

THE
INTERIM REPORT
ON THE
NATIONAL FRESHWATER AND
GEOTHERMAL RESOURCES CLAIM

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AND GEOTHERMAL RESOURCES
CLAIM

WAI 2358

WAITANGI TRIBUNAL REPORT 2012

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PREFACE

In order to meet the Crown's request for a report by 24 August 2012, this version of our report is an interim and truncated one, provided in pre-publication form for the convenience of the parties. We will publish the full version of this report later in the year. Additional material will be added to the report, including maps and illustrations. The text will be edited, footnotes will be added where necessary, and any errors will be corrected. The substance of our findings and recommendations will not be altered.

The Right Honourable John Key
Prime Minister



The Honourable Dr Pita Sharples
Minister of Maori Affairs

The Honourable Christopher Finlayson
Minister for Treaty of Waitangi Negotiations

The Honourable Bill English
Minister of Finance

The Honourable Tony Ryall
Minister for State Owned Enterprises

The Honourable Amy Adams
Minister for the Environment

Parliament Buildings
WELLINGTON

The Waitangi Tribunal
141 The Terrace
WELLINGTON

24 August 2012

E te Pirimia, e nga Minita, tena koutou

Enclosed is our interim report on the National Freshwater and Geothermal Resources claim, which we heard urgently at Waiwhetu Marae from 9–16 July and 19–20 July 2012. It is a truncated version of our full report, which will be published later in the year. We are making this early, pre-publication version available as requested by the Crown so that Ministers can give appropriate consideration to our findings and recommendations before the Government makes decisions as to whether to proceed immediately with the sale of shares in Mighty River Power. While the final report will be edited, further text added, and references completed, the substance of our findings and recommendations will not change.

The New Zealand Maori Council, in conjunction with 10 co-claimant hapu and iwi, filed the National Water and Geothermal Resources claim in February of this year, in response to the Government's proposal to sell up to 49 per cent of shares in the power-generating State-owned Enterprises (SOEs) Mighty River Power, Meridian Energy, and Genesis Energy. One hundred and one Maori iwi, hapu, and individual claimants registered an interest in our inquiry, most of them in support of the claim. In March 2012, we granted the claimants an urgent hearing because it appeared that the imminent sale of shares in Mighty River Power (in the third quarter of this year), and the prospective decisions in the Fresh Start

for Fresh Water programme, could result in irreversible prejudice to Maori interests if they were carried out without first protecting the Crown's ability to recognise Maori rights in water or remedy breaches of those rights.

We have since, after hearing the evidence and submissions of the parties, come to the view that there is a nexus between the asset to be transferred (shares in the power companies) and the Maori claim (to rights in the water used by the power companies), sufficient to require a halt if the sale would put the issue of rights recognition and remedy beyond the Crown's ability to deliver. 'Where there is that nexus', Crown counsel rightly told us, 'then there should be a halt'. We explain the nature of the nexus in chapter 3 of our report, and will return to the point below.

Although the claim was filed in February 2012, it is but the latest in a long series of Maori claims to legal recognition of their proprietary rights in water bodies, many of which date back to the nineteenth century. Having heard the evidence of tribal leaders from around the North Island, we are satisfied that this claim has a long pedigree: it has its origins in the unique customary rights and authority which Maori asserted over their water bodies in 1840 (and still assert today); and in their many attempts to get the New Zealand state to accord them legal recognition and protection of their rights over the past 150 years. One example is Lake Omapere in Northland, where Ngapuhi hapu first attempted to secure a Native Land Court title in 1913 and finally succeeded in 1955, after forty years of litigation with the Crown. The claimants and all the interested parties now find themselves in the position of once again – in 2012 – trying to get the state to recognise and protect their proprietary rights in their water bodies.

The New Zealand Maori Council has provided the leadership for the conduct of this claim in the Tribunal, in accordance with its statutory role (since 1962) to make representations to any authority in the interests of all Maori. In this claim, they seek just such a benefit for all Maori: the establishment of a framework by which Maori proprietary rights in their water bodies can be recognised (where that is possible) or compensated (where recognition is not possible).

While the Crown says that Maori rights in water are not yet fully defined, and that no one can own water, the claimants' position is that article 2 of the Treaty of Waitangi guaranteed them the 'full, exclusive and undisturbed possession' of their properties (in English) and te tino rangatiratanga (full authority) over their taonga (treasured possessions) (in te reo Maori). They presented conclusive evidence that Maori hapu and iwi had customary rights and authority over water bodies – as distinct from land – in 1840. Maori people relied on their rivers, lakes, and other water resources for much of their daily food, their clothing and housing, transport and trade, and the other physical necessities of life. This made the water resources highly valued taonga.

But the water bodies were also valued for spiritual and cultural reasons. Rivers and other water bodies could be living beings or ancestors. In whakapapa, Maori had kin relationships with these water bodies. Each had its own mauri (life force), its taniwha (spirit guardians), and a central place in tribal identity. And access was jealously guarded and controlled. Travelling by waka, fishing, or other forms of use were only by permission of the tribe which held mana over those waters. The importance of these water bodies to Maori cannot be overstated. These things have long been known. Judge Acheson's 1929 judgment granting ownership of Lake Omapere to Ngapuhi demonstrates the point, and we have reproduced parts of that judgment in chapter 2 of our report.

Just as this latest 2012 claim is by no means the first Maori water claim, nor are we the first Tribunal to hear and report on such a claim. We draw your attention in particular to the Tribunal's reports on the Kaituna River claim (1984), the Manukau claim (1985), the Mohaka River claim (1992), the Ngawha Geothermal Resource claim (1993), the Te Ika Whenua Rivers claim (1998), the Whanganui River claim (1999), and the Central North Island claims (2008). We describe the important findings and recommendations of those Tribunals in chapter 2 of our report. In essence, it has been found that Maori possessed their water bodies as whole and indivisible resources, in customary law and in fact. Maori did not possess only the beds of rivers or lakes; they possessed water regimes consisting of beds, banks, water, and aquatic life. We agree with the findings of the Te Ika Whenua Rivers Tribunal, the Whanganui River Tribunal, and the Central North Island Tribunal that the closest English cultural equivalent to Maori customary rights in 1840 was full ownership. While Maori custom was not *the same as* ownership, ownership was its closest equivalent. As at 1840, ownership in English law included rights of exclusive access and control.

In chapter 2 of our report, we make the finding that the proprietary right guaranteed to hapu and iwi by the Treaty in 1840 was the *exclusive right to control access to and use of the water while it was in their rohe*. In making this finding, we did not accept the Crown's submission that Maori rights should be conceived of only as kaitiakitanga or stewardship. We do, however, note that the Treaty changed Maori rights even as it protected them. Article 1 gave the Crown kawanatanga (governance) powers, which included the ultimate right to manage water in the best interests of all. But, as we discuss in chapters 2 and 3, that right is qualified by the Article 2 guarantee of rangatiratanga (control) to Maori. Also, by agreeing to the Treaty bargain, Maori are held to have shared many of their water bodies by the grant of non-exclusive use-rights to the incoming settlers. The Treaty also envisaged that some land and resources would be alienated by Maori to the Crown, by their free, willing, and informed choice. The claimants accept that Treaty-compliant alienations may have occurred, that some water bodies have been shared, and that the Crown has kawanatanga rights. The result, in the finding of the Te Ika Whenua Rivers Tribunal (with which we

agree) is that Maori still have *residual* proprietary rights today. How residual those rights may be is a matter into which we will inquire in stage two.

As we discuss in chapter 1 of our report, the claimants do not seek to benefit from non-commercial uses of the water bodies in which they have these proprietary rights. Nor do they seek a commercial benefit from uses that do not generate an income stream. What they do seek is recognition of their property rights, payment for the commercial use of water in which they have property rights (particularly its use for electricity generation), and enhanced authority and control in how their taonga are used.

There has been much criticism in the public arena of Maori making this claim, but what we say is that property rights and their protection go to the heart of a just legal system. This is not an opportunistic claim. The right of New Zealanders to use their properties entails a right to develop them and to profit from their use; as to the latter right, in the words of the Whanganui River Tribunal, 'that is the way with property'. We were disappointed that the Crown chose to ignore all previous Tribunal findings about Maori rights to develop their properties, and relied instead on a single dissenting opinion delivered in 1999, which on closer analysis, as we have explained in chapter 3, also accepted the right to develop customary resources possessed by Maori as at 1840. We have no hesitation in saying that such a right is also endorsed by the UN Declaration on the Rights of Indigenous Peoples, which New Zealand affirmed in 2010.

In our view, the recognition of the just rights of Maori in their water bodies can no longer be delayed. The Crown admitted in our hearing that it has known of these claims for many years, and has left them unresolved. The issue of 'ownership of water' was advanced by the Crown as a deal breaker but it need not be. Maori do not claim to own all water everywhere. Their claim is that they have residuary proprietary interests in particular water bodies. We know in the twenty-first century that New Zealand is a stronger country partly because of its increasing commitment to biculturalism and to the mutual respect and accommodation of Maori and non-Maori rights and interests. Maori culture cannot be relegated and the rights that arise from that culture cannot be ignored. Maori are the Crown's Treaty partner, and not just another interest group. The Crown's balancing of interests must be fair and Treaty compliant. Maori Treaty rights cannot be balanced out of existence. The closest English equivalent in 1840 was ownership; the closest New Zealand law equivalent today is residuary proprietary rights. It is long overdue for the Crown Treaty partner to recognise its obligation to seek a mutually agreed and beneficial resolution with its Maori Treaty partner.

Stage two of the Tribunal's inquiry may assist with that task. As we noted, the extent to which the residual proprietary rights of Maori should now be recognised – where such recognition is possible – is a matter that will be covered in more detail in stage two, where we consider a framework for how Maori rights in water can be reconciled with the legitimate

rights and interests of others. In stage one, having defined the nature of the Maori rights protected and guaranteed by the Treaty in 1840, we then concentrate on three issues arising from the proposed Mixed Ownership Model (MOM) share sales:

- ▶ *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?*
- ▶ *Is such a removal of recognition and/or remedy in breach of the Treaty?*
- ▶ *If so, what recommendations should be made as to a Treaty-compliant approach?*

We address these issues in chapter 3 of our report. We summarise our answers here as to why the Crown will be in breach of Treaty principles if it proceeds to sell shares without first providing Maori with a remedy or rights recognition, or at least preserving its ability to do so.

- ▶ *Does the sale of up to 49 per cent of shares in power-generating SOE companies affect the Crown's ability to recognise Maori 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 Maori proprietary rights on the table for future discussion. We were also told that the Crown is open to the possibility of Maori 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 Maori terms there are rangatiratanga rights involving 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 Maori 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 Maori 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 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.

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 Maori in partial remedy for this claim, will 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 Maori.

► *Is such a removal of recognition and/or remedy in breach of the Treaty?*

The Crown's Treaty duty in this case is the active protection of the Maori rights to the fullest extent reasonably practicable, and to provide remedy or redress for well-founded Treaty claims. We have found in chapter 3 that there is a nexus between the asset (shares enhanced by shareholders' agreements and revamped constitutions) and Maori rights in the water bodies used by the power-generating companies. We have found that company law will, in practical terms, prevent the Crown from providing or recovering the asset sought after partial privatisation of the companies. If the Crown proceeds with its share sale without first creating an agreed mechanism to preserve its ability to recognise Maori rights and remedy their breach, the Crown will be unable to carry out its Treaty duty to actively protect Maori property rights to the fullest extent reasonably practicable. Its ability to remedy well-founded claims will also be compromised. We find in chapter 3 of this report that the Crown will be in breach of Treaty principles if it so proceeds.

► *If so, what recommendations should be made as to a Treaty-compliant approach?*

The claimants say that shares in the power-generating MOM companies, in conjunction with shareholders agreements, will go some way towards meeting the Crown's Treaty obligation. We agree. But not all of the affected Maori groups want shares. Those who do may want them in combination with other commercial forms of rights recognition or redress.

And there is also the issue to be considered of whether shares in these companies represent a development right for all Maori, regardless of whether their particular water bodies are used (or may be used in the future) by the MOM companies. We are also conscious that some affected Maori groups did not participate in our inquiry. But this is not a matter that can be moved forward by discussions with the Iwi Leaders Group alone.

We recommend that the Crown urgently convene a national hui, in conjunction with iwi leaders, the New Zealand Maori Council, and the parties who asserted an interest in this claim, to determine a way forward. In our view, such a hui could appropriately be held at Waiwhetu Marae. We recognise the Crown's view that pressing ahead with the sale is urgent. But to do so without first preserving its ability to recognise Maori rights or remedy their breach will be in breach of the Treaty. As Crown counsel submitted, where there is a nexus there should be a halt. We have found that nexus to exist. In the national interest and the interests of the Crown-Maori relationship, we recommend that the sale be delayed while the Treaty partners negotiate a solution to this dilemma.

In our view, the scope of such negotiations will need to be limited if a timely solution is to be found. It would not be possible to devise a comprehensive scheme for the recognition of Maori rights in water in the time available. But it should be possible, with good faith endeavours on both sides, to negotiate with all due speed an appropriate scheme in respect of the three power-generating companies. In the narrowest view, the subject for discussion is shares and shareholders' agreements in Mighty River Power. That could include discussion of the use of shares for a number of settlement or rights recognition purposes, where there is not a nexus to rivers utilised by Mighty River Power, such as was raised by Ngati Haka Patuheuheu. As we see it, it would be preferable to take a broader approach in this way, and also to consider other commercial options such as royalties at the same time, and perhaps the opportunity to write such matters into the company constitutions. Undertakings could perhaps be negotiated about future forms of rights recognition. We would not want to be prescriptive about these matters. All that is for the Treaty partners to decide.

In completing our recommendations, we were acutely aware that the matters in this claim are of national importance and at the core of the Maori-Crown partnership sealed in 1840. We therefore trust that our report and recommendations will be read and considered in good faith, respecting the mana of each Treaty partner.

No reira kati mo tenei wa

Naku noa na



Chief Judge Wilson Isaac

Presiding Officer

ABBREVIATIONS

app	appendix
CA	Court of Appeal
CFRT	Crown Forestry Rental Trust
ch	chapter
comp	compiler
DLR	<i>Dominion Law Reports</i>
doc	document
DOC	Department of Conservation
ed	edition, editor
fn	footnote
fol	folio
FSFW	Fresh Start for Fresh Water
GLR	<i>Gazette Law Reports</i>
ICSID	International Centre for Settlement of Investment Disputes
LAWF	Land and Water Forum
ltd	limited
MFAT	Ministry of Foreign Affairs and Trade
MOM	Mixed Ownership Model
no	number
NZLR	<i>New Zealand Law Reports</i>
NZPD	<i>New Zealand Parliamentary Debates</i>
OECD	Organisation for Economic Co-operation and Development
OTS	Office of Treaty Settlements
p, pp	page, pages
para	paragraph
pt	part
RMA	Resource Management Act 1991
s, ss	section, sections (of an Act of Parliament)
SC	Supreme Court
sec	section (of this report, a book, etc)
SLUF	Sustainable Land Use Forum
SOE	State-owned enterprise
TVZ	Taupo volcanic zone
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNDRIIP	United Nations Declaration on the Rights of Indigenous Peoples
vol	volume

‘Wai’ is a prefix used with Waitangi Tribunal claim numbers.

Unless otherwise stated, footnote references to claims, documents, memoranda, and papers are to the Wai 2358 record of inquiry, a copy of which is available on request from the Waitangi Tribunal.

CHAPTER 1

**AN INTRODUCTION TO THE
NATIONAL FRESHWATER AND GEOTHERMAL INQUIRY**

1.1 INTRODUCTION

1.1.1 What this urgent inquiry is about

On 28 March 2012, the Waitangi Tribunal granted an urgent hearing of the Wai 2357 and Wai 2358 claims, which had been filed in February 2012 by the New Zealand Maori Council. The Wai 2357 claim 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 Maori rights in the water resources used by these companies. The Wai 2358 claim concerns the Crown's resource management reforms, including the Fresh Start for Fresh Water programme, which the claimants say are proceeding in the absence of a settled regime to recognise and provide for Maori rights and interests in water. The common denominator is wai or water (fresh water and geothermal waters).

In essence, the claimants argue that Maori 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, Maori do not claim sole or exclusive ownership of all flowing water today. They recognise and accept the rights of non-Maori to share in the use and benefits of New Zealand's waters. Rather, Maori 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 Maori seek compensation.

For Maori, English-style property rights are not necessarily a full or fully appropriate recognition of their tino rangatiratanga (autonomy or authority as a people), kaitiakitanga (guardianship), and mana (authority over land and water). But property rights, they told us, may be the closest equivalent in English law to Maori rights under Maori law. They seek recognition of their rights in ways that can coincide with and be protected in accordance with the provisions and principles of the Treaty. For many of the witnesses who appeared before us, commercial interests were low in their priorities, and their concern was the control and protection of their taonga (treasured water bodies). For these witnesses, shares were of

interest only if they would enable them to better exercise their responsibilities towards those taonga.

Under the Treaty of Waitangi Act 1975, Maori may bring a claim to the Tribunal that any legislation, Crown policy, Crown action, or Crown omission (failure to act) is in breach of the principles of the Treaty, and that they have been prejudiced thereby. If the Tribunal considers the claim to be well founded, it may make recommendations for the removal of the prejudice or to prevent any future prejudice. In this case, while the focal point of the claims is two particular Crown policies (the partial privatisation of the water-using SOEs and the resource management reforms), there is also a general dimension to the claims that is far wider than the two policies about which specific complaint is made. The claimants' view is that the legal and political regimes under which water is used and managed are in breach of the principles of the Treaty of Waitangi, because they fail to protect or provide for Maori Treaty rights, and in particular for Maori proprietary rights.

In order to deal first with the most urgent part of the inquiry, the Tribunal divided the hearing of the claims into two stages. The first stage deals with the conversion of the SOEs into Mixed Ownership Model (MOM) companies. We agreed to prioritise this part of the inquiry because of the Government's express desire to offer shares in Mighty River Power for sale in the third quarter of 2012. Here, the claim is essentially that if privatisation goes ahead without first recognising (or preserving the Crown's capacity to recognise) Maori rights in water, then the claimants will suffer irreversible prejudice. It will be too late, they argue, for the Crown to provide meaningful recognition of their commercial interests by way of shares in the power companies, by a levy or royalty, or by some other means, after 49 per cent of the shares have been sold to private investors on the basis of a zero-cost for water.

This is because the Crown both politically and now by statute giving effect to that policy position, must retain 51 percent of the shareholding in its own hands. In the claimants' view, it will not necessarily be practical or affordable for the Crown to buy back enough shares to recognise or compensate Maori rights after privatisation. And the new shareholders will resist (as will the MOM directors) any regime which devalues their shares or the value of the company by introducing a charge for the use of the water that drives the turbines or for the geothermal steam by which electricity is generated. Such opposition, the claimants argue, will inevitably prevail, especially if the Crown is deterred by the prospect of litigation on the part of overseas investors or minority shareholders.

The Crown denies this part of the claim. It accepts that Maori have legitimate rights and interests in water but says that no one (including Maori) can own water. While the Crown accepts that Maori may be able to prove some kind of property rights in the future (short of full ownership), it argues that the Crown's ability to recognise or protect such rights will not be affected in any way by the partial privatisation of the SOEs. By means of current dialogue with iwi leaders, stakeholder development of policy (the Land and Water Forum),

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and future consultation with all Maori, the Crown intends to reform the resource management regime and provide more effectively for Maori rights and authority in respect of water. The Crown says that it is open to considering the claims of Maori proprietary rights in these processes, and that the sale of shares in the MOM companies would not deter it from providing an agreed form of rights-recognition later. While taking the view that shares in a company are not actually an appropriate way of recognising Maori rights, and that there is no direct connection between shares and water, the Crown nonetheless argues that shares are 'fungible' and can be repurchased for Maori if necessary. Also, in the Crown's view, private shareholder resistance will not be an effective bar to the imposition of a 'modest' levy or royalty.

The first stage of the inquiry therefore focuses on the following issues:

- (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?
 - (i) Before its sale of shares, ought the Crown to disclose the possibility of Tribunal resumption orders for memorialised land owned by the mixed ownership model power companies?
 - (ii) Ought the Crown to disclose the possibility that share values could drop if the Tribunal upheld Māori claims to property rights in the water used by the mixed ownership model power companies?
- (c) Is such a removal of recognition and/or remedy in breach of the Treaty?
- (d) If so, what recommendations should be made as to a Treaty-compliant approach?

The second stage of the inquiry will consider whether any rights established under question (a) above 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 Maori rights so as to provide more effectively for their full recognition (see appendix 1 for the full statement of issues).

In the claimants' view, a framework needs to be developed for Maori proprietary rights and their reconciliation with other legitimate rights, before governance and management regimes are reformed; to do so afterwards would simply be too late and would thus prejudice Maori and their rights. The Crown, on the other hand, argues that the best way to recognise Maori rights and interests is to strengthen their role and authority in resource management, which it says its current processes will do; property rights are beside the point, in the Crown's view. We will consider these and related issues in stage two of our inquiry.

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1.1.2 What this inquiry is not about

During the hearing of the claimants' 'case example' evidence, we received much information in terms of specific grievances about particular water bodies. Taipari Munro of Ngapuhi told us how 'low-value' takings have reduced the volume of water in Poroti Springs, damaging the mauri and harming the springs as a source of food and water for their guardian hapu. Hiria Huata of Ngati Kahungunu described the drying up of waters from use of the aquifer, Heretaunga Haukunui. Eugene Henare of Muaupoko decried the pollution of Lake Horowhenua, such that a mouthful of water could kill a small child. Dr Aroha Yates-Smith told us of how Pekehaua (Taniwha Springs) has been 'imprisoned' by the council for a public water supply, fenced away with a pump station, shutting it away from its kaitiaki and their ability to use it, enjoy it, or exercise their tino rangatiratanga over it. Toni Waho for Ngati Rangi spoke of the drying up of rivers and the harm to the mauri of other waters as a result of the Tongariro Power Development scheme. We could point to many others.

All of these accounts were sourced in korero of traditional relationships with the water bodies concerned, and all informed us of the nature and extent of the rights claimed by Maori in respect of those water bodies. We also learned much of the ways in which Maori believe they are not able to exercise their rights or ensure that their values are respected. In his submissions for the claimants, however, Mr Geiringer emphasised that the New Zealand Maori Council:

does not seek findings particular to any claim. Case examples have been put before the Tribunal including the circumstances of the various co-claimants. However this has been done for the sole purpose of illustrating general propositions.¹

Some specific claims about water bodies, such as the claim in relation to Hamurana and Taniwha Springs, have already been heard and reported on by the Tribunal. Others are included in district inquiries which have not yet had hearings (Poroti Springs) or do not yet have a Tribunal Report after hearings have concluded (Tongariro Power Development scheme). Still others (such as Heretaunga Haukunui) are in districts the subject of direct negotiations with the Crown and will not be heard by this Tribunal. The point we wish to emphasise here, for the avoidance of doubt or disappointment on the part of claimant witnesses and their whanau and hapu, is that the present urgent inquiry will not make findings or recommendations about specific grievances in relation to specific water bodies. There are other avenues for the redress of those matters.

Finally, we note that this inquiry is not about the wisdom (or otherwise) of privatising state assets except insofar as it affects the capacity of the Government to recognise Maori rights in water if proven.

1. Claimant counsel, opening submissions, 19 June 2012 (paper 3.3.1), p 5

1.2 THE CLAIMS

On 7 February 2012, Sir Graham Latimer, the then chairman of the New Zealand Maori Council, filed two claims with the Waitangi Tribunal. He sought an urgent hearing of both claims. The claims were registered as Wai 2357 and Wai 2358 on 9 February 2012. When registering the claims, the Chairperson noted that they had been filed after the 1 September 2008 historical claims deadline. The Tribunal could therefore only inquire into allegations of Treaty breach 'to the extent that they relate to the period after 21 September 1992'.² This was to become an important issue in the inquiry, as the parties debated the degree to which the Tribunal could consider the origins of 'ongoing' breaches of Maori water rights.³

The February 2012 statements of claim were lodged by Sir Graham Latimer on behalf of the New Zealand Māori Council (and on behalf of all Māori), Tom Kahiti Murray on behalf of the Tai Tokerau District Māori Council, and ten sets of co-claimants who 'have proprietary interests in significant fresh water and/or geothermal resources':

- ▶ Taipari Munro, chairperson of Whatitiri Māori Reservation (Poroti Springs), Northland, in the rohe of Ngāpuhi Nui Tonu;
- ▶ Kereama Pene and Rangimahuta Easthope, as 'owners in Lake Rotokawau', in the rohe of Ngāti Rangiteaorere o Te Arawa;
- ▶ Peter Clarke and Jocelyn Rameka, 'as owners in Lake Rongoaio', in the rohe of Ngā Hapū o Tauhara;
- ▶ Eugene Henare, as 'an owner in Lake Horowhenua', in the rohe of Muaupoko;
- ▶ Nuki Aldridge, Ani Martin, and Ron Wihongi, as Kaumatua of Ngāpuhi and as owners in Lake Omapere, Northland;
- ▶ Eric Hodge, as 'an owner in Tikitere Geothermal Field', in the rohe of Ngāti Rangiteaorere;
- ▶ Walter Rika, 'as an owner in Tahorakuri Māori Land Block situate at Ohaaki, Reporoa';
- ▶ Peter Clarke and Emily Rameka, as 'owners in Tauhara Mountain Reserve (4A2A), Taupo';
- ▶ Maanu Cletus Paul and Charles Muriwai White, as 'members of Ngai Moewhare, a marae located in the rohe of Ngāti Manawa and a claimant in Te Ika Whenua inquiry'; and
- ▶ Whatarangī Winiata, for all hapū of Ngāti Raukawa who 'have an interest in the Horowhenua/Manawatu water systems'.⁴

In their opening submissions, the claimants summarised the Wai 2357 and Wai 2358 claims as follows:

2358 – that Maori have proprietary rights to freshwater and geothermal resources, the protection of which was guaranteed under Article 2 of the Treaty, and that the Crown has

2. Chairperson, Memorandum-directions, 9 February 2012 (paper 2.1.1), p 2

3. Presiding Officer, Memorandum-directions, 27 April 2012 (paper 2.5.19), pp 2–4

4. Wai 2358 Statement of Claim – National Water and Geothermal Claim, 7 February 2012 (paper 1.1.1)

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breached that guarantee of protection by refusing to recognise those rights and by establishing and maintaining a management regime that prevented Maori owners from exercising the full enjoyment of those rights; and

2357 – that the Claimants have unresolved claims in relation to freshwater and geothermal resources including Wai 2358 and including historical claims lodged by each of the Co-claimants, that the Crown intends a partial sale of its power-generating SOE assets, and by inhibiting resolution of these outstanding claims the sale will cause prejudice to Maori in breach of the Treaty.⁵

In seeking an urgent inquiry into these claims in March 2012, the claimants proposed to focus on two matters:

- ▶ representative case examples that allow definition of Māori customary, proprietary, and other rights protected or guaranteed by the Treaty of Waitangi, that can be used to set a national framework for rights definition;⁶ and
- ▶ the relief sought by the claimants, that is a ‘framework by which those interests can be provided for in water use planning and compensated for where they have been compromised or are used by third parties.’⁷

On this basis, the Tribunal would be asked to conduct a rapid inquiry focused on the following issue questions:

- ▶ Do the case examples indicate a proprietary interest in water?
- ▶ Do the case examples illustrate or evidence the breach of such interests?
- ▶ Do they inform the nature of the interests and the framework by which such interests might today be provided for or compensated?⁸

Since this initial articulation of the claims, and the grant of an urgent hearing on 28 March of this year, the claimants have refined their issues and arguments, and have made detailed submissions to the Tribunal. We summarise these submissions later in the report.

As it was a matter of debate during the course of this inquiry, we need to make some brief introductory comments about the New Zealand Maori Council and its role in bringing these claims ‘for all Maori’. The New Zealand Maori Council is a statutory body. It was established in 1962 by the Maori Welfare Act as a national body with the power to raise any issue, on behalf of all Maori, with the Minister of Maori Affairs or any other person or authority it deemed appropriate.⁹ Since its creation the New Zealand Maori Council has sought to address a diverse range of issues including education, race relations, fisheries,

5. Claimant counsel, opening submissions, 19 June 2012 (paper 3.3.1), p 2

6. Claimant counsel, memorandum enclosing inquiry management plan, 12 March 2012 (paper 3.1.50), para 4(b)

7. Claimant counsel, inquiry management plan (paper 3.1.50), para 4(a)

8. Claimant counsel, inquiry management plan (paper 3.1.50), para 5

9. Graham Butterworth, *Men of Authority: The New Zealand Maori Council and the Struggle for Rangitiratanga in the 1960s and 1970s*, (Wellington, Treaty of Waitangi Research Unit, Stout Centre for New Zealand Studies, Victoria University, 2007, pp 12–13

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land, the Treaty of Waitangi, and town planning. It has made numerous submissions to Ministers and select committees on issues and bills in an attempt to ensure that Maori concerns are addressed.¹⁰

The New Zealand Maori Council has taken a leading role in protecting Maori claims to land. In 1987 the New Zealand Maori Council took what came to be known as the 'Lands case' to the Court of Appeal. This case confirmed that section 9 of the State-owned Enterprises Act, that 'Nothing in this act shall permit Crown to act in any manner that is inconsistent with the principles of the Treaty of Waitangi' had real force. Following the case, the New Zealand Maori Council worked with the Crown to devise a system whereby both existing and future claims by Maori to SOE land would be protected. The outcome was the Treaty of Waitangi (State Enterprises) Act 1988, which provided for land sold by an SOE to be reacquired by the Crown and returned to Maori through the claims settlement process.¹¹

It was also the New Zealand Maori Council which took action to halt the sale of Crown forest lands in the late 1980s. As with SOE land, much of this land was subject to claims by Maori. Consultation between the New Zealand Maori Council and the Crown resulted in the retention of the forest lands in Crown ownership and the creation of the Crown Forestry Rental Trust (CFRT) to manage rentals gained from the selling of cutting rights and leasing (or licensing) of forest lands. Through these developments Maori claims to the forest lands were protected, funding for researching these claims was provided through CFRT, and the land was kept available for return to Maori if recommended by the Tribunal.¹²

It should not come as a surprise that the New Zealand Maori Council led the present claim before the Tribunal. It did so in association with hapu and iwi who have not yet secured Treaty settlements, in the belief that iwi who have settled their claims have also settled for a 'management regime, rather than one that respects property rights.'¹³ The Council describes its 'mandate' to bring the claim as follows:

The Council does not claim to represent all Maori but to seek a benefit for all Maori. This is done pursuant to the Council's statutory power to make such representations to an authority 'as seem to it advantageous to the Maori race' (Community Development Act 1962 s18(3)). In this instance the Council is assisted by significant hapu and iwi as co-claimants.¹⁴

During the hearing, Maanu Paul (co-chair of the Council) facilitated the proceedings and the presentation of evidence by the various witnesses. The Council's lawyers, Mr Felix

10. Ranginui Walker, 'Maori people since the 1950s', in *The Oxford History of New Zealand*, 2nd ed, (Auckland, Oxford University Press, 1992), p 510

11. Alan Ward, *An unsettled history: Treaty claims in New Zealand today*, (Wellington, Bridget Williams Books, 1999, p35, 39

12. Alan Ward, *An unsettled history*, p 39

13. Sir Graham Latimer, 'A Message from Sir Graham Latimer, Chairman, New Zealand Maori Council, concerning the Treaty Clause in the State-owned Enterprises Act, 13 March 2012 (paper 3.1.53), p 2

14. Latimer, 'A Message from Sir Graham Latimer' (paper 3.1.53), p 5

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Geiringer and Ms Donna Hall, led the evidence and presented opening and closing submissions. Yet it cannot be said that the Council dominated proceedings. The co-claimant hapu spoke with their own voices through their chosen witnesses.

Also, there was an appropriate spirit of cooperation between the claimants and the many Maori interested parties who supported the claim. As a result, we heard evidence or received written testimony from hapu leaders or spokespeople from throughout the North Island. While there were many commonalities in their evidence, as we shall discuss, one which is best addressed here was the need for 'unsettled' claimants to have their claims facilitated and led by Maori organisations with the capacity to do so. In this case, the capacity was provided by the New Zealand Maori Council, which acknowledged that it did not represent all Maori but nonetheless sought a benefit for all Maori, and the Wai Maori Trust, which provided some financial support for the hearing.

Ms Sykes, co-ordinating counsel for interested parties, submitted that the Council is the only national body that could bring a claim of this kind.¹⁵ Mr Haami Piripi, in his evidence for Te Rarawa, stated his view that the Iwi Chairs Forum (of which he is a member) could not substitute in that respect. Although the Council was not a 'perfect' body by any means, it was, in his view, the only national Maori body in existence and therefore the only vehicle for the claim.¹⁶ But, as we have noted, the Council does not represent and does not claim to represent all Maori. In the present proceedings, it represents the co-claimant hapu and iwi of Wai 2358 and the many interested parties who support their claim. In another sense, it is exercising its statutory duty to make representations to appropriate authorities about the interests of the Maori people. Mr Geiringer, in his closing submissions, made appropriate recognition of the mana of those iwi leaders and groups who chose not to participate in the inquiry or to support the Council's claim, and to have their take (matters) dealt with in a different manner of their own choosing.

1.3 THE INTERESTED PARTIES

Approximately 100 Maori iwi, hapu, or registered claimants asserted an interest in this inquiry, greater than that of the general public.¹⁷ A full list is provided as Appendix 2 of this report. Only one non-Maori party, Contact Energy, asserted an interest. The great majority of the Maori interested parties supported the claim, at first in the urgency proceedings and later at the stage one hearing. We also, however, received submissions from iwi opposed to an urgent hearing of the claim, led by the Freshwater Iwi Leaders Group. Despite the opportunity to do so the Iwi Leaders Group elected not to attend or present evidence during the

15. Counsel for interested parties (Sykes), oral submissions, 12 July 2012, Draft Transcript, p 572

16. Haami Piripi, oral evidence, 12 July 2012, Draft Transcript, p 524

17. Presiding Officer, memorandum-directions, 28 June 2012 (paper 2.5.29)

course of our hearing. Contact Energy did not make submissions so we make no further mention of them. Each of the two categories of interested Maori parties is discussed below in turn, beginning with those who supported the claim.

1.3.1 Interested parties in support of the claims

In this inquiry, many Maori groups from around the North Island supported the New Zealand Maori Council's claim. They ranged from tribal groups, such as Te Rarawa, Ngati Haka Patuheuheu, and Ngati Rangi, to individual claimants.¹⁸ During the hearing, Ms Annette Sykes took the role of lead counsel for these interested parties. We received submissions from Ms Sykes and also from Ms Kathy Ertel, Ms Janet Mason, and Mr Robert Enright, each of them focusing on one of the questions in our stage one statement of issues. In addition to written evidence from a number of witnesses for the interested parties, we heard oral evidence on 12 July from Jordan Winiata of Ngati Hinemanu and Ngati Paki, and Haami Piripi of Te Rarawa. The interested parties also provided two technical witnesses, Dr Ganesh Nana, chief economist of Business Economic Research Limited, and Dr Jane Kelsey of the Auckland University Law School. The claimants called some interested party witnesses to give evidence in support of their claim, including Roimata Minhinnick of Ngati Te Ata, Tamati Cairns (for the Pouakani hapu), and Toni Waho of Ngati Rangi. The interested parties thus provided substantial evidence and submissions in support of the claim.

1.3.2 Interested parties opposed to the hearing of the claim

Initially, Ngai Tahu, Waikato-Tainui and other iwi opposed the urgent hearing of the claim. The lead role in this respect was taken by the Freshwater Iwi Leaders Group. At the time (March 2012), the Iwi Leaders Group consisted of Sir Tumu Te Heuheu, ariki of Ngati Tuwharetoa (the chair), Tukuroirangi Morgan of Waikato-Tainui, Mark Solomon of Ngai Tahu, Toby Curtis of Te Arawa, and Brendan Puketapu of Whanganui. In brief, this group argued that the Crown was already in dialogue with them about water issues, and that – while they do not represent all iwi – dialogue was preferable to litigation in this policy-formation stage of the Fresh Start for Fresh Water programme (see section 1.4.5 for information on this programme and the Iwi Leaders Group's role in it).¹⁹ At the judicial conference to consider whether urgency should be granted, Sir Edward Taihakurei Durie acknowledged on behalf of the New Zealand Maori Council that it does not claim to represent all Maori or to have brought its claim on behalf of all Maori, although it does seek a benefit for all Maori. The ten co-claimants, he said, 'agree that what the Council is seeking would indeed

18. Refer to Appendix 2

19. Counsel for the Freshwater Iwi Leaders Group, memorandum, 24 February 2012 (paper 3.1.11)

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be beneficial to all Māori, but they retain their independence.²⁰ After the Tribunal released its urgency decision on 28 March 2012, these interested parties observed that they no longer opposed the hearing per se. Rather, they neither supported nor opposed the claims ‘to the extent that they are advanced by mandated claimants in relation to the rights and interests of those claimants’, that they opposed ‘any claim that purports to be brought on behalf of the iwi represented by the Iwi Parties or all Maori’, and that they would maintain a watching brief.²¹

We do not think it should be taken from this that Maori are split on the issues before us. There is ample evidence that these iwi have laid the take (issue) of Maori proprietary interests in water before the Crown.²² Also, the claimants and the Iwi Leaders Group share a concern about the commodification of water – by which others will be given rights to buy or sell what Maori claim is theirs – which is such a major driver for this claim. On 19 February 2009, for example, Sir Tumu asked the Prime Minister to ‘agree that there shall be no disposition or creation of a property right or interest in water without prior engagement and agreement with iwi.’²³ Finally, many of the arguments put to us by the claimants were made to Parliament by Sir Tumu in his 9 May 2012 submission to the select committee on the Mixed Ownership Model Bill. A key distinction, of course, was that Sir Tumu’s submission was particular to Tuwharetoa’s interests in the waters used by Mighty River Power and Genesis Energy.²⁴ Nonetheless, since these iwi chose not to make submissions or give evidence in our stage one inquiry, it would not be appropriate for us to go much further in terms of articulating what we understand to be their position.

In our view, there is sufficiently broad agreement among Maori as to some of the issues. Where there are differences, however, is in how those issues should be progressed. This is unsurprising; the issues are complex, naturally allowing for some divergence in views. We do not wish to minimise the extent of those differences, but we think it important to note that there is some common ground.

1.4 PRELIMINARY QUESTIONS

There are two preliminary questions that we need to address before describing essential matters of context for our inquiry. These two questions are:

20. Waitangi Tribunal, Decision on Application for Urgent Hearing, 28 March 2012 (paper 2.5.13), p 16

21. Counsel for the Freshwater Iwi Leaders Group, memorandum, 13 April 2012 (paper 3.1.79), pp 4–5

22. See, for example, para 46 of Hon Dr Nick Smith and Hon David Carter, ‘New Start for Fresh Water’, Cabinet paper (undated: 2009), Appendix 1 (Beatson, affidavit, annex GB-3 (doc A3))

23. Sir Tumu Te Heuheu to Rt Hon John Key, 19 February 2009 (Beatson, affidavit, annex GB-1 (doc A3))

24. Sir Tumu Te Heuheu to the chairperson and members of the Finance and Expenditure Select Committee, Mixed Ownership Model Bill, 9 May 2012 (papers in support of Haami Piripi, brief of evidence, 22 June 2012 (doc A77(d))

- ▶ Is this an opportunistic claim?
- ▶ Who is affected?

We are not unaware of public perception that the current claim is opportunistic; it is seen by some as a modern invention to take advantage of politically correct attitudes in government, raising a novel or unprecedented claim to ownership of water in order to profit from the Government's asset sales. We consider that this question needs to be disposed of early in our report, so that the Government, the public, and Maori themselves can be assured of the integrity of the claim and of the Tribunal's inquiry into it.

We are also aware of public concern about the scope of this claim. Who is affected? For example, will it result in a charge for the use of water for drinking, washing, and other domestic purposes? Will it harm agriculture and industry? While we are not in a position to define the exact scope of the claim at stage one, we think it important to consider its broad parameters before proceeding to an exposition of contextual matters and then our detailed analysis of the claim in chapters 2 and 3 of this report.

1.4.1 Is this an opportunistic claim?

When the integrity of a claim is called into question, in this instance by allegations that it is a modern fabrication in order to capture financial benefits, the Tribunal must determine whether there is a legitimate purpose in bringing the claim.²⁵ First it must be said that Crown counsel made no formal submission to us that the claim had no integrity. Claimant counsel responded to the implication of a lack of integrity in the claim mainly, we suspect, because of what was being expressed outside of the hearing. At the beginning of this inquiry, the claimants reminded the Tribunal that modern governments have known of Maori claims to ownership of water bodies since at least the early 1980s, when the Kaituna River and Manukau Harbour claims were brought to the Waitangi Tribunal.²⁶ In its report on the Manukau claim, the Tribunal pointed out that Maori claims to own rivers, harbours, and other water bodies have a long history dating back to the nineteenth century.²⁷ Maori concern is almost as old as the Treaty itself. The central North Island claimants pointed out that Government reassurance that the Treaty protected Maori rights in rivers came as early as 1842, when Chief Protector George Clarke assured rangatira in the Government's Maori newspaper that:

e hoa ma, kua wareware pea koutou ki te pukapuka i tuhituhia ki Waitangi, i roto i taua pukapuka ka waiho nga kauri katoa, nga awa, nga aha katoa. Ma te tangata Maori hei aha noa atu ki a ia . . .

25. See, for example, Waitangi Tribunal, *Rekohu*, chapter 2

26. Claimant counsel, memorandum, 27 February 2012 (paper 3.1.17), pp 1–2

27. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printer, 1985), pp 65–70

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friends, perhaps you have forgotten that document which was written at Waitangi. In that document, all of the kauri, the rivers and everything else are left for the Maori to deal with as he wishes . . .²⁸

Since the Kaituna (1984) and Manukau (1985) reports, the Tribunal has inquired into many Treaty claims about water bodies, including rivers, lakes, springs, lagoons, wetlands, harbours, and – of course – the foreshore and sea. In almost all of its reports on such claims for the last 30 years, the Tribunal has found that the claims are not new or novel, and has traced the prior history of Maori attempts to get the Crown to recognise and protect proprietary rights in their treasured water bodies. There have been intense legal battles lasting many decades, perhaps the most well-known being the battle for ownership of the Whanganui River.²⁹ Other such battles include the nineteenth and twentieth-century struggle for ownership of lakes, detailed in Ben White's 1998 report and also in the Tribunal's reports on the Central North Island (Lake Taupo) and Wairarapa ki Tararua (Lake Wairarapa and Lake Onoke).³⁰ Thus, Maori claims to proprietary rights in water bodies, and to both authority over those waters and the right to profit from their use, have been before the Tribunal for some 30 years, and have existed for a long time before that.

Nuki Aldridge, kaumatua of Ngapuhi, told us on 9 July 2012: 'It is said he who fails to assert his rights has none. I have come here today to assert my rights.'³¹ At the powhiri (welcome ritual) at Waiwhetu Marae that morning, many Maori people from around the North Island were present to support their rangatira and their spokespeople in the presentation of the claims. The importance of this matter was stressed in the whaikorero (oratory) of the leaders who spoke at the powhiri. Then, when we had entered the whareniui (meeting house), we were told that Waiwhetu was an appropriate place at which all the tribes present felt comfortable in bringing their claims. It had been the venue of many important national hui, at which issues of concern to all Maoridom had been discussed. The Te Reo Maori claim had been heard there by the Waitangi Tribunal in 1985. Tamati Cairns told us that the meeting house still echoed with the statements made on that important occasion. He equated the prospect then of the death of the language and the customary law of which it is an integral part, and thus the extinction of the Maori people *as* Maori people, which was the subject of that claim, with the importance of the water claim and its centrality to the survival of Maori *as* Maori.³²

The evidence presented by the claimants' witnesses reinforced the impression that this hearing was an important and solemn occasion for those present. The evidence was

28. *Te Karere o Niu Tireni*, vol 1, no 7, July 1842 (Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1279)

29. See Waitangi Tribunal, *The Whanganui River Report* (Wellington: Legislation Direct, 1999)

30. Ben White, *Inland Waterways: Lakes*, Rangahaua Whanui series: National Theme Q, 1998 (Wellington: Waitangi Tribunal) (doc A90);

31. Nuki Aldridge, oral evidence, 9 July 2012, Draft Transcript, p 25

32. Tamati Cairnes, oral evidence, 11 July 2012, Draft Transcript, pp 302–303

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presented to us in the form of recitation of whakapapa, mihi (including the tribal sayings central to the tribal identity of the speakers) and oral histories, the singing of waiata, and written statements.

We heard whakapapa that began with Ranginui and Papatuanuku and the gods from whom the ancestors of the tribes before us were descended. We heard of the creation of water bodies by ancestors, by taniwha (guardian spirits), and by atua (gods). We heard of whakapapa relationships to water at various stages of its life cycle. We heard of how some water bodies are themselves ancestral beings. We heard tribal histories of long occupation of territory, in which tino rangatiratanga (authority) was exercised over rivers and other waters, controlling access for travel and other uses. Tribal sayings (pepeha) were recited that showed the centrality of rivers and water bodies to tribal identity. We were also told of the vital importance of water bodies as ‘cupboards’ for food, drinking water, aquatic plants, and other necessities. But we heard, too, of the sacred aspect of some waters and the uses to which particular water bodies (or places along their reaches) would be put; including for ritual purposes (baptism, cleansing of warriors after battle, and preparation of the dead for their final journey). For some, the water of particular bodies or places was used in rongoa (healing). And various water bodies are lined with waahi tapu or have waahi tapu located within them. We heard how water bodies have mauri (a life force) and are protected by taniwha (guardian spirits), and how they nurture and sustain the tribes who must nurture and protect them in turn.

In all these ways – as ancestral beings, as taonga, as sources of food, as sources of ritual and healing, as means of transport, as possessions under the control and authority of tribes since time immemorial, and as a responsibility to be cared for – we heard the whakapapa or lineage of the tribes’ claims to their water bodies.

Witnesses also told us of the claims’ pedigree in another way; they described their past attempts to have their rights recognised and confirmed through various means provided them by the State. These included efforts to obtain legal ownership through the Native Land Court or by other means in the nineteenth and twentieth centuries (as with Poroti Springs, Lake Omapere, and Lake Horowhenua). Mr Rudy Taylor, for example, in written evidence to the Tribunal, explained how Ngapuhi sought and won ownership of Lake Omapere, its bed and ‘the water thereon’; the resultant court order (1956) gave them ownership of the water and the sole right to sell water or to lease it for hydroelectricity.³³ There has been a long history of such attempts to obtain legal ownership, although we know of no others who have succeeded to the same extent as Ngapuhi with Lake Omapere.

There have also been attempts through avenues that only became available more recently, including the resource management processes, the Environment Court, and the Waitangi Tribunal itself. Despite their lack of financial resources, Mr Taipari Munro told us, the

33. Rudolph Taylor, affidavit in support of urgency, 9 March 2012 (doc A17)

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hapu of Poroti Springs in Northland have taken two cases to the Environment Court and are about to take a third, attempting to restrain takes of water that sometimes reduce their once fast-flowing and abundant springs to a trickle.³⁴ Anthony Wihapi and Maanu Wihapi explained that Tapuika and Ngati Pikiaio were bringing the Kaituna River claim to the Waitangi Tribunal for a third time, having had their ownership of their taonga recognised by the Tribunal in 1984 and again in 2008, but still not given effect to, or recognised and respected by the Crown in its resource management processes. The immediate trigger for bringing the claim to the Tribunal for a third time, we were told, was their belief that the Crown is attempting to privatise water and transfer its benefits to private shareholders, while ignoring the prior Maori right to control – and to benefit from – the resource.³⁵

Similarly, Mr Roimata Minhinnick told us of how his people, Ngati Te Ata, had pursued a long journey in search of justice, including the work of his mother, Nganeko Minhinnick, in bringing the Manukau harbour claim to the Waitangi Tribunal in the early 1980s.³⁶ Others, too, spoke of their history of bringing the Waikato River claim before the Tribunal and the courts: Cairns explained how Mr John Paki had brought the Pouakani claim to the Tribunal in the late 1980s, and then more recently to the ordinary courts.³⁷ Mr David Whata-Wickliffe of Ngati Te Takinga and Te Arawa told us of the geothermal resources in the Rotorua district,³⁸ which have been the subject of two earlier inquiries before the Waitangi Tribunal in the 1990s and the 2000s. And Dr Aroha Yates-Smith presented the story of Taniwha and Hamurana Springs,³⁹ also considered at Tribunal hearings in 2005 (in the central North Island inquiry). Mr Toni Waho of Ngati Rangi spoke of the history of Maori complaint about the Tongariro Power Development Scheme, most recently before the Tribunal in the (Tongariro) National Park inquiry.⁴⁰

Many witnesses spoke of the need for the Crown to pay ‘rent’ or compensation for its use of their water bodies, so that the money can be spent on restoring the health of those waters, often sadly depleted or polluted. Other witnesses spoke of Maori poverty and the need to develop as a people; and to profit if the use of their waters is to be privatised for the profit of others. The question was put: if rights in waters have been or are to be commodified, why should Maori not be paid for use of what is, after all, their taonga?

It was very evident to us that the commercial or profit motive was not the primary motive for bringing the claim. Maori want their authority over and custodianship of water bodies to be acknowledged and respected. They want to protect their taonga for present and future

34. Taipari Munro, oral evidence, 9 July 2012, Draft Transcript, p19; Taipari Munro, affidavit on behalf of the claimants providing the case example in relation to Poroti Springs, annexure 1, ‘Poroti Springs’ (doc A52(a))

35. Anthony Wihapi and Maanu Wihapi, oral evidence, 9 July 2012, Draft Transcript, pp 35–47

36. Roimata Minhinnick, oral evidence, 10 July 2012, Draft Transcript, pp 90–99; see also Nganeko Minhinnick, affidavit, 18 April 2012 (doc A42)

37. Tamati Cairns, oral evidence, 11 July 2012, Draft Transcript, pp 306–314

38. David Rawiri Whata-Wickliffe, oral evidence, 9 July 2012, Draft Transcript, p 49

39. Aroha Yates-Smith, oral evidence, 9 July 2012, Draft Transcript, pp 63–66

40. Toni Waho, oral evidence, 11 July 2012, Draft Transcript, pp 253–263

generations. And, perhaps less (though still) important, they want the opportunity to benefit from the use of their property for commercial purposes. This, too, is not a sudden or unprecedented claim – it was a significant component of the Ika Whenua Rivers claim in the early 1990s, for example, now brought before the Tribunal once more by Mr Maanu Paul, and also by Ngati Haka Patuheuheu, in support of the Maori Council.⁴¹

Thus, while the Crown's policy of selling up to 49 per cent of shares in the SOEs (and the Fresh Start for Fresh Water programme) triggered this urgent inquiry, it would be fair to say that Maori claims to ownership of and authority over water bodies have been brought to this Tribunal many times since the early 1980s, and they were far from new even then.

We cannot accept, therefore, that these are novel or opportunistic claims in 2012.

The trigger for the Tribunal agreeing to an urgent hearing should not be confused with the origin of the Maori claim to proprietary rights in water bodies. We hope that if our report (along with previous Tribunal reports) is widely read, then the history of Maori claims to waters will become better known and understood, and that will in itself be of service to race relations in this country.

In saying this, we do not wish to suggest that the Crown's position, as advanced by Crown Counsel in our inquiry, was that the claim was new or novel. Rather, Crown counsel's questions to witnesses were based on the proposition that the Maori claim to proprietary rights in water bodies is so well known, and of such long standing, that it was already a known risk for earlier investors in the electricity industry. The Crown's position is that the essential elements of this claim have been around for a long time but are best resolved by means other than a stake for Maori in the power-generating SOEs. This was confirmed in the Crown's closing submissions, where it was stated: 'Maori claims to water and geothermal resources have been advanced, have been the subject of Tribunal reports, and have remained unresolved at a national level for many years.'⁴² The point, we think, needs to be more widely understood.

1.4.2 Who is affected?

In their closing submissions for interested parties and for the Crown, Mr Enright and Mr Raftery both quoted the following statement of the Environment Court:

Water is an essential resource. The life-supporting capacity of water is expressly recognised in Section 5(2)(b) of the [Resource Management] Act which requires it to be safeguarded. Water is essential for the welfare of people. Water is of particular cultural significance to Maori. Water is essential for plants, livestock and farming activities. Water is

41. Counsel for Ngati Haka Patuheuheu, opening submissions, 29 June 2012 (paper 3.3.7)

42. Crown counsel, closing submissions (paper 3.3.15), p 51

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essential for industry. Water is essential for the generation of hydro-electric power and is also necessary for geothermal and other thermal power generation.

Because of the demand for water for different uses within many parts of the Waikato region, the point has been reached where demand for water has the potential to exceed the sustainable supply.⁴³

This statement encapsulates a dilemma of modern times. Water is essential for the life, health, and wellbeing of all living things. It is essential for the spiritual, social, cultural, and economic wellbeing of indigenous peoples, who have unique relationships with it. And its use is also essential to many parts of the economy and to economic growth. In his submissions counsel for the claimants noted the importance of water in the development of civilisations and peoples in general.⁴⁴ In the twenty-first century, the many competing uses of water have the potential to exceed the sustainable supply, even in water-rich countries such as New Zealand.

Hand in hand with this dilemma comes the commodification of water. So significant is this in the industrialised West that it has been called part of a 'second enclosure movement' in which many resources formerly considered 'common' are being privatised.⁴⁵ In his evidence for the claimants, Philip Galloway referred us to a United Nations study entitled *Modern Water Rights*. This study showed that modern rights comparable to New Zealand's RMA water permits have become part of a widespread phenomenon of new property rights (often tradeable), as the nations of the Earth seek to reconcile competing uses of water for the common good and for economic growth. In part, the reasoning is that making water an economic good encourages more efficient (and therefore sustainable) use.⁴⁶

The extent of our future water problems should not be underestimated. The sustainability of ecosystems, water quality, access to water for a myriad of vital purposes, and the availability of sufficient fresh water for everyone's needs; these are fundamental issues for all nations in the twenty-first century, including New Zealand. In that sense, all New Zealanders are affected by this claim. But more particularly, those who have secured water permits by way of resource consents, to extract water or discharge into it, are affected. Yet the claimants were anxious to reassure New Zealanders that the scope of the claim is not so large as it might appear on the face of it.

43. Counsel for interested parties (Enright), oral submissions, 20 June 2012, Draft Transcript, pp 1354–1355; Crown counsel, oral submissions, 20 July 2012, Draft Transcript, pp 1383; citing *Carter Holt Harvey Ltd & Ors v Waikato Regional Council* [2011] NZEnvC 380 at pp 121–134

44. Claimant counsel, oral submissions, 19 June 2012, Draft Transcript, pp 1162–1163; closing submissions (paper 3.3.10), p 3

45. Mark Busse, 'Cross-Cultural Perspectives on Property', June 2012 (doc A69(k)), p 9

46. Philip Galloway, 'Potential Remedies: Commercial and Regulatory Approaches', June 2012 (doc A69(g)); Stephen Hodgson, *Modern Water Rights: Theory and Practice*, FAO Legislative Study 92 (Rome: Food and Agriculture Organisation of the United Nations, 2006)

This is because the claim has two dimensions. On the one hand, it is a claim about tino rangatiratanga, kaitiakitanga and mana: about authority and control over water bodies for their protection and preservation, so that they may be cared for, used, and enjoyed by present and future generations of tangata whenua, and shared with tauwi (non-Maori) as appropriate. As the Crown's witnesses told us, the Government was already committed to giving Maori a greater say in the management of water bodies and the allocation of water, even before this claim was brought to the Tribunal. For example, spokespersons for the kaitiaki of Poroti Springs (Taipiri Munro) or Lake Horowhenua (Eugene Henare) seek enchanted authority over their water bodies of a kind that the Crown says it is already committed to providing in Treaty settlements (co-governance or co-management arrangements) and in RMA reforms (Fresh Start for Fresh Water). Inevitably, giving Maori more control over what use can be made of their taonga will affect other users of those taonga as measures are taken to protect or restore water quality.⁴⁷ It is compatible with the objectives of the Resource Management Act and the matters of importance to which decision-makers under that Act must have regard, which include kaitiakitanga, the ancestral relationship of Maori with their lands and waters, and the principles of the Treaty of Waitangi. Maori want to be decision-makers. The Crown says in this inquiry that they acknowledge that aspiration but submit that the nature and extent of the future participation by Maori in decision making and management of water resources has yet to be determined.

Secondly, there is a commercial dimension to this claim. That is the dimension with which we are mainly concerned in stage one of our inquiry. In step with modern water 'rights' being acquired by others, perhaps soon to be tradeable, Maori seek to benefit from the commodification of the waters in which they claim proprietary rights. In applying for an urgent hearing, they told the Tribunal that the partial privatisation of power-generating SOEs offered a unique and pressing opportunity to provide a remedy for alleged breaches of Māori proprietary and Treaty rights in water and geothermal resources. In its Treaty settlement policies, the Crown 'refuses to recognise any proprietorial interests or commercial rights or rights of user to Māori'.⁴⁸ This includes:

a refusal to compensate or to provide for future rights in respect of hydroelectricity (and implicitly geothermal) power generation. It is exactly these rights which reflect forward-looking Māori rangatiratanga aspirations for these resources.⁴⁹

That being the case – and given the possibility that the law may never recognise Māori proprietary rights in water or geothermal resources – the claimants' view is that shares in the power companies are one possible and 'reasonable proxy for the commercial and

47. Claimant counsel, oral submissions, 19 July 2012, Draft Transcript, p 1224

48. Claimant counsel, memorandum accompanying application for urgency, 7 February 2012 (paper 3.1.2), para 11

49. Claimant counsel, memorandum accompanying application for urgency (paper 3.1.2), para 11

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economic aspect of that rangatiratanga/ownership which they believe should be returned to them.⁵⁰

Significantly, in this respect, Crown counsel emphasised the evidence of Maanu Wihapi on behalf of Ngati Pikiao and Tapuika.⁵¹ Mr Wihapi told the Tribunal that Te Arawa had been ‘comfortable’ with the Crown managing their proprietary interest in their rivers for the good of the nation, but now that it was proposed to give 49 per cent away, then ‘Te Arawa begins to wake up . . . Blame the Government for us claiming ownership.’⁵² This was in accord with the evidence of claimant witness Mark Busse that indigenous peoples are forced to claim ‘ownership’ under settler laws of what has always been ‘theirs’ under customary laws, because that is the only way to protect, control, or benefit from the resource in modern circumstances.⁵³ As we observed above, this use of the English word ‘ownership’ for Maori claims has been of long duration in response to the challenges of Pakeha settlement.

But this ‘modern’ or commercial aspect of the claim, the desire of Maori to profit from use of ‘their’ waters, has limits. That is a key point here, in considering who is affected by the claim. Mr Geiringer argued that a ‘paramount principle’ for the claimants is ‘retention of water security’ for New Zealanders:

The claimants accept that nothing as a consequence of this claim can mean that anyone in New Zealand has their tap turned off. That’s unacceptable. It’s inconsistent with the partnership obligations under the Treaty. It’s inconsistent with the tikanga of sharing, which is also an essential part of Maori relationships with their water resources.

Domestic water users, in other words, will not be adversely affected by any rights-recognition that results out of this claim.

Similarly, farming will not be affected. Mr Geiringer submitted:

Nothing that comes out of this claim can sabotage agriculture around New Zealand. It is – if we’re going to use ‘lifeblood’ – it’s the economic lifeblood of New Zealand. Federated Farmers have come out against this claim, I see in the papers. They needn’t. We’re not going to ask, we’re not going to suggest it would be acceptable, for there to be any outcome from this claim which makes more difficult agriculture in New Zealand.

He added:

We’re also not demanding piecemeal compensation from farmers in relation to their water resources because in our submission that’s not a practical solution.⁵⁴

50. Claimant counsel, memorandum accompanying application for urgency (paper 3.1.2), footnote 5

51. Crown counsel, closing submissions (paper 3.3.15), p 9

52. Crown counsel, closing submissions (paper 3.3.15), p 9; Maanu Wihapi, oral evidence, 9 July 2012, Draft Transcript, pp 43–44

53. Claimant counsel, closing submissions (paper 3.3.10), p 1; Busse, ‘Cross-Cultural Perspectives on Property’ (doc A69(k)), pp 9–11

54. Claimant counsel, oral submissions, 19 July 2012, Draft Transcript, p 1224

. . . And we the claimants don't see it as a practical solution to suddenly pass a law that says anybody who's drinking water or using it to wash their sheds suddenly has to pay a royalty for it. It's not going to work. And that's where, if there's any accusation of opportunism, it comes in because we see the SOES as being a part of a solution, how the Government can resolve what is a very difficult problem without doing something that it can't do as a matter of political reality, it can't do it as a matter of economic reality . . .⁵⁵

While the framework for rights recognition and rights reconciliation is more properly the subject of stage two of our inquiry. We think it proper to record these reassurances for the New Zealand public.

The claimants' position has not been fully articulated yet, but it *appears to be* that only those commercial uses of water that generate a direct income stream from the use of the water itself will be affected by possible levies, royalties, or resource rentals. And, Mr Galloway advised, that is nothing more than is already the case in 'user-pays' for many commercial uses of natural resources around the world, including geothermal resources, oil, and natural gas.⁵⁶ One such direct income-generator, perhaps the most important of all, is the electricity industry and the SOES destined for partial privatisation.

So who is affected by the commercial dimension of the claim? At this stage of our inquiry, it is the Crown (as the owner of the SOES), the SOES, the electricity industry, and – indirectly – the New Zealand public. The public will be affected if the privatisation is delayed, or if a significant proportion of shares is reserved for Maori, because the public is supposed to benefit from enhanced investment opportunities on the one hand, and also from the schools, hospitals, and broadband that the sale of shares in the power companies will fund.⁵⁷ The public may be affected by future electricity price rises, although the Crown was at pains to emphasise that, in its view, the power companies need not pass on the effects of a 'modest' royalty to consumers.⁵⁸ The electricity industry may be affected by an increased emphasis on wind power and other non-water resources in future use and development, although again this is in part counterbalanced by the Emissions Trading Scheme, which has made coal and oil less popular options for power generation.⁵⁹ Maori claim that they will be affected in various ways, including by the Government divesting itself of an opportunity for recognising their rights in water and assisting their economic development. Also, in the claimants' view, the public in a democracy always benefits when the rule of law is defended and property rights are properly recognised and given effect by the law.

55. Claimant counsel, oral submissions, 19 July 2012, Draft Transcript, p 1225

56. Philip Galloway, 'Potential Remedies: Commercial and Regulatory Approaches' (doc A69(g)), pp 9, 11

57. Crown counsel, closing submissions (paper 3.3.15), p 51

58. Crown counsel, closing submissions (paper 3.3.15), p 56, citing Lee Wilson, brief of evidence, 3 July 2012 (doc A96) para 70; see also Crown counsel, oral submissions, 20 July 2012, Draft Transcript, p 1488

59. Lee Wilson, brief of evidence (doc A96), p 17; Lee Wilson, oral evidence, 16 July 2012, Draft Transcript, pp 889–890

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But the key point here is that non-commercial users of water, or users who do not obtain an income stream directly from their use of water, are *highly unlikely* to be affected by the commercial dimension of the claim. All users of particular waters *may* be affected if Maori gain a greater authority in the use and control of the water bodies that are taonga to them – and rightly so, as the Crown concedes.⁶⁰

1.5 THE CONTEXT OF THIS URGENT INQUIRY

In this section, we set out four background matters that must be understood before we proceed with the main issues in our report:

- ▶ the reasons for granting an urgent inquiry to the claimants, despite opposition from the Crown and from the Iwi Leaders Group;
- ▶ a brief summary of the mixed ownership model policy, which triggered the urgent hearing;
- ▶ a short synopsis of the new arrangements available for settling historical claims in relation to water bodies; and
- ▶ a brief background for the Fresh Start for Fresh Water programme and the role of the Iwi Leaders Group in that programme.

1.5.1 Why an urgent inquiry was granted

The claimants applied for an urgent hearing on 7 February 2012. Their initial application was considered at a teleconference on 29 February. At that point, the introduction of enabling legislation was imminent and the question of whether or not the Bill would have a Treaty clause (and, if so, its exact content) was significant to the claim. But the most important trigger for an urgent hearing was the Crown's intention to start selling shares in Mighty River Power between July and September 2012. In the claimants' view, the Crown was planning to divest itself of a key – perhaps *the* key – practical remedy for the water and geothermal claims. In this respect, the claimants argued that the situation mirrored that which prevailed in the 1987 *Lands* case when, as here, the Crown had intended to dispose of 'most of the finite resources potentially available for the settlement of Maori grievances':

This remains the case for the power generating SOEs in respect of the potential return of commercial and economic interests in (or derived from) water and geothermal resources. The relevant SOEs effectively own or possess the assets and large-scale commercial rights to use water and geothermal energy for power generation. The return of those rights in

60. Crown counsel, closing submissions (paper 3.3.15), p 10; Crown counsel, oral submissions, 20 July 2012, Draft Transcript, p 1395

some practical manner is the redress ultimately sought by claimants in their water and geothermal claims . . . The government itself has estimated that the partial sale of these power generating SOEs will deliver \$5–7 billion. Those sales are irreversible, and the assets held by those SOEs are irreplaceable. Those figures also helped to identify the massive potential size of prejudice to Maori, if they miss out on appropriate redress related to water and geothermal resources.⁶¹

The Crown opposed an urgent hearing of the claims, on the grounds that the National Water and Geothermal claim necessitated an individual inquiry into every single water body (and could not therefore proceed urgently), that Maori ‘aboriginal/customary rights or Treaty claims to water or geothermal resources’ would not be affected by a sale of shares in water-using companies, and that the Crown was already in dialogue with the Iwi Leaders Group on all the relevant issues.⁶² The Iwi Leaders Group agreed, suggesting that the claim was premature and that the issue of Maori rights in fresh water should be progressed through ‘direct dialogue with the Crown at the highest leadership level, not litigation, at this time.’⁶³

The claimants replied:

- ▶ Prior rights must be determined before new property interests are created
- ▶ Compensation for irreversible loss must be settled before new property interests are created
- ▶ The denial of a hearing to prove a right is a denial of the right should it in fact exist. (Government has known of the prior Māori claims since the early 1980s – [the Tribunal’s] Manukau report).
- ▶ Section 9 requires the Government act consistently with Treaty principles. The sale of shares without a prior inquiry of pre-existing Māori interests or issues of outstanding compensation is contrary to Treaty principles.⁶⁴

In brief, the claimants at the 29 February 2012 teleconference withdrew their objections to the Bill because the Crown had promised to include a clause that ‘reflects the concepts of section 9’. That being the case, the Tribunal’s Chairperson directed them to amend their claims and restate their case for an urgent hearing.⁶⁵

After receipt of fresh submissions from the claimants, the Crown, interested parties in support of the application, and interested parties in opposition (principally the Iwi Leaders Group), the Tribunal held a conference to hear the parties on 13 March 2012. We do not need to rehearse matters in detail here. In essence, the claimants argued that the partial

61. Claimant counsel, memorandum accompanying application for urgency (paper 3.1.2), paras 23–26

62. Waitangi Tribunal, Decision on Application for Urgent Hearing (paper 2.5.13), pp 5–7

63. Counsel for the Freshwater Iwi Leaders Group, memorandum (paper 3.1.11), p 3

64. Claimant counsel, submissions by way of reply (paper 3.1.17), p 2

65. Waitangi Tribunal, Decision on Application for Urgent Hearing (paper 2.5.13), pp 9–10

privatisation of the power-generating SOES without first protecting the Crown's capacity to recognise Maori proprietary rights in water would put an appropriate settlement asset forever beyond their reach. It would also create a class of private investors who had purchased shares in good faith on the basis of a zero-charge for water, and whose likely opposition would inhibit the Crown's ability to recognise Maori water rights later by way of a royalty or some such charge. In addition, they argued that the water management reforms (the Fresh Start for Fresh Water programme) had reached a point where they might be finalised in late 2012 without understanding or providing for the full extent of Maori rights, which would be fatal to the claimants' interests.⁶⁶

The Crown continued to argue that there was no connection between shares and water (since the companies already had the right to use the water, no matter who owned them), that shares were not an appropriate form of rights-recognition, that other forms of rights-recognition would not be inhibited by partial privatisation of the SOES, and that it was simply impractical to hear the claim on an urgent basis. Crown counsel also argued that dialogue with iwi leaders was the best way to resolve matters, and that this ongoing dialogue would lead to an appropriate recognition of Maori water rights: an enhanced role and authority for Maori in water management and allocation regimes.⁶⁷

Many Maori groups from around the North Island supported the Council's claim, while others (including the Iwi Leaders Group) argued that the Council did not represent them, and that their preferred solution was dialogue with the Crown. As noted above, the Council amended its position at the conference to state that it did not claim to represent all Maori, but it sought a benefit for all Maori.

The Tribunal assessed these arguments against the criteria for urgency: the question of whether a Crown action was likely to cause imminent, significant, and irreversible prejudice; whether another remedy was available; and the readiness of the claimants to proceed. The claimants advised that they would be ready to proceed to hearing after two months to prepare their case, which the Tribunal accepted. The key part of the Tribunal's decision is worth quoting in full:

In summary, the Waitangi Tribunal found in its *Ika Whenua Rivers Report* and its *Whanganui River Report* that Māori have customary rights, sometimes equivalent to English proprietary rights, in the Rangitaiki River, the Whirinaki River, the Wheao River, and the Whanganui River (and its tributaries), and that the Crown has breached the Treaty in respect of those river rights. The claimants submit that they can demonstrate such rights in other freshwater resources. If Māori do have well-founded claims of Treaty breach in respect of water rights, they will suffer significant prejudice if the Crown sells 49 per cent of shares in the power-generating SOES without first providing (or reserving the ability to

66. Waitangi Tribunal, Decision on Application for Urgent Hearing (paper 2.5.13), pp 11–12

67. Waitangi Tribunal, Decision on Application for Urgent Hearing (paper 2.5.13), p 14–15

provide) redress for any such well-founded claims. Also, Māori seek an urgent hearing to establish whether they have extant property and Treaty rights in water that, given the current legal regime, may never have a better opportunity for ‘proxy’ acknowledgement than by becoming shareholders in these water businesses. Here, again, we consider that the claimants are likely to be prejudiced if the Crown disposes of shares worth between five and seven billion dollars before the Tribunal determines whether this aspect of the claims is well founded. Although, technically, shares may be readily repurchased on the stock exchange if the claims were to be upheld at a later date, we agree with the claimants that the prospect of this being considered affordable is remote. Finally, we agree with the claimants that the sale of shares on the basis of a zero cost for water will likely create significant opposition to future recognition of their rights, should such rights be proven and need to be accommodated (as the Crown accepts they may be) at a future date.

For these reasons, we consider that the claimants are likely to suffer imminent, significant and irreversible prejudice if the Crown does not retain the ability to either recognise any proven rights in water and geothermal resources or to provide appropriate redress for any well-founded Treaty claims. Previous Tribunal panels have found that some such rights exist in relation to particular rivers and iwi, and that Treaty principles have been breached in respect of those rights. The Crown’s argument that Māori rights and interests in water are better provided for in a fair and long-lasting governance and management regime is one that needs to be urgently tested, before the transfer of shares from Crown ownership begins and before the water reform process reaches its final stages.⁶⁸

The Tribunal did not accept that there was an alternative remedy available to the claimants in the form of the Crown’s dialogue with the Iwi Leaders Group. On the admission of both of those parties, their discussions did not include either the use of power company shares to remedy Treaty claims (or as a ‘proxy’ recognition of Maori water rights), or a current discussion of Maori proprietary rights and interests in water. The Crown did suggest that proprietary rights might be discussed with iwi leaders at some point later in the Fresh Start for Fresh Water programme.⁶⁹

Accordingly, the Tribunal found that the claimants were likely to suffer significant and irreversible prejudice, and that no other remedy was available to them. An urgent hearing was granted.

1.5.2 The Mixed Ownership Model policy

The Mixed Ownership Model (MOM) policy is essential context for stage one of this inquiry. Under this policy, the Crown will remove Mighty River Power, Genesis Energy, Meridian

68. Waitangi Tribunal, Decision on Application for Urgent Hearing (paper 2.5.13), p 23

69. Waitangi Tribunal, Decision on Application for Urgent Hearing (paper 2.5.13), pp 24–25

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Energy, and Solid Energy from the ambit of the State-Owned Enterprises Act 1986 (SOE Act). Instead of being fully owned by the Crown as sole shareholder, these companies will come under the 'mixed ownership model', already in place for Air New Zealand. They will be partly Crown-owned (with a minimum 51 per cent shareholding) and partly privatised (by the sale of up to 49 per cent of shares to private investors). No private investor will be allowed to obtain more than a ten per cent shareholding in any of the companies.

During the course of our hearings, it became clear that the claim is mainly concerned with three of the five SOEs:

- ▶ Meridian Energy: This SOE's operational hydro generating stations are located in Southland and South Canterbury, and it owns 44 per cent of New Zealand's hydro electricity generation capacity. As at 30 June 2011, it reported total assets of \$8,459 million, net assets of \$4,931 million, and a total shareholders' equity of \$4,931 million.
- ▶ Mighty River Power: This SOE operates both hydro and geothermal generating stations, located in Waikato and the central North Island, and it owns 20 per cent of the nation's hydro generation capacity, and 34 per cent of its geothermal generation capacity. As at 30 June 2011, it reported total assets of \$5,537 million, net assets of \$2,907 million, and a total shareholders' equity of \$2,907 million.
- ▶ Genesis Energy: This SOE operates hydro stations in the central North Island, Hawkes Bay, Otago, and South Canterbury. Its share of hydro generation is 13 per cent. As at 30 June 2011, it reported total assets of \$3,676 million, net assets of \$1,712 million, and a total shareholders' equity of \$1,712 million.⁷⁰

Collectively, these SOEs own about 60 per cent of New Zealand's electricity generation capacity, including 76 per cent of the hydro generation capacity and 37 per cent of the geothermal generation capacity.⁷¹ The sale of shares will begin with Mighty River Power in the September to December 2012 'slot' for an Initial Public Offer of shares. The remaining companies will be partially privatised over the next three to five years. The Securities legislation and regulations require the Crown (as seller) to prepare a prospectus before each sale, disclosing any risks to investors. While currently at its 12th draft (of approximately 20), Mr John Crawford, Deputy Secretary of the Treasury, advised that the prospectus for Mighty River Power will report any findings or recommendations of this Tribunal that might inform risks to the value of the company or of the shares of potential investors.⁷²

The privatisation policy itself has generated significant controversy but the Government's view is that it campaigned successfully for re-election in 2011 on the basis of a platform that included this policy, and it therefore has a mandate to proceed. The Maori claimants, it

70. Brian Cox (East Harbour Energy), 'The Link Between Maori and Electricity Generation by State Owned Enterprises', 15 June 2012 (doc A69(f)), sections 3-4.

71. Cox, 'The Link Between Maori and Electricity Generation' (doc A69(f)), section 3

72. John Crawford, oral evidence, 13 July 2012, Draft Transcript, p 740, pp 804-804

should be stressed, are not opposed to privatisation per se, and that issue has not been put before us for a determination in Treaty terms.

Parliament passed enabling legislation in June 2012. The State-Owned Enterprise Amendment Act 2012 received royal assent on 29 June. The Amendment Act removes the power-generating SOEs from the schedules of the original SOE Act, under which they could not be privatised.⁷³ Thus removed, the Public Finance Act (Mixed Ownership Model) Amendment Act 2012 enables these companies to be listed as MOM companies under its schedule 5.⁷⁴ There is an intermediary step, however, which is an Order in Council to bring a provision or provisions of the SOE Amendment Act into force. This means that the power companies remain SOEs until such an Order in Council is made.⁷⁵

The Public Finance Act (as amended) prevents the Crown from divesting itself of 51 per cent of shares 'or voting securities', and also prevents anyone other than the Crown from holding more than ten per cent of a class of shares or class of voting securities in the company. Section 45Q(1) replicates section 9 of the SOE Act, stating that nothing in that part of the Public Finance Act will permit the Crown to act inconsistently with Treaty principles.⁷⁶ During the hearing, Mr Raftery advised the Tribunal that this provision covers the entire MOM scheme. In written closings, Crown counsel suggested that the 'main practical effect of this Treaty clause is that it makes Crown actions under the new Part 5 of the PFA justiciable in terms of s 6 of the Treaty of Waitangi Act 1975, where any Maori or group of Maori believe those actions may prejudice their interests.'⁷⁷ Bringing a claim under the Treaty of Waitangi Act, however, does not depend on Treaty clauses in particular statutes, so we suspect that the effect is actually to allow litigation in the ordinary courts, as with the *Lands* case in 1987, but that remains to be tested.

Māori were consulted about the MOM policy in February 2012. The Crown's consultation document advised Māori that they would have 'the same investment opportunities as all other New Zealanders'; that is, Māori individuals or collectives could buy shares, using Treaty settlement compensation to do so if they wished. Māori who had not yet settled their Treaty claims with the Crown could use the cash component of future settlement redress to buy shares or to have the Crown buy shares for them on the Stock Exchange. But the issues of Māori participation as investors, and the relationship between the floating of shares and compensation for Treaty claims, were specified as matters outside the scope of the

73. State-Owned Enterprise Amendment Act 2012

74. Public Finance Act (Mixed Ownership Model) Amendment Act 2012

75. John Crawford, oral evidence, 13 July 2012, Draft Transcript, p 794

76. Public Finance Act (Mixed Ownership Model) Amendment Act 2012, s 45R, s 45S, s 445Q; see Bundle of authorities in support of John Lewis Crawford's brief of evidence (doc A95(a)(i)), pp 54–55

77. Crown counsel, closing submissions (3.3.15), p 31

consultation. Māori were also advised that interests in fresh water or geothermal resources were similarly excluded from the consultation.⁷⁸

What, then, was the focus of this consultation with Māori? What the Crown said is this: it was consulting Māori to ensure that ‘it fully understands Māori views on how Māori rights and interests under the Treaty of Waitangi are affected by the proposals.’⁷⁹ Specifically, the removal of the four SOEs from the SOE Act could potentially have ended the protections provided Māori interests under sections 9 and 27 of that Act. The Government advised Māori that the protections of sections 27A–D, enabling the Tribunal to order the resumption of land that had been transferred to an SOE, would be retained. In terms of section 9, which provided that the Crown could not act in a manner inconsistent with the principles of the Treaty, the Government proposed three options for consultation: retaining section 9 (applied to the Crown shareholding); including a new provision specifying the Crown’s Treaty obligations; or having ‘no general Treaty clause.’⁸⁰

One result of this consultation was the adoption of the first of these three options for the enabling legislation. Section 45Q(1) replicates section 9 of the SOE Act. Section 45Q(2) specifies that it does not apply to ‘persons other than the Crown’ – meaning, presumably, the minority shareholders. Another result was the filing of the Wai 2357 and Wai 2358 claims with the Tribunal in early February 2012. The claims do not raise issues about this consultation process. Rather, the New Zealand Maori Council and its co-claimants applied for an urgent hearing about the substance of the policy’s effects on them. Others, such as Ngati Tuwharetoa, made submissions to the parliamentary select committee appointed to consider the enabling legislation. In his evidence for Te Rarawa, Mr Haami Piripi described the various submissions made to the select committee, some of which he filed with the Tribunal as supporting documents, and the Government’s responses.⁸¹

At the present time, the companies are still SOEs and have not been removed from the schedules of the SOE Act, although the Crown is now able to do so whenever it chooses. In practical terms, this means that there is time yet for the Government to deal with Maori interests while these companies remain SOEs, still bound by all the requirements of the SOE legislation. But Maori cannot be allocated or reserved a portion of the shares until an Order

78. New Zealand Government, ‘Extension of the Mixed Ownership Model: a proposal to change legislation in relation to: Genesis Power Ltd, Meridian Energy Ltd, Mighty River Power Ltd, Solid Energy New Zealand Ltd: *Consultation with Maori*’, February 2012, Affidavit of Tata Parata in support of grant of urgency for sale of power generating State-owned enterprises claim and national water and geothermal claim, annexure TP1 (Wai 2357 doc A1).

79. New Zealand Government, ‘Extension of the Mixed Ownership Model’, p 6

80. New Zealand Government, ‘Extension of the Mixed Ownership Model’, p 6

81. Haami Piripi, brief of evidence, 22 June 2012, (doc A77), pp 7–19, 21–22; see also attached ‘Departmental report on the Mixed Ownership Model bill (doc A77(a)); attached copies of submissions from Ngai Tahu Maori Law Centre (doc A77(b)), the Trustees of the Ngati Pahauwera Development Trust and Ngati Pahauwera Tiaki Trust (A77(c)), and Ngati Tuwharetoa (A77(d))

in Council has removed the Companies from the SOE Act, which requires 100 per cent Crown ownership.

