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

ORAL CLOSING SUBMISSIONS
19 JULY 2012

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MAY IT PLEASE THE TRIBUNAL

INTRODUCTION

1. These closing 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?
  - **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 ("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-compliant approach ("Issue D")?[1]

[1] Wai 2358, #1.4.1.

Executive Summary

6. This Phase of this Enquiry primarily turns on the issue of whether or not Maori have proprietary rights in water and whether such rights have been guaranteed under Te Tiriti/the Treaty.

7. It has long been accepted by the Tribunal that Maori have proprietary rights in water.

8. The Crown has not submitted any evidence to contradict or oppose such a proposition.

9. Instead it relies on the proposition that at common law no-one can own water and therefore any claims to ownership of water must necessarily fail.

10. However, there are two fundamental flaws with the Crown's approach, summarised as follows:

a. It is the rights and interests which are guaranteed under Te Tiriti/the Treaty which are at issue – and not whether or not the common law of England provides for proprietary rights in water;

b. In any event the common law of England does actually provide for proprietary rights in water in precisely the situation that we are concerned with – namely the containment or appropriation of water.

11. Consequently, the claims of Maori to proprietary rights are consistent with the position at common law in relation to contained/appropriated water.

12. Moreover, applying the dicta in *Attorney-General v Ngati Apa*[2] and *Yanner v Eaton*[3], the purported vesting of water in the Crown (via section 354(1)(b) of the Resource Management Act 1991 and section 21(1) of the Water and Soil Conservation Act 1967) does not expropriate existing native title.

13. Consequently, Maori ownership in appropriated water continues unextinguished.

14. The transfer of shares in the power generating SOEs, without the prior informed consent of the Maori owners of the water that is so fundamental to the operation of the power generating SOEs is a breach of the Treaty/ Te Tiriti and such rights at common law.

Structure Of These Submissions

15. 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 Issue B;
- **d.** Part IV – Response to Issue C;
- **e.** Part V – Response to Issue D.

Terminology

16. 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,

[2] [2003] 3 NZLR 643 (CA).
[3] (1999) 201 CLR 351

the Wai 996 Claimants and other Māori to support the submissions made on behalf of Te Rarawa and the Wai 996 Claimants.

17. 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

18. 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.

19. 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?

20. 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.

The Tribunal has jurisdiction to inquire into claims that certain Crown ...issions were or are inconsistent with the principles of Te Tiriti and the Treaty under section 6(1) of 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."

22. 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.

23. 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.

24. A report of a Commission of Inquiry (including a Tribunal report) may be judicially reviewed.[4] In this regard, the majority of the Court of Appeal in *Peters v Davison* stated:[5]

> 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...

[4] 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.
[5] *Peters v Davison* [1999] 2 NZLR 164 at 182.

25. 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. [6]

26. 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*:[7]

> 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.

27. 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.

28. 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

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[6] *Ibid.* at 206.
[7] *Peters v Davison* [1999] 2 NZLR 164 at 210.

domestic laws from various nations to interpret Te Tiriti and the Treaty – such a process would most certainly be incorrect both ethically and legally.

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

30. 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.

31. 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.

32. 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?

33. 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.

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

35. Such issues were canvassed extensively in submissions made on behalf of Te Rarawa[8] 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, a copy of the submissions will be attached to our final closing submissions.

36. 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 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.

[8] Refer to Counsel's final closing submissions dated 3rd May 2011, Wai 1040, #3.1.565.

37. 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.

38. 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

39. 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.[9]

40. 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 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:

[9] Wai 1040, #3.1.565.

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.

41. It is in this context that Counsel submits that the common law doctrine of native title is not relevant to the determination of Issue A. 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.

42. 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.[10]

43. 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.

44. 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

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[10] 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 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).

52. Again, the whole of these summaries, if not the whole of the Tribunal's report, is of particular interest and importance to this Inquiry. However, the most salient feature of the purpose of these submissions is the Tribunal's finding that the rights to the rivers at issue amounted to proprietary interests (see, for example, EGR-D, pp 11-13, citing extensively from the Report).

Whanganui

53. The Tribunal's decision the following year in the Whanganui River report reached similar conclusion in relation to that water resources. The following passages are taken from EGR-D pp7-8 with reference to pages in the Tribunal's Report:

> The river and its tributaries were possessed by Atihaunui (p 261). It was possessed by them as a water resource, a single and indivisible entity compromised of water, banks and bed (pp 337, 338, 345). The Treaty guaranteed the continued possession of the river and tributaries (p 263).
>
> The guarantee was of a "full, exclusive and undisturbed" possession. That encompasses both ownership and control (pp 261, 263, 337, 340). Maori customary interests in water bodies cover private, proprietary interests, tribal, territorial interests and unifying, spiritual interests (pp 26-54).
>
> The "full, exclusive and undisturbed" possession of properties connotes all rights of authority, management and control" (p 338). That which they possessed is much larger that which is referred to as guardianship, stewardship or kaitiakitanga (p 264). It was a "property interest" (p 337).

He Maunga Rongo

54. In her report, Marian Mare sets out in full the summary of findings from He Maunga Rongo chapter 20, "Ruamoko/ Ruaimoko and Ngatoroirangi: The Geothermal Resources of the Central North island" (Mare Geothermal Report, pp 2-3). Without repeating those here the most significant conclusion of the Tribunal is that the geothermal fields in question were taonga protected by the Treaty of Waitangi.

Case Examples

Indicia of ownership

55. From these past Tribunal and Court decisions and from the surrounding academic work, it is possible to identify a number of indicia of proprietary interests – factors that have been cited s 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 conclusion 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.

56. The following is a list of these indicia together with references to where such indicia have been discussed in the case examples (including the reports of Marian Mare and Tony Waltz) and in the reports of Habib (EGR-D), Jeffries and O'Leary (EGR-E), and Hohepa and Habib (EGR-I). Claims of occupation apply to all cases examples. Three fresh water case examples mention the use of the resources as a source of drinking water. It is submitted that this in fact was true of all such resources, but was regarded as too obvious to mention.

a. Resources relied upon as a source of food: Heretaunga, pp 4, 5 and 7; Kaituna, pp 1, and 3 – 8; Horowhenua, pp 1 and 2;

Omapere, pp 3 and 7; Poroti, p1; Rangitaiki, pp 1 and 2; Taniwha and Hamurana, pp 3 and 8; Upper Waikato, p 3; Waikato Rivermouth, p 4; Ngati Raukawa, pp 4 – 6, and 8; Walzl CNI Report, pp 2, 10, 11, 21 – 23, and 30; Mare Geothermal Report, pp 11 – 12; Jeffries & O'Leary (EGR-E), p 8; Habib (EGR-I, pp 1, 3, 5, 9 – 12, and 14; Hohepa and Habib (EGR-I), pp 2, 6, 7, 12, 14 – 19, 21 – 23, 25, 28, 34, 36, 38, 39, 42, 43, and 47.

b. **Resources relied on as a source of textiles or other materials:** Kaituna, pp 5 and 7; Rangitaiki, p 1; Heretaunga, p 3; Omapere, p 7; Ngati Raukawa, p 8; Hohepa and Habib (EGR-I), pp 16, 28, and 36.

