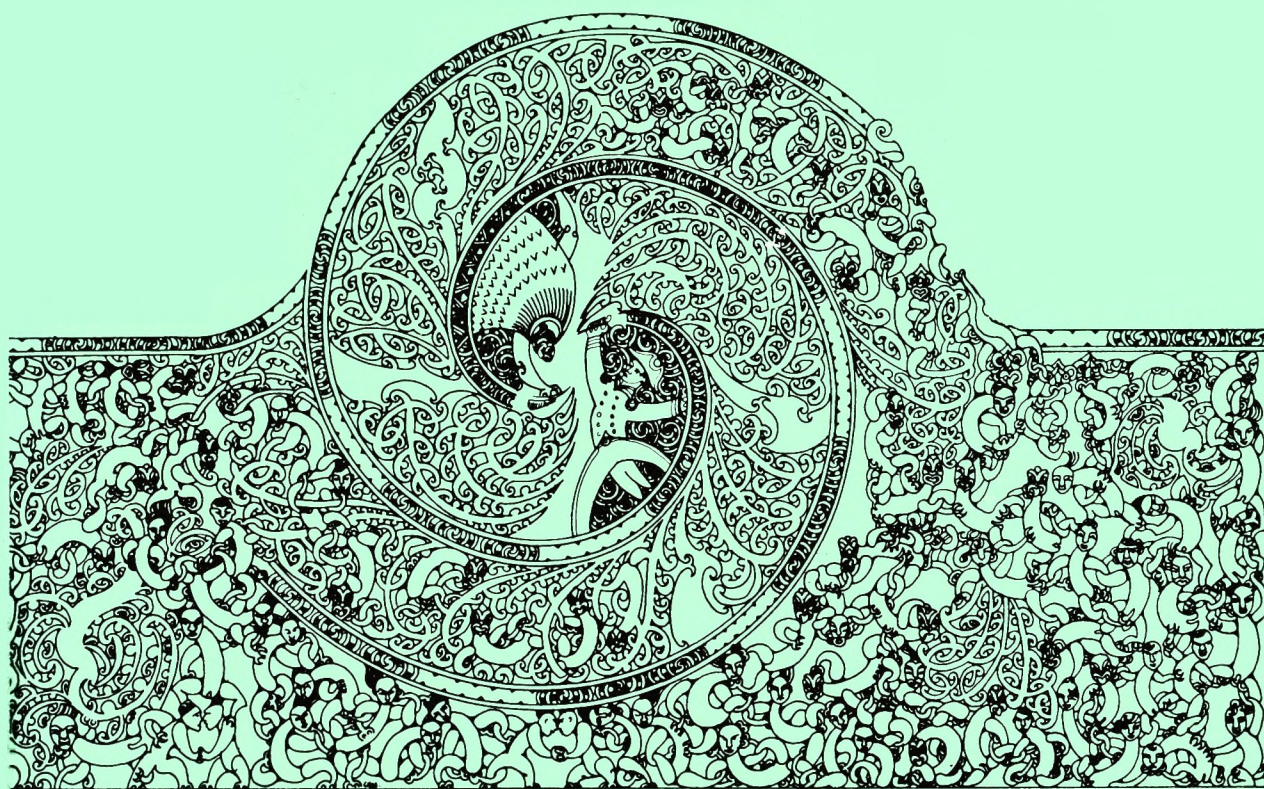


MAORI DEVELOPMENT CORPORATION REPORT



WAITANGI TRIBUNAL REPORT 1993

MAORI DEVELOPMENT CORPORATION REPORT

WAITANGI TRIBUNAL
LIBRARY

WAI 350

WAITANGI TRIBUNAL REPORT 1993



The cover design by Cliff Whiting invokes the signing
of the Treaty of Waitangi and the consequent interwoven development
of Maori and Pakeha history in New Zealand as it continuously
unfolds in a pattern not yet completely known

A Waitangi Tribunal Report
ISBN 1-86956-190-2

© Crown copyright 1993, 1996
First published in 1993 by Brooker's Ltd, Wellington, New Zealand
Second Edition published in 1996 by GP Publications, Wellington, New Zealand
Printed by GP Print Ltd, Wellington, New Zealand
Set in CG Times

Maori Development Corporation

Report

(Wai 350)

Waitangi Tribunal Report: 7 WTR



Brooker's
WELLINGTON

1993

Original cover design by Cliff Whiting,
invoking the signing of the Treaty of Waitangi and the
consequent development of Maori-Pakeha history interwoven in
Aotearoa, in a pattern not yet completely known, still unfolding

Waitangi Tribunal Reports
ISSN 0113-4124
ISBN 0-86472-143-9

Crown Copyright 1993
First Published 1993

Printed by:



Brooker's
Wellington, New Zealand

Contents

1	The Nature of the Claim	1
2	Maori Banking Initiatives	3
2.1	Introduction	3
2.2	The Kingitanga	3
2.3	Te Whiti o Rongomai	3
2.4	Rua Kenana	4
2.5	Tahupotiki Wiremu Ratana	4
3	The Events Leading Up to Incorporation	7
3.1	Hui Taumata	7
3.2	The Steering Committee's Report	7
3.2.1	Current status of Maori, their resources and business achievements	8
3.2.2	Obstacles to accelerated Maori economic development	8
3.2.3	Funding organisations that assist Maori resource development	9
3.2.4	Areas where development has lagged	9
3.2.5	Options available for improving rate of development	9
3.2.6	Preferred options	10
3.2.7	Distinctive features of the preferred option	11

3.2.8	Framework of the preferred option	12
3.2.9	Summary of findings	14
3.3	Consideration by the Officials Committee	14
3.4	Launch of the MDC	15
4	The MDC and its Operations	17
4.1	MDC Objectives	17
4.2	The Poutama Trust	18
4.3	MDC Shareholding	19
4.4	MDC Operations	20
5	The Claims and the Crown's Response	23
5.1	Introduction	23
5.2	Background to Claims	23
5.3	The Claim of Professor Whatarangi Winiata and Te Aho o Te Rangi Ratema Te Awe Kotuku and others	24
5.4	Overview of the Claim	25
5.5	The Claim of Te Runanga o Te Ika Whenua	27
5.6	Overview of the Claim	27
5.7	The Crown's Response	28
5.8	Tribunal Commissioned Evidence	29
5.9	Further Hearing	29
6	Treaty Principles	31
6.1	Introduction	31

6.2	The Crown's Duty to Act Fairly and Impartially Towards Maori	31
6.3	The "Principle of Reciprocity"	33
6.4	The Principle of Partnership	33
7	Analysis of the Issues	35
7.1	Introduction	35
7.2	Should the Crown sell its shares in the MDC at this point in time?	35
7.2.1	Summary	35
7.2.2	The MDC as a Treaty settlement mechanism	36
7.2.3	The impact of the proposed sale	40
7.2.4	If there is to be a sale of shares, should it be to Maori or on the open market?	42
7.4	Insofar as the sale is to Maori, should the Crown contract with a small number of iwi?	43
7.5	What would be the effect of a sale on the use of the Poutama Trust by Maori?	46
8	Conclusions	49
8.1	Conclusions	49
8.2	Findings	51
8.3	Recommendations	52

Appendices

1	Statements of Claim	57
2	The Claim of Professor Winiata and Others	65
3	The Claim of Te Runanga o Te Ika Whenua	81
4	The Crown's Response	89
5	Tribunal Commissioned Evidence	105
6	Treaty Principles	113
7	Record of Hearing	119
8	Record of Inquiry	121

The references in the text of this report are to the tribunal's record as contained in the Record of Proceedings and the Record of Documents listed in appendix 8.

For example:

(2.5) refers to Document 2.5 in the Record of Proceedings.

(A8:4) refers to Document A8 at page 4 in the Record of Documents.

The Honourable Minister of Maori Affairs
Parliament Buildings
Wellington

Te Minita Maori

Tena koe e te rangatira

Kei te mihi atu ki a koe i runga i nga ahuatanga o te wa, tena koe.

Here we present the tribunal's report on the claims made by Maori, individuals as well as groups, about the proposed sale by the government of its shares in the Maori Development Corporation.

At the request of the claimants, the tribunal granted urgency to the hearing of their claims. This was because the process by which the Crown proposes to divest itself of its MDC shares had already been set in motion at the time the claims were made. We were aware, therefore, that if we could complete our inquiry and report prior to Cabinet making a final decision upon the sale, not only would the Crown be cognisant of our views of the Treaty implications of the sale but also the possibility of future court action in respect of it might be avoided.

The claimants believe that implicit in the original intention behind the government's support for the establishment of the corporation and its eventual purchase of shares, was a recognition of its obligation as a Treaty partner to help reduce the economic disparity between Maori and Pakeha. It is the view of the claimants that the economic development of Maori has not yet reached a level where large numbers of Maori can confidently and actively participate in the commercial and social life of the community.

As a result, the claimants argue that there remains a need for a Treaty-based market mechanism to perform the development banking functions for which the MDC was created. While they differ upon the matter of how that outcome can now best be achieved, their common concern is that the proposed sale of the Crown's MDC shares, without provision for the continued predominance of shareholders representing pan-Maori interests, will very likely destroy the company's character

as a Treaty mechanism whose services are available to all Maori people.

To assist you, chapters 1 to 4 of our report briefly present information which sets the claims in context. Chapter 5 outlines the arguments made by the claimants and the Crown at the hearing. Chapter 6 discusses relevant Treaty principles and chapters 7 and 8 contain our analysis of, and conclusions upon, the issues raised by the claims. A summary of our findings and recommendations may be found at the conclusion of chapter 8.

We advise that we have made substantial use of appendices and that the information contained in appendices 2 to 6 is especially relevant to the claims and the conclusions we have reached.

Chapter 1

The Nature of the Claim

This claim is the first of its kind to come before the Waitangi Tribunal. Unlike most previous claims there is no obvious taonga the subject of the grievance.

The claim is not about recovery of land or the desecration of something Maori but about the Crown, having put in place at a cost of \$25 million a trust and a development bank for Maori, now wishing to sell its shares in the bank.

There are two claimant groups. The first claim against the proposed action of the Crown is led by Hohepa Waiti for and on behalf of himself and Te Runanganui o Te Ika Whenua Incorporated (Te Ika Whenua), which body represents the hapu Ngati Whare, Ngati Manawa, Ngati Patuheuheu and Ngati Te Huinga Waka. Te Ika Whenua urge us to recognise that the rights guaranteed them by the second and third articles of the Treaty of Waitangi are being breached by the proposed Crown sale.

The claim of Whatarangi Winiata of Ngati Raukawa, Te Aho o Te Rangi Ratema Te Awe Kotuku of Te Arawa and others is based on the second article of the Treaty of Waitangi. They urge us to recognise that the rangatiratanga of certain Maori is not being protected.

Successive New Zealand governments have over the past decade pursued an economic strategy resulting, inter alia, in sales of Crown assets. As well as land and forests, commercial businesses have been disposed of. Some of these properties were solely owned by the Crown while in others the Crown has held a participating share. The Maori Development Corporation falls into the latter category.

We have been told, and the claimants are aware, that the sale process employed by the Crown is proceeding and this has added the element of urgency to our deliberations. Against the background of the past asset sales and transfers whose timetables have been severely disrupted by the intervention of the courts because of disregard for Maori grievances¹, we wonder at the determination of successive governments in ploughing ahead with asset divestment in the face of tribunal claims and, potentially, court action.

The kaupapa of this claim is the government's role in modern times in creating a bank. Our inquiry has required us to scrutinise recent actions, correspondence, and reports of Ministers of the Crown and senior government officials. This has not been an easy task. Eliciting the threads of recent Crown actions seems to test the parties'

objectivity to a greater degree than when the actions complained of are far removed in time from our inquiry. We too have to be aware that the immediacy of the matter tests our collective objectivity.

We are also faced with the Crown's determination not to recognise the divisive effect that can be caused by its creation of an environment which pitches Maori against Maori. In this claim we see the seeds of such dissent setting back the real progress of Treaty jurisprudence and claim settlements. We cannot say that such a result is intended. Indeed we believe the Crown is honestly seeking equitable solutions but that some of the methodology employed to that end may well be creating further grievances.

A superficial examination of the situation before us could find that it is merely an argument about money and the power emanating therefrom. We believe there is much more at issue than money as we trust the following pages will demonstrate.

References

1. See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641;
New Zealand Maori Council v Attorney-General [1989] 2 NZLR 142 and *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513

Chapter 2

Maori Banking Initiatives

2.1 Introduction

The interest shown by those present at the 1984 Hui Taumata¹ in setting up a bank to facilitate Maori economic development, was only the most recent example of a pattern which began in the 1850s. However, the hui in 1984 was the first initiative to elicit a positive response from government.

In the 1850s, a growing concern among Maori over the loss of their land and rangatiratanga together with a seeming inability to control their situation by implementing tikanga Maori, led them to modify the new Pakeha institutions in order to meet the demands of the political and economic realities. These took varying forms in different places and at different times.

2.2 The Kingitanga

The establishment in 1858 of the Kingitanga with Potatau Te Wherowhero as the first king was one of these. Tawhiao, his successor had a cabinet of "about twelve members including ministers for lands, laws, justice, taxes" and Pakeha affairs.² Revenue was raised by various means; voluntary donations, taxation, ferry charges in the Waikato district, fees and fines taken by the local runanga and tithing the salaries of Maori who worked for the government. All the income from these sources was paid into the "King's Treasury".³

2.3 Te Whiti o Rongomai

In Taranaki the protest movement of Te Whiti o Rongomai began about 1869. He and his relative Tohu organised the development of Parihaka into a prosperous settlement.

At this time over a hundred large thatched whares were grouped in an orderly plan around two maraes, one Te Whiti's and one Tohu's. Strong picket fences enclosed intensely cultivated clearings.⁴

Despite the hostile actions of government officials, or perhaps because of them, Te Whiti attracted strong support from Maori from many parts of the country. Contributions in cash flowed in over a period of many years. The money was stored in *Nuku Te Whatewha* a small building on Tohu's marae that held common funds.

This was known as Te Whiti's bank which held the "Day of Reckoning Fund" believed to amount to thousands of pounds.⁵

2.4 Rua Kenana

In the early 1900s Rua Kenana emerged claiming to be the prophet succeeding Te Kooti. He was both the centre of a religious movement and the energetic leader of a programme of land development. A savings bank was set up and placed under the control of his Council of Elders together with a "well stocked general store". Written ledgers were kept of the transactions and a visitor in 1908 reported that "liberal interest rates" were being paid on money deposited. "At least some of the money put in by wealthier residents was given out according to need".⁶

The bank was also an attempt to adapt institutions to help the progress of the settlement, for the Tuhoe lacked any of the institutional features associated with economic development. It did not function exactly like a Pakeha bank but originally, at least, its purpose was to promote savings and attract capital.⁷

2.5 Tahupotiki Wiremu Ratana

Towards the end of 1918, Ratana had a vision which effectively began the Ratana movement. The Maori people were in a poor state due to the devastating influenza epidemic, disaffection amongst returned servicemen and the primitive living conditions in many rural areas. Ratana's message of faith in religion and the unity of the Maori people (Kotahitanga), a promise of prosperity to come and his success as a faith-healer appealed to many ordinary Maori particularly those living at the subsistence level.⁸

On the secular side he concerned himself with farming and the political situation. During the 1920s a group of Ratana's followers established a bank. It was actually an "investment society." which had three aims:

- to enable the Kotahitanga to "force the government" to provide for Maori welfare,
- to "advance money to needy members of the movement" and
- to "provide a means of gathering contributions" from the Morehu for Ratana's work.⁹

There appears to have been some confusion among the followers as to how a bank should operate and the Native Minister of the time was suspicious of the scheme. Ratana himself disapproved of the bank which may have led to its decline.¹⁰

While these attempts to provide financial support for Maori were not successful the

need for that support continued to exist.

References

1. See chapter 3, p 7
2. John A Williams, *Politics of the New Zealand Maori* (Auckland University Press, Oxford University Press 1977), p 45
3. J E Gorst, *The Maori King* (Christchurch Capper Press Reprint 1974), p 181
4. Dick Scott, *Ask That Mountain* (Auckland Heinemann/ Southern Cross 1975) pp 37-38
5. Ibid, p 159
6. Judith Binney, Gillian Chaplin, Craig Wallace, *Mihaia* (Wellington Oxford University Press 1979) pp 17, 63, 65
7. Peter Webster, *Rua and the Maori Millennium* (Wellington Victoria University Press 1979) p 205
8. J M Henderson, *Ratana* (Wellington AH & AW Reed second edition 1972) pp 16-17, 24, 31-40
9. Ibid, p 66
10. Ibid, p 67

Maori Development Corporation

Chapter 3

The Events Leading Up To Incorporation

3.1 Hui Taumata

During the 1970s and 1980s there was a powerful momentum for change in Maori society. An influential factor was concern over the growing socio-economic gap between Maori and Pakeha. The need for an accelerated drive to improve the economic position of the Maori people was becoming increasingly urgent.

The Hui Taumata (Maori Economic Summit Conference) in October 1984 was convened by the Minister of Maori Affairs, the Hon. Koro Wetere, to address the issues. The hui discussed the proposal for a development bank and recommended "as a matter of urgency, a professional study of the needs, role and means of creating a Maori Development Bank". (A1:100-1)

As a result, the Maori Development Commission was established and reported in February 1986 in favour of a development bank, incorporating the commercial activities of the Maori Trustee and Maori land development funds, together with additional support from the Crown. (A1:101)

3.2 The Steering Committee's Report

In response to the Maori Development Commission's report, a steering committee "to consider accelerating Maori economic development and the case for a Maori development bank" was appointed by the Minister of Maori Affairs and the Associate Minister of Finance in April to study the case further. (A1:1)

The terms of reference for the committee were:

- (a) What is the business climate for Maori economic development?
- (b) What are the obstacles to accelerating the development of Maori people and their resources?
- (c) What are the options available for the more efficient use of resources allocated to Maori economic development with a view to accelerating such development? What are seen as the advantages and disadvantages of each of these options?
- (d) What would be the preferred options?

(e) How could these options be implemented? (A1:1)

In following the terms of reference the committee's primary objective was to "accelerate the economic development of the Maori people". (A1:1)

The steering committee presented its findings in an Interim Report to the Ministers on 16 September 1986. Because of their relevance to the MDC as it eventually emerged these findings are summarised below.

3.2.1 Current status of Maori, their resources and business achievements

After stating that Maori resources comprised Maori people and their assets the committee noted that although Maori were largely urbanised, land in rural areas made up the major portion of Maori assets. Maori commercial organisations were usually communally owned with a "focus on pastoral farming in traditional tribal areas". Although heavily involved in the agricultural sector, Maori commercial organisations were poorly represented in the manufacturing and service sectors.

This focus on agriculture had meant that Maori economic returns were low. A comparison was made using 1983-1985 figures, between the rate of return of Maori commercial organisations and the rate of return on a survey of 618 corporates. The figures ranged between 2 and 5% for Maori organisations and between 4.9 and 13.9% for non Maori organisations. (A1:4)

The committee stated that there was little information on Maori involvement in small businesses although there were some examples of Maori success in the market place. Despite this there were disparities in the employment status between Maori and non Maori. There were also no Maori controlled publicly listed companies and few Maori company directors.

3.2.2 Obstacles to accelerated Maori economic development

The committee identified two "major facets" of accelerated Maori economic development. The first was the advance of Maori employed or self employed in the public or private sector. The second was the increased level of economic performance by Maori institutions. The committee concentrated on the second facet stating that it was "central to the issue of whether a new institution was required to help lift performance levels". (A1:5)

Three reasons for the failure of Maori institutions to generate significant investment returns were given by the committee. They were:

- the weaknesses of management in Maori communally owned enterprises;
- the existence of multiple objectives that impeded a commercial approach on the part of the enterprise; and

- other limitations and constraints on economic development particularly where communal ownership or activity was involved. (A1:5-6)

3.2.3 Funding organisations that assist Maori resource development

Funding organisations and programmes that assisted Maori economic development were then examined by the committee. They included the Maori Authorities New Alliance (MANA), the Board of Maori Affairs, the Office of the Maori Trustee, the Small Cooperative Enterprises Scheme (SCOPE), the Rural Banking and Finance Corporation of New Zealand and the Development Finance Corporation of New Zealand (DFC). The committee stated that although the programmes met a range of development needs they did not deal with:

... the more commercial aspects of development including particularly, problems relating to management, corporate structures, and equity participation in medium/larger projects. In the committee's view these areas offer potential for improved rates of return on Maori resources. (A1:8)

3.2.4 Areas where development has lagged

Two areas where development has obviously lagged were then identified. The first was the "relative shortage of Maori enterprises outside of land based activities where modern management techniques were used". The committee stated that the success of a non-traditional project would not only require adequate equity and efficient management but "a more proactive role than had been traditional in lending institutions". (A1:9)

The second area where development had "lagged" was in the shortage of Maori management in companies. To counter this "management skills gap", the committee felt that Maori should be encouraged to establish their own businesses and supported the expansion of vocational training for Maori young people. Higher participation by Maori in business management courses to raise skill levels was also encouraged. (A1:9)

3.2.5 Options available for improving rate of development

The committee described the three options for "boosting" Maori enterprises that they had examined:

- existing agencies being made more aware of the opportunities for lending to Maori people and commercial organisations for economic development. This could take the form of moral persuasion or the enforcement of positive discrimination programmes;
- a management/packaging agency able to act in an advisory capacity to help put projects into a "bankable" form and to monitor their implementation. This agency

Maori Development Corporation

could be located with the Maori Trustee, the Development Finance Corporation or elsewhere. However, it would have no loan or equity participation functions; and

- a Maori Resource Development Corporation or investment company able to combine a management/ packaging function with funds for lending and equity participation in projects. There are quite a few sub-options: the institution could be a subsidiary of the Maori Trustee or be established on a stand alone basis; it could be fully owned by the Maori Trustee and the Government or it could be owned in part by Maori Authorities; it could take over the Rural Lending and Land Development functions of the Maori Affairs Department or it could focus on other kinds of economic involvement including participation in ventures with top public companies as partners, without necessarily excluding a later expansion into rural lending. (A1:10)

The committee agreed that the promotion of lending by existing agencies to Maori enterprises was likely to be unproductive. The committee also had reservations about the proposal to establish a management/packaging agency. They felt that the lack of capital input would reduce its negotiating stance and readiness of Maori authorities to accept advice. There were also situations where an injection of equity was required to attract loan finance which may not be available elsewhere.

3.2.6 Preferred options

The committee recognised that although the first two options were necessary to improve the rates of return of Maori enterprises they were not sufficient to "translate Maori commercial projects from ideas to reality". Thus:

In view of a need for additional equity to be placed in some Maori commercial projects and for management support at all phases of development the committee has a preference for the Maori Resource Development Corporation or investment fund option. (A1:11)

The committee identified areas which should be excluded from the corporation's objectives. These included Maori housing, small urban Maori business loans, commercial projects under \$100,000 and the "current rural lending and land development activities of the Department of Maori Affairs". (A1:11)

The committee then considered three possible structures for a Maori Resource Development Corporation:

- establishing a stand alone company, clearly separate from any arm of the Government;
- a company which would in effect be a subsidiary of the Maori Trustee; and
- placing more resources under the direct control of the Maori Trustee. (A1:12)

It explained that if the initial capital was to come from the Maori Trustee then it would be difficult to envisage how the stand alone company option could be achieved "in the short term". An advantage of this structure was that it could be "seen as a commercial entity standing completely separate from the government". Both the first and second options had the potential for a significant minority interest to be held by a major financial institution. This was seen as desirable by the committee to ensure "high quality financial analysis and management assistance". (A1:12)

The committee argued for the subsidiary of the Maori Trustee company structure for the short term. The reasons for this, rather than expanding the role of the Maori Trustee were:

... the Maori Trustee's roles are in conflict. As a trustee for general trust and agency work he must act strictly according to the terms of his administration and so is conservative; while as an entrepreneur seeking commercial returns on Maori resources he must be opportunity driven. By establishing a subsidiary company the Maori Trustee would be able to concentrate his funds for entrepreneurial activities and avoid a conflict of roles. People with appropriate financial skills could be brought to the company to assist with setting up and funding Maori corporates. This would allow people to be recruited and trained having regard to clear profit motives rather than imposing new objectives on existing staff. (A1:12)

The committee also felt that although the subsidiary company option was preferred in the short term, a stand alone company with some Maori ownership was desirable and should be an early priority.

