IN THE WAITANGI TRIBUNAL

WAI 2358
WAI 1699
WAI 1701
WAI 996

IN THE MATTER OF	the Treaty of Waitangi Act 1975
AND	an application for an urgent hearing by Sir Graham Latimer, Tom Murray, Taipari Munroe, Kereama Pene, Rangimahuta Easthope, Peter Clarke, Jocelyn Rameka, Eugene Henare, Nuki Aldrige, Ani Martin, Ron Wihongi, Eric Hodge, Walter Rika, Emily Rameka, Maanu Paul, Charles White and Whatarangi Winiata
AND	claims by HAAMI PIRIPI on behalf of himself and TE RARAWA
AND	a claim by DAVID POTTER and ANDRE PATERSON for and on behalf of themselves and NGATI RANGITIHI

MEMORANDUM OF COUNSEL
26 June 2012

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. These opening submissions are filed jointly on behalf of:

a. Haami Piripi, Chairperson of Te Runanga o Te Rarawa ("Te Runanga"), and the Iwi of Te Rarawa ("Te Rarawa"), also the claimants for Wai 1699 and Wai 1701; and

b. Mr. David Potter and Mr. Andre Patterson, the claimants for Wai 996 ("the Wai 996 Claimants").

2. These are Te Rarawa and the Wai 996 Claimants' submissions for the first stage of the Inquiry that came about as a result of two urgent claims brought by the New Zealand Maori Council ("NZMC") together with a number of co-claimants.

3. In summary, the two claims are:

a. That Maori have proprietary rights to freshwater and geothermal resources, the protection of which was guaranteed under Article 2 of Te Tiriti o Waitangi/the Treaty of Waitangi ("Te Tiriti/the Treaty") and the Crown has 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 ("Wai 2358").

b. 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 State Owned Enterprises ("SOE") assets, and by inhibiting resolution of these outstanding claims the

sale will cause prejudice to Maori in breach of Te Tiriti/the Treaty ("Wai 2357").

4. Te Rarawa and the Wai 996 Claimants support the urgent application made by the NZMC and others in relation to Wai 2357 and Wai 2358 ("the SOE and Freshwater Claims").

5. The Tribunal has agreed to hear the SOE and Freshwater Claims on an urgent basis in two stages designed to address the most urgent issues first. The Tribunal has set out the issues to be determined as part of stage one of the Inquiry. These are:

- **a.** What rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi ("Issue A")?
- **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 ("Issue B")?
- **c.** Is such a removal of recognition and/or remedy in breach of the Treaty ("Issue C")? and
- **d.** If so, what recommendations should be made as to a Treaty-complaint approach ("Issue D")?

6. Te Rarawa and the Wai 996 Claimants, along with a number of other parties have joined the SOE and Freshwater Claims in support of the Claimants. As a result of the restricted time frames and legal aid funding and in the interests of efficiency, Senior Counsel from four of the Law Firms representing various interested parties ("the Co-ordinating Counsel"), have coordinated the opening submissions of their respective clients. Those Law Firms are:

- **a.** Aurere Law;

b. Kathy Ertel & Co;

c. Wackrow Williams & Davies Limited; and

d. Pacific Law Limited.

Lead Counsel for the Co-ordinating Counsel is Ms Sykes.

7. Pacific Law has been allocated the task of focusing primarily on legal submissions in relation to Issue A. In relation to Issues B, C and D, Te Rarawa and the Wai 996 Claimants support the submissions set out in the Claimants' opening submissions[1] and in the submissions of the other three Co-ordinating Counsel.

8. The matter of the exact nature of the rights and interests in water and geothermal resources that were guaranteed by Te Tiriti/the Treaty is complicated by the fact that the English text of the Treaty differs from the Te Reo text of Te Tiriti in a manner that is irreconcilable.

