IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2012-485-2187
[2012] NZHC 3338

BETWEEN	THE NEW ZEALAND MĀORI COUNCIL Applicant
AND	THE ATTORNEY-GENERAL First Respondent
AND	THE MINISTER OF FINANCE Second Respondent
AND	THE MINISTER FOR STATE-OWNED ENTERPRISES Third Respondent

CIV 2012-485-2185

AND BETWEEN	POUAKANI CLAIMS TRUST Plaintiff
AND	THE ATTORNEY-GENERAL First Defendant
AND	MINISTER OF FINANCE AND MINISTER FOR STATE-OWNED ENTERPRISES Second Defendants

CIV 2012-485-2351

AND BETWEEN	THE WAIKATO RIVER AND DAMS CLAIMS TRUST Applicant
AND	THE ATTORNEY-GENERAL First Respondent

	AND	THE MINISTER OF FINANCE AND MINISTER OF STATE-OWNED ENTERPRISES Second Respondents

Hearing:	26-28 November 2012
Counsel:	H A Cull QC, A T Sykes and K L Ertel for Plaintiff/Applicants (2185/2351) F Geirenger and J McHerron for Applicant (2187)[1] D J Goddard QC, J R Gough and S Kinsler for all the Respondents and Defendants
Judgment:	11 December 2012

JUDGMENT OF RONALD YOUNG J

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[1] D Hall, P Harman, S Arcus and K Wing-Wong also represented the New Zealand Māori Council but did not take the call as co-counsel at the hearing of this case.

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Introduction

[1] On the 29th day of June 2012, the State-Owned Enterprises Amendment Act 2012 (SOE Amendment Act) and the Public Finance (Mixed Ownership Model) Amendment Act 2012 (Public Finance Amendment Act) were passed by Parliament. The SOE Amendment Act enables the Government by Order in Council to change the status of Mighty River Power Limited (MRP), Genesis Power, Meridian Power and Solid Energy from State-Owned Enterprise (SOE) companies to Mixed Ownership Models (MOM) companies. This change in status is to facilitate the Government's plan to sell up to 49 per cent of each of these companies to private investors. The first such sale is to be the shares in Mighty River Power.

[2] These proceedings by declaration and judicial review, broadly speaking, seek to challenge the lawfulness of the Government's decision to sell 49 per cent of MRP without first implementing protective mechanisms so as to be able to provide redress and recognition of rights for outstanding Māori claims to proprietary interests in freshwater and geothermal resources.

[3] As SOEs the companies were 100 per cent owned by the Crown (through a shareholding Minister). The SOE Amendment Act removes the four SOEs from Schedules one and two of the State-Owned Enterprises Act 1986 (SOE Act) and places them within the MOM regime. The commencement date of this process is by Order in Council. To date no such Order has been made. However, the Government have made it clear they intend to commence the legislation by Order in Council and sell the shares. They have agreed not to proceed with such an Order until this litigation has been heard and judgment given by this Court.

[4] The orders sought by the claimants are declarations that the Government's proposed decisions are unlawful (and related injunctions) and the quashing of ministerial decisions or proposed decisions.

[5] I use the general term "claimants" for the collective of the three plaintiff/applicants, Pouakani Claims Trust, The New Zealand Māori Council and the Waikato River and Dams Claims Trust unless the context specifically requires

otherwise. I use the "Crown" to describe the defendants/respondents unless the context requires otherwise.

Factual background – a brief overview

[6] In May 2011, the Government outlined its policy to sell up to 49 per cent of the four SOE companies by using the MOM. The model involves a mix of Crown and private ownership of the four companies with the Crown throughout retaining 51 per cent of any and all categories of shareholding.

[7] The Crown says they began discussions with Māori regarding this policy as early as August 2011. Ministers met with Iwi Leaders[2] at an iwi leaders forum in Hopuhopu. The Deputy Prime Minister, the Honourable Bill English, outlined the policy and undertook to discuss it further with iwi leaders after the general election if the National Party then formed part of the Government.

[8] After the 2011 general election, the Government decided to proceed with the MOM proposal. In his affidavit in support of the Crown's case, Mr English outlines other consultations that took place with representations of particular Māori groups in September, November, December 2011 and January 2012. The MOM Bill was introduced to Parliament on 5 March 2012. It was later divided into the two bills passed by Parliament.

[9] In late January 2012, the Government announced that it would undertake formal consultation with Māori on the MOM programme beginning 1 February 2012. The Minister said: [3]

> 23. From the start of the consultation process with Māori, the Crown made clear its intention and commitment to replicate sections 27A to 27D of the State-Owned Enterprises Act (SOE Act) and to honour its Treaty obligations.

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2 The Iwi Leaders Group are made up of leaders from 60 iwi groups.

3 The consultation document noted "The Government in consulting with Māori to ensure that, before it makes its final decision on legislation and specifically on options on s 9, it fully understands Māori views on how Māori rights and interests under the Treaty of Waitangi are affected by the proposals".

> 24. The consultation was intended to ensure the government fully understood Māori views on how Māori rights and interests were affected by the proposals, and in particular to explore Māori interests around section 9 of the SOE Act (which states that "[n]othing in this Act shall permit the Crown to act in a manner that is inconsistent with the Treaty of Waitangi") and sections 27A to 27D of the SOE Act, and what might effectively be expressed in the new legislation.

[10] A number of hui were held around the country in February 2012 and over 200 written submissions were received by Treasury relating to a consultation document released by them (relating to the MOM). Further, the Prime Minister and Mr English met the Iwi Leaders Forum at Waitangi the day before Waitangi Day to discuss issues in the document.

[11] The Crown confirmed during the consultation process that they proposed to replicate ss 27A to 27D of the SOE Act as part of the sale process in any new statute and in the Crown's words "honour its treaty obligations". Section 45W of the Public Finance Act incorporates these sections into the MOM company obligations.[4]

[12] As a result of consultation, Cabinet agreed to an equivalent of s 9[5] of the SOE Act being included within the MOM legislative framework. This, in turn, became s 45Q of Part 5A of the Public Finance Act 1989. Section 45Q(1) was in identical terms to s 9 of the SOE Act. Subsection (2) provides:

> **45Q Treaty of Waitangi (Te Tiriti o Waitangi)**
>
> ...
>
> (2) For the avoidance of doubt, subsection (1) does not apply to persons other than the Crown.

[13] Section 27A–D (and, therefore, s 45W) provided that where land was transferred to an SOE which was the subject of a claim by Māori, then a memorial would be placed on the title of the land. If the Tribunal subsequently recommended the return of the land to Māori then the Crown was obliged to resume ownership of the land (to facilitate redress for Māori) and the Crown was obliged to pay

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4 Sections 27A–27D provide for resumption orders with respect to land claimed by Māori.

5 **9 Treaty of Waitangi**
Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi

compensation accordingly. This process was replicated for the four companies in s 45W of the Public Finance Amendment Act.

[14] There were other fora for discussion about reform of freshwater policy between Māori and the Crown. In 2009 the Crown began a programme to consider the reform of New Zealand's freshwater policy. Part of the policy work involves as the Deputy Prime Minster said, "the development of Treaty-based engagement with Māori on water management options".[6] The policy development involves direct contact between iwi leaders and the Crown through the Freshwater Iwi Leaders Group.

[15] The intention is that once policies relating to freshwater are developed there will be wider consultation with Māori. At the beginning of the discussion with the Iwi Leaders Group the Crown agreed that it would not dispense with or create property rights or interests in water without agreement with iwi. Further, the Leaders Group are to be involved in further reform of the Resource Management Act relating to freshwater.

[16] Māori are also members of the Land and Water Forum, a non-Government body including iwi. The Forum comprises "key users and stakeholders in land and water".[7] However, the report of the forum has made clear that "fundamental issues between the Crown and iwi concerning iwi rights and interests are not on the table in this forum".

[17] The Government had a planned process for the proposed sale of the shares in the four SOEs. Broadly it intended only to sell one such SOE at a time.

[18] Mr John Crawford, the Deputy Secretary, Commercial Transactions Group at the Treasury described eight essential steps for the sale of the shares in this way:

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6 Affidavit of Honourable Bill English at [33].

7 *Land and Water Forum, Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity, and Freshwater Policy and Plan Making through Collaboration (April 2012)* at iii.

28. The critical steps to be completed for an IPO (initial public offering) of these companies include the following:

    a. completion of audited accounts;

    b. preparation and approval of offer document by company directors and Ministers;

    c. brief equity analysts (to enable the analysts to prepare research reports and to distribute them to institutional investors);

    d. pre-registration period (to enable potential investors to register their interest in the IPO, enabling the Crown to assess the likely demand for shares when the offer opens);

    e. registration of offer document with the Registrar of Financial Service Providers;

    f. consideration period of 5 working days (during which the FMA may review the Offer Document for compliance with securities laws) (the period may be extended by the FM to up to 10 working days);

    g. retail offer period;

    h. institutional bookbuild, pricing, allocation and listing.

[19] The Government understood this process would take several months. It hoped to have completed the IPO process by mid May 2013 for MRP.

The Waitangi Tribunal claim

[20] In February 2012 the New Zealand Māori Council filed two claims with the Waitangi Tribunal (the Tribunal). The Tribunal reported on the first stage of its inquiry (after granting urgency on 28 March) on an urgent basis on 24 August 2012. In the words of the Tribunal the Wai 2357 claim (one of the New Zealand Māori Council claims):[8]

> concerns the Crown's policy to privatise up to 49 per cent of four State-owned enterprises (SOEs) Mighty River Power, Meridian, Genesis and Solid Energy without first protecting or providing for Māori rights in the water resources used by these companies.

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[8] Waitangi Tribunal *The Interim Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) at 1.

[21] Water was intended to cover both freshwater and geothermal waters. The Tribunal summarised the claim in this way:

> In essence, the claimants argue that Māori have unsatisfied or unrecognised proprietary rights in water, which have a commercial aspect, and that they are prejudiced by Crown policies that refuse to recognise those rights or to compensate for the usurpation of those rights for commercial purposes. In making these claims, Māori do not claim sole or exclusive ownership of all flowing water today. They recognise and accept the rights of non Māori to share in the use and benefits of New Zealand's waters. Rather, Māori claim that there is an ongoing breach of their residual proprietary rights which were guaranteed and protected by the Treaty of Waitangi from 1840 onwards. They seek recognition of their rights. Where those rights cannot be fully restored, Māori seek compensation.

[22] The Tribunal decided to divide its inquiry into two stages.

[23] The Tribunal said it was making an early pre-publication copy of its stage one report available so the Government could decide whether to proceed immediately with the sale of shares in MRP. The first stage of the inquiry focussed on the following issues:[9]

> (a) What rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi?
>
> (b) Does the sale of up to 49 per cent of shares in power-generating SOE companies affect the Crown's ability to recognise these rights and remedy their breach, where such breach is proven?
>
> (c) Is such a removal of recognition and/or remedy in breach of the Treaty?
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> (d) If so, what recommendations should be made as to a Treaty-compliant approach?

[24] The purpose in part of dividing the hearings was that if the Tribunal concluded the sale of 49 per cent of shares in MRP would have no material effect on the Crown's ability to recognise Māori rights or provide redress then there was no reason not to proceed with the sale. If, however, there was such a connection (a nexus), which meant the sale of shares would likely have a material effect on the

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9 Waitangi Tribunal *Interim Report* at 3.

Crown's ability to provide redress or recognise rights, then the sale process would have to halt.

[25] The second stage of the inquiry (likely in 2013) will consider whether any rights established as part of the first stage of inquiry, endure and have been given "Treaty consistent recognition in current laws and policies and whether the Fresh Start for Freshwater programme should wait for the definition of prior Māori rights so as to provide more effectively for their full recognition".[10]

[26] The sale process of MRP and discussion between Māori and the Crown was to a significant degree then driven by the conclusions of the Waitangi Tribunal report.

[27] In summary, the Tribunal at its first stage of inquiry found that there was a nexus between the assets to be transferred (shares in power companies) and the Māori claim to interests in water used by the power companies sufficient to call a halt to the sale process until the Crown provided an agreed mechanism to preserve Māori rights and to provide redress.

[28] The Tribunal noted that counsel representing the Crown, accepted that if the Tribunal found such a nexus, then there should be a halt to the sale process.

[29] The Tribunal having defined the nature of Māori rights and interests protected and guaranteed by the Treaty turned to the issues relevant to the proposed MOM share sales.[11]

[30] As to the sale of the shares affecting the Crown's ability to recognise rights and provide remedy, the Tribunal said:[12]

> We accept the Crown's evidence and submission that it will be able to provide almost all forms of commercial rights recognition and/or remedy after the sale.

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10 Waitangi Tribunal *Interim Report* at 3.
11 See at [23] of this judgment.
12 Waitangi Tribunal *Interim Report* at xv of Preface.

[31] The Tribunal accepted the Crown's "formal assurances" that the sale of the shares would not prevent the Crown from providing appropriate rights recognition afterwards, save for one reservation.

[32] The Tribunal then said:[13]

> The reservation noted above is that the claimants established to our satisfaction one vital matter that will be affected: the shares themselves. The claimants conceded that shares on their own will not give them a very meaningful recognition of their water rights. Nonetheless shares in conjunction with shareholders' agreements and revamped company constitutions could, if properly crafted, give them enhanced power in these companies that control and use their taonga and profit from them and thus a meaningful form of rights recognition. After careful consideration of the submissions we received from Crown and claimant counsel as to New Zealand company law, we agreed with the claimants that in practical terms, the Crown will not be able to provide such recognition after it sells shares to private investors. As a result, the very asset being transferred by the Crown, and which is sought by Māori and partial remedy for this claim would in practical terms be put beyond the Crown's ability to recover or provide after the sale. Since it cannot be stated with certainty that any other commercial rights recognition will actually come to pass, and given the opportunity exists here and now, and that opportunity is about to be removed beyond the Crown's practical ability to provide, we consider that the sale must be delayed while an accommodation is reached with Māori.

[33] The Tribunal then considered whether the removal of this capacity breached the Treaty.

[34] The Tribunal concluded:[14]

> If the Crown proceeds with its share sale without first creating an agreed mechanism to preserve its ability to recognise Māori rights and remedy their breach, the Crown will be unable to carry out its Treaty duty to actively protect Māori property rights to the fullest extent reasonably practicable. Its ability to remedy well founded claims will also be compromised.

[35] And finally, the Tribunal dealt with what recommendation could be made to assist in Treaty compliance. The Tribunal recognised that for some claimants, shares in conjunction with shareholder agreements and amended company constitutions (the shares plus proposal) would go some way towards meeting the Crown's Treaty obligations. But other affected Māori did not want shares.

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13 Waitangi Tribunal *Interim Report* at xvi of Preface.
14 Waitangi Tribunal *Interim Report* at xvi of Preface.

[36] The Tribunal recommended that the Crown:[15]

> Urgently convene a national hui, in conjunction with iwi leaders, the New Zealand Māori Council, and the parties who asserted an interest in this claim, to determine a way forward.

[37] Having concluded that a nexus existed the Tribunal considered that in the interests of the "Crown-Māori relationship we recommend that the sale be delayed while the Treaty partners negotiate a solution to the dilemma".[16]

The Crown reaction and consultation

[38] Mr English commented on the Tribunal's concept of shares plus in his first affidavit in these proceedings. He noted the idea was not closely defined. He assumed that it meant the provision of a greater degree of control over the four companies by Māori through a combination of the ownership of shares bringing particular rights, revised constitutions of the company, and a shareholder's agreement.

[39] He said the Government disagreed with the Tribunal's conclusion that the shares plus proposal could provide a form of redress that could not be provided equally well in other ways. However, the Government also considered that the Tribunal's shares plus proposal was not workable under company law, would significantly devalue MRP, and would compromise MRP's ability to operate efficiently.

[40] After the receipt of the Tribunal's report, Mr English said that the Government were concerned about postponing the first share offer given the cost of doing so. However, Cabinet decided that it would delay the programme to consult Māori affected by the Tribunal's shares plus proposal. He said that:

> Although we had formed a preliminary view about shares plus, we acknowledge that this was just our view and that there may be other views and other relevant information that would assist the decision making process.

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15 Waitangi Tribunal *Interim Report* at 199.
16 Waitangi Tribunal *Interim Report* at xvii of Preface.

