**IN THE WAITANGI TRIBUNAL** **WAI**

**IN THE MATTER OF** The Treaty of Waitangi Act 1975

**AND** A claim by Sir Graham Stanley Latimer of Kaitaia, retired farmer, on behalf of himself And the New Zealand Maori Council and All Maori and Mr Tom Kahiti Murray, Deputy Chairperson of the Tai Tokerau District Maori Council on behalf of himself and all Maori supported by the following claimants in regard to Maori proprietal interests and rights to access and use of water and geothermal resources in Aotearoa

First Claimants

Taipari Munro, Chairperson of Whatitiri Maori Reservation situate at Poroti Springs, Northland in the rohe of Ngapuhi nui Tonu

Second Claimant

Kereama Pene and Rangimahuta Easthope for themselves as owners in Lake Rotokawau, situate in the rohe of Ngati Rangiteaorere o Te Arawa

Third Claimants

Continued ...

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**AFFIDAVIT OF TATA PARATA IN SUPPORT OF GRANT OF URGENCY FOR SALE OF POWER GENERATING STATE OWNED ENTERPRISES CLAIM AND NATIONAL WATER AND GEOTHERMAL CLAIM**

Dated: 7th February 2011

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Peter Clarke and Jocelyn Rameka for themselves as owners in Lake Rotongaio, situate at Waitahanui Settlement, Lake Taupo in the rohe of Nga Hapu o Tauhara

Fourth Claimants

Eugene Henare for himself and as an owner in Lake Horowhenua, situate at Hokio Township, Levin in the rohe of Muaupoko iwi

Fifth Claimant

Nuki Aldridge, Ani Martin and Ron Wihongi, Kaumatua of Ngapuhi on behalf of themselves and as owners in Lake Omapere, situate at Kaikohe, Northland

Sixth Claimants

Eric Hodge on behalf of himself and as an owner in Tikitere Geothermal Field in the rohe of Ngati Rangiteaorere at Tikitere

Seventh Claimants

Walter Rika, on behalf of himself and as an owner in Tahorakuri Maori Land Block situate at Ohaaki, Reporoa

Eighth Claimant

Peter Clarke and Emily Rameka as owners in Tauhara Mountain Reserve (4A2A), Taupo

Ninth Claimants

Maanu Cletus Paul and Charles Muriwai White as members of Ngai Moewhare, a marae located in the rohe of Ngati Manawa and a claimant in Te Ika Whenua inquiry

Tenth Claimants

Whatarangi Winiata, on behalf of himself and all Hapu of Ngati Raukawa who have an interest in the Horowhenua / Manawatu water systems.

Eleventh Claimant

**AFFIDAVIT OF TATA PARATA IN SUPPORT OF GRANT OF URGENCY FOR SALE OF POWER GENERATING STATE OWNED ENTERPRISES CLAIM AND NATIONAL WATER AND GEOTHERMAL CLAIM**

I, Tata Parata, kaumatua of Wellington, swear:

1. I am the secretary of the New Zealand Maori Council. I make this affidavit in support of the application for urgency on the power generating SOEs claim.

2. The Tribunal will be aware of the role played by Sir Graham Latimer and the New Zealand Maori Council in SOE litigation from 1987 onwards. Unfortunately, it appears that intervention is again necessary to set the Crown back on the right path in relation to state-owned enterprises.

3. The Tribunal will also be well aware of the Crown proposals in relation to the partial sale of these power generating SOEs. I attach the Crown consultation paper as **TP1**.

4. It is common knowledge and has been referred to in many newspaper articles that the original consultation paper, briefly posted by the Government on the Internet, simply required the removal of section 9 of the State-Owned Enterprises Act 1986 from the shareholding that the Crown intends to retain. We have a real fear that this remains the inevitable outcome, with consultation no more than window dressing to appease the immediate Maori backlash.

5. In any case, it is the sale of these power generating SOEs themselves, as much as the removal of section 9, which is of real concern. I have read the memorandum in support of this agency application. It correctly conveys the position and the reasoning as to why we wish to retain 100% Crown ownership of these companies until our water and geothermal claims are settled, including discussing the inadequacies in the current protections available.

6. The Maori position is that we have always had and continue to have rangatiratanga over water. This includes the right to regulate and secure

resource rental for those who undertake large-scale commercial use of our water resources. This position has been recognised by the Waitangi Tribunal in earlier reports such as the Whanganui River Report. In spite of this, I attach as **TP2** an extract of the Crown settlement policy related to water and geothermal redress. It is clear that Crown policy refused to provide either:

6.1. redress for past or ongoing commercial exploitation of our water and geothermal resources; or

6.2. a return of rangatiratanga over those resources, which would itself provide amongst other things the right for Maori to directly charge resource rentals or similar for such ongoing commercial and large-scale exploitation.

