

Chapter 8

Conclusions, Findings and Recommendations

8.1 Conclusions

We are satisfied that the claims are well-founded within the terms of the Treaty of Waitangi Act 1975. The claimants have established that they are amongst the many Maori likely to be prejudicially affected by the proposed sale of the Crown's MDC shares, which is a matter covered by the words of s.6(1)(c) and (d) of the Act¹ and that the proposed sale is inconsistent with the principles of the Treaty of Waitangi.

A specific matter which we have identified as requiring immediate action concerns the 5 million shares which, we consider, are held by the Crown on behalf of all Maori. We have concluded that these shares should be transferred immediately to the Poutama Trust, without consideration, but with provision for their further transfer to another pan-Maori body should such a body be identified or emerge and be preferred by Maori as the holder of those shares on their behalf.

We also consider that the proposed sale of the Crown's MDC shares must be deferred until such time as the company is refocused upon its original mission. The very Treaty obligations which the Crown sought to honour in sponsoring and investing in the MDC require this; the combined influence of the Crown and the Poutama Trust within the company can ensure its achievement.

Once the MDC is refocused, the sale of the Crown's remaining 8 million shares must be effected in a manner which ensures the continuation of the company's control by pan-Maori interests. This is not only because the MDC is a Treaty mechanism for the delivery of development finance to all Maori, the need for which is as great as ever. It is also required by the Crown's Treaty duty to deal fairly and equitably with all Maori. The sale process currently in train does not meet those Treaty requirements, having been devised independently of the Treaty.

As has occurred in other contexts, the dearth of truly pan-Maori institutions in a position to acquire sufficient of the Crown's shares to assume control of the company impedes the ability of all concerned to identify a clear path towards resolution of the present grievance. We have explained why we consider the Poutama Trust is best placed to take up a sufficient portion of the Crown's shareholding to ensure the outcome which the Treaty requires. However, this vital matter requires detailed attention by the Treaty partners and it may be that another pan-Maori body will be identified or formed as a result of their endeavours.

Even once there is in place a process for the sale of the Crown's shares which meets the Treaty requirements, we consider further steps are required to maintain the MDC's original purpose and status as a Treaty mechanism for so long as that is necessary. Otherwise, the effect of the measures we have earlier recommended could be circumvented by the onselling of the shares acquired from the Crown.

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As well, we are very aware, especially in light of the outcome of the recent High Court proceedings, that ensuring pan-Maori control of the company could mean that pan-Maori interests own a bare majority of shares, with the bare minority being concentrated in the hands of one or a very limited number of iwi. We consider such a situation would threaten both the smooth running of the company, and thereby the achievement of its Treaty objectives, as well as clients' and potential clients' perception of it as an institution that is truly neutral amongst iwi. In our view, some mechanism is needed to ensure a healthy balance of minority shareholding interests for as long as the company's Treaty basis remains vital.

In light of the outcome of the High Court proceedings between Taharoa C and the Maori Trustee, we have had to consider the two possible scenarios that might now result: that the High Court decision may be overturned in the event of an appeal, or that it will stand. In either case we consider that the Crown is able, and obliged by the Treaty, to further protect the Treaty origins of the MDC.

In the event that the High Court decision is overturned on appeal, leaving the shareholding of the company dominated by the Crown, the Maori Trustee and the Poutama Trust to an extent in excess of 75%, we recommend that the Crown use its voting strength, in conjunction with those other pan-Maori shareholders, to amend the Articles of Association to protect the MDC's Treaty basis. We consider that amendments are necessary both to protect the pan-Maori control of the company and to place an upper limit on the beneficial shareholding of individual iwi. We believe an appropriate upper limit would be 10% of the issued shares, although an exception might be made for Tainui's 15% ownership (Tainui Maori Trust Board, 2 million shares; Taharoa C, 2 million shares). If necessary, legislation should be passed to enable these amendments.

We also note that the Articles could be amended to provide for the Crown's retention of a 'Kiwi share' to ensure that shares may not be transferred to, or registered by, any person or group not approved for the purpose by the Crown; the purpose being the retention of pan-Maori control of the company and a balanced spread of minority shareholding iwi.

In the event that the High Court decision stands and the Maori Trustee transfers his 7,000,004 shares to Taharoa C thereby giving Tainui interests a 42% holding in the MDC, we consider it becomes all the more incumbent on the Crown to protect the MDC's Treaty basis and objectives by ensuring the continuance of pan-Maori control of the company. In our view, this will require the Crown to retain its shareholding until such time as another pan-Maori entity, preferred by Maori, is able to acquire sufficient of the Crown's shares to ensure that result. Further, we consider that the need for balance amongst minority shareholding interests requires, at the very least, that the sale process adopted ensures that none of the Crown's shares is purchased by any individual or group from within Tainui.

Finally, we note that all the measures we have recommended above would be sufficient to ensure that the future of the company accorded with its Treaty inspiration were it not for the fact that iwi are undoubtedly, as a result of their varied past and present circumstances, unequally placed to purchase shares in the company. We believe that many Maori authorities who would otherwise wish to purchase MDC shares from the Crown do not have liquid funds readily available. In light of this, we recommend that the terms of sale of the Crown's shares should allow for payment over time by Maori authorities, with an appropriate interest

charge on the unpaid balance. The shares themselves would provide adequate security to the Crown for that arrangement.