9. It is further complicated by the status of Te Tiriti/the Treaty as an international legal document.

10. Such issues were canvassed extensively in submissions made on behalf of Te Rarawa[2] to the Tribunal as part of the first phase of the Paparahi o Te Raki Inquiry ("Wai 1040") and which form part of the Record of Inquiry for Wai 1040. In the interests of ease of access, key parts of those submissions are repeated here.

11. The first phase of the Wai 1040 Hearing was focused on determining what Te Tiriti and the Treaty mean. It constituted the first significant and in-depth enquiry into the meaning and effect of Te Tiriti and the Treaty that has been undertaken by the Tribunal since it was established. It is an

[1] Wai 2358, #3.3.1, dated 19 June 2012.
[2] Refer to Counsel's final closing submissions dated 3rd May 2011, Wai 1040, #3.1.565.

important pre-requisite for the Tribunal to be able to correctly ascertain the meaning and effect of Te Tiriti and the Treaty prior to making determinations on alleged breaches of Te Tiriti and the Treaty.

12. In responding to Issue A, detailed submissions are made in relation to the meaning and effect of Te Tiriti/the Treaty. In particular, these submissions focus on international legal jurisprudence. We understand that submissions from other Co-ordinating Counsel will focus on the Maori epistemological framework. Counsel notes that the submissions should be read together as complementary.

Structure Of These Submissions

13. The structure of these submissions is as follows:

- **a.** Part I – An Interpretive Framework;
- **b.** Part II – Response to Issue A;
- **c.** Part III – Response to Issues B, C and D.

Terminology

14. Counsel notes that at various points in these submissions Māori are referred to in more generic terms as opposed only to Counsel's clients, Te Rarawa and the Wai 996 Claimants. In doing so, Counsel does not purport to speak for or represent Iwi or Hapū other than Te Rarawa and the Wai 996 Claimants. Instead, the intention throughout these submissions is to draw on the actions and perceptions of both Te Rarawa, the Wai 996 Claimants and other Māori to support the submissions made on behalf of Te Rarawa and the Wai 996 Claimants.

15. In the body of these submissions, Counsel refers separately to Te Tiriti and the Treaty – this is because Te Rarawa and the Wai 996 Claimants consider such documents to be separate and distinct. Thus "Te Tiriti"

refers to Te Tiriti o Waitangi, that is, the Maori text of the document signed by rangatira in 1840 and written in Te Reo and "the Treaty" refers to the Treaty of Waitangi, that is, the English text promulgated in 1840, and written in English.

PART I – AN INTERPRETIVE FRAMEWORK

16. Before presenting Te Rarawa and the Wai 996 Claimants' responses to the issues the subject of this proceeding, a separate and initial section, Part I, has been dedicated to establishing an interpretative framework. Counsel respectfully submits that the Tribunal should utilise this interpretative framework in its deliberations on the important matters before it.

17. Counsel respectfully submits that the body of rules or laws to be used in interpreting the meaning and effect of Te Tiriti/the Treaty must first be agreed upon as the Tribunal's deliberations ought to be undertaken in a logical and coherent manner.

Is There A Need For a Framework?

18. The Tribunal is a Commission of Inquiry established under section 4 of the Treaty of Waitangi 1974 ("the ToW Act"). It is deemed to be a permanent Commission of Inquiry under the Commissions of Inquiry Act 1908.

19. The Tribunal has jurisdiction to inquire into claims that certain Crown actions or omissions were or are inconsistent with the principles of Te Tiriti and the Treaty under section 6(1) of the the ToW Act. In order to carry out this role, and as provided for in section 5(2) of the ToW Act, the Tribunal, in exercising its functions under section 5 "…shall have regard to the 2 texts of the Treaty set out in Schedule 1 to this Act and, for the

purposes of this Act, shall have **exclusive authority** [emphasis added] to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them."

20. The Tribunal is not bound to adopt any particular interpretive framework – as stated above it has exclusive authority to determine the meaning and effect of Te Tiriti/the Treaty as embodied in the 2 texts.

