

māori services

August 2001

Urban Māori Authorities (UMAs) have failed in their bid for recognition as iwi and as recipients of a share of Pre-Settlement Māori Fisheries Assets.

Urban Māori Authorities appeal dismissed by Privy Council

Privy Council decision

In a decision delivered last month, the Privy Council dismissed appeals by Urban Māori Authorities. In doing so, the Court confirmed judgments of the High Court and Court of Appeal on two important points:

1. the Treaty of Waitangi Fisheries Commission (the Commission) is required by statute to allocate the Pre-Settlement Assets solely to iwi or bodies representing iwi; and
2. iwi, in the context of allocation of the Pre-Settlement Assets, means only traditional Māori tribes.

Decision upheld

Māori claims in respect of commercial fishing rights were settled, in two tranches in 1989 and 1992. An interim settlement in 1989 provided that Māori were to receive 10 percent of all fish quota in the Quota Management System, in instalments over four years, plus \$10 million in cash. Those assets were called the Pre-Settlement Assets or PRESA. The 1992 final settlement (the Sealord deal) created a separate group of assets called the Post-Settlement Assets or POSA. The PRESA and POSA assets are now each valued at about \$350 million and are managed by the Commission on trust, pending their allocation to iwi.

The decision concluded one issue in the raft of litigation that surrounds the allocation of the fisheries settlement assets. That issue had been separated off from the others, for determination as a preliminary point. The point concerned interpretation of that part of the Māori Fisheries Act 1989 that requires the Commission to formulate a scheme to allocate the Pre-Settlement Assets to "iwi" and/or bodies representing "iwi". That gave rise to two questions for the Courts: (1) whether that means that only iwi may receive allocation; and (2) if so, whether iwi means traditional tribes only or also includes Urban Māori Authorities.



Chris Hall is a senior associate in the Wellington office who acted for the Treaty Tribes Coalition before the Privy Council.

The point had been the subject of two High Court decisions, two Court of Appeal decisions and one previous Privy Council decision.

Urban Māori Authorities and others appealed from the Court of Appeal. The Commission, the Treaty Tribes Coalition and others opposed the appeals. The Treaty Tribes Coalition is an organisation of iwi who seek allocation of the settlement assets to iwi according to the principle of mana whenua mana moana.

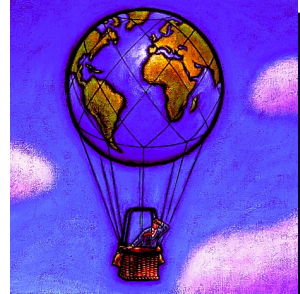
Key findings

The most recent Privy Council decision, issued on 2 July 2000, upheld the High Court and Court of Appeal decisions made in 1998 and 1999. The Privy Council's key findings were:

- The Commission has no power to allocate its assets other than in accordance with the terms of the Māori Fisheries Act 1989 as amended by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992.

Bell Gully

Vantage point



“The Minister has indicated that the Government would like to see a solution to allocation by August 2002.”

- The Act makes it clear that PRESA allocation can only occur under a scheme which gives effect to the resolutions of the hui-ā-tau (annual general meeting) made in July 1992.
- Those resolutions provide plainly that PRESA is to be distributed to iwi only in the sense of traditional Māori tribes.
- Any scheme of PRESA allocation to iwi must also satisfy the Commission’s overriding duty and accountability to all Māori.
- There is no evidence that a scheme for allocation to iwi cannot meet the obligation to all Māori and the Commission is confident that it can produce such a scheme.
- If the Commission, the Minister or a Court ultimately determined that it was not possible to meet the obligation to all Māori through iwi allocation then the Commission would not be obliged to allocate.
- If the Commission wished to make a distribution other than in accordance with the statute (ie. other than to iwi only), a statutory amendment would be required to the Māori Fisheries Act 1989.
- The concept of ultimate benefit for Māori (as used in the Act) is a broad one that does not seem to require any immediate and demonstrable advantage for every Māori and therefore the Commission has a great deal of discretion regarding what is of ultimate benefit to all Māori.
- The encouragement of an economic enterprise among Māori must be able to be said to be for the ultimate benefit of Māori, even though not all are able to participate in the enterprise itself or even share in its profits.

Their Lordships concluded their judgment with reference to a remark made by the Waitangi Tribunal in its 1992 Fisheries Settlement Report that:

“Treaty matters are more for statesmen than lawyers”.

To discuss the matters dealt with in this publication you should contact:

David Tapsell - david.tapsell@bellgully.com

Chris Hall - chris.hall@bellgully.com

Kiri Rikihana - kiri.rikihana@bellgully.com

Disclaimer: This publication is necessarily brief and general in nature. You should seek professional advice before taking any action in relation to the matters dealt with in this publication.

© Copyright Bell Gully 2001

Auckland

Royal & SunAlliance Centre, 48 Shortland Street,
PO Box 4199, Auckland, New Zealand.
DX : CP20509
www.bellgully.com
Telephone: 64 9 916 8800
Facsimile: 64 9 916 8801

Wellington

IBM Centre, 171 Featherston Street,
PO Box 1291, Wellington, New Zealand.
DX : SX11164
www.bellgully.com
Telephone: 64 4 473 7777
Facsimile: 64 4 473 3845

Where to from here?

All parties are hoping that the statesmanship referred to by the Privy Council will come sooner rather than later.

If there is any consensus in this area it is that continued litigation will not resolve the issues. The likelihood is that appeals from the substantive case may not conclude until 2004 or later.

Whether further litigation can be avoided is yet to be seen, but there have been some positive signs, from the Minister of Māori Affairs, Hon. Parekura Horomia and from the Commission.

The Minister has indicated that the Government would like to see a solution to allocation by August 2002. The Commission, on the other hand, has set about tackling issues on two fronts. First, by attempting to resolve the litigation through discussions, facilitated by retired High Court Judge Sir Rodney Gallen; and, secondly, by announcing that it intends to undertake a further round of consultation with iwi.

There have already been fifteen years of negotiation and litigation on these issues. Clearly, meeting the Government’s timetable of allocation by August 2002 will be a significant challenge for all concerned. It will require more than discussion and consultation – it will require real leadership. Time will tell whether by August next year iwi have been restored to the business and activity of fishing – the goal that Māori and the Crown set their sights firmly on when the Māori Fisheries Act was passed in 1989.

The Bell Gully Litigation team successfully represented the Treaty Tribes Coalition in the Privy Council.