without prejudice to its claimed Treaty of Waitangi rights for 100 percent of such TACC, to accept quota in the form of ITQ and to hold them as tribal property;
- Ngai Tahu would not object to such an allocation being delivered via the mechanism of the Maori Fisheries Act providing there was a statutory amendment requiring the Maori Fisheries Commission to ensure its actual delivery to Ngai Tahu; and
- on the basis of the Treaty partnership and its perception of the nature of Treaty of Waitangi based rangatiratanga in sea fisheries, Ngai Tahu believes that the tribe has a right to inclusion in the actual decision-making processes concerning its sea fisheries, which is greater than that of an ordinary quota holder and that the Crown should be required to include Ngai Tahu in management decisions affecting its interest in sea fisheries. It points to the extent of Ngai Tahu mana moana as further justification for such a belief.

12.5.8 Crown counsel Mr Carruthers in final submissions pointed to the Maori Fisheries Act 1989 as being a recognition by the Crown of Maori claims which put in place a system to implement that recognition. He urged that the tribunal should report on a further mechanism for the delivery of the sea fishing rights which Ngai Tahu may have and in this respect proposed support for the Maori Fisheries Act 1989 (AB2:87-88).

12.5.9 The fishing industry through Mr Castle made lengthy submissions on the Maori Fisheries Act (AA43). He expressed the view that the Act taken as a whole, being the delivery of ten percent of the total allowable catch together with the taiapure regime provided for in the Act "strikes a fair and reasonable middle ground consistent with the spirit and principles of the Treaty" (AA43:51). While we record this expression of opinion we also note that the appropriate allocation of quota to Maori is essentially a matter for discussion and resolution as between the Crown and Maori.

# Ngai Tahu Sea Fisheries Report

## 12 Crown Breaches of the Treaty

### 12.6 Conclusion

#### 12.6. Conclusion

It is readily apparent that Ngai Tahu has for more than a century been seriously prejudiced by longstanding breaches of the Treaty culminating in the enactment and implementation of the quota management system. As a direct consequence of the Crown's Treaty breaches deriving from its acquisition of Ngai Tahu land, the tribe was unable from the latter part of the last century to continue its commercial sea fishing business.

Except for a short period from 1877 to 1894 Crown legislation has failed to recognise Ngai Tahu Treaty rights to their sea fisheries. While statutory provision was in place for 62 years from 1900 on for exclusive fishing grounds for Maori, none were ever granted. Then in 1986 under the quota management system the Crown assumed the right to dispose of Maori sea fisheries in clear breach of Treaty principles. The Maori Fisheries Act 1989 expressly states that it is intended to make better provision for Maori fishing rights secured by the Treaty and to facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing. This is a welcome step towards statutory acknowledgement by the Crown of Maori sea fishing rights guaranteed by the Treaty. By October 1992, ten percent of quota should have been transferred to the Maori Fisheries Commission for the benefit of Maori. Ngai Tahu will expect to receive the benefit of its proportional share.

This tribunal is not in a position accurately to assess the value of the sea fisheries to which Ngai Tahu is entitled under the Treaty. The tribe has never disposed of its exclusive right to the sea fisheries out to 12 miles or so from its shoreline. Its reasonable share of the fisheries beyond this distance out to the limit of the 200 mile exclusive economic zone has yet to be negotiated and settled. In so doing allowance should be made for the serious depletion of the inshore fishery. Given the very extensive ocean which surrounds their long coastline and the richness of the deep sea fishery resource within it we would expect the value of the Ngai Tahu sea fisheries to be very substantial in potential catch terms.

At present the Crown is obliged to transfer ten percent of quota to the Maori Fisheries Commission by October 1992. This is intended to be for the benefit of Maori. While we are unaware of how or when this quota will be distributed to iwi we believe if justice is to be done not only to Ngai Tahu but to all other tribes, that a substantially higher percentage of quota than ten percent of the total allowable commercial catch will need to be made available for distribution among Maori. As we have indicated, the value of Ngai Tahu sea fisheries alone must be very substantial.

# Ngai Tahu Sea Fisheries Report

## 12 Crown Breaches of the Treaty

### 12.7 Recommendations

#### 12.7. Recommendations

Our recommendations appear in chapter 14.

#### References

{FNTXT|0-86472-103-X|12.2|1}1 Ngai Tahu Report 1991 (Wai 27) Waitangi Tribunal Report: 3/4 WTR p 821

{FNTXT|0-86472-103-X|12.2|2}2 ibid

{FNTXT|0-86472-103-X|12.2|3}3 ibid pp 821-840

{FNTXT|0-86472-103-X|12.2.1|4}4 ibid

{FNTXT|0-86472-103-X|12.5.2|5}5 Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) 1988 p 142

{FNTXT|0-86472-103-X|12.5.6|6}6 ibid p 239

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