21. In carrying out its functions under the ToW Act, the Tribunal has a wide discretion to regulate its procedure in such manner as it thinks fit. However, this discretion is not unfettered – it is constrained by the rules of natural justice and other administrative law requirements, including the requirement to take into account relevant considerations and disregard irrelevant considerations and to act intra-vires its empowering statute – namely the ToW Act.

22. A report of a Commission of Inquiry (including a Tribunal report) may be judicially reviewed.[3] In this regard, the majority of the Court of Appeal in *Peters v Davison* stated:[4]

> The real as opposed to the technical force of the reports of commissions appears in the growing acceptance over recent years and in this case that commission reports or parts of them can be reviewed on certain grounds…That is so although the report does no more than state opinions, conclusions, and recommendations…

23. A report prepared by a Commission of Inquiry may be subject to judicial review if the Commission has exceeded its terms of reference or has breached principles of natural justice. [5]

24. A report of a Commission of Inquiry may also be reviewed on the basis of an error of law. For example, Tipping J stated in *Peters v Davison*:[6]

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[3] Either by way of an application under section 4(1) of the Judicature Amendment Act 1972 or by invoking the High Court's inherent jurisdiction.
[4] *Peters v Davison* [1999] 2 NZLR 164 at 182.
[5] *Ibid.* at 206.

> I can see no sufficient reason why the report of a commission of inquiry should not be reviewed for material error of law (as a species of ultra vires) in the same way as it can be reviewed for breach of natural justice and excess of jurisdiction (themselves other species of ultra vires)…In real and practical terms, while a commission of inquiry may not have made a decision binding in law, its report can, as is argued here, have a major effect on a participant's reputation; that being an interest which the law will protect.

25. Therefore, it is clear that a Tribunal report, including any recommendations made in that report, may be subject to judicial review, on the basis of a breach of the usual principles of administrative law and natural justice. For instance, if the Tribunal has acted ultra vires the ToW Act and/or has made a material error of law and/or has not acted consistently with the principles of administrative law which fetter its discretion and/or where the Tribunal has taken irrelevant considerations into account or has failed to take relevant considerations into account and/or where the Tribunal's findings and recommendations are unreasonable and/or where the Tribunal has breached general principles of natural justice.

26. It is fundamental to the resolution of any dispute that the first step is in establishing the rules that will be utilised to resolve that dispute. For without such clarity, how can the Tribunal even begin to work through the complexities that face it in this matter? To demonstrate this point, consider a situation in which the Tribunal applied a random set of domestic laws from various nations to interpret Te Tiriti and the Treaty – such a process would most certainly be incorrect both ethically and legally.

27. Counsel respectfully submits that the task of agreeing on an interpretive framework and the appropriate body of rules or laws to apply in resolving

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[6] *Peters v Davison* [1999] 2 NZLR 164 at 210.

the meaning and effect of Te Tiriti and the Treaty is an important pre-requisite for the Tribunal's deliberations in these proceedings.

The Legislative Direction in the Treaty of Waitangi Act 1975

28. Section 5(2) of the ToW Act provides that in exercising any of the Tribunal's functions (which include inquiring into and making recommendations on claims submitted under section 6 of the Act), the Tribunal "shall have regard to the 2 texts of the Treaty set out in Schedule 1 to this Act and, for the purposes of this Act, shall have exclusive authority to determine the meaning and effect of the Treaty as embodied in the 2 texts and to decide issues raised by the differences between them." As well as recognising in section 5(2) that there are differences between the two texts, the ToW Act also makes an express reference to these differences in its Preamble.

29. The ToW Act does not, however, provide any guidance about how the Tribunal should resolve the issues that arise due to the differences between the two texts. Other than requiring the Tribunal to have regard to both the texts set out in Schedule 1, the ToW Act does not oblige the Tribunal to adopt any particular interpretive framework. Therefore, subject to section 5(2) of the ToW Act and general administrative law requirements, the Tribunal may choose for itself which interpretive framework to apply.