7. There is no doubt that Maori proprietal interests in water resources remains a major issue. I attach marked **TP3 - TPX** various official consultation reports, media reports and similar which confirm the currency of this issue amongst Maori at all levels.

8. In the national context, the Crown has been working on water resources and resource management issues generally since it was elected in 2008. The Land and Water Forum provided a major report to Government "A Fresh Start for Freshwater" in August 2010. Its work has moved into further phases since that time.

9. I am aware however that the Land and Water Forum approached its own discussions with Maori on the basis that it was discussing management regimes, and the issues of Maori interests in water were for discussion directly between Maori and the Crown. It is clear from those approaches that water proprietal interests remain a live issue amongst Maori leadership at a national level.

10. On the geothermal front, a resource consent was granted to Contact Energy for its 250 MW geothermal plant at Tauhara in December 2010. This consent was a fast track process, directed to a Board of Inquiry by the Minister. The resource consent application was only launched by

Contact Energy on 19 February 2010, with the process completed in well under a year.

11. These events combined show that in the current climate, political, economic, ecological and power generating pressures are all converging. They are forcing very prompt Crown action in respect of water and geothermal resources. Maori have had little time to react to these individual proposals. However, in our view, each step in this process reduces the chances of Maori securing commercial redress from the water and geothermal resources which remain available to the Crown through its remaining power generating SOEs.

12. The proposed partial sale of the power generating SOEs has focused Maori attention on the need to act in relation to these rights before any realistic prospect of redress is lost. This claim is amongst other things a major effort to bring together the interests of all Maori, and resolve the water and geothermal issues as soon as possible.

13. We expect that this will result in a broad coalition coming together to seek commercial redress via interests in or assets of these power generating SOEs. The intransigent Crown policy, refusing commercial redress, is likely to mean that part of the drive is towards a resumption application. The Tribunal's mandatory powers are at present the main leverage which remains available to Maori in this regard. The presence of section 9 in relation to the power generating SOEs also provide some assistance.

14. However, even as we advance towards this outcome, we would welcome a realistic negotiation with the New Zealand Maori Council on behalf of all Maori, addressing Maori proprietal interests in water and geothermal resources. This would be a constructive outcome in line with the partnership principle between the Crown and Maori. That would allow a win-win situation and the advancement of the Crown's desire to partially sell the power generating SOEs without encumbrance.

15. These commercial aspects are not a substitute for the ongoing individual negotiations which have to occur in relation to kaitiakitanga and other

aspects of cultural redress, including remediation of damaged waterways. However, the Maori proprietal interest in water is a previously untouchable area that needs to be resolved, urgently.

SWORN at Wellington )
by the said **Tata Parata** )
this 7th day of February 2012 )
Before me: )

JP / (Deputy) Registrar/ solicitor of the High Court of New Zealand

Dr G.J. Harley
Barrister
PO Box 5241
Level 7 Sybase House
101 Lambton Quay
Wellington

"TP1"

# Extension of the Mixed Ownership Model

## A proposal to change legislation in relation to:

Genesis Power Ltd
Meridian Energy Ltd
Mighty River Power Ltd
Solid Energy New Zealand Ltd

*Consultation with Māori*

February 2012

New Zealand Government

This is the annexure marked "TP1" and referred to in the affidavit of **TATA PARATA** sworn at Wellington this 7th day of February 2012 before me:

BARRISTER

JP / (Deputy) Registrar/ ~~Solicitor~~ of the High Court of New Zealand

This document is available on the Treasury's website:
http://www.treasury.govt.nz/mixed-ownership-consultation
PURL: http://purl.oclc.org/nzt/r-1429

# Foreword

Under the mixed ownership model, the Government will continue to control the mixed ownership model companies but offer a minority stake to private investors. Air New Zealand has operated successfully under this model since 2001.

In order to raise funds for high-priority future investment in new assets and to reduce its need for extra borrowing, the Government is proposing to reduce its current majority shareholding in Air New Zealand and extend the mixed ownership model to four state-owned energy companies – Genesis Power, Meridian Energy, Mighty River Power and Solid Energy.

It will retain a majority shareholding stake.

