BEFORE THE WAITANGI TRIBUNAL WAI 2358

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the National Fresh Water and Geothermal Resources Inquiry

CROWN CLOSING SUBMISSIONS FOR STAGE ONE

20 July 2012

CROWN LAW
TE TARI TURE O TE KARAUNA
PO Box 2858
WELLINGTON 6140
Tel: 04 472 1719
Fax: 04 473 3482

Contact Person:
V Hardy / J Gough / L McKay
Email: Virginia.Hardy@crownlaw.govt.nz, Jason.Gough@crownlaw.govt.nz

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MAY IT PLEASE THE TRIBUNAL

Introduction

1. Water and geothermal resources are of great significance to Māori and all New Zealanders.

2. This is an urgent hearing of the Tribunal touching on that resource. Urgency was granted on the basis that the Tribunal considered key criteria were met, namely that the planned share sale in State-owned energy companies risks amounting to significant and irreversible prejudice to the claimants and there was no alternative but to hear the claim.[1]

3. Those criteria are relevant because what the claimants seek is that the Tribunal direct a halt to the planned share sale.

4. That is a very serious step for the Tribunal to take, as the Crown is conscious the Tribunal appreciates.

5. The Tribunal must be satisfied on the evidence that directing a halt in share sales is warranted – that the Crown will breach Treaty principles, cause prejudice to claimants and the remedy required is the direction to halt.

6. The direction sought is tantamount to an injunction.

7. The Crown says that no matter how persuaded the Tribunal might be about the significance of the claimed rights and interests over water and the geothermal resource:

    7.1 the sale of minority shares in Mighty River Power and other State-owned energy companies does not compromise future rights recognition;

    7.2 the sale does not compromise the Crown's capacity to respond to any assessments that the Tribunal makes about those rights and interests;

    7.3 the sale does not compromise the capacity of the Crown to continue engaging with iwi-Māori about the interplay of those rights and

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1 Waitangi Tribunal Practice Notes 1999 paragraph 2.4.

interests including managing the allocation and quality control of the water resource.

8. In particular the Crown relies on:

8.1 *Te Runanganui o Te Ika Whenua v Attorney-General* [1994] 2 NZLR 20, which is discussed at [167] – [169];

8.2 In *Love v Attorney General*[2] the applicants claimed that the decision to sell Petrocorp shares would result in shares themselves, and therefore access to Petrocorp's assets (including land, petroleum, gas and other minerals) being removed as a possible form of compensation for a Treaty breach. Ellis J rejected the argument that the interim order sought was necessary to preserve the applicants' position. His Honour held (at pp 18-19):

> "... I cannot see how [the applicants'] eligibility to receive any benefit can possibly be adversely affected by the sale of the shares. Their eligibility to receive some benefit from their claims will in due course be the subject of a recommendation by the Waitangi Tribunal which may or may not be accepted by the Government of the day. It will be a political decision of a high order. What may be affected is the nature of the benefit, not the eligibility to receive it. In my view the benefit which the applicants may receive is a favourable recommendation from the Waitangi Tribunal, and to equate this with the present expectation to receive certain shares now held by the Crown is in my view not justified. The distance between these two propositions can only be bridged by a political decision to translate the recommendation of the Waitangi Tribunal into a transfer the shares. Such a decision is not in my view justiciable or controllable by this court, it can only be viewed as a possibility."

THE ISSUES

9. The four issue-questions in stage one of the inquiry are:

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

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2 HC Wellington CP135/88 Ellis J, 17 March 1988.

9.2 Issue (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?

9.3 Issue (c) - Is such a removal of recognition and/or remedy in breach of the treaty?

9.4 Issue (d) - If so, what recommendations should be made as to a treaty compliant approach?

Not a denial of rights and interests

10. The Crown accepts that Maori have rights and interests in water, and has consistently expressed this position throughout these proceedings.

11. However, the Crown's focus is on the nature and implications of share sales for claimed water rights, not an interrogation of rights definition.

12. The reason for this is the injunctive nature of the direction that the Tribunal has indicated that it will consider before the end of this month, and its stated intention (in its memorandum of 15 May 2012) to issue a memorandum-directions to this effect by end of July with a fuller ruling thereafter.

13. The Crown does not consider that rights definition needs to be effected by the Tribunal at this juncture. Doubtless the Tribunal can give the parties greater guidance on this aspect in Stage 2 of the hearing process.

14. That is not a disdain on the part of the Crown toward the notion of rights and interests but rather recognises the difficulties and ambiguities associated with rights definition. Some of those challenges repeated and raised through hearing process are summarised below.

15. The point is that much of what the claimants have said about attachment and relations with water is incontrovertible. We refer to [39] – [49] of the claimant's opening submissions.

16. The challenge is translating those narratives into a right or interest which might be appropriately recognised in a contemporary way, and in a way which might be integrated with other competing and overlapping rights and interests.

17. Part of the reason it is not straight-forward to sequence rights definition and then establish a scheme for rights recognition is a point the Crown made at the urgency application. That did not seem to find favour with the Tribunal but it is an important one from the Crown's point of view and bears repeating.

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

19. It is that latter role of policy development where iwi-Māori and the Crown are endeavouring to collaborate. Mr Beatson's evidence addressed this process.

20. To the extent that it is necessary to respond now to the rights articulation of the claimants, what the Crown can say is that at an abstract level, a claim of ownership (in the English property law sense) over the water and geothermal resource of New Zealand cannot be accepted by Government. New Zealand has a multi-dimensional society with cultural, recreational and commercial claims on the water resource, and the task of government ultimately is to balance and reconcile those in some way that recognises the long-term needs of New Zealanders.

21. If the Tribunal were to ask why the Crown has not yet come up with a rights definition, part of the answer is that it is a complex exploration still in dialogue.

22. The Wai 262 report looked at the range of matters including natural resources and water.[3] As noted in the Crown opening, the Tribunal there indicated that there was little virtue in the rhetoric of tino rangatiratanga over resources and

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3 See generally, Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, Waitangi Tribunal, 2010) at Chapter Three: Relationship with the Environment.

that what was needed was something more practical to have bite in the world of policy development to make a contribution.

23. The Wai 262 Tribunal went further to provide recommendations as to what a Treaty-compliant environmental regime would provide:

23.1 *Control* by Māori of environmental management of taonga, where it is found that the kaitiaki interest should be afforded priority;

23.2 *Partnership* models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision-making but other voices should also be heard; and

23.3 *Effective influence and appropriate priority* to the kaitiaki interests in all areas of environmental management.[4]

24. It has to be said that the claimants in Wai 262, after many years of hearing, submitted that it was not for the Crown nor even the Tribunal to define rights but rather for iwi.

25. These are not definitive resolutions, but it is unreasonable to expect the Crown to unilaterally define rights and interests.

26. When we look at our past over issues of fish or even water bodies, the reality is that there is little appetite for inch-by-inch, resource–by-resource investigations of the kind that have taken place in other jurisdictions (and only up to a point).[5] What essentially emerges is dialogue, compromise and realism. That might not attain perfection or purity, but incrementally the Crown considers the approach has been successful.

27. What are the difficulties here?

27.1 Whose rights? Extant or extinguished?

27.2 Role of New Zealand Māori Council and iwi/hapū.

27.3 Is this a national claim or localised to rohe?

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4 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Waitangi Tribunal, Wellington, 2010) at 285-286.

5 For example, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

27.4 Is it about return from the SOE (profit) or about control of water allocation?

27.5 Is it foreseeing greater privatisation of rights or is it focussed on the current resource consent regime?

27.6 Is it saying that use of water by companies owned by Ministers is of no concern but private shareholding prompts the concern?

28. In short, there are many, and not necessarily consistent, threads to the claims which need to be unpicked and assessed.

Ownership

29. Central to the claimants' case is a submission that Māori "own" all water. Claimant counsel put to Mr Crawford in cross-examination, in words to the effect, that if Māori don't own water, the sale of MOM shares won't affect Māori.

30. Indeed the opening written submissions for the claimants are peppered with the language of ownership. For example, in paragraph 9 "recognition of ownership rights" is said to be necessary for a Treaty compliant regime.

31. Again, in paragraph 15 they say that this is "a very straight forward case. Māori owned their water resources. That proprietary interest in the water resources was a taonga". Similarly in paragraph 27: "The claimants put this case on the basis of Māori ownership of water resources".

32. They proceed to cite various previous Tribunal reports as acknowledgement of Māori ownership of water, viz – Omapere, Ikawhenua, Whanganui, and Te Maunga Rongo.

33. And in their paragraphs 39 to 49 they cite various matters as "indicia of ownership".

34. However, not all of those who gave evidence before the Tribunal appeared comfortable with such an articulation. For example Taipara Munro (in relation to Poroti Springs) said in answer to questions from Professor Temara words to the effect "I am not saying I own all the water of Aotearoa, but I own the

waters of Waipou ...". He went on to reject the pākehā word "ownership", saying "our word is kaitiaki or guardian".

35. Maanu Waihapi on behalf of Ngāti Pikiao and Tapuika talked of "our river" (referring to the Kaituna) but made the comment that "custodianship remains with us", not the "12 members of the Bay of Plenty Regional Council. We have custodianship."

36. Later he explained how it was that now he was claiming "proprietary interest":

> It is the actions of the Crown that has caused us to claim our proprietary interest. Whilst the proprietary interest was managed by the Crown in the interests of the nation as a whole, Te Arawa was comfortable, there was no objection ...The water, we accept nobody owns the water ... the Crown said it was going to give 49% of it away. Then Te Arawa begins to wake up. We do not agree with that ... Blame the Government for us claiming ownership.

37. On the second day of the hearing Roimata Minhinnick answered Question (a) in this way:

> The first question was what were the customs, the rights to water which were protected by the Treaty. To us there are 3 aspects ... Rangatiratanga (chieftainship), kaitiakitangi (custodianship or stewardship), and mana (authority). Therefore that is one side of it ... Authority and Control are the English words.

38. On day 3 of the inquiry Tony Waho talked in terms of kaitiakitanga. He said "It's not an ownership issue ... it's kaitiakitanga, it's mana". He went on to express himself as fed up with the fixation about ownership. He used the term "myopia". In answer to questions from Professor Temara about the mixing of waters he said words to the effect "my Māori heart says let it lease; but my western mind says perhaps we can find a solution".

39. In answer to questions from Dr Phillipson, Tamati Cairns said:

> I picked up a word just earlier on around what might be the difference between kaitiakitanga and ownership. Now ownership belongs to another cultural belief system that sees an individual or group having power over something which is no different from kaitiakitanga in a kaitiakitanga context. When you start moving across to the other, then we have problems ...

40. On day 4 Haami Piripi expressed the view that while water may not be owned by anyone it can be manipulated.

41. The Crown accepts, of course, that as many of the above speakers spoke in Māori the Crown is reliant on the English translation by the Tribunal's interpreter, and accepts the Court transcript is preliminary and unchecked.

42. However with that caveat in mind, in light of the above it is unhelpful in the Crown's submission to start grappling with the word "ownership" in the context of the present claim. The Crown repeats its comment at paragraph 22 of its written opening submissions where it quotes from comments by Justice Williams during the course of Wai 262 on 21 December 2006 "... one of the problems must be that the use of the term ownership, in the context of the recognition of customary rights and interests, is not a good fit. In fact, there's no Māori word for ownership".

43. In closing, claimant counsel retreated from the position outlined above, stating at [2] of the claimant's closing submissions:

> "Maori do not associate their relationship with their water resources with the English concept of ownership"

44. During questions from the Tribunal to Haami Piripi, Mr Crosby commented on the amount of concentration on kaitiakitanga that there had been during the course of the evidence to date, and asked the rhetorical question "what about rangatiratanga and mana?". Rangatiratanga of course is guaranteed under Article 2 of the Treaty and no one would deny mana to Māori in respect of any particular taonga or any particular piece of water, where the appropriate relationship is shown.

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

46. In the Crown's submission the appropriate approach to addressing issues in relation to Māori rights and interests in water which arise in this claim is the decision of the Tribunal in Wai 262 (Ko Aotearoa Tenei: Te Taumata Tuarua) from July last year. Chapter 3 of volume 1 addresses the relationship of Māori with the environment. In its summary of the various contentions (at page 267 of volume 1) the Tribunal noted:

> The claimants contended that tino rangatiratanga gives kaitiaki the right to control and regulate their relationship with the environment, such as natural and physical resources, eco systems, flora and fauna, and significant places such as waterways, waahi tapu, and pa sites. Rather, the exercise of kaitiakitanga has been severely compromised ...

47. Shortly thereafter the report follows with the Tribunal's analysis of the evidence and submissions. They went on to say at page 269:

> Kaitiaki nurture and care for the environment and its resources – not necessarily by forbidding their use, but by using them in ways that enhance rather than damage kin relationships. The kaitiaki relationship with the environment is not the transactional or proprietary kind of the western market, and does not rest on ownership. Rather, like a family relationship, it is permanent and mandatory, binding both individuals and communities over generations, and enduring as long as the community endures.

48. Further on on the same page the Tribunal stated:

> We agree ... that the Treaty obliges the Crown to actively protect the continuing obligations of kaitiaki towards the environment, as one of the key components of Te Ao Māori ...
>
> But in finding that the relationship between kaitiaki and the environment is the subject of Treaty interest we note some important provisos. First we do not consider the environment as a whole to be a taonga, in the sense that that term is used in the Treaty. Such an all encompassing interpretation devalues the status of taonga and the rights and obligations that flow from them ... Thus taonga are <u>particular iconic</u> mountains or rivers, for example, or <u>specific</u> species of flora and fauna. [Emphasis added]

49. On page 270 the Tribunal further noted:

> The final point to be made about the Treaty is that although the English text guarantees rights in the nature of ownership, the Māori text uses the language of control – tino rangatiratanga – not ownership. Equally, kaitiakitanga – the obligation side of rangatiratanga – does not require ownership. In reality therefore the kaitiakitanga debate is not about who owns the taonga but who exercises control over it. We have also made this point clearly in preceding chapters. In the end it is the degree of control exercised by Māori and their influence in decision making that needs to be resolved in a principled way by using the concept of kaitiakitanga. The exact degree of control according to Māori as kaitiaki will differ widely in different circumstances and cannot be determined in a generic way. Finding the appropriate degree of control will depend on several factors ... but they include the importance of the taonga in question to the iwi or hapu, the health of that taonga and any competing interests in it.

50. The Tribunal went on to note (as it had done elsewhere in its report) that there are many other interests than those of Māori in such matters.

> There are of course many legitimate interests in the environment that must be balanced with the kaitiaki interests. These include the interests of the environment itself, along with those who wish to use or develop environmental resources, others who are affected by those uses, and the community as a whole. ... it can be seen that the interests at play are many, varied, and complex. Indeed they are so complex that even individuals can have conflicting interests.

51. Further on page 272 of the report, the Tribunal discussed the issue of competing interests noting that "The Crown's obligation is to give proper weight to the kaitiaki interests, alongside all others" and noting later on that page:

> There can, therefore, be no standard template for environmental decision making that privileges one set of interests over others. Rather what is needed is an environmental management system that allows all legitimate interests including the interests of the environment itself to be considered against an agreed set of principles and balanced on a case-by-case basis.

52. As will be readily appreciated from some of the passages quoted above, and the Crown's general submission, the report of Wai 262 will help inform the later inquiry in phase 2 of this claim.

53. However, as will also be seen from those passages above Wai 262 provides support for the Crown submission that talk in terms of ownership as opposed to rangatiratanga or kaitiakitanga is not appropriate. In fact it could be seen as a clear rejection of the use of the term 'ownership' in relation to the definition of Māori rights and interests in water.

54. While it may not be strictly necessary in light of the Crown's approach to address the issue of ownership in water as a matter of law, in deference to the matters that have been raised during the course of this hearing and the cases that have been referred to, the Crown now proposes to address that legal issue.