30. In Counsel's submission, the framework that the Tribunal chooses should be principled from a Māori and Pākehā perspective and allow both of those perspectives to be taken into account, be consistent with the Tribunal's broad investigative powers and status as a Commission of Inquiry, and be consistent with the legal status of the principal instruments under consideration, namely, Te Tiriti and the Treaty.

Is International Law Relevant?

31. Counsel respectfully submits that not only is international law a relevant consideration in this inquiry but that the Tribunal must apply international law principles to the interpretation of Te Tiriti and the Treaty. Counsel submits that this is so because Te Tiriti and the Treaty constitute an international legal treaty – the British Crown and the Iwi Nations whose rangatira signed Te Tiriti each had the status of independent nation states treating at international law.

32. Consequently, the Tribunal should not interpret Te Tiriti and the Treaty by reference to domestic law principles of interpretation (such as those set out in the Interpretation Act 1999). Although the Tribunal has exclusive authority to determine the meaning and effect of Te Tiriti and the Treaty, Counsel submits that the Tribunal must utilise the correct body of law, namely the principles of international law in fulfilling its interpretive function – to not do so would be a material error of law.

33. Counsel respectfully submits that, should the Tribunal not utilise international law principles in determining the meaning and effect of Te Tiriti and the Treaty, its report and recommendations would likely be susceptible to judicial review.

34. Such a proposition is not new for the Tribunal. In a number of previous reports, the Tribunal has stated that in interpreting Te Tiriti and the Treaty it must apply the principles applicable to the interpretation of international treaties.[7] For example, in the *Motunui-Waitara Report*, the

[7] See, for example, the Waitangi Tribunal, *Motunui-Waitara Report 1983* (Wellington: Waitangi Tribunal Department of Justice, 1983) at para. 10.1; the Waitangi Tribunal, *Report of the Waitangi Tribunal on the Orakei Claim* (Wellington: Waitangi Tribunal Department of Justice, 1987) at para. 11.2.3; and the Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim 1985* (Wellington: Waitangi Tribunal Department of Justice, 1989) at para. 8.2. Note that in the *Orakei* and *Manukau* reports, the Tribunal referred to "municipal law". However, it is clear from the remaining text in the cited paragraphs from those reports that the Tribunal intended to refer to international law, not municipal or domestic law.

Tribunal considered that "there are several similarities between the Maori approach to the meaning of things, and the 'European' legal approach to the interpretation of treaties."[8] It then cited, with approval, extracts from submissions that the Department of Māori Affairs had made regarding the interpretation of Te Tiriti and the Treaty. These included a submission that Te Tiriti and the Treaty should be interpreted according to the principles applicable to international conventions as opposed to those applicable to statutory interpretation.

35. Counsel respectfully submits that this approach is correct. As Dr. Matthew Palmer (the current Deputy Solicitor-General, Public Law Group, Crown Law Office and an eminent commentator on Te Tiriti, the Treaty and on constitutional matters generally in Aotearoa/New Zealand) argues in his book, *The Treaty of Waitangi in New Zealand's Law and Constitution*, Te Tiriti and the Treaty is a valid treaty at international law.[9] Amongst other matters, Dr. Palmer records that it is no longer disputed that at the time Te Tiriti and the Treaty was concluded, Māori had capacity at international law, and were therefore capable of concluding an international treaty.[10] Dr. Palmer further notes Dr. McHugh's "analysis of the Treaty of Waitangi as … a valid instrument of international law is unequivocal."

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[8] *Motunui-Waitara Report* at para. 10.1. The Tribunal also cited with approval the following submission: "Furthermore the House of Lords [in *James Buchanan & Co. Ltd v. Babco Forwarding and Shipping (U.K.) Ltd* [1977] 3 All E.R. 1048 (H.L.)] has stated that: 'the correct approach in construing a United Kingdom statute which incorporates and gives effect to a European convention is to interpret the English text as set out in the statute in the normal manner appropriate for the interpretation of an international convention, unconstrained by technical rules of English law or by legal precedent but on broad principles of general acceptation." In *New Zealand Maori Council v. Attorney-General* [1987] 1 N.Z.L.R 641 (C.A.) Bisson J cited at 714 almost all of the same passage.