c. **Resource relied upon for travel or trade:** Kaituna, pp 2 and 5; Omapere, p 7; Rangitaiki, p 1: Upper Waikato, pp 3 and 4; Waikato Rivermouth, p 3; Taniwha and Hamurana, p 3; Heretaunga, p 3; Ngati Raukawa, p 8: Walzl CNI Report, p 13; Mare Geothermal Report, p 13; Hohepa and Habib (EGR-I), pp 2, 8, 10, 13, 30, 33, 35 – 37, 40, 43, 46, and 62.

d. **Resources used in the spiritual life of the hapu:** Kaituna, pp 2 and 5; Poroti, p 1; Taniwha and Hamurana, p 5; Rotongaio, p 1; Rotokawau, p 1; Heretaunga, p 1; Waikato Rivermouth, p 4; Ngati Raukawa, pp 7 and 15; Walzl CNI Report, pp 1, 2, 5 6, 8, 10, 17, 18, 20, 21, and 25 – 32; Mare Geothermal Report, p 8; Jeffries & O'Leary (EGR-E), p 3; Habib (EGR-D), pp 1, 5, 6, 7, 12.

e. **The attribution of mauri to the resources:** Omapere, p 7; Upper Waikato, p 7 and 8; Waikato Rivermouth, p 5; Kaituna, p 1; Ngati Raukawa, pp 5 and 6; Walzl CNI Report, pp 1, 2, 6, 7, 9, 10, 16, 20, 26, 29, and 30; Habib (EGR-D), pp 3, 6, and 10; Hohepa and Habib (EGR-I), pp 6, 7, 24, 28, 32, 37, and 39.

f. **Resources referred to in waiata:** Taniwha and Hamurana, p 5; Mare Geothermal Report, p 10; Habib (EGR-D), p 10; Hohepa and Habib (EGR-I) p 20.

g. **Resources referred to in whakatauki:** Heretaunga, p 1; Habib (EGR-D), p 10; Hohepa and Habib (EGR-I), p 20.

h. **The identification of taniwha as residing in resource:** Kaituna, p 3; Poroti, p 1; Taniwha and Hamurana, pp 3, and 5; Heretaunga, pp 4, and 5; Upper Waikato, pp 7; Waikato Rivermouth, p 4; Ngati Raukawa, p 15; Walzl CNI Report, pp 9, and 18; Mare Geothermal Report, p 15; Habib (EGR-D), p 5; Hohepa and Habib (EGR-I), pp 27, 33, 34, 62.

i. **Exercise of kaitiakitanga over the resource:** Kaituna, p 8; Poroti, pp 1 – 3; Rotokawau, p 1; Horowhenua, pp 2 – 3; Waikato Rivermouth, p 3; Ngati Raukawa, pp 3 and 9; Walzl CNI report, pp 10, 20, and 21; Mare Geothermal Report , pp 4 – 5: Jeffries & O' Leary (EGR-E), pp 3 – 6, and 8 – 10; Habib (EGR-D), p 8; Hohepa and Habib (EGR-I), p 39.

j. **Exercise of mana or rangatiratanga over the resource:** Kaituna, p 3; Taniwha and Hamurana, p 1; Horowhenua, p 1; Upper Waikato, p 3; Omapere, pp 3, 4, and 7; Rangitaiki, p 1; Rotongaio, p 1; Ngati Raukawa, pp 3, 6, 7 and 15; Walzl CNI Report, pp 1, 2, 7, 9, 10, 16, 17, 19, 21 – 23, 26,29, 30 and 32; Mare Geothermal Report, pp 1 – 3, and 27; Jeffries & O'Leary (EGR-E), pp 4, 6, and 8; Habib (EGR-D, pp 2, and 6 – 13; Hohepa and Habib (EGR-I), pp 5, 10, 23, 24, 27, 32, 39 and 43.

k. **Whakapapa identifying a cosmological connection with the resource:** Kaituna, p 3; Walzl CNI Report, pp 1, 6, 8, 18, and 29; Mare Geothermal Report, pp 2, 4, and 8; Habib (EGR-D), pp 4, 7, and 10; Hohepa and Habib (EGR-I), pp 5, 11 – 13, 20, 24, 26, 28, 30, 37, and 40.

Management And Governance Rights

57. It is Te Rarawa and the Wai 996 Claimants' view that kawanatanga was not ceded to the British Crown for land not legitimately acquired by the British Crown that is, approximately 95 per cent of Aotearoa and therefore any purported assumptions of sovereignty are not valid. The Claimants recognise that such a view departs from the orthodox position that kawanatanga was ceded over the entire country. For the purposes of Phase One of this Inquiry, Counsel submits that the determination of the issue of the nature and extent of kawanatanga that was ceded is not crucial to the proceedings as it is the actual proprietary rights/ownership rights which are at stake.

58. Cession of kawanatanga, in and of itself, does not of course provide the basis for an expropriation of property rights.

59. Counsel now turns to address the Crown's main argument that there can be no ownership in water as under English common law no one owns water.

No Ownership In Water

60. The proposition that no-one can own water is said to have as its basis the English common law.[15] In general, water itself, whether flowing in a

[15] See generally Laws of New Zealand, Halsbury's Laws of England, entire passages of which are quoted herein.

known and defined channel or percolating through the soil, at common law[16], is not, the subject of property[17] or capable of being granted to anybody[18].

61. In relation to use rights, unrestricted common law rights to use unappropriated water, whether percolating through the soil,[19] diffused as surface water,[20] or flowing, or collected in a pool or small lake, within one holding,[21] were incident to ownership of the land.[22] Such rights were considered similar to proprietary interests, since only the landowner had the right of access to the water and therefore to appropriate it.[23]

62. It is not entirely correct that there can be no proprietary rights in water at common law.

63. Proprietary rights in water at common law exists in the following instances.[24]

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[16] Proprietary interests in water flowing in certain channels may be, and have in certain instances been created by Act of Parliament as in *Rochdale Canal Co v King* (1849) 14 QB 122 (affd (1851) 14 QB 136, Ex Ch); *Medway Co v Earl of Romney* (1861) 9 CBNS 575.
[17] As to rights in flowing water akin to a proprietary interest.
[18] *Wright v Howard* (1823) 1 Sim & St 190; *Williams v Morland* (1824) 2 B & Co at 917; *Embrey v Owen* (1851) 6 Exch 353 at 369-370; *Race v Ward* (1855) 4 E & B 702 per Lord Campbell LCJ; *Ballard v Tomlison* ((1885) 29 ChD 115 at 121, CA. Cf *Mason v Hill* (1833) 5 B & Ad 1; *Rawson v Taylor* (1855) 11 Exch 369. A claim cannot be brought for the recovery of possession of a pool or other piece of water, but only for the land covered with water: *Race v Ward* supra. *Embrey v Owen* (1851) 6 Exch 353. It was said *Mason v Hill* (1833) 5 B & Ad 1 at 24 that it seems that Roman law considered running water not bonum vacans in which anyone might acquire a property but as public or common in this sense only, that all might drink of it to the necessary purpose of supporting life, and that no one had any property in the water except in that particular portion which he might have abstracted from the stream and which he had the possession, and during the time of such possession only. See also *Ewart v Belfast Gurdians* (1881) 9 LR Ir 172, Ir CA. Lord Wensleydale said in *Chasemore v Richards* (1859) 7 HL Cas 349 at 384 that the expression used by Bayley J in *Williams v Morland* (1824) 2 B & Co at 910 and by Tindal LCJ in *Liggins v Inge* (1831) 7 Bing 682 that water flowing in a stream is of public right and the property of the first occupier are founded on a mistake between the property in the water itself and the right to have its continual flow
[19] *Acton v Blundell* (1843) 12 M & W 324; 152 ER 1223 (CA).
[20] *Rawstron v Taylor* (1855) 11 Exch 369; 156 ER 873.
[21] *Holker v Porritt* (1875) LR 10 Exch 59, where the water flowed to a person's land and not beyond and there was no other riparian owner concerned.
[22] Ibid *Race v Ward* in n 4.
[23] Ibid n 8, 9 and 10 above.
[24] Halsbury's Laws of England, volume 49(2), Fourth Edition 2004 Reissue, paras 49 - 52.