Ownership of Water at Common Law

55. *Halsbury's Laws of England* expresses the common law position concerning the ownership of freshwater as follows:

> "Although certain rights as regard flowing water are incident to the ownership of riparian property, the water itself, whether flowing in a

> known and defined channel or percolating through the soil, is not, at common law, the subject of property or capable of being granted to anybody. Flowing water is only of public right in the sense that it is public or common to all who have a right of access to it."[6]

56. Water that has been appropriated or taken into possession from a known and defined channel is the subject of property, such property existing only during possession.[7] Similarly, water that does not flow but is in a receptacle is also the subject of property, so long as the person continues in possession.[8] However, the common law does not recognise proprietary rights in freshwater in its natural state. While individuals may have natural rights to the enjoyment of water, water that has not been appropriated or taken into possession is incapable of ownership.[9]

57. That flowing freshwater is incapable of ownership has been recognised by the New Zealand courts in *Campbell v MacDonald.*[10] That case concerned a conviction for trout fishing in the Waipoua River without a licence, and turned on the construction of the Fisheries Conservation Act 1884. While the appellant admitted he had fished without a licence, it was argued that he had fished with the consent of the owner of the water. In allowing the appeal, Williams J, delivering the judgement of Denniston J, Edwards J and Cooper J, stated:

> "It is conceded, and cannot be questioned, that there is, strictly speaking, no property in running water."[11]

58. Similarly, Conolly J, in his separate decision concurring with the other members of the Court, noted:

> "It may be admitted that no one can have an unqualified ownership of the water of a stream or river which runs through or by the side of his land, since he cannot divert its course permanently so as to deprive the owners of the land below him from the use of it; and if he diverts it temporarily he must return that portion which he does not use in an unpolluted state."[12]

And

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6 *Halsbury's Laws of England* (5th ed, Lexis Nexis, 2009) 100, at para 63.

7 *Halsbury's Laws of England* (5th ed, Lexis Nexis, 2009) 100, at para 66.

8 *Halsbury's Laws of England* (5th ed, Lexis Nexis, 2009) 100, at para 67.

9 See for example, *Ballard v Tomlinson* (1885) 29 Ch D 115, at 120-121 and 126.

10 *Campbell v MacDonald* (1902) 22 NZLR 65.

11 *Campbell v MacDonald* (1902) 22 NZLR 65, per Williams J at 68.

12 *Campbell v MacDonald* (1902) 22 NZLR 65, per Conolly J at 71-72.

> "Although he has not an absolute ownership in the water as it passes, he has a qualified ownership; and the fish that are in that water, being *nullius bona*, may be taken."[13]

59. An owner of land that abuts on a non-tidal river also has certain riparian rights. For instance, in accordance with *usque ad medium filum aquae* ('up to the middle line of the water'), the ownership of land adjoining the river also includes ownership of the river bed to its midpoint.[14] A riparian owner does not, however, possess proprietary rights in the water itself.

60. Flowing freshwater that has not been appropriated or taken into possession is *publici juris*, meaning there is no ownership of the water but all those who have a right of access to it may reasonably use it.

61. In New Zealand, the use of freshwater that is *publici juris* is regulated by section 14 of the Resource Management Act 1991 (the RMA).

62. The RMA provisions dealing with the use of freshwater are a more recent manifestation of those provided under section 21 of the previous Water and Soil Conservation Act 1967. That Act promoted a national policy in respect of the conservation, allocation, use and quality of natural water, which included freshwater, and section 21 vested in the Crown the sole right to dam any river or stream, to divert or take natural water, to discharge natural water or waste into any natural water, or to use natural water.

63. The same principle was reaffirmed post the passing of the 1967 Act in In *Glenmark Homestead Ltd v North Canterbury Catchment Board,*[15] where Macarthur J stated:[16]

> **At common law a riparian owner has no property in the water of a stream flowing** through or past his land but is entitled only to the use of it as it passes along for the enjoyment of his property: see *Wood v Waud* (1849) 3 Exch 748; 154 ER 1047 and *Embrey v Owen* (1851) 6 Exch 353; 155 ER 579. In the latter case Parke B said:

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13 *Campbell v MacDonald* (1902) 22 NZLR 65, per Conolly J at 72.

14 See for example, *Bickett v Morris* (1866) LR 1 Sc & Div 47, at 58, and *Micklethwait v Newlay Bridge Co* (1886) 33 ChD 133, at 145, 152 and 155. See also *Halsbury's Laws of England* (5th ed, Lexis Nexis, 2009) 100, at para 74.

15 *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71 (SC).

16 *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71, per Macarthur , at p 81.

> "The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only ... But each proprietor of the adjacent land has the right to the usu fruct of the stream which flows through it" (ibid, 369; 585-586).[17]

[Emphasis added]

64. The Court of Appeal in *Glenmark*[18] notes that section 21 of the Water and Soil Conservation Act 1967 effected a transformation of the law whereby common law rights were extinguished and statutory rights, where appropriate, took their place.[19] Section 21 was subsequently repealed by the RMA, which continues the protection of the Crown's rights in water.[20]

65. However, the Court did not interfere with McArthur J's ruling in relation to there being no property in water. The appeal focussed on different issues.

66. What the no ownership notion means is that there is freedom in an analytical/legal sense to build up rights and interests responsive to social/environmental/economic need, including Māori concepts/interests. It is not an impediment to contemplating reform or rights acknowledgement.

Extinguishment

67. The Tribunal requested the Crown make submissions on whether Māori rights and interests in water have been extinguished.

68. This is extremely difficult to do in abstract. Whether a statute or other instrument extinguishes rights will depend on the nature, content and character

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17 Macarthur J also stated at p 81:

> The extent to which a riparian owner may take and use such water depends on the purpose for which he takes the water, and the cases have distinguished between (i) ordinary or domestic purposes connected with the riparian tenement (such as drinking and culinary purposes, cleaning and washing, feeding and supplying the ordinary quantity of cattle on the owner's land, and (ii) extraordinary or secondary purposes connected with the riparian tenement (such as irrigation, manufacturing purposes, and trade purposes such as carrying on a tannery or a dye-works).

18 *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1978] 1 NZLR 407.

19 *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1978] 1 NZLR 407, per Woodhouse J at 413. See also *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, at 11-12.

20 Resource Management Act 1991, section 354.

of those rights and the precise terms and purpose of the statute or instrument.[21]

69. A customary right may be extinguished by the lawful creation of a legal interest so inconsistent with the customary interest that extinguishment results, or a by some other lawful extinguishing step (such as a sale, or a statutory vesting). Extinguishment requires close consideration of the interest involved and the extinguishing action. Extinguishment requires a clear and plain intent to create the extinguishing interest.

70. Regulation of property rights is different from the extinguishment of property rights.[22]

71. The RMA is unlikely to have extinguished any common law customary rights. The RMA regulates property rights; a particular customary right may not be able to be exercised in a particular way because that would be contrary to statute but the right subsists subject to the statute. *Ngāti Apa* treats the RMA as regulatory rights, not extinguishing them.

72. It may be that a particular statutory scheme so precludes any customary right being exercised that it constitutes an extinguishment. However, this specific issue has not been addressed by New Zealand courts.[23]

73. In New Zealand, from 1903 statute prevented anyone other than the Crown from using water to generate hydro-electricity. The various statutes governing electricity generation may shape the extent to which the courts may give effect to any customary right relating to water.

Paki v AG [2012] NZSC 50

74. The *Paki* case was not about customary rights.

75. The plaintiffs made no claim about aboriginal title, customary rights to water, or rights founded exclusively in the Treaty.[24] The plaintiffs expressly pleaded

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21 See for instance, Western Australia v Ward (2002) 191 ALR 1, [94].

22 *Yanner v Eaton* (1999) 201 CLR 351.

23 In *Western Australia v Ward* (2002) 191 ALR 1 the majority of the High Court of Australia treated the absolute prohibition of gathering fauna on state land as extinguishing any native title rights to do so.

In *McRitchie v Taranaki Fish & Game Council* [1999] 2 NZLR 139 the Court found that the protection of Māori fishing rights in s 26ZH Conservation Act did not extend to introduced species that were subject to specific regulatory regimes from the moment of introduction to New Zealand. Because Mr McRitchie could not prove a relevant right, the question of extinguishment did not arise.

the claim was about a 20 or so mile stretch of the riverbed, not water. In many ways, the claims run counter to Maori claims which treat rivers holistically and base connections on whakapapa not Native Land Court title.

76. The plaintiffs' case was based on the individualised Native Land Court title to riparian land granted to their ancestors. They argue that the named owners received fee simple ownership of the riverbed to the centre line (to the exclusion of all other members of their iwi or hapū). They accepted the Crown acquired full title to the riverbed when it acquired the land in various subsequent transactions. They say the Crown breached a fiduciary duty to explain *ad medium filum* to the vendors.

77. The recent Supreme Court decision made no findings on any of those issues. Rather, the Supreme Court ruled on a preliminary question of whether the Waikato River was navigable. If it was navigable, it vested entirely in the Crown under s 14 Coal-mines Act Amendment Act 1903, and (the plaintiffs accepted) the fiduciary claim could not succeed.

78. The Supreme Court held the courts below had used the wrong test for navigability. The Pouakani section of the river was not navigable. The Crown could not therefore claim title based on the 1903 Act.

79. Both parties accept that the Crown acquired the Pouakani riverbed from Māori when it acquired the abutting land, *ad medium filum*. The Supreme Court did not question the application of the *ad medium filum* presumption in this case.

80. The next stage of the Pouakani case is the fiduciary duty and trust issues.

The Right to Development

81. If the claimants are saying iwi-Maori have a proprietary (or other) right to water and this becomes a right to ownership of energy companies based on the notion of a development right, that is an incorrect stretching of the concept of development. The Crown considers the careful analysis of Judge Savage in the Radio Spectrum report is the correct approach:

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[24] In her judgment, Elias CJ leaves open the question of whether the 1903 Act extinguishes customary title to the riverbed. This issue was not before the Supreme Court. In *Ngāti Apa*, Anderson and Keith JJ thought the 1903 Act did give the Crown "absolute title" to the beds of navigable rivers.

"To put it another way, it is beyond argument that economic development was a high motivator for Maori in entering the Treaty. No enlightened person today could want Maori to continue to be economically deprived in a general sense. The legacy of disappointment, disaffection, and conflict for our uri (descendants), as we see for others overseas, is a horrifying prospect. That, however, is not the point. The Treaty does not make promises of economic outcomes. It is said that a breach of the Treaty is discernable in relation to resources when the Crown seeks to privatise or create monopolies, and particularly when it seeks to sell to overseas interests. The reasoning seems to run that to do those things is not a proper exercise of kawanatanga and therefore lays the Crown open to claim. Whether the doing of those things is prudent or reasonable or good governance is not the point; this Tribunal is not charged to discern unfair or socially unfortunate actions unless they constitute breaches of the principles of the Treaty.

A variant of the errors of converting motives into principles, reading the Treaty as a promise of economic outcome down through the generations, and viewing the Tribunal as reviewing good governance is the espousal of a principle of development per se. This `principle is said by the claimants to exist independently of any other Treaty principle or right. I do not recognise it. I referred to it in my interim decision.

I have since read the Law Commissions report *Justice: The Experiences of Maori Women.* I drew this to the attention of counsel. It says this:

The principle of *development* is touched on in early reports, and is clearly outlined in the *Ngai Tahu Fisheries* report where the Tribunal said that it was `common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development (253-254). In the *Maori Development Corporation* report the Tribunal noted that it had `no doubt that the Crowns purpose in establishing and investing in the [Maori Development Corporation] was to promote the economic development of Maori - all Maori - in accordance with the Treaty of Waitangi.

With the greatest respect, I do not accept what is said there. The *Maori Development Corporation Report* identified very specific principles, and a principle of development was not one of them. The quote that is referred to does not sit in that part of that report and is merely an introductory remark. The *Ngai Tahu Sea Fisheries Report 1992* is in a completely different category in that it relates to the development of a right rather than the right to develop in a general sense.

So far as the Muriwhenua decision is concerned, if the reference in that report is intended to state a general principle, then I depart from it. I rather doubt that it does, for the report was dealing with principles in relation to fishing. The topic is again dealt with later in the report, particularly in relation to fishing and the development of that right.

Further submissions were sought and received from the claimants on this aspect. They were received in the following form:

The claimants assert that the `right to develop has three main levels:

1. The right to develop resources to which Maori had customary and traditional uses prior to the Treaty (development of the resource);

> I accept this absolutely; it is what is referred to in the various fisheries reports.
>
> The submissions continued:
>
> 2. The right of the partnership principle to develop to include resources not known about or used in a traditional manner at 1840 (development of the Treaty);
>
> This somewhat begs the question in this claim. It is descriptive of the interplay between rangatiratanga and kawanatanga and presupposes that the partnership covers all aspects of life for both parties. In other words, it is claimed that it is more of a marriage than a partnership. It is not. I deal with that further.
>
> The submissions then carried on:
>
> 3. The right of Maori to develop their culture, their language and their social and economic status using whatever means are available (development of Maori as peoples).
>
> I accept that and go further to say that, so far as culture and language (taonga) are concerned, the Crown has a positive duty to assist in the fostering and development of them.
>
> It will be clear, then, that I do not recognise a right to develop as a separate principle."[25]

The nature of resource consents in relation to water and geothermal water

82. The following section is a brief "run through" of the RMA solely for the purpose of providing the Tribunal with an overview of the Act (or portions of it relevant to the matters we have been discussing).

83. The nature of water permits derives from past legislation. The passing of the Water-power Act 1903, the Geothermal Energy Act 1953 and the Water and Soil Conservation Act 1967 vested in the Crown the right to control and use freshwater.[26]

84. Section 2(1) of the Water-power Act provided that "Subject to any rights lawfully held, the sole right to use water in lakes, falls, rivers, or streams for the purpose of generating or storing electricity or other power shall vest in His Majesty."[27]

85. Section 3 of the Geothermal Energy Act specifically vested the sole right to tap, take use and apply geothermal energy in the Crown (including all geothermal energy on or under the land whether the land had been alienated

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25 Waitangi Tribunal *The Radio Spectrum Management and Development Final Report* (Wai 776, Waitangi Tribunal, Wellington, 1999) at 61-63.

26 Contrast this with s 3 of the Coal-mines Act 1908 which vested the beds of navigable rivers in the Crown, not just a right to control and use the bed.

27 The wording of that section was later replicated in s 267 of the Public Works Acts Compilation Act 1905.

from the Crown or not).[28] Section 9(1) of the Act provided that "Notwithstanding anything to the contrary in any Act, instrument of title, or rule of law, no person shall sink any bore or tap, take, use, or apply geothermal energy for any purpose unless he has first obtained a licence granted by the Minister under this section".

86. Section 21(1) of the Water and Soil Conservation Act vested in the Crown "the sole right to dam any river or stream, or to divert or take natural water,[29] or discharge natural water or waste into any natural water ... or to use natural water" except as expressly authorised by that Act, the Mining Act 1926 or by any other Act. Section 21 included certain provisos that created statutory rights in lieu of common law rights - including the right to take natural water that is reasonably required for domestic needs, for the needs of an individual's animals or for fire fighting purposes.

87. These Acts reflect common law riparian rights, and transferred them from owners of land beside rivers, geysers etc, to the Crown.

88. Under s 24 of the Water and Soil Conservation Act a person could apply in writing to the Regional Water Board to dam any river or stream, to divert or take natural water, to discharge into any natural water, or to use natural water. Sections 24A – 24J were inserted by the Water and Soil Conservation Amendment Act 1969 and variously provided that water rights granted under the Act:

88.1 Were transferable subject to any terms and conditions specified in the right;

88.2 Could be later restricted by the Board:

88.2.1 in order to maintain minimum levels, minimum flows and minimum standards of water quality. Notice by the Board under s 24D could require that the holder restrict or suspend the exercise of all or any of the powers conferred by the

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28 Geothermal energy is defined in the Act as meaning energy derived or derivable from and produced within the earth by natural heat phenomenon; and "includes all steam, water, and water vapour, and every mixture of all or any of them that has been heated by such energy ...".

29 Natural water was defined in s 2 of the Act as meaning all forms of water including fresh water, ground water, artesian water, geothermal steam, water vapour, ice and snow".

right. Provision was made under s 25 for the holder to appeal such a notice;

88.2.2 in times of serious temporary shortage of water. An order by the Board under s 24E could require that the taking or use of any natural water be apportioned restricted or suspended for a period not exceeding 14 days. Provision was made for the order to be renewed.