3.2.7 Distinctive features of the preferred option

The committee then identified various features which they proposed should be incorporated into the corporation:

- To ensure increased involvement by Maori in the manufacturing and service sector the Maori Resource Development Corporation or Investment Fund would need to identify "entrepreneurial opportunities", provide finance and assist with the development of the enterprise at all stages. A need for cultural sensitivity was deemed necessary as well as management support and training funded by revenues or subsidies.
- Loans and equity should be available to individuals as well as to Maori communal economic organisations. However, given the focus on medium to large projects, Maori authorities "on a syndicate or joint venture basis" would more likely be involved than individuals.
- Maori authorities should be given the option to become shareholders at some stage. However, the committee emphasised the need for careful consideration in view of the difference in wealth of tribal authorities and the possible

expectation by wealthier authorities that they would "exercise a certain degree of leverage as significant shareholders". Top public companies could also be approached for shareholding.

- The proposed corporation would "compete for funds in the market place and not receive concessionary loans from government". It would also be taxed like any comparable organisation.
- Funding good investment opportunities was a high priority. The committee believed it was preferable to invest in other financial activities rather than "support doubtful projects". It was suggested that an equity analyst from a sharebroker be employed on a short term basis to develop hands on investment skills within the corporation.

The committee concluded:

The committee realises that the recommendations it is making may be seen as out of line with the current thrust of thinking on broader issues of Maori development. The recommendations do not rest directly on a framework of tribally based development. It may be seen as a way in which only a few, perhaps already privileged, Maori people will get direct help. It may in some respects suggest changing the people who make management decisions and the way in which those decisions are made. However, we see the corporation as only one component in an overall process of development policy. It should support tribal development by enhancing the profitability and management skills of tribally based enterprises. It is hoped that it will contribute to the faster economic development of Maori people and enterprises, and enhance their ability to interact with and operate more successfully in the wider commercial sector. (A1:13-14)

3.2.8 Framework of the preferred option

The framework identified by the committee for the preferred option of a Maori Resource Development Corporation is set out below:

- (a) **Market niche:** The top end of Maori commercial business;
- (b) **Mission goal:** To accelerate the profitable development of Maori urban and rural corporate enterprises;
- (c) **Objectives:**
 - (i) to increase rates of return on Maori commercial enterprises;
 - (ii) to help strengthen Maori management skills;
 - (iii) to operate a successful Maori financial institution, achieving market rates of return;

Waitangi Tribunal Reports

- (iv) to help accelerate Maori involvement in modern enterprises;
- (d) **Structure:** a private limited liability company as from 1.4.87 inviting from 1.4.88 Maori shareholding and possibly public corporate shareholding;
- (e) **Shareholders:** initially the Maori Trustee (through his general purposes fund) and when feasible the Crown with other options left open;
- (f) **Capital:** See below;
- (g) **Staffing:** a minimum of 8;
- (h) **Leverage or gearing:** a gearing of 4 is conservative and possible after year 2;
- (i) **Profitability:** depends on capital structure, costs and investment income. The aim is to achieve good commercial returns on shareholders' funds.
- (j) **Maori management support:** costs met either from Corporation revenues or subsidies; using the bank's staff supplemented by outside specialists. The Committee's preference would be an initial 3 years management support paid by the Government;
- (k) **Board:** a maximum of 5. Shareholders should be required to appoint directors with appropriate skills.
- (l) **Client size:** medium/large Maori enterprises: \$100,000 minimum advances unless special circumstances exist. (A1:14-15)

The committee proposed that the initial capital structure of the preferred option would be:

Maori Trustee: \$7.0 million.

This could occur through a transfer to a limited liability company of the general purposes fund and the assets that entails as shareholder equity.

Crown liabilities: \$5.0 million, a non cash charge.

This could occur through the conversion of the debt the Maori Trustee owes to the Crown for monies he administers and advances for business lending to equity. No Crown guarantees would be available.

Capitalised Crown Finance: A cash charge for 1987-88.

Option One

The Maori Trustee administers an annual appropriation of \$800,000 for business lending. Capitalising that amount over 10 years at a 10% discount rate would be \$4.9 million.

Under this option, the Crown could be prepared to subscribe for shares totalling

eventually \$10 million, with \$5 million being called up in 1987-88. This would ensure a good start up capital base. This is the preferred option ...

Option Two

Alternatively the Crown could provide a higher cash injection in 1987-88 to complement the resources of the Maori Trustee, ie, \$7.0 million. (A1:15)

3.2.9 Summary of findings

In summarising their findings the committee stated that lack of business expertise and the pressures of working to multiple objectives were the chief obstacles to Maori economic development. It was clear that there was a need for assistance with the packaging of Maori projects as well as ongoing management support and training. However, they committee felt that an agency with such a limited role would not make the desired impact on Maori economic development. Therefore an organisation which would provide Maori equity and loan finance was proposed.

3.3 Consideration by the Officials Committee

The steering committee's report was considered by the Ad Hoc Cabinet Committee on Maori Development and an Officials Committee convened by the State Services Commission in the months following. (A1:47-87)

Because of the report's significance to the Maori community, prominent Maori and Maori officials were added to the Officials Committee. In a memo to Cabinet, the Minister of State Services, Hon Stan Rodger, advised that the Maori officials and consultants had been critical of the process as there had not been the "extensive consultation and consensus-seeking" desired by Maori. He said it was a situation which should be avoided when dealing with major Maori issues in the future. (A1:40-41)

In one report from the Officials Committee, the convenor, Margaret Basley stated that "... the goals and objectives of the government should so far as possible be in harmony with those of Maoridom". (A1:42)

In another (30 January 1987) she noted that:

... officials are agreed that the Government has a major interest in encouraging the development of a viable economic basis for Maoridom that would reverse the pattern of over-dependence on the State. (A1:54)

The general thrust of the report was supported throughout the process of consultation although the financial details were subject to some modifications. A second option suggested a much higher level of funding - an authorised capital of \$100 million - but this was not approved. (A1:103)

3.4 Launch of the MDC

On 1 July 1987 the Ministers of Finance and Maori Affairs released a press statement launching the new Maori Development Corporation and a trust fund of \$10 million, the Poutama Trust, to work in parallel with the MDC. The Corporation would have a paid up capital of \$24 million and authorised capital of \$50 million. The government was to contribute \$13 million of the paid up capital and the Maori Trustee's share was \$7 million. Fletcher Challenge and Brierley Investments were contributing \$2 million each. (A1:121)¹

The aim of the Corporation and the rationale for the government's participation in it was to further the development of profitable commercial Maori business enterprises. The Ministers' background statement stressed the importance to the Maori people of developing their assets, many of which were presently bringing in below average returns, thus reducing the wealth available to them. (A1:101)

In line with the Steering Committee's original recommendation, it remained the intention that the Corporation should confine its attention to larger scale projects, leaving Mana Enterprises to assist in the development of smaller Maori businesses. (A1:123-4)

References

1. After the issue of the press statement, the Development Finance Corporation (NZ) Ltd became the owner of 2 million shares, lifting paid capital to \$26 million.

Chapter 4

The MDC and Its Operations

As established in the preceding section and in response to the accepted need to correct the economic disparity between Maori and Pakeha, the Crown established two vehicles:

- The Maori Development Corporation Limited
- The Poutama Trust

4.1 MDC Objectives

The Maori Development Corporation Limited was established to meet clear objectives:

- to be fully commercial and focus on the promotion of viable and unsubsidised Maori economic development; (A1:125)
- to lend at commercial rates and invest in equity in viable commercial Maori business projects; (A1:122) and
- to provide appropriate development and investment banking services. (A1:159)

In 1987 when the company was formed, the above was engrossed into the company's corporate mission:

Maori Development Corporation's mission is to *provide financial resource for the development and enhancement of Maori businesses, Maori assets and the financial and business skills of Maori people*. Maori Development Corporation will be the catalyst to grow existing potential resources of Maoridom. [emphasis added]

Maori Development Corporation's resources will include practical financial and advisory services and its business strategies will centre around a team approach to the building and continuing relationships with targeted clients and *the delivery of fully competitive and appropriate Development and Investment Banking services*. Maori Development Corporation will aim to accrue superior rewards for its client, and to obtain the respect and confidence of Maori businesses, Maoridom generally and the business community at large. [emphasis added]

Maori Development Corporation's *financial mission will be to accrue acceptable*

Maori Development Corporation

rewards for the Company, its shareholders and staff. [emphasis added]

Maori Development Corporation's success and development will be closely linked to its ability to "add value" to the financial attributes of its target market thereby ensuring growth in the Maori business community. (A2(a):4)

The intent then, was that the company would provide "development and investment capital banking services". (A2(a):4) It was proposed that the equity capital would be geared up to fund a development bank to operate in a way similar to the Development Finance Corporation of New Zealand Limited. (A1:160)

It may be noted that the corporation was never intended to service small businesses. "Loans and/or equity investments will be for a minimum of \$100,000". (A1:90)

4.2 The Poutama Trust

The Crown recognised the need for an altruistic, non-commercial component if the object of encouraging more Maori commercial enterprises was to be achieved. In order to separate this component from the MDC with its commercial objectives, the Poutama Trust was established with a grant of \$10 million from the Crown.

The principles, objects and purposes for which the trust was established are:

- (a) To assist in and carry out investigation and assessment of commercial projects or propositions with a view to completing project documentation and seeking financial assistance from the Corporation;
- (b) To assist in the formulation and compilation of applications for financial assistance from the Corporation;
- (c) To manage and oversee commercial projects which have received or are to receive financial assistance from the Corporation
- (d) To provide investigative, management and supervisory assistance to commercial projects financed by institutions other than the Corporation;
- (e) To arrange, develop and assist the study of and the acquisition of, dissemination and application of knowledge and information amongst Maori people involved in commercial projects, assisted by or being considered for assistance by the Trustees;
- (f) To provide assistance in the training and development of expertise by Maori managers in commercial projects assisted by or being considered for assistance by the Trustees. (A25:2-3)

The 1989 Annual Report of the MDC described the Poutama Trust's function as follows:

To assist MDC's business goals, the Poutama Trust was launched by the Government in 1988. The fund seeks to enhance Maori Economic development by identifying and supporting new opportunities in the areas of feasibility studies, market research, consultancy services, skill upgrading and post-loan management. The cost of such support is generally shared by the Trust and its clients. (A2(a):6)

We note that the Poutama Trust was established to complement the MDC's original mission and is fulfilling a valuable role. It receives a steady stream of applications for assistance to undertake feasibility studies for new and growing Maori enterprises and to provide other help in accordance with its Deed. With regard to feasibility studies, the Trust operates in much the same way as the Business Development Board's Business Development Investigation Grants. As with the Board, the Trust obtains a contribution from the applicant of at least 50% of the total cost of the investigation, although this does not seem to be a requirement of the Trust Deed. It is also notable that the Business Development Board does practically no business with Maori, underscoring the Trust's valuable role.

We also note that, as the MDC does not currently provide financial assistance by way of debt finance, the first three objects of the Trust (3.1(a), (b) & (c)) are not being observed. Further, the Trust has not utilised anywhere near its annual income in meeting its objectives.

4.3 MDC Shareholding

The initial shareholding of the company was such as to facilitate the achievement of its goals:

The Crown	\$13.0M
Maori Trustee	\$7.0M
Brierley Investments Ltd	\$2.0M
Fletcher Challenge Ltd	\$2.0M
Development Finance Corporation of NZ Ltd	\$2.0M

The Crown's substantial participation would have at that time, provided confidence to the lenders. The involvement of Brierley Investments Ltd and Fletcher Challenge would provide valuable commercial experience and "reputational capital". (A37:38) The Development Finance Corporation was seen to provide valuable experience and expertise in the areas of development and investment banking services. The Crown and the Maori Trustee gave a pan-Maori character to the company.

Initially the commercial shareholders were represented on the board of the MDC by very senior executives and, in the case of the Development Finance Corporation, the chief executive. (A1:161)

The investments made by the Crown, Brierley Investments Ltd and Fletcher

Challenge Ltd were not entirely commercial:

... it is not clear that the goal of either the Crown or the Corporates was originally to contribute wealth to the Crown, Brierley Investments Ltd or Fletcher Challenge Ltd. (A37:2)

The shareholding has subsequently changed with the withdrawal of the corporates: DFC, Fletcher Challenge and Brierley Investments.

Following the placing of the DFC under statutory management, its shares were acquired by Stratacorp Financial Services Limited and subsequently purchased by the Poutama Trust. (A35:10)

Subsequent to the year ending 31 March 1992, the shares of Brierley Investments and Fletcher Challenge were acquired, respectively, by the proprietors of the Taharoa C Block and the Tainui Maori Trust Board. Dr Mahuta gave evidence that these were not sold by private negotiation. (A35:10)

4.4 MDC Operations

From its first days the company launched into its activities as a "special bank". It provided a diverse range of financial services, including term finance; term loans, table loans, working capital finance, bridging loans, seasonal finance, plant and equipment finance, joint venture funding and investment financing.

In the first full year of operation it was successful in establishing its loan portfolio. Loans and advances increased from \$7.8 million to \$28.8 million (including \$3.0 million of loans committed but not delivered). As in the first eight months of operation, a profit was made and a dividend declared.

The year ending March 1990 was not a good year. Debts written off rose to \$2.190 million and provisions for doubtful debts to \$2.795 million. Profit slumped and no dividend was paid. (A2(b):20, 23-24) This situation forced a rethink of the company's roles and objectives and an external review by consultants was commissioned.

The company had no competitive advantages as regards its source of funds for on-lending and because of uncertainty, plans to put a Debenture Trust Deed in place and borrow from the public, were abandoned.

Concern was expressed by the executives representing the corporate shareholders that lending and involvement in the debt market was inappropriate. It was felt that a "packaging" role was more appropriate. It was also felt that the breadth of activities in which the corporation was involved was excessive and that there was need for a tight focus. (A37:39)

Waitangi Tribunal Reports

The board accepted many of the consultants' recommendations and the MDC decided to move its strategic direction away from an emphasis on lending to greater emphasis on financial restructuring, financial packaging and equity investment. (A2(b):9)

This change in policy was reflected in the new corporate mission published in the 1991 Annual Report:

Maori Development Corporation's mission is to operate a profitable business which invests and facilitates investment by Maori interests in projects which provide satisfactory returns to itself and Maori investors. The Corporation also provides advice to Maori clients on a fee basis in the area of investment appraisal, project management and funding. (A2(b):3)

The change is also reflected in comparing the corporations's balance sheets (year ending 31 March) between 1988 and 1992:

	\$ Millions				
	1988	1989	1990	1991	1992
Current Assets	0.6	1.7	2.4	3.4	5.1
Investments (mainly loans and advances)	7.8	25.1	32.8	24.6	18.2
Commercial bills and Government Stock	19.4	14.1	8.2	-	-
Shares	-	-	0.5	5.4	8.3
Other	0.2	0.5	0.4	1.3	0.9
Total Assets	28.0	41.4	44.3	34.7	32.5
Current Liabilities	1.1	0.8	0.3	0.8	0.9
Term Liabilities	0.1	12.8	16.0	5.0	1.7
Shareholders' Funds	26.8	27.8	28.0	28.9	29.9
Total Liabilities and Shareholders' funds (A24:9-10)	28.0	41.4	44.3	34.7	32.5

Maori Development Corporation

The new Corporation policy, together with improved economic conditions and new packaging investment opportunities, resulted in the company's profitability improving.

The MDC is now a specialist financial organisation promoting the following activities:

- (a) Investment opportunities - identifying investment opportunities and marketing them to Maori investors.
- (b) Equity funding - taking an equity position with other Maori investors.
- (c) Advisory services - offering on a fee for service basis, advisory services and merchant banking type activities.
- (d) Lending services - short to medium term loans to existing clients and new ones where a strategic advantage exists.
- (e) Cash management services to Maori clients on a principal/agent relationship.
(A2(c):5)

The MDC has investments in eight companies and has marketed investment opportunities to a wide range of Maori Trusts, Runanga and Incorporations.

The 1992 report sees a bright future for the company with a widening of the Maori commercial market. (A2(c):7)

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.

5.2 Background to Claims

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)

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 Matauranga Maori at Te Wananga o Raukawa.

5.4 Overview of the Claim

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:

- 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.
- 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.
- 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.
- 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.
- 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.

- 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.
- 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.
- 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.
- 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.
- 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:

- 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.
- 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.

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.

5.6 Overview of the Claim

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:

- 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.
- That the commercial operation of the MDC does not preclude its Treaty basis and ability to fulfil the Crown's Treaty obligations.
- 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.
- 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:

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

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.

5.8 Tribunal Commissioned Evidence

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.

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 Rangimaiwahine Trust Inc. (A34)(a)-(d))

Chapter 6

Treaty Principles

6.1 Introduction

If the tribunal finds that any claim submitted to it under section 6 of the Treaty of Waitangi Act 1975 is well-founded, it may recommend remedial action by the Crown. Before it can find a claim to be well-founded, the tribunal must be satisfied of three things:

- that the claimant has established a claim falling within one or more of the matters referred to in section 6(1) of the Act;
- that the claimant has been or is likely to be prejudicially affected by any such matters; and
- that any such matters were or are inconsistent with the principles of the Treaty.

In previous reports the tribunal has discussed the issues arising in the interpretation of the English and Maori texts of the Treaty of Waitangi and made general observations about the broad intentions which underlie the Treaty's principles.¹ We do not intend to reiterate those matters.

The tribunal has also identified certain Treaty principles relevant to the claims into which it has inquired. Some are of a general nature and are readily transposable to novel claims. Others are more specific to the situation which was before the tribunal at the time and cast only a filtered light upon different circumstances.

In considering the present claims, the tribunal has been assisted by previously identified Treaty principles but has also found it necessary to seek more specific guidance in the Treaty itself and in the circumstances surrounding its acceptance. From our own analysis has emerged a Treaty principle of particular relevance to this claim. We identify that principle below and then summarise those previously identified Treaty principles which have also assisted our inquiry.

6.2 The Crown's Duty to Act Fairly and Impartially Towards Maori

There is, in our view, a duty arising from the Treaty that the Crown act fairly and impartially towards Maori. This Treaty principle derives from the large concession

made by Maori in 1840 of the gift of governance to the Crown, in return for which it is reasonable to assume that Maori would receive good governance and laws and policies that would be beneficial to them all. The guarantee of rangatiratanga then, with which the Crown responded, was a guarantee to all of the iwi, not to a selected number. Implicit in this is a guarantee that the Crown would not, by its actions, allow one iwi an unfair advantage over another.

From the circumstances prevailing at 1840, Maori expectations of the solemn exchange of promises made in the Treaty may be better understood. The arrival of Europeans had created tensions between Maori and Pakeha as well as between Maori themselves. Indeed, as between Maori, that is an understatement of the situation: the acquisition of muskets led to tribal warfare on a scale and of a type never before experienced.

The issue of inter-tribal rivalry was debated at Waitangi and had been discussed amongst Maori for several years previously. The missionaries had long endeavoured to mediate between the tribes and, in explaining and promoting the Treaty, led Maori to believe that, on its acceptance, a new order would follow in which disputes would be settled and all tribes provided for fairly.

These assurances were influential and, at the debate at Waitangi, crucial. Many Maori there called upon Governor Hobson to "go" and to leave the country to the Maori. Hobson recorded that the speech of Tamati Waka Nene "turned aside" that feeling. After referring to the prevailing state of disorder, the chief said "O Governor! sit. I, Tamati Waka, say to thee, sit. Do not thou go away from us; remain for us, a father, a judge, a peacemaker".²

The onus of fairness and impartiality was thus created. Transported to modern times, the principle remains the same but is now to be applied in different circumstances. A critical feature of today's circumstances, however, is the continuing vitality of Maori tribal organisation and identification. From our own knowledge and experience we are able to confirm to the Crown a fact of which it is no doubt already aware: tribal rivalry remains healthy and dynamic.

The Court of Appeal has characterised the Crown's Treaty relationship to Maori as that of a fiduciary thereby setting a very high standard of performance for its Treaty obligations (*New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641). It is fundamental that a fiduciary must act fairly as between beneficiaries rather than allowing one of the group to be favoured. Whether or not the duty arises in a particular case, however, must depend on the circumstances. There may well be circumstances in which the Crown has good cause to promote the interests of one particular sector of the Maori community defined, for example, by need, gender, age or tribe, thereby positively discriminating between Maori groupings. However, where the Crown's purpose is to promote projects for the benefit of Maori generally, clearly it should act impartially and adopt fair procedures to achieve that end.

6.3 **The "Principle of Reciprocity"**

In earlier reports the tribunal has identified, as deriving from articles 1 and 2 of the Treaty, an over-arching Treaty principle of paramount importance. Stated in full, it is that the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga. By referring to this as the principle of reciprocity, we have sought to capture its basis in the solemn exchange that was agreed between Maori and the Crown. The tribunal has also already accepted that several vital concepts inhere in or are integral to that principle, namely:

- the Crown obligation to actively protect Maori Treaty rights;
- the tribal rights of self-regulation;
- the rights of redress for past breaches; and
- the duty to consult.

While elaborated in contexts removed from the present claims, we consider that the essence of the reciprocity principle and its inherent concepts may be readily transposed to the situation before us. Rather than repeat here the tribunal's earlier statements, a summary of extracts pertaining to the scope of this fundamental Treaty principle may be found in Appendix 6.

6.4 **The Principle of Partnership**

This principle, established by the Court of Appeal and later elaborated by the tribunal, requires the Maori and Pakeha partners to the Treaty of Waitangi to act towards each other reasonably and with the utmost good faith. Again, we have found this principle instructive in the present context and have included judicial and tribunal statements about its requirements in appendix 6.

References

1. See for example *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22), (Waitangi Tribunal, Wellington 1988) pp 173-189 and *Report of the Waitangi Tribunal on the Ngai Tahu Claim* (Wai 27), (Brooker & Friend 1991), volume 2, pp 221-236
2. William Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi, New Zealand, February 5 and 6 1840*, (Wellington, George Didsbury, Government Printer 1890) p 27, cited by Bisson J in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 714

Chapter 7

Analysis of the Issues

7.1 Introduction

From the information summarised so far, we believe the issues to be considered are:

- **Should the Crown sell its shares in the MDC at this point in time?**
- **If there is to be a sale, should it be to Maori or on the open market?**
- **Insofar as the sale is to Maori, should the Crown contract with a small number of iwi?**
- **What would be the effect of a sale on the use of the Poutama Trust by Maori?**

We consider these in turn.

7.2 **Should the Crown sell its shares in the MDC at this point in time?**

7.2.1 Summary

For convenience, we will summarise our answer to this question at the outset.

First, we consider that the MDC was created as a Treaty settlement mechanism for the benefit of all Maori and that the Crown's involvement as the principal shareholder was a vital means of achieving the company's Treaty-based objectives. From the inception of the MDC, the Maori Trustee was to be a significant shareholder and, as both the Crown and Maori Trustee are pan-Maori institutions in the sense that they represent the interests of all New Zealand Maori, their domination of the company ensured its pan-Maori character. Since it is clear, in our view, that the MDC has not met those goals and, indeed, has turned away from them, we consider that the Crown would be in breach of the Treaty obligations which it sought to honour upon the formation of the company if it were to sell its shares before taking all possible steps to ensure that the company resumes its original Treaty-based objectives.

In light of our view that the MDC is a Treaty settlement mechanism, we also consider that the proposed sale of the Crown's shares would be inconsistent with the

Treaty principle, earlier identified, whereby the Crown must act fairly and impartially towards all Maori. This conclusion rests upon our view that the likely outcome of a sale at this time would advantage a few iwi and disadvantage the majority, thereby creating a new prejudice.

Moreover, we consider that even if the proposed sale of the Crown's MDC shares is viewed in isolation, the Treaty principle requiring the fair and equitable treatment of Maori by the Crown would be breached. Thus, even if the MDC were not a Treaty mechanism, the Crown's obligation to conduct its business in such a way as to be fair to all Maori and not create fresh prejudice entails that the proposed sale of its shares at this time would be in breach of the Treaty.

We now elaborate upon these reasons.

7.2.2 The MDC as a Treaty settlement mechanism

We are in no doubt that the Crown's purpose in establishing and investing in the MDC was to promote the economic development of Maori - all Maori - in accordance with the Treaty of Waitangi. We consider the same purpose was the genesis of the creation of the Poutama Trust.

While the government of the day did not expressly identify these initiatives as flowing from the Treaty, that is unsurprising for Treaty jurisprudence in this country was nascent at the time. It is clear, however, that the government's actions stemmed from an awareness of the need of Maori for positive economic assistance in the form of development banking services and a commitment to providing that assistance.

Today, we believe, the relationship between that need and the commitment to supplying it would be expressed unequivocally in Treaty terms. The Crown's duty of active protection, inherent in what we have referred to as the Treaty principle of reciprocity, has been said to amount to an assurance that "despite settlement Maori would survive and because of it they would also progress".¹ Post-Treaty history, however, reveals an inordinate loss of resources by Maori and an accompanying inability to participate fully in the national economy.