64. In some circumstances, a person's rights to the enjoyment and use of flowing water may be such as to be akin to a proprietary interest, so that no one can claim a right against that person, for example where the water flows to a person's land and not beyond so that he may use it as he pleases without complaint by another[25], or where the water does not flow beyond the land where it first rises from the earth[26]. Moreover, an owner of land has a right to appropriate or drain for agricultural purposes mere casual surface water.

65. Water which has been appropriated or taken into possession from a known and defined channel is the subject of property, the right of property existing only during such possession[27], as is also percolating water which has been appropriated, even by artificial means such as pumping[28].

66. Water which does not flow but is in some receptacle is the property of the person who has the possession of the receptacle so long as he continues in such possession[29].

67. The owner of land has an unqualified right to appropriate or drain mere casual surface water, not flowing in a regular or definite course, for

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[25] *Holker v Porritt* (1875) LR 10 Exch 59, Ex Ch, where the plaintiff established his right to the continuance of the flow to his land.

[26] Although such water cannot be the subject of property, while it remains in the field where it issues forth nobody apart from the owner of the field has a right to appropriate it: *Race v Ward* (1855) 4 E & B 702 per Lord Campbell LCJ.

[27] 2 BI Com (14th Edn) 14, 18; *Mason v Hill* (1833) 5 B & Ad 1 at 29; *Holker v Porritt* (1875) LR 10 Exch 59, Ex Ch, Ex Ch. A person who has appropriated water to a beneficial use may sue for any injury done to him in respect of that use: *Mason v Hill* supra at 16 per Lord Denman.

[28] *Ballard v Tomlison* (1885) 29 ChD 115, CA. It has been said to be larceny (theft) at common law to take water from a person's pipes: *Ferens v O'Briens* (1883) 11 QBD 21, DC. Water has been held to be an 'article' for purposes of what is now the Factories Act 1961 a 175 (1) (see HEALTH AND SAFETY AT WORK vol 20 (1) (2004 Reissue) para 519): *Longhurst v Guildford, Godalming and District Water Board* [1963] AC 265, [1961] 3 All ER 545, HL.

[29] 2 BI Com (14th Edn) 14; *Ferens v O'Briens* (1883) 11 QBD 21, DC. As to liability for the consequences of the escape of water from land see *Rylands v Fletcher* (1868) LR 3 HL 330; para 253 ct seq post; and NUISANCE vol 34 (reissue) para 40 et seq.

agricultural purposes[30], and a neighbour cannot complain that it does not come to his land[31].

68. Moreover, there can be statutory rights in flowing water[32]:

> Proprietary interests in water flowing in certain channels may be, and have in certain instances[33] has been, created by Act of Parliament[34]. Rights can also be obtained to abstract water[35].

69. As can be seen, the proposition that water cannot be owned at common law is exceedingly misleading. There are many instances in which proprietary rights exist.

70. One such instance is once the water is appropriated – it is important in the current circumstances to note that the use of water for electricity purposes occurs after it has been appropriated.

PART III – RESPONSE TO ISSUE B

71. Issue B relates to whether or not the sale of shares in the power-generating SOEs affects the Crown's ability to recognise these rights and remedy their breach.

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[30] *Rawstron v Taylor* (1885) 11 Exch 369.
[31] *Briscoe v Drought* (1860) 11 ICLR 250; *R v Metropolitan Board of Works* (1863) 3 B & S 710; *Roberts v Fellowes* (1906) 94 LT 279. See also *Wood v Wand* (1849) 3 Exch 748; and *Gretarex v Hayward* (1853) 8 Ex Ch 291, which established that an owner who appropriates or drains water in this manner is not obliged to continue to do so even after 20 years have elapsed.
[32] Halsbury's Laws of England, Volume 49(2) Fourth Edition 2004 Reissue, para 48.
[33] See eg the River Lee Water Act 1855 cc 9, 72 (as originally enacted; now repealed with savings for s 72).
[34] *Rochdale Canal Co v King* (1849) 14 QB 122 (affd (1851) 14 Qb 136, Ex Ch); *Medway Co v Earl of Romney* (1861) 9 CBNS 575.
[35] As to abstraction rights see paras 427 et seq post.

72. In responding to Issue B, an enquiry into whether or not any rights and interests in water and geothermal resources have been extinguished or whether they are existing extant customary interests, is warranted.

73. It is Te Rarawa and the Wai 996 Claimants' view that native title rights to water have not been extinguished and remain extant.

What is Aboriginal Title?

74. Aboriginal title has been described as follows:

> *Aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a country up to the time of its colonisation. On the acquisition of the territory, whether by settlement, cession or annexation, the colonising power acquires a radical or underlying title that goes with sovereignty. Where the colonising power has been the United Kingdom, that title vests in the Crown. But at least in the absence of special circumstances displacing the principle, the radical title is subject to the existing native rights. They are usually, although not invariably, communal or collective.*[36]

75. In the 18th century international law recognised three ways of acquiring sovereignty: by conquest; by cession, and; by the occupation of territory that was defined as "terra nullis", which literally means "land of no-one". However, the application of the doctrine of terra nullis went further than its meaning would suggest. Where land was populated by "backward peoples", it was treated as though it was unoccupied and so, any

[36] *Te Runanga o Te Ikawhenua Inc Soc v Attorney General* [1994] 2 NZLR 20 at 23 - 24.

acquisition by a new sovereign was treated as if it had been by occupation or settlement of a territory that was terra nullis.[37]

76. The content of Aboriginal title is very fact specific as it is determined by enquiring into the laws and customs of the indigenous society and their connection to the land and waters. Consequently, if the way of life of an indigenous people included hunting, fishing and gathering then the Aboriginal title would include the right to engage in traditional activities such as the right to hunt, fish and gather native plants and animals. The Australian courts[38], the Canadian courts[39] and the Privy Council[40] all accept that Aboriginal title includes the right to hunt, fish and gather native plants and animal. The situation is similar in New Zealand. Williamson J stated in *Te Weehi v Regional Fisheries Officer* that in his view, a customary right to take shellfish from the sea along the foreshore need not necessarily relate to ownership of the foreshore and consequently such "non-territorial" customary rights were valid[41]. Aboriginal title may also include an element of commercial exploitation if traditional society included such a right.