1.5.3 New arrangements through Treaty settlements: co-governance and co-management models

The evidence of Ms Tania Ott, Deputy Director of the Office of Treaty Settlements (OTS), outlined the recent development by the Crown of co-governance and co-management models that include iwi and other Maori groups in governance, management and decision-making processes regarding fresh water and other natural resources. Ms Ott's evidence advises that the development of these arrangements was a response to Maori seeking the return of these resources, related land and sacred sites, or a partnership role in the management of these resources, as part of the settlement of their historical Treaty claims.⁸² Many iwi were dissatisfied with existing arrangements for their involvement in resource management issues. Under the RMA the Crown devolved responsibility for natural resource management and for making decisions on how iwi would be involved in such management to local government bodies.⁸³

The new arrangements are what OTS terms 'cultural redress'. According to the OTS 'Guide to Treaty of Waitangi Claims and Negotiations with the Crown', cultural redress is intended to 'meet the cultural rather than economic interests of the claiming group.'⁸⁴ The aims of cultural redress include the protection of significant sites, giving recognition to the special relationship Maori have with the natural environment, giving Maori greater ability to participate in management of resources, and 'making decision-makers more responsible for being aware of such relationships.'⁸⁵

Ms Ott stated that the Crown's current Treaty settlement policy does not generally include the vesting of ownership of natural resources because resources such as water and geothermal resources are required for the benefit of all New Zealanders. In relation to water specifically, the Crown is unable to vest ownership as the current legal position, as expressed by Ms Ott, is that no one owns water and the Crown 'cannot transfer what the Crown does not own.'⁸⁶

The focus of Crown policy is on providing for a more effective role and kaitiakitanga rights in management of natural resources.⁸⁷ Two standard arrangements for the inclusion

82. Tania Ott, brief of evidence, 29 June 2012 (doc A92), pp 3-5

83. Office of Treaty Settlements, 'Involving iwi in natural resource management through historical Treaty of Waitangi settlements', October 2010 (doc A92(a))

84. Office of Treaty Settlements, *Healing the Past, Building a Future: A guide to Treaty of Waitangi Claims and Negotiations with the Crown*, extract (doc B36) p 288

85. Office of Treaty Settlements, *Healing the Past, Building a Future*, p 288

86. Ott, brief of evidence (doc A92), pp 4-5

87. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, p 950

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of Maori in natural resource management can be negotiated through the settlement of historical Treaty claims. The first is the establishment of an advisory board whose advice local authorities must have regard to. The second is the establishment of a joint committee that has direct input into the development of regional policy statements and regional plans under the RMA. Arrangements which fall outside of these standard arrangements can be considered but must be agreed to by Cabinet before forming part of a settlement.⁸⁸

The OTS guide states that the redress options ‘developed in settlement negotiations to date are designed to satisfy the aspirations of claimant groups in many different ways, while still providing for the interests of New Zealanders as a whole.’⁸⁹ The maintenance of local democracy is also an important aspect in providing for Maori involvement in the management of natural resources. Crown guidelines for the involvement of Maori in resource management stipulate that local authorities must be engaged at an early stage in the development of co-governance or co-management arrangements and, preferably, should agree to the arrangements before they are finalised. Such arrangements are intended to preserve local authorities’ final decision-making rights over natural resource management.⁹⁰

The Waikato River Authority (the Authority), established through the Waikato River settlement of December 2009, is an example of the new co-governance arrangements. The Authority is made up of equal members of iwi and Crown appointed members, with Waikato-Tainui, Maniapoto, Raukawa, Te Arawa, and Ngati Tuwharetoa all appointing one member each.⁹¹ The Authority is responsible for ‘monitoring the implementation of a direction setting document, the Vision and Strategy, Te Ture Whaimana.’ This document is the primary direction setting document for the Waikato River and forms part of the Waikato Regional Policy Statement, which is given effect through plans administered by local authorities along the river. The focus of the document is the restoration and protection of the health and wellbeing of the River for future generations. The Authority is able to ‘add targets and methods’ to the document as necessary, which are given effect under the RMA and conservation legislation.⁹²

The Waikato River settlement caters for co-management arrangements through agreements between Waikato-Tainui and local authorities.⁹³ These agreements cover only matters relating to the Waikato River and activities within its catchment affecting the Waikato River. They provide for the iwi and local authorities to work together in carrying out particular duties and functions and exercising particular powers, in the RMA. In particular, the

88. Office of Treaty Settlements, ‘Involving iwi in natural resource management through historical Treaty of Waitangi settlements’

89. Office of Treaty Settlements, *Healing the Past, Building a Future*, p 290

90. Office of Treaty Settlements, ‘Involving iwi in natural resource management through historical Treaty of Waitangi settlements’

91. Waikato Tainui Raupatu Claims (Waikato River) Settlement Act, 2010, schedule 6, p105

92. Ott, brief of evidence (doc A92), p 8

93. Ott, brief of evidence (doc A92), p 8

agreements allow for iwi input into the consent granting process in relation to a range of activities affecting the Waikato River.⁹⁴

The Waikato River settlement also caters for co-management through the preparation by Waikato-Tainui of an integrated river management plan. Components of this plan, which must be agreed to by relevant central government agencies and local government bodies, then become conservation and fisheries management plans under relevant legislation. That component relating to the regional council becomes a document to which a relevant local authority must have regard when preparing, reviewing, or changing an RMA planning document.⁹⁵ Waikato-Tainui may also prepare a Waikato-Tainui environmental plan. Local authorities can then be required to recognise the plan under the RMA when preparing, reviewing, or changing a RMA planning document.⁹⁶

The Rangitaiki River Forum (the Forum), established through Ngati Whare and Ngati Manawa claim settlement legislation, allows for the iwi to have a voice in the management of the Rangitaiki River. Comprised of equal number of iwi and elected council representatives, the Forum is a permanent joint committee of Environment Bay of Plenty and the Whakatane District Council, and will 'develop a high level Rangitaiki River Document that includes the vision, objectives and desired outcomes for the Rangitaiki River.'⁹⁷ This document will not be integrated into existing legislation. Rather, it will be 'recognised and provided for in the Bay of Plenty Regional Policy Statement' in so far as it has a bearing on resource management issues. Also, 'particular regard' will be had to it in the relevant Conservation Management Strategy, to the extent that it has a bearing on the conservation of the area.⁹⁸

Both those iwi who have settled historical Treaty claims and iwi still to settle are included in a Joint Planning Committee of the Hawke's Bay Regional Council. The committee, set up under the provisions of the Local Government Act 2002, includes equal representation of the Hawke's Bay Regional Council and local iwi and will be responsible for the development of and amendments to Regional Plans and the Regional Policy Statement.⁹⁹ The Ngati Pahauwera settlement of 2010 established their involvement in this joint committee. The deed states that the committee's role will relate to natural resource planning processes that affect the region and, in particular, the Mohaka, Waihua and Waikari Rivers (the Tribunal's *Mohaka River Report* is discussed in chapter 2). The work of the committee will include

94. Waikato Tainui Raupatu Claims (Waikato River) Settlement Act, 2010, s 42, s 43, and s 47, p 37 and pp 4–43

95. Waikato Tainui Raupatu Claims (Waikato River) Settlement Act, 2010, s 36 and s 37, pp 33–34

96. Waikato Tainui Raupatu Claims (Waikato River) Settlement Act, 2010, s 39 and s 40, pp 35–36

97. Ott, brief of evidence (doc A92), p 9

98. Ott, brief of evidence (doc A92), p 9

99. Ott, brief of evidence (doc A92), pp 9–10

drafting and recommending to the regional council, plan and policy changes that affect natural resources in the region.¹⁰⁰

1.5.4 The Fresh Start for Fresh Water Programme and the Iwi Leaders Group

Although the Fresh Start for Fresh Water programme (and associated iwi-Crown engagement) will be a major focus of stage two of our inquiry, it is appropriate to provide a brief description of it here for contextual purposes. As will be seen later in the report, the Crown relied heavily on the processes associated with this programme to support its view that it can and will provide appropriate rights-recognition for Maori, irrespective of the sale of shares in the MOM companies. For that reason, we provide a brief overview here. The Iwi Leaders Group did not present us with any evidence. We did receive some evidence from Mr Haami Piripi, a member of the Iwi Leaders Forum, to which the Iwi Leaders Group informally reports from time to time.

According to the evidence of Guy Beatson, Deputy Secretary (Policy) at the Ministry for the Environment, the present water reform process began in 2003. Its purpose was to redesign the national framework for the management of water, encompassing governance and decision-making processes, systems for allocating water and setting limits on its use, incorporation of community values more effectively into decision making, and ‘Treaty of Waitangi considerations.’¹⁰¹ The driver in the 2000s was that allocation and use of water was starting to reach its limit in New Zealand, with the result that demand was beginning to outstrip supply, water quality was deteriorating, economic growth was being blunted, and many groups – including Maori – were dissatisfied with the ‘status quo management model.’¹⁰² From 2003 to 2008, the Sustainable Water Programme of Action considered issues of water quality, allocation, and use, producing draft National Policy Statements for the consideration of the Labour-led Government.¹⁰³

In 2009, the National-led Government set up the New Start for Fresh Water programme (renamed ‘Fresh Start for Fresh Water’ in 2011). As Mr Beatson noted, its scope is limited to fresh water (surface and ground) and it does not include geothermal water. Policy advice to Government comes through three channels under this programme: the work of officials in the relevant Ministries; a forum of some 60 stakeholder groups called the Land and Water Forum; and the Freshwater Iwi Leaders Group. Policy decisions are then made by Cabinet after receipt of this advice. The Land and Water Forum includes primary producers, environmental groups, ‘hydro-generators’, industry groups, recreational users, and five iwi organisations: the Tuwharetoa Maori Trust Board, Te Arawa Lakes Trust, Waikato-Tainui

100. Deed of Settlement of Historical Claims of Ngati Pahauwera, 17 December 2010, Provisions Schedule, para 3.20.2, p7

101. Guy Beatson, affidavit, 24 February 2012 (doc A3), p 3

102. Beatson, affidavit (doc A3), p 4

103. Beatson, affidavit (doc A3), p 4

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Te Kauhanganui, the Whanganui River Maori Trust Board, and Te Runanga o Ngai Tahu. Leaders from the same five iwi organisations comprise the Freshwater Iwi Leaders Group.¹⁰⁴ At the close of our hearings, we were advised by memorandum of Crown counsel that there are now two extra members of the Iwi Leaders Group, representing Ngati Porou and Te Whanau a Apanui.¹⁰⁵

It is not necessary to provide a detailed account of the structure and activities of these various groups at this point in our inquiry, except to note that the Freshwater Iwi Leaders Group first met with the Government in 2007. Its membership was 'endorsed' by the 'Iwi Leaders Forum' [also called the Iwi Chairs Forum, constituted of some 60 iwi organisations¹⁰⁶] at a series of meetings in 2008 and 2009.¹⁰⁷ The Iwi Leaders Group is chaired by Sir Tumu Te Heuheu of Ngati Tuwharetoa. It receives technical support and advice from an Iwi Advisory Group, which also participates in the Land and Water Forum and provides advice to officials.¹⁰⁸ In 2008, a 'joint work programme' was set up for officials and these iwi advisers to explore issues of Maori engagement, the use of Maori knowledge in limit-setting, and the role of Maori in management and allocation of water.¹⁰⁹

In 2009, the Government announced that its aims for the Fresh Start for Fresh Water programme included ensuring that water contributes to economic growth and environmental sustainability; maintaining 'Treaty-based engagement with Maori on water management options'; and creating a system of allocation that provides for ecological needs, 'public purposes (including Treaty considerations)', and economic returns.¹¹⁰ In February 2009, Sir Tumu Te Heuheu wrote to the new Prime Minister to advise him of the Iwi Leaders Group's role in discussions with the previous Government, and to seek a continuing dialogue on freshwater reforms and issues.¹¹¹ After a meeting in March 2009, the Prime Minister, the Rt Hon John Key, replied to this letter on 9 May, agreeing to meet with the Iwi Leaders Group up to three times a year for high-level engagement on freshwater issues. As will be discussed later in this report, Mr Key acknowledged that 'Iwi have specific interests and rights in fresh water' but that the Government had not yet 'provided specific responses to the level of iwi engagement on two outstanding issues', one of which was 'property rights and interests', which he proposed be added to the agenda for the next meeting.¹¹²

104. Beatson, affidavit (doc A3), pp 4-6; Rt Hon John Key to Sir Tumu Te Heuheu, 9 May 2009 (Beatson, affidavit, annex GB-2 (doc A3))

105. Crown counsel, memorandum, 20 July 2012, (paper 3.2.8), p 5

106. Haami Piripi, oral evidence, 12 July 2012, Draft Transcript, p 524

107. 'Communication and Information Exchange Protocol between the Iwi Leaders Group and the Crown', 2009 (Beatson, affidavit, annex GB-4 (doc A3))

108. Beatson, affidavit (doc A3), pp 7-10

109. Hon Dr Nick Smith and Hon David Carter, 'New Start for Fresh Water', Cabinet paper (undated: 2009), Appendix 1 (Beatson, affidavit, annex GB-3 (doc A3))

110. Beatson, affidavit (doc A3), p 5

111. Sir Tumu Te Heuheu to Rt Hon John Key, 19 February 2009 (Beatson, affidavit, annex GB-1 (doc A3))

112. Rt Hon John Key to Sir Tumu Te Heuheu, 9 May 2009 (Beatson, affidavit, annex GB-2 (doc A3))

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In September and October 2009, a protocol was signed by the Iwi Leaders Group and Ministers. Mr Beatson provided a copy of it as part of his evidence. In the protocol, it was agreed:

New Zealanders have an interest in ensuring the country's freshwater resources are managed wisely in order to provide for present and future cultural, environmental, social and economic wellbeing.

Iwi, and more generally Maori, have a particular interest in fresh water, having traditional and cultural connections with freshwater resources, as well as economic interests. Water is a taonga of paramount importance with attendant rights, interests and responsibilities. The Treaty of Waitangi (Te Tiriti o Waitangi) forms the underlying foundation of the Crown-Maori relationship with regard to freshwater resources. There exists a shared interest and desire for tenable and long-term solutions in respect of the management of freshwater resources.¹¹³

The protocol formalised communication and information-sharing so as to enable informed engagement on 'mutually acceptable solutions', to ensure that Cabinet policy decisions were 'informed by iwi views', and to ensure good faith engagement. This engagement was an 'important step in the process of addressing tangata whenua values and interests in freshwater resources.' It was just one step, however, because the Iwi Leaders Group 'is clear that they do not represent all iwi and have informed Government that wider engagement with iwi is necessary in the ongoing development of freshwater policy'. The Crown intended to 'engage with iwi on a wider scale . . . at the appropriate time(s).'¹¹⁴

Since then, Ministers and the Iwi Leaders Group have continued to meet, the Iwi Advisory Group has continued to advise iwi leaders and officials, the Iwi Leaders Group and Iwi Advisory Group have continued to participate in the Land and Water Forum, and that forum has completed two of its three proposed policy advice reports. In September 2010, its first report, *Fresh Start for Freshwater*, was published. According to Mr Beatson, this report made '53 recommendations covering the setting of limits for quantity and quality, achieving targets, improving allocation, rural water infrastructure, changes to governance (including changes to better reflect the Treaty relationship with iwi), science and knowledge, water services management, drainage and floods.'¹¹⁵ As the claimants noted when seeking an urgent hearing, tradeable water permits, and payment for first obtaining and then transferring water permits, were included in this policy advice.¹¹⁶ After a 'public engagement process', the

113. 'Communication and Information Exchange Protocol between the Iwi Leaders Group and the Crown', 2009 (Beatson, affidavit, annex GB-4 (doc A3))

114. 'Communication and Information Exchange Protocol between the Iwi Leaders Group and the Crown', 2009 (Beatson, affidavit, annex GB-4 (doc A3))

115. Beatson, affidavit (doc A3), p 5

116. Waitangi Tribunal, Decision on Application for Urgent Hearing (paper 2.5.13), p 12

forum reconfirmed its recommendations in March 2011. This was followed by the gazetting of the National Policy Statement for Freshwater Management in May 2011.¹¹⁷

In that month, the Government announced that the reforms would proceed in three stages. In the first stage, it would begin implementing the National Policy Statement through the existing RMA regime, and ‘early’ implementation of key Forum recommendations ‘to signal the new limits-based regime’. These were the Irrigation Acceleration Fund and the Fresh Start for Fresh Water Clean-up Fund. The second stage would cover the setting of limits for water quality and quantity, ‘including considerations of governance arrangements for freshwater planning processes’. The Land and Water Forum developed recommendations on this matter between May 2011 and April 2012. The third stage would consider how to ‘manage to limits’, including allocation mechanisms and tools to manage the effects of land-use, with the Forum to report on those matters by September of this year.¹¹⁸

The forum’s second report was provided to Ministers in April 2012.¹¹⁹ According to Mr Beatson, it:

contains advice to government on how tangata whenua values might be incorporated into the setting of objectives and limits at the national and local level, the role of iwi/Maori as participants in collaborative planning processes for water management, and the involvement of iwi in local government decisions on water planning.¹²⁰

As noted, the forum will produce a third report in September, after which, Mr Beatson advises, the Government will finalise a reform package for wider consultation, with major decisions to follow in 2013.¹²¹

As noted above, the substance of this policy work, the agencies involved, and the Treaty issues that arise, will be a focus in stage two of our inquiry. What is important at this stage is the Crown’s argument that none of this work will be affected by the partial privatisation of the MOM companies, an argument to which we will return in later chapters of the report.

1.6 THE STAGE ONE HEARING

We heard stage one of this inquiry at Waiwhetu Marae over eight days: 9–13 July, 16 July, and 19–20 July 2012. The first three days of the hearing were allocated for the claimants’ evidence, the fourth day was allotted to the interested parties for their evidence and

117. Beatson, affidavit (doc A3), pp 5–6

118. Beatson, affidavit (doc A3), pp 5–7; Guy Beatson, brief of evidence, 29 June 2012 (doc A93), pp 4–5

119. Land and Water Forum, *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity Freshwater Policy- and Plan-Making Through Collaboration*, April 2012 (supporting papers to Guy Beatson, brief of evidence, 29 June 2012 (doc A93(a))

120. Beatson, brief of evidence (doc A93), pp 5–8

121. Beatson, brief of evidence (doc A93), p 8

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submissions, and the fifth and six days were allocated for the hearing of the Crown's witnesses and its opening submissions. Due to the urgent nature of this inquiry, parties were only given two days to prepare their closing submissions. Mr Geiringer delivered the claimants' closings on Thursday 19 July. He was followed by Ms Ertel, Ms Sykes, and Ms Mason for the interested parties. On Friday 20 July, Mr Enright delivered the last of the interested parties' closing submissions, after which Mr Raftery, Mr Radich, and Mr Gough closed the case for the Crown. Counsel for the claimants and for the interested parties provided written reply submissions on Wednesday 25 July (a full list of witnesses and counsel is provided in appendix 3).

This was an extremely tight timeframe and we congratulate all parties for the way in which they met their demanding responsibilities. We received high quality evidence and submissions. We note that an issue was raised of some concern to us, involving the administration of legal aid and the question of whether the claimants and the interested parties were resourced fairly to bring their cases to the Tribunal, vis-a-vis the resourcing of the Crown. The issue of equity is important as between the Treaty partners. While we do not pursue the matter further at this stage of our inquiry, we wish to note that the issue has been raised.

1.7 INTERIM RELIEF DIRECTIONS

On 30 July 2012 we released a memorandum-directions dealing with the question of whether, in our assessment, the Crown should refrain from commencing the sale of shares prior to the release of this stage one report. This was in response to a request from claimants for an interim recommendation to the same effect.¹²²

In deciding whether the interim direction should be made there were two points we thought it necessary to consider:

- ▶ whether there was a serious question to be inquired into; and
- ▶ whether the balance of convenience favoured making an interim direction that the Crown should preserve the status quo until the release of the report.

On the first of these considerations, we found that there was a serious question to be inquired into. This was confirmed both by a consideration of the evidence before us and by the fact that Treaty rights of a proprietary nature had been found to exist in specific fresh-water bodies in previous Tribunal reports. Other important contributing factors were the Crown's acknowledgement that Maori have rights in fresh water generally and the Court of Appeal in *Ngati Apa* leaving open to question the nature and extent of such rights and interests. It was in our view arguable, that where the Crown alters the nature of the shareholding

122. Memorandum-directions of the Tribunal, 30 July 2012 (paper 2.7.2)

of a Crown owned body utilising freshwater resources, it may alter its ability, either in a legal or practical sense, to recognise any proven Treaty rights in such resources, or to remedy their breach in fresh water generally.

We found, too, that the balance of convenience favoured the maintenance of the status quo until the release of the report, as the sale of shares in MOM companies could cause significant disadvantage to the claimants were their claims determined to be well founded. It was also clear to us that any delay in an initial public offering of MOM company shares could have significant implications for the Crown. However, the Crown's evidence was that a share float could be undertaken in September-December 2012, and as the Tribunal intended to issue its report in September, we considered that there would be, at most, a minimal delay to the Crown's plans. Therefore, we concluded that the Crown ought not to commence the sale of shares until we had completed this report and the Crown had had the opportunity to consider it and the recommendations it contained.¹²³

1.8 THE STAGE ONE REPORT

On 2 August 2012, the Crown filed a memorandum with the Tribunal in response to our memorandum-directions of 30 July, asking us to provide as full a report as possible by Friday 24 August.¹²⁴ During our stage one hearing, we advised parties of our intention to issue directions by the end of July, dealing with the claimants' request for an interim recommendation, to be followed by a full preliminary report on stage one issues in September. As noted in our 30 July memorandum-directions, we understood from Mr Crawford's evidence that this would be a workable timeframe for the Crown. In their memorandum of 2 August, however, Crown counsel advised that the Government wishes to make a final decision in the first week of September to proceed (or not) with the sale of shares in Mighty River Power, if the 2012 slot is to be used. In order that due consideration might be given to our findings and recommendations, the Crown requested that we provide an interim report no later than 24 August 2012. Otherwise, we were told, the decision would have to be made without further input from the Tribunal.

The claimants submitted that a speedy report was highly desired by all but a thorough report was essential. If the Tribunal was able to thoroughly consider the issues and material placed before it and give a fully reasoned decision by 24 August 2012, the claimants considered it should do so.¹²⁵ Similarly, counsel for interested parties submitted that they were not opposed to a timely report, but that the matters before the Tribunal should not be rushed

123. Memorandum-directions of the Tribunal, 30 July 2012 (paper 2.7.2)

124. Crown counsel, memorandum, 2 August 2012 (paper 3.4.6), p 3

125. Claimant counsel, memorandum, 3 August 2012 (paper 3.4.7), p1, 4

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if this compromised the report.¹²⁶ Having regard to the national importance of the issues before us and the role of the Tribunal in contributing to the health of the Maori-Crown relationship, we decided to endeavour to provide an interim but truncated report on stage one issues by 24 August 2012.¹²⁷

The present interim report is an attempt to report as fully as possible on the very serious issues before us within the timeframe requested by the Crown. It has not been possible to recite all submissions and evidence: this is in effect a truncated version of our report. The full version of our preliminary stage one report will be released later in the year. We hope, however, that there is sufficient in this interim report for the parties to understand and benefit from the Tribunal's analysis of the issues, our findings as to whether the sale of shares in Mighty River Power will breach Treaty principles, and our recommendations as to how the Crown may best meet its obligations to its Maori Treaty partner.

In this report, the Tribunal will address the stage one issues by consideration of five refined or subsidiary issue questions. We begin with issue (a) in our statement of issues:

- ▶ What rights and interests (if any) in water and geothermal resources were guaranteed by the Treaty of Waitangi?

This issue will be the subject of substantive discussion in chapter 2.

After addressing that issue, we will consider the following consequential questions in chapter 3:

- ▶ What are the options for rights recognition or rights reconciliation?
- ▶ To what extent, if any, will these options be affected by partial privatisation of the power-generating SOEs?
- ▶ If the Crown proceeds with partial privatisation, will it be in breach of Treaty principles?

We conclude with our findings and recommendations.

126. Counsel for interested parties (Jason Pou), memorandum, 6 August 2012 (paper 3.4.9)

127. Presiding Officer, memorandum-directions, 6 August 2012 (paper 2.7.3)

CHAPTER 2

WHAT RIGHTS ARE PROTECTED BY THE TREATY OF WAITANGI ?

2.1 INTRODUCTION

In this chapter, we address question (a) from our statement of issues: what rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi?

The answer to this question is the foundation of the claim. Throughout the hearing, the claimants maintained that the closest English equivalent of their customary rights was proprietary rights. In 1840, we were told, the Crown and Maori agreed to a treaty that acknowledged the Crown's right to govern in exchange for the protection of Maori in the full, undisturbed and exclusive possession of their property, their political authority (tino rangatiratanga), and their treasures (taonga), until such time as they chose to relinquish some part of them for the arriving settlers. In the claimants' view, their 'fullblown' proprietary rights in February 1840 amounted to exclusive ownership of treasured water bodies, no matter how incompatible Maori custom and English law might appear at first glance, and no matter how inconvenient that may be for the Crown today. Such rights still exist, except to the extent that they have been extinguished in a Treaty-compliant manner, shared with tauwi (non-Maori) in a Treaty-compliant manner, or 'severely interfered with' in breach of the Treaty. But breaches await consideration in stage two; for the purpose of stage one, we were told, the claimants' rights in 1840 amounted to ownership of property and tino rangatiratanga over taonga, and that ownership and rangatiratanga was protected by the Treaty.

Unfortunately, the Crown did not present any evidence on this question, but it denied that Maori did or can – as a matter of law – own water. In the Crown's view, the common law is clear that no one owns water. It accepted unconditionally that Maori have rights and interests in their particular water bodies, but did not consider that such rights amounted to or were the equivalent of proprietary rights. This argument, too, is foundational for the Crown. Nonetheless, the Crown submits that whatever a full inquiry determines the nature of the rights to be – even if they are proprietary rights – the Crown's ability to recognise or protect proven rights will not be affected by partial privatisation of the MOM companies. The Crown's principal arguments, therefore, will not appear in this chapter but the next.

2.2 THE CLAIMANTS' CASE

2.2.1 An overview of the claimants' case

The claimants argue that in 1840 Maori had full, undisturbed, and exclusive possession of all the water resources of Aotearoa. Their continued possession of those resources was guaranteed to them by Article 2 of the Treaty of Waitangi. The Native Land Court and, more recently, the Waitangi Tribunal have recognised that Maori had and have proprietary interests in their water resources. This is not to say, however, that western-style legal ownership is a comfortable fit with Maori customary authority (tino rangatiratanga), stewardship (kaitiakitanga), and control of particular resources (mana whenua, mana moana). Rather, 'ownership' is the closest English cultural equivalent.

Maori have little choice but to claim English-style property rights today as the only realistic way to protect their customary rights and relationships with their taonga. The claimants say that, unless there has been a Treaty-compliant extinguishment, subject to the Crown's kawanatanga (governance) and some degree of sharing under the Treaty – Maori retain property rights in their water bodies today. In the claimants' submission, the question of whether there have been any Treaty-compliant alienations, and of how far Maori rights have been set aside or abrogated, is a matter for stage two of this inquiry.

Proof of ownership, as accepted in the Native Land Court and later in the Waitangi Tribunal, and as demonstrated in the claimants' case examples, rests on the following customary proofs or 'indicia of ownership':

- ▶ The water resource has been relied upon as a source of food;
- ▶ The water resource has been relied upon as a source of textiles or other materials;
- ▶ The water resource has been relied upon for travel or trade;
- ▶ The water resource has been used in the rituals central to the spiritual life of the hapu;
- ▶ The water resource has a mauri (life force);
- ▶ The water resource is celebrated or referred to in waiata;
- ▶ The water resource is celebrated or referred to in whakatauki;
- ▶ The people have identified taniwha as residing in the water resource;
- ▶ The people have exercised kaitiakitanga over the water resource;
- ▶ The people have exercised mana or rangatiratanga over the water resource;
- ▶ Whakapapa identifies a cosmological connection with the water resource; and
- ▶ There is a continuing recognised claim to land or territory in which the resource is situated, and title has been maintained to 'some, if not all, of the land on (or below) which the water resource sits'.¹

Claimant counsel maintained that the whakapapa and oral histories related by his witnesses would have demonstrated an indisputable title to land, even though Maori relationships with land (as with water) were not viewed by Maori in terms of English-style

1. Claimant counsel, opening submissions, 19 June 2012 (paper 3.3.1), pp12-13

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ownership. Yet no one doubts that Maori owned land.² Counsel also relied on the Australian *Mabo no 2* decision to maintain that some of the ‘indicia of ownership’ listed above were culturally particular to an indigenous people and did not need to show all of the classical western-style attributes of property ownership in order to be accepted in a western legal paradigm. In particular, he argued, communally-owned resources – sometimes shared between hapu or iwi – were traditionally inalienable and so might not meet monocultural tests for exclusivity or alienability.

Counsel argued that *Mabo no 2* supports the claimants’ contention that hapu possessed property in land and water; their possession does not need to meet exactly the same criteria as English law to be found valid under that law, having become a burden on the newly-acquired radical title of the Crown in 1840. Counsel stressed, however, that this is not a native title claim, nor is it a claim to common law ownership per se: it is a Treaty claim. Under the common law, native title concepts add to *uncertainty* as to whether water can be owned and, if so, by whom. That, in the claimants’ submission, is a matter for stage two of this inquiry.³ Mr Geiringer added in oral submissions:

If the Government is right that under the common law no one owns water, that does not answer this claim. In fact, I would suggest, if it is true, then it is a very clear and simple articulation of the problem. It is that refusal of recognition of the rights that existed in 1840 that is giving rise to this claim.⁴

In support of their position that Maori had proprietary rights in 1840 that were protected and guaranteed by the Treaty (and that they still have them today), the claimants relied in particular on the Native Land Court’s 1929 decision in the case of Lake Omapere, and on the Waitangi Tribunal’s reports on the Ika Whenua Rivers claim (1998), the Whanganui River claim (1999), and the Central North Island claims (2008). They rely on these decisions to argue:

The suggestion by the Claimants that Maori interest in water resources amount to ownership is not novel. Indeed, the Claimants would go so far as to say that judicial considerations of this issue have overwhelmingly favoured such a conclusion.⁵

Judge Acheson’s 1929 Lake Omapere decision was endorsed by the Te Whanganui-a-Orotu Tribunal as ‘one of the most perceptive judgements in the legal history of this country’.⁶ Of particular note, in the claimants’ view, is the judge’s finding that ‘the customary

2. claimant counsel, closing submissions, 19 July 2012 (paper 3.3.10), pp 1-2

3. Claimant counsel, oral submissions, 19 July 2012, Draft Transcript, pp 1167-1174; claimant counsel, closing submissions, 19 July 2012 (paper 3.3.10), pp 4-7

4. Claimant counsel, oral submissions, 19 July 2012, Draft Transcript, p 1172

5. Claimant counsel, opening submissions (paper 3.3.1), p 9

6. Waitangi Tribunal, *Te Whanganui-a-Orotu Report* (Wellington: GP Publications, 1995), p 201 (Claimant counsel, opening submissions (paper 3.3.1), p 10)

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right envisaged the lake, including its bed and its waters, as being an indivisible whole, and his ultimate decision to award title to the waters of the Lake as well as its bed.⁷ The Tribunal's *Te Ika Whenua Rivers Report* found that the rights to the rivers at issue in that inquiry 'amounted to proprietary interests.'⁸ The *Whanganui River Report* found that the Whanganui River and its tributaries were possessed by the tribe as a water resource, a 'single and indivisible entity comprised of water, banks and bed.'⁹ This was a 'property interest'.¹⁰ The Treaty guaranteed the tribe's full, exclusive and undisturbed possession of their river. Ownership and control were included in the Treaty guarantee; '[t]hat which they possessed is much larger than that which is referred to as guardianship, stewardship or kaitiakitanga.'¹¹ And, finally, the claimants relied on the Tribunal's Central North Island report, *He Maunga Rongo*, to establish that geothermal fields were taonga possessed by the claimants and protected by the Treaty of Waitangi.¹²

Having argued that the Treaty guaranteed Maori possession of their property, in this case their rivers and other water bodies, the claimants addressed the issue of what exactly this meant in terms of Treaty rights. In their view, the plain meaning of Article 2 in English guaranteed possession of their property for so long as they wished to retain it (thus providing for Treaty-compliant alienations), and, in te reo Maori, their tino rangatiratanga over their taonga. Maori relationships with their water bodies, as well as the water bodies themselves, are taonga protected by the Treaty.¹³

In the claimants' submission, they are not asking the Tribunal to find anything 'new' or 'radical' in respect of Treaty interpretation or Treaty principles.¹⁴ They accept that Article 1 gives the Crown kawanatanga rights, including a legitimate role in the management of water resources.¹⁵ They are not, therefore, 'implacably opposed' to entering into co-management arrangements with the Crown. But Article 2 rights are a standing qualification upon the Crown's sovereignty. Article 1 rights cannot be used to 'vitiate the Crown's obligation to protect property interests under Article 2.'¹⁶ Rather, co-management regimes must enable Maori as owners of property to have the full use and enjoyment of their property, including the right to develop it and profit from it. The claimants suggest that this is one key area

7. Claimant counsel, opening submissions (paper 3.3.1), p 10

8. Claimant counsel, opening submissions (paper 3.3.1), p 10

9. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), p 337 (Claimant counsel, opening submissions (paper 3.3.1), p 10)

10. Waitangi Tribunal, *The Whanganui River Report*, p 337 (Claimant counsel, opening submissions (paper 3.3.1), p 11)

11. Claimant counsel, opening submissions (paper 3.3.1), p 11

12. Claimant counsel, opening submissions (paper 3.3.1), p 11

13. Claimant counsel, opening submissions (paper 3.3.1), pp 5, 28; claimant counsel, closing submissions (paper 3.3.10), p 3; claimant counsel, oral submissions, 19 July 2012, Draft Transcript, p 1222

14. Claimant counsel, oral submissions, 19 July 2012, Draft Transcript, pp 1157-1158

15. Claimant counsel, opening submissions (paper 3.3.1), pp 5-6, 17

16. Claimant counsel, opening submissions (paper 3.3.1), p 6

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where Treaty rights differ from native title rights. The courts tend to fossilise native title as traditional practices whereas the Treaty guarantees Maori a right to develop their properties. In that respect, the Treaty is supported by recent international law, including the UN Declaration on the Rights of Indigenous Peoples.¹⁷ It cannot be a ‘startling proposition’, argued Mr Geiringer, that Maori should be ‘able to develop into the modern world and into the future using their own property and resources.’¹⁸

The claimants accepted that the Treaty provided in two ways for their rights to be altered so that they may no longer be exclusive to Maori communities today.

First, the *Te Ika Whenua Rivers Report* found that Maori had acceded to a shared use of their rivers for non-commercial purposes. In the claimants’ view, this is consistent with the principle of partnership and the express reference to settlement in the preamble of the Treaty. No Treaty breach arises from the non-commercial use of water by settlers. The claimants suggest that this is likely the situation for the majority of cases, although the examples of Lake Rotokawau and Lake Rotongaio ‘evidence a clear and consistent intention to exclude all but the owners from any use.’¹⁹ Nonetheless, they see the act of sharing as sourced in tikanga and as an exercise of rangatiratanga, not a relinquishment of it.²⁰

Secondly, the Treaty provides for alienation. The claimants accept that there *may have been* some Treaty-compliant alienations but the question is really for stage two. They noted that riparian land alienations may have affected the ownership of water bodies, although the Ika Whenua Rivers Tribunal found that ‘rangatiratanga in the river was not lost through such sales.’²¹ In the claimants’ view, land sales are unlikely to represent a Treaty-compliant alienation of waters because the facts of those sales usually show no intention to relinquish the waters with the lands, nor, in a metaphysical sense, an intention to cut up and alienate ‘their indivisible river entity.’²²

Finally, the claimants argue that the Crown did not challenge their evidence as to the existence of proprietary rights at 1840, either through cross-examination of claimant witnesses or the production of rebuttal evidence. That being the case, the claimants say that the Tribunal should accept their position not only for the case examples provided in evidence but also – given the Omapere decision and the relevant Tribunal reports – that it can be generalised for all hapu and water bodies in New Zealand.²³

17. Claimant counsel, oral submissions, 19 July 2012, Draft Transcript, pp 1173-1178

18. Claimant counsel, oral submissions, 19 July 2012, Draft Transcript, p 1175

19. Claimant counsel, opening submissions (paper 3.3.1), p 14

20. Claimant counsel, oral submissions, 19 July 2012, Draft Transcript, p 1177

21. Claimant counsel, opening submissions (paper 3.3.1), p 14

22. Claimant counsel, opening submissions (paper 3.3.1), p 15

23. Claimant counsel, closing submissions (paper 3.3.10), pp 3-4

2.2.2 Additional arguments from interested parties in support of the claim

The interested parties presented extensive evidence and submissions in this inquiry. In particular, opening submissions, closing submissions, and written reply submissions were delivered by Ms Sykes, Ms Wara, Ms Ertel, Ms Mason, and Mr Enright. As we noted in chapter 1, the interested parties numbered almost 100 (see appendix 2). While counsel represented separate and multiple clients, their submissions were cooperative and were made on behalf of all those who supported the claims. For that reason, we do not identify particular parties unless there is a special cause to do so. Also, we focus in this section on arguments that were additional to or differed from those made by the claimants, so as to avoid duplication. In most instances, claimant counsel relied on points made by the interested parties, and vice versa. We note that some interested parties were unable to attend or be represented at the hearing, so we have paid particular attention to their written submissions where such were made.

(1) Maori rights in a Kaupapa Maori framework

In her submissions on issue (a), Ms Sykes addressed the framework within which the claimants' 'indicia of ownership' should be interpreted. Part of the problem, she submitted, is that Maori concepts are too often judged in terms of the common law instead of in their own right. She pointed to Privy Council decisions which queried this approach, including *Amodu Tijani* and *Mullick v Mullick*, both of which establish that the rights of indigenous cultures must be judged within their own cultural framework, not that of England, and that this can be accommodated by the common law.²⁴

In the interested parties' view, this is best done by way of a kaupapa Maori (Maori epistemological) framework, as explained in the evidence of the late Mr Hohepa Kereopa to the Foreshore and Seabed Tribunal. This framework shows the interrelationships between whenua (the land and all things that cover and nurture Papatuanuku), Te Miina o Papatuanuku, manaakitanga, kaitiakitanga, and tangata whenua. The Maori relationship with their world is, in a cosmological sense, with the environment as made up of living beings to whom they are related, and patterned with tapu and rituals which impinge on every aspect of their life. The connections are sourced in whakapapa and they impose reciprocal obligations embodied in the words manaakitanga and kaitiakitanga.²⁵

Whenua is the word used for the placenta, which surrounds, protects and nurtures a baby. It is also the word used for the nurturing land, which 'protects, sustains and regenerates humanity and the surrounding environment.'²⁶ The relationship between whenua and tangata whenua begins with Ranginui and Papatuanuku and the creation whakapapa. After the

24. Counsel for interested parties (Sykes), closing submissions (revised), 25 July 2012 (paper 3.3.12(b)), pp 9-14, 30-31

25. Counsel for interested parties (Sykes), closing submissions (revised) (paper 3.3.12(b)), pp 13-15, 24-25; counsel for interested parties (Sykes), oral submissions, 19 July 2012, Draft Transcript, pp 1273-1283

26. Counsel for interested parties (Sykes), oral submissions, 19 July 2012, Draft Transcript, p 1281

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separation of Rangi and Papa, the ‘children that were taken by Rangi’ included ‘the storms, snow, frost and the goddess of mist, as their role is to create the wind for the land while the dew is used to cleanse Papatuanuku.’²⁷ Counsel cited the English translation of Mr Hohepa’s explanation: ‘This is to remind us of our origins so that we follow the cleansing waters of Papatuanuku which is to cleanse all of the impurities from her body which will aid in fostering Tane’s children who clothe Papatuanuku.’ The cleansing waters begin with the mists:

... upon its descent through the warmth of Papatuanuku, the mists will begin to elevate. When it is nightfall the dew begins to fall on the surface of the earth, which are the land winds. All the rivers converge together from the valleys which follows the descent of the waterfalls forming into the miina or the cleansing waters whose role is to gather all the impurities together and carry them to the river mouth. As a cleansing for the children of Tangaroa the crest of the moon is lifted creating the mist and clouds, allowing the process to begin again.²⁸

Thus, while there are separate water bodies or ‘different states of wai’, the cyclical, reciprocal relationship of Te Miina and Papatuanuku shows their interconnections, ‘how they sustain and replenish each other, often through the spiritual protection of taniwha.’²⁹ While every tribe has its particular relationships to its specific water bodies, including whakapapa relationships with them, Ms Sykes emphasised the evidence of witnesses such as Toi Maihi that ‘highlights the connectivity between the various forms of wai, being a whole system of waters including awa and ngawha, cold water and hot water.’³⁰

The point to be drawn from this, in counsel’s submission, is that Maori rights and interests have spiritual as well as physical sources, and they embrace a reciprocal relationship with, and mutual obligations of protection towards, the Maori environment as Maori understand it to be. That understanding rejects the divisibility of water bodies into beds, banks, water, and aquatic lifeforms, and it also rejects the divisibility of particular water bodies from each other and from the sustaining earth and skies. Maori rights and interests, therefore, if understood within a kaupapa Maori framework, encompass all these things. And that is the taonga protected by the Treaty, and the kaitiakitanga spoken of by witnesses. In the interested parties’s submission, it is not that English-style property rights are offensive to Maori or unknown to Maori, but rather it is offensive that Maori rights should not be considered to have given rise at the very least to English-style property rights. This is because the obligations imposed on Maori as part of their reciprocal relationships with their taonga require them to care for those taonga (manaakitanga and kaitiakitanga). And such care cannot take

27. Counsel for interested parties (Sykes), closing submissions (revised) (paper 3.3.12(b)), p16

28. (Counsel for interested parties (Sykes), closing submissions (revised) (paper 3.3.12(b)), pp16-17) [add original ref]

29. Counsel for interested parties (Sykes), closing submissions (revised) (paper 3.3.12(b)), p17

30. Counsel for interested parties (Sykes), oral submissions, 19 July 2012, Draft Transcript, p1283; counsel for interested parties (Sykes), closing submissions (revised) (paper 3.3.12(b)), pp17-19, 40

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place without rights of access, rights to control the access of others, rights to place conditions on access, and the authority to control how the taonga (water) will be used. In all these ways, property rights are essential and the ‘rights of Maori to their waterways are akin to ownership.’³¹

Commercial rights, we were told, are clearly included in this framework because waterways sustained the people in a physical sense. Traditional use, allocation, and trading of resources such as fish were common at the time of the Treaty, and rangatira had begun to adapt to the presence of Pakeha, controlling the use of waters as trade routes and even charging fees for the use of water. The interested parties emphasised the Treaty right of development and the choice of Maori to walk in two worlds: to resist assimilation and protect their matauranga Maori and tikanga (knowledge and law) but also to benefit commercially from development, as guaranteed by the Treaty and affirmed by the UN Declaration on the Rights of Indigenous Peoples.³²

(2) Te Tiriti o Waitangi

On behalf of Te Rarawa and the Wai 996 Ngati Rangitihi claimants, Ms Mason submitted that the English and Maori versions of the Treaty (which she referred to as ‘the Treaty’ and ‘Te Tiriti’) are ‘irreconcilable’. For iwi such as her clients, who only signed Te Tiriti, the words of the English-language version are of no effect.³³ Mr Enright made a similar submission for his clients, Mr Rudy Taylor and Professor Patu Hohepa of Ngapuhi, but argued that the Tribunal is nonetheless ‘entitled to adopt a purposive reading of the Article 2 Treaty right to “full exclusive and undisturbed possession ... land ... other properties” as including water rights’ [emphasis in original].³⁴

Under her clients’ interpretation of Te Tiriti, Ms Mason submitted that kawanatanga was ceded in respect of only 5 per cent of the country, with Maori retaining sovereignty over the remaining 95 per cent. It is wrong in law to try to reconcile the meaning of the two texts; the only document binding upon the tribes is the one that they signed. Even if that were not so, in counsel’s submission, the irreconcilability of the two versions would mean that – under the contra proferentem rule – only Te Tiriti would apply. The British Crown’s usurpation of sovereignty and jurisdiction over Maori was itself a breach of Te Tiriti.³⁵ The evidence and legal argument in support of this interpretation of Te Tiriti has been submitted in the Tribunal’s Te Paparahi o Te Raki (Northland) inquiry.³⁶

31. Counsel for interested parties (Sykes), closing submissions (revised) (paper 3.3.12(b)), pp 13-21, 24-27, 29-33, 37-42

32. Counsel for interested parties (Sykes), closing submissions (revised) (paper 3.3.12(b)), pp 7-8, 13-14, 21-23, 25-26

33. Counsel for interested parties (Mason), closing submissions, 19 July 2012 (paper 3.3.13), pp 6-15

34. Counsel for interested parties (Enright), closing submissions, 20 July 2012 (paper 3.3.14), p 1

35. Counsel for interested parties (Mason), closing submissions (paper 3.3.13), pp 10-15

36. Counsel for interested parties (Mason), closing submissions (paper 3.3.13), pp 10-11

Nonetheless, Ms Mason suggested that the question of kawanatanga, and whether or not it was actually ceded, is not crucial to the stage one inquiry, because Maori retained their proprietary rights regardless. In other words, the argument is not essential to the case.³⁷ And much of the water at issue in this claim has been appropriated or captured at the point at which it is used by power companies, whether hydro or geothermal, and thus is owned (and therefore prior Maori proprietary rights can exist in it as well) under the common law.³⁸ In contrast to the claimants, these interested parties do seek to rely on native title.³⁹ In their view, the reasoning in *Ngati Apa* (2003) can be applied to ‘the customary proprietary rights of Maori in fresh water’, which have never been extinguished and which remain in existence for appropriated water as for natural flowing water.⁴⁰ The significance of this argument for the Crown’s transfer of shares in the power-generating companies will be explored in chapter 3. Here, we note the interested parties’ submission that Te Tiriti protects native title rights in water, if the common law is to be applied. Also, in Ms Mason’s submission, the Australian case of *Yanner v Eaton* shows that this would be the case even without Te Tiriti, and that regulation does not suffice to extinguish native title.⁴¹

2.3 AN OVERVIEW OF THE CROWN’S CASE

The Crown’s essential argument was that:

- ▶ No one can own water.
- ▶ Maori have rights and interests in water.
- ▶ The full nature and extent of those rights and interests has not yet been defined.
- ▶ No matter what the full scope of the rights turns out to be – even if proprietary in nature – the rights will not be affected by a transfer of shares in the MOM companies, and the Crown’s ability to recognise and protect the rights will not be affected by the partial privatisation.

For that reason, the Crown’s principal arguments were reserved for the issues addressed in chapter 3.

As noted by the claimants, the Crown did not cross-examine any of the tangata whenua or technical witnesses who gave evidence in relation to question (a), nor did it produce evidence of its own. Crown counsel submitted:

To the extent that it is necessary to respond now to the rights articulation of the claimants, what the Crown can say is that at an abstract level, a claim of ownership (in the English

37. Counsel for interested parties (Mason), closing submissions (paper 3.3.13), p 22

38. Counsel for interested parties (Mason), closing submissions (paper 3.3.13), pp 23-25, 38

39. Counsel for interested parties (Mason), closing submissions (paper 3.3.13), pp 26-28, 31-47

40. Counsel for interested parties (Mason), closing submissions (paper 3.3.13), p 37

41. Counsel for interested parties (Mason), closing submissions (paper 3.3.13), pp 39-47

property law sense) over the water and geothermal resource of New Zealand cannot be accepted by Government. New Zealand has a multi-dimensional society with cultural, recreational and commercial claims on the water resource, and the task of government ultimately is to balance and reconcile those in some way that recognises the long-term needs of New Zealanders.⁴²

The Crown accepted the range of customary 'indicia of ownership' outlined by the claimants (see above) as 'incontrovertible', but it took the view that they were customary indicia of something *other than* ownership.⁴³ This argument rested on two foundations.

First, while not challenging the authenticity of the claimants' oral evidence, the Crown's view was that their narratives did not actually get matters to a point where concrete rights could be defined. In Crown counsel's submission, the process of defining the rights and reconciling them with other rights is best left to the policy arena.⁴⁴ There is 'little appetite for inch-by-inch, resource-by-resource investigations', the inevitable endpoint of which is 'dialogue, compromise and realism' in any case.⁴⁵ While accepting that rights definition may take place at stage two of this inquiry, and that the 'Tribunal can give the parties greater guidance' as to the rights at that stage,⁴⁶ the Crown's submission is that rights definition should move outside the Tribunal:

To enable rights recognition to function in a contemporary regime the regime itself assists in defining the rights. That is at least if one evolves rights definition beyond narratives of attachments and relationships and historical use.⁴⁷

According to the Crown, this process of rights definition is best left to collaboration between iwi and the Crown, which, it says, is already occurring with the Iwi Leaders Group in the Fresh Start for Fresh Water programme. It is a 'complex exploration still in dialogue'.⁴⁸ If the Tribunal is to play a part, it is more properly in the district historical inquiries because 'the relationships with particular waters may be different for a large number of people. You need to work that out and work through it with a lot more information than we've had thus far'.⁴⁹ In other words, the Crown resisted the claimants' contention that the Tribunal can generalise on the basis of their case examples. We pause to observe that this would seem to conflict with the earlier proposition from the Crown that there is little appetite for inch by inch, resource by resource investigations.

42. Crown counsel, closing submissions, 20 July 2012 (paper 3.3.15), p 6

43. Crown counsel, closing submissions (paper 3.3.15), pp 5-7; Crown counsel (Raftery), oral submissions, 20 July 2012, Draft Transcript, p 1391

44. Crown counsel, closing submissions (paper 3.3.15), pp 5-7

45. Crown counsel, closing submissions (paper 3.3.15), p 7

46. Crown counsel, closing submissions (paper 3.3.15), p 5

47. Crown counsel, closing submissions (paper 3.3.15), p 6

48. Crown counsel, closing submissions (paper 3.3.15), p 6

49. Crown counsel (Raftery), oral submissions, 20 June 2012, Draft Transcript, pp 1398-1399

The Crown's second argument was that English-style ownership is not in fact the best English cultural equivalent for Maori rights. For this argument, it relied primarily on the Waitangi Tribunal's report on the 'indigenous flora and fauna and Maori cultural and intellectual property claim' (Wai 262). In light of that report, the Crown suggested that kaitiakitanga is the true and practical expression of Maori rights in respect of environmental matters, including water resources. Whether it be full kaitiaki control, partnership (co-governance or co-management), or a lesser interest (kaitiaki influence through consultation), this is the correct mechanism to give expression to the rangatiratanga protected in the Treaty.⁵⁰ Ownership is not the appropriate mechanism; as Justice Williams commented in the Wai 262 hearings, 'there is no Maori word for "ownership"'.⁵¹ The Crown also relied on statements by some of the claimants' witnesses to support the proposition that Maori prefer kaitiakitanga to the English concept of ownership, even sometimes rejecting the latter altogether.⁵²

Although not 'strictly necessary' in light of the Crown's argument that the Treaty did not provide for Maori 'ownership' of water, but rather for their rangatiratanga and kaitiakitanga over particular water bodies, counsel made submissions in respect of common law rights because the matter had been raised in hearing.⁵³ Matters of detail on this issue are for stage two, but we note here the Crown's argument that no one owns or has proprietary rights in flowing water under the common law; all those who have a right of access to it may reasonably use it (except as constrained by statute, the latest of which is the Resource Management Act 1991).⁵⁴ This argument was based on Halsbury, *Campbell v MacDonald* (1902), and *Glenmark Homestead Ltd v North Canterbury Catchment Board* (1975).⁵⁵ The Crown also addressed issues of extinguishment briefly, but, again, those are matters for stage two.

So, what rights does the Crown see as protected by the Treaty?

First, it asserts its own kawanatanga right to manage water and balance the interests of the many groups with rights and interests in water.

Secondly, the Crown says that its right in water is a general one, whereas Maori rights are specific to particular water bodies:

rangatiratanga of course is guaranteed under Article 2 of the Treaty and no one would deny mana to Maori in respect of any particular taonga or any particular piece of water, where the appropriate relationship is shown.

In respect of 'pieces of water', mana and rangatiratanga are all hapu or iwi specific and geographically specific. Water is not seen in a vacuum, it is very much related to hapu, to iwi, to whenua.⁵⁶

50. Crown counsel, closing submissions (paper 3.3.15), pp 6-7, 10-12

51. Crown counsel, closing submissions (paper 3.3.15), p 10

52. Crown counsel, closing submissions (paper 3.3.15), pp 8-10

53. Crown counsel, closing submissions (paper 3.3.15), p 12

54. Crown counsel, closing submissions (paper 3.3.15), p 13

55. Crown counsel, closing submissions (paper 3.3.15), pp 12-15

56. Crown counsel, closing submissions (paper 3.3.15), p 10

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In the Crown's view, kaitiakitanga (including the possibility of kaitiaki control of a particular water resource) is the best expression of this rangatiratanga and mana in modern times, and it is specific to particular water bodies.

Thirdly, the Crown says that a Government-iwi dialogue is the appropriate way to define Treaty rights in the present circumstances.

Fourthly, the Crown says that the Treaty right of development does not apply if the claimants' position is that 'iwi-Maori have a proprietary (or other) right to water and this becomes a right to ownership of energy companies based on a notion of a development right'.⁵⁷ Here, it relied on the Court of Appeal's decision in *Ika Whenua* that the Treaty did not conceive of a Maori right to generate electricity, and also the Tribunal's minority report on the Radio Spectrum claim (which is discussed further below).⁵⁸

2.4 THE CLAIMANTS' REPLY

In the claimants' view, the Crown has misrepresented the claim as a claim to own all water in New Zealand. Also, the Crown was misguided in its attempt to recharacterise the issue as a claim to rangatiratanga, mana, and kaitiakitanga (with rangatiratanga and mana then forgotten in favour of a narrow interpretation of kaitiakitanga). In reality, the English version of the Treaty guaranteed full, exclusive, and undisturbed possession, which is ownership. That guarantee cannot be read down.⁵⁹ Also, the claimants do not claim to own all water, but rather to have 'proprietary interests in particular water resources'.⁶⁰ While accepting that some Maori witnesses were uncomfortable with characterising their relationship with their taonga as 'ownership', claimant counsel suggested that both cultures view 'property' differently but both have relationships 'capable of recognition as a full-blown property relationship in English law – as ownership'.⁶¹ To put matters in a Pakeha way: Pakeha owners of property have rights to their property; Maori owners of property have corresponding obligations to their property. 'The evidence on which the Crown relies', said counsel, 'does no more than reject the Pakeha notion of ownership in favour of the Maori concept that carries the correlative duty of a kaitiaki'.⁶²

In the claimants' view, we should not be persuaded that 'Maori rights and ownership are "irreconcilable"', but should follow the many Tribunal reports that have recognised

57. Crown counsel, closing submissions (paper 3.3.15), p 17

58. Crown counsel, closing submissions (paper 3.3.15), pp 17-18, 41-42; Crown counsel (Raftery), oral submissions, 20 July 2012, Draft Transcript, pp 1386-1387, 1413-1417

59. Claimant counsel, submissions by way of reply, 25 July 2012 (paper 3.3.20), pp 2-11

60. Claimant counsel, submissions by way of reply (paper 3.3.20), p 2

61. Claimant counsel, submissions by way of reply (paper 3.3.20), p 3

62. Claimant counsel, submissions by way of reply (paper 3.3.20), p 3

‘customary interests in terms of proprietary rights’.⁶³ Also, the claimants suggest that the Crown has misinterpreted the Wai 262 report: ‘the issue is not in fact the dichotomy between ownership and kaitiakitanga, as the Crown contends, but the fundamental unity of ownership and rangatiratanga (or mana), albeit camouflaged by different cultural modes of expression.’⁶⁴

First, the claimants relied on the *Manukau Report* where the Tribunal found that the closest cultural equivalent to the English words ‘full, exclusive, undisturbed possession’ was ‘mana’, but that ‘tino rangatiratanga’ was used in the Treaty to ‘overcome problems arising from the personification of “mana” in Maori culture.’⁶⁵ ‘Mana’ is the customary term for authority over land and water.⁶⁶ Secondly, the claimants relied on the *Muriwhenua Fishing Report* for ‘the compatibility of “rangatiratanga” and “ownership”’. In that inquiry, the Crown had submitted that rangatiratanga was ‘something less than ownership’. It had also suggested that stewardship was more important in Maori society, and that in reality rangatiratanga meant ‘stewardship’. While acknowledging that Maori could not customarily alienate their communally-held ‘property’, the Tribunal nonetheless held that they had the authority to exclude others and the ethic to hold their properties with profound spiritual regard ‘for a vast family, of which many are dead, few are living, and countless are as yet unborn’ (not as commodities); ‘full ownership is necessarily implied’, concluded the Tribunal.⁶⁷ Thirdly, the claimants argued that the Wai 262 Tribunal focused on kaitiakitanga because of the subject matter of that inquiry, but that it expressly stated that kaitiakitanga was the ‘obligation side of rangatiratanga’, and thus only part of it. The Wai 262 Tribunal uses the language of ‘control’, which the claimants say is compatible with their position. If it were not, then the ‘clear statement of rights’ in the English version of the Treaty would have to be ignored.⁶⁸ The Treaty right is ‘plainly much more than the mere stewardship without ownership, or shared-management right, for which the Crown contends.’⁶⁹

Having set out the parties’ main arguments as to the nature of the Maori rights and interests in water, as protected by the Treaty, we next consider the key Tribunal reports on which the parties relied for their Treaty jurisprudence and for their findings of fact as to Maori rights in water bodies. In this inquiry, as we have been reminded by both claimants and the Crown, those many reports mean that we do not need to reinvent the wheel. Maori claims in respect of water bodies have been around for a long time and have been the subject of repeated inquiries by the Waitangi Tribunal. Before we consider the Tribunal’s reports, however, there is a key Native Land Court decision which has been highly influential in

63. Claimant counsel, submissions by way of reply (paper 3.3.20), p 4

64. Claimant counsel, submissions by way of reply (paper 3.3.20), p 5

65. Claimant counsel, submissions by way of reply (paper 3.3.20), p 5

66. Claimant counsel, submissions by way of reply (paper 3.3.20), p 5

67. Claimant counsel, submissions by way of reply (paper 3.3.20), pp 6-7

68. Claimant counsel, submissions by way of reply (paper 3.3.20), pp 8-9

69. Claimant counsel, submissions by way of reply (paper 3.3.20), p 11

previous Tribunal inquiries and in the claimants' evidence and submissions: the 1929 Lake Omapere decision. We begin our discussion by describing in some detail the content of that decision.

2.5 THE LAKE OMAPERE DECISION, 1929

In many Tribunal reports dealing with water bodies, Judge Acheson's 1929 decision in respect of Lake Omapere in Northland has been foundational to the reasoning and has therefore been quoted extensively. We reproduce the following passages from that decision, as quoted in the 1995 *Te Whanganui-a-Orotu Report*:

Page 7:

Did the ancient custom and usage of the Maoris recognise ownership of the beds of lakes?

... Yes! And this answer necessarily follows from the more important fact that Maori custom and usage recognised full ownership of lakes themselves.

The bed of any lake is merely a part of that lake, and no juggling with words or ideas will ever make it other than part of that lake. The Maori was and still is a direct thinker, and he would see no more reason for separating a lake from its bed (as to the ownership thereof) than he would see for separating the rocks and the soil that comprise a mountain. In fact, in olden days he would have regarded it as rather a grim joke had any strangers asserted that he did not possess the beds of his own lakes.

A lake is land covered by water, and it is part of the surface of the country in which it is situated, and in essentials it is as much part of that surface and as capable of being occupied as is land covered by forest or land covered by a running stream.

Page 8:

... To the spiritually-minded and mentally-gifted Maori of every rangatira tribe, a lake was something that stirred the hidden forces in him. It was (and, it is hoped, always will be) something much more grand and noble than a mere sheet of water covering a muddy bed. To him, it was a striking landscape feature possessed of a 'mauri' or 'indwelling life principle' which bound it closely to the fortunes and the destiny of his tribe. Gazed upon from childhood days, it grew into his affections and his whole life until he felt it to be a vital part of himself and his people.

Page 9:

... To the Maori, also, a lake was something that added rank, and dignity, and an intangible mana or prestige to his tribe and to himself. On that account alone it would be highly prized, and defended.

... Finally, to all these things there was added the value of a lake as a permanent source of food supply.

... Lake Omapere ... has been to the Ngapuhis for hundreds of years a well-filled and constantly-available reservoir of food in the form of the shell-fish and the eels that live in the bed of the lake. With their wonderful engineering skill and unlimited supply of man-power, the Maoris could themselves have drained Omapere at any time without great difficulty. But Omapere was of much more value to them as a lake than as dry land.

Pages 10 and 11:

... Was Lake Omapere, at the time of the Treaty of Waitangi (1840), effectively occupied and owned by the Ngapuhi Tribe in accordance with the requirements of ancient Maori custom and usage?

... Yes! The occupation of Omapere was as effective, continuous, unrestricted, and exclusive as it was possible for any lake-occupation to be.

It is not contested that for many hundreds of years the Ngapuhis have been in undisputed possession of this lake, and have lived around or close to its shores ... Great numbers of the Ngapuhi, must have grown up within sight of Omapere's waters, and have regarded the lake as one of the treasured tribal possessions. By no [process] of reasoning known to the Native Land Court would it be possible to convince the Ngapuhis that they and their forefathers owned merely the fishing rights and not the whole lake itself.

According to ancient Maori custom and usage, the supreme test of ownership was possession, occupation, the right to perform such acts of ownership as were usual and necessary in respect of each particular portion of the territory possessed.

In the case of a lake the usual signs of ownership would be the unrestricted exercise of fishing rights over it, the setting up of eel-weirs at its outlets, the gathering of raupo or flax along its borders, and the occupation of villages or fighting-pas on or close to its shores.

... In short, the Ngapuhis used and occupied Lake Omapere for all purposes for which a lake could reasonably be used and occupied by them, and the Native Land Court says that much less use and occupation would be ample, according to ancient custom and usage, to prove actual and effective ownership of the lake, bed and all.

Pages 13 and 14:

... It was contended (but not seriously pressed) on behalf of the Crown that sales by Natives to the Crown, of areas adjoining Lake Omapere, gave to the Crown rights in those portions of the bed of the lake fronting on to the portions sold.

This contention had no merit whatever. The sales to the Crown were of particular areas of land well defined as to area and boundaries, and could not possibly have been intended to include portions of the lake-bed adjoining. See also Judgment of Court of Appeal in *Re Mueller v Taupiri Coal Mines Co* (1900) 3 GLR 154.

Also the mere fact that Lake Omapere was 'customary land' was an absolute bar to sales of any portions of it to the Crown. Section 89 of 'The Native Land Act, 1909', forbids sales of 'customary land' to the Crown, and earlier statutory provisions were to the same effect.

Moreover, Lake Omapere was tribal territory, and therefore, according to established Maori custom and usage, no individual or group of individuals had the right to alienate any portion of its bed. To hold otherwise would be to give support to that lamentable doctrine which led, in the celebrated Waitara Case, to tragic and unnecessary wars between Pakeha and Maori.

There can thus be no presumption either in law or in fact that the sales of some lands to the Crown adjoining Lake Omapere carried with them rights to portions of the lake or of its bed.

Page 19:

... Are the words 'Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess', contained in Article Two of the Treaty of Waitangi, ample in their scope to include Lake Omapere?

... Yes!

According to both English Common Law and ancient Maori Custom, the term 'Lands and Estates' would be ample to include by description a lake or a lake-bed. But even if that were not so, the further term 'other properties collectively possessed' would be more than ample to include a lake occupied and possessed as was Omapere.

Page 20:

... Did the parties to the Treaty of Waitangi contemplate, at the time of the signing, that the Natives would be entitled to the bed of Lake Omapere?

... The parties to the Treaty certainly intended it to protect the rights of the Ngapuhis to their whole tribal territory. The Court has already shown that such territory necessarily included Lake Omapere, and that ownership of the lake necessarily included ownership of the lake-bed.

Page 21:

... Did the parties to the Treaty of Waitangi contemplate, at the time of the signing, that the Crown would claim the bed of Lake Omapere?

... No!

There was no Common Law Right of the Crown to lakes or to the beds of lakes in England, so it is impossible to suppose that the Crown's representatives who were negotiating with the Maoris took it for granted that New Zealand lakes would belong to the Crown as a matter of right.

Page 24:

... In these later days, 1929, it is not sufficiently realised how dependent the early settlers were on the Treaty of Waitangi, and what great benefits the white people derived from it for several decades.

... In view of the considerations set out above, the Native Land Court holds that it is unreasonable to suppose that the Natives at the time of the Treaty intended to give up Lake Omapere or its bed to the Crown, and that it is equally unreasonable to suppose that the Crown at the time of the Treaty intended to claim the lake or its bed in opposition to the Natives.⁷⁰

The Te Whanganui-a-Orotu Tribunal concluded: 'We think that the words of Judge Acheson could be applied to Te Whanganui-a-Orotu with only minor modifications.' This necessity for minor modification came mostly because Te Whanganui a Orotu is a lagoon, and a different common law regime applied to salt or tidal waters, but the Tribunal saw the difference as ultimately of little effect.⁷¹

As noted by David Alexander in his Omapere case study for the claimants, as endorsed by Ngapuhi kaumatua Nuki Aldridge, Ngapuhi first tried to use the introduced courts to secure a legally-recognised title in 1913 when they applied to the Native Land Court for title to the lake. The hearing was delayed for 16 years (including a ten-year delay because, according to Mr Alexander, the Crown stalled the necessary survey). The Crown opposed the Maori claim in the 1929 hearing, and then appealed Judge Acheson's decision. The appeal had still not been heard ten years later. In 1936 and 1937, the Crown had secured an adjournment for negotiations with Maori, but these remained unresolved when Maori applied again to the Court in 1939, this time to have the lake made a Native Reservation. Judge Acheson heard this case in 1940 and indicated that, the appeal having remained unresolved because of the 'delaying tactics of the Crown', he would make the lake a Native Reservation in the ownership of the whole Ngapuhi tribe, with 20 trustees. Under the Native Purposes Act 1937, which provided for such reserves, the final decision had to be made by the Native Minister upon a recommendation from the Court. The Native Minister did not act on the recommendation and the Crown's appeal remained adjourned.⁷²

In 1952, Ngapuhi applied to have the Crown's appeal dismissed for lack of prosecution. This application was heard by the Maori Appellate Court in 1953. The Crown in the

70. *Application by Ripi Hongi and Other Natives for Investigation of Title* unreported, 1 August 1929, Judge Acheson, Native Land Court (Bay of Islands Native Land Court minute book, vol 2, ff 259-263, 265-266, 271-273, 276 (Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, pp 201-203)

71. Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, p 203

72. David Alexander, 'Lake Omapere case study', 18 May 2012 (doc A57(a)), pp 4-10; Nuki Aldridge, affidavit, undated (18 May 2012) (doc A57)

meantime had decided that, as the Auckland commissioner of Crown lands put it, ‘the ownership of the lake is not of any great moment.’⁷³ Nonetheless, it sought concessions from the Maori owners in terms of riparian rights (for both private farmers and the Crown itself), but the Appellate Court ruled that the Crown could not attach conditions to withdrawing its appeal. The Court then dismissed the Crown’s appeal. Judge Acheson’s 1929 decision then became final. At this point, the 1940 Maori Reservation proposal became one for a section 438 trust under the new Maori Affairs Act 1953.⁷⁴ We need not discuss the detail of how the trust order was finalised (the Minister finally approved it in 1956) except to note, as we mentioned in chapter 1, that it included ownership of the ‘land and the water thereon known as Lake Omapere.’⁷⁵

This 40-year battle between Maori and the Crown for ownership of Lake Omapere (1913-1953) was not unusual, as other Tribunal reports testify. Lengthy battles over the ownership of Lake Taupo and Lake Wairarapa have been reported on in detail by the Tribunal. Maori claims to ownership of lakes are far from novel in 2012, one hundred years after the battle for Omapere first began. What is unusual, however, and perhaps shows a way ahead, is that the Native Land Court demonstrated in 1929 (and again in its 1955 order) that Maori customary rights to a lake – whole and indivisible, with its resources, its mauri, its spiritual significance, and its centrality in tribal identity and life – could be given equivalence in or protected by a legal title to a lake (including its water).

We turn next to describe some key findings of the Waitangi Tribunal in earlier reports, as discussed by parties in the inquiry and on which we are being asked to rely in terms of the present claim. These reports are particularly important because the brevity of this urgent inquiry, and the relatively limited evidence which we were able to receive in the time available, means that the parties are asking us to rely on findings of fact about Maori ownership or proprietary rights in water bodies as found in earlier Tribunal inquiries: the claimants relied in particular on the *Te Ika Whenua Rivers Report*, the *Whanganui River Report*, and the Central North Island report (*He Maunga Rongo*); the Crown relied in particular on the Wai 262 report, *Ko Aotearoa Tenei*.

73. Commissioner of Crown Lands North Auckland to Director General of Lands, 29 July 1953 (Alexander, ‘Lake Omapere case study’ (doc A57(a)), p13)

74. Alexander, ‘Lake Omapere case study’ (doc A57(a)), pp12-14

75. Order of the Native Land Court, 22 February 1955 (Alexander, ‘Lake Omapere case study’ (doc A57(a)), p15)

2.6 PREVIOUS WAITANGI TRIBUNAL REPORTS

2.6.1 The reports of the 1980s

(1) *The Kaituna River Report, 1984*

The *Kaituna River Report* was of great importance to the Tapuika witnesses, Anthony Wihapi and the Reverend Maanu Wihapi, who appeared before the Tribunal on 9 July 2012.⁷⁶ In this report, the Tribunal found that Ngati Pikiāo and Te Arawa owned the Kaituna River in 1840 and had done so for many generations.⁷⁷ In coming to this view, the Tribunal relied particularly on the traditional evidence of Te Irirangi Te Pou O Uruika Tiakiawa, who recited the whakapapa, history, and territorial authority of Ngati Pikiāo which established them as ‘the owners of these lakes and the river in question’, and more particularly the spiritual significance of the river and its critical importance as a source of food.⁷⁸ The Tribunal also found that the Treaty ‘guaranteed the continued enjoyment and undisturbed possession of [this] Taonga Maori’, that traditional fishing and other resource-use rights were part of the ownership and part of the taonga, and that the discharge of sewage effluent into the river was contrary to Maori values and in breach of the Treaty.⁷⁹

(2) *The Manukau Report, 1985*

The claimants relied on the Tribunal’s 1985 report on the Manukau harbour, which was also important to Roimata Minhinnick and the Ngati Te Ata people whom he represented before us. The claim was Wai 8 and the original claimant was Mr Minhinnick’s mother, Mrs Nganeko Minhinnick, who supplied written evidence to this Tribunal. A key finding in the Manukau report is that, as we mentioned in chapter 1, there is a long history of Maori claims to ownership of harbours, rivers, water bodies, and fisheries, dating back to the nineteenth century; the present claim is not a new one. In their arguments in favour of an urgent hearing, the claimants cited the Manukau report to support their contention that modern governments had known about – and done nothing about – Maori water claims since at least 1985.

The Manukau Tribunal found that Maori owned the harbour under Maori customary law as a ‘prized possession’ (taonga), and that this was guaranteed under the Treaty just as much as ownership of the land, even though *In re the Ninety Mile Beach* (since overturned by *Ngati Apa*) showed that the Crown owned it as a matter of law.⁸⁰ The guarantee of possession ‘entails a guarantee to the authority to control that is to say, of rangatiratanga and mana.’⁸¹

76. Anthony Wihapi and Maanu Wihapi, oral evidence, 9 July 2012, Draft Transcript, pp 35, 44

77. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wellington: Government Printing Office, 1984), p 31

78. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, pp 10, 34-37

79. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Kaituna River Claim*, p 31

80. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printing Office, 1985), pp 33-34; 68-70

81. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, p 70

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But the Treaty also provided for settlers and partnership, and the ‘new partner necessarily needed access’.⁸² Thus, although guaranteed to Maori as a taonga under Article 2, the ‘Maori interest in the seas’ is something less than the full, exclusive and undisturbed possession described in the English version of Article 2 because of the sharing that arises from the Treaty bargain. In the Tribunal’s view, it was the long and absolute denial of the Maori interest that had provoked claims to exclusivity in modern times. The Maori claimants, however, were still willing to share so long as their rights were recognised.⁸³ The Tribunal concluded:

We conclude that the Treaty did promise the tribes an interest in the harbour. That interest is certainly something more than that of a minority section of the general public, more than just a particular interest in particular fishing grounds, but less than that of exclusive ownership. It is in the nature of an interest in partnership the precise terms of which have yet to be worked out. In the meantime any legal owner should hold only as trustee for the partnership and acknowledge particular fiduciary responsibilities to the local tribes, and the general public, as distinct entities.⁸⁴

2.6.2 The rivers reports of the 1990s

(1) *The Mohaka River Report, 1992*

In the Mohaka River case, the Crown argued that it could not conceive of any way in which to own a non-navigable river except ownership of its bed by the *ad medium filum aquae* rule. That form of ownership, it was said, had passed from Maori to the Crown and to settlers ‘to the centre line’ of the river with the sale of riparian lands. Any other view would be ‘novel’ or ‘radical’.⁸⁵

The Tribunal did not accept this submission, pointing in particular to the long-standing Lake Omāpere decision (described above) and to the then-recent *Mabo* decision.⁸⁶ Instead, the Tribunal found that the Mohaka River was and is a taonga, possessed and controlled (for their stretch of it) by Ngāti Pahauwera at the time of the signing of the Treaty in 1840. It was their ‘property’ (under the English version of Article 2). The Treaty guaranteed the Crown’s active protection of Maori property rights and taonga, to the fullest extent practicable in the circumstances of the time. The Crown has breached this guarantee in terms of the river because it could only be obtained from the Maori Treaty partner with their free and informed consent. Ngāti Pahauwera have never knowingly or voluntarily ceded either ownership or control (te tino rangatiratanga) of the river, whether in selling adjacent land or in

82. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, p 60

83. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, pp 69-70

84. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim* (Wellington: Government Printing Office, 1985), p 70

85. Waitangi Tribunal, *The Mohaka River Report* (Wellington: Brooker and Friend Ltd, 1992), pp 31, 65

86. Waitangi Tribunal, *The Mohaka River Report*, pp 65-66, 80

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obtaining the individualised Native Land Court titles imposed by the Crown's native land laws. The common law doctrine of *ad medium filum aquae* is rebuttable in law and would be rebutted on the basis of the facts about the Mohaka River; Maori could not be deprived of their property (the river) by means of a sidewind. In the Tribunal's view, the common law doctrine of native title applies instead. It was thus not necessary to go beyond the common law to establish the claimants' rights of possession, rights which were guaranteed by the Treaty.⁸⁷ Nothing radically new, therefore, was being claimed by Maori or found by the Tribunal: the Tribunal cautioned that it would be wrong to see its findings as 'a radical or unprecedented extension of the rights of Maori.'⁸⁸

This was not to say that there was no place for *kawanatanga* or settlers. The Tribunal found that, under the Treaty, Ngati Pahauwera had been willing to share their river with settlers, although their *tino rangatiratanga* was not lessened by what was effectively a grant to Pakeha of 'non-exclusive use rights.'⁸⁹ Thus, *tino rangatiratanga* under the Treaty meant 'something more than ownership or guardianship of the river but something less than the right of exclusive use.'⁹⁰ The problem today was:

It is necessary to find a balance between Ngati Pahauwera's ownership of and right to control their *taonga* the river, the use of the river by others and the Crown's responsibility to manage the river in the interests of conservation."⁹¹

The Tribunal accepted that the Treaty gave the Crown a legitimate *kawanatanga* role (especially in terms of conservation) and that interests needed to be balanced. It recommended that the claim should be settled by the vesting of the bed of their stretch of the Mohaka River in Ngati Pahauwera, and by the establishment of an agreed regime for its ownership and co-management.⁹² 'We are confident', the Tribunal said, 'that the outcome of such discussions will be an agreement which recognises the legitimate interests in the river of both Ngati Pahauwera and the other citizens of this country and which demonstrates that the Treaty of Waitangi can be made to work in a sensible and realistic way in its application to a beautiful river which is both an undoubted *taonga* of Ngati Pahauwera and a great asset to the country as a whole.'⁹³

87. Waitangi Tribunal, *The Mohaka River Report*, pp 10-21, 30-38, 42-44, 47-50, 75-80

88. Waitangi Tribunal, *The Mohaka River Report*, pp 65-66, 80

89. Waitangi Tribunal, *The Mohaka River Report*, pp 78

90. Waitangi Tribunal, *The Mohaka River Report*, p 64

91. Waitangi Tribunal, *The Mohaka River Report*, p vii

92. Waitangi Tribunal, *The Mohaka River Report*, pp 79-80

93. Waitangi Tribunal, *The Mohaka River Report*, p 80

(2) *Te Ika Whenua Rivers Report, 1998*

The *Te Ika Whenua Rivers Report* was one of three Tribunal reports on which the claimants have placed the most reliance.⁹⁴ Dr George Habib of the claimants' expert group provided us with a commentary on the report.⁹⁵ It is not possible here to recite every relevant comment and finding in the report but we note those most pertinent to our inquiry.

The Tribunal found that the Te Ika Whenua rivers, the Rangitaiki, Wheao, and Whirinaki, 'are tipuna awa and living taonga of the hapu of Te Ika Whenua', over which those hapu exercised tino rangatiratanga at 1840. The rivers are whole and indivisible entities, and the Maori concept of 'ownership' did not recognise banks, bed, and water as separate parts of the river.⁹⁶ The Tribunal found that a river could be 'owned' in Maori terms as 'a taonga, a valuable food resource to those who possess it, which carries its own separate mauri (life force) and is guarded by the taniwha that inhabit it.'⁹⁷ English-style 'ownership' should be distinguished from tino rangatiratanga, which is perhaps best encapsulated by the concept of control, since legal ownership of land (for example) could be obtained from the Native Land Court by individuals while tino rangatiratanga nonetheless remained with the hapu.⁹⁸ The claimants had sought a finding that they have a proprietary interest which can best be described as legal ownership of the waters of the rivers. The Tribunal acknowledged that this was a difficult prospect since it differed from common law and was not 'easily described in conventional legal terms.'⁹⁹ Nonetheless, the English version of Article 2 guaranteed full, exclusive and undisturbed possession. As a result, the Tribunal found that:

Te Ika Whenua [hapu] were entitled, as at 1840, to have conferred on them a proprietary interest in the rivers that could be practically encapsulated within the legal notion of the ownership of the waters thereof. The term "ownership" conflicts with the common law view because the waters were not captured but flowed on and were consequently available to other users downstream. Protection of those users' interests by way of the preservation of the resource would be provided for by custom and protocol. Notwithstanding this limitation, the right of use and control of their rivers rested with Te Ika Whenua. We therefore describe the "ownership" or property or proprietary right of Te Ika Whenua of or in their rivers as being the right of full and unrestricted use and control of the waters thereof – while they were within their rohe.¹⁰⁰

The Treaty itself changed matters, even as it guaranteed proprietary rights. The Tribunal found that Maori, through the Treaty, envisaged 'a sharing of those resources that were

94. Claimant counsel, opening submissions (paper 3.3.1), pp 10-11

95. George Habib, 'Whanganui River & the Ika Whenua Rivers', June 2012 (doc A69(d))

96. Waitangi Tribunal, *Te Ika Whenua Rivers Report* (Wellington: GP Publications, 1998), pp 135-136

97. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 84

98. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 121, 123

99. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 123

100. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 124

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essential for immigrants to settle and survive in a new land'. The Article 2 guarantee of exclusive possession 'had to be modified by a practicable accommodation by Maori to make the Treaty a living and workable document'.¹⁰¹ In agreement with the *Mohaka River Report* and *Manukau Report*, the Tribunal found that Maori acquiesced to the sharing of their water resources: 'while Te Ika Whenua were, and still are, entitled to a proprietary interest akin to ownership in the rivers and to the active protection thereof, they agreed to a sharing of that interest'.¹⁰² In the Tribunal's view, this did not reduce their rights of tino rangatiratanga, since hapu had customarily allowed access to others; rather, it enhanced it.¹⁰³ But it has reduced their proprietary interest. Nonetheless, the 'residue proprietary interest' remains and requires the utmost active protection of the Crown. Whether it is called a residual entitlement or a 'share under a partnership' (as found in *Tainui Maori Trust Board v Attorney General*), the result is the same.¹⁰⁴

The Tribunal was unable to define the 'finite limits' of the residual proprietary interest, which it felt was best left to negotiation between Maori and the Crown, but found that it must be 'substantial'.¹⁰⁵ The Tribunal agreed with the claimants that, while they had shared their rivers for non-commercial uses, it was 'quite unacceptable that commercial profit can be made from Te Ika Whenua's interest in the rivers without any form of compensation or payment'.¹⁰⁶ In particular, the Tribunal held that 'Te Ika Whenua are entitled to payment for the use of their interest in the rivers for power generation'.¹⁰⁷ While accepting the Court of Appeal's view in *Ika Whenua* that the Treaty did not envisage a Maori right of hydro power generation in 1840, the Tribunal found that there is a Treaty right of development, and that it includes the right to develop property – in this case, the Ika Whenua rivers – for hydro generation as for other new purposes not yet thought of in 1840.¹⁰⁸

Dr Habib commented:

The problem disclosed by this paper, and by the Ika Whenua Rivers Report, is the need for a law that provides more effectively for Maori proprietary interests in water bodies, like significant rivers, while providing as well for developments in the public interest and for the interests of other water users. The Tribunal recommended negotiations to that end.¹⁰⁹

101. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p124

102. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p127

103. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p125

104. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 126, 134

105. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p127

106. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 131-132; see also p 126

107. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p132

108. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 127-132, 137-138

109. Habib, 'Whanganui River & the Ika Whenua Rivers' (doc A69(d)), p14

(3) *The Whanganui River Report, 1999*

The *Whanganui River Report* is one of three Tribunal reports on which the claimants placed particular reliance. We agree that it is perhaps the most important Tribunal report ever published on the issues before us, so we summarise its findings as fully as possible within the brief space of this urgent report.

The *Whanganui River Report* deals with the largest navigable river in New Zealand. The river is held for its entire length by a single tribe, Te Atihaunui-a-Paparangi. It was of such central importance to the tribe that it had already been the subject of a long history of conflict, petitions, inquiries, and lengthy litigation in the Native Land Court and the superior courts, when the Tribunal heard the claim in 1994.¹¹⁰ The oral history of the claimants established clearly that the river was and is their taonga (treasured possession), absolutely central to their tribal identity, way of life, and wellbeing.¹¹¹

The Whanganui River Tribunal relied on the doctrine of native title, which it held to have been part of the imported common law from the beginning of the colony's existence. It examined relevant case law, noting the Privy Council's *Amodu Tijani* ruling in 1921 that native title was to be conceptualised in its own terms, and not in terms of English rules of law.¹¹² Thus, the Whanganui Maori did not own a dry bed in 1840, or at any time after. What they possessed was a taonga consisting of water, bed, banks, fisheries, plants, taniwha (supernatural guardians), and a mauri (life force). All this was theirs under native title, and therefore under the law of New Zealand, from the commencement of the colony in 1840.¹¹³

The Tribunal accepted that this customary relationship with the river was not conceptualised by Maori as an English-style ownership.¹¹⁴ The Crown argued that the common law would recognise it as nothing more than a non-exclusive use-right, and that any claim to own running water should be rejected. But the Whanganui River Tribunal disagreed, finding that ownership was the closest equivalent in English law. The tribe's right to possess the river, and to control and manage it, was guaranteed to them by the plain meaning of Article 2 of the Treaty, and by its principles, as well as by the law. While a 'quirk of English law' compartmentalised the components of a river system, and held that running water could not be owned, Maori law neither knew nor accepted such distinctions.¹¹⁵ The Tribunal stated categorically that possession 'is of itself at common law proof of ownership', quoting Hall J to that effect in the Canadian *Calder* decision.¹¹⁶ It concluded: 'In terms of both the general law and the Treaty, that which Maori possessed must be determined by that which

110. Waitangi Tribunal, *The Whanganui River Report* (Wellington: GP Publications, 1999), pp xviii, 3-5, 195-232

111. Waitangi Tribunal, *The Whanganui River Report*, pp 23-48, 55-79

112. *Amodu Tijani v Secretary, Southern Nigeria* (1921) 2 AC 399 (Waitangi Tribunal, *The Whanganui River Report*, pp 25-26, 231-232, 293)

113. Waitangi Tribunal, *The Whanganui River Report*, pp 23, 38-46, 50-51, 261, 337-338

114. Waitangi Tribunal, *The Whanganui River Report*, p 337

115. Waitangi Tribunal, *The Whanganui River Report*, pp xiii-xx, 261-269, 280-284, 290-294, 337-338

116. Waitangi Tribunal, *The Whanganui River Report*, p 293. The case cited is *Calder v Attorney-General of British Columbia* [1973] 34 DLR (3d), 145

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they possessed in fact, and not by reference to what may legally be possessed in England.¹¹⁷ And it found that what Maori possessed and owned was a water regime, an ancestral taonga, including possession and ownership of the water 'until it naturally escaped to the sea.'¹¹⁸

Furthermore, the Whanganui River Tribunal observed that exclusive ownership of a river (and in reality of its water) was possible even in England. This was because English law recognised that the beds of rivers can be owned privately, and that riparian owners can prevent access to the running water of their privately-owned river:

The issue, then, is not about the ownership of water but access to a private water resource. It was the full and exclusive use of the river, as a water resource, that was guaranteed to Atihaunui.¹¹⁹

Essentially, the property right protected in the Treaty was held to be the exclusive right to access and use the water: a tradeable right, in the Tribunal's view. Also, in the Tribunal's view, private property had been guaranteed in English law from at least the time of the Magna Carta. The private property of indigenous peoples had been guaranteed in the 'colonial common law' since the seventeenth century. The Treaty of Waitangi, with its guarantee of exclusive possession and full authority – until such time as owners chose to alienate their properties – was simply a guarantee that this law applied to Maori. The Tribunal was concerned that this not be seen as race-based privilege: it was nothing more or less than the protection of private property, a cornerstone of English law.¹²⁰ The Tribunal observed:

It is neither a privilege nor racist that a people should be able to retain what they have possessed. Property rights go to the heart of any just legal system.¹²¹

The Tribunal suggested that, had Parliament not intervened through the Coalmines Act Amendment Act 1903, nationalising the beds of navigable rivers, Te Atihaunui-a-Paparangi would still own their river in its entirety today. We need not discuss here the Tribunal's analysis of whether the *ad medium filum aquae* rule applied to alienations of riparian land before 1903, or the effects of the later Water and Soil Conservation Act 1967 or the RMA 1991. Suffice to say that the Tribunal recommended the Crown now recognise Te Atihaunui as the legal owners of their river, with compensation for past losses. Also, it recommended that effective control and management be vested in the tribe. Co- or joint-management arrangements, the Tribunal felt, would be a step down from the tribe's entitlement but perhaps acceptable if the tribe agreed.¹²² In a dissenting opinion on these points, one member of the Tribunal held that ownership of natural water, and sole authority to manage the river,

117. Waitangi Tribunal, *The Whanganui River Report*, p 291

118. Waitangi Tribunal, *The Whanganui River Report*, p 263

119. Waitangi Tribunal, *The Whanganui River Report*, p xv; see also pp 337-338

120. Waitangi Tribunal, *The Whanganui River Report*, pp xiii-xx, 329, 335-341

121. Waitangi Tribunal, *The Whanganui River Report*, p 339

122. Waitangi Tribunal, *The Whanganui River Report*, pp 342-344

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could not – in fairness to the public – be vested in Te Atihaunui today. He recommended joint Crown-Maori ownership of the riverbed, and that these owners have the same status as other landowners in the resource management regime.¹²³

There are two further aspects of the *Whanganui River Report* that we need to mention here.