Priority will be given to New Zealand investors, who will have the opportunity to invest in large and proven companies. The stock market will be strengthened by increasing the breadth and depth of investment opportunities. Public scrutiny of the companies will improve, creating sharper incentives to run them efficiently. And the companies will be better able to raise the capital they need to grow.

The proceeds from the sale of these assets, estimated by the Treasury to total $5 billion to $7 billion, will be invested in schools, hospitals and public infrastructure.

In order to proceed, the Government proposes to remove Genesis Power, Meridian Energy, Mighty River Power and Solid Energy from the State-Owned Enterprises Act and put them under new legislation that will ensure it retains at least 51 per cent ownership and other individual shareholdings are limited to 10 per cent.

The Government is committed to meeting its Treaty of Waitangi obligations. It is consulting Māori on legislative changes, including what provisions aimed at protecting the rights and interests of Māori, such as general or specific Treaty clauses, should be carried over into the new legislation covering these companies.

It is seeking written submissions through this consultation document. Your feedback is welcomed.

Hon Bill English
Minister of Finance

Hon Tony Ryall
Minister for State Owned Enterprises

The opinions and proposals contained in this document are for consultation purposes only and do not reflect final Government policy.

Please seek specific legal advice from a qualified professional person before undertaking any action in reliance on the contents of this publication. The contents of this consultation document must not be construed as legal advice. The Government does not accept any responsibility or liability whatsoever for any action taken as a result of reading, or reliance placed because of having read, any part, or all, of the information in this consultation document or for any error, inadequacy, deficiency, flaw in or omission from this consultation document.

# Contents

# Purpose of this Document

The Crown is consulting with Māori on its proposal to change legislation to enable its mixed ownership model policy to proceed. This consultation document outlines the proposal.

## How to make a submission

The Government welcomes feedback on the consultation document. You can make a submission by using the form at the back of this document or electronically at www.treasury.govt.nz/mixed-ownership-consultation

Submissions can be sent by email to mixed-ownership-consultation@treasury.govt.nz or by post to:

FreePost Authority No.126395
Mixed Ownership Model: Consultation with Māori
Commercial Transactions Group
The Treasury
PO Box 3724
Wellington 6140

The deadline for receipt of submissions is **5pm on Wednesday 22 February 2012.** Late submissions will not be considered.

The Government is also holding a series of consultation hui as a further means of presenting its proposals and receiving feedback from interested parties. Note that the start time for the hui in Auckland has changed from the originally advertised time of 3.30pm to the new time of 5.00pm:

| Date | Time | Venue | Location |
|---|---|---|---|
| 8 February | 10.00am-1.00pm | Distinction Rotorua | Rotorua |
| 8 February | 3.00pm-6.00pm | Waikato Stadium | Hamilton |
| 9 February | 3.00pm-6.30pm | Whanganui Racecourse | Whanganui |
| 10 February | 9.30am-12.30pm | Toll Stadium | Whangarei |
| 10 February | 5.00pm-8.00pm | Novotel Auckland Airport | Auckland |
| 14 February | 10.00am-1.00pm | Waihopai Runaka Murihiku Marae | Invercargill |
| 14 February | 4.00pm-7.00pm | Chateau on the Park | Christchurch |
| 15 February | 10.00am-1.00pm | Emerald Hotel | Gisborne |
| 15 February | 3.30pm-6.30pm | Te Puni Kōkiri | Wellington |

Following consultation, the Government will consider the feedback and submissions and then decide the final form of the legislation.

# Part 1 – Policy and Approach

## Overview

The Crown has ongoing obligations to honour the Treaty of Waitangi in all its activities. In relation to its continued 51 per cent ownership of the Mixed Ownership Model Companies, the Crown is committed to maintaining its obligations under the Treaty.

The Government is consulting on three options to express its Treaty obligations, in addition to retaining the memorials regime for land, contained in section 27A-D of the State-Owned Enterprises Act (SOE Act):

1 include section 9 of the SOE Act in the new legislation in relation to the Crown's shareholding in these companies

2 include a more specific Treaty clause describing how the Crown will meet its obligations

3 no general Treaty clause.

Section 9 will remain in the SOE Act and will continue to apply to all SOEs.

## Why the Government is consulting Māori

To proceed with the mixed ownership model, the Government proposes to remove four State Owned Enterprises (SOEs) from the ambit of the State-Owned Enterprises Act 1986 (SOE Act). The SOEs are Genesis Power, Meridian Energy, Mighty River Power and Solid Energy (the Mixed Ownership Model Companies). The Government also proposes to reduce its shareholding in Air New Zealand, which is already a mixed ownership company listed on the New Zealand Stock Exchange (NZX), from around 74 per cent to no less than 51 per cent. As Air New Zealand is not an SOE, it does not fall within the scope of this consultation process.

