

Ngai Tahu Sea Fisheries Report

14 Recommendations in Respect of Treaty Breaches

14.1 Introduction

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Before discussing our recommendations it is desirable that we state shortly the Crown breaches of the Treaty which we have considered in detail in chapter 12. The purpose of our recommendations is to suggest ways in which amends should be made for the serious loss and harm to Ngai Tahu resulting from the Crown's breaches of its Treaty obligations.

Waitangi Tribunal, Department of Justice, Wellington.

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14.2 Crown Breaches of the Treaty

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14.2.1 We have found that Ngai Tahu has been prejudicially affected by various acts, omissions, policies and Acts relating to their sea fisheries which were or are inconsistent with the principles of the Treaty in that:

- Grievous and irreparable harm resulted from the Crown's breaches of its Treaty obligations when acquiring the vast Ngai Tahu land holdings between 1844 and 1864. Not only did the tribe lose virtually the whole of their land and their economic base, they were as a direct consequence unable to continue their thriving and expanding business and activity of sea fishing.

- In legislating to protect and conserve the sea fishery resource the Crown failed to recognise Ngai Tahu rangatiratanga over their sea fisheries and in particular their tribal rights of self-regulation or self-management of their resource, this being an inherent element in rangatiratanga. Their rights were usurped by the Crown without any consultation with Maori and without any recognition of their Treaty rights in their sea fisheries. This denial of Ngai Tahu rangatiratanga over their sea fisheries was in breach of article 2 of the Treaty.

- 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 undermined Ngai Tahu mana moana and was the consequence of the Crown's breach of its Treaty duty to protect and sustain Ngai Tahu tino rangatiratanga.

- Subject to some limited or partial exceptions the sea fishery statutes reflected the Crown's assumption that non-Maori had equal rights with Maori in the whole of the sea fisheries, notwithstanding that article 2 of the Treaty guaranteed Maori rangatiratanga over their fisheries. This assumption was in breach of the Treaty principle requiring the Crown actively to protect Maori rangatiratanga.

- In providing in the Sea Fisheries Act 1894 for the sale by public tender of an exclusive right to the absolute property in oysters the Crown acted on the basis that it, not Ngai Tahu, owned the oysters within Ngai Tahu sea fisheries, contrary to its Treaty duty to protect Ngai Tahu rights to their fisheries.

- From 1894 on until recently the Crown failed to provide any statutory recognition of Ngai Tahu Treaty rights to their fisheries. This was in breach of the Crown's Treaty obligation actively to protect Ngai Tahu rangatiratanga in their sea fisheries and 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 1989 without regard to its Treaty obligations to Ngai Tahu and other Maori and in breach of Treaty principles.

- The refusal of the Crown to give any effect to legislative provisions in force between 1900 and 1962 providing for the reservation of exclusive Maori fishing grounds notwithstanding applications by Maori including Ngai Tahu was in breach of the Crown's duty as a Treaty partner to act reasonably and in good faith.

- The quota management system first put in place in a limited way by regulation in 1983 and in statutory form in 1986 is in fundamental conflict with the terms of the Treaty and Treaty principles. It is based on an assumed right of the Crown to dispose of Maori fisheries without Maori consent as if they were the property of the Crown. No effort was made by the Crown to ascertain the nature and extent of Maori sea fisheries guaranteed by the Treaty prior to the passage of this legislation. Nor were the tribes consulted. The legislation constitutes a virtual denial of any significant rangatiratanga of Maori in their sea fisheries; far from protecting it, the Act gives the Crown authority to dispose of the Maori right to their sea fisheries. This the Crown has proceeded to do without the consent of Maori. The Act as it stands, constitutes a serious breach of the Treaty.

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14.3 Recommendations Pursuant to Section 6.3 of the Treaty of Waitangi Act 1975

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Introductory comment

14.3.1 In earlier findings of this tribunal at paragraphs 10.6, 12.5.4 and 13.15 when summarising Ngai Tahu sea fisheries Treaty rights today we recorded our conclusion that Ngai Tahu have:

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

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

This tribunal is not in a to position accurately 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. It is no doubt possible to assess reasonably accurately the extent and value of the sea fisheries within this inshore zone of Ngai Tahu. However, the fixing of a reasonable share of sea fisheries extending beyond such inshore zone and also beyond the continental shelf into the deepwater fisheries within the 200 mile exclusive economic zone is more difficult. In assessing this share the tribunal believes that account must be taken of the serious depletion of the inshore fisheries resulting in a decline in yields of the major species and in the yields from recreational and traditional Maori fishing.