89. Geothermal steam came within the definition of "natural water" in s 2 of the Water and Soil Conservation Act, with the result that the Crown had, pursuant to the two later statutes, vested in itself the common law riparian rights.

90. Section 354(1) of the Resource Management Act 1991 reaffirms the above vestings and the rights conferred on the Crown.[30]

91. Subsection 2 states that "Any person may take, use, dam, divert, or discharge into, any water in which the Crown has an interest, without obtaining the consent of the Crown, if the taking, use, damming, diversion, or discharge by that person does not contravene this Act or regulations." Thus, despite the reaffirmation of the vestings and rights conferred on the Crown, whereby the Crown was given a sole right to undertake the activities provided for in the earlier legislation, the Resource Management Act provides for others to now undertake those activities if not in contravention of the Resource Management Act or regulations. The regime in the Resource Management Act refocuses on resource management rather than using terminology relating to vesting of rights.

Water permits

92. Section 14 of the Resource Management Act provides that no person may take, use, dam or divert any water (which includes geothermal water), heat or energy

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30 **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—

(a) Section 3 of the Geothermal Energy Act 1953; and

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

(c) Section 261 of the Coal Mines Act 1979[30],—

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.

from water, or heat or energy from the material surrounding geothermal water, unless expressly allowed by:

92.1 a national environmental standard;

92.2 a rule in a regional plan or proposed regional plan;

92.3 a resource consent; or

unless one of the other exemptions in subsection (3) apply. Those exemptions, relevant to this hearing, are:

92.4 the taking or use of water, heat or energy for an individual's reasonable domestic needs or the reasonable needs of an individual's animals for drinking water, and such taking or use does not, or is not likely to, have an adverse effect on the environment; or

92.5 in the case of geothermal water, the taking or use of any water, heat or energy if it is taken or used in accordance with tikanga Māori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or

92.6 the water is required to be taken or used for fire-fighting purposes.

93. A resource consent to do something that otherwise would contravene s 14 is a water permit (s 87(d)). This applies to both freshwater and geothermal water.

94. The regional council may grant a water permit subject to conditions. One of those conditions can be a review condition which prescribes or specifies the times at which and number of times conditions of the water permit can be reviewed. The regional council is then entitled to serve notice (in accordance with the review condition) on the consent holder of its intention to review the conditions to deal with any adverse effects on the environment that may arise from exercising the consent or for any other purpose specified in the water permit (s 128).

95. Section 128(1)(b) expressly states that in the case of a water permit, the regional council may give notice of its intention to review the conditions when a regional plan has been made operative and which sets rules relating to

maximum or minimum levels or flows or rates of use of water (or minimum standards of water quality) and it is the regional council's opinion that it is appropriate to review the conditions to enable those levels, flows, rates or standards to be met. The regional council may also give notice of a review when relevant national environmental standards have been made (s 128(1)(ba)).

Nature of a resource consent

Not real or personal property; and not creating a proprietary interest

96. Section 122(1) states that a resource consent is neither real nor personal property. Resource consents are personal to the consent holder and may be acted on by other persons with the permission of the consent holder, unless the consent conditions say otherwise (s 3A).

97. It is helpful to think of resource consents as providing permission to undertake an activity that is not automatically permitted by the Resource Management Act or by a regional or district plan. See the restrictions on activities in Part 3 of the Resource Management Act and the descriptions of types of resource consents and classes of activities in ss 87-87B. Throughout, the terminology of consent for "activities" is used.

98. Accordingly a resource consent that allows an activity in respect of a resource does not give any proprietary interest in that resource. The High Court, for example has held that a resource consent to occupy the seabed for marine farming does not create any interest in the land of the seabed.[31]

Duration

99. Consents can be granted for a period up to 35 years (see s 123(d)). If no period is specified in the consent itself, it is deemed to be granted for 5 years from the date of commencement of the consent. A consent can, however, lapse under s 125 or be cancelled if not complied with in accordance with s 126.

Transferability

100. A water permit granted for damming or diverting water may be transferred (as a whole) to any owner or occupier of the site in respect of which the permit is

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31 *Marlborough District Council v Valuer-General* [2008] 1 NZLR 690.

granted but cannot be transferred to any other person or from site to site (s 136(1)). Any other water permit, however, can be transferred in whole or in part to any owner or occupier of the site for which the permit is granted, or to another person on another site or to another site. This is if both sites are in the same catchment, aquifer, or geothermal field, and the transfer is expressly allowed by a regional plan or has been approved by the regional council upon application (s 136(2)). Any transfer can be for a limited period (s 136(2A)).

101. A transfer (other than a transfer that has been approved by the regional council upon application under (s 136(4)) has no effect until written notice is received by the regional council (s 136(3)). Where a transfer is notified to the regional council or is approved by the regional council, the original permit (or that part of the permit transferred) is cancelled and a new permit is issued on the same terms and conditions as the original permit or on such conditions as the regional council determines (where an application for transfer has been lodged with the regional council) (s 136(5)).

Status of a water permit

102. The High Court in *Aoraki Water Trust v Meridian Energy Ltd*[32] considered that there were four features of the Resource Management Act that were of particular importance in that case (which related to water allocation):

102.1 The sustainable management concept underpinning the Resource Management Act which revolves around the management of resources as opposed to leaving their fate to chance (s 5);

102.2 The obligation on a regional council to have particular regard to the efficient use of resources (s 7(b)), again highlighting the management aspect and the need for complete allocation in some cases;

102.3 The regional council's related obligation to control the taking, use, damming and diversion of water (s 30(1)); and

102.4 The requirement that, except in the situations specified (s 14(3)(b) – (e)), water can only be taken, used, dammed or diverted if that activity

32 [2005] 2 NZLR 268, 276-278 (HC).

is expressly allowed by a rule in a regional plan or by a resource consent (s 14(1) and (3)(a)).

> ... A regional council exercises its statutory function of regulating or managing the allocation or use of a resource through its power to grant permits (ss104-104D). In summary, subject to very limited exceptions, Parliament has introduced a comprehensive statutory management regime for water allocation and use.[33]

103. The Court stated that the Resource Management Act "effectively prescribes a licensing system" and that Part 6 of the Resource Management Act codifies the constituent elements of a resource consent, covering its nature, duration, expiry, review and transfer.

> A number of specific provisions ... elevate the status of a water permit from something in the nature of a bare licence to a licence plus a right to use the subject resource. In that sense it has similarities with a profit à prendre (*Hinde, McMorland & Sim*, para 6.054). Four features are particularly relevant: (1) a permit is for the fixed term (not exceeding 35 years) specified in the permit or five years if no period is specified, subject to limited rights of revocation ...; (2) a permit specifically allows the holder to remove property, in this case water, for its own purposes subject to express conditions, even though the resource is owned by the Crown; (3) the regional council "grants" a permit (ss 104-104D), a grant being a term commonly employed to describe a right created by the Crown (*Jowitts Dictionary of English Law*, 2ne ed., Vol.1, 870); and (4) a permit is assignable with the interest to which it is coupled, namely ownership or occupation of the site for which the permit is granted (s 136).[34]

104. The Court held that, while permits are not themselves real or personal property, what is determinative is that, when granting the water permits, the regional council (in that case) created the right in Meridian to take, use or divert property (surface water in Lake Tekapo) for a defined term at maximum rates and quantities and for maximum periods. Economic value of a permit derives from the permit holder's rights to use the property in accordance with the permit. The Court found that where a resource is already fully allocated in a physical sense to a permit holder, a regional council cannot lawfully grant another party a permit to use the same resource unless specifically empowered by the Resource Management Act because:[35]

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33 At 277.

34 At 279.

35 At 282.

104.1 The subsequent grant would negate or frustrate the purpose and effect of the provisions designed to ensure the effective allocation of resources;

104.2 The Court of Appeal[36] has identified the principle of first-come, first-served as Parliament's guide to an authority's regulation of competing applications for scarce resources, by holding that the grant of a consent to one party necessarily excludes the other. Other Courts have applied the related principle that statutory authorities are unable to exercise a statutory power in a manner which might interfere with a validly granted right of exclusivity.

104.3 A subsequent grant to another party would have the effect of derogating from the authority's original grant because it would interfere with, erode or destroy the holder's right to use the property; and

104.4 An original permit holder enjoys a legitimate expectation that a public authority will not deliberately erode a grant during its term by granting a permit to another party.

105. It is acknowledged that, while s 122 of the Resource Management Act states that water permits are not real or personal property, water permits do have economic value. As stated by the Court in *Aoraki*, they may confer a right to use the resource that prevents further resource consents being issued for the same use; and economic value can be derived from a permit. The transferability of a permit is also analogous to aspects of the bundle of rights that includes property rights.

106. However, notwithstanding that "exclusivity", it is only a *right* to take, use, dam or divert the water that has been granted. That right is likely to be subject to conditions, and it is for a limited duration. This does not suggest ownership of the resource.

107. The Resource Management Act provides a regional council with a right to include a review condition entitling it to review the conditions. This conforms

36 *Fleetwing Farms Ltd v Marlborough District Council* [1997] 3 NZLR 257.

with the continued management role of regional councils once a permit has been granted. It is acknowledged that the Court referred to the resource being owned by the Crown.[37] However, with respect, it is submitted that the Court overstated the position in relation to water being property and being vested in the Crown. The Crown does not own the water. The Water-power Act 1903, the Geothermal Energy Act 1953 and the Water and Soil Conservation Act 1967 each vested certain rights to use water in the Crown. These statutes still only conferred a right (albeit exclusive) to the Crown, and that right was continued by s 354 of the Resource Management Act whereby the Crown (delegated to regional councils) continues to control the taking, use, damming and diversion of water. No ownership rights have been conferred on the Crown.

108. The type of conditions imposed on a consent do not imply any ownership being conferred to the permit holder but they do illustrate the management role that a regional council has in relation to water. This can be illustrated by some of the conditions in Resource Consent 104706, which was produced as evidence. For example, Condition 1 states that the maximum mass of fluid taken shall not exceed the volumes specified in that condition. That provision is then subject to qualifications about the rate at which water is taken and extensive conditions allowing reviews of the resource consent.

109. Condition 7.5 of Resource Consent 105227 (also produced as evidence) states that the consent holder shall restrict public access to the Waikato hydro reservoirs only in those areas and for those periods where the safety of the public or the integrity of structures and other facilities associated with the Waikato hydro system would be compromised by such access. If the water was owned by Mighty River Power, then this condition limiting public access at certain times would not be required. As owner, to protect its resource, Mighty River Power would have the right to restrict access at all times. It would not be limited to those areas or periods specified in the condition.

110. Following *Aoraki*, Philip Milne, a partner at Simpson Grierson and counsel for Aoraki, gave the 2005 Salmon lecture on the implications of the *Aoraki*

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[37] See paragraph 17 above.

decision.[38] As he notes, the declarations sought in *Aoraki* were not given and the scope and effect of the decision are "somewhat unclear" and will require careful interpretation and application. Milne considered that the Court's conclusions "will undoubtedly be further litigated in other contexts" and he lists some key questions that arise including:

110.1 Did Parliament intend water permits to provide exclusive legal rights in property as well as a practical right priority?

110.2 Is there property in water?

110.3 Does a permission to take water from a lake and use it downstream "necessarily" assign exclusive rights to that volume of water in the lake?

110.4 Was it intended that consents (other than coastal occupation permits under s 122(5) and (6)) could provide a legal exclusion?[39]

111. Milne states that the Court sidestepped s 122 (whereby a consent is neither real nor personal property) by finding, not that a water permit was a property right but instead that it provided a right to the property in the water owned by the Crown.[40] Milne disputes this, saying water, and other public resources are not "property" that is "owned by" the Crown; they are a public resource (he refers to the "Commons") which the Crown has control and stewardship of.

112. This accords with the Crown's submission. As stated by the Court in *Aoraki*, the Resource Management Act revolves around the *management* of resources. This is reflected in the obligation of regional councils to have particular regard to the efficient use of resources, their role in relation to controlling the taking, use, damming and diversion of water, and the management of the resource through rules in a regional plan and the granting, or otherwise, of permits. Through the Resource Management Act, Parliament has delegated this management role on regional councils. However, contrary to what the Court stated in *Aoraki,* with respect, water is not a property and the Crown does not own water, it merely manages it.

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38 Milne, Philip "Allocation of Public Resources under the RMA: Implications of *Aoraki Water Trust v Meridian*" [2005] Resource Management Theory & Practice at 146.

39 At 151.

40 At 158.

ISSUE (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?

The Mixed Ownership Model programme

Overview

113. The proposed sales programme for energy companies involves, pursuant to the State-Owned Enterprises Amendment Act 2012 (the SOEA) and the Public Finance (Mixed Ownership Model) Amendment Act 2012 (the PFA), initial public offerings (IPOs) for Mighty River Power, Meridian, Genesis and Solid Energy.

114. The Government will retain a minimum shareholding of 51% in all cases and no other shareholder is permitted to own more than 10% of any of the shares.

115. Transactions are to be separated by approximately 6 months to match the limited slots (in April to July and September to December) at which the companies' financial reporting cycles and market conditions are all at their best; a point expanded on below.

116. The SOEA enables, through Orders in Council on a company-by-company basis, the SOE MOM companies to be removed from the schedules of the SOE Act while ensuring the continued application of the provisions of the SOE Act that allow for the necessary transfer of assets and land by the Crown to the SOEs. As John Crawford said in evidence,[41] the Government's objectives in pursuing the programme are not just fiscal. As well as optimising value for the Crown and freeing up capital, the programme is intended to:

116.1 allow the companies to obtain capital growth without depending entirely on the Government;

116.2 broaden the pool of investments available to New Zealand savers and increase the depth of New Zealand's capital markets;

116.3 ensure that these large and important companies reap the benefits of sharper commercial disciplines in terms of

41 Wai 2358, Oral evidence of John Crawford in response to questions from the Tribunal, Friday 13 July 2012.

performance to allow them to make the strongest possible contribution to New Zealand's economic growth.

117. Once listed, the companies will be subject to the NZX Listing Rules, including the continuous disclosure regime, thereby increasing transparency. Those Rules contain detailed provisions, in section 10, relating to the disclosure of material information, relating to forecasts, transactions, dividends, proposed takeovers, changes in business, the disposal or acquisition of securities and accounts.

The Legislation

118. The SOEA enables the Crown to remove Genesis Power Limited, Meridian Energy Limited, Mighty River Power Limited, and Solid Energy New Zealand Limited from the operation of certain restrictions contained in the State-owned Enterprises Act 1986 ("SOE Act") which prevent the Crown from selling shares in State enterprises. Sections 4 to 5 of the SOEA allows for the name of each company to be removed from the list of State enterprises and new State enterprises in Schedules 1 and 2 of the SOE Act. Once this occurs, each company will cease to be a State enterprise and cease to be subject to the provisions of the SOE Act, with the exception of sections 22 to 30(1) of the SOE Act which will continue to apply (see s 45W of the SOE Amendment Act). The SOEA also enables the Crown to remove these companies from the scope of the Official Information Act 1982 and the Ombudsmen Act 1975 (see ss 6 and 7 of SOE Amendment Act).

119. The SOEA then allows for Genesis Power Limited, Meridian Energy Limited, Mighty River Power Limited, and Solid Energy New Zealand Limited to be listed under schedule 5 of the Public Finance Act 1989 as a mixed ownership model company, subject to the provisions of that Act.

120. Part 5A of the Public Finance Act imposes restrictions or caps on the selling or issuing of shares or voting securities in any mixed ownership model company which is listed in Schedule 5 of that Act. In particular, s 45R prohibits the Crown from selling, otherwise deposing, or permitting shares or voting securities in any mixed ownership model company, if such action would result in the Crown having less than 51% control of the shares or voting securities in any such company. Any acquisition or issue of share or voting securities which would result in the Crown having less than 51% control of the company is

invalid and of no effect (s 45R(3)). Section 45S restricts any person (other than the Crown) from holding more than 10% of the shares or voting securities in any mixed ownership model company. The consequences of breaching the 10% cap are set out in the Act (see s 45T).

