

Proceedings of a Hui held at Hirangi Marae, Turangi

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I INTRODUCTION

- (a) This report is based on the deliberations of a national Maori Hui held at the Hirangi marae, Turangi on Sunday 29 January 1995 ("the Hui").
- (b) Sir Hepi Te Heuheu called the Hui in response to the *Government's Proposals For the Settlement Of Treaty of Waitangi Claims* ("the Proposal") and to consider how the rangatiratanga of Iwi might be advanced.
- (c) Over 1,000 people attended the Hui representing major tribes from both the North and South Islands as well as other national and local Maori organisations. Those who made submissions did so on behalf of their Iwi or groups.
- (d) The level of agreement emerging from the Hui was sufficiently high to enable major resolutions to be passed unanimously.
- (e) It was resolved that the deliberations of the Hui should be transmitted to the Prime Minister.

II PRELIMINARY CONSIDERATIONS

A *A Proposal Only*

Although reaction to the Proposal has sometimes assumed that it has already received Government approval, in fact the Proposal is only a proposal. It is neither policy nor legislation. For it to become law it will require Maori support as well as support within Parliament. Without sufficient Maori support the Government would be highly irresponsible to recommend the adoption of the Proposal as national policy. For that reason it is imperative that Maori views on the Proposal are clearly enunciated and conveyed to the Government in the allocated time frame. While it is unlikely that there will be a single Maori viewpoint or that there will be full Maori agreement on all issues, it is important that the range of Maori views be assessed in a fair and accurate manner so that levels of support and opposition can be determined. Nonetheless whether or not there is sufficient Maori support to enable the Proposal to proceed is likely to be a matter of contention as it was when the Sealords Agreement was under consideration. Sufficient Maori support does not necessarily mean total Maori support though it should mean substantial Maori support as determined by the Government and Maori jointly.

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B Existing Avenues for the Settlement of Treaty Claims

The Proposal is not essential for Treaty claims to be processed or resolved. There are already avenues for settling claims which have enabled the Government to negotiate terms according to what it considered reasonable. The Heads of Agreement signed by Tainui and the Crown demonstrates that it is possible to reach agreement without the imposition of a national fiscal framework. Obviously in the negotiation process, the Crown will always have regard to what it considers affordable at any particular time, just as claimants will be eager to obtain the best results for their people. It is hoped that both parties will be primarily concerned with justice. If the current Proposal were not accepted there is no indication that the existing avenues for settling claims would not remain open. At least until a more comprehensive system is in place the Waitangi Tribunal, the Courts, and direct negotiation should remain in place. There are also other models for Treaty settlements, such as the Crown Forest Rental Trust and the Congress/Crown Joint Working Party for the disposal of surplus railway properties, which should be submitted to thorough evaluation before yet another approach is introduced.

C Objections to the Government's Proposal

Discussion of the Government's Proposal for the Settlement of Treaty of Waitangi Claims occupied the greater part of the Hirangi Hui. No speaker endorsed the proposal nor recommended that it be adopted as policy either in part or in whole. Objections stemmed from the *process* adopted in the development of the proposal, the *principles* upon which the proposal is based, the *assumptions* made in justification, and the *framework* within which the Proposal has been drafted.

III THE PROCESS ADOPTED TO DEVELOP THE PROPOSAL

A Lack of Consultation

A major concern at the Hui was that the Proposal was developed without Maori consultation. Although Maori opinion will be actively sought over the next two or three months, elements of the Proposal are clearly beyond discussion, including the key aspects of a fiscal cap, the conservation estate, and the ownership of natural resources. A climate of secrecy and unilateral declaration has surrounded the Proposal, suggesting a lack of good faith by the Crown and undisclosed motivation for developing a proposal of this nature.

B Scepticism

As a consequence of a lack of consultation there is a high level of scepticism about the consultation process planned during February and March 1995. Not only are certain aspects beyond discussion but Maori input is being requested simply to comment on a proposal rather than to work constructively with the Crown to draft a proposal which might then be tested on wider audiences.