[41] Cabinet decided the consultation would not be by an urgent national hui as recommended by the Tribunal but a targeted consultation with respect to those Māori groups who were directly affected. It noted that the Tribunal had found that residual property rights in water were localised not generalised and so consultation should be with those groups who were directly affected by the proposed sale. The consultation was to be about the Tribunal's shares plus proposal and not otherwise.

[42] In summary, the consultation process with respect to shares plus consisted of the Government writing to those groups that they believed were directly affected and other groups with an interest (including, for example, the New Zealand Māori Council) and inviting submissions. Others who self identified as having an interest were also invited to respond. There were face to face meetings (between the Crown and representatives of hapū and iwi) in Hamilton, Taupo, Te Kuiti, Whanganui, Tuai and Christchurch to discuss the shares plus concept. In both the written material and in the oral presentation to Māori, the Crown explained what it understood of shares plus and why it did not support it. There was to be no consultation with Māori, during this process, beyond the shares plus concept.

[43] Mr English said:[17]

> The consultation process confirmed our preliminary view that the redress outcomes available from shares plus are either replicable after sale by other mechanisms, or else not workable practice, and that the Crown's capacity to recognise rights and provide redress would not be impaired in any meaningful way by proceeding to IPO without first reserving shares plus.

[44] On 15 October, Cabinet decided to proceed with the share sales without implementing the shares plus idea of the Waitangi Tribunal.

[45] A number of affidavits by the claimants challenge the adequacy of the consultation process (both before the introduction of the MOM Bill and after the Waitangi Tribunal report) including whether the Crown came to the consultation with an open mind, whether the consultation was about the right issues, whether it was with the right participants and whether a fair opportunity was given to invitees

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[17] Affidavit of Honourable Bill English at [72].

to consider and comment on the policy. The adequacy of consultation will be dealt with later in this judgment.

[46] As a result of the decision of 15 October these proceedings were issued.

Review grounds

[47] The New Zealand Māori Council, the Waikato River and Dams Claims Trust and the Pouakani Claims Trust say that to give effect to the amendment Acts there are three actions by the Crown which it has said it proposes to undertake which are susceptible to review. These are the decisions[18] which are the subject of challenge by claimants.

[48] The proposed decisions are:

(a) the direction by the Cabinet to the Governor-General to bring into force by Order in Council the State-Owned Enterprises Amendment Act 2012. This has the effect of changing the status of MRP from an SOE to a MOM company;

(b) amending the constitution of MRP (and later the other SOE companies) which currently requires 100 per cent of the shares to be held by the Crown through the relevant Minister, to permit 49 per cent ownership by private persons; and

(c) offering for sale and selling up to 49 per cent of the shares in MRP.

[49] The claimants say their primary ground of review is that, with respect to each step, the "Crown" (typically the relevant Minister) must act in a manner that is not inconsistent with the principles of the Treaty of Waitangi. That is, the decisions are subject either to s 9 of the SOE Act or s 45Q of the Public Finance Amendment Act. In each case ministerial action would be inconsistent with the Treaty if the Crown did not first implement protective mechanisms to provide for redress and protect

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[18] Anticipated decisions in fact, but the Crown accept the distinction is irrelevant in this case.

Māori proprietary rights to water and geothermal resources before making any of the three decisions.[19]

[50] The failure by the Government to institute such protective mechanisms meant the anticipated decisions were inconsistent with the principles of the Treaty and, therefore, unlawful.

[51] The alternative grounds of review are:

(a) inadequate consultation. There were two separate consultation processes. The first, before the amendment Acts were passed but after the Government announced its sale policy. The second relating solely to the shares plus concept. The claimants say both consultations were inadequate: with respect to who was consulted; about what; and the time and resources given to enable effective consultation. Further, the claimants say the consultation was predetermined. The Crown did not come to either consultation with an open mind. Such a flawed consultation was inconsistent with the principles of the Treaty and resulted in unlawful decisions;

(b) the Crown took into account the idea that "no-one owns the water" in considering Māori claims of proprietary rights to freshwater and geothermal resources when deciding whether its actions were not inconsistent with the principles of the Treaty. This was an error of law;

(c) the failure by the Crown to allow the Waitangi Tribunal process to finish by waiting for its first and second reports to be completed before proceeding with the sale of MRP's share was unreasonable;

(d) it was an error of law and/or fact for the Crown to conclude that a sale of 49 per cent of MRP would not be inconsistent with the principles of the Treaty;

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[19] At [48](a), (b) and (c).

(e) the intention to proceed with the sale of shares in MRP was a breach of Māori legitimate expectation, expressed in this way, "that the Crown would act with utmost good faith and actively protect Māori cultural and proprietary rights and interests in freshwater and geothermal resources as recognised in the Treaty of Waitangi". The breach of this legitimate expectation by the Crown made the sale decision unlawful;

(f) the Crown had a duty to have Māori claims relating to water and geothermal resources properly heard and determined before dealing with MRP's assets and that the failure of the Crown to act fairly breached natural justice;

(g) the Waikato River and Dams Claims Trust say that the Crown's decision to proceed with the sale of shares in MRP is a breach of s 64(3) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.

Remedies sought

[52] The New Zealand Māori Council seek injunctions preventing the Crown from partially privatising the SOEs until the Waitangi Tribunal has completed its investigation and report relating to freshwater and geothermal claims and the Crown has "implemented a mechanism agreed on by the parties or determined by the Court which will protect Māori cultural and proprietary rights and interest in freshwater and geothermal resources through the partial privatisation".

[53] Secondly, the New Zealand Māori Council seek declarations that the Crown ought not to take any further action relating to the partial privatisation until the completion and implementation of those factors mentioned above.

[54] Further, an injunction is sought to prevent the Crown from partial privatisation until "they have conducted a lawful process" and finally, the declaration that the Crown ought not to take such action until it has conducted a lawful process.

[55] The Pouakani Claims Trust in its amended statement of claim seeks the declaration that the decision of the Crown to remove MRP from the SOE Act and proceed to offer 49 per cent of the shareholding "without establishing a system or mechanism to protect the applicant's claims and interests are inconsistent with the principles of the Treaty of Waitangi and are unlawful". Orders are sought quashing or setting aside the decisions of the Crown and directing the Crown to reconsider its decisions with specific directions for reconsideration. The Waikato River and Dams Claims Trust seeks identical relief to the Pouakani Claims Trust.

Summary of Crown's position

[56] At this point it is appropriate to set out the Crown's overall position:

(a) the Crown acknowledge that in these proceedings Māori seek to protect the rights and interests of Māori in freshwater and geothermal resources;

(b) the Crown do not dispute these rights exist and are protected by the Treaty. The extent of such rights may be in dispute and will in any event vary depending upon each particular circumstance of an iwi/hapū claim. Some such claims can be described as residual property rights;

(c) the Crown accept it would be inconsistent with Treaty principles for it to impair to a material extent its ability to recognise such rights and to provide redress for well founded claims;

(d) the transfer and sale of shares does not affect relevant rights in that it does not impair the Crown's ability to provide redress or rights recognition;

(e) the decisions of the Crown to commence the amending Acts, to amend the constitution of MRP and to sell the shares are not reviewable;

(f) no errors of law were made in the process nor were any of the Crown's decisions unlawful or unreasonable.

[57] It is appropriate to consider first the Crown's claim that the three decisions by the Crown relating to the creation of MOM companies and the sale of shares is not reviewable.

Crown says the decisions are not reviewable

Introduction

[58] As the Crown identified, the challenges by the claimants fall into two broad categories:

(a) the 'commencement decision': those that challenge the decision to commence the SOE Amendment Act as it relates to MRP (and by analogy as it relates to the other SOEs); and

(b) the 'sale and constitution amendment decision': those that challenge the decisions required after MRP becomes a MOM to give effect to the intention to sell the shares (the amendment of MRP's constitution and the actual sale of the shares).

[59] The Crown case is that neither the decision to commence the legislation nor amend the constitution and sell the shares are reviewable as to whether they are inconsistent with Treaty principles.

[60] As to the commencement decision, the Crown says by passing the amending legislation Parliament has spoken. The amending Acts provide for the four SOEs to become MOM companies. Parliamentary intent, revealed through the debates and explanatory notes to the Bill as well as the terms of the amending Acts are to enable the Crown to sell 49 per cent of the MOM companies. Parliament has included within the amending Acts specific Treaty protections including s 45Q and 45W illustrating Treaty issues have already been considered. The commencement

decision through the Order in Council does not, therefore, create an obligation to review the legislation for Treaty compliance. Parliamentary intent given effect to through legislation is not reviewable by the Courts.

[61] As to the sale process of the shares this, the Crown say, is the exercise of the shareholder's (the Minister) common law right to sell. It is not a process governed by the SOE Act (s 9) or the Public Finance Act (s 45Q) and, therefore, is not subject to an assessment of consistency with Treaty principles.

[62] Further, this case is on all fours with the Court of Appeal's conclusions in *New Zealand Māori Council v Attorney-General* (known as the *Commercial Radio* case).[20]

[63] The claimants challenge to these Crown propositions are based primarily on three grounds:

(a) section 9 of the SOE Act applies to the commencement power and, therefore, the decision to commence the provisions relating to MRP, are subject to an assessment of whether that decision is inconsistent with the principles of the Treaty of Waitangi;

(b) as to the power to sell the shares in MRP (and amending the constitution), the claimants say that this power is exercisable by the Minister pursuant to s 22 of the SOE Act and is not the exercise of the common law power of sale. This section is incorporated into the SOE Amendment Act by virtue of s 23 of the Interpretation Act 1999. To sell MRP's shares, the Minister must exercise the s 22 power. This is a discretionary decision under the SOE Act and, therefore, susceptible to review by virtue of s 9 of the SOE Act or s 45Q of the amendment Act;

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[20] *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA).

(c) the claimants say that the *Commercial Radio* case is distinguishable and that this case is similar to the *Lands* case.

[64] I agree with the Crown, that:

(a) the commencement decision is not reviewable, it is effectively an attempt to review Parliamentary intent;

(b) the sale of shares in MRP is the exercise of the common law power of sale and is not subject to review through either s 9 of the SOE Act or s 45Q of the Public Finance Act (nor is the constitution amendment decision);

(c) this case is on all fours with the *Commercial Radio* case with respect to (a) and (b) above.

The commencement decision

[65] To expand the Crown submissions. The Crown accepts that it is open for courts to review a legislative commencement decision. An Order in Council is subordinate or delegated legislation. Thus, the power to promulgate such an Order comes within the definition of "statutory power"[21] and the Court can, therefore, review the lawfulness of such actions. There can be no doubt, therefore, that the commencement decision is reviewable.[22]

[66] However, the decision of the Minister as to when (via an Order in Council) the amending legislation comes into effect does not, the Crown say, require the Minister to review whether there has been compliance with the principles of the Treaty. If this proposition is correct, the Crown say, then the failure by the Minister to review whether there has been compliance with the principles of the Treaty is no

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21 Judicature Amendment Act 1972, s 3.

22 See *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA) at 164. See also *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 (HOL).

error by the Minister and his decision to bring the legislation into force would not, therefore, be reviewable for his failure to do so.

[67] The Crown's case is that the policy decisions making MRP a MOM company have been made by Parliament. Such decisions are not reviewable. An attempt to review this policy through the commencement process is, the Crown say, in effect trying to review the Parliamentary process by the back door. The review of Parliamentary process is forbidden. This prohibition was identified and confirmed by the Court of Appeal in the *Commercial Radio* case.[23]

[68] The Crown say the purpose of the MOM legislation is clear from the legislation itself, the policy announcements before the introduction of the legislation, and the Parliamentary Explanatory Note to the legislation.

[69] These all illustrate Parliament's intention was to authorise the sale of 49 per cent of MRP by changing its status from an SOE to a MOM company and that the commencement decision should reflect that intent. Further, Parliament turned its mind to Treaty issues. It preserved in the amending Acts ss 27A to 27D of the SOE Act relating to resumption orders with respect to land, a Treaty protection.[24] It also included a requirement (s 45Q) that any of the powers exercised under Part 5A of the Public Finance Act 1989 would be subject to Treaty consistency compliance, a provision that mirrored s 9 of the SOE Act relating to the Crown's Treaty obligations.

[70] I agree with the Crown in this context that it makes no sense to suggest that in providing for the Government/Minister to set the commencement date of the SOE Amendment Act by Order in Council, Parliament intended the Crown to undertake a review of the consistency of the MOM legislation with the principles of the Treaty. This would have the constitutionally unattractive proposition that the Executive would effectively be reviewing Parliamentary process and intent and the adequacy of Parliamentary consideration of Treaty principles.

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23 *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA) at 165–166.
24 Section 45W.

[71] As the Crown in their submissions said:

> The commencement provision which appears in this legislation and in similar form in many other Acts is included to enable the Executive to take account of practical matters relevant to the date on which the legislation comes into force: not to enable (or require) the Executive to revisit the merits of the policy to which the legislation gives effect.

[72] Public announcements by Government both before the last election and after the election as to their intention in introducing the MOM legislation to Parliament make it clear that its purpose was to amend the SOE Act to enable four companies to have their status changed from SOEs to MOMs to sell shares in these companies. The Act itself expressly does this. And finally, the Explanatory Note to the Bill expressly says that is the purpose of the Act:[25]

> The Government plans to sell a minority of shares in (the four SOE companies). As these are currently State enterprises it is necessary to pass legislation that enables the Crown to remove these companies from the ambit of the State-Owned Enterprises Act.

[73] As to the new s 45Q the Explanatory Note says "consultation with Māori has been undertaken to gather views from Māori on how the Crown's obligations under the Treaty of Waitangi should be reflected in the Bill".[26] The inclusion of s 45Q reflected that consultation.

[74] The power being exercised here (the Order in Council) is the power to bring a statute into force at a time considered appropriate by the Executive. For example, in this case, the timing of the commencement may be influenced by market conditions relevant to share value.[27] The inclusion of s 45Q and s 45W illustrate Parliamentary consideration of Treaty principles in the amending statutes.

[75] Considered in this context, therefore, in my view there can be no basis for suggesting that the Executive has an obligation to review the MOM amending Acts for consistency with Treaty principles when proposing to exercise the commencement power.

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25 Mixed Ownership Model Bill (7–1) (explanatory note) at 1.

26 At 4.

27 *R v Secretary of State for the Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 (HOL).

[76] However, the claimants submit that the effect of s 23 of the Interpretation Act 1999 on the SOE Amendment Act means that the exercise of the commencement process is specifically subject to s 9 of the SOE Act. This, therefore, obliges the Minister to assess consistency or lack of it with Treaty principles when deciding whether to commence the legislation. It is submitted s 9 is, therefore, a fetter imposed on the exercise of the power to bring the Act into force, which was not present in the *Commercial Radio* case.

[77] Section 23 of the Interpretation Act 1999 provides as follows:

> **23 Amending enactment part of enactment amended**
>
> An amending enactment is part of the enactment that it amends.

[78] The claimants' submission is that the SOE Amendment Act amends the SOE Act, and thus, the Amendment Act is an integral part of the SOE Act by virtue of s 23 of the Interpretation Act. It was submitted this was consistent with Parliamentary intention and the legislative framework of SOEs. As the claimants say:

> The significance of that proposition is that s 9 of the SOE Act 1986 applies to the actions carried out under the amending 2012 Act. Section 9 of the SOE Act requires the Crown to act in a manner which is consistent with the principles of the Treaty of Waitangi.

[79] Pursuant to s 2 of the SOE Amendment Act, Cabinet has a discretion as to when (and indeed whether) the amending Act comes into force. The claimants' case is that this power must be exercised in a way that is not inconsistent with the Treaty of Waitangi pursuant to the statutory obligation in s 9 of the SOE Act.

[80] I am satisfied that s 9 of the SOE Act has no application to the commencement decision. In assessing the arguments of the claimants and the Crown, it is necessary to consider what s 23 of the Interpretation Act 1999 is intended to do. Self evidently many amendment Acts change (for particular purposes) the provisions in the main "Act". Indeed changing the original Act is typical of the purpose of an amending Act. And so in a literal sense often the amending Act and the original Act cannot both be part of a whole Act in the sense that s 23 appears to say. Nor would such an idea give authority to the amending Act

if the Act it amended was to remain as it was. Any such combined statute will often have glaring and irreconcilable inconsistencies arising from the amending statute.

[81] Here, the purpose of the SOE Amendment Act is to remove the four companies from the SOE model and place them in the MOM model. The intention is that the four SOE companies will no longer be SOEs and will no longer, therefore, be subject to the provisions of the SOE Act. They are no longer to be SOE companies but MOM companies subject to different rules.