121. The Public Finance Act contains a provision equivalent to section 9 of the SOE Act. Section 45Q(1) provides that nothing in Part 5A of the PFA will permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. The main practical effect of this Treaty clause is that it makes Crown actions under the new Part 5A of the PFA justiciable in terms of s 6 of the Treaty of Waitangi Act 1975, where any Māori or group of Māori believe those actions may prejudice their interests.

Why Mighty River Power first?

122. As John Crawford confirmed in response to Tribunal questions, following ongoing assessment of the companies, it was determined by Treasury that MRP is the only company that was in fact market ready at this stage. While many of the reasons for that conclusion are commercially sensitive, Mr Crawford discussed for example the fact that Solid Energy had recently purchased Pike River Coal and that uncertainties relating to that asset needed to be resolved before a share sale could be contemplated, and the fact that Meridian has recently appointed a new Chief Executive Officer and that the market would need to see a stable strategy in place from the new CEO for a time before it would be in a position to proceed.

Why timing is critical

123. The timing of the IPOs is governed by half and full year accounting periods. SOE half year accounts are due on 31 December and full year accounts are due on 30 June each year. Offer material and auditing, following the release of accounts, takes some time but needs to be undertaken while the accounts are still fresh.

124. Having regard to factors which indicate when the market is most 'open' (including taking holiday periods here and in the Northern Hemisphere into account) and the existence of other known share floats or offers which

represent competition for investment dollars, there are only limited windows in a year during which an IPO can realistically be undertaken.[42]

125. If the September to December 2012 slot is missed, then over the next 1½ years - during which the Government's MOM programme needs to be conducted to meet its objectives - there will not be sufficient slots for each company. Missing the 2012 slot will cause significant prejudice to the programme.[43]

126. As John Crawford said in response to questions from Mr Enright, there are five companies (the energy companies and Air NZ) involved here, and there are fewer slots available than required for the life of the programme such that there is a real cost in losing one.

The Government's priorities and programme

127. As will be discussed in the next section, while the Crown cannot unreasonably compromise its capacity to provide for well founded Treaty claims, it must be permitted to pursue its legislative and policy programmes.

128. If it determines, reasonably, that it is able to provide for a well-founded Treaty claim and if the legislative or policy measure in contemplation will not prevent the provision of relevant redress or recognition, then a Court should not intervene. That, in turn, should in the Crown's submission inform the Tribunal's approach to issue (b).

129. In circumstances, in particular, where the assets in question are substitutable, or fungible, it is very difficult to see how the relevant redress or rights recognition could not, at the appropriate time, be provided.

130. As was said in the *Broadcasting Assets* case, if the Government decides when the time is right that it will bear the cost of providing certain redress - in this case perhaps the purchase of shares, a takeover of the minority shareholding or economic rights over water - then it is open to it to do that. An analysis of the cost of measures of that sort now, as against their cost later, is not relevant to the inquiry of this Tribunal or of any Court. The fact that it can be done is what matters.

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42 See generally the brief of evidence of John Crawford at paragraphs 117 to 121.

43 Many other factors may cause a slot to be missed, including international financial conditions and natural disasters, so each slot opportunity is valuable.

131. There is a broad range of factors that go into the mix in deciding whether to proceed with a share sales programme such as this, when the time is right to do it, and whether the balance of risk factors (such as Māori interests in water and geothermal resources, domestic and global financial conditions) on the one hand, and benefit factors (such as the deepening of capital markets, the provision of investment opportunities to New Zealanders that do not otherwise exist, needed investments in infrastructure such as schools, hospitals and broadband) on the other, warrants proceeding.[44]

132. Equally, when the difficulties identified in the discussion on rights and interests earlier have been settled and when recognition solutions are achievable, a policy decision will be needed involving a similarly large basket of considerations; including the effect on electricity prices on the one hand, effective rights recognition on the other and, somewhere in the middle perhaps, the springboard that the programme will by then have provided to infrastructure such as schools and hospitals.

133. Unless it can be said that shares in MRP - and shares in that company now rather than later - is the only way in which those rights can be recognised and that other forms of commercial redress could not possibly be put in place after the sale, then it is not for the Tribunal or the Courts to interfere in the Government's programme balancing, as it does, a broad spectrum of social and economic factors.

A framework for considering Māori rights and interests in water

134. Witnesses and counsel for the claimants and interested parties have advocated an approach that would stop the entire programme, resolve Māori rights and interests in water, and then carry on with the sale so as to avoid risk to price or profitability. The thing is that it doesn't work like that. There are multi-faceted economic considerations for a share sale and for recognising rights and interests in water. The framework is in place to provide for rights and interests recognition and potentially for resource allocation. It has nothing to do with the sale of shares. The Iwi Leaders Forum, the Land and Water Forum, and

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44 As Mr Cox said in response to questions from the Chief Judge, the 49% block of shares could be sold to one foreign owner such as to achieve a better return, but one of the objectives of the programme is to provide that investment opportunity for local investors - in their interests and in the interests of the economy. **This is much more than a purely fiscal programme.**

the Fresh Start for Fresh Water programme are all dealing with use, management, governance and allocation.

135. This should not be seen as a moment of leverage, such that to let it pass will mean the Government is less inclined later to recognise rights. The formulation of those rights and decisions that would follow about resource allocation cannot be undertaken in a short space of time. To stop this disconnected share process despite there not yet being sufficient work done on recognition is to say that the Government cannot be trusted to do the right thing in accordance with the process that is in place and well under way. It is to discard the Ministerial statements made directly to the Tribunal.

136. A potential benefit through shares may be one way of recognising past breaches - rather than rights recognition - in due course, but as John Crawford said in evidence, even then it is far from an ideal remedy for breach, given that the MOM companies have assets that are geographically diverse (many of which are not related to water) such that they would not reflect individual iwi or hapu interests in their particular taonga. The better outcome, in terms of redress, could well be financial compensation to enable a direct interest through the likes of a joint venture relating to a particular area of water. A small shareholding cannot give control of water.

137. The changes to allocation that may ultimately be necessary will affect SOEs, MOMs and the fully privately owned generating companies such as Contact and TrustPower, together with all other users of water such as irrigators, equally. It will be a large policy decision to be made in due course. The fact that MOMs may have some private shareholdings by then will not be a factor that will make a difference in the political decision that will need to be made. Shares are only a very small part in this mosaic of interests.

138. For these reasons, halting the share sales does not advance the challenge of dealing properly with these issues.

Financial merits alone

139. Dr Nana has said that the Government is better off overall receiving dividends and paying off debt, rather than selling shares and not borrowing as much.

140. As the Chief Judge said in his Memorandum–Directions, the arguments contained in Dr Nana's brief were directed at issues that were not for this inquiry.[45]

141. By adding a very general, new Part 5 in Dr Nana's evidence on share prices and profitability, this evidence has, however, come on to the record.

142. With the strong caveat that the part of Dr Nana's evidence dealing with financial outcomes for the Government remains irrelevant, and noting that, even if it were right, it does not have any material effect on the Government's ability to provide effective Treaty redress or on the far broader range of factors that need to go into Government decision making as addressed in the preceding sections, the Crown offers these comments:

142.1 The assumptions upon which Dr Nana's conclusions were based are flawed. The actual dividend rate for the MOM companies over the last 5 years was 4.1%[46] and the Crown's borrowing rate, averaged over the last 5 years was 5.4%.[47] Dr Nana's figures were 8% and 4% respectively.

142.2 As the 2012 Budget Fiscal Strategy Report[48] shows in Table 2 on page 7, the forecast forgone dividends from MOM companies total $460 million over the period 2013 to 2016, compared with $575 million in estimated finance cost savings.

142.3 As John Crawford said, the 'forecast gain on disposal recorded in taxpayer funds' of $800 million in that table - while certainly an estimate - is rightly included because the proceeds figures are based on compulsory accounting treatment that produces a figure well short of actual expected returns. It would be illusory not to include the return that is projected. There is a real difference between accounting value and economic value.

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45 Memorandum-Directions of the Presiding Officer, Wai 2358, #2.5.33.

46 Dividends paid divided by the average of the current commercial value and the previous commercial value of the shareholding.

47 Finance costs divided by total sovereign issued debt.

48 2012 Budget Fiscal Strategy Report (Hon Bill English, Minister of Finance, 24 May 2012).

142.4 In Dr Nana's response to the Tribunal questions of 17 July, he accepts an 8% dividend was never 'paid' and goes on to say that the $800m gain on sale in Table 2 makes no difference to his conclusions. In fact it makes a fundamental difference. That figure is at present unrealised but it is properly projected. And the $6b debt reduction cannot be overlooked.

142.5 As John Crawford said, the return on invested capital figures in the Ernst & Young paper of 25 November 2011[49] include retained equity and so are not a reflection of income the Government will forgo. While the Government holds the investment, its assets are reflected in both dividends received and accrued profit or equity, but for the purpose of considering a pure cash position on sale, dividends (being the benefit that comes back to the Crown) is the relevant figure; in terms in particular of considering the Crown's ability to manage Treaty settlements.

142.6 Dr Nana's conclusion that 'replacement' dividends from newly constructed assets will be delayed did not take into account the fact that the Government is borrowing money now to build these assets and that borrowing would be paid off with the money from the IPO. It is like buying on a credit card and putting money in a savings account and then withdrawing the money to pay the credit card bill when it is due. Consequently, the timing of the benefits is not related to the timing of the payment for the assets.

142.7 In any event, this is all, for the reasons discussed already and to be considered below, a red herring. As Dr Nana accepted,[50] the Crown collected some $51 billion in taxes last year and had total revenues of $81 billion. Even, then, if Dr Nana was correct about the negative impact (and an army of Treasury economists would

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49 Ernst & Young "SOE Economic Profit Analysis" (Ernst & Young, 25 November 2011).

50 Wai 2358, Oral Evidence of Dr Ganesh Nana in response to Question from Paul Radich, Thursday 12 July 2012.

disagree with him on that), it is negligible when set against the backdrop of the Crown's accounts.

143. Finally, as mentioned already, the objectives of the programme are much more than purely fiscal.

There is no sufficient connection between the MOM programme and the recognition of Māori rights and interests in water – Legal Considerations

Introduction

144. A significant body of case law exists concerning the effect of sales of state-owned assets on the Māori rights and interests guaranteed by the Treaty of Waitangi. Although these cases do not define the nature or extent of Māori rights and interests in freshwater or geothermal resources, they are nonetheless informative of the scope of the Crown's Treaty obligations when effecting asset sales policy.

145. From the *Lands* case in 1987,[51] to the more recent *Broadcasting Assets* and *Radio New Zealand* decisions,[52] the courts have carefully developed principles that underpin a Treaty-compliant framework for the sale of state-owned assets.

146. Two key principles are echoed throughout the Treaty jurisprudence of the past three decades, and are of particular relevance to the Tribunal's current inquiry:

146.1 First, the Treaty does not unreasonably restrict the right of a duly elected government to pursue its chosen policy agenda in the exercise of its right of kawanatanga; and

146.2 Secondly, there must be a direct nexus between the assets concerned and the Crown's ability to fulfil its Treaty obligations before Treaty principles can halt that policy agenda.

147. These principles must be given due consideration in evaluating the effects of the Crown's MOM policy on Māori rights and interests in freshwater and geothermal resources.

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51 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

52 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (Broadcasting Assets); *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (Radio New Zealand).

148. The Crown says that, having regard to this body of case law, there is no nexus between the recognition of Māori rights and interests in freshwater and geothermal resources and the sale of shares in power-generating SOEs, such that the Crown should be prevented from carrying out its MOM policy.

Lands

149. The *Lands* decision establishes that, while Māori interests are essential considerations in the sale of state-owned assets, the mere existence of those interests is not in itself enough to prevent the Crown from pursuing such a policy.

150. Instead, what must be shown is that the sale of the particular assets will in some way prejudice the Crown's ability to fulfil its Treaty obligations, particularly through the provision of redress in respect of Māori Treaty grievances.

151. Further, the decision demonstrates that, where the Crown reasonably and in good faith satisfies itself that the transfer of the assets concerned will not prevent it from subsequently recognising Māori claims, "no principle of the Treaty will prevent a transfer".[53] As such, the nexus between the assets and the Crown's ability to satisfy its Treaty obligations is crucial to determining whether or not an asset sales policy is Treaty compliant, and requires careful evaluation.

152. That nexus was clearly present in the *Lands* case. The relevant asset was land that was potentially subject to Treaty claims. It was thus foreseeable that, were the claims determined to be well-founded, the land itself would form a significant part of any redress sought by Maori. In essence, the asset being transferred was the very asset Māori sought, or would likely seek, in compensation for their Treaty grievances. Transferring the land in the absence of any mechanism to preserve its use in future Treaty settlements would therefore prejudice the Crown's capacity to provide redress, and ultimately its ability to fulfil its Treaty obligations. As a result, the Crown's chosen policy was not Treaty compliant.

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53 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, per Cooke P at 36.

Coal

153. The *Coal* case is another example of the nexus required to prevent the Crown from pursuing its chosen policies.[54]

154. In *Coal*, the primary issue was whether mining rights held by Coalcorp in respect of land confiscated from Waikato Māori were interests in land protected by the Treaty of Waitangi (State Enterprises) Act 1988. The Court of Appeal determined they were, and the sale of Coalcorp could not proceed until the Crown had established a scheme protecting the rights of the plaintiffs.

155. Like *Lands*, the nexus in *Coal* was clear and direct. The mining rights were to coal contained in the land confiscated from Waikato Māori in breach of the Treaty, and in respect of which Treaty claims had been lodged with the Waitangi Tribunal. Again, the land and mining rights were the very assets sought by Māori as part of the redress for their claims and, were the Crown to divest itself of those assets without ensuring their availability for future Treaty settlements, its ability to fulfil its Treaty obligations would be prejudiced.

Radio Frequency

156. The two *Radio Frequency* decisions concerned the Crown's allocation of rights to use AM and FM radio frequencies under the Radiocommunications Act 1989 as part of its broadcasting policy.[55]

157. The Court of Appeal noted that, while the Treaty guarantees the protection of taonga, it does not specify how that protection must be effected.[56] Further, where the Crown has a range of options available to achieve protection, the Court determined that the Treaty will be complied with if the Crown elects between those options reasonably and in good faith.[57]

158. In evaluating the nexus between the sale of assets and the Crown's ability to meet its Treaty obligations, a chosen policy agenda will therefore not be invalid in terms of Treaty principles merely because the Crown has chosen one option of meeting its Treaty obligations over other available options.

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54 *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513.

55 *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129 (Radio Frequency No. 1); *New Zealand Maori Council v Attorney-General* [1991] 2 NZLR 147 (Radio Frequency No. 2).

56 *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129, per Cooke P at 135.

57 *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129, per Cooke P at 135.

159. In assessing the effects of asset sales policy then, the courts must take a wide view as to the ways in which the Crown may satisfy its Treaty obligations; a narrow focus on the particular outcome or option sought by claimants is not appropriate, and would unreasonably restrict the ability of Government to carry out its governance functions.

160. In terms of redress or rights recognition, there is clearly a range of possible options the Crown could exercise to meet its Treaty obligations. Such options may include the return of the asset concerned or similar assets, the payment of financial compensation, shares, royalties, levies or the statutory recognition of rights. In pursuing its policies and balancing competing interests, the Crown thus has a discretion as to the way in which it fulfils its Treaty obligations. Dialogue between the Treaty partners will occur in that decision-making process. The Court in *Radio Frequency* made it clear that the Crown will then consider, reasonably and in good faith, the available options.

161. The question then is whether, following the sale of state-owned assets, any of those options remain available to the Crown. If so, then Treaty principles cannot disrupt the Crown's chosen policy agenda.

Broadcasting Assets

162. In *Broadcasting Assets*, the Privy Council considered the transfer of broadcasting assets from the Broadcasting Corporation of New Zealand to Radio New Zealand Limited and Television New Zealand Limited. The appellants argued that, in the absence of any mechanisms to ensure the protection of the Māori language through broadcasting, the transfer would be unlawful.