C *Genuine Consultation*

Consultation at this relatively late stage, when much of the proposal has been already decided upon, goes against the established wisdom on community consultation and Court of Appeal's judgment in *Wellington International Airport Ltd v Air New Zealand*.¹ If good faith and honour are to be demonstrated then there must be a clear indication that the Government is ready to change its plans and even start afresh if that is what the people consulted wish.

D *Active Participation*

The Government Proposal has been developed over a period of years, and at considerable expense. The presentation of an alternative proposal, developed by Maori, would not be an unreasonable outcome of the consultation proposal but a detailed alternative proposal is unlikely to emerge in the time allowed for consultation or without adequate resourcing. In this respect the consultation round prescribes a passive reactive role for Maori rather than enabling active participation in a climate of mutual trust and respect. Hui participants agreed that if an alternate Maori proposal is seriously sought then time and resources must be made available.

E *International Observation*

The further development of the Government's Proposal should depend, to a considerable extent, on the consultation round. In turn that will demand careful analysis of submissions and inevitably some judgment as to the representiveness of those making submissions and whether or not they represent the views of a substantial proportion of all Maori. In light of the unilateral approach taken by the Government so far, the task of analysis should not be undertaken by the Government alone but in partnership with Maori and under international scrutiny through an agency of the United Nations. New Zealand recognised the wisdom of objective international scrutiny when it sent a delegation to South Africa to observe the 1994 general election. In view of the profound constitutional implications for Maori and the Nation, it is appropriate to request international involvement in the consultation and submission analysis process of the Government's Proposal.

IV PRINCIPLES UNDERLYING THE PROPOSAL

A *Treaty of Waitangi Principles*

Surprisingly, in view of the aims of the Proposal, the principles of the Treaty of Waitangi have not been included among the Settlement Principles. Reference to the Treaty focuses attention on Article III of the Treaty and in particular access to mainstream Government programmes. The significance of Treaty principles for Maori

¹ [1991] 1 NZLR 671.

relationships with the Crown, as defined by the Waitangi Tribunal and the Court of Appeal in 1987² have been omitted.

B Justice

Of the seven Settlement Principles, only one gives any indication of fairness to the claimants; the others appear to provide reassurances for non-claimants. While it is appropriate that the rights of others must be protected, the resolution of proven claims must be guided primarily by the principles of natural justice, not political expediencies or popular support. The Settlement Principles do not reflect a primary focus on justice as a principle for remedying past injustices.

C An Absence of Higher Ideals

Similarly, in discussing settlement principles which might be applied to claims to the conservation estate, the Proposal does not acknowledge the principles of the Treaty of Waitangi but suggests other principles which for the most part provide reassurances to the general public and interested third parties at the expense of potential claimants. In this respect the principles proposed by the Government are not obviously based on higher ideals or apolitical ethics; they more closely resemble a recitation of existing Government policies.

V ASSUMPTIONS

A Rigid Positions

The Proposal makes certain assumptions which have not been tested or universally accepted. Within the Proposal rigid positions have been adopted when the evidence does not warrant such a degree of certainty. There was a particular focus at the Hui on three key elements of the Proposal, which are apparently not negotiable, and are based on narrow understandings of the Treaty of Waitangi and unilateral assumptions about the role and prerogatives of the Crown.

B Natural Resource Ownership

In the Proposal, four types of interest in a natural resource are listed: ownership interest, use interest, value interest and regulatory interest. For Treaty claims natural resources comprise water, geothermal energy, river and lake beds, foreshore and seabed, sand and shingle, and minerals including gold, coal, gas and petroleum. Maori interests are deemed to be confined to use and value interests. A refusal to contemplate Maori ownership of natural resources, even though acknowledging use and value interests, is contrary to the Treaty of Waitangi. The Courts have recognised Maori interests in natural resources and have never explicitly ruled out Maori ownership. In the Proposal, this has been interpreted as an indication that by implication the Courts do not recognise an Article II ownership interest in natural resources. A more honest position is that the

² *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

Courts have not ruled on the issue in terms of the Treaty of Waitangi. "Tino rangatiratanga" in Article II conveys a level of interest which goes well beyond "use and value". In choosing to ignore this interpretation the Proposal has prematurely opted for a colonial view of ownership and has dismissed global understandings of the ownership rights of indigenous peoples.