[82] The SOE Amendment Act expressly removes the four companies from the schedule in the SOE Act so that these companies cannot any longer be subject to the SOE Act. The Public Finance Amendment Act 2012 provides that MOM companies will be subject to a Treaty inconsistency rule (at s 45Q) but one which has narrower application than s 9 of the SOE Act. This all illustrates that Parliament's intention in passing the SOE Amendment Act and the Public Finance Amendment Act was to ensure that those companies that are subject to the new MOM regime are not subject to the s 9 SOE Act Treaty compliance requirement but to the s 45Q Treaty compliance requirement.

[83] To therefore interpret s 23 in the way the claimants submit would be contrary to Parliament's clear intention. I agree with the Crown's submissions that the primary purpose of s 23 of the Interpretation Act 1999 is to ensure continuity between the originating statute and the amending statute for such things as definitions. But what it cannot be intended to do is literally incorporate all of the main Act into the amendment Act without regard for the substantive content of the amendment and Parliamentary intention.

[84] I am, therefore, satisfied for the reasons given that the proposed decision to commence the amendment is not susceptible to review in this case.

The sale and constitution amendment decision

[85] The claimants say that this Court should make orders preventing the sale of up to 49 per cent of the shares in MRP until such time as adequate protective

measures have been put in place to ensure the sale is not inconsistent with Treaty principles. It is common ground that before the shares can be sold MRP's constitution will need to be amended to permit such a sale. The claimants submit that the sale of shares and the amendment of MRP's constitution are subject to either s 9 of the SOE Act or s 45Q as incorporated by the Amendment Act.

[86] The Crown says that the proposed amendment to the constitution and share sale issues were dealt with by the Court of Appeal in the *Commercial Radio* case. They say the exercise of the power of sale of shares is no more than the exercise of the common law right of sale and not the exercise of a statutory power subject to s 9 or s 45Q review.

[87] In the *Commercial Radio* case, the Court said:[28]

> Once the (No 2) Act is in force the provisions of the State-Owned Enterprises Act including s 9 will have no application. The unlawfulness in effecting the sale of the shares in Radio New Zealand is then alleged to arise on conventional administrative law grounds by failure by the Crown to meet the legitimate expectations of the appellants that the Crown will comply with its obligations under the treaty, failure to have proper regard to relevant considerations namely treaty obligations, unreasonableness and substantive unfairness. The relevant treaty obligations alleged are "as a fiduciary to act with utmost good faith" and to ensure that the Māori language has a secure place in both radio and television broadcasting in New Zealand. Those grounds have no greater strength in respect of the proposed sale after the (No 2) Act is in force than they do in relation to the decision to bring the Act into force.

[88] The Court in the *Commercial Radio* case then identified the basis on which the shares in Radio New Zealand could be sold. It said:[29]

> In selling the shares after the (No 2) Act is in force the Crown will not be exercising any statutory power. The (No 2) Act does not expressly authorise sale of the shares though its effect will be to remove the prohibition on the sale of these shares in s 11 of the State-Owned Enterprises Act. The sale would be effected simply by exercise of the Crown's common law right as owner to dispose of the shares. It will be exercising that right with the overlay of the legislative steps clearing the way and the preparatory activity by the Executive with the view to the sale. It is plain that the intention of Parliament is that the (No 2) Act should be brought into force to enable the sale which was in contemplation at the time the Act was passed. Its

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[28] At 166.
[29] At 166–167.

> enactment was by way of implementation of the policy to sell to private interests the Crown owned commercial radio stations. In any event, in the course of formulating and implementing that policy consideration was given to the Crown's obligations under the treaty and representatives of Māori were consulted in the manner detailed earlier in this judgment.

[89] The claimants argue that the sale of MRP's shares is not the exercise of a common law power of sale but the exercise of the statutory power in s 22 of the SOE Act. Thus, they say, the exercise of such a statutory power is reviewable by virtue of either s 9 or s 45Q.

[90] Section 22 provides as follows:

> **22 Provisions relating to Ministers' shareholding**
>
> (1) Shares in a State enterprise held in the name of a person described as the Minister of Finance or the responsible Minister shall be held by the person for the time being holding the office of Minister of Finance or responsible Minister, as the case may be.
>
> (2) Notwithstanding any other enactment or rule of law, it shall not be necessary to complete or register a transfer of shares of the kind referred to in subsection (1) of this section consequent upon a change in the person holding the office of Minister of Finance or responsible Minister, as the case may be.
>
> (3) Each shareholding Minister may exercise all the rights and powers attaching to the shares in a State enterprise held by that Minister.
>
> (4) A shareholding Minister may at any time or times, by written notice to the secretary of a State enterprise, authorise (on such terms and conditions as are specified in the notice) such person as the Minister thinks fit to act as the Minister's representative at any or all of the meetings of shareholders of the State enterprise or of any class of such shareholders, and any person so authorised shall be entitled to exercise the same powers on behalf of the Minister as the Minister could exercise if present in person at the meeting or meetings.

[91] Section 22 of the SOE Act is incorporated into the Public Finance Act by virtue of s 45W of that Act.

[92] Section 22 they submit, replaces the common law right of an owner of property to sell that property (here shares) in the unusual circumstances pertaining to an SOE. It is the SOE Act which makes particular Ministers shareholders in SOEs. They do not hold the shares as "owners" in the sense that ordinarily applies to that

term. The Minister's interests and powers in relation to these shares are defined by the SOE Act.

[93] Counsel for the New Zealand Māori Council urged me to adopt what he said was the persuasive dissent of Thomas J in the *Commercial Radio* case where the Judge said "the Minister's status as the owner of the shares in the SOE is derived from the SOE Act... Any powers which they purport to exercise as owners stem from that Act ...".[30]

[94] In terms of s 22(3), the Minister in selling the shares is exercising "the rights and powers" in relation to these shares. The sale is a right the shareholding Minister is permitted to exercise by virtue of s 22(3). The same rights and powers in s 22 authorise the Minister to vote to amend the constitution of MRP to enable the sale of the shares, the claimants argue.

[95] The claimants say this case can be distinguished from the *Commercial Radio* decision. The Radio New Zealand Act (No 2) 1995 removed Radio New Zealand from the relevant list of companies that were SOEs. There was no equivalent of s 45W in the Radio New Zealand Amendment Act to continue the s 22(3) power.

[96] I am satisfied:

(a) that s 22(3) is not the source of the power of a shareholding Minister to sell shares in an SOE and in this regard the *Commercial Radio* case has direct application;

(b) Parliament intention was that the shares should be sold without the obligations in either s 9 or s 45Q applying. In passing the legislation Parliament authorised the sale of shares in MRP with Treaty obligations recognised in s 45Q and s 45W. Parliament itself had assessed and had passed laws which reflected its view of required Treaty compliance. It did not intend a further process by which the

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[30] At 173.

sale of the shares in MRP was assessed for consistency with Treaty obligations by the Courts.

[97] To expand on these points, as to the exercise of the power of sale, the passage from the *Commercial Radio* case quoted at [88] makes it clear what power was being exercised at sale in that case. As the Crown said, it would be possible to adopt this quote word for word in this case save to substitute the SOE Amendment Act as relevant. Both amending statutes amended the SOE Act. Both removed an SOE from the SOE Schedule. Both removals were without express statutory authorisation for sale but by the device of removal of any prohibition against sale.

[98] The SOE regime was in part to reform commercial enterprises run by the State by the use of formal company structures to mirror, in part, private companies. Such companies required, for example, (by virtue of the Companies Act) an individual shareholder rather than an office (e.g. Minister of Finance) shareholder. And so s 22 provided that the name of the Minister of Finance or the name of the Minister in charge of the SOE would be the owner of all the shares of the SOE.

[99] To avoid having to re-register the shares each time such Ministers changed, s 22(2) provided that when the name of the relevant Minister changed no share transfer was required. And finally, the section provides that it is the shareholding Minister who exercises the "rights and powers" attaching to the shares.

[100] Contrary to the claimants' submission, this section is simply designed to identify the individual who is to exercise the powers attaching to the shares. The section does not identify what these powers are or in any way limit the Minister in exercising the powers and rights as an "ordinary" shareholder. Section 22(3), therefore, says nothing about such rights and powers of the shareholder. These rest in the relevant Minister as if an ordinary shareholder. These powers include, as the Court of Appeal identified in the *Commercial Radio* case, the common law power of sale. (In fact s 7 of the Constitution Act 1986 provides any member of the Executive Council can exercise the power of any other Minister).

[101] The New Zealand Māori Council submitted that if s 22(3) did not exist then as the representative of the monarch, the Governor-General by Order in Council, could exercise the power of the monarch to sell the shares.

[102] The Crown submitted without s 22(3) of the SOE Act, the relevant Minister could still sell the Government's shareholding in an SOE if the Minister had Cabinet authority. The Minister had a common law right to do so. The Crown's "right" to sell as owner is by convention exercised through a Minister of the Crown as it must do. If, as the claimants say, s 22(3) is the statutory authority for the sale of shares in an SOE, then it was an unnecessary power given the existence of an authority to sell through the common law. This supports the Crown interpretation of s 22(3).

[103] Finally, I have already noted Parliament's clear intention in passing the amending Acts. Certainly Parliament did not intend the Crown would be required to review the sale process against s 45Q incorporated by the Amendment Act or s 9 of the SOE Act when it limited the exercise of s 45Q to Part 5A actions only. Such actions included the transfer of assets to MOM companies but not the sale of shares in MOM companies.

[104] As the Crown noted, if that had been Parliamentary intention it could have said so. It would then have hardly passed s 45Q in the form it did.

[105] I am satisfied, therefore, that neither the amendments to the constitution of MRP nor the sale of shares are subject to review based on Crown obligations in s 9 or s 45Q. The sale of shares in MRP is not the exercise of a statutory power. It is the exercise of a common law right of sale. It is not, therefore, reviewable.

The Commercial Radio case

[106] As I have noted it is the Crown's position that with respect to the commencement order and the sale of the shares this case is on all fours with the *Commercial Radio* case.[31]

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[31] *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA).

[107] This case raised the Crown duty to protect the Māori language, in the context of the Crown's proposal to sell its commercial radio assets. On 25 September 1995 the Radio New Zealand Act 1995 and Radio New Zealand Act (No 2) 1995 were assented to. The first Act removed public radio assets from SOE status to Crown entity status. The No 2 Act would remove the company holding commercial radio assets, Radio New Zealand (RNZ), from the SOE Act. Section 1(2) of that Act provided the Act would come into force on a date to be appointed by the Governor-General by Order in Council. An Order in Council was pending to bring it into force. The purpose, as derived from the Explanatory Note of the Bill and Parliamentary debates was to enable the Government to sell the shares in the company. The reason it was not brought into force upon Royal Assent was that it was not the Government's intention to remove RNZ from the SOE regime until the completion of the sale process. The Crown entered into a contract of sale with NZ Radio Network Ltd, conditional on the litigation being determined.

[108] Māori challenged four steps of the Crown: (1) the policy decision to sell the assets; (2) the agreement to sell; (3) the prospective making of an Order in Council to bring into force the (No 2) Act (thereby taking the commercial radio interests out of the SOE Act and beyond s 9); and (4) the prospective completion of sale. Only steps (3) and (4) are relevant to this case.

[109] Interim relief restraining the sale was sought by Māori. The Crown in response applied for strike out of the third cause of action, which related to the disposal of its commercial radio assets.[32] Of relevance to this case in particular is the Crown's strike out application.

[110] In the High Court, both interim relief and strike out were refused. In the Court of Appeal interim relief was again refused but the majority allowed the cross-appeal by the Crown. Thomas J dissented on the Crown's strike out.

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[32] The first and second causes of action relating to television and public radio were not in issue on the appeal.

[111] The main argument for interim relief was that mainstreaming was a primary means of protection of the Māori language. The Court considered the current position and found that mainstreaming on commercial radio was a risky proposition, but that in any case it could be achieved by regulation without the retention of commercial radio stations. The Court was not satisfied on the facts that a preclusion of transfer was required to preserve the position of Māori, pending any substantive hearing.

[112] The Radio New Zealand (No 2) Act 1995 provides as follows:

> **An Act to remove The Radio Company Limited from the State-Owned Enterprises Act 1986 and other legislation**
>
> *25 September 1995*
>
> BE IT ENACTED by the Parliament of New Zealand as follows:
>
> **1. Short Title and commencement**–
> (1) This Act may be cited as the Radio New Zealand Act (No. 2) 1995.
> (2) This Act shall come into force on a date to be appointed by the Governor-General by Order in Council.
>
> **2. Amendments to State-Owned Enterprises Act 1986 and other Acts**–
> The enactments specified in the Schedule to this Act are hereby amended in the manner indicated in that Schedule.

[113] The Court with respect to that Act said:[33]

> The (No 2) Act was assented to on 25 September 1995 immediately after the (No 1) Act, but its substantive provisions have not yet been brought into force. Therefore, the entity running commercial radio still remains a state-owned enterprise and subject to ss 9 and 11 of the 1986 Act. It is, however, quite plain from the (No 2) Act itself, from the explanatory note to the original Bill and from many references in the parliamentary debates that its purpose is to enable the government to sell the shares in the company which holds the commercial radio assets. The reason for the (No 2) Act's not being brought into force upon royal assent or at the same time as the (No 1) Act is that it is not the intention of the government to remove Radio New Zealand Ltd and its ministerial shareholders from the ambit of the State-Owned Enterprises Act until the time for completion of the sale process.

[114] As I have noted, the position here is virtually identical. It is also plain from the SOE Amendment Act, from the explanatory note and the references in the Parliamentary debates that the purpose of the Act was to enable the Government to

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[33] At 160.

sell 49 per cent of the shares in MRP by removing the companies from the schedules to the SOE Act and placing them within the MOM regime. In this case there is no contract of sale and the second step relevant to the process in the *Commercial Radio* case is not relevant here.

[115] As to the making of the Order in Council to bring the Act into force, the Court accepted, as do the parties to this litigation, that it is possible for a Court to review an Order in Council. The Court said:[34]

> An Order in Council is subordinate or delegated legislation (44(1) *Halsbury's Law of England* (4th ed) paras 1499, 1500). The power to promulgate an Order in Council in our view comes under the definition of "statutory power" as defined in s 3 of the Judicature Amendment Act 1972. It is therefore a power which may be capable of review by the Courts. An Order in Council bringing an Act into force is also included along with various delegated legislative instruments in the definition of "Regulations" under the Regulations (Disallowance) Act 1989, and is therefore amenable to disallowance, revocation or amendment by resolution of the House of Representatives along with the other instruments; so it is equally subject to judicial review. The real issue is whether the appellants have established as reasonably arguable a basis upon which the Court in its discretion could properly intervene in the present case.

[116] The Court then undertook an analysis of the *Fire Brigade Union* case.[35] They noted that the significance (partially) of that case for the purpose of the *Commercial Radio* litigation was a recognition of the sensitivity with which the Court construed applications for review of commencement powers. The challenge to the failure to bring the legislation into force (in the *Fire Brigade Union* case) was seen as highlighting the care which must be taken to see that there is no unwarrantable intrusion into the function of Parliament.

[117] The Court of Appeal then turned to s 1(2) of the (No 2) Act. It said:[36]

> It is necessary to construe s 1(2) of the (No 2) Act. It was enacted against the background of a decision to sell the state commercial radio operations, to be achieved in part by removing the status of Radio New Zealand Ltd as a state-owned enterprise under the State-Owned Enterprises Act 1986. The (No 2) Act does no more than effect that removal, with the consequence in

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34 At 164.

35 *R v Secretary of State for Home Department ex parte Fire Brigades Union* [1995] 2 AC 513 (HOL).

36 At 165.

> particular that s 9 and s 11 of the 1986 Act will no longer apply to this company. That is the clear legislative intent. There are no express fetters imposed on the exercise of the power to bring it into force. Intervention therefore could only be based on some restriction which is either implicit in the Act itself or imposed in some other way which is consistent with the purposes of the Act. Three bases were put forward by Mr Farmer as justifying intervention, none of which in our view is sustainable.

[118] I am satisfied that there are exact parallels between the situation here and the Court's observations with respect to the (No 2) Act. As I have noted, s 3 of the SOE Amendment Act removes the four companies from the SOE regime. This must inevitably mean that s 9 of the SOE Act no longer applies to MRP once the Order in Council is promulgated. Indeed, in this case the Public Finance Amendment Act 2012 contains an alternative provision to s 9 which while in similar form to s 9 has more limited application. This is an even stronger indication that s 9 of the SOE Act is no longer intended to apply to MOM companies.

