

Fisheries Bill Claim

6 Whether Or Not There Should Be A Hui?

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6.1 The claimants' case is well stated in these extracts from the initial claim of Hariata Gordon:

* Ngati Paoa claims [that the clause for appointment of members] is inconsistent with the treaty in that it does not make provision for Iwi to come together collectively to decide on who shall be the members on the new Maori Fisheries Commission. The treaty of Waitangi clearly envisages that issues of national importance such as this should be dealt with by Iwi/Maori collectively and not individually...

In support of this claim we say:-

* that the expectation of the Treaty of Waitangi is that issues of national importance require consultation to be carried out not only between the Crown and individuals but also between the Crown and the Maori collectively, that is with all Iwi coming together at one time to make the decision... Any procedure which falls short of this is not consultation but manipulation;

* the rangatiratanga of Iwi requires that the Minister give effect to a collective decision of the Tribes as a whole and not what is envisaged in the Bill where the Minister gives consideration to the joint decision of the Maori negotiators but is not required to consult with Iwi/Maori collectively;

* it is a natural democratic right that issues of this nature and significance should be dealt with in a process which is transparent and visible and any suggestion of internal selectivity should be ruled out;

* it is our understanding of the Fisheries Deed that the new Fisheries Commission would be expanded and made more accountable to Maori. Inherent in this objective must be a consultation process which properly and adequately reflects Maori needs not only in terms of the Treaty but also in terms of modern reality. It is our submission that this clause must be amended so that the minister is required to call a hui so that Iwi/Maori have the opportunity to come together collectively...

Those are compelling arguments in our view. It is helpful to see the matter in some historical context.

6.2 Although for practical reasons the Treaty was mainly executed on an iwi or regional basis, yet it appears to us the need for some collective opinion was foreseen:

"Her Majesty the Queen asks you to sign this Treaty", said Lt Governor Hobson in opening the discussion before the multitude at Waitangi, "I ask you for this publicly: I

don't go from one chief to another" [Colenso's manuscript account of proceeding at Waitangi 5-6 February 1840, Alexander Turnbull Library]

Earlier, the Crown has recognised a Maori political unity under a Confederation of United Tribes as provided for in the 1835 Declaration of Independence. The confederation is expressly referred to in the Treaty.

The subsequent search for a national Maori identity to address issues of national importance is well known to student of New Zealand history, in the Kohimarama conferences, the Kingitanga, Kotahitanga and Maori parliaments, for example. These often operated in the context of Crown suspicion or hostility, particularly where they were Maori initiated. This must also be read with some opinions that the Crown was averse to national Maori institutions, preferring to divide and rule. There may have been a considerably different result for example, had the Crown's land purchase policies been first considered with Maori at a national level.

The Ratana movement, Maori War Effort Organisation and Mana Motuhake likewise demonstrated concerted Maori action and opinion.

It does not follow however that a national structure necessarily diminishes hapu or iwi autonomy. We understand the National Maori Congress for example, to be founded on the principle that nothing can restrict the right of independent iwi action; while acknowledging at the same time that some things are best dealt with or are at least best discussed, nationally.

Rangatiratanga then is not confined to iwi. Iwi themselves largely reached pre-eminence in the post-European period. At 1840, as the treaty itself shows, hapu (not iwi) were considered the appropriate groups to treat with. There is a rangatiratanga that attaches in our view to each whanau, hapu, iwi and the Maori as a people. As was considered in the Fisheries Settlement Report there can be no single rule and the level at which Maori should be dealt with, must depend upon the case.

6.3 At what level then should consultation be effected? In terms of the Treaty we recognise the right of iwi to make their own nomination for their iwi, that is their own business, but the consideration of criteria, the formulation of guidelines for the selection, and the structure to be achieved through the appointment of members, or the appointment of persons on a non-iwi basis, are matters to be considered nationally.

6.4 We had thus to remind ourselves that the task in s16 of the 1992 Act involved much more than reviewing nominations to the Commission. The minister's letter itself demonstrated the need to consider as well the types of persons needed for the task and the composition of the Commission's personnel. Crown counsel acknowledged this, and considered that the minister's stated criteria for appointment were not necessarily closed. To the minister's reference to a knowledge of tikanga Maori, an understanding of resource management and a commitment to Maori development, Crown counsel added commercial acumen, fluency in Te Reo Maori, gender and continuity with the previous Commission.

No doubt others would give yet more criteria or would challenge those already stated. It might be considered for example, that commercial acumen is not so necessary for this present Commission given that it may be only temporary until matters of allocation and restructuring are sorted out and given that some skills can be hired. It could be thought as well that continuity with the previous Commission was not so important at this stage either.

All this demonstrated however, that the minister may need to go much further than merely calling for nominations and that the minister may need to invite discussion on the criteria that Maori see as important.

Nor could we presume that iwi representation alone is necessary. Though the minister has referred to "a geographical balance with respect to the tribes represented by the members on the new Commission" the combined minds of many may produce other preferred alternatives. We considered for example, in light of the main tasks to be performed, that regard might be had to representation according to classes of interest and thus, representation for, and a proper balancing of:

- iwi with large coastlines;
- those with short coastlines;
- inland tribes with traditional access to coastal areas;
- the protection of small tribes and minority groups;
- the main lake tribes (for they too have been included in the settlement);
- the main river tribes; and
- urban Maori groups, especially those in the large metropolitans.