The first is that it differed from previous reports on the question of whether Maori had, by virtue of agreeing to the Treaty, shared the use of their rivers. The Tribunal specifically disagreed with the Manukau report on this point, suggesting that the context of that contemporary inquiry was ‘a question of how competing interests at the time of the hearing could be reconciled’. The Whanganui River Tribunal’s view was that Maori interests in harbours, lakes or rivers could remain exclusive to a particular descent group, and that the Manukau Tribunal’s conclusion was unsustainable on the basis of further facts revealed in historical inquiries. The Tribunal added: ‘At least, it is unsustainable on the basis of the facts in this case.’¹²⁴ Historically, Maori did share the lower reaches of the river with the incoming settlers but on the basis that their authority to do so was not impaired. In acknowledging that the claimants do not seek to maintain exclusive possession today, the Tribunal commented: ‘that is their choice as we see it. Our concern is with their legal and Treaty rights.’¹²⁵

The second point is the Tribunal’s agreement with earlier reports that the Treaty right of development applied to rivers as to other properties. Maori could license others to use their water, since one aspect of their exclusive right and ‘property in the river’ was its value as a ‘tradable commodity’. The Tribunal added:

The right to develop and exploit a water resource is conceptually no different from a right to develop and exploit the resources on dry land.

If one owns a resource, it is only natural to assume that one can profit from that ownership. That is the way with property.¹²⁶

2.6.3 The Central North Island Report, 2008

The third report on which the claimants relied was the Tribunal’s stage one report on the Central North Island claims, *He Maunga Rongo*.¹²⁷ In this report, the Tribunal expressed its agreement with the *Whanganui River Report*:

Waters that are part of a water body such as a spring, lake, lagoon, or river were possessed by Maori. In Maori thought, the water could not be divided out, as the taonga would be meaningless without it. Our views on this matter are consistent with the *Whanganui*

123. Waitangi Tribunal, *The Whanganui River Report*, pp 345-348

124. Waitangi Tribunal, *The Whanganui River Report*, p 291

125. Waitangi Tribunal, *The Whanganui River Report*, p 338

126. Waitangi Tribunal, *The Whanganui River Report*, p 338

127. Claimant counsel, opening submissions (paper 3.3.1), p 11

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River Report ... We accept that where, on the evidence, Central North Island iwi and hapu can establish their waterways and geothermal resources to be taonga, the waters cannot be divided out and must be considered a component part of that taonga. The issue in relation to water is about the holistic nature of the resources in Maori custom and the relationships of the people with those resources. It is also about possession akin to ownership and the right to control access to the water.¹²⁸

This report was also of particular importance to many of the Council's co-claimants, whose geothermal claims included Tikitere, Ohaaki, and Tauhara. It is very difficult to summarise this report briefly. The Tribunal addressed claims about the many rivers and lakes of the central North Island, including Lake Taupo-nui-a-tia, and also the many geothermal resources of the region. Partly because of the limited utility of much of the region for farming, these natural resources (and the development opportunities that they represented) were central to the Tribunal's four-volume report. Also, in response to the Crown's request that it provide greater detail and specificity as to the Treaty right of development, the Tribunal provided a detailed analysis and findings on that matter (see vol 3, especially chapter 13).

For our purposes, given that freshwater bodies have been the main subject of findings in the reports discussed so far, it is most helpful to concentrate on the Central North Island Tribunal's findings about the geothermal resource. Before doing so, however, we note two points. First, claimant witness Tony Walzl emphasised the concessions that the Crown had made in that inquiry in respect of lakes and rivers,¹²⁹ which we think are worth quoting in full:

The Crown acknowledged the importance of Lake Taupo as a taonga to Ngati Tuwharetoa. It has agreed with all claimants, such as Ngati Tuwharetoa, that lakes and rivers are taonga, highly significant to Maori well-being and ways of life. The Crown has also accepted that the relationship between Maori and their taonga 'exists beyond mere ownership, use, or exclusive possession; it concerns personal and tribal identity, Maori authority and control, and the right to continuous access, subject to Maori cultural preferences'. In addition, it accepts the importance of water as a resource to both economic development and the tangata whenua. The parties, therefore, agree that the taonga were subject to Maori authority and control, that they were vital to the claimants' personal and tribal identity, and that Maori cultural preferences must be taken into account. This agreement between the parties is helpful.¹³⁰

128. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wellington: Legislation Direct, 2008), vol 4, pp 1251-1252

129. Tony Walzl, 'The Waterways of the Central North Island', 18 May 2012 (doc A45(a)), p 31

130. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1281

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Secondly, the waters of the lake were not included in this concession so the Tribunal examined the evidence and found that the water, as with the lake and its fisheries, was a taonga possessed by the claimants and over which they exercised tino rangatiratanga.¹³¹

For full details of the Tribunal's analysis of geothermal issues, the relevant chapters are chapter 13 (the Treaty right of development), chapter 16 (development opportunities in hydro and geothermal electricity), chapter 17 (the Crown's Treaty duties in respect of natural resources) and chapter 20 (an intensive analysis of issues with respect to geothermal resources). Dr Marian Mare, who commented on this report for the claimants' expert group, suggested that the most accessible route to the Tribunal's findings on the nature of the Maori interest in the geothermal resource is its own summary at the end of chapter 20,¹³² which is as follows:

The origins of Central North Island Maori customary rights to geothermal taonga

- ▶ The Central North Island Maori relationship with their geothermal taonga is an ancient one, as is evident in the significance right across the region of stories of the ancestor Ngatoroirangi, specialist navigator and priest of the Te Arawa waka who, in the course of his early explorations called for fire from Hawaiki, which was brought for him, his relatives, and his descendants.
- ▶ The stories show that Maori conceived the arrival of the geothermal waters and the heat and energy source as separate in time from the creation of the land.
- ▶ They show also the linkages between the three districts of our region (Rotorua, Taupo, Kaingaroa) converging via the 'geothermal passage' to Hawaiki, binding the geothermal resource and the people through whakapapa (genealogy).
- ▶ Though these are stories which go back many generations, they should not be thought of only as artefacts of a long-gone past. Nothing was clearer to us than the central importance of these stories down to the present, in the history and world-view of the peoples of the Central North Island, and their claim to the resource. Like many key Maori traditions, they also express a deep understanding and knowledge of the natural world – in this case of the nature and extent of the tvz [Taupo Volcanic Zone].

The nature of customary rights to the geothermal taonga at 1840 and since

Extensive evidence from many who gave evidence in this inquiry, and from early European accounts, makes it clear that:

- ▶ The geothermal resource of the Central North Island is a taonga of great cultural, spiritual, and economic importance, protected by the Treaty of Waitangi.

131. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1286

132. Marian Mare, 'Once Was Water: a Geothermal Perspective, including case studies of Tikitere, Rotokawa, Ohaaki, and Tauhara', 18 May 2012 (doc A61(a)), pp 2-3

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- ▶ The hapu and iwi of the Central North Island exercised rangatiratanga over the resource through customary tenure and law, based on their deep knowledge and understanding of the resource over many generations.
- ▶ As at 1840 Central North Island Maori held customary title to all land in their region, and to all its geothermal resources.
- ▶ Their rights were at three levels: 1) to the geothermal surface features and resources (the principal holders of rights are the particular hapu or iwi associated with the land and surface features); 2) to the fields (the principal holders of rights are the particular hapu or iwi associated with the fields); and 3) to the subterranean resource (TVZ) system itself, shared by all hapu/iwi by virtue of their common history, whakapapa and reliance on the discovery of the resource by the ancestor Ngatoroirangi.
- ▶ In legal and Treaty terms Maori customary rights to the fields and the TVZ were retained.
- ▶ Where customary ownership of land has been modified by the issue of freehold title, the exclusive right of hapu and iwi to control access to resources was modified, in that it became the responsibility of individual Maori owners; but all other aspects of their customary rights and Treaty interests remained because the Maori landowners continued to act in accordance with tikanga and custom.
- ▶ Moreover, Central North Island hapu/iwi have retained sufficient Maori land in and around geothermal features and resources to establish that they have never relinquished their rangatiratanga over the TVZ; even though in some cases alienation of the land has meant that the right to control access has gone.¹³³

While we do not intend to discuss Treaty breaches at this stage of our inquiry, we note the Tribunal's finding that the Treaty required the Crown to acknowledge and protect Maori rights in the subterranean part of the resource, the 'underlying heat, energy, and water system which was clearly part of their taonga because that was, and is, its essential characteristic and the source of its value to Maori'.¹³⁴ Instead, the Crown appropriated their property and the development rights in it. Maori nonetheless retain their customary title (and always will while Ngatoroirangi's underground resource persists). In that respect, the Tribunal's findings were distinguished from those of the Ngawha Tribunal, which had not found that Ngapuhi hapu 'owned' the subsurface geothermal field once the land (with surface features) was sold, although they had retained sufficient surface features to have maintained a 'substantial interest' in it.¹³⁵ The facts before the Central North Island Tribunal were different, with multiple geothermal fields and a common underlying heat system, the TVZ, in which customary rights remained intact despite land sales.¹³⁶ The Tribunal found: 'There is still

133. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1633-1634

134. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1634

135. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1558-1562

136. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1558-1562

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an obligation today for the Crown to compensate Maori for the use [to generate power] of their proprietary interests in the geothermal subsurface resource [the TVZ].¹³⁷ It recommended that the Crown should recognise Maori title, that royalties (for the use of the geothermal resource) should accrue to Maori or be shared with them, that surface features in Crown ownership should be returned to them where possible, and that their rangatiratanga should be given effect by means of management partnerships with local councils.¹³⁸

There is not space in this urgent report for an in-depth consideration of the Central North Island Tribunal's exposition of the Maori right to development. In brief, it was found that Maori had the right to develop as a people and to develop their properties.¹³⁹ This included two aspects of great relevance to our inquiry, in respect of the use of Maori taonga to generate electricity, and the opportunity created for Maori by the Crown's intention to give up its sole ownership of the power-generating SOEs. These two aspects were:

- ▶ the 'right to develop or profit from resources in which they have (and retain) a proprietary interest under Maori custom, even where the nature of that property right is not necessarily recognised in, or has no equivalent in, English law'; and
- ▶ the 'opportunity, after considering the relevant criteria, for Maori to participate in the development of Crown-owned or Crown-controlled property or resources or industries in their rohe, and to participate at all levels (such criteria include the existence of a customary right or an analogy to a customary right, the use of tribal taonga, and the need to redress past breaches or fulfil the promise of mutual benefit).'¹⁴⁰

We will return to these points later in the chapter when we consider the Crown's Treaty duties in respect of the present claim.

2.6.4 The Wai 262 Report, 2011

The 'Wai 262 claim' is the short title for the 'Indigenous Flora and Fauna and Maori Cultural and Intellectual Property claim'. The Tribunal's comprehensive, whole-of-government report was designed to address all issues regarding modern government's Treaty responsibilities in respect of matauranga Maori and kaitiakitanga. These vast topics were considered in terms of taonga works and intellectual property regimes, environmental management (including management of the Conservation Estate), te reo Maori, cultural treasures, New Zealand's mode of entering into international agreements, and other relevant topics. We

137. Waitangi Tribunal, *He Maunga Rongo*, vol 3, p 1195

138. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1636

139. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1666-1667

140. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1667

think the report shows a way forward for Maori and the Crown in respect of many key areas for the Treaty partnership in the twenty-first century.¹⁴¹

We do not intend to provide a description of relevant findings here, other than to commend this report to as wide a readership as possible. The Crown did not contest or even address the findings of the reports described above, although it noted their existence as part of its argument that Maori water claims have been around for a long time and so would have already affected the electricity market if they were going to do so. The Wai 262 report, however, was a key point of debate between the parties. We will therefore deal with it in our main analysis section (below) rather than describing its findings in summary form here.

2.7 THE CLAIMANTS' EVIDENCE

The claimants and the interested parties provided us with three forms of evidence: oral evidence from tribal leaders and representatives at the hearing; written case example evidence compiled by a mix of tribal authorities and professional witnesses (filed early in the proceedings in May 2012); and reports or briefs of evidence from technical witnesses (the claimants' expert group and the two technical witnesses called by the interested parties, Dr Ganesh Nana and Dr Jane Kelsey). The Crown called evidence from officials of the Treasury, the Office of Treaty Settlements, the Ministry of Foreign Affairs and Trade, and the Ministry for the Environment, as well as electricity industry consultant Lee Wilson. None of the Crown's evidence, however, addressed question (a) of our statement of issues, which is the subject of this chapter. As noted in our summary of the Crown's case above, the Crown preferred to rely mainly on the claimants' evidence and the Tribunal's Wai 262 report to support its submissions on question (a). For that reason, this section sets out the claimants' and interested parties' evidence for question (a) but no Crown evidence. In order to meet the timeframe of this urgent report, we note that our recitation and exploration of this evidence will not be as full as would otherwise have been the case, but we are of the view that we are sufficiently informed to reach a conclusive view on the issue.

2.7.1 'Indicia of ownership'

In his evidence for the claimants, Mr Tony Walzl summarised how Maori claims to water bodies are evaluated or 'proven' in the Tribunal:

¹⁴¹ Waitangi Tribunal, *Ko Aotearoa Tenei: a Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity*, 3 vols (Wellington: Legislation Direct, 2011). The report consists of an overview volume, *Te Taumata Tuatahi*, and two volumes containing the detailed analysis and findings, *Te Taumata Tuarua*. The volume of the report cited by the Crown in this inquiry is *Te Taumata Tuarua*, vol.1.

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In assessing whether a waterway was a taonga to any particular group, the Tribunal took into account the intensity of the Maori association with the waterway including the originating ancestral relationship and the ongoing cultural and spiritual relationship with the waterway; the use of resources associated with the waterway; the exercising of control and authority over the resources; and the fulfilment of obligations to conserve, nurture and protect the waterway. Within this test, Lake Taupo and other waterways of the Central North Island hearing district were shown to be taonga. As taonga were created by tupuna as living beings for their descendants, they were viewed as indivisible entities. Water was an integral component of these taonga which had been put into the possession of an iwi or hapu. As the Tribunal has noted, in Maori terms, the taonga would be meaningless without water.¹⁴²

We accept Mr Walzl's evaluation of how customary rights are demonstrated and taken as proofs of 'ownership'. Conscious of the need to translate Maori culture and law so that it may be accommodated by the state's law, the claimants chose to structure their claim around a series of such 'proofs' or 'indicia' of ownership. As claimant counsel put it:

From these past Tribunal and Court decisions [see above] and from the surrounding academic work, it is possible to identify a number of indicia of proprietary interests – factors that have been cited as demonstrating the existence of such an interest. It is submitted that the case examples filed by the Claimants evidence the existence of these same indicia. This supports the conclusions that the findings that have been made in relation to such resources as Lake Omapere, and the Whanganui and Ika Whenua rivers are more broadly applicable.¹⁴³

Because of the urgency of this inquiry we only received oral evidence for some of the case examples. Additional examples were put to us in a range of written evidence from interested parties. We received more case example evidence about some kinds of water resource than others. The claimants' expert group also provided general evidence across a range of examples. For these reasons, we have decided not to analyse the evidence on a case-by-case basis. With reference to this body of evidence, we will instead examine each of the indicia of ownership in the order in which they were put to us by the claimants.

We begin with the importance of water resources as a source of food, textiles and other vital materials, and as highways for travel or trade. These first points establish the physical importance of water bodies to the tribes. In their report for the claimants, Professor Hohepa and Dr Habib commented:

In those early days, New Zealand was as much a land of water as it was of dry land. The dry land comprised mainly the higher land – the ranges and mountains and hills and ridges on which grew the dense and some would say forbidding indigenous forests. In between

142. Walzl, 'The Waterways of the Central North Island' (doc A45(a)), p 31

143. Claimant counsel, opening submissions (paper 3.3.1), p 11

the higher lands were vast areas of swamp that those Maori ancestors saw as huge resource areas because they contained plants like flax and raupo and lowland forest trees (e.g. kahikatea) building and weaving materials, and a huge abundance of fish and birdlife for food. Just as important was the fact that the swamp lands interlinked with connecting rivers and streams represented aquatic highways over which they could pass on their extensive canoe and foot journeys across the country. To get past natural barriers such as coastal mountain ranges and dense coastal forest, or to get to offshore islands, the early Maori explorers made short sea voyages. Through all of this journeying and exploring, food was readily to hand in the form of eels and water birds in the inland waterways, and the fish and shellfish in the sea.¹⁴⁴

Later 'indicia' relate more to the exercise of authority and to the metaphysical dimension of the resource, and to how Maori traditionally (and today) relate to their taonga. For these indicia, we had the whakapapa, histories and kaitiaki obligations explained to us by the learned people of their tribes. We agree with the Wai 262 Tribunal that whether a resource is a taonga is a matter capable of proof:

Whether a resource or a place is a taonga can be tested ... Taonga have mātauranga Māori relating to them, and whakapapa that can be recited by tohunga. Certain iwi or hapū will say that they are kaitiaki. Their tohunga will be able to say what events in the history of the community led to that kaitiaki status and what obligations this creates for them. In sum, a taonga will have kōrero tuku iho (a body of inherited knowledge) associated with them, the existence and credibility of which can be tested.¹⁴⁵

(1) *The water resource has been relied upon as a source of food*

It would be difficult to overestimate the importance of water resources to the survival of pre-contact Maori. We heard much evidence about the traditional reliance upon water bodies as sources of food. As Ms Te Hira Huata described in her evidence for Ngati Rahungai-te-rangi, a hapu of Ngati Kahungunu, the rich wetlands of Heretaunga were the main source of food for her people in pre-contact times. The 11,726-acre wetland next to her home at Bridge Pa had once fed the community with its abundant waterfowl, eels, freshwater crayfish, kokopu, and other fish, until it was drained by settlers in the 1860s.¹⁴⁶ All of the other freshwater bodies were referred to in oral histories as important sources of food. The Kaituna River, for example, was described as a food cupboard for its people.¹⁴⁷

It should not be supposed, however, that reliance on the waters for the physical sustenance of the people is a matter of the past. In the evidence of Barbara Marsh for the interested

144. Patu Hohepa and George Habib, 'Maori Terminology and Water', June 2012 (doc A69(i)), p

145. Waitangi Tribunal, *Ko Aotearoa Tenei*, Te Taumata Tuarua, vol1, p 269

146. Matatewharemata Te Hira Huata, 'Te Haukunui o Heretaunga', May 2012 (doc A58(a)), pp1, 5

147. Maanu Wihapi, oral evidence, 9 July 2012, Draft Transcript, pp 45-46

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parties, whanau still have their particular pa tuna (eel weirs) along the Mokau and Mokauiti Rivers, each of them named and 'handed down through the generations'. Commercial development has destroyed some pa tuna and damaged the eels' habitat, and eeling has had to be suspended in recent times to protect the resource.¹⁴⁸ Many Maori communities regularly supplement other food sources with kai from their streams, rivers or lakes so far as they still can, while for all Maori communities the ability to feed their manuhiri (guests) with the food for which they are renowned is important to their mana. Ms Hira Huata told us of how Bridge Pa's kai rangatira ('chiefly food'), a species of eel, once lived in the now dry Karewarewa stream.¹⁴⁹ And with loss of traditional foods (because of the deterioration of waterways) comes loss of matauranga Maori, of the old knowledge and the old ways. Nuki Aldridge explained how the foods and uses of Lake Omapere were being forgotten by his people because of the long period in which the lake was choked with weed and algal bloom.¹⁵⁰ Also important for the purposes of this claim, Ms Georgina Whata-Wickliffe suggested that the physical reliance of the tribes on waterways that could no longer feed them should, in the face of modern realities, be given a modern expression. Four generations ago, she told us, her people had controlled their rivers and supported themselves from the rivers, but now they had no control and received no benefit from them; one answer, she suggested, was for Maori to get a new benefit in the form of revenue generated by activities on their rivers.¹⁵¹

(2) *The water resource has been relied upon as a source of textiles or other materials*

Again, the witnesses in our inquiry explained that their freshwater resources were vital to everyday life and survival traditionally, because they made an important contribution to the means of housing, clothing, and healing the people. The coast and inland waterways were primary sites of location, partly for that very reason.¹⁵² Wetlands were particularly important in this respect. Forest resources probably outweighed those of waterways other than wetlands for building and weaving materials, although the water bodies were still important sources of such materials.¹⁵³ Raupo and flax were gathered from the fringes of Lake Omapere, for example, for thatching houses and for weaving.¹⁵⁴ Plants for medicines (rongoa) and dyes have also been obtained from the waterways. Pia Callaghan and David Whata-Wickliffe referred to evidence about the Kaituna River in 1984, when the weaver Emily Schuster explained the special value and importance of the plants that grow along its

148. Barbara Marsh, brief of evidence, 18 March 2012 (doc A50), pp 5, 9, 11

149. Matatewharemata Te Hira Huata, oral evidence, 9 July 2012, Draft Transcript, p 78

150. Nuki Aldridge, oral evidence, 9 July 2012, Draft Transcript, p 32

151. Georgina Whata-Wickliffe, oral evidence, 9 July 2012, Draft Transcript, pp 52, 57

152. Hohepa and Habib, 'Maori Terminology and Water' (doc A69(i)), p 22

153. Hohepa and Habib, 'Maori Terminology and Water' (doc A69(i)), p 36

154. Alexander, 'Lake Omapere case study' (doc A57(a)), p 7

banks for weaving and dyeing, especially kiekie.¹⁵⁵ Mr Jordan Winiata, too, told us how the rivers of Mokai Patea provided materials for the weaving of korowai and ‘for the people to ensure our survival’.¹⁵⁶

In Ms Wara’s submission for the interested parties, these uses of material from the waterways are an ‘indicator of ownership’ in customary terms.¹⁵⁷

(3) *The water resource has been relied upon for travel or trade*

Both before and after European settlement, Maori relied on their waterways for travel, transport, and trade. There was an extensive trade in the specialities of one area (customary foods and resources) with another, and waterways were highways that enabled it. According to Professor Hohepa and Dr Habib, this demonstrates the importance of rivers and waterways in the life of the tribe; without them, parts of the country would simply have been impenetrable and the tribes much the poorer for it.¹⁵⁸

(4) *The water resource has been used in the rituals central to the spiritual life of the hapu*

Many witnesses referred to the use of water and of water bodies in rituals that were and are central to their spiritual life. Professor Hohepa explained:

Water has two powerful links; firstly, it was used to remove tapu from and avert danger to warriors and others. Tapu of the dead was the most dangerous, and many cemeteries still have that procedure, using buckets and plastic bottles filled with water when streams are distant or running dry; and secondly, tapu would also add tapu qualities to recipients. With Tohi – dedication or baptism of child for a specific calling – where water was sprinkled over the child with a sprig or small branch, was widely practised.¹⁵⁹

In the evidence of Mr Turama Hawira:

My teachings at Tuhiariki came from my paternal grandmother who was taught in the Whare Wananga as well as from historical korero of my pahake Toma Hawira (my paternal grandfather’s brother).

Intrinsic to the customary rituals we were taught was the use of particular wai. The wai immediately down the front of the homestead is where, as children, we were taken to. Often in the hours of the early morning, the family would gather and karakia would be performed. Preceding this ritual there was often dialogue between the paheke, with Nanny Mine, attentively listening and then giving instruction. I came to realise that the cause of us going to the

155. Pia Callaghan and David Whata-Wickliffe, ‘Kaituna River’, May 2012 (doc A68(a)), pp 5-6

156. Jordan Haines-Winiata, oral evidence, 12 July 2012, Draft Transcript, p 404

157. Counsel for the interested parties (Wara), oral submissions, 12 July 2012, Draft Transcript, p 598

158. See, for example, Hohepa and Habib, ‘Maori Terminology and Water’ (doc A69(i)), pp 2, 7, 13, 16

159. Hohepa and Habib, ‘Maori Terminology and Water’ (doc A69(i)), p 27

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wai, was often when a whanau member had transgressed tapu or was suffering an affliction that could not be remedied by the Pakeha doctor.

In my generation it is still a norm to go to the wai at home. When whanau members located away from home are sick, wai is collected and taken to them. When venturing outside the tribal rohe, we go to the wai to pray for safe travel, and upon return, we stop again at the wai to acknowledge our safe return. When burdened by a task, such as the Tribunal mahi, we take it to the wai.

This customary practice in its original form is known as ‘Whakapiki Mauriora.’¹⁶⁰

Witnesses explained that rivers and other water bodies had many waahi tapu, including burial sites, on their banks or in the waters. Special sites were used for rongoa (healing) or to prepare the dead for burial. As a result, some places were never used for drinking water, swimming, or the gathering of food. Mr Minhinnick told us that the Waikato River has many such places, and also many places where it is safe to drink or take kai (supposing the waters are not contaminated by development).¹⁶¹

(5) *The water resource has a mauri (life force)*

Associated with the metaphysical aspect of water bodies is their mauri, their life force. All of the Maori witnesses who appeared before us referred to the mauri of their waters. If not respected and cared for, mauri can lose its vitality and the kaitiaki suffer with it. Mr Aldridge, Ms Toi Maihi, Dr Yates-Smith, and Ms Huata all spoke of the harm to their people that comes from the pollution, degradation, or even interference with their waters. Mr Waho and Mr Minhinnick told us of the grief felt by their hapu when the waters of rivers are diverted and artificially mixed with those of another, thus harming the unique mauri of each. In response to a question from the Tribunal, as to whether his river was still alive with so many dams on it, Mr Cairns responded:

I believe I hold the life force, I hold the authority but the life or the death of that section of the river is not in my hands, it has gone into the hands of those that build things on that section of the river where my inherited authority should lie and does lie. That is the very nature of legislating from outside over the top of another.¹⁶²

Mr Cairns explained the link between kaitiaki and mauri:

As kaitiaki of the Waikato river (or the section in their domain), the Pouakani people have an obligation to maintain the mauri of the river. The mauri is the life force of the river. This includes taking care of the physical and spiritual health of the river.

160. Turama Thomas Hawira, brief of evidence for the Whanganui district inquiry (doc B28), pp 8-9

161. Roimata Minhinnick, oral evidence, 10 July 2012, Draft Transcript, pp 102-103

162. Tamati Cairns, oral evidence, 11 July 2012, Draft Transcript, pp 318-319

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By maintaining the mauri of the river, the Pouakani people enhance their own mana as kaitiaki and are connected to the mauri of the river itself.¹⁶³

As with so many other matters in connection with water bodies, maintaining their mauri has physical and metaphysical dimensions. For the Pouakani people, the physical dimension meant the responsible use of the river and its resources: collecting (and enhancing) supplies of food and other resources sustainably 'to ensure that it would remain for future generations'.¹⁶⁴ On the spiritual side, a key aspect of maintaining the mauri of the river was 'ensuring that the tikanga that applied to the river was followed'. Some places were used for karakia, some for gathering kai, and some for washing. These were kept strictly separate to preserve the tapu or noa states of those activities 'and the areas in which they were practised'. Tohunga regulated these activities and the places they were performed. Thus was the mauri of the river maintained.¹⁶⁵

(6) *The water resource is celebrated or referred to in waiata*

In their report for the claimants' expert group, Professor Hohepa and Dr Habib quoted Hauraki kaumatua, the late Tai Turoa:

The Hauraki people have long regarded the Waihou River with great reverence and refer to it often in oratory and song. Most of the tribal settlements were situated along its banks because of its food resources and it was used frequently as a means of communication between various local tribal sections ...¹⁶⁶

Waiata or song is therefore one of the claimants' key 'indicia of ownership'; the others mentioned by Mr Turoa in this quotation also figure in this section of our chapter.

Dr Mare reproduced part of a famous waiata, 'Ka eke ki Wairaka', in her evidence about geothermal resources. This waiata tells the history of the creation of the resource:

Kati au ka hoki ki taku whenua tipu
Ki te wai koropupu i heria mai nei
I Hawaiki ra ano e Ngatoro-i-rangi,
E ona tuahine, Te Hoata-u-Te Pupū;
E Hu ra i Tongariro, ka mahana i taku kiri.

But now I return to my native land;
To the boiling pools there, which were brought
From the distant Hawaiki by Ngatoroirangi,

163. Tuahuroa Tamati Cairns, brief of evidence (High Court, 2009) (doc A99), p 8

164. Tuahuroa Tamati Cairns, brief of evidence (doc A99), p 8

165. Tuahuroa Tamati Cairns, brief of evidence (doc A99), p 9

166. Hohepa and Habib, 'Maori Terminology and Water' (doc A69(i), p 39

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And his sisters Te Hoata and Te Pupu,
To fume up there on Tongariro, giving warmth to my body.¹⁶⁷

We heard many waiata sung at our hearing in support of the evidence that had been given. Toni Waho of Ngati Rangi and his whanau, for example, sang the famous lullaby ‘He Oriori mo Wharau-rangi’, an ancient waiata naming the rivers of the west coast of the North Island from Taranaki south. This waiata was composed by Te Rangi-Takoru. We will not reproduce it here but it is to be found in *Nga Moteatea*.

We did not only hear traditional waiata. Dr Yates-Smith composed a waiata especially for the occasion, calling upon tauiwi to take responsibility for past actions of the Crown and put matters to rights for her taonga, the springs of her ancestors Pekehaua and Hinerua:

Ngau kino mai te hau mate o te ao
Aue taukuri e te mamae hoki ra e
Haehaetia ana te tinana o te Ukaipo
Aue tauiwi e me whakatika ra a te Karauna he
Kia tau ai te rongo-a-whare, te rongo-a-marae
ki runga i nga reanga me te whenua o Aotearoa nei e
Ko nga wai puna a Pekehaua, a Hinerua¹⁶⁸

[The winds of sickness of the world do their terrible work
Alas, this pain within me
The body of the nurturing earth mother has been cut up
Rise up all non-Maori, come and sort out the Crown’s misdeeds
So we may have peace in our houses, peace on our marae
On future generations of Aotearoa
For these are the springs
Of Pekehaua and Hinerua.

Waiata thus show the importance and ongoing nature of the Maori relationship with their taonga.

(7) *The water resource is celebrated or referred to in tribal proverbs (whakatauki and pepeha)*

Water bodies are crucial to tribal identity, so much so that it is sometimes said not only that ‘the river belongs to the people and the people belong to the river’ but also, more fundamentally, ‘Ko au te awa, ko te awa ko au: I am the river, the river is me.’ It need not be a large and mighty water course like the Whanganui River to be fundamental to the mana and

167. Marian Mare, ‘Once Was Water: a Geothermal Perspective, including case studies of Tikitere, Rotokawa, Ohaaki, and Tauhara’ (doc A61(a)), p 10

168. Aroha Yates-Smith, brief of evidence, 13 July 2012 (doc B16), p 1

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the identity of hapu. Mr Taipari Munro said of the relationship of his hapu, Te Uriroroi, Te Parawhau, and Te Mahurehure, and the Waipao Stream: ‘the waters of Waipao are us and we are the waters of Waipao.’¹⁶⁹

At the beginning of his ceremonial greeting to the Tribunal, Anthony Wihapi introduced himself in the usual way: ‘Rangiuru is the mountain. The river is Kaituna. Tapuika is the tribe. Te Arawa is the canoe.’¹⁷⁰ Again, it is not only large water bodies that are the focal point of identity. Te Mimi o Pekehaua is a stream of great importance to its local people. Dr Aroha Yates-Smith of Ngati Rangiwewehi introduced herself thus:

Ko Tiheia te maunga
Ko te Mimi o Pekehaua te awa
Ko Tawakeheimoa te tangata
Ko Tarimano te marae
Ko Tawakeheimoa te whareahuru, te pouwhirinaki o te iwi
Ko Te Aongahoro te kuia whangai i te iwi
Ko Aroha Yates-Smith, he tamahine na Ngarua raua ko Monehu, e mihi atu nei ki a koutou ...¹⁷¹

[The mountain is Tiheia
The river is Te Mimi o Pekehauā
The person is Tawakeheimoa
The marae is Tarimano
Tawakeheimoa is the meeting house, the secure leaning post of the people
The dining hall is Te Aongahoro she the elder who feeds the people
I am Aroha Yates-Smith, a daughter of Ngarua and Monehu, standing to greet you ...]

In their report for the claimants’ expert group, Professor Hohepa and Dr Habib explained that Maori commonly ‘link themselves with mountain, water, ancestral canoe, and group name as tribal proverbial markers.’¹⁷² Using the name of a river or other water body to invoke identity comes from long and deep association with a particular taonga, based not only on the physical importance of the taonga to the sustenance and economic life of the people but also its metaphysical significance to the tribe, often as an ancestor and living being.¹⁷³ In her opening submissions for the interested parties, Ms Sykes noted that the response to the question ‘Ko wai au – who are you?’ might not be a personal name but that of a mountain or river, so important are they to Maori identity.¹⁷⁴

169. Taipari Munro, oral evidence, 9 July 2012, Draft Transcript, p 13

170. Anthony Wihapi, oral evidence, 9 July 2012, Draft Transcript, p 34

171. Aroha Yates-Smith, brief of evidence, 13 July 2012 (doc B16), pp 1-2

172. Patu Hohepa and George Habib, ‘Maori Terminology and Water’, June 2012 (doc A69(i)), p 32

173. Hohepa and Habib, ‘Maori Terminology and Water’ (doc A69(i)), p 22

174. Counsel for interested parties (Sykes), oral submissions, 12 July 2012, Draft Transcript, pp 567-568

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Tribal maxims such as these are never simply a form of words. In evidence placed on the Record by Ms Sykes for the interested parties, Mr Turama Hawira of Ngati Rangi told the Whanganui Tribunal that ‘the health and state of our awa is intrinsically reflected in the health and state of our people. The relationship between the awa and its iwi is a symbiotic relationship.’¹⁷⁵ He went on to say:

It was with huge sadness that we observed dead tuna and trout along the banks of our awa tupua. The only thing that is in a state of growth is the algae and slime. Our river is stagnant and dying.

‘E rere kau mai te awa nui mai i Te Kahui Maunga ki Tangaroa. Ko au te awa, ko te awa ko au. [The great river flows from the Mountains to the Sea. I am the river, the river is me.] If I am the river and the river is me – then, emphatically, I am dying.’¹⁷⁶

Mr Nuki Aldridge of Ngapuhi explained the impact on his people when the mauri of Lake Omapere was dying as a result of the growth of weed and algal bloom. Mr Aldridge told us that ‘when the treasure dies, the spirit dies, and the spirit dies the body dies, and that is how it runs. It was like that, the cry of the people, all of the community cried out. It welled up, the protest to fix it and it is getting better.’¹⁷⁷

Kaitiakitanga thus has deep roots in the relationship between iwi and taonga, which is fundamental to identity, to cultural wellbeing, and to the very life of the tribe.

(8) *The people have identified taniwha as residing in the water resource*

Every Maori witness who appeared before us spoke of the taniwha or spirit guardians of their water bodies or of their interconnected water systems. Toi Maihi told us of Mapere, who shed a fiery fingernail which heats the geothermal springs at Ngawha. Another of his fingernails formed Lake Omapere. Then there is Takauere, the taniwha of the ‘fresh waters of Tai Tokerau’, whose eye is at Ngawha and whose body connects the many waters of the region. The closeness of eye and brain, she told us, ‘enables us to understand how important the Ngawha area is to the health of the whole water system that is represented by Takauere.’¹⁷⁸ Some taniwha were feared. Mr Wihapi told us of a taniwha named Mapu whose lair on the Kaituna River had dark waters and large whirlpools, and who ate unwary travellers. After he was persuaded to leave, a ‘dark aura’ remained on that part of the river; in 1982, local authorities widened the river and destroyed this waahi tapu, a matter of great grief to Tapuika.¹⁷⁹ Taniwha are also ancestors: Dr Yates-Smith told us that she is a descendant of

175. Turama Thomas Hawira, brief of evidence for Ngati Rangi regarding water issues in the Whanganui district inquiry, 16 February 2009 (doc B28), p 10

176. Turama Thomas Hawira, brief of evidence for the Whanganui district inquiry (doc B28), p 11

177. Nuki Aldridge, oral evidence, 9 July 2012, Draft Transcript, p 31

178. Toi Maihi, written notes of oral presentation, 9 July 2012 (doc B1)

179. Anthony Wihapi, oral evidence, 9 July 2012, Draft Transcript, p 39

Pekehaua and Hinerua, the taniwha associated with the springs that are of so much importance to Ngati Rangiwewehi (now called Taniwha and Hamurana Springs).¹⁸⁰

But why are taniwha ‘indicia of ownership’? Mrs Nganeko Minhinnick, in her evidence for Ngati Te Ata, explained:

Taniwha personified kaitiaki; they enshrined our beliefs; strengthened our resolve; supported our plight; exercised kaitiakitanga and embodied the mauri of our waters. Not only do they represent mana and kaitiakitanga of our waters, each taniwha has its own mana, unique, exercising kaitiakitanga in their own equally different ways. They have their own names, names which our people gave them reflecting their character and disposition, one taniwha tupuna aptly born with his name, Kaiwhare. They had their own places of abode and boundaries where they patrolled. The places where they patrolled were akin to reflecting their people’s rohe.¹⁸¹

Taniwha, Mr Roimata Minhinnick confirmed, are proof of ownership:

The taniwha is named. That reinforces, establishes. Once known, the guardianship of the iwi and hapu on the water is known. The name is known and the rights become established permanently to that water, they own it, that stretch of water.¹⁸²

(9) *The people have exercised kaitiakitanga over the water resource*

Today, some Maori leaders have combined the roles of legal trustee and kaitiaki. Mr Munro explained to us how the kaitiakitanga of Poroti Springs in Northland had been handed down from generation to generation, and how European legal processes have been used (and can be used further) as part and parcel of kaitiakitanga. He told us how the ‘court-appointed trustees’ of the land block in which Poroti Springs are contained are also kaitiaki of the springs in a long line of kaitiaki: ‘we have inherited the role of kaitiaki from a long time ago from a long line of traditional guardians before us.’¹⁸³ Their ‘guardianship’ of land and springs was first ‘formalised’ in this way in the 1890s, when their tupuna created a legal reserve and sought the protection of the law for the springs that were of such importance to all of Ngapuhi.¹⁸⁴ Before 1895, rahui and tapu were the sole forms of management but after the creation of the reserve, the trustees were able to deal with those who sought to use their water from a position of legal strength – at least, Mr Munro told us, until the 1960s and the Water and Soil Conservation legislation.¹⁸⁵

180. Aroha Yates-Smith, oral evidence, 9 July 2012, Draft Transcript, p 64

181. Nganeko Minhinnick, brief of evidence, 18 April 2012 (doc A42), pp 4-5

182. Roimata Minhinnick, oral evidence, 10 July 2012, Draft Transcript, p 94

183. Taipari Munro, oral evidence, 9 July 2012, Draft Transcript, pp 8-9

184. Taipari Munro, oral evidence, 9 July 2012, Draft Transcript, p 9

185. Taipari Munro, oral evidence, 9 July 2012, Draft Transcript, p 10

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With a significant increase of private water uses in the 1970s, especially of the Waipao Stream that feeds the springs, the Poroti Springs dried up in the early 1980s. The result was a ‘furore’ and the kaitiaki called all the people home, held hui, and launched litigation which eventually succeeded in restoring some of the water volume to the springs. Ms Meryl Carter told us that the home people have since begun a community education programme in local schools (and through them to parents) about the importance and value of the springs to the tribe. They have also inaugurated community restoration programmes to replant the riparian strips of the Waipao and also to get funding for farmers to fence the stream (thus protecting it from stock effluent). Although the local people are not wealthy, they have participated in difficult and expensive RMA processes since the 1990s, and have been ‘proactive in every single resource consent to take water and effluent discharge consent’. Frequent, expensive Environment Court battles ensued. They often lose. This is kaitiakitanga in action.¹⁸⁶

Mr Munro concluded his korero by referring to a whakatauki expressed earlier in the hearing by Mr Maanu Paul:

if I can reach out and grasp the words that were spoken by Maanu when he said that the water is me and I am the water. That’s the same expression that we want to express to yourselves as well, as the waters of Waipao are us and we are the waters of Waipao.

We have been – we were charged with the responsibility from our parents, our grandparents and our tupuna to look after that water and it’s been very hard for us to have to go through processes that disenfranchise us, where we are more like flies on the wall and we are not a part of the process or the decision making. The question is asked, “What is it that you want?” And our answer is that we want the right to talk about our water. We want to sit at the decision-making table. We don’t want to be like flies on the wall that nobody takes any notice of. The Whatitiri Māori Reserves Trust seeks to establish ownership of the Springs. The Whatitiri Māori Reserves trustees wish to reassert control over the springs to more effectively manage the use of the springs and to better use the water for the benefit of the owners of the springs but, as Meryl pointed out, we are also happy to share the water of Waipao. That’s been the way of our old people. Our grandparents and our parents shared the water of Waipao and we are prepared to do that, and that includes ensuring that the use of the water is for high value uses and not low value agricultural, horticultural and stock uses, and [also] obtaining recompense for the use of the water.¹⁸⁷

In making his final comment – ‘and obtaining recompense for the use of the water’ – Mr Munro demonstrated that kaitiakitanga is not inconsistent with use of (and benefit from, including financial benefit) the taonga. He told us in his evidence of how earlier trustees had sought and obtained payment for water extraction before the Water and Soil Conservation

186. Meryl Carter, oral evidence, 9 July 2012, Draft Transcript, pp 11-12.

187. Taipari Munro, oral evidence, 9 July 2012, Draft Transcript, p 13

Act of 1967 vested such rights in the Crown.¹⁸⁸ This is one example of many where the claimants demonstrated ongoing kaitiakitanga.

(10) *The people have exercised mana or rangatiratanga over the water resource*

Many witnesses expressed the authority of tribes over territory and over water, and also described the many aspects of mana, which can be personal as well as expressive of authority over a place, people, or taonga. We refer to Mr Roimata Minhinnick's evidence for Ngati Te Ata as an example. Mr Minhinnick told us that his people – and Maori generally – have rights of te tino rangatiratanga, kaitiakitanga and mana in respect of water. He translated rangatiratanga and mana as tribal 'authority and control', which included the kaitiaki obligation to care for the resource and the people. There was no doubting, he said, that Ngati Te Ata had had full authority and control over their waters at the time of the Treaty – and for some time afterwards. Challenges to Ngati Te Ata's authority were met with force before 1840, and he described some of the battle sites, but also with the negotiation of peace treaties.¹⁸⁹

The mechanism for the exercise of control, we were told, was rahui and tapu: 'Maori were able to lay tapu on the water to restrict it. They could control it, they could levy rights for usage, they could issue instructions not to cross on the water.'¹⁹⁰ Another group could not pass through Ngati Te Ata's part of the Waikato River without permission.¹⁹¹ This control applied to early settlers as well as to any outside Maori group who wished to cross or travel, and Mr Minhinnick referred to documentary evidence of his enterprising ancestor Katipa charging travellers a toll in the 1850s.¹⁹² Authority is maintained and expressed in a number of ways: by customary use (such as fishing), by physical occupation, but most importantly by whanaungatanga and by caring for relationships within and between tribal groups.¹⁹³

(11) *Whakapapa identifies a cosmological connection with the water resource*

Professor Hohepa and Dr Habib explained that Polynesians have a 'culturally shared belief that all things on earth are first alive, and second, created by these ancestors, the gods and guardians, and it is the duty of their descendants to care for and honour these elements.'¹⁹⁴

Many witnesses who appeared before us did so as custodians of tribal knowledge, and they recited whakapapa of their descent from the gods, their descent from eponymous ancestors, and sometimes their family links to their relatives the rivers, springs, and water

188. Taipari Munro, oral evidence, 9 July 2012, Draft Transcript, pp 10-11

189. Roimata Minhinnick, oral evidence, 10 July 2012, Draft Transcript, pp 91-93

190. Roimata Minhinnick, oral evidence, 10 July 2012, Draft Transcript, pp 98-99. See also Roimata Minhinnick, brief of evidence, 18 May 2012 (doc A65), pp 10-12, 25.

191. Minhinnick, brief of evidence (doc A65), p 5

192. Minhinnick, brief of evidence (doc A65), pp 27-28

193. Minhinnick, brief of evidence (doc A65)

194. Hohepa and Habib, 'Maori Terminology and Water' (doc A69(i)), p 11

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bodies of their rohe. Mr Toni Waho of Ngati Rangi told us of the creation of the Waikato River by Ranginui after his separation from Papatuanuku: his tears fell and one formed the Waikato River, the other formed the Whanganui River. The Whanganui River in turn is an ancestor and is named in whakapapa. We will not reproduce those whakapapa in this report; suffice to say that the chants, waiata, whakapapa, and oral histories recited to us showed that these traditions live on today. They lie at the heart of the Maori world, and they give force to tino rangatiratanga, mana, and kaitiakitanga. This is why these people were able to stand before us and tell us the things that they did. This is why they have authority.

(12) Authority over territory in which the water resource is situated

Authority has temporal and spiritual sources. The tendency is to see it mainly as a physical thing. As Mr Minhinnick put it: 'Control the surrounding land and you controlled the water and any traffic that passed by.'¹⁹⁵ This is, we think, a fair summation of how tino rangatiratanga enabled hapu and iwi to exercise physical control over access to and use of their taonga, the tribal waters.

Mr Anthony Rereamanu Wihapi explained how Tapuika's claim to their end of the Kaituna River is sourced to the arrival of their tupuna on Te Arawa waka, and the claiming, naming, and continuous occupation of territory, Te Takapu o Tapuika, that followed. The ancestor Tia, father of Tapuika, claimed their territory for them by naming it for the belly of his son, Tapuika. Mr Wihapi told us that his people have held it ever since:

From earliest times Tapuika understanding was that they were one with the gods and the environment. As descendents of the god Puhāurangi, Tapuika maintain the belief that they represent the link between the heavens and the earth. The naming of the Parawhenuamea waterway in our rohe which flows into the Kaituna which is the goddess of freshwater, is but one example of that connection. A further example of the connection between Te Rangi me te whenua is our taniwha. Poro-hinaki, Pareawhewhe and Mapu, who inhabit the river and are the physical manifestation of the mana, ihi, wehi and mauri of the river. They are the spiritual kaitiaki of the river whose responsibility it is to protect the river and the people to whom they whakapapa. Tōhunga of Tapuika held an important role in maintaining the sacredness of the river. To Tapuika the river has a mauri which gives life and sustenance to us. It nurtures us and gives us strength. It is part of us and we are part of it and we are responsible for its protection in order to ensure that it is passed on to further generations.

Our claim to proprietary interests in the waters of the Kaituna commences with a taonga of our tupuna Tia, the father of Tapuika. I quote: 'Mai i ngā pae maunga ki te toropuke e tu kau mai ra ki te awa e rere mai ana, waiho te Whenua, ko te takapu o taku tamaiti o Tapuika.' The taumau [bespoken claim] establishes the ownership of all the land, mountain ranges and the waters of the Takapu in accordance with the body of his son. The second claim

195. Minhinnick, brief of evidence (doc A65), p 12

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is based upon our belief that the river was discovered and named by our ancestor Tia Te Awanui o Tapuika and this is acknowledged in Waiata Moteatea by a neighbouring iwi and the Tapuika patere, 'Koia, tera koia'.

From the time of the taumau to the present day, Tapuika have continued to occupy and exercise proprietary interests and rights over the river. This is evidenced by the numerous pā, waahi tapu, burial [grounds], settlements, mahinga kai, many years of Tapuika hāpu along the river. A selection of many Tapuika kainga, kainga noho and sites of renowned, will be highlighted on the screen.¹⁹⁶

Mr Wihapi then went on to speak of the sites and histories of the waahi tapu to be found along the Kaituna River. His korero weaves together many of the claimants' 'indicia of ownership' and serves as a summary of how title is asserted in customary terms.

2.8 THE TRIBUNAL'S ANALYSIS AND FINDINGS

In this section, we set out our analysis of the evidence and arguments that have been put to us on issue question (a), and also our view of the Crown's Treaty obligations in light of the answer that we come to for question (a).

2.8.1 The Crown's dichotomy: ownership or kaitiakitanga?

By the end of the hearing, some points of agreement had emerged between the parties. The Crown said that Maori do not claim to own all natural water; the claimants agreed. The Crown said that the claim concerns tribal groups and their particular 'pieces of water'; the claimants agreed. The Crown said that Maori customary rights were not conceived of as English-style ownership or proprietary rights; again, the claimants agreed.

But a fundamental gulf remained between the parties. The Crown argued that no one can own natural water and – a different but related point – that no one has property rights in it. The claimants said that English-style ownership is the closest cultural equivalent to Maori customary rights, and that what they possessed (owned) in 1840 was guaranteed to them in the Treaty: indivisible water resources, encompassing the water and the fish that swam in it. Although it is more an issue for stage two, we note here the claimants said also that water permits under the resource management regime have the character of property rights (relying particularly on *Aoraki*). They pointed to proposals in the Land and Water Forum to make such permits tradeable in the near future; the Crown, they said, has created rights in water akin to property rights and is contemplating making those rights even more proprietary in nature in the future, while still refusing to recognise the prior proprietary rights of

196. Anthony Wihapi, oral evidence, 9 July 2012, Draft Transcript, pp 35-36

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Maori. The claimants accepted that their prior rights may be ‘residual’ or even non-existent today where water resources have been shared or possibly *alienated* in Treaty-compliant ways, but the Crown did not agree with this qualifying point; it refused to accept that any proprietary rights existed in the first place. The question of what rights existed at 1840, and were therefore covered by the Treaty guarantees, is thus of prime importance to deciding whether the claim is well-founded.

The claimants submitted that this is a simple case, that the rights they are asking the Tribunal to recognise are ‘trite Treaty law’, and that this Tribunal should confirm the findings of the many Tribunal inquiries that have preceded it over the last 30 years:

- ▶ Maori customary rights are akin to proprietary rights in their indivisible water bodies, including the water, and as such were guaranteed under Article 2 of the Treaty for so long as Maori wished to retain them.
- ▶ The closest cultural equivalent for Maori rights in 1840 was ‘full-blown’ English-style ownership, with all the rights that that entailed. (Management systems have since qualified some of the rights of owners.)
- ▶ Also guaranteed under the Treaty was ‘te tino rangatiratanga o o ratou taonga’, full tribal authority over and control of their treasured possessions, in this case the waterways of the country.

For this reason, we have provided some detail as to the relevant findings of those earlier inquiries in section 2.6 above.

The Crown did not engage specifically with the findings of the many Tribunal reports outlined in section 2.6. Nor did it discuss the Lake Omapere decision, on which both the claimants and previous Tribunal reports have placed great weight. Nonetheless, the Crown argued that ownership of property was not the closest English law equivalent of Maori rights in respect of water. As we outlined in section 2.3, the Crown’s argument was that the Maori witnesses were themselves uncomfortable with expressing their culturally-specific rights in that way, and that we should adopt the 2011 findings of the Wai 262 Tribunal that the Maori relationship with the environment ‘is not the transactional or proprietary kind of the western market and does not rest on ownership.’¹⁹⁷ The Crown quoted the Wai 262 Tribunal as follows:

The final point to be made about the Treaty is that although the English text guarantees rights in the nature of ownership, the Maori text uses the language of control – tino rangatiratanga – not ownership. Equally, kaitiakitanga – the obligation side of rangatiratanga – does not require ownership. In reality, the kaitiakitanga debate is not about who owns the taonga but who exercises control over it ... In the end it is the degree of control exercised by

197. Waitangi Tribunal, *Ko Aotearoa Tenei*, Te Taumata Tuarua, vol 1, p 269 (Crown counsel, closing submissions (paper 3.3.15), p 11

Maori and their influence in decision making that needs to be resolved in a principled way by using the concept of *kaitiakitanga*.¹⁹⁸

Essentially, the Crown's case is that we should follow the Wai 262 report as the most recent and best authority on the matter of how Maori rights in water should be conceived, and as the authority which most accords with the *tangata whenua* evidence that was presented to us. We take these points in turn.

(1) *The language of ownership in the claimants' evidence*

The claimants emphasised in their submissions that they were not arguing that Maori customary rights were the same as those of an English proprietor. Rather, as has been outlined, their view was that the closest cultural or legal equivalent to Maori customary rights was English-style ownership. The Crown did not accept this important distinction. In its view, the language of ownership was entirely inappropriate. One reason for taking this view was the evidence of the claimant witnesses themselves. This was one of two key points in the Crown's case so we examine Crown counsel's contentions in some detail here.

Mr Raftery opened the Crown's case with the following oral submission:

This case has been much dominated by the word 'ownership'. It's been dominated by the word "ownership" for a variety of reasons. 'Ownership' has been the language used by my learned friends for the claimants in their opening written submissions. 'Ownership' has been talked about on the political stage outside this room. The media, both the visual and the printed media, have been dominated by the word 'ownership' over the course of the last fortnight, and the principal submission that I make to you about the word 'ownership' is: forget it. It is an irrelevance and a distraction to the task that we are undertaking in these proceedings. And I say that because, as I will develop later, the Crown's position is – and they are not alone in this, I think some of the Māori witnesses agree with them on it – that no one owns water. And so to start being fixated by this term is not helping the dialogue that needs to take place.¹⁹⁹

The Crown accepted that the claimants' 'indicia' showed an 'incontrovertible' 'attachment and relations with water'.²⁰⁰ The challenge, in the Crown's view, is to translate these narratives 'into a right or interest which might be appropriately recognised in a contemporary way'.²⁰¹ Thus, 'narratives of attachment and relationships and historical use' do not get matters to a point where modern rights can be defined.²⁰² One thing, however, the Crown was certain of after hearing the claimants' evidence: 'I don't in any way belittle any of those', said

198. Waitangi Tribunal, *Ko Aotearoa Tenei*, p 270 (Crown counsel, closing submissions (paper 3.3.15), p 11

199. Crown counsel (Raftery), oral submissions, 20 July 2012, Draft Transcript, pp 1383-1384

200. Crown counsel, closing submissions (paper 3.3.15), p 6

201. Crown counsel, closing submissions (paper 3.3.15), p 6

202. Crown counsel, closing submissions (paper 3.3.15), p 6

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Mr Raftery, 'but I say they aren't indicia of ownership when we use that European word.'²⁰³ Thus, the Crown rejected this part of the claimants' case.

To support their contention that 'ownership' was an inappropriate concept by which to express Maori rights, Crown counsel relied in particular on extracts from the oral evidence of Taipari Munro, Maanu Wihapi, Roimata Minhinnick, Tamati Cairns, Toni Waho, and Haami Piripi. We take each in turn.

We begin with the evidence of Mr Haami Piripi, which can be dealt with briefly because we suspect that the Crown misapprehended the subject that he was discussing. In the Crown's submission: 'On Day 4 Haami Piripi expressed the view that while water may not be owned by anyone it can be manipulated.'²⁰⁴ Mr Piripi was actually describing the Crown's position and the growing privatisation that he saw occurring around the country, and which (we noted above) is one of the root causes of this urgent inquiry:

The Government says water cannot be owned. Perhaps they are right but it can be manipulated into a capital resource and allocated according to sector-friendly priorities for farming and this is certainly the case up home and where I come from, and I see it all around the country where water allocation and rights have been promoted to protect Pākehā development over Māori development and there's hundreds of examples of that.²⁰⁵

Taking next the evidence of Mr Munro, the Crown submitted:

Taipari Munro (in relation to Poroti Springs) said in answer to questions from Professor Temara words to the effect 'I am not saying I own all the water of Aotearoa, but I own the waters of Waipao.' He went on to reject the Pakeha word 'ownership', saying 'our word is kaitiaki or guardian.'²⁰⁶

Mr Munro's evidence about kaitiakitanga is discussed in section 2.7.1(9) above. As we noted, he spoke of the congruence between legal trusteeship of tribally-reserved land and the ability to exercise kaitiakitanga over the springs contained within the boundaries of that trust. He saw the utility of being able to protect the springs in that way until the 1960s when the water and soil conservation legislation created difficulties for the trustees. In that context, he stated in response to the Tribunal's question about ownership that 'it looks as if the authority over water is with the government', whether central government, local government, or the Environment Court:

but as long as my feet are standing on the earth, I'll not accept that. I won't accept that, I can't accept that, because that's not what was charged to me by my elders and their, their

203. Crown counsel (Raftery), oral submissions, 20 July 2012, Draft Transcript, p1391

204. Crown counsel, closing submissions (paper 3.3.15), p 9

205. Haami Piripi, oral evidence, 12 July 2012, Draft Transcript, p 529

206. Crown counsel, closing submissions (paper 3.3.15), pp 8-9

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word was sacred, their word was sacred, I couldn't desert what it was that they had left for us to, ah, to, to be charged with.

So, I don't accept what the Prime Minister says [that no one owns water] ... I'm not saying that I own all of the water of Aotearoa, but I own the water of Waipao. I have the mana and even speaking now back to you – what I said about the difficulty of swapping backwards and forwards between languages – I'm a bit frightened to even utter the word 'ownership' because I know the people over here on that side have the meaning of that word but our particular word is 'kaitiaki' or 'guardian'.

It's a bigger thing, it's something that doesn't only concern us the people who are walking around on this earth, but it also concerns our ancestors and it concerns the old atua Māori and that's why I can't desert the past that had been left to us by our old people because they're speaking with the voice of their old, old tupuna and with the voice of those atua, and so we take seriously what has been left to us to, ah, to take care of by those elders.²⁰⁷

We think that Mr Munro's evidence was unequivocal. In English terms, he claimed ownership (and has seen the utility of the protections that 'ownership' confers under the law), but authority or power (mana) has been claimed by the Government. In that respect, Mr Munro stated: 'I own the water ... I have the mana.' His preferred word was 'kaitiaki' (guardian) to express his obligations under Maori law to the gods, the ancestors, and their charge that has been passed down to the present generation, and which must also be transmitted to future generations. Despite the difficulties of 'swapping backwards and forwards between languages', Mr Munro claimed 'ownership' and 'authority' in English, and 'mana' and 'kaitiakitanga' in Maori, noting that these words carried their own culturally-specific meanings and obligations.

Moving on to the evidence of Mr Maanu Wihapi of Tapuika, the Crown noted Mr Wihapi's suggestion that Te Arawa was only claiming 'ownership' because the Crown was planning to privatise what had formerly been a national or public good. In his evidence, Mr Wihapi claimed 'custodianship' of the Kaituna River. The Crown quoted him as saying:

It is the actions of the Crown that has caused us to claim our proprietary interest. Whilst the proprietary interest was managed by the Crown in the interests of the nation as a whole, Te Arawa was comfortable, there was no objection ... The water, we accept nobody owns the water ... the Crown said it was going to give 49% of it away. Then Te Arawa begins to wake up. We do not agree with that ... Blame the Government for us claiming ownership.²⁰⁸

In his evidence for Tapuika, as we have seen, Mr Anthony Wihapi emphasised the Tribunal's 1984 *Kaituna River Report* (discussed above at 2.6.1(2)) and its finding that Maori

207. Taipari Munro, oral evidence, 9 July 2012, Draft Transcript, pp18-19; Mr Munro's reference to 'the people over there' was a reference to Crown counsel.

208. Crown counsel, closing submissions (paper 3.3.15), p 9

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owned the Kaituna River. He spoke of ‘proprietary’ interests in the river, which he supported by way of reciting the whakapapa of Tia and Tapuika, the taumau (bespoken claim) of the tribe through Tia’s naming of their rohe ‘Te Takapu o Tapuika’, their long residence next to the river (using its great bounty and excluding others who had not permission), their care for the mauri of the river and their use of the river and its water for ritual, and their many waahi tapu on the river and its banks (see 2.7.1(12)). This left no doubt that their part of the Kaituna River was a taonga to Tapuika. Mr Wihapi then handed over to the Reverend Maanu Wihapi, who repeated his elder’s statements that Tapuika’s claim to the river came from Tia and the arrival of the Te Arawa canoe.

Rev Wihapi affirmed that their claim was to ownership of the river and its water, which cannot be separated from the other components of a river in the Maori view. While the water is a gift from God, the river is under the ‘chieftainship’ and ‘custodianship’ (kaitiakitanga) of Tapuika.²⁰⁹ Authority and custodianship remains with the tribe, even though it is now claimed by central and local government: ‘We have the custodianship, we have the knowledge of it, of our river, we know its history, we know all the stories and legends. So, chiefs, leaders of the Tribunal, the river is ours, also the waters within.’²¹⁰ But Te Arawa, a tribe which has done much for the nation in the past, was willing for their waters to be used for hydroelectricity in the national good. Now, however, that the Crown proposes to transfer ownership to the business world, ‘we claim *back* our proprietary interest’ [emphasis added].²¹¹ Rev Wihapi, as the Crown has quoted, suggested that the Crown was to blame for Te Arawa claiming ‘ownership’, but we note the material point that they were claiming ownership *back*. Rev Wihapi reiterated the findings of the Kaituna River Tribunal and the Central North Island Tribunal that Ngati Pikiāo and Tapuika own the river. But he also said:

The water, we accept, nobody owns the water until the Crown said it was going to give 49% of it away, the right to use and access the water. Then Te Arawa starts to wake up. We do not agree with that and so therefore Tapuika wishes to be part of any future developments of the Awa as it, as a proper incident of ownership. Blame the government for us claiming ownership.

The water is an asset, is a taonga from the god, from God. That is a Te Arawa stance. That is the stance of Māori really, that the water didn’t really belong to any individual. But when the Crown said, “We’re going to sell the right to use it, 49% to other people,” eh, the water is ours, the water is ours. You don’t sell our resource. That mana, that river is within the mana whenua of Te Arawa. It is subject to Te Arawa mana tāngata and it is subject to Te Arawa, and Tapuika is the iwi that has the closest relationship to that river.²¹²

209. Rev Maanu Wihapi, oral evidence, 9 July 2012, Draft Transcript, pp 41-42

210. Rev Maanu Wihapi, oral evidence, 9 July 2012, Draft Transcript, p 42

211. Maanu Wihapi, oral evidence, 9 July 2012, Draft Transcript, pp 43-44

212. Maanu Wihapi, oral evidence, 9 July 2012, Draft Transcript, p 44

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A number of concepts are expressed in Rev Wihapi's korero. But we do not think that the Crown can rely on it for the point it wishes to make, which is Rev Wihapi's acceptance of the concept that no one owns water. That is because he clearly clarified his point: 'that the water didn't really belong to any individual'. Water is a taonga, a gift from God. No one individual owns it. The river is a taonga, including its water, in the possession of the tribe which has the traditional Maori relationship with it, as outlined in the korero tuku iho of Mr Anthony Wihapi. But Te Arawa were comfortable with the Government using water resources for electricity for the good of the nation; now that the industry is to be partially privatised, Te Arawa do not wish their properties to be used for private profit. That is the point of his evidence. He switched between concepts of ownership, mana, and kaitiakitanga ('custodianship'). We see in this evidence a need, as the claimants have argued, to find an equivalence that can be comprehended as falling within the protections of policy and the law.

The next witness cited by the Crown was Roimata Minhinnick of Ngati Te Ata. Crown counsel submitted:

On the second day of the hearing Roimata Minhinnick answered Question (a) in this way: 'The first question was what were the customs, the rights to water which were protected by the Treaty? To us there are 3 aspects ... Rangatiratanga (chieftainship), kaitiakitanga (custodianship or stewardship), and mana (authority). Therefore that is one side of it ... Authority and Control are the English words.'²¹³

Mr Minhinnick later went on to say:

Who has the mana or the authority over water? That is a question, my question to the Tribunal, who has the authority over water? ... The management authority to me has been usurped by the Government to prevent it remaining with us. We did not cede that authority to the Government, never, in relation to water at any stage.²¹⁴

We agree that, in his oral evidence, Mr Minhinnick stressed the concepts of rangatiratanga, mana, and kaitiakitanga, which he defined as authority and control, coupled with the responsibility to look after and care for the resource (and the people).²¹⁵ In his written evidence and submissions, Mr Minhinnick added that the customary right to possess or enjoy the benefits of water was 'akin to proprietary interests, a property right, and the notion of ownership'.²¹⁶ But we accept that this was not a primary point in his evidence, which related to mana and the exercise of rangatiratanga (see 2.7.1(10)).

The Crown also referred to the evidence of Mr Toni Waho, summarising it in this way:

213. Crown counsel, closing submissions (paper 3.3.15), p 9

214. Roimata Minhinnick, oral evidence, 10 July 2012, Draft Transcript, pp 108-109

215. Roimata Minhinnick, oral evidence, 10 July 2012, Draft Transcript, pp 90-109

216. Roimata Minhinnick, memorandum, 22 June 2012 (paper 3.1.138), p 2

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On day 3 of the inquiry Toni Waho talked in terms of kaitiakitanga. He said 'It's not an ownership issue ... it's kaitiakitanga, it's mana'. He went on to express himself as fed up with the fixation about ownership. He used the term 'myopia'. In answer to questions from Professor Temara about the mixing of waters he said words to the effect 'my Maori heart says let it cease; but my western mind says perhaps we can find a solution.'²¹⁷

We think that this is a fair representation of Mr Waho's view. For the issues of concern to Ngati Rangī, relating to the Tongariro Power Development (and its impacts on their rivers) and the pollution and degradation of rivers, Mr Waho argued that a solution is necessary that restores tribal authority (mana) and the ability to be kaitiaki of their waters, while also taking proper account of other interests in those waters.²¹⁸ What is needed, in his view, is 'an effective kaitiakitanga body that ensures Māori rights are protected.'²¹⁹ With respect to the mixing of waters in the Tongariro Power Development, he said:

the Māori heart says let it cease. The mind of the western world, Pakeha world says let's keep going, perhaps we can find a solution. But here's the problem. There is no place where things can be graded with proper legal form in our world, here in our land, which assigns [priority] or is able to resolve the conflict of the two worlds.²²⁰

His evidence clearly supports the view that, for the issues at stake for Ngati Rangī, the solutions proposed by the Wai 262 Tribunal would be appropriate (see below). At the same time, Mr Waho saw the chance to become owners in the power companies as an important development opportunity for his people, one which they needed more time to consider.²²¹

The Crown also referred to the evidence of Mr Tamati Cairns:

I picked up a word just earlier on around what might be the difference between kaitiakitanga and ownership. Now ownership belongs to another cultural belief system that sees an individual or group having power over something which is no different from kaitiakitanga in a kaitiakitanga context. When you start moving one across to the other, then we have problems.²²²

Mr Cairns made this comment in the context of the dialogue that must take place between the Treaty partners:

When I'm asked to explain who I am inside of somebody else's framework then that's a difficulty. I referred earlier to my good friend the Crown as born in 1840 and a relationship that we have had for that long. One of the major gaps that we have in this country is a

217. Crown counsel, closing submissions (paper 3.3.15), p 9

218. Toni Waho, oral evidence, 11 July 2012, Draft Transcript, pp 253-288

219. Toni Waho, oral evidence, 11 July 2012, Draft Transcript, p 265

220. Toni Waho, oral evidence, 11 July 2012, Draft Transcript, p 270

221. Toni Waho, oral evidence, 11 July 2012, Draft Transcript, pp 261, 265

222. Crown counsel, closing submissions (paper 3.3.15), p 9

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cultural gap: a language, or lack of understanding of language, and who we are – or at least who I am – as the Crown partner. And to answer a question like that from one framework to another ... I picked up a word ... [quote continues as above]²²³

Mr Cairns concluded that he could not define kaitiakitanga as ‘ownership’, although there are aspects common to both.

In their closing and reply submissions, the claimants accepted that Maori traditionally did not understand their customary rights as English notions of property ownership. In their view, the key point is this:

The Crown then contends that in the views of selected Maori witnesses their interests are less than ownership because they reject ownership in English terms ... In fact that evidence supports the claimants’ position that while Maori and Pakeha express their relationship with property in different ways both ultimately have a relationship capable of recognition as a full-blown property relationship in English law – as ownership. The fundamental difference between the relationships the two cultures have with property is that the Pakeha one consists entirely of the rights of the property holder to the property whereas the equivalent Maori concepts involve corresponding obligations of the property holder to the property. The evidence on which the Crown relies does no more than reject the Pakeha notion of ownership in favour of the Maori concept that carries the correlative duty of a kaitiaki.²²⁴

As we see it, the parties in fact concur that Maori customary law does not conceptualise Maori rights as English-style property rights. This point is not fatal to the claim. As the claimants put it:

The comment that ‘ownership’ does not fit well with customary rights and interests is supported by a long line of previous reports in which the Tribunal, having noted the distinctive cultural approaches, proceeds to reconcile the differences between them.²²⁵

We agree with the Whanganui River Tribunal, which found in respect of that river:

As mentioned earlier in this report, *it does not matter that Maori did not think in terms of ownership in the same way as Europeans*. What they possessed is equated with ownership for the purposes of English or New Zealand law. Similarly, it does not matter that they thought in terms of territory rather than property. What they possessed, even rivers, is deemed to be a property interest for the purposes of law, and has been treated that way by the courts.²²⁶
[emphasis added]

223. Tamati Cairns, oral evidence, 11 July 2012, Draft Transcript, p 323

224. Claimant counsel, submissions by way of reply (paper 3.3.20), p 3

225. Claimant counsel, submissions by way of reply (paper 3.3.20), p 4

226. Waitangi Tribunal, *The Whanganui River Report*, p 337

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The Tribunal acknowledged: ‘A modern Maori focus on “property” and “rights” reflects how they were forced to reconceptualise their customs to make them cognisable in English law.’²²⁷ The question is: how are the rights and laws derived from Maori culture to be understood or given effect (so that they may be protected) in New Zealand’s laws? The Tribunal went on to carry out such an exercise for the Whanganui River:

Referring then to Crown counsel’s questions on customary land and river interests, and relating those to the Treaty of Waitangi ... the first question was whether Maori interests were mere rights of user or amounted to ownership in the English legal sense. The answer is that they are more than use rights and include the incidences of English ownership, save those of free transferability or escheat to the State. But they are also more, for there exists, in the hapu and the descent group as a whole, the right to manage and control according to tribal preference and to be left in quiet possession.

The Treaty of Waitangi does not change any of this, save that it introduces the concept of alienation.

Counsel’s second question was whether the Crown is correct in assuming that it is appropriate to describe ‘this bundle of interests’ as rangatiratanga.

We see rangatiratanga not as the sum total of use or ownership rights but as expressive of political autonomy in the management of the total of the people’s affairs.²²⁸

In the Crown’s view, however, this translation from one culture to another should be done in a different way, so that the just rights of Maori in their water bodies may be protected in a more appropriate, more effective, and ultimately more practicable and realistic framework than that of ‘ownership’. For this argument, the Crown relied on the Wai 262 report, to which we now turn.

(2) *The Wai 262 framework for environmental management*

As we mentioned earlier, the Wai 262 report addressed kaitiakitanga in relation to a wide range of taonga. These included modern and traditional arts and crafts, knowledge (matauranga Maori), cultural and intellectual ‘property’ (such as haka and waiata), te reo Maori, iconic species of flora and fauna, environmental taonga (outside the Conservation Estate), the taonga inside the Conservation Estate, the movable taonga in museums, and many more. In their submissions in our inquiry, Crown counsel relied in particular on the chapter concerning the management of environmental taonga. According to the claimants, the Crown misconstrued the findings in that chapter but – if the Tribunal disagreed – then the claimants maintained that the Wai 262 Tribunal’s interpretation was incorrect and should

227. Waitangi Tribunal, *The Whanganui River Report*, p 49

228. Waitangi Tribunal, *The Whanganui River Report*, p 50

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not be preferred over the Tribunal's prior 25 years of 'consistent jurisprudence on the recognition of customary interests in terms of proprietary rights'.²²⁹

The main points on which the Crown relied were as follows:

- ▶ Kaitiaki nurture and care for the environment and its resources. Their 'relationship with the environment is not the transactional or proprietary kind of the western market and does not rest on ownership'. Rather, it is like an enduring family relationship, permanent and mandatory.
- ▶ The environment as a whole is not a taonga 'in the sense that term is used in the Treaty'. Taonga are, for example, 'particular iconic mountains or rivers' from which rights and obligations flow.
- ▶ Although the English text of the Treaty 'guarantees rights in the nature of ownership, the Maori text uses the language of control – tino rangatiratanga – not ownership. Equally, kaitiakitanga – the obligation side of rangatiratanga – does not require ownership. In reality, the kaitiakitanga debate is not about who owns the taonga but who exercises control over it.'
- ▶ What needs to be decided in a principled way is the degree of control or influence over a taonga that should be accorded to kaitiaki. This will depend on the circumstances and cannot be decided by a generic formula. How much control kaitiaki should have will depend in part on how important the taonga is to the iwi or hapu, its 'health', and what kind of competing interests exist (if any).
- ▶ Other legitimate interests in the environment must be balanced with the kaitiaki interest. These include the best interests of the environment itself, the interests of users or developers, the interests of those who are affected by use or development, and the interests of the community as a whole. What is needed is an environmental management system that balances these interests against a set of principles on a case-by-case basis; the kaitiaki interest does not automatically trump other interests.²³⁰

The Crown made two submissions on the basis of these Wai 262 findings: the first was that they inform the matters to be decided at stage two of this inquiry (in terms of an appropriate framework for recognising and reconciling Maori interests in water with other interests); and, secondly, they support the Crown submission 'that talk in terms of ownership as opposed to rangatiratanga or kaitiakitanga is not appropriate. In fact it could be seen as a clear rejection of the use of the term "ownership" in relation to the definition of Maori rights and interests in water'.²³¹

229. Claimant counsel, submissions by way of reply (paper 3.3.20), pp 3-11

230. Crown counsel, closing submissions (paper 2.3.15), pp 10-12. Direct quotations are from chapter 3 of the Wai 262 report, Te Tumata Tuarua, vol 1, as reproduced in the Crown's closing submissions.

231. Crown counsel, closing submissions (paper 2.3.15), p 12

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As noted, the claimants argued that the Crown had misconstrued some passages from the Wai 262 report, that the Wai 262 inquiry was ‘highly distinguishable’ from the subject matter of our inquiry, or – alternatively – that the Wai 262 Tribunal was simply wrong.

In light of the Wai 262 Tribunal’s analysis of issues across its whole report, we cannot accept the claimants’ view that the Crown has misconceived the meaning of that report or the passages quoted from it. We accept the Crown’s submission that the Wai 262 Tribunal rejected the concept of ‘ownership’ as an appropriate vehicle for giving modern expression to the Treaty rights at issue in that inquiry. To paraphrase, the question before that Tribunal was how to give effect to Maori Treaty rights in environmental taonga that were in the legal ownership of others, or which Maori still owned but the management rights were with others. This included taonga currently in the conservation estate. The Tribunal took what it considered to be a practical approach and found that kaitiakitanga is the key Treaty right in all cases, no matter what the ownership status of the taonga.

But this was not a diluted Treaty right. The Tribunal found that kaitiaki rights exist on a sliding scale. At one end of the scale, full kaitiaki control of the taonga will be appropriate. In the middle of the scale, a partnership arrangement for joint control with the Crown or another entity will be the correct expression of the degree and nature of Maori interest in the taonga (as balanced against other interests). At the other end of the scale, kaitiaki should have influence in decision-making but not be either the sole decision-makers or joint decision-makers, reflecting a lower level of Maori interest in the taonga when balanced against the interests of the environment, the health of the taonga, and the weight of competing interests.²³²

This scheme is not incompatible with Maori having residual proprietary interests in – or, indeed, full ownership of – water bodies that are taonga. Rather, that would be a factor to be considered in terms of the weight accorded the kaitiaki interest vis-a-vis other interests in the resource. The Tribunal commented:

Cutting across all of these interests are those of property owners and the owners of resources. Property owners may wish to use their property, and may also be affected by other users. As we noted in chapters 1 and 2, property rights of all kinds are accorded considerable weight in te ao Pākehā, and are often prioritised if drawn into competition with other interests, although they are never absolute.²³³

Recognition of Maori proprietary interests, therefore, could only increase the weight accorded the kaitiaki interest. But proprietary interests are ‘never absolute’, firstly because the Maori interest (when it is of a non-proprietary nature) is still of great importance, and secondly because property owners are constrained in so many ways by the modern resource management regime.

232. Waitangi Tribunal, *Ko Aotearoa Tenei*, Te Taumata Tuarua, vol 1, pp 267-280

233. Waitangi Tribunal, *Ko Aotearoa Tenei*, Te Taumata Tuarua, vol 1, p 271

Nor was a commercial dimension considered incompatible with the kaitiaki interest. As the Tribunal put it, when considering how Maori should benefit from Department of Conservation concessions: 'It is incongruous to proceed on the basis that Māori have a special place in the management and administration of the DOC estate except where there is money to be made.'²³⁴ We think this point is particularly apposite to the present claim.

Also, the Wai 262 Tribunal's findings are not to be taken as being in opposition to the recognition or restoration of customary title to resources (that is, the kinds of rights recognition being sought in the present claim). That the Tribunal itself did not intend them to be taken that way is evident in its analysis of claims in relation to National Parks (see chapter 4 of its report). Drawing on the Australian experience, the Tribunal called for 'title return' to Maori as well as co-management.²³⁵ But the Tribunal was clearly concerned that kaitiaki control or partnership not be considered as conditional on Maori having retained title to a resource, a condition that could not be met for many taonga.

In this inquiry, we are not concerned with a general scheme for the rights of kaitiaki in all taonga of every kind, nor are we concerned with the many taonga for which Maori may not have retained a customary or Crown-derived (freehold) title. We are concerned solely with water bodies, for which there is a well trodden jurisprudence confirming that Maori possessed their waterways as taonga (and as indivisible water regimes) at the time of the Treaty. Maori were, as the Te Ika Whenua Rivers Tribunal put it, 'entitled, as at 1840, to have conferred on them a proprietary interest in the rivers that could be practically encapsulated within the legal notion of the ownership of the waters thereof'.²³⁶

It is neither possible nor appropriate for us to ignore the relevant findings of previous Tribunal reports. Indeed, it is not appropriate for reasonable Treaty partners acting in good faith to ignore the relevant findings in any Tribunal reports. In this inquiry, as commended to us by the claimants, the applicable Tribunal reports include the *Kaituna River Report*, the *Te Ika Whenua Rivers Report*, *The Whanganui River Report*, and the report of the Central North Island Tribunal (*He Maunga Rongo*). We could point to many others. The *Mohaka River Report* has been discussed above (2.6.2(1)). The *Te Whanganui-a-Orotu Report* found that Maori owned Te Whanganui-a-Orotu lagoon (Napier Inner Harbour) in the same manner that Judge Acheson found Ngapuhi to have owned Lake Omapere.²³⁷ The Chatham Islands Tribunal found that Moriori and Ngati Mutunga possessed, used, and controlled the 46,000-acre Te Whaanga Lagoon as an indivisible water resource. The coupling of *use* with *control*, and the status of the lagoon and its fishery as a highly prized resource (a taonga), meant that their entitlement under the Treaty was a 'guarantee of ownership at English law' as 'an appropriate cultural equivalent'.²³⁸ The Wairarapa ki Tararua Tribunal found that the

234. Waitangi Tribunal, *Ko Aotearoa Tenei*, Te Taumata Tuarua, vol 1, p 363

235. Waitangi Tribunal, *Ko Aotearoa Tenei*, Te Taumata Tuarua, vol 1, pp 364-366

236. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 124

237. Waitangi Tribunal, *Te Whanganui-a-Orotu Report*, pp 201-205

238. Waitangi Tribunal, *Rekohu*, pp 277-278

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ownership of the [Wairarapa] lakes, surrounding land that they did not sell, the attendant control over the opening to the sea, and customary fishing rights were all property rights, protected under Article 2 of the Treaty.²³⁹

We do not disagree with the findings and recommendations of the Wai 262 Tribunal. Rather, we consider them of vital importance to the future of this country and we urge the Crown to carry them out. No doubt, as Crown counsel foreshadowed, they will be the subject of further analysis and argument in stage two of our inquiry. But we also agree with the claimants that the subject matter of the Wai 262 inquiry is 'highly distinguished' from our own. We are concerned with the specific issue of the exact nature and extent of customary and Treaty rights in water bodies, which was not the question before the Wai 262 Tribunal.

Before we proceed to make our findings on issue question (a), however, we need to consider a subsidiary question. The Crown has submitted that we cannot generalise from the case examples before us, and there is also the question of whether previous Tribunal findings cover (or are the same for) all the different kinds of water bodies at issue in this claim. Certainly, all manifestations of the geothermal resource have been dealt with sufficiently in the Central North Island Tribunal's comprehensive coverage. But what of freshwater bodies? The discussion of Tribunal reports in this chapter so far has concentrated on the resources for which there are specific reports or chapters, mainly lakes, rivers, and (partly freshwater) lagoons. The claimants noted this point in their statement of claim, where they said that the Tribunal's past findings 'principally address rivers, rather than the broader range of interests like aquifers, springs, and streams'.²⁴⁰ We turn next to consider the Tribunal's findings on other kinds of freshwater resources, and the claim in respect of springs, streams, wetlands, and aquifers.

2.8.2 Water systems, ground water, and less well-reported water bodies

In the case of streams, the Te Ika Whenua Rivers Tribunal found that the hapu of Te Ika Whenua had exercised mana and tino rangatiratanga over their streams as at 1840 (and after). That was not in doubt.²⁴¹ The Tribunal also considered that Maori had proprietary rights in their streams, as with their rivers.²⁴² But the Te Ika Whenua Rivers Tribunal was doubtful as to whether streams were of such status to Maori that they were taonga to which rights survived after the sale of riparian lands:

In our view, the Rangitaiki, Wheao, and Whirinaki Rivers were taonga and entitled to protection under article 2 of the Treaty. However, the position in respect of tributaries and

239. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, 3 vols (Wellington: Legislation Direct, 2010), vol 2, p707

240. First Amended Statement of Claim, 2 March 2012 (paper 1.1.1(a)), para 11

241. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 15, 22

242. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 104, 112

streams is less clear. There is little evidence to suggest that they too were regarded as taonga. Consequently, we find it hard to believe that tino rangatiratanga was retained over streams and tributaries that were contained within the boundaries of land sold *and where access to and authority and control over them was eventually lost.*

The case for Te Ika Whenua in these circumstances rests almost entirely on the validity or otherwise of the land sales, and the issue of tino rangatiratanga over these streams and tributaries is a question that must be reserved until the land claims are heard.²⁴³ [emphasis added]

The question, therefore, of whether Maori retained their proprietary rights in streams after riparian sales was considered one for factual inquiry. That need not concern us here, where the focus is on the rights as established in 1840 and therefore guaranteed by the Treaty. Those rights, in the view of the Te Ika Whenua Rivers Tribunal, were proprietary rights and rights of tino rangatiratanga or mana (authority and control). We note that in other reports the Tribunal has sometimes grouped streams with rivers and not distinguished between them.²⁴⁴

As we noted above, the Wai 262 Tribunal observed that whether a place or resource is a taonga may be tested on the facts. If it is a highly valuable and prized resource, if it has whakapapa and matauranga associated with it, if it has a history of kaitiakitanga, and if it has kaitiaki today, then it is a taonga. We heard such evidence about streams in our inquiry. Ms Huata, for example, in her evidence for Ngati Rahunga-i-te-rangi, gave the whakapapa of streams as part of the many interconnected waters of Heretaunga, and explained how they are prized resources (including the source of the most prized resource of all, kai rangatira), and told of how the kaitiaki try to prevent harm to their precious streams.²⁴⁵ Clearly, in her evidence, streams are taonga to her hapu. We also heard evidence from Mr Taipari Munro that the Waipao Stream is a taonga.

The evidence of Mr Munro and Ms Huata maintains that certain springs are also taonga of great significance to hapu. According to Mr Munro, the Poroti Springs are a taonga of great spiritual significance to Te Uriroroi, Te Parawhau, and Te Mahurehure, and indeed to the whole of Ngapuhi. The springs were and are a highly prized resource, the waters were used for healing (rongoa) and also for ritual, and they provided physical sustenance in the form of watercress, eels, and kawai.²⁴⁶ We described above how the trustees have inherited the ancestral obligations of kaitiakitanga and how they attempt to perform them in the present day (see section 2.7.1(9)).

243. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 91-92

244. See, for example, Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1252-1253

245. Te Hira Huata, 'Heretaunga Araurau Haukunui', 16 July 2012 (doc B19), pp 11-12, 18, 22-24, 51, 61-66 [these are the pdf page numbers]; see also Matatewharemata Te Hira Huata, 'Te Haukunui o Heretaunga', (doc A58(a))

246. T Munro, 'Poroti Springs', 18 May 2012 (doc A52(a), pp 1-2; Taipari Munro, oral evidence, 9 July 2012, Draft Transcript, pp 7-11

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We also heard evidence from Dr Aroha Yates-Smith about how Ngāti Rangiwewehi's springs are taonga, highly prized resources that were created by taniwha and are of great significance in the history of the tribe. The Tribunal in its Central North Island report, *He Maunga Rongo*, agreed with the claimants that these springs are taonga over which they exercised tino rangatiratanga and kaitiakitanga. It also noted tangata whenua evidence that had been quoted in the *Te Ika Whenua Rivers Report*:

The water from the puna wai (water of the spring) of a whanau is considered a taonga to that whanau as it carries the Mauri (life force) of that particular whanau. Of course all the waters of the puna wai find their way into the river and thereby join with the Mauri of the river. In essence then the very spiritual being of every whanau is part of the river ... In this sense the river is more than a taonga(;) it is the people themselves.²⁴⁷

The Central North Island Tribunal found that, 'just as taonga such as rivers inclusive of waters may be owned in Treaty terms, as found in the *Whanganui River Report*, likewise the springs inclusive of waters which feed rivers of importance can be owned'.²⁴⁸ As with the Te Ika Whenua Rivers Tribunal, the Central North Island Tribunal found that whether legal rights have survived intact after 1840 is a matter for inquiry (a matter which we will consider in stage two of this inquiry).²⁴⁹

Legally, wetlands appear to have simply been regarded by the Crown as lands temporarily swampy but soon to be dry. Even though some wetlands were vast, they were not regarded as a water resource for which title should be claimed by the Crown, and so Maori claims in the Native Land Court were not resisted as they were for lakes. The Crown did not claim to own all swamps. This is evident in the case of the Hauraki wetlands, discussed by the Tribunal in *The Hauraki Report* and by the claimants' expert group in the report of Professor Hohepa and Dr Habib.

The predominant Pakeha view of wetlands in the nineteenth century was that they were a 'dreary waste' to be drained as soon as possible for agriculture and settlement.²⁵⁰ But this is not how Maori saw them. Ms Huata told us:

The people of Ngāti Kahungunu ki Heretaunga, of whom we are part, held mana over a large water resource, once represented in widespread wetlands supporting an abundant supply of fish and water fowl, the primary food resource of Ngāti Kahungunu. We know that other iwi relied upon wetlands like ours as their primary food resource but ours were particularly large and famous being recorded in the whakatauki that represents our pride:

Heretaunga ararau
Heretaunga haukūnui

247. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1253

248. Waitangi Tribunal, *He Maunga Rongo*, vol 4, p 1253

249. Waitangi Tribunal, *He Maunga Rongo*, vol 4, pp 1253-1254

250. Hohepa and Habib, 'Maori Terminology and Water' (doc A69(i)), pp 38, 42-43

Heretaunga hāro te kāhu

Heretaunga takoto noa

In this play on words Heretaunga ararau stands for both the myriad of waterways through the great swamps and the myriad of hapū that they linked together on the shore. Haukūnui describes the waters as a system, of repo or swamps, awa or rivers and puna or springs, the life-giving waters from deep within the earth. Hāro te kāhu sees the whole through the eyes of the soaring hawk, the plains standing solitary below, takoto noa, needing no other embellishment.²⁵¹

In Ms Huata's evidence, the draining of the wetlands by farmers has left them with vestiges of their once vast surface water resource, and water-use has even dented the underground aquifer, the second largest in the country. But the aquifer remains:

The evidence of the aquifer, for our ancestors, was the numerous punawai or springs around the 'shoreline' of the former repo or swamps. These were on the more elevated spots, where the many hapū maintained their kāinga or villages. The extraordinary clean water from the springs, and from the streams which flowed from them, was the elixir of life for the hapū, feeding and cleansing body, soul and mind, and as important for ritual as it is for bodily needs.

Our story is about how the hapū lost not only their wetlands, and eventually their streams, but also finally their access to all water, including the water from their bores, to the point where those of our own hapū, and many others, had to truck it in. This followed the abstraction of water for town, industrial and agricultural needs. To us, our story tells of the consequences for indigenous peoples when customary, proprietary interests in water bodies are not recognised and respected by the governments that came after them.²⁵²

Ms Toi Maihi, in her evidence for Ngapuhi in regard to Poroti Springs, recounted the traditional knowledge about underground waterways in Hokianga and how they are all linked. In particular, the taniwha Takauere represents the whole water system in that respect.²⁵³ The Ngawha Tribunal was told: Takauere travels underground between Ngawha springs and Lake Omapere, and his head can be seen at Ngawha (which is his eye) while his tail whips in 'the lakes adjoining the springs'.²⁵⁴ The Ngawha Tribunal was also told of the well known whakatauki:

Ka mimiti te puna o Hokianga, ka toto ki Taumarere; ka mimiti te puna ki Taumarere, ka toto ki Hokianga

251. Huata, 'Te Haukūnui o Heretaunga', (doc A58(a), p 1

252. Huata, 'Te Haukūnui o Heretaunga', (doc A58(a), p 1

253. Toi Maihi, written notes of oral presentation (doc B1); Toi Maihi, oral evidence, 9 July 2012, Draft Transcript, pp 27-30

254. Waitangi Tribunal, *The Ngawha Geothermal Resource Report* (Wellington: Brooker's Ltd, 1993), p 17

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(When the spring of Hokianga dries up, that of Taumarere fills up; When the spring of Taumarere dries up, that of Hokianga fills up.)²⁵⁵

Professor Hohepa explained in our inquiry: ‘The spring refers to the warriors who will flow to protect the Bay of Islands when it is attacked and leave Hokianga empty, and vice versa. We are the water and the water is us is replicated in this proverb.’²⁵⁶ The Ngawha Tribunal added: ‘the proverb also refers to the underground waterways linking Hokianga and Taumarere, the pathway of taniwha.’²⁵⁷

Ms Maihi made a crucial point: ‘Clearly the fresh water of Lake Omapere is indivisible from the both the major and minor waterways of Tai Tokerau, that extend from coast to coast and join the Hokianga.’²⁵⁸ We heard similar evidence about Heretaunga from Ms Huata, who told us that Ngati Kahungunu had tino rangatiratanga over the aquifer and all its many manifestations:

I a Ngati Kahungunu ki Heretaunga te mana waiu oranga, waiahuru, waipikiao, wairakei, wairatahi o Heretaunga Ararau Haukunui. Ara, ko te tini o nga awa, o nga manga, o nga kaitaka, o nga pukaki, o nga puna, o nga punawai, o nga waipuna, o nga papawai, o nga hinerepo, o nga reporepo, o nga waipuhake, o nga matatara, o nga hopua wai, o nga kopua, o nga poka, o nga papi, o nga one oi.²⁵⁹

[Ngati Kahungunu ki Heretaunga had the mana whenua or authority over the water that suckled, water that comforted, waipikiao, water of reflecting pools for adornment and hairdressing, wairatahi, indeed over all the aquifer system known as Heretaunga Ararau Haukunui. That is, the many rivers, creeks, the small tributaries fed by underground springs, tributaries, springs, springs of water, well springs, tarns, swamps, swampy ground or marshes, bogs, natural dams, constructed dams, ponds, swimming holes, wells, rock pools from seepage, and quick sands.]

We asked the Maori witnesses as to their knowledge of and traditional relationships with aquifers. Ms Huata replied:

So when I was 16, that was the question I asked my uncle. ‘What is a haukunui?’ And bluntly he puts it as, ‘Oh, it’s a swamp.’ And then, then he realised, ‘Oh, don’t be too fast at answering that,’ and then he came back and told – well, he said to me, ‘It’s an aquifer that supplies artesian water.’ And as far as I know and many of the Heretaunga people know too, that the haukunui is our aquifer. Āe.²⁶⁰

255. Waitangi Tribunal, *The Ngawha Geothermal Resource Report*, p 15

256. Hohepa and Habib, ‘Maori Terminology and Water’ (doc A69(i)), p 32

257. Waitangi Tribunal, *The Ngawha Geothermal Resource Report*, p 15

258. Toi Maihi, written notes of oral presentation (doc B1), p 2

259. Huata, ‘Heretaunga Ararau Haukunui’ (doc B19), p 19

260. Matatewharemata Te Hira Huata, oral evidence, 9 July 2012, Draft Transcript, p 88

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Mr Minhinnick told us that the word used by his people, Ngati Te Ata, is 'kaawa': 'They called it a kaawa, the aquifer, it was like a train which delivered water.'²⁶¹ Tunnels and caves, some of them waahi tapu, gave knowledge of how water moved in the ground.²⁶² Mr Cairns told us of how a spring at Ruatahuna is known as Te Korokoro o Te Motu, the Throat of the Island, because although it is a small spring, it wells up deep from within Papatuanuku, 'the gift of the island to me on my marae.'²⁶³ Deep-welling water was often referred to by witnesses. We are aware also of the term 'wai manawa whenua' for a spring that arises so deep from within the heart of the earth that it is unfailing. And Mr Waho told us of how the waters come from deep within nga kahui maunga, the chiefly cluster of mountains. The links between the waterways are all known and they are associated with the taniwha Takaka.²⁶⁴ We also received the evidence of Mr Tuarama Hawira, who told the Whanganui Tribunal: 'Within the archives of tribal korero there is the carefully protected knowledge of the underground network of springs, streams and rivers.'²⁶⁵ We will not mention the detail of Mr Hawira's korero, except to say that the springs and lakes of a wide area were believed to be linked, including to a famous spring at Takaka in Te Tau Ihu (the northern South Island), referring to the taniwha also mentioned by Mr Waho. A prominent ridgeline was named 'Waipuna' because it was known that underground waterways flowed through it.²⁶⁶

While it is not for us to comment on the Pakeha science of this traditional knowledge, as earlier Tribunals have sometimes sought to do, we note simply that there is a great deal of evidence even in our relatively brief urgent inquiry that underground water was known to be part of the indivisible water resources that were taonga to so many hapu and iwi. And, although it has not been highlighted in this inquiry, the links with the coast and the sea (especially estuaries) were also important.

Where hapu were fortunate enough to have life-sustaining wetlands in their rohe, they were clearly seen as taonga – the evidence from Professor Hohepa and Dr Habib,²⁶⁷ from Mr Jeremy Gardiner,²⁶⁸ and from Ms Huata supports that point. But the evidence also shows that wetlands and indeed all surface waters were known to be part of a wider cycle in the life of water. As we discussed above (2.2.2(1)), the late Mr Hohepa Kereopa described the life cycle of Te Miina o Papatuanuku, how water fell from Ranginui to Papatuanuku, how it formed the many waterways of the lands and washed the impurities to Tangaroa, the sea, from whence it rose again to Ranginui to begin the cycle over. And where there were

261. Roimata Minhinnick, oral evidence, 10 July 2012, Draft Transcript, p 97

262. Roimata Minhinnick, oral evidence, 10 July 2012, Draft Transcript, pp 97-98

263. Tamati Cairns, oral evidence, 11 July 2012, Draft Transcript, p 305

264. Toni Waho, oral evidence, 11 July 2012, Draft Transcript, pp 282-283

265. Turama Thomas Hawira, brief of evidence for the Whanganui district inquiry (doc B28), p 7

266. Turama Thomas Hawira, brief of evidence for the Whanganui district inquiry (doc B28), pp 7-8

267. Hohepa and Habib, 'Maori Terminology and Water' (doc A69(i)), pp 36-39

268. Jeremy Gardiner, 'Rangitaiki Plains Wetland and Aquifer', 18 May 2012 (doc A55(a))

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aquifers and underground water sources, the evidence in our inquiry appears to be that surface waters were deemed indivisible from those underground waters.

This leads us to the question of whether aquifers or ground water could be ‘possessed’ in the same manner as a surface water body, or as an indivisible part of such bodies. The answer is likely similar, in our view, to how the geothermal and petroleum resources have been conceptualised. While there was some disagreement over the effects of land alienation on Maori rights in the subsurface resource, both the Ngawha and Central North Island Tribunals found that Maori had substantial rights in the heat and energy system that formed and was inseparable from the surface manifestations of the geothermal taonga (see above, 2.6.3). In the petroleum inquiry, the Tribunal did not need to find petroleum to have been a taonga at 1840 because the common law gave landowners ownership of it, even though it was an underground, migratory resource similar to subterranean water (whether fresh or geothermal).²⁶⁹

In their report for the experts group, Professor Hohepa and Dr Habib reproduced the following quotation from *The Whanganui River Report*:

We thus noticed that when the claimants spoke of the river, or referred to its mana, wairua (spirit), or mauri, they might in fact have been referring not just to the river proper but to the whole river system, the associated cliffs, hills, river flats, lakes, swamps, tributaries, and all other things that served to show its character and form . . . For Maori it included all things related to the river: the tributaries, the land catchment area, or the silt once deposited on what is now dry land.²⁷⁰

The question of what Treaty rights apply to aquifers will be considered below (2.8.3(2)).

Having assessed the evidence and the arguments of the parties, we turn next to make our findings as to the nature and extent of Maori rights in freshwater and geothermal resources that were guaranteed and protected by the Treaty in 1840.

2.8.3 The Tribunal’s Findings

(1) Findings in respect of the claimants

We preface our findings with the point that we are not making findings of mana whenua or mana moana for any of the particular groups who appeared before us. The claimants have asked us to determine the *nature* of Maori rights at 1840, not *who had the rights*. This is an important proviso, as we are aware that the rights of kin groups overlap in the Waikato River, the Kaituna River, and some of the other water bodies used as ‘case examples’.

269. Waitangi Tribunal, *The Petroleum Report* (Wellington: Legislation Direct, 2003), pp 19-20, 42-43 [chk]

270. Waitangi Tribunal, *The Whanganui River Report*, p 39 (Hohepa and Habib, ‘Maori Terminology and Water’ (doc A69(i), p 24

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With that proviso in mind, we are satisfied that the claimants' and the interested parties' evidence demonstrates that their water bodies were taonga over which hapu or iwi exercised te tino rangatiranga and customary rights in 1840, and with which they had a physical and metaphysical relationship under tikanga Maori (Maori law). Their rights included authority and control over access to the resource and use of the resource. This authority was sourced in tikanga and carried with it kaitiaki obligations to care for and protect the resource. Sometimes, authority and use was shared between hapu but it was always exclusive to specific kin groups; access and use for outsiders required permission (and often payment of a traditional kind).

The water in these water bodies was vital for the sustenance of the life and health of the person, both in body and spirit. The water bodies had their own mauri (life force) which was so tied to that of the people that if it sickened, they did too. Water could be tapu. Waterways were lined with waahi tapu, and water was used for rituals, including tohi. Water bodies were also highly prized for their resources, both food and other materials. And water bodies could be living ancestors, tupuna awa, such as the Whanganui River. As such, they were taonga, indivisible water regimes encompassing banks, bed, water, fish, aquatic plants, and even their spiritual guardians (taniwha). No element was severable; although fish were taken, plants were gathered, and the water flowed by, a whole and healthy water body – cared for and used sustainably by its kaitiaki – remained as a fishery, a 'garden',²⁷¹ a water resource. As Judge Acheson observed, without water the taonga was nothing more than a muddy piece of land.

Under Maori law, rights in these water bodies – and whether or not they were a taonga – was demonstrated by what the claimants called the customary 'indicia of ownership'. We have discussed these at length (2.7.1) and set out the claimants' evidence for each of them. The claimants submitted that, if we found the same 'indicia of ownership' existed for them as had been found in the Lake Omapere decision and previous Tribunal reports, then we should make the same finding as those reports: that the closest cultural equivalent to their rights in 1840 was English-style ownership. Given that the legislation under which governments assumed management and allocation powers – including the Water Power Act 1903, the Water and Soil Conservation Act 1967, and the Resource Management Act 1991 – lay in the future, we agree that the claimants' evidence has demonstrated the customary 'indicia of ownership', and that 'full-blown' ownership of property in the English sense was the closest legal equivalent for Maori customary rights in 1840.

But we also agree with the Whanganui River Tribunal, the Central North Island Tribunal and others that te tino rangatiratanga was *more than ownership*: it encompassed the autonomy of hapu to arrange and manage their own affairs in partnership with the Crown (see sections 2.6.2(3) and 2.6.3; see also section 2.6.2(1)). We quoted above a concession made

271. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, p 33

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by the Crown in the Central North Island inquiry, that ‘the relationship between Maori and their taonga “exists beyond mere ownership, use, or exclusive possession; it concerns personal and tribal identity, Maori authority and control, and the right to continuous access, subject to Maori cultural preferences”’.²⁷² We agree with that statement. But, as we also find, it *includes* ownership. On the evidence before us, we can see no reason to dissent from the findings of the many Tribunal inquiries that have preceded ours, and that we have set out in section 2.6 above.

Some of those Tribunal reports, including *The Whanganui River Report*, have relied in part on a native or aboriginal title analysis, which is important in establishing what the common law might have provided for at the time (see 2.6.2(3)). As we noted in 2.2, the claimants say that theirs is not a native title claim. Why do they say that? It is because they are not looking to go to the courts to seek whatever kind of title or rights that the present law will allow them. Rather, they say that they had full-blown property rights as at 1840, that the Crown should have recognised and protected those rights by conferring on them a legal title, that the Crown did not do so, and that the Crown should now take steps to recognise the rights where that is possible and to compensate for their loss or infringement where it is not. That is the basic argument in this claim.

We note that it accords with the findings of the Te Ika Whenua Rivers Tribunal, which were that the hapu of Te Ika Whenua were ‘entitled, as at 1840, to have conferred on them a proprietary interest in the rivers that could be practically encapsulated within the legal notion of the ownership of the waters thereof’.²⁷³ The Tribunal went on to find: ‘The failure of the Crown under its power of kawanatanga to put into effect a form of title that recognised customary and Treaty rights of Maori to their rivers is an underlying factor in the present claim.’²⁷⁴ For our inquiry, the second point is a matter for stage two but it underpins this claim, as it did the Te Ika Whenua claim.

We agree with the claimants that both texts of the Treaty support this finding of ‘ownership’ at 1840. We acknowledge Ms Mason’s submission (see 2.2.2(2)) that only the Maori text of the Treaty (Te Tiriti) should be relied upon. The evidence in support of this submission was given in the Te Paparaki o Te Rahi inquiry. That Tribunal has not yet reported on the issue raised by Ms Mason. It is simply not possible for us to accept her submission in the meantime; the matter must await determination by the Tribunal that has heard the claim. We note that Mr Enright submitted, for Professor Hohepa and Mr Taylor, that we should consider the English text in any case. And that is certainly the submission of the claimants in their reply to the Crown:

272. Waitangi Tribunal, *He Maunga Rongo: Report on Central North Island Claims, Stage One* (Wellington: Legislation Direct, 2008), vol 4, p 1281

273. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 124

274. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 104

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Article 2 in the English text is clear in confirming and guaranteeing to Maori ‘. . . the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess . . .’. It is simply not possible to deal with Maori rights and interests solely in terms of stewardship rights, without reference to ownership in view of the clear statement of rights in the English text of Article 2.²⁷⁵

The claimants argued further that the guarantee of ‘te tino rangatiratanga o o ratou taonga’ in the Maori version of Article 2 coincided with this guarantee of possession in the English version, because ‘full-blown’ ownership was its closest cultural equivalent in 1840. We agree and would add that the authority and control embodied in the rangatiratanga guarantee are, as the Tribunal has stated in many reports, a standing qualification of the Crown’s kawana-tanga. (The exception to this finding is the nature and extent of the Maori interest in ground water and aquifers, which we discuss separately in the next section (2.8.3(2)).)

Maori rights and interests in their water bodies, however, were not left completely unaltered by the Treaty compact. Rather, they changed in three ways.

First, the Treaty provided for tauwiwi (non-Maori) to settle and make their home in New Zealand. They, too, would need access to water resources. Article 2 guaranteed the Maori Treaty partner possession of their property for so long as they wished to retain it, thus providing for Treaty-compliant alienations. But, as we discussed in section 2.6 above, the Tribunal’s Manukau, Mohaka River, and Te Ika Whenua Rivers reports found that by adhering to the Treaty, Maori had granted settlers a non-exclusive use-right in the waters that were the subject of those reports. The Whanganui River Tribunal, as we also noted above, found that this could not be shown to have been the case, on the facts, for the Whanganui River.

In our inquiry, the claimants accepted the possibility that Treaty-compliant alienations may have taken place. In particular, by selling or leasing the land that controls access to water bodies, the claimants may be considered to have shared their waters.²⁷⁶ That particular point is a matter for stage two of our inquiry, where we consider what Maori rights remain extant. What is more important here is the claimants’ position on the question of whether, in agreeing to the Treaty, they thereby consented that settlers would have access to and use of New Zealand’s waters. The Maori witnesses who appeared before us were quite firm on two points: yes, they shared their water bodies with the manuhiri (guests) who settled here in accordance with manaakitanga; but the act of sharing reinforced their mana and authority, rather than derogating from it. We heard such evidence from Ms Toi Maihi, from Mr Nuki Aldridge, from Mr Taipari Munro, from Dr Yates-Smith and from others. Mr Aldridge, for example, told us:

275. Claimant counsel, submissions by way of reply (paper 3.3.20), p 9

276. Claimant counsel, opening submissions (paper 3.3.1), pp 14-15

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At the first contact with Europe, there was an exchange of good will where my ancestors gave sustenance to Pākeha ancestors. This would have facilitated the priority, the who gave and who received. To reiterate, tangata whenua Māori were in all situations the host nation and the (inaudible) from Europe, the visitors, and they, Māori, offered sustenance as a user right to manaaki manuhiri and we're maintaining that even today. There is enough information recorded on how Pākeha reciprocated to these contacts and that left Māori with no lasting impression.²⁷⁷

In submissions, claimant counsel accepted the Te Ika Whenua Rivers Tribunal's finding that Maori had 'acceded to a shared use' for non-commercial purposes, consistently with the Treaty principle of partnership and the Treaty expectation that settlement would occur.²⁷⁸ Claimant counsel agreed that 'similar findings would be likely in the majority of cases'. In his view, however, this was not an automatic component of the Treaty bargain with the Crown. The case examples of Lake Rotokawau and Lake Rotongaio, for example, show 'a clear and consistent intention to exclude all but the owners from any use.'²⁷⁹ Nonetheless, the claimants accept:

a Treaty breach does not arise from the mere use by non-Maori of a water resource. Treaty issues arise from commercial exploitation and large scale use, particularly where that use interferes with the Maori owners' own ability to exploit the resource.²⁸⁰

In accord with the evidence, counsel submitted that Maori did not see the sharing of their water bodies as a *relinquishment of tino rangatiratanga* but rather as an *exercise of tino rangatiratanga*.²⁸¹

We accept the claimants' submissions on these points. The Treaty was intended to create a new nation where two peoples would share land and resources for their mutual benefit. But it also provided for those who owned all the land and resources at 1840 to make free, willing, and informed choices as to which land and resources they would alienate to the Queen. As is well known, and was referred to in submissions by Ms Sykes, there followed a debate within the British and New Zealand Governments as to whether Maori owned every inch of soil in New Zealand or merely those pieces on which they had expended labour. The question was settled decisively in 1848: Maori owned all the land. It could only be obtained from them, on the instructions of the British Government, by fair and equal contracts. No land was to be purchased that was essential for their subsistence and wellbeing. As the Foreshore and Seabed Tribunal found, this guarantee is to be taken as including the properties Maori

277. Nuki Aldridge, oral evidence, 9 July 2012, Draft Transcript, p 25

278. Claimant counsel, opening submissions (paper 3.3.1), p 14

279. Claimant counsel, opening submissions (paper 3.3.1), p 14

280. Claimant counsel, opening submissions (paper 3.3.1), p 14

281. Claimant counsel, oral submissions, 19 July 2012, Draft Transcript, p 1177

owned by their own customary law, which included the foreshore and the sea.²⁸² It should also be taken to have included, as we explained at length above, their freshwater and geothermal resources.

It follows that, while there might be a general expectation of access and use for non-commercial purposes, access would be on Maori terms until such time as they chose to make a Treaty-compliant alienation. And Maori could say 'no'. Otherwise there was no point to the Article 2 guarantee. But they could not say 'no' unreasonably. It is fundamental to the Treaty that each partner was expected to act reasonably and co-operatively towards the other, and with the utmost good faith.²⁸³ But the situation *today* will be different in terms of the balance of 'sharing' between the partners, hence the existence of this Treaty claim for rights recognition and rights reconciliation.

This leads us to the second way in which the Treaty modified Maori rights in their water bodies. Under Article 1 of the Treaty, Maori ceded 'sovereignty' (in English) and 'kawanatanga' or 'governance' (in Maori). Tribunal reports have examined this cession of kawanatanga in return for the guarantee of tino rangatiratanga, and have said that Crown and Maori authority operate autonomously (in their own spheres) and in partnership (where they overlap).²⁸⁴ We accept the Crown's argument that it is required to govern in the interests of the nation and the best interests of the environment, and that it must balance many interests in doing so. We also note, as the Tribunal has done many times in the past, that Maori are the Crown's Treaty partner and not just one interest group among many.²⁸⁵ Nor can Maori Treaty rights be balanced out of existence. Rather, the Crown's balancing of interests must be fair and must comply with Treaty principles. We agree with the findings of the Wai 262 report, as put to us by the Crown (2.8.2), that a principled regime for environmental management must be established so as to determine what degree of priority should be accorded the Maori interest in any one case. We also agree that a sliding scale is necessary: sometimes kaitiaki control will be appropriate, sometimes a partnership arrangement, and sometimes kaitiaki influence will suffice, depending upon the balance of interests (including the interest of the taonga itself).

Just how matters should be balanced in terms of recognising and giving effect to Maori proprietary rights in their water bodies (or compensating for them where that is not possible) is yet to be determined. The claimants' position on this matter is not fully articulated. We expect that will happen in stage two. At present, however, we note the claimants' admission that the Crown has a legitimate role to play in the management of water resources 'as a legitimate exercise of its kawanatanga under Article 1.'²⁸⁶ We welcome that admission.

282. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wellington: Legislation Direct, 2004), pp 18-28

283. Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 131

284. Waitangi Tribunal, *The Taranaki Report: Kaupapa Tuatahi* (Wellington: GP Publications, 1996) pp 5, 20

285. Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, p 70

286. Claimant counsel, opening submissions (paper 3.3.1), pp 5-6

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The third way in which the Treaty modified Maori rights in water is that it brought a new people to the country and established a bicultural nation. Under the principle of options, this conferred on Maori the option of walking in two worlds. It was expected in the Treaty that both Maori and settlers would prosper in the new nation state and that there would be mutual benefit from settlement. Integral to that understanding was that Maori would have the rights of citizens, which included the right to have their properties protected under the law, and the right to develop those properties by the means available to them. As the available means changed, the right remained constant. Under the Treaty, Maori gained the right to develop by the opportunities it created.

The Crown's submission on this point relied on the Radio Spectrum minority opinion, which accepted that Maori had a right to develop traditional uses of customary resources (such as fishing) and to 'develop their culture, their language and their social and economic status using whatever means are available'. The minority opinion rejected, however, any development right in 'resources not known about or used in a traditional manner'.²⁸⁷ The claimants disagreed, arguing that their development right cannot legitimately be constrained in that way.

We need not consider this matter further here, other than to note that the Treaty conferred a development right on Maori as part of the quid pro quo for accepting settlement. The nature and extent of that right in respect of water resources, in relation to the Crown's proposal to sell up to 49 per cent of the power-generating companies, will be discussed in chapter 3.

So far, we have discussed the Treaty duty that Maori owed the Crown of reasonableness and cooperation, and how it applied to water resources, and also the Crown's acquisition of kawanatanga rights in return for its guarantee of Maori property rights (English version) and te tino rangatiratanga o o ratou taonga (Maori version). We now need to consider what Treaty duties were created for the Crown in respect of Maori and their water resources.

In the submission of counsel for the interested parties, we should adopt the finding of the Foreshore and Seabed Tribunal that the Crown's Treaty duty is:

actively to protect and give effect to property rights, management rights, Maori self-regulation, tikanga Maori, and the claimants' relationship with their taonga; in other words, te tino rangatiratanga.²⁸⁸

In the view of the Wairarapa Tribunal, the Crown owed this duty to Maori owners of water bodies on two counts: first, as Maori with Treaty rights; and, secondly, as citizens with property rights:

²⁸⁷ Waitangi Tribunal, *The Radio Spectrum Management and Development Report* (Wellington: GP Publications, 1999), pp 62-63 (Crown counsel, closing submissions (paper 3.3.15), pp 17-19)

²⁸⁸ Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy*, p 28 (Counsel for the interested parties (Sykes), opening submissions, 29 June 2012 (paper 3.3.6), p 2)

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Colonisation imported a system of law, and Māori, like other citizens, are entitled to its benefits. The story of Wairarapa Moana [Lake Wairarapa] is a story of Māori property rights being overridden, disregarded, and dishonoured . . . And people whose experience tells them that their rights do not matter feel ultimately that they are people who do not matter. Over time, this becomes a way of being that is erosive of self-esteem. It affects people's ability to succeed both privately and professionally. It is a condition from which the Treaty should have, but did not, protect them.²⁸⁹

The duty of active protection has been described many times by the Tribunal and the courts. We agree with the Te Ika Whenua Rivers Tribunal that 'the Crown must actively protect Maori property rights to the fullest extent reasonably practicable.'²⁹⁰ In the present claim, this duty is to protect Maori property rights in their water bodies. In the *Lands* case, Cooke P said that this duty 'is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent [reasonably] practicable.'²⁹¹ This includes the active protection of their development rights in their water bodies.

The Crown is also required to 'redress Treaty breaches by taking positive steps to make amends, including compensation for loss.'²⁹² This requirement applies just as much if not more to present or ongoing breaches as it does to historical breaches. If the claimants and the interested parties have residual proprietary rights (as the case examples suggest that they do), then the Crown's Treaty duty is to undertake in partnership with Maori an exercise in rights definition, rights recognition, and rights reconciliation. If we follow the reasoning of the Te Ika Whenua Rivers Tribunal, it might result in a new 'form of title' that recognises the customary and Treaty rights of Maori in their water bodies. Or it might, as the Crown suggests, take the form of putting into effect the recommendations of the Wai 262 Tribunal so that kaitiaki can have control of taonga or partnership arrangements where appropriate. It might be a combination of both or something else altogether.

In the Crown's submission, whatever option is chosen will not be affected if the sale of shares in Mighty River Power proceeds in September–December 2012 as planned. We will address that argument in the next chapter. Here, we note that Maori rights in 1840 included rights of authority and control over their taonga (water bodies), and rights akin to the English concept of ownership. We agree with the Te Ika Whenua Rivers Tribunal that the Crown's Treaty duty in 1840 was to devise a form of title that would have conferred on Maori 'a proprietary interest in the rivers [and other water bodies] that could be practically encapsulated within the legal notion of the ownership of the waters thereof.'²⁹³

289. Waitangi Tribunal, *The Wairarapa ki Tararua Report*, vol 2, p 707

290. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 134

291. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 664 (Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 134)

292. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 135

293. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 124

(2) *Are aquifers and ground water an exception?*

We have some hesitation in defining the exact nature and extent of Maori rights in aquifers at the time the Treaty was signed.

The evidence outlined in section 2.8.2 shows that some waterways were believed to be interconnected underground, that those connections were valued and thus the domain of taniwha, and that underground water was also valued as the source of springs and other surface features. When Mr Cairns, for example, spoke of the Ruatahuna spring Te Korokoro o Te Motu, the Throat of the Island, he did not conceptualise it as a piece of surface water but something that welled up from deep within Papatuanuku. And the core of Ms Huata's evidence was the nature of her people's relationship with the wetlands and other waters of Heretaunga, which is conceived of as inseparable from the aquifer beneath the plains.

The finding that we are being asked to make is that the nature of Maori rights in ground water and in aquifers was such that the closest English equivalent in 1840 was proprietary rights – and 'full-blown' ownership at that.

We accept the Central North Island Tribunal's view that Maori had rights of a proprietary nature in the underground heat and steam system that generated surface geothermal features. We also noted above the Petroleum Tribunal's finding that landowners were considered to own the migratory petroleum resource under their land as a matter of common law, until the the Crown nationalised it in 1937. These two findings assist up to a point. We read them in light of the claim, which we have accepted (in common with earlier inquiries), that Maori water resources were conceived of as an indivisible whole and not in component parts.

But it cannot be the case that all ground water and certainly not all aquifers were known and the benefits enjoyed (in the way that all surface water bodies were known and enjoyed) in the territories over which Maori tribes exercised tino rangatiratanga in 1840. Does that matter? The claimants' witness, Mr Tony Walzl, argued that if Maori did not know of the existence of aquifers or particular aquifers in 1840, nor had the scientific knowledge and technology to use them, the Treaty right of development encompassed them nonetheless. Both peoples were to develop as a result of the new opportunities provided by the Treaty.²⁹⁴ Here, the difference between the Crown and claimants over the development right becomes acute.

We did not receive specific submissions from the claimants as to the nature and extent of rights in aquifers or ground water; it was assumed that the 'indicia of ownership' applied to them in the same manner as to other water resources. Nor did we receive submissions about how the right of development should apply – if at all – to aquifers.

294. Tony Walzl, oral evidence, 11 July 2012, Draft Transcript, pp 296-297

In the absence of specific submissions, we lack the evidence and legal argument to make a finding about the nature and extent of Maori rights in aquifers and ground water at 1840. Our findings above at 2.8.3(1) should not be read as applying to aquifers or ground water.

We next need to consider whether our findings for the claimants can be generalised to other hapu and ‘their’ water bodies.

(3) Can our findings be generalised?

In the claimants’ view, their ‘indicia of ownership’ can be generalised for all hapu and all water bodies in New Zealand. One reason, so they told us, is that the very same indications of ownership have been consistently accepted since 1840 in respect of land. The Crown, however, submitted that we should not generalise from the claimants’ case examples (and previous Tribunal reports) to all other hapu and water bodies. In Crown counsel’s view, there needs to be a detailed inquiry into the circumstances of each case as part of the historical claims process. There is insufficient evidence in this urgent inquiry to enable findings of such a scope. We are mindful, too, of the position of the interested parties such as Ngai Tahu, who stand apart from the claim. In their submissions, we should not make findings that extend to or affect their resources.²⁹⁵

In our memorandum-directions of 15 May 2012, we responded to Ngai Tahu’s submissions:

Whatever findings and recommendations this Tribunal makes will be generic and therefore of national scope, regardless of who is bringing the claim. However, we do note that the list of case examples, which will form the basis of such findings, does not include any examples from the Ngāi Tahu tākiwa. Also, any findings and recommendations made by this Tribunal will be non-binding, and it will be for Māori (including Ngāi Tahu) and the Crown to decide in partnership what import they should be given and whether or how they should be given effect. Further, Ngāi Tahu will hold a watching brief in the inquiry and may make submissions if they feel that their interests are being adversely affected.²⁹⁶

Our position on this matter has not changed. The findings set out in 2.8.3(1) are generic in nature – albeit drawn from the claimants’ evidence, the interested parties’ evidence, the Lake Omapere decision, and previous Tribunal reports – and are therefore of general application. Any of the interested parties in this inquiry may take such findings as applying to them if they so wish. That is a matter for them. But our findings do not have specific application to any of the groups who preferred not to participate in the inquiry.

It is likely that all iwi and hapu in New Zealand would be able to demonstrate some or all of the ‘indicia’ set out by the claimants in respect of their particular water bodies. It is a matter common to all Waitangi Tribunal reports that Maori exercised tino rangatiratanga over their territories in 1840. Surely no Maori group would dispute that. As such, the nature and

295. Counsel for Ngai Tahu, memorandum, 8 May 2012 (paper 3.1.98)

296. Waitangi Tribunal, memorandum-directions, 15 May 2012 (paper 2.5.20), p 2

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extent of their rights will be similar. But the question of whether a particular water body is a taonga is a matter for case-by-case inquiry. Again, we doubt anyone would dispute that point.

Our generic finding is that Maori had rights and interests in their water bodies for which the closest English equivalent in 1840 was ownership rights, and that such rights were confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that there was an expectation in the Treaty that the waters would be shared with the incoming settlers. In agreement with the *Te Ika Whenua Rivers Report*, *The Whanganui River Report*, and *He Maunga Rongo*, we say that the nature and extent of the proprietary right was the exclusive right to control access to and use of the water while it was in their rohe. In the next chapter, we consider the issues that arise from this finding in respect of the Crown's proposal to sell up to 49 per cent of shares in the MOM power companies, starting with Mighty River Power in 2012.

CHAPTER 3

**SELLING SHARES WITHOUT
FIRST PROVIDING FOR MAORI RIGHTS : A BREACH ?**

3.1 INTRODUCTION

In the statement of issues for stage one of this inquiry, the Tribunal posed the following questions:

- (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?
 - (i) Before its sale of shares, ought the Crown to disclose the possibility of Tribunal resumption orders for memorialised land owned by the mixed ownership model power companies?
 - (ii) Ought the Crown to disclose the possibility that share values could drop if the Tribunal upheld Māori claims to property rights in the water used by the mixed ownership model power companies?
- (c) Is such a removal of recognition and/or remedy in breach of the Treaty?
- (d) If so, what recommendations should be made as to a Treaty-compliant approach?

In chapter 2, we addressed question (a). We found that Maori had rights and interests in their water bodies for which the closest English equivalent in 1840 was legal ownership. Those rights were then confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that the Treaty bargain provided for some sharing of the waters with incoming settlers. The nature and extent of the proprietary right was the exclusive right of hapu and iwi to control access to and use of the water while it was in their rohe.

Having made that finding, we now examine the remaining issue questions (b) to (d). We begin by summarising the relevant arguments of the claimants, the Crown, and the interested parties. We then dispose of preliminary issues about the nature of the disclosures that will be made in the share sale prospectus (sub-issues (b)(i)–(ii)). After that, we analyse the evidence and arguments put forward by the parties in terms of four key areas of debate:

- ▶ What are the options for rights recognition or rights reconciliation? (section 3.6)
- ▶ Is there a nexus between shares and water rights? (section 3.7)

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- ▶ To what extent, if any, will the options for rights recognition be affected by partial privatisation? (section 3.8)
- ▶ If the Crown proceeds with partial privatisation, will it be in breach of Treaty principles? (section 3.9)

In the final section of this chapter (3.9), we set out our findings and recommendations in respect of stage one of this urgent inquiry.

3.2 THE CLAIMANTS' CASE

3.2.1 An overview of the claimants' case

In this section, we set out the claimants' arguments and follow that with the additional arguments put to us by the interested parties. The question of whether the present degree of recognition accorded Maori rights is in breach of the Treaty is a matter for stage two. Yet it is necessary, in the claimants' view, to assume that there *is* a breach for the purposes of stage one; in other words, that current laws and policies do not sufficiently recognise Maori proprietary and Treaty rights in their water bodies. The extent to which proprietary rights have survived colonisation, and the prejudice caused by insufficient recognition of the rights, is something that the claimants intend to demonstrate in stage two.¹ But they foreshadowed that the prejudice consists of interference with customary uses (sometimes lost altogether), environmental degradation, interference with development rights, and commercial exploitation by others without compensation to the proprietors.²

With this alleged breach as their starting point, the claimants summarised their case at stage one as follows:

A treaty compliant regime would require both recognition of the ownership rights to the extent that that is possible and compensation to the extent that it is not. Such compensation would need to include finite amounts in recompense of past breaches and ongoing payments for continued use. Expert evidence has been adduced setting out realistic options for how both ongoing revenue and recognition of rights might be achieved.

Whichever mechanism is used, compensation for continued use by SOEs should come from SOEs to maintain the Maori owners' connection to the water. Compensation will also need to be provided in cases where the cause of the breach is not revenue producing and the SOEs are best placed to also provide this compensation.

Some Claimants have unresolved claims to water resources being used by power generating SOEs. They also have interests in a number of resources that the Crown has identified as being the site of potential future SOE development. The SOEs will therefore be a necessary

1. Claimant counsel, opening submissions, 19 June 2012 (paper 3.3.1), pp 3-4

2. Claimant counsel, opening submissions (paper 3.3.1), p 18

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part of any compensation. Irrespective of mechanism, such compensation will not be possible if the partial sale goes ahead.

Given the nature of the interest established and the Crown's failure to address this issue, it would be inconsistent with principles of the Treaty for the partial sale to go ahead until Maori claims to freshwater and geothermal resources are resolved.³

While it is not necessary to fully define a framework at stage one, any framework for rights recognition or rights reconciliation must, in the claimants' view, cater for three sets of circumstances:

► Where it is practical to recognise Maori 'ownership rights'.

In this case, Maori proprietary rights could be given effect in a variety of ways, such as the ability to exclude the public from waahi tapu, or to control or veto uses of the resource. Arrangements could also be put in place to pay the owners for future commercial exploitation of the resource or to enable them to develop it themselves. The claimants suggested that there is still a connection between this category and the SOEs because the co-claimant tribal groups have interests in at least ten 'waters of national significance' being contemplated for future hydro or geothermal power generation by the SOEs.

► Where it is impractical to recognise Maori 'ownership rights' because the water resource is used by a power-generating SOE.

In this case, two forms of compensation may be required: payment for ongoing use by the power company; and compensation for the corresponding loss of use by the Maori owners. To preserve the Maori relationship with the resource, compensation should come from the income generated by use of the water. In the claimants' view, it is very important that whatever compensation mechanism is devised preserves a connection to the water resource.

► Where it is impractical to recognise Maori 'ownership rights' because there is extensive reliance on the resource by users other than for power generation (such as agriculture or urban drinking supplies) or where the resource has been so significantly degraded that Maori rights could not be given practical effect.

In this case, Maori still need to be compensated for use of their water by others, and for the corresponding loss of the ability to develop it themselves. Use by others of the water may not generate a 'readily realisable revenue stream'; if it does, then compensation 'ought to be sourced from that revenue stream'. In other cases, the power-generating SOEs have 'significant value and are therefore capable of funding such compensation to a significant degree', they are already a 'necessary part of a compensation framework', and 'no other resource readily suggests itself'. This is particularly so where environmental degradation requires very expensive clean-up, but the harm has not resulted from uses that produced a 'readily identifiable revenue stream'.⁴

3. Claimant counsel, opening submissions (paper 3.3.1), p 4

4. Claimant counsel, opening submissions (paper 3.3.1), pp 21-27

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These are not hard and fast categories: 'It is quite easy to imagine a water resource where some increased recognition of ownership is possible, where there has been some use by an SOE and some use by others, and where there may have also been some environmental degradation.'⁵

In summary, the claimants want the SOEs to pay for the water they use (including any additional uses in future). They also want the SOEs to be available as a source of compensation if other water-users' activities do not generate a readily identifiable income stream, and to be available as a source of funds for environmental restoration of degraded water bodies. The nexus for all of this is the power companies' use of Maori-owned water resources, and the temporary opportunity created by the Government's decision to privatise up to 49 per cent of their shares, which makes them 'best placed' to provide compensation for many different things.⁶ Counsel pointed to the fisheries settlement as a key precedent. Interests in Sealords and the particular quota allocations for Maori 'did not directly reflect the fisheries that the Maori recipients of that settlement had lost'; the nexus was fishing rights. In this case, it is water rights.⁷ We summarise this argument by saying that at its root, all problematic exploitations of water, including that of the SOEs, have a single enabling cause: the Crown's legislative framework since 1903 (the Water-Power Act 1903, the Water and Soil Conservation Amendment Act 1967, the RMA 1991). These statutes have 'resulted in all of these problems and has also enabled the Crown to make a lot of money. And that's the nexus.'⁸

Thus, any framework adopted in the future will be absolutely dependent on the SOEs to be part of the solutions. As a result, in the claimants' view, it would become 'much more difficult, if not impossible' to implement any framework at all after the partial sale. One reason for this is that a sale of shares on the basis of a zero-cost for the use of water would make it 'very difficult, if not impossible, to subsequently alter this model in order to recognise Maori ownership rights to the water used.'⁹ That is because:

After the sale there will be minority shareholders and minority shareholders have rights, and minority shareholders have political power, and minority shareholders have friends and families with political power.¹⁰

In the claimants' submission, the Crown can do a number of Treaty-compliant things at the moment that the introduction of minority shareholders will prevent. First, the claimants suggested that the SOEs have put in place peppercorn rentals on memorialised properties that could still be undone while the Crown effectively controls both lessor and lessee.

5. Claimant counsel, opening submissions (paper 3.3.1), p 24

6. Claimant counsel, opening submissions (paper 3.3.1), pp 21-27

7. Claimant counsel (Geiringer), oral submissions, 19 July 2012, Draft Transcript, pp 1220-1221

8. Claimant counsel (Geiringer), oral submissions, 19 July 2012, Draft Transcript, p 1185

9. Claimant counsel, opening submissions (paper 3.3.1), pp 27-28

10. Claimant counsel, closing submissions, 19 July 2012 (paper 3.3.10), p 12

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Secondly, the claimants submitted that minority shareholders might make it impossible for the Government to introduce a charge for the use of water, and would certainly be in a position to prevent special arrangements between the Crown and Maori shareholders if such arrangements are not put in place before the sale.¹¹ The claimants also suggested that the Tribunal should disregard any suggestion that the Crown might resolve this problem by buying back or even renationalising minority shareholders' shares in the future, as adverted to by Crown witnesses during the hearing. Claimant counsel pointed to the Crown's stated policy of not renationalising private property for the purposes of Treaty settlements (as legislated for in section 6(4A) of the Treaty of Waitangi Act 1975).¹²

Thus, the claimants' position is that the sale would further entrench the status quo and make remedies more difficult, if not impossible, to obtain after it. Such an outcome would be inconsistent with the Crown's Treaty obligations to the Maori owners of the rights. The sale should therefore be delayed until an arrangement can be put in place to protect their interests.¹³ In particular, the claimants' argument is that no one, including the Crown, can be sure the sale will not prejudice Maori rights and interests. The Crown itself says that those interests have not yet been fully defined. As a result, the Crown is reassuring Maori and the Tribunal that the sale will not affect its ability to recognise rights, the nature and extent of which are unknown to it, and to provide remedies, the full nature and extent of which are also unknown to it; a logical impossibility.¹⁴

The claimants seek a recommendation that 'the planned partial sale of power generating SOEs be suspended until such a time as the Crown has reached a settlement with the New Zealand Maori Council on an arrangement to protect the Maori interests in freshwater and geothermal resources'.¹⁵

3.2.2 Additional arguments from the interested parties

As noted in chapter 2, counsel for the interested parties presented detailed evidence and submissions. The claimants relied on certain of their submissions, and vice versa. In this section, we avoid duplication by summarising any additional or differing arguments made by the interested parties. There were inevitably differences of perspective and we have attempted to capture those here.

(1) *The chilling effect*

In their written closing submissions for the interested parties, Ms Sykes, Mr Pou and Ms Wara submitted:

11. Claimant counsel, closing submissions (paper 3.3.10), pp 12-13, 15

12. Claimant counsel, closing submissions (paper 3.3.10), p 13

13. Claimant counsel, opening submissions (paper 3.3.1), pp 28-29

14. Claimant counsel (Geiringer), oral submissions, 19 July 2012, Draft Transcript, pp 1199-1201

15. Claimant counsel, opening submissions (paper 3.3.1), p 29

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Without water, there are no hydro-power companies and there are no shares. There is an intrinsic link between the necessity to determine issues associated with the ownership of water and the sale of the state owned power companies. The nexus between these two issues is one of value. Where uncertainty exists, the value of any right is undermined.

The value of the right must be determined prior to the partial privatisation of any state owned asset. The value of the right can be given expression through a rights recognition regime. Once the asset is partially privatised, any opportunities for hapu and iwi in those state owned power companies that rely on water will be lost.¹⁶

In the interested parties' view, this very nexus is what will prevent the Government from providing rights recognition after the share sale: 'The value of the shares comes from the use of the water. The value of the water impacts the value of the shares.'¹⁷ In counsels' view, this is an inescapable link. Shares are to be sold on the basis that no one owns water, that there is therefore a zero value for water, and that the Crown alone has the ultimate right to allocate water (which it has delegated to regional councils and on which the companies' water permits are based). A change to any one of these fundamental principles would impinge upon the companies' bottom-line, and would therefore 'cease to be a legitimate option' after the sale. Yet the Maori Treaty claim challenges the Crown on all three of these grounds, and genuine rights recognition would have to encompass all three.¹⁸

At present, uncertainty over the Treaty claim – and over what might change if it is accepted – threatens to devalue the shares before anything actually happens at all. At the same time, the interested parties predict that selling shares on the basis of a zero value for water will prevent the Government politically from taking action that would disadvantage investors after the sale.¹⁹

Also, ministerial statements in the media, designed to reassure potential investors that the Maori claim will fail, provide grounds for litigation if the Government does later attempt to recognise rights in a way that lowers share values or profits. In particular, there is a known threat of overseas investors making claims under international investment agreements. Regardless of what is in the official prospectus, the interested parties' argument is that the ministers' public statements will justify claims based on a legitimate expectation that the status quo would continue. In selling shares to investors (including overseas investors), the Crown will effectively lock in a zero-value for water and also current administrative arrangements for water, because it would simply be too costly to alter them later in the face of likely litigation. This kind of litigation is so expensive that even the threat of it will

16. Counsel for interested parties (Sykes, Wara, and Pou), closing submissions (updated), 25 July 2012 (paper 3.3.12(b)), p 47

17. Counsel for interested parties (Sykes, Wara, and Pou), closing submissions (updated) (paper 3.3.12(b)), p 49

18. Counsel for interested parties (Sykes, Wara, and Pou), closing submissions (updated) (paper 3.3.12(b)), pp 47-49

19. Counsel for interested parties (Sykes, Wara, and Pou), closing submissions (updated) (paper 3.3.12(b)), pp 47-49; counsel for interested parties (Ertel and Thornton), closing submissions, 19 July 2012 (paper 3.3.11), p 14

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have a ‘chilling effect’ on the possibility of future rights recognition for Maori. In face of such risks, and given the Crown’s Treaty obligations, it should avoid the risks altogether by resolving the matter of redress prior to sale. In the interested parties’ view, there is no pressing public reason for the sale to go ahead immediately and so there is ample opportunity to settle with Maori before partial privatisation takes place.²⁰

(2) Ngati Ruapani’s view that shares are not the answer

Counsel for Ngati Ruapani denied that shares in the power-generating SOEs would be an ‘adequate or acceptable remedy’ for her clients. In their view, shares would be a meaningless ‘grant of scrip’ that would fail to ‘recognise the range of rights claimed.’²¹ It would be insufficient, therefore, for the Government to reserve shares for Maori and then proceed with the sale. In the first place, this would not actually resolve the question of whether Maori have proprietary rights in their water bodies, and so would do nothing to resolve the uncertainties that will plague share values.²² Secondly:

A shareholding will not recognise rights akin to ownership or the right to control manage and develop the water over which Maori have tino rangatiritanga. It is merely ownership in a company, with all the limited rights of a shareholder.²³

Thirdly, counsel argued that the use of shares to settle claims would simply replicate the “show of justice” that has ‘enabled many non-Treaty compliant transactions to be clothed in legitimacy at law’ in the past.²⁴

(3) The ‘Lands’ case is analagous

In 1987, the Court of Appeal in the *Lands* case stated: ‘The way ahead calls for careful research, for rational positive dialogue and, above all, for generosity of spirit’. In her submissions for Ngati Ruapani, Ms Ertel suggested that the present claim mirrors that case, and the need for a pause for dialogue is the same. ‘Land for land – water for water’: the practical outcome should also be the same. In the *Lands* case, memorials were placed on the properties so that the Crown could pursue its policy while the claimants were left with time to research and prove their claims in the Waitangi Tribunal and then seek a binding resumption order if required. In the interested parties’ view, a similar remedy is needed here, to preserve the Crown’s ability to recognise Maori proprietary rights in water if those rights are proven for particular iwi such as Ngati Ruapani after the share sales have taken place. It

20. Counsel for interested parties (Sykes, Wara, and Pou), closing submissions (updated) (paper 3.3.12(b)), pp 52-58

21. Counsel for interested parties (Ertel and Thornton), closing submissions (paper 3.3.11), p 17

22. Counsel for interested parties (Ertel and Thornton), closing submissions (paper 3.3.11), pp 18-19

23. Counsel for interested parties (Ertel and Thornton), closing submissions (paper 3.3.11), p 17

24. Counsel for interested parties (Ertel and Thornton), closing submissions (paper 3.3.11), pp 17-18

need not take long to devise such a protection mechanism, as the swift resolution of cases in 1987 and 1989 shows.²⁵

(4) A native title claim

In the claimants' submissions, they are not advancing a native or aboriginal title claim because, in their view, the effect of such a claim at common law is uncertain. However, one of the interested parties, Te Rarawa and the Wai 996 claimants, did advance such a basis for their arguments.

In submissions for those parties, Ms Mason stated that her clients do rely on a common law native title claim. Their argument is based on the Court of Appeal's decision in *Ngati Apa* and the Australian case *Yanner v Eaton*, that the statutes vesting sole rights to use and control water in the Crown have not expropriated the native title. Te Rarawa and the Wai 996 claimants therefore have an extant native title to water, and proceeding with the sale will prevent the Crown from recognising their title in three key ways:

- ▶ The Crown will not have recognised their rights to authority and control over the water because it will have sold shares without their agreement.
- ▶ Their own right to develop the resource is an inherent right of ownership, but no shares are being offered to them in recognition of their development right, nor will it be practicable to buy back shares for that purpose later.
- ▶ Their kaitiaki rights to decide what constitutes sustainable management of the resource will be prohibited because it will be much harder to modify the relevant resource consents once they are in the hands of third parties.²⁶

(5) The Crown will not be able to transfer water permits to Maori after the sale

In the claimants' view, the key thing that we need to understand about the RMA is that it is not working: Maori are unable to exercise kaitiakitanga or control over water bodies and are therefore unable to prevent or mitigate the many extractions and discharges that are harming their water bodies. Lake Horowhenua was cited as a prime example. For that reason, the claimants did not feel it necessary to examine the resource consents process in detail, or to assess whether or not the water permits granted under it constituted property rights in water.²⁷

In Mr Enright's submission for the interested parties, however, it is important to note that the proprietary rights being claimed by Maori are not presently with the Crown but with the SOE companies. Having obtained their water permits, it is the companies that control the water and profit from its use; they exercise the very rights claimed by Maori. This is because the Crown has given the SOEs (for free) what is in effect the Maori property right,

25. Counsel for interested parties (Ertel and Thornton), closing submissions (paper 3.3.11), pp 1-5, 13-14

26. Counsel for interested parties (Mason), closing submissions, 19 July 2012 (paper 3.3.13), pp 25-51

27. Claimant counsel (Geiringer), oral submissions, 19 July 2012, Draft Transcript, pp 1178-1179, 1233-1235

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and for very long periods – up to 35 years. But as the 100 per cent shareholder, the Crown can still ‘transfer assets held by the SOES’ to Maori while there are no third party shareholders. The assets in question are the water permits. (Although Mr Enright did not mention it, we presume he meant that Maori would then need to be empowered to lease the rights contained in the permits back to the power-generating companies, perhaps after adjusted conditions to facilitate customary use of the water bodies or for other legitimate reasons.) This ‘transfer of assets’, counsel suggested, would be impossible once there are third party shareholders. Also, since the MOM companies will have a high priority for renewal of their permits, and adjustment of conditions will be much harder with the interests of third party shareholders at stake, the time to act is now, before the sale.²⁸

(6) *The only nexus required is a well-founded claim in respect of a water resource*

In counsels’ submissions for Ngati Haka Patuheuheu (but also more generally for all of the interested parties), it was argued that many Maori groups around the country have water claims that have not been remedied because the appropriate remedy is now beyond the reach of both claimants and the Crown. Counsel referred to the example of Ngati Haka Patuheuheu’s well-founded claim in respect of the Te Ika Whenua rivers, where the hydro schemes are run by Trust Power, a fully privatised company since 1999. There is no legal avenue for Ngati Haka Patuheuheu to receive a remedy directly from the power company that uses their rivers.²⁹ The Tribunal found that they – in common with other hapu – have residual proprietary interests in those rivers and an entitlement to urgent relief in the form of ‘an economic resource that they can utilise to develop and protect their interest in the rivers and to assist them to break away from welfare dependency’.³⁰ But no remedy connected with their own rivers appears to be available. Hence, Maori in like circumstances are supporting the New Zealand Maori Council claim, which seeks a benefit for all Maori.³¹

Counsel submitted that the power-generating SOES should be made available to help settle all such claims, regardless of where the water bodies used by these particular SOES are located. In Ngati Haka Patuheuheu’s view, there is nothing in section 8A of the Treaty of Waitangi Act 1975 requiring ‘that claims relate to specific land or rohe or that the claimants can only seek redress in their respective rohe’.³² In counsels’ submission, the relevant legislative provision is that relating to the Tribunal’s powers under section 8A, and the Tribunal should put the broadest possible construction on that section. He referred to the findings of the Turangi Tribunal in its remedies report, to the effect that there is no statutory requirement that ‘the historical wrong’ must relate directly to the specific

28. Counsel for interested parties (Enright), 20 July 2012 (paper 3.3.14), pp1-6, 8-10

29. Counsel for interested parties (Williams, Arapere and Fong), opening submissions, 29 June 2012 (paper 3.3.7), pp12-14

30. Counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7), p15

31. Counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7), pp12-16

32. Counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7), p16

memorialised land available for resumption orders. ‘On its face’, the Tribunal found, ‘a claim may “relate” directly or indirectly to “any” memorialised land.’ It was simply not sustainable for the Crown to argue that only direct claims about the specific land concerned could result in redress using that land. That would be ‘inconsistent with such fair, large and liberal construction’ of the legislation.³³ Counsel for Ngati Haka Patuheuheu also relied on the Muriwhenua Lands Tribunal’s determination of preliminary remedies issues in 1998. In that decision, the Tribunal found that a narrow interpretation should not be placed on remedial legislation, and that assets should be available ‘to compensate generally for Tribal land losses.’³⁴

Counsel concluded: ‘there is no impediment to this Tribunal finding that any redress should apply to all Maori, regardless of whether they have state owned geothermal and electricity generating assets within their rohe.’³⁵

3.3 AN OVERVIEW OF THE CROWN’S CASE

The Crown’s essential argument is that, ‘no matter how persuaded the Tribunal might be about the significance of the claimed rights and interests over water and the geothermal resource’, the sale of minority shares in the power-generating SOEs ‘does not compromise future rights recognition.’³⁶ In the Crown’s view, the sale will not compromise the Crown’s ‘capacity to respond to any assessments that the Tribunal makes about those rights and interests’, or to engage with iwi about their interests. Those interests, the Crown accepts, include ‘managing the allocation and quality control of the water resource.’³⁷ ‘Resource allocation and joint ventures is where the conversation needs to head,’ the Crown argued.³⁸

In the Crown’s submission, halting the planned sale of shares in Mighty River Power would be ‘a very serious step.’³⁹ This is because the Government’s programme will be significantly affected if it loses the opportunity to sell shares in 2012. The plan is to sell shares in all five companies over the next 1½ years (to mid-2014), so that missing the 2012 slot will prevent all five from being processed, which will cause ‘significant prejudice to the programme.’⁴⁰ The anticipated benefits of the programme include a deepening of capital markets, the provision of new investment opportunities for New Zealanders, and ‘needed investments in infrastructure such as schools, hospitals and broadband.’⁴¹ In the Crown’s

33. Counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7), pp16-19

34. Counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7), p 17

35. Counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7), p 14

36. Crown counsel, closing submissions, 20 July 2012 (paper 3.3.15), p 3

37. Crown counsel, closing submissions (paper 3.3.15), p 3

38. Crown counsel, closing submissions (paper 3.3.15), p 51

39. Crown counsel, closing submissions (paper 3.3.15), p 3

40. Crown counsel, closing submissions (paper 3.3.15), p 32

41. Crown counsel, closing submissions (paper 3.3.15), p 33

view, we should ignore Dr Nana's evidence about whether the partial privatisation makes fiscal sense, both because it is wrong and because it is irrelevant. The programme's goals are much broader than the purely fiscal.⁴²

The social and economic objectives in this programme need to be balanced against the Crown's obligation not to 'unreasonably compromise its capacity to provide for well-founded Treaty claims'.⁴³ In the Crown's submission, the asset in question – shares – is substitutable and its sale would not prevent rights recognition in the future. Relying on the *Broadcasting Assets* case, the Crown submitted that it could repurchase shares, conduct a takeover of the minority shareholding, or create new 'economic rights over water' (meaning a levy or royalty); a share sale *now* prevents none of that. And, again relying on *Broadcasting Assets*, the Crown argued that the question of what this might cost – and whether it would cost more to do it later – is not relevant to a Tribunal or Court: 'The fact that it can be done is what matters'.⁴⁴

The Crown concluded:

Unless it can be said that shares in MRP – and shares in the company *now* rather than later – is the *only way* in which those [Maori] rights can be recognised and that other forms of commercial redress could not possibly be put in place after the sale, then it is not for the Tribunal or the Courts to interfere in the Government's programme balancing, as it does, a broad spectrum of social and economic factors.⁴⁵

Relying on the *Lands* case, the *Broadcasting Assets* case, the *Coal* case, *Ika Whenua* and *Radio New Zealand*, the Crown submitted that we should be guided by the principles developed in the courts:

- ▶ First, 'the Treaty does not unreasonably restrict the right of a duly elected government to pursue its chosen policy agenda in the exercise of its right of kawanatanga';⁴⁶
- ▶ Secondly, 'there must be a direct nexus between the assets concerned and the Crown's ability to fulfil its Treaty obligations before Treaty principles can halt that policy agenda';⁴⁷ and
- ▶ Thirdly, if there are a number of Treaty-compliant options available, an informed Crown is free to choose between them and is not required to do any one particular thing. In the Crown's submission, it has other options (including those on offer through the Fresh Start for Fresh Water programme and historical Treaty settlements).

The Crown concluded from these cases that there must be a direct nexus between the asset and the Crown's ability to fulfil its Treaty obligation, which it argued is not the case

42. Crown counsel, closing submissions (paper 3.3.15), pp 34-37

43. Crown counsel, closing submissions (paper 3.3.15), p 32

44. Crown counsel, closing submissions (paper 3.3.15), p 32

45. Crown counsel, closing submissions (paper 3.3.15), p 33

46. Crown counsel, closing submissions (paper 3.3.15), p 37

47. Crown counsel, closing submissions (paper 3.3.15), p 37

with shares in the power-generating SOES.⁴⁸ If the asset is 'not itself subject to the specific claim or grievance, is substitutable, or the Crown has open to it a range of options in meeting its Treaty obligations, Treaty principles cannot prevent it from pursuing its policies reasonably and in good faith.'⁴⁹ In the Crown's view, the nexus between Maori water claims and shares is 'remote, if it exists at all. Water is not being sold or transferred. The assets and infrastructure held by the SOES (such as the dams and power stations) are not being transferred. There is no nexus.'⁵⁰

The Crown also made a number of submissions as to why a shareholding in a company was, as with ownership of the shares themselves, too remote from Maori rights in water to be a meaningful form of rights recognition. We will not discuss the detail here but will provide a brief summary. The Crown argued that shareholders do not own the company's assets, which are diverse and include wholesaling and retailing as well as generating. Shareholders' rights are largely restricted to receiving dividends, which may or may not be paid depending on the company's circumstances and the decisions of directors. Otherwise, shareholders are too remote from the company itself to have any meaningful connection with its water. A joint venture between the company and Maori over a particular water body would be a much more meaningful arrangement. Also, in the Crown's submission, the present SOES operate independently of the Crown and the shareholding ministers would not shape the companies' response to proposals that involve recognition of Maori rights in water. Crown counsel rejected the claimants' suggestion that the Crown and Maori shareholders could enter into shareholders' agreements that would provide Maori shareholders with enhanced rights. But in any case, the Crown argued that MOM companies will be virtually identical to commercially-oriented SOES; the private shareholders will not change what the Crown can do to recognise Maori rights. (The implication was that the Crown is already constrained to the extent that it is going to be because the SOES operate as independent businesses that would resist any regulatory changes which affect their bottom lines.)⁵¹

Would it benefit the sale itself to stop and sort out Maori rights, so that share values and profitability are clarified? On this question, the Crown submitted that it will take a long time, and the consideration of a number of factors, to resolve water allocation issues. In other words, the present freshwater management reform process has already put in doubt whether or not there will be a zero cost for water, and whether water might need to be allocated differently than by present water permits so as to use the resource more efficiently and sustainably. That being the case, Maori rights will be one of several factors to consider, and the 'fact that the MOMs may have some private shareholdings by then' will not make a difference in the very large political decisions that the Government will have to make.⁵² At

48. Crown counsel, closing submissions (paper 3.3.15), pp 37-44, 66-76

49. Crown counsel, closing submissions (paper 3.3.15), p 44

50. Crown counsel, closing submissions (paper 3.3.15), p 44

51. Crown counsel, closing submissions (paper 3.3.15), pp 43-51

52. Crown counsel, closing submissions (paper 3.3.15), pp 33-34

the same time, the Crown submitted that the market had been aware of Maori water claims for a long time without an appreciable difference in the value of shares for companies like Contact Energy, or in the rate of investment in hydro and geothermal power. Also, companies are accustomed to adapting to regulatory regime-change that affects their profitability, and they would have to cope with the effects of a royalty or whatever the change might be, regardless of whether they are MOM companies or remain as fully Crown-owned SOES.⁵³

Nor, in the Crown's submission, will there be a 'chilling effect' if it goes ahead with the sale in the meantime. Relying on Dr Ridings' evidence, Crown counsel maintained that the risk of successful overseas investor litigation was so low that it would have no effect on the kinds of rights the Crown could recognise after selling shares to investors. This would depend, of course, on an appropriately worded disclosure in the prospectus.⁵⁴

On the question of other Treaty-compliant options available for recognising Maori rights in the future, the Crown submitted that this is more properly a matter for stage two. Nonetheless, the Crown's view is that there is a 'range of potentially appropriate mechanisms for recognising ongoing rights and [for] considering matters of redress for breach of those rights in the past'.⁵⁵ These are two separate matters, although there are overlaps. For recognising ongoing rights, mechanisms must relate to ongoing uses. Relying on the evidence of Guy Beatson, the Crown submitted that they may include 'decision making in relation to care, protection, use, access and allocation, and/or charges or rentals for use'.⁵⁶ These matters are all within the purview of the Ministry for the Environment. Redress of past breaches is compensatory and the Office of Treaty Settlements has a 'range of mechanisms' for such compensatory redress. The overlap between 'mechanisms to recognise and *restore* rights and interests [emphasis added]' and redress of past breaches has actually resulted in the Office of Treaty Settlements developing mechanisms for the practical recognition and exercise of rights in the present.⁵⁷ In the Crown's submission, the sale of minority shares in the SOES will have no impact on the ability of Ministry for the Environment and OTS to continue to develop appropriate forms of rights recognition and redress, informed by the recommendations of the Wai 262 Tribunal.⁵⁸

In summary, the Crown argued that shares are not the right remedy but they can be repurchased if that is what Maori ultimately want. But the Crown considered that shares would be an 'impoverished proxy for the recognition of Maori rights and interests in water'.⁵⁹ While shares are unsuitable for many reasons, there cannot be a 'single remedy'. Instead, the focus must be on developing models for the control and management of water that better

53. Crown counsel, closing submissions (paper 3.3.15), pp 50-58

54. Crown counsel, closing submissions (paper 3.3.15), pp 58-66

55. Crown counsel, closing submissions (paper 3.3.15), p 66

56. Crown counsel, closing submissions (paper 3.3.15), p 67

57. Crown counsel, closing submissions (paper 3.3.15), p 67

58. Crown counsel, closing submissions (paper 3.3.15), pp 67-76

59. Crown counsel, closing submissions (paper 3.3.15), p 76

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reflect Maori interests, and on arrangements that accord them a direct economic interest in and benefit from the use of water to generate electricity. The Crown proposed that new models should be developed to give effect to kaitiakitanga, so that hapu and iwi have a role in making decisions on all kinds of water management issues that affect them and their taonga. They could also include 'by far the most tangible economic option' of joint ventures with electricity generators; the implication was that these might become the norm for the use of Maori-claimed water for hydro generation.⁶⁰ A 'good deal in the way of thinking and engagement is necessary' before these decisions can be made.⁶¹

3.4 REPLY SUBMISSIONS

3.4.1 The claimants' reply to the Crown

In their reply submission, the claimants challenged the Crown's argument that it must sell shares in Mighty River Power immediately or its entire programme of asset sales will be put at risk. Claimant counsel noted that the Crown accepted a number of reasons why a slot might not actually be used, such as adverse global market conditions, and also pointed to Mr Crawford's evidence that the sales process was supposed to take place over the next three to five years (not 1½ years, as submitted by Crown counsel). A three to five year time-frame, in the claimants' view, means that there is opportunity for the Crown to pause and engage with them, without doing any real harm to its overall programme.⁶²

Perhaps the claimants' most important reply submission, though, was that the entirety of the Crown's position depended on its presumption that no one owns water and that Maori would never be able to prove the existence of proprietary rights in water. It was on *that* assumption that the Crown's suggestions of other remedies being sufficient, such as an enhanced role in management, were predicated; take that foundation away and the entire Crown case 'unravels.'⁶³ The result, in the claimants' view, is that the Crown is wrong to rely on the *Lands* case because Maori proprietary rights in water do create a direct nexus between the claim and the remedy being sought (which had been denied by the Crown):

The water resources are not being sold wholesale. Nevertheless, the Crown is selling into private hands companies who have accrued their enormous value through the exploitation of the water resources and who have Crown allocated rights to continue to exploit those water resources. Mr Wilson for the Crown agreed that geothermal and hydro stations would be worthless without the water.

60. Crown counsel, closing submissions (paper 3.3.15), p 76

61. Crown counsel, closing submissions (paper 3.3.15), p 76

62. Claimant counsel, submissions by way of reply, 25 July 2012 (paper 3.3.20), p 14

63. Claimant counsel, submissions by way of reply (paper 3.3.20), pp 26-27

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It may also be helpful to compare the loss of control in the present case with that in the *Lands* decision. In the *Lands* case it was considered enough of an issue that the Crown was transferring assets to a company structure despite the Crown retaining 100% of the shareholding. It is submitted below that the loss of control in a partial privatisation is significantly greater. However, all can agree that it is certainly no less.⁶⁴

The claimants also disputed the applicability of other cases cited by the Crown, arguing again that they were predicated on a lack of nexus between claim and asset, which is not, they argued, the situation in this claim.⁶⁵

The claimants also challenged the Crown's interpretation of company law. We will discuss this in more detail below, but here we note that the claimants maintained that the Crown could enter into shareholders' agreements with Maori prior to selling shares to private investors, and that such agreements would enable the Treaty partners to make a shareholding a commercially-viable and direct link between Maori and their water resources.⁶⁶ Counsel concluded:

A shareholder agreement is a common mechanism in private companies to overcome all of the shortcomings of a mere shareholding that have been highlighted by the Crown. The shareholders can agree who will have the power to appoint directors, how investment money can be spent, how decisions over dividends will be made, and anything else about the company that contracting parties can agree under the general law. Such an agreement could be entered between the Crown and Maori now, but not after the MOM.⁶⁷

The claimants further argued that the Crown's favoured commercial solution, joint ventures, will be virtually impossible after private shareholders are brought into the MOM companies. New joint ventures for new power stations will still be possible. But 'pre-MOM' it would also be possible for the Crown to 'retrospectively enter into joint ventures with local Maori' for Mighty River Power's 17 existing power stations, while there are still no private shareholders' interests to consider.⁶⁸

Nor, in the claimants' view, did the Crown provide a satisfactory answer to the conundrum of trying to introduce a charge for the power companies' use of water after the creation of private shareholding interests in those companies. It would be much more practicable, the claimants argued, prior to the sale.⁶⁹

Finally, the claimants argued that the Crown's intention to continue with the sale regardless will have the effect of:

64. Claimant counsel, submissions by way of reply (paper 3.3.20), p 17

65. Claimant counsel, submissions by way of reply (paper 3.3.20), p 18

66. Claimant counsel, submissions by way of reply (paper 3.3.20), pp 20-23

67. Claimant counsel, submissions by way of reply (paper 3.3.20), pp 22-23

68. Claimant counsel, submissions by way of reply (paper 3.3.20), p 23

69. Claimant counsel, submissions by way of reply (paper 3.3.20), p 23

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closing doors, removing options and causing prejudice to the position of all Maori ... If the Crown genuinely wishes to negotiate with all options open then it needs to do so before its partial privatisation programme goes ahead.⁷⁰

3.4.2 Some additional arguments in the interested parties' replies

The interested parties' reply submissions were consistent with those of the claimants on many points.⁷¹ But they made some additional or slightly different arguments:

- ▶ In counsels' submission, the evidence from Mr Wihapi underlined the argument that the Crown is turning an operation created and maintained as a public enterprise (in the national interest) into an organisation that will operate partly for the profit of private investors, some of them overseas investors. In that circumstance, it is entirely artificial for the Crown to argue that there is no nexus when private profit will be made from the use of Maori taonga, and the creation of private interests is happening without Maori agreement that their taonga can be used for the private gain of others, especially non-New Zealanders.⁷² Counsel for Ngati Ruapani added that there had been 'detailed concerns expressed by Maori over the use of water for in excess of 100 years'. But now the 'creation of third party interests in assets that rely upon water claimed by Maori for its value and profitability is the offending and galvanising issue'. A clash between investors and Maori would be 'devastating, polarizing and harmful to the Nation' and 'that is why these issues require determination prior to sale'.⁷³
- ▶ In counsels' submission, the *Paki* case establishes that the Crown cannot claim to have owned the riverbeds on which dams have been built at the time it transferred the dams to the SOEs, if it was relying on the Coal-Mines Amendment Act 1903 for ownership of the bed in the non-navigable parts of navigable rivers. Some Tuwharetoa hapu, it is alleged, can establish the same case as the Pouakani hapu: 'The proposition from the *Paki* decision is that there must be a forensic analysis of facts prior to the sale of shares in the SOE's responsible for hydroelectricity generation, and an examination of all rivers or parts of rivers that would have been non-navigable prior to the enactment of the Coal-mines Act Amendment Act 1903'.⁷⁴ Nor, at present, is it clear that the *ad medium filum* rule will continue to be applied: the law is in a state of flux until the second stage of the *Paki* case is concluded.⁷⁵

70. Claimant counsel, submissions by way of reply (paper 3.3.20), p 27

71. See, for example, counsel for interested parties (Mason), submissions by way of reply, 25 July 2012 (paper 3.3.19), pp 10-11

72. Counsel for interested parties (Sykes, Pou and Wara), submissions by way of reply, 25 July 2012 (paper 3.3.18), pp 3-5

73. Counsel for interested parties (Ertel and Thornton), submissions by way of reply, 25 July 2012 (paper 3.3.16), pp 17-18

74. Counsel for interested parties (Sykes, Pou and Wara), submissions by way of reply (paper 3.3.18), pp 12-14

75. Counsel for interested parties (Ertel and Thornton), submissions by way of reply (paper 3.3.16), p 19

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- ▶ In the submission of the interested parties, the Crown cannot rely on the Radio Spectrum minority opinion as to the right of development, nor the Court of Appeal's statement in *Ika Whenua* that the Treaty did not envisage a Maori right to generate electricity. Rather, the Tribunal should rely on the majority Radio Spectrum report, and also on the Te Ika Whenua Rivers Tribunal's findings on the right of Te Ika Whenua hapu to develop their properties, the rivers.⁷⁶ There is also the UN Declaration on the Rights of Indigenous Peoples to consider, stressed by the claimants and interested parties in closing their case.⁷⁷
- ▶ The interested parties denied that the Tribunal can rely on Dr Ridings' assurances as to the 'chilling effect' and reiterated Dr Kelsey's argument that investment tribunals are extremely unpredictable. In their view, the Crown will not be able to rely on the likelihood of an overseas investor challenge failing, especially given ministerial statements in the media, and the risk to Maori of a 'chilling effect' is a serious one.⁷⁸

Finally, Ngati Ruapani submitted:

The Treaty will provide a workable outcome. It has been expressly stated throughout the course of this hearing that recognition of Maori water rights is not intended to stop the nation's prosperity and functioning as a leading primary producer and the like. What this claim seeks to do is prevent third parties from being created that will be affected if the rights are found worthy of recognition and compensation for past, present and future use. Ngati Ruapani concedes that there will be effects on all commercial water users at some time. However, it is not beyond the ken of the Treaty partners to develop a system that reconciles the rights of Maori with the current users who will need time and other support to transition into a treaty compliant world.⁷⁹

3.5 DISCLOSURE REQUIREMENTS

The stage one statement of issues for this urgent inquiry includes the following sub-issues to question (b):

- (i) Before its sale of shares, ought the Crown to disclose the possibility of Tribunal resumption orders for memorialised land owned by the mixed ownership model power companies?

76. Counsel for interested parties (Sykes, Pou and Wara), submissions by way of reply (paper 3.3.18), pp 14-16; Counsel for interested parties (Ertel and Thornton), submissions by way of reply (paper 3.3.16), pp 20-21, 29-31

77. Counsel for interested parties (Sykes, Pou and Wara), submissions by way of reply (paper 3.3.18), pp 16-17

78. Counsel for interested parties (Sykes, Pou and Wara), submissions by way of reply (paper 3.3.18), pp 17-28

79. Counsel for interested parties (Ertel and Thornton), submissions by way of reply (paper 3.3.16), p 24

- (ii) Ought the Crown to disclose the possibility that share values could drop if the Tribunal upheld Māori claims to property rights in the water used by the mixed ownership model power companies?

These sub-issues were added to the original statement of issues on 11 June 2012 at the request of Ngati Ruapani.⁸⁰ The concern at that stage was whether the Crown would make appropriate disclosures about Treaty claims in its offer prospectus, and their possible effects on share values, so that the potential for shareholder litigation or an anti-Maori backlash would be reduced.

Under the Securities Act 1978 and the Securities Regulations 2009, a prospectus must be lodged with the Companies Office at the beginning of an initial public share offer (IPO). In Mr Crawford's evidence for the Treasury, he explained that the Mighty River Power prospectus was (as at 13 July 2012) in its twelfth draft of an expected twenty, and that both the Government and the company were exercising 'due diligence' to identify all the risk factors that needed to be explained in the prospectus.⁸¹ The 1999 Contact Energy prospectus was supplied as an example, to show the language in which the existence of section 27B memorials or the possibilities for regulatory change were disclosed and explained to the share-buying public. We were concerned that there was not – as we had expected – a disclosure of Maori water claims in that prospectus.⁸² When cross-examined by claimant counsel as to the adequacy of the Contact disclosures, Mr Crawford replied that there were new and more stringent regulations in place now, and that the Crown's lawyers would ensure that a proper job was done.⁸³

Crown counsel submitted that the Mighty River Power prospectus would be a new and improved model:

It is expected that the risk factors to be mentioned in a prospectus for Mighty River Power, in the light of the nature of Maori claims over rights to interests in water, Tribunal reports that have issued since the Contact share sale and, potentially, any guidance that this Tribunal can give, will be considerably more specific than that contained in the Contact preliminary offer memorandum ...⁸⁴

Indeed, Mr Crawford assured the Tribunal that the findings in our report would be taken into account in framing the relevant disclosures:

we expect to see a section on the Treaty of Waitangi, um, a summary of the section 9 of the SOE Act and the memorials regime and also factual statements about the section, part 5(a) of the Public Finance Act, so those will be definitely included so in terms of giving people

80. Waitangi Tribunal, memorandum-directions, 11 June 2012 (paper 2.5.24)

81. John Crawford, oral evidence, 13 July 2012, Draft Transcript, pp 740-741

82. *Contact Shares Power to the People Prospectus*, 1999 (doc B13)

83. John Crawford, oral evidence, 13 July 2012, Draft Transcript, pp 742-747

84. Crown counsel, closing submissions (paper 3.3.15), p 53

an understanding of what has occurred through this process. Plainly there is the issue of water and geothermal claims would have relevance to investor decisions and we expect that this will be referred to in the offer document but in deference to the Tribunal we're not writing that until we see what the results of these processes are. We don't have to complete that offer document until five days before the offer goes live, I think the FMA has five days to review the document. So we are able to incorporate in that document fresh views, fresh risks, fresh expressions of those risks right up until quite a late point in the process. But we are running very substantial what's called due diligence processes across both the company and the Crown to ensure that all risks that would be material to investors are disclosed and are properly explained or documented in the offer document.⁸⁵

Mr Crawford's evidence clarified, therefore, that the matters raised in sub-issues (i) and (ii) will be disclosed in the prospectus, with the exception of stating explicitly that share values would drop if Maori claims to proprietary rights were demonstrated after the share sale. As we shall see below, the Crown did not accept that this was an unavoidable outcome of recognising Maori rights.

New issues about the prospectus were raised during the hearing. These included the questions of:

- ▶ whether unsophisticated first-time investors would grasp the full import of the carefully worded legal disclosures;
- ▶ whether investors might rely on ministerial statements in the media instead as to there being no real risk from Maori claims; and
- ▶ whether – despite the prospectus – the Government's public statements (which are permitted under a special exemption from certain sections of the Securities regulations) might provide grounds for overseas investors to make an investment arbitration claim.

There was also debate between the evidence of Mr Crawford and of Dr Nana for the interested parties as to whether the disclosed risks will significantly discount the price of shares in the initial public offer or not. In Dr Nana's view, a risk to the companies' fundamental input – water – was of a greater magnitude than something like the Emissions Trading Scheme.⁸⁶

In the claimants' view, the prospectus could meet legal requirements but still not avert a politically influential backlash from private investors:

The problem is that the Crown is coming at this issue from the question of what are its legal requirements. The Crown cannot emphasise risk any more than it has to because that would drive down the sale price. However, ultimately the issue for these proceedings

85. John Crawford, oral evidence, 13 July 2012, Draft Transcript, p 741

86. Ganesh Nana, oral evidence, 12 July 2012, Draft Transcript, pp 440-443

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is likely to be a political one not a legal one. The question will not be whether the Crown satisfied the legal disclosure test, but whether the share buyers feel aggrieved at any loss.⁸⁷

As we see it, when the debate switched to whether ‘mum and dad’ investors would understand the prospectus or whether it might be outweighed by Ministerial statements in the media, it was effectively conceded that the prospectus would contain the correct disclosures in the proper legal form.

It will be very important, in our view, for such disclosures to refer to the full nature of Maori claims in respect of water, including as to residual proprietary rights which if established could potentially expose the companies to a royalty regime.

3.6 WHAT ARE THE OPTIONS FOR RIGHTS RECOGNITION OR RIGHTS RECONCILIATION?

3.6.1 The claimants’ framework for rights recognition

The claimants’ evidence about a framework for rights recognition was developed by three members of their experts group: Mr Brian Cox (electricity industry consultant), Mr Philip Galloway (investment adviser), and Mr Steven Michener (investment and development consultant). We consider that Mr Michener’s evidence, which relates to the detail of how a framework might be implemented in the case example of Tikitere (Hell’s Gate), is mostly a matter for consideration in stage two of our inquiry. In this section, therefore, we focus on the evidence of Mr Galloway, who was the principal witness on this issue, supplemented by the evidence of Mr Cox where relevant. There were also many relevant submissions from counsel as well as exchanges between counsel and witnesses, and we draw on those too to establish the parameters of what Maori are seeking in this urgent inquiry.