For convenience, we summarise our findings and recommendations below.

8.2 Findings

- That the MDC was created as a Treaty mechanism to redress for all Maori past breaches of the Treaty of Waitangi.
- That the Crown's principal shareholding is a vital element ensuring the pan-Maori character of the company.
- That the Crown's role as principal shareholder in the MDC and the proposed sale of the Crown's MDC shares are subject to scrutiny by the tribunal in the light of Treaty principles.
- That the Crown, as a Treaty partner and principal shareholder in the MDC, is obliged to actively promote Maori economic development according to the original mission of the company for as long as the need targeted by that mission remains.
- That the need for a development bank providing debt and equity finance to commercially viable Maori enterprises in a culturally sensitive manner remains at this time.
- That the MDC, since changing direction, is neither meeting that need nor structured to meet it.
- That for the Crown to sell its MDC shares before the company reinstates its original mission will extinguish the potential of the MDC to achieve the Treaty goals for which it was established, thereby breaching those Treaty obligations which the Crown sought to honour in creating and investing in the company.
- That the Crown's influence on the company's Board of Directors, in conjunction with that of the Poutama Trust if necessary, can ensure that the MDC commits itself once more to its original mission.
- That the sale of the Crown's shares will very likely result in the promotion of the interests of specific iwi to the deprivation of others, creating new prejudice and breaching the Crown's Treaty duty to deal with all Maori fairly and equitably.
- That \$5 million of the \$13 million cash contribution made by the Crown to the capital of the MDC comprised the capitalisation over ten years of the 1986/87 annual appropriation to Maori business lending.
- That, as a result, 5 million of the Crown's MDC shares are held by it on behalf of all Maori people in New Zealand.

- That, while there remains the need which the MDC was created to meet, the company can only continue operating as a Treaty mechanism for its original purpose if pan-Maori interests continue to dominate its shareholding.
- That the failure of the sale process which is presently in train to make provision for the continued neutrality of the company as amongst iwi by ensuring its continuing pan-Maori control reveals breaches by the Crown of Treaty principles.
- That consultation is required upon the vital matter, affecting all tribes' mana and rangatiratanga, of how to ensure the continued pan-Maori character of the MDC.
- That if a bare minority of MDC shares becomes concentrated in the hands of one iwi or a very limited number of iwi, both the ability of the company to achieve its Treaty objectives and its credibility as an institution which is truly neutral amongst iwi will be threatened.

8.3 Recommendations

We therefore recommend:

- That the Crown immediately transfer, without consideration, 5 million MDC shares to the Poutama Trust (being the most appropriate pan-Maori institution presently in existence to hold those shares on behalf of all Maori) with provision for the further transfer of those shares from the Trust, without consideration, to a preferred pan-Maori recipient identified by or formed as a result of consultation between Maori and the Crown.

We further recommend, before the Crown sells its remaining 8 million MDC shares:

- That it use its influence on the MDC's Board of Directors, in conjunction with the Poutama Trust if necessary, to reinstate the original mission of the company.
- That a sale process be devised, in consultation with Maori, which will ensure the continued control of the MDC by pan-Maori interests.
- That, in the event of the High Court's decision in *The Proprietors of the Taharoa C Block v The Maori Trustee* being overturned on appeal, the Crown use its voting strength in the MDC, in conjunction with the other pan-Maori shareholders (the Maori Trustee and the Poutama Trust) to amend the Articles of Association:
 - to protect the MDC's Treaty basis and objectives and the consequent need for its control by pan-Maori interests; and
 - to limit the maximum beneficial ownership of individual iwi to 10% of the issued shares.

- That, should the High Court's decision take effect:
 - the Crown retain its shareholding in the MDC until such time as another pan-Maori entity, preferred by Maori, is able to acquire sufficient of the Crown's shares to ensure the continuance of pan-Maori control of the company; and
 - the sale process ensure that none of the Crown's shares is acquired by any individual or group from within Tainui.
- That, if desired by Maori authorities presently lacking the liquid funds necessary to purchase shares in the MDC, the sale process make provision for payment for the purchase of the Crown's shares over time, with an appropriate rate of interest chargeable on the unpaid balance.

Our final recommendations are made to provide for the contingency that the Crown's share sale proceeds as currently proposed and results in the company becoming dominated by other than pan-Maori interests. They are:

- That the Minister of Maori Affairs exercise his powers in relation to the Poutama Trust to ensure that it is distanced from the MDC in all matters, including its objects and directors.
- That the Crown immediately negotiate with Maori a settlement of the grievance arising from the unmet need for a pan-Maori development banking institution.

References

1. Those paragraphs require that the likely prejudice to the claimants be attributable to 'any policy or practice (whether or not still in force) adopted by or on behalf of the Crown, or by any policy or practice proposed to be adopted by or on behalf of the Crown' or to 'any act done or omitted to be done on or after the 6th day of February 1840, or proposed to be done or omitted, by or on behalf of the Crown.'