C The 1840 Rule

The Treaty of Waitangi was never intended to freeze Maori in a time warp. It was essentially about forward development, economic growth for Maori and Settlers and the opportunity to share new technologies. Yet in the Proposal the Government has emphasised 1840 uses and values and chosen to ignore the intentions of the Treaty and the expectation that Maori would share fully in the benefits of the new nation. Because Maori had not contemplated deer farming in 1840, their right to own land now used for deer farming is no less secure. The issue should not revolve around a hypothetical reconstruction of 1840 views and attitudes but, in keeping with the objects of the Treaty of Waitangi, should focus on Maori interest in the economic potential of properties and other taonga which were owned in 1840 and which have never been justly alienated. By concluding in the Proposal that the 1840 benchmark is an adequate test of Maori interest, the Hui agreed that Government has made assumptions which are not shared by Maori, by the Courts or by the international community.

D The Fiscal Envelope

The sum of one billion dollars has been proposed as the settlement sum which will make up the fiscal envelope. The amount is non-negotiable and includes the assessed value of land and other resources used to settle claims. In addition certain claims which have already been settled, such as the Deed of Settlement to settle the fisheries claims (the Sealords Agreement), will be included in the envelope.

The Proposal is not explicit on how a sum of one billion has been calculated but it is justified as a political decision largely on the basis of affordability and acceptability to the wider community. It is also suggested that the amount should be sufficient to redress claimants' sense of grievance. There is an assumption that one billion dollars is fair and affordable. However, neither the methodology used to calculate the amount, nor the basis for deciding viability has been disclosed. The cap is simply stated as a given, even though most claims have not yet received due consideration while others have yet to be filed.

The amount necessary to ensure a just settlement is in fact not known. Estimates vary but even highly conservative estimates suggest that the sum of one billion dollars falls well short of a reasonable and fair settlement price. Hui delegates concluded that the approach taken in the Proposal, emphasising political expediency rather than fairness and justice, is at best irresponsible. Not only is the size of the envelope a source of concern but the failure to disclose the manner in which the cap has been determined suggests a rigidity if not an arrogance which has done little to uphold the principles of honour and good faith. An agency agreed upon by Maori and the Crown should be asked to value the claims so that a more thoughtful assessment of the Proposal can be made.

VI THE SETTLEMENT FRAMEWORK

A *Political Acceptability*

Hui participants were adamant that the settlement of Treaty of Waitangi claims cannot be weighed in isolation from other matters or without recourse to broader considerations. In the Proposal an overall framework is not clearly defined. The principles suggest that the governing considerations have been based on political acceptability to wider electorates and secondarily, to compensating Maori for the Crown's past injustices.

B *The Elimination of Article II*

In the absence of a clear framework, several speakers at the Hirangi Hui expressed concern about the motivation for the Proposal and the narrow constructs within which assertions have been made. A central concern is that the Proposal may well be a blueprint to diminish the Treaty of Waitangi, not just settle claims under the Treaty, and that it is a prelude to eliminating Article II rights from future Treaty considerations. Reassurances that Article III rights will be protected are not matched in the Proposal by parallel reassurances about guarantees for Article II rights. By removing recourse to the Courts and the Waitangi Tribunal in respect of claims which have been "settled", there will be a serious erosion of the tino rangatiratanga of Iwi and hapu and the guarantee of full exclusive and undisturbed possession will have been unilaterally withdrawn before the rights and wrongs have been adequately debated.