163. In upholding the Court of Appeal's decision dismissing the action, the Privy Council noted that the transfer of the broadcasting assets would not substantially undermine the Crown's ability to meet its Treaty obligations because, even without the assets, the Crown could promote the Māori language provided it was prepared to accept the cost implications.[58]

164. Further, both the Privy Council and the Court of Appeal took the view that the Crown's ability to meet its Treaty obligations was not prejudiced by the transfer because the broadcasting assets were substitutable and "could be

58 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, per Woolf L at 9.

replaced by acquiring assets of the same nature".[59] As noted by Richardson J in the Court of Appeal:

> "...they are substitutable in the sense that equally suitable equipment and facilities could be acquired by the Crown if it wished to provide in that way for more Māori television and radio broadcasting in order to enhance Māori language and culture".[60]

165. The situation in *Broadcasting Assets* was a step removed from that in *Lands* in that the assets affected were not themselves the subject of Treaty claims or foreseeable as redress in respect of such claims, and the required nexus therefore did not exist. As noted by Lord Woolf:

> "They were different from the assets involved in earlier cases where what was being considered was, for example, land which was not substitutable. The land was itself taonga and could not be replaced by land which was not taonga".[61]

166. *Broadcasting Assets* reinforces the notion of options articulated in the *Radio Frequency* decisions, and emphasises the wide view that the courts must take in determining the Crown's ability to fulfil its Treaty obligations following the sale of assets.

Ika Whenua

167. The *Ika Whenua* case concerned the transfer of assets, specifically the Aniwhenua and Wheao dams, from the Bay of Plenty Electric Power Board and the Rotorua Electricity Authority to energy companies established under the Energy Companies Act 1992.[62] The claimants argued, inter alia, that in consenting to the erecting of the dams, the Minister of Energy had interfered with their aboriginal rights.

168. Of particular importance to the Tribunal's current inquiry, the Court of Appeal found that Māori had no rights to or in the assets concerned, and Treaty rights did not extend to the generation of electricity through the use of water. As noted by Cooke P:

> "But, however liberally Māori customary title and Treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power.

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59 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, per Woolf L at 14.

60 *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576, per Richardson J at 2.

61 *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513, per Woolf L at 14.

62 *Te Runanga O Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20.

> Such a suggestion would have been far outside the contemplation of the Māori Chiefs and Governor Hobson in 1840. No authority from any jurisdiction has been cited to us to suggest that aboriginal rights extend to the right to generate electricity. Nor was the argument for the appellants put to the Court in that way. It was not contended that the dams are themselves *taonga*".[63]

And:

> "The essence of what has been said above is that neither under the common law doctrine of aboriginal title, nor under the Treaty of Waitangi, nor under any New Zealand statute have Maori, as distinct from other members of the general New Zealand community, had preserved or assured to them any right to generate electricity by the use of water power. Consequently there can be no legal objection to the transfer of the Aniwhenua and Wheao dams to energy companies. If any claims to compensation for interference with Māori customary or fiduciary or Treaty rights to land or water can be mounted, they will not be diminished or prejudiced in any real sense by such transfers."[64]

169. While the Crown agrees that the argument in *Ika Whenua* was advanced on an aboriginal title rather than Treaty rights basis, it cannot be said that the aforementioned comments of Cooke P are obiter. It is clear that the comments were made in respect of both Treaty rights and aboriginal title, and the decision itself came on the back of, and considered, a significant Tribunal inquiry relating to Treaty rights issues. Indeed, the Crown's submissions to the Court in *Ika Whenua* canvassed such issues.[65]

Radio New Zealand

170. In the *Radio New Zealand* case, the Court of Appeal considered the Crown's proposed sale of its commercial radio assets which, it was argued, would breach the Crown's Treaty duty to promote the Māori language through broadcasting.

171. In determining that the sale of commercial radio assets did not prejudice the Crown's ability to meet its Treaty obligations in respect of Te Reo Maori, the Court of Appeal noted:

> "To the extent that the issue is the choice of policy instrument to be used to advance this aspect of the protection of the Māori language and policy, the Crown has thus far elected to rely on reservations of

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63 *Te Runanga O Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, per Cooke P at 24.

64 *Te Runanga O Te Ika Whenua Inc. Society v Attorney-General* [1994] 2 NZLR 20, per Cooke P at 25.

65 See for example, *Te Runanga O Te Ika Whenua Inc. Society v Attorney-General* CA 124/93, Outline of the Crown's Submissions, at [35]-[39] and [46]-[62].

> frequencies, access to transmission and production facilities and funding support and incentives. Incentives include the funding or subsidising of Māori programmes and making them available freely or on favourable bases to private radio. That could extend to buying time on commercial radio for presentation of Māori content programmes. Such a process of negotiating the purchase of slots on a chosen range of popular stations to mainstream Māori language could proceed without any regard to the ownership of the stations"

and:

> "The premise underlying the argument for the appellants is that the only policy mechanism that will work is regulation or the threat of regulation. There is no necessary connection between regulation and ownership...If regulation becomes favoured as an instrument to achieve the ends sought, a Government can regulate to impose its will on all or any participants in the broadcasting industry, regardless of their current or previous ownership. Publicly and commercially it would be in no worse position to do so then than it is now".[66]

172. As in *Radio Frequency* and *Broadcasting Assets*, the *Radio New Zealand* decision highlights the consideration that must be given to the range of options the Crown could reasonably pursue in meeting its Treaty obligations when effecting asset sales policy. And, again, the focus is squarely on the relationship between the asset concerned and what it is the Crown is required to do under the Treaty.

173. In *Radio New Zealand*, what the Crown was required to do was ensure it could give active protection to Te Reo Maori, notwithstanding the sale of its commercial radio assets. Unlike in *Lands*, the Court determined, having regard to the range of options available, that the sale of the assets would not prevent the Crown from providing such protection, and the nexus required to prevent the Crown from carrying out its sales policy was therefore not present.

Conclusion

174. In order to prevent the Crown from carrying out its chosen policy agenda, there must be a direct nexus between the asset concerned and the Crown's ability to fulfil its Treaty obligations.

175. Treaty jurisprudence concerning the sale of state-owned assets has considered a wide range of claims to a diverse range of assets, from land to radio frequencies. What is clear from those decisions is the closer the particular asset is to the specific Treaty claim or grievance, the stronger the safeguards required

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66 *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140, at 29-30.

to be implemented by the Crown in pursuing its chosen policies. However, where the asset is not itself subject to the specific claim or grievance, is substitutable, or the Crown has open to it a range of options in meeting its Treaty obligations, Treaty principles cannot prevent it from pursuing its policies reasonably and in good faith.

176. In the present case, the nexus is remote, if it exists at all. At the heart of the claims put before the Tribunal is the access to, and use of, freshwater and geothermal resources currently used by power-generating SOEs. Unlike the *Lands* case, the resource at the heart of Māori claims is not being sold or transferred. Unlike the *Broadcasting Assets* case, the Crown's MOM policy does not even involve the transfer or ownership of the assets and infrastructure held by the SOEs. Indeed, what the MOM policy achieves is much more remote than the policies considered in either of those decisions. In reality, all the MOM policy does is effect a transfer of up to 49 percent of shares in a company that holds assets and infrastructure which use water to generate electricity.

There is no sufficient connection between the MOM programme and the recognition of Māori rights and interests in water – Factual Considerations

Relevant factual circumstances for Issue (b)

A resource consent is removed from a property right in water

177. For the reasons discussed earlier, a resource consent is removed from a property right in water.

A share in a MOM company is removed from a property right in water

178. As s 15 of the Companies Act provides, a company is a legal entity in its own right, separate from its shareholders.[67]

179. A shareholder may not benefit directly from or exercise the rights that a company may have. Equally, a stakeholder's rights and obligations lie with the company and do not extend to the company's shareholders.

180. Even now, there is no guarantee - implied or otherwise - that the Crown will meet the liabilities of an SOE or a MOM company. As John Crawford said,[68]

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67 Which reflects long-established case law - for example, *Salomon v A Salomon and Co Limited* (1897) AC 22 (HL) and *Lee v Lee's Air Farming Limited* [1961] AC 12 (PC).

for all SOE company financing, there must be a disclaimer in the finance contract stating that the Crown does not guarantee or financially support SOE borrowing.

181. A share is not a share in assets. It cannot be connected, for example, with a particular waterway or dam. The SOEs have a broad range of assets (generating, wholesaling and retailing) and generate electricity through hydro, geothermal, wind, oil, coal, gas and co-generation plants. These assets are geographically diverse.

182. Shareholders only have a right to an equal share in the dividends authorised by the board and to an equal share in the collective residual assets of a company (once the rights of priority creditors are met).

183. Shareholders' rights are limited[69] to the right to a vote on a poll at a meeting of a company, including on resolutions to appoint or remove a director or auditor, adopt or alter a constitution, approve a major transaction, approve an amalgamation or put the company into liquidation.

184. These rights are exercised equally by all shareholders and cannot be exercised unilaterally. Shareholders have no unilateral power to exercise the rights of a company directly, such as using company assets, directing employees or incurring liabilities.

185. Shareholders have a right to dividends alone.[70] It is not a right to the revenue or profits of the company or to the assets of the company. Dividends do not bear a direct relationship with profits. Dividends may not come out of profits but, for example, may be a distribution of capital following the sale of an asset or following borrowing.

186. The fact that a company makes an accounting profit does not mean that it is able to pay a dividend. Accounting profit is calculated on an accrual basis which, broadly speaking, means that income and expenses are recorded when they are earned or incurred, not when they are received or paid.

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68 John Crawford brief of evidence paragraph 15.

69 S 36(1) of the Companies Act.

70 S 36(1)(b) of the Companies Act.

187. Conversely, if a company makes a loss, its directors are not precluded from authorising a dividend, provided legal and other requirements are met.

188. Equally, even if a company does make a profit, the board may choose not to pay a dividend for a range of reasons including planned business expansion and building up reserves.

189. A company is governed by its board of directors, not its shareholders. While shareholders can influence the management of a company indirectly (for example through their choice of directors and changes to the constitution), in terms of actual decision making, they have no direct power except as granted by the Act or the company's constitution.

190. It is the board of directors which is responsible for the management of the company. Directors do have a range of duties, which they owe to the company; not to the shareholders.[71]

191. Because these duties are not owed to shareholders, what is in the best interests of the company may not always align with the best interests of individual shareholders.

192. Directors do owe some duties to shareholders as a collective group - not to individual shareholders. As Mr Crawford indicated in paragraph 76 of his evidence, these are duties to supervise the share register, to declare self interest, and to disclose shareholdings in the company (ss 90, 140 and 148 respectively).

193. There are, arguably, some specific obligations that would have the potential to be enforced by a shareholder, being obligations to respect the rpe-emption rights of existing shareholders (s 45(1)), not to take action that affects the rights attached to shares without obtaining a special resolution (S 117(1)), to treat shareholders equally and fairly when authorising a dividend, to treat shareholders equally when a company is offering to acquire its own shares (s 60(1)), to call a special shareholders meeting when required by a shareholder

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71 Including s 131 - directors must act in good faith and in the best interests of the company; s 133 - directors must exercise their powers for a proper purpose; s 134 - directors must not act in a manner that contravenes the Act or the constitution; s 135 - directors must not allow the business of a company to be carried on in a manner likely to create a substantial risk of serious loss to creditors; s 136 - directors must not agree to the company incurring an obligation unless the director believes that the company will be able to perform the obligation; s 137 - directors must exercise the care, diligence and skill that a reasonable director would exercise; and ss 139 to 149 - directors must not use any information they have in their capacity as directors.

(s 121) and to comply with the minority buy-out procedures in the event that they are triggered (s 110).

194. There are some decisions that, under s 107 of the Companies Act, can be made by shareholders - if all shareholders agree. These are decisions concerning the rights and powers of shareholders that are ordinarily made by directors:

(a) authorising a dividend;

(b) approving a discount scheme for shareholders;

(c) enabling the company to acquire its own shares;

(d) enabling the company to redeem its own shares;

(e) enabling the company to give financial assistance for the purpose of, or in connection with, purchasing its shares;

(f) authorising remuneration and other benefits for directors.

195. It is a very difficult thing, in a company the size of MRP for example, to have all shareholders agreeing on any matter of this sort. This is a provision for the benefit primarily of small, closely held, companies.

196. In a MOM company, no significant decision concerning the control of the company can be made without the Crown knowing of it and agreeing to it. The Crown will have, in effect, a veto over any proposals raised by other shareholders, whether requiring a simple or a special majority.

197. While, when participating in decisions, the Crown as a majority shareholder in a MOM company will not owe any obligation to the minority shareholders, minority shareholders can require the company to purchase their shares if they do not agree with certain decisions that require a special resolution[72] or can apply to the Court for relief in the case of allegedly oppressive, discriminatory or unfair behaviour in relation to the conduct of the affairs of the company. In this sense, then, when exercising its voting rights, the Crown needs to consider a broad range of factors, including the rights of minority shareholders and the

72 Ss 110 to 115 of the Companies Act.

possibility of a claim of oppressive action or the company having to buy back the shares of minority shareholders. This is no different from any other company that has a majority shareholder and, as Mr Crawford said in evidence, the Crown operates as a majority and as a minority shareholder in a broad range of companies entirely effectively.

198. Even now, under the SOE Act, the Crown has no scope to instruct SOE directors on how to act in relation to the operational activities of the company. Although SOEs are under the common ownership of the Crown, they operate independently of the Crown and of other SOEs. On this basis, the sale of shares in the MOM companies will make no real difference to the way in which the directors of the companies will respond to any determination of Māori rights in water and geothermal resources. Ministers and other shareholders do not run the companies. The directors do, and they must do what they consider to be in the best interests of the companies, irrespective of who the shareholders are.

199. As was described in John Crawford's evidence, a company is separate from its shareholders. It is a separate legal entity. A company's assets belong to it alone, not to the shareholder. A shareholder's rights to a company are broadly to vote on a discrete range of matters, to receive an equal share of any dividends authorised by the board, and to receive an equal share of any surplus assets of the company upon winding up.

200. There was a suggestion by claimant counsel that shareholders could enter into an agreement between themselves that provided them with greater rights than those provided for under the Companies Act 1993. The suggestion was put to Mr Crawford that the shareholders could perhaps agree to a regular dividend stream, or agree that the directors would owe certain duties to the shareholders.

201. Quite aside from the practicalities of binding potentially thousands of shareholders in the MOM companies, the identities of whom would change day by day, it does not take into account the legal absurdity of doing so, as follows:

(a) Directors have a duty to act in the best interests of the company, not its shareholders.

(a) Directors, and directors alone, are responsible for making decisions for the management of the company. It is not for the directors to act on the shareholders' whim. The circumstances in which the shareholders can participate in decisions concerning the company are detailed in the Companies Act, and the Companies Act alone.

(b) Shareholders' agreements are exactly that: agreements between shareholders. They are not agreements between directors and shareholders, or between the company and shareholders. What the shareholders, as a stakeholder group, decide between themselves in no way binds the company excepted as permitted under the Companies Act (for example, when the shareholders pass a special resolution in respect of a particular matter).

(c) The constitution is the appropriate vehicle for any control around director behaviour. As described in section 31 of the Companies Act:

> Subject to this Act, the constitution of a company is binding as between—
>
> (a) the company and each shareholder; and
>
> (b) each shareholder—
>
> in accordance with its terms.

202. The further suggestion by claimant counsel was that a SOE, on becoming a MOM company, would not be required to exhibit a sense of social responsibility. This was premised on section 4 of the State-owned Enterprises Act.

203. This does not take into account the whole text of section 4. The heading of section 4 reads "Principal objective to be a successful business". Subsection 4(1) reads "The principal objective of every State enterprise shall be to operate as a successful business". Exhibiting a sense of social responsibility is one of the ways that an SOE can achieve this objective.

204. It does not mean that companies that are not SOEs do not exhibit a sense of social responsibility. Indeed, many companies take measures to recognise and cater for a variety of interests in society.

205. Claimant counsel also pointed to section 7 of the State-owned Enterprises Act as being something that would be "lost" if an SOE became a MOM company. Section 7 reads:

> **7 Non-commercial activities**
>
> Where the Crown wishes a State enterprise to provide goods or services to any persons, the Crown and the State enterprise shall enter into an agreement under which the State enterprise will provide the goods or services in return for the payment by the Crown of the whole or part of the price thereof.

206. Claimant counsel's suggestion was that a MOM company would not be able to enter into agreements with Māori that were "non-commercial".