77. Aboriginal title may be extinguished by statute or by relinquishment. Extinguishment of Aboriginal title by statute requires the manifestation of a clear and plain intention on the part of the legislature to extinguish and thereby expropriate Aboriginal title. In *Te Weehi* Williamson J state:

> *The customary right involved has not been expressly extinguished by statute and I have not discovered or been referred to any*

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[37] Butt, P. and Eagleson, R. *Mabo: What the High Court said and What the Government Did* (1996) at 22.
[38] *Mason v Tritton* (1994) 34 NSWLR 572 at 575, 582; *Yarmirr v Northern Territory (Croker Island)* (1998) 156 ALR 370; *Ward on behalf of the Miriwung and Gajerrong People v Western Australia* (1998) 159 ALR 483 at 645, and; *Mabo v Queensland* (no 2) 175 CLR 1; 107 ALR 1.
[39] *R v Sparrow* [1990] 1 SCR 1075 and *Calder v A-G (British Columbia)* (1973) 34 DLR (3d) 145 (SC(Can)).
[40] *St Catherine's Milling and Lumber Co v R* (1888) 14 App Cas 46 and *R v Secretary of State for Foreign and Commonwealth Affairs* [1982] QB 892 at 915.
[41] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 at 690.

adverse legislation or procedure which plainly and clearly extinguishes it. It is a right limited to Ngai Thu tribe and its authorised relatives for personal food supply...It follows that I prefer the reasoning in the Weepu decision concerning the preservation of customary rights unless extinguishes rather than the view that such rights are excluded unless specifically preserved or created in a statute.[42]

78. Where the statute is inconsistent with any "Aboriginal title", the statute prevails. An intention to extinguish may be implied where extinguishment is necessary to the purpose of the legislation and legislative scheme in question is incapable or impossible of co-existence with the Aboriginal title to hunt or fish.[43]

79. Extinguishment of Aboriginal title by relinquishment may occur by cession or sale, or by abandonment. If the traditional connection of the indigenous community with the customary practice has been lost, that is, if continuity of that practice cannot be demonstrated, then extinguishment of Aboriginal title by abandonment will be seen to have occurred[44].

80. It is Te Rarawa and the Wai 996 Claimants' view that proprietary rights in water are extant and have not been extinguished, either by statute or relinquishment.

VESTING IN THE CROWN OF RIGHTS IN RELATION TO THE MANAGEMENT OF WATER

[42] *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.
[43] *Te Runanga o Te Ikawhenua Inc Soc v Attorney General* [1994] 2 NZLR 20. See also Bartlett, R. H. *Native Title in Australia* (2000) at 247.
[44] *Members of the Yorta Aboriginal Community v State of Victoria* [2001] FCA 45, 8 February 2001.

81. Counsel refers to the evidence of David Alexander regarding the vesting in the Crown of the right to control and use natural water. [45]

82. Mr Alexander refers to current legislation – section 354(1)(b) of the Resource Management Act 1991 ("the RMA") – which "saves and continues the vesting in the Crown of a right to water provided in Section 21 Water and Soil Conservation Act 1967".[46]

83. As at 1991, the relevant part of section 21 of the Water and Soil Conservation Act 1967 ("the Water Conservation Act") – section 21(1) – read as follows[47]:

> Except as expressly authorised by or under this Act, or as expressly authorised under the Mining Act 1926 by a mining privilege in respect of water granted after the 9th day of September 1966, or as expressly authorised under any other Act by any right granted during the period commencing after the 9th day of September 1966, and ending not later than the 31st day of December 1968, or as expressly authorised by any other Act (whether before or after the passing of this Act) in respect of any specified natural water, the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to discharge natural water containing waste on to land or into the ground in circumstances which result in that waste, or any other waste emanating as a result of natural processes from that waste, entering natural water, or to use natural water, is hereby vested in the Crown subject to the provisions of this Act:
>
> Provided that nothing in this section shall restrict the right to take, divert or use sea water:

[45] Wai 2358, #A69(b).
[46] Wai 2358, #A69(b), page 3.
[47] Wai 2358, #A69(b), page 3.

Provided also that it shall be lawful for any person to take or use any natural water that is reasonably required for his domestic needs and the needs of animals for which he has responsibility and for or in connection with firefighting purposes:
Provided further that any authorisation granted under the provisions of the Geothermal Energy Act 1953 shall not constitute an express authorisation within the meaning of this subsection.

84. Currently section 354(1)(b) of the RMA preserves this provision and provides as follows:

354 Crown's existing rights to resources to continue

(1) Without limiting the Acts Interpretation Act 1924 but subject to subsection (2) it is hereby declared that the repeal by this Act or the Crown Minerals Act 1991 of any enactment, including in particular—

...

(b) Section 21 of the Water and Soil Conservation Act 1967; and

...

shall not affect any right, interest, or title, to any land or water acquired, accrued, established by, or vested in, the Crown before the date on which this Act comes into force, and every such right, interest, and title shall continue after that date as if those enactments had not been repealed.

...

85. As Mr Alexander states in his evidence:

> Section 21(1) was effectively treated as being a nationalisation of rights to use of freshwater that had previously resided by English and New Zealand common law in those persons with a legal right of access to that water (usually by virtue of ownership of land underlying or adjoining the water).[48]

86. Section 354(1)(b) therefore preserves the position under section 21(1) of the Water Conservation Act that the Crown has vested in itself "..the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to discharge natural water containing waste on to land or into the ground in circumstances which result in that waste, or any other waste emanating as a result of natural processes from that waste, entering natural water, or to use natural water..."[49]

87. Counsel's submissions, as discussed above, are that under Te Tiriti/the Treaty and in accordance with their customs, Maori have proprietary rights in both flowing water and water that is "contained". Under the common law doctrine of aboriginal title rights and interests of native title holders falls along a spectrum from consultation rights to use rights to management rights, right through to ownership rights.

88. The Crown does not assert any ownership to water. Rather their argument is that as no-one can own water, Maori cannot and do not. This imposition of English common law concepts onto customary concepts cannot be substantiated at law. Nor is the assertion even correct in accordance with English common law.

89. For the Crown to argue that no one owns water is illogical and can be challenged through legal precedent. Counsel submits that it is clear that

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[48] Wai 2358, #A69(b), pages 3 - 4.
[49] Section 21(1) Water and Soil Conservation Act 1967.

Maori proprietary rights in relation to water remain extant, and that such rights have not been extinguished through any legislation of the Crown.

90. Counsel submits that the vesting provisions of section 21(1) of the Water Conservation Act, as preserved by section 354(1)(b) of the RMA relate only to the notion of radical title or imperium of the Crown, they do not relate to any form of property rights for the Crown.

91. These provisions only extend to rights of the Crown to regulate the resource once water has been "contained". These provisions do not otherwise extinguish the customary proprietary rights asserted by Maori in water which remain extant.

92. Counsel refers in this regard to the precedents, in relation to similar issues raised in the landmark Court of Appeal 2003 decision in *Attorney-General v Ngati Apa*[50] (*"Ngati Apa"*) and in the Australian case of *Yanner v Eaton*.[51]

Ngati Apa

93. The Court in *Ngati Apa* essentially concluded that there was a possibility that Native Title could exist in the foreshore and seabed in Aotearoa/New Zealand. The Court held that the Māori Land Court had jurisdiction to determine the status of the foreshore and seabed under the Te Ture Whenua Māori Act 1993 ("the TTWMA"); but just as significantly the earlier and long-standing 1963 decision of the New Zealand Courts *In Re Ninety Mile Beach* based on the discredited authority of *Wi Parata v Bishop of Wellington*[52] was overturned.

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[50] [2003] 3 NZLR 643 (CA).
[51] (1999) 201 CLR 351.
[52] *Wi Parata v Bishop of Wellington* NZ JUR (NS) SC 72.