[9] Matthew S.R Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Wellington: Victoria University Press, 2008) at 153. At 167, Dr. Palmer states: "I believe that fully-fledged consideration by an international court, or by the New Zealand Supreme Court, of the status of the Treaty of Waitangi would yield the result that it is valid at international law."

[10] Dr. Palmer at 153-159.

36. The analyses of Dr. Palmer and Dr. McHugh[11] are consistent with that of Kingsbury. In a 1989 article entitled "The Treaty of Waitangi: some international law aspects", Kingsbury contends that Te Tiriti and the Treaty constitute a valid international treaty and consequently Te Tiriti and the Treaty should be interpreted according to international law principles.[12]

37. Accordingly, because Te Tiriti and the Treaty constitute a valid international treaty, international law principles ought to be applied to interpret it.

38. As Kingsbury states, these principles "have evolved from long international experience in dealing with difficult issues of treaty interpretation, and provide a rich source for which New Zealand has no domestic parallel."[13]

39. In Counsel's submission, the international law principles applicable to the interpretation of treaties would be principled from a Māori and Pākehā perspective and allow both of those perspectives to be taken into account, be consistent with the Tribunal's broad investigative powers and status as a Commission of Inquiry, and be consistent with the legal status as international treaties of the principal instruments under consideration, namely, Te Tiriti and the Treaty.

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[11] In his article, Dr. Palmer cites from Dr. McHugh's publication *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991) at 178.

[12] Benedict Kingsbury, "The Treaty of Waitangi: Some International Law Aspects" in I. H Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) at 121 and 127-134. Counsel notes that in this article, Kingsbury's analysis is based on his assumption that through Te Tiriti and the Treaty, Māori "lost [their] sovereign status" (see 126). Counsel submits that the interpretation of Te Tiriti and the Treaty as an instrument through which Māori ceded sovereignty is incorrect.

[13] Benedict Kingsbury, "The Treaty of Waitangi: Some International Law Aspects" in I. H Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Auckland: Oxford University Press, 1989) at 131.

40. Counsel has attached submissions on the applicable international law principles at 1840, as made to the Wai 1040 Tribunal, as Annex A, for ease of access for Tribunal Members who wish to inquire further.

41. For current purposes, it is sufficient to note that the orthodox view that Kawanatanga was ceded to the British Crown under the Treaty/Te Tiriti in 1840 is disputed by Te Rarawa and extensive submissions were made on this point in reliance primarily on the application of international law rules of interpretation to the evidence of Professor Patu Hohepa, an expert linguist, on the meaning to be attributed to the text of Te Tiriti.

42. Counsel acknowledges that the Tribunal has yet to release its report on that first phase of the Wai 1040 Inquiry.

PART II – RESPONSE TO ISSUE A

43. As alluded to above, extensive legal submissions on the exact legal status of Te Tiriti/the Treaty at international law and the rights and interests, which were ceded by Maori to the British Crown in accordance with the relevant international law principles and with the benefit of an expert linguist were made to the Tribunal as part of the first phase of Wai 1040.[14]

44. Essentially, these submissions are summarised as follows:

a. Te Tiriti and the Treaty are the founding constitutional documents of Aotearoa/New Zealand as a nation. They are the cornerstone documents upon which Aotearoa/New Zealand's constitutional arrangements rest. Te Tiriti and the Treaty represent a promise and a covenant between Māori and the

[14] Wai 1040, #3.1.565.