207. On a careful reading of section 7, it becomes clear that the section relates to the situation where the SOE provides goods or services to other people, and receives payment (or part-payment) for it from the Crown. These are situations where the Crown wishes the SOE to provide goods or services, not where the SOE itself decides to provide goods or services to people. Even in such circumstances, the SOE has the ability to negotiate the terms of such provision with the Crown; the Crown cannot demand the provision nor dictate the terms of the provision.

208. An SOE, as for any other company, can choose to provide goods or services to whomever they wish and on whatever terms they choose. The same analysis will apply to a MOM company. There is nothing in the SOE Act that enables or requires an SOE to provide goods or services to others. Providing goods and services on terms different to the usual "commercial" ones is part of the landscape for all companies, not just SOEs.

209. The reality is that SOEs (and MOM companies and privately held companies) are all ultimately in the business of making a profit. They will not do anything that is non-commercial, in the sense that they do not receive any commercial benefit at all from any given transaction. A company may, however, choose to do a transaction where there is no financial benefit directly or immediately, but where it considers the transaction assists them in their profit-making activities.

210. The fact of the matter is that everything a company decides to do will provide it with a commercial benefit, either directly or indirectly. This benefit may be in the form of money (eg through buying and selling goods and services) or in other, less direct forms (eg through increased goodwill by sponsorships, charitable and community action/participation etc).

211. The overriding point here is, as John Crawford indicated, there is nothing in the Companies Act or Part 5A of the Public Finance Act that affects the Crown's ability to achieve a settlement with Maori. The situation with MOM companies is as it always has been with SOEs (save the fact that the Crown could not sell or transfer shares in SOEs).

212. For all of these reasons, shares are an impoverished proxy for the recognition of Māori rights and interests in water. Resource allocation and capacity for joint ventures is where the conversation needs to head.

The share sales will not create a 'chilling effect' on the Government's willingness to provide effective rights recognition and redress

213. Three aspects to this argument have emerged during the hearings:

213.1 the price of shares will be devalued due to the uncertainty arising from unresolved Māori claims relating to water and geothermal resources;

213.2 MOM company assets/profits/shares will be reduced if commercial rights in water were introduced or if memorialised lands were returned;

213.3 there is a risk of claims by overseas investors under New Zealand's international investment obligations if commercial rights in water were introduced or if memorialised lands were returned;

213.4 the prospect of these things will demotivate the Government from providing redress and rights recognition for Māori in relation to water and geothermal resources.

214. Each point is considered in turn:

The price of shares will be devalued due to the uncertainty arising from unresolved Māori claims in relation to water and geothermal resources

215. Māori claims to water and geothermal resources have been advanced, have been the subject of Tribunal reports, and have remained unresolved at a national level for many years.

216. There are any number of examples of claims. They include the Nga Hapu o Ngawha claim in the Tribunal in 1992 to the 'ownership' of the Ngawha geothermal resource; the Ngati Pahauwera claim in 1990 to 'possession and control' of the Mohaka River; the 1992 Ika Whenua rivers claim in which recognition of 'ownership' of the Wheao and Rangitaiki Rivers was sought; and the 1993 Ika Whenua energy assets claim in which claimants sought

recognition of the 'rangatiratanga' in relation to the Rangitaiki, Wheao and Whirinaki Rivers.

217. Tribunal reports since the mid 1980s have considered claims to rights and interests in water. For example, the report of the Tribunal on the Kaituna River claim in 1984 found a pipeline scheme to be contrary to the principles of the Treaty; the Mohaka River report in 1992 concluded that the Mohaka River was a taonga of Ngati Pahauwera over which Ngati Pahauwera retained rangatiratanga; in the Ngawha geothermal resource report in 1993, the Tribunal made findings in relation to the Ngawha geothermal resource and in relation to the Te Aroha geothermal resource (the Rotokawa Baths, the Whakarewarewa geothermal surface manifestations, and the Waitangi soda springs); the 1998 Ika Whenua rivers report, described Te Ika Whenua's residuary rights and interests in rivers in chapter 10 as being a proprietary interest akin to ownership;[73] the Tribunal's report on the Whanganui River in 1999 found there to be a property interest in water;[74] and the report on the CNI claims in 2007 found that Māori possessed the river system, albeit on the basis that there were a number of iwi with interests in the Tarawera River.[75]

218. As Lee Wilson said in his evidence,[76] despite the uncertainties associated with the prospect of Māori rights in water - together with the other uncertainties for potential investors mentioned in his evidence - investment in hydro and geothermal power stations has proceeded over the last 20 years by the Government and, more so, by private companies and through joint ventures.

219. This was the case when 100% of the shareholding in Contact Energy was sold to the public in 1999. It has been the case in relation to share transactions in Contact since that time and in share transactions relating to TrustPower, Todd Energy and irrigation companies over many years.

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73 And in which it was found that all Government policies, actions and legislation that affected the transfer of ownership of the riverbeds to private purchasers or that vested or confirmed exclusive control of the waters in the Crown or third parties were breaches of the Treaty principles of active protection of taonga, exchange and partnership - see paragraph 24.1(j) of the Tribunal's findings and recommendations.

74 The Tribunal said, in 18.1.2: 'It does not matter that Māori did not think in terms of ownership in the same way as Europeans. What they possessed is equated with ownership for the purposes of English or New Zealand law ... What they possessed, even rivers, is deemed to be a property interest for the purposes of law, and it has been treated that way by the Courts. Ordinarily, water in free flowing form cannot be owned or possessed, but that is not the point. The issue is not about the ownership of water as such but about the right to access the water while it is in the river.'

75 Paragraph 9.1 of the Tribunal report.

76 Paragraph 51.

220. The claims are well known. They are known through this Tribunal process, and will be identified sufficiently well in accordance with the shareholding Ministers' obligations under the Securities Act and Regulations to disclose in the prospectus for the sale of shares in a MOM company any material risks.[77] Section 34(2) of the Securities Act 1978 prohibits the distribution of a prospectus if it is false or misleading in a material particular by reason of failing to refer, or give proper emphasis, to adverse circumstances and the schedules to the Securities Regulations prescribe the information to be contained in a prospective.

221. It is expected that the risk factors to be mentioned in a prospectus for Mighty River Power, in the light of the nature of Māori claims over rights to interests in water, Tribunal reports that have issued since the Contact share sale and, potentially, any guidance that this Tribunal can give, will be considerably more specific than that contained in the Contact preliminary offer memorandum referred to in paragraph 52 and footnote 6 of Mr Wilson's evidence.

222. There has been some discussion about potential investors perhaps not reading this part of the prospectus, of statements of this sort being offset by statements of the Prime Minister, and to the prospect of investors taking a chance to see if they can get a good return. As John Crawford said in evidence,[78] share price will be determined by people who fully understand the risk.

223. As Mr Crawford said also,[79] if the assessment of the effect of this risk on price changed and became great, that would crystallise the risk and would become apparent during the book build stage, at which stage the Government would need to decide whether the indicative pricing was such that the share sale process should or should not proceed.

224. As Dr Riding said in evidence,[80] it would be only an imprudent investor who would invest in any shares without considering disclosed risks. Generally

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77 The effect of Securities Act (Mixed Ownership Model Companies, Crown Pre-Offer) Exemption Notice 2012 is explained in the Crown's memorandum of 16 July 2012.

78 Wai 2358, Oral Evidence of John Crawford, Friday 13 July 2012.

79 Wai 2358, Oral Evidence of John Crawford in Response to Question from the Presiding Officer, Friday 13 July 2012.

80 Wai 2358, Oral Evidence of Dr Penny Ridings in Response to Questions from Felix Geiringer, Monday 16 July 2012.

speaking, the volatility of shares, even in companies like this which are resource-dependent, are not the best investment in terms of Treaty redress or rights recognition.

225. As Lee Wilson said,[81] he would be doubtful that allocating shares through the MOM programme would reduce any uncertainty in relation to overall rights recognition. These SOEs are only few of the many players who use water under water permits, and shares go nowhere near recognising and providing for the overriding issues here.

226. There is a broad range of other uncertainties relating to share purchases in a MOM. They include:

(a) whether optimal operating conditions for hydro schemes (where maximum water storage in lakes is maintained until optimal pricing conditions exist) can be achieved;

(b) whether consents will be renewed and, if so, on what terms;

(c) review conditions in consents to remove or reduce adverse effects or to consider the effectiveness of conditions in resource consents.[82]

227. If therefore there is any material effect on share price due to risk, that is something that can and will be considered. It is one of a broad range of factors the Government will need to take into account. It is not something that can be decided here.

That MOM company assets/profits/shares will be reduced if commercial rights were introduced or if memorialised lands were returned

228. As both Lee Wilson and John Crawford have said in evidence,[83] companies regularly have to deal with marketplace changes. Examples of changes the companies have to deal with regularly are:

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81 Wai 2358, Oral Evidence of Lee Wilson in Response to Questions from Dr Grant Phillipson, Monday 16 July 2012.

82 Including, for example, in relation to the Mighty River Power consent to dam and take water from the Waikato River, a review condition in clause 8.1 enabling a review of conditions to ensure that the consent is in alignment with the provision of any Treaty claim settled by the Crown; a claim which, given the nature of the consent, could only relate to water.

83 Lee Wilson, paragraph 55; John Crawford, paragraphs 17-19.

(a) changes in competitive dynamics (for example, a competitor builds a new plant or disestablishes an old one);

(b) new laws (for example, the introduction of the Emissions Trading Scheme);

(c) outcomes of regulatory processes (for example, a decision on a resource consent application);

(d) cycles in financial market (for example, the availability of credit markets);

(e) the crystallisation of latent rights (for example, resumption of land under section 27B of the SOE Act).

229. A company will determine how it deals with changes in its own right, separately from its shareholders. Contrary to propositions that have been put to witnesses by counsel for claimants and interested parties, the identity of shareholders will not determine the way in which companies operate in relation to matters like these. In the energy sector, for example, a MOM company would be no different from an SOE like Meridian Energy or a privately held company like Contact Energy in the way in which it is affected by and needs to react to changes to the environment in which it conducts its business.

230. At one level, in the event that an economic cost in the use of water or geothermal resources was imposed as a form of rights recognition, as Lee Wilson has said,[84] investments in the likes of wind generation become more attractive, and investments in the likes of oil, coal and gas stations become less unattractive.

231. At another level, if there was to be an economic cost in the use of water and/or geothermal resources, that cost may well not flow to profits. Brian Cox, Dr Ganesh Nana and Dr Jane Kelsey all accepted the following propositions:[85]

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84 Brief of evidence paragraphs 68-74.

85 See Wai 2358, Oral Evidence of Brian Cox, Tuesday 10 July 2012; Oral Evidence of Dr Ganesh Nana, Thursday 12 July 2012; Oral Evidence of Dr Jane Kelsey, Thursday 12 July 2012. See also the Brief of Evidence of John Crawford at paragraphs 29-45.

(a) It is possible that levies could be set at modest levels such that, through adjustments to the operations of a company (as discussed below), the charge would not find its way to the bottom line.

(b) A levy may influence the scheduling of electricity production from different power stations and potentially change the mix of resources involved.[86]

(c) It may result in an increase in electricity prices and therefore be passed on to the public, so as not to affect a company's bottom line.[87] This is particularly so where electricity from hydro stations is the highest priced offer into the grid at the half hourly auctions made for supply through the system operator. As the evidence of both Brian Cox and Lee Wilson shows, the highest price from all accepted offers in any half hour bid process is paid to all of those who have had their bids accepted. Run of the river hydro bids are usually the lowest on the basis that they must generate at all times (a 'use it or lose it' generating system) but, in the case of a plant that can store water, a value can be put on it and water can then set the price.

232. In these circumstances, there is a balancing decision to be made on the part of the Government. It must balance, on the one hand, the provision of effective Treaty redress and rights recognition with, on the other, any effect on electricity pricing.

233. Moreover, as witnesses have accepted generally, the Government has the ability to provide compensation for any company in the face of Treaty redress that would affect its operations if it, in the course of that balancing exercise, determined that to be an appropriate thing to do - or to phase in any water use charges over a period of time, as is the case with the Emissions Trading Scheme.

234. Who it is that owns the shares in a company is quite irrelevant to all of that. It affects SOEs, MOMs, private generating companies and organisations across the spectrum of industries that use water equally. The broad matrix of

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86 Lee Wilson brief of evidence paragraph 69.

87 Lee Wilson brief of evidence paragraph 70.

economic and policy considerations that would need to be considered by the Government is not going to be swayed by reason of the fact that the enormous pool of private investors with shares in companies that use water will be increased slightly by shares in Mighty River Power, or other MOMs in due course, being owned privately.

235. Another significant aspect of the analysis under this head is that the power-generating SOEs have many lines of business. Profit is a reflection of revenues and expenses from all of them.

236. The electricity-generating MOM companies do two things: they generate electricity to sell into the wholesale electricity market, and they buy electricity from the wholesale market to retail to customers. Revenue from the generation side of the businesses offsets risks to the revenue from the retail side, and vice versa. So the companies try to keep the two sides roughly in balance although, depending on circumstances, some companies generate more than they retail - and so are net sellers into the wholesale market - and some do the reverse.

237. Hypothetically, if a form of levy was introduced that increased the cost of hydro power and reduced the amount of electricity generated from hydro stations, then:

237.1 companies with hydro power stations would reduce the size of the retail operations by shedding customers (most likely by attrition over time) to bring them back into an appropriate balance with the reduced generation; and

237.2 companies with non-hydro power stations would do the opposite, since the generation output would go up.[88]

238. Hydro generation has a low marginal cost, so even with a (reasonable) levy it would still make commercial sense to run a hydro station if there was fuel (water) available.

239. Moreover, profitability is not just linked to the use of water and/or geothermal resources but depends also on how well a MOM company performs:

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88 As accepted by Brian Cox: See Wai 2358, Oral Evidence of Brian Cox in Response to Question from Paul Radich, Tuesday 10 July 2012.

239.1 in generating electricity;

239.2 in bidding in to the electricity market;

239.3 in terms of protecting its position through the entry into and execution of forward contracts, hedges and options;

239.4 in the retail market, which is a significant component of a company's revenue.

There is a risk of claims by overseas investors under New Zealand's international investment obligations if commercial rights in water were introduced or if memorialised lands were returned

240. Dr Kelsey's thesis is that, if the Crown adopted measures in redress for claimants that adversely affected the value of shares by overseas investors, New Zealand could be subject to claims under international commitments and those claims – whether well-founded or simply tactical – could deter the Crown.

241. In the first place, it needs to be emphasised that the thesis is based in its entirety upon each of a series of assumptions: that redress necessitated measures that caused an investor loss; that that loss would not be compensable by the Crown or by, for example, cost increases to customers; that that loss could even be argued to engage the quite specific protections accorded some foreign investors; that the Crown's conduct did not fall within the exceptions for justifiable governmental regulation, including specific clauses exempting measures taken under the Treaty of Waitangi; and that the Crown was unable or unwilling to defend such a claim.

242. First, on the basis discussed above, and as was accepted by Dr Kelsey under cross-examination,[89] it is entirely possible that any redress in the form of a royalty or tax or levy would not flow to profits. The evidence, therefore, has a hypothetical base only.

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89 Wai 2358, Oral Evidence of Dr Jane Kelsey in Response to Questions from Paul Radich, Thursday 12 July 2012.

243. What, then, if there was a limited effect on profitability or shares? In the first place, given that purchasers will purchase on notice, it would be particularly difficult for them to be able to support a claim.[90]

244. Beyond that there would, on any view of the relevant principles, need to be a significant effect on profits and share value for a claim to be contemplated. It would have to mean that a MOM company's inevitable steps to minimise the impacts of any form of economic rights recognition on its bottom line would have failed.[91]

245. Again, therefore, there is so much uncertainty about whether there would ever be a loss that this point is not something that can properly be relied upon.

