

Maori Development Corporation Report

5 - The Claims and the Crown's Response

5.1 - Introduction

Chapter 5

The Claims and the Crown's Response

5.1 Introduction

In the latter part of May 1993, three claims were lodged with the tribunal concerning the proposed sale of the Crown's shares in the MDC. Upon registration, each was given the claim number Wai 350. Because the claimants requested an urgent hearing, on 3 June 1993 a chambers conference was held to give the parties the opportunity to elaborate their views on the need for urgency. The Crown indicated that it would abide any decision of the tribunal on the matter. By memorandum dated 8 June 1993 the tribunal granted urgency to the MDC claims, stating:

It appears there is an arguable case that Treaty rights may exist which the commercial processes for the sale of the Crown shares in the Maori Development Corporation will not address. The sale process having begun, a delay in hearing these claims would render them ineffectual. (2.7)

On 17 June 1993, the tribunal gave notice that the MDC claims would be heard in Wellington between June 28 and 30. The hearing was conducted on June 28 and 29.

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5.2 - Background to Claims

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By way of summary, the situation out of which the claims arose involves a Cabinet decision of 29 March 1993 to offer the Crown's 49.9% shareholding in the MDC for sale in an open and competitive manner. Prior to that decision being taken, interest in acquiring the Crown's shares had been expressed, separately, by two Maori groups. The National Maori Congress first expressed its interest in February 1992, repeating it in October that year. In July 1992, two Tainui authorities - the Tainui Maori Trust Board and the Proprietors of the Taharoa C Block - also expressed interest in purchasing the Crown's shares and followed up with offers for them. The first offer was made in August 1992, the second in March 1993.

The process by which the Crown proposes to sell its MDC shares is currently in train and is being managed by The Treasury, with Southpac as commercial advisor. The MDC Board has been consulted on the process and is involved in ongoing discussions upon the matter. The Crown has agreed to consider offers for 5% tranches of its shares, a figure which is said to have been reached in light of the average size of Maori entities, who are considered to be the most likely purchasers.

By an advertisement first published on 21 May 1993, expressions of interest in purchasing the shares were called for by 28 May. By 26 May, 6 expressions of interest had been received. The closing date was later extended, however, and the tribunal was advised by the Crown late in August that expressions of interest were still able to be made at that time.

Following the receipt of expressions of interest, a confidential information memorandum is to be sent to the interested parties who will then be required to satisfy the Crown that they have the financial capacity to complete the transaction. After due diligence has been carried out, information requests from bidders dealt with and any necessary supplementary information circulated, binding bids will be submitted. A report will then be prepared for Cabinet's consideration and it will make the final sale decision. (2.5:2-5)

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5.3 - The Claim of Professor Whatarangi Winiata and Te Aho o Te

Rangi Ratema Te Awe Kotuku and Others

5.3 The Claim of Professor Whatarangi Winiata and Te Aho o Te Rangi
Ratema Te Awe Kotuku and Others

This claim is made by Professor Whatarangi Winiata of Ngati Raukawa, and by Te Aho o Te Rangi Ratema Te Awe Kotuku (also known as Te Aho Rogers and Te Aho Welch) for the owners of the Okawa Bay Resort, on behalf of themselves and those iwi of the National Maori Congress, and others, who have elected to join the claim. A list of those iwi and other bodies was appended to the statement by the claimants. (A24)1

Included in the list is Te Arawa Kaumatua Council which, together with Te Arawa Maori Trust Board, Te Runanganui o Te Arawa and Te Arawa Federation of Maori Authorities, lodged a separate claim with the tribunal supporting the claim of Whatarangi Winiata and others. (1.3) The four Te Arawa organisations were not represented separately at the hearing but Mrs Piri Fenwick gave evidence on their behalf.

Another of the listed bodies, Tuwharetoa Maori Trust Board, engaged Russell T Feist as counsel to appear before the tribunal. In a brief statement, Mr Feist supported Professor Winiata's claim, adopted the arguments made and the evidence relied upon by Professor Winiata and by Ms Ertel for Te Ika Whenua, and sought a recommendation that the Crown retain its shareholding in the MDC. (A22)

Professor Winiata presented the claim to the tribunal and, at its request, gave his qualifications. He is Professor of Accountancy at Victoria University of Wellington where he teaches management finance and international finance. He also teaches hapu planning and development and a graduate seminar in Mataurangi Maori at Te Wananga o Raukawa.

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5.4 - Overview of the Claim

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Included in the statements Professor Winiata made by way of an overview of the nature of the claim are the following:

There are two major issues in this claim.

The first is the fundamental nature of the Crown's investment from the Treaty perspective, and the effect in Treaty terms of the proposed sale, and Crown withdrawal from the investment ...