In arriving at a "reasonable" share of the extended fishery it is also necessary to have regard to the expectation of Ngai Tahu arising from its Treaty right to development (10.6, 12.5.4, 13.15). It is therefore clear to the tribunal that there is a need for Ngai Tahu and the Crown to negotiate and settle by compromise if possible, what constitutes a reasonable share of the fisheries beyond 12 miles including the deep sea fisheries. Note will need to be taken of the provisions of the Maori Fisheries Act 1989 which have introduced onto the scene a new party in the form of the Maori Fisheries Commission to which body government has transferred quota to hold and deal with on behalf of all Maori.

The findings of this tribunal are specifically in respect of the Ngai Tahu claim but the tribunal cannot ignore the legislative procedures now in place for what the Maori Fisheries Act 1989 describes (inter alia) as a process to make better provision for the recognition of Maori fishing rights secured by the Treaty. Obviously, therefore, there will be a need for the Crown and Ngai Tahu to negotiate and settle within the overarching provisions of the 1989 Act and any amendments made to that Act which provide for additional quota allocation.

During his final address, counsel for the Crown requested that the tribunal should report on a proper mechanism for delivery of any rights Ngai Tahu may have and urged support for the provisions of the Maori Fisheries Act 1989. The Crown is entitled to much credit for facilitating the passage of this Act. It is a tangible, welcome and significant step towards the full recognition of Maori fishing rights under the Treaty. This tribunal agrees that the Act can usefully be employed as the vehicle to allocate the additional quota necessary to provide a remedy for Ngai Tahu. As a prerequisite to that procedure it will be necessary for prior discussion to take place between the parties. The findings of the tribunal are intended to provide a basis for those discussions. If a compromise does not flow from negotiations the matter may once again return to the High Court where proceedings stand adjourned. Whether or not judicial proceedings will provide an answer or remedy remains a question which we as a tribunal would not seek to answer. It is however evident that there is a need for the Crown and Ngai Tahu to exercise the utmost good faith and good will in negotiating a compromise. A compromise does not always involve a settlement based solely on the issues. It may take into account a number of external circumstances such as the public conscience, the nation's ability to meet the costs and the desirability of a permanent solution. There are also to be measured the benefits that should flow from an agreed settlement and such intangibles as the satisfaction of a long outstanding grievance and the unity of people resulting therefrom. It must be an honourable settlement and the Crown, following the sad history of the loss of Ngai Tahu land and mahinga kai resource, has need to retrieve its honour.

We now set out our recommendations which include those in respect of eel fishing licences at Waihora (Lake Ellesmere) and provision for mahinga kaimoana to be reserved to Ngai Tahu and other iwi or hapu.

Recommendations

14.3.2 Negotiations

We RECOMMEND that the Crown and Ngai Tahu enter into negotiations for the settlement of the Ngai Tahu sea fisheries claim.

In so doing the tribunal RECOMMENDS that the parties take into account the findings of this tribunal that Ngai Tahu have:

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

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

- that appropriate allowance should be made for the serious depletion of the inshore fishery off the Ngai Tahu rohe when assessing the reasonable share of the sea fisheries to which Ngai Tahu is entitled beyond the first 12 miles or so from the shoreline.

14.3.3 Quota Management System

We FURTHER RECOMMEND that the negotiations and settlement should include determination of an appropriate additional percentage of quota under the Quota Management System and that the Maori Fisheries Act 1989 be used as the mechanism to deliver that quota to Ngai Tahu.

14.3.4 Waihora (Lake Ellesmere)

In addition to the above recommendations affecting the major sea fishery we make the following recommendations concerning annual eel fishing licences at Waihora (Lake Ellesmere) and mahinga kaimoana reserves.