246. If it did ultimately prove to be the case that the recognition of Māori rights and interests in water and geothermal resources caused an impact on overseas investors - through a drop in share price or profitability of the company - then the claim would most likely be for compensation. As Dr Ridings has said on page 3 of her speaking notes, a consolidation of claims into a single dispute would have to be done by shareholders of the same nationality who could have recourse to one of New Zealand's eight agreements. This in practice limits the likelihood that there would be a consolidation of claims. Dr Ridings, in her evidence, considered the limit of a maximum of a 10% shareholding to be highly relevant. The numbers here are not sufficiently large to produce a chilling effect; even if there was a cause of action that had any merit.

247. There was talk in the hearing about the final award in the *Guatemala* case, which was approximately $11 million, still being reasonably high in the context of Treaty redress. It has to be remembered, however, that the circumstances of that case (discussed below) were extreme and well removed from the type of factual situation that Dr Kelsey contemplates.

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90 That would be so despite Dr Kelsey's views that opportunists would purchase despite the notice and still bring a claim afterwards. As Dr Ridings said, there are procedural strikeout mechanisms to deal with claims that are manifestly without merit and, even if a claim could be brought, its prospects of success would be extremely limited.

91 Steps that a company might take to minimise the impacts of any royalty, charge, tax or levy on its bottom line have been discussed already but might include for example buying more electricity on the wholesale market, reducing its retail customer base or investing in other forms of electricity generation.

248. If this further hurdle were to be overcome, the prospect of a claim surviving a strikeout application[92] in circumstances in which a measure has been taken to provide for Treaty redress would appear to be slim and, even if it did, its prospects are not such as to cause a chill of any sort for the Government.

249. As Dr Ridings said in her speaking notes, there is nothing in our trade investment agreements which would restrain the Government's power to regulate for legitimate public purposes or hinder the Government from providing appropriate redress for claimants.

250. Dr Ridings' reasoning is, as she said in her speaking notes and explained in detail in her brief of evidence, based on three things; three things that both she and Dr Kelsey address.

251. The first is the range of thresholds set out in New Zealand's trade and investment agreements means that there is a high bar which has to be reached for a successful claim by an investor. The following points can be made by way of summary in relation to the six rules in international trade agreements that Dr Kelsey highlights:

251.1 Dr Kelsey concluded that national treatment obligations are not relevant under New Zealand's obligations.

251.2 The comparison, for the purpose of the most favoured nation treatment rule, must be between investors *in like circumstances*. The comparison therefore is not between any investor but one in like circumstances. The Crown's ability therefore to provide redress is not constrained where the same treatment is accorded to all investors.

251.3 Direct appropriation could only be raised if the Government compulsorily took back shares in foreign hands without compensation. This is an event too extreme to contemplate.

251.4 The thresholds to make out a claim for indirect appropriation are extremely high. They must deprive the investor in substance of the use of the investor's property. Measures taken in the exercise of the State's regulatory powers as are reasonably justified will generally not

92 See paragraph 34.5 of the brief of evidence of Dr Ridings of 3 July 2012.

constitute indirect appropriation.[93] There would, in the Crown's view, be few measures that would be more justified than the provision of Treaty redress, and that is particularly so when redress of this sort has been known to be a prospect and has not come out of the blue.

252. The minimum standards of treatment rule does not for a moment require a government to freeze the regulatory environment as it applied at the date of the investment. As was said in the *Glamis Gold* extract set out in paragraph 20 of the evidence of Dr Ridings, to violate the customary international law minimum standard of treatment, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination or manifest lack of reasons. Even if the bar was not quite that high, it remains extreme, as indicated by the extract from the Guatemala case referred to below and cited by Dr Kelsey.[94]

253. Secondly, there is a range of safeguards that New Zealand generally includes in its agreements in order to prevent an expansive interpretation of the obligations. They include the following:

253.1 the reference to customary international law (which provides a restraint on minimum standards of treatment rules) in the minimum standard of treatment obligation;

253.2 the inclusion of expropriation annexes (such as Annex 13 to the China-New Zealand free trade agreement) which, as mentioned, require substantive loss and enable measures to be taken that may reasonably be justified in the protection of public welfare.

254. Thirdly, there are exceptions which enable the Crown to regulate for legitimate public policy reasons:

254.1 Exceptions to the application of the obligations to permit measures necessary for the protection of human, animal or plant life or health

93 See for example Annex 13 to the China-New Zealand Free Trade Agreement, Wai 2358 #A31.

94 Supplementary Brief of Evidence of Dr Jane Kelsey, para 4.4.

or taxation measures or measures necessary for the protection of New Zealand's essential security interests.[95]

254.2 The Treaty of Waitangi clause, under which New Zealand can adopt measures to provide more favourable treatment to Māori, including in order to fulfil its obligations under the Treaty of Waitangi. An example of the clause can be found on page 33 of Dr Kelsey's brief of 22 June. As Dr Ridings said, the words are deliberately self-judging in the sense that nothing in the agreement precludes the adoption by New Zealand of measures ***it*** deems necessary to accord more favourable treatment to Māori in respect of matters covered by the agreement, including in fulfilment of its obligations under the Treaty of Waitangi. Although this clause does not appear in the Hong Kong FTA (because that agreement was negotiated before New Zealand developed clauses of this sort), there is an exception in that agreement for measures taken in the public interest.

255. Even although Dr Kelsey said in paragraph 13 of Annex E to her evidence of 22 June that a state or investor could still challenge what they would regard to be arbitrary or unjustified discrimination or a disguised barrier to trade in goods or services, and that the exception covers only redress of a commercial nature that gives more favourable treatment to Māori vis-à-vis offshore investors, commercial redress is exactly the sort of thing that is being discussed here. Dr Ridings' evidence, however, is that the clause is not restricted to commercial measures and that it has been negotiated deliberately so that there is no restriction on the type of measures that may be imposed in order to give more favourable treatment to Māori. It is suggested that Dr Ridings' evidence on this point is the more persuasive as it is she who has been negotiating these clauses for New Zealand.

256. In fact, as Dr Ridings explains on the second page of her speaking notes, the agreements under which foreign investors could actually invoke protections are quite narrow.

257. The case examples used by Dr Kelsey in her first brief of evidence are not used, it is understood, for the purpose of endeavouring to draw comparisons

95 See the examples cited in footnote 18 of Dr Ridings' brief of 3 July 2012.

between their factual circumstances and those that could come into play here (because the factual circumstances in those cases are considerably more extreme than could ever be the case under the types of scenarios we are contemplating) but to draw attention to the fact that arbitral tribunals deal with a broad range of subject matter. The cases themselves are discussed in a schedule to these submissions but for present purposes it can simply be said that these cases are what they are. They reflect the risk that the Government faces in every regulatory step that it takes in every direction. These tribunals have their own processes and rigour, and it is only cases that involve extreme conduct that are successful.

258. One case in particular is worth highlighting, however - the *Guatemala* decision referred to by Dr Kelsey in her oral evidence and in her third brief of evidence. In that case[96] it was held that the decision to void ('lesivo') the investor's 50 year contract breached the minimum standard of treatment obligation under the Dominican Republic – Central America – United States of America free trade agreement.[97]

259. In relation to the minimum standard of treatment provision, the Tribunal said this:

> The Tribunal refers to and adopts the conclusion reached by the Tribunal in *Waste Management II* in considering NAFTA Article 1105 standard of review and after surveying NAFTA arbitral awards: '... the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.'[98]

260. The basic point in this decision is that there was an essentially non-reviewable executive determination that the contract in question was contrary to the national interest and, it transpired, the determination was made as a means of putting pressure on the investor:[99]

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96 *Railroad Development Corporation v Republic of Guatemala* ICSID case No ARD/07/23.

97 See [212]ff of the award.

98 Paragraph [219].

99 See [232] and [234].

> The lesivo remedy has been used under a cloak of formal correctness allegedly in defence of the rule of law, in fact for exacting concessions unrelated to the finding of lesivo.

261. The case is a fair illustration of the kind of State conduct likely to be found to breach international obligations and demonstrates just how far removed it is from the most conceivable Crown conduct here.

262. The rise in ISCID cases since 2000 is not remarkable in its own right as it parallels a growth in bilateral investment agreements and investment chapters in free trade agreements.

263. Arbitral proceedings on international investment obligations are not something wildly unpredictable that causes concern for the Government. As Dr Ridings said, she is not chilled by any potential investment claim.[100] It is Dr Ridings who provides advice to the Government on any such claim. Like any litigation, it is a matter of assessing the likelihood of success, considering the prospect of strikeout, and dealing with it appropriately. Much has been made of the cost of litigation but that is true for the cost of all litigation on the part of a government. Everything it does is subject to risk. This Waitangi Tribunal process is an example in itself. Legal principles and arbitral tribunals do continue to develop but that is the case with the law (whether common law, equity or the interpretation of statutes) in any domestic court. The introduction of rights recognition or Treaty redress at the appropriate time would not be such as to enter the Wild West. International investment obligations are one of the often vast matrix of considerations a government needs to take into account in deciding on regulatory measures.

264. The short point is that it is not enough to point to the possibility of claims, for two reasons: first, and as illustrated by the examples that Dr Kelsey herself gave, governmental conduct that gives rise to claims is generally extreme – for example, expropriation as in *Piero Foresti, Laura de Caril & Others v. The Republic of South Africa*[101] or unilateral and bad faith cancellation of a contract as in *Railroad Development Corporation v Republic of Guatemala* [102] – in contrast to the range of reasonable measures that the Crown may be obliged to take by way of

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100 Wai 2358, Oral Evidence of Dr Penny Ridings in Response to Questions from Annette Sykes, Monday 16 July 2012.

101 *Piero Foresti, Laura de Caril & Others v. The Republic of South Africa* ICSID Case No ARB(AF)/07/1.

102 *Railroad Development Corporation v Republic of Guatemala* ICSID case No ARD/07/23

redress; second, the relevant agreements specifically exempt measures taken by the government in the public interest, including through dedicated exceptions for measures taken under the Treaty.

265. Put more shortly still and as has been submitted more broadly, the operation of investment protections, including the Treaty of Waitangi and other exceptions, form part of the ordinary business of government. While the sale of shares to investors including foreign investors may engage our international commitments, that simply does not have the paralysing effect described by Dr Kelsey.

The prospect of these outcomes will demotivate the Crown from recognising (materially) and/or providing redress for Māori rights and interests in water and geothermal resources

266. If there is an effect, there will be an effect whoever owns the shares:

266.1 If Ministers remain the shareholders, they will wear a loss in dividends.

266.2 If Ministers own a 51% share and others hold the balance, the Government will wear a reduced relative loss in dividends and will either have to consider the notion of compensation or, more likely, will have engaged with stakeholders (ie iwi, all entities that use water and the general public) such as to satisfy itself that a rights recognition and/or redress measure is in order.

267. The Government makes hard decisions all the time. To think that recognition or redress is going to hinge on shareholdings in the MOM companies is to focus so narrowly as to avoid the reality of the far broader commercial and social interests in water; through a range of private companies and individuals. All new regulation has an impact across the community, whether it be the likes of an emissions trading scheme or splitting Telecom. In that, latter, case there was a short term impact on share value but, as is always the case, markets adjust around change.

268. The shareholdings will certainly not affect resumption orders. It is this Tribunal that makes resumption orders; not the Crown. Any land that is resumed is resumed free of encumbrances. There was evidence of long term

peppercorn leases. That could not be a reference to leases by the Crown to MOM companies because the land that is the subject of memorials is transferred in fee simple to the SOE. To the extent that an SOE might have granted a lease then, in the event of a resumption order, land is resumed free of any such interests.

269. As John Crawford said in evidence,[103] the fact that there are 10,000 or 80,000 investors in a MOM company opposed to levies would not prevent the Government from making a hard decision if it needs to do so. It is no different, as he said, to other Government decisions that affect large numbers of New Zealanders.

Recognition of rights and interests and redress of their breach

270. The question of appropriate and suitable mechanisms for the recognition of rights and interests, and redress for breach of those rights and interests are properly matters for stage two of this inquiry.

271. They are, however, somewhat relevant to stage one:

271.1 Grievances cannot be neatly "packaged'. Grievances associated with a loss or lack of recognition of rights and interests are wound up with grievances relating to past wrongs and the effect of those wrongs on the resources and the people; and

271.2 The suggestion that shares in relevant power generating companies might be appropriate means of recognition of rights and/or redress for their breach.

272. Accordingly, the Crown submits that, in the course of considering whether a halt in the sale of shares is warranted, the Tribunal ought to consider, at least in a preliminary sense:

272.1 The range of potentially appropriate mechanisms for recognising on-going rights and considering matters of redress for breach of those rights in the past;

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103 Wai 2358, Oral Evidence of John Crawford in Response to Questions from Felix Geiringer, Friday 13 July 2012.

272.2 How the Crown currently provides for, or is working towards the provision of, appropriate recognition and redress.

273. As a preliminary point, the Crown notes that mechanisms for the recognition of extant and on-going rights will differ from appropriate redress for grievances in relation to those resources:

273.1 The recognition of rights and interests in freshwater and geothermal resources must, by definition, involve mechanisms that relate to the on-going use of those resources, and may include decision making in relation to care, protection, use, access and allocation, and/or charges or rentals for use. Currently, for the Crown's part, these matters are within the purview of the Ministry of the Environment.

273.2 Redress for past wrongs claimed in relation to freshwater and geothermal resources, whatever its form, is properly viewed as compensatory in nature. The office of Treaty settlement has a range of mechanisms for redressing historical breaches of the Treaty, including in relation to the resources relevant to this inquiry.

274. Having said this, there can be a measure of cross over. The implementation of mechanisms to recognise and restore rights and interests may go some way to redressing past breaches. Similarly, the Treaty settlement process, in dealing with historical grievances over freshwater and geothermal resources, has, in recent times, provided for recognition of rights and interests, and practical mechanisms for their exercise.

275. The Crown says that the sale of minority shares in the power generating state owned enterprise does not compromise the Crown's capacity to recognise Maori rights or interests, or the Crown's capacity to remedy any breaches of those rights and interests.

276. The point is that the Crown has for some time been engaging with iwi/Maori on rights and interests in natural resources, and through the Treaty settlement process has been, and is, developing mechanisms for the redress of breaches of those rights and interests. The Crown says that the sale of minority shares in the power generating state owned enterprises will have no impact upon its ability to continue in this regard.

Recognition of rights and interests

277. There has been a suggestion by counsel for the claimants that the evidence of Mr Beatson is irrelevant to stage one of this inquiry, and rather is directed at stage two. Counsel for the Crown acknowledge and agree with the point made by Tribunal member Dr Phillipson, that evidence adduced thus far is relevant to the whole inquiry. In any event, the Crown says that the evidence of Mr Beatson is specifically relevant to the stage one issue questions.

278. First, the issue of whether the Crown's ability to recognise rights and interests will be compromised by the sale of minority shares requires evidence on, and an assessment of, the Crown's past and current engagement with iwi/Maori on those rights and interests.

279. Secondly, it is fair to say that the emphasis of each of the claimants' case studies, and of the tangata whenua evidence, is on matters of breach:

279.1 The loss of access to fresh water and geothermal resources for the exercise of the various customary rights and practices associated with the resources, as outlined above;

279.2 The inability, by virtue of the current Resource Management regime, to exercise customary rights and responsibilities to care for waterways and other resources, including the ability to control, or to have a say in the control, of allocation and use of the resources;

279.3 The exclusion of the customary holders of rights and interests from development and commercial opportunities associated with the resources; and

279.4 The degradation of the resources and the environments they occupy, though declining quality, diversion or over extraction/use.

280. There is no doubt that investigation of appropriate solutions to these matters, and in particular, discussion on mechanisms for the contemporary and on-going recognition of rights and interests, will form a large part of stage two of the inquiry.

281. Evidence of the matters listed above, however, underlies the claims for both stages of this inquiry for the need to urgently hear the claim, and ultimately to recommend a halt to the minority share sales.

282. Issues relating to exclusion of access to a resource, a say in its use and management, development and commercial opportunities, and quality, health and well-being are matters of resource management policy development in which iwi/Maori and the Crown are endeavouring to collaborate.

283. The affidavit, brief of evidence, and cross examination of Guy Beatson provides a thorough survey of:

283.1 The complexity of issues concerning fresh water;

283.2 The current approach, development and initiatives in relation to freshwater policy, including the Fresh Start for Fresh Water programme;

283.3 Iwi/Maori engagement in the policy development to date, and into the future; and

283.4 Relationship of the freshwater policy development and reforms to the issue of sale of a minority shareholding in power generating SOEs.