In Mr Galloway’s evidence, there are three possible components in a framework for recognising and giving modern expression to Maori proprietary rights and commercial interests in water:

- ▶ Shares in the water-using SOEs ‘to effectively “swap” ownership in water for equity in some of the companies that use it’;
- ▶ ‘Modern water rights’ of the kind which provide a direct (Crown-derived) proprietary interest in water, and which would require ‘new institutional arrangements for governance and allocation’; and
- ▶ A royalties regime, which relates only to the commercial use of water in specific (existing or new) projects.⁸⁸

In the claimants’ submission, these are not mutually exclusive categories and a mix of some or all of them are required. In particular, the claimants argued that the SOEs will

87. Claimant counsel, closing submissions (paper 3.3.10), p 12

88. Philip Galloway, ‘Potential Remedies: Commercial and Regulatory Approaches’, June 2012 (doc A69(g)), p 4

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provide a vital and non-substitutable part of whatever ways the Government can now find to recognise Maori proprietary rights in water to the extent that that is still possible.⁸⁹

(1) Shares on their own could be a remedy or proxy for rights recognition

The claimants' position is that shares on their own could be a partial remedy or proxy for rights recognition for certain categories of claim. In particular, they argued that the partial privatisation of the SOEs provides a fleeting opportunity for water-based companies to be used as a source of compensation for the Crown's breaches of Maori water rights (wherever those breaches happen to have occurred). This compensation could take three forms. First, for situations where tribes need a large injection of cash to help restore the health and mauri of their degraded water bodies, they could be allotted shares which they would then sell for money to help pay for 'remediation'. The Government's policy of partial privatisation would thus enable a tidy correspondence between water-based grievances and water-sourced solutions. And the money for this type of remediation does not appear to be available from other sources, hence the unique nature of the opportunity for Maori kaitiaki.⁹⁰ Mr Galloway cautioned that this kind of compensation must be insured against any kind of dilution by taxes or duties, if Maori sell shares to pay for remediation of their water bodies.⁹¹ In his view, assigning shares that could be 'monetised' for this purpose was the most appropriate way of using shares in the rights recognition framework.⁹²

Secondly, the claimants put to us situations where Maori are unable to benefit from their residual proprietary rights because of the priority accorded other users, but those users' activities do not generate an 'income stream' from their use of the water. In other words, where water-users cannot pay or should not reasonably be expected to pay for their use of Maori property, a readily available solution at the present time would be shares in the power-generating SOEs. With the expectation that there will be dividends and at least semi-regular income from owning shares in a power-generating company, the shares thus serve as a proxy for Maori groups who cannot develop or profit from their own water bodies.⁹³ Counsel concluded: 'the role of the power generating SOEs is not, in the Claimants' submission, limited to payment for the water they use.'⁹⁴

The question of how much real benefit might come from shares was hotly debated by witnesses and counsel. Ultimately, the claimants' witness, Mr Cox, accepted that dividends are not an automatic benefit. There may be years in which the company elects not to pay a

89. Claimant counsel, opening submissions (paper 3.3.1), pp 2-4, 22, 24-25

90. Claimant counsel, opening submissions (paper 3.3.1), pp 22-25; claimant counsel (Geiringer), oral submissions, 19 July 2012, Draft Transcript, pp 1182-1183, 1199-1202

91. Philip Galloway, oral evidence, Draft Transcript, pp 239-240

92. Philip Galloway, oral evidence, Draft Transcript, p 248

93. Claimant counsel, opening submission (paper 3.3.1), pp 23-25; see also counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7); Steven Michener, oral evidence, 11 July 2012, Draft Transcript, p 368

94. Claimant counsel, opening submission (paper 3.3.1), p 27

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dividend because profits do not permit it or because the funds need to be injected back into the company for its development.⁹⁵ There was a lengthy exchange between claimant counsel and Mr Crawford, the Treasury witness, as to whether shareholders could compel the directors to authorise a dividend.⁹⁶ In the evidence before us, it may be possible for shareholders agreements to require regular dividends but this may not be in the best interests of the companies concerned. We return to this issue below.

The third scenario was put to us by counsel for Ngati Haka Patuheuheu (see above). In this scenario, hapu are unable to benefit from or develop their water bodies because privately-owned companies are already doing so. Although the activity, such as the generation of electricity by Trust Power, does generate income directly from the use of the water, there is no way *at present* for Maori to benefit from this use of their taonga. In Ngati Haka Patuheuheu's view, an allocation of shares in the three power-generating SOEs is the only possibility that is actually practicable at the moment. It could be done fairly immediately whereas no other remedy is on the table. Thus, they seek an allocation of shares for themselves and all hapu in like circumstances; and, indeed, for all Maori.⁹⁷

(2) Shares plus a shareholders agreement

The situation of hapu who have proprietary interests in the water and geothermal resources being used by Mighty River Power and the other SOEs is seen to be different from those outlined in the previous section. In response to questions from the Tribunal, Mr Geiringer told us:

Shares by themselves, I would submit, can't be a solution. Not even a simple pragmatic one. Shares and some control of the companies is beginning to be a potential solution in relation to some of the issues because, as Mr Crawford pointed out, shares are a very disjoint, distant from the assets in question. Shares and control is much less so. So if, you know, just hypothetical, ... in particular let's focus on the Māori groups whose water resources are used by say Mighty River Power and if you're able to give them shares that give them the economic interest and an active role in determining the future of that company through appointment of directors, for example, then you are beginning to give those groups some continued direct involvement with their water resources.⁹⁸

The claimants thus accepted that shares on their own would not suffice as even proxy recognition of Maori rights *in their particular water bodies*. A shareholding, however, in conjunction with a real and meaningful stake in the company, appeared to the claimants to be a much closer approximation to recognising Maori rights. This resulted in another lengthy

95. Brian Cox, oral evidence, 10 July 2012, Draft Transcript, p 171

96. John Crawford, oral evidence, 13 July 2012, Draft Transcript, pp 654-656, 658, 676, 687-693

97. Counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7)

98. Claimant counsel (Geiringer), oral submissions, 19 July 2012, Draft Transcript, pp 1230-1231

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exchange between claimant counsel and Mr Crawford about company law and the capacity of Crown-Maori shareholders agreements, in conjunction with control of the companies' constitutions, to provide Maori with real power in the companies and over the water assets that they use. Because this issue is of critical importance in our inquiry, we will discuss it at some length later in the chapter.

(3) *Modern water rights*

In Mr Galloway's evidence, 'modern water rights' are one of three possible framework solutions for the recognition of Maori rights in water. His evidence was based in part on a 2006 United Nations study, *Modern Water Rights*, which detailed the manner in which rights comparable to our RMA water permits have been created in recent times and treated as property rights around the world.⁹⁹ In response to a question from the Tribunal, Mr Wilson agreed that water permits are commonly understood as property rights in New Zealand's electricity industry.¹⁰⁰ Mr Enright for the interested parties argued that the permits confer property rights at law, a point denied by the Crown. The meaning and effect of the *Aoraki* case in this respect was debated between the parties but in our view it is not necessary to decide the point at stage one. The material point for the Tribunal is that the water permits allow the use and control of water and therefore are analogous to the claimants' residual proprietary rights in the respective water bodies. They have been imposed over the top of those rights in disregard for them.

As we observed in chapter 1, New Zealand may be heading towards a water management regime in which these water permits are tradeable (in whole or in part), may be traded for money (with or without having been purchased in the first place), and new ones may need to be purchased in the first instance from now on. These propositions are among the 2010 recommendations of the Land and Water Forum for consideration by the Crown.¹⁰¹ Water permits may thus become more property-like in the future, not less.

The 'modern water rights' proposition is that Maori should either have the power to allocate these water permits (that is, to become the consenting authorities) or be allocated them for leasing to the power-generating companies.¹⁰² In Mr Enright's submission, the Crown should transfer Mighty River Power's permit to Maori before partial privatisation takes place.¹⁰³ As we see it, this part of the claimants' proposed framework would allow them to impose conditions on water use (such as the manner in which that use affects customary

99. Stephen Hodgson, *Modern Water Rights: Theory and Practice*, FAO Legislative Study 92 (Rome: Food and Agriculture Organisation of the United Nations, 2006)

100. Lee Wilson, oral evidence, 16 July 2012, Draft Transcript, pp 888-889

101. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, 2010, pp xii, 31, 36-39

102. Galloway, 'Potential Remedies: Commercial and Regulatory Approaches', June 2012 (doc A69(g)), p 7

103. Counsel for interested parties (Enright), 20 July 2012 (paper 3.3.14), pp 1-6, 8-10

fishing) and to lease the right in return for a resource rental. But the details have not been explored at this stage; for stage one, we only have information in a very summary form.

(4) Royalties

In essence, a royalties regime would involve the power-generating MOM companies paying for the water that they use. In Mr Galloway's evidence, energy companies overseas have developed a variety of ways to value resources as they are used and to pay those who own or have an economic interest in the resource. Legal ownership of the resource is not necessary for a royalty to be required. These overseas regimes include payment for geothermal fluids in the United States and Australia, where the resource is treated as a mineral instead of a water resource. Royalties can be imposed by statute (as in Australia) or negotiated between the developer and the resource-owner on a case by case basis. Depending on the circumstances, the royalty can be a percentage of revenue or of net profit. It can involve the owner contracting the developer and splitting the profit. There are a number of possibilities.¹⁰⁴

According to the evidence of Mr Cox, joint ventures involving Maori have been limited to the geothermal resource, where Maori landowners control access to the geothermal field under their lands.¹⁰⁵ But royalties are contemplated by power companies in a number of circumstances – such as, Mr Cox told us, the desire to enter into a positive relationship with local people and prevent isolated power stations from being the target of hostility and vandalism.¹⁰⁶ In his view, developers have much to gain from that type of arrangement in terms of the 'durability' of their projects, to be balanced against the cost of a royalty.¹⁰⁷ Also, Mr Galloway suggested that it is practical to quantify the use of fresh water and geothermal fluids for royalty purposes; there are no insuperable difficulties.¹⁰⁸

In the Crown's view, the impact of a royalty regime on the electricity industry would be uncertain. A 'modest' levy might be absorbed by the power-generating MOM companies without affecting their bottom line. Alternatively, a higher royalty or levy might result in a price increase for consumers and a concentration of investment away from new freshwater and geothermal power stations.¹⁰⁹ In Mr Cox's evidence, however, there are not a great number of plausible alternatives. Hydro generation will always be dominant because of the nature of New Zealand's natural resources, and there has already been a move away from coal as a result of the Emissions Trading Scheme. Water, he told us, will continue to be important in new electricity generation schemes. The industry will not suffer although the

104. Galloway, 'Potential Remedies: Commercial and Regulatory Approaches' (doc A69(g)), pp 9-13; Philip Galloway, responses to written questions, 10 July 2012 (doc B6), pp 1-5

105. Brian Cox, 'The Link Between Maori and Electricity Generation by State Owned Enterprises', 15 June 2012 (doc A69(f)), p [7]

106. Brian Cox, oral evidence, 10 July 2012, Draft Transcript, p 178

107. Brian Cox, oral evidence, 10 July 2012, Draft Transcript, p 189

108. Galloway, responses to written questions (doc B6), pp 2-3

109. Crown counsel, closing submissions (paper 3.3.15), pp 55-56

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cost might be passed on to consumers.¹¹⁰ Further, in response to a question from claimant counsel, Mr Crawford agreed that if a fixed resource rental or royalty posed a risk to the profitability of a company, and so risked the bottom line, the arrangement could be one for a share of a profit instead, thus avoiding the problem.¹¹¹

3.6.2 The Crown's suggestions for possible rights recognition

The Crown's evidence focused on mechanisms for the recognition of Maori rights and interests in water outside of the 'ownership' paradigm.

Ms Tania Ott, Deputy Director of the Office of Treaty Settlements, described the Crown's approach to redress for historical Treaty breaches in respect of natural resources, including freshwater and geothermal resources. In her evidence, ownership of these resources is not open for negotiation although there are a number of mechanisms to provide cultural redress to iwi, and sometimes to provide commercial redress tailored to the resource in question.¹¹² The Crown's other main witness on this subject, Mr Guy Beatson, Deputy Secretary (Policy) at the Ministry for the Environment, provided evidence as to how Maori interests will be protected and enhanced in water management through the outcomes of the Fresh Start for Fresh Water programme.¹¹³ The other Crown witnesses did not address possible forms of rights recognition in their written evidence, but Mr Crawford proposed joint ventures as a better form of rights recognition during his cross-examination by claimant counsel.¹¹⁴ We deal with each of these possibilities in turn.

(1) Possibilities that are currently available or in development

In the evidence of Mr Beatson for the Crown, options are currently in development for the better recognition of Maori rights and interests in water. None of those options, he said, would be affected by the partial privatisation of the power-generating companies.¹¹⁵ Specifically, Mr Beatson referred us to the Fresh Start for Fresh Water (FSFW) programme, which is being conducted by the Land and Water Forum, and to the dialogue between senior Ministers and the Iwi Leaders Group. The forum is a non-government body of stakeholders, including Mighty River Power, Genesis, Meridian, and the five iwi organisations listed in chapter 1. We set out some of the background to the FSFW programme and the forum in that chapter. Here, we note the proposals that have been made so far for the enhancement of Maori authority in water governance and management.

110. Cox, 'The Link Between Maori and Electricity Generation by State Owned Enterprises' (doc A69(f)), p [10]; Brian Cox, oral evidence, 10 July 2012, Draft Transcript, pp 144, 159-161, 163-166

111. John Crawford, oral evidence, 13 July 2012, Draft Transcript, p 712

112. Tania Ott, brief of evidence, 20 June 2012 (doc A92)

113. Guy Beatson, brief of evidence, 29 June 2012 (doc A93)

114. John Crawford, oral evidence, 13 July 2012, Draft Transcript, pp 699-700

115. Beatson, brief of evidence (doc A93), pp 1-2, 10-12

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In its first report (2010), the forum identified water governance as a key issue: iwi, who have a Treaty relationship with the Crown, do not have ‘a clear path to engage as a partner’ with either regional councils or central government on freshwater issues.¹¹⁶ The forum made two recommendations of relevance to our report: first, the establishment of a National Land and Water Commission ‘on a co-governance basis with iwi’ to develop and oversee the implementation of a national land and water management strategy, and to advise Ministers on water management; and secondly, that iwi must have ‘adequate representation’ in the water-related committees of the regional councils.¹¹⁷ The forum concluded that the Crown had delegated water management to regional councils without resolving how the councils were to work in partnership with iwi or giving the councils clear direction on how they were to discharge ‘their role on behalf of the Crown partner.’¹¹⁸ The suggestions for new governance arrangements were designed to plug this gap, although the report contains no specific suggestions as to how the national commission might be constituted in terms of Maori membership or what degree of representation on regional council committees would be ‘adequate’. It does, however, note an iwi view that governance must include direct Crown-iwi dialogue and a much stronger role for central government, if water problems are to be solved effectively and water bodies to be restored to health.¹¹⁹

The forum also acknowledged that there were Crown-iwi discussions happening outside its purview. It suggested that a new system of water allocation needs to be designed – which might include tradeable water permits and payment for water permits – and that the transition to any new system of water allocation should proceed ‘hand in hand with Crown-iwi discussions on iwi rights and interests in water management.’¹²⁰ It noted:

Iwi assert foundation rights to freshwater based on the Treaty, customary, and aboriginal rights and that these rights continue to hold relevance in the wider legal framework of water management. Iwi are keen to see resolutions emerge from their conversations with the Crown that improve the clarity and certainty of iwi rights to freshwater. A robust system recognising iwi in its design is needed.¹²¹

But Crown-iwi discussions about rights were happening in parallel, so the forum observed:

A particular point which needs to be borne in mind is the relationship between changes in allocative mechanisms for water and the discussions on water between iwi and the Crown. We think that any transition to more effective allocation should proceed hand in

116. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, 2010, p viii

117. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 4

118. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 13

119. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 17

120. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 3

121. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 9

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hand with those discussions, to avoid the risk that it will need to be revisited later, with disruptive consequences.¹²²

Nonetheless, the forum acknowledged that iwi concerns included the need for their rights and interests to be recognised, their role in governance enhanced, their degraded water taonga to be cleaned up, and ‘the capability to satisfy iwi development aspirations, including by ensuring future access to water for commercial business.’¹²³ In general, iwi also supported the development of more collaborative, cheaper consent processes and greater incorporation of Maori knowledge and science into decision making.

In April 2012, the Land and Water Forum published its second report.¹²⁴ This report did not expand a great deal on what had already been proposed for the enhanced recognition of Maori in water management. It reiterated that fundamental issues ‘between the Crown and iwi concerning iwi rights and interests are not on the table in this Forum.’¹²⁵ The forum’s second report focused on collaborative processes for freshwater planning and limit-setting.

Mr Beatson’s evidence also referred to the direct dialogue between Ministers and the Freshwater Iwi Leaders Group, which is considering – in part – the issues ‘not on the table’ in the forum. But Mr Beatson told us that officials are not privy to this dialogue and he was not able to give us any information as to how it has developed since 2009.¹²⁶ As we know from correspondence in 2009, the question of property rights and interests in water was raised for discussion but we have no evidence as to where those discussions have gone, if anywhere.¹²⁷ According to Mr Beatson, we should understand the 2009 Protocol (described in chapter 1) as involving a commitment on the part of the Crown to discuss the issue of Maori proprietary rights and interests in water. In response to questions from the Tribunal, he clarified that the possibility of full ownership is not on the table but that the Crown intends to discuss with iwi whether or not Maori have ‘property rights and interests’ that amount to something other than full ownership of water.¹²⁸ The key exchange was as follows:

Tribunal: So is the Crown, through you, in a policy sense, saying that property rights of Māori are on the table?

Mr Beatson: Yes and the reference [in the protocol] to rights and interests encompasses that ...¹²⁹

122. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p xiii

123. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 16

124. Land and Water Forum, *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity Freshwater Policy- and Plan-Making Through Collaboration*, April 2012 (supporting papers to Guy Beatson, brief of evidence, 29 June 2012 (doc A93(a)))

125. Land and Water Forum, *Second Report of the Land and Water Forum* (supporting papers to Guy Beatson, brief of evidence (doc A93(a)), p 31)

126. Guy Beatson, oral evidence, 16 July 2012, Draft Transcript, pp 1059-1086

127. Rt Hon John Key to Sir Tumu Te Heuheu, 9 May 2009 (Beatson, affidavit, annex GB-2 (doc A3))

128. Guy Beatson, oral evidence, 16 July 2012, Draft Transcript, pp 1066-1086, esp pp 1081-1083

129. Guy Beatson, oral evidence, 16 July 2012, Draft Transcript, p 1082

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We asked Crown counsel to supply us with further information about the post-2009 dialogue, in particular any documentation of it, and received the following response:

Meetings of Iwi Leaders and Ministers are high-level and no formal minutes are kept. Officials are unable to confirm exactly what meetings involve discussion of rights and interests ... In summary, the Crown has structured the water reform process in such a way that Iwi Leaders and Advisers can bring their views straight to the Crown and to the LAW F [Land and Water Forum]. Initial discussions on rights and interests have occurred, and will continue. It is likely that discussions on rights and interests will accelerate significantly in 2012 as the LAW F has now reported on limit setting and governance, and will submit its final report in September.¹³⁰

We take it, therefore, that the official position is that 'property rights and interests' have, in the evidence of Mr Beatson, been on the table for ministerial discussions with the Iwi Leaders Group since 2009 without any conclusion as yet. We were told that discussions 'will accelerate significantly' later this year. We were also told that the Crown is simply informing itself in discussions with the Iwi Leaders Group, not negotiating arrangements that will affect Maori people whom that group do not represent, and that all matters in the land and water forum process will eventually be taken to Maori for full consultation. Nonetheless, the Crown's position in our inquiry (as we discussed in chapter 2) is that property rights are not an appropriate paradigm for the modern expression of Maori rights, and that the analysis and recommendations of the Wai 262 Tribunal in respect of kaitiakitanga are to be preferred. That submission is in keeping with the Crown's emphasis on water management in Mr Beatson's evidence and in the Fresh Start for Fresh Water programme. It is also in keeping with the Treaty settlement policies of the Office of Treaty Settlements, to which we turn next.

In its 2010 report, the Land and Water Forum recommended general changes to governance of water management at the central and regional levels. It also noted that what it called 'ad hoc policy making' about the Maori role in governance was being made through a series of individual iwi Treaty settlements. General governance arrangements would have to 'complement' these local particularities.¹³¹ In her evidence for the Crown, Ms Ott referred us to examples of these 'ad hoc' Treaty settlements, some of which we described briefly in chapter 1. These include the co-governance of the Waikato River through the Waikato River Authority and the co-management of the Rangitaiki River through the Rangitaiki River Forum. In the evidence of Ms Ott, it is neither possible nor desirable to draw a strict line between the settlement of historical claims and the creation of such mechanisms for the

130. Crown counsel, memorandum, 23 July (paper 3.4.1), pp 1-2

131. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 16, 43

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operation of the Treaty partnership in the present. Rights recognition can be an inextricable part of redressing past (sometimes ongoing) Treaty breaches.¹³²

At our request for more information, we received documentary evidence about the evolution of the Crown's settlement policies in respect of natural resources. Ms Ott made two key points in respect of the policies. The first is that a return of title is only contemplated in respect of land. Surface geothermal features located on (or in) Crown land, for example, may be returned to the ownership of iwi as part of the title to the surrounding land.¹³³ Such geothermal features may be developable for power generation or tourism.¹³⁴ Otherwise, 'ownership' of natural resources is not something which the Crown will agree to in historical claim settlements.¹³⁵ This point is perhaps most pointed in the Te Arawa lakes settlement, to which Mr Paul Harman, counsel for the Savage Whanau, referred us: the Crown returned the title of the lakebeds (land) to Te Arawa but asserted its ownership of the 'Crown stratum', which was the space above the lakebeds occupied by water and air. In the legislation, this stratum is defined as 'land'.¹³⁶ The Crown is sometimes prepared to go as far as recognising rights in solid natural resources, such as rights to pounamu (vested in Ngai Tahu), and the right to manage the extraction of hangi stones from the Mohaka River (for Ngati Pahauwera).¹³⁷ But ownership (or even co-ownership) of natural resources is otherwise something to which the Crown will not agree in Treaty settlements.

The second point is that the Crown considers redress in terms of natural resources to be 'cultural redress' and not of a commercial nature. Cultural redress can include, for example, official recognition of Maori relationships with taonga, protocols with the Minister of Conservation, access to aquatic resources on conservation land, and changes to place names. Such forms of recognition are important, and they will be explored further as part of the framework in stage two. But 'land and cash', we were told, are the only reliable forms of commercial redress. In response to a question from the Tribunal, Ms Ott agreed that shares in the power companies might be considered a form of commercial redress that related to a natural resource. But, in the view of the Office of Treaty Settlements, shares are not usually considered as a component of commercial redress because of their 'volatility': 'We tend to look for types of redress which will hold their value, so land or money, and warm less to the idea of more sort of volatile types of arrangements. It goes to the durability of the settlement.'¹³⁸

132. Ott, brief of evidence (doc A92); Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 910, 913-914

133. Ott, brief of evidence (doc A92), pp 4-8; Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 897

134. Crown counsel, memorandum, 20 July 2012 (paper 3.2.8), p 4

135. Ott, brief of evidence (doc A92)

136. Counsel for interested parties (Harman), memorandum, 8 August 2012 (paper 3.4.11), pp 4-6; Te Arawa Lakes Settlement Act 2006, ss 11, 23(2)

137. Crown counsel, memorandum, 20 July 2012 (paper 3.2.8), p 4

138. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, p 965

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Also, Ms Ott told us that Treaty settlements do not provide for a Maori right of development in natural resources, including water. When asked by the Tribunal what Maori rights and interests in water are recognised by the Crown, Ms Ott replied that the ‘Crown recognises the cultural relationship that iwi have with those resources.’¹³⁹ In particular, the structures created by the Crown for Treaty settlements, such as the Rangitaiki River Forum, are designed to provide for the exercise of kaitiakitanga in local authority decision-making.¹⁴⁰ Nonetheless, commercial redress specifically related to natural resources is possible (even if shares are not considered suitable). Ms Ott mentioned the recent settlement of the historical claims of Raukawa (North) as an example of such an arrangement. Through this settlement, and in recognition of the effects of the establishment of hydro dams on the Waikato River, an \$8 million fund was established to assist any joint venture arrangements that Raukawa and Mighty River Power might wish to enter into post-settlement.¹⁴¹ Counsel for Raukawa, however, submitted that this money was a settlement of historical grievances and does not recognise their rights in their rivers. Raukawa understands that their existing aboriginal title and Treaty rights are not affected by their historical settlement and that they will be developing how best to give effect to and protect those rights in lakes and rivers in future discussions with the Crown.¹⁴²

We are not concerned in this stage of our inquiry with the criticisms that have been made of these arrangements. According to the claimants, nothing more is on offer than a ‘consultative right’. While not ‘implacably opposed’ to co-management, they argued that a necessary first step is to clarify the proprietary rights so that management systems meet the needs of owners (and not the other way around).¹⁴³ The Wai 262 report, too, queried why only some groups could get such one-off arrangements and had to do so in their historical claims settlements, when mechanisms for kaitiaki control or partnership should be available to all through the operations of the ordinary law.¹⁴⁴

These criticisms are a matter that will have to be revisited at stage two when we consider the framework in its entirety. The Crown acknowledged that concerns have been raised but submitted:

There has been some criticism of the use of a mere co-management approach. While this could be the subject of ongoing debate, it can certainly be said that:

- Rights and interests *are* acknowledged and provided for within current frameworks;

139. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 942, 949-950

140. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 949-951

141. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 966-967

142. Counsel for the Raukawa Settlement Trust, memorandum, 27 July 2012 (paper 3.4.5)

143. Claimant counsel, opening submissions (paper 3.3.1), pp 6, 9

144. Waitangi Tribunal, *Ko Aotearoa Tenei: a Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity*, 3 vols (Wellington: Legislation Direct, 2011), Te Taumata Tuarua, vol 1, p 279

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- ▶ Those frameworks can be developed and improved upon. The Tribunal's guidance on these matters is sought and will be valuable [at stage two].¹⁴⁵

In the Crown's view, the critical point is that co-governance and co-management arrangements are on the table in Treaty settlements and in the recommendations of the Land and Water Forum as a necessary and important means of recognising Maori rights and interests in water. And none of these arrangements will be prevented or affected by the partial privatisation of the power-generating SOES. Ms Ott said to us: 'I'm unclear about how or why we [OTS] would do things any differently in the future, simply because of a change of ownership in these state owned enterprises.'¹⁴⁶

We will return to this argument below when we consider how the options for rights recognition are affected by the MOM policy.

(2) Other possibilities

As noted in the previous section, Mr Beatson advised us that 'property rights and interests' may yet be discussed between Ministers and the Iwi Leaders Group. In its submissions, the Crown is not ruling out the possibility of a 'modest levy', royalties, joint ventures, or some other arrangement that provides for Maori economic interests in their water bodies in the future. Its argument at stage one of this inquiry is simply that none of these things will be precluded if it proceeds with the partial privatisation of Mighty River Power and the other power-generating SOES.¹⁴⁷ But this should not be confused with the position outlined in the previous section, where options for the recognition of Maori rights in water have been developed or are under active contemplation. In response to a question from the Tribunal, for example, Ms Ott stated that royalties were not 'on the table'.¹⁴⁸

Where the Crown really entertained a commercial possibility is the option of joint ventures between Maori and the power-generating companies. In his evidence for the Crown, Mr Crawford suggested that shares in the power companies would not give Maori 'the level of control, interest, and right to revenue that MRP's joint venturers have'.¹⁴⁹ Under cross-examination by claimant counsel, he stated that joint ventures would be a superior form of commercial rights recognition for Maori. Both as a form of recognition of their ownership – if they do in fact own the resource – and as a means of facilitating a more direct relationship with the resource and a direct profit from it, joint ventures are to be preferred. By entering into such arrangements, Mr Crawford said, Maori would avoid the risks to which

145. Crown counsel, closing submissions (paper 3.3.15), p 74

146. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, p 942

147. Crown counsel, closing submissions (paper 3.3.15), p 40

148. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, p 971

149. John Crawford, brief of evidence, 3 July 2012 (doc A95), p 12

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companies (and they as shareholders) would be exposed. He did note, however, that companies would need to believe that they had a commercial imperative to enter into a joint venture.¹⁵⁰

In closing submissions, Crown counsel did not make a detailed submission about joint ventures but simply said:

A potential benefit through shares may be one way of recognising past breaches – rather than rights recognition – in due course, but as John Crawford said in evidence, even then it is far from an ideal remedy for breach, given that the MOM companies have assets that are geographically diverse (many of which are not related to water) such that they would not reflect individual iwi or hapu interests in their particular taonga. The better outcome, in terms of redress, could well be financial compensation to enable a direct interest through the likes of a joint venture relating to a particular area of water. A small share holding cannot give control of water ... Resource allocation and capacity for joint ventures is where the conversation needs to head ... As Brian Cox, John Crawford and Lee Wilson all said, by far the most tangible economic option, giving Maori a direct right and interest in water, is through joint ventures with electricity generators of the likes of those that exist already with Mighty River Power, Contact Energy and others. Arrangements of this sort give a direct interest in a resource consent, direct control and interest and a direct right to revenue.¹⁵¹

In suggesting this possibility, therefore, Crown counsel was perhaps envisaging the kind of arrangement referred to by Ms Ott, in which the Crown provided Raukawa with funding to help establish a joint venture with Mighty River Power. In the Crown's submission, this option – as with all of the options – is something that it can do at any time, and will not be affected by the partial privatisation of the SOEs.

Having outlined the options for rights recognition (and redress), we consider the question of whether these options will be affected by the partial privatisation of the power-generating SOEs in section 3.8. First, however, there is a prior question to decide. For shares to be considered an indispensable remedy for past breaches or an essential component of rights recognition, such that we would need to recommend a delay in the sale while the parties negotiated, there would first have to be a nexus between the 'asset' (the shares) and 'the claim' (to rights in water). While the existence of a nexus would not itself be determinative of whether the proposed sale is in breach of Treaty principles, its absence could mean that the claim failed at the first hurdle.

150. John Crawford, oral evidence, 13 July 2012, Draft Transcript, pp 699-701

151. Crown counsel, closing submissions (paper 3.3.15), pp 34, 51, 76

3.7 IS THERE A NEXUS BETWEEN SHARES AND WATER RIGHTS?

In the Crown's view, the test that must be met at stage one of our inquiry is that the ordinary courts would find a nexus between the 'asset' (shares) and 'the claim' (to rights in water), such that the Crown could not reasonably sell the asset without first preserving its ability to use the asset to settle well-founded claims. Further, the Crown says that the asset must be non-substitutable; that is, as we understand the Crown argument, it has to be these shares *now* in Mighty River Power and not other shares *later* in Mighty River Power or another power-generating SOE. The claimants' argument is that the nexus is obvious for shares in a company that controls, uses, earns income, and profits from the water in which they claim proprietary rights, so long as the shares carry with them a significant stake in (and power in) the company. Shares alone, in the claimants' view, are too distant from the use of the water to provide a remedy, although they would form a necessary and indispensable part of that remedy.

The Crown's arguments about nexus were in many ways its core arguments in this inquiry, so we set them out in some detail here. In their opening submissions, Crown counsel put the position as follows:

- ▶ The planned share sale is about shares in corporate entities that use water and geothermal resources to generate electricity. Energy companies do not purport to own water or geothermal resources. Those resources are renewable.
- ▶ Resource consents which accommodate conditions reflecting environmental limits are the mechanism for allocation.
- ▶ Shareholders are distinct from companies, and this is the case with SOEs. Shares in mixed ownership companies are not investments in power stations and power station owners do not affect the determination of rights or interests in water. While Crown shareholding in mixed ownership model companies has the potential to decrease to 51%, the Crown maintains the same effective control for relevant purposes.
- ▶ The determination of Maori interests in water and geothermal resources will have no relevant effect on company operations or on the commitment and ability of the Crown to provide appropriate redress for well founded Treaty claims.¹⁵²

These propositions remained at the heart of the Crown's case throughout the hearing. In their closing submissions, however, counsel added an explanation of the case law on which the Crown relies for its argument that if there is no direct nexus between shares and Maori water claims, then there is no Treaty requirement that the Crown should halt its asset sales. We discuss this case law first.

152. Crown counsel, opening submissions (paper 3.3.8), p 6

3.7.1 Case law on nexus issues

It was Crown counsel's submission that there is now in New Zealand a significant body of case law concerning the effect of selling state-owned assets on 'the Maori rights and interests guaranteed by the Treaty'. The courts have developed 'principles that underpin a Treaty-compliant framework for the sale of state owned assets.'¹⁵³ Two key principles are:

- ▶ First, 'the Treaty does not unreasonably restrict the right of a duly elected government to pursue its chosen policy agenda in the exercise of its right of *kawanatanga*'; and
- ▶ Secondly, 'there must be a direct nexus between the assets concerned and the Crown's ability to fulfil its Treaty obligations before Treaty principles can halt that policy agenda.'¹⁵⁴

In oral submissions, Crown counsel added: 'Where there is that nexus then there should be a halt.'¹⁵⁵ We consider this to be an important and proper acknowledgement, should we find that a nexus exists between the shares and the ability of the Crown to preserve a remedy for the present claim. But the Crown's view is that:

having regard to this body of case law, there is no nexus between the recognition of Maori rights and interests in fresh water and geothermal resources and the sale of shares in power-generating SOES, such that the Crown should be prevented from carrying out its MOM policy.¹⁵⁶

The Crown first cited *New Zealand Maori Council v Attorney General* (the *Lands* case) [1987] NZLR 641 in support of its arguments. Crown counsel submitted:

where the Crown reasonably and in good faith satisfies itself that the transfer of the assets concerned will not prevent it from subsequently recognising Maori claims, 'no principle of the Treaty will prevent a transfer' [citing Cooke P in *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 664]. As such, the nexus between the assets and the Crown's ability to satisfy its Treaty obligations is crucial to determining whether or not an asset sales policy is Treaty compliant, and requires careful evaluation.¹⁵⁷

In the Crown's view, this nexus 'was clearly present in the *Lands* case', where the asset was land potentially subject to Treaty claims. It was clearly foreseeable, said Crown counsel, that the land itself would form a significant part of any redress sought if the claims were later determined to be well-founded. In essence, 'the asset being transferred was the very asset Maori sought, or would likely seek, in compensation for their Treaty grievances'. Thus, to

153. Crown counsel, closing submissions (paper 3.3.15), p 37

154. Crown counsel, closing submissions (paper 3.3.15), p 37

155. Crown counsel (Radich), oral submissions, 20 July 2012, Draft Transcript, p 1454

156. Crown counsel, closing submissions (paper 3.3.15), p 38

157. Crown counsel, closing submissions (paper 3.3.15), p 38

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transfer that land beyond the ability of the Crown to recover it for redress of well-founded claims was not Treaty compliant.¹⁵⁸

The *Lands* case is well enough known of course. In his opening sentence in his judgment in the Court of Appeal, Cooke P (as he then was) said:

This case is perhaps as important for the future of our country as any that has come before a New Zealand Court.¹⁵⁹

One of the declarations sought by the Maori parties in the case was a declaration that the transfer of assets en bloc to SOEs without establishing any system to consider whether such transfer would be inconsistent with the principles of the Treaty of Waitangi would be unlawful. The “assets” in the *Lands* case were land. It was argued for the applicants that ‘whether in any instance the transfer of a particular asset would be inconsistent with the principles of the Treaty is a question of fact.’¹⁶⁰ The Court of Appeal agreed and went on to say, ‘but it does not follow that in each instance the question will admit of only one answer.’¹⁶¹

This observation is important because it recognises that a factual inquiry as to whether asset transfer is inconsistent with the principles of the Treaty is likely to yield an answer particular to the facts of the specific transfer or transaction concerned. This means in our view that not only the nature of the asset being transferred must be identified but also what customary rights are affected by its transfer. Comparisons of the facts in one case with the facts in another are unlikely to be helpful.

Cooke P went on to say in *Lands* that the argument for the applicants was correct that:

the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent possible.¹⁶²

This is the principle which in our view must inform the factual analysis.

It is correct that the factual inquiry in the *Lands* case was sufficiently straightforward – land was the asset Maori sought and it was also the asset being transferred – so much so that the nexus was obvious. But nowhere in any of the judgments of the Court is it laid down that the link or nexus must be as obvious or direct as it happened to be in that case.

Next the Crown relied on the *Coal* case (*Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513). Crown counsel submitted that this case was another example of a direct nexus required between the assets to be transferred and the assets sought in settlement, before the Crown could be reasonably required to provide a scheme for protection of Maori rights in respect of the assets available before the transfer was effected.

158. Crown counsel, closing submissions (paper 3.3.15), p 38

159. *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641, p 651

160. *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641, p 664

161. *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641, p 664

162. *New Zealand Maori Council v. Attorney-General* [1987] 1 NZLR 641, p 664

The Court of Appeal determined in that case that the mining rights held by Coalcorp in respect of land confiscated from Waikato Tainui were interests in land protected by the Treaty of Waitangi (State Enterprises) Act 1988. Accordingly the sale of Coalcorp could not proceed until the Crown had established a scheme protecting the rights of Maori in those lands. As with the *Lands* case, the Crown said in our inquiry that the nexus was clear: the land and mining rights were ‘the very assets sought by Maori as part of the redress for their claims and, were the Crown to divest itself of those assets without ensuring their availability for future Treaty settlements, its ability to fulfil its Treaty obligations would be prejudiced.’¹⁶³

But in our view a fact-specific inquiry process of the kind approved in the *Lands* case must also have been undertaken for the *Coal* case before the Crown’s proposition can be accepted. The question was, in the *Coal* case, whether the transfer of the mining rights and surplus land would be inconsistent with the principles of the Treaty. This inquiry as to the facts yielded an identifiable link or connection or nexus between the assets being transferred and the assets being sought. The Court determined that no further action should be taken by the Crown until it had established a scheme of protection in respect of the potential rights of Maori.¹⁶⁴

The Crown says the link was clear because the land and the mining rights being transferred were the very assets being sought by Maori. But Tainui were seeking access to the coal resource itself. It was not that resource which was being sold; rather, it was the legal means – the coal mining licences – by which Coalcorp would, upon transfer, gain access to that resource. Cooke P observed when considering the nature of the coal mining rights being acquired by Coalcorp that ‘it remains true that the [coal mining] business is wholly dependent on the licenses and that the right given by the licenses to use finite energy resources such as coal must be a most significant part of the land value in the ordinary sense.’¹⁶⁵

In the Crown’s submission, the *Lands* and *Coal* cases establish that a nexus arises because return of the asset is ‘foreseeable’ (that is, that the asset’s return would be a foreseeable part of a settlement), and because the actual asset being transferred is the ‘very asset Maori might likely seek.’¹⁶⁶ The Crown is at ease with the idea that an asset claimed might be *returned*.

In our view, however, there is a difference in the nature of the nexus established in these two cases. In *Lands*, it was ‘land for land’; in *Coal* it was ‘land for land plus coalmining rights (including mining rights received by Coalcorp where land was not being transferred)’; the mining rights were considered in themselves a primary asset. While the nexus was comparatively straightforward, therefore, in the *Lands* case, we consider that it was less so in *Coal*. The Court evaluated the question of whether Maori knew about or used the resource

163. Crown counsel, closing submissions (paper 3.3.15), p 39

164. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA), p 514

165. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513 (CA), p 520

166. Crown counsel, closing submissions (paper 3.3.15), pp 38-39

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in 1840, whether it was a taonga, the facts of the confiscation of the land in which it was contained, and the Maori role in building up the coalmining industry, all before coming to its view that mining rights could not be transferred without first protecting the Crown's ability to remedy well-founded claims.

The Crown also relied on the *Ika Whenua* case¹⁶⁷ as an example of where – unlike in *Lands and Coal* – Maori applicants failed to prove the existence of a nexus between remedy and asset. In Crown counsel's submission, the two key points in that case were first 'that Maori had no rights to or in the assets concerned', and secondly that Maori Treaty rights 'did not extend to the generation of electricity through the use of water.'¹⁶⁸

This case introduces a new question to our analysis of the relevant case law: can there be more than one type of nexus or connection between asset and remedy, such that Maori are not necessarily required to prove the very direct link that existed in the *Lands* case? We also consider this point further in our analysis of the various broadcasting cases.

Here, we note these salient points about the background to the *Ika Whenua* case:

- ▶ The case was triggered by the proposal of two local electricity authorities to transfer the Aniwhenua and Wheao dams into the ownership of private energy companies.
- ▶ The Tribunal, in its 1993 *Te Ika Whenua Energy Assets Report*, had recommended that this transfer should not take place before the rivers claim of the Te Ika Whenua hapu could be heard and reported upon.
- ▶ The hapu of Te Ika Whenua initiated judicial review proceedings in the High Court, seeking interim relief to prevent the transfer, which was declined. They then appealed this decision to the Court of Appeal.

The Crown is clearly correct that the Court of Appeal did not accept that there was a nexus:

The reason why the present appeal does not succeed is simply that rights to or in the dams themselves are not held by Maori, nor is there any substantial prospect of a change in that regard; yet Maori claims to remedies not extending to the ownership of the dams will not be affected by the proposed transfers. For these reasons the appeal is dismissed.¹⁶⁹

What is particularly important, however, is how the Court reached that conclusion. In its view, the key question was whether Maori could establish rights in the dams such that there was a 'realistic prospect' that those assets could be the remedy for a Treaty claim:

[I]f there were any realistic prospect that by compulsory purchase or otherwise the Crown would take steps to bring about a complete or partial vesting of the dams in the tangata whenua, or that a Court might order such a vesting, we think that this Court should

167. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20

168. Crown counsel, closing submissions (paper 3.3.15), p 41

169. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 27

give at least serious consideration to making an order which would keep those prospects open. It is because, in the light of the nature of Maori customary title, the scope of treaty rights and the history of electricity generation in New Zealand, no such realistic prospect appears, that we dismiss this appeal.¹⁷⁰

One assumption which appears to underlie the Court's decision was that Maori customary rights and Maori Treaty rights were in that case identical. Cooke P, who delivered the judgment of the Court, stated that, subject to Article 1 rights, Article 2 of the Treaty 'must have been intended to preserve for them effectively the Maori customary title'.¹⁷¹ From that standpoint, the Court continued: 'But, however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power'.¹⁷² The appellants had 'not contended that the dams are themselves taonga'.¹⁷³

So, the Appeal Court appears to have decided that the claim could only succeed if it could be established that these very recent structures, which had been built for the purpose of generating electricity, could be a settlement asset for a claim derived from a customary or Treaty right to generate electricity. Otherwise, in the Court's view, 'there can be no legal objection to the transfer of the Aniwhenua and Wheao dams to energy companies. If any claims to compensation for interference with Maori customary or fiduciary or treaty rights to land or water can be mounted, they will not be diminished or prejudiced in any real sense by such transfers'.¹⁷⁴ Cooke P stated that it was 'inconceivable' that a Court would order the transfer of the 'dams or incidental rights' to Maori, and unrealistic to suppose that assets of such importance to the community – and in which Maori held no rights – would be used as redress in a negotiated Treaty settlement.¹⁷⁵

As noted, the Court took this view because it held that neither the Treaty nor customary rights (nor indeed any statute) could be understood as giving Maori a right to generate electricity. But it also took the view that the Crown's assumption of control over the rivers without consent, which underlay the building of the dams, could be a breach of the Treaty.¹⁷⁶ Whatever remedy or contribution of remedial measures there may have been, the foreseeable remedy for such a Treaty claim, however, would not consist of Maori ownership of the dams. In a key passage, the Court stated: 'As we see it, the real difficulty facing the appellants is not the absence of a justiciable issue but the absence of any substantial prospect of obtaining relief affecting the ownership of the dams'.¹⁷⁷ The Court was much concerned with

170. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 23

171. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 24

172. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 24

173. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 24

174. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 25

175. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 25

176. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 26

177. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 27

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what it considered to be 'practical' remedies for meritorious claims, and practical *impediments* to such remedies. In neither case did it consider the dams would make a material difference: it was unrealistic to suppose that they could be used as a settlement asset; but nor would their transfer impede other remedies for a meritorious river claim under the Treaty, if one existed.¹⁷⁸

In submissions for the interested parties, Ms Ertel drew our attention to the very important statement in the judgment that

there may be room also [in a Treaty claim] for an argument that some form of payment should be made for the right to obstruct the flow of the rivers.

Given that statement, and the distinction which Ms Ertel argued must be drawn between customary rights (aboriginal title) and Treaty rights, and which had not been before the Court, her submission was:

To use sport idiom, here the field is wide open, the Treaty and the raft of rights it recognises are all in play. Te Ika Whenua is support not a hindrance to this inquiry and the relief sought.¹⁷⁹

For the purposes of our discussion of case law in respect of 'nexus', two key points emerge from the *Ika Whenua* case. On the basis on which that case was advanced before the Court, the first is that the Court rejected the appeal because there was no nexus between the asset (the 'dams or incidental rights') and an appropriate, realistic, or even conceivable remedy for a Treaty claim. The second point is that the Court acknowledged that there was a possibility of an indirect nexus between these recent structures, which Maori had not claimed as taonga, and a Maori right to generate electricity. If Maori had been able to establish such a right, whether under custom or the Treaty, then we consider it open to take the implication from the Court's reasoning is that that would have been sufficient to prevent the transfer. Viewed in this way, the *Ika Whenua* case allows for the proposition that a nexus between asset and claim may be of a less direct nature than the 'land for land' type of nexus established in the *Lands* and *Coal* cases.

The outcome was, in practical terms, that the Court held in *Ika Whenua* that no right to generate electricity existed for Maori distinct from that of every other New Zealander. As we will discuss later in this chapter, our view is that Maori *do* have a Treaty right to develop their properties, the rivers and lakes, and therefore a development right in the use of their

178. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 27

179. Counsel for interested parties (Ertel and Thornton), submissions by way of reply (paper 3.3.16), pp 29-30

properties to generate hydroelectricity. That does not seem to have been argued or considered in the *Ika Whenua* case.¹⁸⁰

Now we turn to how the radio frequencies and broadcasting cases inform our view of the nexus issue.¹⁸¹ In our inquiry, the Crown relied on the two radio frequency decisions, which concerned its allocation of rights to use AM and FM radio frequencies under the Radiocommunications Act 1989. In the *Radio Frequency No 2* case, Cooke P noted that while the Treaty guarantees the protection of taonga, it does not specify how the protection must be effected. The Crown submitted that in evaluating 'the nexus between the sale of assets and the Crown's ability to meet its Treaty obligations, a chosen policy agenda will not be invalid in terms of Treaty principles merely because the Crown has chosen one option of meeting its Treaty obligations over other available options.'¹⁸² This was a critical argument for the Crown in our inquiry. Crown counsel expressly submitted that in terms of 'redress or rights recognition', there is clearly a range of possible options for the Crown in respect of the present claim, including

the return of the asset concerned or similar assets, the payment of financial compensation, shares, royalties, levies or the statutory recognition of rights.

We are not sure how to understand the implication here of the Crown listing shares as a separate item from the 'return of the asset ... or similar assets'. It may be that the Crown was using 'asset' here in a wider sense to include proprietary rights in the water bodies, but its submission does not explain the distinction that it was seeking to make. It may have been a simple error. In any case, three questions arise in consequence of this submission:

- ▶ is there a nexus between the asset (shares) and the proprietary rights in water; and,
- ▶ if so, will the Crown be able to recover the asset for settlement redress after it has partially privatised up to 49 per cent of the MOM companies; and,
- ▶ alternatively, are there other Treaty-compliant options for settling the claim, regardless of whether there is a nexus between shares and rights in water?

Before proceeding to discuss the second two questions we must decide the first. In order to do so, it is important to consider whether the Radio Frequency decisions cited by the Crown represent cases where there was not a sufficient nexus of the kind that has been argued in the present claim (that there is no nexus between the recognition of Maori rights and interests in fresh water and geothermal resources on the one hand, and the sale of shares in power generating SOEs on the other). As we see it, the nexus was clear in the radio

¹⁸⁰. The likely explanation for the Court not to have dealt with the Treaty right of development is the way in which the case was both pleaded and, on the face of the judgment, argued. Cooke P recorded at p 23 that 'since the (High Court) judgment that statement of claim has been amended, most notably to introduce allegations, based on aboriginal title..(and)..the argument of the appeal took place on this amended statement of claim.'

¹⁸¹. *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (Radio Frequency No 1); *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 147 (Radio Frequency No 2); *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513

¹⁸². Crown counsel, closing submissions (paper 3.3.15), p 39

frequency cases, even if not as direct as in the *Land* and the *Coal* cases. In brief, that nexus was the centrality of radio broadcasting to the protection and promotion of te reo Maori.

Cooke P did, as the Crown has noted, say that the Treaty did not prescribe a specific course to be followed in the case of radio frequencies, and that governments can elect between available options so long as they give due weight to Treaty principles. But, as claimant counsel observed, the Court in the case cited (*Radio Frequencies No 1*) dismissed the Crown's appeal and Cooke P found that the Crown should wait for the advice of the Waitangi Tribunal, so that it could take into account 'highly relevant considerations, namely the findings to be made by the Tribunal'.¹⁸³ In the present claim, our first finding is that Maori rights and interests protected by the Treaty were such that the closest English cultural equivalent in 1840 was proprietary rights in the nature of full ownership, save to the extent that the Treaty bargain included some sharing of water bodies with the incoming settlers (see chapter 2). In *Radio Frequency No 2*, the Court of Appeal was satisfied that, having considered the contents of the Tribunal's report, there was no evidence that the Government would not select a Treaty-compliant option.¹⁸⁴

In the *Broadcasting Assets* case, the taonga was once again te reo Maori and Maori culture. The character of this case, as the claimants have pointed out, was very different from the *Lands* and *Coal* cases.¹⁸⁵ On appeal in the Privy Council, Maori argued that in the absence of any mechanisms to ensure the protection of the Maori language through broadcasting, the transfer of broadcasting assets from the Broadcasting Corporation of New Zealand to Radio New Zealand and Television New Zealand would be unlawful. In our view, the Privy Council's decision did not challenge the fact that there was a nexus between the promotion of the Maori language through broadcasting on the one hand, and the divestment of broadcasting assets on the other. Rather, the *Broadcasting Assets* case turned on the Court being satisfied that the transfer of the assets would not substantially undermine the Crown's ability to meet its Treaty obligations because, even without the assets, the Crown could promote the Maori language provided that it was prepared to accept the cost implications. There was a nexus but the Crown could still exercise substantial 'indirect' control over the assets by means of its powers over the SOEs, so long as it was prepared to fund Maori broadcasting. Hence, the assets would not be transferred beyond the ability of the Crown to still use them to meet its Treaty obligations.¹⁸⁶

183. *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (Radio Frequency No 1), 139; see also claimant counsel, submissions by way of reply (paper 3.3.20), pp 17-18

184. *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 147 (Radio Frequency No 2), 148-149

185. Claimant counsel, submissions by way of reply (paper 3.3.20), pp 18-19; see also counsel for interested parties (Ertel and Thornton), submissions by way of reply (paper 3.3.16), p 29

186. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 519-520

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The Crown also relied on the 1996 *Radio New Zealand* case in which the Court of Appeal followed a similar approach, finding that the Crown could promote the Maori language provided that it was prepared to accept the cost implications.¹⁸⁷

The *Broadcasting Assets* case supports, in our view, elements of both the Crown's and claimants' positions because the existence of a nexus was established, but the ability of the Crown to still meet its Treaty obligations despite the transfer was also accepted by the Privy Council. It is correct to say that the *Broadcasting Assets* case represents consideration of a proposed Crown asset transfer where the assets themselves were not held to be the subject of the Treaty claims but they were foreseeable as needed for remedy in respect of such claims. Even if it is correct to say that from the *Lands* and *Coal* cases, it appeared that the nexus must be solely attributable to the assets themselves being transferred, on the one hand, and claims by Maori to those assets, such a view of a nexus arose because of the facts in those particular cases. That is to say, the factual inquiry promoted as appropriate and necessary in the *Lands* case yielded that result. In our view, the radio frequencies and broadcasting cases show that the law does not go so far as to completely exclude a nexus being established in a less direct or different way, related to potential remedies available for relevant Treaty breaches.

We have to consider whether there are varying dimensions or degrees to the nexus or connection. In our view, this question turns on the facts of the particular case. The appropriate factual inquiry, which Cooke P recognised and approved of in the *Lands* case, is not much assisted by requiring it to be defined as a "direct" nexus between the asset(s) being transferred and the asset(s) being sought. The authorities do not require the nexus to be "direct" in our view. Of course, that nexus should not be nebulous. But if the nexus, in fact, exists and is not nebulous, it is sufficient for the purposes relevant to this inquiry that the nexus exists.

3.7.2 The factual basis of a nexus

The Crown's expert witness in this inquiry was Mr Lee Wilson, an energy sector consultant. In Mr Wilson's evidence, access to water resources is critical to the operation of many of the country's power stations. Water provides the source of energy for hydro power stations, it provides the medium by which the geothermal energy is captured for geothermal power stations, and it is commonly used as a source of cooling in thermal power stations.¹⁸⁸ In response to questions from the Tribunal, Mr Wilson agreed that without water, the power stations cannot operate and the shares in the MOM companies would have no value.¹⁸⁹ Currently, the right to use the water comes from water permits issued by local authorities

187. *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (C.A.)

188. Lee Wilson, brief of evidence (doc A96), pp 4-6

189. Lee Wilson, oral evidence, 16 July 2012, Draft Transcript, pp 893-894

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under the Resource Management Act. Again, without the permit (and therefore without the water) the turbines will not turn and the shares will have no value. While Mr Crawford for the Treasury and other witnesses pointed out that the power-generating SOEs have other assets, and are involved in selling as well as generating electricity, it must also be the case that without water or the rights to use water, there will be no electricity to sell. These companies and the value of their shares would not survive on generation from wind farms alone. Finally, the evidence presented to us by the Crown shows that seven of the eight power stations owned by Mighty River Power have been built on memorialised land, subject to binding resumption orders on the part of the Tribunal.¹⁹⁰ The claimants have stated that they may seek such orders in this inquiry.¹⁹¹

As we see it, all of these things create a direct nexus between Maori proprietary rights in their water bodies – which we found to have existed in 1840 and which were guaranteed by the Treaty – and the power companies that rely on the water as their principal and non-substitutable resource. The water underpins what gives the shares in those companies their value. Claimant counsel conceded, however, that shares are a relatively distant or disjointed way of recognising or giving expression to Maori proprietary rights in the waters used by the companies.¹⁹² This was certainly the view of the Crown's witness, Mr Crawford, and of the claimants' witnesses, Mr Galloway and Mr Cox.¹⁹³ In particular, Mr Crawford argued that shares gave no control over the company or its directors, no say in the management or use of the water bodies, and no direct profit from the use of the water bodies – the latter would depend on whether the company decided to pay a dividend. If it did decide to pay a dividend, then there would be no direct correlation between the money and the use of the water resource, as the companies' profits come from diverse sources.¹⁹⁴

One mistake, we think, lies in conceiving of shares – as the Crown does – solely as an investment opportunity for the purpose of acquiring dividends or selling the shares later at a profit. That is how investors will see shares, not how Maori will see shares. In part, this is because an integral aspect of the shares is the ownership interest that they give in the companies, which can be rendered more or less meaningful depending on the circumstances. But for Maori, having an ownership stake in the companies that profit from their water bodies is an important consideration. Also, as we discussed in chapter 2, the Crown says that it is not selling water or the rights to use water but that is not how Maori see it.¹⁹⁵ For many decades, they have been told that it is necessary for their taonga to be used by the

190. Crown counsel, list of Waikato River power stations with section 27B memorials, 25 July 2012 (doc B35)

191. Wai 2358 Amended Statement of Claim – National Water and Geothermal Claim, 2 March 2012 (paper 1.1.1(a)), para 33.6

192. Claimant counsel (Geiringer), oral submissions, 19 July 2012, Draft Transcript, pp 1230-1231

193. Brian Cox, oral evidence, 10 July 2012, Draft Transcript, pp 188-190; Philip Galloway, oral evidence, 10 July 2012, Draft Transcript, pp 231-232, 245, 247-248

194. Crawford, brief of evidence (doc A95), pp 2-15, 18-20

195. See, for example, Crown counsel (Radich), oral submissions, 13 July 2012, Draft Transcript, p 605

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Crown to generate electricity for the benefit of the nation. Now, however, private shareholders are to be introduced to Crown-owned entities and a fundamental change is taking place in the ownership of the companies that profit from their taonga.¹⁹⁶ As Maori see it, their water will now be used for private profit, regardless of whether the MOM company already had the right to use the water when it was an SOE. We agree with Maori that that is a real change, and clearly one that matters to them.¹⁹⁷

Nonetheless, shares on their own are not an ideal solution for what these Maori groups are seeking. As we noted earlier, Mr Geiringer made the following oral submission:

Shares are not an ideal solution and I think this was identified by all of the witnesses for the claimant. They were discussed and Mr Cox in particular thought that it was a potential solution but my reading of his evidence was that that was an issue of pragmatism rather than ideal ... Shares by themselves, I would submit, can't be a solution. Not even a simple pragmatic one. Shares and some control of the companies is beginning to be a potential solution in relation to some of the issues because, as Mr Crawford pointed out, shares are a very disjoint, distant from the assets in question. Shares and control is much less so. So if, you know, just hypothetical, if you were able to give the, in particular let's focus on the Māori groups whose water resources are used by say Mighty River Power and if you're able to give them shares that give them the economic interest and an active role in determining the future of that company through appointment of directors, for example, then you are beginning to give those groups some continued direct involvement with their water resources.¹⁹⁸

Thus, in the claimants' view, the nexus is not simply between shares and proprietary rights in water, but in shares that give a significant element of control over the companies that use their waters, without paying.

To a large extent, this expansion from 'shares' to 'shares plus' turned on a detailed debate between counsel and witnesses as to the content of New Zealand company law and the meaning or effect of shareholders' agreements and the power to frame or alter a company's constitution. Because this issue is so central to the question of establishing a factual nexus, and the later question of how far the Crown's ability to remedy the claims will be constrained by the introduction of private shareholders into the mix, we set out the arguments and our conclusions in some detail here.

196. Maanu Wihapi, oral evidence, 9 July 2012, Draft Transcript, pp 43-44

197. See also Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 920-923

198. Claimant counsel (Geiringer), oral submissions, 19 July 2012, Draft Transcript, pp 1230-1231

3.7.3 Company law and shareholders' agreements

The Crown's witness, Mr Crawford, stated: 'I think the point we're making is that an investment in those shares provides very limited control rights and there's no direct correlation between the revenue from [a] particular resource the company uses and the dividends or other payments a shareholder might receive from the company.'¹⁹⁹ As we have noted, there was a lengthy exchange between claimant counsel and Mr Crawford as to how much power shareholders can have over a company, especially by means of a shareholder agreement. In closing submissions, claimant counsel summarised the Crown's position as:

The Crown relies on the legal niceties of corporation law to say that the shareholders have no control over the company and the company has only an indirect interest in the water resources.²⁰⁰

But, in the claimants' view, the Crown was failing to take into account the potential for shareholder agreements to give Maori a connection to their water.²⁰¹ Further, the Crown statement that shareholders in MRP would not have any ownership of water resources ignored the fact that 'those shareholders would be benefitting from the exploitation of the water resources.'²⁰²

In closing its case, the Crown argued that there was insufficient connection between the sale of shares in a company and any asserted breach of Maori rights in respect of water, because of the limited rights held by shareholders. A share in a MOM company was 'removed from a property right in water.'²⁰³

The Crown supported this submission by a detailed analysis of the Companies Act 1993.²⁰⁴ That analysis commenced with reference to section 15 of the Companies Act, which declares that: 'A company is a legal entity in its own right separate from its shareholders'. Because a company is separate from its shareholders, the Crown argued that the company's assets belong to the company and not to the shareholders, and that a share in the company is not a share in the assets of a company.²⁰⁵ The shareholders' rights were said to be restricted to voting on a discrete range of matters specified either in the Act or in the company's constitution. These include the right to receive an equal share of any dividends authorised by the company's directors, and to receive an equal share of any surplus assets if the company is wound up.²⁰⁶

199. John Crawford, oral evidence, 16 July 2012, Draft Transcript, p 649

200. Claimant counsel, closing submissions (paper 3.3.10), p 12

201. Claimant counsel, closing submissions (paper 3.3.10), p 12

202. Claimant counsel, closing submissions (paper 3.3.10), pp 12-13

203. Crown counsel, closing submissions (paper 3.3.15), p 44

204. Crown counsel, closing submissions (paper 3.3.15), pp 44-51

205. Crown counsel, closing submissions (paper 3.3.15), p 45

206. Crown counsel, closing submissions (paper 3.3.15), p 45

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Crown counsel emphasised that the fact that a company made a profit did not mean the shareholders had any entitlement to a dividend, and that dividends did not bear a relationship directly with profits. Dividends, for example, could be declared in respect of a distribution of capital following an asset sale. It was stressed that the board authorised dividends, although there were other rights and powers that shareholders could agree upon unanimously, including declaration of a dividend.²⁰⁷ This was said to be unlikely with larger company shareholdings, as with Mighty River Power after it has become a MOM, because all shareholders would have to unanimously agree. Shareholder agreements are usually for small, closely-held companies.²⁰⁸

The Crown's analysis stressed that a company is governed by its board of directors, and that shareholders only have very indirect powers to influence the management of a company. These can include appointing directors or changing the company's constitution. Directors were said to owe duties primarily to the company and not to individual shareholders, although some duties were acknowledged to collective groups of shareholders, one being the obligation to recognise pre-emptive rights held by shareholders.²⁰⁹

Further obligations were also acknowledged to be enforceable at the potential suit of shareholders. The most significant are the rights of a minority shareholder to apply to the Court in respect of oppressive, discriminatory or unfair behaviour towards that minority shareholder, and of dissenting shareholders to seek a buy-out of their shares if they had voted against a special resolution in respect of certain categories of decision.²¹⁰

The Crown summarised the position it would face after sale in respect of the new shareholders as being:

In this sense, then, when exercising its voting rights, the Crown needs to consider a broad range of factors, including the rights of minority shareholders and the possibility of a claim of oppressive action or the company having to buy back the shares of minority shareholders. This is no different from any other company that has a majority shareholder and, as Mr Crawford said in evidence, the Crown operates as a majority and minority shareholder in a broad range of companies entirely effectively.²¹¹

As to the claimants' propositions about shareholders' agreements, the Crown submitted:

There was a suggestion by claimant counsel that shareholders could enter into an agreement between themselves that provided them with greater rights than those provided for under the Companies Act 1993. The suggestion was put to Mr Crawford that the shareholders

207. Crown counsel, closing submissions (paper 3.3.15), p 47, citing s107 of the Companies Act 1993

208. Crown counsel, closing submissions (paper 3.3.15), p 47

209. Crown counsel, closing submissions (paper 3.3.15), p 46

210. Crown counsel, closing submissions (paper 3.3.15), pp 46-47

211. Crown counsel, closing submissions (paper 3.3.15), pp 47-48

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could perhaps agree to a regular dividend stream, or agree that the directors would owe certain duties to the shareholders.

Quite aside from the practicalities of binding potentially thousands of shareholders in the MOM companies, the identities of whom would change day by day, it does not take into account the legal absurdity of doing so ...²¹²

The first of these 'legal absurdities' was held to be the statutory duty imposed on directors in section 131 to act in the best interests of the company and not the shareholders. The next was to repeat that in terms of section 128, the management of the company was vested solely in the directors, who could not act on shareholders' whims. The Crown then asserted that shareholder agreements could not bind directors unless the measures agreed upon were passed by special resolution in certain circumstances allowed by the Act. Finally, the Crown stressed that the constitution of the company controlled relations between the company and its shareholders and between shareholders, as per section 31 of the Act.²¹³

Many of those observations as to the application of shareholders' agreements seem to be based on a misapprehension of the proposition put to Mr Crawford by claimant counsel, and later reiterated in the claimants' submissions to us. Mr Geiringer's proposition was that if the Crown was to settle Maori claims in respect of water while it still owned the whole shareholding, it had open to it a range of mechanisms that could be used to provide remedies for Treaty breach by means of shareholder agreements *with Maori*, which would not be an opportunity open to the Crown after sale of the shares to private individuals. The Crown did not expressly address that particular proposition but its responses are, in part at least, relevant to it.

The Companies Act 1993 contains some 398 sections and nine schedules, many of a complex nature, so it is not surprising that there was a significant dispute between Crown and claimants over the interpretation of this Act. We are satisfied that the parties before us made honest attempts to wrestle with its meaning and effect. In their reply submissions, the claimants disagreed strongly with the Crown's interpretation. In particular, claimant counsel pointed out that the Crown had not addressed the argument that the fact of sale would remove the ability of the Crown to enter into a shareholders' agreement with Maori as to how the MOM companies were to be operated, including: addressing how directors were to be appointed; how investment money was to be spent; how decisions over dividends would be made; as well as anything else about the operations of the company that could be decided between shareholders at general law.²¹⁴ Claimant counsel concluded: 'Such an agreement could be entered between the Crown and Maori now, but not after the MOM.'²¹⁵

212. Crown counsel, closing submissions (paper 3.3.15), p 48

213. Crown counsel, closing submissions (paper 3.3.15), pp 48-49

214. Claimant counsel, submissions by way of reply (paper 3.3.20), pp 22-23

215. Claimant counsel, submissions by way of reply (paper 3.3.20), p 23

While there were clearly significant differences between Crown and claimants over shareholders' agreements, we do not consider that there is any great difference between them as to shareholders' rights under the *basic* statutory regime contained in the Companies Act. This point is particularly significant for the question of what rights minority shareholders will have after partial privatisation, and how those rights will constrain the ways in which the Crown, as majority shareholder, and the company itself, can act. In our view, the parties agreed, in effect, with how claimant counsel summarised the position:

The primary duties may be owed at first instance to the company, but as s170 and 174 set out, there is a duty owed to shareholders to perform those primary duties in a manner consistent with the constitution of the company or the Companies Act 1993 or the Financial Reporting Act 1993 and which is not oppressive, unfairly discriminatory, or unfairly prejudicial to the individual shareholder.²¹⁶

The parties agreed, too, that minority shareholders will have the option of applying to the courts under section 174 for 'relief in the case of allegedly oppressive, discriminatory or unfair behaviour in relation to the affairs of the company'.²¹⁷

While the parties were therefore in broad agreement as to the statutory regime, they differed significantly as to its import for the MOMs after partial privatisation. The claimants' position as to the duties imposed on majority shareholders – and, presumably, directors appointed by them and so under their indirect control – was summarised as follows:

The existence of these duties undermines the Crown's case. These duties mean that as soon as the Crown sells a single share to a private shareholder the company and its directors are subject to significant additional restraints on their actions.²¹⁸

We will return to this issue later in the chapter. Here, we are primarily concerned with the claimants' argument that a shareholders' agreement could create a more meaningful connection with the company and its use of their water resources than would shares as a simple investment option. Under this scenario, the Crown as sole shareholder could vest some of the existing MOM shares in Maori, or even potentially create a special class of shares in the MOM for Maori, possibly with special rights. Operational company matters would be addressed by way of shareholders' agreements between the Crown and Maori before any other shares in the MOM are alienated.

No detail was provided to us of what those agreements might contain, or what form any new class of shares might take, or even of which Maori entities might be parties to such agreements with the Crown or recipients of a new class of shares. That was understandable as a number of vital factors would need to be resolved by negotiation before anyone could

216. Claimant counsel, submissions by way of reply (paper 3.3.20), p 21

217. Companies Act 1993, s174

218. Claimant counsel, submissions by way of reply (paper 3.3.20), pp 21-22

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attempt to address such detail or consider its practicability in the market place. We note, however, that the claimants' arguments were predicated upon the connection that such a settlement would give Maori in their water bodies; that is, claimant counsel envisaged this arrangement as deepening the connection between shareholding hapu and the particular water bodies in which they claim proprietary rights, and which are used to generate hydro or geothermal power by the MOM companies.

It is not our role at stage one of this inquiry to venture into any great detail as to possible shareholder agreements or new classes of shares; matters of detail for the rights recognition framework will be left to stage two. All that can be done at this stage is to assess the basic issue of whether the claimants are correct that corporation law provides more flexibility than the Crown considers to be available at law, so as to enable consideration of a range of possible settlement mechanisms through use of the MOM shares prior to a sale, rather than after.

One of the new creations introduced by the Companies Act 1993, as compared to its predecessor 1955 Act, was the concept of a company constitution. The Act does not require a company to have a constitution but if a company does adopt one, that constitution becomes a very significant document in terms of the rights and obligations of the company, its shareholders and directors. Both the Act and the company constitution mechanism were intended to allow more flexibility in the way companies operate. In that, and many other ways, the 1993 Act adopts an enabling approach to various aspects of company structures.

The particular provision in the Act which conveys this flexibility is section 27, which enables the constitution of a company to negate or modify the Act's requirements. It provides: 'If a company has a constitution, the company, the board, each director, and each shareholder of the company have the rights, powers, duties, and obligations *set out in this Act except to the extent that they are negated or modified*, in accordance with this Act, *by the constitution of the company*' [emphasis added]. One of the other methods commonly used throughout the Act to enable this flexible approach is for various of the basic framework provisions in the Act to state that they are effectively 'subject to' the constitution.

In the context of this inquiry, one of the fundamental provisions relied upon by the Crown as to shareholders' limited rights to dividends and eventual distribution of assets contains just such a proviso. Section 36(1) provides that all shareholders have those rights, as well as the right to vote on resolutions to appoint or remove a director, adopt or alter a constitution, approve a major transaction, approve an amalgamation, or put the company into liquidation. Thus, while the Crown was correct in saying that the Act provides that every shareholder has a right to an equal share in the dividends authorised by the board, and to an equal share in the collective residual assets of a company, section 36(2) enables the constitution to negate, alter, or add to those rights. In addition, there is provision under

sections 41, 42, 44, and 107 for the equal rights of shareholders to be varied at the time the shares are issued.

Those provisions need to be appreciated in conjunction with section 37 of the Act, which enables the issue of different classes of shares carrying differing rights, including preferential rights. Subject to the constitution (which can pretty much do anything), this section allows certain shareholders to have 'preferential rights to distributions of capital or income', and 'special, limited, or conditional voting rights' or even no voting rights at all. This demonstrates even more graphically, in our view, the intent of the legislature to ensure that a company's constitution, or the terms upon which shares are issued, can allow for and permit a wide range of shareholder arrangements.

Another relevant example of the flexibility provided by the Act relates to the powers and obligations of the board of directors. Once again, the Crown's submission to the effect that the management of a company is vested solely in the directors is correct as far as the opening declaratory part of section 128 is concerned. However, subsection (2) makes it plain that that limitation is subject to any modifications in the constitution.

There is yet further scope for flexibility provided by the Act in relation to the obligations of directors to act in the best interests of the company and not the shareholders. That obligation on directors was stressed to us by the Crown in closing submissions.²¹⁹ The strict requirements stressed by the Crown are correct, but only so far as far as they go in section 131(1). Subsection (4) of section 131, however, makes it expressly plain that where a joint venture between the shareholders is being engaged upon, those limitations may not always apply, provided the constitution permits otherwise. Also, although we think these circumstances are likely not relevant to our inquiry, there is a further exception in subsections (2) and (3) of partially or wholly-owned subsidiaries.

There are other relevant provisions in the Act where it declares a standard position that the provisions defer to those of a constitution if one exists, so long as the Act's default provisions do not expressly prevent a different approach. Moreover, section 134 of the Act makes it explicit that the Act places the constitution at the apex of authority for any particular company, and one to which the board is bound, along with the relevant provisions of the Act: 'A director of a company must not act, or agree to the company acting, in a manner that contravenes *this Act or the constitution of the company* [emphasis added]'. For completeness, we add that the scheme of the Act is that the constitution must always be consistent with the Act – not too difficult a task to achieve, given the flexibility the Act provides.

In our view, even these few major provisions to which we have just referred demonstrate that the Companies Act 1993 is designed to enable the constitution of any company to be inventive and flexible. That in turn enables a constitution to provide for a wide range of differing rights and obligations for both shareholders and boards. It is this very flexibility that

219. Crown counsel, closing submissions (paper 3.3.15) p 46

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the claimants urged upon us when asserting that shareholders' agreements had wide scope to provide for varying solutions in a company structure.

3.7.4 Conclusions as to nexus: Shares 'Plus'

In the preceding sub-sections, we have discussed the fundamental question of nexus: are shares in the power-generating SOES so distant or disjuncted from Maori proprietary rights in the water bodies used by the SOES that they would, as the Crown put it, be an 'impoverished proxy' for the recognition of those rights? The Crown argued that there is no nexus, either in law or in fact.

Having considered relevant case law, we are satisfied that a nexus between claim and asset need not be so tight as to say that if the 'asset' is not identical to the resource claimed by Maori, in this case their water bodies, then there is no nexus. Unlike in the *Broadcasting Assets* case, the whole business of these SOES, be it power generation or selling electricity, is based ultimately on their use of the claimants' taonga. That is one nexus. But it is a nexus between the companies and Maori water rights. What of *shares* in the companies?

We considered the essential character of shares in the power-generating SOES, and whether they could be considered solely as a financial asset which would give little or no control over (or direct interest in) the company and its water-based operations. The claimants accepted that shares on their own could never be a sufficient form of rights recognition; in doing so, they essentially accepted the Crown's position that there is an insufficient nexus between shares and recognition of Maori rights in their water bodies. But the claimants' argument did not end with that admission. Rather, counsel submitted that shares which carried with them a significant degree of control over the MOM company, and its future operations in respect of the claimants' water resources, would be an essential component of redress for settlement of the claim.

Having examined the relevant provisions of the Companies Act, we agree with the claimants that a shareholders' agreement between Maori and the Crown, in combination with a jointly written or jointly amended company constitution, could potentially provide what they are seeking in partial remedy of their claims. In that circumstance, we are persuaded that there is a sufficient nexus between shares in the power-generating SOES and Maori rights in water that we can proceed to consider the next question: does it have to be shares *now* or can it be shares later?

Before doing so, however, we need to examine the other categories of claim put to us by the claimants: those Maori groups who do not have rights in the water bodies used by the power-generating SOES, and for whom the shares would have more of a purely financial character.

3.7.5 Shares for the purpose of funding remediation or in recognition of rights in other waters: is there also a nexus?

We begin this sub-section by noting that there does not always need to be a nexus between claim and assets in the ordinary course of Treaty settlements. As Ms Ott explained, cash is a large component of historical settlements, which the claimants can invest as they choose.²²⁰ The issue of nexus is important in stage one of our inquiry because it has been developed by the courts as a test of whether or not a Crown asset is so germane to a future Treaty settlement that the Crown must preserve its ability to use that asset in the settlement.

In the claimants' submission, under the heading 'further role of the SOES':

The residual question is how to find funding for those who require compensation but for whom [there is] no readily identifiable revenue stream from which such compensation can be provided.

The Claimants submit that such compensation ought also to be sourced from the power generating SOES. The Claimants have come to this view for the following reasons:

- ▶ the power generating SOES have significant value and are therefore capable of funding such compensation to a significant degree;
- ▶ equally prejudicial breaches in respect of water have occurred in other areas which have not created the type of readily realisable asset which is comprised in the SOES;
- ▶ despite this lack of revenue, these other breaches are no less deserving of compensation;
- ▶ the fact that there is no readily identifiable revenue stream in relation to these other water resources means that there is no way of compensating through a mechanism that preserved the connection to the water resource;
- ▶ the power generating SOES are already a necessary part of an compensation framework; and
- ▶ no other resource readily suggests itself.²²¹

Claimant counsel argued that the nexus in these cases is the root of all breaches of Maori water rights: the Crown's vesting in itself of the sole right to control and use natural water. For this argument, the claimants relied on the evidence of Mr David Alexander, a member of their experts group. Mr Alexander's report outlined how the Crown had assumed the sole right to use water for electricity in 1903, and then the control and use of all natural water (save for domestic purposes, watering of stock, and firefighting) in 1967. These powers are preserved today by the Resource Management Act 1991.²²²

220. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, p 965

221. Claimant counsel, opening submissions (paper 3.3.1), pp 24-25

222. David Alexander, 'Historical analysis of the relationship between Crown and iwi regarding the control of water', June 2012 (doc A69(b))

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This argument about nexus was only made in oral submissions, in response to a question from the Tribunal, and was not repeated in the claimants' written reply submissions. We therefore quote claimant counsel in full:

My submission is that there is a nexus between the SOES and every one of the water resources. It's the same thing, it's the Water and Soil Conservation Act 1967, to a limited degree the 1903 legislation and to the greatest degree the 1991 RMA.

The Government has unilaterally determined that it should be able to say what happens to these water resources and it has given over the decision making power to the local authorities where the Māori representation is almost non-existent. And it has set up a legislative framework for the decision making process which does not give proper recognition to Māori rights under Article 2. And the results have been, I use the word cautiously but I'm confident on it, catastrophic around the country. I just think if the people have had a taonga who used to live in a swamp, a glorious swamp full of food, now their boreholes have run dry so they can't drink, and that's the result of this legislative framework.

So my submission is that there is a nexus, it is the one decision of the Crown which has resulted in all of these problems and has also enabled the Crown to make a lot of money. And that's the nexus.²²³

The proposition that money made from exploiting water should help pay for restoring water is an attractive one. But claimant counsel's suggestion that this provides a nexus of the type necessary to halt an asset sale is not sustainable. It may well be that shares in the SOES could assist in funding restoration of degraded water taonga but that is a matter for detailed consideration of the framework in stage two.

Counsel for Ngati Haka Patuheuheu submitted that there does not need to be a nexus at all for the Tribunal to recommend that an asset be used to settle a claim under its section 8A jurisdiction (see above, 3.2.2(6)).²²⁴ We do not need to reach a view on this general argument here. What is important for the purposes of stage one is that there does need to be a sufficient nexus to recommend halting a transfer of assets.

3.8 TO WHAT EXTENT, IF ANY, WILL THE OPTIONS FOR RIGHTS RECOGNITION BE AFFECTED BY PARTIAL PRIVATISATION?

3.8.1 Are shares essential for rights recognition or remedy?

The short answer to this question is that they may be for some, depending on choices yet to be made by affected hapu and iwi. The New Zealand Maori Council seeks a remedy that preserves the ability of the Crown to provide 'shares plus' in *partial* recognition of Maori

223. Claimant counsel (Geiringer), oral submissions, 19 July 2012, Draft Transcript, pp 1184-1185

224. Counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7)

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rights and as a *partial* remedy for Maori Treaty claims. We stress the word ‘partial’ because there was no support from the claimants that they might, as Mr Galloway put it, ‘effectively “swap” ownership in water for equity in some of the companies that use it.’²²⁵ Shares in the MOM companies could only ever be one component of rights recognition. An enhanced role in the governance and management of water resources, for example, would clearly also be needed to meet the claimants’ Treaty rights. We are uncertain whether the claimants were proposing that those who receive shares would do so in sole satisfaction of the economic and development interests arising from their residual proprietary rights, or whether they were seeking a royalty as well. Claimant counsel did not want to be prescriptive on this point, arguing that we do not need to consider exactly how the framework of rights recognition will be configured at this stage of the inquiry, but rather whether the Crown’s ability to deliver on the various options will be impaired by the partial privatisation of the SOEs.²²⁶

But shares are not wanted by all. Ms Sykes, for example, told us that Barbara Marsh and her people in Mokau ki ringa have worked in ‘every way possible to ensure that their pristine waters were maintained.’ According to Ms Sykes they see ‘hydroelectricity or shares to substitute for the right of development there, as an antithesis to the very thing she [Ms Marsh] holds dear.’²²⁷ Counsel for Ngati Ruapani advised that her clients do not want shares in Genesis as part of the recognition of their claimed rights in Lake Waikaremoana.²²⁸ Mr Toni Waho, in his evidence for Ngati Rangī, told us that his people need time to consider whether they would want shares as part of a settlement package.²²⁹ Nonetheless, claimant counsel’s submission is that for many Maori groups, shares – so long as shares bring with them a meaningful stake in the power companies which control and profit from their taonga – could be an essential component of any future rights recognition.

One question that arises is: do the Crown’s preferred options for rights recognition provide for Maori what shares in the power-generating SOEs could provide? In the Crown’s submission:

There are multi-faceted economic considerations for a share sale and for recognising rights and interests in water. The framework is in place to provide for rights and interests recognition and potentially for resource allocation. It has nothing to do with the sale of shares. The Iwi Leaders Forum, the Land and Water Forum, and the Fresh Start for Fresh Water programme are all dealing with use, management, governance and allocation.²³⁰

225. Galloway, ‘Potential Remedies: Commercial and Regulatory Approaches’ (doc A69(g)), p 4

226. Claimant counsel, opening submissions (paper 3.3.1), pp 3-4, 21-28

227. Counsel for interested parties (Sykes), oral submission, 12 July 2012, Draft Transcript, p 562

228. Counsel for interested parties (Ertel and Thornton), closing submissions (paper 3.3.11), p 17

229. Toni Waho, oral evidence, 11 July 2012, Draft Transcript, pp 263-264

230. Crown counsel, closing submissions (paper 3.3.15), pp 33-34

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This submission was based on the evidence of Mr Guy Beatson, supplemented by Ms Ott's evidence as to the special co-governance and co-management arrangements that can be obtained through Treaty settlements.

In essence, the Crown's position was based on Maori not having proprietary rights in water, and that their rights of tino rangatiratanga and kaitiakitanga will best be recognised through the results of the Fresh Start for Fresh Water programme. As we explained in section 3.6.2(1), the Land and Water forum have recommended the creation of a national commission on a 'co-governance basis with iwi' to guide and oversee water management; iwi representation on regional committees; and enhanced iwi participation in resource management planning and consenting processes. But the Land and Water Forum has also recognised that Maori look to their waterways to 'satisfy iwi development aspirations' and that they have commercial interests in water.²³¹ Iwi, the forum noted, seek outcomes that 'retain the capability to satisfy iwi development aspirations, including by ensuring future access to water for commercial business.'²³² Mr Beatson provided us with the panui of the 2012 'freshwater iwi summit' at Hopuhopu, which recorded a resolution that 'Iwi confirmed they have economic interests in freshwater that need to be acknowledged and provided for.'²³³ Mr Beatson's evidence, however, does not suggest any ways in which the processes he describes will provide for Maori economic interests in their water bodies.²³⁴

The one-off mechanisms available through the Treaty settlements process may, in cases such as the Waikato River Authority, provide more for Maori than the Land and Water Forum has recommended. But, as Ms Ott stated in her evidence (see above), natural resources are seldom a part of the Crown's commercial redress, and the Office of Treaty Settlements does not see its settlements as providing for a development right in natural resources.²³⁵

It will also be recalled from chapter 2 that the Crown set great store in our inquiry on the findings of the Wai 262 report, that Maori rights in environmental management should be conceived on a sliding scale of complete control at one end, partnership in the middle, and influence in decision-making at the other end. But these recommendations have not yet been carried out. As Crown counsel explained, the Government's view is that all such matters will be resolved eventually through the consultation and policy decisions that will come after the Land and Water Forum completes its work.²³⁶

231. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, pp viii, 9

232. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 16

233. 'Special E-Panui: 2012 National Iwi Freshwater Summit', February 2012 (Guy Beatson, supporting papers to Beatson, brief of evidence (doc A93(b)), p 8)

234. Beatson, brief of evidence (doc A93)

235. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 942-943, 949-951, 964-970; Ott, brief of evidence (doc A92), pp 4-10

236. Crown counsel (Rafferty), oral submissions, 20 July 2012, Draft Transcript, p 1396, referring to statements made by Guy Beatson, oral evidence, 16 July 2012, Draft Transcript, pp 975-976, 993-994

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We have no doubt that governance and management of freshwater resources is a key concern for Maori in this inquiry. Many of the Maori witnesses told us so. Mr Waho emphasised that for Ngati Rangī, the establishment of some kind of Maori body – whether national or regional – was essential to ensure that kaitiaki have real power in decisions about their water bodies.²³⁷ Clearly, these issues will be an important part of the framework for rights recognition, which will be the focus of our stage two inquiry. We also wish to emphasise our view that the Wai 262 recommendations require serious consideration and action from the Crown. Further, we accept the Crown's submission that co-governance and co-management of water resources will be an important component of rights recognition. The Crown is correct to emphasise that tino rangatiratanga requires arrangements of this sort. The Crown is also correct to say that none of the options being developed in the Fresh Start for Fresh Water programme will be affected by the sale of minority shares in the power-generating SOES. We accept the Crown's submission on that point.

But as will be clear from our analysis in chapters 1 and 2, there is a commercial and property right dimension to the present claim. The protection of property rights is at the core of the English version of Article 2 of the Treaty. The Crown's preferred options for rights recognition fall short of the Treaty guarantees in three ways:

- ▶ they will not recognise or give effect to Maori residual proprietary rights where that is possible (or compensate for their loss where it is not);
- ▶ they will not provide for the holders of those rights to obtain a commercial or economic benefit from their residual proprietary rights; and
- ▶ they will not provide for the Treaty development rights of Maori in their water bodies.