C *Undermining the Maori Version of the Treaty*

Significant opposition to the Proposal stems from the implicit discounting of the Maori version of the Treaty. Nowhere in the Proposal are the roles and powers of Government fettered by the authority of tino rangatiratanga contained in Article II of the Maori version of the Treaty. Similarly, discussion on the conservation estate and natural resources places no importance of Maori understandings of the meaning of the Treaty as conveyed in the Maori version. Ironically, whereas in 1975 the principles of the Treaty were introduced by the Crown as a tool to enable both versions of the Treaty to be addressed, the Government has reverted to a literal interpretation of the terms of the Treaty. In so doing it has not only relegated the Maori version to an inconsequential position but has also moved away from any recognition of the Treaty as a broad guide to future national development.

D *The Status and Interpretation of the Treaty of Waitangi*

Rather than first formulating a mutually acceptable Treaty policy, the Government has opted instead to tackle one aspect of the Treaty of Waitangi but in isolation from either Treaty principles or provisions. The Government urgently needs to declare its position on the Treaty of Waitangi. Are both the Maori and English versions of the Treaty to be afforded equal standing? Are the principles of the Treaty to be used in deciding the relevance of the Treaty or are the strict terms of the Treaty, the provisions,

to form the basis for discussion? Is the principle of partnership between Maori and the Crown, so deliberately formulated by the Waitangi Tribunal, the Court of Appeal and the Royal Commission on Social Policy, now to be abandoned? Is it proper to deal with each Article of the Treaty as if it were independent of the other two Articles? How do claim settlement principles relate to an overall Treaty policy? Do the Crown Treaty principles released by the Government in 1989 have any significance in 1995? These questions need to be answered so that the full significance of the Proposal can be understood.

E The Cart before the Horse

It is imperative that Maori know where the Government stands in relation to the Treaty of Waitangi so that a more reasoned evaluation of the Proposal can be made. Without an explicit Treaty policy the inescapable conclusion is that either there is no Treaty policy or the Government is determined to remove the Treaty as a significant factor in the nation's future growth and development. The Proposals for the Settlement of Treaty of Waitangi Claims have suffered from the absence "of" an overriding clear framework, based on the Treaty of Waitangi.

Several submissions made at the Hui considered that without a wider contextual backdrop, Government Proposals to settle claims simply foster the impression that Treaty matters have become irksome and that a piecemeal consideration of each Article will eventually do away with the Treaty altogether. Hui participants agreed that any mechanism for the settlement of Treaty claims will only make sense if it is premised upon a wider Treaty framework and that settlements which purport to be full and final will never be durable unless they are formulated within that wider context. In this sense the Proposal is premature. It should have been preceded by the careful development of a Constitutional Covenant regarding the Treaty and the position of Maori as Tangata Whenua.

VII AN ALTERNATE APPROACH

A Constitutional Change

Although the Statute of Westminster officially set New Zealand free to decide its own laws and make its own constitutional arrangements, until recently there has been no move to make any major changes to the system imposed by the British Parliament in the New Zealand Constitution Act 1852. The change to MMP will bring major changes to the electoral system and presumably to Parliamentary decision-making. There is also talk of changing the name of New Zealand (to Aotearoa), adopting a new flag which more clearly identifies New Zealand as an independent nation in the South Pacific and replacing the Queen's Honours List with a New Zealand equivalent. Most significantly, the Prime Minister has raised the serious possibility that New Zealand will become a Republic.

B A Treaty Based Constitution

The need for a clear Constitution was reiterated at Hirangi. According to those making submissions Maori are not content to depend on the goodwill of successive Governments or to be exposed to inconsistent policies developed to suit the needs of Pakeha. Progress in one decade all too frequently must be revisited a decade later. Despite repeated calls for the Treaty of Waitangi to be entrenched as a constitutional document, it dangles precariously in front of governments who have other agendas and often little sympathy with Maori aspirations. The Hui concluded that greater certainty was needed. As the Nation gears itself for a debate on major constitutional reform (Republicanism, a new flag, a New Zealand's honours system, the implementation of MMP) it is an opportune time to develop a Constitutional Covenant based on the Treaty of Waitangi. Until that occurs, Maori identity and security will forever run the risk of being compromised.

