

# The Fisheries Settlement Report

## 10. Conclusions

### The basic approach

It would be churlish not to consider that in seeking to provide for Maori interests in commercial fisheries, the Crown has done well in our time. The resolve, the enterprise and the spirit are all there. But the spirit became lost in the small print, in our view, leading to many of the complaints we have described. It was a salient reminder of what has been said before, that treaty matters are more for statesmen than lawyers.

Most especially it needs to be appreciated that any settlement of this nature has two essential goals, not just to pay off for the past, but also to buy into the future. The Treaty, it must be understood, is primarily concerned with the latter. It is not the extinguishment of rights that is essential but the affirmation of them. Somehow the deed does not capture this, apart from the preamble, and Maori anxieties were understandable.

The problem is partly one of expression. The deed was not packaged well for Maori and what was presented as an abrogation of the Treaty could also have been given as a fulfilment of its goals. It is useful to compare for example, the stated purpose of the Maori Fisheries Act 1989 "to make better provision for the recognition of Maori fishing rights secured by the Treaty of Waitangi".

There was nonetheless a fundamental flaw in the deed's basic approach, in our opinion. The Treaty is about the maintenance of basic rights and obligations. That sort of thing cannot be got rid of by agreement. The just rights of peoples are also meaningless without access to the courts to enforce them. The courts may be seen as the Pakeha taonga in the Treaty, a taonga which simply cannot be traded.

### Purposes and principles

The settlement as we see it, is primarily to end the litigation, and with that, the Maori claims that the system for the management of commercial fisheries does not take account of Maori fishing interests. It has been agreed that Maori be given a capital interest in the commercial fishing industry, to manage as they will, in return for which Maori will abandon their claims and will accept the current fish management arrangement.

The essential acknowledgements as we see them are, on the Crown part, that Maori should have an interest in the commercial fishery, and on the Maori part, that that interest is not exclusive and must be constrained to work within resource management laws for the benefit of everybody. We see those as important acknowledgements both of which are consistent with the Treaty.

In addition further matters have been grafted onto the settlement. Other Maori fishing interests will be provided for in regulations and policies. This too is consistent with

the Treaty, in our view, in so far as it is directed to giving better effect and definition to the Treaty's broad principles. It should also be helpful to all users to have that definition.

Subject to our comments below, we consider there is sufficient Maori support for these policy intentions.

What is then proposed however, is the effective extinguishment of the Treaty interest. This is wrong in our view and demonstrates a serious misunderstanding of what the Treaty is about, as we said earlier. The Treaty promised protection for Maori fishing interests for so long as Maori wish to keep them. The extinguishment of those interests is quite a different matter from providing rules and policies to protect and manage them. Some general consensus may do for the latter, but the former requires the consent of all with an interest, or their appropriate representatives. In much the same way, customary land rights are extinguished by purchase, only with an agreement that covers all interests.

The Crown is obliged to actively protect the Maori fishing interest. This is not an obligation that can be extinguished, or got rid of at any one point in time. The most that can be said is that the Crown has acquitted itself well of its current obligation in the present circumstance. Who can say what the future may hold however, or what adjustments may be needed if fish management policies change?

## **Findings and recommendations**

Our more specific conclusions are these:

- The hapu have generally the main interest in the fisheries, but it is appropriate and not inconsistent with the Treaty, that a national settlement on fisheries should be ratified at no less than an iwi level.  
It follows that the people of Tuhuru may be bound by a Ngai Tahu decision. It follows further that the Tuhuru status need not be determined here but may be relevant when it comes to allocating.
- There is presently no settled structure to determine who are iwi and who represents them on a national basis, and so no national iwi ratification process is currently possible. In the absence of such settled structures the canvassing of Maori opinion through general hui and by individual subscriptions was the next best alternative. With representational uncertainties however, the assessment of the outcome can only be subjective. In these circumstances, the Crown was justified in relying upon the report of the Maori negotiators.
- The report of the Maori negotiators indicates a reasonable mandate, but with the qualification that the Treaty itself should not be compromised.  
The question of whether a Maori position might be represented through the New Zealand Maori Council or National Maori Congress did not arise in this inquiry.
- Subject to the deletion of extinguishment, as referred to below, it is reasonable and not inconsistent with the Treaty that the fisheries settlement, if generally agreed, should bind all, including dissentients. The settlement as a whole might be challenged if some dissentients are especially disadvantaged, but such disadvantage has not been established.

Some national settlements have not bound all, Railcorp for example, but only an all-in arrangement was workable for fisheries.

- The Crown's treaty obligations to hapu require that any allocation of benefits should be based on principles that are fair. Those obligations are likely to be compromised, inconsistently with treaty principles and in a manner prejudicial to some Maori, as the deed stands. To alleviate that position IT IS

RECOMMENDED:

- that the allocation scheme should not be based on treaty principles alone, but according to what is tika, or fair, in all the circumstances. This may include treaty principles, but need not be exclusive to them;
- that objections should not be referred to this tribunal, as our jurisdiction is constrained, but should be sent to some court or especially established body that is able to consider all relevant matters.

There are also legitimate anxieties over the future internal management of the settlement. To meet these it is FURTHER RECOMMENDED:

- that the legislation should state the settlement's goals.

These we presume to be, to get Maori into the fishing business, to provide fairly for the different Maori groups, and to maintain a central business to fund local fisheries development. The goals however should be settled between the Crown and Maori negotiators. IT IS THEN RECOMMENDED:

- that the legislation provide for a Crown-Maori body to review, say every 5 years, the progress towards achieving those goals, and to hear particular Maori complaints.
- We also consider that if there is an intention to legislate for para 4.6 of the deed, relating to the impact of this settlement on other claims, the Crown should clarify what the clause means and how in practice it is to be applied.
- It is not inconsistent with the Treaty that a settlement was proposed before allocation questions were decided, or that an allocation scheme should now be proposed by the new commission. A fair process may be difficult to establish but it is premature to consider that one will not be found. To accommodate particular complainants however, the scheme may need to provide:
  - for legal determinations on beneficial entitlements; and
  - for occasional reviews of the scheme and for the hearing of particular complaints.
- It is inconsistent with the Treaty and prejudicial to Maori, to legislate for the extinguishment of treaty fishing interests, or otherwise to make those interests legally unenforceable. WE RECOMMEND:
  - that the legislation make no provision for the extinguishment of treaty fishing interests, and that the legislation in fact provides for those interests;
  - that fish regulations and policies be reviewable in the courts against the Treaty's principles; and
  - that the courts be empowered to have regard to the settlement in the event of future claims affecting commercial fish management laws.

However we consider:

- it would be reasonable for the Crown to place a moratorium on such claims for a term not exceeding 25 years (or earlier on a material change in fish management policies); and
- it is appropriate, in view of the settlement, that the Crown should legislate to terminate current actions.

We are of opinion that the settlement is not contrary to the Treaty except for some aspects which can be rectified in the anticipated legislation. The "agreement" to legislate for those matters is not aptly so described, in the Court of Appeal's judgment, as the Maori negotiators did not ask for various of the provisions (supra at pp 14-15). The court went on to note that the deed could not bind Parliament as to the legislation that may be passed.

Accordingly if the settlement proceeds, we urge that the effecting legislation has the modifications recommended above.

DATED at Wellington this 4th day of November 1992

E T J Durie, chairperson

M T A Bennett, member

I H Kawharu, member

J R Morris, member

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*Waitangi Tribunal, Department of Justice, Wellington.*