Appointments to the Treaty of Waitangi Fisheries Commission Report

(Wai 321)

Waitangi Tribunal Report: 6 WTR

Waitangi Tribunal Division
Department of Justice
WELLINGTON
1992

The Honourable Doug Kidd
Minister of Maori Affairs
Parliament Buildings
WELLINGTON

Tena koe

We have inquired into a claim by Hariata Gordon for herself and Ngati Paoa concerning the appointment of members to the Treaty of Waitangi Fisheries Commission under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the 1992 Act). This report on that inquiry should be read with the tribunal's *Fisheries Settlement Report* of 4 November 1992 which describes negotiations between the Crown and Maori negotiators to resolve Maori fishing claims on a national basis and the resultant deed of settlement of 23 September 1992. The 1992 Act is to effectuate that settlement.

1. Background

1.1 The Maori Fisheries Act 1989 (the 1989 Act) followed a preliminary settlement. It created a Maori Fisheries Commission (the old Commission) to receive fish quota and cash from the Crown and provided for Aotearoa Fisheries Limited, a commercial operation returning to the Commission additional and on-going revenue. The old Commission's principal function was:

> to facilitate the entry of Maori into, and the development by Maori of, the business and activity of fishing (s5).

All other powers were subsidiary to that purpose. The Commission could review Maori fishing proposals to render special assistance (s9) and could lend monies, provide advisory and technical services, promote research and assist industry restructuring (s6). It had nonetheless to operate on a profitable basis (s8) and had substantial additional powers in quota dealing and other matters of a commercial nature for the management, protection and enhancement of its assets and revenue (s9).

It appears that in the course of its work the old Commission was persuaded to the view that it could best promote Maori into fishing through the distribution of quota and funds to various iwi fishing groups so that some allocation of its assets became an important part of its operations. The extent to which it could do this was problematical however. Some complex legal issues were involved and it could be said the Commission had a duty to maintain its asset base and profitability for the continuance of its ongoing functions and in exploring ways in which Maori throughout the country could be got back into fishing.

Nonetheless, and no doubt with pressure from various iwi groups, the Commission pursued the allocation option and proposed to an annual general meeting of July 1992 that it should allocate the whole of its assets having regard to the extent of traditional resource ownership amongst the various iwi. That criterium was not provided for in the Act, and there also being doubts as to the Commission's power to dispose of its undertaking, it was proposed that legislative authority be sought. It was also intended that the assets of Aotearoa Fisheries Limited would be distributed as well.

The annual meeting, or Hui-a-Tau, endorsed the principle that allocation should be effected but the hui proposed further inquiry on the allocation

method. The concerns of various hapu under that heading were outlined in our *Fisheries Settlement Report.*

1.2 The Sealord's settlement provided for in the deed of 1992 enabled the joint venture purchase of Sealord Products Ltd, providing a revenue producing central asset that effectively substitutes for Aotearoa Fisheries Limited. The old Commission was to be restructured as the Treaty of Waitangi Fisheries Commission (the new Commission) to receive the revenues from the joint venture and additional new species quota from the Crown. The new Commission was to have an expanded membership of up to 13, and was to have greater input to fisheries management through representation on fish management bodies. Most especially, the new Commission was to be made more accountable to Maori and its members were to be appointed in consultation with them.

The new Commission was also to be empowered to pursue the allocation question, not just in respect of the assets of the old Commission and Aotearoa Fisheries Limited, but also in respect of future assets to be received.

Obviously the new Commission would have critically important functions in determining the vexed question of allocation principles and in deciding the future shape of the Commission itself — the extent to which it would be a mere distribution agency and the extent to which it would continue as a central agency to promote Maori fishing and assist particular Maori to become established in the fishing industry.

1.3 The 1992 Act, as described in the preamble, is to give effect to the Sealord's settlement contained in the 1992 deed. It amends but does not repeal the 1989 Act and the Commission's principal functions in s5 of the 1989 Act presently remain unchanged.