We are not making findings as to the framework for rights recognition at this stage of our inquiry, but we do find that any framework will need to deliver on these three important aspects of the rights. For that reason, we find that the Crown cannot ignore the option of using shares in the power-generating MOM companies in partial recognition of these rights, where that is what Maori want.

3.8.2 Does it have to be shares *now*? Can it be shares after the sale?

The Crown's argument is that if shares are in fact an essential component for the recognition of rights or the compensation of lost rights, then there is no reason why it cannot provide those shares after the partial privatisation of the MOM companies. In its view, shares are 'fungible' and 'substitutable': one share is the same as another.²³⁸ The basis for this argument was the evidence of Mr Crawford: 'A particular share is not worth more or less than another share in the company. The rights associated with a particular share are identical to those

237. Toni Waho, oral evidence, 11 July 2012, Draft Transcript, pp 265, 287

238. Crown counsel, closing submissions (paper 3.3.15), p 32

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attaching to every other share in that company.²³⁹ That is one foundation for the Crown's case. The second foundation is that the Crown could repurchase shares after the initial sale or even conduct a takeover of the minority shareholding if necessary; a share sale *now* prevents none of that. Relying on *Broadcasting Assets*, the Crown also argued: 'An analysis of the cost of measures of that sort now, as against their cost later, is not relevant to the inquiry of this Tribunal or of any Court. The fact that it can be done is what matters.'²⁴⁰

The Crown concluded:

Unless it can be said that shares in MRP – and shares in the company *now* rather than later – is the *only way* in which those [Maori] rights can be recognised and that other forms of commercial redress could not possibly be put in place after the sale, then it is not for the Tribunal or the Courts to interfere in the Government's programme balancing, as it does, a broad spectrum of social and economic factors.²⁴¹

The Crown made an additional point in the passage quoted here: that it might be able to put other forms of commercial redress in place after the sale, because it sees shares as substitutable not merely one for another, but also as one form of commercial redress for another. We will discuss this related point later in the chapter. In this subsection, we focus on the Crown's argument that shares can be repurchased later because one share is the same as another, and that the partial privatisation will not inhibit its ability to provide shares if required in future.

As we see it, this argument turns on the question of whether shares are genuinely fungible; that is, that arrangements that could be made at present in terms of shares and shareholdings are identical to those which could be provided for Maori after partial privatisation.

As we discussed above (3.7.3), the claimants' case is heavily dependent on the argument that shares on their own cannot be an adequate remedy. In their view, shares must be accompanied by Crown-Maori shareholders' agreements, or provisions in the companies' constitutions, that would enable Maori shareholders to exercise significant influence in the companies that generate electricity (and profit) from their taonga. Possibly, Maori would seek a special class of shares, with different voting rights or other rights, so as to ensure that they received a meaningful stake in the companies, out of proportion (perhaps) to the number or percentage of their shareholding. In the claimants' submission, these are all things that could be done now but which would be impossible to achieve after the introduction of private shareholders into the mix.

As we have said earlier, as a matter of company law the Crown is the sole shareholder and so has the flexibility at present to alter the constitution of, for example, Mighty River Power. This sole shareholder power will disappear in practical terms as soon as new shareholders

239. Crawford, brief of evidence (doc A95), p 12

240. Crown counsel, closing submissions (paper 3.3.15), p 32

241. Crown counsel, closing submissions (paper 3.3.15), p 33

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are brought into the company. Sections 2 and 32 of the Companies Act require the amendment of constitutions to be carried out by special resolution of the shareholders, on the basis of a 75 per cent majority of those shareholders *entitled to vote*. As soon as the Crown's holding drops below 75 per cent, it will no longer be able to force a change of constitution. In other words, the Crown will no longer be able to pass a special resolution to change the constitution, incorporating benefits by way of Treaty settlement to only one class of shareholders, such as special distribution entitlements, special voting entitlements, or powers to appoint directors. Although strictly speaking not impossible, it cannot seriously be envisaged that the other new private shareholders would vote in favour of such a special resolution, which would or might seriously disadvantage their shareholding value.

Moreover, there would also be the problem that to attempt, for example, the issue of new shares carrying special rights arising from a Treaty settlement, would – even if compelled by statutory amendment – create at least a risk of a serious and – potentially – unfair loss of significant value to private shareholders. Authority for this proposition can be found in the Privy Council decision of *Holt v Holt*.²⁴² In that case, it was held that an A class share with 10,000 votes which outnumbered the single votes of all the other 999 B class shares meant that a premium in value existed for the A share, and a corresponding discount in the value for the B shares. That was held to be so, despite the fact that in that case on a winding-up all shares were equal as to the final distribution, that is, the one A share only participated on a liquidation as to a 1/1000 share of the asset value.

In our view, there is flexibility in the combination of sections 42 and 44 of the Companies Act, which enables the board to issue further shares in accordance with the company's constitution. Unless the constitution was amended to reflect a Treaty settlement as to the number and nature of such shares *before* the sale of shares to private investors, then in practical terms any further issue of shares would be unlikely to be approved by a special resolution requiring the agreement of those new shareholders. These practical considerations are bolstered even further by the statutory requirements of section 117, which provides for specific interest group rights, to protect shareholders against actions that might affect their existing rights, or the effect of the issue of further shares. Unless the constitution provides for the issue of shares with identical or greater rights than those of current shareholders, then the company cannot issue shares that might affect these 'interest groups' without a special resolution requiring a 75 per cent majority of those entitled to vote.

Even if the Crown was able, after selling less than 25 per cent of shares, to pass a special resolution to require or even force the issue of differing classes of shares to give effect to a Treaty settlement, the consequences would still be significant. If any such action had the effect of altering the rights of existing interest groups, and was understandably voted

242. *Holt v Holt* (1990) 3 NZLR 401

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against by them, then section 118 of the Act expressly enables such affected shareholders to require that their shares are bought out by the company.

For all of these reasons, we accept the claimants' arguments that if a settlement with Maori in respect of these MOM shares was viewed in Treaty terms as being an action the Tribunal saw fit to recommend to the Crown as a remedy for breach of Treaty principles, then in our view it is plain that in practical terms, having regard to the consequences of New Zealand's company law, such an action would have to occur before the Crown sold shares in MRP.

Even a sale of less than 25 per cent of the shares would create in practical terms such a potential contingent liability by the company to the new private shareholders, that it would either have a chilling effect on the Crown's willingness to settle with Maori by the issue of shares; or the contingent liability would undermine in value the undertaking of the company whose shares were being used for settlement purposes with Maori, because the company would almost certainly be required to repurchase the shares sold by the Crown to other private shareholders. The Crown could, of course, assist the company with such a repurchase.

In our view, the flexibility that the Companies Act provides the Crown as sole shareholder of the SOES to enter into Treaty settlement negotiations with Maori would be lost once sales of shares to other shareholders occurred. That would mean that the ability to negotiate remedy agreements with Maori would be lost if those potential remedies were by way of share issues or transfer of existing shares on terms involving any form of preference as to voting rights, capital or income distributions, pre-emptive rights, or appointment of directors, to name but some possible remedy considerations.

In a practical sense, the Crown could negotiate with Maori now and ensure that any requisite changes were made to the companies' constitutions. These might include, for example, provisions in respect of a possible future settlement of this Treaty claim or for the companies to enter into joint ventures with Maori in respect of water. Then, after partial privatisation, and having regard to its section 45Q obligations, the Crown could use its 51 per cent shareholding to prevent such provisions being altered or removed. The Crown could also make the policy decision now to reserve a proportion of shares for Maori, rather than to sell the full 49 per cent or to retain what is not sold. For entering into a shareholders' agreement, however, it would need to change the status of the companies from SOES to MOMs by issuing an order in council to bring the relevant legislative provisions into effect. Then, before selling shares in Mighty River Power to private shareholders, the Crown could potentially transfer shares to Maori and negotiate a shareholders' agreement with them. The Crown's submission agreed with the claimants' as to the impracticality of entering into a Crown-Maori shareholders agreement after partial privatisation, because it would require 'binding

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potentially thousands of shareholders in the MOM companies, the identities of whom would change day by day.²⁴³

We are aware that such arrangements might affect the market value of the class of shares that would then be sold to private investors. This would, of course, depend on the nature of any agreements reached between Maori and the Crown. There is no way of knowing whether the effect would be great, small, or non-existent. In part, this depends on the question of whether the Crown might be able to provide as an alternative an even more effective form of commercial rights recognition than ‘shares plus’. We turn to that question next.

3.8.3 Would the Crown be able to provide alternative commercial remedies after the share sale?

As we noted above, not all Maori want shares, even as a commercial form of rights recognition or remedy. The claimants’ witnesses proposed a number of mechanisms for recognising and enabling Maori to benefit from their residual proprietary rights. We outlined these above (3.6.1). They include ‘modern water rights’ (Maori become the holders of the water permits which they then lease to the MOMs), and a variety of arrangements for the payment of royalties. Joint ventures were the only commercial option about which the Crown expressed any enthusiasm. Nonetheless, without stating that it was prepared to provide all or any of these commercial options, the Crown argued that its ability to do so in future would not be inhibited by partial privatisation of the SOEs. In the claimants’ view, partial privatisation will make a crucial difference to the Crown’s ability to act. Private shareholders will resist the introduction of any kind of levy, charge, resource rental or royalty that impacts on the profitability of the company and (as a result) their income and the value of their shares. Further, overseas investors may threaten litigation that will have a ‘chilling effect’ on what the Crown is actually prepared to do in recognition of Maori rights. These various possibilities were debated extensively by witnesses and counsel during the hearing.

(1) Levies or royalties for the use of water to generate electricity

One of the options for rights recognition is that the Crown could introduce a levy or royalty payment for the use of water to generate electricity. This could be done by statute. The claimants’ witnesses gave us examples of where this has been done overseas: a 2.5 per cent royalty on geothermal energy in Western Australia; a royalty on geothermal energy in Alaska of 1.5 per cent of gross revenue for the first ten years of income producing production, rising to 3.5 per cent after that; varying royalties on the generation of hydroelectricity in Nepal; and payment for water rights to generate electricity in Chile.²⁴⁴ Royalties do not

243. Crown counsel, closing submissions (paper 3.3.15), p 48

244. Brian Cox, responses to questions in writing and to Crown evidence, 10 July 2012 (doc B5), p 2; Philip Galloway, oral evidence, 10 July 2012, Draft Transcript, p 238

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have to take the form of levies or charges imposed by statute, however, and can instead be negotiated on the ground between Maori groups and the power-generating companies. Royalties do not necessarily require or imply a formal recognition that Maori have residual proprietary rights in the water used by the power-generating companies.

As was discussed in the hearing, there is already statutory power for the Crown to require royalty payments in respect of the use of geothermal energy. Although the power exists on the statute book, the Crown's evidence is that it has not actually been used for that purpose although regulations were drawn up to allow it (under sections 112(2) and 360(1)(c) of the RMA).²⁴⁵ According to the information that the Ministry for the Environment was able to provide in the urgent timeframe of the hearing:

A decision was made shortly after commencement of the RMA to waive collection of royalties in relation to geothermal resources.

The Ministry for the Environment does not have any specific record of receiving royalties in relation to geothermal resources. (If such royalties were collected they may have been accounted for in conjunction with other kinds of royalties).

The Ministry has been unable to gather any more accurate information on whether royalties were collected specifically in relation to geothermal resources in the timeframe available to respond to the Tribunal's request [for information].²⁴⁶

It is currently possible for the Crown, therefore, to charge royalties on the use of geothermal energy for electricity generation and to pay those royalties to Maori. The Central North Island Tribunal has already proposed this course of action as a way in which the Crown could meet its Treaty obligations to those Maori who have retained proprietary interests in the geothermal heat and energy system.²⁴⁷

In the Crown's submission, it could also impose a levy on the commercial use of water, although it envisaged this as a more general levy affecting multiple users of water. At this stage of our inquiry, however, we are concerned solely with the possibility of a levy or royalty charge for the use of water to generate electricity. We agree with the Crown that it has the power to seek Parliament's approval for a legislative scheme to impose a royalty for the use of water. This will not be altered by partial privatisation of the MOM companies. The focus during the hearing was on the questions of whether the Crown would be less able *politically* to impose such a royalty after partial privatisation, what effect such a charge might have on the energy sector and consumers, and what effect various kinds of royalties might have on the profitability of the companies concerned.

245. Regulation 14 and Schedule 3 of the Resource Management (Transitional Fees, Fents, and Royalties) Regulations 1991

246. Crown counsel, memorandum, 23 July 2012 (paper 3.4.1), p 2

247. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 1191-1195; vol 4, pp 1592, 1636

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On the first point, the parties agreed that shares will be sold on the basis that there is a zero cost for the companies' use of water. The Crown stressed that its prospectus will draw the attention of investors to the possibilities of legislation, regulation, or tax changes that could affect the profitability of the companies and the value of the shares. Investors will thus be forewarned and have no right to complain afterwards. If it is a large impost, the Crown may consider compensating the companies.²⁴⁸

In our view, the very real possibility that there will no longer be a 'zero cost' for water has been on the table since at least 2010, when the Land and Water forum recommended that the Government consider a number of options in terms of increasing the efficiency of water management and use. These included the possibilities of making water permits tradeable and that applicants should have to pay to obtain water permits.²⁴⁹ These options would end the current scenario of a zero cost for water. In recommending that the Government consider these options, the forum suggested that payment for water permits 'would realise a return for a public asset.'²⁵⁰ This option is therefore already on the table in the water management reform process. We would suggest, however, that the residual proprietary rights of Maori mean that the water bodies used by permit holders are not 'public assets', and the payments that are already under consideration could be made to Maori. According to the theory being advanced, the purpose of charging permit holders is to impose an economic incentive for more efficient water use and management; it is not to make money. Under that theory, it does not matter *who the charge is paid to*, although the Land and Water Forum (as noted) have suggested that it will enable a 'return' on the 'asset'. When we consider the framework in depth in stage two, we may well find that such charges should be paid to or shared with Maori.

In his submissions for interested parties, Mr Enright suggested that this could happen immediately if the Crown, before proceeding with the sale, were to transfer Mighty River Power's water permit to Maori (for leasing back on payment of a rental).²⁵¹ As we see it, this would require a law change and is unlikely to be feasible in the short term, regardless of whether the company is an SOE or a MOM. Payment for water permits (perhaps to Maori or shared with Maori) is, however, one direction in which future dialogue may develop, especially in light of the Land and Water Forum's 2010 report.

According to the claimants, the political feasibility of changing the 'zero cost' for water will be significantly reduced by the introduction of maybe thousands of 'mum and dad' investors into the ownership of the MOM companies. In claimant counsel's submission:

248. Crown counsel, closing submissions (paper 3.3.15), pp 53-61. Crown counsel also put many questions along these lines to the claimants' and interested parties' witnesses.

249. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, pp xii, 31, 36-39

250. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 37

251. Counsel for interested parties (Enright), closing submissions (paper 3.3.14), pp 8-10

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After the sale there will be minority shareholders and minority shareholders have rights, and minority shareholders have political power, and minority shareholders have friends and families with political power.²⁵²

In Ms Ertel's submission for the interested parties, the political problem would be even greater for the Government because it would have to act against its own economic interest (as 51 per cent shareholder), the economic interest of the general public, the economic interest of the private shareholders, and its good name as the seller of the shares:

Further as the evidence of Dr Nana has confirmed, any change to input costs will have the effect of increasing the price of electricity and/or reducing the profitability of the Enterprise. This will be politically unacceptable to the government that sold the shares and that owns the balance of the shares and to the public who has purchased them.²⁵³

The Crown's response to these arguments was essentially that there are already private shareholders in the other power companies, such as Trust Power and Contact Energy, as well as a large political constituency for the many other commercial users of water. In the Crown's view, if there would be a political problem then it already exists.²⁵⁴ Crown counsel also referred to the Emissions Trading Scheme as an example of a situation where regulatory changes can have very significant effects on a range of powerful interests, and the Government of the day must simply weigh all interests in the balance and then make the hard choices.²⁵⁵ In his evidence for the Treasury, Mr Crawford stressed that governments make unpopular decisions every day, such as putting up GST, increasing ACC levies, raising road user charges: 'you're doing things for the benefit of the country and there's always going to be one group of people who bear some cost that they're unhappy about, that's the nature of the political decision making process.'²⁵⁶

As we see it, the introduction of a levy or royalty payment for the use of water to generate electricity is a practicable option. The Crown was able to legislate for just such a royalty for the use of geothermal water in 1991 and that power remains on the statute book. While it is certainly the case that there are already private shareholders whose interests will be affected by such a royalty for fresh water, the evidence of Mr Cox and Mr Wilson agrees that the three power-generating SOES control three-quarters of the hydro power generation in New Zealand. An impost on their use of water, introduced while they are still SOES, could involve a lot less difficulty in political terms than introducing such a charge after private shareholders are introduced into the mix. And if the charge were to apply to all users of water for the generation of electricity, we think that it will be more practicable to introduce

252. Claimant counsel, closing submissions (paper 3.3.10), p 12

253. Counsel for interested parties (Ertel and Thornton), closing submissions (paper 3.3.16), p 14

254. Crown counsel, oral submissions, 20 July 2012, Draft Transcript, p 1442, 1519-1526

255. Crown counsel, closing submissions (paper 3.3.15), p 65

256. John Crawford, oral evidence, 13 July 2012, Draft Transcript, p 754

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it while private shareholders have a stake in only 25 per cent of generation rather than in 100 per cent of generation. Mr Cox, in response to a question from Crown counsel, agreed that a levy could be introduced gradually as with the emissions trading scheme, one sector at a time.²⁵⁷ That would seem to support the proposition that immediate action could be taken in respect of the electricity industry.

In the Crown's view, it might be possible to introduce a 'modest levy' that had little or no effect on the MOM companies' bottom line, and therefore to which there would be little or no resistance on the part of the companies and their private shareholders.²⁵⁸ The claimants' and interested parties' witnesses agreed under cross-examination that this was theoretically possible, although difficult to achieve in practice.²⁵⁹ In Mr Cox's evidence, there are indeed a variety of ways in which extra costs might be absorbed and not passed on to consumers.²⁶⁰ Mr Crawford's view was that the introduction of a cost for water would have a significant effect on the way in which the energy sector operates: it would change the profitability of storing and using fresh water to generate electricity, it would discourage future investment in new hydro generation schemes, and it could result in price rises.²⁶¹ Claimant counsel put to Mr Crawford that a royalty could take the form of a percentage of profit, and thus have no effect on the companies' ability to *make* profit. Mr Crawford agreed that that was possible.²⁶²

In summary, as we noted above, this is only an issue for fresh water because the Crown already has statutory power to charge royalties for geothermal energy. As we also noted, a charge for water might already be a case of *when* not *if*, given the possible introduction of charges for water permits. We do not accept, however, that water is a 'public asset', as the Land and Water Forum says, for which imposts or levies or charges should automatically go to the Crown or only to the Crown. For the water bodies used by the power-generating SOEs, it is an asset in which Maori have residual proprietary rights that now need to be recognised, where that is possible. The Crown put to us that it will still be practicable for a royalty or levy to be introduced after the partial privatisation of the power-generating SOEs. That is undoubtedly correct. It *could* be done. The claimants put to us that it will nonetheless be difficult – perhaps prohibitively so – to introduce such a charge after the creation of private shareholdings in the MOM companies. We are unable to say for certain whether that would be the case. We heard evidence that companies have to adapt to new taxes or costs all the time. We agree with the claimants that it would make sense, both politically and practically, to legislate or otherwise provide for a royalty while there is no private shareholding stake in 75 per cent of hydro generation. But we do not accept that it would necessarily be

257. Brian Cox, oral evidence, 10 July 2012, Draft Transcript, p 163

258. Crown counsel, closing submissions (paper 3.3.15), pp 56, 59

259. See, for example, Jane Kelsey, oral evidence, 12 July 2012, Draft Transcript, pp 483-484, 490-493

260. Brian Cox, oral evidence, 10 July 2012, Draft Transcript, pp 159-166, 171-172

261. Crawford, brief of evidence (doc A95), pp 8-9

262. John Crawford, oral evidence, 13 July 2012, Draft Transcript, p 711

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prohibitively difficult to introduce such a charge after the share sales. Much will depend on the assurances given in this inquiry by the Crown, a point to which we will return below (see 3.8.3(4)).

(2) Joint ventures

The possibility of joint ventures was an option alluded to by Crown and claimants but without much elaboration or detail. Claimant counsel suggested that joint ventures might be a means of recognising Maori water rights in future electricity development, but that they could not be a solution for the control and use of water by existing schemes.²⁶³ In Mr Crawford's evidence, joint ventures could provide Maori with much more direct benefits from their relationship with their particular water resources than would dividends from shares.²⁶⁴ He also suggested that the MOM companies could enter into such ventures on the same basis that the SOES would, so long as there is a commercial or compelling imperative to do so. Recognition of Maori proprietary rights in water resources, he accepted, would be one such imperative.²⁶⁵

We quoted the Crown's closing submissions as to joint ventures above (3.6.2(2)), which we repeat here for convenience:

A potential benefit through shares may be one way of recognising past breaches – rather than rights recognition – in due course, but as John Crawford said in evidence, even then it is far from an ideal remedy for breach, given that the MOM companies have assets that are geographically diverse (many of which are not related to water) such that they would not reflect individual iwi or hapu interests in their particular taonga. The better outcome, in terms of redress, could well be financial compensation to enable a direct interest through the likes of a joint venture relating to a particular area of water. A small share holding cannot give control of water ... Resource allocation and capacity for joint ventures is where the conversation needs to head ... As Brian Cox, John Crawford and Lee Wilson all said, by far the most tangible economic option, giving Maori a direct right and interest in water, is through joint ventures with electricity generators of the likes of those that exist already with Mighty River Power, Contact Energy and others. Arrangements of this sort give a direct interest in a resource consent, direct control and interest and a direct right to revenue.²⁶⁶

In oral submissions for the Crown, Mr Raftery added that the Crown's witnesses were: talking about sitting down at the decision-making table and joint ventures. Now, if they use the language of joint ventures, they may not talk about kaitiakitanga, but they're talking about a resolution addressing the problem ... Now, in addressing that issue and seeing how

263. Claimant counsel, submissions by way of reply (paper 3.3.20), p 23

264. John Crawford, oral evidence, 13 July 2012, Draft Transcript, pp 699-700

265. John Crawford, oral evidence, 13 July 2012, Draft Transcript, pp 699-707

266. Crown counsel, closing submissions (paper 3.3.15), pp 34, 51, 76

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we can get these joint ventures going so that it was both sides of the Treaty partnership are in there, that's an important part of the discussion.²⁶⁷

In his reply submissions, claimant counsel suggested that for joint ventures to be a genuine remedy, they would need to be arranged retrospectively for all the power schemes already in existence:

The Crown seems oblivious to the fact that the exact same issues apply to joint ventures in relation to existing power stations. The Crown concludes this section by saying that 'joint ventures is where the conversation needs to head'. The problem is that this will not be possible post MOM.

Of course, it will be possible for, say, MRP to enter into a joint venture with a Maori group over the development of a new power station, particularly one for which MRP currently has no consent. However, this leaves the bigger problem of what to do in relation to MRP's 17 existing power stations. Pre-MOM it would be possible for the Crown to retrospectively enter into joint ventures with local Maori in respect of those power stations. Post-MOM this would be as impossible, for the same reasons, as entering into a shareholder agreement against the interests of the private shareholders.²⁶⁸

We saw nothing to suggest that the Crown was contemplating retrospective joint ventures when it submitted that 'capacity for joint ventures is where the conversation needs to head'. We agree with claimant counsel that, in realistic terms, joint ventures can only provide for rights recognition in future developments – and then only if there is sufficient incentive for the MOM companies to enter into them.

Ultimately, we think that the prospect of joint ventures may well be a fruitful one for discussion between the parties, and that it will likely be an important component of any framework for rights recognition. But arranging for the Crown to preserve its ability to provide for 'shares plus' seems to us to be a much more achievable goal before the proposed share sale than the negotiation of dozens of retrospective joint ventures. These joint ventures could realistically only be achieved by an agreed transfer to hapu or iwi of all or a percentage of existing water rights, which could then be used in joint ventures to continue existing power-generating operations. We cannot think that claimant counsel was advancing this as a serious proposition, but rather to point out the weakness of the joint venture option to provide for rights recognition in existing circumstances. We agree with both Crown and claimants: joint ventures may well be where the 'conversation needs to go' if that is what the Treaty partners want, but it will not suffice for rights recognition in terms of a large number of existing arrangements. Joint ventures plus a levy on existing uses of water for electricity might come closer to an answer, and provide a more meaningful resolution than

267. Crown counsel (Rafferty), oral submissions, 20 July 2012, Draft Transcript, pp 1402-1403

268. Claimant counsel, submissions by way of reply (paper 3.3.20), p 23

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'shares plus' or in combination with 'shares plus'. We cannot say for certain at this stage of our inquiry. But Mr Raftery made a key point: this is a matter that needs to be decided in partnership with both Treaty partners sitting at the decision-making table.

(3) Will the threat of litigation from overseas investors have a 'chilling effect'?

One of the most extensive debates in stage one of our inquiry was between the evidence of Dr Jane Kelsey for the interested parties and Dr Penelope Ridings for MFAT. In the full version of this report, we will set out their evidence in some detail, as the debate was an important one. In this truncated, interim version of our report, we concentrate on what we see as the central issue: the question of whether the Crown might be 'chilled' from providing commercial recognition of Maori rights by the prospect of expensive litigation on the part of overseas investors who have purchased shares in the MOM companies.

Dr Kelsey's argument was that foreign investors could use the threat of costly and prolonged investment arbitration to influence the Government's decisions and 'chill it away from taking actions' that an investor believes will affect the value of their investment.²⁶⁹ In her evidence, she suggested that the many free trade and investment commitments to which New Zealand is currently party will have an impact on 'the Crown's ability to provide commercial and non-commercial redress to the claimants subsequent to the proposed sale of shares in the power generating state-owned enterprises (SOEs)'.²⁷⁰

The kinds of commercial redress referred to by Dr Kelsey include the 'vesting of ownership rights in claimants by way of shareholding or other entitlements, such as revenue or profit share arrangements, or investment through a particular legal form that entails iwi representation or participation, such as a co-ownership model'.²⁷¹ Non-commercial redress includes 'regulatory authority over policy, regulatory or administrative matters, consistent with tino rangatiratanga and kaitiakitanga, and/or new obligations, considerations, and criteria for such decisions, in accordance with the Crown's obligations of active protection'.²⁷²

In closing submissions, counsel for the interested parties, Ms Sykes, stated that the chilling effect was more than simply a possibility, arguing:

there is a credible and tangible risk that a foreign investor who buys a significant parcel of shares in a power-generating state enterprise could threaten, or lodge, a claim that the Crown has breached its obligations under an international investment agreement if the Crown adopts measures to redress Treaty grievances that impact negatively on the value or expected profits of those shares. Such a threat or claim would significantly constrain the

269. Jane Kelsey, oral evidence, 12 July 2012, Draft Transcript, p 488

270. Jane Kelsey, brief of evidence, 22 June 2012 (doc A76), p 3

271. Kelsey, brief of evidence, (doc A76), p 3

272. Kelsey, brief of evidence, (doc A76), p 3

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Crown's willingness or ability to recognise rights and remedy its breach if it proceeds with the sale of 49 per cent of the shares.²⁷³

In her evidence for the Crown, Dr Ridings agreed with Dr Kelsey that there is indeed a risk that foreign investors will claim compensation through arbitration for any loss of investment suffered as a result of regulatory or legislative change. Her central point was that a distinction must be made between investors simply making a claim and any perception by the Crown that such claims would succeed (or the investors had a case strong enough that it might succeed). She told the Tribunal:

As a Government lawyer faced with investors' claims of breach of our international obligations I would look at the nature of our commitment. I would weigh the extent to which the foreign investor has a good case. What I would look at is not an assessment of the likelihood of a claim but the assessment of a likelihood of a successful claim.²⁷⁴

Dr Ridings did not accept the idea that there was a real risk of a chilling effect on the Government's willingness to enact regulatory or legislative change. Her conclusion was based on her belief that there is little likelihood of a successful claim. At the hearing, she stated: 'there is nothing in our trade and investment agreements which would constrain the Government's power to regulate for legitimate public purposes or hinder the Government from providing appropriate redress.'²⁷⁵ This point was repeated by the Crown in its closing submissions.²⁷⁶ Dr Ridings also stated that 'while academics and some commentators have said that investment arbitrations encourage regulatory chill, I don't believe that there's significant evidence of that actually occurring'.²⁷⁷

In Dr Ridings' view, trade and investment commitments only come into play if States engage in 'discriminatory behaviour or otherwise unreasonable actions that substantially devalue an investment'.²⁷⁸ Investors could certainly seek compensation for adverse impacts on the value of their investments but 'the provision of compensation is subject to a high threshold'.²⁷⁹ Dr Ridings added that 'the threshold for finding government actions to be impermissible is demonstrably high' and is further addressed in New Zealand's investment agreements by various protections, including the Treaty of Waitangi clause.²⁸⁰

273. Counsel for interested parties (Sykes, Wara, and Pou), closing submissions (updated), 25 July 2012 (paper 3.3.12(b)), p 52

274. Penelope Ridings, oral evidence, 16 July 2012, Draft Transcript, p 1106

275. Penelope Ridings, oral evidence, 16 July 2012, Draft Transcript, p 1095

276. Crown counsel, closing submissions (paper 3.3.15), p 60

277. Penelope Ridings, oral evidence, 16 July 2012, Draft Transcript, p 1095

278. Penelope Ridings, brief of evidence, 3 July 2012 (doc A94), p 2

279. Ridings, brief of evidence (doc A94), p 2

280. Ridings, brief of evidence (doc A94), p 2

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This debate focused mainly on New Zealand's trade and investment agreements with Hong Kong and Thailand, and to a lesser extent on those with China and Malaysia. It also focused on four of six rules arising from these kinds of agreements:

- ▶ Expropriation: this rule prohibits New Zealand from expropriating any investment unless it is done for a public purpose, is non-discriminatory, conducted according to due process, and with payment of full compensation. The rule extends to 'indirect expropriation', which can include regulations that have a 'substantial impact' on the value or profitability of an investment.²⁸¹ Dr Kelsey and Dr Ridings disagreed over how this rule would be applied to foreign investments in the MOMs, in the event of an 'indirect expropriation' in the form of a levy on water or an issue of special shares in redress of Treaty claims. In particular, Dr Kelsey maintained that the Crown could not, as Dr Ridings suggested, rely on having paid full market compensation if it had to buy back shares for Maori. A case could still be made in respect of losses of future profit. In her view, both the possibility of having to pay further and steep compensation, as well as to fight such claims, 'may be a potential inhibition on government decision-making.'²⁸²
- ▶ Minimum standard of treatment: New Zealand must provide a 'minimum standard of treatment to investors and investments.'²⁸³ This provision is the most common basis for claims by investors against States. It is sometimes described as entitlement to 'fair and equitable treatment' and 'full protection and security', concepts that Dr Kelsey viewed as 'vague and subject to widely divergent interpretations by investment tribunals.'²⁸⁴ She stated that the key feature of 'fair and equitable treatment' is the investor's 'legitimate expectations' of a stable and predictable business environment, unimpaired by new regulatory or tax measures.²⁸⁵ Under cross-examination by the Crown, Dr Kelsey stated that this clause did not freeze the regulatory environment as at the date of foreign investment. Rather, the clause gives investors the ability to challenge regulatory changes that impact upon the value of investments.²⁸⁶

In Dr Ridings' view, however most arbitral tribunals focus on due diligence and due process as opposed to 'legitimate expectations' and a stable regulatory environment.²⁸⁷ A breach of this obligation has recently been defined as: 'an act ... sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted standards.'²⁸⁸ In Dr Ridings' view, the Crown has an

281. Kelsey, brief of evidence, (doc A76), p 7

282. Jane Kelsey, brief in response to Dr Ridings, 6 July 2012 (doc A97), pp 6-7

283. Kelsey, brief of evidence, (doc A76), p 7

284. Jane Kelsey, 'Investment and Investor Protections' (Annex D to Kelsey, brief of evidence (doc A76(d))) p 31

285. Kelsey, 'Investment and Investor Protections' (Annex D to Kelsey, brief of evidence (doc A76(d))) pp 31-32

286. Jane Kelsey, oral evidence, 12 July 2012, Draft Transcript, p 513

287. Ridings, brief of evidence (doc A94), p 7

288. *Glamis Gold Ltd v United States*, Award, Ad hoc – UNCITRAL, Arbitration rules; ILC 380 (2009) (Ridings, brief of evidence (doc A94), p 8)

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obligation to enact any changes in good faith, in accordance with the law, following due process, and must not deny foreign investors the ability to challenge the measures through the courts or administrative procedures. These are all protections that exist in New Zealand's domestic law.²⁸⁹ The Crown emphasised these points in its closing submissions.²⁹⁰

- ▶ Umbrella clause: this clause is a feature of the current agreements with Hong Kong and China. It states that neither 'Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its area of investors of the other Contracting Party'.²⁹¹ In Dr Kelsey's view, any commercial or non-commercial redress offered to Maori that affected the enjoyment or disposal of investors from Hong Kong or China has the potential to be challenged.²⁹² Dr Ridings did not address the 'umbrella clause' in either her brief of evidence or in her oral evidence.
- ▶ Most favoured nation (MFN): the MFN provision is described as a requirement for New Zealand that, if it gives better treatment to any overseas investors or investments, it must also apply that better treatment to investors and investments from the countries to which this rule applies.²⁹³ In relation to New Zealand's agreements, Dr Kelsey argued that investors from countries with newer and more clearly defined international agreements might use this provision to try to benefit from the less well defined and less qualified provisions in the older Hong Kong–New Zealand bilateral investment treaty.²⁹⁴ Under cross-examination, Dr Kelsey conceded that New Zealand's agreements include a 'denial of benefits clause' which prevents the importing of provisions from one agreement to another unless an investor has a 'substantial presence' in the countries concerned. However, she was doubtful as to whether the requirement for investors to show a 'substantial presence' was a difficult one.²⁹⁵ Dr Ridings, on the other hand, suggested that comparison is not with *any* investor but with one in 'like circumstances'. She argued that the Crown's ability to provide redress to Maori is not inhibited under this rule so long as the measures taken affect *all* investors.²⁹⁶

Witnesses and counsel debated whether claims were likely to be brought, the degree of unpredictability in how the arbitral tribunals might interpret the rules outlined above, and the possibility of the threat of such claims inhibiting the Crown from taking effective action to recognise Maori rights. Dr Kelsey and Dr Ridings agreed that there was a risk of

289. Ridings, brief of evidence (doc A94), p 8

290. Crown counsel, closing submissions (paper 3.3.15), p 61

291. Kelsey, 'Investment and Investor Protections' (Annex D to Kelsey, brief of evidence (doc A76(d))) p 32

292. Kelsey, 'Investment and Investor Protections' (Annex D to Kelsey, brief of evidence (doc A76(d))) p 32

293. Kelsey, brief of evidence, (doc A76), pp 7-8

294. Jane Kelsey, oral evidence, 12 July 2012, Draft Transcript, p 499

295. Jane Kelsey, oral evidence, 12 July 2012, Draft Transcript, p 511

296. Ridings, brief of evidence (doc A94), pp 4-5

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investment claims being made by overseas investors, although Dr Ridings considered that the risk of *successful* claims was low for a number of reasons. While Dr Kelsey disputed this point, it was not her key consideration. Dr Ridings had emphasised the role of the IPO prospectus in setting parameters for ‘legitimate expectations’ but Dr Kelsey pointed to Ministerial statements in the media which, she argued, could ‘outweigh’ the disclosures in the prospectus. She commented: ‘I come back to my fundamental point: this is not about what the outcome in a dispute will be. This is actually a game-playing exercise to try to influence the decision-making of the government and to chill it away from taking actions that an investor might [see as] contrary to its interests.’²⁹⁷ In Ms Sykes’ submission, there is a known risk that providing redress to Maori would adversely impact share values or company profitability and lead to claims by overseas investors. The risk should simply be avoided by settling with Maori prior to the share sale.²⁹⁸

The Crown denied that there would be a chilling effect, largely on the basis of Dr Ridings’ evidence. In Crown counsel’s submission, the ‘chilling effect’ thesis:

is based in its entirety upon each of a series of assumptions: that redress necessitated measures that caused an investor loss; that that loss would not be compensable by the Crown or by, for example, cost increases to customers; that that loss could even be argued to engage the quite specific protections accorded some foreign investors; that the Crown’s conduct did not fall within exceptions for justifiable government regulation, including specific clauses exempting measures taken under the Treaty of Waitangi; and that the Crown was unable or unwilling to defend such a claim.²⁹⁹

In the Crown’s view, it is by no means certain that any redress would even cause a loss to investors in the first place (see above, 3.8.3(1)) but if it did, the likelihood of a successful claim was so low that MFAT’s lawyers, as Dr Ridings told the Tribunal, would not be ‘chilled’.³⁰⁰

In reply, counsel for the interested parties took issue with the Crown’s proposition that Maori could be provided redress relating to the MOM companies and the water they use without affecting the profitability of the companies or the value of private investors’ shares:

The only ways to minimise those impacts are to allocate to the claimants some of the 49 percent of shares proposed for sale or the 51 percent residual Crown shareholding, or for the Crown to otherwise fulfil its Treaty responsibilities through some mechanism that is distinct from the power generating SOEs.³⁰¹

297. Jane Kelsey, oral evidence, 12 July 2012, Draft Transcript, p 488

298. Counsel for interested parties (Sykes, Wara, and Pou), closing submissions (updated), 25 July 2012 (paper 3.3.12(b)), pp 57-58

299. Crown counsel, closing submissions (paper 3.3.15), p 58

300. Crown counsel, closing submissions (paper 3.3.15), p 59; Crown counsel (Radich), oral submissions, 20 July 2012, Draft Transcript, p 1498

301. Counsel for interested parties (Sykes, Wara and Pou), submissions by way of reply (paper 3.3.18) p 18

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Ms Sykes also defended the reality of a likely ‘chilling effect’, pointing out that the final decision would rest in the hands of the Government and not of MFAT:

It is correct that an investor-initiated dispute will claim compensation, but that is the endgame. Deterring the Crown from adopting such measures – the chilling effect – will be cheaper, faster and preferable from the investor’s point of view.

Dr Kelsey addressed the issue of the chilling effect in paragraphs 5.1 to 5.5 of her brief in response to Dr Ridings. In addition to the costs of legal proceedings and any potential compensation award, she observed that the Crown ‘would be likely to come under pressure not only from foreign investors and other shareholders, but also from the Treasury and other state agencies concerned about the impact on foreign investors’ confidence in investing in New Zealand assets, especially as other partial, and potentially full, privatisations are slated for the future. The Government may also have other political considerations, depending on the influence of affected investors and their constituencies.’

The Crown says Dr Ridings is not chilled by any potential investment claim. However, Dr Ridings’ view does not bind the Crown, which would make a political decision in the face of threatened litigation.³⁰²

Dr Kelsey stated that assessing whether the risks are ‘significant or *de minimis* is *intrinsically subjective, speculative and unpredictable* [emphasis added].’³⁰³ Both witnesses agreed that there *is* a risk, and both agreed that the decisions of the arbitral tribunals can be unpredictable, although they disagreed on the level of risk and the degree of unpredictability. But the point which Dr Kelsey described as ‘fundamental’ was her argument that the Crown would be ‘chilled’ by the prospect of lengthy and expensive litigation with an uncertain outcome, and not by the prospect of a win for the investors and the need to pay (additional) compensation at the end of it all. If we examine the evidential foundation for this argument, it appears to us to be inconclusive, perhaps reflecting the point that the sudden growth of this kind of litigation is a relatively recent phenomenon.

In her initial evidence, Dr Kelsey stated that legal costs can be US\$500–1000 per hour, with a number of cases costing over US\$100 million.³⁰⁴ Ms Sykes repeated the claim that some cases can cost hundreds of millions of dollars in her closing submissions.³⁰⁵ The source from which this information was taken, however, was not clear as to whether costs were commonly US\$100 million each, or if the 48 cases had cost US\$100 million in total.³⁰⁶

302. Counsel for interested parties (Sykes, Wara and Pou), submissions by way of reply (paper 3.3.18) p 26

303. Kelsey, brief in response to Dr Ridings (doc A97), p 2

304. Kelsey, brief in response to Dr Ridings (doc A97), p 10. In relation to cases costing US\$100 million each see also Jane Kelsey, oral evidence, 12 July 2012, Draft Transcript, p 477

305. Counsel for interested parties (Sykes, Wara, and Pou), closing submissions (updated), 25 July 2012 (paper 3.3.12(b)), p 55

306. Jane Kelsey, oral evidence, 12 July 2012, Draft Transcript, pp 478-480; *Legalised Profiteering: How corporate lawyers are fuelling and investment and arbitration boom*, Transnational Institute and Corporate Europe Observatory, November 2011, pp 3-4

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In her supplementary brief of evidence, Dr Kelsey gave new figures for the cost of investment disputes. An OECD³⁰⁷ report was cited which put the average cost for parties in an investor-state dispute before the ICSID³⁰⁸ at US\$8 million. Costs exceeded US\$30 million in some cases.³⁰⁹ But costs for investors can be higher: in a case involving Argentina, the state has spent US\$12 million but the claimants in that case have so far spent US\$27 million. In the *Chevron Oil v Ecuador* case, the state is estimated to have spent US\$18 million, whereas Chevron may have already spent US\$200 million. The Philippines Government is estimated to have spent US\$45 million in defending two arbitration cases brought by a company called Fraport. An award has been annulled and a third arbitration is pending with more costs.³¹⁰

Under cross-examination by counsel for the interested parties, Dr Ridings agreed that the costs for States could be 'quite high', but that this depended entirely on the nature of the case, its duration, and whether external legal counsel were used. By way of example, she advised that the New Zealand case against Australia through the World Trade Organisation in relation to apples, for which in-house counsel had been used, had cost \$1 million over 3 years.³¹¹

We suspect that the New Zealand Government would likely be deterred by cases costing US\$100 million, but that figure appears to be one on which we cannot rely. An average cost of US\$8 million is not as significant in comparison, although costs can rise to in excess of US\$30 million. Of course, what we see in these figures is the cost of cases that governments were not deterred from pursuing. Dr Kelsey drew our attention to a statement in the OECD report that high costs 'or the threat of such costs' in arbitration can have a 'dissuasive effect on States', and that investors can use 'the spectre of high-cost litigation to bring a recalcitrant State to the negotiating table'.³¹² This would support the interested parties' proposition that the possibility of high-cost investment disputes of this kind could have a 'chilling effect' on what the New Zealand Government might be prepared to do. As Dr Kelsey also mentioned, however, the report notes that such effects might also exist for investors.³¹³ Ultimately, high costs 'will likely generally play to the advantage of financially stronger parties (including third party sources of funding) on either side'.³¹⁴ In the Crown's view, the 10 per cent cap on investments will prevent the building up of really powerful overseas investors in the MOM companies, although the interested parties maintained that even a 2 or 3 per cent

307. Organisation for Economic Cooperation and Development

308. International Centre for Settlement of Investment Disputes

309. Jane Kelsey, supplementary brief of evidence, 16 July 2012 (doc B18), p 2

310. Kelsey, supplementary brief of evidence (doc B18), p 3

311. Penelope Ridings, oral evidence, 16 July 2012, Draft Transcript, pp 1117-1118

312. OECD, *Investor-State Dispute Settlement Public Consultation: 16 May – 23 July 2012* (Paris: OECD, 2012), p 23 (Kelsey, supplementary brief of evidence (doc B18), pp 2-3)

313. Kelsey, supplementary brief of evidence (doc B18), p 3; see also counsel for interested parties (Sykes, Wara, and Pou), closing submissions (updated), 25 July 2012 (paper 3.3.12(b)), p 57

314. OECD, *Investor-State Dispute Settlement Public Consultation* (doc B18(a)), p 23

investment would be significant.³¹⁵ The OECD report, we note, was mainly concerned about an imbalance between the financial and legal resources of developing countries vis-a-vis wealthy international corporations.³¹⁶

Ultimately, it may not be necessary for us to determine this point. As we see it, this argument – that overseas investment arbitrations are so difficult and expensive that they will deter the New Zealand Government from providing rights recognition for Maori – has to be seen in conjunction with the argument that the Crown will also be ‘chilled’ by the presence of so many ‘Kiwi mums and dads’ among the MOM investors. The Crown, in answering both of these arguments, asked the Tribunal to accept the good-faith pledges of its Ministers that they will not be deterred from providing appropriate rights recognition for Maori by anything that results from the sale of shares in the power-generating SOES. This goes to the very point raised by counsel for interested parties: ‘The Crown says Dr Ridings is not chilled by any potential investment claim. However, Dr Ridings’ view does not bind the Crown, which would make a political decision in the face of threatened litigation.’³¹⁷

We turn to consider this question next.

(4) *The honour of the Crown*

During the oral presentation of the Crown’s closing submissions by Mr Radich on 20 July 2012, the Tribunal discussed with Crown counsel the significance of a particular passage in the Privy Council’s decision in *Broadcasting Assets*:

However, in relation to the bona fides of the Crown it is to be noted that the Solicitor-General, subject to the variations necessary due to the passage of time, gave Their Lordships an assurance that the proposals made by the Cabinet between the two hearings at first instance would still be adhered to by the Crown if this appeal is dismissed. The Judge was entitled to take this assurance as can Their Lordships in determining the outcome of this appeal in assessing the reasonableness of the Crown’s conduct. The assurance may not be directly enforceable in law, and it has to be considered in the context of Maori fulfilling their responsibilities to take such action as is reasonably available to preserve the language, but this does not mean that it is devoid of legal significance.³¹⁸

The Tribunal asked Mr Radich as to whether the Crown was providing an assurance in our inquiry that the Crown, as a responsible Treaty partner, ‘after privatisation will still

315. Crown counsel, closing submissions (paper 3.3.15), p 59; counsel for interested parties (Sykes, Wara and Pou), submissions by way of reply (paper 3.3.18) p 20

316. OECD, *Investor-State Dispute Settlement Public Consultation* (doc B18(a)), pp 23-24

317. Counsel for interested parties (Sykes, Wara and Pou), submissions by way of reply (paper 3.3.18) p 26

318. *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, 535; Crown counsel (Radich), oral submissions, 20 July 2012, Draft Transcript, p 1462. This passage from the *Broadcasting Assets* case was put to Mr Radich by the Tribunal, with the question as to whether the Government was giving these kinds of assurances in the present inquiry.

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have the ability to redress and remedy Treaty breach in relation to property rights in water resources of Māori. Is that the assurance, effectively, the Crown is giving us here?³¹⁹

In response, Mr Radich assured the Tribunal that the Ministers stand by the commitment given by the Prime Minister in his 2009 letter to the Iwi Leaders Group that property rights in water would be on the table for discussion with Maori, and the commitment given by the Deputy Prime Minister and the Minister for the Environment in their February 2012 letter to the Chairperson that:

there is no intention at all on the part of Government that the MOM process would prejudice in any way the work being done on rights and interests in water and natural resources. That commitment is utterly and entirely unabated, unchanged. And they went on to say in that letter that they, certainly the Crown would not be relying upon these reforms to say that there is any diminution in those rights and interests.³²⁰

In light of this assurance, we reproduce the relevant parts of the two letters here.

First, in his letter to the Iwi Leaders Group in 2009, the Rt Hon John Key stated:

The Government understands that this process does not constitute consultation with Iwi, and any recommendations from the SLUF³²¹ and other relevant forums will be discussed specifically with Iwi as Treaty partners.

In agreeing to meet with the Iwi Leaders Group, the Government acknowledges Iwi have specific interests and rights in freshwater, and therefore agree to discuss the draft National policy on Water with the Iwi Leaders Group prior to the policy going to Cabinet.

Furthermore, to enable Iwi to participate fully in these processes it will be important for Iwi and the Government to agree on appropriate communication and information exchange protocols.

I recognise that we have not provided specific responses to the level of iwi engagement on two outstanding issues:

- a) property rights and interests, and
- b) direct iwi involvement in Phase 2 of the RMA review.

I propose these items be added to the agenda for our next meeting.³²²

For the Crown, Mr Radich has assured the Tribunal that 'the commitment that is given in those words stands absolutely. And it involves discussion about exactly what the Prime Minister has said and that is ongoing'.³²³ Reference was had back to the evidence of Mr

319. Tribunal, question to Crown counsel (Radich), 20 July 2012, Draft Transcript, p1463

320. Crown counsel (Radich), oral submissions, 20 July 2012, Draft Transcript, p1467

321. Sustainable Land Use Forum

322. Rt Hon John Key to Sir Tumu Te Heuheu, 9 May 2009 (Beatson, affidavit, annex GB-2 (doc A3))

323. Crown counsel (Radich), oral submissions, 20 July 2012, Draft Transcript, p1467

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Beatson, who had advised the Tribunal that property rights – short of full ownership in water – were on the table for discussion.³²⁴

The relevant part of the second letter, from the Hon Bill English and the Hon Nick Smith to the Chairperson on 21 February 2012, is as follows:

The Crown wishes to acknowledge and confirm to the Waitangi Tribunal and to iwi and Maori that the sale of shares is not intended to prejudice the rights of either iwi and Maori, or the Crown, in the natural resources used by those mixed ownership companies. Government does not consider the legislation will affect any rights or interest in water or other natural resources used in the generation of electricity or affected by such use, including lakes, rivers, and the associated waters, beds and other parts, or geothermal resources.

Government confirms here that in relation to claims to the Crown about such rights and interests, Government will not seek to rely on the changed status from SOE to mixed ownership to suggest any diminution in the claimed rights.

The Crown also confirms that as the majority shareholder in the mixed ownership companies, it will continue to exercise its Treaty obligations to iwi. The Government is intending that the legislation to implement the mixed ownership model include a provision which reflects the concepts of section 9 of the State-Owned Enterprises Act.³²⁵

The Tribunal then asked Mr Radich whether these assurances could be considered to include an assurance that the Crown will not be ‘chilled’ by the prospect of overseas investor litigation.³²⁶ Crown counsel sought instructions and provided the following reply to the Tribunal after the close of our hearing:

Counsel for the Crown are instructed that the assurances made on behalf of the Crown by Ministers in the 21 February 2012 letter stand, and that those assurances remain regardless of possible litigation by overseas investors. Counsel are further instructed that the partial sale of shares in the power generating state owned enterprises to domestic or international investors could not in any event be material to any alleged ‘chilling effect’ in relation to assurances it has made. This is because domestic and foreign investors currently have interests in business enterprises in New Zealand that utilise fresh water and geothermal resources.³²⁷

We note the qualifying point made at the end of this statement that there are already many domestic and foreign investors with interests in businesses that use freshwater and geothermal resources. This same point was made in the hearing when Crown counsel

324. Crown counsel (Radich), oral submissions, 20 July 2012, Draft Transcript, p 1467-1473; see also Guy Beatson, oral evidence, 16 July 2012, Draft Transcript, pp 1081-1083

325. Hon Bill English and the Hon Nick Smith to Chief Judge Isaac, 21 February 2012 (attachment to Crown counsel, memorandum, 23 February 2012 (paper 3.1.3))

326. Tribunal, question to Crown counsel (Radich), 20 July 2012, Draft Transcript, pp 1495-1499

327. Crown counsel, memorandum, 25 July 2012 (paper 3.4.4), pp 2-3

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referred to private shareholdings in Contact Energy and Trust Power. As we said earlier, we are concerned in stage one of this inquiry with the use of water (fresh and geothermal) to generate electricity, and the partial privatisation of three SOEs which are jointly responsible for the generation of 75 per cent of New Zealand's hydro electricity. It appears to us that any 'chilling effect' would certainly be less powerful at present while the lion's share of New Zealand's hydro generation remains with Mighty River Power, Genesis, and Meridian. As we discussed in chapter 1, these SOEs only control some 37 per cent of geothermal energy generation. But the Crown has already legislated for geothermal royalties (back in 1991).

We consider the honour of the Crown to have been pledged in these assurances. We note the Privy Council's judgment in the *Broadcasting Assets* case:

The assurance once given creates the expectation, or to use the current parlance the 'legitimate expectation', that the Crown would act in accordance with the assurance, and if, for no satisfactory reason, the Crown should fail to comply with it, the failure could give rise to a successful challenge on an application for judicial review.³²⁸

These assurances were made in the context of Ministers acting in relation to the SOE Act, section 9 of which requires the Crown to act consistently with the principles of the Treaty.

We will consider the implication of this point in the next section, where we make our findings as to whether the Crown will breach Treaty principles if it proceeds with its partial privatisation of the power-generating SOEs.

3.9 IF THE CROWN PROCEEDS WITH PARTIAL PRIVATISATION, WILL IT BE IN BREACH OF TREATY PRINCIPLES?

3.9.1 The Crown's Treaty duties

In his closing submissions for the Crown, Mr Radich emphasised a point from the *Coal* case: 'The principles of the Treaty have to be applied to give fair results in today's world.'³²⁹ In many modern circumstances, he argued, the Treaty is not prescriptive of any one particular course of action. The Crown's responsibility is to inform itself and to balance the interests in the issue concerned. It may then, giving 'due weight' to Treaty principles, choose between a range of Treaty-compliant options. The Crown is not to be stopped from pursuing its chosen policy merely because there are other Treaty-compliant options, so long as it has selected one that *is* Treaty compliant.³³⁰ In oral submissions, Mr Raftery elaborated on

328. *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 (PC) p 525

329. *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513, 530 (Crown counsel (Radich), oral submissions, 20 July 2012, Draft Transcript, p 1457)

330. Crown counsel (Radich), oral submissions, 20 July 2012, Draft Transcript, p 1458

the Crown's written submissions and he acknowledged that choices need to be made with both Treaty partners sitting at the decision-making table.³³¹

In chapter 2 of this report, we found that Maori had rights and interests in their water bodies for which the closest English equivalent in 1840 was legal ownership. Those rights were confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that there was an expectation in the Treaty that the waters would be shared with incoming settlers. In agreement with the *Te Ika Whenua Rivers Report*, *The Whanganui River Report*, and *He Maunga Rongo*, we said that the nature and extent of the proprietary right was the exclusive right to control access to and use of the water while it was in their rohe. We also found that the Treaty conferred on both partners a right to develop their resources and properties to their mutual benefit. In agreement with the *Te Ika Whenua Rivers Report*, the *Whanganui River Report*, and *He Maunga Rongo*, we found that this included a development right in their properties, the water bodies of New Zealand.

As discussed earlier in this chapter, the Crown's preferred option for recognising Maori rights and interests in water is the enhancement of the Maori role in water governance and management. In section 3.8.1, we found that the Crown's preferred option falls short of the Treaty guarantees in three ways:

- ▶ it does not recognise or give effect to Maori residual proprietary rights where that is possible (or compensate for their loss where it is not);
- ▶ it does not provide for the holders of those rights to obtain a commercial or economic benefit from their residual proprietary rights; and
- ▶ it does not provide for the Treaty development rights of Maori in their water bodies.

We elaborate on those findings here. As we discussed in chapter 2, the claimants placed great weight on the plain meaning of the English version of Article 2. They were guaranteed the possession of their properties for so long as they wished to retain them. Such properties, they argued and we agreed, included rights equivalent to the full ownership of their water bodies in 1840. The Treaty itself changed the nature of those rights by conferring what has been called 'non-exclusive use rights' on the incoming settlers.³³²

The question of whether there have since been Treaty-compliant alienations, and how far the residual proprietary rights of Maori survive today, is for stage two of our inquiry. But the evidence at stage one was very clear that they have survived in some cases. The claimants described the essence of the claim in this way: the Treaty obliges the Crown to recognise their proprietary rights today, to the extent that that is possible. We accept that fundamental proposition. The plain meaning of Article 2 requires nothing less.

We agree with the Whanganui River Tribunal that property laws and the protection of property go to the heart of a just legal system. It is neither racist nor a racially-based

331. Crown counsel (Raftery), oral submissions, 20 July 2012, Draft Transcript, pp 1402-1403

332. Waitangi Tribunal, *The Mohaka River Report*, p78

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privilege that Maori should enjoy and profit from their property.³³³ The right to profit is inherent: ‘that is the way with property’.³³⁴

We also agree with the Te Ika Whenua Rivers Tribunal that the Crown’s Treaty duty is to actively protect these property rights to the fullest extent (reasonably) practicable.³³⁵ Any rights recognition, therefore, must provide for the right holders to obtain a commercial or economic benefit from their residual proprietary rights, where that is appropriate for the water body concerned. We agree with the Central North Island and Te Ika Whenua Rivers Tribunals that the use of Maori taonga to generate electricity requires that Maori rights holders be paid.³³⁶ We see that as absolutely fundamental to the Treaty guarantee of property in Article 2.

We think that most New Zealanders, if properly informed as to the nature of Maori rights, would not disagree that the owners of property rights should be paid for the commercial use of their property. Otherwise there would be no landlords and no tenants, no joint ventures, no leases, no commercial property arrangements of any kind. That seems to us to be absolutely basic to the way in which New Zealand society operates. We think that the Article 3 rights of Maori entitle them to the same rights and privileges as any other possessors of property rights.

We note, however, that property is not absolute in New Zealand in the way that it was in 1840 because kawanatanga powers of management have been superimposed upon it. As the Whanganui River Tribunal put it, it was not necessary to ‘labour the point’ of the rangatiratanga guarantee because the Article 2 English-language guarantee was as follows: ‘The “full, exclusive, undisturbed possession” of properties connotes all rights of authority, management, and control.’³³⁷ In the present day, the resource management regime has imposed constraints on the rights of property owners in the interests of the sustainable use and management of land and resources. In common with many other Tribunal reports, we accept the necessity of an overarching kawanatanga authority to manage natural resources. We also accept, however, that Maori rights of tino rangatiratanga under Article 2 are a standing qualification upon the Crown’s sovereignty, as has been stated by the Tribunal many times before. For the appropriate recognition of tino rangatiratanga and kaitiakitanga, as guaranteed in the Maori version of Article 2, it is absolutely essential that the Maori role in water governance and management must be adequately provided for – a matter which will be considered in more depth in stage two of our inquiry. But the Maori ‘say’ in management must certainly be commensurate with their Treaty rights and responsibilities. For the avoidance of any conflict, the Treaty partners owe each other duties of reasonableness,

333. Waitangi Tribunal, *The Whanganui River Report*, pp 339-340

334. Waitangi Tribunal, *The Whanganui River Report*, p 338

335. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 134

336. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 131-132; Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 1183-1195; vol 4, pp 1592, 1636

337. Waitangi Tribunal, *The Whanganui River Report*, p 338

cooperation, and good faith in the exercise of their respective Article 1 and Article 2 rights and obligations.

In light of what the Treaty requires, it is our view that the Crown has not been sufficiently informed so as to conduct a fair and Treaty-compliant balancing of interests in the present case. The Crown said that it does not know for sure what rights and interests Maori have in water, but that – whatever those rights turn out to be – they do not include full ownership of water, and they will not be affected by the partial privatisation of the power-generating SOEs. We have now found, upon inquiry into the facts (and as other Tribunals have found before us) that Maori have rights for which full ownership was the closest cultural equivalent in 1840. Today, Maori have residual proprietary rights where that can be established on the facts and – the Crown having stated that it does not claim ownership and that no one else can claim ownership – the Treaty entitles them to the recognition of those rights today. So, the question of whether the sale of up to 49 per cent of shares in the SOEs will affect the Crown's ability to recognise Maori rights and remedy their breach must be answered in light of the fact that Maori rights are proprietary in nature and extend to the authority and control inherent in the rangatiratanga guarantee.

Is there also a right of development? This was one of the more contentious points in our inquiry. As we discussed briefly in chapter 2, the Crown relied on the Tribunal's minority Radio Spectrum report. Crown counsel submitted:

If the claimants are saying iwi-Maori have a proprietary (or other) right to water and this becomes a right to ownership of energy companies based on the notion of a development right, that is an incorrect stretching of the concept of development.³³⁸

In closing submissions, the Crown quoted extensively from Judge PJ Savage's minority opinion, which we summarise as follows:

- ▶ Maori have a right to develop their properties and resources, including a right to take advantage of new technology to develop a customary activity such as fishing;
- ▶ Maori have a right to develop 'their culture, their language and their social and economic status using whatever means are available (development of Maori as peoples)', and a right to positive assistance from the Crown to do so 'so far as culture and language (taonga) are concerned';
- ▶ Maori do not have a development right arising from their partnership with the Crown, in respect of 'resources not known about or used in a traditional manner in 1840'.³³⁹

In its written submissions, the Crown's position on development rights was based on this one minority report. We are concerned that in advancing this submission, the Crown has chosen to ignore the majority decision in that case and the many Waitangi Tribunal reports

338. Crown counsel, closing submissions (paper 3.3.15), p17

339. Waitangi Tribunal, *The Radio Spectrum Management and Development Report* (Wellington: GP Publications, 1999), pp 62-63 (Crown counsel, closing submissions (paper 3.3.15), pp 17-19

which address this issue. However, in this claim the difference is not material because Judge Savage's minority opinion accepted the development right advanced in this claim; that is, the right of Maori to take advantage of new technology to develop their properties; the right of Maori to develop their taonga and their social and economic status using whatever means are available, and their right to positive assistance from the Crown to develop taonga such as their culture and language. In our view, we need not go beyond those aspects of the right of development. In his minority report, Judge Savage did not accept that the radio spectrum was a taonga, and he did not accept that the Treaty bargain gave Maori a right of tino rangatiratanga over newly discovered or newly exploitable resources of that kind.³⁴⁰ That case was not analogous with the present case, where the development right encompasses the right to profit from the ways in which a property (in this case, water bodies) were customarily exploited and equally can be now, using new technologies and for modern commercial ends.

When questioned on this point by the Tribunal, Mr Raftery for the Crown referred us to the statements of Cooke P in *Ika Whenua*, which he submitted clarified a distinction inherent in Judge Savage's finding that Maori had the right to develop their resources and customary activities:

But, however liberally Maori customary title and Treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori Chiefs and Governor Hobson in 1840. No authority from any jurisdiction has been cited to us to suggest that aboriginal rights extend to the right to generate electricity. Nor was the argument for the appellants put to the Court in that way. It was not contended that the dams are themselves taonga.³⁴¹

In our view, Crown counsel has not interpreted the minority Radio Spectrum report correctly. We do not understand it to be making the distinction claimed by Crown counsel. In respect of Cooke P's statements in the *Ika Whenua* judgment, the Te Ika Whenua Rivers Tribunal commented in 1998:

We do not disagree with the comment of the Court of Appeal that Maori, as distinct from other members of the community, have not had preserved or assured, through customary title, any right to generate electricity by the use of water power. What we do say is that under the Treaty Maori were entitled to the full, exclusive, and undisturbed possession of their properties, which would include their rivers. As part of that exclusive possession, they were entitled to the full use of those assets and to develop them to their full extent. This right of

340. Waitangi Tribunal, *The Radio Spectrum Management and Development Report*, pp 57-64

341. *Te Runanga o Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, 24; Crown counsel (Raftery), oral submissions, 20 July 2012, Draft Transcript, pp 1416-1417

development would surely include a right to generate electricity. The ability to exercise that right, however, depends on present-day circumstances, not on the position as at 1840.³⁴²

We agree with the Te Ika Whenua Rivers Tribunal, which went on to find that the Crown missed a crucial opportunity to carry out its Treaty obligations when it decided in the 1980s and 1990s that a cooperative industry for the benefit of all could be commercialised for private profit. A new opportunity arose in consequence for tribes to finally be able to utilise their development rights and to become significant players in the electricity industry. But the Crown failed to take into account the Maori proprietary rights in their taonga, and the industry was partially privatised without them benefitting.³⁴³ As Ngati Haka Patuheuheu observed in submissions in this inquiry, their rivers are now beyond their reach in the hands of privately-owned Trust Power.³⁴⁴ The Te Ika Whenua Rivers Tribunal found that the Crown should have consulted affected hapu about this change and that it should have taken their residual proprietary interests into account. It concluded: 'It seems quite unacceptable that commercial profit can be made from Te Ika Whenua's interest in the rivers without any form of compensation or payment.'³⁴⁵

The Central North Island Tribunal endorsed these findings and added:

Maori are still entitled to develop and profit from the lands, resources, and taonga that they own. This has been accepted by the Crown, claimants, the courts, and the Tribunal. In our view, the principle of active protection requires the Crown to assist Maori today to develop their properties, where that is their wish. Such assistance should take the form of facilitating equal opportunities to develop, especially the removal of obstacles to Maori development (such as title and governance problems) created by past actions of the Crown . . . It may, depending on circumstances, extend to other forms of positive assistance. Further, the Crown ought to consider and carry out the findings and recommendations of earlier Tribunals, and compensate Maori for its use of properties that they possessed under the Treaty and that have been developed and used without payment. In our inquiry region, this could include the use of their proprietary interest in waterways and geothermal taonga for the generation of electricity without compensation.³⁴⁶

In our inquiry, the claimants responded that the Crown had misapprehended their claim when Crown counsel characterised it as a right to own the energy companies arising from a development right.³⁴⁷ Rather, the claimants' position was that their proprietary rights

342. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 128-129

343. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 129-132

344. Counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7), pp 12-20

345. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, pp 131-132

346. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 911-912

347. Claimant counsel, submissions by way of reply (paper 3.3.20), p 13

entitled them to develop their properties, and to be paid for the use of their water bodies to generate electricity:

It does not matter if the original owners had the right to generate electricity or merely to use that property to play Pooh Sticks . . . Lord Cooke is worthy of great respect, but the relevant legal landscape has moved on considerably since 1994. It is now trite law that central to indigenous rights is the right to use their property to develop both their culture and their economy in parallel and on an equal footing with others.³⁴⁸

We agree. And, in searching for a framework in which customary rights may be given modern expression, the claimants' position is that a shareholding (potentially involving special rights settled by shareholder agreement) may be an appropriate form of commercial rights recognition or redress for many groups.

As we see it, a right to develop one's properties is a right possessed under the law by all New Zealand property owners. What is unique about this claim is that Maori citizens were guaranteed the property that they possessed in 1840. That right of property was not constrained by what could be legally owned in England. Rather it depended on what Maori possessed at the time in custom and in fact. As we have found, they possessed (and in the English sense owned) their water bodies in 1840. And inherent in their proprietary interests is the right to develop their properties, and to be compensated for the commercial use of their properties by others. There is nothing unusual or novel in this finding. As we see it, it is entirely consistent with Judge Savage's Radio Spectrum opinion and the Crown must therefore be held to have accepted it. When asked by the Tribunal whether the Crown had accepted the Central North Island Tribunal's findings as to development rights, Mr Raftery replied that the Crown 'may not accept all of them'.³⁴⁹ We struggle to see why the Crown would not accept this fundamental right of all property owners, as set out in this report.

In the claimants' view, their development rights are also endorsed or supported by the UN Declaration on the Rights of Indigenous Peoples, which the New Zealand Government affirmed in April 2010. We also received submissions from the interested parties, noting the significance of the Declaration in respect of their development rights.³⁵⁰ While the UN Declaration on the Rights of Indigenous Peoples is not binding at international law, it does articulate base standards for all States who have affirmed it. The Waitangi Tribunal has commented elsewhere that, as 'the courts and tribunals of this country are part of the state of New Zealand, then to the extent that rights declared in the UNDRIP may be recognised

348. Claimant counsel, closing submissions (paper 3.3.10), p 8

349. Crown counsel, oral submissions, 20 July 2012, Draft Transcript, p 1416

350. Claimant counsel, closing submissions (paper 3.3.10), pp 8-9; Counsel for interested parties (Sykes, Wara, and Pou), closing submissions (updated) (paper 3.3.12(b)), pp 7-8

consistent with the jurisdiction and procedures of the Tribunal, then this Tribunal should do so.³⁵¹

In claimant counsel's submission, the Declaration 'expressly sets out the right to develop resources possessed by reason of traditional ownership' in Article 26(2).³⁵² The Article states: 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.'³⁵³ This is further supported by Article 20(1) which states that: 'Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.'³⁵⁴ An important part of the context for these articles is the following statement in the preamble that the UN General Assembly was:

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests . . .³⁵⁵

This statement resonates with us because of the long history that sits behind the present claim, and which was touched upon by many of the witnesses who appeared before us. We were struck in particular by Mr Alexander's evidence, which quoted the statements of the Member for Northern Maori, Hone Heke, in 1903 when Parliament nationalised the use of water to generate electricity:

Mr Heke (Northern Maori District), – I quite agree with what was said by some of the previous speakers in regard to the provisions of the Bill enabling the Crown to acquire all the water-power in the colony; I think it is going too far. I speak more particularly in regard to waterfalls on Maori lands. It would not be proper for a Bill like this to take away from Maori owners the use of water-power on their lands. There is no telling to what use even the Maoris may desire to put such water-power for themselves. It would be entirely different if the Crown desires to acquire water-power on Maori land; it remains for them to acquire it from the Natives. But the sweeping provision of subsection (1) of clause 2 is going too far. My objection to the Bill is on that subsection, and I shall oppose that in Committee. It is an attempt to take away Native rights.³⁵⁶

351. Waitangi Tribunal, Memorandum-Directions, 3 December 2010 (Wai 2200, Porirua ki Manawatu inquiry, paper 2.5.18), pp 12-13

352. Claimant counsel, closing submissions (paper 3.3.10), p 9

353. United Nations Declaration on the Rights of Indigenous Peoples, 2004 (paper 3.3.10(b)), p 10

354. United Nations Declaration on the Rights of Indigenous Peoples, 2004 (paper 3.3.10(b)), p 8

355. United Nations Declaration on the Rights of Indigenous Peoples, 2004 (paper 3.3.10(b)), p 2

356. Hone Heke, NZPD, 24 September 1903 (Alexander, 'Historical analysis of the relationship between Crown and iwi regarding the control of water' (doc A69(b)), p 22)

The Te Ika Whenua Rivers Tribunal found that the Crown had a kawanatanga right to ensure that the development of electricity was managed and coordinated for the benefit of the nation. It also found that Maori, having shared the Te Ika Whenua Rivers with settlers through the Treaty, could not claim a *sole* right to benefit from their development for hydro generation. But the Crown's kawanatanga must be exercised so as to respect and give effect to the rangatiratanga guarantee in Article 2, a guarantee which includes a development right in the properties protected by the Treaty:

The Treaty encompasses reciprocity and partnership. Both parties have an obligation to the nation as a whole to act fairly and responsibly. Where, as in this case, one party has effectively surrendered property rights by sharing them as envisaged by the Treaty, and such property can be the subject of development, then the Crown should ensure that its Treaty partner is able to partake fully in that process. While the Crown is able to appropriate or regulate the interest parted with by Te Ika Whenua (or do both), the residuary interest retained by the claimant remains subject to the Treaty guarantees. The Crown is therefore obliged actively to protect that interest and to allow Te Ika Whenua the full use and enjoyment thereof, including their right to development.³⁵⁷

The degree to which rights have been surrendered or extinguished, and the degree to which the Maori proprietary rights are therefore *residuary*, is a matter for stage 2. Here, however, we note that the development right is inherent in the proprietary right. Mindful of the injunction of Crown counsel quoted above, that the 'principles of the Treaty have to be applied to give fair results in today's world', we think that fairness requires recognition of Maori proprietary rights (including the development right) to the fullest extent practicable, balancing the fact of kawanatanga rights and the existence of other interests. But, as the Central North Island Tribunal found, the Maori rights cannot be balanced out of existence; otherwise the Treaty has no meaning.³⁵⁸

Crown counsel told us that 'development and commercial opportunities' would be provided for in the 'resource management policy development in which iwi/Maori and the Crown are endeavouring to collaborate'.³⁵⁹ We cannot accept this submission, at least not on the evidence presently before us, as we saw nothing to justify it in Mr Beatson's evidence or the reports of the Land and Water Forum.

Having set out the Crown's Treaty duties, we now turn to answer the issue questions posed in our stage one statement of issues:

- ▶ Does the sale of up to 49 per cent of shares in power-generating SOE companies affect the Crown's ability to recognise Maori rights and remedy their breach, where such breach is proven?

357. Waitangi Tribunal, *Te Ika Whenua Rivers Report*, p 129

358. Waitangi Tribunal, *He Maunga Rongo*, vol 3, pp 900-901

359. Crown counsel, closing submissions (paper 3.3.15), p 69

- ▶ Is such a removal of recognition and/or remedy in breach of the Treaty?
- ▶ If so, what recommendations should be made as to a Treaty-compliant approach?

On the basis of our discussion of the issues and evidence in chapter 3, we now answer each of these questions in turn.

3.9.2 Does the sale of up to 49 per cent of shares in power-generating SOE companies affect the Crown's ability to recognise Maori rights and remedy their breach, where such breach is proven?

In essence, the claimants have argued that the partial privatisation of the MOM companies will make it prohibitively difficult for the Government to provide them with a form of shareholding that accords a meaningful role in the companies that use and profit from their taonga, their water resources. They have also argued that the introduction of private shareholders into the mix will make it prohibitively difficult for the Crown to provide them with other commercial forms of rights recognition or redress, including 'modern water rights' (where Maori grant or own water permits for hydro and geothermal power), a royalties regime, or restrospective joint ventures for existing power stations (if joint ventures is the Crown's preferred commercial option).

The Crown denies that the asset sales will inhibit its ability to provide rights recognition or redress in the future. The Crown also argues that shares are fungible and that it will be able to reacquire them later if necessary; no special arrangements are necessary to recover the asset if needed for a future Treaty settlement. Also, the Crown's view is that the introduction of private shareholders in the MOM companies will have no effect on its ability to provide any other form of redress for Maori water claims. As noted in the preceding section, its preferred option is an enhanced role for Maori in governance and management of water resources, which it says is more in keeping with how kaitiakitanga should be given effect in modern times. But the Crown argues that if commercial redress or rights recognition is eventually shown to be appropriate, then it will still be able to provide it. It will be able to foster joint ventures, impose a levy or tax on water, create a royalties regime, or reacquire shares (irrespective of the cost) for allocation to Maori, regardless of having partially privatised the MOM companies.

As we have said, our finding as to the nature and extent of Maori rights in their water bodies means that a commercial option for rights recognition or redress (where recognition is not possible) is essential. That commercial option or options should, as far as possible, provide for the Maori development right.

In our view, the Crown is correct that it will still be able to provide many such options after the sale of shares in the MOM companies. We think that the claimants' evidence has shown that it will be significantly more difficult for the Crown to do so once it has

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introduced thousands of ‘mum and dad’ investors into the political mix. We suspect that the Crown’s evidence underestimated the political obstacle that these new interests will put in the way of a tax, levy, royalty, or resource rental for the use of water to generate electricity. We note Mr Cox’s evidence (cited above) that, as with the emissions trading scheme, a new regime could be introduced sector by sector. The Crown could start with hydroelectricity (it is already empowered to charge royalties for geothermal energy), and it would surely be much easier to do so before there are private interests in the companies which command three-quarters of New Zealand’s hydro generation capacity. But it will not be impossible for the Crown to introduce this kind of rights recognition or redress after the partial privatisation of the MOM companies. As the Crown says, it will have to balance the interests concerned (including the possibility of consumer price rises) in a Treaty-compliant manner. But we note the Crown’s own evidence and submissions that it may be possible to provide a commercial option that does not affect profit or result in price rises. We also note the fact that the ‘zero cost for water’ may be about to disappear in any case, if charges for water permits are introduced to help increase efficiency. As we said earlier, such charges might be paid to or shared with Maori.

We accept the Crown’s assurances, given as part of our inquiry, that it is open to discussing the possibility of Maori proprietary rights (short of full ownership), that it will not be ‘chilled’ by the possibility of overseas investors’ claims, and that the MOM policy will not prevent it from providing appropriate rights recognition once the rights have been clarified. We trust that our report has now clarified the rights for the Crown.

But there is one area in which the Crown will not be able to provide appropriate rights recognition or redress after the partial privatisation, and that is in the area that we have termed ‘shares plus’: the provision of shares or special classes of shares which, in conjunction with amended company constitutions and shareholders’ agreements, could provide Maori with a meaningful form of commercial rights recognition. As we have found, ‘shares plus’ are not ‘fungible’ and company law would in practical terms prevent the Crown from providing this form of rights recognition after the introduction of private shareholdings, certainly after the sale of more than 25 per cent of shares and arguably before that too. The detailed analysis of company law and of the parties’ evidence and submissions that supports this finding is set out above in sections 3.7.3 and 3.8.2.

We conclude therefore that the sale of up to 49 per cent of shares in power-generating SOE companies will affect the Crown’s ability to recognise Maori rights and remedy their breach, where such breach is proven.

3.9.3 Is such a removal of recognition and/or remedy in breach of the Treaty?

The Crown's Treaty duty in this case is the active protection of the Maori rights to the fullest extent reasonably practicable, and to provide remedy or redress for well-founded Treaty claims. In the Crown's submission, there has to be a nexus between the asset to be sold and the foreseeable remedy in a Treaty claim, and a finding that the asset will be put beyond the reach of the Government to recover or use in settling with Maori, before an asset sale should be halted. Crown counsel submitted that where there is a nexus, then there should be a halt.³⁶⁰ We have found that there is a nexus between 'shares plus' and Maori rights in the water bodies used by the power-generating companies. We have found that company law will in practical terms prevent the Crown from providing or recovering the asset sought – 'shares plus' – after partial privatisation of the companies. The Crown will therefore be unable to carry out its Treaty duty to actively protect Maori property rights and to remedy well-founded claims if it proceeds with its share sale without first creating an agreed mechanism to preserve its ability to recognise Maori rights and remedy their breach. We find that the Crown will be in breach of Treaty principles if it so proceeds.

We also think that there is presently an important opportunity for the Treaty partners to consider or provide for other forms of commercial rights recognition particular to these three companies (which command the lion's share of the hydro resource). In our view, the evidence supports a finding that this will be more practicable if it is done now. It might involve amending company constitutions or it might involve a law change to allow for hydro royalties. But because these things will still be feasible after the sale, and because the Crown has given an assurance that it will not allow the sale to prevent it from offering appropriate forms of rights recognition in the future, we find that the Crown will not be in breach of Treaty principles in respect of *these* matters if it proceeds with the sale.

3.9.4 If so, what recommendations should be made as to a Treaty-compliant approach?

The claimants say that shares in the power-generating MOM companies, in conjunction with shareholders agreements, will go some way towards meeting the Crown's Treaty obligation. We agree. But not all of the affected Maori groups want shares. Those who do may want them in combination with other commercial forms of rights recognition or redress. And there is also the issue to be considered of whether shares in these companies represent a development right for all Maori, regardless of whether their particular water bodies are used (or may be used in the future) by the MOM companies. We are also conscious that some affected Maori groups did not participate in our inquiry. But this is not a matter that can be moved forward by discussions with the Iwi Leaders Group alone.

360. Crown counsel (Radich), oral submissions, 20 July 2012, Draft Transcript, p1454

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We recommend that the Crown urgently convene a national hui, in conjunction with iwi leaders, the New Zealand Maori Council, and the parties who asserted an interest in this claim, to determine a way forward. We recognise the Crown's view that pressing ahead with the sale is urgent. But to do so without first preserving its ability to recognise Maori rights or remedy their breach will be in breach of the Treaty. As Crown counsel submitted, where there is a nexus there should be a halt. We have found that nexus to exist. In the national interest and the interests of the Crown-Maori relationship, we recommend that the sale be delayed while the Treaty partners negotiate a solution to this dilemma.

In our view, the scope of such negotiations will need to be limited if a timely solution is to be found. It would not be possible to devise a comprehensive scheme for the recognition of Maori rights in water in the time available. But it should be possible, with good faith endeavours on both sides, to negotiate with all due speed an appropriate scheme in respect of these three power-generating companies. In the narrowest view, the subject for discussion is shares and shareholders' agreements in Mighty River Power. That could include discussion of the use of shares for a number of settlement or rights recognition purposes, where there is not a nexus to rivers utilised by Mighty River Power, such as was raised by Ngati Haka Patuheuheu. As we see it, it would be preferable to take a broader approach in this way, and also to consider other commercial options such as royalties at the same time, and perhaps the opportunity to write such matters into the company constitutions; but all that is for the parties to decide. Undertakings could perhaps be negotiated about future forms of rights recognition. We would not want to be prescriptive about these matters.

The parties have leave to return to the Tribunal for more detailed recommendations or assistance with their discussions if necessary.

Dated at *Wellington* this *24th* day of *August* 20*12*



Chief Judge W W Isaac, presiding officer



R Anderson, member




T Castle, member



R Crosby, member



G Phillipson, member



WT Temara, member



APPENDIX I

STATEMENT OF ISSUES

**STATEMENT OF ISSUES – NATIONAL FRESHWATER AND GEOTHERMAL RESOURCES
INQUIRY – STAGE ONE¹**

What rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi?

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?

Before its sale of shares, ought the Crown to disclose the possibility of Tribunal resumption orders for memorialised land owned by the mixed ownership model power companies?

Ought the Crown to disclose the possibility that share values could drop if the Tribunal upheld Maori claims to property rights in the water used by the mixed ownership model power companies?

Is such a removal of recognition and/or remedy in breach of the Treaty?

If so, what recommendations should be made as to a Treaty-compliant approach?

**STATEMENT OF ISSUES – NATIONAL FRESHWATER AND GEOTHERMAL RESOURCES
INQUIRY – STAGE TWO²**

Where the Tribunal has found in stage one that Maori rights or interests in freshwater or geothermal resources were guaranteed and protected by the Treaty, are these rights and interests adequately recognised and provided for today?

If not, why not?

In particular, is the current situation an ongoing or continuing consequence of past Treaty breaches that have already been identified in Waitangi Tribunal findings in relation to water resources, geothermal resources, or other natural resources (including Crown acquisitions of land in breach of the Treaty)?

1. Waitangi Tribunal, memorandum-directions, 4 July 2012 (paper 1.4.1)
2. Waitangi Tribunal, memorandum-directions, 15 May 2012 (paper 2.5.20)

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In particular, has the Crown asserted rights amounting to de facto or de jure ownership of water and/or geothermal resources? What is the basis of any such assertion, and is it consistent with Treaty principles?

If, having considered issues (e) and (f), we find there is a failure to recognise fully the rights and interests identified in issue (a) in stage one of this inquiry, is it causing continuing prejudice to Maori in relation to matters to which the Fresh Start for Fresh Water and/or geothermal resource reforms relate but which those reforms fail to address? If so, is this failure to address such issues itself a breach of principles of the Treaty of Waitangi?

Alternatively, could implementation of the Government's proposals under the Fresh Start for Fresh Water and/or geothermal resource reforms, without ascertaining and providing appropriate recognition of the rights and interests identified in issue (a) in stage one of this inquiry, cause prejudice to Maori in breach of principles of the Treaty of Waitangi?

If either of these breaches and/or other breaches have been established, what recommendations should be made to protect such rights and interests from such prejudice either by:

taking steps to fully recognise those rights and interests prior to the design or implementation of the reforms; or

reworking the reforms so that the reforms themselves take cognisance of, and protect, those rights and interests in such a manner that they are reconciled with other legitimate interests in a fair, practicable, and Treaty-compliant manner.