(We noted with interest that certain Maori urban authorities were included in the minister's circular. This seemed to us important having regard to the number of Maori in cities and the Commission's statutory objective to promote Maori entry into the fishing business. A matter the new Commission may need to bring into account is the manner or extent to which urban Maori should be provided for.)

Earlier we mooted another alternative, that some might be appointed for iwi, or regions, others for their proven commitment to Maori generally.

We are of opinion that the various options cannot be adequately brought forward and discussed without some general meeting. It is only in the light of such discussion, in our view, that nominations can then be considered.

6.5 It was pointed out in opposition to any hui, that few national hui had been called for such a purpose in the past. Bad practice does not make good law however. Only recently and still only imperfectly in our view, have Maori rights of autonomy and self-government been appreciated. Past practice has been, with some exceptions, that the Maori membership of statutory bodies has been selected by the Crown. We have considered for example the former Board of Maori Affairs with a function not dissimilar to that now proposed for the Commission in allocating funds and assistance for Maori land development. Informal consultation with Maori no doubt occurred, but rarely has this been expressly provided for in the relevant legislation and rarely has the case been so critical as that now being examined.

The novelty of the change is apparent. The old Commission was appointed by the Crown without a consultation requirement and the same applies even to the Waitangi Tribunal. Past practice then, gives little guidance in this situation.

6.6 A right of Maori autonomy is inherent in article 2 of the Treaty in our view, an autonomy that exists at hapu, iwi and national levels.

We need not measure the extent of that right or examine in this claim the general debate on aboriginal self-government. It is sufficient to find as we now do, that for the minister to appoint without an adequate facility for Maori representatives to meet nationally on this matter and to form and forward such collective opinions as they are able, would be inconsistent with that Treaty principle.

It is also the right of any hapu or iwi of course, to resile from attending such a hui, and to prefer direct consultation with the minister. The minister would need to give more weight however to opinions collectively made at a hui, having regard to the extent that different tribal and other groups are in fact represented at it.

It would also appear to be the case that the minister should treat cautiously with proposals privately made for the appointment of Commission members according to some plan, where the proponents did not avail themselves of the opportunity to put the plan to the assembly.

6.7 The question of whether the claimants would be prejudiced by the failure to call such a hui, is in our view, to be answered in the affirmative. Only through this process can they present their views and adopt or attempt to counter the preferences of others with all opinions laid bare before them. Though they may be small tribes, they should have the opportunity to caucus with others in a similar position or appeal to the larger groups to provide for the protection of minority interests by allowing some representation. They are in any event affected by the fact that in the Maori way, informed decisions are best made through debate and hearing one another.

We have considered and placed much weight on Crown counsel's argument that Ngati Paoa is protected by the fact that the commissioners must in any event submit their proposals to the people. In rejoinder it was pointed out however that no provision for consultation is made in respect of the pending allocation of existing assets, and if consultation is to be had on that aspect of the matter, it may depend upon the good will of the commissioners to do so. We would further observe that in any event, much thinking can be shaped by the way in which proposals are examined and presented by the commissioners. We are reminded for example of an earlier tribunal finding that but one scheme for allocation was submitted to the last Hui-a-Tau, and that it was necessary for the hui to resolve that further options be considered.

6.8 Also to the point, we consider, is that a well attended hui is important for building confidence in the Commission to be appointed and in the subsequent process. It is an appropriate beginning for a Commission that is to have greater accountability to Maori as is provided in the settlement deed.

We also place great value on the dialogue and discussion that a hui may engender, and from the assurance that is given when all that is done is seen to be done openly

without room for fear of manipulation. It was obvious that there is a deal of suspicion of the Crown and the Maori leadership. It may be totally unfounded but it is there, a natural consequence of the necessary task that the Crown and the Maori leadership had to perform. To remove it at this stage is vital, and that can only be done by transparent action. Not to call a hui would represent a considerable lost opportunity.

6.9 We had still to consider whether a hui should be called having regard to all the circumstances. We were given to understand there was a limited time frame. This was not fully explained but neither was it challenged. We also considered whether a hui would be very productive. As Ngai Tahu Maori Trust Board pointed out, it would need careful planning. We were conscious too that only a small section of Maori was represented before us and we had not the benefit of the opinion of the majority. They may be opposed to the course proposed, to the time and effort that would need to be expended and they may elect not to be present.

Times have also changed and from a recent tribunal hearing on the Sealord's settlement we gained some impression that a hui on this topic could descend to a counter-productive slanging match.

We cannot predict those matters but can only say that a substantial case has been made for a hui, and that despite the possibility of some unfortunate outcomes, the greater certainty is that the grievance will be more without one. Despite the short time frames, we recommend that a hui be called.

We consider it within the competence of the Ministry of Maori Development to call one, with advice from its kaumatua body, Nga Tuara. We think it more important however for the hui to be directed first to the criteria for appointment and only then to the selection of possible candidates, and should it degenerate in any way, that would be a factor for you, as minister, to take into account, in weighing its deliberations.

We urge that you call a hui and follow Lieutenant-Governor Hobson's advice when he said "I ask you this publicly; I don't go from one chief to another".

Dated this 21st Day of December 1992

(signed) E T J Durie, Chairperson

(signed) M T A Bennett, Member

(signed) M B Boyd, Member

Waitangi Tribunal, Department of Justice, Wellington.