

The Fisheries Settlement Report

9. Allocation

Allocation describes the division of benefits amongst the various Maori groups entitled. The Sealords purchase would provide a major stake in the industry and an income to promote Maori fishing through a restructured commission. The concern was that the commission should allocate benefits fairly and impartially amongst the iwi, and that the interests of particular sub-groups and individual operators should also be protected. These things might not happen, some thought, without special safeguards.

The Crown has a treaty duty to all the tribes, in our view, and has therefore some delicate balancing to achieve. It cannot tell the commission what to do so as to undermine self-management on the one hand, but on the other, it would be failing in its treaty obligations to permit of a system that did not have protections for particular groups. To that end the deed envisages that an allocation system will be promoted through three stages. The new commission will propose an allocation scheme after full consultation with Maori. Then, the Crown must be satisfied it is fair, and finally, the legislation to effectuate the scheme may be referred to this tribunal. The scheme is to include proposals for an independent dispute resolution process.

The question of whether this arrangement gives sufficient protection must be answered in the context of the complaints. The first of these, that there should be no settlement at all until an allocation system is agreed, is one we cannot uphold. An early settlement was needed in our view, and could not have awaited resolution of the allocation problems. In any event the allocation question was properly to be referred to the more representative Fisheries Commission that is still to be established.

Nor could we accept the submissions that the Crown should deal direct with each tribe, acknowledging though we do the proven competence of some tribes to make their own arrangements. The submissions do not resolve who should be dealt with, hapu or iwi, or how does the Crown deal with hundreds of hapu or identify who are iwi? Nor did these submissions consider how an equitable apportionment could be achieved on a piece-meal settlement basis. We think it reasonable that the Crown should call upon the expanded commission to resolve these problems.

Other concerns, that a Maori bureaucracy would emerge holding the power and the assets at the centre, that Maori would get shares in a business but not a chance to be in the business themselves, or that the scheme would advantage groups and prejudice individual initiatives, are all matters to be handled within an allocation scheme, through defining the goals and providing for reviews. The need to maintain the central business asset that generates the necessary revenue, must also be recognised and provided for, however.

Our inquiries then revealed a more serious concern. It appears the various ways in which allocations might be effected have not yet been adequately examined. The old commission had in fact proposed only one option to its annual general meeting, that

each tribe should be deemed to possess the whole of the fishery from their shorelines to the deep blue yonder, with allocations to be based on the relative catch values in the consequentially defined sea territories. This definition gives more significance to the deep-sea and distant fisheries where the greater catch value is found, and less to the inshore fishery where most traditional fishing was done.

We will call it 'the off-shore equation'. It is said to be based on tikanga Maori, or Maori law, in that traditionally the tribes had authority over the seas adjoining their land, an opinion encapsulated in the recent expression, 'mana-whenua, mana-moana'. We would hesitate to use 'tikanga Maori' or 'mana moana' to describe the scheme however, for it is arguable that traditionally the mana, or authority, did not extend far from the shoreline, and the central feature of this scheme is the value given to the distant fisheries of modern times. The authority went only as far as it could in practice be enforced, it could be said, and customarily, the open seas were open. The equation does underline however, that there are differences in the extent of traditional resource ownership amongst the various iwi.

It particularly favours Ngai Tahu. It is also thought to advantage the tribal districts of most of the commission's members and thus there were concerns that only one option had so far been presented. As it turned out the commission's annual general meeting had not approved that option but, according to the resolutions as filed, had directed further inquiry. Nonetheless the commission chairman was of the view that an allocation based on tikanga Maori, by which he meant the off-shore equation, had been approved (thus for example, B9:1) and the commission's September 1992 bulletin continues to describe the fishery as "a continuation of lines projecting into the sea from the land boundaries" (A2:1).

This concern appears to be covered by the settlement however. The commission is to be changed and made more representative and it is the new commission, not the old, that is to promote an allocation scheme.

It is important nonetheless to mention the allocation alternatives and some of the opinions that were given. As we see it, allocation could involve a number of options, as for example:

- the funding of approved schemes;
- the allocation of benefits at occasional iwi forums; or
- the division of assets according to predetermined criteria.

The first option is currently within the present commission's brief and may well form an important part of the new commission's policy.

The second, perhaps more aptly related to tikanga Maori, seemed to us to have potential despite some immediately obvious problems. Mr Harman for Maketu spoke of "iwi to iwi negotiations based on the sharing of the fullest information". This would substantially reduce the commission's role, he noted, elevate the role of iwi, and do away with what he saw as pre-conceived agendas. This process could well meet the needs for both national co-ordination and direct iwi involvement.

The third option, of fixed criteria, is the only one previously canvassed, and as mentioned, only one criterion was earlier raised. The variables would appear to include the following however:

- the 'deep sea equation' as earlier discussed, based upon imagined tribal sea territories. This at least attempts to grapple with resource ownership;
- the comparable length of tribal coastlines. This is favoured by some east coast tribes. For certain inland tribes however, sea fishing rights were not dependent on owning any coastline at all;
- the size of the continental shelf. This suggestion was raised by a section from Maketu;
- past user, based upon a tribe's historical fishing activity. This favours Te Arawa for example, with a short coastline but with a record of large iwi fishing expeditions;
- the extent of dependence on fisheries, having regard to the lack of other resources. This would favour the Chathams and also Muriwhenua;
- comparable populations;
- comparable needs. Some tribes must rely more than others on fishing to re-establish their people. The Chathams for example lack the land and other resources that Ngai Tahu might capture while Muriwhenua has few other resources and a large number of unemployed;
- the impact of past over-fishing. Do some tribes need more help in becoming re-established?
- capability. Should the test be based on who can catch what?
- special needs, those of the freshwater tribes for example, in protecting habitats or in re-establishing or developing freshwater fisheries.