The old Commission is replaced by the new but the goal remains as before. The important additional functions that contemplate the distribution of assets to iwi, as are later referred to, are still subsidiary to the principal function in s5. As is also referred to later however, it is contemplated that the future focus of the Commission may change.

A significant aspect of the Deed of Settlement was that the new Commission was to be made more accountable to Maori. This is now reflected in s15 of the 1992 Act which calls upon the new Commission to propose a process to that end within 90 days.

1.4 The Maori-Brierley Investments Limited joint venture purchase of Sealords is defined in s2 of the 1992 Act to mean:

> the joint venture (including any company formed to act as the joint venture entity) established by and between the Treaty of Waitangi Fisheries Commission (through Te Waka Unua Limited) and BIL [Brierley Investments Ltd] to purchase Sealords.

This represents a change from the deed. The deed gave the old Commission as the Maori partner (1.1.9). The 1989 Act substitutes the new Commission. We were advised in the course of hearing that the Maori directors have already been appointed to the new joint venture company by the old Commission, as was published in issue 11 of *Te Reo o te Tini A Tangaroa.* It was mooted however that that might be an interim arrangement and that the final appointment of new directors could be a further important task confronting the new Commission.

Whether or not the joint venture directors can also hold office on the Commission is a matter that may not yet be settled. The 1989 provisions in ss19 and 30 prohibiting such an arrangement, applied only to Aotearoa Fisheries Limited, and as that company now ceases business the prohibitions have been repealed (s16(3) 1992 Act). The new Commission may still need to determine however whether a person may hold office on both the Commission and the joint venture company or any company connected with it.

1.5 In addition to keeping the principal function to promote Maori into the business of fishing, the new Commission retains the substantial additional powers in quota dealing and business generation, in providing research and advice, and in rendering assistance to particular Maori in order that they might be established in business. As earlier said however, the Commission's role could change.

1.6 The 1992 Act then authorises the new Commission to allocate to iwi the assets of the old Commission and those of Aotearoa Fisheries Limited (s6(e)(i) 1989 Act as inserted by s15, 1992 Act). After a scheme has been put to the Minister of Maori Affairs, and his comments have been considered, the allocation may proceed (s17, 1992 Act). In addition the new Commission is to develop a procedure and propose legislation for the allocation of the future benefits to be received and the identification of the persons or groups to receive them (s6(e)(ii)(B) 1989 Act as inserted by s15, 1992 Act).

The new Commission may therefore become much more an instrument for allocation. Though at present it may still need to determine the extent, if any, that it should retain a central asset base to promote Maori fishing and provide assistance to particular individuals or groups, it may also propose legislation to change the whole nature of its focus and powers (s6(e)(ii)(A) 1989 Act, as inserted by s15, 1992 Act).

Plans for the allocation of future assets (as distinct from those of the old Commission and Aotearoa Fisheries Limited), and proposals for the identification of beneficiaries and the future restructuring of the Commission, are to be developed only after full consultation with Maori (s6(e)(ii) 1989 Act as inserted by s15, 1992 Act).

1.7 In summary it appears:

- the 1992 Act contemplates a major change in direction. The current assets are to be allocated to iwi and a plan is to be prepared and legislation provided for the allocation of future benefits to be received;
- the new Commission will have important tasks:

  — in considering whether a Commission member should also serve as a director on the joint venture company or any associated company and possibly, in appointing directors;

  — in determining, within 90 days, how the Commission can be made more accountable to Maori;

  — in preparing a scheme for the allocation of current assets to iwi and in giving effect to it;

  — in settling in consultation with Maori, a scheme for the distribution of future assets and the identification of beneficiaries and their interests;

— in determining the extent to which the Commission should in future be a simple allocation agency or should continue as a central agency for the promotion of Maori fishing by research, funding and other means; and

— in determining the shape of the future Commission to carry on work thereafter.