[119] And, as the Court said in the *Commercial Radio* case, there are no express fetters imposed on the exercise of the power to bring the Act into force in this case. Equally, therefore, any intervention could only be based on some restriction which is implicit in the Act or imposed in some other way which is consistent with the purposes of the Act.

[120] The Court then went on to say:[37]

> He first submitted that promulgation would itself constitute a breach of s 9 of the State-Owned Enterprises Act 1986. Even assuming for present purposes the intended sale is in breach of s 9, the argument is not tenable. The removal of Radio New Zealand Ltd from the list of state-owned enterprises does not of itself contravene treaty obligations. Parliament has decreed that such a change of status is to happen independently of fulfilment or non-fulfilment of those obligations. The (No 2) Act is not in conflict with the State-Owned Enterprises Act 1986, and its coming into force is clearly not governed by that Act. In a practical sense the (No 2) Act does no more than amend the 1986 Act in this one respect.

[121] As the Court said, the removal of MRP from the list of SOE companies could not in itself contravene Treaty obligations. Parliament has agreed to the change of status of these companies. Here, as I have noted, rather differently than the

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[37] At 165.

Commercial Radio case, a Treaty inconsistency clause has been introduced and in limited circumstances s 45Q applies to Crown obligations.

[122] The Court then said:[38]

> Second, it was submitted that there is a duty not to exercise the power whilst the Crown remains in breach of s 9. For the same reasons this submission must fail. There is no proper basis for reading into s 1(2) such a restriction, which indeed would be in direct conflict with the legislative intent, namely to take Radio New Zealand Ltd outside the constraints of the 1986 Act. On analysis what is really being challenged is the enacted legislation, not its coming into effect.
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> Third, Mr Farmer submitted that the administrative law grounds of legitimate expectation, unreasonableness and failure to have regard to relevant considerations were also available as a basis for challenge. Each of these is in turn based on alleged breach of treaty obligations. In reality this again is an attack on the legislation itself, not on the execution decision to bring it into force. Parliament has enacted the (No 2) Act, and there is no cause of graft onto its coming into force any condition which is not there, either expressed or by implication. Section 1(2) does not impose on the Governor-General in Council a duty to refrain from exercising the power if other actions of the Crown, whether past or which may follow as a consequence of the (No 2) Act, constitute breaches of the treaty.
>
> The fallacy in the argument for the appellants is the underlying contention that the commencement power can be reviewed because the Act itself breaches, or will be a means of permitting a breach, of treaty obligations. In effect what is sought is a review of the legislation, and that is outside the proper functions of the Courts.
>
> In summary we are satisfied that to intervene in this way would here be an unwarranted intrusion into completion of the legislative process. It is the duty of the Courts to give effect to Acts of Parliament. To prevent the (No 2) Act from coming into force for the reasons proposed by the appellants would be contrary to the very intent of that Act and an unwarranted limiting of the very broad terms of s 1(2). We are therefore satisfied that the relief sought in this respect in the substantive proceeding is not available to the appellant, and accordingly on that ground too the need for interim relief disappears. It also follows that this aspect of the third cause of action has no tenable basis in law and to that extent the application to strike out this cause of action is successful.

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[38] At 165–166.

[123] The claimants say that the *Commercial Radio* case is distinguishable for these reasons:

(a) The relief sought in this case and the *Commercial Radio* case are different. In the *Commercial Radio* case the claimants sought to prevent the relevant Act from being introduced. Here the relief sought is an "unless" order, that is, the claimants seek a mechanism or system of safeguards before the Act is introduced to ensure no prejudice to Māori. The fact that the relief sought in the two cases may have been different is not a feature which is relevant to the Court of Appeal's analysis relating to the commencement orders. In both situations orders are/were sought to delay the introduction of a statute until certain actions were taken by the Crown.

(b) The claimants say that in the *Commercial Radio* case the Crown had made arrangements for Māori interests in broadcasting. In this case while the Crown recognised Māori interests in water short of full ownership, no proposal had been put to Māori with respect to their claims. This difference, assuming there is one, is a factual difference but not one that is relevant to the Court of Appeal's analysis of the lawfulness of the challenge to the commencement order process.

(c) The claimants say that the Court found in the *Commercial Radio* case that the plaintiffs were attempting to dictate policy to the Crown but the claimants say no such attempt to dictate policy was occurring in this case. The claimants only sought compliance with s 9 of the SOE Act. For the reasons I have given, I am satisfied that s 9 of the SOE Act does not apply to the commencement order decision. The Court of Appeal in the *Commercial Radio* case reached the same conclusion.

(d) The claimants submit that the SOE Amendment Act can be contrasted with the Radio New Zealand Amendment Act. The Radio New Zealand Amendment Act was not an Act amending the SOE Act and, therefore, s 23 of the Interpretation Act could not apply.

Section 23 did apply to the SOE Amendment Act. Firstly, I have rejected the claimants' case that s 23 can be used in the way submitted to make the SOE Amendment Act subject to s 9 of the SOE Act. Secondly, although in the *Commercial Radio* case the amending statute was not called an SOE Amendment Act it did amend the SOE Act.[39] There was, therefore, no basis to distinguish these two legislative amendments as the claimants sought to do.

(e) In the *Commercial Radio* case no claim was made to the assets themselves. This can be contrasted with the current case where there is a claim made to water rights which MRP owns as well as their infrastructure. There is, therefore, a close nexus between the outstanding freshwater resource claims and the actions of the Crown in selling the shares. I do not see that the nexus argument is relevant here to the commencement decision. That issue can be expressed as I have previously said in the claimants' case that the Crown should be required to review consistency with the principles of the Treaty before that Act could commence. This requires an analysis of the meaning of the amendment Act and whether that was Parliament's intention rather than an assessment of a nexus.

[124] The claimants emphasised that the real issue in this case was expressed in the *Commercial Radio* case by the Court in this way:[40]

> The real issue is whether the appellants have established as reasonably arguable the basis upon which the Court in its discretion could properly intervene in the present case.

[125] As with the *Commercial Radio* case, to establish a reasonably arguable basis the claimants have to show that it is either "implicit in the Act itself or imposed in some other way which is consistent with the purposes of the Act",[41] i.e. that there is a requirement that before a commencement order is made an assessment is made by the Executive as to whether the decision is consistent with the principles of the

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39 At [112]. The Act makes it clear it is amending the SOE Act.
40 At 164.
41 At 165.

Treaty of Waitangi. For the reasons I have given I am satisfied that the claimants cannot establish such a proposition.

The Lands case – is it similar to this case?

[126] The claimants placed significant emphasis on what they submitted were the similarities between this case and the *Lands* case.[42]

[127] Government reorganisation of the public sector in the late 1980's was given effect by the State Owned Enterprises Act 1986. The *Lands* case concerned the proposed transfer of some four to five million hectares of Crown land to State-owned Enterprises. The New Zealand Māori Council applied for review of this decision on the basis that a system was required to ensure transfer would not be inconsistent with the principles of the Treaty of Waitangi and would not prejudice unresolved Māori claims to land.

[128] The case essentially concerned two legal issues: (1) one of statutory interpretation in relation to s 27 and s 9 of the Act and (2) substantively and practically, what were the principles of the Treaty of Waitangi that the Crown was obliged to act consistently with, by virtue of s 9. The Court was unanimous in its decision, but delivered five separate judgments.

[129] Section 27 set out an elaborate procedure for Māori land claims. Essentially, if a claim had been submitted to the Tribunal in respect of land then s 27(1) restrained the alienation of that land owned by a SOE. Section 27(2) gave a discretion to the Crown to order the resumption of land from an SOE to the Crown where the Tribunal had made a recommendation in relation to land (regardless of when the claim was submitted). However, this left a gap for those where a claim had not been submitted by Māori to the Tribunal before the enactment of the Act, where the land may have been alienated by the SOE into private hands, affecting any possible restoration of the land following a successful claim in the Tribunal.

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[42] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

New Zealand Māori Council argued s 9 provided additional protection against this risk.

[130] The Court rejected the Crown interpretation that s 27 was a code and held that s 9 was to be given its plain meaning – it was a statement of broad principle that nothing in the Act should permit the Crown acting in a manner inconsistent with the Treaty. Section 9 was held to override everything else in the Act.

[131] As to the principles of the Treaty, the Court defined the relationship between Crown and Māori as one of partnership. On that basis the Crown had an obligation to act towards Māori reasonably and in the utmost good faith. The Crown also had a duty of active protection of Māori people in the use of their lands and water as well as a duty to remedy and redress past breaches. Māori were also obliged by a duty of loyalty to the Crown and reasonable co-operation. The Court declined to hold there was an absolute duty of consultation as it was incapable of practical fulfilment and could not be regarded as implicit in the Treaty, however, it was recognised that in many cases the responsibility to make an informed decision would require some consultation.

[132] The Court declared that to transfer land to State Enterprises, without establishing any system to consider in relation to the particular assets or particular categories of assets, whether such a transfer would be inconsistent with the Treaty principles was unlawful.[43] The Crown was ordered to prepare a scheme of safeguards to give reasonable assurance that assets would not be transferred in a way such as to prejudice any claims in the Tribunal. Agreement was made and recorded in the preamble to the Treaty of Waitangi (State Enterprises) Act 1988. Sections 27A-D were subsequently inserted in the SOE Act. Essentially, where any land was transferred to an SOE a memorial was to be placed on the title. Where the Tribunal subsequently recommended its return to Māori, then the Crown was bound to resume it and pay compensation accordingly.

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[43] At 166.

[133] The claimants argued that the loss of Crown control over the assets of MRP when transferred from an SOE to a MOM is significantly greater than in the *Lands* case. They say that unlike s 27 protection in the *Lands* case, here there is no protective measures for Māori interests in the water.

[134] In the *Lands* case the complaint was that the Crown failed to provide for future claims to land. Here, Māori had made claims to proprietary interests in water (particularly through the Waitangi Tribunal process) but no protection for actual claims had been instituted with respect to the sale of MRP shares.

[135] Further, the Crown have failed to take steps to address the Tribunal's recommendations which recognised a nexus between the share sales and the ability to recognise rights and interests in water and the shares plus concept. A similar equivalent mechanism to land ultimately agreed upon by Māori and the Crown relating to water should be accepted as appropriate by the Crown.

[136] There are distinctive differences between the *Lands* case and this case. The concern of Māori in the *Lands* case was that the transfer of land to SOEs would allow the SOEs to sell the land to private individuals without recognising Māori claims to particular land. In this case there is no transfer of any property in water. What is being sold is not water but shares in a company that uses water for profit. That use is time limited by virtue of the water consents obtained (35 years).

[137] Further, as the Crown noted in their submissions, in the *Lands* case the Crown was exercising a discretion as to whether to transfer the assets of a SOE. Parliamentary intent in passing the SOE legislation did not require transfer of the land. The exercise of that statutory discretion by the Crown was, therefore, subject to s 9 of the SOE Act.

[138] Here, Parliament's intention was to change SOEs to MOM companies. The commencement decision and the sale of the shares give effect to Parliament's intention. That is, to transfer the companies from SOEs to MOMs to facilitate the 49 per cent sale of shares. And so the Crown's decision to bring the MOM provisions into force and to sell the shares is not a discretionary decision (as it was in

the *Lands* case) and therefore is not subject to assessment against consistency with Treaty principles. The Crown here is simply carrying out the intention of Parliament. The only discretion to be exercised is as to the timing of the commencement order.

[139] In summary, I am satisfied that for the reasons I have given the commencement decision, the amendment of the constitution of MRP decision and the sale of shares decision are not reviewable in this case. All the claimants' causes of action, save for the s 64(3) Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 claim must fail on this ground alone. All causes of action, save the s 64(3) claim, arise from the proposition that the three decisions above are reviewable in the particular circumstances. I have found they are not. For these reasons each of the claimants' causes of action, save the s 64(3) claim are dismissed.

Are the decisions of the Crown contrary to Treaty principles?

[140] I have concluded the claimants' review proceedings cannot succeed as a matter of law. If I am wrong and the commencement decision and/or the sale of shares in MRP are subject to s 9 or s 45Q, then I consider the claimants' grounds of review. Firstly those based on whether the various relevant decisions are inconsistent with the principles of the Treaty of Waitangi.

[141] The claimants' case can be simply expressed. In making the commencement decision, in passing a resolution as sole shareholder in MRP to sell part of the shares in MRP, and in actually selling the shares, the relevant Minister will be making statutory decisions to which a discretion attached. The SOE Act and the Public Finance Amendment Act required the Ministers in making these decisions to do so in a way which was not inconsistent with Treaty principles. The Crown has made it clear that in making these three decisions they will not consider whether they are inconsistent with the Treaty. Thus, the claimants say, these decisions are based on an error of law that inconsistency with Treaty principles does not need to be considered and are, therefore, unlawful.

[142] Further, the Crown is required to consider whether in making these three decisions they are to a material extent compromising the Crown's ability to take reasonable action to comply with the Treaty principles. Here, such compliance requires the Crown to have measures to protect Māori proprietary interests in water and geothermal resources before any of these three decisions are made. The Crown's failure to do this makes the three intended decisions unlawful, the claimants say.

[143] The test for assessing inconsistency was identified by the Privy Council in *New Zealand Māori Council v The Attorney-General* in the first *Broadcasting Assets* case.[44]

[144] The Court said:[45]

> The Crown contends that in fulfilling its obligations and in any event the transfer of assets by vesting them in the statutory enterprise, would not be inconsistent with the principles of the Treaty; inconsistency with those principles being the only matter which the appellant's are entitled to raise in these proceedings. Whether the Crown is correct in this contention is a question which is central to the outcome of this appeal. The answer depends on whether the transfer of the assets could now or in the foreseeable future impair, to a material extent, the Crown's ability to take reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty.

[145] The New Zealand Māori Council's claim identifies a number of iwi and hapū proprietary claims relating to other rivers within New Zealand. Mr Emery in his affidavit refers to Ngāti Kauwhata's claims in respect of the Oroua and Manawatu Rivers, Ms Whata refers to the interest of the Ruahine-Kuharua Incorporation relating to the Kaituna River and the Taheke geothermal resource and Ngāti Rangiwewehi through Ms Bidois refers to the Poroti and Taniwha Springs claim.

[146] The claimants seek to protect what they identify as Māori proprietary rights and interests in freshwater and geothermal resources.

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44 *New Zealand Māori Council v The Attorney-General* [1994] 1 NZLR 513 (PC) at 519.
45 At 519.

Proprietary claims to water

[147] The Waikato River and Dams Claims Trust identified particular sections of the Waikato River as giving rise to these property rights and interests with respect to particular iwi and hapū. This is especially relevant given the number of dams on the Waikato River that are owned by MRP.

[148] The Waikato River and Dams Claims Trust consists of a number of hapū groups from the Waikato River and as well the Pouakani Claims Trust. Each of the constituent hapū are represented by a trustee appointed to represent their interests on the trust.

Waikato-Tainui hapū and the Kiingitanga

[149] Mr Morgan is a trustee of the applicant and has been formally mandated by the Māori king to represent the Kiingitanga and to represent the interests of hapū of Waikato-Tainui, each of whom hold allegiance to the Kiingitanga. Both Waikato-Tainui and the Kiingitanga have settled historical Treaty claims in the Waikato-Tainui District, but excluded the Waikato River from those settlements.[46]

Ngāti Te Ata

[150] Richard Minhinnick is a trustee of the applicant appointed by Ngāti Te Ata, an iwi of the Waikato River. This iwi has several claims before the Waitangi Tribunal relating to the Waikato River. No settlement had been reached with the Crown with respect to these claims. One outstanding claim includes an application for a s 27B SOE Act resumption order relating to land that extends to the Muritai Dam title currently in the name of MRP.

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[46] Waikato Raupata Claims Settlement Act 1995, s 82.

Pouakani

[151] The Crown and the Pouakani people entered into a Deed of Settlement in 2000. Section 10(2) of the Pouakani Claims Settlement Act 2000 specifically preserved claims by the Pouakani people to the Waikato River. There are outstanding and unresolved claims by Pouakani relating to claimed proprietary rights and interests in freshwater and geothermal resources. The Trust currently has proceedings before the Supreme Court known as *Paki v The Attorney-General* and relates to a claim by Pouakani to a section of the riverbed of the Waikato River out to the midway point adjacent to the original Pouakani land.[47] Three of the dams owned by MRP are immediately adjacent to the Pouakani block.

