

The Fisheries Settlement Report

3. Complaints

The complaints came mainly after the terms of the deed were studied. Perhaps as a consequence of the inevitable haste, the deed was not packaged well for Maori, in our view. What might have been a noble compact presents like a warranty to protect the manufacturer. There is a poverty of spirit in the operative parts, a burden of legalism that does no justice to the preamble's references to "co-operation and good faith". Also the goals are not clearly stated and the document is difficult to understand. The Court of Appeal, referring to apparently conflicting provisions in the deed, has said:

This weakness in the Deed and other aspects of it which are criticised by the appellants could be in part accounted for by input into it from different hands. Certainly it is a most unusual document and, perhaps even designedly, obscure in some major respects. [Te Runanga o Wharekauri Rekohu Inc and ors v Attorney-General and ors (CA 297/92, p 11 judgment 3.11.92)]

The more specific concerns are set out under the following headings:

Abrogation

Most especially the deed was seen by the complainants to extinguish rather than fulfil the Treaty's obligations. All treaty fishing rights are either extinguished (5.1) or made unenforceable (5.2). The deed does not see the Treaty as a living and on-going covenant but as something to be ended; and that was wrong in their view. In substitution however regulations are proposed, but the terms are still unknown. This was like buying a pig in a poke, it was thought, and in addition, there was a risk the Crown would make the regulations to suit itself, subjecting tribal rangatiratanga once more to the bureaucracy. Most felt the regulations should be agreed and should be subject to judicial review. There was some anger that the Crown might compromise the standing of the Treaty and the principle of rangatiratanga.

There was a particular view that under the deed, regulations could be made for Maori fishing areas only if there were no commercial aspects. A commercial component is a natural ingredient of some important areas however, it was said, and a commercial and non-commercial distinction cannot in practice be maintained.

Not only fishing rights are abrogated. All previous arrangements are set aside too (1.3). These date from last century, apparently, and include agreements provided for in special legislation, orders in council, certificates of title and court orders. They were said to derive from past settlements thought to be final and binding and to involve private property interests. The language of the deed was thus seen as broad and sweeping, at least when it came to taking things away.

Recent negotiations are swept aside too, like those of the Whanganui people with regard to their river fishing, without notice or warning. This was seen to belittle the sincerity of their deliberations and to trample on their mana.

Effect on other settlements

Other negotiations are also to be affected. It is axiomatic that the large fisheries payout diminishes the Crown's ability to settle claims elsewhere but saying so in the deed, (at 4.6), without more particulars, led only to uncertainty. What does it mean? How will it be applied? Will it affect proposals under the Railcorp settlement (per Ngati Paoa)? Will the impact be fairly spread amongst the current competing negotiators? Will some claims be deferred while others proceed, and if so, who will go first and why? And will the tribes that benefit most from the fisheries settlement be the first to have their land claims deferred or discounted? What principles will the Crown apply?

Consent and ratification

The concerns were not only about the contents of the deed but how the deed was executed; and most especially it was claimed, there were insufficient consents. There could have been no proper agreement, it was said, if people were not informed. At some meetings, it was claimed, the Memorandum of Understanding was not presented or properly explained. In concentrating on the commercial aspects, many said they did not know, or did not have it explained, that customary and freshwater fisheries were involved, that previous arrangements would be abrogated or that other claims would be affected.

The reality of consent was questioned too when there were significant uncertainties, on the regulations to be made, the method of allocation or the impact on other claims, for example.

The question of who could consent raised many difficulties. Most had assumed that the consents should come from iwi. Not so, in the opinion of others. The fisheries belonged to the hapu in their view, and each hapu had to agree, not some large iwi group purporting to act on their behalf.

Hapu or iwi, the consent of each group with an interest had to be obtained in many views. They challenged the assumption of the deed that a majority rule could apply, arguing that the Treaty guaranteed that the groups would keep their fisheries for so long as they wished to.

Others contended that the majority had not agreed anyhow.

Which iwi might consent, was challenged in some areas. Is it the Moriori in the Chathams for example or the Taranaki people who came later?

Then the question arose, which person or body could represent the appropriate hapu or iwi, the local runanga, Maori council, trust board or some other body or person; and it was alleged the wrong persons had signed the deed or the wrong people had

called the hui. (Similarly it might have been asked if the complainants before us were the appropriate representatives of the proper body.)

The manner of ratification, or lack of it, was also attacked, by nearly everyone; but some appreciated the difficulties, there being no settled Maori structure for mandating, a condition thought to have been worsened by the repeal of the Runanga Iwi Act 1990. Some blamed the Crown for destroying the legal personality of the tribes from last century.

Viability

Only three groups questioned the viability of the Sealords' proposal however. There are some doubts about the venture's worth should a major fishery collapse. The business, it appears, depends on the maintenance of the Quota Management System in an industry where systems had often changed; and the Quota Management System may depend on scientific programmes that are under-resourced, need improvements and lead to advice that may not be followed.

Allocation

The more important concern however, was not the business viability of Sealords but the settlement structure. Many feared a central Maori agency, a Maori bureaucracy that might keep the power and the assets from the people. It would be better, they argued, if the Crown settled direct with the tribes, who were ready, willing and able to manage their own fishing industries and neither wanted nor needed a controlling intermediary.

Again, those from the Chathams were staunch advocates for a separate settlement for their islands, presenting a compelling case based upon the rigours of their lives, their dependence on the fisheries, the extent of their fishing resource and the chilling prospect of continuing mainlander domination. What can the Fisheries Commission do for us, it was argued, that we cannot do for ourselves? How long would it take for the Chathams to receive a direct benefit through this mainlander agency?

The prospective allocation of settlement benefits to the tribes caused the greatest consternation. The principles of allocation have yet to be resolved but there was a feeling that no settlement should be agreed to while things so crucial to the tribes were still unknown. There was a very large concern too that the principles might be fixed on the basis of only two tribunal inquiries. Just two tribes had been heard on those principles, it was said, and one expected the lion's share on the basis of the tribunal's findings. Other tribes had no say on the relevant principles, they pointed out, and nor had they the chance to demonstrate their special circumstances or to have their treaty fishing rights defined according to their perspectives.

Again the Chatham Islanders presented a special case. They claimed the largest sea resource in relation to land mass and population, and the greatest community dependence on the seas; but they considered they would not get fair treatment from any Maori commission, company or hui on the mainland, especially on allocation, and they wanted a direct deal with the Crown.

Thus the tribes would be prejudiced by the repeal of the tribunal's jurisdiction to hear their cases, it was claimed, since their side of the story would not be known. Claimants were anxious to have their claims heard, to explain their particular circumstances, the places of special significance in their areas, the impact of quota management on them and their own plans to develop into fishing.

Relief

Some groups sought specific relief, being, in paraphrase:

- a finding that the Crown would breach its fiduciary obligations were it to extinguish the Treaty fishing rights of any group without that group's consent;
- a finding that the consent must come from the hapu and whanau to whom the rights accrue; or a recommendation that the proposal be made binding only on those who agreed;
- a recommendation that the Crown buy the Maori share in Sealords to hold until the new non-commercial regulations and the system of allocation was known, and until the level of the then Maori consent could be assessed properly;
- a recommendation that the Crown devise an independent system to protect and promote the fishing rights of those claimants who do not agree to the settlement; and
- recommendations by which the Maori Land Court would determine the customary fishing rights of Moriori, Tuhuru and others who were prejudiced because their customary entitlements have yet to be established.

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