- the new Commission now to be appointed may be seen as an interim body to settle the matters above referred to; and
- while any ongoing Commission may need to have or need access to competent commercial, legal, management and research expertise, much will depend on the nature of the future Commission to be established; but it seems the persons most needed now, are those best able to guide Maori to proper conclusions on the allocation and restructuring matters.

1.8 For completeness and for the purposes of this claim, it has also to be noted that s40 of the 1992 Act adds a new provision to the 1989 Act. This provides:

> Notwithstanding anything in this Act or any other Act or rule of law, on and from the commencement of this subsection the Tribunal shall not have jurisdiction to inquire or further inquire into, or to make any finding or recommendation in respect of —
>
> (a) Commercial fishing or commercial fisheries (within the meaning of the Fisheries Act 1983); or
>
> (b) The Deed of Settlement between the Crown and Maori dated 23 of September 1992; or
>
> (c) Any enactment, to the extent that it relates to such commercial fishing or commercial fisheries.

It may then be observed that with the exception of one provision that need not be considered here, the 1992 Act does not come into force until provided for by Order in Council. That does not appear to affect our jurisdiction to consider the claim. It is still an Act and we can consider any Act. We can also consider proposed Crown policy (s6 Treaty of Waitangi Act 1975). On the other hand however, s40 being inoperative (unless Orders in Council have in fact issued) it does appear we currently have jurisdiction to consider the Deed of Settlement should that be necessary.

2. The Claim

2.1 In view of the background described and Maori anxiety that a fair and proper allocation be achieved, the claimants' concern over the appointment of new commissioners to oversee the task is understandable, and their wish that all that is done to that end should be seen to be done openly and transparently is not surprising. It must be read in the same context as the clear call for greater accountability to Maori, in the deed and the ensuing legislation.

The claim is limited to the method of appointment.

2.2 The 1992 Act sets the new Commission membership at not more than 13, appointed on advice of the Minister of Maori Affairs, but only after consultation. Section 16 provides that the minister shall consult:

> (a) the Maori Fisheries negotiators (jointly unless it is impracticable to do so by reason of absence, illness or otherwise); and

(b) such persons who are, in the Minister's opinion, representatives of Maori who are or may be beneficiaries of the Commission's assets.

Members of the old Commission are deemed to have vacated office (s16(2) 1992 Act). They were appointed by the Crown without formal provision for consultation with Maori; but may of course be re-appointed under the new scheme.

There are obvious difficulties. Who are "representatives of Maori"? Representation problems were referred to in our *Fisheries Settlement Report* but for the purpose of this exercise the determination of representation is left to the minister, acting, no doubt, with advice from his ministry. And who may be beneficiaries? Conceivably this could include all Maori, for we have yet to hear of any hapu devoid of any interest in fishing.

2.3 On 16 October 1992 the minister wrote to 73 Maori organisations seeking nominations for the new Commission by 30 October 1992. He believed it important that members should have "a knowledge of Tikanga Maori; an understanding of resource management principles and practices; ... a commitment to Maori development" and that there should be "a geographical balance with respect to the tribes represented".

The number written to does not indicate the number of tribes as some are represented in more than one organisation. Four urban authorities were included (Auckland and Wellington). In addition the head office and eight registries of the Maori Land Court were advised.

Hariata Gordon responded to the minister on 23 October and 7 December 1992 seeking an extension of time and the calling of a national hui. The evidence for Ngati Paoa is that there is no further material of which they are aware that the minister is to undertake any larger consultation with "representatives of Maori" and they are given to understand that a hui is not proposed. Crown counsel did not attest to any intention for wider consultation and opposed the proposal that a hui be called.

2.4 There is a change from the Deed of Settlement. The deed provided simply for consultation with the negotiators and "... Maori with beneficial interests" (3.4.2). The 1992 Act refers to the negotiators and "such persons who are, in the Minister's opinion, representatives of Maori who are or may be beneficiaries". The amendment we see as necessary, for practical reasons, but the Act must be read "in a manner that best furthers the agreements expressed in the Deed of Settlement" (s3) and the latter's reference to "Maori with beneficial interests" suggests to us that consultation should be sought widely from those representing many interested groups.

