

# Ngai Tahu Sea Fisheries Report

## 11 Treaty Principles

### 11.1 Introduction

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In chapter 4 of our Ngai Tahu Report 1991 we considered the Treaty and the Treaty principles relating to the claims concerning land and mahinga kai. Before discussing the Treaty and its application to the various claims of the Ngai Tahu people we recounted how Ngai Tahu subscribed to the Treaty in various localities within their tribal rohe. We noted that had Captain Hobson not acted precipitately in May 1840 by issuing a proclamation asserting the sovereign rights of the Crown over the South Island and Stewart Island by right of discovery, his proper course would have been to proclaim sovereignty over the South Island on the grounds of cession. This indeed was what Major Thomas Bunbury did on 17 June 1840 at Port Underwood after he had obtained the signatures of seven Ngai Tahu rangatira and those of nine other South Island chiefs acceding to the Treaty. {FNREF|0-86472-103-X|11.1|1} We understand why Ngai Tahu, whose Maori predecessors have occupied Te Wai Pounamu for upwards of 1000 years, reject the notion that their island was "discovered" by the British. In fact they, the tangata whenua, readily signed the Treaty of Cession and they are entitled to invoke their rights under it.

Among the matters discussed in chapter 4 of our Ngai Tahu Report 1991 were the status of the Treaty, the rules of Treaty interpretation, the constitutional status of the Treaty and Treaty provisions. These were a necessary preliminary to our consideration of the principles relating to the claims for land and mahinga kai. All that we said on those matters applies equally to the present sea fisheries claim. However, no useful purpose is served by repeating our discussion of these topics. It is sufficient here that we briefly state our conclusions on them before moving to a discussion of the Treaty principles relevant to the sea fisheries claims.

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 11.2 The Status of the Treaty

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11.2.1 We believe there is credible and persuasive support for the view that the Treaty of Waitangi was a valid treaty under international law. Certainly it was the intention of the British government to treat with the Maori people as a sovereign independent nation. Accordingly it is reasonable to apply the general principles of treaty interpretation to the Treaty of Waitangi. {FNREF|0-86472-103-X|11.2.1|2}

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### 11.3 Rules of Treaty Interpretation

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11.3.1 The tribunal's task is complicated by the existence of two versions of the Treaty, one in Maori, the other in English. We are obliged to have regard to both and where differences exist, to reconcile or harmonize these differences. In so doing we should bear in mind that the broad and general nature of its language indicates the Treaty was not intended as a finite contract but rather a blueprint for the future. For all lay in the future. What matters is the spirit. It is necessary to look not only at the language of both texts of the Treaty but also to the surrounding circumstances including the Maori perception at the time of what the Treaty meant.

With very few exceptions the Maori version of the Treaty was signed by the Maori chiefs. Where there is a difference between the two versions considerable weight should, in our opinion, be given to the Maori text since this is the version assented to by all but a few Maori who signed the treaty.

We believe the Treaty of Waitangi should be seen as a basic constitutional document. In seeking to ascertain and give effect to the spirit of the Treaty as the nation's founding document we should interpret each text in a generous, ample and ultimately compatible fashion. Moreover, the Treaty must be capable of adaptation to new and changing circumstances as they arise. {FNREF|0-86472-103-X|11.3.1|3}

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### 11.4 Constitutional Status of the Treaty

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11.4.1 Certain legislative provisions, most notably the Treaty of Waitangi Act 1975 and its amendments have resulted in the Treaty being given effect to and, as a consequence, residing in the "domestic constitutional field." Other recent legislation requires or permits decision-makers to have regard to the Treaty. The High Court has ruled that the Treaty "is part of the fabric of New Zealand society" and in certain circumstances regard may be had to its provisions in interpreting legislation. But in the absence of express legislative provision, Treaty rights cannot be enforced in the courts. Nevertheless this tribunal senses that the central importance of the Treaty in our constitutional arrangements is likely to receive growing recognition by the courts, the legislature and the executive in the foreseeable future. {FNREF|0-86472-103-X|11.4.1|4}

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If the tribunal finds that any claim submitted to it under s6 of the Treaty of Waitangi Act 1975 is well-founded it may recommend remedial action by the Crown. Before it can find a claim to be well-founded the tribunal must be satisfied:

- (a) that the claimant has established a claim falling within one or more of the matters referred to in s6(1) of the Act,
- (b) that the claimant has been or is likely to be prejudicially affected by any such matters, and
- (c) that any such matters were or are inconsistent with the principles of the Treaty.