It appears likely to us, from our own knowledge of the various Crown actions leading to tribal losses and the recorded outcome of the extent of lands remaining in tribal ownership, that there is not a tribe in the country without some legitimate claim to economic restoration. It follows then that the disparity between the rate of economic progress of Maori compared with other New Zealanders can clearly be attributed in some measure to breaches of the Treaty. As a result, we consider the Crown's promotion of Maori business by means of the MDC and the Poutama Trust to be consistent with the Treaty and that those institutions are properly regarded as measures by which the Crown sought to honour its Treaty obligations.

The only alternative explanation, offered by the Crown, is that while it was motivated by "social" considerations in establishing the Poutama Trust, it acted purely commercially in investing in the MDC. On the basis of the evidence of the events and the official analysis which preceded the establishment of the company, we firmly reject this suggestion. We note that Dr Mahuta, the Crown's witness, also rejected it when he expressed his view that the Crown's investment in the MDC was based on its Treaty obligations. Finally, we give credence to the evidence that, at the time of its creation, there was uncertainty as to the potential of the MDC to succeed as a commercial institution.

Our finding that the MDC and Poutama Trust were created as Treaty mechanisms is at odds with the Crown's submission that Treaty principles are irrelevant now that it proposes to sell its MDC shares without making an alternative commitment to the objectives for which the company was formed. Stated simply, having formed the MDC because of the Treaty, the Crown cannot ignore that fundamental fact in its subsequent conduct affecting the company.

Moreover, we consider that the involvement of the Crown as the principal shareholder in the MDC, with 49.9% of its shares, supplies further evidence of the Crown's commitment to the Treaty objectives which the MDC was created to promote. This is in turn bolstered by the fact that, when the Crown committed itself to its substantial investment in the company, it was known that the Maori Trustee would also be a sizeable investor. As we have said, both the Crown and the Maori Trustee have a pan-Maori character in the sense that they represent the interests of all Maori in New Zealand, not the more particular and, inevitably, sometimes competing interests of the Waka, iwi and hapu to which all Maori individuals belong. In light of these facts, it is our firm view that the original shareholding of the company, which secured its control by pan-Maori institutions, was designed to ensure the promotion of the company's Treaty objective of advancing the economic position of all Maori.

Further, we do not accept that it is beyond our jurisdiction to examine the operations of the MDC. Despite the Crown's argument that it is a minority shareholder, the fact remains that, with 49.9% of the company's shares, it is extremely well-placed to exert influence over the MDC if it so chooses. The tribunal's clear jurisdiction to assess acts of the Crown against the principles of the Treaty therefore requires us to examine the Crown's performance as the principal shareholder in the MDC. It is purely by virtue of the fact that the Crown has always held such a significant proportion of the MDC's shares that our examination necessarily entails an assessment of the performance of the company itself. But that does not mean the tribunal will be directing any recommendations to the company. Insofar as our recommendations to the Crown relate to the operations of the MDC, they are founded upon the Crown's ability to exert influence over the company's operations.

The Crown also submitted that it would be unwise for the tribunal to attempt to

examine the MDC's operations on the evidence before it and that a commercial study would need to be undertaken by the MDC. However, we regard our own assessment of the company's fulfilment of the Treaty objectives which inspired its creation as being logically prior to the type of study mentioned by the Crown. Exploring the ramifications of the Treaty origins of the company will, in effect, set the boundaries for any other study of its operations. As for the evidence before the tribunal, we record that, at the hearing and afterwards, the tribunal called for and was supplied with additional information from the Crown relating to the MDC and Poutama Trust. We are satisfied that the information before us provides a thoroughly sound basis for our task.

We have earlier provided an overview of the MDC's activities since its inception (see chapter 4). From this it is plain that while the company is operating successfully from a commercial point of view, it is certainly not fulfilling the functions for which it was founded. The MDC was charged with the responsibility of operating as a Maori Development Bank, providing a diverse range of financial services including term finance, term and table loans, working capital and bridging and seasonal finance. Because of the problems with some of the loans (in this regard the MDC was certainly not on its own) and other difficulties, the directors, following consultants' advice, withdrew from the finance market preferring to concentrate on investment packaging and, partly on behalf of the Poutama Trust, undertaking investigation, assessments and advisory services on a fee basis.

These functions are of course important and the decision to make some change in the company's direction was no doubt appropriate at the time. However, there is no indication that in making the policy change, the Crown, as the sponsoring and dominant shareholder - or any other shareholder for that matter - gave much thought to the purpose for which the company was established or the obligation it accepted in so doing. As has been indicated, we regard the Crown's obligation in this regard to be that of a Treaty partner. It is our view that, had the company's purpose and the Crown's obligation been borne in mind at the time the company changed direction, a less draconian change may have been made than that which involved the almost complete withdrawal from the lending market. For example, the introduction of more cautious lending policies would have minimised risk yet allowed a market presence to be maintained pending an improvement in the economy.

The need for a development bank to provide banking services to "commercially viable Maori enterprises in a culturally sensitive way"², was clearly apparent when the MDC started operations as it built a lending book of \$30 million in its first full year of operation. From this previous experience, the frequent applications through the Poutama Trust for assistance with feasibility studies and the evidence of Mr Fitzgerald of Westpac, we consider it beyond doubt that the need is still there but is not being fulfilled. Indeed, the growth in the Maori financial market as a result of recent Treaty settlements has increased the need.

We recognise that the Crown has never held the controlling interest in the MDC. As a result, the most practical course would have been for it to collaborate with at least one other shareholder (for example the Maori Trustee or, more recently, the Poutama Trust) in order to influence the direction of the company. While we have received no evidence that the Crown has endeavoured to ensure that the Corporation resumed the function of debt financing originally intended, the very fact that that function has not been resumed would seem to indicate the lack of such efforts.

Against that is our view that the Crown is obliged as a Treaty partner to actively promote the MDC's original mission. As we have stated, the need of Maori - all Maori - for development banking services has not lessened in the few years since the company was established. Further, we do not accept Crown counsel's argument that the commercial orientation of the MDC divorces the Crown's role in the company from its role as a Treaty partner. As we have also said, a less draconian shift in company policy in the difficult times of the late 1980s could have satisfied commercial goals without losing sight of the Treaty objective of providing development banking services to Maori.

We observe too that the economy has now improved, the lending environment changed and the Maori commercial market widened (A2(c)) 11), all of which factors provide a highly favourable context for the achievement of the MDC's original mission. For example, the improved financial position of a large number of Maori authorities and trusts could provide an improved source of funds for the company, allowing the margin required for it to be a commercial lender. As well, the current MDC balance sheet would allow significant borrowing against a debenture trust deed from either the public or Maori authorities. In short, we are convinced that the resumption of the MDC's original mission could be implemented without impairing its profitability commensurate with the risk involved.

For the reasons given, we believe that if the Crown were to sell its MDC shares before the company is once more committed to its original mission, the MDC's potential to achieve the Treaty goals for which it was created would be extinguished. This would occasion a breach of the Treaty obligations which the Crown sought to honour in forming and investing in the company as its principal shareholder and would be to the detriment of those Maori, including the claimants, whose legitimate expectations of the company's character and services are in accord with its original Treaty-based design.

As a result, we are firmly of the view that, before the Crown divests itself of its MDC shareholding, it must take all steps possible to ensure that the original mission of the MDC is reaffirmed. To this end, it will need to use its influence on the company's Board of Directors, in conjunction with the Poutama Trust if necessary.

We note here that our conclusion that the Crown is obliged to actively promote the MDC's original mission means that we have not pursued Te Ika Whenua's

submission that the Crown's Treaty obligations would be met by its commitment of the proceeds of the sale of its shares to a pre-arranged alternative market mechanism which would deliver development finance to Maori. In our view, the merit of that submission is outweighed by the fact that the MDC is a Treaty mechanism already in existence which is well-run and profitable and which requires only a change of direction to fulfil the Treaty goals for which it was established. Against that background, the difficulties involved in the establishment of a new mechanism to perform the functions originally agreed for the MDC seem to be unnecessarily burdensome and to be required only as a last resort.

As explained at the outset, it follows from our view that the MDC is a Treaty settlement mechanism that we believe a sale of the Crown's shares at this time would also be inconsistent with its Treaty duty to act fairly and equitably towards all Maori. We examine this principle now in the narrower context of considering the impact of such a sale.

7.2.3 The impact of the proposed sale

In our discussion of Treaty principles, we identified a duty on the Crown to act fairly and impartially towards all Maori, a duty which is to be performed to the strict standard required of a fiduciary. It is our firm view that were the Crown to sell its MDC shares now, it would fail in its performance of this duty by giving one or more iwi an unfair advantage over others.

Even before the outcome of the recent High Court proceedings between the proprietors of Taharoa C Block and the Maori Trustee³, we considered it highly likely that the Crown's proposed sale would cause unfairness amongst iwi. The very proposal to sell to whichever iwi or other groups were in a position to make the most attractive bids at the present time, without concessions to interested Maori parties beyond the Crown's agreement to consider offers for 5% parcels of its shares would, in view of the differing financial strengths of iwi, have considerably limited the field of prospective Maori purchasers.

However, in the High Court proceedings, specific performance was ordered of a contract between the Maori Trustee and the proprietors of Taharoa C Block for the sale to the latter of the Maori Trustee's 7,000,004 MDC shares. As a result, save only for the possibility of an appeal, Taharoa C, a Tainui incorporation, will within a month own a total of 9,000,004 shares in the MDC. The Tainui Maori Trust Board owns a further 2 million shares. If the effect of the High Court's decision is achieved, therefore, within one month the only other shareholders in the MDC will be the Crown, with 13 million shares, and the Poutama Trust, with 2 million. Evidence presented to the High Court clearly indicates that both Taharoa C and the Tainui Maori Trust Board remain interested in acquiring MDC shares⁴ and simple mathematics reveals that the acquisition of a further 2 million shares would secure to Tainui the control of the company.

While the prospect of one iwi or a small number of iwi gaining control of the MDC as a result of the proposed sale of the Crown's shares was always in our mind as we considered the impact upon Maori of such a sale, that prospect has clearly now been heightened to a very considerable degree. We regret that the actions of the Maori Trustee have precipitated the present situation for, as we have suggested, we consider his shareholding in the MDC contributed to the pan-Maori character of the company and, as we will elaborate later, to the perceived neutrality of its operations to date as amongst the various iwi.

Crown counsel submitted at the reconvened hearing that the sale of the Maori Trustee's MDC shares has no bearing on the Crown's proposed sale. That submission was based upon the Crown's consistent stance that Treaty principles are entirely irrelevant to the present claims. Quite apart from our earlier conclusion that the MDC is a Treaty mechanism, with which Crown counsel's submission conflicts, our present narrower focus on the impact upon Maori of the proposed sale of the Crown's shares also leads us to reject the Crown's argument.

In our view, the prospect of one or a small number of iwi gaining control of the MDC as a result of the Crown's sale - a prospect which now happens to be greatly heightened - is highly likely to result in the promotion of the interests of a few to the detriment of the majority of Maori, thereby causing new prejudice. Whether or not the MDC is a Treaty settlement mechanism, our earlier conclusion that all tribes have suffered economic disadvantage since 1840 still stands. So too does the Crown's interest in promoting the goal of economic recovery for all Maori. Focusing purely upon the likely impact of the proposed sale then, we consider it will prejudice the achievement of that goal by enabling a select group of Maori to capture control of the assets and services of a company which was previously neutral in its delivery of economic assistance to Maori.

As we later elaborate, one reason for our view that the shift of control of the MDC to a select group of iwi will further limit the access of many Maori to much needed economic services, derives from the vigour of tribal rivalries. We consider the fact of tribal competitiveness to be no mere trifling impediment which may reasonably be expected to be subjugated to the need of Maori for economic assistance. Rather, we see rivalry amongst iwi as the inevitable consequence of what it means to be Maori. From our own knowledge, we confirm that to be Maori means to belong to a tribal group with an ancestry and heritage that guides the group's present and future conduct. Consequently, the identity of and with an iwi is of paramount importance to Maori: it has ensured the survival of Maori as Maori and, by definition, must continue to dominate Maori life.

As a result of the foregoing discussion, we conclude that the Crown should not sell its shares in the MDC at the present time.

As this conclusion does not involve the Crown remaining a shareholder indefinitely,

we proceed to consider the remaining issues. We do so, however, on the basis that the original mission of the MDC will be reinstated prior to any sale of the Crown's shares. As will become apparent from our discussion of the further issues, we consider that this is not the only limitation upon the Crown's sale of its MDC shares required by the Treaty of Waitangi.

7.2.4 If there is to be a sale of shares, should it be to Maori or on the open market?

For the purpose of considering whether a sale of the Crown's shares should be to Maori or, instead, on the open market (thereby inviting non-Maori contenders), we can put to one side the outcome of the recent High Court proceedings.

Just as the Crown recognised the value of involvement by the original corporate shareholders, we also agree that a similar commitment by non-Maori corporates could be to the benefit of a refocused MDC. We do not believe, however, that non-Maori ownership of all the Crown shares would be appropriate. Indeed we consider it would be adverse to Maori interests because a further purchase of a minimal number of shares would deliver control of the company. Quite apart from the possibilities which control always brings, the prospect of non-Maori control of the MDC would, we believe, plainly be at odds with the company's original mission.

An entirely separate matter relevant to the question whether the sale of the Crown's shares should be to Maori or on the open market, is the source of the funds used to purchase the Crown's MDC shareholding. We do not accept the argument made by some claimant witnesses that the Crown's shareholding is, in its entirety, rightly regarded as belonging to Maori. From the evidence before us, however, we believe that some \$5 million of the Crown's cash contribution of \$13 million to the MDC is properly distinguished from the balance. We refer to the amount of \$807,000 voted to Maori business lending each year from 1982/83 until 1986/87, which the Minister of Maori Affairs of the day, in seeking Cabinet approval for the commitment of funds to the MDC, offered to capitalise over a ten year period thereby foregoing future provisions for that purpose.

On this matter, Crown counsel submitted that it was false to conceptualise funds as being diverted to the MDC from Vote Maori Affairs after 1987 because there would have been no guarantee after the 1986/1987 year of future allocations for Maori business lending. We accept that there can be no guarantee of continued funding but note that, when assessing the proposals relating to the MDC, nowhere did Cabinet or any government official deny the validity of the Minister's offer.

Crown counsel also pointed to the changes which occurred between the time the government committed itself to what became the MDC and the time the company was actually established, submitting that the capitalisation approach may not have been pursued in the end at all.

On the evidence, we believe that funds earmarked for Maori business lending were affected by a theoretical capitalisation over a ten year period and that the resulting \$5 million was, and should continue to be, considered as distinct from and of a different character to the balance of the Crown's contribution. We cannot say how much the offer to forego future grants to Maori business lending influenced the Crown, but observe that, right up to the time final Cabinet approval was given to the MDC, the offer was part of the funding proposal.

As a result, we believe that the Crown is holding 5 million shares in the MDC as a fiduciary, or something analogous, for all Maori. We consider then that 5 million of the Crown's 13 million shares should not be sold either on the open market or to Maori but should be transferred immediately, without consideration, to an appropriate recipient. We later identify the most appropriate presently existing recipient of those shares.

7.4 Insofar as the sale is to Maori, should the Crown contract with a small number of iwi?

Our previous discussion envisages Maori and non-Maori purchasing the 8 million MDC shares which we consider the Crown is entitled to sell. Here, we focus only on potential Maori purchasers.

We have already explained our view that the MDC is a creature of the Treaty of Waitangi with the Crown's shareholding at its heart. If that Treaty partner sells its shares before the company achieves its original goals, we see only one way in which the MDC can continue to act as a Treaty mechanism: by the shareholding continuing to be dominated by pan-Maori interests in the sense in which we have earlier used that term.

In reaching that conclusion, we accept the evidence of the claimants that the Crown's dominant shareholding is the key to the MDC's present neutrality as amongst iwi. As they explained, the current credibility of the company as a Treaty mechanism for the assistance of all Maori derives from the substantial involvement of the Crown and is further supported by the shareholding of the Maori Trustee. We would add that the shareholding of the Poutama Trust also supports the company's credibility as an institution representing pan-Maori interests and note that Professor Winiata also acknowledged the pan-Maori character of the Poutama Trust.

We also accept that, for many current and potential clients of the MDC, their perception of the company as being neutral amongst iwi is a critical factor influencing their existing and possible future use of its services. Nowhere is this more important than in those areas of the company's present or future operation where Maori land may be used as security for the provision of finance. As we heard, were the MDC to be or to be perceived as being dominated by specific Maori interests, it would be unacceptable to many non-shareholding Maori that their land,

mana and rangatiratanga be placed at risk of being surrendered to those other interests.

As a result, we have the most serious reservations about the possibility of the MDC becoming dominated by anything other than pan-Maori interests. That possibility would preclude the continuation of the current neutrality of the company and, therefore, the perception of that neutrality in the eyes of potential clients.

We are aware that some might argue that continued pan-Maori control of the MDC would not be conducive to maximising its growth and efficient operation. We do not accept this view. The MDC has operated well to date, with its substantial pan-Maori ownership and there is no reason why this should not continue, particularly with appropriate management incentives.

We believe that when the Crown and its advisors discussed and approved the sale of its MDC shares, it may not have been aware of some of the factors which have led to our conclusion that continued pan-Maori control of the company remains essential. If this is so, it would appear to reveal a failure on the part of the Crown to sufficiently inform itself, by means of consultation, of its Treaty partner's views on this vitally important matter which impinges on the mana and rangatiratanga of all iwi. Nevertheless, the very fact that the sale process presently in train makes no provision for ensuring the continued neutrality as amongst iwi of the company's shareholding is itself, we consider, evidence of the Crown's policy and actions to date being in breach of Treaty principles.

Should the proposed sale process continue now, or should the same process be adopted in future, the way would be left open for a small number of Maori interests to gain control of the MDC. As has been noted, the prospect of this occurring has been heightened considerably as a result of the decision of the High Court in the proceedings between Taharoa C and the Maori Trustee. In our view, the prejudice that this would very likely cause consists in the extinguishment of the company's potential to continue, as a Treaty mechanism, in the task of providing development finance to all Maori and the consequent promotion of the interests of specific Maori groups to the deprivation of others.

To our mind, the question of how to ensure that the company retains its actual and perceived pan-Maori character requires the most careful consideration by the Treaty partners. Without intending to pre-empt the consultative process designed to reach consensus on the matter, we record here our own thoughts upon the entities which might be regarded as fitting recipients of the pan-Maori mantle currently worn by the Crown in the MDC.

We explored first the possibilities of a new entity arising out of the tradition that all Maori must, if they are Maori, belong to a Waka. It is commonly assumed by Maori that there were seven Waka in the great Heke from Hawaiki: Aotea, Kurahaupo,

Mataatua, Tainui, Takitimu, Te Arawa and Tokomaru. For many, their tupuna reached these shores on one or more of those Waka in ancient times.

But there are some iwi who claim descent from other Waka; Mamari and Mahuhu for example. Whether their journeys were planned for the same period of time as the Heke is not clear but in the context of this consideration it should not matter.

Further, Elsdon Best described in great detail Te Tini o Toi who inhabited the "Mataatua district" before the advent of the Mataatua "immigrants".⁵ While reservations may be expressed today about some of Best's information, the existence of Te Tini o Toi does not appear to be in dispute. The manner of their arrival to Aotearoa is relevant to this discussion.

Then there is the matter of Takitimu and Horouta. In 1950 Sir Apirana Ngata stated:

The traditions of the two canoes are so intertwined as regards personnel that it's a real puzzle to sort them out.⁶

Therefore, it seems that the issue is extremely complex and that the use of Waka as the basis of a new entity representing all Maori would require substantial consultation amongst iwi.

We then considered the potential of existing Maori organisations to supply the vital neutrality in the MDC in future. Most of those we considered, however, including the National Maori Congress, the New Zealand Maori Council, the Federation of Maori Authorities and the Associated Maori Trust Boards, did not appear to us to represent all Maori, although we consider that a combination of those groups, together with the Maori Women's Welfare League, could well claim to be so representative.

We therefore returned to the two existing institutions, other than the Crown, which we believe do possess a pan-Maori character: the Poutama Trust and the Maori Trustee. We observe that the recent High Court proceedings cast grave doubt upon the likelihood of the Maori Trustee playing any role in the MDC in future. The Poutama Trust, however, as we have outlined earlier (see chapter 4), owns 2 million shares in the company and is successful in its own, closely related, activities.

It is our view then that, should consultation fail to produce or identify an alternative pan-Maori entity to take up sufficient of the Crown's shareholding to ensure the MDC's future neutrality amongst iwi, the Poutama Trust is the only existing institution, apart from the Crown, capable of fulfilling that role. Naturally, we appreciate that we cannot, as a consequence of this view, make any recommendation to the Trust.

At this point, we would observe that it seems probable that the dearth of pan-Maori

bodies able to fulfil the vital role required in any Treaty settlement intended to benefit all Maori will continue to hinder the efforts of the Treaty partners to effect such settlements. In our view, this is not to be regarded as a "Maori problem". As we have attempted to explain, tribalism is the essence of Maori life. Further, it was recognised as such by the Crown in its Treaty guarantee of rangatiratanga. Therefore, the matter is properly one for conscientious exploration by both Treaty partners. We would suggest that while Maori must be ultimately responsible for determining the basis for and identity of any novel pan-Maori entity, the Crown's part in facilitating that determination is equally vital.

Our view of the Poutama Trust's pan-Maori character and general suitability for playing a larger role in the MDC, leads us to conclude that it is, at present, the most appropriate recipient of the 5 million MDC shares held by the Crown on behalf of all Maori. We therefore recommend to the Crown that 5 million of its MDC shares be transferred immediately to the Poutama Trust without consideration, but with provision for the further transfer of those shares, also without consideration, from the Trust to any preferred pan-Maori body identified by or formed as a result of the necessary consultation process.

7.5 What would be the effect of a sale on the use of the Poutama Trust by Maori?

We have previously stated that we consider the Poutama Trust to be a Treaty settlement vehicle created to provide particular economic assistance to all Maori. We have also noted that while the Trust is performing a valuable role, the present direction of the MDC has put the Trust in the position of being unable to observe its first three objects (see chapter 4). It is our view that, upon the MDC reverting to its original mission, the Poutama Trust is readily capable of fulfilling all of its functions and that the already flourishing and successful relationship between the two institutions will be further enhanced.

If, however, the MDC loses its present pan-Maori character, we would regard it as essential to the Trust's own Treaty-based and pan-Maori purposes that the special relationship now existing between the Trust and the company⁷ be dissolved and the Trust Deed modified accordingly.⁸

Insofar as the Crown, in proposing the sale of its MDC shares, may have given insufficient consideration to the sale's likely flow-on effects to the ability of the Poutama Trust to remain, and to be seen to remain, as a Treaty-based, pan-Maori institution, we are of the view that it has overlooked the likelihood of new prejudice being caused to Maori.

References

1. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22), (Waitangi Tribunal, Wellington 1988), p 194
2. The words used in the Interim Report of the Committee to consider accelerating Maori economic development and the case for a Maori Development Bank. (A1:3)
3. *The Proprietors of Taharoa C Block v The Maori Trustee* CL 41/93, 30 September 1993
4. Letter of 2 August 1993 from secretary of Taharoa C to Chairman of Tainui Maori Trust Board, CL 41/93, pp 8-9; letter of 11 August 1993 from secretary of Tainui Maori Trust Board to the Maori Trustee CL 41/93, pp 13-14
5. Elsdon Best, *Tuhoe* (Wellington A H & A W Reed, 2nd ed 1972) p 15
6. D R Simmons, *The Great New Zealand Myth* (Wellington Sydney London A H & A W Reed 1976) p 132
7. For example, as discussed in objects 3.1(a), (b) and(c) and Schedule 1 "Constitution of Board of Trustees"
8. The Tribunal has noted the comment in the Trust's 1992 Report regarding the External Consultants' Review (A25:27). It would view with concern any significant changes strengthening the relationship between the Trust and the MDC (particularly regarding the balance sheet of the latter) until the question of the Crown's shares in the MDC is decided.

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.

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

Maori Development Corporation

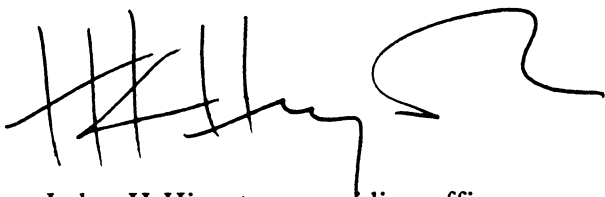
Poutama Trust to ensure that it is distanced from the MDC in all matters, including its objects and directors.