2.5 The claim was brought by Hariata Gordon for Ngati Paoa, but the Runanga o Ngati Porou and Te Iwi Moriori Trust Board joined in support, and there were submissions for Ngai Tahu Maori Trust Board, partly in support but mainly opposed. There was little time for others to be involved in the inquiry if they wished to be.

The claim as we perceive it, in light of the documents filed and the submissions, is that Ngati Paoa and those who joined with them are prejudicially affected by the consultation proposals in the 1992 Act, and are prejudicially affected by a proposed policy of the minister, in the exercise of his consultation duties.

not to consult collectively at a hui; and that the Act and the policy are to that extent inconsistent with the principles of the Treaty.

By way of relief a hui is sought. The formal Ngati Paoa claim went further to contend that the hui should make the selection.

Were a claim well founded we would still need to consider whether in all the circumstances the relief sought, or any other relief, should be given (s6(3) Treaty of Waitangi Act 1975).

2.6 In support of the claim it was contended:

- Consultation between Maori and the Crown is a major issue, and consultation appropriate to the case should be carefully conceived;
- In this case, the appointments and the method of appointment are critical to the integrity of a process where serious questions of fairness and equity amongst Maori are involved;
- The Crown alone should not determine the consultation procedure. Consultation should be on mutually acceptable terms;
- The appointment process should be fully transparent and fair. The proposed process is not;
- The proposed method of appointment does not capture the intention of the deed for a more accountable Maori body;
- It is inappropriate for the minister to determine Maori representatives. It is the rangatiratanga of the tribes to choose their own;
- The Maori negotiators have no mandate to advise on appointments and do not represent Maori (Ngati Paoa, Ngati Porou runanga); or, the negotiator's mandate to advise on appointments is in the settlement deed, but as they have no mandate to represent iwi, the minister should prefer iwi advice (Ngai Tahu Maori Trust Board);
- The Crown should not treat with Maori separately, but collectively at a hui;
- That the minister should not decide the appointments. The minister should appoint those settled upon at a hui;
- The minister should not in any event appoint without prior reference to a hui;
- The policy of calling for nominations with the minister setting the criteria and making the decision, is not consultation;
- The Crown relied on the collective voice of Maori at hui to proceed with the Sealord's transaction, and that process should continue to apply to the appointments;
- There is no provision for the commission to consult with Maori with regard to the allocation of the existing assets of the commission including those of Aotearoa Fisheries Limited. There should be such provision as the optimum method of allocation was not finally settled at the last Hui-a-Iwi.

2.7 In opposition it was contended:

- The Treaty is between iwi and the Crown not Maori and the Crown. The duty of the Crown is to deal with its individual iwi Treaty partners. Ngai Tahu entered into the Treaty on its own accord and requires the Crown to deal with it on that basis (Ngai Tahu Maori Trust Board);
- There is no duty on the Crown to call a national hui. Nor is one required (Crown);
- By its circular letter to 73 Maori groups of 16 October 1992, the Crown has undertaken a comprehensive consultation with a wide range of Maori organisations (Crown);
- Care should be taken in the appointments in view of the substantial assets involved. Such care cannot properly be exercised at a general hui except after long preparation of which time does not allow (Ngai Tahu Maori Trust Board; Crown);
- A national hui will not protect smaller tribes. "The outnumbering and dominance of smaller tribes with major fishing interests by more numerous iwi with relatively smaller interests in fisheries ... would be an almost certain outcome" (Ngai Tahu Maori Trust Board);
- The concerns of small tribes like Ngati Paoa are met by the procedures in place for allocation schemes and other matters to be settled in consultation with Maori. (Crown);
- Sealord's was not mainly settled after national hui, but after hui that were region or iwi specific. There is no established precedent for national hui as a general rule (Ngai Tahu Maori Trust Board).