94. Consequently Māori customary rights to the foreshore and seabed had not been extinguished, and a claim to Native Title was held to still be possible.

95. The *Ngati Apa* decision fundamentally overturned *In Re Ninety Mile Beach*[53] which had concluded that Native Title could not exist in the foreshore and seabed except where land contiguous to the foreshore and seabed was uninvestigated Maori customary land.[54]

96. The result of the Court of Appeal decision in *Ngati Apa* was that there was nothing at law that precluded Native Title being established in the foreshore and seabed – the Court of Appeal determined that the first step was to ascertain what the nature of that title was at tikanga/custom and the appellants were directed to proceed with their applications to the Māori Land Court under the TTWMA that certain land below the mean high-water mark in the Marlborough Sounds was Māori customary land.

97. Shortly after the *Ngati Apa* decision was released, the Crown proposed enacting legislation vesting the ownership of the foreshore and seabed absolutely with the Crown. As a result, the Foreshore and Seabed Act 2004 ("F & S Act") was enacted in late 2004 which vested the full beneficial ownership of the foreshore and seabed absolutely in the Crown.

Application of Ngati Apa

98. The Court in *Ngati Apa* clarified the distinction between the notional (or radical) title of the Crown (the Crown's rights to govern over a territory) – which is subject to aboriginal title interests – and the absolute title of the Crown (the Crown's rights to beneficial ownership over property).

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[53] [1963] NZLR 461 (CA).
[54] See decision of North J at pages 473 and 474.

99. It is settled law that just because the Crown may hold radical title to a territory over which it exercises sovereignty or governorship, this does **not** equate to the Crown holding absolute title or property rights to lands and resources within that territory.

100. The Court in *Ngati Apa* in discussing this issue referred, inter alia, to the Privy Council case of *St Catherine's Milling and Lumbar Co v The Queen*[55] in which the Privy Council' described the Crown's:

> .."substantial and paramount estate" **as encumbered by the rights of the Indian inhabitants** [our emphasis]**.** The Crown only received "a plenum dominium" (full ownership, combining legal title and beneficial entitlement) when the Indian title was surrendered or otherwise extinguished [our emphasis].[56]

101. The Court in *Ngati Apa* goes on to discuss that similarly, in New Zealand, "the Crown's notional "radical" title, obtained with sovereignty, **was held to be consistent with and burdened by native customary property**" [our emphasis].[57]

102. The Court in *Ngati Apa* proceeded to discredit the reasoning of Prendergast CJ in *Wi Parata v Bishop of Wellington*[58] and noted that while that reasoning had been rejected by the Privy Council in *Nireaha Tamaki v Baker*,[59] "it continued to influence thinking in New Zealand. In particular, the Crown continued to argue that, through the acquisition of sovereignty, all land in New Zealand became owned by it".[60] The Court went on to state that the error in this approach of the Crown was its

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[55] (1888) 14 App Cas 46.
[56] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 20.
[57] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 21.
[58] (1877) 3 NZ Jur (NS) SC 72.
[59] [1901] AC 561; [1900] NZPCC 371.
[60] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 25.

equation of sovereignty with ownership (conflating imperium and dominium).[61]

103. The Court noted that Sir Salmond was "alive to the distinction between sovereignty and property"[62] and went on to quote, inter alia, the following passage from Sir Salmond's legal text *Jurisprudence*:

> When we say that certain lands belong to or have been acquired by the Crown, we may mean either that they are the territory of the Crown or that they are the property of the Crown. The first conception pertains to the domain of public law, the second to that of private law. Territory is the subject matter of the right of sovereignty or imperium, while property is the subject-matter of the right of ownership or dominium.[63]

104. In relation to the effect of vesting provisions on any existing proprietary interests of Maori in natural resources, the *Ngati Apa* decision discusses the vesting provisions of the Territorial Sea and Fishing Zone Act 1965, the Territorial Sea, and Contiguous Zone and Exclusive Economic Zone Act 1977 (together called the "Territorial Seas Acts"), and found that these provisions were principally concerned with matters of sovereignty, not property.[64]

105. The Court of Appeal in *Ngati Apa* noted that the Territorial Seas Acts:

> ...deem the seabed and its subsoil from the low water mark to the limits of the territorial sea (3 miles and 12 miles respectively in the two Acts) to "be and always to have been vested in the

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[61] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 26.
[62] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 27.
[63] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 27, quoting JW Salmond *Jurisprudence* (6th ed, 1920), p495.
[64] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 63.

Crown". Existing grants made before and after the Act are specifically preserved. [65]

106. In response to the Crown's arguments that the vesting provisions in the Territorial Seas Acts above expropriated prior proprietary interests of Maori in the foreshore and seabed, the Court of Appeal rejected these arguments, stating that:

> **No expropriatory purpose in the Act in relation to Maori property recognised as a matter of common law and statute can be properly read into the legislation. It is principally concerned with matters of sovereignty, not property** [our emphasis]. I agree with the reasons given in the judgment of Keith and Anderson JJ. **The language of deeming, the preservation of existing property interests, the compatibility of radical title in the Crown and Maori customary property, and the absence of any direct indication of intention to expropriate make it impossible to construe the legislation as extinguishing such property** [our emphasis].[66]

107. In relation to the Foreshore and Seabed Endowment Revesting Act 1991 ("the F & S Revesting Act"), the Court of Appeal noted:

> As its long title explains, the Foreshore and Seabed Endowment Revesting Act 1991 was one "to revoke certain endowment of foreshore and seabed, and re-vest those endowments in the Crown". With some exceptions, under s 5 of the Act all land formerly vested in harbour boards or local authorities is re-vested in the Crown "as if it had never been alienated from the Crown

[65] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 62.
[66] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 63.

and free from all subsequent trusts, reservations, restrictions and conditions".[67]

108. The Court noted that Section 9A of the F & S Revesting Act was "broader in reach than the lands re-vested in the principal Act because it reinstated the Harbours Act provisions which was of more general application.[68] Section 9A provided for foreshore and seabed land to be vested in the Crown.

109. As with the vesting provisions in the Territorial Seas Acts, the Court of Appeal in *Ngati Apa* again rejected the idea that the vesting provisions in the F & S Revesting Act expropriated prior proprietary interests of Maori in the foreshore and seabed:

> The argument for the Crown entails reading s 9A to effect an appropriation to the Crown of Maori customary land in respect of foreshore and seabed when no such appropriation is made in the Land Act. **The language of s 9A(1) is not capable of being read as itself effecting a vesting of land** [our emphasis].[69]

110. Counsel submits that the same reasoning can be applied to the customary proprietary rights of Maori in fresh water.

111. The vesting provisions in section 354(1)(b) of the RMA and section 21(1) of the Water Conservation Act relate to the right of the Crown to regulate and not to proprietary rights.