Tuhourangi-Ngāti Wahiao

[152] Mr Joseph Hurihanganui is the trustee for the above iwi and hapū. The iwi and hapū have interests in land affected by flooding by dams owned by MRP. The iwi and hapū have settled claims as at 21 September 1992 but retained their right to claim aboriginal title and/or customary law and/or Treaty claims arising from the Crown's decision to partially privatise MRP. In particular, they make claim to their taonga, a hot lake known as Roto-a-Tamaheke at Whakarewarewa Papakainga.

Ngāti Tahu-Whaoa

[153] Mr Galvin is the relevant trustee. There has been a long battle between this hapū/iwi and the Crown over hydro-electricity issues. They say they retain the right to make claims arising from the Crown's decision to partially privatise MRP and commercialise its assets base.

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[47] *Paki v The Attorney-General* [2012] 3 NZLR 277 (SC).

Ngāti Hineure

[154] Mr Clark is the relevant trustee. This hapū has communities along the upper reaches of the Waikato River from the Taupo outlet control to the first dam at Aratiatia. It has unresolved s 27B SOE claims over Contact Energy land. Resumption orders have been sought.

Ngāti Koroki-Kahukura

[155] Mr Edwards is the relevant trustee. Within the iwi's land is a stretch of the Waikato River on which the Karapiro and Arapuni Dams are located. This iwi have negotiated with the Crown to settle their historic claims and there is a non-binding settlement. No claim has been currently made in respect of the Waikato River. There are claims to banks of the river and the land underneath the Karapiro and Arapuni Dams.

[156] At the Waitangi Tribunal Freshwater hearing, many Māori registered an interest and appeared before the Tribunal identifying outstanding historic claims relating to freshwater and geothermal resources. In addition, 16 witnesses gave oral evidence before the Tribunal of hapū or iwi claims to freshwater or geothermal resources before the Tribunal.

[157] The claimants adopt the Tribunal's assessment of the nature of Māori rights in water in 1840 at the signing of the Treaty. The Tribunal said:[48]

(a) the water bodies identified by the claimant witnesses were taonga;

(b) hapū and iwi exercised te tino rangatiratanga and customary rights in 1840; and

(c) Māori had a physical and metaphysical relationship under tikanga Māori with these water bodies.

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[48] Waitangi Tribunal *Interim Report* at 101.

[158] The Tribunal concluded, therefore, that the claimants' evidence demonstrated the necessary "indicia" of ownership and that the closest legal equivalent to these Māori customary rights in 1840 was the common law idea of ownership.

[159] Given the fact that the Treaty of Waitangi guaranteed the continued enjoyment and undisturbed possession of them to Taonga Māori, then this established current Māori proprietary interests in various water bodies. The claimants say, therefore, that they have established claims of proprietary interest to water resources used by MRP (and in the future the other three SOEs).

[160] There can be no doubt that the New Zealand Māori Council and the Waikato River and Dams Claims Trust have established that various hapū and iwi have claims of a type of proprietary interest in freshwater and geothermal resources within New Zealand including, of particular relevance to this case the Waikato River, the source of the water used by MRP to generate electricity.

[161] The claimants' case is that these proprietary interests in water are the interests the Crown agreed to protect pursuant to Article 2 of the Treaty of Waitangi. The Crown's failure to protect these interests is a breach of the principles of the Treaty (s 9, s 45Q). The Crown, therefore, should not be permitted to dispose of assets (here the MRP shares) which will materially impair the ability of the Crown to provide redress for those well founded claims of Treaty breach and to provide recognition of rights protected by the Treaty. I now consider, therefore, whether the sale of MRP shares will materially affect the Crown's ability to provide this redress and/or recognition of rights.

Will the sale of shares in Mighty River Power to private interests materially affect the Crown's ability to provide redress or recognition of rights?

[162] The New Zealand Māori Council's case is that privatisation will materially affect the Crown's ability to recognise rights and provide redress by:

(a) the loss of control of MRP;

(b) prejudice to the ability to institute general measures of reform; and

(c) the loss of shareholding of MRP.

[163] The Waikato River and Dams Claims Trust's case is that the Crown have the ability now to provide for a mechanism for redress and rights recognition and so the Crown should do so before sale. Further, the Trust stressed the difficulty claimed in the practical use of resumption orders under s 27A-D. This could be avoided if the Crown dealt with these claims before sale.

[164] However, these submissions do not engage with the need to establish why such redress and rights recognition cannot equally be provided after sale.

[165] As to the difficulties with resumption orders, the process of the making of such orders is made clear in s 27A–D of the SOE Act as is its adoption to the MOM regime in the Public Finance Amendment Act. Whatever practical difficulties there may be will be present both before and after the share sales.

[166] The New Zealand Māori Council say that with respect to each type of prejudice there are two separate issues. Firstly, whether the transformation from an SOE to MOM makes any difference to the Crown's ability to provide redress and rights recognition and secondly, if it does make a difference, whether that difference is sufficiently connected to the claimed Māori interests as to justify interfering with the Crown's proposal to sell the shares.

Loss of control of Mighty River Power

[167] The claimants say there are important differences between SOE and MOM companies. Some differences occur as soon as an SOE becomes a MOM, others after the private sale of shares.

[168] The differences are:

(a) the loss of an obligation to act with social responsibility;[49]

(b) loss of Crown control of the company through the statement of corporate intent;

(c) loss of oversight by the Ombudsman;[50]

(d) private shareholders are free to sell their shares as they choose, the Crown cannot do so under an SOE model;

(e) an SOE has no duty to private shareholders. The Companies Act 1992 (applicable to MOM companies) gives individual shareholders actionable rights in a variety of situations;

(f) once the Crown sells a 49 per cent shareholding, it can no longer amend the constitution on its own (relevant to the shares plus concept);

(g) once the Crown shareholding drops below 75 per cent the Crown cannot approve major transactions without the agreement of other shareholders; and

(h) the Crown loses its exclusive right to set dividends once it has sold a portion of its shareholding.

[169] The New Zealand Māori Council compares this loss of control with the *Lands* case.[51] There, the Crown was proposing to transfer the assets directly owned by it to SOEs in which the Crown itself would have a 100 per cent shareholding. Thus, land owned by SOEs could in turn be sold to private individuals. Such shares

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49 State-Owned Enterprises Act 1986, s 4.
50 State-Owned Enterprises Amendment Act 2012, s 6.
51 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

would remove the possibility of Māori claims and restoration of such land to Māori. The Court concluded that such transfers would be inconsistent with Treaty principles without a system to safeguard Māori claims to such land.

[170] Here, New Zealand Māori Council says that the loss of Crown control of MRP's 49 per cent shareholding is greater than that in the *Lands* case. In the *Lands* case the Crown still retained ownership of the land through the SOEs. Here, the 49 per cent of shares in the SOEs will be sold to private persons. And further, there are no mechanisms to protect Māori proprietary claims to freshwater and geothermal resources once the sale of shares takes place.

[171] This loss of Crown control, the claimants say, will severely limit the Crown's ability to provide redress for recognition of Māori water and geothermal rights through its current exclusive shareholding of MRP. The New Zealand Māori Council stressed that MRP through its use of water is exploiting the very resource it says Māori have property rights to. The resource consents granted to MRP involve an interference with Māori proprietary interests in water.

[172] And so the claimants say the transformation of MRP from an SOE to a MOM will make a difference to the capacity of Māori to seek redress or rights recognition.

[173] As I have noted, the Waitangi Tribunal in its Freshwater Report[52] identified the interests and rights in water and geothermal resources that were guaranteed and protected by the Treaty. They then considered (as relevant here) whether the sale of the shares would affect the Crown's ability to recognise such rights and provide remedy for breach (the nexus question). And finally, whether the removal of recognition or the capacity to remedy breach was a Treaty breach.

[174] The Tribunal concluded that with respect to the shares plus concept, the Crown's ability to recognise rights or remedy breach would be irretrievably compromised by a sale of MRP shares. Thus, the sale would be in breach of the Treaty in the absence of any mechanism to protect the rights and remedies affected.

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52 At [19]–[33].

[175] Obviously a sale of 49 per cent of the shares in MRP by the Crown will have an effect on the control it exercises over MRP. Its control from a 100 per cent to a 51 per cent shareholder will be lessened. But the pivotal question is whether such a transfer and its accompanying loss of control will materially affect the Crown's ability to recognise rights and provide remedy for breaches of Treaty principles. This pivotal nexus question was considered by the Tribunal.

The nexus issue and shares plus

[176] The Tribunal expressed the nexus question in this way at the beginning of its report in its summary:[53]

> *Does the sale of up to 49 per cent of shares in power-generating SOE companies affect the Crown's ability to recognise Māori rights and remedy their breach, where such breach is proven?*
>
> We accept the Crown's evidence and submission that it will be able to provide almost all forms of commercial rights recognition and/or remedy after the sale. First, we received a formal assurance from the Crown that Prime Minister John Key's letter of May 2009, and the subsequent protocol arranged with the Freshwater Iwi Leaders Group, has placed the issue of Māori proprietary rights on the table for future discussion. We were also told that the Crown is open to the possibility of Māori proprietary rights existing, so long as those rights are not held to amount to full ownership. We trust that our report has now clarified this matter for the Crown: the commercial rights are of a residual proprietary nature, while in Māori terms there are rangatiratanga rights involved mana and kaitiakitanga responsibilities in respect of their taonga. In chapter 2, we urge the Crown to carry out the recommendations of the Wai 262 Tribunal for giving effect to kaitiaki rights, a matter we will revisit in more detail in stage two of this inquiry.
>
> Secondly, the Crown says that it will not be beyond its ability to provide some form of commercial rights recognition post-MOM, whether it be modern water rights (where Māori grant or own water permits for hydro and geothermal power), a royalties regime, joint ventures, or some other form of commercial benefit. We took the claimants' point that providing this kind of rights recognition may be much more difficult after private shareholders have been introduced into the mix, but we accepted that it will not be impossible. We accepted the Crown's argument that the arrangements currently available or under consideration for enhancing Māori authority in water management, which include such mechanisms as the Waikato River Authority, will not be affected by the sale of shares in these companies. Subject to the finding we set out below, we have accepted the Crown's formal assurances that nothing which arises from the sale of shares will be

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53 Waitangi Tribunal *Interim Report* at xv of Preface.

> allowed to prevent it from providing appropriate rights recognition afterwards. We observe that the Crown's position is that these various forms of commercial redress are possible, not that they are or will be on offer.

[177] Counsel for the New Zealand Māori Council made the point that the test applied by the Tribunal as to the provision of rights recognition for Māori after sale as being "much more difficult ... (but) it will not be impossible" was inappropriately generous to the Crown.

[178] Counsel pointed out that the Privy Council test in the *Broadcasting Assets* case was whether the sale of the shares would materially impair the ability of the Crown to recognise Treaty rights or provide redress. This was a much lower threshold than that set by the Tribunal. If the correct test had been applied then there may well have been other remedies (apart from shares plus) that could not be available after share sale.

[179] I do not consider this argument can be correct. This section of the decision of the Tribunal relates to the Crown assertion that it could provide commercial rights recognition in whatever form (for example, modern water rights, royalties, joint ventures or other commercial benefits) independent of the sale of 49 per cent of MRP shares. The Crown position must be correct. Changes to current water rights to allow Māori to grant/own such rights or obtain royalties from a charge for the use of water and other commercial benefits to Māori are as possible after as they were before any SOE, MRP, share sales.

[180] None of these proposed commercial rights recognition requires the Crown to own all of MRP. Changing current water rights allocations requires amendments to the Resource Management Act 1991. Parliament is free to institute a charge for water use for hydro electric companies. Commercial benefits for Māori for loss of proprietary interests in water can come from any source the Government thinks suitable.

[181] In any event, the Tribunal's assessment was no more than such commercial recognition "may be more difficult". I cannot see any material effect on the identified commercial rights recognition by a sale of 49 per cent of MRP.

[182] The Tribunal saw the nexus not between ordinary shares in MRP and proprietary interests in water but in shares that gave significant control of MRP to Māori shareholders enabling them to have commercial advantages with respect to water use and to rights of management with respect to water use by MRP (shares plus).

[183] The shares plus proposals were not well developed before the Waitangi Tribunal. There were understandably potential problems with such an ill defined concept which have been exposed by the Crown's submission. Without the detail of such a scheme it is difficult to be clear whether in fact the essence of the scheme can only be provided before sale of the shares or that it is a meaningful and reasonable scheme to address remedy and recognition of rights.

[184] The Tribunal mentioned a number of possible forms the proposal might take including shares with; additional voting rights; additional capital and income distribution; pre-emptive rights; and an entitlement to appoint directors. The Tribunal's view was that the detail of the scheme could and should be negotiated between the parties.

[185] The Crown response to the shares plus proposal is that the Tribunal was wrong when they concluded that the shares plus concept, could not be replicated after a sale of the shares, provided a meaningful form of redress or rights recognition and was workable.

[186] Further, the Crown say the claimants have not identified sufficient detail of a shares plus scheme or an alternative that provides redress and/or protects rights which cannot be entered into after the share sale.

[187] As to shares plus, counsel for the claimants advised that the shares plus scheme had been devised by the Tribunal and counsel had not had a full opportunity to think through the concept. Counsel submitted, however, that the principle behind the shares plus proposition, whatever the strengths of the particular shares plus proposal was, remained. Providing forms of management control of water resources used by MRP to Māori could be achieved before sale but could not be achieved after

sale. The Crown would compromise its ability to provide proper relief by redress or rights recognition once the shares were sold.

[188] I consider there is little connection between the owning of a share in MRP (even one with "plus" powers) and proprietary interests in the water used by MRP to generate electricity. At its closest the connection with Māori proprietary interest claims in particular waters is that MRP uses water as part of the resource to generate its profit and thereby supports the value of the shares and the return earned on them.

[189] Counsel for the New Zealand Māori Council also stressed that there is a distinction between recognition of loss of commercial rights through compensation and the need for recognition of less of cultural "rights" or mend through forms of restitution. It was submitted that while a dam may not be able to be pulled down shares plus is the best that can be done to recognise rights and provide redress.

[190] However, it is difficult to see how shares in a power generating company which does not own any water resources can provide meaningful recognition for loss of commercial interests or mana given the distance of the connection.

[191] By owning shares in a company shareholders do not own a share in particular assets of the company let alone a share in a water consent held by such a company. The ownership of a share would give Māori no rights beyond those who did not own shares in MRP with respect to MRP's water consents. Nor would ordinary shareholders be able to direct how the company was to operate other than through their voting powers.

[192] The purpose of the various suggestions by the Tribunal as to how the shares plus concept would work are overall intended to provide Māori with a "partial remedy of their claims".[54] The Tribunal's intent was to try to provide shares which did allow Māori holders of such special shares to have authority over water consents and use by MRP.

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[54] Waitangi Tribunal *Interim Report* at 161.

[193] The Tribunal concluded that the Companies Act 1993 provided sufficient flexibility to enable MRP's Constitution to "provide for a wide range of different rights and obligations of shareholders and boards".[55] Thus, individual Māori shareholders could be given different rights than other shareholders.

[194] The first difficulty with such a proposal is that the provision of varying shareholders' rights attaching to shares inevitably involves either directly or by implication, the creation of separate classes of shares. The particular class of share would be those shares held by Māori with special powers and entitlement. Such a proposal would inevitably come up against s 45R, of the Public Finance Act, that requires the Crown to have at least 51 per cent ownership of every share class.

[195] The hoped for Māori control, therefore, is explicitly prohibited. Māori who had shares plus shares would, therefore, be left with less than majority control with respect to their additional management powers. Given the controversial nature of such rights and their minority interests Māori would likely have very little control of water consents held by MRP. If the shares plus concept was designed to give explicit commercial return to Māori from MRP's use of water (which Māori have a claimed proprietary interest in), then there are more direct and effective ways of achieving that result. The Government could make a direct payment to Māori for the use of such water. A form of royalty payments by water users could be introduced payable in whole or in part directly to Māori for water use in areas where claimed proprietary interest claims are established. Other forms of payment to Māori arising from their proprietary interests can just as easily be paid after sale as arranged before sale.