- 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."


DATED at Wellington this 13th day of October 1993

A handwritten signature in black ink, appearing to read 'H Hingston', with a stylized flourish at the end.

Judge H Hingston, presiding officer

A handwritten signature in black ink, appearing to read 'J R Morris'.

J R Morris, member

A handwritten signature in black ink, appearing to read 'H R Young'.

H R Young, member

A handwritten signature in black ink, appearing to read 'J H Ingram', with a large, sweeping initial 'J'.

J H Ingram, member

Appendix 1

The Statements of Claim

*Statement of claim by Whatarangi Winiata
and Te Aho o Te Rangi Ratema Te Awe Kotuku in respect
of the Maori Development Corporation (1.1):*

We, Whatarangi Winiata of Ngati Raukawa and Te Aho O Te Rangi Ratema Te Awe Kotuku on behalf of the owners of Okawa Bay Resort, for ourselves and those Iwi of the National Maori Congress who elect to join herein, claim that we and the Iwi are likely to be prejudicially affected by the proposed action and policy of the Crown to dispose of the Crown's shares in Maori Development Corporation by open tender, and without prior settlement of a process with the Iwi, and that such action and policy would be contrary to the principles of the Treaty of Waitangi upon the following grounds:

- 1 *That* the action of the Crown in establishing the Maori Development Corporation and holding shares in the Corporation was an action of the Crown consistent with the Crown's obligations to protect and restore the rangatiratanga of the Tribes, and was a step especially necessary to restore the Tribes following historic Crown action that removed the economic base of the Tribes through excessive Maori land acquisitions and extreme land tenure rearrangements.
- 2 *That* included in the Crown's contribution of \$13,000,000 to the share capital of the Corporation were monies which were diverted from, and would otherwise have been expended on, Maori economic development and other programmes of the Department of Maori Affairs for the benefit of Maori.
- 3 *That* as part of the financing "package" of the Corporation the Maori Trustee, in concert with the Crown's involvement contributed \$7,000,000 from Maori unclaimed monies and uneconomic interests properly belonging to those Tribes from whom the incomes derived but never credited to those Tribes because of a law that simply vested those monies in the Maori Trustee. Some Tribes, especially those of the central island, contributed far more than any others to this fund.
- 4 *That* to adequately protect the interests of the Tribes as a whole the Crown

must ensure an equitable apportionment of its shares amongst the Tribes, or that the shares be held by some national trust, commission, or body for the Tribes generally and equitably apportioned to the Tribes if and when the Tribes wish that to happen.

- 5 *That* in the event that the Crown fails to ensure an equitable apportionment to Tribes, the Crown will cause more grievances and will cause more divisions amongst the Tribes by advancing the position of some and disadvantaging the position of others.

Such action would be inconsistent with the principles of the Treaty which assumes that the Crown will act fairly in the protection of the Tribes as a whole.

- 6 *That* the Crown's programme of settling with some Tribes ahead of others is in itself inconsistent with the Crown's Treaty obligations to treat fairly between the Tribes as a whole, and that it funds some Tribes ahead of others and gives them an unfair advantage in the acquisition of the Crown shares in Maori Development Corporation.

- 7 *That* the sale of the Crown's shares by public tender and outside of the Tribes would likewise be contrary to the principles of the Treaty and in particular the Crown's obligation to protect the rangatiratanga of the Tribes and to restore the economic base of the Tribes on account of past wrongful resource dispossession.

- 8 *That* some tribes have expectations of improving their financial capacities through Maori land rearrangements under the new Te Ture Whenua Maori Act 1993 and it is unfair and unreasonable for the Crown, if it insists on selling its shares in the Corporation, to tender its shares at this stage without giving these Tribes the prior opportunity to reorganise land interests under the new Act to enable them to acquire a fair proportion of the Crown's shares, in particular we refer to the central island Tribes who have already given so much to the unclaimed monies of the Maori Trustee.

- 9 The immediate relief sought is recommendations from the Tribunal as follows:

- (a) calling upon the Crown to defer the disposal of its shares before a fair process has been settled and agreed between the Tribes through negotiations;
- (b) reminding the Crown of its obligations to deal fairly and openly with the Tribes as a whole and not to go from one Tribe to another on an individual basis;

- (c) the Tribunal is asked to give notice of this claim to the Prime Minister, Minister of Finance, Minister of Justice, Minister of Maori Affairs, Minister of State Owned Enterprises, and to all Iwi;
- (d) the Tribunal is asked to convene an urgent hearing by way of a National Hui at a central island marae and to seek an undertaking that at least one of the above Ministers of the Crown will attend.

Professor Whatarangi Winiata
Te Aho o Te Rangi Ratema Te Awe Kotuku

*Statement of claim by Te Runanganui
o Te Ika Whenua in respect of the Maori
Development Corporation (1.2):*

Whereas:

- A In 1840 the claimants had tino rangatiratanga over their rohe.
- B In 1840 the claimants were spiritually, culturally and economically prosperous as the holders of assets including land, water and other natural resources.
- C The Treaty of Waitangi guaranteed to the claimants the tino rangatiratanga and full exclusive and undisturbed possession of their lands, fisheries, forests and other treasure. Article III of the Treaty guaranteed equity between Maori and other New Zealanders.
- D Maori people have been systematically deprived of their economic spiritual and cultural richness by breaches of Articles II and III of the Treaty of Waitangi.
- E The Crown has at various times recognised that there is a significant gap between the position of Maori and Pakeha in New Zealand.
- F One of the methods employed by the Crown to redress this balance was to hold the Maori Economic Development Summit Conference also known as the Hui Taumata. The then Minister of Maori Affairs (Hon Koro Wetere)

Maori Development Corporation

in calling the Hui Taumata set the following objectives:

- to examine the economic situation of New Zealand as it affects Maori people
- to assess the economic strength and weaknesses of Maori people in New Zealand
- to obtain a commitment from those attending the conference
- to support policy changes necessary to obtain socio-economic parity between Maori and non Maori

G A Maori Development Bank had been discussed prior to Hui Taumata and at the Hui.

H The government accepted that a Maori Development Bank would assist in addressing the relative economic imbalance between Maori and Pakeha people.

I On or about 1 July 1987 the Maori Development Corporation Limited ("MDC") was incorporated under the Companies Act 1955 as a public limited company.

J The share capital of the company is \$50 million divided into 50 million ordinary shares of \$1.00 each.

K Not all of the 50 million shares have been issued.

L The annual return dated 27 April 1992 shows the following shareholders:

Holder	Shares
Brierley Investments (No 1) Limited	2 million
Fletcher Challenge Limited	2 million
The Maori Trustee	7 million & 2
Minister of Finance	6.5 million
Minister of Maori Affairs	6.5 million
Georgina Manunui Te Heuheu	1
Waari Geoffery Ward-Holmes	1

Total numbers of shares subscribed for: 24,000,004¹

M An advertisement appeared in the Dominion Newspaper on 21 May 1993 announcing that the Crown is considering the sale of its 49.9% shareholding

in MDC.

- N The claimants understand that if the Crown does sell its shares in MDC that the proceeds will be put in to the consolidated fund.
- O The claimants understood that the provision of the Crown's \$13 million used to purchase its MDC shares was provided in recognition of the special relationship between the Crown and Maori embodied and/or evidenced in the Treaty of Waitangi.
- P Further, the Crown shareholding, support and influence over MDC was to assist the development of Maori business thus in part addressing the Article III imbalances that had developed between the signing of the Treaty and recent times.
- Q The Crown's shares in MDC may be used as redress in the settlement of Treaty breaches.
- R The claimants believe that the provision of money for business and/or development funding to Maori is an obligation of the Crown arising from the Treaty and amounts to an action consistent with the Crown's obligations to protect and restore their rangatiratanga.
- S The Crown's support, financial input and influence in and over MDC is in accordance with its obligations under the Treaty of Waitangi.

Urgent Claim - Particulars

The Claimants

- 1 This claim is lodged by Hohepa Joseph Waiti as the chairman of Te Runanga o Te Ika Whenua Incorporated Society ("Te Ika Whenua"). Hohepa Waiti claims on behalf of himself and on behalf of the hapu represented by Te Ika Whenua, those hapu are:

Ngati Manawa
Ngati Whare
Ngati Patuheuheu
Ngati Te Huinga Waka

The Claim

- 1.2 The claimants are or are likely to be prejudicially affected by the following omissions, policies and practices of the Crown that are inconsistent with the

Maori Development Corporation

principles of the Treaty of Waitangi. The omissions, policies and practices are:

- (a) The omission of the Crown to actively protect the Article III rights of Maori.
- (b) The Crown's proposed sale of its shares in MDC.
- (c) The Crown's proposal to sell its shareholding in MDC without making the sale proceeds available to Maori in order to partly satisfy the Crown's obligations to Maori and redress the breaches of Article III.
- (d) The Crown's proposal to sell its shareholding in MDC without making the sale proceeds available to help meet the Crown's obligations to Maori and redress the breaches of Article II and III of the Treaty.
- (e) The Crown's proposal to sell its shareholding in MDC would be contrary to the principles of the Treaty, in particular the Crown's obligations to protect the rangatiratanga of the claimants.

1.3 The said omissions, policies and practice will prejudicially affect the claimants by:

- (a) representing a failure by the Crown to:
 - (1) actively promote Maori economic development; and
 - (2) actively address past Treaty breaches
 - (3) honour the terms of the understanding upon which the \$13 million was provided by the Crown and other funds provided on behalf of Maori by the Maori Trustee
- (b) removing a source of possible Treaty redress without replacement by the Crown
- (c) the Crown appropriating money from an activity which is consistent with the Crown's Treaty obligations to another non-Treaty use, ie the consolidated fund

Remedies

2.1 The claimants seek the following relief; a recommendation to the Crown that:

- (a) it not sell its shares in MDC unless it applies the sale proceeds towards another Maori initiated and supported scheme to restore tino rangatiratanga and economic development to Maori
- (b) consultation with Maori take place to establish another scheme to restore tino rangatiratanga and economic development to Maori
- (c) no sale take place until the consultations referred to in subparagraph (b) have concluded
- (d) any other relief the Waitangi Tribunal deems fit

Hohepa Waiti

Notice

The claimants consider that the following should be notified:

- The Ministers of Finance and Maori Affairs
- The Maori Trustee and the other MDC shareholders
- All other iwi

This particulars of urgent claim is filed by Kathy Lee-Anne Ertel, Solicitor of Luckie Hain.

*Statement of claim by Te Arawa in respect
of the Maori Development Corporation (1.3):*

Representatives of the combined groups of Te Arawa Kaumatua Council, Te Arawa Maori Trust Board, Te Runanganui o Te Arawa and Te Arawa Federation of Maori Authorities met on 27 May to consider amongst other matters, the proposed sale of Crown interests in the Maori Development Corporation.

The groups concerned believe that Te Arawa beneficiaries are likely to be prejudicially affected by the proposed actions of the Crown and that without prior settlement of a process with the iwi that such action would be contrary to the principles of the Treaty of Waitangi.

This statement is consistent with claim No 350 which Te Arawa believe has been

Maori Development Corporation

lodged before the Waitangi Tribunal by Whatarangi Winiata of Ngati Raukawa and Te Aho o Te Rangi Ratema Te Awe Kotuku of Te Arawa.

In this respect, the above Te Arawa organisations endorse and support the above claim and call upon the Crown through the Waitangi Tribunal to defer the disposal of its shares in the Maori Development Corporation until a fair process has been settled and agreed between the Tribes.

We request that the Tribunal give urgent attention to this issue and to forward on this concern to any interested parties.

Kia ora

Chairperson, Te Arawa Kaumatua Council
Chairperson, Te Arawa Maori Trust Board
Chairperson, Te Runanganui o Te Arawa
Chairperson, Te Arawa Federation of Maori Authorities

References

1. It should be noted that this graph is incorrect. Infact DFC (or Poutama trust) held 2 million shares too and the total of shares subscribed for is 26,000,004.

Appendix 2

The Claim of Professor Winiata and Others

The following sections summarise the arguments made by Professor Winiata and the evidence presented in support of the claim.

2.1 The Crown's Involvement in the MDC

This claimant group submits 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. (A24:2)

In support, reliance was placed upon statements made in a submission of the foundation Chairman of the MDC, Waari Ward-Holmes, to the Parliamentary Select Committee examining the Bill which, when enacted, authorised the Ministers of Finance and Maori Affairs to subscribe for shares in the company. After outlining the background to the establishment of the company and its mission, Mr Ward-Holmes wrote:

The Maori Development Corporation therefore represents a joint approach between government, the Maori Trustee and major New Zealand business ventures to accelerate the development of Maori resources.

The Directors of the Maori Development Corporation Limited are firmly of the opinion that greater impetus needs to be given to the development of Maori resources. If we are to maintain a balanced community it is vital that a significant proportion of the community is not allowed to fall behind in the development and management of their resources. The willingness of government and the private sector to join together with the Maori Trustee in promoting Maori development gives a unique opportunity which will be strengthened by the Crown becoming a full shareholder in the Corporation. (A24:8-9 citing A1:160-161)

Unlike Te Ika Whenua, the claimants represented by Professor Winiata placed considerable emphasis on the source of the funds used to purchase the Crown's MDC shareholding. Relying on Cabinet papers produced by the Crown, Professor Winiata emphasised that \$5 million of the funds used to purchase the Crown's \$13 million shareholding derived from capitalising, at approximately 10%, Vote Maori Affairs' business lending programme for the decade following the MDC's formation. (A24:12)

Maori Development Corporation

Witnesses called by Professor Winiata made larger claims about the source of the funds. Thompson Parore, a former director of the MDC and trustee of the Poutama Trust, and Maori Trustee from 1987 until the end of 1989, stated:

- The Maori Development Corporation was a creation of the Labour Government following the Hui Taumata in 1984 and was funded from money from Vote Maori Affairs, the Maori Trustee and three commercial interests, a total of \$26m. The Poutama Trust was created at the same time with a Government funding of \$10m.
- The Corporation and the Trust were instruments designed to facilitate Maori commercial development. It is my clear understanding that financial support for these two bodies by the Crown was in recognition of the Crown's responsibility to assist with closing the gap between the economic position of the Maori and that of the rest of the population. It was my understanding that the Crown recognised that the disadvantageous position of Maori was a function of land and other transactions of the Crown which had been detrimental to Maori.
- The creation of the Corporation and the Poutama Trust was used by the Government in succeeding years as justification for not continuing the funding provision for business lending. So Maoridom, although benefiting from the creation of these organisations, effectively was deprived funding that could otherwise have been available. And this is notwithstanding that Mana funds were subsequently made available.
- The selling of the Corporation and return of the proceeds to the Consolidated Revenue Account for use for general purposes, on top of discontinued funding as referred to earlier, [previous paragraph] ... would be a double deprivation in my view of development funds that should be used to help develop Maoridom. (A21:2)

In response to questions from the tribunal, Mr Parore elaborated on his view that the government's financial contributions to the MDC and Poutama Trust put a stop to other Maori economic development funding. He said that if the appropriation for business lending in Vote: Maori Affairs had not been used in creating the MDC and Poutama Trust, there would have been a reasonable and justifiable expectation that the appropriation would carry on in future. He stated that while it is difficult to get the first vote provision for a particular activity, once it was obtained a reasonable belief arose that it would continue in future years. Mr Parore also gave his view that the ongoing financial provision for Maori business development which, in his view, should have continued after the creation of the MDC, could have been used to build up the Corporation's funds so that, with leverage, it could have been more involved in the role of an iwi banker. In his view, the cessation of government funding for Maori business development was another lost opportunity. (A35:46)

Tuwhakairiora Williams, Chief Executive Officer of the National Maori Congress, explained that at a recent hui facilitated by congress and attended by 25 iwi groups, all iwi who had been sent a copy of Professor Winiata's claim had an opportunity to discuss its contents and register their support. He summarised the discussion that

took place in these terms:

It was understood that Maori Development Corporation had been established to redress the disadvantageous economic position of Maori caused by Crown injustices of the past.

The fact that the Crown used \$13 million of vote Maori and that \$7 million was also invested from the Maori Trustee to assist in the establishment of Maori Development Corporation supported the view that it is a Maori asset and, therefore, the right of the Crown to sell the asset without prior consultation with Maori has to be challenged. (A26:1)

2.2 Effect of the Sale Upon Maori

Professor Winiata argued that the proposed sale of the Crown's MDC shares would have serious adverse effects upon Maori. He examined these under six headings:

- Threat to the existence of the MDC
- Threat of great inequality among iwi
- Threat to the value of the Maori Trustee's holdings
- Threat to the mana of non-participating iwi
- Loss of liquid resources to the Maori community
- Allocation of shares to iwi.

2.2.1 Threat to the existence of the MDC

The claimant argues that under the proposed arrangement for the sale of the Crown's shares, the highest and winning bidder could be a group, Maori or Pakeha, which desires to liquidate the Corporation. It is Professor Winiata's view that there will be very little competition for the shares and that there is a real possibility, if the sale goes ahead, of a consortium, or management, purchasing the Crown's total shareholding. Acknowledging that 13 million shares is slightly less than 50% of the company's capital, Professor Winiata said that such a large shareholder could successfully exert pressure to have the company dissolved. The outcome would be the disestablishment of the MDC notwithstanding, he submitted, that the need for the Corporation remains as high as at the time of its creation. (A24:13)

2.2.2 Threat of great inequality among iwi

The claimant's concern here is that if an asset stripper is Maori or a small number of iwi acting collectively, some Maori or iwi will benefit from the Crown's share sale while others do not. It was suggested that a further element of inequity would be involved if the capacity of a potential Maori or group to purchase the Crown shareholding was due to their having received settlements from the Crown or being otherwise advantaged compared to other Maori. (A24:13)

If a Maori purchaser did not liquidate the MDC's assets, Professor Winiata argued that prejudice could also be caused if that purchaser introduced lending policies designed to accommodate the particular aspirations of its iwi. Summarising this concern by the expression "the rich get richer and the poor get poorer", Professor Winiata said it had also been expressed in 1986 by the committee which investigated and reported on the acceleration of Maori economic development. In that committee's interim report, in the context of discussing its preferred option of establishing a Maori Resource Development Corporation which would be, in effect, a subsidiary of the Maori Trustee, it was stated:

These [Maori] authorities could be invited at some stage to participate in the Corporation as shareholders. This would need careful consideration as tribal authorities can differ markedly in their asset bases and the wealthier authorities may expect to exercise a certain degree of leverage as significant shareholders. (A24:14; A1:13)

2.2.3 Threat to the value of the Maori Trustee's holdings

Arguing that the Crown and Maori Trustee shareholdings in the MDC are inter-dependent (A24:14), Professor Winiata stated that their combined presence gave the MDC a national perspective and a dominant influence from that vantage point.

If the Crown, or some national body stepping into the shoes of the Crown, is not present then, in terms of a National viewpoint, the Maori Trustee is in a minority position with respect to any aspirations to bring a pan iwi and national perspective to the affairs of the Corporation. (A24:15)

2.2.4 Threat to the mana of non-participating iwi

Following on from the argument that the MDC presently has a national perspective by virtue of the Crown and Maori Trustee shareholdings, Professor Winiata stated:

Iwi are prepared to be part of a national co-operative but there is deep concern about an unwillingness toward being subject to the control of a small number of iwi. Iwi based organisations which have borrowed from the Maori Development Corporation would face this threat. It is unacceptable to some iwi to have their loans administered by another iwi or waka with a dominant shareholding. (A24:15)

He added that this threat would be worse if there was default by an iwi which had borrowed from the Corporation and it then faced the prospect of its land being taken by the lending iwi.

In response to questions from the tribunal, Professor Winiata elaborated upon his written submissions under this head, saying that the Crown's involvement in the MDC confers upon the company a neutrality which would be lost if anything other than a pan-iwi body took over that shareholding. He also expressed his view that if

one iwi, or a consortium of iwi which was not representative of all, acquired the Crown's shares, there would be reluctance on the part of those iwi not represented to take advantage of the MDC's facilities thereafter. In the case of a management buy-out, Professor Winiata said there would also be reluctance to use the MDC's facilities in future but for the reason, in that instance, that there would be a belief that insiders had exercised a monopoly position on knowledge. (A35:55)

Pursuing Professor Winiata's contention that a purchase of the Crown's shares by a limited number of iwi would cause divisiveness and apprehension, the tribunal asked him which would be preferable from a Maori point of view: a limited Maori buy-out or a Pakeha buy-out? Professor Winiata replied:

Well, I think a passive Pakeha buy-out would be a nice way of having some capital there and without the kind of responses and reactions that I have indicated here. I think that's probably unrealistic. Even with their small shareholdings Fletchers and Brierleys and the DFC and its successor would have influenced the Board and I think in favourable ways as the chairman indicated yesterday. I think the worry with a Pakeha presence in any organisation is the influence that they inevitably bring to bear and so that's a difficult one. Money without any strings attached and no influence is a desirable situation to have but difficult to achieve. (A35:56)

The evidence of Te Aho Te Awe Kotuku focused on the claimant's concern at the prospect of non-participating iwi losing mana. In an oral statement, she told the tribunal of the history of the Okawa Bay Resort and how the owners, Ngati Pikiao, came to borrow funds from the MDC secured by mortgage on Ngati Pikiao lands. She expressed her repugnance and distress at the prospect of continuing to be indebted to the MDC should the company lose its present pan-iwi character and become dominated by a small number of iwi. While focusing on the untenable position that she would regard herself as being in, as a Maori borrower, should the MDC undergo such a change of shareholding, Te Aho Te Awe Kotuku also indicated that the loss of the MDC's pan-iwi character would, for her, destroy the attractiveness of investment via the company's facilities. In sum, she made it clear that the sale of the Crown's shareholding would destroy the MDC's Crown-Maori partnership character and that if anything other than a pan-iwi body took over the Crown's shareholding, she would then perceive the MDC as a company serving its shareholders' interests. Since her iwi were not intending to purchase shares, she would not choose to use any of the MDC's facilities in such a situation.