112. Counsel submits that the situation can be depicted in the following graphic:

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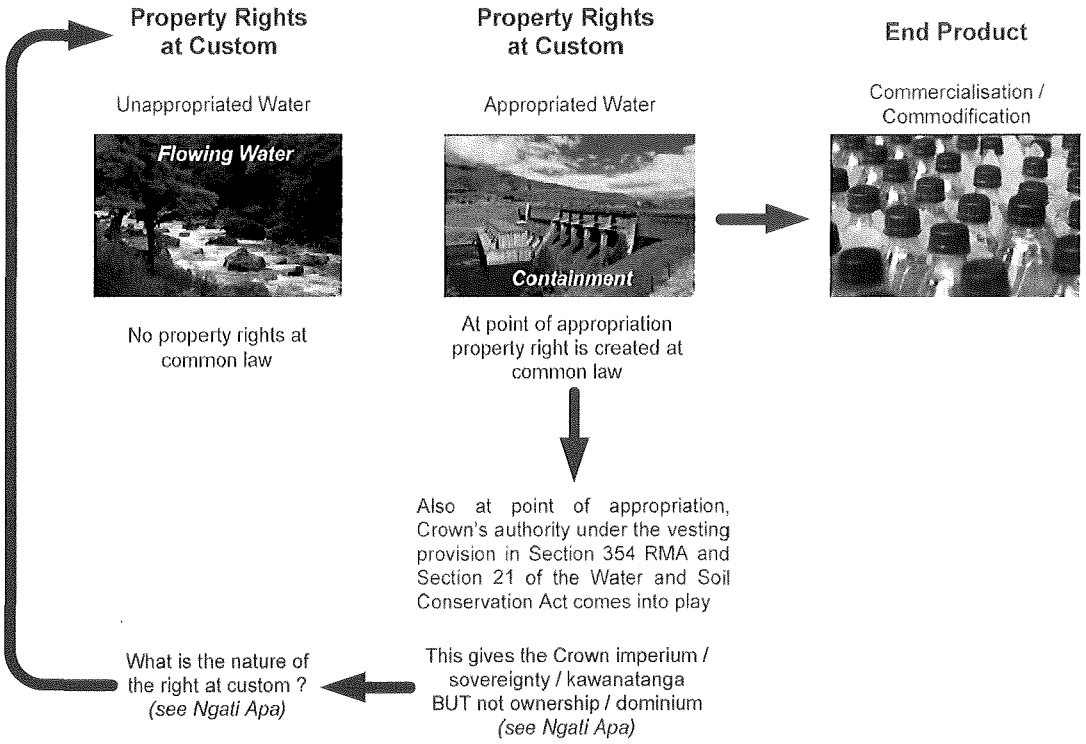
[67] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 64.
[68] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 66.
[69] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 (CA), para 70.



113. In the current case, Maori have extant customary proprietary interests in water that have not been extinguished. The façade of the Crown saying that no-one owns water is a de-facto purported expropriation of the ownership rights and interests of Maori. Obviously, the Crown is exercising powers incidental to ownership when it delegates the issuing of resource consents to local authorities.

114. The concept of putting ownership in limbo by saying there is no "owner" in reality is a failure to adequately address the proprietary rights of Maori – such rights and interests can and do attach to appropriated water under both common law principles and Te Tiriti/the Treaty.

115. Te Rarawa and the Wai 996 Claimants assert their customary proprietary rights to water. Counsel submits that it is impossible to construe the legislative provisions in section 21(1) of the Water Conservation Act, as

preserved by section 354(1)(b) of the RMA, as expropriating or extinguishing any extant Maori customary property in water.

116. Te Rarawa and the Wai 996 Claimants object to the unilateral role of the Crown in purporting to allocate valuable commercial development rights – one of the rights in the spectrum of Maori customary proprietary rights and interests in water resources – to third parties on the assumption that no one owns the water. This is a continuation of the diminution of the mana of Te Rarawa and the Wai 996 Claimants and is a breach of common law principles and the principles of Te Tiriti/the Treaty.

Application of Yanner v Eaton

117. In *Yanner v Eaton*[70], Mr Yanner was prosecuted for taking fauna without holding a licence. He claimed that his native title rights to take estuarine crocodiles had not been extinguished and so he did not need a licence.

118. The case sets out so very clearly the law in this area, namely, that the right of the Crown to regulate natural resource use for the public good does not in and of itself extinguish prior native title.

119. The following passages, extensively quoted, are taken directly from the case of *Yanner v Eaton*. The relevant section was section 7(1) of the Fauna Act, which provided that:

> All fauna, save fauna taken or kept otherwise than in contravention of this Act during an open season with respect to that fauna, is the property of the Crown and under the control of the Fauna Authority.

120. The relevant passages are as follows:

[70] (1999) 201 CLR 351.

The word "property" is often used to refer to something that belongs to another. But in the Fauna Act, as elsewhere in the law, "property" does not refer to a thing; it is a description of a legal relationship with a thing.[71] It refers to a degree of power that is recognised in law as power permissibly exercised over the thing. The concept of "property" may be elusive. Usually it is treated as a "bundle of rights".[72] But even this may have its limits as an analytical tool or accurate description, and it may be, as Professor Gray has said[73], that "the ultimate fact about property is that it does not really exist: it is mere illusion". Considering whether, or to what extent, there can be property in knowledge or information or property in human tissue may illustrate some of the difficulties in deciding what is meant by "property" in a subject matter[74]. So too, identifying the apparent circularity of reasoning from the availability of specific performance in protection of property rights in a chattel to the conclusion that the rights protected are proprietary may illustrate some of the limits to the use of "property" as an analytical tool[75]. No doubt the examples could be multiplied.

Nevertheless, as Professor Gray also says[76],"An extensive frame of reference is created by the notion that 'property' consists primarily in control over access. Much of our false thinking about property stems from the residual perception that 'property' is

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[71] Bentham, *An Introduction to the Principles of Morals and Legislation*, ed by W Harrison (1948) at 337, n 1; K Gray and S F Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 15.
[72] See, for example, *Minister of State for the Army v Dalziel* [1944] HCA 4; (1944) 68 CLR 261 at 285 per Rich J.
[73] Gray, "Property in Thin Air", (1991) 50 *Cambridge Law Journal* 252 at 252.
[74] See, for example, Kohler and Palmer, "Information as Property" and Magnusson, "Proprietary Rights in Human Tissue", in Palmer and McKendrick (eds), *Interests in Goods*, 2nd ed (1998) 3 and 25 respectively.
[75] See, for example, *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* [1968] HCA 50; (1968) 122 CLR 25 at 34 per Windeyer J.
[76] Gray, "Property in Thin Air", (1991) 50 *Cambridge Law Journal* 252 at 299.

itself a thing or resource rather than a legally endorsed concentration of power over things and resources[77]."

"Property" is a term that can be, and is, applied to many different kinds of relationship with a subject matter. It is not "a monolithic notion of standard content and invariable intensity"[78].That is why, in the context of a testator's will, "property" has been said to be "the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have"[79].

Because "property" is a comprehensive term it can be used to describe all or any of very many different kinds of relationship between a person and a subject matter. To say that person A has property in item B invites the question what is the interest that A has in B? The statement that A has property in B will usually provoke further questions of classification. Is the interest real or personal? Is the item tangible or intangible? Is the interest legal or equitable? For present purposes, however, the important question is what interest in fauna was vested in the Crown when the Fauna Act provided that some fauna was "the property of the Crown and under the control of the Fauna Authority"?

The respondent's submission (which the Commonwealth supported) was that s 7(1) of the Fauna Act gave full beneficial,

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[77] Jeremy Bentham recognised this long ago. Bentham pointed out that "in common speech in the phrase 'the object of a man's property', the words 'the object of' are commonly left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length, they have made that part of it which consists of the words 'a man's property' perform the office of the whole". See *An Introduction to the Principles of Morals and Legislation*, ed by W Harrison (1948) at 337, n 1.

