

# The Fisheries Settlement Report

## 7. Representation

Complaints that the settlement had not been adequately agreed raised questions about who could agree; and most especially about who held customary fishing rights, about who could decide and about who could represent the decision makers. At issue were three aspects of representation:

- which descent group(s) represent the holders of customary fishing rights in a district? (customary representation);
- at what level should descent groups be represented in this case? (level of representation); and
- what authority represents the persons at that level? (institutional representation).

### Customary representation

#### 1.7.1 First, who own the Maori fisheries? Who had the customary rights?

Maori recognised a range of interests in our view. An eel weir in a river might belong to a single family while many hapu could have interests in common or severalty in a sea-fishing ground. For Maori, there was little distinction between land and fisheries in that both tended to be held not by individuals but the group, but which group, the smaller hapu or the larger iwi? The tribal ownership of fisheries was made clear in the Muriwhenua Report, as J C Upton for Ngai Tahu pointed out in referring to para 11.6. The Muriwhenua Tribunal carefully refrained from commenting however, whether 'tribe' meant 'hapu' or 'iwi'. From our own knowledge and from subsequent evidence tendered in various Tribunal inquiries it does appear however that the main Maori group in this context was the hapu.

Some claimants assumed this to be so. Whanau-a-Apanui for example did not lodge one claim, but several in the name of each hapu and their submissions talk only of a hapu entitlement. Submissions from Ngati Porou however, suggest that many interests have all to be accommodated, whanau, hapu and iwi. A similar position pertains at Maketu. All the hapu of Te Arawa have interests there and they sometimes undertook sea fishing on a large-scale, iwi basis. Nonetheless it does appear that local fisheries were mainly associated with hapu, while smaller units and individuals on the one side and the larger iwi on the other, had interests too.

The Treaty supports this view. It recognises both collective and individual possession, and as to the collective interest refers to 'hapu', the word 'tribe' in the English text being rendered as 'hapu' in the Maori. The Ngai Tahu Report does not appear to conflict. The passages of that report that describe the Ngai Tahu ownership, to which Mr Upton referred, can equally refer to any Ngai Tahu hapu.

We had then to consider which of the competing hapu have the right in the Chathams, the Moriori hapu who were there first or those of the Taranaki people who claim the

right of conquest? That question should be disposed of on another claim, already filed, we consider. For now it is enough to say that by traditional protocol, as both are there then both must be respected.

## **Level of representation**

7.2 Ngai Tahu are the predominant people of the greater part of the South Island. For as long as we can remember they have spoken with one voice on other than local issues, through a single authority which was, until recently, the Ngai Tahu Maori Trust Board. On the West Coast however is a well known section of Ngai Tahu at Arahura, who now identify as Tuhuru, or Ngai Tuhuru as their counsel described them in his closing submissions. Ngai Tuhuru contended that no-one can agree but them on anything affecting 'their' fisheries. The Ngai Tahu Trust Board responded that Tuhuru was a break-away group from Kati Waewae and should not be separately recognised.

We find that we need not determine the independent or other status of Ngai Tuhuru in order to deal with this matter. In this case the question is one of the level at which the decision should be represented? Can the iwi authority bind all or must each local group consent?

There can be no one rule for all cases. Some matters are local issues and should be handled locally. A specific claim to a particular piece of land may fall in that category. The fisheries settlement however involves broad policy and we accept the submission of Mr Upton for Ngai Tahu that that should be dealt with at no less than an iwi level.

Certainly, property rights are important and they are affected in this case, but there are many with customary interests in fishing. Groups like Tuhuru can legitimately claim interests along with smaller whanau and even individuals. The consent of all with an interest would be impracticable, and thus the political reality that in any society, the protection, enhancement or limitation of property rights may need to be settled for all through appropriate representative institutions.

To reach a conclusion in this matter we have had to have regard to the nature of customary Maori society as we see it. As earlier mentioned, there was not time to meet with all who could have assisted this inquiry although we had some help from submissions from T O'Regan and H M Mead and an affidavit from G S Latimer. Traditionally, it appears to us, Maori society was essentially anti-state and egalitarian. Sections regularly split off to stand alone and form new hapu following leadership or other struggles. They still do, and Tuhuru, which distance themselves from Kati Waewae, well illustrate this. This tendency to fractionate and reform ensured the operational autonomy of small hapu groups and so, though they were forever dividing and reassembling in new shapes, the hapu remained the basic political and resource owning unit. (T O'Regan describes the groups as sub-units, and sub-sub units. They may also divide laterally however to simply create more hapu.)

Nonetheless the fragmentation of hapu was conditioned by the need to band together on occasions, and thus there remained a loyalty to a larger collectivity, to those of the common descent line called the 'iwi', or simply, the 'people'. For the most part 'iwi'

effectively describes the parent tribe from whom all hapu have come, or a confederation of tribes, as G S Latimer contended; but the word has been variously applied. Iwi were sometimes a transient collation of hapu members for some expeditionary, military or political purpose, and some iwi crusades involved unrelated hapu. In addition, as H M Mead pointed out, iwi may split to form new iwi, or, as G S Latimer considered with regard to Ngati Wai, larger hapu may claim an iwi status. Most importantly however, there were times when iwi associations were more regularly dominant, through war or some personal influence, and times when hapu chiefs met in regular conclaves or iwi runanga.