Up to 49 per cent in each company will be sold by means of an initial public offering (IPO) and each company will be listed on the New Zealand Stock Exchange (NZX). The companies will remain under the ambit of the Companies Act 1993; in addition, they will come under the ambit of the Securities Markets Act 1988 and the NZX Listing Rules.

The Government has announced that it will pass new legislation that will guarantee the Crown retains at least 51 per cent of the shares with voting rights in each company, and that no other investor may own more than 10 per cent of the shares with voting rights in each company.

The SOE Act contains provisions aimed at protecting the rights and interests of Māori, as follows:

- Section 9 of the SOE Act provides that "nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".
- Sections 27A-D provide a regime for memorials to be placed on the titles of land that is transferred by the Crown to SOEs. This land must be resumed by the Crown if the Waitangi Tribunal makes a recommendation for its return to Māori ownership or if the Governor-General, by order in council, requires the Crown to resume ownership of land that is wahi tapu.

The Government proposes to continue the application of sections 27A-D of the SOE Act in their entirety to each of the Mixed Ownership Model Companies in the new legislation in order to protect the specific rights they confer on Māori. In respect of section 9, the Government sees three options for the new legislation: retaining section 9 as it applies to the Crown as shareholder in these four companies; including a new provision relating to the Crown's specific obligations under the Treaty; or no general Treaty clause. Some arguments for and against these options are laid out in Part 2 of this document.

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

## The Government's mixed ownership model

The Government plans to sell shares in four SOEs that it owns – Genesis Power, Meridian Energy, Mighty River Power, and Solid Energy. No other SOEs are being considered as candidates for the mixed ownership model. The Government will offer shares in the companies at intervals over three to five years, beginning in 2012 with Mighty River Power. The exact timing of the sales will depend on market conditions.

The shares in the Mixed Ownership Model Companies will be available to the public for purchase both at the time of the initial public offering (share float) and subsequently on the stock exchange (NZX). The Government will continue to hold at least 51 per cent of the shares with voting rights in each company, which means it will continue to hold a controlling interest. No other investor will be able to hold more than 10 per cent of the shares with voting rights in each company, which will help to ensure widespread ownership.

When shares in each company are sold, it is proposing that Māori will have the same investment opportunities as all other New Zealanders. For retail investors (individuals), this means shares will be available by direct subscription and through brokers at the time of the IPO, and subsequently on the stock exchange. For large investors (such as financial institutions and iwi), this means shares will be marketed through a book build. Widespread and substantial New Zealand ownership can be achieved through the initial allocation of the shares. The Government will control this initial allocation.

***Initial public offerings (IPOs)***

An initial public offering, or share float as they are often called, is a way of selling some or all of a company to a large number of investors. Shares in the company are offered for sale to retail investors (individuals, sometimes referred to as "mums and dads") through an advertising campaign to the public and through share brokers. Shares are also offered directly to large investors (such as KiwiSaver funds and other managed funds and, if they wish to invest, iwi) by investment banks working on behalf of the vendor (the "book build"). The book build is a type of auction that determines the price for all investors.

The offer runs over approximately four weeks during which investors apply for shares. When the offer closes, shares are allocated to investors. If demand is too high, some investors may receive fewer shares than they applied for (called "scaling"). The Crown has control over which groups of investors are scaled and by how much.

Once a minority shareholding in each company is sold, the Government proposes that the company will be governed in the same way as other listed companies and that they will be subject to the Companies Act 1993 and other relevant legislation, the NZX listing rules and the companies' constitutions. The Crown will not reserve any special rights to itself, except that it is still to decide whether it will a have any special power to approve the chairman of the Board, as it has for Air New Zealand.

***The companies***

Genesis Power is New Zealand's largest electricity retailer with about 27 per cent of retail customers (650,000 customers, including customers of its subsidiary Energy Online). It also generates electricity from hydro-electric schemes, wind farms, and gas-fired and coal-fired power stations in both the North and South Islands.

Meridian Energy is New Zealand's largest electricity generating company, predominantly from South Island hydro-electric schemes but also from wind farms in both islands. It has an approximately 15 per cent retail market share with 295,000 customers (including customers of its subsidiary Powershop).

Mighty River Power is an electricity generating company, with North Island hydro-electric schemes and geothermal generation plants. It also retails electricity and gas under the Mercury Energy and Bosco brands to about 400,000 customers.