British Crown and goes to the very heart of the social and political lives of every New Zealander.

b. In 1840, Iwi held the legal status at international law of independent sovereign nations, and were recognised as such by the British Crown. It is widely accepted that they met all of the requirements for international legal personality namely:

i. a permanent population;
ii. a defined territory;
iii. government; and
iv. Capacity to enter into relations with other states.

c. It is in this context that Te Tiriti was entered into. Te Tiriti is thus a binding international treaty. Consequently Te Tiriti and the Treaty should be interpreted, first and foremost, under international law principles, as opposed to being considered directly under British common or constitutional law and/or under domestic Māori customary law. It is important to stress that while these municipal or domestic bodies of law are relevant to the interpretation of Te Tiriti and the Treaty they are not the primary bodies of law under which Te Tiriti and the Treaty should be interpreted.

d. The agreements set out in the Treaty differ substantially from those set out in Te Tiriti, so much so that the contents of the two texts are irreconcilable.

e. For those Iwi that only signed Te Tiriti and not the Treaty, that is the agreement that is relevant to their rights and obligations. They did not consider the English text of the Treaty, they did not

sign it, and consequently they do not agree that it has equal authority to Te Tiriti.

f. Article 31 of the Vienna Convention on the Law of Treaties 1969 ("the Vienna Convention") provides that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

g. The ordinary meaning of Te Tiriti, interpreted in good faith, in its context and in light of its object and purpose, is that:

- **i.** the rangatira signatories granted a limited kawanatanga or governorship to the Queen over land legitimately received by her (whether soon after the signing of Te Tiriti or subsequently), and over her subjects;
- **ii.** this kawanatanga was not to apply to land under the authority of those rangatira – the rangatira retained sovereignty over their own lands and their own people;
- **iii.** Māori were to be treated equally to the Queen's subjects when on the Queen's land – otherwise, they would continue to have the rights and duties bestowed and imposed by tikanga

h. The meaning and effect of Te Tiriti is not ambiguous or unclear – to the contrary, it is crystal clear. Consequently, Counsel's submissions are very simple as Counsel considers the meaning and effect of Te Tiriti is straightforward.

i. Over the years since the signing of Te Tiriti and the Treaty, much has been written comparing the English text of the Treaty with the Māori text of Te Tiriti in an attempt to reconcile the two. However, Counsel submits that such an exercise is wrong at law.

It is a most basic and fundamental legal principle that, for a document to be binding on a party, that party must agree to it, as evidenced by a signature representative of that party.

j. Te Rarawa's submission is that a limited form of governance or kawanatanga was granted to the British Crown over land that its subjects had legitimately acquired (which in 1840 amounted to 5% of Aotearoa/New Zealand) and may legitimately acquire in future and over her subjects resident in such lands.

k. Under international law, inconsistencies and ambiguities in international treaties must be resolved contra proferentem, that is, against the party that drafted them. This means that any ambiguities in Te Tiriti and/or the Treaty must be resolved against the British Crown.

l. Even if both Te Tiriti and the Treaty are given equal status in determining the rights and obligations of the rangatira that signed Te Tiriti, the Treaty is fundamentally inconsistent with Te Tiriti. Accordingly, the contra proferentem rule would require that Te Tiriti be given preference and the Treaty read down.

m. Similarly, international law (the in dubio mitius rule) requires that inconsistencies and ambiguities in an international treaty be resolved in the manner that least restricts the sovereignty of the parties to that treaty (that being the sovereignty they had at the time they entered into the treaty). This means that any ambiguities in Te Tiriti must be resolved in a way which least restricts Māori sovereignty. Moreover (and once again in the alternative), if both Te Tiriti and the Treaty are given equal status in determining the rights and obligations of the rangatira that signed Te Tiriti (which Counsel deny), those texts would

have to be interpreted in a way which imposed the lowest level of obligation or burden upon Māori, in deference to Māori sovereignty. Clearly, this would mean that the Treaty would have to give way to Te Tiriti.

n. As Māori did not cede sovereignty under Te Tiriti and the Treaty the British Crown's usurpation of such a jurisdiction was a material and illegal breach of Te Tiriti and the Treaty.