Accordingly, a variety of criteria may be considered before any allocation scheme is determined, even assuming that the better course is not simply to fund the most deserving proposals, or is not to settle matters at iwi forums.

This led to a further complaint. Nearly all those appearing before us considered the tribunal should retain its jurisdiction to hear their claims. Only through that process, it was considered, would their particular circumstances be made known and the criteria most suitable for them, identified.

The complainants wished to be heard for another reason too. Allocation is to be based on treaty principles (deed, 4.5.4.2). The Ngai Tahu Tribunal had confirmed the off-shore equation as a treaty principle, in T O'Regan's view, in holding that Ngai Tahu has the exclusive right to the deep-sea fishery off their shores as against other tribes. The concern was that no other tribes had been heard on that finding, and it was felt they should now be heard before the principles are finally laid down.

We are of opinion that it would be impractical for the tribunal to hear each and every fishing claim, and that the better course is to seek an allocation scheme that is fair to everyone, without hearing every claim, if that is possible.

We also consider however that allocation should not necessarily be based on treaty principles and that previous tribunal opinion should not be binding on the framers of the allocation scheme. We say this for three reasons.

In the first instance, treaty principles have been developed to define the relationship of Maori and the Crown, not Maori inter se, and allocation is primarily concerned with the latter.

Secondly, as already noted, the treaty principles in fishing were laid down in Muriwhenua and Ngai Tahu. Only the Muriwhenua and Ngai Tahu tribes were heard.

Finally, there is uncertainty over the tribunal's position. In T O'Regan's view the Ngai Tahu tribunal had confirmed the Ngai Tahu mana-moana of the deep and distant seas. That was a logical extension of treaty principles laid down in Muriwhenua, he claimed. In our view however, the Muriwhenua Tribunal found that customary authority applied only to the inshore area. Rights beyond that arose from the inherent human right of development, a right that needed augmenting in the Maori case to offset the past impairment of their original industry and the loss of a developmental capacity, and to compensate for the depletion of their customary fishing areas. On that basis all iwi have developmental rights and it could be that no custom restricts iwi from developing where they will in the open sea.

Accordingly we cannot see how this matter can be decided on treaty principles. Similarly the new commission should not be bound by the tribunal's opinions when promoting allocation proposals, but should endeavour to form its own view after full consultation with affected Maori, as the settlement requires.

There was then very real anxiety that the scheme might not give a sufficient protection for certain special interests. The Moriori and Tuhuru in particular had eloquent cases in this regard. Both have a marked dependence on a sea economy (the Moriori almost entirely), both claim to be under threat of domination by mainlander opinion on the one hand or a large iwi group on the other, and both are in the unenviable position of having their existence and their right to receive any benefits, under challenge from other Maori.

The position is especially critical for the Moriori. They were denied land rights in about 1870, by some Maori Land Court rule that placed great value on near-contemporary atrocities and very little on ancient and peaceful occupations. For the same reason their customary fishing right is now disputed, and, according to M Solomon, development quota was recently issued to a Chatham Islands enterprise without any consultation with Te Iwi Moriori.

Despite these large concerns, we do not think it beyond the wit of the new commission to work out a scheme to be legislated for that would accommodate these problems. It may well require the Maori Land Court to determine, or reconsider, questions of customary entitlement, to rule on Moriori and Tuhuru rights for example, or to determine whether they or other groups similarly placed, are entitled to share as beneficiaries.

We mention at this point that we decline the Tuhuru application to state a case to the Maori Appellate Court on the Tuhuru customary entitlement. Their concerns should properly be handled within the scheme of allocation. We decline to state a case however, upon the ground that it is not necessary to do so in order to dispose of this matter.

An allocation scheme may also need to provide for an investigation of the comparable circumstances of each tribe, by some appropriate body. Occasional reviews of the allocation system and a hearing of individual complaints may also be necessary.

Our conclusions then, are these. A fair system of allocation is crucial to the settlement. It would be inconsistent with the Treaty guarantees in our view, if the apportionment of fishing benefits dealt unfairly between the various interests, but the present provisions do not give an adequate assurance against that.

The proposed scheme goes first to the Crown to consider if it is fair. The Crown does not hear anyone or act transparently however. The effecting legislation may then be referred to this tribunal. This tribunal however deals with treaty principles and with claims against the Crown and the issues here are essentially between Maori. We would not therefore support a reference to the tribunal on the grounds that the tribunal's jurisdiction is too circumscribed to deal adequately with the matter.

Accordingly, we think it better that the scheme should not be based on treaty principles alone but on broad considerations of what is tika, or fair, in all the circumstances. The Crown should then appoint a special court or body to hear any objections.

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