APPENDIX II

**INTERESTED PARTIES IN THE NATIONAL FRESHWATER AND
GEOTHERMAL RESOURCES INQUIRY**

No	Counsel	Who	Wai no
1	T Afeaki	Sue Te Huinga Nikora & Sonny Akuhata of Ruawaipu, Tairāwhiti, East Coast Lands & Waters claims	129
2	" "	Sue Te Huinga Nikora, Te Puia Springs, Te Tai Rawhiti	222
3	" "	Waimarie Bruce of Ngāti Kahu o Torongare Te Parawhau, Ngāpuhi. Ngāti Kahu o Torongare/Te Parawhau Hapū claim	619
4	" "	Kingi Taurua of Ngāti Rahiri, Ngāti Kawa o Ngapuhi. Waitangi Lands and Resources claim	774
5	" "	Tamati Olsen and others on behalf of Te Iwi o Rakaipaka o Nuhaka, Waikokopu, Te Mahia, Tahaenui and Morere puia, Te Tai Rawhiti	964
6	" "	Miriama Solomon (nee Tuoro) and Graeme Prebble Jnr of Te Honihoni, Te Ihutai, Te Mahuruhuru o Hokianga, Ngapuhi. Hokianga Regional Lands claim.	985
7	" "	Timothy Waitokia, Tracey Waitokia, Bill Ranginui and others on behalf of Ngāti Hineoneone o Atene, Whanganui, Te Tai Hauāuru	1028
8	" "	Hoane Titari John Wi and others of Ngāti Tutakamoana o Ngāti Maniapoto, Ngāti Rora o Ngāti Maniapoto, Te Rohe Pōtae	1455
9	" "	Louisa Collier, for and on behalf of Ani Taniwha and Rihari Dargaville and on behalf of Ngati Kawau	1673
10	" "	Rihari Dargaville for and on behalf of Ngarui Dargaville, Harry Te Awa, Jay Dunn, Nga Uri o Tama and Tauke Te Awa	2179
11	" "	Popu Tahere for and on behalf of himself and on behalf of Nga Uri o Te Aho	1681
12	" "	Iris Niha for and on behalf of himself and on behalf of Nga Uri o Te Aho	1722
13	" "	Louisa and Fred Collier on behalf of themselves and the descendants of Hinewhare	1541

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No	Counsel	Who	Wai no
14	David Stone/ Robert Wills	Hineamaru Lyndon and Louisa Collier for and on behalf of the descendants of Pomare Kingi	1524
15	K Ertel	Vernon Winitana & ors on behalf of Panekiri Tribal Trust Board, Ngāti Ruapani. Ruapani Lands claim	144
16	" "	Anaru Paine, Irene Williams, Sid Paine on behalf of Ngāi Tuhoe Potiki. Tumatawhero– Waikaremoana claim	795
17	" "	Dr Rangimarie Turuki Rose Pere or Kuini Te Iwa Beattie on behalf of Ngāti Rongo, Ngāti Hingaanga, Ngāti Hinekura, Te Whānau Pani and Ruapani-Tuhoe. Pere Kaitiakitanga claim.	1013
18	" "	Nicky Kirikiri and another on behalf of the owners and beneficiaries of the Te Heiotakoka 2B To Kopani 36 & 37 Trust. Te Heiotakoka 2B To Kopani 36 & 37 Trust claim.	1033
19	" "	Charles Aramoana and Sandra Jeanette Kari Kari Aramoana for themselves and Upokorehe hapū, Ngāti Raumoā, Roimata Marae Trust and Upokorehe. Upokorehe claim	1092
20	" "	Hinehou Polly Leef, Mekita Te Whenua, Richard Wikotu, Rocky Ihe and Kahukore Baker for the Whakatohea hapū, Rongopopoia ki Upokorehe. Rongopopoia Hapū Claim	1787
21	" "	Ani Taniwha for Ngāti Hine, Ngāti Kawau, Ngāti Kawhiti and Ngā Uri o Te Pona, Ngāti Hine, Ngāti Kawau, Ngāti Kawhiti and Ngā Uri o Te Pona (Taniwha) Claim	1666
22	" "	Christine Wallis and others, Wallis whānau claim	1908
23	" "	Julie Tamaia Taniwha for Ngā Uri o Te Pona. Ngā Uri o Te Pona Waahi Tapu	2149
24	" "	Justyne Te Tana for Herself, Pera Tuporo, Henare Tuporo 1, Henare Tuporo 2, Wiremu Tuporo, Winiata Tuporo, Pera Tuporo Taniwha Taipari, Talia Tuporo Taniwha, Cogan Tuporo Taniwha Parslow, Anahera Tuporo Taniwha, Zavier Tuporo Taniwha Te Tana. Taniwha and Others Lands Claim	2010
25	" "	Te Rarua (Kui) McClutchie – Morrell for Te Rarua (Kui) McClutchie – Morrell, descendents of Uepohatu and Ngāti Hau hapū whānau. East Coast Airing of Grievances Hearing Claim	2340
26	" "	Rapata Kaa for the hapū Ruawaipu. Ruawaipu Active Protection claim	1272
27	" "	Vivienne Taueki for herself, the descendants of Taueki and Muaupoko ki Horowhenua. Muaupoko (the descendants of Taueki) Claim	1629

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No	Counsel	Who	Wai no
28	" "	Ron Taueki and another for Muaupoko. Horowhenua Block claim	237
29	" "	Te Rūnanga o Ngāti Manawa	
30	" "	Sharon Barcello-Gemmell, Harvey Ruru and Jane duFeu on behalf of Te Ati Awa Te Tau Ihu Water Rights Claim	1454
31	A Sykes/ J Pou/ T Wara	Arapeta Witika Pomare Hamilton and others on behalf of Ngāti Manu, Te Uri Karaka, Te Uri o Raewera, Ngapuhi ki Taumarere tribes. Tai Tokerau Land claim	354
32	" "	Jordan Haines for himself and on behalf of the whānau and hapū represented by the Ngāti Hinemanu me Ngāti Ngāti Paki and Ngāti Paki Heritage Trust. Awarua Block 4A 1 claim	647
33	" "	Mangaohane No 1 Block claim;	662
34	" "	Ngāti Paki and Ngāti Hinemanu (Winiata, Lomax, Cross and Teariki) Treaty Claim;	1835
35	" "	Oruamatua Kaimanawa Block (Hoet) Claim	1868
36	" "	Barbara Marsh, Tohe Raupatu and Muiora Barry on behalf of all the descendants and original owners of Part Kaingapipi No 9, Karu o te Whenua and Kinohaku East 4B1 Block. Pio Pio Stores Site claim	691
37	" "	Atiria Rora Ormsby Takiari and the descendents of the owners of the land. Mokau Mohakatino and Other Blocks (Maniapoto) claim.	788
38	" "	Professor Patu Hohepa and Rudy Taylor on behalf of whānau and hapū of Hokianga. Ngapuhi Land and Resources; Te Mahurehure Claim.	549
39	" "	Professor Patu Hohepa and Rudy Taylor on behalf of whānau and hapū of Hokianga. Te Mahurehure Claim.	1526
40	" "	Lynnette Gloria Waitiahoaho Te Ruki and Gary Shane Te Ruki on behalf of the hapū of Ngāti Kahu and Ngāti Unu. Kakepuku Mountain and Kakepuku Block claim.	846
41	" "	Te Hapai Robert Ashby and Gail Rika on behalf of Ngā Uri o Mangakahia. Pakotai School and Village Claim.	1467
42	D Naden & B Loader	Harry and Evelyn Kereopa on behalf of Te Ihingarangi a hapū of Ngāti Maniapoto	762
43	" "	Marama Waddell on behalf of her whānau and her hapū who are members of Te Whiu, Te Uri Taniwha and Ngā Uri o Wiremu Hau raua ko Maunga Tai Wiremu Hau Whānau Lands (Northland) claim.	824

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No	Counsel	Who	Wai no
44	" "	Morehu McDonald on behalf of Ngāti Hinerangi and the Ngāti Hinerangi Trust Board	1226
45	" "	Te Enga Harris on behalf of Wiremu Hemi, Harris and Meri Otene whānau and on behalf of Ngāti Rangī, Ngāti Here, Ngāti Tupoto, Ngāti Hohaitoko, Ngāti Kopuru, Te Rarawa and Ngāti Uenuku. Land Alienation and Wards of the State (Harris) Claim.)	1531
46	" "	Mona Thompson and Ron Wi Repa on behalf of themselves, Ngāti Rakai, Ngāti Waimauku, Ngāti Waikorara, Ngāti Mihi, Ngāti Waiora, and Ngā Uri o Pehira Keepa and Ngā Uri o Wi Repa. Te Kaha Hapū (Thompson and Wi Repa) Claim.	1962
47	" "	Rueben Taipari Mare Porter on behalf of himself, his whānau and members of Kaitangata, Ngā Tahawai and Whānau Pani hapū of Northland. Tutamoe Pa Claim.	1968
48	" "	The combined claim of Chappy Harrison on behalf of the Harihona whānau and Ngāti Tara, and Robert Gabel on behalf of the descendants of Ngāti Tara, a hapū of Ngāti Kahu. Ngāti Tara (Gabel) Claim.	2000 (incl 1886)
49	" "	Piriwhariki Tahapeehi on behalf of Ngāti Mahanga, Ngāti Tamaoho and Ngāti Apakura. (Tahapeehi) Lands Claim.	1992
50	" "	Raymond Fenton and Gordon Lennox as co-claimants on behalf of themselves and on behalf of Ngāti Apakura	2291
51	" "	Phillip Hiroki Ripia for and on behalf of Hohepa Joseph Ripia and Robert Reginald Ripia Eagle, children of Erana Pera Manene Ripia (Nee Powhiro) and Manu Frederick Ripia	973
52	" "	Maggie Ryland, for and on behalf of Te Whānau a Te Aotawarirangi of Tokomaru Bay	1089
53	" "	Noeline Taia Nola Rangitaiapo Henare for and on behalf of Ngati Pahere, a hapu of Ngati Maniapoto	1480
54	T Shepherd	Whirinaki Māori Committee on behalf of Ngā hapū o Whirinaki and others (Hokianga)	700
55	K Taurau	Cheryl Turner, John Klaricich, Harerei Toia, Ellen Naera, Fred Toi, Warren Moetara and Hone Taimona claimants on behalf of Ngāti Korokoro, Ngāti Wharara, Te Pouka Hapū, Ngā Hapū o Te Wahapu o Hokoia nui a Kupe (Te Wahapu)	2003
56	TK Williams	Robert Marunui Iki Pouwhare for and on behalf of himself and the Ngāti Haka Patuheuheu Trust. Ngāti Haka and Patuheuheu Lands, Forests and Resources (Urewera) claim.	726
57	M Sinclair	Tahorakuri A130 Trust, Ohaaki Marae, Marae Reporoa	

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No	Counsel	Who	Wai no
58	" "	Tama-i-Uia Ruru and descendants of Tangauru – Muaupoko – Horowhenua	108
59	" "	Charles Rudd and the beneficial owners of Lake Horowhenua (Te Waipunahau), Hokio stream and Hokio beach	1631
60	" "	Hari Benevides, Wilson Ropoama, Graham Smith (Pohe Hapū) and descendants of Raketapaumu land block	1632
61	" "	Brigitte Te Awe Awe-Bevan on behalf of herself and descendants of Te Rangitepaea, Rangiotu, Ngāti Rangitāne	1627
62	J Mason, P Agius	David Potter and Andre Paterson on behalf of Ngāti Tionga hapū of Ngāti Rangitihī. Ngāti Rangitihī Inland and Coastal Land Blocks claim	996
63	" "	Haami Piripi, Chairperson of the Te Rūnanga o Te Rarawa on behalf of Te Rarawa. Tangonge (Kaitaia Intel) claim.	1699
64	" "	Haami Piripi, Chairperson of the Te Rūnanga o Te Rarawa on behalf of Te Rarawa on behalf of Te Rarawa. Te Rarawa (Piripi) Claim.	1701
65	M Taia, Q Duff, S Potter, T Tarawa	Te iti o Mahuta (Taharoa and Kawhia)	
66	" "	Janet Maria (Paki) King, representing the descendants of John Gilbert Paki and Rina Whawhakia Reti. Ngāti Whawhakia ki Aotea (Aotea). Okapu C Block (King) claim	1534
67	" "	Te Mateawa (Horowhenua)	
68	" "	Verna Tuteao, Herself and Uri of Wetini Mahikai, The Descendants of Wetini Mahikai and Hera Parekawa (Tuteao) Claim. Ngā Uri o Wetini Mahikai (Raglan).	2345
69	" "	Ngāti Paoa (Hauraki).	
70	" "	Daniel Toto, Daniel Toto, his whānau and descendants of his tupuna, Toto Whānau (Wairarapa, East Coast, Waikato and King Country). Tekikiri Meroiti Haungurunguru Toangina Toto Whānau Trust Claim	1826
71	" "	Ngā Uri o Hetaraka Takapuna (North Shore, Mahurangi and the Gulf Islands)	
72	" "	Ngā Uri o Ngāti Moetara (Pakanae and Waimamaku)	
73	none	Roimata Minhinnick of Ngāti Te Ata Waiohua	2362
74	none	Te Rangikaheke Bidois, Chairperson of Te Maru o Ngāti Rangiwewehi, on behalf of Ngāti Rangiwewehi	
75	D Edmonds	Te Atiawa Iwi Authority	

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No	Counsel	Who	Wai no
76	" "	Ngā Hapū o Ngaruahine Iwi Incorporated	
77	B Vertongen	Raukawa Settlement Trust	
78	J Ferguson & D Flavell	Waikato-Tainui Te Kauhanganui Incorporated	
79	J Ferguson	Freshwater Iwi Leaders Group	
80	" "	Ngāti Tama Manawhenua ki te Tau Ihu Trust	
81	" "	Te Rūnanga o Ngāti Whare	
82	" "	The Whanganui River Maori Trust Board	
83	Karen Feint	Ngāti Tūwharetoa	575
84	J Inns	Te Rūnanga o Ngāi Tahu	
85	P Harman	Savage Whānau Trust (Kawerau)	
86	none	J McEnteer Deputy-Chair of Hauraki Collective – Ngāi Tai ki Tamaki, Ngāti Hako, Ngāti Hei, Ngāti Maru, Ngāti Paoa, Ngāti Porou ki Hauraki, Ngāti Pukenga, Ngāti Rahiri Tumutumu, Ngāti Tamatera, Ngāti Tara Tokanui, Ngāti Whanaunga, Te Patukirikiri	
87	L Poutu	Ngāti Rangī collective, Ngāti Rangī Trust. Mark Tumanako Gray, Robert Mathew Gray, Toni Waho and others. The Waiouru to Ohakune Lands Claim	151
88	" "	Ngāti Rangī collective, Ngāti Rangī Trust. Matiu Marino Mareikura, Robert Gray and others. Te Puna Blocks claim	277
89	" "	Ngāti Rangī collective, Ngāti Rangī Trust. Hune Rapana, Colin Richards and Richard Manuete Pirere. The Makotuku & Ruapehu Survey Districts Claim	554
90	" "	Ngāti Rangī collective, Ngāti Rangī Trust. Sarah Reo on behalf of the descendants of Amiria Tamehana, Henare Ateara, Mere te Aowhakahinga. The Murimotu 3B1A No 1 Block claim	569
91	" "	Ngāti Rangī collective, Ngāti Rangī Trust. Toni James Davis Waho of behalf of the descendants of Lena and Edward Waho and the hapū of Ngāti Rangī that descend from Paerangi-ite-Wharetoka. Ngāti Rangī (Paerangi-i-te-Wharetoka) claim.	1250
92	Spencer Webster	Rangī Paku on behalf of the Wairoa Waikaremoana Māori Trust Board. Kahungunu Ki Wairoa claim	621
93	" "	Pukeroa Oruawhata Geothermal Resource claim (335). Pihopa Kingi on behalf of Pukeroa Oruawhata Trust and the Proprietors of Ngāti Whakaue Tribal Lands Incorporated, Pukeroa Oruawhata Trust	317, 335

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No	Counsel	Who	Wai no
94	Hemi Te Nahu	Te Kenehi Teira, Michael Whareaitu, Johnny McGregor, Tracey Stretch, Rangitewhiu Jury, Kararaina Te Ira, Heemi Te Peeti, Hinekura Hemi, Huataki Whareaitu, Vance McGregor, Wayne McGregor, Christine Miritana, Pania Taylor, Heta Taylor, Tania Hippolite, Kim Hippolite, Kim Woon, Toha Eparaima and Puhi-Carlotta Campbell on behalf of themselves and Ngati Hinemata, Nga Uri o Tukumarua, Ngati Ngakohua, Ngati Wairangi, Ngati Ira, Ngati Te Momo, Ngati Takihiku, Ngati Ngarongo, Ngati Te Ringa	1944
95	Paul Beverley/ David Randal	Contact Energy Limited	
96	none	Cherry Nikora on behalf of Te Maru o Ngati Wahiao wish to be joined as members of the Te Arawa Geothermal Cluster	
97	none	Paula Werohia wishes to be joined as a co-claimant to the Te Arawa Geothermal Cluster	
98	none	Walter Pererika wishes to be joined as a co-claimant to the Te Arawa Geothermal Cluster	
99	none	Tony Haupapa wishes to be joined as a co-claimant to the Te Arawa Geothermal Cluster	
100	none	Tarati Kinita wishes to have the Waipupumahana c AhuWhenua Trust joined as co-claimant to the Te Arawa Geothermal Cluster	
101	none	David Te Hurihanganui Whata Wickliffe wishes to have the following geothermally active Maori land blocks joined as co-claimants to the Te Arawa Geothermal Cluster: Paehinahina Mourea, Manupirua, Tautara Matawhaura, Rotoma No 1, Pukaretu, Rotokawa Baths, Haumingi 1A2, Ruahine Kuharua	

APPENDIX III

RECORD OF HEARINGS

THE TRIBUNAL

The Tribunal that heard the National Freshwater and Geothermal Resources claim comprised Chief Judge Wilson Isaac (presiding), Ron Crosby, Tim Castle, Professor Pou Temara, Dr Robyn Anderson, and Dr Grant Phillipson.

THE COUNSEL

Counsel for the claimants were Felix Geiringer and Donna Hall.

Kieran Raftery, Paul Radich, and Jason Gough appeared for the Crown.

Counsel for interested parties were Annette Sykes, Jason Pou and Terena Wara (for Ngati Manu, Wai 354; Ngati Paki and Ngati Hinemanu, Wai 662; Mokau ki Runga, Wai 691 and 788; Ngati Kahu and Ngati Unu, Wai 846; whanau and hapu of Hokianga, Wai 549; and the descendants of Mangakahia, Wai 1467); Robert Enright (for Rudy Taylor and Patu Hohepa, Wai 2344); Kathy Ertel and Linda Thornton (for Ngati Ruapani, Wai 144); and Janet Mason and Priscilla Agius (for Haami Piripi, Chairperson of Te Runanga o Te Rarawa and the Iwi of Te Rarawa, Wai 1699 and Wai 1701; David Potter and Andre Patterson, Wai 996), Paul Harman (for the Savage Whanau Trust); Te Kani Williams, Bernadette Arapere and James Fong (for Ngati Haka Patuheuheu, Wai 726).

THE WITNESSES

Witnesses for the claimants were Taipari Munro and Meryl Carter in relation to Poroti Springs; Nuki Aldridge in relation to Lake Omapere; Toi Maihi in relation to the waters of Hokianga; Anthony Wihapi and Maanu Wihapi in relation to the Kaituna River; David Te Hurihanganui Whata-Wickliffe and Georgina Whata in relation to Te Arawa geothermal resources and the Kaituna River; Aroha Yates-Smith in relation to Pekehaua (Taniwha) and Hamurana Springs; Hira Huata in relation to the Heretaunga aquifer and freshwater resources; Roimata Minhinnick in relation to the Waikato River; Toni Waho in relation

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to the waters within the Ngati Rangi rohe; Tamati Cairns in relation to the Waikato River; Eugene Henare in relation to Lake Horowhenua; David Alexander; Brian Cox; Philip Galloway; Tony Walzl; Steven Michener; and Bradford Morse.

Witnesses for the interested parties were Jordan Haines-Winiata for Ngati Hinemanu and Ngati Paki; Ganesh Nana; Jane Kelsey; and Haami Piripi for Te Rarawa.

Witnesses for the Crown were John Lewis Crawford, Lee Wilson, Tania Ott, Guy Beatson, and Penelope Ridings.

HEARINGS

The claim was heard between 9 and 16 July, 19 and 20 July 2012, at Waiwhetu Marae in Lower Hutt. The claimants presented their evidence and opening submissions from Monday 9 July to Wednesday 11 July. The interested parties presented evidence and opening submissions on Thursday 12 July. The Crown presented opening submissions and evidence on Friday 13 July and Monday 16 July. The parties' made their closing submissions on Thursday 19 July and Friday 20 July. Written reply submissions were received on Wednesday 25 July 2012.

APPENDIX IV

COMPANIES ACT SECTIONS REFERRED TO IN CHAPTER 3

Reprint
as at 1 July 2012

Companies Act 1993

Public Act 1993 No 105
Date of assent 28 September 1993
Commencement see section 1(2)

2 Interpretation

(1) In this Act, unless the context otherwise requires,—

accounting period, in relation to a company, means a year ending on a balance date of the company and, if as a result of the date of the registration of the company or a change of the balance date of the company, the period ending on that date is longer or shorter than a year, that longer or shorter period is an accounting period

address for service in relation to a company, means the company's address for service adopted in accordance with section 192

annual meeting means a meeting required to be held by section 120

annual report—

(a) means a report prepared under section 208; and

(b) does not include a concise annual report

balance date has the meaning set out in section 7 of the Financial Reporting Act 1993

board and **board of directors** have the meanings set out in section 127

charge includes a right or interest in relation to property owned by a company, by virtue of which a creditor of the company is entitled to claim payment in priority to creditors entitled to be paid under section 313; but does not include a charge under a charging order issued by a court in favour of a judgment creditor

class has the meaning set out in section 116

company means—

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- (a) a company registered under Part 2;
- (b) a company reregistered under this Act in accordance with the Companies Reregistration Act 1993

concise annual report, in relation to a company and an accounting period, means a report on the affairs of the company during that period that is prepared in accordance with the requirements prescribed in regulations made under this Act

constitution means a document referred to in section 29

court means the High Court of New Zealand

designated settlement system has the meaning set out in section 156M of the Reserve Bank of New Zealand Act 1989

director has the meaning set out in section 126

distribution, in relation to a distribution by a company to a shareholder, means—

- (a) the direct or indirect transfer of money or property, other than the company's own shares, to or for the benefit of the shareholder; or
- (b) the incurring of a debt to or for the benefit of the shareholder—
in relation to shares held by that shareholder, and whether by means of a purchase of property, the redemption or other acquisition of shares, a distribution of indebtedness, or by some other means

dividend has the meaning set out in section 53

document means a document in any form; and includes—

- (a) any writing on any material; and
- (b) information recorded or stored by means of a tape recorder, computer, or other device; and material subsequently derived from information so recorded or stored; and
- (c) a book, graph, or drawing; and
- (d) a photograph, film, negative, tape, or other device in which 1 or more visual images are embodied so as to be capable (with or without the aid of equipment) of being reproduced

entitled person, in relation to a company, means—

- (a) a shareholder; and
- (b) a person upon whom the constitution confers any of the rights and powers of a shareholder

exempt company has the meaning set out in section 6A of the Financial Reporting Act 1993

existing company means a body corporate registered or deemed to be registered under Part 2 or Part 10 of the Companies Act 1955, or under the Companies Act 1933, the Companies Act 1908, the Companies Act 1903, the Companies Act 1882, or the Joint Stock Companies Act 1860

financial markets participant has the same meaning as in section 4 of the Financial Markets Authority Act 2011

financial statements has the meaning set out in section 8 of the Financial Reporting Act 1993

FMA means the Financial Markets Authority established under Part 2 of the Financial Markets Authority Act 2011

group financial statements has the meaning set out in section 9 of the Financial Reporting Act 1993

group of companies has the meaning set out in section 2 of the Financial Reporting Act 1993

holding company has the meaning set out in section 5

interest group has the meaning set out in section 116

interested, in relation to a director, has the meaning set out in section 139

interests register means the register kept under section 189(1)(c)

licensed insurer has the same meaning as in section 6(1) of the Insurance (Prudential Supervision) Act 2010

major transaction has the meaning set out in section 129(2)

New Zealand register means the register of companies incorporated in New Zealand kept pursuant to section 360(1)(a)

ordinary resolution has the meaning set out in section 105(2)

overseas company means a body corporate that is incorporated outside New Zealand

overseas register means the register of bodies corporate that are incorporated outside New Zealand kept pursuant to section 360(1)(b)

personal representative, in relation to an individual, means the executor, administrator or trustee of the estate of that individual

pre-emptive rights means the rights conferred on shareholders under section 45

prescribed form means a form prescribed by regulations made under this Act that contains, or has attached to it, such information or documents as those regulations may require

property means property of every kind whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise

receiver has the same meaning as in section 2(1) of the Receiverships Act 1993

records means the documents required to be kept by a company under section 189(1)

redeemable has the meaning set out in section 68

registered office has the meaning set out in section 186

Registrar means the Registrar of Companies appointed in accordance with section 357(1)

related company has the meaning set out in subsection (3)

relative, in relation to any person, means—

- (a) any parent, child, brother, or sister of that person; or
- (b) any spouse, civil union partner, or de facto partner of that person; or
- (ba) any parent, child, brother, or sister of a spouse, civil union partner, or de facto partner of that person; or
- (c) a nominee or trustee for any of those persons

relevant interest has the meaning set out in section 146

secured creditor, in relation to a company, means a person entitled to a charge on or over property owned by that company

securities has the same meaning as in the Securities Act 1978

share has the meaning set out in section 35

share register means the share register required to be kept under section 87

shareholder has the meaning set out in section 96

solvency test has the meaning set out in section 4

special meeting means a meeting called in accordance with section 121

special resolution means a resolution approved by a majority of 75% or, if a higher majority is required by the constitution, that higher majority, of the votes of those shareholders entitled to vote and voting on the question

spouse, in relation to a person (A), includes a person with whom A has a de facto relationship (whether that person is of the same or a different sex) and a civil union partner

subsidiary has the meaning set out in section 5

surplus assets means the assets of a company remaining after the payment of creditors' claims and available for distribution in accordance with section 313 prior to its removal from the New Zealand register

working day means a day of the week other than—

- (a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's birthday, Labour Day, and Waitangi Day; and
- (b) a day in the period commencing with 25 December in any year and ending with 2 January in the following year; and
- (c) if 1 January in any year falls on a Friday, the following Monday; and
- (d) if 1 January in any year falls on a Saturday or a Sunday, the following Monday and Tuesday.

(2) Where,—

- (a) in relation to a company or an overseas company, any document is required to be delivered or any thing is required to be done to a District Registrar or an Assistant Registrar in whose office the records relating to the company or overseas company are kept within a period specified by this Act; and

- (b) the last day of that period falls on the day of the anniversary of the province in which that office is situated,—
the document may be delivered or that thing may be done to that District Registrar or Assistant Registrar on the next working day.
- (3) In this Act, a company is related to another company if—
- (a) the other company is its holding company or subsidiary; or
 - (b) more than half of the issued shares of the company, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, is held by the other company and companies related to that other company (whether directly or indirectly, but other than in a fiduciary capacity); or
 - (c) more than half of the issued shares, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, of each of them is held by members of the other (whether directly or indirectly, but other than in a fiduciary capacity); or
 - (d) the businesses of the companies have been so carried on that the separate business of each company, or a substantial part of it, is not readily identifiable; or (e) there is another company to which both companies are related;—
and **related company** has a corresponding meaning.
- (4) For the purposes of subsection (3), a company within the meaning of section 2 of the Companies Act 1955 is related to another company if, were it a company within the meaning of subsection (1) of this section, it would be related to that other company.
- (5) A reference in this Act to an **address** means,—
- (a) in relation to an individual, the full address of the place where that person usually lives;
 - (b) in relation to a body corporate, its registered office or, if it does not have a registered office, its principal place of business.

Section 2(1) **annual report**: inserted, on 18 June 2007, by section 4(3) of the Companies Amendment Act (No 2) 2006 (2006 No 62).

Section 2(1) **concise annual report**: inserted, on 18 June 2007, by section 4(3) of the Companies Amendment Act (No 2) 2006 (2006 No 62).

Section 2(1) **designated settlement system**: inserted, on 24 November 2009, by section 16 of the Reserve Bank of New Zealand Amendment Act 2009 (2009 No 53).

Section 2(1) **exempt company**: substituted, on 22 November 2006, by section 4(1) of the Companies Amendment Act (No 2) 2006 (2006 No 62).

Section 2(1) **financial markets participant**: inserted, on 1 May 2011, by section 82 of the Financial Markets Authority Act 2011 (2011 No 5).

Section 2(1) **FMA**: inserted, on 1 May 2011, by section 82 of the Financial Markets Authority Act 2011 (2011 No 5).

Section 2(1) **licensed insurer**: inserted, on 1 February 2011, by section 241(2) of the Insurance (Prudential Supervision) Act 2010 (2010 No 111).

Section 2(1) **receiver**: inserted, on 1 November 2007, by section 4(1) of the Companies Amendment Act 2006 (2006 No 56).

Section 2(1) **relative** paragraph (a): substituted, on 26 April 2005, by section 7 of the Relationships (Statutory References) Act 2005 (2005 No 3).

Section 2(1) **relative** paragraph (b): substituted, on 26 April 2005, by section 7 of the Relationships (Statutory References) Act 2005 (2005 No 3).

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Section 2(1) **relative** paragraph (ba): inserted, on 26 April 2005, by section 7 of the Relationships (Statutory References) Act 2005 (2005 No 3).

Section 2(1) **spouse**: substituted, on 1 November 2007, by section 4(2) of the Companies Amendment Act 2006 (2006 No 56).

Section 2(3)(b): amended, on 15 April 2004, by section 3 of the Companies Amendment Act (No 2) 2004 (2004 No 24).

15 Separate legal personality

A company is a legal entity in its own right separate from its shareholders and continues in existence until it is removed from the New Zealand register.

27 Effect of Act on company having constitution

If a company has a constitution, the company, the board, each director, and each shareholder of the company have the rights, powers, duties, and obligations set out in this Act except to the extent that they are negated or modified, in accordance with this Act, by the constitution of the company.

31 Effect of constitution

- (1) The constitution of a company has no effect to the extent that it contravenes, or is inconsistent with, this Act.
- (2) Subject to this Act, the constitution of a company is binding as between—
 - (a) the company and each shareholder; and
 - (b) each shareholder—in accordance with its terms.

32 Adoption, alteration, and revocation of constitution

- (1) The shareholders of a company that does not have a constitution may, by special resolution, adopt a constitution for the company.
- (2) Without limiting section 117 (which relates to an alteration of shareholders' rights) and section 174 (which relates to the right of a shareholder to apply to the court for relief in cases of prejudice), but subject to section 57 (which relates to the reduction of shareholders' liability), the shareholders of a company may, by special resolution, alter or revoke the constitution of the company.
- (3) Within 10 working days of the adoption of a constitution by a company, or the alteration or revocation of the constitution of a company, as the case may be, the board must ensure that a notice in the prescribed form of the adoption of the constitution or of the alteration or revocation of the constitution is delivered to the Registrar for registration.
- (4) If the board of a company fails to comply with subsection (3), every director of the company commits an offence and is liable, on conviction, to the penalty set out in section 374(2).

36 Rights and powers attaching to shares

- (1) Subject to subsection (2), a share in a company confers on the holder—
 - (a) the right to 1 vote on a poll at a meeting of the company on any resolution, including any resolution to—
 - (i) appoint or remove a director or auditor:
 - (ii) adopt a constitution:
 - (iii) alter the company's constitution, if it has one:
 - (iv) approve a major transaction:
 - (v) approve an amalgamation of the company under section 221:
 - (vi) put the company into liquidation:
 - (b) the right to an equal share in dividends authorised by the board:
 - (c) the right to an equal share in the distribution of the surplus assets of the company.
- (2) Subject to section 53, the rights specified in subsection (1) may be negated, altered, or added to by the constitution of the company or in accordance with the terms on which the share is issued under section 41(b) or section 42 or section 44 or section 107(2), as the case may be.

Section 36(2): amended, on 3 May 2001, by section 3 of the Companies Act 1993 Amendment Act 2001 (2001 No 18).

Section 36(2): amended, on 30 June 1997, by section 2 of the Companies Act 1993 Amendment Act 1997 (1997 No 27).

Section 36(2): amended, on 1 July 1994, by section 4 of the Companies Act 1993 Amendment Act 1994 (1994 No 6).

37 Types of shares

- (1) Subject to the constitution of the company, different classes of shares may be issued in a company.
- (2) Without limiting subsection (1), shares in a company may—
 - (a) be redeemable within the meaning of section 68; or
 - (b) confer preferential rights to distributions of capital or income; or
 - (c) confer special, limited, or conditional voting rights; or
 - (d) not confer voting rights.

Section 37(2)(a): substituted, on 1 July 1994, by section 5 of the Companies Act 1993 Amendment Act 1994 (1994 No 6)

41 Issue of shares on registration and amalgamation

A company must,—

- (a) forthwith after the registration of the company, issue to any person or persons named in the application for registration as a shareholder or shareholders, the number of shares specified in the application as being the number of shares to be issued to that person or those persons:

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- (b) in the case of an amalgamated company, forthwith after the amalgamation is effective, issue to any person entitled to a share or shares under the amalgamation proposal, the share or shares to which that person is entitled.

Section 41(b): amended, on 1 July 1994, by section 6 of the Companies Act 1993 Amendment Act 1994 (1994 No 6).

42 Issue of other shares

Subject to this Act and the constitution of the company, the board of a company may issue shares at any time, to any person, and in any number it thinks fit.

44 Shareholder approval for issue of shares

- (1) Notwithstanding section 42, if shares cannot be issued by reason of any limitation or restriction in the company's constitution, the board may issue shares if the board obtains the approval for the issue in the same manner as approval is required for an alteration to the constitution that would permit such an issue.
- (2) Subject to the terms of the approval, the shares may be issued at any time, to any person, and in any number the board thinks fit.
- (3) Within 10 working days of approval being given under subsection (1), the board must ensure that notice of that approval in the prescribed form is delivered to the Registrar for registration.
- (4) Nothing in this section affects the need to obtain the approval of an interest group in accordance with section 117 (which relates to the alteration of shareholders' rights) if the issue of shares affects the rights of that interest group.
- (5) A failure to comply with this section does not affect the validity of an issue of shares.
- (6) If the board of a company fails to comply with subsection (3), every director of the company commits an offence and is liable on conviction to the penalty set out in section 374(2).

107 Unanimous assent to certain types of action

- (1) Notwithstanding section 52 but subject to section 108, if all entitled persons have agreed or concur,—
- (a) a dividend may be authorised otherwise than in accordance with section 53:
- (b) a discount scheme may be approved otherwise than in accordance with section 55:
- (c) shares in a company may be acquired otherwise than in accordance with sections 59 to 65:
- (d) shares in a company may be redeemed otherwise than in accordance with sections 69 to 72:
- (e) financial assistance may be given for the purpose of, or in connection with, the purchase of shares otherwise than in accordance with sections 76 to 80:

- (f) any of the matters referred to in section 161(1) may be authorised otherwise than in accordance with that section.
- (2) If all entitled persons have agreed or concur, shares may be issued otherwise than in accordance with section 42 or section 44 or section 45.
- (3) If all entitled persons have agreed to or concur in a company entering into a transaction in which a director is interested, nothing in sections 140 and 141 shall apply in relation to that transaction.
- (4) For the purposes of this section, no agreement or concurrence of the entitled persons is valid or enforceable unless the agreement or concurrence is in writing.
- (5) An agreement or concurrence may be—
- (a) a separate agreement to, or concurrence in, the particular exercise of the power referred to; or
- (b) an agreement to, or concurrence in, the exercise of the power generally or from time to time.
- (6) An entitled person may at any time, by notice in writing to the company, withdraw from any agreement or concurrence referred to in subsection (5)(b) and any such notice shall have effect accordingly.
- (7) Where a power is exercised pursuant to an agreement or concurrence referred to in subsection (5)(b), the board of the company must, within 10 working days of the exercise of the power, send to every entitled person a notice in writing containing details of the exercise of the power.
- (8) If the board of a company fails to comply with subsection (7), every director of the company commits an offence and is liable on conviction to the penalty set out in section 374(1).

Section 107(1)(c): amended, on 3 May 2001, by section 7 of the Companies Act 1993 Amendment Act 2001 (2001 No 18).

117 Alteration of shareholder rights

- (1) A company must not take action that affects the rights attached to shares unless that action has been approved by a special resolution of each interest group.
- (2) For the purposes of subsection (1), the rights attached to a share include—
- (a) the rights, privileges, limitations, and conditions attached to the share by this Act or the constitution, including voting rights and rights to distributions:
- (b) pre-emptive rights arising under section 45:
- (c) the right to have the procedure set out in this section, and any further procedure required by the constitution for the amendment or alteration of rights, observed by the company:
- (d) the right that a procedure required by the constitution for the amendment or alteration of rights not be amended or altered.

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- (3) For the purposes of subsection (1), the issue of further shares ranking equally with, or in priority to, existing shares, whether as to voting rights or distributions, is deemed to be action affecting the rights attached to the existing shares, unless—
- (a) the constitution of the company expressly permits the issue of further shares ranking equally with, or in priority to, those shares; or
 - (b) the issue is made in accordance with the pre-emptive rights of shareholders under section 45 or under the constitution of the company.

Section 117(3)(b): amended, on 1 July 1994, by section 14 of the Companies Act 1993 Amendment Act 1994 (1994 No 6).

118 Shareholder may require company to purchase shares

Where—

- (a) an interest group has, under section 117, approved, by special resolution, the taking of action that affects the rights attached to shares; and
- (b) the company becomes entitled to take the action; and
- (c) a shareholder who was a member of the interest group cast all the votes attached to the shares registered in that shareholder's name and having the same beneficial owner against approving the action; or
- (d) where the resolution approving the taking of the action was passed under section 122, a shareholder who was a member of the interest group did not sign the resolution,—

that shareholder is entitled to require the company to purchase those shares in accordance with section 111.

128 Management of company

- (1) The business and affairs of a company must be managed by, or under the direction or supervision of, the board of the company.
- (2) The board of a company has all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.
- (3) Subsections (1) and (2) are subject to any modifications, exceptions, or limitations contained in this Act or in the company's constitution.

131 Duty of directors to act in good faith and in best interests of company

- (1) Subject to this section, a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be the best interests of the company.
- (2) A director of a company that is a wholly-owned subsidiary may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of

that company's holding company even though it may not be in the best interests of the company.

- (3) A director of a company that is a subsidiary (but not a wholly owned subsidiary) may, when exercising powers or performing duties as a director, if expressly permitted to do so by the constitution of the company and with the prior agreement of the shareholders (other than its holding company), act in a manner which he or she believes is in the best interests of that company's holding company even though it may not be in the best interests of the company.
- (4) A director of a company that is carrying out a joint venture between the shareholders may, when exercising powers or performing duties as a director in connection with the carrying out of the joint venture, if expressly permitted to do so by the constitution of the company, act in a manner which he or she believes is in the best interests of a shareholder or shareholders, even though it may not be in the best interests of the company.

Section 131(4): amended, on 30 June 1997, by section 11 of the Companies Act 1993 Amendment Act 1997 (1997 No 27)

134 Directors to comply with Act and constitution

A director of a company must not act, or agree to the company acting, in a manner that contravenes this Act or the constitution of the company.

170 Actions by shareholders to require directors to act

Notwithstanding section 169, the court may, on the application of a shareholder of a company, if it is satisfied it is just and equitable to do so, make an order requiring a director of the company to take any action that is required to be taken by the directors under the constitution of the company or this Act or the Financial Reporting Act 1993 and, on making the order, the court may grant such other consequential relief as it thinks fit.

174 Prejudiced shareholders

- (1) A shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity or in any other capacity, may apply to the court for an order under this section.
- (2) If, on an application under this section, the court considers that it is just and equitable to do so, it may make such order as it thinks fit including, without limiting the generality of this subsection, an order—
 - (a) requiring the company or any other person to acquire the shareholder's shares; or

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- (b) requiring the company or any other person to pay compensation to a person; or
 - (c) regulating the future conduct of the company's affairs; or
 - (d) altering or adding to the company's constitution; or
 - (e) appointing a receiver of the company; or
 - (f) directing the rectification of the records of the company; or
 - (g) putting the company into liquidation; or
 - (h) setting aside action taken by the company or the board in breach of this Act or the constitution of the company.
- (3) No order may be made against the company or any other person under subsection (2) unless the company or that person is a party to the proceedings in which the application is made.

WAITANGI TRIBUNAL

Wai 2357
Wai 2358

CONCERNING

the Treaty of Waitangi Act 1975

AND

an application for an urgent hearing by Sir Graham Latimer, Tom Murray, Taipari Munro, Kereama Pene, Rangimahuta Easthope, Peter Clarke, Jocelyn Rameka, Eugene Henare, Nuki Aldridge, Ani Martin, Ron Wihongi, Eric Hodge, Walter Rika, Emily Rameka, Maanu Paul, Charles White and Whatarangi Winiata

DECISION ON APPLICATION FOR URGENT HEARING

Introduction

1. On 7 February 2012, two new claims were filed with the Waitangi Tribunal. The first, Wai 2357, concerned the Crown's proposal to sell a minority shareholding in certain power-generating state-owned enterprises ("SOEs") to private investors. The second, Wai 2358, concerned Māori rights under the Treaty in aquifers, springs, streams, lakes, rivers, and geothermal resources.
2. In an application filed on the same date, the claimants requested that the Tribunal accord urgency to the hearing of both claims. The claimants sought that each claim be heard separately, with priority being accorded to the urgent hearing of the Wai 2357 claim.
3. A Crown response to this application was sought by the Chairperson and received, in relation to the Wai 2357 claim, on 23 February 2012, and in relation to the Wai 2358 claim on 24 February 2012. Reply submissions to the Crown position were filed by the claimants on 27 February 2012.
4. A teleconference was convened by the Chairperson on 29 February 2012 to hear the parties on the application for urgency. There were appearances from the counsel for the claimants, the Crown and a number of interested parties who had filed submissions supporting, opposing, or noting their interest in the claims and the application for urgency. At the teleconference, the Chairperson noted that the basis on which the claimants sought urgency had been altered in their 27 February reply submissions, and that they now sought that both claims be heard together, with the Tribunal reporting its findings by the third quarter of 2012 or as soon thereafter as practicable. The Chairperson directed the claimants to revise and refile their pleadings in light of this change, with a response from the Crown and interested parties to follow prior to a

judicial conference that would hear the parties as to whether an urgent hearing should be granted.

5. Before this judicial conference, the Chairperson appointed, under clause 8(2) of the second schedule of the Treaty of Waitangi Act 1975, a panel of Tribunal members to determine the application for urgency. This panel is the Chairperson, Professor Pou Temara, Mr Tim Castle and Dr Grant Phillipson. The panel's function is not to consider whether the claims are well-founded or whether the Crown's conduct is consistent with Treaty principles, but solely to determine whether an urgent hearing of the claims would be justified in all the relevant circumstances.
6. The judicial conference was convened on 13 March 2012. Counsel for the claimants, Crown and interested parties addressed the Tribunal on the application for urgency, including the key criteria of whether significant and irreversible prejudice was likely to be caused to the claimants by current or pending Crown actions; whether there were any alternative remedies available to the claimants; and whether the claimants were ready to proceed urgently to a hearing.
7. For the reasons which follow, the application for an urgent hearing of the Wai 2357 and Wai 2358 claims is granted.

Background

8. In February 2012, the Crown embarked on consultation with Māori over its proposal to remove Mighty River Power, Genesis Power, Meridian Energy, and Solid Energy from the ambit of the State-Owned Enterprises Act 1986 ("SOE Act"). The Crown's plan was to adopt the 'mixed ownership model', already in place for Air New Zealand, by selling up to 49 per cent of its shares in these power companies to private investors.
9. In its consultation document of February 2012, the Government confirmed its intention to retain a controlling interest in all four companies, retaining at least 51 per cent, and otherwise offering shares in those companies for sale over the next three to five years. No private investor would be allowed to obtain a share greater than ten per cent. The sale process would begin with Mighty River Power in 2012. Māori were advised that they would have 'the same investment opportunities as all other New Zealanders'; that is, Māori individuals or collectives could buy shares, using Treaty settlement compensation to do so if they wished. Māori who had not yet settled could either use the cash component of their settlement redress to buy shares in the future, or have the Crown buy shares for them on the stock exchange at the time of settlement, again using the cash component of their settlement. But the issues of Māori participation as investors, and the relationship between the floating of shares and compensation for Treaty claims, were specified as matters outside the scope of the consultation. Māori were also advised that interests in fresh water or geothermal resources were similarly excluded from the consultation.¹
10. What, then, was the focus of this consultation with Māori? What the Crown said is this: it was consulting Māori to ensure that 'it fully understands Māori views on how Māori rights and interests under the Treaty of Waitangi are affected by the proposals'.² Specifically, the removal of the four SOEs from the SOE Act could potentially end the protections provided Māori interests under sections 9 and 27 of that Act. The Government advised Māori that the protections of sections 27A-D, enabling the

¹ New Zealand Government, 'Extension of the Mixed Ownership Model: a proposal to change legislation in relation to: Genesis Power Ltd, Meridian Energy Ltd, Mighty River Power Ltd, Solid Energy New Zealand Ltd: *Consultation with Maori*', February 2012, attached as annexure TP1 to the affidavit of Tata Parata, Wai 2357 doc A1

² *Ibid*, p 6

Tribunal to order the resumption of land that had been transferred to an SOE, would be retained. In terms of section 9, which provided that the Crown could not act in a manner inconsistent with the principles of the Treaty, the Government proposed three options for consultation: retaining section 9 (applied to the Crown shareholding); including a new provision specifying the Crown's Treaty obligations; or having 'no general Treaty clause'.³

The Claims

Wai 2357 – The Sale of Power Generating State-Owned Enterprises Claim

11. After discussion of the Crown's proposals among Māori at Waitangi on Waitangi Day, Sir Graham Latimer filed two claims with the Tribunal on 7 February 2012, seeking an urgent hearing of these claims. The first claim, registered as Wai 2357, concerned the Crown's proposal to transfer up to 49 per cent of shares in the four SOEs to private investors. This claim was made by Sir Graham Latimer on behalf of the New Zealand Māori Council (for all Māori), Tom Kahiti Murray on behalf of the Tai Tokerau District Māori Council, and ten sets of claimants who 'have proprietary interests in significant fresh water and/or geothermal resources':

- a) Taipari Monro, chairperson of Whatitiri Māori Reservation (Poroti Springs), Northland, in the rohe of Ngāpuhi Nui Tonu;
- b) Kereama Pene and Rangimahuta Easthope, as 'owners in Lake Rotokawau', in the rohe of Ngāti Rangiteaorere o Te Arawa;
- c) Peter Clarke and Jocelyn Rameka, 'as owners in Lake Rongoaio', in the rohe of Ngā Hapū o Tauhara;
- d) Eugene Henare, as 'an owner in Lake Horowhenua', in the rohe of Muaupoko;
- e) Nuki Aldridge, Ani Martin, and Ron Wihongi, as Kaumātua of Ngāpuhi and as owners in Lake Omapere, Northland;
- f) Eric Hodge, as 'an owner in Tikitere Geothermal Field', in the rohe of Ngāti Rangiteaorere;
- g) Walter Rika, 'as an owner in Tahorakuri Māori Land Block situate at Ohaaki, Reporoa';
- h) Peter Clarke and Emily Rameka, as 'owners in Tauhara Mountain Reserve (4A2A), Taupo';
- i) Maanu Cletus Paul and Charles Muriwai White, as 'members of Ngai Moewhare, a marae located in the rohe of Ngāti Manawa and a claimant in Te Ika Whenua inquiry'; and
- j) Whatarangi Winiata, for all hapū of Ngāti Raukawa who 'have an interest in the Horowhenua/Manawatu water systems'.⁴

12. In brief, the Wai 2357 claimants alleged that their outstanding Treaty claims in respect of freshwater and geothermal resources could not be redressed solely by the return of land under the section 27B protections of the SOE Act. Nonetheless, any such return of land will be much less likely once the Crown has ceased to be sole owner of the power companies. Also, the Crown's ability to provide practical redress for their Treaty claims, in the form of shares in the power companies, would likely be reduced if privatisation went ahead without section 9 protections. As a result, 'the pool of assets and range of potential remedies' for well-founded claims would be reduced. The claimants sought recommendations that section 9 protections 'not be removed', and that the sale of

³ Ibid

⁴ Statement of Claim, Wai 2357 Paper 1.1.1

shares should not proceed until their claims had been resolved, or an acceptable compromise had been negotiated with the New Zealand Māori Council.⁵

Wai 2358 – The National Fresh Water and Geothermal Resources Claim

13. The second claim, filed by the same claimants and registered as Wai 2358, was labelled the 'National Water and Geothermal Claim'. In brief, the claimants alleged that their customary rights and tino rangatiratanga over aquifers, springs, streams, lakes, rivers, and geothermal resources had been guaranteed by the Treaty of Waitangi in 1840, but that these rights have been systematically violated or denied by the Crown through a number of historical policies or actions, relying either on the common law or statute law. Although such rights (and Treaty breaches) have been identified in previous Waitangi Tribunal inquiries, the Crown's settlement policy refuses recognition of those rights, and therefore redress or compensation in relation to them. As a result, the Crown continues to deny Treaty rights and tino rangatiratanga in respect of freshwater and geothermal resources, which has three prejudicial effects:
 - a) Māori are denied the right to profit from 'development uses' of water and geothermal energy;
 - b) Māori interests are prejudiced by their lack of control, so that they cannot prevent harm and degradation of significant cultural treasures (taonga); and
 - c) Māori who have settled or will settle Treaty claims are denied compensation for prejudicial breaches of their Treaty rights in respect of water and geothermal resources.⁶
14. As remedies, the claimants seek (among other things) binding recommendations for the return of memorialised section 27B properties, and/or a recommendation that 'the claimants be granted a substantial shareholding interest in the Crown's Power Generating State Owned Enterprises'.⁷
15. When the claims were registered, the Tribunal's Chairperson noted that they had been filed after the 1 September 2008 historical claims deadline, and that the Tribunal could therefore only inquire into allegations 'to the extent that they relate to the period after 21 September 1992'.⁸

Application for urgency

16. The claimants initially sought an urgent, but separate, hearing for each of the claims. Counsel submitted that the SOE claim (Wai 2357) should be 'progressed immediately', and that the National Water and Geothermal claim (Wai 2358), 'potentially together with the outstanding historical water claims of participating claimants', should be progressed 'on a secondary but still urgent timetable'.⁹
17. Their grounds for this submission was that the SOE claim was in effect a subset or essential component of the national fresh water and geothermal claim; the Crown's proposed privatisation of power company shares offered a unique and pressing opportunity to provide a remedy for alleged breaches of Māori proprietary and Treaty rights in water and geothermal resources. In its Treaty settlement policies, the Crown 'refuses to recognise any proprietary interests or commercial rights or rights of user to Māori'.¹⁰ This includes 'a refusal to compensate or to provide for future rights in respect

⁵ Ibid

⁶ Statement of Claim, Wai 2358 paper 1.1.1

⁷ Ibid, para 25.5

⁸ Memorandum-directions of the Chairperson, 9 February 2012, Wai 2357 paper 2.5.1

⁹ Counsel for claimants, memorandum accompanying application for urgency, 7 February 2012, Wai 2357 paper 3.1.2, para 2

¹⁰ Ibid, para 11

of hydroelectricity (and implicitly geothermal) power generation. It is exactly these rights which reflect forward-looking Māori rangatiratanga aspirations for these resources.¹¹ That being the case – and given the possibility that the law may never recognise Māori proprietary rights in water or geothermal resources – the claimants' view is that shares in the power companies are a 'reasonable proxy for the commercial and economic aspect of that rangatiratanga/ownership which they believe should be returned to them'.¹²

18. In essence, the case for urgency at this point was that there is a very short time frame in which this 'reasonable proxy' might be achieved (between now and the first sale of shares), and that without Tribunal intervention, it was unlikely that the Crown would provide the redress sought. Counsel for the applicants submitted: 'Once 49% is sold, it is unrealistic to think that the Crown would buy back shares to vest in Māori. Having guaranteed the public would retain a 51% share, the government would also be unable to provide any of those shares to Māori by way of redress.'¹³ Such redress would be even less likely, in the claimants' view, if the law no longer required the Crown to act in accordance with section 9 of the SOE Act. Māori would no longer be able to seek the intervention and protection of the courts. Also, the sale of shares to private investors would create a new class of private interests opposed to resumption orders under section 27B, making it significantly less likely that these could provide any real or effective remedy for well-founded Māori claims. As a result of all these concerns, the claimants believed that the Crown should not start selling shares until their claims had been resolved or a satisfactory compromise had been negotiated.
19. In respect of the Tribunal's criteria for granting urgency, the claimants argued that the original *Lands* case in the Court of Appeal¹⁴ hinged on the prejudice that would arise from the Crown divesting itself of:

most of the finite resources potentially available for the settlement of Maori grievances. This remains the case for the power generating SOEs in respect of the potential return of commercial and economic interests in (or derived from) water and geothermal resources. The relevant SOEs effectively own or possess the assets and large-scale commercial rights to use water and geothermal energy for power generation. The return of those rights in some practical manner is the redress ultimately sought by claimants in their water and geothermal claims ... The government itself has estimated that the partial sale of these power generating SOEs will deliver \$5-7 billion. Those sales are irreversible, and the assets held by those SOEs are irreplaceable. Those figures also helped to identify the massive potential size of prejudice to Maori, if they miss out on appropriate redress related to water and geothermal resources.¹⁵

Crown response

20. In memoranda filed on 23 and 24 February 2012, the Crown notified the Tribunal that it opposed an urgent hearing in relation to both claims. Although the applications for urgency were the subject of a single submission by the claimants, the Crown responded to them separately.

Wai 2357

21. In its submission on the Wai 2357 claim, the Crown argued that the claimants had not demonstrated 'imminent significant and irreversible prejudice without alternative

¹¹ Ibid, para 11

¹² Ibid, footnote 5

¹³ Ibid, para 16.4

¹⁴ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641

¹⁵ Counsel for claimants, memorandum accompanying application for urgency, 7 February 2012, Wai 2357 paper 3.1.2, paras 23-26

avenues of redress'.¹⁶ First, the Crown noted that consultation with Māori had just concluded on 22 February. As a result of that consultation, the Crown confirmed that, as the majority shareholder in the four power companies, it would continue to carry out its Treaty obligations. A clause which 'reflects the concepts of section 9' would be included in the upcoming Bill (which would not be introduced to the House before 5 March).¹⁷ This meant that 'there is no prejudice and, with respect, no need for Tribunal intervention'.¹⁸

22. The Bill itself would simply enable the named SOEs to be removed from the operation of the SOE Act, which prohibits sale of shares. The approach to how the minority shareholding would be disposed of 'is further down the track'.¹⁹ Although there is a high-level political commitment to retaining at least 51 per cent, the Government has not yet decided what percentage will actually be alienated.
23. Secondly, the Crown submitted that the 'claimed rights' of Māori to water and geothermal resources would not be compromised by the privatisation of power company shares. A change in shareholding 'does not prejudice aboriginal/customary rights claims to water'.²⁰ Māori property rights in water 'have not been established', and there is guidance from the Waitangi Tribunal (in its Wai 262 report) that property rights may not be 'the best way of conceiving the Crown–Māori resource relationship'.²¹ Any investigation of Māori rights in water would be detailed, time-consuming, and specific to hapū, iwi, and (many) particular places. These could not be matters for an urgent, short inquiry.
24. In any case, the Crown's view was that Māori rights are simply not affected. Counsel relied on the Court of Appeal's decision in *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20, which found that Māori Treaty rights did not include a right to generate electricity by the use of water power, and therefore that there could be no legal objection to the transfer of dams to electricity companies. The Court did not consider ownership of generating assets as suitable redress for Māori grievances. The Crown also referred to *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 512, to the effect that negotiations were preferable to injunctions and litigation. Since the Crown had consulted Māori over the policy, was negotiating river settlements with appropriate iwi, and was engaging with Māori in the Land and Water Forum over fresh water issues, there was no need for the Wai 2357 claim to be heard and to interrupt those good and necessary processes.
25. Finally, the Crown rejected the claimants' argument that the privatisation of shares would have a 'chilling effect' on the Tribunal's ability to make section 27B resumption orders. The whole point of such orders was that they enabled the resumption of land that has been transferred out of Crown ownership. But, in any case, the Tribunal would still have to consider the desirability of resumption orders for core operating sites such as power stations, no matter who owns the power companies that rely on them.

Wai 2358

26. In its submission on the Wai 2358 claim, the Crown again argued that the claimants did not meet the Tribunal's criteria for urgency. In summary, it submitted that:

¹⁶ Crown counsel, memorandum in response to application for urgent hearing, 23 February 2012, Wai 2357 paper 3.1.3, p 1

¹⁷ *Ibid.* See also Hon Bill English and the Hon Nick Smith to Chief Judge Isaac, 21 February 2012, attached to Wai 2357 paper 3.1.3

¹⁸ Crown counsel, memorandum in response to application for urgent hearing, Wai 2357 paper 3.1.3, p 4

¹⁹ *Ibid.*, p 3

²⁰ *Ibid.*, p 5

²¹ *Ibid.*, p 5

- a) The creation of mixed ownership model companies, with sale of shares to private interests, does not prejudice 'aboriginal/customary rights or Treaty claims to water or geothermal resources'.²² The ability of Māori to 'prosecute claims to ownership interests in those resources' will remain intact, and is an alternative remedy for the claimants.²³ If Māori rights are proven to exist in the future, then all users of water will be affected. It makes no difference whether the users are private, the Crown, or a mixed ownership company. (The Crown did not specify how or by what process Māori could 'prosecute' their claims.)
- b) Current and pending Crown policies are concerned with the management and use of water, not its ownership. These issues are vital to Māori. The Crown is committed to a range of processes for engaging with them, including the Land and Water Forum and high-level discussions with the Iwi Leaders Group. This provides an alternative – and, indeed, a preferable – remedy for Māori on fresh water issues. An urgent Tribunal hearing would focus attention on grievances and would interrupt the present dialogue between Māori and the Crown. The Crown accepts that Māori are 'dissatisfied with the current level of recognition of their rights and interests in water and geothermal resources, and the roles practically available to them in resource management processes'.²⁴ Current dialogue is aimed at developing 'means by which Māori rangatiratanga and control in relation to the[se] resources can be incorporated into a holistic framework that benefits the nation'.²⁵ If, in the future, Māori ownership or some other form of Māori property rights were found to exist, then the policy and legal framework for the management and use of fresh water could be adapted to accommodate them. Crown Counsel submitted: 'The Government is open to this. While ownership of water has not been considered to date, the Government is committed to further engagement with Māori and their rights and interests in water'.²⁶
- c) The claimants are not and cannot be ready to proceed, because a national water and geothermal inquiry would require input from 'all individual Māori groups who claim a relationship with those resources'.²⁷ A 'representative' claim would not be appropriate, rendering it impossible to carry out an urgent inquiry on the subject matter raised by the Wai 2358 claim.

Interested parties

27. In the period between the filing of the claim and the 29 February 2012 teleconference, several Māori groups advised the Tribunal of their wish to be included in these proceedings as interested parties. These groups (and those who registered their interest after the first judicial conference) are listed in an appendix to this decision. Most of the interested parties supported the application for urgency, although they did not make any additional arguments at this point in the inquiry.
28. Some interested Māori parties, however, opposed the application for urgency. These parties were led by the Freshwater Iwi Leaders Group, consisting of Sir Tumu Te Heuheu (Ngāti Tuwharetoa), Tukuroirangi Morgan (Waikato-Tainui), Mark Solomon (Ngāi Tahu), Toby Curtis (Te Arawa), and Brendan Puketapu (Whanganui). The Iwi Leaders Group argued that the issue of rights and interests of Māori in fresh water should be 'progressed through direct dialogue with the Crown at the highest leadership

²² Crown counsel, memorandum, 24 February 2012, Wai 2357 paper 3.1.9, p 9

²³ Ibid, p 2

²⁴ Ibid, p 8

²⁵ Ibid

²⁶ Ibid, p 7

²⁷ Ibid, p 11

level, not litigation, at this time'.²⁸ In their view, their active engagement with the Crown over freshwater governance, allocation, and associated issues was ongoing and would contribute to 'an equitable and enduring freshwater management regime'.²⁹ The New Zealand Māori Council's claim was therefore 'premature', and not made on behalf of all Māori.

The claimants' reply

29. The claimants responded to the Crown's arguments, and those of the Freshwater Iwi Leaders Group, on 27 February 2012.³⁰ In essence, the claimants' view was that the Crown had long known of prior Māori rights in water resources, not least because of various Tribunal Reports on the matter. Yet the Crown still insisted on proceeding to sell shares in the power companies without first recognising and providing for the Māori interests. In particular, the claimants argued:

- Prior rights must be determined before new property interests are created
- Compensation for irreversible loss must be settled before new property interests are created
- The denial of a hearing to prove a right is a denial of the right should it in fact exist. (Government has known of the prior Māori claims since the early 1980s – [the Tribunal's] Manukau report).
- Section 9 requires the Government act consistently with Treaty principles. The sale of shares without a prior inquiry of pre-existing Māori interests or issues of outstanding compensation is contrary to Treaty principles.³¹

30. If the Crown proceeded to sell shares without first identifying and satisfying the Māori interest, then the claimants argued that they would suffer significant and irreversible prejudice. First, private shareholders would be created with a vested interest in 'opposing Māori water claims', and, secondly, assets for the redress of Māori claims would be irreversibly lost.³² The claimants did not accept the Crown's assertion that percentages for alienation had not yet been decided, pointing to what they considered clear statements in the media that the Government planned to sell the maximum number of shares, not retaining any capacity for redress to Māori 'by way of transfer of share ownership'.³³

31. In making these arguments, the claimants stressed that previous Tribunal Reports would assist an urgent inquiry but would not remove the necessity for holding it. In particular, Tribunal 'precedent' has not yet included a 'full consideration of springs, aquifers, streams, lakes, swamps and other water bodies, and has not proceeded on a coherent national basis'.³⁴ Principles established in the Tribunal's river reports are likely to 'hold good' for these other waterways, but that is yet to be determined. A national inquiry is necessary to 'provide further insight' as to how Māori rights should be incorporated in modern regimes, and 'why and how they should result in financial compensation for their breach'.³⁵ The Crown's present policy, both in terms of Treaty settlements and the sale of these SOE shares, does not provide for compensation to Māori. The claimants' hope was that a prompt national inquiry into Wai 2358, along with water and geothermal aspects of the historical claims of its supporting claimants, would change this situation and allow the Crown's future discussions with Māori (including with the Iwi Leaders Group) to proceed on a properly informed basis. While acknowledging that the Iwi Leaders Group speaks for the tribes it represents, the

²⁸ Counsel for the Freshwater Iwi Leaders Group, memorandum, 24 February 2012, Wai 2357 paper 3.1.11, p 3

²⁹ Ibid, p 2

³⁰ Counsel for claimants, submissions in way of reply, Wai 2357 paper 3.1.17

³¹ Ibid, p 2

³² Ibid

³³ Ibid, p 15

³⁴ Ibid, p 5

³⁵ Ibid

claimants' fundamental view was that matters were happening in the wrong order, no matter who was participating in discussions. Rights-definition must come first, and management or governance arrangements second. The Crown's ability as a Treaty partner to redress breaches must also come after rights-definition but before privatisation. Otherwise, the claimants would suffer irreversible prejudice.

32. In addition, the claimants suggested that it was not impractical to conduct a national water and geothermal inquiry on an urgent footing. Most claimants have already prepared relevant evidence for a Tribunal inquiry or for settlement negotiations, and some already have Tribunal Reports upholding well-founded claims. All claimants 'have continuing traditional knowledge of their taonga'.³⁶ It was 'highly unlikely', therefore, that additional research would be required: 'The collection and focusing of this material is the core job to hand'.³⁷ The claimants asserted that they could be ready to proceed with four weeks of preparation, and predicted a similar amount of preparation time for the Crown, thus enabling a rapid urgent hearing. At the same time, the claimants rejected the Crown's argument that they could prove their ownership claims at some time in the future. In their view, litigation in the courts would be time-consuming, expensive, and extremely uncertain as to its outcomes, whereas an urgent Tribunal inquiry could establish the full range of their rights as protected by the Treaty, even (or especially) where those rights have been reduced or compromised. Thus, future rights-definition in the courts was not an appropriate alternative remedy.
33. In respect of section 9 and the upcoming Bill, however, the claimants conceded the Crown's intention to insert a clause reflecting the principles of section 9, and acknowledged that the Bill was simply an enabling piece of legislation which they were not seeking to delay or prevent. Nonetheless, their view was that the retention of section 9 'goes nowhere to addressing the issues'.³⁸ This was because the 'ongoing issue in the SOE inquiry is not about section 9, but about the decision of the Treaty partner to sell further significant interests in national freshwater resources prior to having full knowledge of Māori interests, and prior to the provision of redress to Māori'.³⁹

Teleconference of 29 February 2012

34. After receipt of these submissions, the Chairperson held a judicial conference by way of teleconference on 29 February 2012. The claimants were represented by Ms Donna Hall and Mr Martin Taylor. The Crown was represented by Ms Virginia Hardy and Mr Jason Gough. Interested parties were also present and represented by counsel.⁴⁰
35. Mr Taylor and Ms Hardy indicated that they were ready to proceed with a hearing of the urgency applications. The Chairperson, however, noted that matters had changed significantly as a result of the claimants' reply submissions (discussed above). The focus of the urgency applications had shifted from the introduction of legislation to enable the mixed ownership model for the power-generating SOEs. In particular, the claimants seemed to accept that the Crown's promise to include a clause which

³⁶ Ibid, p 12

³⁷ Ibid

³⁸ Ibid, p 3

³⁹ Ibid, p 8

⁴⁰ Ms Deborah Edmunds for Te Atiawa Iwi Authority and Ngā Hapū o Ngaruahine; Ms Laura Carter for the Raukawa Settlement Trust; Mr Jason Pou for Wai 549, 846 & 1526; Ms Terena Wara for Wai 2355; Ms Annette Sykes for Wai 354, 647, 662, 1835 & 1868; Ms Justine Inns for Te Rūnanga o Ngāi Tahu; Mr Alex Hope for Roimata Minhinnick of Ngāti Te Ata; Mr Tavake Afeaki for Wai 129, 619, 774, 964, 985 & 1028; Ms Brooke Loader for Wai 824 & 1531; Ms Kathy Ertel and Ms Robyn Zwaan for Wai 144, 945, 795, 1013, 1033, 1666, 2149, 2010, 2340, 1272, 1629, 237, 1787 & 1092; Ms Janet Mason for Wai 996; Mr Stephen Potter for Wai 1826, 1897, 1534, 1589, 2345 & 2354; Mr Jamie Ferguson & Ms Donna Flavell; Mr Roger Bowden; Ms Moana Sinclair; Mr Toni Waho claimant for Wai 151.

'reflects the concepts of section 9'⁴¹ had made that issue immaterial to the urgency applications. Thus, it was no longer necessary to decide the applications before 5 March. Since the time frame had shifted, the Chairperson's view was that the present teleconference was not the best mode of hearing the applications, and the matter should be moved to a judicial conference in Wellington on 13 March. In the meantime, the claimants would need to file revised pleadings, to which the Crown and interested parties could respond.

36. The Crown and claimants agreed that the proposed Bill was no longer an issue and that the timetable could be adjusted accordingly.
37. Ms Annette Sykes, counsel for interested parties (Wai 354, 647, 662, 1835, and 1868), submitted that the exact wording of the replacement for section 9 was still a live issue for her clients. Given that the wording of the replacement clause was not known, and given the potential prejudice that any erosion of section 9 protection might have on Māori, Ms Sykes suggested that it would be appropriate for the Crown to refer the Bill to the Tribunal under section 8 of the Treaty of Waitangi Act 1975.
38. The Chairperson accepted Ms Sykes' submission and directed Ms Hardy to convey this proposal to the appropriate Ministers, and to update the Tribunal on this matter by 2 March.⁴²

The Crown's decision not to refer the Bill to the Tribunal

39. Section 8 of the Treaty of Waitangi Act provides that the Crown may refer proposed legislation to the Tribunal for a report on whether its provisions 'or any of them' are contrary to the principles of the Treaty of Waitangi. For Bills, the necessary procedure is for a Bill to have been introduced to the House and then referred to the Tribunal by a resolution of the House. To date, the Tribunal has not been asked to assess a Bill or any of the provisions of a Bill under this section of the Act.
40. On 2 March, Ms Hardy advised that the Minister responsible for the Mixed Ownership Model Bill had decided not to seek a resolution of the House, referring the Bill to the Tribunal.⁴³
41. The Mixed Ownership Model Bill received its first reading on 8 March and is currently before the House. As a result, the Waitangi Tribunal has no jurisdiction to consider the Bill or its contents. We discuss the significance of this for the urgency applications below.

Judicial Conference of 13 March 2012

42. On 1 March 2012, the Chairperson confirmed his oral directions in writing, setting a timetable for hearing the urgent applications:
 - a) The claimants were to file revised pleadings by 2 March and any additional submissions by 5 March;
 - b) The Crown was to file any submissions in response by 7 March;
 - c) Interested parties were to file any submissions and applications to be heard by 7 March; and
 - d) The application for urgency would be heard at a judicial conference in Wellington on 13 March.

⁴¹ Crown counsel, memorandum in response to application for urgent hearing, Wai 2357 paper 3.1.3, p 1

⁴² Memorandum-directions of the Chairperson, 1 March 2012, Wai 2357 paper 2.5.4

⁴³ Crown counsel, memorandum, 2 March 2012, Wai 2357 paper 3.1.23

43. These dates were subsequently extended for those interested parties who sought additional time to make submissions.
44. On 7 March, the Chairperson appointed the panel to hear the urgency application. On 12 March, he issued memorandum-directions setting a timetable for the judicial conference, so that the submissions of all parties could be considered in a fair and efficient manner. As a means of disciplining the proceedings, the Chairperson asked all third parties in support of the application to select one counsel to present submissions on their behalf, and to confine their submissions to any new or additional arguments over and above those made by the applicants. Also, the Chairperson noted that the affidavits received by the Tribunal addressed evidential matters that should be taken as read. The essential arguments as to urgency would be addressed by submissions.
45. On 13 March, the Tribunal held its judicial conference to hear the application for urgency. Counsel summarised their written submissions and made additional oral submissions. Ms Donna Hall read out an opening statement from Sir Graham Latimer for the New Zealand Māori Council.⁴⁴ Sir Graham could not be present but was represented at the conference by Mr Neville Baker and Sir Edward Taihakurei Durie. We then heard submissions as follows:
 - a) Ms Donna Hall and Mr Martin Taylor presented submissions for the claimants
 - b) Ms Annette Sykes presented submissions for the interested parties in support of the application, supplemented by additional submissions from Ms Kathy Ertel and Mr Darrell Naden
 - c) Ms Virginia Hardy, appearing with Mr Jason Gough, presented submissions for the Crown
 - d) Sir Edward Taihakurei Durie and Professor Whatarangi Winiata presented reply submissions from the claimants
46. We now summarise the parties' arguments, including their oral submissions at the conference, before proceeding to assess their arguments against the Waitangi Tribunal's criteria for granting an urgent hearing.

The claimants' revised case for urgency

47. On 2 March, the claimants filed revised statements of claim, accompanied by a single application for the urgent hearing of both claims. In addition to relying on their previous submissions (summarised above), the claimants filed additional submissions on 5 March. As noted, we also heard oral submissions at the conference on 13 March.
48. In essence, the claimants' case for urgency was altered in three material respects.
49. First, as signalled in their reply submissions of 27 February, the claimants no longer relied on the section 9 protection as having any relevance to the proceedings. They accepted that the Bill was simply an enabling measure that would go ahead as planned. In their view, their claim concerned what would happen after the Bill was enacted. They urged the Tribunal's 1986 interim report on the SOE Bill as a relevant precedent in this respect. The grounds for urgency rested in the Crown's stated intention to begin selling shares in Mighty River Power in the third quarter (July to September) of 2012, dependent on a favourable market at that time. The other SOEs were on a slower track (to have up to 49 per cent of their shareholding privatised at some time over the next three to five years), but claimants argued that the principles, issues, and Crown processes involved would be the same. The claimants sought an

⁴⁴ 'A message from Sir Graham Latimer, Chairman, New Zealand Maori Council concerning the Treaty clause in the State-owned Enterprises Act', 13 March 2012, Wai 2357 paper 3.1.53

interim recommendation from the Tribunal that the Crown delay its first sale of shares until their claims had been heard and reported on by the Tribunal.

50. Secondly, the claimants placed greater emphasis on the Crown's present engagement with Māori about the management and use of fresh water, especially the Fresh Start for Fresh Water initiative. In their view, the Crown's SOE policy was only part of an across-the-board revision in 2012 of the platform for water management and, they argued, effectively for water ownership. The Fresh Start for Fresh Water programme would result in the creation of new private rights in water, including tradable use rights. When added to the creation of new private interests by way of privatising shares in the power companies, a formidable array of private rights in water would be created in 2012, adding a further and powerful layer of opposition to Māori rights, and reducing the prospect of those rights ever receiving proper recognition or proper compensation for past breaches. While the Crown has noted that ownership is not on the table for discussion, either with the Iwi Leaders Group or any other Māori groups involved in discussions for freshwater reform, the reality is that all rights in water will be affected by the outcomes, including any surviving Māori proprietary and Treaty rights. As with the privatisation of shares in the SOE, the claimants' position is that the freshwater management and allocation reforms should not proceed until the prior Māori rights have been identified and a process created for their recognition (no doubt involving compromises on all sides). Only then can a systematic remedy be provided for long-term, sustained Crown breaches of Māori Treaty rights in water and geothermal resources. In the claimants' view, the Crown will be in breach of the Treaty principle of redress if it does not move in time to enable their just rights to be addressed.
51. The claimants acknowledged that the Crown's present discussions with iwi leaders may be appropriate for the groups represented by those leaders, but the claimants seek a benefit for all Māori, and consider that the risk to them is too great if discussions take place without a prior definition of Māori rights. Thus, Crown engagement with iwi leaders and others over matters of freshwater management is not an alternative remedy for the claimants; indeed, it is a source of potential prejudice. As a result, the claimants sought the 'deferral of the Fresh Start for Fresh Water and Iwi Leaders Forum discussion programmes until all Māori claims have been determined and all Māori are able to participate equally in redress discussions'.⁴⁵
52. Thirdly, the claimants sought a Tribunal inquiry and report by 1 June 2012, revising their earlier estimate of October by some months. In oral submissions, Mr Taylor suggested that an urgent inquiry of this type might take between four and six months. As a result, the claimants spent considerable time arguing as to how this might be feasible in respect of a national, comprehensive inquiry into all water and geothermal resources. The claimants proposed that an urgent inquiry should focus on two matters:
- a) representative case examples that allow definition of Māori customary, proprietary, and other rights protected or guaranteed by the Treaty of Waitangi, that can be used to set a national framework for rights definition; and
 - b) the relief sought by the claimants, that is a 'framework by which those interests can be provided for in water use planning and compensated for where they have been compromised or are used by third parties'.⁴⁶

On this basis, the Tribunal would conduct a rapid inquiry focused on the following issue questions:

- Do the case examples indicate a proprietary interest in water [or geothermal resources]?
- Do the case examples illustrate or evidence the breach of such interests?

⁴⁵ First Amended Statement of Claim, 2 March 2012, Wai 2357 paper 1.1.1(a), para 12.5

⁴⁶ Counsel for claimants, memorandum enclosing inquiry management plan, 12 March 2012, Wai 2357 paper 3.1.50, para 4(a)

- Do they inform the nature of the interests and the framework by which such interests might today be provided for or compensated?⁴⁷

Particular hapū or iwi claims would not be addressed, other than as case examples, although 'particular solutions for particular cases', including the compensation appropriate for particular cases, 'constitute a second step' for the inquiry which 'may or may not need to proceed under urgency'.⁴⁸

53. In the claimants' submission, some case examples such as major rivers have already been completed, referring to the Tribunal's reports on the Mohaka River claim, the Whanganui River claim, and the Ika Whenua Rivers claim. In most or all other categories, case examples have been researched for the Tribunal's district inquiries, and the evidence of kaumātua would also be readily available. Thus, in the claimants' view, no additional research would be required and the claimants are ready to proceed. A brief period of preparation would still be necessary, including the use of a group of experts to categorise rights in the various water resources, identify the methods by which those rights may have been breached, and design a framework for how they may be provided for today. Following the production of this evidence, the claimants suggested ways in which the hearings could be tightly managed so as to proceed expeditiously and efficiently. In their view, it would be possible for the Tribunal to report in June (or soon after), but – as noted – they seek an interim recommendation for the Crown to delay any sale of shares until the Tribunal has reported.
54. Otherwise, the claimants' position was as set out in earlier submissions (summarised above).

Additional arguments in support of urgency (interested parties)

55. Many interested Māori parties supported the application for urgency, and made submissions in agreement with the case outlined by the claimants. The following arguments were put to us:
- a) Binding international agreements may prevent the New Zealand Government from favouring domestic investors over foreign investors once the sale of shares begins. Thus, if the Crown does not provide in some way for the Māori interest in the immediate future, it may be too late to do so once the sales process has begun. At the same time, international agreements (such as the General Agreement on Tariffs and Trade) allow the Crown to give favourable treatment to Māori. Yet the Crown is not contemplating doing so in this case, and will not unless the Tribunal follows earlier panels and intervenes.
 - b) International agreements may also hinder or even prevent the New Zealand Government from giving effect to binding resumption orders for land presently owned by the power-generating SOEs, once foreign investors hold shares.
 - c) Rights recognition in the ordinary courts is not an alternative remedy for the claimants, because the courts do not have a restorative function. The focus in the courts would inevitably be the legal erosion of rights. The very same focus in an urgent Tribunal inquiry, however, could be restorative and would take the Treaty principles into account, including the principle of redress.
 - d) The seriousness of the position for Māori should not be underestimated. The loss to Māori in deferring a hearing (and by that hearing the definition of prior

⁴⁷ Ibid, para 5

⁴⁸ Ibid, para 4(b)

rights) will be much greater than the loss to the Crown if the sale of shares is deferred for a short period. New Zealand as a nation must confront the long-delayed definition of Māori rights in fresh water before it is too late – and the timing of ‘too late’ is measured in months if Māori rights are not defined and protected before the SOE sales begin and water management/allocation regimes are reformed. The new water regime will be transformative of Māori rights, both de facto and de jure, and ‘will or may further crystallise illegal and illegitimate private rights in water’.⁴⁹

- e) At all costs, a situation of conflict between Māori and ‘mum and dad’ investors in the New Zealand public must be avoided. Investors must be made aware of Māori rights, and warned that the possible future recognition of Māori rights in water may affect their asset. Hence, some form of memorial on the shares may be appropriate for the sake of the share-buying public, the Māori interest, and the honour of the Crown.
- f) The Tribunal should not put too much weight on the existing dialogue between the Crown and iwi leaders. Māori have a right under the Bill of Rights to be heard, and, according to the recent Supreme Court decision in *Haronga*,⁵⁰ Māori claimants have a right to be heard even when others are in negotiations. Denial of a hearing to prove a right is denial of the right. And while SOE sales and freshwater management discussions may not appear on the surface to affect prior Māori rights, the practical reality is that they will have a devastating impact on Māori, especially those whose claims have not yet been heard. The simple fact of the matter is that Māori claimants without Treaty settlements live in poverty and must rely on the New Zealand Māori Council and Māori leaders to take claims like this one to the Tribunal on their behalf, for the benefit of all Māori.
- g) The Crown has not acted on the findings and recommendations of the Ika Whenua Rivers Tribunal, which has a specific significance for the hapū who brought that claim but also a general significance as to the need for a further Tribunal hearing and recommendations.

The Crown’s revised submissions opposing urgency

- 56. Ms Hardy for the Crown relied on her previously filed submissions (summarised above). She also argued that additional Waitangi Tribunal findings about Māori water rights (including property rights) are simply not required. The Crown is already well informed, she submitted, by the many relevant reports of the Waitangi Tribunal, including the river reports referred to by the claimants and the Wai 262 report. In response to a question from the Tribunal as to whether the Crown had accepted and acted on the findings of those reports, Ms Hardy responded that the Crown had not done so in all cases.
- 57. In order to add materially to the existing findings, Ms Hardy’s submission was that the Tribunal would need to go to an enormous level of detail on a national scale, including for all aquifers, swamps, wetlands, and streams. In the Crown’s view, a broad brush framework for rights-resolution already exists, and the kind of detailed rights definition sought by the claimants is unnecessary. The Tribunal, she told us, should be sceptical of the claimants’ submission that they are ready to proceed, and that this kind of inquiry could be conducted according to an urgent timeframe.

⁴⁹ Counsel for Te Rarawa, memorandum, 7 March 2012, Wai 2357 paper 3.1.34, p 5

⁵⁰ *Haronga v Waitangi Tribunal* [2011] NZSC 53

58. Also, Ms Hardy understood the claimants to accept that – ultimately – a Crown-Māori dialogue would be the endpoint for agreeing (and therefore defining) rights, and integrating them with existing rights and regimes. Since the Waitangi Tribunal's usual recommendation is that the claimants and the Crown should negotiate, the Crown's view is that an informed Crown is already conducting a dialogue with Māori and the endpoint has already been reached, without the need for an urgent Tribunal inquiry. It would be 'perverse', in counsel's submission, to interrupt that dialogue with 'litigation'.⁵¹ Because the Iwi Leaders Groups has a confined mandate, the Crown recognises that wider engagement with Māori will be necessary, but discussions with the Iwi Leaders Group are a good start for a focused dialogue on freshwater interests. Ms Hardy submitted that 'an approach that involves shared policy development is superior to a model through which the Crown develops policy unilaterally and then enters into consultation and/or specific negotiations with Māori'.⁵²
59. Also, if definition of legal rights is in fact required, then the Waitangi Tribunal is not the appropriate body to do it. The Tribunal is a forum for the definition of Treaty interests (of Māori and the Crown) and the balancing of those interests. One implication of this argument was that claimants have an alternative (or, rather, sole) path for rights definition in the courts.
60. In terms of concrete rights recognition, the Crown understood the claimants to now be seeking three possible outcomes: compensation payments, adjustment to management regimes to incorporate their interests, and/or a resource rental. None of these outcomes would be irreversibly prejudiced by the Crown's sale of shares in the SOEs. The sales would not transfer an asset – in this case, a property right in water – and so there is no direct prejudice. Nor is it possible to demonstrate that the creation of private interests would create an environment more hostile to Māori water rights; electricity consumers will ultimately bear the cost of resource rentals, whether the power companies are state-owned, privately-owned, or a mixed model ownership.
61. In making this submission, Ms Hardy relied in part on the letter to the Chairperson from the Hon Bill English, Deputy Prime Minister, and the Hon Nick Smith, Minister for the Environment, of 21 February 2012. In that letter, the Ministers stated that 'the sale of shares is not intended to prejudice the rights of either iwi and Maori, or the Crown, in the natural resources used by [the] mixed ownership companies'.⁵³ In the Ministers' view, the proposed legislation would not affect 'any rights or interest in water or other natural resources used in the generation of electricity or affected by such use, including lakes, rivers, and the associated waters, beds and other parts, or geothermal resources'.⁵⁴ They also affirmed that the Government would not 'seek to rely on the changed status from SOE to mixed ownership to suggest any diminution in the claimed rights'.⁵⁵ The Ministers did not specify what rights *the Crown* was claiming in relation to these water and geothermal resources, and Crown counsel was unable to clarify this matter at the conference in response to questions from the Tribunal.