45. It is in this context that Counsel submits that the common law doctrine of native title is not relevant to the issues currently before the Tribunal. The Tribunal is inquiring into the rights and interests protected by Te Tiriti/the Treaty itself. The Tribunal is not confined to a narrow construction of Treaty obligations in reliance on what Parliament may or may not have set out in any given piece of legislation. Counsel submits that actions of the Crown which may or may not amount to extinguishment under the common law doctrine of aboriginal/native title are not currently relevant to the Tribunal's role in ascertaining what rights and interests were guaranteed and protected by Te Tiriti/the Treaty. As submitted above, the status of Te Tiriti/the Treaty is that of an international legal instrument, and it is with reference to international law rules of interpretation that the meaning and therefore exact nature of the rights and obligations of the states parties ought to be ascertained.

46. Moreover, in Aotearoa/New Zealand, the obligations on the States Parties contained within an international agreement have little legal effect unless incorporated into statute by the relevant contracting state.[15]

[15] The exception is where such obligations comprise mandatory relevant considerations on decision-makers. It is now accepted that international legal obligations have, in the exercise of a statutory decision, the status of a mandatory relevant consideration – *Tavita v Minister of Immigration* [1994] 2 NZLR 257 at 266. *Tavita* involved consideration of whether international obligations were required to be taken into account in the exercise of statutory powers under the Immigration Act 1987. The facts of the case were regarding the proposed deportation of an overstayer who was the father of a young daughter born in New Zealand. Counsel for the Crown submitted that the Minister of Immigration and Department of Immigration were

47. The ToW Act has given the Tribunal exclusive authority, under section 5(2) of the ToW Act, to determine the meaning of Te Tiriti/the Treaty.

48. In responding to Issue A on the rights and interests in water and geothermal resources guaranteed and protected by Te Tiriti/the Treaty, and in reliance upon the above interpretation of Te Tiriti/the Treaty, for 95% of New Zealand's land mass, Maori were, under Article 2 of Te Tiriti guaranteed tino rangatiratanga **and** kawanatanga over all of those resources.

49. The proclamations of 1840[16], which purported to grant the British Crown sovereignty over Aotearoa/New Zealand were among the first acts to breach Te Tiriti/the Treaty ("the Original Breach"). Under the Original Breach, the Crown, contrary to what was guaranteed in Te Tiriti/the Treaty, illegally purported to acquire sovereignty. Subsequent actions continued the historical breach, such that the failure to recognise and give effect to the intent of the States Parties can be seen as an ongoing and continuing historical breach which has now become a contemporary breach. Te Rarawa and the Wai 996 Claimants do not accept the validity of any legislative or executive acts which derive their legitimacy from those original proclamations of sovereignty, namely the Original Breach.

50. Te Rarawa and the Wai 996 Claimants submit that under Te Tiriti/the Treaty they are entitled to the full spectrum of rights and interests which they hold in water, which includes both resource management rights, that

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entitled to ignore the international instruments of the ICCPR and the Convention on the Rights of the Child 1989. The Court rejected this argument and stated, inter alia, that: …this was an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. Although, for the reasons to be mentioned shortly, a final decision on the argument is neither necessary nor desirable, there must at least be hesitation about accepting it. The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing revolution…(page 266).

[16] There were a series of Proclamations made in 1840, including the primary ones in May 1840.

is, the right to make decisions over the sustainable use and management of the relevant water resource, **and** proprietary rights. The case example evidence provided in the Affidavits of Mr Haami Piripi[17] and Mr David Potter[18] set out in detail the nature of the ownership, management and governance rights and interests which Te Rarawa and the Wai 996 Claimants possess over their water bodies.

51. In relation to proprietary rights, the submissions of Counsel for the Claimants, at paragraphs 27 – 49 are supported.