The second is the process by which the sale is being effected. Maori economic interests are closely involved and the process should be one which is consistent with these interests. There should be consultation with the tribes, which there has not been

We seek to stop the sale of the Crown's shareholding, and, we urge the restructuring of Maori Development Corporation to perform the serious purpose of development banking for which it was established. (A24:2-4)

While we have provided a full summary, in appendix 2, of the arguments and evidence presented in support of this claim, we set out here the claimant's main submissions concerning the proposed sale of the Crown's 49.9% shareholding in the MDC and the recommendations it sought from the tribunal.

The claimants submitted:

- o That the Crown's investment in the MDC was made in partial recognition of the economic devastation wrought upon Maori society by Crown actions in breach of the Treaty.
- o That \$5 million of the \$13 million used to purchase the Crown's MDC shares was, by virtue of it being the capitalisation over ten years of the 1986/87 appropriation to Maori business lending, money that belonged to all Maori.
- o That, as a result of the proposed sale, a purchaser of all the Crown's shares might be in a position to ensure the dissolution of the company or exert pressure to have it dissolved, thereby removing the potential of the MDC to

fulfil the continuing need for Maori development banking services for all Maori for which it was created.

o That, as a result of the proposed sale, one iwi or a small number of iwi might be in a position to strip the company's assets, thereby inequitably benefitting only those iwi.

o That the MDC shareholdings of the Crown and the Maori Trustee are interdependent in the sense that they give a pan-iwi and national perspective to the company's operations, which could be lost as a result of the sale of the Crown's shares.

o That if, as a result of the proposed sale, the MDC's pan-iwi perspective were lost and the company controlled by a small number of iwi or by management, there would be deep concern amongst other iwi about the equitableness of that result and, because of the threat to their mana that would be caused to some iwi by the prospect of being subject to the control of others, iwi not represented in the company would be reluctant to make use of its services.

o That if, as has been stated officially, the proceeds of the proposed sale go into the Consolidated Fund, then that money will be available for general purposes yet, if Maori purchase the shares, there will be a loss of liquidity to the Maori community and/or an increase in indebtedness.

o That, the proposed sale process does not preclude the disadvantages to iwi, outlined above, but should ensure a better sharing of the advantages associated with the holding of the MDC's shares. Specifically, it was submitted that the Crown's shares should be held by a widely representative group on behalf of all or most iwi.

o That, although Maori economic interests are closely involved, there has been no consultation with Maori as to whether the proposed sale should proceed and, if so, as to the sale process.

o That, the MDC is no longer fulfilling the need of Maori for development banking services for which it was created, which need is as great as ever, making it inappropriate for the Crown to sell before such time as it has used the influence of its shareholding to refocus the company on its original mission.

The claimant sought the following recommendations from the tribunal:

o That the sale of the Crown's shares be stopped until the MDC is restructured to perform the purpose of development banking for which it was established.

o That conditions as to the nature of the sale of the Crown's shares and the uses to which the funds may be put should be prepared following wide consultation with iwi.

A detailed summary of the arguments and evidence presented in support of this claim is set out in appendix 3.

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5.5 - The Claim of Te Runanga o Te Ika Whenua

5.5 The Claim of Te Runanga o Te Ika Whenua

The claim is made by Hohepa Joseph Waiti, chairman of Te Runanga o Te Ika Whenua Incorporated Society, on behalf of himself and the four hapu represented by Te Ika Whenua: Ngati Manawa, Ngati Whare, Ngati Patuheuheu and Ngati Te Huinga Waka. (1.2:5)

In opening submissions counsel for this claimant group, Kathy Ertel, provided an overview of the claim:

Te Ika Whenua do not seek to stop the sale of the Crown shareholding in the Maori Development Corporation Limited ("MDC") per se. It is the sale without prior consultation as to the application of the sale proceeds and the Crown's intention to not provide any replacement source of Maori Development finance that represents the main source of prejudice to these claimants. (A18:3)

Importantly, it was noted:

The claimants do not seek to criticise or ask the Tribunal to inquire into the MDC itself, for this reason no argument has been directed to the status of MDC and whether or not it would be covered by the Tribunal's jurisdiction. (A18:4)

Ms Ertel added orally that Te Ika Whenua reserved its position on this last mentioned matter.

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5.6 - Overview of the Claim

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While we have provided a full summary, in appendix 3, of the arguments and evidence presented in support of this claim, we set out here the main submissions made by counsel and the recommendations sought from the tribunal.