Solid Energy is New Zealand's largest coal mining company and an investor in and developer of other energy technologies.

### *What will change with mixed ownership*

The sale of the shares will mean increased investment opportunities for New Zealanders – both individuals and institutions.

Once the Mixed Ownership Model Companies are partially owned by private sector shareholders and listed on the NZX, the companies will be able to raise capital for future growth from the markets rather than relying solely on taxpayer-funded government support.

The Mixed Ownership Model Companies are likely to have improved business performance because they would be subject to the market disciplines that come from being listed, including increased scrutiny from market analysts and the media.

## Timetable

The Government plans to conduct the first initial public offering (IPO) of shares in Mighty River Power, most likely in the third quarter of 2012, provided legislation has been passed and market conditions are suitable. The Government plans to introduce legislation in March subject to the outcome of consultation with Māori.

The timetable for consultation is as follows:

| | |
|---|---|
| 1 February: | Consultation document released |
| 8 – 15 February: | Hui |
| 1 – 22 February: | Written submissions |

The Government will also consult with specific Māori groups as appropriate.

The exact timing of the Mighty River Power initial public offering will not be decided until the legislation is passed and will also be subject to market conditions. Once under way, the marketing and offer period for the sale will run for about nine weeks.

## Legislation

The Government proposes the following changes to legislation:

a) **Creation of a power to remove the Mixed Ownership Model Companies from schedules 1 and 2 of the SOE Act by order in council**. This is necessary to be able to remove the companies from the ambit of the SOE Act which prohibits the sale of shares. By using an order in council, the Government will have the flexibility to remove each company when it believes market conditions are appropriate.

b) **Placing the companies under new legislation**. The legislation will require shareholding Ministers in the Mixed Ownership Model Companies to retain 51 per cent of the shares with voting rights in each company and restrict any other individual entity shareholding to a maximum of 10 per cent of the shares with voting rights in each company (although trustee corporations and nominee companies that hold shares on behalf of other persons may be exempt from the 10 per cent limit).

c) **Continued application of sections 22 to 30(1) of the SOE Act**. Section 22 of the SOE Act retains an administrative provision to allow existing shareholding Ministers to transfer their shares between Ministers without needing to formally register a transfer of shares, and enables a shareholding Minister to authorise another person to act as the Minister's representative at a meeting of shareholders.

   Sections 23-29 of the SOE Act enable the transfer of land and other assets from the Crown to State enterprises. These provisions need to continue to apply to the Mixed Ownership Model Companies to ensure that all as-yet uncompleted processes (resulting from historical contracts) for the transfer of land from the companies can continue once the companies are no longer State enterprises.

   Sections 27A-D provide a regime for memorials to be placed on the titles of land that is transferred by the Crown to SOEs. This land must be resumed by the Crown if the Waitangi Tribunal makes a recommendation for its return to Māori ownership or if the Governor-General, by order in council, requires the Crown to resume ownership of land that is wahi tapu.

   Section 30(1) ensures that any changes to the names of any of the Mixed Ownership Model Companies are not in breach of any legislation.

d) **Removal of the companies from the ambit of the Ombudsmen Act 1975 and Official Information Act 1982 at the point the order in council comes into effect**. This will mean

the Mixed Ownership Model Companies will not be subject to review by the Ombudsman or to Official Information Act requests. Instead, they will be subject to the stock exchange's continuous disclosure regime.

e) **Continued application of the Public Records Act 2005 to the Mixed Ownership Model Companies in respect of records relating to their affairs while a State enterprise.**

f) **Consequential, technical amendments to other legislation to preserve the existing property rights of either the companies or of third parties.**

In the nine Acts identified below, the only change is to amend the definition of the terms "state enterprise" or "Crown body" to make it clear that the Acts will continue to apply to the mixed ownership companies. The changes to these definitions are necessary to preserve existing property rights of either the companies or third parties:

- Manapouri-Te Anau Development Act 1963
- Electricity Act 1992
- Public Works Act 1981
- Ngāi Tahu Claims Settlement Act 1988
- Ngāti Turangitukua Claims Settlement Act 1999
- Waikato Raupatu Claims Settlement Act 1995
- Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010
- Māori Purposes Act 1959
- Employment Relations Act 2000

Affected iwi are being consulted directly in respect of the changes to settlement legislation outlined above.