[196] Further, the Crown could retain part of the 49 per cent of shares proposed to be sold or purchase shares in the market itself if further shareholding in the MOM was required to meet Treaty obligations post sale.

[197] I do not consider that control of water resources by Māori is likely to be facilitated by the shares plus proposal. Certainly a far more direct, effective and

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55 Waitangi Tribuanl *Interim Report* at 160.

obvious control is through the amendment of the Resource Management Act 1991 which directly governs the water consent process.

[198] There are also other concerns. Māori shares plus shareholders are likely to find they have worrying conflicted loyalties to Māori water claimants on the one hand, and to the company on the other hand.

[199] It is difficult to gauge the effect on the value of shares in power generating MOMs who have a shares plus system operating where control of the water consents held by the MOM is in the hands of a small Māori shareholding. What is highly likely is that the value of the MOM shares would be significantly compromised. The fact that decisions about water supply and use were being made by a small group of shareholders whose interest was not necessarily in MOM profitability but in protecting Māori proprietary interests illustrates the problem.

[200] In any event the Crown say that an analysis of what underlies shares plus illustrates all entitlements identified by the Tribunal, can be provided as well after as before sale of the shares, save one. The one exception, special management rights for Māori shareholders can, the Crown say, be better achieved in any event in other ways. I agree with this analysis.

[201] As to appointment of directors and other management control, the Crown must always retain 51 per cent of all categories of shares including voting shares in the company and will, therefore, be in a position, post share sale, to promote Māori directors and Māori managers of MRP should that be seen as part of appropriate redress.

[202] None of these proposals in any event would give any real connection or control by Māori over water resources. It is control of the water resources which gives the direct relationship with Māori proprietary interests in water. Such control through special management powers to Māori shareholders of MRP could clearly be given pre-sale but not post-sale.

[203] However, for the reasons previously given, and with respect to two interconnected points, I do not consider that this aspect assists the claimants. Māori interests are, as the evidence before the Tribunal and this Court illustrates, not simply related to MRP water resource consents. Māori identify a wide range of freshwater and geothermal resources with which they say they have proprietary interests in and to which they have redress and recognition rights.

[204] Currently decision making in relation to water rights is primarily controlled by the Resource Management Act 1991. Māori have identified that they want a say in the New Zealand-wider management of water (especially to ensure water quality), commercial redress for others use of their proprietary interest in water and the ability themselves to use water for their commercial purposes. The shares plus concept will hardly achieve these aims.

[205] After all, there are, as the Crown evidence established, over 20,000 water right grants in New Zealand, the vast majority for irrigation and approximately one per cent for use in hydroelectric schemes.

[206] To achieve Māori wishes would require a new approach to water including identifying who controls water, how they control it, who has access to it, who has property interests in it and who is entitled to economic benefit from it. There are, therefore, far more effective methods for Māori to achieve its goals than the shares plus scheme which hardly addresses these issues at all.

[207] The second point is that management control of the water resource used by MRP in the hands of a few shareholders is likely, as I have previously identified, to have serious implications for the value of the SOEs affected. This is especially so if those who have control of the resources are not committed to use the water to maximise the profit of MRP. This potential loss of value of MOMs would seriously affect Māori themselves both as direct shareholders and indirectly as a loss in the value of assets owned by all New Zealanders. Such an approach would also frustrate Government policy to sell the assets and use the sale proceeds for improvements to public facilities. The former part of which at least has been

approved by Parliament. The result is potentially a serious diminution of value of these assets with little or any parallel advantage to Māori.

[208] What also must be kept in mind is that, as the Privy Council noted in the *Broadcasting Assets* case, it is the Crown's ability to take reasonable action, which it is under an obligation to take, to comply with Treaty principles that is in the spotlight.

[209] I am satisfied that the provision of special management powers for Māori to control MRP's use of water would seriously compromise the value of MRP (and the other MOM companies). Māori aspirations for the control of water resources could be more effectively achieved in other ways. I do not consider the shares plus proposal (particularly the management control aspect) is a reasonable action required of the Crown to meet Treaty obligations.

[210] A further issue raised here is that Māori have claims of proprietary interests in freshwater and geothermal resources. The Government is required to protect these claims pursuant to Article 2 of the Treaty. The Crown has been aware of these claims for many decades and now propose to sell part of MRP and other power generating companies. MRP has property rights in the water it uses. This is the very same water that Māori have proprietary interest in and claims to. Therefore, to sell MRP's shares compromises the Crown's ability to recognise these property rights through the direct connection with MRP's property rights.

[211] Once a sale of 49 per cent of the shares is complete, the opportunity to give Māori claimants an interest in MRP's property rights in water will be gone. MRP's property rights in water arise from the company's resource consents to take water. The claimants say these consents are a form of property. And so Māori have a direct claim to MRP assets in the same way that Māori had a claim to the land being alienated from Crown control in the *Lands* case.

[212] Section 122 of the Resource Management Act provides as relevant:

> **122 Consents not real or personal property**
>
> (1) A resource consent is neither real nor personal property.
>
> (2) Except as expressly provided otherwise in the conditions of a consent,—
>
> (a) On the death of the holder of a consent, the consent vests in the personal representative of the holder as if the consent were personal property, and he or she may deal with the consent to the same extent as the holder would have been able to do; and
>
> (b) On the bankruptcy of an individual who is the holder of a consent, the consent vests in the Official Assignee as if it were personal property, and he or she may deal with the consent to the same extent as the holder would have been able to do; and
>
> (c) A consent shall be treated as property for the purposes of the Protection of Personal and Property Rights Act 1988.
>
> (3) The holder of a resource consent may grant a charge over that consent as if it were personal property, but the consent may only be transferred to the chargee, or by or on behalf of the chargee, to the same extent as it could be so transferred by the holder.
>
> [(4) Subject to the provisions of this Act, and in particular to subsection (3), the Personal Property Securities Act 1999 applies in relation to a resource consent as if—
>
> (a) the resource consent were goods within the meaning of that Act; and
>
> (b) the resource consent were situated in the Provincial District in which the activity permitted by the consent may be carried out (or, where it may be carried out in more than 1 Provincial District, in those Provincial Districts).**]**

[213] However, the claimants say that this Court has concluded that despite s 122(1), there are or could be property rights in resource consents. The claimants submit that in two cases in this Court there was acceptance that resource consents were a form of property rights or interest.

[214] In *Aoraki Water Trust v Meridian Energy* the claimants say the Court concluded that given resource consents were of considerable economic value this value could only be explained on the basis that such value derives from the use of

property (here, water) according to its permit.[56] I note the Court appeared to be careful not to say a resource consent was a form of property.

[215] In *Armstrong v Public Trust* this Court said that the purpose of s 122(1) was to prevent the transfer of resource consents.[57] Fogarty J concluded that property rights were recognised by the Resource Management Act but were contained. He said:[58]

> It is not possible to interpret that [s 122(1)] as saying that Parliament has set its face against the creation of property rights as incidental to holding consents under the RMA, for that proposition is confounded immediately by the remaining sub-sections of s 122.
>
> What, then, is the reason for subs (1)? There was a measure of agreement between counsel that it functions by eliminating recognition by the Courts of any property rights be they real or personal property in respect of RMA consents, except and only to the extent that Parliament has provided for them expressly or by necessary implication. I think that proposition is sound. It is confirmed by consideration of later provisions in Part 6 of the Act, within which s 122 falls, under the heading "*Transfer of Consents*". The following sections fall under that heading:
>
> **134 Land use and subdivision consents attached to land – ...**
>
> **135 Transferability of coastal permits – ...**
>
> **136 Transferability of water permits – ...**
>
> **137 Transferability of discharge permits – ...**
>
> **138 Surrender of consent – ...**
>
> **138A Special provisions relating to coastal permits for dumping and incineration.**
>
> Accordingly, the purpose of s 122(1) is to prevent other transfer of consents, except as provided for in the statute. Sub-section (2) of s 122 can then be seen as providing some general qualifications. Subparagraphs (a) and (b) deal with the involuntary transfer and subparagraph (c) and subs (3) allow the securitisation of consents. Such recognition of property rights is contained. What Parliament has set its face against is the unfettered transfer of resource consents except where specifically provided.

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56 *Aoraki Water Trust v Meridian Energy* [2005] 2 NZLR 268.
57 *Armstrong v Public Trust* [2007] 2 NZLR 859.
58 At [18]–[19].

[216] I consider the meaning of s 122 is straight forward. Section 122(1) makes a clear and ambiguous statement. Exceptions are provided for in ss (2), (3) and to the general proposition in (4). None of the exceptions apply to MRP's resource consents. There are only two forms of property in New Zealand, real and personal. A resource consent is neither. The fact that in limited circumstances a resource consent holder may be able to act as if the consent is property through specific statutory authorisation does not generally make a resource consent property.

[217] Further, as the Crown pointed out the nature and terms of the resource consents will not be changed by a sale of shares, nor will who holds the consent. In any event the resource consents are granted pursuant to the Resource Management Act and any claim to an interest in a resource consent would require it to be dealt with pursuant to the Act or by amendment to that Act.

[218] I am satisfied that the resource consents held by MRP are not property. One of the essential planks to the claimants' argument is, therefore, removed. I, therefore, reject this claim of a further nexus.

[219] I, therefore, reject the claimants' case that the privatisation of part of MRP's shareholding will materially affect the Crown's ability to recognise rights and provide redress for Māori claims to proprietary interest in water.

[220] It is proper also to record individual iwi and hapū's frustration (as well as Māori generally) at being unable to negotiate with the Crown resolution of claims to forms of proprietary interest in water many of which have been outstanding for decades. I have read many affidavits from representatives of iwi, hapū and tribal organisations deeply frustrated over years of failure to address claims of interest in particular waters. It is a great sadness that many of these claims have not been heard and resolved. Many go to the essence of Māori iwi and hapū. I urge those who have the authority to urgently address these claims. It is also proper to acknowledge the efforts the Crown have made to develop a new strategy for the use of water in New Zealand as I have recounted.[59]

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[59] At [14].

Prejudice to ability to institute general measures of reform – water resource rental – another nexus?

[221] Connected with this claim is the claimants' submission that there is another nexus or connection between the sale of the shares and potential remedy for loss of proprietary interests in water not considered or recognised by the Tribunal. This issue relates to the fact that privatisation of MRP is taking place in circumstances where MRP pays nothing for the water it uses to generate its product, electricity. One of the potential forms of redress for Māori generally, the New Zealand Māori Council says, was a resource rental payment to Māori. This would involve charging those that use water for commercial gain.

[222] The New Zealand Māori Council's submission is that it will be significantly more difficult to institute a resource rental arrangement for Māori once MRP is in part privatised. The Government have said that the sale of shares is targeted at "kiwi mums and dads". After sale there will be a significant number of New Zealanders who have a financial interest in preserving the status quo of the zero cost for water. It would be much easier to institute a regime of resource rental payment for water to Māori before any such privatisation.

[223] The Tribunal in its report accepted the assurance from Crown counsel that the Crown could implement a resource rental payment arrangement should it chose to do so, whatever the difficulties may be.[60]

[224] The New Zealand Māori Council submits that this Court should not accept such a vague assurance and that the kind of detailed assurance provided for in the *Broadcasting Assets* case,[61] is the kind of assurance required here.

[225] In short, as the New Zealand Māori council says:

> A nexus in relation to this prejudice is with all Māori who have a claim to a water resource since all such Māori will be directly affected by the Crown's diminished ability to provide a solution with national implications.

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60 Waitangi Tribunal *Interim Report* at 197.

61 *New Zealand Māori Council v Attorney-General* [1992] 2 NZLR 576 at 594–595.

[226] There will, therefore, be real prejudice to the claims for all Māori if this potential avenue of redress is closed off.

[227] I reject this argument. In my view there is nothing to suggest that it will be any more difficult to institute a rental (or royalty) payment system for water after the sale of shares in MRP. Such a rental system would likely relate to most, if not all, commercial use of water. It could hardly be introduced for MRP's use only. It would likely require amendment to the Resource Management Act 1991.

[228] Parliament is free to introduce such changes to the water use regime as it chooses. There would be no unfairness to investors in MOMs or indeed any entity currently using water for free to be faced with a change for the resource. While this may be a change to the commercial basis on which such entities operate, investors will no doubt be aware of such potential changes. Commercial entities are subject to regulatory change which can affect commercial profitability (see, for example, the Emissions Trading Scheme and the Resource Management Act).

[229] In summary, the sale of shares in MRP will not affect the Crown's ability to introduce a cost of water charge which could be the source of a rental payment for Māori for redress for use of their proprietary interest in water. I reject this claim of a further nexus.

Loss of shares prevents redress?

[230] The New Zealand Māori Council emphasised that part of the shares plus proposal was the provision of shares to Māori interests. While they maintain their position before the Tribunal that shares by themselves will not provide them with very meaningful recognition of their water rights, that did not mean that shares or some other means of direct equity interest in MRP, is not an important part of redress.

[231] The New Zealand Māori Council says that with regard to those Māori groups who have a claim directly to rivers and geothermal resources being exploited by MRP, shares do offer a form of direct redress. MRP has amassed enormous wealth

as a result of the exploitation of a particular river or geothermal resources owned by Māori. This exploitation is in breach of the protections promised under Article 2 of the Treaty.

[232] The New Zealand Māori Council, therefore, say that the Crown should ascertain which groups would accept shares in MRP (some do not seek shares) as part of redress for their claims of proprietary interests in the water resources used by MRP.

[233] Further, the Council submitted that all of the breaches of Māori claims to water rights arise from, "one systemic breach being the appropriation by the Crown through national legislation of decision making authority over the use of water" (currently the Resource Management Act).[62] The New Zealand Māori Council says that this systemic breach has resulted in numerous particular breaches all over New Zealand.

[234] Given that some of these breaches involve MRP and MRP has generated significant wealth through the use of water, then there is an identifiable revenue stream from which compensation can be made. There is no other source of funds to provide this redress that readily suggests itself, and that is both available and closely connected to water, say the New Zealand Māori Council.

[235] As far as all Māori are concerned, New Zealand Māori Council submits that the wealth generated by MRP and the other power generating SOEs, are the ideal resources to be used to resolve all Māori claims of breaches of their water rights.

[236] The New Zealand Māori Council disagrees with the conclusion of the Waitangi Tribunal which said that there was not sufficient nexus between the shares of MRP and the claims of all Māori to halt the sale of the shares.[63]

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62 New Zealand Māori Council submissions at 26. See similar argument made in Waitangi Tribunal *Interim Report* at 163.

63 New Zealand Māori Council submissions at 26. See similar argument made in Waitangi Tribunal *Interim Report* at 163.

[237] I am satisfied that the sale of MRP shares will not compromise the Crown's ability to provide recognition of rights or redress for Māori for claimed proprietary interests in water.

[238] There is little connection between the sale of shares in a company which neither owns nor has any property rights in water,[64] but uses water for its business and Māori rights recognition and redress with respect to water.

[239] In any event, if ultimately shares are seen as an appropriate form of redress or rights recognition, then the Crown can either choose not to sell the full 49 per cent of the shares in MRP or purchase shares on the open market for transfer to Māori. While the shares may be a convenient capital fund from which any compensation payable could be paid, ultimately the source of any redress will be a matter for agreement or Crown decision. I reject this aspect of the claim.

Summary

[240] In summary, in this part of the judgment I have assumed that the three decisions of the Ministers, the subject of review, are subject either to s 9 or s 45Q.

[241] To establish that the Crown's decisions to proceed with the sale of shares in MRP was unlawful, the claimants must show it is likely that the sale would materially affect the Crown's ability to recognise Treaty rights and provide redress. The claimants have not established such a proposition. The Waitangi Tribunal found that in its shares plus concept there was an area where remedy or rights recognition would be irretrievably compromised after a share sale. I have rejected this argument.

[242] I cannot see that the shares plus concept is workable, all but one of the identified advantages are available after the sale and the shares plus concept is unlikely to provide the benefits to Māori identified. I am not satisfied there is any other proposed remedy or rights recognition which has a nexus with the sale of shares in MRP.

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64 At [215]–[222].

[243] One final point. The claimants suggested that if the Crown considered shares plus would not work then as a Treaty partner the Crown had an obligation to come up with a workable scheme that met the criticisms made of shares plus.

[244] The Crown case is that there is no such workable scheme. It has said so to Māori. In those circumstances it is surely up to Māori interests to come up with a credible workable scheme to illustrate their claim. None were identified. Counsel for New Zealand Māori Council did for the first time in oral submissions suggest some alternative possibilities.[65] But those were undeveloped ideas. Given the late stage at which they were introduced they could hardly be properly analysed and considered.