The evidence of Mrs Piri Fenwick, on behalf of Te Arawa Kaumatua Council and the other Te Arawa claimants, was also directed to the issue of loss of mana by iwi as a result of the sale of the Crown's MDC shares. She referred to the "peculiar attitude" which Maori have and explained, again with reference to Ngati Pikiao's Okawa Bay Resort situation:

We don't mind borrowing from our own but it's very difficult to borrow from someone else and find that one's status is, I suppose, repressed to a degree - lost to

a degree. (Tape of evidence)

Having referred to a lack of courtesy amongst Maori, Mrs Fenwick also said:

It's significant, more so after yesterday, that we listened to the very sterile commercial aspects of commercial investment and I wonder whether we in Maoridom have actually been able to accept that commercial sterilised world negating our social feeling and attitudes. (Tape of evidence)

Mr Parore expressed a similar concern in cross-examination by Crown counsel. Explaining his view that the Maori Trustee's MDC shareholding might be more fragile if the Crown was no longer involved in the company, Mr Parore said:

... I think there is a danger if the Crown shareholding goes out just to some iwi and not to all iwi, that the confidence to be able to deal with the corporation, the support that [it] needs to have for Maoridom, I think may not be there and there will be tribes, and I understand there might be some evidence on it, who would be hesitant to go to a corporation that was owned by x number of tribes for assistance. Whereas if there was an organisation such as the government or an organisation that represented all iwi, I think there would be the confidence to carry on. So I think the Maori Trustee shares would be more fragile in that kind of structure with a relatively small number of iwi and from the activities than it would if it was a national coverage. (A35:43-44)

2.2.5 Loss of liquid resources to the Maori community

Professor Winiata stated that if the successful bidder for the Crown's shareholding is Maori and the Crown puts the proceeds of the sale into the consolidated fund, there will be a loss of liquidity to the Maori community and/or an increase in indebtedness. The loss of liquidity would result from Maori cash being used to purchase the shares; Maori indebtedness would increase if funds were borrowed to purchase them. As well, the proceeds of the sale would, upon being paid into the consolidated fund, be available for the general purposes of the nation. (A24:16)

2.2.6 Allocation of shares to iwi

Following on from the points (d) and (e), the claimant argued that, to avoid disadvantage to some iwi, the Crown should ensure a better sharing of the advantages associated with the holding of shares in the MDC than is likely to occur as a result of the proposed sale process. (A24:17) Professor Winiata stated that unless the Crown's 13 million shares are held by a widely representative group on behalf of all or most iwi, a national identity for Maoridom will be lost and the potential of a pan-iwi and nationwide Maori presence in the finance and capital markets will be set back. (A24:16)

He gave two examples of a "widely representative group" which could hold shares

on behalf of all or most iwi: the Crown and National Maori Congress. (A24:16) In response to questions from the tribunal however, Professor Winiata added that either the Poutama Trust or the Maori Trustee could, if they took over the Crown's shareholding, be regarded as representative of Maori generally. (A35:58) This was consistent with his submission that the Maori Trustee's present holding of 7,000,004 shares and Poutama Trust's 2 million could, after a sale of the Crown's shares, provide a national presence in the MDC but from a minority position. (A24:16) On the matter of how it was envisaged that the Crown's shareholding might be allocated, Professor Winiata drew attention to the assets distribution system presently being sought by the Treaty of Waitangi Fisheries Commission. He submitted that, although it would not be part of a settlement, a similar task could be undertaken for the allocation of the Crown's shares in the MDC. (A24:17)

In his evidence for the claimant, Mr Parore suggested a strategy for allocating the Crown's MDC shareholding which would, in his view, fulfil the original intention behind the establishment of the company. Mr Parore's proposal would involve increasing the authorised share capital of the MDC to 36 million \$1 shares and would result in the National Maori Congress Endowment Fund Inc and the Poutama Trust each holding 16 million shares (44.4% each) with the remaining 4 million shares (11.1%) being held, as at present, by Tainui and Taharoa C. Under the proposal, the Crown's 13 million shares would be vested in the National Maori Congress's Endowment Fund and the fund would purchase 3 million of the Maori Trustee's shares. The Poutama Trust would retain the 2 million shares it presently holds, purchase the remainder of the Maori Trustee's shares (4 million) and otherwise secure the further 10 million shares allocated upon the increase of the company's share capital. (A21:3-4)

Mr Parore explained:

The justification for the vesting of the Government shares in National Maori Congress is its wide representation of iwi (45) and the confidence arising therefrom that all iwi will be treated on a fair and equitable basis. The \$13m was voted for Maori development and should not be lost to general Government purposes which would advantage the Crown to the detriment of the Maori Treaty partner. The Government has recognised in the case of the Mana programme, that funds provided to iwi should remain with iwi. It is submitted that the same policy is appropriate for the MDC shareholding. (A21:4)

Elaborating upon the increased MDC shareholding that he envisaged for the Poutama Trust, Mr Parore stated:

Although there is a difference in priority between MDC (commercial) and Poutama Trust there is already a close working relationship which I believe can be further developed. Already a major part of the Trust's financial assistance is to MDC for non-commercial aspects of projects. An external review in 1990/91 raised the question that the trust should be included in the MDC balance sheet. The

administrative servicing of both organisations is already done on a joint basis. (A21:4-5)

Crown counsel questioned Mr Parore about his acknowledgment that the Poutama Trust has quite a different focus from the MDC and Mr Parore explained further that he believed it would be possible to harmonise the two functions of the two organisations. He stated his belief that the very close working relationship of the MDC and the Poutama Trust could be developed if they were a combined operation in fact rather than de facto, as at present. Emphasising that he thought both the MDC and Poutama Trust had done "a marvellous job" in helping to develop Maoridom, Mr Parore continued by explaining the "two main thrusts" of the Trust's activities as he understood them while he was a trustee:

... one of those is to assist the corporation itself so that in arrangements that it's dealing with, that it's part of the packaging component and assistance is given. Because they're dealing in some cases with projects that, just in the normal commercial process, might not be able to progress. But because the Poutama Trust is alongside it can help the Corporation to go through and process those claims and help package them in a way that is going to give benefit to the people that are involved with those deals. So that's a major part of the Poutama Trust activities.

The other major activity, of course, is providing assistance to people who approach them directly for assistance - feasibility studies for putting projects together and also, I think, some of the ongoing loan management. That quite often is a problem; that a loan is granted to an organisation and then twelve months down the track they are starting to have difficulties and the Trust is able to go in at that stage and give them management support just to get them through until they can get onto a profitable basis. (A35:42)

The tribunal asked Mr Parore whether the Poutama Trust had the funds to buy the MDC shares which his proposal envisaged it should acquire. He replied that he had deliberately not used the word "buy" in his proposal and that the detail would have to be worked out by others but that he was suggesting a restructuring whereby the Trust's additional shares would be put into the balance sheet. (A35:44)

Mr Parore was also asked by the tribunal where the funds had come from that were used to purchase the Maori Trustee's original shareholding in the MDC. Mr Parore explained that the money was a mixture of cash and assets from loans and came from the Trustee's general purposes account, not from common fund money. The latter, he explained, belongs to particular trusts rather than to Maori generally, although he said there was some blurring as to the extent to which the profits belonged to the particular beneficiaries or Maori generally so that some of the money that bought the Maori Trustee's 7 million shares could have been from Maori. (A35:45-46)

2.3 The Sale Process

In his overview of the claim, Professor Winiata asserted that because Maori economic interests are closely involved, the sale process should be consistent with those interests. In particular, he said that there should be consultation with the tribes but that this has not occurred. He continued:

Emphasis has been placed upon the sale being a commercial one, Crown memorandum paragraph 12, with the various ritual observances which follow from that, including, neutrality, conflict of interest, openness and contestability, and due diligence. And the object is to extract the maximum price (from, inter alia, Maori bidders).

There is recognition of the significance of the sale to Maori - by providing 5% lots. There are problems, however, for an aspirant for such a lot undertaking 'due diligence', to enable the Crown to have a clean sale, of being able to offer advice, and so forth. (A24:2-3)

Professor Winiata then listed four issues which he submitted required attention in the claim, even supposing that a sale was appropriate. Two relate to the sales process:

Apparently, information will be supplied only to those with the financial capacity to conclude a sale. This requirement is unlikely to be met in any conventional sense by many Maori bidders. The short time frame for advertisement to cut off for expressions of interest is an example.

The communal decision making across hapu and iwi and to aggregate resources and responses do not fit this pattern

Maori Development Corporation is one of the few substantial financial entities with an emphasis on Maori investment and economic development. Sale of the Crown's shareholding is full of risks to those objectives.

Consultation between the Crown and tribes about the sale, and the sale process, is essential before it can be determined that a sale should proceed, or that the process is one which is tailored to the needs of Maori. (A24:3-4)

It requires mention that Professor Winiata acknowledged, when presenting his submissions, that the "short time frame" referred to in (a), quoted above, had been extended.

In elaboration of his submission that consultation is required, Professor Winiata relied on the same 1987 Memorandum to Cabinet that Te Ika Whenua claimants had highlighted in this regard. He noted that the then Minister of State Services had commented there upon the importance of "extensive consultation and consensus seeking" in regard to matters Maori. (A24:17; A1:40-41)

Also relevant in this regard is information supplied by Professor Winiata about the two letters written in February and October 1992 by the National Maori Congress to the Minister of Finance. Professor Winiata explained that, in response to those letters in which the congress expressed interest in acquiring the Crown's shareholding in the MDC, the Crown stated that it had not resolved its policies concerning its shareholding. He added that on 19 May 1993, concurrently with the lodging of the present claim with the tribunal, congress sent the two shareholding ministers a copy of the claim and expressed a desire to soon meet with them to consider the future of their shareholding. However, Professor Winiata stated, congress has received no reply to that letter. (A24:4-5)

2.4 Analysis of the MDC's Operations and the Continuing Need for Maori Economic Development Funding

The claimant's written statement deals with the matter of the MDC's change of focus since its establishment (A24:9-12) and, in presenting the claim to the tribunal, Professor Winiata expanded orally upon this matter. His purpose in so doing was to support the claimant's request that the tribunal recommend not only that the sale of the Crown's MDC shares be stopped but also that the MDC be restructured, or refocused, to perform the serious purpose of development banking for which it was established. (A24:4) The evidence of Mr Arama Kukutai (A27), Mr Horimatua Evans (A28) and Mr Ian Fitzgerald (A29) is also relevant in this regard.

After outlining the initial objectives of the MDC and its close links with the Poutama Trust (A24:7-8), Professor Winiata compared its asset and financial structure as at 31 March 1988 with the position as at 31 March 1992. He concluded that, had the MDC "stayed on the track" as a development institution and achieved the gearing of four¹ which officials had estimated as being both conservative and possible after its second year of operation, an extra \$118 million of capital would have been made available through the company to Maori. (A24:9-10) He added orally that this would have been an attractive outcome from the Crown's standpoint as the private sector would have been providing those funds, not the government. A study of the 1992 Annual Report and Accounts of the MDC, Professor Winiata stated:

... reveals a range of activity and size which is different from what was envisaged in 1987. With term liabilities of \$1.7 million (page 19), there is no gearing to speak of; loans and advances are in decline - on purpose, and investments in shares in five companies (page 11) which cost \$8.3 million (page 19) represent 25 percent of Maori Development Corporation's assets. (A24:10)

He concluded that the emphasis of the MDC now appears to be on portfolio investment for the MDC itself and for Maori investors, except "small Maori investors". (A24:11) He explained orally that this meant the MDC had moved from development banking to being an investment banker with the result that the Crown has become a passive investor, not directly involved in Maori development.

As for the success of the MDC and of the continuing need for development banking, Professor Winiata stated:

It is fair to say that the Maori Development Corporation is having success in its current operations. It has been able to package funding arrangements of various enterprises and has attracted Maori investors. Its activities, however, appear to be largely different from what was intended. What is still urgently required is development banking. (A24:11)

He added that there is still plenty of scope to change the focus of the MDC to give greater emphasis to development banking. The Crown, he submitted, should exercise its influence over the affairs of the Corporation to achieve this renewed focus. (A24:11)

The written evidence of Arama Kukutai, a principal of Stratcom Ltd and consultant to National Maori Congress on a project to investigate the development of business and retail banking options, was received by the tribunal in the absence of the witness. He noted the original objectives of the MDC and observed that its structure and operating principles have become closer to that of a merchant banking/investment institution with conglomerate leanings than of a Maori development oriented financier. (A27:2) In his view:

The Crown's intention to sell its shares in the MDC can be seen as an inevitable conclusion to the decision, conscious or otherwise, to shift MDC's operating focus away from Maori development. Consequentially the Crown has assumed a passive investor's role in an organisation which has its principal commercial interest in large scale transactions that are beyond the scope of the majority of Maori business dealings and which has become a market-driven investor with an interest in developing Maori investment in general business opportunities. (A27:2-3)

Mr Kukutai contended that the transaction size set as a threshold by the MDC, its physical inaccessibility and its inability, as a "finance company" equivalent, to take advantage of the higher gearing ratios available to a development bank, makes its operating focus and structure inappropriate to its original goal of Maori development. Acknowledging, however, that the Corporation is a viable operation, he argued that it should retain its current merchant banking function but expand its operation to include Maori development banking. That latter function, he said, is still relevant as is evidenced by the market-driven demand for such an institution, signalled by interest from both iwi and banking institutions. Mr Kukutai added that an appropriate Maori development vehicle would need to identify, by means of consultation, Maori organisations' needs and then target its development and investment banking accordingly. (A27:3-4)

Mr Kukutai also contended that the Crown is obligated to ensure that its investment in Maori development is maintained:

Maori Development Corporation

First, the Crown, under the Treaty, should act to improve the conditions for Maori to realise their economic potential and improve their contribution to economic goals of national importance, by retaining the MDC as the nucleus for Maori Development Banking.

Secondly, the Crown should allow the market to operate effectively and efficiently by removing impediments to iwi and financial institutions' participation. (A27:4)

Horimatua Evans, farmer, registered valuer and a foundation director of the Rural Bank, gave evidence focusing specifically on the unmet financial needs of rural Maori landowners. While acknowledging that the MDC's purpose did not include providing assistance to Maori land owners, Mr Evans stated that this fact, together with the sale of the Rural Bank and the demise of the Board of Maori Affairs, meant the Crown had abandoned its Maori land portfolio. As a result, he said, many Maori farmers have been left in need of assistance beyond the lending criteria of trading banks. (A28:2-3)

Ian Fitzgerald M.Ec, a senior executive with Westpac Banking Corporation responsible for business development, gave evidence of a feasibility study, being conducted by the bank in conjunction with the National Maori Congress, on the development of a joint banking/cultural relationship. The study had commenced six to eight weeks previously and would take a further six weeks or so to complete. Mr Fitzgerald stated that a number of working concepts were being developed which would require full consultation before being finalised. He listed the major issues being addressed as:

- Viability of structural options;
- Cultural development/skills transfer needs for both organisations;
- Investment and ownership by Iwi;
- Priority of development finance versus banking services; and
- Use of the Maori Development Corporation as a possible vehicle to provide development finance and banking services for Maori. (A29)

Mr Fitzgerald presented an illustrative working concept of a development funding and banking vehicle that had been developed by the Westpac/Congress working party. He emphasised that it was one of a number of such working concepts that Westpac had before it and that the feasibility study, when completed, would supply the presently unknown or uncertain factors therein. One such factor was the number of iwi who would provide equity contributions for the vehicle. The working concept assumed that seven iwi would provide capital, a number which, Mr Fitzgerald explained, had been selected to indicate that not all iwi would choose to join.

Another uncertain factor was the total amount of equity contributions required for the development funding and banking vehicle under consideration. The illustrative working concept gave \$80 million as the total amount and assumed a 12% gearing ratio potential, giving the potential for the vehicle to raise \$640 million. When asked by the tribunal whether there was a need for a \$640 million resource for Maori development funding and banking purposes, Mr Fitzgerald responded:

Again, at this stage our initial impressions are yes, but [in] the feasibility study, one of the difficulties we've found is lack of information which is readily available in the market to identify the opportunities, the worth of assets and land holdings. One of the exercises of the feasibility study is to identify what are the opportunities, what are the value of the assets which are there but under-utilised and there is just a great lack of information at the moment and part of the feasibility studies don't address that. I suppose my reaction is yes, there would be opportunities to quickly identify that. (A35:53)

Another feature of the illustrative working concept presented by Mr Fitzgerald was its inclusion of the MDC as a contributor of \$20 million equity. The working concept listed that contribution as deriving from the Crown (\$13 million) and the Maori Trustee (\$7 million). Mr Fitzgerald explained that there had been no discussions with the MDC about this concept and made it plain that there had been no discussions with the Crown either. (A35:49-53)

In response to questions from Crown counsel, Ellen France, Mr Fitzgerald confirmed that the development funding and banking vehicle being investigated had to be a commercial proposition from which Westpac would derive a financial return. Ms France then focused on the working concept's inclusion of only seven iwi equity contributors and asked whether he would describe it as a concept designed to represent all Maori.

Mr Fitzgerald responded that the concept's structure was not designed to represent all Maori and that it had been chosen because of the need for commercial viability. He also said that more iwi would join if the development funding and banking vehicle was both commercially viable and culturally sensitive and that the intention was to gain the participation of as many iwi as possible. He acknowledged that one cultural issue which had yet to be resolved was the question of how to distribute the vehicle's resources, whether through individual iwi or otherwise. (A35:48-49)

Ms France also asked whether Mr Fitzgerald foresaw any difficulties in terms of the reaction of iwi who were not represented in the vehicle. Mr Fitzgerald replied that it was envisaged at this stage that, initially, the iwi who were shareholders in the vehicle would receive most of the funding. He emphasised, however, that the concept was still in the feasibility stage as to whether or not it was commercially viable and indicated that any issue concerning the importance to iwi of ownership or any sense of their being excluded would need to be examined and understood at a later stage. (A35:49)

Ms France then focused on the working concept's inclusion of the Crown as a contributor of equity, through its involvement with the MDC, and asked what would happen if "a little bit further down the line" the Crown chose to exit from the role envisaged by the concept. Mr Fitzgerald replied that from a commercial point of view there may be no difficulty with that but that there were other issues, beyond the scope of Westpac's view, as to whether it was important for the Crown to be involved. On the commercial side, Mr Fitzgerald went on to say that the Crown's involvement in the new vehicle would certainly assist it in terms of standing and would enhance the ability of the vehicle to quickly gather the necessary deposits to gear up. (A35:49-50)

Ms France also asked Mr Fitzgerald whether it would be possible for someone else to come into the MDC, in place of the Crown, and then carry out the sort of proposal contained in the working concept. Highlighting the status of the Crown or of any "large player" providing equity to the new vehicle and thereby assisting it in raising deposits, Mr Fitzgerald acknowledged Ms France's point that an institution other than the Crown might inject further money, beyond its original equity contribution, into the new vehicle. He explained that there were a number of working concepts before Westpac and suggested that in each case they would be assessed for commercial viability on the basis of the Crown being included and on the basis of it being excluded. Mr Fitzgerald also confirmed that it was not envisaged that the Crown would provide any guarantee of the vehicle's operations. (A35:51)

In the working concept, Westpac was envisaged as providing half the equity contribution and Mr Fitzgerald had earlier emphasised that the bank's involvement might very well not be long term. Ms France's final question to Mr Fitzgerald was whether, in the working concept, it was envisaged that the Crown would have the same rights as Westpac. Mr Fitzgerald responded:

I think this is an area in which essentially Westpac doesn't have a view as to whether the Crown should or shouldn't undertake this role but on the assumption that the Crown chose to have involvement quite clearly it would assist the vehicle. Westpac would enter its arrangements with a commercial basis and would be wishing to be free to exit at a future date if that was possible. As to the Crown, whether the Crown comes under a commercial basis or another basis because of a development profile, you would deal with the concepts. It's not critical in terms of this paper. (A35:51)

In response to questions from Ms Ertel, counsel for Te Ika Whenua, Mr Fitzgerald acknowledged that prior to the relationship that had been formed with the National Maori Congress, the specific cultural issues that face bankers and Maori people had not been addressed as strongly as they should have been by Westpac. (A35:51) Ms Ertel then asked whether it was fair to say that mainstream financiers have not been providing culturally appropriate financial facilities to Maori people up to the present time or until quite recently. Mr Fitzgerald responded that he believed that was a fair point and attributed the absence of such facilities to the prohibitive cost involved for

a financial institution in identifying the relevant issues and bringing its staff up to speed. When Ms Ertel then asked whether it was fair to say that, until the liaison with Congress, there were some cultural needs in the market which were not being met by mainstream financiers, Mr Fitzgerald replied that he believed that was true. (A35:52)

2.5 Findings and Recommendations Sought

In the overview of the claim given by Professor Winiata (see chapter 5) it was stated that the claimant sought to stop the sale of the Crown's MDC shareholding and urged the restructuring of the company. (A24:4) At the conclusion of the claim statement, however, under the heading "Remedy", it was submitted:

If the Crown is insistent on selling the shares [or even if it is not insistent²] it holds in the Maori Development Corporation then conditions as to the nature of the sale and as to the uses to which the funds may be put should be prepared following wide consultation with iwi. (A24:18)

This last quoted statement is consistent with the recommendation sought by Russell Feist, counsel for Tuwharetoa Maori Trust Board, in his oral submissions to the tribunal. His written submission stated that the Board:

Supports the claim of **Whata Winiata**, and *seeks a recommendation* that the Crown retain its shareholding in the Maori Development Corporation. (A22)

Mr Feist elaborated orally, however, that the recommendation sought was not that the Crown retain its shareholding forever but that it retain it until such time as an acceptable alternative has been resolved. (Tape of evidence)

References

1. The multiplier applied to capital to assess borrowing potential.
2. This phrase was added orally by Professor Winiata at the hearing.

Appendix 3

The Claim of Te Runanga o Te Ika Whenua

The following is a summary of the arguments made by counsel for Te Ika Whenua and the evidence presented in support of the claim.

3.1 Formation of the MDC

Te Ika Whenua emphasised the background to the formation of the MDC, including the commitment of the government of the day to honouring the Treaty of Waitangi and the proposals of the Hui Taumata for a development decade in which the achievement gap between Maori and Pakeha would be closed by progressively shifting government's negative spending upon Maori into the tribal system. (A18:15-16) It was argued that the Crown's entry to the MDC was inspired by awareness of its Treaty obligations to Maori. (A18:17) But even if the Treaty was not the motivating factor, it was said that the Crown could not thereby avoid its Treaty obligations. The jurisdiction of the Waitangi Tribunal, Ms Ertel submitted, is not confined to acts of the Crown where it intends that the Treaty should apply. (2.15:3)

Rejecting the Crown's argument that its decisions to enter the MDC and to depart from it were made on purely commercial grounds, Ms Ertel contended that the Crown invested in Maori economic development, rather than any other commercial investment, because of the special relationship between the Crown and Maori which derives from and is embodied in the Treaty. The claimant acknowledged the commercial operation of the MDC but, emphasising the failure of mainstream financiers to service Maori clients, concluded that the MDC's commercial focus does not preclude it from being "Maori motivated" and able to fulfil the Crown's Treaty obligations. (2.15:2-3) In response to the Crown's suggestion that there is nothing to distinguish it from the original corporate shareholders in the MDC, all of whom have since sold their shares, the claimant observed that the Crown alone signed the Treaty of Waitangi and is encumbered with Treaty obligations. (2.17:3-4)

In sharp contrast to the other claimant group which appeared before the tribunal, Te Ika Whenua's view is that the source of the funds used to purchase the Crown shareholding in the MDC is immaterial. (2.15:5) Because the basis of this claim is that the Crown has a Treaty obligation to promote the economic development of Maori and the Crown's involvement in the MDC should be assessed in those terms, Te Ika Whenua also maintain that it is immaterial that the Crown originally advanced its contribution to the MDC by way of a loan which was later converted to shares. In response to the Crown's argument that the commercial manner in which it entered

the MDC is to be distinguished from the grant made to establish the Poutama Trust and that only the latter evidences the Crown's achievement of social objectives, Ms Ertel submitted that it was unacceptable to argue that grants are the only method by which the Crown can meet its Treaty obligations. (2.17:3)

3.2 The Treaty of Waitangi

A summary of the claimant's view of the Treaty issues relevant to the claim was provided in counsel's closing submissions:

- (a) The Crown has an obligation arising from the Treaty to foster and promote Maori economic development.
- (b) The Crown has an obligation arising from the Treaty to consult with Maori on issues of major significance.
- (c) The Crown has a fiduciary duty to Maori which includes the obligation to act in the best interests of Maori.
- (d) A right of development is a human right and one inherent in the Treaty of Waitangi.
- (e) Maori as the other Treaty partner should not be left to the whim of the administrative fiat in the context of the sale process and the application of the proceeds and future commitment by the Crown to Maori economic development. (2.17:2)

Ms Ertel made detailed argument upon the rights and obligations flowing from the Treaty. Her principal argument is that Articles 2 and 3 guarantee the right of iwi, hapu and whanau to economic development in a manner consistent with Maori customs and preferences and that the Crown has a duty to actively protect and promote that development. (A18:4-11)

In general support of this Treaty duty, counsel for the claimant invoked the tribunal's own statement that the Crown's Article 1 right to govern, its right of kawanatanga, is not absolute:

It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Maori land but of much more, including fisheries.

Rangatiratanga was confirmed and guaranteed by the Queen in Article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga - mana Maori - in terms of Article 2.

The Crown in obtaining the cession of sovereignty under the Treaty therefore

obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired was a qualified right. (A18:22-23)¹

Ms Ertel also relied upon the judicially recognised Treaty partnership principle and the resulting fiduciary duty that has been held to constrain the Crown's exercise of its governmental powers.² While acknowledging that judicial statements to date have focused on the Crown's fiduciary duty to actively protect Maori people in the use of their lands and waters, counsel argued that since the Treaty has a commercial component and does not deal solely with land and fisheries, it is logical that the Crown's duty should apply equally to Maori economic activity.

In support, she submitted that the Supreme Court of Canada has recognised a general principle, arising from the legal doctrine of aboriginal title, that the Crown has a fiduciary duty with respect to aboriginal peoples.³ Such a broadly framed duty would find even stronger roots in the Treaty of Waitangi, Ms Ertel argued, because the Treaty was an express "transaction" for sovereignty containing Crown promises of protection. Moreover, if the Crown's fiduciary duty did not apply to Maori economic activity, an unwarranted distinction would be created between the Treaty rights of Maori and the rights flowing to aboriginal peoples from the doctrine of aboriginal title. (A18:19-22)

In further support of a Treaty duty to promote Maori economic development, it was argued that the right to economic development is a human right, recognised by the United Nations General Assembly and supported by New Zealand, and that the Treaty includes or must be interpreted in light of human rights norms. (A18:10) Reliance was also placed upon statements made by this tribunal in the 1988 *Muriwhenua Fishing Report*, including the following passage which is couched in both Treaty and human rights terms:

A Treaty that denied a development right to Maori would not have been signed.

It is the inherent right of all people to develop and progress in all areas. No one has seriously suggested that Maori could not develop their lands on Western lines and sell the produce of their industry.