Certain sections in the four Acts identified below will also continue to apply to the Mixed Ownership Model Companies, as if they continued to be State enterprises. The continued application of these sections is necessary to preserve existing property rights of either the companies or third parties:

- Land Act 1947
- Conservation Act 1987
- Crown Pastoral Land Act 1998
- Treaty of Waitangi Act 1975

In the two Acts identified below, other changes are proposed:

- Income Tax Act 2007. The changes will: ensure that the companies continue to be unable to group losses with other mixed ownership companies: and provide that the companies will no longer be special corporate entities, which means that in line with the tax rules for private sector companies, shareholder continuity will be lost for the purposes of the imputation credit utilisation rules when the Crown sells below 66 per cent.

- Finance Act (No 2) 1988. The changes will remove redundant provisions that enabled the removal of Solid Energy from the SOE Act by order in council, and which will be superseded by this new legislation.

# Part 2 – Discussion of Issues

## The general Treaty clause – section 9 of the SOE Act

Section 9 of the SOE Act provides that "nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi". The Government has yet to come to a view on the treatment of section 9 in the new legislation and sees three options: no general Treaty clause; retaining section 9 as it applies to the Crown's shareholding; or including a new provision relating to the Crown's obligations under the Treaty. Before making a decision, it would like to understand Māori views on the specific rights and interests that section 9, or a new Treaty clause, would protect in respect of the powers that Ministers will be able to exercise over the Mixed Ownership Model Companies.

The Government recognises the historic significance of section 9 of the SOE Act and the role it has played in the development of the place of the Treaty in modern New Zealand and the relationship between the Crown and Māori. Litigation brought under section 9 in the *Lands* case, led to the articulation of Treaty principles by the Court of Appeal. The same case led to the section 27A-D memorials regime that protects specific Māori interests in land transferred by the Crown to SOEs. These provisions require the Crown to resume ownership of the land where the Waitangi Tribunal has recommended its return to Māori ownership. They also enable the Governor-General, by order in council, to require the Crown to resume ownership of land that is wāhi tapu.

The Government notes that in the 25 years since section 9 was legislated, much has changed. The Crown recognises the principles of the Treaty, including the nature of the Treaty relationship as one akin to partnership. This recognition routinely informs the Crown's relationship with Māori. For some time now, Parliament has not included general Treaty clauses like section 9 in legislation. Instead, where a Treaty clause is considered necessary, legislation has specified the manner in which the Crown must meet its Treaty duties and linked any reference to Treaty principles to the relevant, operative provisions of the legislation.

Under the Mixed Ownership Model, Ministers' legal powers will be those afforded to shareholders under the Companies Act 1993. In practice, Ministers will look to best commercial practice in how they exercise those powers. This is a necessary pre-requisite where the decisions of the Crown as majority shareholder could affect the property rights of minority shareholders, including Māori where they are investors. Under the new legislation, the main actions likely to be taken by Ministers are:

- Sell (and buy back) shares, provided they retain at least 51 per cent of the shares with voting rights in each company at all times
- Exercise their majority voting rights including in respect of the appointment of directors, the approval of major transactions (in simple terms, transactions with a value equal to half the value of the company) and any other powers conferred on shareholders by the Companies Act 1993 or the companies' constitutions
- Exercise their voting rights in respect of changes to the constitution
- Decide whether to take up any issue of new shares
- Possibly approve the appointment of the chairman of the Board (this is yet to be decided).

Specific iwi and hapu have a range of direct commercial relationships with the Mixed Ownership Model Companies. These rights and interests have been built up through 20 years of interaction between iwi or hapu and the companies or their predecessors in the context of normal commercial laws and wider community and statutory processes.

The Government also recognises that Māori have other interests that are connected to the operations of the Mixed Ownership Model Companies, for example interests in water. However, these interests are provided for in other ways, principally by the Resource Management Act 1991 and other legislation. Other well-developed, collaborative processes are in train to develop policy and legislation in respect of water and resource management more generally. Further, the historical claims of specific iwi in natural resources are subject to Treaty settlements both in negotiation and completed.

This suggests that the continued application of section 27A-D of the SOE Act with their core resumptive protections, irrespective of section 9 of the SOE Act, means that Māori rights and interests can be adequately protected.

While the Mixed Ownership Model Companies can be affected by wider policy changes, such as the Emissions Trading Scheme, these issues are not dealt with under section 9 (and affect all companies in the economy). The Crown is committed to the Treaty relationship through ongoing interaction with iwi and relevant Māori entities across the whole range of policy, well beyond the scope of section 9. Recent discussions on rights and interests in foreshore and seabed, water policy and radio spectrum rights with Māori have been dealt within this broader framework of cooperation and do not rely on section 9. In addition, any future Treaty claims fall as an obligation on the Crown not the company.