Consultation – was it adequate?

[245] The claimants submit that the principles of the Treaty and the concept of partnership and utmost good faith give rise to obligations on the Crown to consult Māori "where it seems there may be Treaty implications that responsibility to make informed decisions will require some consultation".[66]

[246] This obligation of consultation, they say, was emphasised by Cooke P in the *Forestry*[67] case and by Neazor J in the *Ngai Tahu Māori Trust Board* case that there should be consultation "whenever a reasonable Treaty partner would consult".[68]

[247] Richardson J, in the *Lands* case said:

> In many cases where it seems there may be Treaty implications, that responsibility can 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 his possession for it to act consistency with the principles of the Treaty without any specific consultation.

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65 For example analogous to the Kiwi share in Telecom or preferential shares.

66 See *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 683 per Richardson J.

67 *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA).

68 *Ngai Tahu Māori Trust Board v Director of Conservation* HC Wellington CP 841/9223, December 1994.

[248] In the *Forestry* case, the Court confined the duty on both parties to consult the other party to "truly major issues".[69] And finally, the opportunity to make submissions on the issue for consultation is sufficient; face to face consultation is not required as a matter of law.

[249] Consultation must be with an open mind giving those who should be consulted a reasonable opportunity to know what they are being consulted about and to respond. A breach of the consultation obligation is, the New Zealand Māori Council say, a breach of s 9 of the SOE Act and s 45Q of the Public Finance Act 1989.

[250] The claimants say consultation was required of the Crown with Māori as part of the development of the privatisation policy regarding SOEs before the MOM legislation was passed and after the Waitangi Tribunal Report.

[251] The claimants say the consultation processes were inadequate because:

(a) the scope of consultation was inappropriately limited;

(b) the Crown refused to meet with representatives chosen by Māori;

(c) the Crown did not consult about a system or mechanism to provide meaningful protection for their claims.

(d) no adequate information was provided before the consultation meetings on other options;

(e) the time available to comment and the resources provided to Māori to facilitate consultation were insufficient for meaningful engagement;

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69 At 521.

(f) the Crown was not willing to start afresh and consider options other than share plus; and

(g) the Crown did not have an open mind.

[252] I consider each in turn.

Scope of consultation

[253] The claimants submit that the extent of consultation of Māori was too narrow and thereby flawed. The two sets of consultation, before the Waitangi Tribunal report and after, focussed only on narrow issues and did not truly consider the issue of privatisation of the SOE assets and their relationship with Māori proprietary claims to freshwater and geothermal resources.

[254] The February 2012 consultation hui[70] narrowly focussed on whether or not the protection mechanism for Māori under s 9 and s 27A to D in the SOE Act should be retained in the new legislation. The consultation after the Waitangi Tribunal report was narrowly focussed on whether or not to implement the shares plus provision.

[255] The basis of Crown consultation regarding the extension of the MOM model was set out for those consulted in a proposal document produced in February 2012.[71] This document outlined the Government proposal to change legislation to enable the MOM policy to proceed. It noted that the Government was consulting on three options to express its Treaty obligations in addition to retaining the memorials

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[70] Described at [9] to [11].

[71] The front page of the document said:
Extension of Mixed Ownership Model.
A proposal to change legislation in relation to:
(a) Genesis Power Limited;
(b) Meridian Power Limited;
(c) Mighty River Power Limited;
(d) Solid Energy New Zealand Limited;
Consultation with Māori
February 2012, New Zealand Government.

regime for land contained in s 27A–D of the SOE Act. The three options related to whether s 9 of the SOE Act should be incorporated and if so, in what form in the new legislation.

[256] The proposal said:[72]

> The Government has consulted with Māori to ensure that, before it makes final decisions on legislation, and specifically on options on s 9, it fully understands Māori views on how Māori rights and interests under the Treaty of Waitangi are affected by the proposals.

[257] The document set out what legislation was required, discussed relevant issues and identified matters which the Government considered were beyond the scope of the consultation including, specifically, what interests in water Māori claimed.

[258] The New Zealand Māori Council says that the Government's proposal to sell major assets whose value, Māori said, was derived in part at least from the exploitation of Māori assets and breach of the Treaty, required broad consultation of all Māori, both about the policy and the remedies and rights recognition if privatisation was to proceed.

[259] The claimants' case was that it is not "true" consultation if everything was not on the table. The "everything" included the policy of privatisation of SOEs and for there to be adequate scope for consultation on the Crown policy relating to the privatisation of SOEs.

[260] I reject that approach. Government is free to develop its policy. It is free to try and convince Parliament to pass laws to reflect that policy. If the statutory obligation in s 9 of the SOE Act (or its equivalent elsewhere) is raised by the policy and the transfer of assets, or as a result could now or in the foreseeable future impair to a material extent the Crown's ability to take reasonable action to protect Māori rights and interests, then the Crown must consult on what it can do to comply with these Treaty principles.

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[72] At 6.

[261] In the *Lands* case, the focus of discussion between the Crown and New Zealand Māori Council was on how Treaty principles could be adhered to while ensuring the SOE policy of the Government could be carried into law.

[262] Here, the Crown does not need to consult on a policy of the sale of the 49 per cent share in SOEs. It does need to, and did, consult on what protective measures were required for Māori in the circumstances of the sale of shares. The Government had agreed to include what became s 45W of the Public Finance Act to ensure the right of return of land to Māori who brought themselves within the ss 27A–D SOE process. This resumption right was to apply even after the 49 per cent share sale to all land owned by MRP.

[263] Secondly, the Government agreed after further consultation to incorporate the equivalent of s 9 of the SOE Act into the new legislation in limited circumstances arising from decisions made pursuant to Part 5A of the Public Finance Act.

[264] As to the pre-Waitangi Tribunal consultation, as I have noted, the Government was not obliged to consult about its privatisation policy as such. What s 9 obliged it to do was ensure that such a policy did not deprive Māori of redress and rights recognition for claims to proprietary interest in water.

[265] When the Waitangi Tribunal concluded that it was only with respect to the share plus concept that there was a connection between the share sale and the ability for redress or rights recognition, the following consultation was logically limited to this point. (I note the Tribunal observed it might be more difficult to implement general solutions post-sale.)

[266] Finally, the claimants did not identify what further relevant information could have been provided to the Crown that was not provided because of the inadequacies of the consultation.

Refusal to meet with chosen representatives

[267] This submission relates to the question of whether the Crown should have met with Māori representatives who were chosen to represent Māori at a national hui held in September 2012 after the Tribunal report and whether their failure to do so was a fatal flaw in the consultation. The national hui was called by the Māori King at the Turangawaewae Marae, Ngarawhaia to discuss the water claim. The New Zealand Māori Council say the hui was very well attended, a broad consensus amongst Māori was reached and that those present agreed to be represented by one united body.

[268] The New Zealand Māori Council say it was up to Māori to decide who their representatives will be when they consult with the Crown regarding these issues. And in particular those who were discussing the matter with the Crown needed to have particular experience and skills in negotiating, a knowledge of the technically complex shares plus issue and a knowledge of the water rights issue which had its own complexities. The Crown chose not to arrange a national hui as recommended by the Tribunal and chose not to consult about the Tribunal report with those chosen to represent Māori from the hui. Instead the Crown chose to consult with those iwi/hapū and other Māori bodies who claimed to be directly affected by the proposal to sell shares by virtue of claimed proprietary interest in particular waters.

[269] Further, the New Zealand Māori Council submits in any event there is a duty on the Government to consult fully and directly with the Council by virtue of the statute which established the Council (the Māori Community Development Act 1962).

[270] As I have noted after the release of the Waitangi Tribunal report, the Government elected to consult those iwi/hapū or Māori organisations who represented Māori who had particular proprietary claims to water. The Tribunal had concluded that identifying Māori interests in water required a case by case, fact by fact analysis of each claim. A proprietary interest in water was not something all Māori could claim simply by virtue of their indigeneity.

[271] The Government, therefore, identified the relevant Māori interests in the waters that were said to be affected by MRP's commercial activities and invited them to respond to the proposal by submission and by participation in hui. Who represented each iwi/hapū or organisation was a matter for Māori. Further, the Government wrote to the New Zealand Māori Council inviting its view of the shares plus concept. A number of Māori attendees at the huis organised to discuss shares plus consulted the lawyers representing the New Zealand Māori Council before the hui. They were provided with a letter detailing objection to the Crown's plans which, if they agreed with the contents, they could provide (and a number did so) to the Crown representatives at the hui.

[272] I am satisfied Māori were free to have their chosen representatives make representations to the Crown regarding the shares plus proposal.

Limited time and resources

[273] The New Zealand Māori Council says that the limited time and the resources provided to Māori for the September consultations (particularly) were inadequate to enable proper consultation. However, there was no evidence at this review which identified what further relevant information could have been provided if more time and money had been made available.

Predetermination

[274] This submission relates to the second consultation period. The New Zealand Māori Council accepts that it was appropriate for the Crown to set out a tentative view of the shares plus proposal so that those who were consulted could focus their submissions. However, the Council submits that the Crown crossed the line from a tentative view to closed mindedness and predetermination before the consultation was complete.

[275] There are two basic reasons for the New Zealand Māori Council submission:

(a) the Prime Minister's press announcement, contemporaneous with the proposal to hold the September consultation, showed a closed mind; and

(b) the hui itself were conducted in a way that illustrated the Crown were consulting, in the words of the Council, "for show with no real prospect that the Crown would change its views".

[276] As to the later submission, the New Zealand Māori Council relied upon a number of affidavits filed by those who attended the hui. They said that the consultation process consisted of an explanation of what shares plus was by the Deputy Prime Minister a brief, but only brief, period of discussion and an invitation to file submissions. None of those present saw that as consultation.

[277] As to the Prime Minister's press statement, he said (in part):

> The Government's position of water rights has been consistent and clear:
>
> - in common law no-one owns water;
> - Māori do have rights and interests in water that are being addressed, and will continue to be addressed through the Treaty process with dealing with historical kinds and by other mechanisms, iwi by iwi;
> - the partial sale of MRP does not impact on the Crown's ability to recognise Māori rights and interest in water.

[278] The situation here is somewhat similar to the position in the *Forestry* case, the claimants say, when Cooke P said:[73]

> A main complaint about the national hui in January 1989 is that the people there were confronted with a fate accompli. A Māori translation of the French words is he kaupapa he kaupapa kua tau kee kore taea te whakatika – a proposal that has already been decided that you cannot correct. Assuredly that would not represent the spirit of partnership which is at the heart of the principles that the Treaty of Waitangi referred to in s 9 of the State Owned Enterprises Act.

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[73] At [152].

[279] The claimants submit this illustrates predetermination of the outcome, that the Government would not accept shares plus and that this predetermination meant that there was effectively no consultation. The Crown's approach did not "represent the spirit of partnership" at the heart of the Treaty.

[280] Christopher White is the manager of the commercial transaction group at Treasury established to advise the Government on MOM and implement decisions by Government arising from the change of MRP and the other companies from SOEs to MOMs.

[281] Once the Government had decided that it would consult about the share plus concept, it considered the Tribunal's proposal to hold an urgent hui. It rejected that approach. It decided to consult with those iwi and hapū who had direct interest in water bodies and geothermal resources affected by the operations of MRP and the three other companies. This was said to reflect the Tribunal's findings as to Māori interest in water.

[282] The Office of Treaty Settlements, Te Puni Kokiri,[74] Treasury and ministerial advisers identified those they believed fell into this category of a direct interest. Mr White noted that groups who self identified as having a direct interest were also welcomed at the consultation hui.

[283] In addition, written participation was sought from others including the New Zealand Māori Council and the 11 claimants and 90 interested parties who had been before the Waitangi Tribunal for the freshwater and geothermal claim.

[284] Further, those who were invited to make written submissions and/or attend the six hui, were invited to forward the invitation to make written submissions to any others who they thought might be affected by the Government's proposal.

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[74] Ministry of Māori Development.

[285] A letter from the Honourable Bill English was then sent to all such persons. It advised the addressees:

(a) that the consultation was intended to be a "targeted" consultation about the shares plus concept and the Waitangi Tribunal Report;

(b) how the Tribunal described the shares plus concept;

(c) the Crown's preliminary view that the shares plus concept was neither necessary nor desirable and why the Crown thought so;

(d) what the consultation process would consist of including five topics on which the Crown particularly sought submissions.

[286] Further invitational letters were sent out on 5 and 10 September and said in part:

> that the Government wanted to explain its preliminary view of shares plus to answer questions and to "listen carefully to your views before any final decision is made".[75]

[287] There were also media releases by the Crown shortly before each of the hui which were extensively published in the media.

[288] Six huis had variable numbers of attendees; Waikato 15 attended; at Wairarakei 90 attended; at Whanganui 50 attendees; at Te Kuiti 15 attendees; at Tuai 46 attendees; and at Christchurch 30 attendees.

[289] Fourteen written submissions were provided to the Crown officials at the hui and 23 written submissions were subsequently sent to the Crown within the timeframe allowed (5 October).

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[75] Letter from Honourable Bill English (Minister of Finance) and Honourable Christopher Finlayson (Attorney-General) regarding consultation on shares plus proposal (10 September 2012).

[290] As to the concept of share plus the Crown invited the New Zealand Māori Council to provide details of the use of the share plus concept. Mr White in his affidavit said the Council had claimed that such an arrangement was common for overseas companies using natural resources. Mr White said that the New Zealand Māori Council referred it to electronic links with US and Australian companies with preference shares (which typically provided a heightened level of financial return) but they were not a shares plus concept.

[291] Treasury through instructed agents could find "no examples" of a "special class of shares" being used as a "proxy for recognition of rights and interests in respect of the resources used by the companies".[76]

[292] As to the affidavits from attendees at various hui, some said they were helped to understand the concept of share plus by the presentation by Mr English. Others said that their initial confusion was not helped by the presentation.

[293] However, a dominant theme in the affidavits was that the consultation consisted of the Honourable Bill English explaining the share plus concept and why the Government's view was against the idea. Then followed a brief opportunity for questioning limited to the share plus concept. Attendees were then invited to file written submissions with the Crown.

[294] The Crown ministers and advisers who attended the hui were not prepared to discuss issues beyond the share plus proposal. While many attendees appeared not to support the share plus idea, their expectation was that the Crown would come up with a more attractive proposal which directly protected Māori proprietary interests in water.

[295] The New Zealand Māori Council has not satisfied me the Crown predetermined its consultation with Māori about the share plus concept.

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[76] Affidavit of Christopher White at [41].

[296] Consultation need not be person to person. It need not be in any particular form.[77] The Government itself was limited in its capacity to consult about shares plus by the limited identification of the concept of the Tribunal. The letter sent to potential attendees emphasised the Government was open to suggestions from Māori. This was a chance to show how shares plus could work, or how an alternative could work and why such an arrangement had to be introduced before the sale of the shares. In my view there is no convincing evidence the Government had set its mind, irreversibly, against shares plus before the consultation. I reject this ground of challenge.

No one owns the water – error of law

[297] The claimants say that the Government's refusal to recognise claims of proprietary rights to freshwater or geothermal resources on which it based in part its conclusion that the sale of the shares was not inconsistent with Treaty principles is based on an error of law that no one owns water. This error of law goes to all three decisions to be made by the Crown; the commencement decision, the amendment decision and the sale decision. The claimants say ownership of water by individuals is possible. Certainly the Tribunal recognised that Māori interest in water equated in 1840 to common law concepts of ownership. The claimants submit that the Crown's position is that because they consider no one owns water then they cannot acknowledge Māori claims to proprietary interests in water. The Crown by doing nothing to resolve Māori claims are creating, the claimants say, further barriers to recognition of water rights by selling shares in MRP. The Crown's position misunderstands the common law as to ownership of water, is irrelevant to the decision making and misunderstands Māori claims. They submit, in any event, that such a proposition is irrelevant in deciding whether to recognise Māori claims of proprietary interest in water.

[298] This is not the time, nor the opportunity to answer the question who, if anyone, owns water in the context of this case. Far more extensive submissions would be required to adequately deal with that proposition. However, having

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[77] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 at 683.

reviewed the evidence I am satisfied that the Crown did not take into account the proposition that no one owns the water when considering Māori claims to proprietary rights in water and in making its decision to proceed with the commencement order and with its intention to sell the shares in MRP.