284. It appears that during cross-examination of Mr Beatson by counsel for various interested parties, and questioning by the Tribunal, that there may be some confusion as to the role of the Land and Water Forum, and the breadth of the issues that are properly for its consideration, especially regarding the interests of iwi/Maori. As already noted, the Crown considers that current policy development and engagement with Maori is of the utmost importance to the Tribunal's consideration of both stages of this inquiry. For this reason, it is important to set out exactly how all this fits. It is Mr Beatson's evidence that the Fresh Start for Fresh Water Programme *vis a vis* engagement with Maori has three aspects:

284.1 Direct engagement between iwi and the Crown. This is currently occurring through ongoing discussions between the Iwi Leaders Group and Ministers;

284.2 The Land and Water Forum, which is a non-governmental forum comprising stakeholders from all relevant sectors, including iwi; and

284.3 Policy development by Crown officials in concert with the Iwi Advisers Group, a group that advises the Iwi Leaders Group).

285. His evidence includes details of the engagement with iwi/Maori:

285.1 The Iwi Leaders Group is a group of 5 iwi leaders, elected by the wider Iwi Leaders Forum to discuss with Ministers freshwater issues and report back to the Forum.

285.2 The Iwi Leaders Forum is a forum of chairs to approximately 65 representative iwi organisations throughout the motu.

285.3 Engagement between the Iwi Leaders Group and senior Ministers is governed by the Communication and Information Exchange Protocol, which is annexed to the Affidavit of Mr Beaston (#A3) as GB-4. Importantly, the protocol:

285.3.1 States that the Iwi leaders group is clear that it does not represent all iwi (or all Maori);

285.3.2 Makes it clear that wider engagement with iwi is necessary in the ongoing development of freshwater policy;

285.3.3 Includes 'rights and interests' among the core issues for discussion at the meetings between the Iwi leaders and Ministers groups.

286. There has been criticism about the Crown's engagement with iwi leaders. Counsel for the interested parties put to Mr Beatson that the group and the forum are not fully representative of Maoridom. Tribunal members raised the issue of why the Crown did not consult with the New Zealand Maori Council, given that it is the only extant national Maori organisation, and is established under legislation for the very purpose of representing all Maori.

287. In relation to the issue of the representativeness of the iwi leaders, the Crown says simply that, as noted above, neither the iwi leaders themselves nor the

Crown have ever considered that the iwi leaders represented anyone other than their own iwi.

288. Further, the Crown submits that the purpose of the engagement in fresh water issues was not to seek views representative of Maori generally, but to have constructive discussions on core issues to underlie the formation of policy. It was always, and is, the intention of the Crown to consult and discuss these issues widely once viable options for the future of freshwater policy are developed.

289. Turning now to the issue of consultation with the New Zealand Maori Council. The Crown points out that in recent years iwi organisations have been the main point of dialogue with the Crown. On the other hand, also in recent years, and until very recently, it is fair to say, (and without any criticsm) that national bodies such as the New Zealand Maori Council have been less visible than they once were. This was discussed by Mr Piripi in his evidence before the Tribunal.

290. The Crown submits that engagement with the ILG is a preliminary step in the development of options for fresh water reform. It will be followed by full consultation and discussion when policy reform and options are proposed.

291. The Land and Water Forum is a non-government body with membership from various community stakeholders, including iwi. That is not to say that iwi are 'just another stakeholder'. There are, as outlined above, separate streams for engagement with Maori.

Redressing historical grievances

292. Treaty settlements are relevant to this inquiry to the extent that:

292.1 The issue of redress, and the Crown's ability to provide it, is central to issue-question (b); and

292.2 The Crown's Treaty settlement framework has moved some way towards the recognition of rights and interests in natural resources and provided mechanisms for their expression.

293. That framework has developed to provide for the recognition and expression of rights and interests in natural resources in two respects:

293.1 The acknowledgement of mana, rangatiratanga and kaitiakitanga; and

293.2 The provision of redress that, despite being in settlement of historical claims, is contemporary in nature, forward looking and that provide for on-going rights and interests.

294. A number of Treaty settlements have made it clear that the Crown acknowledges the mana, rangatiratanga and kaitiakitanga of claimant groups in natural resources. Examples of this can be found in Treaty settlement legislation:

Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

Preamble

(17) In summary, the Crown acknowledges:

. . .

(c) that the Crown's breach of the Treaty of Waitangi denied Waikato-Tainui their rights and interests in, and mana whakahere over, the Waikato River; and

(d) that Waikato-Tainui never willingly or knowingly relinquished their rights and interests in, or authority over, the Waikato River; and

(e) the importance to Waikato-Tainui of the principle of te mana o te Awa; and

(f) to Waikato-Tainui the Waikato River is a tupuna which has mana and in turn represents the mana and mauri of Waikato-Tainui; and

(g) that to Waikato-Tainui, the Waikato River is a single indivisible being; and

(h) that for Waikato-Tainui, their relationship with, and respect for, the Waikato River gives rise to their responsibilities to protect the mana and mauri of the River and exercise their mana whakahaere in accordance with their long established tikanga; and

(i) that for Waikato-Tainui, their relationship with, and respect for, the Waikato River lies at the heart of their spiritual and physical wellbeing, and their tribal identity and culture; and

(j) that the Crown has failed to respect, provide for and protect the special relationship of Waikato-Tainui with the Waikato River; and

(k) that the deterioration of the health of the Waikato River, while under the authority of the Crown, has been a source of distress for the people of Waikato-Tainui; and

(l) that the pollution, degradation and development of the Waikato River, its lakes, streams and wetlands have caused the decline of once rich fisheries that, for generations, had sustained the people's way of

life and their ability to meet obligations of manaakitanga, and this is a further source of distress; and

(m) that the Crown respects the deeply felt obligation of Waikato-Tainui to protect te mana o te awa; and

(n) that the Crown seeks a settlement that will recognise and sustain the special relationship of Waikato-Tainui with the Waikato River; and

(o) that the Crown undertakes to assist and work with Waikato-Tainui to restore their mana whakahaere; and

(p) that Waikato-Tainui wish to promote the concept of a korowai to bring the River tribes together as an affirmation of their common purpose to protect te mana o te awa.

Affiliate Te Arawa Iwi and Hapu Claims Settlement Act 2008

7 Text of acknowledgements

The text of the acknowledgements, as set out in the deed of settlement, is as follows:

. . .

(5) The Crown acknowledges that lands of particular significance to the Affiliate, including land at Te Ariki, Okere Falls, and lands with geothermal surface features at Orakei Korako and Rotorua Airport, were taken under public works legislation. The Crown acknowledges that these takings have impeded the ability of the Affiliate to exercise control over its taonga and wahi tapu and maintain and foster spiritual connections with those ancestral lands. This has resulted in a sense of grievance among the Affiliate that still exists today.

. . .

(7) The Crown acknowledges that the Affiliate considers the geothermal resource a taonga. The Crown also acknowledges that the following matters have caused a sense of grievance within the Affiliate that is still held today:
(a) the passing of the Geothermal Energy Act 1953; and
(b) the loss of lands containing geothermal features for public works purposes.

295. Overall, it is the Crown's submission that the Treaty settlement framework will be unaffected by the share sales. However, the Tribunal's consideration of and findings on rights and interests issues as part of stage two will be of importance in the continuing development of the Treaty settlement framework.

296. Secondly, as well traversed by Ms Ott in her evidence, as a consequence of the current Crown policy in relation to natural resources, but also given the significance of many of these resources especially water, the Crown has developed Treaty Settlement redress to meet certain aspirations in relation to

those resources. This has, to date, included several co-management arrangements.

297. There has been some criticism of the use of a mere co-management approach. While this could be the subject of ongoing debate, it can certainly be said that:

297.1 Rights and interests *are* acknowledged and provided for within current frameworks;

297.2 Those frameworks can be developed and improved upon. The Tribunal's guidance on these matters is sought and will be valuable.

Redress options

298. The Crown submits that, for all of the reasons given in the section on shares above, the shares are not the right remedy for any historic breaches of the Treaty in relation to rights and interest in water. Against the backdrop of the likes of Wai 262, a parcel of shares in a company that has a broad range of assets - many not related to water and those which are being geographically spread and which generates revenue from the generation, wholesale and retail markets, and which, as with any shareholding, carries inherent risk – is not the answer and there is no good reason to delay the Government's programme to think about that further.

299. Having said this, some claimant groups may wish for shares. As noted by claimant counsel, there has been some suggestion by Government that this is being considered. The point is, in light of the above, such shares are in the same category as other redress, such as cash and are substitutable with other forms of redress.

300. Equally, rights recognition is a far broader question. The discussion, consultation and resolution can proceed to an outcome irrespective of the sales. They are simply not connected.

301. Analogies have been drawn during the hearing with the fisheries model. Comments have been made to the effect that the ownership of fisheries had changed with the introduction of the QMS. It is not right to say that there was no ownership right to fisheries before the QMS and that, after the QMS, the Crown owned the fish and could sell quota as a result.

302. Fisheries are still not 'owned' by anyone. Management is undertaken by the Crown with input and participation of Māori and with consultation occurring with other stakeholders. The tradable property right is the right to take a certain quota of fish.

303. The fisheries settlement was achieved in two tranches. Quota was allocated to fishers based on catch history. No quota was allocated initially to iwi. After legal challenges and the findings of the Waitangi Tribunal on the Muriwhenua claim, the Crown agreed to provide 10% of all existing quota as an interim settlement of Māori claims.

304. The Maori Fisheries Act 1989 required the Crown to provide 10% of quota over a 3 year period or pay an equivalent dollar value. The Crown developed a purchase programme and bought most of the required quota. A small monetary payment was made to finalise that part of the settlement.

305. Then, after the findings of the Waitangi Tribunal in the Ngai Tahu sea fisheries claim (in which it was claimed that Ngai Tahu had a development right to fisheries unknown or unfished at the time of the Treaty), the Crown and Māori fisheries negotiators renewed discussions. As there was no opportunity to purchase further quota on the market, the Crown agreed to provide $150 million to the Māori Fisheries Commission to enable it to purchase up to 50% of Sealord Products Limited which was then on the market, with Brierley Investments Limited. In addition, the Crown agreed to provide 20% of any quota for new species that were introduced into the QMS. The details are contained in the 1992 Fisheries Deed of Settlement.

306. The difficult question, if anything of this sort were to be attempted with water, would be how to allocate the benefit of any shares among Māori. Would it be to iwi with hydro/geothermal sites, or more widely, or by population as in the development right to deepwater fisheries? The creation of Te Ohu Kaimoana was intended to enable Māori to address that problem themselves.

307. But power generation cannot properly be used as a surrogate for rights in water. Unlike fish, and as was the case in the broadcasting assets litigation, shares are substitutable. We are not dealing with a fully consumable item. Furthermore, unlike fisheries, shares as a surrogate for water only addresses the

mixed ownership model. Allocation for agricultural, industrial and domestic use would remain unresolved.

308. There are any number of models that could be developed to better reflect the interests of Maori, and these include models which give Maori a say in the management of the water resource as a whole (which ownership of shares could never provide). Kaitiaki roles might, for example, be reflected through different models providing for a role for iwi/hapu in making decisions on water management. Those decisions might include, for example, a choice of what allocation model should apply in a rohe (noting that some allocation models provide for proportions of the available water resource to be tagged to particular types of uses or activities); what level allocations might be capped at to provide for particular economic, cultural or environmental outcomes from the resource; or what requirements might be set on water users and landowners to maintain and improve water quality.

309. As Brian Cox, John Crawford and Lee Wilson all said, by far the most tangible economic option, giving Māori a direct right and interest in water, is through joint ventures with electricity generators of the likes of those that exist already with Mighty River Power, Contact Energy and others. Arrangements of this sort give a direct interest in a resource consent, direct control and interest and a direct right to revenue.

310. These are all broad notions, advanced on a hypothetical basis to underscore the point that shares are an impoverished proxy for the recognition of Māori rights and interests in water, that a single remedy is not possible, and that a good deal more in the way of thinking and engagement is necessary

Other matters

Leases of memorialised land

311. The claimants allege that the leasing of SOE land undermines the memorial system. This is incorrect, and misconceives the statutory scheme.

312. The memorial system was designed to allow interests in the land to be created and altered while also ensuring the land could be available for return to Māori if necessary.

313. The titles of the leased land will all state that the land may be resumed under s 27B SOE Act 1986.

314. The granting of a lease does not prevent the land being resumed.

315. If a Tribunal finds it is necessary to resume the land, the resumption will take effect as if it was a taking under the Public Works Act 1981.

316. It would be for the Crown to compensate any lease-holder whose interests were taken should compensation be available under the Public Works Act as it applies to resumed land.

317. The Tribunal's task under s 8A Treaty of Waitangi Act 1975 is to decide whether the "return to Māori ownership" of land or interests in land "should" be part of the redress provided to a particular group.

318. The Tribunal may make its recommendations on such terms and conditions as the Tribunal decides appropriate. The Tribunal would have a discretion to order the resumption of some or all of the estates in the land. The Tribunal may, depending on the circumstances, order resumption of the fee simple subject to any existing lease, or it may order resumption of the fee simple unburdened by other interests.

319. As the Muriwhenua Tribunal acknowledged in a preliminary ruling (#2.166), any resumption decision by the Tribunal would turn on close consideration of the particular circumstances, Treaty breaches, and various Māori and national interests involved in the specific case. That would be the case regardless of whether a lease had been created.

320. The precise scope and proper exercise of the Tribunal's discretion are for future consideration. They have been given only brief attention in the context of the 1989 preliminary directions in *Muriwhenua*, and the *Turangi* inquiry. They are not at issue in this inquiry.

ISSUE (C) - IS SUCH A REMOVAL OF RECOGNITION AND/OR REMEDY IN BREACH OF THE TREATY?

321. There is, for the reasons given, no such removal. In any event, there simply is no Treaty right to shares in energy companies. The well-rehearsed judgment of Lord Cooke in *Ikawhenua* is clear on this point.

ISSUE (D) - IF SO, WHAT RECOMMENDATIONS SHOULD BE MADE AS TO A TREATY COMPLIANT APPROACH?

322. The proposed sale does not amount to a Treaty breach and accordingly no recommendation is warranted under the Treaty of Waitangi Act 1975.

323. The Crown says that in order for the Tribunal to give practical application to Treaty principles, questions about the detailed content of and application in New Zealand today of the claimed rights are important. New Zealand is a small, highly integrated country – legally, politically and practically. Tribunal findings, in order to have "practical application", need to be able to accommodate this.

324. Finally, where the nature (rather than the fact) of redress is discretionary because there is a range of options, the Tribunal is careful to avoid simply substituting its own views of crown policy or own inclinations as to how it would resolve an issue of redress. The Tribunal in the Ngati Awa Cross Claims report said:

> "Indeed, the Tribunal would have to have very compelling reasons to act so as to thwart Ngāti Awa in their strong desire to conclude their many years of negotiation with the Crown by settling their grievances once and for all. The part of the proposed deal that relates to the Matahina lands is an important part. We consider that the means of dealing with the Matahina lands proposed by Ngāti Awa and the Crown, while not the only means, is a means not so wanting in good judgement and good faith for this Tribunal to be minded to ask the Crown to change it. We are conscious that, if we were to do so, there would be a high risk of derailing the whole settlement. We would be prepared to do that only if satisfied that the Crown is acting in breach of Treaty principle. It is not enough that we, or some of us, might ourselves have chosen to deal with the matter differently. Our focus is not on whether we like or approve the Crown's policy. It is on the Treaty, and whether or not the Crown has fallen foul of it. We are satisfied that, so far as this policy is concerned, it has not."[104]

Dated 20 July 2012

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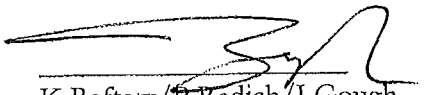
104 Waitangi Tribunal *The Ngati Awa Cross-Claims Report* (Wai 958, Waitangi Tribunal, Wellington, 2002) at 79.



K Raftery/P Radich/J Gough
Counsel for the Crown