[78] K Gray and S F Gray, "The Idea of Property in Land", in Bright and Dewar (eds), *Land Law: Themes and Perspectives*, (1998) 15 at 16.

[79] *Jones v Skinner* (1835) 5 LJ Ch (NS) 87 at 90 per Lord Langdale MR. See also *Commissioner of Stamp Duties (Q) v Donaldson* [1927] HCA 30; (1927) 39 CLR 539 at 550 per Isaacs ACJ; *In re Prater; Desinge v Beare* (1888) 37 Ch D 481 at 483 per Lord Halsbury LC, 486 per Cotton LJ.

or absolute, ownership of the fauna to the Crown. In part this submission was founded on the dictum noted earlier, that "property" is "the most comprehensive of all the terms which can be used"[80]. But the very fact that the word is so comprehensive presents the problem, not the answer to it. "Property" comprehends a wide variety of different forms of interests; its use in the Act does not, without more, signify what form of interest is created.

There are several reasons to conclude that the "property" conferred on the Crown is not accurately described as "full beneficial, or absolute, ownership". First, there is the difficulty in identifying what fauna is owned by the Crown. Is the Fauna Act to be read as purporting to deal with the ownership of all fauna that is located within the territorial boundaries of the State but only for so long as the fauna is within those boundaries, or does it deal with all fauna that has at any time been located within those boundaries? That is, does the Fauna Act purport to give the Crown ownership of migratory birds only as they pass through Queensland, or does it purport to give ownership to the Crown of every bird that has ever crossed the Queensland border?

Secondly, assuming that the subject matter of the asserted ownership could be identified or some suitable criterion of identification could be determined, what exactly is meant by saying that the Crown has full beneficial, or absolute, ownership of a wild bird or animal? The respondent (and the Commonwealth) sought to equate the Crown's property in fauna with an individual's ownership of a domestic animal. That is, it

[80] *Jones v Skinner* (1835) 5 LJ Ch (NS) 87 at 90 per Lord Langdale MR.

was sought to attribute to the Crown what Pollock called "the entirety of the powers of use and disposal allowed by law"[81].

At common law, wild animals were the subject of only the most limited property rights. At common law there could be no "absolute property", but only "qualified property" in fire, light, air, water and wild animals[82]. An action for trespass or conversion would lie against a person taking wild animals that had been tamed[83], or a person taking young wild animals born on the land and not yet old enough to fly or run away[84], and a land owner had the exclusive right to hunt, take and kill wild animals on his own land[85]. Otherwise no person had property in a wild animal.

"Ownership" connotes a legal right to have and to dispose of possession and enjoyment of the subject matter. But the subject matter dealt with by the Fauna Act is, with very limited exceptions, intended by that Act always to remain outside the possession of, and beyond disposition by, humans. As Holmes J said in *Missouri v Holland*[86]: "Wild birds are not in the possession of anyone; and possession is the beginning of ownership."[87]

In light of all these considerations, the statutory vesting of "property" in the Crown by the successive Queensland Fauna Acts can be seen to be nothing more than "a fiction expressive in legal shorthand of the importance to its people that a State have power

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[81] Pollock, *A First Book of Jurisprudence*, 4th ed (1918) at 178.
[82] Blackstone, *Commentaries*, vol II at 14, 391, 395.
[83] *Case of Swans* [1572] EngR 403; (1592) 7 Co Rep 15b at 17b [77 ER 435 at 438]; *Blades v Higgs* [1865] EngR 593; (1865) 11 HL Cas 621 at 638 [11 ER 1474 at 1481].
[84] *Case of Swans* [1572] EngR 403; (1592) 7 Co Rep 15b at 17b [77 ER 435 at 438].
[85] *Blades v Higgs* [1865] EngR 593; (1865) 11 HL Cas 621 at 631 [11 ER 1474 at 1478].
[86] [1920] USSC 87; 252 US 416 at 434 (1920).
[87] See also *Geer v Connecticut* [1896] USSC 48; 161 US 519 at 538-539, 541-542 (1896) per Field J, 543-544 per Harlan J; *Toomer v Witsell* 334 US 385 (1948); *Baldwin v Montana Fish and Game Commission* 436 US 371 (1978); *Hughes v Oklahoma* [1979] USSC 74; 441 US 322 (1979).

to preserve and regulate the exploitation of an important resource"[88]...

Roscoe Pound explained why wild animals and other things not the subject of private ownership are spoken of as being publicly owned. He said[89]:

> "We are also tending to limit the idea of discovery and occupation by making *res nullius* (eg, wild game) into *res publicae* and to justify a more stringent regulation of individual use of *res communes* (eg, of the use of running water for irrigation or for power) by declaring that they are the property of the state or are 'owned by the state in trust for the people.' It should be said, however, that while in form our courts and legislatures seem thus to have reduced everything but the air and the high seas to ownership, in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river as it owns the furniture in the state house. *It does not own wild game as it owns the cash in the vaults of the treasury.* What is meant is that conservation of important social resources requires regulation of the use of *res communes* to eliminate friction and prevent waste, and requires limitation of the times when, places where, and persons by whom *res nullius* may be acquired in order to prevent their extermination. *Our modern way of putting it is only an incident of the nineteenth-century dogma that everything must be owned.*" (Emphasis added).

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[88] *Toomer v Witsell* 334 US 385 at 402 (1948) per Vinson CJ.
[89] Pound, *An Introduction to the Philosophy of Law* (rev ed) (1954) at 111.

The "property" which the Fauna Act and its predecessors vested in the Crown was therefore no more than the aggregate of the various rights of control by the Executive that the legislation created. So far as now relevant those were rights to limit what fauna might be taken and how it might be taken[90], rights to possession of fauna that had been reduced to possession[91], and rights to receive royalty in respect of fauna that was taken[92] (all coupled with, or supported by, a prohibition against taking or keeping fauna except in accordance with the Act 1975[93]). Those rights are less than the rights of full beneficial, or absolute, ownership. Taken as a whole the effect of the Fauna Act was to establish a regime forbidding the taking or keeping of fauna except pursuant to licence granted by or under the Act.

The respondent expressly disclaimed a contention that the enactment of legislation forbidding the taking or keeping of fauna except pursuant to licence would be sufficient to extinguish the rights and interests relied on by the appellant. This concession was rightly made and it follows, therefore, from what we have said about the meaning and effect of the Fauna Act (and, in particular, the vesting of property in some fauna in the Crown) that the Act did not extinguish those rights and interests. It is as well, however, to examine why the respondent's concession was right. That examination must begin from a consideration of what is meant by native title rights and interests.

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[90] ss 24, 24A, 25, 27, 30, 60.
[91] ss 71(2), 83(3).
[92] s 67.
[93] s 54(1)(a).

It is clear that native title in land is extinguished by a grant in fee simple of that land[94]. As was said in the joint judgment in *Fejo v Northern Territory*[95] "it is extinguished because the rights that are given by a grant in fee simple are rights that are inconsistent with the native title holders continuing to hold any of the rights or interests which together make up native title". That is, native title is extinguished by the creation of rights that are inconsistent with the native title holders continuing to hold their rights and interests. The extinguishment of such rights must, by conventional theory, be clearly established[96].