All three elements must be established before the tribunal can find a claim to be well-founded.

Previous reports of the tribunal have formulated a number of Treaty principles considered to be applicable to those particular claims. The Court of Appeal, notably in the New Zealand Maori Council case, has also formulated certain Treaty principles. {FNREF|0-86472-103-X|11.5|5} Not all principles are relevant to any given claim.

In reflecting on which principle or principles are applicable to the present claim the tribunal has noted that some matters earlier characterised as principles might more appropriately be seen as inherent in or encompassed by a wider or more general principle. We believe this to be especially true of the first of the four principles we are about to discuss as being applicable to the present claim.

The cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga

11.5.1 This principle is fundamental to the compact or accord embodied in the Treaty and is of paramount importance. We see it as over-arching and far-reaching, derived as it is directly from the provisions of articles 1 and 2 of the Treaty. Intrinsic to it are several concepts which elsewhere have been characterised as principles but which we now believe are better seen as inherent in or integral to this basic principle. Specifically we refer, in the context of the present claim, to the Crown obligation actively to protect Maori Treaty rights; the tribal right of self-regulation, the right of redress for past breaches, and the duty to consult.

Implicit in this principle is the notion of reciprocity - the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands, forests, fisheries and other valuable possessions for so long as they wished to retain them. It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Maori land but of much more, including fisheries.

Rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga - mana Maori - in terms of article 2.

The Crown in obtaining the cession of sovereignty under the Treaty therefore obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired was a qualified right.

As will appear in our discussion of the tribal right of self-regulation and of the principle of mutual benefit, the tribunal recognises that in reconciling the concepts of sovereignty and rangatiratanga some compromises will need to be made by both Treaty partners.

11.5.2 The Crown obligation to protect Maori rangatiratanga required it actively to protect Maori Treaty rights, including Maori fisheries rights.

The preamble to the Treaty records the anxiety of the Queen to protect the "just Rights and Property" of the Maori chiefs and tribes of New Zealand. The English version of article 2 was drafted by James Busby. He had been in New Zealand since 1833 and was well acquainted with Maori and their way of life. In particular he knew of the high value Maori attached both to their land and their fisheries. It is not surprising that he ensured that specific reference was made to both in article 2 whereby the Crown confirmed and guaranteed to Maori the full exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties for so long as they chose to retain them in their possession. We note that article 3 extends to Maori the Queen's royal protection and in addition confers on them the rights and privileges of British subjects. Protection of Maori rights and property is clearly a dominant characteristic of the Treaty.

Claudia Orange has noted the assurances given by Hobson and other Crown representatives, both prior to the first signing of the Treaty on 6 February 1840 and prior to subsequent signings by Maori, that their lands and other Treaty rights would be protected. {FNREF|0-86472-103-X|11.5.2|6} While Dr Orange does not record any specific reference to Maori fisheries as such, it cannot be disputed that the Treaty guarantee of protection of this taonga would have been of great importance to them. Seafood was a significant and indispensable element in the diet of most Maori in Aotearoa including Ngai Tahu.

The tribunal in various reports has stressed the duty imposed on the Crown under the Treaty actively to protect Maori interests. The Court of Appeal in 1987 endorsed this view. The president of the court, Sir Robin Cooke, then said:

the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded. {FNREF|0-86472-103-X|11.5.2|7}