C The Development of a Constitution for New Zealand

The terms of the Government's Proposals for the settlement of Treaty of Waitangi Claims give little reason to believe that there has been any fundamental move away from a colonial mind set and towards a system of laws and policies which encompass modern New Zealand's unique heritage and origins. Were it to be guided by a Treaty-based constitution, the Hui considered that the Crown (or its republican equivalent) might not necessarily assume ownership over the beds of lakes or rivers or model a New Zealand common law exclusively on the British system or even conclude that sovereignty could not be shared between the Crown and Maori.

Maori organisations have long since entertained the possibility of shared political decision-making and speakers confirmed that several Maori organisations are already considering ways in which constitutional arrangements might give greater expression to the reality of tino rangatiratanga. The common aim is to enable Maori policy to be formulated by Maori, legislation which impacts on Maori to be approved by Maori and Maori representatives on national bodies to be appointed by Maori. A Maori Parliament, a Maori House within Parliament, a Maori/Pākeha Senate and a National Maori Assembly have all been seriously proposed.

At the Hirangi Hui, however, there was agreement that what matters now is not so much the details of a Treaty-based Constitution or the flow-on constitutional arrangements, but a commitment to a constitutional review jointly undertaken by Maori and the Crown for the purpose of developing a New Zealand Constitution based on the Treaty of Waitangi and, among other things, fully recognising the position of Maori as Tangata Whenua. Hui participants discounted the possibility of durable Treaty settlements without fresh Constitutional guarantees and a final break with colonial laws and processes.

VIII RECOMMENDATIONS FOR THE CROWN

- (a) The deliberations of the Hirangi Hui should be transmitted directly to the Prime Minister and the principle of tino rangatiratanga should form the kaupapa for a

hikoi to Waitangi and to Parliament. Alternately the Government could be invited to a marae to be informed of the Hui's objections to the Proposal.

- (b) At least until a more comprehensive system is in place the Waitangi Tribunal, the Courts, and direct negotiation should remain in place as avenues for deciding on Treaty of Waitangi claims
- (c) During and following the consultation process, the level of Maori support for or against the Proposal should be jointly determined by the Government and Maori.
- (d) To maintain good faith and honour there must be a clear indication that the Government is ready to change its plans for the settlement of Treaty claims and even start afresh if that is what the people consulted wish.
- (e) Time and resources should be allocated to enable the development of an alternate Maori proposal - the same time and the same level of resources which were available to the Crown.
- (f) In view of the profound constitutional implications for Maori and the Nation, there should be international involvement in the consultation and submission analysis process of the Government's Proposal.
- (g) The principles governing any Proposal to settle Treaty of Waitangi claims should include the principles of the Treaty, the principles of natural justice and higher moral and ethical ideals.
- (h) The Government's assertions of ownership of the conservation estate and the natural resources in New Zealand are inconsistent with the Treaty of Waitangi and should be rejected.
- (i) The Government should make explicit its methodology for deciding that a fair and affordable fiscal envelope should not exceed one billion.
- (j) The estimated value of Treaty claims should be determined by an independent agency jointly appointed by Maori and the Crown.
- (k) A World Court should decide on the validity of the Treaty of Waitangi and a delegation from the United Nations should be invited to visit New Zealand and investigate the continuing colonisation process being practiced by the Government.
- (l) Priority and commitment should be given to a Constitutional review jointly undertaken by Maori and the Crown for the purpose of developing a New Zealand constitution based on the Treaty of Waitangi and, among other things, fully recognising the position of Maori as Tangata Whenua.