PART III – RESPONSE TO ISSUES B, C AND D

52. As set out in paragraph 7 of these submissions, Counsel relies on and supports the submissions of the Claimants and other Co-ordinating Counsel in relation to Issues B, C, and D. The following summarises the submissions of Te Rarawa and the Wai 996 Claimants:

a. It is clear that the sale of 49 per cent of shares in power generating SOE companies does affect the Crown's ability to recognise Maori rights and remedy any breach, where such breaches are proven because it removes this potential redress from the hands of the Crown. Counsel supports the submissions made in this regard by Counsel for the Claimants in paragraphs 110 – 123 of the Claimants' opening submissions.

b. It is also plain to see that the removal of recognition and this potential remedy is in breach of Te Tiriti/the Treaty. The Crown has a duty of active protection and a duty to remedy past breaches: *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641, pp 664-665. Counsel submits that such duty extends to the reservation

[17] Wai 2357 and Wai 2358, #A64, #A64(a) and #A64(b).
[18] Wai 2357 and Wai 2358, #A63, #A63(a) and #A63(b).

of key assets available for redress, which duty crystallises at the point of time that the Crown becomes aware of prima facie claims. Counsel supports the submissions made in this regard by Counsel for the Claimants in paragraphs 124 – 129 of the Claimants' opening submissions.

c. The submissions in relation to the recommendations that should be made as to a Treaty-compliant approach as set out in paragraphs 90 – 109 of the Claimants' opening submissions are supported.

53. Finally, Te Rarawa and the Wai 996 Claimants make the following observation. Should the Crown have been genuine in its intentions to properly assess any potential breaches of Te Tiriti/the Treaty and/or the principles of Te Tiriti/the Treaty, the Crown would merely have made minor amendments to the existing State Owned Enterprises Act 1986 ("the SOE Act") which would have left the obligations under section 9 of the SOE Act intact. Section 9 states:

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

54. If so, the very act of considering whether or not a sale should be undertaken would have been subject to section 9.

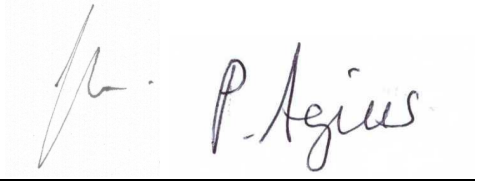
55. Consequently, if minor amendments had been made to the SOE Act instead of introducing an entirely new Act, then any transfer to any third parties would have been subject to section 9. A result of this would have been that the sale itself would have been justiciable in the Courts and, if inconsistent with the principles of Te Tiriti/the Treaty, would have been disallowed.

56. Under the proposed new legislation, however, the act of transferring almost half of these substantial assets to a third party will not be justiciable in the High Court. Section 45Q of the Mixed Ownership Model

Bill ("MOM Bill"), which sets out the equivalent of the SOE Treaty provision in the MOM Bill, is only applicable to Part 5A of the MOM Bill. It is Part 1 of the MOM Bill which contains the provisions for companies to cease to be state enterprises and to become mixed ownership model companies. It is in this manner that the Crown has managed to avoid completely its obligations to properly assess the effect of the sale of assets subject to Treaty claims and to avoid having to cater for or put in place a protection mechanism for Maori claimants. To transfer a significant proportion of an asset to a third party without having to assess or arrange for, at the very least, some saving provision with respect to providing redress for extant Te Tiriti/the Treaty rights is a breach of the principles of Te Tiriti/the Treaty.

57. Instead, the Crown has blatantly attempted to circumvent its Treaty duties of good faith, active protection and duties to remedy past breaches by relying on the doctrine of sovereignty of Parliament to hastily introduce new legislation to allow for the sale of current SOEs without having to put in place protection mechanisms reserving these assets for the purposes of settling genuine claims when the time comes to do so. The evidence of Mr Haami Piripi[19] demonstrates the haste with which legislation was introduced and the extent and nature of opposition to the legislation and the purported sales.

Dated at Wellington this 26th day of June 2012



Janet Mason/Priscilla Agius
Counsel for the Claimant

[19] Wai 2358, #A77, #A77(a) - #A77(h).