One of the reasons for the British government despatching Captain Hobson to negotiate a treaty of cession with the Maori was the presence in New Zealand of some 2000 British subjects and the likelihood of substantial numbers of settlers joining them. Wakefield's determination to press on with his settlement plans was apparent with the arrival of the first contingent of colonists at Port Nicholson in January 1840 shortly before the Treaty was signed. While land was no doubt foremost in the minds of both Maori and Captain Hobson, it must have been apparent to both that the growing numbers of settlers would wish to take fish from the sea. Hobson, the Queen's representative, approved the express inclusion of fisheries in the English version of the Treaty. While, no doubt, the apparent plentitude of fish in the waters of Aotearoa would not have suggested to Hobson the need at that time for any special measures to protect the Maori fisheries, the Treaty guarantee was intended to operate indefinitely into the future. The duty of the Crown would become operative when the build up of the settler population began to place the Maori fisheries under pressure. At that point it was the Crown's responsibility to ensure, if the settlers were to continue to take fish from the sea, that the interest of Maori in their fisheries was fully protected. In so far as Maori were prepared to continue to share this resource with non-Maori the Crown in its protective role was obliged to ensure that the needs of Maori were first met. In discussing the principle of protection the Muriwhenua tribunal said:

The essential point was that the Treaty both assured Maori survival and envisaged their advance, but to achieve that in Treaty terms, the Crown had not merely to protect those natural resources Maori might wish to retain, but to assure the retention of a sufficient share from which they could survive and profit, and the facility to fully exploit them. {FNREF|0-86472-103-X|11.5.2|8}

The critical point is that the Treaty guaranteed to Maori their fisheries for so long as they wished to retain them. The fisheries so guaranteed were those over which Maori exercised rangatiratanga in 1840. Any diminution in the exclusive possession of such fisheries as a result of fishing by non-Maori would require the concurrence of Maori. It was the duty of the Crown to ensure that non-Maori, who were now and in the future to share the bounty of Aotearoa (including access to Maori sea fisheries), did so with the concurrence of Maori and in such a way that Maori retained a sufficient share for their present and reasonably foreseeable future needs.

The Treaty guarantee extended not merely to those sea fisheries over which Maori exercised rangatiratanga in 1840 but to such extended fisheries in which they subsequently became entitled to an exclusive share under the right to development inherent in the Treaty.

The tribal right of self-regulation or self management is an inherent element of tino rangatiratanga. This concept was discussed in the Muriwhenua Fishing Report. The Muriwhenua tribunal put it this way:

In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government. {FNREF|0-86472-103-X|11.5.2|9}

By way of elaboration, the Muriwhenua tribunal emphasised (among other matters) that:

- the Treaty guaranteed tribal control of Maori matters, including the right to regulate access of tribal members and others to tribal resources.

- the cession of sovereignty or kawanatanga enabled the Crown to make laws for conservation control and resource protection, being in everyone's interests. These laws may need to apply to all alike. But this right is to be exercised in the light of article 2 and should not diminish the principles of article 2 or the authority of the tribes to exercise control. In short, sovereignty is said to be limited by the right reserved in article 2. {FNREF|0-86472-103-X|11.5.2|10}

The Crown in the exercise of its powers of governance in the national interest clearly has a right, if not a duty, to make laws for the conservation and protection of valuable resources such as the sea fisheries. But such power should be exercised with due regard to the interests of the owners of such resources. In the case of their sea fisheries guaranteed to Maori by the Treaty, the Crown should first consult with Maori on proposed conservation measures and ensure that Maori interests are not adversely affected, except to the extent necessary to conserve or protect the resource. Failure by the Crown to so act is inconsistent with Maori tino rangatiratanga over their sea fisheries.

11.5.3 The duty to consult does not exist in all circumstances. In our Ngai Tahu Report 1991, after citing a passage from the judgment of Sir Ivor Richardson in the New Zealand Maori Council case, we said:

It follows from Sir Ivor Richardson's discussion that in some areas more than others consultation by the Crown will be highly desirable, if not essential, if legitimate treaty interests of Maori are to be protected. Negotiation by the Crown for the purchase of Maori land clearly requires full consultation. On matters which might impinge on a tribe's rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources - mahinga kai - also require consultation with the Maori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may impinge on Maori interests, will often give rise to the need for consultation. The degree of consultation required in any given instance may, as Sir Ivor Richardson says, vary depending on the extent of consultation necessary for the Crown to make an informed decision. {FNREF|0-86472-103-X|11.5.3|11}

As we indicate above, environmental matters and, we would emphasise, measures of resource control as they affect Maori access to traditional food resources - mahinga kai - require consultation with the Maori people concerned. Given the express guarantee to Maori of sea fisheries, consultation by the Crown before imposing restrictions on access to or the taking by Maori of their sea fisheries is clearly

necessary. Such matters plainly impinge on the rangatiratanga of tribes over their sea fisheries.