The Treaty envisaged that Maori would gain greater development opportunities from settlement and access to new markets. (A18:10)⁴

It was also argued that the principle that the Crown must redress past and continuing breaches of the Treaty is relevant in the present context. Attention was focused on the Waitangi Tribunal's previous findings of breaches of Article 2's guarantee of tino rangatiratanga and its conclusion that these have caused adverse economic, social and cultural impacts on the Maori nation. (A18:12) Further, it was submitted that the Treaty's Article 3 guarantee to Maori, of royal protection and the rights and privileges of British subjects, gives rise to an obligation upon the Crown to ensure equity of outcome between Maori and Pakeha which, if not achieved, gives rise to

a right of redress. (2.17:4)

Finally, counsel for the claimant relied upon the Crown's duty to consult with its Treaty partner, arguing that consultation was required upon the important matter of how the Crown should actively protect and promote Maori economic development. A Memorandum prepared for a Cabinet meeting early in 1987 by the then Minister of State Services was relied upon as evidence of the Crown's acknowledgement that consultation is imperative upon issues of such magnitude as Maori development. (A18:28 referring to A1:40-41) Observing that the Court of Appeal in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665 rejected as elusive and unworkable the concept of a detailed or unqualified duty to consult, Ms Ertel maintained nevertheless that consultation was necessary in the present situation where the seriously disadvantaged economic position of Maori would be aggravated by the Crown's proposed sale of its MDC shareholding. (A18:27-28)

On the general matter of the standard of protection required by the Crown to discharge its Treaty duties, counsel referred to a letter written in 1845 by the Secretary of State for the Colonies, Lord Stanley, to the newly appointed Governor Grey, quoted by the tribunal in its *Orakei Report*. There, in the name of the Queen, Lord Stanley firmly denied any notion that treaties entered into by Her Majesty were "a mere blind to amuse and deceive ignorant savages" and instructed the Governor to "honourably and scrupulously fulfil the conditions of the Treaty of Waitangi." Counsel submitted that the Crown remains bound to this standard of performance of its Treaty duties. (A18:23-24)

3.3 Alleged Breaches of the Treaty and Prejudice to the Claimant

A summary of the Treaty breaches alleged by the Te Ika Whenua, and an indication of the prejudice this group of claimants claim to have suffered thereby, was provided in counsel's closing submissions:

- (a) The Crown has an obligation pursuant to Article II to ensure the unimpeded exercise by Maori of rangatiratanga. This necessarily includes a right of development. Maori have not enjoyed the level of development that they should have and this is directly attributable to breaches of Articles II and III of the Treaty. These breaches require remedy. While more is needed, MDC was one way of delivering remedy.
- (b) The Crown has an obligation pursuant to Article III of the Treaty to ensure equity of outcome between Maori and Pakeha. The Crown acknowledges that Maori suffer from an achievement gap. Gwenda Paul's evidence (document A15) presents material showing that the achievement gap still exists today. This requires redress, one of the methods of redress being employed is MDC. It is submitted, that to redress Treaty breaches (even if only in part) is consistent with the Treaty. To stop redressing is obviously contrary to the Treaty. This is the position the Crown finds itself in.

- (c) The Crown has an obligation to provide appropriate ways to meet its obligations under the Treaty. This position is supported by Dr Robert Mahuta, one of the Crown's witnesses (see Document A35 pages 8-9).
- (d) The Crown has an obligation to consult its Treaty partner on major issues (The SOE case). (2.17:4-5)

It merits emphasis that, at the heart of Te Ika Whenua's allegations that the proposed sale of the Crown's shareholding in the MDC will breach the Treaty of Waitangi, is their view that the Crown's involvement in the company is a measure by which the Crown discharges its Treaty duties to promote and actively protect Maori economic development and to redress past Treaty breaches. Importantly however, Te Ika Whenua do not assert that the Crown must retain its MDC shareholding in order to continue acting consistently with the Treaty. The basis of the claimant's allegations of Treaty breach is that the Crown's proposal to sell its MDC shares is being pursued in isolation, without a commitment to a pre-arranged mechanism to take the place of the Crown's shareholding.

It is the absence of such a replacement mechanism that will, it is alleged, cause the claimant to suffer two major prejudices. First, the "disappearance" of the MDC share sale proceeds into the Consolidated Fund will cause a net diminution in the Crown's involvement in Maori economic development. (2.15:6) Secondly, Te Ika Whenua will be particularly adversely affected by the loss of a "market Treaty delivery mechanism" providing development funds to Maori because, it was said, their economic position is dire and they have not accessed MDC funds to date. (A18:29)

In elaborating the nature of this latter prejudice, counsel stated that upon the sale of the Crown's MDC shares, the company will "lose its Treaty component, which is contingent on and attaches to the Crown-Maori relationship". (2.17:6) Regardless of who might purchase the Crown's shares then, the claimant's argument is that the Treaty partnership aspect of the MDC's operations will be destroyed by the sale. Since, the claimant argues, this will occur at a time when Maori economic development is still lagging, the need remains for a Treaty-based market mechanism such as the MDC.⁵ As a result, the Crown's proposal to sell in the absence of a commitment to a pre-arranged replacement vehicle will breach all of the Treaty duties posited by claimant's counsel.

A third prejudice which it was alleged the claimant could suffer, although less emphasis was placed upon it, arises from the claimant's view that the Maori Trustee's shareholding in the MDC is connected to that of the Crown. As has been stated earlier, the Crown owns 13 million of the MDC's 26,000,004 shares and the Maori Trustee owns 7,000,004. The claimant argued that, together, the shareholdings of the Crown and Maori Trustee represent a considerable majority within the MDC and that the sale of the Crown's shares might reduce the Maori Trustee's control and his ability to ensure the best return on the investments made

by the company. Further, if the MDC was to collapse or have its assets stripped, any resultant loss to shareholders would be felt by the Maori Trustee and thus by Te Ika Whenua as his beneficiaries. (A18:31) Maanu Paul elaborated upon this last point when he stated that the Waiariki District, of which Te Ika Whenua is part, has been a significant contributor to the Maori Trustee's funds. (A19:2)

Rejecting the Crown's submission that the claimant's arguments amounted to a request that the tribunal dictate how the Crown should spend its money, counsel explained that Te Ika Whenua do not argue that there is a Treaty principle requiring the provision of cash for Maori business. Rather, they seek the tribunal to confirm that there is a Crown duty to actively promote Maori economic development. Such a duty, it was said, might be discharged by means of a raft of facilities available to the Crown. (2.15:6) Counsel also rejected any suggestion that the role of Te Puni Kokiri in relation to Maori development sufficed to discharge the Crown's Treaty obligations. It was said that the role of that government agency does not answer the claimant's point that the Crown's net involvement in Maori development will be diminished by the sale of the Crown's MDC shares and, further, that Te Puni Kokiri does not and cannot deliver funds in the Treaty-based, market manner which characterises the MDC's operations. (2.17:5)

As well, counsel rejected the Crown's assertion that it is up to it how it meets its Treaty obligations. Observing that the Treaty is a compact between two parties, Ms Ertel recalled her earlier argument that the Crown's freedom to govern is constrained by the need for compliance with the whole of the Treaty. The Crown could not therefore govern in a manner which amounted to a unilateral exercise of its Article 1 powers to the detriment of Articles 2 and 3. (2.15:6-7)

3.4 Findings and Recommendations Sought

The recommendations and findings sought by Te Ika Whenua are set out in counsel's opening submissions:

Negotiation, in the true spirit of the Treaty, between the Crown and Maori is imperative so that solutions can be developed which are consistent with the Treaty. In the context of this urgent hearing recommendations are required that inform the Crown of its obligations to Maori of development and the restoration of tino rangatiratanga. Such recommendations require findings that:

- (a) The Crown has an active duty to protect the claimants' interests pursuant to the Treaty of Waitangi and that it has failed to discharge that duty.
- (b) Material Crown actions, to date, have prima facie not scrupulously adhered to the principles of the Treaty of Waitangi.
- (c) The Treaty embodies obligations on the Crown which include, in today's context, an obligation to provide appropriate mechanisms to service economic development

Waitangi Tribunal Reports

to Maori as a specific group.

- (d) The Crown's sale of its MDC shares signifies a withdrawal from its obligations to Maori development and is therefore in breach of the Treaty.
- (e) A pre-arranged replacement development vehicle is required if breach is to be avoided.
- (f) If any replacement vehicle is to be effective consultation with iwi Maori is required. (A18:33-34)

References

1. *Report of the Waitangi Tribunal on the Ngai Tahu Sea Fisheries Claim* (Wai 27), (Brooker & Friend 1992), p 269
2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 per Cooke P
3. *R v Sparrow* [1990] 70 DLR 385, 408 per Dickson CJ and La Forest J
4. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22), (Waitangi Tribunal, Wellington 1988) p 235
5. The evidence of Mrs Paul focused on the disadvantaged position of Maori compared with other New Zealanders in the areas of education and housing (A15)

Appendix 4

The Crown's Response

The Crown's submissions were made under three major headings, which will be summarised in turn below: Establishment of the MDC, Nature of the Asset, and The Sales Process.

4.1 Establishment of the MDC

Referring to a chronological list of events and documents (A30:appendix) covering the period during which it was decided to establish the MDC through to the filing of the present claims, Ms France first emphasised that the Crown's investment in the MDC was a commercial one. She highlighted the fact that in February 1987, when Cabinet approved the establishment of a Maori Resource Development Corporation in conjunction with the Maori Trustee, it was agreed that the Corporation should have a fully commercial orientation except in the role of packaging and managing selected commercial projects, which role was to be separately funded by an annual appropriation from Vote: Maori Affairs. It was also agreed at that time that additional shareholding from other sources should be further considered and, in March 1987, Cabinet endorsed the canvassing of investment support from private sector corporations. (A30:3-4; A1:109-112)

By June 1987, when Cabinet again considered the matter, there had been significant changes, apparently due to discussions with private sector individuals and organisations, in the way in which the MDC was to be established and as to its funding. Crown counsel drew attention to three significant changes which Cabinet agreed to in June. First, it agreed that the government's contribution was to be \$13 million cash rather than \$8 million cash and \$5 million in the form of business lending debt transferred into equity. Secondly, it agreed that any private sector participation could be additional to the government/Maori Trustee contributions, thus increasing the size of the organisation. Thirdly, the concept emerged of a trust with a cash grant of \$10 million, replacing the original proposal to fund the non-commercial aspects of the Corporation's activities by means of annual subsidies. (A30:4; A1:119,115)

Citing the views of officials advising the government at the time, the conditions upon which Cabinet agreed to lend \$13 million to the MDC until such time as the Crown was able to become a shareholder, the terms of the Deed of Agreement which recorded those conditions, and the priority accorded to the legislation which enabled the Crown to hold MDC shares, Crown counsel submitted that the commercial

approach of the Crown was evident throughout. (A30:5-7; A1:129-130) Acknowledging the backdrop to the government's decision to invest in the MDC, provided by the Hui Taumata and the views of the Maori Economic Development Commission and people such as Professor Winiata, Crown counsel stressed the wealth of other advice received by the government and stated:

However, after taking into account all of the advice received, Executive government in making its decisions on the matter agreed to make an investment on a commercial basis in a commercial organisation. (A30:8)

Five key features of the establishment of the MDC, it was said, reflect the commercial nature of the Crown's investment and reveal that the facts do not support the claim that the Crown is, by withdrawing from the company, failing to honour the terms of understanding on which its investment was made. (A30:8,9)

First, the contribution to the MDC was in cash, not as a grant but as a loan, a situation which is to be contrasted with the Crown's grant of \$10 million to the Poutama Trust. Describing the Poutama Trust as a social vehicle, Crown counsel said it:

... can be seen as the means by which the Crown achieved what may be termed its social objectives. (A30:8)

Acknowledging that the Crown loan of \$13 million was unsecured, Ms France drew attention to the manner in which the deed of agreement ensured protection for the Crown's interest, such as requiring the provision of information about the MDC and the payment of interest equivalent to any dividends. (A30:8)

Secondly, the Crown's intention from the outset was that its investment would be by way of shares and there was concern from the outset to ensure that the Crown had the protections of a shareholder. The significance of this, Crown counsel stated, is that the Crown expected a return and, she noted, the MDC paid dividends to the Crown in the last financial year. Again, Crown counsel contrasted this situation with the grant made to establish the Poutama Trust. (A30:8-9)

The Crown's witness Dr Robert Mahuta, Chairman of the MDC, also drew a distinction between the grant made to establish the Poutama Trust and the loan made to establish the MDC. In response to questions from the tribunal, Dr Mahuta confirmed that the Poutama Trust money is non-returnable so that, in his words, it belongs to Maori yet to be identified. (A35:11-12) When questioned about his evidence of two hui in April and May 1993 (after the Crown had announced its decision to sell its MDC shares) and the decision taken by the eleven Maori authorities present at the latter hui to support a consortium to purchase the Crown's MDC shares, Dr Mahuta implied that just as he did not question the commercial nature of the proposed sale, neither did those authorities. He stated that the argument that the shares might belong to Maori, while being raised before the tribunal, is not

part of the commercial aspects of the transaction. (A35:11-12)

When asked for his view of the notion that the Crown's shares should, by some other mechanism than the proposed sale process, become the non-returnable property of Maori, Dr Mahuta replied:

No, I don't think that would find credibility in the commercial world. With respect, there is bigger fish in the sea than MDC that we should be trying to hook. MDC what it does it gives a vehicle to operate successfully in the commercial world without having all those other fish hooks besides it. All I'm saying is that my understanding is that is the way the government wanted to get rid of its shares and I accept that and am in support of it. My short answer is that it should be sold because I don't think that's where the argument is, with MDC. (A35:13)

In response to further questions from the tribunal, Dr Mahuta stated that the income from the Poutama Trust derived from the interest on its \$10 million grant and that he thought that its income would be improved if the Trust bought out the government's shares in the MDC. (A35:13-14)

In her closing submissions, Crown counsel challenged the evidential value of a statement relevant to this matter that was reported to have been made by a former Maori Trustee, Bruce Robinson, to tribunal-commissioned researchers Graham Butterworth and Susan Butterworth. The evidence of Mr and Mrs Butterworth stated that Mr Robinson had expected the Crown to withdraw from the MDC at an "appropriate time" and had hoped there would be some "element of gift" about its withdrawal. (A16:20) Crown counsel observed that there was no evidence to suggest that Mr Robinson's hope was any more than the view of one official at the time yet the Crown makes decisions taking into account the advice of a wide range of persons. She also drew attention to the limited document base available to Mr and Mrs Butterworth in compiling their report and the limited time in which they had completed it, reiterating the request she had made at the hearing that the tribunal give the evidence of Mr and Mrs Butterworth appropriate weight in light of those factors. Crown counsel also challenged the value of the opinion of Mr Butterworth, given in response to a question by counsel for Te Ika Whenua, that it was not an appropriate time for the Crown to withdraw from the MDC. Crown counsel submitted that the witness did not have the expertise to comment on that matter. (2.16:2-3)

Thirdly, the MDC was set up as a public limited liability company and not, for example, an SOE. (A30:9 citing A1:146-147)

Fourthly, the investment by way of shares, which are tradeable commodities, also reflects the fact that it was not necessarily to be permanent. Dr Mahuta stated in evidence that he understood that the Crown had not intended to be a longterm shareholder and the Crown restated that in its March 1993 announcement offering its shares for sale. (A30:9)

Fifthly, the commerciality of the MDC is highlighted by the initial participation of private sector shareholders Fletcher Challenge and Brierley Investments. (A30:9)

Crown counsel then made three points in reply to Professor Winiata's submissions and evidence relating to the source of funding for the Crown's investment in the MDC.

First, she said that the \$13 million contribution was new money, as is apparent from the appropriation to Vote: Maori Affairs of \$15,500,000 in the supplementary estimates for the year ended 31 March 1988. (A30:9,7)

Secondly, Crown counsel argued that, in any event, it is not correct in terms of the Crown's accounting practices and conventions to refer to money being "diverted" from one area to another because decisions about funding are taken on an individual basis. Noting that the \$807,000 allocated to business lending in Vote: Maori Affairs for the year ended 31 March 1987 was funds used to provide loans for Maori businesses, Ms France stated that that was an annual appropriation and there was no guarantee of the same amount being appropriated in any other year. (A30:10) In her closing submissions, Crown counsel made an additional comment on the point made by the claimants that the capitalisation of the \$807,000 over ten years reflected a commitment by the Crown to ongoing investment for Maori commercial activities:

It is also relevant that ultimately the contribution was by way of cash which may indicate that the capitalisation approach was not ultimately used. The establishment of the Poutama Trust is also relevant to this. [emphasis in original] (2.16:3)

Thirdly, it was submitted that the Maori Trustee's involvement in the MDC is irrelevant to the issues at stake because the claim does not relate to the sale of his shares and he is, in any event, an independent statutory officer. Observing that the claimants had not suggested that the sale of the Crown's shares would impact on any other shareholder, nor that the earlier sales of MDC shares, by Brierley Investments for example, had affected the Maori Trustee, Crown counsel stated that it was difficult to see why the sale of the Crown's shares should impact on the shareholding of a completely independent shareholder. (A30:10)

Concluding this section of her submissions, Ms France focused on the fact that the Crown, with 49.9% of MDC's shares, is not a majority shareholder who can dictate the company's actions. She argued that it is unimportant who owns shares in the MDC because it is the results achieved by the company which are at issue. The claim, however, in assuming that the MDC would not continue to provide the funding that it does now, appeared to pre-empt subsequent actions by the company, which was at best an exercise in speculation. Summarising the Crown's position, Ms France stated:

The Crown's investment can be seen as providing a "kick start" to Maori development. Now that the MDC is in the position that it is, it can operate without

that investment. The sale can be seen as providing Maori with the opportunity to have greater control over the MDC and of moving from a "do it for us" mentality to a "do it for ourselves" mentality. (A30:11)

In closing submissions, Crown counsel elaborated this point in response to Professor Winiata's focus on the MDC's operations and upon how its approach might be altered. Ms France submitted that this is not a matter within the jurisdiction of the Waitangi Tribunal because its jurisdiction relates to actions of the Crown and culminates, in a successful claim, in recommendations to the Crown. She emphasised that the MDC is a limited liability company under the Companies Act 1955 and that the Crown is simply one shareholder and not even a majority shareholder. In other words, she stated, Professor Winiata's concern is not a matter which the Crown can do anything about. In the words of Ms France:

It is submitted that it would be outside of the Tribunal's jurisdiction to make any recommendations on the direction of the MDC and it would certainly be unwise to do that on the basis of the evidence provided. A commercial study would need to be undertaken by the Board of the MDC - not by the Crown. (2.16:4)

The Crown's witness Dr Mahuta, while stressing throughout his evidence the commercial nature of the Crown's investment in the MDC and the sale of its shares, nevertheless acknowledged that he understood the Crown's decision to invest in the Corporation to be based on its Treaty obligations. Having explained his view that, from the outset, the various Ministers of Maori Affairs did not see themselves as long term shareholders, Dr Mahuta suggested that just as the private corporate shareholders had left the MDC when they felt they had done as much as they could, so too the Crown now wanted to leave. He also indicated, however, that the Crown was nervous of the direction that the MDC had been taking in recent years, explaining that the decisions taken by the company may have been too commercial and insufficiently conservative for the Crown. (A35:9)

As Dr Mahuta had drawn an analogy between the private corporate shareholders' reasons for leaving the MDC and the Crown's reasons, the tribunal asked whether it was his understanding that the Crown's involvement in the Corporation was not based on the Treaty. Dr Mahuta responded:

No, I'm not saying that. I think in this aspect of it, initially it was based on the Treaty obligation but as people grow up then you can cut the apron strings so that they can grow up and make their own decisions. But there are still other functions that need to be performed by the Crown in order to fulfil its Treaty obligations. One of those is of course still this huge development gap that I have referred to. The view, and if I could be so bold as to say, what I think the Crown is thinking, is that to some, MDC has grown up in the commercial world and therefore did not need the Crown's presence there. (A35:9-10)

When questioned further by the tribunal as to whether the Crown wanted to leave

the MDC because it thought the company had grown up or because the company was doing things which the Crown did not want it to, Dr Mahuta replied:

Well that's normally part of the process of growing up - you do things that your parents don't normally like you to do. With respect, a bit of both probably but I think growing up was the critical factor and I believe that too I think we'd acquired enough expertise. Certainly it requires still much more support within the Maori world but I think the expertise and the track record is there to move forward.
(A35:10)

Also relevant is Dr Mahuta's answers to questions put by counsel for Te Ika Whenua, Ms Ertel, about his view of the Crown's obligation to deliver development funding to Maori. Having explained that his own iwi, Tainui, did not accept Mana funding because the manner of its delivery was thought to be inappropriate, Dr Mahuta agreed with Ms Ertel's proposition that the Crown still has an obligation to try to find an appropriate way to deliver funds to Tainui. He then added:

But to Maoridom generally too. That's a big gap that was left there after the Hui Taumata and with the establishment of the Maori Development Corporation - was the development funding. (A35:9)

In response to Ms Ertel's next question, Dr Mahuta stated that he thought the Crown's obligation, to provide development funding to Maori generally, arises from the Treaty of Waitangi. (A35:9)

4.2 Nature of the Asset

Under this head the Crown submitted that, because it is a commercial transaction, there is no justification for looking at the Crown's conduct in connection with the MDC in terms of the principles of the Treaty. But even if it were assumed, for the sake of argument, that Treaty principles were relevant, Crown counsel argued that the claimants could not establish any prejudice resulting from the Crown's actions.

One reason that there was no such prejudice to the claimants, it was stated, was that the asset at stake is money which, unlike land, is substitutable. Because the Crown is always solvent and can use other money to meet any of its obligations, no question arises of the need to use the particular \$13 million invested in the MDC to redress any Treaty breaches. Further, it was submitted that there is no Treaty principle requiring the Crown to provide cash for Maori business: any obligations which the Crown may have in relation to Maori economic development can be met in a variety of ways, such as the provision of expertise or advice or by making particular facilities available. Accordingly, Crown counsel submitted that the present situation is more akin to that which arose in the broadcasting assets case, *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576.

Attention was drawn to a passage in the judgment of Justice McKay in the

broadcasting case where a distinction was drawn between the situation before the Court and the earlier lands case between the same parties, where the asset which the Crown was proposing to transfer was itself subject to Treaty claims. After noting that the Crown was committed, prior to transferring its broadcasting assets, to entering contractual arrangements with the transferees that would guarantee access for Maori broadcasters to the transmission and production facilities, Justice McKay said:

Even apart from such contractual arrangements, the particular assets are not essential for Maori broadcasts. They are substitutable, at least to the extent that funds are made available (A30:11)¹

Further, Crown counsel submitted that it is up to the Crown how it meets Treaty obligations where the decision involves the allocation of resources. Referring to a suggestion by counsel for Te Ika Whenua that redress of relevant Treaty breaches requires the Crown to make equity finance available to Maori, Ms France stated that it is unacceptable to the Crown that the claimants should seek recommendations from the tribunal as to how the Crown should spend its money.

The Crown also disagreed with those claimants' proposition that, because of the Crown's Treaty obligations, the basis on which the MDC was established was irrelevant. Recalling Dr Mahuta's statement that the tribunal cannot do everything, Crown counsel said that it was not for the tribunal to determine the way in which the Crown allocates funds between taxpayers. Moreover, it was said, the claimants would not suffer or be likely to suffer prejudice before two decisions had been made: the Crown's decision to accept a particular offer and its decision as to how to utilise the proceeds of the sale. Crown counsel observed that it was open to the Crown to consult with Maori over either of those two decisions. (A30:12)

In further support of the submission that, even if Treaty principles were relevant, the claimants could not establish any prejudice caused to them, Crown counsel relied on the Crown's Article 1 right of *kawanatanga*. She argued that the Crown's decision to offer its shares for sale is a valid exercise of *kawanatanga* and noted that it is established government policy to avoid devoting taxpayer resources to commercial enterprise. (A30:12)

The Crown's witness Richard Shallcrass, Advisor on Commercial Relations for the Industries Branch of the Treasury, confirmed this latter point in reply to a question from Ms Ertel as to why the Crown had decided to sell its MDC shares. He stated:

The governments in recent years have followed a policy of selling investments in commercial businesses because of the risks which result for the Crown's balance sheet. In investing in commercial businesses government has a policy of focusing its resources in areas of core activity, welfare, education, training and such matters and it has sought to dispose of its shares in commercial businesses. (A35:35)

Mr Shallcrass stated further, in response to Ms Ertel, that meeting its obligations under the Treaty is a core activity of the Crown. (A35:37)

Before concluding this section of her submissions, Crown counsel quoted from the President of the Court of Appeal Sir Robin Cooke's judgment in the lands case:

The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try to shackle the Government unreasonably would itself be inconsistent with those principles.²

Ms France submitted that if the Crown were not able to make the decision that it should no longer be investing in the MDC, it would have far reaching implications on the ability of governments to make decisions in the best interests of all New Zealanders. (A30:13)

4.3 The Sales Process

In a memorandum which the tribunal directed the Crown to file prior to the 3 June chambers conference, Crown counsel supplied a summary of events leading up to the Crown's decision to offer its MDC shares for sale. She stated that since February 1992 there has been correspondence from parties interested in purchasing the Crown's shares. Specifically, the National Maori Congress wrote to the Minister of Finance on 11 February 1992 and 2 October 1992 advising of its interest in acquiring the Crown's shareholding. Further, on 22 July 1992 an expression of interest was received from the Tainui Maori Trust Board and the Proprietors of Taharoa C Block. Those last mentioned bodies then submitted an offer on 26 August 1992.