The critical contention of the respondent was that the Fauna Act created a legal regime that was inconsistent with native title holders in Queensland (and, in particular, the group of which the appellant is a member) continuing to hold one of the rights and interests (the right and interest in hunting and fishing) that made up the native title the Magistrate found to exist. That inconsistency was said to lie in the creation of property rights in the Crown that were inconsistent with the continued existence of the native title rights and interests.

It is sufficient to say that *regulating* the way in which rights and interests may be exercised **is not inconsistent with their continued existence**. Indeed, regulating the way in which a right may be exercised presupposes that the right exists..

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[94] *Mabo v Queensland [No 2]* [1992] HCA 23; (1992) 175 CLR 1 at 69 per Brennan J, 110 per Deane and Gaudron JJ; *Western Australia v The Commonwealth* (*Native Title Act Case*) [1995] HCA 47; (1995) 183 CLR 373 at 439 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 84-85 per Brennan CJ; *Fejo v Northern Territory* [1998] HCA 58; (1998) 72 ALJR 1442 at 1451 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, 1468 per Kirby J; [1998] HCA 58; 156 ALR 721 at 736, 759.

[95] [1998] HCA 58; (1998) 72 ALJR 1442 at [1998] HCA 58; 1451; 156 ALR 721 at 736. See also [1998] HCA 58; (1998) 72 ALJR 1442 at 1466 per Kirby J; [1998] HCA 58;156 ALR 721 at 756-757.

[96] *Wik Peoples v Queensland* (1996) 187 CLR 1 at 85 per Brennan CJ, 125 per Toohey J, 146-147 per Gaudron J, 185 per Gummow J, 247 per Kirby J.

121. The decision in *Yanner v Eaton* can be relied upon to support the position that the vesting provision in section 354(1)(b) of the RMA and section 21(1) of the Water Conservation Act do not expropriate prior Maori customary title.

122. Issue B asks does the sale of the power generating SOE companies affect the Crown's ability to recognise these rights and remedy their breach, where such breach is proven?

123. Counsel submits that extant customary title/proprietary rights exist. The nature of those rights are those incidental to ownership and those incidental to management and governance.

124. The rights incidental to ownership include:

a. The authority to decide who can use or take water and the authority to give permissions to use or take on such terms and conditions as the owner decides (Authority and Control);

b. The right to develop the resource oneself (Development Right).

125. The rights incidental to management and governance include:

a. Responsibility to define what constitutes sustainable management and to exercise kaitiakitanga over the resource – for instance, approval of resource consents.

126. The following table sets out the nature of the rights of Maori under Te Tiriti/the Treaty alongside an indication of whether or not the Crown can recognise those rights.

Nature of Rights	**Crown's Ability to Recognise Rights**
Rights Incidental to Ownership: Authority to decide who can use or take water and authority to give permissions to use or take on such terms and conditions as the owner decides (Authority and Control).	Crown cannot recognise this right as sale is without Maori owner's approval or authority – a breach of Te Tiriti/the Treaty and common law.
Rights Incidental to Ownership: Right to develop the resource oneself (Development Right).	No shares are being offered to Maori in this instance, so not even an offer of development, despite CNI Report. Crown argues that shares can be provided later – but this is not by any means guaranteed – see evidence of Professor Jane Kelsey.
Rights Incidental to Management and Governance: Responsibility to define what constitutes sustainable management and to exercise kaitiakitanga over resource for instance, approval of resource consents.	Resource Consents already granted; no right of veto over consents. Unlikely to significantly amend Resource Consents once in private third party hands.

127. It is clear that the sale of 49 per cent of shares in the 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. The sale is also a direct breach of Te Tiriti/the Treaty and contrary to common law rights.

128. Consequently it is submitted that the Crown cannot recognise the rights of Maori and/or remedy any breach. Moreover the Crown is actually in breach of Te Tiriti/the Treaty in offering the shares for sale, without the prior consent of the Maori owners. Counsel refers to the quote from 1847 where Chapman J said in the case of *R v Symonds* (1847) NZPCC 387 at p 390 that:

> Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.

PART IV – RESPONSE TO ISSUE C

129. 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 of key assets available for redress, which duty crystallises at the point of time that the Crown becomes aware of prima facie claims.

PART V – RESPONSE TO ISSUE D

130. Te Rarawa and the Wai 996 Claimants seek the following findings and recommendations:

a. a finding that the rights and interests in water and geothermal resources guaranteed and protected by Te Tiriti/the Treaty include the full spectrum of rights from management and governance rights, usufructuary rights through to ownership rights;

b. a finding that, in accordance with the Maori custom, Maori owned water;

c. a finding that a fundamental right attaching to ownership is the authority to decide who can use or take water and the authority to give permission to use or take water on such terms and conditions as the owner decides;

d. a finding that a further fundamental right attaching to ownership is a right to develop the water resources;

e. a finding that the sale of any level of shares in the power generating SOEs without the express consent of the Maori owners is a breach of all three Articles of Te Tiriti/the Treaty in that it breaches the rights set out in paragraphs (a) – (d) above;

f. a recommendation that the planned partial sale of power generating SOEs be suspended until such time as the Crown has reached agreement with the New Zealand Maori Council and the interested parties on a process to utilise to enable the Maori owners of the affected water bodies to discuss if they so wish for the sales to proceed to do so on such terms and conditions of sale as agreed between the Maori owners, the Crown and the relevant power generating SOEs.

CONCLUSION

131. Te Rarawa are familiar with long-winded struggles for justice over recognition of their proprietary rights to their natural resources.

132. Most Tribunal members will be familiar with the Ninety Mile Beach struggle. The case was first initiated in the Maori Land Court in 1955. Te Rarawa are one of the kaitiaki of Te Oneroa a Tohe/Ninety Mile Beach.

133. After 48 years, finally the New Zealand judiciary recognised their proprietary rights in the *Ngati Apa* Court of Appeal case.

134. In an act of extreme bad faith, Parliament immediately sought to unilaterally extinguish those proprietary rights by claiming that the Crown owned the foreshore and seabed and enacting the Foreshore and Seabed Act 2004 ("the F & S Act").

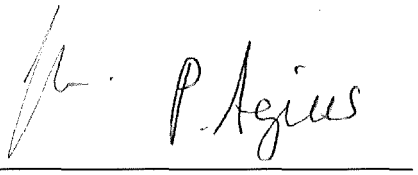
135. Four years later, the National Party and the Māori Party, as part of its Relationship and Confidence and Supply Agreement of 16 November 2008, agreed to initiate a review of the F & S Act and a Ministerial Review Panel was appointed by the Attorney-General to report on the Act and provide recommendations.

136. The Panel unanimously concluded that the F & S Act was "wrong in principle and approach"[97] and it advised a repeal of the F & S Act and the enactment of replacement legislation.[98]

137. The Panel's recommendations were subsequently ignored and instead legislation stating that no-one owned the foreshore and seabed was enacted.

138. Te Rarawa once again observes as history repeats itself and the Crown attempts to argue that no-one owns water, yet it continues to enjoy all of the benefits incidental to ownership of water, such as the unimpeded transfer for valuable consideration of ownership rights.

Dated at Wellington this 19th day of July 2012



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[97] Pākia ki uta pākia ki tai Report of the Ministerial Review Panel, Ministerial Review of the Foreshore and Seabed Act 2004, Volume 1, 30 June 2009, page 12.
[98] Pākia ki uta pākia ki tai Report of the Ministerial Review Panel, Ministerial Review of the Foreshore and Seabed Act 2004, Volume 1, 30 June 2009, page 13.