Submissions of interested parties (formerly in opposition to urgency)

62. In submissions made at the conference on 13 March, Mr Jamie Ferguson helpfully clarified the position of the Iwi Leaders Group and of Ngāi Tahu. In a written submission, Ngāi Tahu 'actively supports and encourages any iwi or hapū who have a mandate to take claims on their own behalf to do so in the forum of their choice and in

⁵¹ Crown counsel, memorandum, 7 March 2012, Wai 2357 paper 3.1.37, p 7

⁵² *Ibid*, p 6

⁵³ Hon Bill English and the Hon Nick Smith to Chief Judge Isaac, 21 February 2012, attached to Wai 2357 paper 3.1.3

⁵⁴ *Ibid*

⁵⁵ *Ibid*

their own time'.⁵⁶ But, as the New Zealand Māori Council does not represent Ngāi Tahu, the iwi 'reserve the right to be a party to any process where the claims of another may impact on Ngāi Tahu's existing rights and interests'.⁵⁷ As Ngāi Tahu have customary and traditional associations with freshwater in 'approximately 50% of the geographical area of Aotearoa/New Zealand', they clearly have an interest in the subject under claim.⁵⁸

63. In oral submissions, Mr Ferguson also clarified the position of the Iwi Leaders Group. As their position appeared to have changed significantly from their previous submission, we think it necessary to note the salient points in detail.⁵⁹ Mr Ferguson told us that the 'key issue' for the Iwi Leaders Group (and the interested parties in support of the Iwi Leaders Group) is that 'it takes issue not with the rights of iwi, hapū or other groups to progress claims before this Tribunal, but for any of those groups to say that it does so on behalf of all Māori'. Also, a national inquiry that looks at case studies 'all over the country' is naturally of interest to all iwi and hapū, and the Iwi Leaders Group have concerns about the practicality of such an inquiry being conducted on an urgent footing. In their view, an urgent Tribunal inquiry should focus on:

the four SOEs that have particular extant resource consents in relation to a number of power stations, some geothermal (mostly hydro), that are identifiable and relate to specific catchments. There is obviously an issue for this Tribunal to deal with in terms of the nexus between those SOEs and those particular uses of water and the protections that the Crown has said exist in terms of safeguarding those interests post-sale of shares. That is for this Tribunal to consider. But if one is looking at a more wholesale national inquiry, then the view that has been expressed is that we think that's premature, that we'll see a whole lot of resources being diverted. One would hope it would not divert the Crown's interest in continuing the dialogue that's occurring, but certainly that dialogue must continue as Crown policy continues, and unless the Crown is going to stop its policy-making today, which I doubt it is and the Tribunal has never suggested that it should, then that engagement needs to occur to continue to advance those issues as much as possible.⁶⁰

64. In summary, we understand the position of the Iwi Leaders Group (and the interested parties in support of that group), as expressed by their counsel, to be that they do not object to the claimants obtaining an urgent hearing if it focuses on:
- a) the particular waters and geothermal resources used by the four power-generating SOEs; and
 - b) the Crown's protection of Māori interests in those resources vis-a-vis the sale of shares.

They do, however, consider a full national inquiry to be 'premature', and possibly unmanageable in an urgent timeframe. Their 'key issue', however, is that the New Zealand Māori Council does not represent all Māori.

The claimants' reply

65. The claimants' reply submissions were made orally by Sir Edward Taihakurei Durie and Professor Whatarangī Winiata.
66. Sir Edward clarified that the New Zealand Māori Council does not claim to represent all Māori or to have filed a claim on behalf of all Māori, but that the claim is intended for the benefit of all Māori. That, we were told, is a core statutory function of the New Zealand Māori Council. The ten co-claimants agree that what the Council is seeking would indeed be beneficial to all Māori, but they retain their independence.

⁵⁶ Counsel for Te Rūnanga o Ngāi Tahu, memorandum, 12 March 2012, Wai 2357 paper 3.1.56, p 1

⁵⁷ Ibid, p 2

⁵⁸ Ibid

⁵⁹ The following quotations are from the oral submissions of counsel for the Freshwater Iwi Leaders Group, 13 March 2012

⁶⁰ Counsel for the Freshwater Iwi Leaders Group, oral submissions, 13 March 2012

67. In response to the question 'if the claimants agree that customary rights are not being extinguished, what is the urgency?', the claimants' view was that the sale of shares without protection of Māori interests, and the wholesale reform of freshwater management, will be tantamount to an extinguishment. Rights will be replaced by a management plan or not replaced at all, but they will nonetheless be lost. 'In a democratic capitalist society,' we were told, 'you get the rights right first, you do the management thing later.'⁶¹ The claimants reasserted that their rights must be defined and protected before management regimes were finalised. The intention that ownership issues might be addressed by the Crown and iwi leaders after the management system was overhauled would simply come too late to be of any real effect.
68. Both Sir Edward and Professor Winiata emphasised that it was urgent for Māori rights to be defined and protected or compensated before share sales, or else the new private owners would have an expectation (whether legitimate or not) that their company had a right to use water at zero cost. The irreversible prejudice is that 'once sold, the Crown will never be able to retract from that position without admitting to the fact that it put up shares for public subscription without a proper disclosure of the fact that there were claims in respect of it that had some proper basis'. In the claimants' view, the Government is selling shares on the basis that the use right to water is free, when Māori say that it is not, and can prove to the Tribunal that it is not. The claimants wished to clarify that they think there is a direct analogy between this situation and previous fisheries claims in respect of transferable quota, because a use-right 'is being alienated to others in which Māori have a proprietary interest'. This is, in the claimants' view, a very direct and likely irreversible form of prejudice.
69. In response to the Crown's suggestion that existing Tribunal jurisprudence is sufficient for the purpose of informing the Crown as to Māori customary or Treaty rights in water, Sir Edward noted that the reports to date deal with select waterways or geothermal resources but do not address the kind of framework necessary to give effect to rights, to restore rights, or to provide redress for compromised rights. Acknowledging the findings of the Tribunal in the *Ika Whenua Rivers Report*, that Māori have proprietary interests in their rivers which now have to be shared with non-Māori, Sir Edward commented:

What *Ika Whenua* left undone was the framework by which sharing might be considered, and that's the question for this Tribunal. Now, here's the point. This Tribunal, in my view, is the only body in New Zealand that can address it from a bicultural perspective. What this Tribunal has effectively been charged to do since 1975 is cross the cultural divide, explain one world to the other, and find the way whereby all interests, Pākehā and Māori, can be accommodated within the Treaty framework.⁶²

The Tribunal's jurisdiction while the Bill is before the House

70. As noted above, the Mixed Ownership Model Bill was introduced to the House of Representatives on 5 March 2012. Under the provisions of section 6(6) of the Treaty of Waitangi Act 1975, the Tribunal has no jurisdiction 'in respect of any Bill that has been introduced into the House of Representatives unless the Bill has been referred to the Tribunal pursuant to section 8 of this Act'.
71. The Tribunal may not, therefore, undertake any inquiry into the provisions of the Mixed Ownership Model Bill while it remains before the House. Counsel have addressed us in their submissions as to whether the Wai 2357 and Wai 2358 claims contain any issues that would require the Tribunal to inquire into this Bill.

⁶¹ This and the following quotations are from the oral submissions of Sir Edward Taihakurei Durie by way of reply, 13 March 2012

⁶² Sir Edward Taihakurei Durie, oral submissions on behalf of the claimants in way of reply, 13 March 2012

72. The parties agree that the Mixed Ownership Model Bill is a piece of enabling legislation which, if enacted, will remove the four power-generating SOEs from the ambit of the SOE Act.
73. In the Crown's view, the Bill enables its stated policy to sell a minority of shares in the four power-generating companies. Crown counsel noted that the claimants do not challenge privatisation of the power-generating companies per se. In the Crown's view, the Wai 2357 SOE claim is essentially one for the 'preservation of remedy' (by means of a share in the power companies) for the matters raised in the Wai 2358 national water and geothermal claim. On that basis, the Crown accepted that the Tribunal has jurisdiction to inquire into both claims despite the introduction of the Bill on 5 March 2012.
74. The claimants' view is that they do not challenge the policy contained in the Bill. Rather, they seek an urgent hearing so that the Crown is fully informed as to their rights before the sales enabled by the Bill commence. The Crown's stated intention to start selling shares in Mighty River Power in the third quarter of 2012, in the absence of any protection of Māori interests, is both the core of the Wai 2357 claim and the prospective Crown action which justifies an urgent hearing of it. The Crown calls this 'preservation of remedy'. It is the claimants' view, therefore, that the Bill does not prevent the Tribunal from proceeding to an urgent hearing of their claims. The claimants have also amended the Wai 2357 claim to excise their initial pleadings in relation to the removal of the power-generating companies from the SOE Act and from the coverage of section 9 of that Act. The Bill implements the Crown's policy in relation to this issue and, as recognised by the parties, removes consideration of it from the Tribunal's jurisdiction while the Bill is before the House.
75. In summary, the claimants and the Crown agree that there is no jurisdictional bar to the Tribunal hearing the Wai 2358 claim while the Bill is before the House. The Crown also accepts that the Wai 2357 claim can proceed as a claim for the 'preservation of remedy'. The Tribunal accepts these submissions. There is no bar to the Tribunal hearing the claims as currently pleaded.

Grounds for urgency

76. The Waitangi Tribunal's 2009 practice note *Guide to the Practice and Procedure of the Waitangi Tribunal* sets out the criteria that the Tribunal is to consider when determining applications for an urgent inquiry.⁶³ The Tribunal will grant urgency only in exceptional cases. It has particular regard to whether:
- a) The claimants can show that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
 - b) There is no alternative remedy that it would be reasonable for the claimants to exercise; and
 - c) The claimants are ready to proceed urgently to a hearing.
77. In addition, the Tribunal will consider other factors, including whether:
- a) The claims challenge an important current or pending Crown action or policy; and
 - b) Any other grounds for urgency have been made out.
78. These criteria are a refinement of similar considerations originally set out by the Tribunal in an 18 July 1991 practice note entitled 'Claim Priorities'. Applications for

⁶³ The Tribunal issues practice notes under the authority of cl 5(10), schedule 2, Treaty of Waitangi Act 1975

urgency have been considered in relation to these factors, or earlier iterations of them, since that date.

79. Considering the large volume of determinations on urgency made since 1991, some useful precedent should be noted:

- a) Urgency should only be afforded where there is genuine need to receive a report and irreversible consequences may flow from any delay in processing the claim.⁶⁴ These consequences must lead to a result that is likely to be so important or notable, that it causes unalterable or irrevocable detriment to or disregard for the claimants' rights.⁶⁵
- b) In establishing that they are 'likely' to suffer significant and irreversible prejudice, claimants must show that it is more probable than not that they will suffer this prejudice.⁶⁶
- c) The significance of the prejudice must be such that it justifies the reallocation of Tribunal resources so that an urgent hearing can take place.⁶⁷
- d) Significant prejudice may be caused to claimants where the Crown is likely to create a 'benchmark' in pending settlements with other claimant groups that would preclude the Crown from addressing the issues raised by the claimants seeking urgent inquiry in future negotiations.⁶⁸
- e) Where the existence of section 27B memorials over relevant land provide an adequate protection for the claimants in the circumstances, significant and irreversible prejudice justifying urgency will not exist.⁶⁹
- f) Where claimants seek to traverse an issue already heard and reported on by the Tribunal in a previous inquiry, this will not necessarily preclude the granting of urgency. Considering this situation in relation to an application for urgency by Wai 955, Chief Judge Williams (as he was then) found that:

The pragmatic appeal [of refusing urgency on this ground] is plain. Pragmatism, however, must not be allowed to defeat the purpose of the Tribunal's unique responsibility to assess Crown conduct against the principles of the Treaty of Waitangi.

The long title to the Treaty of Waitangi Act 1975 states that the Tribunal exists in order to 'provide for the observance, and confirmation' of the Treaty principles. I am satisfied that that purpose would not be best served if it were the Tribunal's practice never to inquire as a matter of urgency into any claim that involved replication of arguments and evidence already reported on. Consider, for example, a situation where a Tribunal report has found Crown breaches of Treaty principle and, later, a new claim is made about very similar circumstances. The advent of the fresh claim may indicate continuing problems with the Crown's ability or willingness to comply with its Treaty obligations in the particular circumstances. Should that be so, a Tribunal practice of accepting that the Crown will have taken due account of the earlier report and that no useful purpose could be served by a Tribunal inquiry into the new claim could be seen to encourage, or at least countenance, the Crown's non-observance of Treaty principles.

The result is that it will not be fatal to an application for urgency that the claim involves significant replication of the issues, argument and evidence already heard and reported on by the Tribunal in connection with an earlier claim. However, given the limitations on the

⁶⁴ Waitangi Tribunal, Memorandum, 5 April 1995, Wai 431 (Tertiary Education), paper 2.19

⁶⁵ Waitangi Tribunal, Final decision on application for urgency, 23 June 2006, Wai 837 (Te Arawa Lakes Settlement), paper 2.40

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Waitangi Tribunal, memorandum-directions, 12 May 2000, Wai 796 (Petroleum), paper 2.9

⁶⁹ Waitangi Tribunal, memorandum-directions, 12 June 2000, Wai 848 (Tokoroa Post Office Site), paper 2.3

Tribunal's resources, it will not embark lightly on any inquiry the substance of which has already been traversed. Instead, the Tribunal would need a very good reason to take a second look.⁷⁰

- g) Likely prejudice may be aggravated where the Crown has chosen not to consult with Māori in relation to the relevant act or policy.⁷¹ However where consultation has occurred and the claimants still seek urgency, the Tribunal will be unlikely to grant an urgent hearing unless the claimants have first raised their concerns with the Crown's consulting body.⁷²
80. There has also been some commentary in the ordinary courts on the considerations the Tribunal should apply in determining urgency:
- a) In *Haronga v Attorney-General* the Supreme Court found that where the Tribunal's ability to exercise its binding jurisdiction to recommend the return of Crown forest lands is likely to be removed as the result of pending Crown actions, and the claimants seek such binding orders as redress, this will be a powerful factor in favour of granting an urgent hearing.⁷³
- b) In *Attorney-General v Mair* the Court of Appeal found that in assessing whether significant and irreversible prejudice may be caused to the claimants, the Tribunal may balance such prejudice against the prejudice that would be caused to other groups were urgency to be granted.⁷⁴
81. Finally, and as has been noted on a number of occasions, we emphasise that while all of the above factors are relevant considerations in determining an application for urgency, where one or more cannot be shown it will not necessarily be fatal to the application. In determining whether a claim presents an exceptional case justifying urgency, the Tribunal has a discretion to exercise. It must have regard to the law, its statutory functions and responsibilities, and all relevant facts, and determine whether a case warrants prioritisation on the Tribunal's hearing schedule accordingly.

Assessment of the Grounds for Urgency

Are the claimants likely to suffer significant and irreversible prejudice?

82. As currently pleaded, the Wai 2357 and Wai 2358 claims are about rights: customary, legal, proprietary, and Treaty rights (including a right of development); and commercial redress for any loss, diminution, or usurpation of those rights. In particular, the claimants say that they have a range of rights in water and geothermal resources, which were guaranteed and protected by the Treaty of Waitangi in 1840, but which have since been ignored, interfered with, or usurped for a period of 172 years. In the 1980s, the Crown was about to transfer significant assets to SOEs without considering their necessity for settling Treaty claims, but was stopped in its tracks by the courts and compelled to negotiate an agreement with Māori. Now, the claimants say that history is about to repeat itself: the Crown proposes to transfer up to 49 per cent of its shares in the power-generating SOEs to private buyers, without reserving a share for Māori. If that happens, the claimants' view is that they will suffer significant and irreversible prejudice:

⁷⁰ Waitangi Tribunal, memorandum-directions, 15 March 2002, Wai 955 (Mokai School), paper 2.7, pp 16-17

⁷¹ Waitangi Tribunal, memorandum-directions, 29 April 2003, Wai 967 (Wellington Hospital Endowment Lands), paper 2.21

⁷² Waitangi Tribunal, memorandum-directions, 18 July 2007, Wai 1306 (Ngāti Rehia Marine Reserve), paper 2.5.2

⁷³ *Haronga v Waitangi Tribunal* [2011] NZSC 53 at [105]

⁷⁴ *Attorney-General v Mair* [2009] NZCA 625 at [55]-[65]

- a) Shares, which could have been used as a practical form of redress for Crown breaches of the Treaty in respect of Māori rights in water or geothermal resources, will have been transferred out of Crown ownership. Once the 49 per cent threshold is reached, the Crown must retain the remaining 51 per cent (which would not, therefore, be potentially available for the settlement of well-founded claims).
 - b) Given the current legal framework in New Zealand, which says that water and subterranean geothermal resources cannot be owned, shares – which might represent the only practical recognition that the Crown can ever give to Māori proprietary rights – will have been transferred out of Crown ownership. Again, once the 49 per cent threshold has been met, the remaining 51 per cent could not be used for the recognition of Māori rights.
83. The Crown did not engage directly with these propositions. It maintained that it is in discussions with iwi leaders and other Māori about rangatiratanga and control in respect of fresh water, that ownership or customary rights may be discussed at the end of that process, and that the key issues are not really about ownership of the resource. When asked by the Tribunal whether the Crown might reserve a portion of the shares for Māori, Crown counsel replied that she would have to seek instructions on that matter. The Crown accepts that it has a Treaty duty to preserve its ability to remedy Treaty claims: 'The Court of Appeal decisions about section 9 issues have emphasised the Crown's obligation of preserving capacity to remedy Treaty breaches.'⁷⁵ But, in the Crown's view, it has already done so by enacting sections 27A-D of the SOE Act. Those protections will remain and the Crown will be able to use land owned by the Mixed Ownership Model companies if necessary for the settlement of claims; in the Crown's view, that is as far as it needs to go to preserve a remedy in the case of the four power-generating SOEs.
84. In the Crown's February consultation document, the Government stated that Māori would have the same opportunity as all other citizens to buy shares, and that they could use their settlement compensation to do so, whether at the time of first offer or later on the share market. In other words, the Crown did not at that point intend to use shares in the power-generating SOEs to settle Treaty claims. Māori would have to buy shares using their own money, including the cash component of a Treaty settlement. While it has not so far entertained a scenario in which it would use shares as a component of settling Treaty claims or as a 'proxy' recognition of Māori water rights, the Crown did point out that shares are 'fungible' items, readily purchased on the market, and thus there is no *irreversible* prejudice because the Crown can always repurchase some later if necessary. The claimants' response was that the Crown was very unlikely to repurchase shares for that purpose, once it had sold them, and may not often be in a financial position to do so in any case.
85. In our view, this question turns on whether the claimants would be able to demonstrate that they have customary rights, sometimes amounting to the equivalent of legal ownership in the English common law sense, and which were protected and guaranteed by the Treaty in 1840. While this turns on the facts of particular cases, the Crown and the claimants agreed that the Tribunal has already made relevant findings in the Mohaka River, Whanganui River, and Ika Whenua Rivers claims. Similarly, relevant findings have been made about customary rights in subterranean geothermal resources for stage one of the Central North Island claims. In its own words, the Crown is already informed of the Tribunal's findings as to Māori rights, although it argues that Māori property rights in water 'have not been established', and that there is guidance from the Waitangi Tribunal (in its Wai 262 report) that property rights may not be 'the

⁷⁵ Crown counsel, memorandum in response to applications for urgent hearing, Wai 2357 paper 3.1.3

best way of conceiving the Crown–Māori resource relationship'.⁷⁶ Also, the Crown suggests that many Māori may not see relationships with water in terms of rights.

86. We have considered the findings of the Ika Whenua Rivers Tribunal and the Whanganui River Tribunal, which were put to us by the claimants. They maintain that there is a prima facie case for the existence of Māori customary rights, sometimes amounting to full ownership rights, in other waters as in those rivers. Similarly, we have considered the findings of the Central North Island Tribunal as to extant customary rights in subterranean geothermal resources. Were the Wai 2357 and Wai 2358 claims to be considered well-founded, an inquiry panel might well find that shares in the power-generating SOEs were an appropriate form of redress for Crown breaches of those rights. The claimants have put this to the Tribunal in their statements of claim and their submissions. An urgent hearing would inevitably have to consider this point. It would also have to consider the Crown's argument that the Tribunal should follow the Wai 262 Tribunal and conceive of contemporary Māori interests apart from or outside the framework of property rights. It would also have to consider the argument that customary Māori relationships with water should not be conceived of in terms of rights. Either way, an urgent inquiry would consider these questions, which are at issue while a possible remedy (in the form sought by the claimants) is still in Crown ownership.
87. It follows that the claimants are likely to suffer irreversible prejudice if SOE shares are sold without preserving the ability for the Crown to remedy any well-founded Māori claims of Treaty breach. The claimants have argued that the denial of a hearing to prove a right is a denial of the right. We agree that this would likely be the outcome if an urgent hearing is not granted.
88. We also accept the claimants' argument that the Crown is unlikely to repurchase shares once they have been sold. For fiscal reasons alone, the argument is compelling. We think that the prejudice – should Māori claims prove well founded – will likely be irreversible, even if shares are fungible and can be more readily repurchased by the Crown than other forms of property.
89. The claimants identified a third form of prejudice that they believe they are likely to suffer. Essentially, their argument is that the Māori water rights themselves are about to be irreversibly eroded, to the significant and irreversible prejudice of the rights holders. This argument focused on two pending Crown actions: the sale of shares in the power-generating SOEs; and the development of a new regime for the management, governance, and allocation of water. In both cases, the claimants suggested that their prior rights must be identified and defined by the Waitangi Tribunal, and commercial redress or rights recognition considered, before new private interests and rights in water are created. These likely new rights ranged from the shareholdings of private investors in the Mixed Ownership Model companies to tradable use-rights in fresh water.
90. We do not accept the claimants' argument that the sales of shares will have a 'chilling effect' on the Tribunal's ability to order resumption of land under section 27B. We agree with the Crown that the inclusion of a private shareholding in the companies will make no difference, and that the more likely 'chilling effect' would be the inextricable link between the companies' core functions and assets such as power stations. Nor do we accept the claimants' argument that an asset in which Māori claim property rights, a use-right in water, is being transferred. What are being transferred are shares in the power-generating companies.

⁷⁶ Ibid, p 5

91. Nonetheless, while the Crown is technically correct that the transfer of shares in the power companies will not change Māori customary rights in water (since the companies' right to use the water is already in place, regardless of who owns the companies), we also think that there is strength in the claimants' argument that public opposition to any future articulation of Māori rights would be significantly increased by transferring the shares. As the claimants put it, this opposition would likely come from two sources: the Crown, which transferred the shares on the basis that there is zero cost for the companies' use of water to drive their turbines; and the shareholders, who made bona fide purchases of shares on that understanding.
92. We also accept that there is some force to the claimants' view that their rights may be irreversibly prejudiced if critical decisions about water are made without being able to take proper account of or give effect to Māori rights. Again, since the Tribunal's river reports indicate that such rights may exist, a hearing of the Wai 2358 claim might well find that new private rights in water should not be created unless or until prior Māori claims have been properly addressed. For this to be effective, an urgent inquiry should be commenced as soon as possible, since, as Mr Ferguson submitted, the water reforms process has been gaining momentum since 2007. Major decisions are expected in late 2012.
93. In summary, the Waitangi Tribunal found in its *Ika Whenua Rivers Report* and its *Whanganui River Report* that Māori have customary rights, sometimes equivalent to English proprietary rights, in the Rangitaiki River, the Whirinaki River, the Wheao River, and the Whanganui River (and its tributaries), and that the Crown has breached the Treaty in respect of those river rights. The claimants submit that they can demonstrate such rights in other freshwater resources. If Māori do have well-founded claims of Treaty breach in respect of water rights, they will suffer significant prejudice if the Crown sells 49 per cent of shares in the power-generating SOEs without first providing (or reserving the ability to provide) redress for any such well-founded claims. Also, Māori seek an urgent hearing to establish whether they have extant property and Treaty rights in water that, given the current legal regime, may never have a better opportunity for 'proxy' acknowledgement than by becoming shareholders in these water businesses. Here, again, we consider that the claimants are likely to be prejudiced if the Crown disposes of shares worth between five and seven billion dollars before the Tribunal determines whether this aspect of the claims is well founded. Although, technically, shares may be readily repurchased on the stock exchange if the claims were to be upheld at a later date, we agree with the claimants that the prospect of this being considered affordable is remote. Finally, we agree with the claimants that the sale of shares on the basis of a zero cost for water will likely create significant opposition to future recognition of their rights, should such rights be proven and need to be accommodated (as the Crown accepts they may be) at a future date.
94. For these reasons, we consider that the claimants are likely to suffer imminent, significant and irreversible prejudice if the Crown does not retain the ability to either recognise any proven rights in water and geothermal resources or to provide appropriate redress for any well-founded Treaty claims. Previous Tribunal panels have found that some such rights exist in relation to particular rivers and iwi, and that Treaty principles have been breached in respect of those rights. The Crown's argument that Māori rights and interests in water are better provided for in a fair and long-lasting governance and management regime is one that needs to be urgently tested, before the transfer of shares from Crown ownership begins and before the water reform process reaches its final stages.
95. Having accepted these grounds for significant and irreversible prejudice, the Tribunal does not need to assess the related question of the Crown's international treaty obligations, and what effect these might have on the Crown's ability to provide redress

after shares are transferred. That matter is complex and we do not have full information on the point.

Is there an alternative remedy available to the claimants?

96. In the Crown's submission, there is an alternative remedy available to the claimants. The Tribunal's approach, we were told, is 'generally to encourage continued inquiry and dialogue'.⁷⁷ A Crown-Māori dialogue on the governance, management, and allocation of water is already happening, in the form of:
- a) participation by the Iwi Leaders Group (and their advisers) in the Land and Water Forum;
 - b) high-level discussions between the Iwi Leaders Group and Ministers; and
 - c) future wider consultation with Māori (it being agreed by all concerned that the Iwi Leaders Group do not speak for all Māori).
97. We note first our concern that geothermal resources are not part of any dialogue. From the affidavit of Mr Guy Beatson, Deputy Secretary Policy in the Policy Division of the Ministry for the Environment,⁷⁸ and as confirmed by Crown counsel at the conference, geothermal resources will eventually be included in stage two of the resource management reform process, which is not due to start until late 2012. As with water, it is unlikely that stage two of the resource management reform process will consider questions of ownership.
98. Secondly, the Crown-iwi leaders' dialogue does not include the question of Māori rights in water, which is being left to possible discussion towards the end of the process in late 2012. Instead, dialogue is proceeding on the basis that Māori rights (of whatever nature) are not affected by the outcomes of the freshwater management reforms, including the possible creation of tradable use rights in water. The claimants take a different view. They maintain that rights must be properly defined before they can be reconciled with the admitted rights of others, so that all rights may then be integrated into a fair, durable regime for the governance and management of water. The Iwi Leaders Group suggests that a process of rights definition in all waters would be premature at this stage of their dialogue with the Crown.
99. We note, however, the Iwi Leaders Group's suggestion that an urgent inquiry could rightly be held into the Wai 2357 claim, and those waters and geothermal resources used by the four power-generating SOEs in which shares will be sold. It seems to be the iwi leaders' view that their dialogue with the Crown need not be interrupted by such an inquiry, although a wider inquiry into all waters might divert the Crown's attention and disrupt ongoing and fruitful discussions.
100. The claimants and the Iwi Leaders Group agree on at least one thing: current discussions with the Crown will not provide a remedy for the foreclosure of the Crown's ability to use SOE shares for settling Treaty claims, or as a 'proxy' recognition of Māori rights in water. The iwi leaders support a hearing of Wai 2357 and related parts of Wai 2358. Nor has the Crown suggested that this particular matter will be discussed with the Iwi Leaders Group or the wider Māori community. We agree with the claimants, therefore, that there is no alternative remedy for them in the current Crown-Iwi Leaders' Group dialogue.

⁷⁷ Crown counsel, oral submissions, 13 March 2012 (quoting Crown counsel, memorandum, 7 March 2012, Wai 2357 paper 3.1.37, p 7)

⁷⁸ Guy Beatson, affidavit, 24 February 2012, Wai 2357 doc A3

101. There remains the question of whether the continuation of this dialogue (and future, wider consultation to follow it) provides a fair and possibly better alternative to an urgent Tribunal hearing of the Wai 2358 claim.
102. This was certainly the view of the Crown and of the Iwi Leaders Group, and of those tribes in support of the Iwi Leaders Group, at the judicial conference. Mr Ferguson, in his submissions for Ngāi Tahu, put to us that the conditions of the 1980s are long gone, when disempowered iwi needed the New Zealand Māori Council to act on their behalf. Ms Sykes, however, in her submissions in support of the claimants, observed that many Māori, especially those without Treaty settlement assets, still need organisations and leaders like the Council to carry matters forward that they cannot carry themselves. As we see it, there are many Māori in support of each side of this debate. And, since the Iwi Leaders Group and their respective iwi have expressed a wish to participate fully in the inquiry if urgency is granted, both sides would come together if an urgent hearing were to be held, making it a truly national inquiry. We do not believe, therefore, that an urgent hearing would divide and polarise Māoridom. Both the claimants and the Iwi Leaders Group intend to participate fully in an inquiry if it is granted. We are more concerned that, as Ms Ertel submitted, failure to grant an urgent hearing might deepen differences between Māori and non-Māori down the track, once shares in the power companies have been sold to the general public.
103. In our view, there are two key points to consider. The first is the question of whether the current Crown–Māori dialogue is an alternative remedy for the claimants. It is not, for the simple fact that it does not include them. Nor are there any plans to include them, except for an intention to conduct broader-based consultation on the freshwater management regime in the future. We do no doubt that the intention to conduct broader-based consultation is honest, well-meant, and entirely appropriate. But it is no substitute for the fact that the Crown is not presently in discussion with the many Māori represented by the claimants in these proceedings, and there is no immediate intention of being so.
104. The second point is that 'litigation', as the Crown and Iwi Leaders Group called it, might disrupt the discussions which *are* taking place at present. Again, we note the Iwi Leaders Group's concession that an urgent hearing of Wai 2357 and of Māori rights in the water and geothermal resources used by the SOEs would be appropriate and need not interrupt their discussions with the Crown. Also, we note the intention of these iwi to participate fully in an urgent inquiry if one is granted. The question then becomes whether the Crown would wish to continue its Fresh Start for Fresh Water discussions with the Iwi Leaders Group in those circumstances. Ms Hardy stated in oral submissions that the Crown–Māori dialogue could not proceed 'in parallel' with an urgent hearing. That is a matter for the Crown and the respective iwi to resolve. We do not think, in all fairness, that this should have any material effect on whether the claimants can obtain an urgent hearing of their claims.
105. The claimants, however, have sought a halt to dialogue between the Crown and the Iwi Leaders Group, and of the whole Fresh Start for Fresh Water programme, until their claims have been heard and reported upon. This proposition would have merit if such discussions were almost complete and final decisions were about to be made, but, as we understand it, that is not the case. In our view, the Crown and those Māori leaders with whom it is in discussion should continue those discussions in the meantime. We encourage the Crown and Māori to make what progress they can while we hear the claims. (We hope, too, that this may result in less polarised Crown–Māori positions in an urgent inquiry into the Wai 2357 and Wai 2358 claims.)
106. At the same time, we are persuaded by the claimants' submission that 'prior rights must be determined before new property interests are created' and 'compensation for

irreversible loss must be settled before new property interests are created'.⁷⁹ We expect that the Crown, as a responsible Treaty partner acting in good faith towards all Māori, would carefully consider any findings and recommendations made by the Tribunal as a result of an urgent hearing, and would give those findings and recommendations their due weight in eventual discussions and decision-making with all Māori groups and leaders with an interest in water or geothermal resources. There is still time for this to occur, even if discussions between the Crown and the Iwi Leaders Group continue in the meantime. But it is incumbent upon the Tribunal, the Crown, and the claimants to ensure that an urgent inquiry can be completed in time to have its due weight in the freshwater management reforms.

107. The other possible remedy to consider is litigation. The Crown argued that the Waitangi Tribunal is not an appropriate body to determine the existence (or otherwise) of legal rights, and that the courts are the only forum for defining property rights. Taken to its logical conclusion, this argument would mean that the claimants, in seeking a definition of their property rights, have a more appropriate remedy in the courts. In response to questions from the Tribunal, Crown counsel rejected this proposition. Her submission was that the current Crown–Māori dialogue is far preferable to litigation. Mr Taylor and Ms Ertel, in their submissions, maintained that the courts are not preferable to the Tribunal for pursuit of the present claims. They emphasised that they are seeking 'reinstatement' and 'restoration' of lost rights, as well as commercial redress for rights lost or reduced in breach of the Treaty, and appropriate recognition of surviving rights. The courts cannot take a restorative approach to rights, whereas the Waitangi Tribunal can determine what rights were protected or guaranteed by the Treaty, whether those rights have been so protected, whether compensation is due if they have not been protected, and how such rights might be accommodated in Treaty terms today. Sir Edward Taihakurei Durie also pointed out, on behalf of the claimants, that the Waitangi Tribunal is a unique body for explaining the nature of Māori rights, the Crown's Treaty duties in respect of those rights, and how the interests of Māori and non-Māori should be accommodated, given its unique Treaty jurisdiction and its bicultural makeup and expertise.

108. It is apparent, therefore, that neither the Crown nor the claimants regard the courts as an alternative remedy. We accept this position.

109. We also note that it has been long established that the Tribunal can define the content of the law and of legal rights for the purpose of determining the law's consistency with the principles of the Treaty, and for determining whether legal rights have been abrogated in breach of the Treaty. The Tribunal, of course, is not a court and does not purport to exercise the role or jurisdiction of a court.

Do the claimants challenge an important Crown action or policy?

110. The claimants challenge two Crown policies or actions of vital importance to all Māori and indeed to all New Zealanders: the Crown's intention to sell shares in the power-generating SOEs without first reserving means to redress well-founded Treaty claims or providing practical recognition of Māori rights in water; and the Crown's policy to reform freshwater governance, management, and allocation regimes without first defining and provide for Māori customary, proprietary, and Treaty rights in water. The Crown's view, as we have noted, is that customary or proprietary rights will not be affected by what is planned, and – even if they were – Māori interests should not be considered in a property rights-based framework but in other ways.

⁷⁹ Counsel for claimants, submissions in way of reply, Wai 2357 paper 3.1.17, p 2

111. The claimants and the Crown have widely divergent views on these fundamental questions, which in turn are fundamental to Crown–Māori engagement over what the claimants termed the ‘final frontier’: fresh water. This is a matter of critical importance to all Māori, to the Crown, to the Treaty partnership between them, and to the nation.

Are there any other grounds justifying a grant of urgency?

112. At Te Hapua in December 1986, at the first hearing of the Muriwhenua fishing claim, the claimants drew the Tribunal’s attention to the State-Owned Enterprises Bill and the risk that Crown lands would be put beyond the possibility of use for redress of their claims. The Tribunal felt that the matter was so urgent, and of such import to Māoridom, that it made an interim report to the Minister the same day (which has been cited in these proceedings).⁸⁰ At that hearing, the Waitangi Tribunal gave the following waiata:

Karanga ra, e Rata
Te hiku o te ika e
Whakaripo ake nei e

Tenei a Tai
Whakamana Te Tiriti e
Te ope nei e

Tainui e
E tama Rawiri
Paora e
Whakaterehia rā

Maranga mai
Te iwi oho ake rā
Tauīwi tahuri mai e
Whatungarongaro
Toitū te whenua e

The clarion voice of Rata calls
The movement in the tail of the fish responds.

In our midst we now have Tai
Now is the time to give strength to the Treaty.
Here too is the ope, all members of the Tribunal.

Tainui (Koro, Minister of Maori Affairs)
Rawiri (David, Prime Minister) and
Paora (the Governor General)
Through you, this fish can swim.

Maori people rise and be vigilant
Tau-iwi (Pakeha and others)
The time is now to face each other.

As the light of the eye and the life of things living
fade from sight,
only the land is seen to remain,
constant and enduring.⁸¹

113. Now, as then, the Tribunal has been called upon to consider urgently the transfer of an asset that might be essential for the redress of Treaty claims, should such claims prove well founded. All Māori are either involved in or affected by these claims. Also, the claims concern very large interests, whether economic or otherwise, for all New Zealanders. Water is of vital importance to everybody. As we see it, this strengthens the need for an urgent hearing so that Māori interests may

⁸⁰ Waitangi Tribunal, *Muriwhenua Fishing Report*, Government Printing Office, 1988, p 5

⁸¹ *Ibid*, p ix

receive such recognition and protection as is just and compliant with Treaty principles, in a manner that is fair to all New Zealanders.

Are the claimants ready to proceed?

114. We deal with this question last because we consider it to be determinative of whether an urgent inquiry *can*, as opposed to *should*, take place. The question of the claimants' readiness to proceed, and the question of whether an inquiry into these claims is practicable in an urgent timeframe, has been very difficult to assess.
115. The Crown put to us that a hearing of Wai 2358 requires an exhaustive and detailed examination of all waters and geothermal resources throughout the country, on a place by place, hapū by hapū, iwi by iwi basis. There are certainly grounds to think so in the Wai 2358 statement of claim and some of the submissions that we have received.
116. Mr Ferguson, in his submission for the Iwi Leaders Group, suggested that the Tribunal should inquire into Wai 2357 and the relevant parts of Wai 2358, on the basis that there is a nexus between the four power companies and the particular waters and geothermal resources that they use. An urgent inquiry, he told us, should be limited to in that way.
117. In their submissions of 12 and 13 March, the claimants proposed an 'inquiry management plan' to focus and discipline an urgent inquiry. We have summarised some of the main points above in paras 52-53. The claimants submit that they are ready to proceed because they do not require any fresh research, due to the wealth of evidence already filed in previous Waitangi Tribunal inquiries. They also submit that the evidence of kaumātua as to Māori rights will be readily obtained in time for hearings. What remains, in their view, is the necessity for a group of experts to tie it all together and develop evidence 'categorising rights by water resource type, identifying methods by which they may have been breached and how they may be provided for today'.⁸²
118. In addition to saying that they are ready to proceed in terms of research and evidence, except for the work of the experts' group, the claimants suggest that an urgent inquiry should be focused on rights definition and relief definition, and should be confined to the case examples of the ten sets of co-claimants in the Wai 2358 claim. They recognise, however, the practical difficulties that may emerge if many other Māori groups (interested parties in the present proceedings) should seek to have their claims joined to the inquiry or to be heard as interested parties. As we understand it, the claimants' proposed solution is to involve interested parties in the preparation of the expert group's evidence (which uses the ten case examples), and then to confine the hearing to that evidence alone. Next, the Tribunal would hear groups with particular cases relevant to the four SOEs where there are separate issues to consider about the resources used by those SOEs. After that, the Tribunal should hear the Iwi Leaders Group, hear the Crown, and then hear the claimants in reply.
119. The claimants also suggested that it will eventually be necessary to hear hapū and iwi on their particular cases, including interested parties, but that this would 'constitute a second step. That step may or may not need to proceed under urgency'.⁸³ In other words, the claimants envisage a two-stage process, with the first stage focusing on a framework of Treaty rights definition, types of breach (if established), and a design for

⁸² Counsel for claimants, memorandum enclosing inquiry management plan, 12 March 2012, Wai 2357 paper 3.1.50, para 4(b)

⁸³ *Ibid*

remedy, conducted urgently, and a second stage directed at considering individual hapū or iwi.

120. Is this a realistic plan? The Crown suggests that we should be sceptical of the claimants' statement that they are ready to proceed. In particular, Ms Hardy cautioned that the preparation of evidence by the experts' group may take some time.
121. Certainly, it is the case that a very large body of relevant research has already been filed in previous Tribunal inquiries, along with written or audio recordings of relevant kaumātua evidence. Some of that evidence has been reported on by the Tribunal, although some has been filed in inquiries on which the Tribunal has only reported in part, or for which no Tribunal report has yet been completed. We have a concern that, since the case examples are to be drawn from claimants who have not yet settled, not all of the co-claimants can necessarily rely on research already completed for other inquiries. But we expect that most of them will be able to do so.
122. That being the case, we accept that the claimants will be ready to proceed once relevant research and kaumātua evidence in other inquiries has been identified and filed on the Wai 2358 Record, once kaumātua witnesses have been briefed, and once the experts' group has produced its evidence. This process will necessarily take some time, but our view is that it should be able to be done within the timeframe necessary for an urgent inquiry.
123. On balance, we are satisfied that the claimants will be ready to proceed within an urgent timeframe.
124. As to the question of how exactly to focus and constrain matters so that they may be heard within a practicable and urgent timeframe, that is a matter that can only be decided by the Tribunal appointed to hear the claims. The availability of Tribunal resources to hold such an inquiry, bearing in mind the balance of the Waitangi Tribunal planning for this financial year and early into the next financial year, will also be an important consideration.

The Tribunal's Decision

125. Against the criteria for urgency, we are of the view that the claimants are likely to suffer significant and irreversible prejudice, that no other remedy is available to them, and that they will be ready to proceed on an urgent basis. We also accept that the claims address proposed Crown actions and policies of national importance. Accordingly, we grant the claimants' application for an urgent inquiry into the Wai 2357 and Wai 2358 claims.
126. In terms of interim relief, the applicants sought an interim recommendation from the Tribunal that the Crown delay its first sale of shares until their claims had been heard and reported. They also requested that the dialogue between the Crown and the Iwi Leaders Group, along with the Fresh Start for Fresh Water reform process, be similarly delayed. We decline to make any interim recommendation at this point.
127. The first proposed sale of shares is for Mighty River Power, presently scheduled for the third quarter of 2012. The sale of shares in Solid Energy, Meridian Energy, and Genesis Energy is, as we understand it, due to follow later. Given the nexus between Mighty River Power and a confined set of waters and geothermal resources, as noted by Mr Ferguson, we expect that the Tribunal could issue an interim report before or soon after the commencement of a share sales process for Mighty River Power. That would be a matter for the Tribunal appointed to hear the Wai 2357 claim.

128. Decisions in terms of freshwater management reforms, we were told, are likely due at some time in late 2012. Also, the Crown may begin discussions with the Iwi Leaders Group about Māori property and other rights in water at that point. Consideration of geothermal resources, as part of stage two resource management reforms, is not due to start until late 2012. Given these timeframes, an urgent, focused inquiry should enable the Crown and claimants to participate in late-stage discussions about fresh water, and early-stage discussions about geothermal resources, with the assistance of a Tribunal report on the Wai 2358 claim. It is not for this panel to decide how issues for the Wai 2358 inquiry should be defined and the case managed, so that an urgent hearing of these complex and difficult matters can realistically be conducted on an urgent footing. The Tribunal appointed to hear the claims will need to grapple with that issue, together with the parties. To date, only Māori interested parties have come forward. We anticipate that others with an interest may also seek to be heard, which will need to be managed carefully if an urgent hearing is to be completed in the proper timeframe.

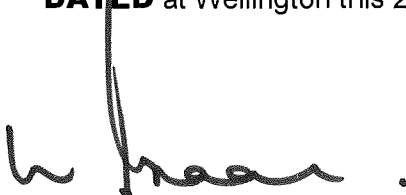
129. The Crown has signalled that the mere fact of an urgent inquiry will stop its discussions with the Iwi Leaders Group. That is a matter for them but we see no reason why those discussions cannot continue in parallel with an urgent hearing.

130. The claimants submitted that the denial of a hearing to prove a right was tantamount to a denial of the right. We agree. We direct an urgent hearing accordingly.

The Registrar is directed to send a copy of this decision to counsel for the claimants, Crown counsel and all those on the distribution list for:

- Wai 2357, the Sale of Power Generating State-Owned Enterprises Claim; and
- Wai 2358, the National Fresh Water and Geothermal Resources Claim.

DATED at Wellington this 28th day of March 2012



Chief Judge W W Isaac
Chairperson



Professor Pou Temara
Member



Mr Tim Castle
Member



Dr Grant Phillipson
Member

Appendix

Parties that have notified the Tribunal of their interest in Wai 2357 and 2358

Wai number (if applicable)	Claim name (if applicable)	Interested Party	Counsel (if applicable)	Document number(s)
Wai 549, 1526	Ngapuhi Land and Resources claim; Te Mahurehure Claim	Professor Patu Hohepa and Rudy Taylor on behalf of whānau and hapū of Hokianga	J Pou	#3.1.4; #3.1.26
Wai 846	Kakepuku Mountain and Kakepuku Block claim	Lynnette Gloria Waitiahoaho Te Ruki and Gary Shane Te Ruki on behalf of the hapū of Ngāti Kahu and Ngāti Unu	J Pou	#3.1.5; #3.1.26
Wai 647, 662, 1835, 1838	Awarua Block 4A1 claim; Mangaohane No 1 Block claim; Ngāti Paki and Ngāti Hinemanu (Winiata, Lomax, Cross and Teariki) Claim; Oruamatua Kaimanawa Block (Hoet) Claim	Jordan Haines for himself and on behalf of the whānau and hapū represented by the Ngāti Hinemanu me Ngāti Paki Heritage Trust	A Sykes	#3.1.6; #3.1.26
		Te Atiawa Iwi Authority	D Edmonds	#3.1.7
		Ngā Hapū ō Ngāruahine Iwi Incorporated	D Edmonds	#3.1.8
		Waikato-Tainui Te Kauhanganui Incorporated	D Flavell	#3.1.10
		Freshwater Iwi Leaders Group	J Ferguson	#3.1.11
		Ngāti Tama Manawhenua ki te Tau Ihu Trust	J Ferguson	#3.1.12
		Te Rūnanga o Ngāti Whare	J Ferguson	#3.1.13

		Raukawa Settlement Trust	J Ferguson	#3.1.14
		Tahorakuri A130 Trust	M Sinclair	#3.1.15
Wai 129	East Coast Lands & Waters claim	Sue Te Huinga Nikora & Sonny Akuhata of Ruawaipū, Ta Rāwhiti	T Afeaki	#3.1.16
Wai 619	Ngāti Kahu o Torongare/Te Parawhau Hapū claim	Waimarie Bruce of Ngāti Kahu o Torongare Te Parawhau, Ngāpuhi	T Afeaki	#3.1.16
Wai 774	Waitangi Lands and Resources claim	Kingi Taurua of Ngāti Rahiri, Ngāti Kawa o Ngāpuhi	T Afeaki	#3.1.16
Wai 985	Hokianga Regional Lands claim	Miriama Solomon (nee Tuoro) of Te Honihoni, Te Mahuru o Hokianga, Ngāpuhi	T Afeaki	#3.1.16
		Te iti o Mahuta (Taharoa and Kawhia), Ngāti Whawhakaia ki Aotea (Aotea), Te Mateawa (Horowhenua), Nga Uri o Wetini Mahikai (Raglan), Ngāti Paoa (Hauraki), Toto Whānau (Wairarapa, East Coast, Waikato and King Country), Ngā Uri o Hētāraka Takapuna (North Shore, Mahurangi and the Gulf Islands) and Ngā Uri o Ngāti Moetara (Pakanae and Waimamaku)	M Taia	#3.1.18; #3.1.29; #3.1.36; #3.1.38
		Mr Te Hapai Robert Ashby and Ms Gail Rika for and on behalf of themselves and Ngā Uri o Mangakahia	T Wara	#3.1.19
Wai 354	Tai Tokerau Land claim	Arapeta Witika Pomare Hamilton and others on behalf of Ngāti Manu/Te Uri Karaka/Te Uri O Raewera/Ngāpuhi	A Sykes	#3.1.20
		Te Rūnanga o Ngāi Tahu	J Inns	#3.1.21; #3.1.32

Wai 996	Ngāti Rangitīhi Inland and Coastal Land Blocks claim	David Potter and Andre Paterson on behalf of Ngāti Rangitīhi	J Mason	#3.1.22; #3.1.35
Wai 354	Tai Tokerau Land claim	Arapeta Hamilton on behalf of the descendants of Pōmare II, Ngāti Manu, Te Uri Karaka, Te Uri o Raewera and Ngāpuhi ki Taumarere tribes	A Sykes	#3.1.26
Wai 691, 788	Pio Pio Stores Site claim; Mokau Mohakatino and Other Blocks (Maniapoto) claim	Barbara Marsh, Tohe Raupatu and Muira Barry on behalf of all the descendants and original owners of Part Kaingapipi No. 9, Karu o te Whenua and Kinohaku East 4B1 Block	A Sykes	#3.1.26; #3.1.27
Wai 1467	Pakotai School and Village Claim	Te Hapai Robert Ashby and Gail Rika on behalf of Ngā Uri o Mangakahia	T Wara	#3.1.26
Wai 788	Mokau Mohakatino and Other Blocks (Maniapoto) claim	Atiria Rora Ormsby Takiari and the descendants of the owners of the land	A Sykes	#3.1.27
Wai 824	Wiremu Hau Whānau Lands (Northland) claim	Marama Waddell on behalf of the Hau whānau	D Naden	#3.1.28; #3.1.31; #3.1.45
Wai 1531	Land Alienation and Wards of the State (Harris) Claim	Te Enga Harris on behalf of herself and her whānau	D Naden	#3.1.28; #3.1.31; #3.1.45
Wai 726	Ngāti Haka and Patuheuheu Lands, Forests and Resources (Urewera) claim	Robert Marunui Iki Pouwhare for and on behalf of himself and the Ngāti Haka Patuheuheu Trust	T K Williams	#3.1.30; #3.1.40
Wai 1886	Ngāti Tara (Gabel) Claim	Robert Gabel on behalf of Ngāti Tara	D Naden	#3.1.31; #3.1.45
Wai 1968	Tutamoe Pa Claim	Rueben Porter on behalf of Ngāti Rokeka, Ngāti Pakahi, Ngā hapū o Wharo te Oneroa a Tohe, Ngā hapū o Te	D Naden	#3.1.31;

Wai 2000	Harihona Whānau Claim	Rarawa and Ngā whānau o Unaiiki Mare	Chappy Harrison on behalf of himself and the Harihona whānau	D Naden	#3.1.45
Wai 1699 Wai 1701	Tangonge (Kaitaia Lintel) Claim and Te Rarawa (Piripi) Claim	Haami Piripi on behalf of Te Rarawa		J Mason	#3.1.34;
Wai 144	Ruapani Lands claim	Vernon Winitana and others on behalf of the Panekiri Tribal Trust Board		K Ertel	#3.1.42
Wai 795	Tumatawhero - Waikaremoana claim	Anaru Paine, Irene Williams, Sid Paine on behalf of Ngai Tuhoë Potiki		K Ertel	#3.1.42
Wai 945	Ngāti Ruapani Ancestral Lands, Forests and Waterways claim	Desmond Renata on behalf of Ngāti Ruapani		K Ertel	#3.1.42
Wai 1013	Pere Kaitiakitanga claim	Dr Rangimarie Turuki Rose Pere or Kuini Te Iwa Beattie on behalf of Ngāti Rongo, Ngāti Hingaanga, Ngāti Hinekura, Te Whānau Pani and Ruapani-Tuhoe		K Ertel	#3.1.42
Wai 1033	Te Heiotakoka 2B To Kopani 36 & 37 Trust claim	Nicky Kirikiri and another on behalf of the owners and beneficiaries of the Te Heiotakoka 2B To Kopani 36 & 37 Trust		K Ertel	#3.1.42
Wai 1962	Te Kaha Hapū (Thompson and Wi Repa) Claim	Mona Thompson and Ron Wi Repa on behalf of themselves, Ngāti Rakai, Ngāti Waimauku, Ngāti Waikorara, Ngāti Mihi, Ngāti Waiora, and Ngā Uri o Pehira Keepa and Ngā Uri o Wi Repa		D Naden	#3.1.46
		Te Rangikaheke Bidois, Chairperson of Te Maru o Ngāti Rangiwewehi, on behalf of Ngāti Rangiwewehi			#3.1.49

		Roimata Minhinnick of Ngāti Te Ata Waiohūa		#3.1.52
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WAITANGI TRIBUNAL

Wai 2358

CONCERNING

the Treaty of Waitangi Act 1975

AND

the National Fresh Water and
Geothermal Resources Inquiry

MEMORANDUM-DIRECTIONS OF THE TRIBUNAL

Introduction

1. This memorandum-directions addresses the request by the claimants that the Tribunal make an interim recommendation that the Crown not commence the share float of any of the four Mixed Ownership Model companies named in their claim until it has received the Tribunal's report and recommendations for stage one of this inquiry.
2. This request was initially made by the claimants as a part of their application for urgency. In our direction granting urgency we declined to make any interim recommendation to the Crown at that stage of proceedings (Wai 2358, #2.5.13).
3. The claimants renewed their request for an interim recommendation at the judicial conference of 24 April 2012, requesting that an interim hearing be convened in June 2012 to hear the parties on whether their case example evidence had established a prima facie case, and consequently whether an interim recommendation should be made that the Crown delay any sale of shares in the Mixed Ownership Model companies until the Tribunal has fully heard the claim and issued its report and recommendations for the Crown to consider (Wai 2358, #3.1.95).
4. In memorandum-directions dated 27 April 2012 we declined to hold an interim hearing prior to the hearing of the substantive claims. Instead, we directed that the Tribunal's hearing of the claims would proceed in two stages.
5. Stage one would consider the following issues:
 - 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?
 - i) Before its sale of shares, ought the Crown to disclose the possibility of Tribunal resumption orders for memorialised land owned by the mixed ownership model power companies?
 - ii) Ought the Crown to disclose the possibility that share values could drop if the Tribunal upheld Māori claims to property rights in the water used by the mixed ownership model power companies?

- c) Is such a removal of recognition and/or remedy in breach of the Treaty?
 - d) If so, what recommendations should be made as to a Treaty-compliant approach?
6. Stage two would consider the following issues:
- e) Where the Tribunal has found in stage one that Māori rights and interests in freshwater or geothermal resources were guaranteed and protected by the Treaty, are these rights and interests adequately recognised and provided for today?
 - f) If not, why not?
 - i) In particular, is the current situation an ongoing or continuing consequence of past Treaty breaches that have already been identified in Waitangi Tribunal findings in relation to water resources, geothermal resources, or other natural resources (including Crown acquisitions of land in breach of the Treaty)?
 - ii) In particular, has the Crown asserted rights amounting to de facto or de jure ownership of water and/or geothermal resources? What is the basis of any such assertion, and is it consistent with Treaty principles?
 - g) If, having considered issues (e) and (f), we find there is a failure to recognise fully the rights and interests identified in issue (a) in stage one of this inquiry, is it causing continuing prejudice to Māori in relation to matters to which the Fresh Start for Fresh Water and/or geothermal resource reforms relate but which those reforms fail to address? If so, is this failure to address such issues itself a breach of principles of the Treaty of Waitangi?
 - h) Alternatively, could implementation of the Government's proposals under the Fresh Start for Fresh Water and/or geothermal resource reforms, without ascertaining and providing appropriate recognition of the rights and interests identified in issue (a) in stage one of this inquiry, cause prejudice to Māori in breach of principles of the Treaty of Waitangi?
 - i) If either of these breaches and/or other breaches have been established, what recommendations should be made to protect such rights and interests from such prejudice either by:
 - i) taking steps to fully recognise those rights and interests prior to the design or implementation of the reforms; or
 - ii) reworking the reforms so that the reforms themselves take cognisance of, and protect, those rights and interests in such a manner that they are reconciled with other legitimate interests in a fair, practicable, and Treaty-compliant manner.
7. The purpose of splitting the Tribunal's hearing of the claim into these two stages was to enable us to deliver a report and recommendations on the issue of the sale of shares in Mixed Ownership Model companies in as short a timeframe as possible, given the pressing nature of this issue for both claimants and the Crown.
8. In the memorandum-directions of 27 April 2012 the Presiding Officer also advised parties that at the conclusion of the stage one hearings the Tribunal would issue memorandum-directions addressing the claimants' request for an interim recommendation that the Crown delay any sale of shares until the Tribunal had issued its report and recommendations on stage one of the inquiry (Wai 2358, #2.5.19).
9. The hearing into stage one took place at Waiwhetu marae between 9 and 20 July 2012. Written submissions in reply to the Crown's oral closings were received from claimant counsel and counsel for interested parties on 25 July 2012.

10. We now set out our decision on the interim relief sought by the claimants that the Crown delay any sale of shares until the Tribunal has issued its report. It should be emphasised that this direction is not our report on stage one of the inquiry. As stated during the stage one hearing, this report will be released in September 2012, and will contain our findings and any consequent recommendations on the question, posed by the claimants, of whether the sale of shares in Mixed Ownership Model companies should proceed prior to a settling of the question of rights in water preserved under the Treaty of Waitangi.
11. This memorandum-directions will instead deal with the question of whether, in our assessment, the Crown should refrain from commencing the sale of shares prior to the issuing of the Tribunal's stage one report in September. We note that this is an interim direction setting out our assessment of the situation and not, as sought by the claimants, an interim recommendation. For the Tribunal to make a recommendation of this nature, we would first be required to make a finding as to whether all or part of the Wai 2358 claim was well-founded in terms of section 6(3) of the Treaty of Waitangi Act 1975. While we have heard extensive evidence and submissions in stage one of the inquiry, there will still need to be a period of consideration before we are able to make a decision on such findings in our report in September.
12. Prior to canvassing matters relevant to the interim direction sought by the claimants, we consider it important to set out, for the benefit of the parties, the role the Tribunal plays in the Māori-Crown relationship, and the Tribunal's jurisdiction in a claim involving current or former state-owned enterprise lands.

Role of the Tribunal

13. As stated in the Presiding Officer's concluding remarks at Waiwhetu marae on 20 July 2012, at the core of stage one of our inquiry is the question of Māori rights in freshwater and geothermal resources, and the connection between these rights and the sale of shares in Mixed Ownership Model companies. These are matters of national importance, which go to the essence of the Māori-Crown partnership and to the document that founded this partnership in 1840.
14. Since 1975 one of the main responsibilities with which the Waitangi Tribunal has been charged is that of monitoring this partnership to ensure that the Crown upholds its Treaty obligations and that the relationship between Māori and the Crown is a healthy one.
15. For the Tribunal the weight of this responsibility is very real. We consider that in our 37-year history the value of the Tribunal to Māori and to New Zealand has been demonstrated by the robustness and relevance of our reports, and their contribution to the Treaty partnership. As was stated in 2011 in the Wai 262 report:

It is in the fact that the agreement of Waitangi took the form of a treaty that we see mutual respect for each other's mana, and it is in the Treaty's words that we find the promise that this respect will last forever. This is the essential element of the Treaty partnership confirmed time and again in the courts and in this Tribunal.... It is the core of our national identity. And it is unique.¹

16. This claim, as with many with which the Tribunal has dealt, asks the Tribunal to take the role of monitoring and ensuring the integrity of the Crown-Māori partnership and relationship. We trust that both Māori and the Crown hear our words and that these words continue to add value to that relationship.

¹ *Ko Aotearoa Tēnei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262), pp. xviii-xix.

Jurisdiction

17. The Waitangi Tribunal came into existence in 1975 with the passing of the Treaty of Waitangi Act 1975. It should be emphasised that the establishment of the Tribunal was a political response to the demand for a forum to address Māori claims that the Crown was in breach of its Treaty of Waitangi obligations.
18. The Tribunal was established as a permanent commission of inquiry in terms of the Commissions of Inquiry Act 1908. Our jurisdiction, as set out in the Treaty of Waitangi Act 1975, is to inquire into claims of Māori who allege the rights guaranteed under the Treaty of Waitangi have been breached by the Crown, and to make findings as to whether these claims are well-founded (s 5(1)(a) of the Act), in that the claimants will be prejudiced and the Crown actions or omissions complained of breach the principles of the Treaty of Waitangi (s 6(1) of the Act).
19. Where the Tribunal finds that a claim is well-founded, it may make recommendations in terms of s 6(3) of the Act that the Crown take the necessary action to compensate for or remove the prejudice suffered. These recommendations do not bind the Crown.
20. However, in certain circumstances the Tribunal can make recommendations that are binding upon the Crown (s 8A(2)(a) of the Act). This jurisdiction relates to particular memorialised state-owned enterprise, education and railway lands transferred by the Crown and land held under a Crown forestry licence. It should be noted that in their statement of claim the claimants reserve the right to request, by way of remedy, that the Tribunal exercise its binding recommendatory jurisdiction in respect of memorialised state-owned enterprise lands used for the generation or transmission of hydroelectricity or geothermal electricity (Wai 2358, #1.1.1(a), para 33.6).
21. Our powers relevant for this memorandum-directions are to be found in s 8(2)(a) of the second schedule of the Act, which enables the Tribunal to make directions of the type sought by the claimants.²

Interim Direction

22. The direction that the claimants seek is akin to an interim injunction in the High Court. Their view, as expressed in their memorandum of 24 April 2012 and at the judicial conference of the same date, is that the Crown should not sell any shares in the Mixed Ownership Model companies until the Tribunal has heard their substantive claim and issued its findings and any accompanying recommendations. Essentially they seek to preserve the status quo until their claim has been heard and reported on. This claimant request was echoed during the course of the hearing.
23. The Crown recognised this and described the nature of the proceedings in stage one of the Tribunal's inquiry as being 'tantamount to an injunction' and 'of an injunctive nature' (Wai 2358, #3.3.15, paras 7 and 12). Also in oral submissions to the Tribunal Crown counsel stated that "in a way, this part of the inquiry is an injunction". Viewing the recommendations requested by the claimants in stage one in this light, the interim direction sought prior to the release of the Tribunal's report on this stage can be seen as analogous to interim injunctive relief in the courts of general jurisdiction.
24. As set out above, the claimants' initial request for an interim recommendation prior to the stage one hearings was declined. This was on the basis that the Tribunal had, at the stage the request was made, received only minimal evidence which it could consider in relation to such a direction. Substantial evidence has now been placed before us, and we consider that we are now in a position where we can address the

² See, for example, Wai 422, #2.1; Wai 796, #2.9.

claimants' request, in the form of an interim direction, prior to completing our report and recommendations on stage one of this inquiry.

25. In deciding whether the interim direction sought by the claimants should be made, we consider that the principles applied by the courts of general jurisdiction in determining an application for an interim injunction, as set out in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*,³ *Esekielu v Attorney-General*,⁴ *Carlton & United Breweries Ltd v Minister of Customs*,⁵ *Petherick v Commissioner of Inland Revenue*⁶ and *Attorney-General v Mahuta*⁷ are relevant. There is no single test, but adopting these principles, the considerations for the Tribunal are:
- a) Whether there is a serious question to be tried or inquired into; and
 - b) Whether the balance of convenience favours making an interim direction that the Crown should preserve the status quo until the release of the Tribunal's report and recommendations.
26. The overarching consideration for the Tribunal must be that, if there is a reasonably arguable case, then the position of the parties should be preserved.
27. If there is a serious question raised by the claim, and if the balance of convenience favours maintaining the status quo, then in our view this would make out a sufficient basis for an interim direction concluding that the Crown ought to delay any sale of shares in the Mixed Ownership Model companies until it has had the opportunity to receive the Tribunal's stage one report and consider its findings.

Is there a serious question to be inquired into?

28. In stage one of the inquiry, the claimants (and interested parties that support their position), submitted first that the Treaty of Waitangi guaranteed and protected rights of rangatiratanga, kaitiakitanga, mana, control and management in freshwater and geothermal resources to Māori. Secondly, the claimants submitted that the Crown's proposed sale of shares in presently state-owned companies that generate electricity from freshwater resources removes the Crown's ability to both recognise these Treaty rights and provide a remedy for their past or ongoing breach.
29. In relation to the question of what rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty, it is acknowledged by all parties to this inquiry that a number of previous Waitangi Tribunal reports have considered and made findings as to Treaty rights and interests in freshwater and geothermal resources.
30. These reports include, amongst others, the 1984 *Kaituna River Report* (Wai 4), the 1985 *Manukau Report* (Wai 8), the 1992 *Mohaka River Report* (Wai 119), the 1993 *Ngawha Geothermal Report* (Wai 304), the 1998 *Te Ika Whenua Rivers Report* (Wai 212), the 1999 *Whanganui River Report* (Wai 167), the 2008 report *He Maunga Rongo: The Report on Central North Island Claims, Stage 1* (Wai 1200), and the 2011 report *Ko Aotearoa Tēnei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262).

³ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129.

⁴ *Esekielu v Attorney-General* (1993) 6 PRNZ 309.

⁵ *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423.

⁶ *Petherick v Commissioner of Inland Revenue* (1997) 11 PRNZ 92.

⁷ *Attorney-General v Mahuta* CA71/99, 1 April 1999.

31. Certain relevant findings in relation to freshwater resources which demand articulation include:

- In the *Kaituna River Report* the Tribunal found that the Kaituna river was owned at and before 1840 by Ngāti Pikiao and Te Arawa; that this traditional ownership carried with it the free and uninterrupted right to fish the river, the estuary and the sea, together with the use and enjoyment of flora adjacent to it; and that such traditional rights had continued uninterrupted up until the present day. These traditional rights were found to be taonga guaranteed and protected by the Treaty of Waitangi, with the Tribunal recommending that a proposed pipeline discharging effluent into the river be abandoned as it was contrary to the principles of the Treaty, and that research undertaken into the discharge of such waste on the land 'in a suitable and practical manner'.
- In the *Mohaka River Report* the Tribunal found that rangatiratanga held by Ngāti Pahauwera and others over the Mohaka river pre-Treaty 'amounted to more than simply ownership of the river and its resources. It included the ability to control those resources in a manner determined by the tikanga, the customs, of the tribe itself to ensure their protection for future generations.'⁸ Considering the effect of the Treaty on rangatiratanga over the Mohaka River, the Tribunal stated:

As we have said earlier, the exchange of sovereignty for the guarantee of rangatiratanga created a partnership between the parties requiring each to act in good faith toward the other. In the context of this claim we take that to mean that the parties are bound to recognise the interests of each other in the river.

In the public interest the Crown has a responsibility to ensure that proper arrangements for the conservation, control and management of the river are in place. That responsibility, however, must recognise the Treaty interest of Ngāti Pahauwera by seeking arrangements which allow for the exercise of their tino rangatiratanga over the river. It is in the nature of the partnership that Crown and Māori seek arrangements which acknowledge the wider responsibility of the Crown but at the same time protect tribal tino rangatiratanga.⁹

- In the *Ika Whenua Rivers Report* the Tribunal found that rights, sometimes equivalent to English proprietary rights, were guaranteed to certain Māori groups (jointly called Te Ika Whenua in the report) in the Rangitaiki River, the Whirinaki River and the Wheao River by the Treaty, stating:

As at 1840, Te Ika Whenua were entitled to the full use and control of their rivers. The rivers were theirs and nobody could obtain use rights other than by submitting to their jurisdiction and control and through their authority or acquiescence.

The Treaty promised to Māori in respect of their taonga – the rivers – full, exclusive, and undisturbed possession, something more than mere common law rights. This encompassed the two separate elements of tino rangatiratanga and full rights of use referred to above. Accordingly, Te Ika Whenua were entitled, as at 1840, to have conferred on them a proprietary interest in the rivers that could be practically encapsulated within the legal notion of ownership of the waters thereof. The term 'ownership' conflicts with the common law view because the waters were not captured but flowed on and were consequently available to other users downstream. Protection of those users' interests by way of preservation of the resource would be provided for by custom and protocol. Notwithstanding this limitation, the right of use and control of their rivers rested with Te Ika Whenua. We therefore describe the 'ownership' or property or proprietary right of Te Ika Whenua of or in their rivers as being the right of

⁸ *Mohaka River Report* (Wai 119), p.19.

⁹ *Mohaka River Report* (Wai 119), p.65.

full and unrestricted use and control of the waters thereof – while they were within their rohe.¹⁰

- In the *Whanganui River Report* the Tribunal found that the closest English law equivalent for the Māori customary rights that had been guaranteed and protected by the Treaty was ownership of a water resource, without distinction between its bed, banks, water, fisheries, or aquatic plants. The Tribunal observed that private ownership of water resources was also possible in England in 1840, by means of the rights by which riparian owners controlled access to and use of such water resources. The Tribunal found that exclusive possession and tino rangatiratanga guaranteed by the Treaty of Waitangi is still in force today in relation to the Whanganui river and its tributaries, except insofar as rights have been appropriated by others in breach of Treaty principles.
- In the Wai 262 report on indigenous flora and fauna and intellectual and cultural property, *Ko Aotearoa Tēnei*, the Tribunal considered Treaty rights over the environment as a whole, including rivers and other freshwater and geothermal resources. Considering what rights in relation to the environment were guaranteed to Māori under the Treaty, the Wai 262 Tribunal found that the Crown ‘must actively protect the continuing obligations of kaitiaki towards the environment’, with such protection encompassing control by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority; partnership models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision making but other voices should be heard; and effective influence and appropriate priority to the kaitiaki interests in all areas of environmental management when the decisions are made by others. Considering the question of ‘ownership’ in relation to the environment and the principles of the Treaty of Waitangi, the Wai 262 Tribunal noted that:

[A]lthough the English text [of the Treaty] guarantees rights in the nature of ownership, the Māori text uses the language of control – tino rangatiratanga – not ownership. Equally, kaitiakitanga – the obligation side of rangatiratanga – does not require ownership. In reality, therefore, the kaitiakitanga debate is not about who owns the taonga, but who exercises control over it.¹¹

32. Certain relevant findings in relation to geothermal resources to which attention should be drawn include:

- In the *Ngawha Geothermal Report* the Tribunal stated that ‘[t]he tribunal has found that at the time of the Treaty, and for a long time before 1840, the hot springs of Ngawha and the associated sub-surface geothermal system were a sacred taonga over which the hapū of Ngawha had rangatiratanga. In this sense they “owned” the Ngawha geothermal resource.’¹² The Tribunal went on to hold that:

[A]lthough the claimant hapū no longer have an exclusive interest in the sub-surface geothermal resource they necessarily retain a substantial interest in the resource. The preservation of their taonga, the Ngawha hot springs, necessarily depends on the preservation and continued integrity of the underlying resource which manifests itself in their hot springs and pools. It is totally unrealistic to isolate or divorce their interest in the Ngawha hot springs from the geothermal resource which finds expression in them.¹³

¹⁰ *Te Ika Whenua Rivers Report* (Wai 212), p.124.

¹¹ *Ko Aotearoa Tēnei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262), p.270.

¹² *Ngawha Geothermal Resource Report* (Wai 304), p.133.

¹³ *Ngawha Geothermal Resource Report* (Wai 304), p.135.

Against that evidential background the Tribunal held in respect of the Government's intended drilling of wells for geothermal power generation purposes 'that the Crown has acted in breach of Treaty principles in failing to ensure that the Geothermal Act 1953 and s 354 of the Resource Management Act 1991, which preserves existing rights to geothermal resources under the 1953 Act, contain adequate provisions to ensure that the Treaty rights of the claimants, in their geothermal resource at Ngawha, are fully protected. As a consequence the claimants have been, and are likely to continue to be, prejudiced by such breach',¹⁴ and that '[t]he tribunal finds that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.'¹⁵

- In relation to Central North Island iwi, the Tribunal found in *He Maunga Rongo: The Report on Central North Island Claims, Stage 1* that:

[A]t 1840 when the Treaty was signed the Crown guaranteed that in exchange for kawanatanga it would protect Central North Island Māori in the exercise of their tino rangatiratanga and authority at the regional level over the entire underlying common heat and energy system known as the TVZ [Taupō Volcanic Zone]. It also guaranteed to protect the autonomy and authority of each iwi and hapū residing at the district level in the exercise of their tino rangatiratanga over the specific geothermal resources and fields of that zone.¹⁶

33. Together with consideration of these Waitangi Tribunal reports, at stage one of the inquiry we heard the evidence of claimant witnesses from Ngāpuhi, Te Arawa, Ngāti Kahungunu ki Heretaunga, Pouākani, Ngāti Te Ata, Ngāti Rangī and Muaūpoko setting out their relationship with particular freshwater resources, including rivers, lakes, springs, and aquifers, and geothermal areas. While these witnesses expressed their ongoing relationship with these water bodies in a number of different ways, they all asserted a level of ongoing rangatiratanga, kaitiakitanga, and mana over them, interpreted variously as being equivalent to property rights, a right to control and manage, and a duty of care in relation to the resource. In their submissions, the claimants then invited the Tribunal to draw from this evidence, and the previous Tribunal findings on specific water bodies, a general set of rights recognised and preserved for Māori in the Treaty of Waitangi in relation to freshwater and geothermal resources.

34. Notably, the Crown has not sought to challenge the existence of such rights, albeit with the qualification, stated by Crown counsel and several Crown witnesses, that in their submission there cannot be any 'ownership' of a freshwater resource. Crown counsel and witnesses, however, acknowledged that Māori have rights in freshwater resources, without at this stage clarifying the content and extent of such rights as recognised by the Crown. In fact, Crown counsel began the oral presentation of his closing submissions to the Tribunal with the clear statement that:

The Crown has never disputed that Māori have rights and interests in water. The first question that you ask in your list of questions is 'what rights, if any, do Māori have?' And that really gives rise to two questions, because the use of the phrase 'if any' means that the first question is 'do Māori have rights and interests in water?', and the second question is 'if so, what are they?' So to that very first question, the Crown has said, and says now, and repeats again, unequivocally and unqualified, the answer is 'yes'.

¹⁴ *Ngawha Geothermal Resource Report* (Wai 304), p.142.

¹⁵ *Ngawha Geothermal Resource Report* (Wai 304), p.147.

¹⁶ *He Maunga Rongo: The Report on Central North Island Claims, Stage 1* (Wai 1200), p.1500.

35. While the Tribunal's inquiry is concerned with rights preserved under the Treaty of Waitangi, there was some evidence canvassed by counsel as to whether there could be equivalent recognition of the property rights asserted by the claimants at common law. The Court of Appeal in *Ngāti Apa v Attorney-General* appears to have left the door ajar to consider the determination of such rights, stating that

The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.¹⁷

36. In the same judgment, Chief Justice Elias stated that:

Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature.... The content of such customary interest is a question of fact discoverable, if necessary, by evidence.¹⁸

37. While the decision in *Ngāti Apa v Attorney-General* was limited to the issue of customary interests in the foreshore and seabed, it does raise the question, which the claimants have brought to us, of the extent of pre-existing Māori rights and interests in water and the need to examine these rights and their ongoing status.

38. It should also be noted that courts in Australia¹⁹ and the United States²⁰ have considered this question and found the existence of customary title in water bodies.

39. Furthermore, the High Court (Full Court) decision in *Aoraki Water Trust v Meridian Energy* was cited by claimants as authority supporting the proposition that notwithstanding the provisions of s 122 of the Resource Management Act 1991, which declare that resource consents are neither real nor personal property, the common law may recognise property rights in water. Particular sections of the Court judgment were cited stating that, in relation to a permit held by Meridian Energy:

[A] permit specifically allows the holder to remove property, in this case water, for its own purposes subject to express conditions, even though the resource is owned by the Crown.... While permits are not themselves either real or personal property, what is determinative in our view is that, when granting consent, [Canterbury Regional Council] created the right in Meridian to take, use or divert property, being surface water in Lake Tekapo, for a defined term.... Mr Milne's concession that Meridian's consents are of considerable economic value is explicable only on the basis of a recognition that such value derives from the holder's rights to use the property in accordance with its permits.²¹

40. It therefore seems clear to us that given Treaty rights of a proprietary nature have been found to exist in specific freshwater bodies in previous Tribunal reports; the Crown has acknowledged that Māori do have rights in fresh water generally; and New Zealand's Court of Appeal has left open to question the nature and extent of such rights and interests; these issues warrant serious inquiry. Putting it another way, they are serious issues to be inquired into.

41. There is then the second core question heard in stage one of this inquiry of whether the sale by the Crown of shares in companies that generate electricity from freshwater

¹⁷ *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643, para [86].

¹⁸ *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643, para [31].

¹⁹ *The Northern Territory vs Arnhem Land Aboriginal Trust* (2008) HCA 29; *Yorta Yorta Aboriginal Community vs Victoria* (2002) 194 ALR 358.

²⁰ *Winters v United States* (1908) 207 US 564; *Arizona v California* (1963) 373 US 546.

²¹ *Aoraki Water Trust v Meridian Energy* [2005] 2 NZLR 268, paras [34]-[35].

resources would affect the Crown's ability to both recognise any Māori Treaty rights in these resources and provide a remedy for their past breach, if proven.

42. The claimants submit that the asserted Māori Treaty rights in water require a change in the power-generating companies' model for use of the water resource to recognise these rights, and that such an alteration will be either legally or practically impossible for the Crown to implement if shares in these companies have been sold to private investors. The claimants assert that the sale of part of the shares in the SOE companies before settling the nature and extent of Māori rights in respect of the water relied upon for the generation operations and profits of those companies is a breach of the Crown's Treaty duties to acknowledge and respect the pre-existing Māori rights guaranteed by the Treaty in respect of that same water.
43. Evidence and submissions were presented at the hearing as to the possibility that any Crown measures to recognise Māori rights in water after a share float could be subject to legal challenge by international investors under New Zealand's commitments under various international treaty and trade instruments. In addition to the potential for such legal challenges to bind the Crown, the claimants submit that the likelihood of challenges would have a 'chilling effect' on the Crown's willingness to recognise Māori property rights in water to the extent asserted by the claimants. The claimants also submitted that there would be, as a practical matter, pressure brought to bear on the Crown by private shareholders not to implement any policy that would have the effect of diminishing the value of shares in power-generating Mixed Ownership Model companies, including any recognition of Māori property rights in water that would have the effect of imposing constraints or a cost on the use of water by such companies. Finally, the claimants submitted that the sale of shares in power-generating Mixed Ownership Model companies can be equated to selling shares in the water utilised by these companies, as the companies rely on the water resources they control for the generation of power, and in many instances have exclusive rights to control and use such resources for a specified period (commonly 35 years).
44. The Crown disputes these contentions, submitting that the partial sale of shares in the power-generating companies does not affect the Crown's ability to recognise Māori rights in the water resources utilised by these companies, where such rights are later proven.
45. In relation to the legal challenges proposed by the claimants, the Crown submits that any such challenges are unlikely to be upheld, and as such will have no 'chilling effect' on the Crown. In relation to the pressure that may be put on the Crown to not enact any recognition of Māori rights in water in a manner that would potentially devalue shares in Mixed Ownership Model companies, the Crown submits that there are many means by which such recognition could be effected without any impact on share values. Even where recognition could affect share values the Crown submits that it would not avoid taking such action, pointing to the recent implementation of the Emissions Trading Scheme as an example of the Crown enacting socially responsible policy despite the financial burden that such policy places on individual landowners. The Crown emphasised that the possibility of future Crown steps to recognise Māori rights in water would be listed in the 'risks' section of the prospectus for the initial public offering of shares in any power-generating Mixed Ownership Model company, so that all potential investors would be aware of the possibility of future action by the Crown to recognise Māori rights in water.
46. In relation to the argument that the sale of shares in Mixed Ownership Model companies is effectively the sale of shares in the water resources utilised by these companies, the Crown submits that there is no clear nexus between shares in a power-generating company and rights in the water used by that company, and that any Crown action to recognise Māori rights in water will be arrived at independently of whether the

shareholding of the Mixed Ownership Model companies is altered. The Crown also submits that as there are already a number of completely privately-owned companies that generate power from water resources, the additional sale of shares in Mixed Ownership Model companies will not in any way alter the Crown's response when it comes to considering and implementing policy in relation to Māori water rights.

47. Regardless of whether the claimants' evidence, in our deliberations and stage one report, is found to establish a connection between any Treaty rights in water and the sale of shares in the companies in question – and, further, whether such a connection establishes a Treaty breach on the part of the Crown – the claimants' position as put to us at this stage is not an implausible one. Where the Crown alters the nature of the shareholding of a Crown owned body utilising freshwater resources, it is in our view arguable that this may alter its ability, either in a legal or practical sense, to recognise any proven Treaty rights in such resources, or to remedy their breach.
48. As a result of this discussion, we are of the view that the second core question in stage one is also of substance and warrants serious inquiry.

Balance of Convenience

49. As we have found that there is a serious question to be inquired into, we must now consider whether the balance of convenience favours making an interim direction concluding that the Crown should preserve the status quo until the release of the Tribunal's report and recommendation into stage one issues.
50. The claims before us are premised on the argument that to sell shares in the power-generating Mixed Ownership Model companies would compromise the Crown's ability to recognise Māori Treaty rights in water and remedy this prior breach. Clearly, were shares in one or more Mixed Ownership Model companies sold prior to the Tribunal's report, the Crown would have limited its ability to address the report if the Tribunal finds in favour of the claimants.
51. We are aware that were the Tribunal to make recommendations in favour of the claimants in its stage one report, the Crown has stated that it could repurchase any shares sold in the Mixed Ownership Model companies. This is, however, only a partial factor in weighing the balance of convenience, as the shares, once sold, can only be repurchased from a willing seller and may require a prohibitively expensive outlay. The only other option available to the Crown, were it to wish to return the Mixed Ownership Model companies to full Crown ownership, would be to pass legislation compulsorily reacquiring the shares sold in the companies.
52. The sale of shares in Mixed Ownership Model companies could therefore cause a significant disadvantage to the claimants, were their claims to be determined to be well-founded by the Tribunal.
53. The delay of an initial public offering of Mixed Ownership Model company shares would, however, have significant implications for the Crown. Crown counsel have stressed to us the complicated and detailed work involved in preparing a share float of this nature. They have also submitted that the sale of shares in the power-generating Mixed Ownership Model companies is a major policy initiative of the current government. That point is well made and accepted by us. The Tribunal must always take care in considering whether to direct that the Crown ought to delay a policy initiative, particularly one of this scale (and upon which budgetary considerations and other policy initiatives are dependant), to enable an as-yet-unproven claim to be heard and recommendations made. The inconvenience to the Crown of a prolonged delay to the proposed share sale would clearly exist.

54. However, the timing of the proposed share float is an important factor in assessing the balance of convenience, and with the Tribunal planning to release its stage one report in September, it may be that in reality the Crown's planned share float may not be delayed at all (or might only be subject to a minimal delay). The Crown's witness, Mr John Crawford, Deputy Secretary of the Treasury, advised that the latest possible time for selling shares this year in the September–December slot is the first week in December.
55. The Crown have, through their counsel, stated that they are not in a position to confirm when the initial public offering (IPO) of the first Mixed Ownership Model company, Mighty River Power, will occur. As noted, Mr Crawford gave evidence that this IPO would take place in a slot between September and the first week of December. When questioned on what would be contained in the 'risks' section of the IPO prospectus dealing with Treaty of Waitangi issues, this witness told us that Treasury is awaiting the Tribunal's report on stage one of the inquiry before drafting this section of the prospectus. When it was put to him at hearing that the Tribunal intended to issue its report in September, the witness stated that, without wanting to commit the Crown with his statements, that this was "the sort of timing that we have in the back of our mind".
56. We note that in closings Crown counsel sought to modify this position slightly, stating that the Crown hoped to receive the Tribunal's report 'by the end of August'. Taking this submission along with the statements of the Treasury witness, the Tribunal infers that there will either be a minimal delay to the Crown's current plans if a report is issued in September, or no delay at all.
57. For these reasons, we find that the balance of convenience favours the maintenance of the status quo and the preservation of the position of the parties until the Tribunal has issued its findings on the issues before it in its stage one report.

Conclusion

58. As previously stated, this is an issue of national importance. It is also an issue which has been before Māori and the Crown for a considerable time, a fact which is reflected in the previous Waitangi Tribunal reports on freshwater and geothermal issues and in the acknowledgments made by Māori and the Crown during the hearing of this claim.
59. In the interests of the Māori-Crown relationship, and all New Zealanders, the issues raised in this stage of the inquiry are serious ones that warrant measured consideration.
60. We also consider that the balance of convenience favours maintenance of the status quo.
61. We therefore conclude that the Crown ought not to commence the sale of shares in any of the Mixed Ownership Model companies until we have had the opportunity to complete our report on stage one of this inquiry and the Crown has had the opportunity to give this report, and any recommendations it contains, in-depth and considered examination.
62. Finally we consider the words of Cooke P in the *Radio Frequency (No.1)* case are apposite to this situation:²²

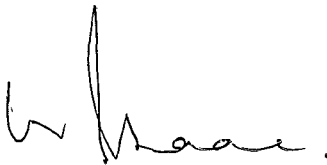
In short I am driven to hold that no reasonable Minister, if he accepted that the Crown is bound to have regard to Waitangi Tribunal recommendations on Māori broadcasting, could do other than allow the Tribunal a reasonable time for carrying out its inquiry. To allocate frequencies without waiting would be to abort its inquiry and

²² *Attorney-General v NZ Māori Council* [1991] 2 NZLR 129, p.139

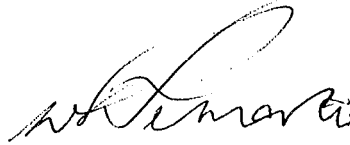
probably contrary also to the purpose of the Treaty of Waitangi Act 1975. It would deprive the Government of the day of the opportunity of taking into account in an effective way highly relevant considerations, namely the findings to be made by the Tribunal.

The Registrar is directed to send a copy of this direction to counsel for the claimants, Crown counsel and all those on the distribution list for Wai 2358, the National Fresh Water and Geothermal Resources Inquiry.

DATED at Wellington this 30th day of July 2012



Chief Judge W W Isaac
Presiding Officer



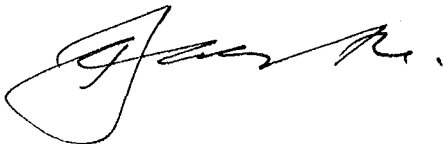
Professor Pou Temara
Member




Dr Robyn Anderson
Member



Dr Grant Phillipson
Member



Mr Tim Castle
Member



Mr Ron Crosby
Member