We FURTHER RECOMMEND that all existing annual eel fishing licences on Waihora (Lake Ellesmere) be not renewed on expiry so that the lake can be returned to Ngai Tahu as a Ngai Tahu eel fishery (paragraph 2.8).

We FURTHER RECOMMEND that existing annual eel fishing licence holders be compensated by the Crown for any consequential loss (paragraph 2.8).

14.3.5 Mahinga Kaimoana Reserves

We further recommend that the Fisheries Act 1983 be amended to provide that in appropriate circumstances mahinga kaimoana as envisaged by the Ministerial Task Force in chapter 2 of its April 1992 report may be reserved to an iwi or hapu (paragraph 8.4.11)

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14.4 Conclusion

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By the time this report is presented it will be just on five years from the first hearing of the Ngai Tahu grievance claim at Tuahiwi on 17 August 1987. The hearing of sea fisheries evidence commenced in April 1988 and continued thereafter at various hearings throughout 1988 and 1989. For a period from 10 October 1989 until 28 June 1990 no further hearings took place. At this point an application was made by the New Zealand Fishing Industry Board and New Zealand Fishing Industry Association for leave to present further evidence. It was granted by the tribunal and further hearings on sea fisheries matters alone took place with the final hearing being between 2-5 September 1991.

The rather spasmodic way in which the sea fisheries claim was finally heard has not made it easy for the tribunal to maintain continuity in the hearing and assessment of the evidence. It has also not been easy for the parties before it to present their respective cases in a cohesive way. The tribunal acknowledges its indebtedness to counsel appearing for the claimants, the Crown and the fishing industry for their patience and assistance in the conduct of this major inquiry.

As pointed out earlier in this report there are several actions extant in the High Court in respect of sea fisheries. These proceedings stand adjourned by agreement between Maori and the Crown, to free the way for discussions between the Crown and Maori representatives to continue. In a Court of Appeal decision in re Te Runanga o Muriwhenua v Attorney General CA110/90 dated 28 June 1990 (unreported) Richardson J made this comment when referring to an earlier decision of the Court of Appeal of 27 February 1990:

There were 3 reasons for the decision to allow the appeal. The first was that the case was not ready for trial, the judicial timetable not having been complied with by any of the parties. The second was that, as our earlier judgment of 22 February (the Muriwhenua judgment) had indicated, in the light of the Maori Fisheries Act 1989 (assented to on 20 December 1989) contested litigation at this stage concerning Maori fishing rights might not be necessary or fruitful. Third, the Muriwhenua judgment had underlined that Waitangi Tribunal reports could be helpful to the Courts and provide valuable evidence and that apart from the tribunal's Muriwhenua report the forthcoming report on Ngai Tahu claims could be of significance in the High Court's consideration of the case in the event of its going to trial and could also shorten a hearing in the High Court.

This tribunal has been mindful of these comments made by the Court of Appeal. Like that court this tribunal would comment that the Maori Fisheries Act 1989 is a step in

the right direction. We would also like to feel that our report will be of help, not so much in providing evidence for future contested litigation in the courts but rather in providing the Crown and Maori with a suitable foundation for negotiation and settlement.

In this connection we refer to our introductory comments at para 14.3.1 pointing out what is involved in a compromise and we urge the Crown and Maori in the spirit of goodwill and agreement that attended the introduction of the Maori Fisheries Act 1989 to come together again and find a resolution.

In accordance with s6(5) of the Treaty of Waitangi Act 1975, the director of the tribunal is requested to serve a sealed copy of this report on:

(a) The claimants, Henare Rakihiia Tau and the Ngai Tahu Maori Trust Board

(b) Minister of Maori Affairs

Minister of Justice

Minister of Fisheries

Minister of Conservation

Minister for the Environment

(c) Solicitor-General

(d) Mr J L Marshall - counsel for New Zealand Fishing Industry Board

(e) Mr T J Castle - counsel for New Zealand Fishing Industry Association

(f) Maori Fisheries Commission

DATED at Wellington this 6th day of August 1992

A G McHugh, presiding officer

M T A Bennett, member

M E Delamere, member

Georgina M Te Heuheu, member

I H Kawharu, member

G S Orr, member

D J Sullivan, member

Waitangi Tribunal, Department of Justice, Wellington.