11.5.4 If failure by the Crown to protect a tribe's rangatiratanga results in detriment to Maori there is an obligation on the Crown to make redress. This was recognised by Mr Justice Somers in the New Zealand Maori Council case:

The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle .... That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal. {FNREF|0-86472-103-X|11.5.4|12}

Sir Robin Cooke also accepted that if the Waitangi Tribunal found merit in a claim and recommended redress the Crown should grant at least some form of redress unless grounds existed justifying a reasonable partner in withholding it " which he thought - would be only in very special circumstances, if ever." {FNREF|0-86472-103-X|11.5.4|13}

We turn next to consider the second principle applicable to this claim.

The principle of partnership

11.5.5 This principle is now well established. It was authoritatively laid down in the New Zealand Maori Council case where the Court of Appeal found that the Treaty signified a partnership between Pakeha and Maori requiring each to act towards the other reasonably and with the utmost good faith. {FNREF|0-86472-103-X|11.5.5|14}

We reiterate our earlier adoption of the following statement by the Muriwhenua tribunal as to the basis for the concept of a partnership:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership. {FNREF|0-86472-103-X|11.5.5|15}

The principle of mutual benefit

11.5.6 This principle was expounded in the Muriwhenua Fishing Report in this way:

Both parties expected to gain from the Treaty, the Maori from new technologies and markets, non-Maori from the acquisition of settlement rights and both from the cession of sovereignty to a supervisory state power. For Maori, access to new markets and technologies necessarily assumes a sharing with the settlers who provide them, and for non-Maori, a sharing in resources requires that Maori development be not constrained but perhaps even assisted where it can be. But neither partner in our view can demand their own benefits if there is not also an adherence to reasonable state

objectives of common benefit. It ought not to be forgotten that there were pledges on both sides. {FNREF|0-86472-103-X|11.5.6|16}

In the context of sea fisheries, where we believe it was envisaged from the outset that the resources of the sea would be shared, this is an important principle. It recognises that benefits should accrue to both Maori and non-Maori as the new economy develops but this should not occur at the expense of unreasonable restraints on Maori access to their sea fisheries.

#### The principle of options

11.5.7 This principle was also enunciated by the Muriwhenua tribunal. {FNREF|0-86472-103-X|11.5.7|17} In essence it is concerned with the choice open to Maori under the Treaty. Article 2 contemplates the protection of tribal authority and self-management of tribal resources according to Maori culture and customs. Article 3 in turn conferred on individual Maori the rights and privileges of British subjects. The Treaty envisages that Maori should be free to pursue either or indeed both options in appropriate circumstances. The Crown is obliged to offer reasonable protection to Maori in the exercise of the rights so guaranteed them.

11.5.8 We propose in the next chapter to apply these principles in testing whether and, if so, to what extent, the Crown has acted consistently or inconsistently with them in relation to Ngai Tahu sea fisheries.

#### References

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{FNTXT|0-86472-103-X|11.2.1|2} 2 *ibid* pp 218-221

{FNTXT|0-86472-103-X|11.3.1|3} 3 *ibid* pp 221-224

{FNTXT|0-86472-103-X|11.4.1|4} 4 *ibid* pp 224-226

{FNTXT|0-86472-103-X|11.5|5} 5 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, (CA)

{FNTXT|0-86472-103-X|11.5.2|6} 6 Claudia Orange *The Treaty of Waitangi* (Allen & Unwin, Wellington 1987) Chs 3 and 4; see also Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim (Wai 22) (Muriwhenua Fishing Report) 1988 pp 189-190

{FNTXT|0-86472-103-X|11.5.2|7} 7 *N Z M C v A G* [1987] 1 NZLR 641, (CA) P 664

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{FNTXT|0-86472-103-X|11.5.2|9} 9 *ibid* p 187

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