Certainty in expressing the Crown's Treaty obligations will help ensure the value of the taxpayers' investment and assist the sales process.

We are engaging with Iwi to get a better understanding of what section 9 means in practice.

Before coming to a firm view, the Government wants to ensure that it understands the views of Māori on these issues.

## The memorials regime for land

SOEs have significant land holdings, some of which could be the subject of Treaty of Waitangi claims. In order to preserve the Crown's ability to address these claims, many parcels of land carry memorials on their titles that enable the Crown to resume ownership of the land if the Waitangi Tribunal recommends its return to Māori ownership even if the land has been sold by the SOE. Sections 22 – 30(1) of the SOE Act will be retained in the new legislation in respect of the mixed ownership companies. The provisions for the protective memorials are sections 27A-D. These provisions are among those which will continue to apply in the new legislation. A partial sale of shares in mixed ownership companies will make no difference to the validity of the memorials. The Government believes that Māori rights associated with present or future Treaty settlement processes are fully protected.

## Other issues that are beyond the scope of this consultation

The Government considers that a number of issues, that it recognises may be of interest to Māori, are beyond the scope of this consultation. In particular:

- The consultation is not intended to present specific investment opportunities or seek investment – this will take place during the marketing of each IPO.
- The Government is not consulting on other policy issues with well-established policy processes, for example fresh water or RMA reform.
- This consultation is not part of a Treaty settlement process and does not alter the Government's commitment to Treaty settlements.

A brief rationale for these views is presented below.

### *Fresh water*

The Government considers interests in water to be beyond the scope of this consultation.

Interests in water are subject to Resource Management Act 1991 processes and existing historical settlements such as the Waikato River settlement. Any arrangement for managing and governing water in a Treaty settlement will continue.

Generators access water through water consents issued by regional councils for a limited time under the Resource Management Act 1991. They do not own water. This applies for all generators regardless of whether they are publicly or privately owned, and will remain so under mixed ownership. The existing regulatory regime will be unaffected.

It is recognised that some Māori have concerns about the effectiveness of aspects of the regulatory regime for water. Māori are not alone in such concerns and various processes are under way to review and improve the operation of the Resource Management Act 1991. For example, some Māori are actively participating in the *Land and Water Forum*, and there are parallel discussions between the iwi leaders group and the Crown on Māori interests in water. Mixed ownership will have no effect on these processes.

### *Geothermal*

Geothermal resources are similar to water. They are important both to electricity generators and to Māori. Their use is governed by the Resource Management Act 1991, and there is nothing in this proposal that will change the process for deciding the use of these resources.

### *Māori participation as investors*

The Government welcomes Māori participation as individual and institutional investors, on a commercial basis and on an equal footing to other New Zealanders. It recognises that iwi institutions are not identical to financial market institutions, and will consider how best to engage with iwi and other Māori institutions that wish to invest in the run-up to the first IPO.

### *Treaty settlements*

Some iwi who have yet to settle may be concerned that they will be disadvantaged by not having the means to take up shares in the initial public offerings. The Crown's view, however, is that those iwi will be no worse off buying shares in the market once they have settled.

Some iwi who have not yet settled may want to request shares in mixed ownership companies as part of their commercial redress. Shares will, however, be readily available for purchase on the stock exchange. It would be straight-forward enough for the Government to purchase shares on the day with any cash that forms part of the settlement package, but equally it will be possible for iwi to purchase shares themselves. The latter would seem much preferable because it would afford iwi greater freedom to decide exactly how their money is used, and would be less likely to slow down the settlement process.

# Mixed Ownership Model Submission Form

The Government welcomes your feedback on this consultation document, particularly the questions set out below.

You can make a submission by using this form, which is also available electronically at www.treasury.govt.nz/mixed-ownership-consultation

## 1 Contact Details

*I am responding (please complete one):*

**As an individual**

| | |
|---|---|
| **Your name** | |
| **Your iwi affiliation** | |
| **Address** | |
| **Email address** | |

**On behalf of an organisation**

| | |
|---|---|
| **Your name** | |
| **Organisation you represent** | |
| **Address** | |
| **Email address** | |