The tension between those two strong desires, for local autonomy on the one hand and unity on the other, has characterised ancient and modern Maori society. Opinions will no doubt vary but we venture to suggest that local autonomy was seen as more important for Maori, while yet it was recognised that some things had perforce to be done by the iwi. Major arrangements with outside groups, or tauiwi, were usually at this level.

With Pakeha settlement iwi structures became more necessary, significant and permanent. Pan-iwi structures likewise appeared, with waka or iwi-whanui confederations. Each is a legitimate extension from the customary base in our view, a necessary response to a new circumstance. The present-day position now varies from place to place but the current wisdom appears to be that matters of common policy affecting the people generally, should be determined or ratified at an iwi or iwi-whanui plane. Likewise, though resources are primarily hapu owned, generations of Maori have accepted that some commercial operations should be undertaken on an iwi basis.

We find in the Treaty some support for our view. It distinguishes ownership and representation and then points to the need for new representational models. While the land and fisheries are guaranteed to the 'hapu' (Maori text), the Treaty purports to be made with the newly formed 'Confederation of United Tribes' (English text), and was in fact mainly executed along iwi lines.

Mr Woods contended for Tuhuru that the consent of each hapu was required before any tribal policy could be said to be formed; and even that there had to be total consensus within the hapu. The approval of everyone, or of each hapu seems to us to put the matter too strongly, although in former days it seems, there was a tendency for dissentient groups to accept a majority opinion. We think it has now been accepted for a long time however, that matters of common policy must be resolved with the Crown at an iwi or wider plane, and that of necessity, some decisions should be binding on sub-entities including dissentients. We need not conclusively determine that matter however, but only that the Crown is not bound to inquire beyond the iwi on a matter of general policy. How the iwi reaches an agreement is an internal domestic matter for the iwi, not the Crown, to work out.

But who represents the iwi?

## **Institutional representation**

7.3 Several bodies may be seen to represent the iwi of an area, including

- trust boards
- Maori councils
- federated Maori authorities, and
- runanga

We will briefly review each.

TRUST BOARDS became the embodiment of the people in many districts from about the 1940s and some boards claim a mandate to this day. Other trust boards have been recently created by statute for this same purpose.

THE MAORI COUNCILS were also effective from an early period and predominate in some areas.

It would be difficult to bypass local branches of the FEDERATION OF MAORI AUTHORITIES (FOMA) in some places, especially in major land-owning areas when questions of resource use and ownership are involved.

More recently, RUNANGA have been created expressly to represent iwi.

Today there is a diversity of structure and different institutions may stand for the iwi in different places. To illustrate this we speculate as follows.

There appears to exist, for Tainui and Ngai Tahu, settled arrangements that combine marae or hapu based representation (Nga Marae Toopu; Runanga Nui-a-Tahu) with a trust board (Tainui; Ngai Tahu) under some uniting umbrella (Kingitanga; Iwi Authority).

On the other hand there appears to be three separate bodies with standing in Te Arawa-a trust board, a runanga and the local branch of FOMA. In that district one may need to consult with each of these. Separate bodies are also important in Kahungunu, but the main ones there appear to be, at present, a district Maori council, a trust board and a runanga. The Tuwharetoa however, are represented in a single trust board. And so it goes on.

The extent to which any of these bodies may represent the iwi, or replace the traditional Maori authority, is still problematical. The tribe exists irrespective of these structures in some opinions (see for example, the affidavit of H K Ngata B28f). In other words, the rangatiratanga of the iwi has not necessarily been relocated. Others make the point that in some areas, the ratification of the kahui ariki, kawai rangatira or the ropu kaumatua, remains a pre-requisite, irrespective of the existence of a board or other authority (thus the affidavit of G S Latimer, B28c)-"it would be unthinkable when dealing with a matter of great significance for the tribe to proceed without the approval of rangatira or kaumatua who are acknowledged custodians of the authority of the tribe"). In yet further places, kaumatua councils have been integrated into the structural design. For others however, especially many younger people, the expectation remains that whoever assumes to sign for the iwi must have a mandate from an elected or representative body. In many areas, these difficulties have still to be worked through.

There was a proposal to provide formally for iwi structures and give certainty to the situation, in the Runanga Iwi Act 1990. There were arguments over the details however, and rather than deal with them, the Act as a whole was recently repealed. This was unfortunate in our view. Now the position remains as it was, fluid or even flaky.

## **National representation**

7.4 Whether Maori opinion could have been settled through the New Zealand Maori Council or National Maori Congress was not considered in this case. It was assumed that the iwi, or Maori generally, should be approached.

This tribunal is in no position to advise Government on the appropriate institutional representation for iwi except following lengthy sittings in an area (and thus a decision was made on institutional representation in Ngai Tahu). We consider below however, under the heading of Ratification, the question of whether the settlement can be said to have been adequately agreed, having regard to the representation problems.

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*Waitangi Tribunal, Department of Justice, Wellington.*