The claimant submitted:

- o That the Crown was motivated to enter the MDC because of its Treaty obligations to Maori but, even if this were not the case, the Crown could not now avoid its Treaty obligations.
- o That the commercial operation of the MDC does not preclude its Treaty basis and ability to fulfil the Crown's Treaty obligations.
- o That the Treaty of Waitangi obliges the Crown to:
 - actively promote Maori economic development
 - consult with Maori on issues of major significance and
 - act in the best interests of all Maori.
- o That the proposed sale of the Crown's MDC shares, without a commitment to an alternative Treaty-based market mechanism delivering development finance to Maori, will be in breach of the Treaty and cause actual or likely prejudice to the claimant by:
 - ending the redress of past Treaty breaches that is provided by the MDC, when the need for development funds is as great as ever and the need of the claimant, which has not accessed MDC funds, is dire
 - being conducted in the absence of consultation with Maori on the matter of a replacement Treaty-based mechanism
 - possibly causing adverse effects on the Maori Trustee's shareholding, the purchase of which was made with funds to which the claimant has made a significant contribution.

The claimant sought from the tribunal recommendations which:

- o informed the Crown of its Treaty obligations to Maori

- o declared the Crown's actions with regard to the proposed sale of its MDC shares to be inconsistent with the Treaty and

- o supported the need for a Treaty-based market mechanism delivering development finance to Maori to be arranged, in consultation between the Crown and Maori, before the sale of the Crown's MDC shares.

A detailed summary of the arguments and evidence presented in support of this claim is set out in appendix 2.

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5.7 - The Crown's Response

5.7 The Crown's Response

Crown counsel, Ellen France, gave the following summary of the Crown's position with respect to the proposed sale of its MDC shares:

The Crown's submission is that its policy in this matter is in keeping with the principles of the Treaty and there is no prejudice nor is there likely to be any prejudice to any claimant. On the facts, the Claimants do not meet the threshold of prejudice required. On the facts, the claim demonstrates a misunderstanding of the history and purpose of MDC. The Crown's investment in the MDC was an investment on a commercial basis. The decision to offer its shares for sale is similarly a commercial one and it is the Crown's view that it has nothing to do with the principles of the Treaty. Further, what is important is the results obtained by the MDC. There is no factual basis for suggesting that it will not achieve the same results for Maori in the absence of Crown shareholding. In any event, the asset involved is substitutable - the Crown's investment represents cash, not land or other non-substitutable asset. There is nothing in the sale of its shares in the MDC which prevents the Crown from redressing any breaches of the principles of the Treaty. (A30:1-2)

The Crown's submissions were made under three major headings: Establishment of the MDC, Nature of the Asset, and The Sales Process. We have provided a full summary, in appendix 4, of the arguments and evidence presented by the Crown and consider that, because the above-quoted passage captures the essence of the Crown's response so thoroughly, there is no need for us to attempt here a further summary of our own. Instead, we refer the reader to appendix 4 for the detail of the Crown's response to the claims.

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5.8 - Tribunal Commissioned Evidence

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By a Memorandum of Directions dated 25 June 1993, the tribunal commissioned Graham Butterworth and Susan Butterworth, professional historians in private practice, to investigate and report on the following matters by 28 June.

To: Review the history of the Department of Maori Affairs and developments and government policy between 1980 and 1986. In particular, to consider how the decision to advance funds to the Maori Development Corporation (MDC) fitted in with these policies.

Interview those who are intimately involved in the establishment of the MDC.

Examine the Cabinet papers and relate them to the above process. (3.1)

A summary of this evidence is provided in appendix 5.

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5.9 - Further Hearing

5.9 Further Hearing

On 17 September 1993 Professor Winiata asked the tribunal to consider evidence relating to the High Court proceedings of 13-17 September 1993 between Taharoa C and the Maori Trustee. These proceedings concerned the proposed purchase by Taharoa C of the Maori Trustee's shares in the MDC. In response, the tribunal reconvened on 30 September 1993 to hear arguments upon the relevance and status of the additional evidence. At the conclusion of the reconvened hearing, the tribunal decided that it should not accept the evidence for the reason that it was not the best evidence available of the High Court proceedings. It noted however that the reconvened hearing had served to formally apprise the tribunal of the High Court proceedings, the decision in which was issued later that same day.

We emphasise that a full understanding of the arguments and evidence presented to the

Tribunal requires the reading of the material contained in appendices 2 to 5.

References

1. The iwi and other bodies who expressed their desire to join the claim are Ngati Kahu, Ngati Raukawa Trust Board, Rangitane, Tauranga Moana Maori Trust Board, Te Arawa Kaumatua Council, Te Iwi Moriori Trust Board, Te Kete o Taranaki Incorporated, Te Runanga o Kirikiriroa, Te Runanga o Ngati Kahungunu Incorporated, Te Runanga o Raukawa, Te Runanga o Tapuika me Waitaha, Te Runanga o Te Whanau and Tuwharetoa Maori Trust Board. In addition, separate letters of support for the claim were received by the tribunal from Ngati Whatua O Orakei Maori Trust Board, Te Runanganui o Taranaki Whanui ki te Upoko o te Ika a Maui, Moehau Nga Tangata Whenua Trust Board and Te Whanau o Rangmaiwahine Trust Inc. (A34)(a)-(d))

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