[299] The source of the comment "no one owns the water" is several Prime Ministerial press statements when the Government announced its intention to proceed with the sale of MRP shares and subsequent to the release of the first report from the Waitangi Tribunal.

[300] The Prime Minister's press statement of 3 September 2012 announcing the sale of 49 per cent of MRP illustrates the point. He said (amongst other matters):

> The Government's position on water rights has been consistent and clear:
>
> - In common law no one owns water;
> - Māori do have rights and interests in water that are being addressed and will continue to be addressed through the Treaty process when dealing with historic claims and by other mechanisms iwi by iwi.

[301] The Prime Minister reiterated the Crown's view that the sale of MRP would not affect such rights and interests.

[302] In his affidavit of 7 November 2012 the Deputy Prime Minister said:

> I understand that the applicants in these proceedings claim that the decisions made by Ministers in relation to the MOM programme were based on a view that "no one owns water". I can confirm that:
>
> 45.1 Ministers were clear throughout the process that particular Māori iwi/hapū have rights and interests in specific water and geothermal resources in rohe. If the applicants are seeking to suggest otherwise that is simply wrong;
>
> 45.2 the decisions that Ministers have made in relation to the MOM programme do not depend on particular views about the ownership of water. To the contrary, my view, along with that of other Ministers, has consistently been that the MOM programme will not affect the continuing process of ascertaining and recognising Māori rights and interests in respect of such resources.

[303] This evidence establishes that the Crown did not base its decision with respect to the change in status of the SOE companies to MOMs, in part, on the proposition that no one owns the water. The Crown's decision was that whatever Māori rights and interests were in water, the sale of shares in MRP would not affect these rights.

[304] Further, the Prime Ministerial statements were simply press statements made in the context of a continuing public debate about these issues. They do not indicate that decisions about compliance with the Treaty principles with respect to the proposed transfer were made on that basis at all.

[305] I, therefore reject that ground of challenge.

Failure to wait for the Waitangi Tribunal process to be complete – error of law/unreasonableness

[306] As I have noted, stage one of the Waitangi Tribunal inquiry is now complete although a final report is yet to be prepared. The Tribunal noted that its recommendation and conclusions would not change in its final report at stage one but that there may be some further material provided and any typographical errors corrected. The stage two inquiry has not yet begun.

[307] The New Zealand Māori Council's submission that it was an error of law and unreasonable for the Crown not to wait for the completion of the first and second stages of the Tribunal hearings is based on a quote from Cooke P in the *Radio Frequency* case, where he said:[78]

> I am driven to hold that no reasonable Minister, if he accepted that the Crown is bound to have regard to Waitangi Tribunal recommendations on Māori broadcasting could do other than allow the Tribunal a reasonable time for carrying out its inquiry.

[308] The New Zealand Māori Council's submission is that the Crown is acting unreasonably in the sense meant by Cooke P by refusing to wait for the final report on the stage one inquiry and by refusing to wait for the conclusion of the stage two

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[78] *Attorney-General v New Zealand Māori Council* [1991] 2 NZLR 129 (CA) at 139.

inquiry. It was submitted the Crown has wrongly rejected the stage one recommendations of the Waitangi Tribunal without waiting to receive the full text and references to support the Tribunal's conclusions. I reject this argument.

[309] As to the first report, the Tribunal made it clear in its interim report, that the final report would not change its findings and recommendations but the Tribunal would edit for typographical error and provide further footnoting and references.[79] This tidying up of the first report could not possibly justify a delay in Crown decision-making.

[310] The purpose in dividing the Waitangi Tribunal hearing and report into two stages was to enable an early hearing and decision on that aspect of the claim (stage one) which would determine whether a halt to the privatisation of the SOEs process could be justified (the nexus question). If the Tribunal found a nexus, then the sale process would halt. If not, there could be no reason to halt the sale process.

[311] The Tribunal found there was a nexus and, therefore, the sale process should halt until protective measures were put in place by the Crown. Even if this situation had been accepted by the Crown and if agreement on protective measures was reached before the beginning of the second stage of inquiry, there would be no reason then to delay any share sale simply for the second part of the inquiry.

[312] As I have observed in this Judgment, the Crown rejected the notion of shares plus as a functioning possibility and said, in any event, it did not provide the nexus claimed by the Tribunal. The Crown, therefore, advised Māori that it intended to proceed with the sale. And so the failure of the Crown to wait for the Tribunal's second report is not by itself an error of law.

[313] The process undertaken by the Tribunal was intended to provide guidance on how the Crown could proceed with the sale of the shares before the second part of the hearing was undertaken. If the Crown are wrong in their approach to dispute there is a nexus in this case, then their error is not in failing to wait for the second

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[79] Waitangi Tribunal *Interim Report* at iv of Preface.

report but in the failure to ensure proper protective mechanisms were in place to protect Māori water rights.

[314] I, therefore, reject this ground of appeal.

Legitimate expectation

[315] The New Zealand Māori Council acknowledges that this submission is properly considered only if I have found that the privatisation does not raise s 9 or s 45Q inconsistency issues. The legitimate expectation is expressed by the Council in this way:

> That the Crown would act with utmost good faith and actively protect Māori culture and proprietary rights in interests in freshwater and geothermal resources as recognised in the Treaty of Waitangi.

[316] The Waikato River and Dams Claims Trust expresses the legitimate expectation similarly, and further submit there was a legitimate expectation that the Crown would engage with Waikato-Tainui in relation to the Crown's decision.

[317] The claimants submit this legitimate expectation arises from a number of sources: the Treaty of Waitangi; s 9/s 45Q; court decisions confirming the Crown's Treaty partner obligations; and assurances from the Crown.

[318] The claimants say that that legitimate expectation would be defeated if the Crown sold shares in any of the MOMs before the Waitangi Tribunal's final report and before there was a mechanism implemented to protect Māori rights and interests relating to water resources. The New Zealand Māori Council relies upon the dissenting judgment of Thomas J in the *Commercial Radio* case.[80]

[319] Two possible legitimate expectations arise here – one substantive the other procedural.

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[80] *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 at 183 and 185.

[320] I acknowledge the current debate about the place of a legitimate expectation to a substantive outcome in New Zealand jurisprudence.[81] I express no view as to that debate because the assertion of a legitimate expectation in a substantive outcome cannot succeed in this case. The substantive outcome of the legitimate expectation expressed at [315] is that privatisation as proposed should not proceed as it is inconsistent with Treaty principles. I have already rejected this argument. The New Zealand Courts have concluded that the Treaty can only be enforced if incorporated into domestic law and then only to the extent provided for in law.[82] Pleading legitimate expectation of a substantive outcome based on future Treaty of Waitangi compliance is simply an attempt to get around the restrictions on direct enforcement in law of the Treaty.

[321] As to the process legitimate expectation, the claimants say the legitimate expectation is that the Minister would not proceed with the commencement decision or with the sale until the Crown had properly assessed these decisions against consistency with Treaty principles.

[322] I have already rejected such an approach given clear Parliamentary intention. A claim to legitimate expectation of such a process would cut across Parliamentary intent that the share sale process is subject to the Treaty protections in s 45Q and s 45W.

[323] The majority in the *Commercial Radio* case made it clear that there cannot be a legitimate expectation of Crown conduct in conflict with the policy and intent of Parliament.

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81 New Zealand courts have not yet given effect to a legitimate expectation of a substantive outcome. See discussion in *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] NZAR 138 (HC). This is in contrast to the position in the UK. See *R v North East Devon Health Authority, ex parte Coughlan* [2000] WLR 622.

82 *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308; 1941 NZLR 590 PC. I acknowledge that in the likely event this case is heard ultimately in the Supreme Court, the New Zealand Māori Council wish to challenge the correctness of this decision. I am, however, bound by it.

[324] Finally, as the Crown pointed out, looked at overall given there was consultation by the Crown about compliance with Treaty principles, the MOM regime, and with respect to the shares plus concept and that the final legislation provided Treaty principles protection, meant any legitimate expectation about process had been met.

[325] I reject this claim.

Material error – actions in breach of Treaty?

[326] This ground of challenge relates to the breach of the Treaty as a matter of law. This alternative ground of challenge is based on these propositions:

(a) the Crown has made a material error of law by holding its actions are not in breach of the Treaty of Waitangi;

(b) if the Court finds the Crown's actions are inconsistent with the principles of the Treaty but there is no relevant enforceable requirements for the Crown to act consistently with those principles, then this Court should inform the Crown of its error and require the Crown to reconsider its decisions and acknowledge that its actions do amount to a breach of the principles of the Treaty of Waitangi.

[327] I have found that the actions of the Crown are not inconsistent with the principles of the Treaty of Waitangi in that those actions are not likely to materially affect redress or rights claims by Māori or redress with respect to its claims to a proprietary interest in water.

Breach of natural justice?

[328] The Waikato River and Dams Claims Trust submits that the Crown owes a duty to have Māori claims heard and determined before any sale of MRP shares. This is a duty on the Crown to act fairly. This includes the important duty to ensure all relevant claims are resolved before assets are sold. In this case that duty requires

the Crown to permit the claims to be heard before the Tribunal to determine rights and interests before sale. In particular with respect to Waikato-Tainui and Pouakani to await determination of their property claims to the Waikato River before the sale of the shares.

[329] This ground of claim is essentially a repeat of other grounds of challenge already rejected by me, for example, consultation and failure to wait for the second Tribunal report. I am satisfied this ground of appeal raises no new claims. Further, I am satisfied the Crown's actions will not affect the ability of the claimants to participate in the Waitangi Tribunal process.

[330] I reject this ground of challenge.

Section 64 of the Waikato-Tainui Raupatu (Waikato River) Settlement Act 2010

[331] When Waikato-Tainui settled their claim with the Crown, there remained one difference between them relating to the Waikato River. Section 64(1), (2) and (3) of the Act provides as follows:

> **64 Creating or disposing of interests**
>
> (1) The Crown and Waikato-Tainui acknowledge that—
>
> (a) they have different concepts and views regarding relationships with the Waikato River (which the Crown would seek to describe as including "ownership"):
>
> (b) the 2009 deed and this Act are not intended to resolve those differences:
>
> (c) the 2009 deed and this Act are primarily concerned with management of the Waikato River to—
>
> (i) achieve the overarching purpose of the settlement:
>
> (ii) recognise the special relationship of Waikato-Tainui with the Waikato River.
>
> (2) This section applies if the Crown, a Crown entity, **[**a state enterprise, or a mixed ownership model company**]** proposes doing any of the following actions in relation to a property right or interest in the Waikato River:

(a) creating it:

(b) disposing of it:

(c) starting a statutory or other process to create it:

(d) starting a statutory or other process to dispose of it.

(3) The Crown, Crown entity, **[**state enterprise, or mixed ownership model company**]** must engage with Waikato-Tainui in accordance with the principles described in the Kiingitanga Accord before doing the action.

[332] The Waikato River and Dams Claims Trust submission is that the actions of the Crown in the share sales of MRP have breached s 64 of that Act.

[333] The Waikato River and Dams Claims Trust says that the Crown in proposing to sell 49 per cent of the shares in MRP and thereby relinquishing exclusive control of the company is instituting a statutory process to dispose of its proprietary rights or interests in the Waikato River. In breach of s 64(3) there has been no engagement by the Crown with Waikato-Tanui before the decision to sell was made. The Crown are, therefore, in breach of the statute and a declaration is sought accordingly. The statement of claim seeks an order setting aside the decisions and an order that the Crown reconsider its decision with directions from this Court.

[334] I reject the claimants' argument. By proposing to sell the shares in MRP, the Crown is not starting a statutory process to dispose of a property right or interest in the Waikato River.

[335] An owner of a share in MRP does not own any part of the assets of a company. And so even if it could be said that a resource consent is a proprietary right in water, the sale of shares in the company holding the resource consent is not the sale of a property right in the water.

[336] In any event, for the reasons previously given,[83] a resource consent is not a property right in water. The Crown's proposed sale of the shares in MRP does not come within s 64(2), and, therefore, the section does not apply and the Crown is not, therefore, statutorily obliged to consult Waikato-Tainui.

Water rights

[337] In supplementary submissions the Waikato River and Dams Claims Trust raised the issue of MRP's water rights. The Trust submitted that when the Crown and New Zealand Māori Council settled the *Lands* case, an issue arose as to the water permits held by SOEs. These permits, the Trust says, were and remain assets of SOE companies.[84]

[338] While there was no settlement of Māori claims to an interest in water at the time of the *Lands* case, it was agreed between Māori and the Government that water rights that had been held in perpetuity would in the future be restricted to a period of 35 years.

[339] MRP's current water rights were obtained through application to the Waikato Regional Council. Grants were made in 2006 for 35 year water consents. The original water consents had been held by the New Zealand Electricity Department, then the Electricity Corporation of New Zealand, in turn Waikato SOE Limited and finally, MRP.

[340] While the Waikato River and Dams Claims Trust make no specific claim arising from these water permits (none was pleaded and counsel accepted none could be directly advanced in this judicial review) counsel stressed:

(a) there is no settlement between the Crown and New Zealand Māori Council or other Māori as to the ownership or commercial rights attaching to water permits;

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83 At [210]–[218].
84 State-Owned Enterprises Act, s 29(1)(e).

(b) part of the settlement in the *Lands* case was to improve processes by Māori when there were disputed transfers of Crown assets;

(c) these propositions supported the claimants' case that the sale of MRP shares should wait proper inquiry to ascertain an effective mechanism to protect Māori claims to interests in water;

(d) sale of shares will remove the possibility of a mechanism to protect Māori claim to these water permits.

[341] It is relevant that MRP's current water rights were granted in 2006. This may restrict any such claim by Māori to a share in those water consent assets. Nor is there any basis currently to say that the transfer of water consents somehow breached s 9 of the SOE Act. No further analysis is required with respect to the observations by the Waikato River and Dams Claims Trust as to this aspect of the case.

Summary

[342] I am satisfied that the three proposed decisions of the Crown; the commencement decision; the amendment to the constitution of MRP decision; and the sale of MRP shares decision; are not reviewable decisions. Neither s 9 of the SOE Act nor s 45Q of the Public Finance Act apply to these decisions.

[343] Parliament has decided the four SOEs (including MRP) should be removed from the SOE Act to become MOM companies to facilitate the sale of up to 49 per cent of the shares in the four companies. This case is on all fours with the *Commercial Radio*[85] case from the Court of Appeal. No review of Parliament by the Courts is permitted in law. This is effectively what the claimants have asked this Court to do in these proceedings. All causes of action, save the claim based on s 64(3) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 must, therefore, fail on these grounds. These grounds of review were dependent upon one or more reviewable decision by the Crown. I have found there are none.

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[85] *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA).

[344] As to the claim of a breach of s 64(3) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 I am satisfied that there is no breach. The sale of shares was not a sale that required the Crown to engage with Waikato-Tainui.

[345] If I am wrong in my conclusions at [343] and [344], then I consider each particular ground of review must fail:

(a) I am satisfied that the Crown when proposing to make each of the three decisions will not act inconsistently with the principles of the Treaty. I am satisfied that there is no nexus or connection between the sale of the shares in MRP and the need to provide for Māori claims to proprietary interest in water by way of potential redress or recognition of rights.

(b) I am satisfied the consultation that took place relating to the Treaty protection with respect to the privatisation policy was adequate and that the Crown had not predetermined its stance especially with respect to the Waitangi Tribunal's shares plus concept.

(c) I do not consider the three decisions or intended decisions of the Crown to commence the legislation, amend MRP's constitution or sell MRP shares were based in part on the proposition that "at common law no one owned the water". No error of law was, therefore, established.

(d) I do not consider that the Crown was obliged to allow the Waitangi Tribunal process to be finished. The essence of the first report was already complete with further referencing and typographical error correction to come. The purpose of splitting the hearing was to determine the Waitangi Tribunal's view as to whether the sale of the shares could proceed without inconsistency with Treaty principles through the first report. The Crown was not, therefore, obliged to wait for the second Tribunal report.

(e) I reject the claim that there was a breached legitimate expectation of Māori either to the substantive claim or the procedural complaints which made the sale decision unlawful. These claims were essentially a repeat of other claims already rejected.

(f) Finally, I am satisfied that there was no breach of natural justice in the process.

Costs

[346] Should the Crown seek costs then they should file a memorandum within 21 days. The claimants have a further 21 days within which to respond.

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Ronald Young J

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