3. Maori Negotiators

We need not determine the precise extent of the negotiators' mandate. Their experience with Maori and knowledge of the legislative scheme and the goals to be achieved makes their advices invaluable on the criteria for appointment and the persons suitable for the task. They might consider for example that tribal or regional representation should not alone prevail, and that persons might also be appointed for their greater impartiality, their commitment to the people as a whole or their willingness to accommodate the interests of others.

To the extent that iwi or regional representation is to be provided for however, we accept the submission for Ngai Tahu Maori Trust Board and Ngati Paoa that the negotiators' role should be constrained. If they have made or propose nominations on behalf of any region or iwi, those nominations should be discounted. It would be contrary to the Treaty in our view were the right of iwi to make their own nominations usurped.

We do not recommend change to that part of the legislation providing for consultation with the Maori negotiators but urge the minister to consult with them on the basis described.

4. The Determination of Maori Representatives to Consult With

The minister has effectively determined that those comprising the management of the 73 Maori organisations circulated are persons to be consulted with. No-one can claim prejudice in our view, at least on this account, if they are included in the list thus compiled. The Ngati Paoa Whanau Trust Board is not there, nor the Iwi Moriori Trust Board which joined this inquiry in support. We can say from previous inquiries, that both should be included and that it would be contrary to the Treaty and the rangatiratanga of the iwi thus represented, if they are not. In the case of Te Iwi Moriori we observe, that some are included in Te Runanga o Wharekauri Rekohu, which is on the list, but Moriori are also an independent iwi and are entitled to stand under their own representative body.

The problem is capable of ready resolution however. We *recommend* that the minister include them on the list and allow them the opportunity to respond to the earlier circular if they have not already done so.

For the purposes of this proceeding we had no need to inquire further whether the provision enabling the minister to settle the persons representative of Maori is inconsistent with the principles of the Treaty; and, no other prejudice to the particular claimants having been demonstrated in this respect, we would be exceeding our jurisdiction to do so.

Similarly we were not called upon in this inquiry to consider the adequacy of the list the minister has compiled and we refrain from commenting on that. Our only proper concern, in this claim, is whether the claimants are there and if not, whether they should be.

5. Adequacy of Consultation

The main complaint concerns the adequacy of consultation. It is not consultation, it was contended, merely to call for nominations with the minister settling the criteria for selection as proposed in the October circular. We are mindful of the fact however that a legal issue is involved, and whether or not the minister has adequately discharged his statutory duty to consult in terms of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, is a matter that may be taken to the courts. As Morris J said in *Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496 at p 500:

> If a complaint is made of failure to consult, it will be for the court to examine the facts and circumstances of the particular case and to decide whether consultation was, in fact, held.

So as not to trespass on other jurisdictions, we resolved to confine ourselves to the Treaty aspects of the case and the Maori cultural considerations involved. This revolves principally around the question of —

6. Whether or Not There Should be a Hui?

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

- Ngati Paoa claims [that the clause for appointment of members] is inconsistent with the Treaty in that it does not make provision for Iwi to come together collectively to decide on who shall be the members on the new t. Maori Fisheries Commission. The Treaty of Waitangi clearly envisages

that issues of national importance such as this should be dealt with by Iwi/Maori collectively and not individually ....

In support of this claim we say:—

- that the expectation of the Treaty of Waitangi is that issues of national importance require consultation to be carried out not only between the Crown and individuals but also between the Crown and the Maori collectivity, that is with all Iwi coming together at one time to make the decision .... Any procedure which falls short of this is not consultation but manipulation;
- the rangatiratanga of Iwi requires that the Minister give effect to a collective decision of the Tribes as a *whole* and not what is envisaged in the Bill where the Minister gives consideration to the joint decision of the Maori negotiators but is not required to consult with Iwi/Maori collectively;
- it is a natural democratic right that issues of this nature and significance should be dealt with in a process which is transparent and visible and any suggestion of internal selectivity should be ruled out;
- it is our understanding of the Fisheries Deed that the new Fisheries Commission would be expanded and made more *accountable* to Maori. Inherent in this objective must be a consultation process which properly and adequately reflects Maori needs not only in terms of the Treaty but also in terms of modern reality. It is our submission that this clause must be amended so that the minister is required to call a hui so that Iwi/Maori have the opportunity to come together collectively ....