Crown counsel said that the Minister's consistent response was to note that no decisions had been made as to the future objectives, if any, that the Crown considered it should achieve through its MDC shareholding but that the Crown was always open to questioning whether or not its shareholding in organisations such as the MDC continued to meet its objectives.

In March 1993, she continued, a second offer for the Crown's shares was received from the Tainui Maori Trust Board and the Proprietors of Taharoa C Block. In response, the Crown advised that Ministers were considering the matter but had yet to make a decision. Towards the end of March 1993, the Ministers of Finance and Maori Affairs took the issue of their MDC shareholding to Cabinet. It was Crown counsel's understanding that the Ministers had four options: not to sell, accept the current offer, negotiate with the offerors or offer the Crown's shareholding for sale in an open and contestable manner.

On 29 March 1993, Cabinet agreed to proceed with the last option and announced its decision on 31 March. The Treasury, which was directed to manage the sale on

behalf of the government, then appointed Southpac as its commercial advisor in the sales process. The press release announcing that appointment was distributed to, amongst others, some 26 Maori media organisations. (2.5:2-3)

Crown counsel said that the Board of the MDC has been consulted on the sales process and on the manner of the sale and that discussions with the Board are ongoing. The sales process, she advised, commenced with an advertisement inviting expressions of interest by 28 May 1993. It may be noted that it was the claimants who pointed out that the advertisement was first published on 21 May, one week before the advertised closing date for expressions of interest. (A24:3) The Crown, however, explained that the closing date had been extended and that, as at the date of hearing, it remained possible for parties who had not registered an expression of interest by 28 May to do so and become involved in the process. (2.5:4)³

It was explained that following the receipt of expressions of interest, an information memorandum will be sent to those parties who have expressed an interest in the sale. They will be required to first satisfy the Crown that they have the financial capacity to complete the transaction and, it was said, in this regard the sales process has been designed to encourage and facilitate Maori involvement. In particular, the Crown has agreed to consider offers for parcels of its shares as small as 5%, a figure which has been reached taking cognisance of the average size of Maori entities.⁴

Following the despatch of the information memorandum, due diligence will be carried out and any information requests from bidders dealt with. Then any necessary supplementary information will be circulated before the submission of binding bids. Once parties have submitted their final bids, a report will be prepared for Cabinet's consideration and Cabinet will make the final sale decision. (2.5:4-5)

Crown counsel added that she understands that the Treasury and Southpac have been cognisant that the most logical purchasers of the Crown's shares are Maori parties and that part of the sales process will involve a letter, informing of the opportunity to purchase the shares, being sent to all of the 350 entities listed on the current database held by the Federation of Maori Authorities. She noted that as at 26 May 1993, 6 expressions of interest had been received, including one from the National Maori Congress. (2.5:5)

Ms France gave two reasons for her submission that it was reasonable for the Crown to follow the sales process it has adopted. First, because of the commercial nature of the investment, the sales process would be compromised if the Crown had consulted with Maori about its decision to offer the shares for sale. Noting that some of those who may have been consulted would be prospective bidders, Crown counsel said that the process adopted removed the potential for conflict of interest.

Secondly, Ms France highlighted the Crown's acknowledgement that the likely purchaser will be a Maori party or parties and the efforts made to ensure Maori

participation in the sales process. These included the efforts made to communicate the Crown's decision to sell to Maori, the Crown's agreement to consider offers for parcels of its shares as small as 5% and the more relaxed than usual time frame that has been adopted. (A30:13-14)

Defending the decision to offer the shares for sale under an open competitive process, it was said that this reflected the realities of the commercial world in which the MDC operates and conforms to the government's policies. Further:

It would be difficult to justify selecting a buyer for the Crown's shares where there was not an equal opportunity for all parties to participate in the process. The price finally achieved would be discounted and therefore difficult for the government to defend. (A30:14)

Rejecting the claimants' arguments about the need for consultation, the Crown maintained that this situation was of the type envisaged by Justice Richardson in the lands case ([1987] 1 NZLR 641, 683) where consultation was not necessary before the Crown can be informed of the relevant facts so as to make an informed decision. It was observed that the sales process involves discussions with any interested party and, if requested, officials would explain to any such party the commercial nature of the process and the framework in which the shares are being offered for sale. (A30:14-15)

Also rejecting the claimants' suggestion that it is a Treaty breach to treat with one iwi before another, the Crown replied that it will have to do this on a number of occasions for practical reasons. (A30:14-15)

Dr Mahuta elaborated upon the proposed sale process both in his brief of evidence and in response to questions from counsel. He first stated that he is not only Chairman of the MDC but also of the Tainui Maori Trust Board and Taharoa C Block management committee. Accordingly, he had declared those other positions to the Crown and had stood aside from the process regarding the Tainui/Taharoa interest in the Crown's shares so as not to influence the outcome of a sale. (A23:2) Dr Mahuta also stated that he had advised the other directors, and management, of the MDC, to declare any conflicts they may have and to refrain from any course of action which would cause a conflict of interest. (A23:5)

Commenting upon the proposed sale process, Dr Mahuta said that as the Crown is a shareholder in the MDC and he is its Chairman, he has a duty to the Crown and the company to ensure that the Crown receives the best price for its shares. In his view, the sale being by public tender means that all Maori can participate and that there is no possibility of settling with some tribes ahead of others. (A23:3)

Professor Winiata challenged Dr Mahuta's view in cross-examination. In reply to earlier questions put by Professor Winiata, Dr Mahuta had stated that in the course

of the MDC's efforts to attract investment by consortia, the company canvassed all potential Maori investors, who he defined as those who had both the authority and the capacity to participate. Dr Mahuta then said that, in the market place, investors select themselves by their ability to make quick decisions and to "front" with their contribution. He added:

But I guess the sad thing about it is that in the main, it seems to be the same groups selecting themselves. Those who are disadvantaged tend to remain disadvantaged and that's something that we have to address. (A35:4)

Professor Winiata took up this point when he asked Dr Mahuta to comment on whether the Crown needs to look at how to reduce the disadvantage to those who are unable to participate in the purchase of its MDC shares. Specifically, Professor Winiata asked for Dr Mahuta's comment on whether the Crown should suggest some process of distribution of its shares other than by price. (A35:5) Dr Mahuta's reply emphasised the availability of Mana funding to all iwi, with the exception of his own which would not sign the requisite contract for its receipt. He said that he understood \$15 to \$20 million had gone from the Crown to iwi by means of Mana funding and that, therefore, they had the capacity to put some capital together in the form of a consortium to purchase MDC shares if they chose and if that was their priority. (A35:6)

Professor Winiata then stated that there is at least one other iwi, represented before the tribunal, which did not sign the contract entitling receipt of Mana funds and which is disadvantaged. He asked again whether price is a sufficient mechanism to allocate surplus value when there were iwi unable to participate. Dr Mahuta replied that, although that was not his understanding of the funds held within Maoridom:

... there might be a special case for that one but I don't think it applies generally across the board. (A35:6)

Earlier, Dr Mahuta had accepted the proposition, put to him by Professor Winiata, that he would expect there to be a number of competitors rather than a monopoly on the tendering side if the market is to be relied on to set the true price of the Crown's MDC shares. (A35:5) Professor Winiata later asked whether Dr Mahuta would say that, given that there is surplus value and that the MDC is a pan-iwi Maori organisation, some provision ought to be made for that. Dr Mahuta's reply and the following exchange between Professor Winiata and Dr Mahuta was:

Mahuta: As a commercial transaction, the provision has been made, you have to put some cash up. It's not a commercial transaction if you get it for nothing.

Winiata: I think that's a pretty good commercial transaction. All I'm saying is that where there is an iwi and let's say there was only one and that where there is not a competitive market, the sale of the shares and the surplus value then is present. Does the market mechanism cope with that?

Maori Development Corporation

Mahuta: The competitive market we are talking about, I hope, is essentially between Maori bidders. I believe that it should go to Maori. It is a Maori Development Corporation, it should remain so and the only competitiveness is going to remain amongst the Maori bidders themselves who should get together and make one collective bid. (A35:6-7)

In his evidence, Dr Mahuta had referred to the support given by eleven Maori authorities, at a hui in May 1993, for a bid for the Crown's MDC shares by a consortium of Maori authorities.⁵ He stated that the objective of those authorities, who believe it is timely for the Crown to sell its shares, is to enable widespread participation by Maori based organisations in the consortium. He added that the opportunity for such participation is still available. (A23:5)

Ms Ertel, counsel for Te Ika Whenua, asked Dr Mahuta in cross-examination whether, in his view, it is inconsistent with the principles of the Treaty for a consortium to purchase the Crown's MDC shares. Dr Mahuta replied:

No, it's a commercial proposition. The Treaty has nothing to do with it in my view. (A35:3)

In the course of re-examination by Crown counsel, Ms France, Dr Mahuta stated that he saw the sale of the Crown's MDC shares as providing a tremendous commercial opportunity for Maori, an opportunity that would not recur for several years. When asked whether he foresaw any difficulties in Maori participating in an open commercial process, for example with due diligence requirements, Dr Mahuta responded:

Well, some ground rules I guess need to be established by the seller in that I am assuming for example that whoever the successful tenderer is it will be one of our people, one of our groups, Maori. I know that there has been talk of some corporates getting behind some Maori faces and making bids and I would be opposed to that. I think it's time that control moved more into the hands of Maori people. The due diligence in all that we are producing them by the hundreds now, these bright young sparks who can help us with that. (A35:14)

Ms France then asked whether, with reference to a commercial transaction, Dr Mahuta thought the open competitive tender process was necessary to ensure its integrity. Dr Mahuta replied that he did not necessarily think so but that it was a Treasury requirement. Nor did he agree with Crown counsel's suggestion that the open competitive tender process necessarily gives transparency. He stressed that the outcome of the process was what was important and that, while he was not suggesting what the Crown intended, it may not want the highest tenderer. (A35:14-15)

Dr Mahuta also stated, in response to further questions from counsel for Te Ika Whenua, that if an iwi purchased shares in the MDC that would not, in itself, break

the "dependency bond" between the iwi and the Crown but it would be part of that process in providing the iwi with the opportunity:

... to see how a commercial decision is made with no excuses to the Treaty any way. It's a straight commercial decision: you put your money up, you do your assessment and you take a risk. (A35:15)

Also relevant in this context is evidence given by Mr Shallcrass (Advisor on Commercial Relations for the Industries branch of the Treasury). Mr Shallcrass did not make a statement in evidence but was called by the Crown to answer any questions put by the tribunal and counsel. Professor Winiata asked Mr Shallcrass to describe the market which is going to be operative in responding to the Crown's invitation to bid for its MDC shares. Mr Shallcrass's reply and Professor Winiata's next questions were:

Shallcrass: One of the essential features of the sales process is to give any party that has an interest in buying the shares an opportunity to put in an offer for those shares. This is the established procedure for ensuring that maximum value is realised through any sales process.

Winiata: And does that require any minimum number of participants?

Shallcrass: Any number above one could be seen as constituting a competitive sales process.

Winiata: Is there any idea of the size of this market?

Shallcrass: The government has advertised through the media as well as through direct communication to maximise the likelihood of all possible participants in the market to be aware of the opportunity to buy.

Winiata: I notice that the decision on the final buyer if we get to that, is to be by Cabinet. Are you able to comment on what criteria Cabinet will use?

Shallcrass: The stated criteria are the price per share.

Winiata: The highest price will be the winning price.

Shallcrass: That is the standard assumption in this situation. (A35:34-35)

Ms Ertel, for Te Ika Whenua, then asked Mr Shallcrass to explain why the decision had been taken to advise Maori authorities about the sale of the Crown's MDC shares. Mr Shallcrass replied that it was recognised, given the nature of the MDC business and the characteristics of the other shareholders, that it was most likely that the greatest interest would come from the Maori community. When asked to shed light on why the Crown had decided to sell its MDC shares, Mr Shallcrass emphasised the Crown's recent policy of selling investments in commercial

businesses, because of the risks involved, and focusing its resources in areas of core activity such as welfare, education and training. (A35:35) He later stated that he was sure that meeting Treaty obligations was a core activity of the Crown. (A35:37)

Professor Winiata's next questions sought to elicit the degree of commercial analysis done by the Crown both before it invested in the MDC, in terms of the expected rate of return compared to other possible investments, and prior to its decision to sell its MDC shares. Mr Shallcrass was unable to answer these questions, having not been involved in any such analysis that may have been conducted. He was aware, however, that before the Crown decided to sell, there had been a review of its MDC experiences. (A35:35-36) In response to Professor Winiata's statement that one would expect there to be such a commercial analysis where there is a strictly commercial approach to a commitment of funds, Mr Shallcrass made the following point:

The government's policies with regard to the sale of investments was really a divestment process. The Crown has not been selling its businesses with a view to reinvesting those funds in other businesses, and therefore its approach is somewhat different from the standard private sector norm which has just been put forward. (A35:36)

Ms Ertel then asked whether, to Mr Shallcrass's knowledge, an analysis had been done, prior to the Cabinet decision to sell the MDC shares, of the implications of the sale for the Crown's Treaty obligations. When Mr Shallcrass replied that the Crown proceeded on the basis that it was selling an investment and that Treaty obligations would not be a primary concern, counsel for the Crown reminded the tribunal of her submission that it was the Crown's position that it made a commercial investment, that the decision to sell was a commercial one and that Treaty principles were not raised. (A35:37)

References

1. Cited in *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 603
2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665-6
3. By letter to the tribunal dated 24 August 1993, Crown counsel advised that the period for the receipt of expressions of interest had still not expired. (2.19)
4. By letter dated 24 August 1993, Crown counsel declined the tribunal's request for a copy of the Information Memorandum, advising that it is only being released to interested parties who have signed a confidentiality agreement between the Crown, the MDC and Southpac and who have satisfied the Crown that they have the financial capacity to transact with the Crown. (2.19)

Waitangi Tribunal Reports

5. The eleven named authorities were Tainui Maori Trust Board, Ngati Raukawa Maori Trust Board, Taranaki Maori Trust Board, Whanganui River Maori Trust Board, Taitokerau Maori Trust Board, Te Arawa Maori Trust Board, Ngati Awa Maori Trust Board, Tuhoe Maori Trust Board, Te Runanga o Ngati Whatua, Ngai Tahu Maori Trust Board, Paraninihi Ki Waitotara Incorporation. (A23:4)

Appendix 5

Tribunal Commissioned Evidence

In a preliminary report dated 25 June 1993 (A16), the qualifications of Graham and Susan Butterworth are recorded. Both have M.A degrees and are the authors of *The Maori Trustee*, a scholarly history of that office published in 1992. Mr Butterworth was, from 1986 to 1990, Director of Research for what was then the Department of Maori Affairs and subsequently became the Iwi Transition Agency (Te Tai). In that capacity he co-authored, with Hepora Young, a bilingual history of the Department of Maori Affairs entitled *Maori Affairs*, published in 1990. (A16:1-2) Accompanying the 25 June report by Mr and Mrs Butterworth were excerpts from both the abovementioned books, relevant to the background to the formation of the MDC. (A17, A20)

The 25 June report provides a brief overview of the political climate prior to the creation of the MDC, records two preliminary findings reached by Mr and Mrs Butterworth and directs the tribunal's attention to three issues. The writers' first finding is that the government intended a long-term commitment to the MDC, probably of at least a decade, although eventually its shareholding would be replaced by some form of Maori ownership. Their second finding is that the government expected eventually to recover its capital investment in the MDC but that this would be effected by transfer to Maori on favourable terms. (A16:5-6)

The three issues identified are, first, whether the government's involvement in the MDC stems from its Treaty obligations. Mr and Mrs Butterworth regard it as "straightforward" that this is the case, even if it was not the language commonly employed at the time. (A16:7) Secondly, the question is raised whether the government's withdrawal from the MDC would in some legal way jeopardise the shareholding of the Maori Trustee. (A16:7-9). Finally identified is the question whether the government has an express or implied obligation to maintain the character of the MDC as a vehicle for Maori commercial activity and, if so, for how long. (A16:9)

In a fuller report submitted on 28 June (A16(a)), Mr and Mrs Butterworth elaborated upon the events leading up to the creation of the MDC. They emphasised both the limited time and sources of information available to them in compiling the report, expressing particular concern that the documents comprising A1 in the tribunal's record of documents and supplied by the Crown under the Official Information Act, were biased sources of information because they had been selected by interested parties. (A16(a):1-2) They noted:

Maori Development Corporation

Insofar as the time allows we have tried to corroborate key interpretations from several sources but as a matter of professional principle and in fairness to the Tribunal and counsel we acknowledge that this work is more rough hewn than we would like. (A16(a):2)

The following summary of the evidence of Mr and Mrs Butterworth is taken from their two reports and their answers, at the hearing, to questions from counsel and the tribunal.

By way of general background, Mr and Mrs Butterworth highlighted the diversity of Maori opinion in the early 1980s as to how best to address Maori grievances and the crystallisation of the Treaty-based approach only after the 1987 *New Zealand Maori Council v Attorney-General* case. They commented that because the creation of the MDC pre-dated that case, the documents relating to its formation reflect the more diverse philosophies of the time. (A16:3)

After outlining the Muldoon government's support of the Tu Tangata programme, with its emphasis on economic and social self-reliance, and the radical restructuring of the Department of Maori Affairs, Mr and Mrs Butterworth state that, after December 1983, the drive for economic development continued with the appointment of Bruce Robinson as the department's Senior Deputy Secretary with special responsibility for economic development.

They outline a number of changes heralded by the election of the 1984 Labour government; its determination to resolve Maori grievances, give greater importance to the Treaty of Waitangi, end the social and economic imbalance between Maori and other New Zealanders and, in particular, its acceptance of the need to end Maori welfare dependency and to reverse the negative outcomes thereby created. The Kawenata resulting from the Hui Taumata, called by the government in October 1984, is emphasised as being a vital force in the creation of the MDC. Importantly, it analysed Maori problems in terms of welfare dependency and called for a decade of development and, it is said, the Minister of Maori Affairs attempted to implement the Kawenata within the limits of his authority and the resources he could win from the system. (A16:4-5)

Also noted is a corollary of the need to end welfare dependency: the need to assist Maori organisations and individuals to become major economic players. At the time there was deep concern that there was only one publicly listed Maori company and that Maori assets were largely tied up in land and yielding low returns. Mr and Mrs Butterworth state that the MDC was intended to assist Maori to invest in new industries and to gain economic clout in the marketplace. Further, while initially the government and the Maori Trustee would be major shareholders, in the long term some form of Maori ownership would replace them. (A16:5)

The spirit of exuberance in the years between 1984 and 1987 is recalled by Mr and

Mrs Butterworth and stated to be an essential part of the context of the MDC's creation. (A16(a):3-4) Also emphasised is the spirit of the Hui Taumata's Kawenata which, the writers' say, reveals that not only money but pride, self-respect and independence were at stake in its call for a "quantum leap in Maori economic development". (A16(a):8)

Outlining the response to the Kawenata's proposals for a Maori Economic Development Commission and a Maori Development Bank, Mr and Mrs Butterworth commented on the report produced in February 1986 by the Commission:

It placed considerable emphasis upon the development of Maori land and asked that an additional \$38.5 million should be injected into Vote: Maori Affairs in 1986. From 1986/87 to 1989/90 they wanted a total of \$136.5 million. (A16(a):10)

While Mr and Mrs Butterworth had accepted, in their book *The Maori Trustee*, that the MDC flowed from this report, they note the disagreement of Bruce Robinson, Maori Trustee and Senior Deputy Secretary in the Department of Maori Affairs at the time. His view, they record, is that the Commission's idea was not feasible since it revolved around rural lending at concessionary rates (A16(a):10) contrary to Mr Robinson's view, ultimately preferred by the government, that lack of business skills rather than access to cheaper capital was the primary problem in Maori economic underdevelopment. (A16(a):15) It was also Mr Robinson's view that the Treasury needed to be involved in the next stage of events and Mr and Mrs Butterworth highlight the role the Treasury played in chairing the Steering Committee which made its favourable interim report in September 1986. (A16(a):10-12)

Mr and Mrs Butterworth place considerable reliance upon the information supplied to them by Mr Robinson in the course of preparing their reports for the tribunal. They note that, because of his roles at the time, particularly in his office as Maori Trustee where he sought to improve efficiency and profitability, he was a key player in the events leading up to the creation of the MDC. They also note that, at that time, Mr Robinson confidently expected to play a vital role in the MDC's operations: he would be a Director and a major shareholder, enjoyed the confidence of the two future shareholding Ministers of the Crown, had a good relationship with the Treasury and had contact with all the important Maori leaders. (A16(a):12,16)

They record that the "Hawaiian Loans Affair" which became public in December 1986 gave a push to the whole matter, forcing a sweeping review of government policy on Maori business. Mr Robinson's explanation of the situation was that the Finance Minister, the Hon. Mr Roger Douglas:

... felt that something needed to be done in the commercial area and he liked the idea of a one-off capital sum to create a commercial organisation without the mixed objectives that were held to have generated low rates of return in other Maori enterprises such as incorporations. As Mr Robinson put it, he [Mr Douglas] was attracted to the idea of giving seed potatoes rather than chips to Maori. (A16(a):12)

Another point to emerge from the interviews with Mr Robinson was the haste or, as Mr Butterworth described it to the tribunal, the "opportunism" with which the MDC was established. Mr Robinson's explanation was that the important thing was to get the MDC up and running and that a lot of issues were not fully explored. (A16(a):13) Mr and Mrs Butterworth highlight the lack of information about the government's future intentions with regard to the MDC. They state:

We asked for a copy of the Articles of Association of the MDC to see what light this would throw upon the question of future withdrawal of any of the parties and the disposal of their shares. To our surprise the Articles appear to be a completely standard commercial formula making no reference to any special status of the Crown or any particular Maori character. This all tends to confirm Mr Robinson's comments about the haste with which MDC was established. Clearly the path of least resistance was followed and the standard formula used. (A16(a):15-16)

Mr Robinson's hope that the Maori Trustee's office and the MDC would enjoy a strong working relationship were impeded, Mr and Mrs Butterworth state, by three things: the difficulties of getting a social service oriented institution to work with a very financially focused organisation; Mr Robinson's retirement in November 1987 and the share market crash one month earlier. (A16(a):16-18) Commenting on the crucial importance of the share market crash, Mr and Mrs Butterworth state:

This utterly changed the economic climate and hence the strategy of the MDC. The MDC had seen itself working as a financial intermediary for Maori people. This had included raising capital. After the crash the conservative borrowing policies of most Maori economic institutions had left them in relatively good financial shape. Deregulation had also brought in new banking institutions. Mr Dyall [MDC's Secretary] in an interview on 7 May 1990 thought that these newcomers were actually targeting the stronger Maori institutions and thereby taking business away from the MDC. Interest rates were also being pushed up so that it was hard for MDC to borrow and on-lend competitively. At that point in time MDC was essentially a finance broker and project packager on a fee-for-service basis for Maori clients.

Things were difficult but the Poutama Trust had been a lifeline with its income covering a lot of the MDC's costs. Both of us recollect that Mr Dyall indicated that the MDC might be forced to become an industrial company making large investments in established companies.

Certainly both of us took from the interview that the MDC was very much in survival mode and the sharemarket crash and resulting economic recession had badly upset their plans. (A16(a):18-19)

The final matter reported on by Mr and Mrs Butterworth is Mr Robinson's view, expressed in an interview on 26 June 1993, of what was intended, upon the formation of the MDC, with regard to the future of the Crown's shareholding. In their words:

... he explained that the Crown's future role in MDC and the mechanism for its exit was left imprecise. "It was surmised and discussed how the Government would move out but nothing was really finalised. There was even a question mark or two as to whether it would really succeed."

