

The Fisheries Settlement Report

8. Ratification

Ratification involves the approval of appropriate persons and bodies. To obtain that approval, the Maori negotiators arranged for numerous hui on marae around the country, issuing notices and maintaining minutes, and arranging for Maori organisations to undertake meetings of their own. A full record of the hui is contained in a 260 page report. A copy of the report was made available to the Crown Ministers, and as we understand it, it was on the basis of this that the Crown considered there was a sufficient mandate to proceed to the conclusion of a formal deed. We have read that report ourselves and have gained the same impression. The report is commendable for its thoroughness and detail. It conveyed to us the impression that there was indeed a mandate for the settlement, provided however that the Treaty itself was not compromised.

In this type of case, where a natural resource is involved, one would expect ratification to be on an iwi basis. Such are the problems on representation however, on who are the appropriate iwi, who qualify as iwi and who represents them, that it is hard to imagine any procedure the Maori negotiators might have adopted other than that which they chose. Likewise, numerous claims and counter-claims that the majority were for or against, or that signatories had or had not a sufficient authority, cannot be determined as things stand at present. This lack of settled structure, as earlier described, means no formal iwi ratification process is presently possible. That, in our view, is regrettable, but it is also, in our view, a fact. The position is too, and for the same reason, that we are in no better position than anyone else to decide whether or not a majority iwi consent has or has not been given.

Accordingly, we are of the view that the Maori negotiators acted reasonably in pursuing the programme of hui they embarked upon; and that the Crown Ministers acted reasonably in relying upon the report of those hui, to resolve that a deed should then be finalised. The deed signing we see, not as giving a consent but as affirming that a sufficient consent had already been given at hui, and that, to that end, the signatories were prepared to make a personal commitment.

There were concerns as well that the Maori negotiators had failed to explain the Memorandum of Understanding in some cases, and that uncertainties over the proposed regulations or the future allocation of benefits were such that no proper consent can be said to have been provided. Given our task to consider claims against the Crown, not claims between Maori, the question before us was whether the Crown would be failing in its duty if it proceeded with the settlement in view of the complaints of an inadequate presentation. The negotiators for their part have contested these allegations through personal appearance (T O'Regan), or through furnishing affidavits together with a full report on the proceedings. The report discloses that some negotiators went further than others. W Winiata in particular made a full and open disclosure of all material particulars at every meeting he attended. Others considered the Memorandum of Understanding should not be produced on account of some commercially sensitive content.

Given the task of explaining complex matters to diverse groups and the business and political imperatives, allegations of too much haste and too little information were inevitable. Having viewed the matter as a whole however, we are of opinion that the complaints are not justified in all cases. We also believe it was necessary that the final form of regulations and allocation procedures should be deferred, and that the latter should pass to a wider group than that comprising the present Maori Fisheries Commission. Further, in the light of the report emanating from the hui it was reasonable for the Crown to believe it was justified in proceeding.

The main contention however was that the settlement should not be binding on those who have not concurred. The Crown is obliged to uphold the independent rangatiratanga of each tribe, it was argued, and a settlement that is coercive and binding on non-consenting groups is in breach of this. The settlement should apply to those who have agreed, in other words, and not to those who are opposed.

Iwi have the right to negotiate direct and to make their own settlements, it was added, and iwi have in fact done this. Rangitane o Wairau for example reached direct agreement with the Crown on scallop quota allocations. They have had many subsequent negotiations, are now involved in a court action over paua, and have long been seeking a special arrangement for Whites Bay, an area of particular significance to them. To their chagrin, the national Maori negotiators have undermined their plans and course of actions, in their view. Nearly every other iwi group likewise claimed to have their own development plans, and some West coast iwi of the North Island had banded together for that purpose.

This objection presents the same difficulties that were noted under 'Representation'. Some persons of some tribes are agreed, others of the same tribe are in the opposite camp and no-one can say with certainty which is the correct group. The Runanga o Ngati Porou claims the right for Ngati Porou for example, and objects, while the affidavit of H K Ngata challenges that position and asserts that Ngati Porou have agreed.

In addition, Crown counsel contended that this must be an "all-in" settlement. The maintenance of the Quota Management System is central to the proposal and the system cannot be maintained on a piece-meal basis, it was said. The exclusion of some tribes would also require pro-rata reductions in the Crown's total payout, involving impossible computations and prejudicing the Sealords' acquisition. Finally, on the claimants' argument, a separate settlement would be needed with each iwi, or each hapu as some would contend, making the prospect of any national settlement with Maori a virtual impossibility.

Subject to what we said earlier about removing the extinguishment provisions, we are of the view that the settlement should proceed despite the inevitable compromise to the independent rangatiratanga of the dissentients. We consider the Crown would be justified in not proceeding except on an all-in basis, for the reasons above given, and the independent rangatiratanga of someone would be affected no matter which course was followed. There are some cases, we consider, where the consent of each iwi or hapu would be necessary, or where only consenting groups should be bound. The extinguishment of customary rights would represent such a case, in our view. Land

rights for example, cannot be extinguished except with the actual consent of the title holders; but as we have said, extinguishment should not apply in this case.

On the basis then that the settlement is to introduce new national policy for the benefit of tribes, to perfect rights rather than abrogate them and with protection for the customary position, we consider this settlement can be dealt with not just at an iwi level, but a pan iwi level, where the actual consent of each iwi is not a pre-requisite, and a general consensus can be relied upon.

All this must be subject however, to the question of whether a fair allocation system can be agreed, for that is one area where the majority rule is not enough, and special protections are needed for minorities.

Waitangi Tribunal, Department of Justice, Wellington.