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

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

> "Her Majesty the Queen asks you to sign this Treaty", said Lt Governor Hobson in opening the discussion before the multitude at Waitangi. "I ask you for this publicly: I don't go from one chief to another". [Colenso's manuscript account of proceedings at Waitangi 5-6 February 1840, Alexander Turnbull Library]

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

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

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

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

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

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

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

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

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

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

— iwi with large coastlines;

— those with short coastlines;

— inland tribes with traditional access to coastal areas;

— the protection of small tribes and minority groups;

— the main lake tribes (for they too have been included in the settlement);

— the main river tribes; and

— urban Maori groups, especially those in the large metropolitans.

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

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

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

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

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

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

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

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

It would also appear to be the case that the minister should treat cautiously with proposals privately made for the appointment of Commission members

according to some plan, where the proponents did not avail themselves of the opportunity to put the plan to the assembly.

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

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

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

We also place great value on the dialogue and discussion that a hui may engender, and from the assurance that is given when all that is done is seen to be done openly without room for fear of manipulation. It was obvious that there is a deal of suspicion of the Crown and the Maori leadership. It may be totally unfounded but it is there, a natural consequence of the necessary task that the Crown and the Maori leadership had to perform. To remove it at this stage is vital, and that can only be done by transparent action. Not to call a hui would represent a considerable lost opportunity.

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

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

We cannot predict those matters but can only say that a substantial case has been made for a hui, and that despite the possibility of some unfortunate

outcomes, the greater certainty is that the grievance will be more without one. Despite the short time frames, ***we recommend*** that a hui be called.

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

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

Dated this 21st Day of December 1992

E T J Durie, chairperson

M T A Bennett, member

M B Boyd, member

THE SEAL OF THE WAITANGI TRIBUNAL

Record of Proceedings

1 Claims

1.1 Claim of H Gordon for Ngati Paoa, filed 11 December 1992

2 Papers In Proceedings

2.1 Tribunal direction to register claim, 9 December 1992.

2.2 Notice of claim and of direction.

2.3 Claimant response to tribunal, received 10 December 1992

2.4 Crown response to tribunal, received 11 December 1992

2.5 Amendment of claim request for urgent hearing received 14 December 1992

2.6 Tribunal direction, 14 December 1992

2.7 Notice of hearing 15 December 1992

2.8 Memorandum from Runanga O Ngati Porou, 15 December 1992

2.9 Memorandum from Te Iwi Moriori Trust Board, 15 December 1992

2.10 Memorandum from Ngai Tahu Maori Trust Board, 15 December 1992

2.11 Memorandum from Ngai Tahu Maori Trust Board, 15 December 1992

2.12 Claimant counsel submission

2.13 M Solomon response to Crown, received 16 December 1992

2.14 Written form of Crown counsel oral submission received 16 December 1992

2.15 Memorandum from negotiators counsel received 16 December 1992

3 Record Of Documents

A1 Treaty of Waitangi (Fisheries Claims) Settlement Bill

A2 Extract from Deed of Settlement of 23 September 1992

A3 Treaty of Waitangi (Fisheries Claim) Settlement Act

A4 Letter Gordon to Minister of Maori Affairs, 7 December 1992

A5 Panui from Minister with address list attached, 16 December 1992

A6 Letter Gordon to Minister 23 December 1992

4 Proceedings

A hearing was held at the board room of the Waitangi Tribunal on 15 December 1992. Maui Solomon appeared for the claimants, Martin Dawson for the Maori negotiators, Caren Wickliffe for Te Runanga o Ngati Porou and Jennifer Lake for the Crown. Submissions were also received from Te Iwi Moriori Trust Board and the Ngai Tahu Maori Trust Board.