Mr Robinson's expectation was that at the appropriate moment he would have raised the question of the Crown's withdrawal and he added "I had hoped there would be an element of gift about the way the Crown went out." (A16(a):19-20)

When asked by the tribunal to elaborate on this point at the hearing, Mr Butterworth again stressed both Mr Robinson's key role and the opportunistic element in the creation of the MDC. He explained that everybody who is trying to create a change within a bureaucracy has to seize opportunities as they arise and address them in the appropriate ways. Therefore:

Mr Robinson was not anxious to raise questions of ultimate Crown withdrawal. (A35:18)

He added that it also needed to be borne in mind that everything was occurring with two factors in mind:

The first, that the government was determined to do something about the under-achievement gap and the second thing was that the government recognised it was in for the long haul. The decade of development that was stressed at the Hui Taumata and reiterated very strongly in the Kawenata that came out of that is I think very important to understand. People did expect that it was a long process and a decade was set, from my conversations with my colleagues because I wasn't in there in the department at the time, to signify that it was a long haul. There was no quick fix solution, there was no way you were going to reduce that within the one or two terms of the government and I think Mr Robinson was working within the assumption of the goodwill also in that period. But when it came to a withdrawal the Crown would accept that some concessions should be made to put Maori people into a stronger economic position. (A35:18-19)

Mrs Butterworth added that Mr Robinson did not envisage the Crown as a permanent partner in the MDC but nobody envisaged how they were going to get out. She then said:

In fact, there was some uncertainty indeed as to whether the whole venture would succeed. Really nobody was looking that far ahead. (A35:19)

Crown counsel asked Mr and Mrs Butterworth whether, in light of their evidence that the focus was on setting up the MDC and that the end result could be unexpected, it was fair to categorise Mr Robinson's comments about how the Crown might ultimately exit from the company as merely his own suggestion, unsupported by the views of the time. In rejecting that interpretation, Mr Butterworth again stressed Mr Robinson's connections with all the likely decision makers of the time,

particularly in the Treasury. (A35:20-21) When Crown counsel asked whether there was any written evidence of the Crown's attitude "further down the line", Mr Butterworth replied that nobody wanted to raise those issues because they raised such thorny questions and reiterated the point that it was uncertain whether Maori could succeed in the venture. As he put it, in light of the scepticism whether Maori could make it at all, it could have been an academic question whether there was ever going to be any capital or assets to recover. (A35:21)

In response to questions from Professor Winiata and the tribunal as to whether the Maori Trustee would have invested in the MDC without the Crown's involvement, Mr Butterworth drew attention to a passage in a paper written by the Assistant Secretary to the Treasury in December 1986 to the Minister of Finance. There it is stated, with regard to the Maori Trustee's intentions as to the proposed Maori Resource Development Corporation:

We understand that he is likely to proceed even if the Crown does not participate as he accepts the desirability of separating his more commercial objectives from other statutory functions that he performs. (A35:24;A1:35)

Professor Winiata also asked whether, in light of the evidence that the Crown should, in exiting the MDC, give favourable terms to Maori, a public tender was likely to produce that result. Mr Butterworth responded:

I do not feel we can answer specifically about whether a public tender is fair or not. What I could, I believe, say as a result of our historical knowledge is that I don't believe anybody thought there would be an auction for the Crown shares of the MDC. That there would be some sort of negotiation and consultation with Maoridom ... Thinking back on the conversations with Mr Robinson, he was thinking in terms of a certain proportion of the MDC always being held in some pan-Maori way. (A35:25-26)

The tribunal then asked Mr and Mrs Butterworth whether, in their historical research, they had seen government policies or programmes which, rather than helping Maori, tended to create divisiveness. Upon receiving an affirmative answer from Mr Butterworth, he was then asked whether the proposed method of disposing of the Crown's MDC shares, whereby any Maori authorities or iwi groups with the funds could end up owning them, could be categorised as divisive. Mr Butterworth replied:

Yes, from a historical perspective it does seem to be this way. I mean that the Maori Trustee tried to be the representative of all Maoridom, the instrumentality he was creating in the end in MDC was intended to be an instrumentality for all Maoridom and we had long talks with Mr Robinson and Mr Baker - unfortunately Mr Parore was not available - but I know both of them were very concerned that that institution should always be seen as pan-Maori and felt able to go and get a fair hearing from. (A35:26-27)

It has already been noted that Crown counsel challenged the evidential value of certain statements made in the reports and oral evidence of Mr and Mrs Butterworth and asked the tribunal to give appropriate weight to their evidence in light of the limited time and sources of information which they had available. Both claimant groups acknowledged that Mr and Mrs Butterworth had been subject to limitations of time and upon their access to information but drew attention to their previous research work relating to Maori Affairs and the Maori Trustee and Mr Butterworth's previous employment by the Department of Maori Affairs. The claimants asked that these matters be taken into account by the tribunal in weighing Mr and Mrs Butterworth's evidence. (A35:17)

Appendix 6

Treaty Principles

6.1 **The Principle of Reciprocity - ie the cession by Maori of sovereignty to the Crown was in exchange for the protection by the Crown of Maori rangatiratanga**

This over-arching principle of paramount importance, deriving directly from articles 1 and 2 of the Treaty, has been elaborated by the tribunal in these terms:

Implicit in this principle is the notion of reciprocity - the exchange of the right to govern for the right of Maori to retain their full tribal authority and control over their lands, forests, fisheries and other valuable possessions for so long as they wished to retain them. It is clear that cession of sovereignty to the Crown by Maori was conditional. It was qualified by the retention of tino rangatiratanga. It should be noted that rangatiratanga embraced protection not only of Maori land but of much more, including fisheries.

Rangatiratanga was confirmed and guaranteed by the Queen in article 2. This necessarily qualifies or limits the authority of the Crown to govern. In exercising sovereignty it must respect, indeed guarantee, Maori rangatiratanga - mana Maori - in terms of article 2.

The Crown in obtaining the cession of sovereignty under the treaty, therefore obtained it subject to important limitations upon its exercise. In short, the right to govern which it acquired was a qualified right.¹

The tribunal has also accepted that several vital concepts inherent in or are integral to the fundamental reciprocity principle, namely:

- the Crown obligation actively to protect Maori Treaty rights
- the tribal rights of self-regulation
- the rights of redress for past breaches; and
- the duty to consult.²

In the Muriwhenua Fishing Report, where the *Crown's duty of active protection* was discussed, it was said that:

Maori were protected in their lands and fisheries (English text) and in the retention of their tribal base (Maori text). In the context of the overall scheme for settlement, the fiduciary undertaking of the Crown is much broader and amounts to an assurance that despite settlement Maori would survive and because of it they would also progress.

The settlement profit to Maori derives from the tribe's access to new technologies and markets, from Maori opportunity to adopt Western ways or from a combination of both. In terms of the Treaty none of these alternatives was denied or can be denied today, but at 1840, the former was uppermost in the minds of both sides....

... The essential point was that the Treaty both assured Maori survival and envisaged their advance, but to achieve that in Treaty terms, the Crown had not merely to protect those natural resources Maori might wish to retain, but to assure the retention of a sufficient share from which they could survive and profit, and the facility to fully exploit them.

The application of this principle at any particular past or future point, must depend upon the conditions then applying, the extent to which Maori have subsequently chosen to benefit in Western terms and the degree to which the tribal base remains preferred. The essential problem lies in balancing or blending the competing philosophies of protecting Maori as equal citizens, or upholding their distinctive heritage, as Mr Justice Richardson observed (in the 1987 New Zealand Maori Council case) in commenting on article the third.³

Again, on the matter of *tribal self-regulation*, an inherent element of tino rangatiratanga, it has been said:

'Rangatiratanga' and 'mana' are inextricably related words. Rangatiratanga denotes the mana not only to possess what is yours, but to control and manage it in accordance with your own preferences.

We consider that the Maori text of the Treaty would have conveyed to Maori people that amongst other things they were to be protected not only in the possession of their fishing grounds, but in the mana to control them and then in accordance with their own customs and having regard to their own cultural preferences.⁴

It may be added that, because of the cession of sovereignty in article 1 of the Treaty, article 2's guarantee of tino rangatiratanga has been further explained as referring to:

... tribal self-management on lines similar to what we understand by local government.⁵

The *right to redress* for past Treaty breaches arises when detriment has been caused to Maori as a result of the Crown's failure to protect the rangatiratanga of a tribe or hapu. Mr Justice Somers in the New Zealand Maori Council case enunciated the principle in these terms:

The obligation of the parties to the Treaty to comply with its terms is implicit, just as is the obligation of parties to a contract to keep their promises. So is the right of redress for breach which may fairly be described as a principle... As in the law of partnership a breach by one party of his duty to the other gives rise to a right of redress so I think a breach of the terms of the Treaty by one of its parties gives rise to a right of redress by the other - a fair and reasonable recognition of, and recompense for, the wrong that has occurred. That right is not justiciable in the Courts but the claim to it can be submitted to the Waitangi Tribunal.⁶

The tribunal has emphasised in this regard that it is out of keeping with the spirit of the Treaty that the resolution of one injustice should be seen to create another.⁷

As a result of the Court of Appeal's statements in the New Zealand Maori Council case, the *duty to consult* does not arise in all situations. Sir Ivor Richardson, after highlighting the difficulties in deciding which matters affecting Maori might require consultation, who should be consulted and how consultation should be conducted, said:

In truth the notion of an absolute open-ended and formless duty to consult cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one Treaty partner to act in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision where it is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard to the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith. In many cases where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation. In some extensive consultation and co-operation will be necessary. In others where there are Treaty implications the partner may have sufficient information in its possession for it to act consistently with the principles of the Treaty without any specific consultation.⁸

The Ngai Tahu tribunal, applying these words to the situation before it, considered that:

Negotiation by the Crown for the purchase of Maori land clearly requires full consultation. On matters which might impinge on a tribe's rangatiratanga consultation will be necessary. Environmental matters, especially as they may affect Maori access to traditional food resources - mahinga kai - also require consultation with the Maori people concerned. In the contemporary context, resource and other forms of planning, insofar as they may impinge on Maori interests, will often give rise to the need for consultation. The degree of consultation required in any given instance may, as Sir Ivor Richardson says, vary depending on the extent of consultation necessary for the Crown to make an informed decision.⁹

6.2 The Principle of Partnership

This principle, firmly established by the Court of Appeal in the New Zealand Maori Council case, requires the Pakeha and Maori partners to act towards each other

reasonably and with the utmost good faith. In the words of Sir Ivor Richardson:

Where the focus is on the role of the Crown and the conduct of the Government that emphasis upon the honour of the Crown is important. It captures the crucial point that the Treaty is a positive force in the life of the nation and so in the government of the country. What it does not perhaps adequately reflect is the core concept of the reciprocal obligations of the Treaty partners. In the domestic constitutional field which is where the Treaty resides under the Treaty of Waitangi Act and the State-Owned Enterprises Act, there is every reason for attributing to both partners that obligation to deal with each other and with their Treaty obligations in good faith. That must follow both from the nature of the compact and its continuing application in the life of New Zealand and from its provisions. No less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty of Waitangi. In the same way too honesty of purpose calls for an honest effort to ascertain the facts and to reach an honest conclusion.¹⁰

Elaborating on the reasonableness which must characterise the Treaty partners' dealings with one another, the President of the Court of Appeal stated:

The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy. Indeed to try and shackle the government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other cooperation.¹¹

The tribunal later described the basis of the partnership concept in these terms:

It was a basic object of the Treaty that two people would live in one country. That in our view is also a principle, fundamental to our perception of the Treaty's terms. The Treaty extinguished Maori sovereignty and established that of the Crown. In so doing it substituted a charter, or a covenant in Maori eyes, for a continuing relationship between the Crown and Maori people, based upon their pledges to one another. It is this that lays the foundation for the concept of a partnership.¹²

References

1. *Report of the Waitangi Tribunal on the Ngai Tahu Sea Fisheries Claim* (Wai 27), (Brooker & Friend 1992), p 269
2. *Ibid*, p 269 and *Report of the Waitangi Tribunal on the Ngawha Geothermal Resource Claim*, (Wai 304), (Brooker & Friend, Wellington 1993) pp 99-100
3. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22), (Waitangi Tribunal, Wellington 1988), p 194

Waitangi Tribunal Reports

4. *Report of the Waitangi Tribunal on the Motunui-Waitara Claim* (Wai 6), (Waitangi Tribunal, Wellington 1983), p 51
5. *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22), (Waitangi Tribunal, Wellington 1988), p 187
6. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 693
7. *Report of the Waitangi Tribunal on the Waiheke Claim* (Wai 10), (Waitangi Tribunal, Wellington 1987), p 99 and *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22), (Waitangi Tribunal, Wellington 1988), p xxi
8. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 683
9. *Report of the Waitangi Tribunal on the Ngai Tahu Claim* (Wai 27), (Brooker & Friend, Wellington 1991), p 245
10. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 682
11. *Ibid*, pp 665-6
12. *Report of the Waitangi Tribunal of the Muriwhenua Fishing Claim* (Wai 22), (Waitangi Tribunal, Wellington 1988), p 192

Appendix 7

Record of Hearing

2.1 Appointments

The tribunal was constituted to comprise:

Judge Heta Hingston (presiding officer)
Joanne Morris
John Ingram
Hepora Young

Suzanne Woodley assisted the tribunal as staff researcher and Lynette Fussell assisted as claims administrator.

2.2 Hearing and Appearances

1. Waitangi Tribunal Hearing Room, Seabridge House, 110 Featherston Street, Wellington, 28-29 June 1993

For the claimants:

Kathy Ertel for Te Ika Whenua
Whatarangi Winiata for himself, Te Aho O Te Rangi Awe Kotuku and others

For the Crown:

Ellen France
Harriet Kennedy

Also appearing:

Russell Feist for Ngati Tuwharetoa

Submissions and evidence were received from:

Maanu Paul	A19
Gwenda Monteith Paul	A15
Thompson Parore	A21
Dr Robert Mahuta	A23

Maori Development Corporation

Te Aho o Te Rangi Ratema Te Awe

Kotuku

Pirihira Fenwick 1.3

Tuwhakairiora Williams A26

Graham and Susan Butterworth A16, A16(a), A17 & A20

Arama Kukutai A27

Horimatua Evans A28

Ian Fitzgerald A29

Sophie Ryans

Richard Shallcrass

J Hawke A34(a)

Kara Puketapu A34(b)

O M Nicholls A34(c)

Mana Cracknell A34(d)

Documents A1 to A37 were admitted to the record.

**2. Waitangi Tribunal Hearing Room, Seabridge House, 110 Featherston Street,
Wellington, 30 September 1993**

For the claimants:

Kathy Ertel for Te Ika Whenua

Whatarangi Winiata for himself, Te Aho o Te Rangi Ratema Awe Kotuku and others

For the Crown:

Ellen France

Also appearing:

Chris Finlayson for the Maori Trustee

Toko Kapea for Taharoa C

Documents B1 to B2 were admitted to the record.

Appendix 8

Record of Inquiry

Record of Proceedings

1 **Claims**

- 1.1 Wai: 350
 Date: 19 May 1993
 Claimant: Whatarangi Winiata and Te Aho o Te Rangi Ratema Te
 Awe Kotuku for owners of Okawa Bay Resort and others
 Concerning: Maori Development Corporation
- 1.2 Wai: 350
 Date: 27 May 1993
 Claimant: Hohepa Waiti for Te Ika Whenua
 Concerning: Maori Development Corporation
- 1.3 Wai: 350
 Date: 27 May 1993
 Claimant: Te Arawa Kaumatua Council, Te Arawa Maori Trust
 Board, Te Runanganui o Te Arawa and Te Arawa
 Federation of Maori Authorities
 Concerning: Maori Development Corporation

2 **Papers in Proceedings**

- 2.1 Tribunal direction to register Whatarangi Winiata claim, 21 May 1993
- 2.2 Notification of claim, 21 May 1993
- 2.3 Tribunal direction to register Hohepa Waiti claim, 2 June 1993
- 2.4 Notification of claim, 2 June 1993
- 2.5 Memorandum of Crown counsel, 31 May 1993
- 2.6 Advertisement from *The Dominion*, regarding sale of shares in Maori
Development Corporation, 21 May 1993

Maori Development Corporation

- 2.7 Tribunal direction regarding chambers conference, 8 June 1993
- 2.8 Submission of counsel for claimants, 3 June 1993
- 2.9 Public notice and notification of hearing, 17 June 1993
- 2.10 Tribunal direction to constitute tribunal, 25 June 1993
- 2.11 Tribunal direction to register Te Arawa Kaumatua Council claim and notification of claim, 24 June 1993
- 2.12 Opening submissions of counsel for claimants
(Counsel for Runanganui o Te Ika Whenua)
(also as A18)
- 2.13 Submission of Crown counsel, 29 June 1993
(also as A30)
- 2.14 Letter from Whatarangi Winiata requesting further evidence be called (also enclosing affidavit of Waari Ward-Holmes),
7 July 1993
- 2.15 Submission of counsel for claimants, in reply to submissions of Crown counsel (2.12), 7 July 1993
- 2.16 Closing submission of Crown counsel, 16 July 1993
- 2.17 Closing submissions of counsel for claimants, 22 July 1993
- 2.18 Letter from Maori Development Corporation regarding shareholdings of MDC and Maori investors, 15 July 1993
- 2.19 Letter from Crown counsel regarding sale process, 24 August 1993
- 2.20 Letter from Whatarangi Winiata requesting that the Tribunal gives attention to certain evidence relating to the High Court hearing between Taharoa C and the Maori Trustee, 17 September 1993
- 2.21 Crown response to Whatarangi Winiata's letter of 17 September 1993 (2.20), 22 September 1993

3 Research Commissions and Agreements

- 3.1 Butterworth G & S, Commission, 25 June 1993

Waitangi Tribunal Reports

Record of Documents

- A First hearing at Waitangi Tribunal Meeting Room, Seabridge House, Featherston St, Wellington, 28-29 June 1993**
- A1 Background information to the establishment of the Maori Development Corporation (Crown)**
- A2 Maori Development Corporation Annual Reports;**
(a) 1989
(b) 1991
(c) 1992 (held in Waitangi Tribunal Library)
(registrar (of Waitangi Tribunal))
- A3 Maori Development Corporation Newsletter - "Te Wero"; (held in Waitangi Tribunal Library)**
(a) No 3 (September 1988)
(b) No 4 (December 1988)
(c) No 6 (May 1989)
(d) No 7 (August 1989)
(e) No 9 (October 1990)
(registrar)
- A4 Maori Economic Development Summit Conference, Conference Proceedings, October 1984, extracts;**
(a) Opening address of Hon. Koro Wetere, Minister of Maori Affairs (pages B4-C3)
(b) Address of Whatarangi Winiata (pages G3 - H1)
(c) Closing address of Hon. Koro Wetere, Minister of Maori Affairs (pages 3E3-3E5)
(registrar)
- A5 Maori Economic Development Summit Conference, Background Papers, October 1984, extracts;**
(a) Paper of Whatarangi Winiata (No 9)
(b) Paper of G M Tattersfield
(registrar)
- A6 A Briefing on Maori and Economic Affairs, Maori Economic Development Summit Conference 1984, (MA ECO 1984/3)**
(registrar)
- A7 Maori Economic Development Summit Conference 1984, *He Kawenata*, 31 October 1984, (MA ECO 1984/2)**
(registrar)
- A8 G M Tattersfield, *A Maori Affairs (Development) Corporation*, (MA ECO 1984/6)**

Maori Development Corporation

- (registrar)
- A9 Dyall and Mako, *Negative Funding and Inequity*, Maori Economic Development Commission (MA ECO 1985/3)
(registrar)
- A10 Report of the Maori Economic Development Commission on a Maori Development Bank, February 1986, (MA ECO 1986/5)
(registrar)
- A11 The Maori Development Corporation 1987 (MA ECO 1987/7)
(registrar)
- A12 Maori Economic Development Commission, 1987 (MA ECO 1987/6)
(registrar)
- A13 Maori Development Corporation, Address presented by Waari Ward-Holmes for Press Conference to Launch the Corporation, 1 July 1987 (MA ECO 1987/1)
(registrar)
- A14 Miscellaneous extracts
(registrar)
- (a) Report of the Department of Maori Affairs, the Board of Maori Affairs and the Maori Trust Office for the year ended 31 March 1988, (AJHR 1987-90, volume VII, E13, pp 3-4)
 - (b) Address in Reply by Hon. Koro Wetere, Minister of Maori Affairs, 24 September 1987, (New Zealand Parliamentary Debates, volume 483, 1987, pp 131-132)
 - (c) Copy of Finance Act 1987, section 3 authorising Crown shareholding in Maori Development Corporation
 - (d) Report of Finance and Expenditure Committee, first reading of Finance Bill, 8 December 1987 (New Zealand Parliamentary Debates, volume 485, 1987, pp 1601-1613)
 - (e) Second Reading of Finance Bill, 8 December 1987 (New Zealand Parliamentary Debates, volume 485, pp 1803-1835)
 - (f) Third Reading of Finance Bill, 8 December 1987 (New Zealand Parliamentary Debates, volume 485, pp 1897- 1900)
 - (g) Positive Steps, an article concerning the Maori Development Corporation, *New Zealand Business*, pp 11-14, November 1987
- A15 Evidence of Gwenda Monteith Paul
(Te Runanga o Te Ika Whenua)

Waitangi Tribunal Reports

- A16 Evidence of G V & S M Butterworth, Preliminary Observations on an Urgent Claim by Te Runanga o Te Ika Whenua relating to the Maori Development Corporation (registrar)
- A16a Evidence of G V & S M Butterworth, Historical Narrative of the Events Leading to the Creation of the MDC with comments on the intentions of those involved (registrar)
- A17 Evidence of G V & S M Butterworth, concerning Maori Trustee (registrar)
- A18 Opening Submissions of Counsel for Claimants (Counsel for Te Runanga o Te Ika Whenua)
- (a) Supporting Documents (extracts of case law)
- A19 Evidence of Cletus Maanu Paul (Te Runanga o Te Ika Whenua)
- A20 Evidence submitted by G V Butterworth concerning Maori Affairs (registrar)
- A21 Evidence of Thompson Parore (Te Runanga o Te Ika Whenua)
- A22 Submission by Russell T Feist (Tuwharetoa Maori Trust Board on behalf of the iwi of Ngati Tuwharetoa)
- A23 Evidence of Robert Te Kotahi Mahuta (Crown)
- A24 Evidence of Whatarangi Winiata and Te Aho o Te Rangi Ratema Te Awe Kotuku (claimants for owners of Okawa Bay resort and others)
- A25 Poutama Trust Annual Report 1992, Poutama Trust Deed, Maori Development Corporation Memorandum and articles (Crown)
- A26 Evidence of Tuwhakairiora Williams (National Maori Congress)
- A27 Evidence of Arama Kukutai (claimants)
- A28 Evidence of Horimatua Evans (claimants)
- A29 Options for Maori Development Finance and Banking Needs, Ian Fitzgerald,

Maori Development Corporation

- Westpac
(claimants for owners of Okawa Bay Resort and others)
- A30 Submission of Crown Counsel, 29 June 1993
- (a) Department of Maori Affairs papers re: Vote Maori Affairs Budget 31 March 1989
- A31 Case: *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (Crown)
- A32 Letter from Southpac Corporation Limited, sent to Federation of Maori Authorities, 11 June 1993 (Crown)
- A33 Press statement, Minister of Maori Affairs and Finance, 31 March 1993 (Crown)
- A34 Letters of Support for Wai 350 Maori Development Claim:
- (a) J Hawke, on behalf of Ngati Whatua o Orakei Maori Trust Board
- (b) Kara Puketapu, on behalf of Te Runanganui o Taranaki Whanui ki te Upoko o Te Ika a Maui
- (c) O M Nicholls, on behalf of Moehau Nga Tangata Whenua Trust Board
- (d) Mana Cracknell, on behalf of Te Whanau o Rongomaiwahine Trust Inc
- A35 Transcriptions from the hearing 28-29 June 1993
- Russell Feist
 - Dr Robert Mahuta
 - Tuwhakairiora Williams
 - Graham & Susan Butterworth
 - Horimatua Evans
 - Richard Shallcrass
 - Thompson Parore
 - Ian Fitzgerald
 - Professor Whatarangi Winiata
- (registrar)
- A36 Response by Hon. Douglas Kidd, Minister of Maori Affairs to Catchy Brown, Maori Programmes, TVNZ, 17 June 1993 (registrar)
- A37 Extract from the MDC 1991 Report concerning the recommendations made in the Wheeler-Campbell Review (registrar)
- B Second Hearing at Waitangi Tribunal Meeting Room, Seabridge House, Featherston Street, Wellington, 30 September 1993**
- B1 Evidence of Whatarangi Winiata concerning the consideration of evidence from the

High court case between Taharoa C and the Maori Trustee

- B2 High Court decision *The Proprietors of Taharoa C Block v The Maori Trustee*, 13-17 September 1993, CL 41/93, 1 October 1993
(registrar)