## 2 Submission

| **Question 1:** What rights and interests, if any, do Māori have in the Mixed Ownership Model Companies that are not protected by the section 27A-D memorials regime, or by other legislation? |
|---|
| |

| **Question 2:** How would any rights and interests identified in question 1 be protected by continued application of section 9 of the State-Owned Enterprises Act 1986? |
| --- |
| |

| **Question 3:** Could any rights and interests identified in question 1 be protected by an alternative, more specific, formulation of the Crown's obligations under the Treaty? |
| --- |
| |

| **Additional comments:** Please insert any other comments you wish to make on this consultation document. |
| --- |
| |

### All submissions will be publicly available

The Government will publicly release your submission, a summary of submissions and a list of the names of submitters, on The Treasury's website: www.treasury.govt.nz/mixed-ownership-consultation

### Your name will be made publicly available as part of your submission when it is released

Your contact details will be removed from your submission before it is posted on the website, recorded in the summary of submissions or released under the Official Information Act 1982 (OIA).

If you do not wish your name in your submission to be released, please clearly state this in your submission or tick the option below:

☐ I request that my name be removed from my submission before it is released and that it is recorded as 'anonymous' in the summary of submissions.

If there is particular information in your submission that you wish to remain confidential, please clearly indicate this and explain your reasons for wanting the information kept confidential.

The Treasury is subject to the OIA and copies of submissions sent to The Treasury will normally be released in response to an OIA request from a member of the public. If your submission is subject to an OIA request, The Treasury will consider your confidentiality request in accordance with the grounds for withholding information outlined in the OIA. You can view a copy of the OIA on the New Zealand Legislation website: www.legislation.govt.nz

The Privacy Act 1993 governs how The Treasury collects, holds, uses and discloses personal information about you which is contained in your submission. You have the right to access and correct this personal information.

Submissions can be sent by email to mixed-ownership-consultation@treasury.govt.nz or by post to:

FreePost Authority No.126395
Mixed Ownership Model: Consultation with Māori
Commercial Transactions Group
The Treasury
PO Box 3724
Wellington 6140

The deadline for receipt of submissions is **5pm on Wednesday 22 February 2012.** Late submissions will not be considered.

"TP2"

Settlement Redress

Settlement Redress

This is the annexure marked "TP 2" and referred to in the affidavit of **TATA PARATA** sworn at Wellington this 7th day of February 2012 before me:

JP / (Deputy) Registrar/ Soliciter of the High Court of New Zealand

# Settlement Redress

THIS PART LOOKS AT THE POSSIBLE COMPONENTS OF REDRESS AVAILABLE IN A NEGOTIATED SETTLEMENT:

- the acknowledgements and apology made by the Crown for the wrongs caused to the claimant group
- the ways in which Crown assets can be transferred to the claimant group to help meet economic or cultural interests
- other ways in which the claimant group can be recognised – for instance, by involving it in decision-making about resources of cultural significance, and the legal mechanisms, known as Statutory Instruments, used to recognise cultural interests

## Settlement Redress

So far this guide has looked at the Crown's policy framework and the negotiations process. It has also briefly mentioned some of the different types of redress available. This section looks in more detail at the options for *settlement redress*. This includes:

- the acknowledgements and apology made by the Crown for the wrongs caused to the claimant group
- ways in which Crown assets can be transferred to the claimant group to help meet their economic interests
- ways in which Crown assets can be transferred to the claimant group to help meet their cultural interests, and
- other ways in which claimant groups' interests can be recognised – for instance, by involvement in decision-making about resources of cultural significance.

Not all the redress options discussed will be relevant to every settlement – some settlements may involve only two or three different items of redress. New redress options, or new applications for existing options, could also be developed in future negotiations to meet different interests or circumstances. However, the existing options do offer a very wide range of redress to meet interests and values that claimant groups have so far identified as being important to them. They also have the advantage of existing Cabinet approval, and have become familiar to government departments, local authorities and others involved in settlement implementation.

## Main aims of settlements

The overall aims of negotiations are to reach a settlement that:

- is intended to remove the sense of grievance
- is a fair, comprehensive, final and durable settlement of all the historical claims of the claimant group, and
- provides a foundation for a new and continuing relationship between the Crown and the claimant group, based on the principles of the Treaty of Waitangi.

How do settlements give effect to these aims? In practice, for a settlement to achieve these aims means that:

- the Crown recognises the wrongs done – it does this through the historical account, Crown acknowledgements and apology
- the Crown provides financial and commercial redress, in recognition of breaches by the Crown of the Treaty of Waitangi and its principles, which can be used to build an economic base for the claimant group, and
- the Crown provides redress recognising the claimant group's spiritual, cultural, historical or traditional associations with the natural environment, sites and areas within their area of interest – often called cultural redress.

Together these three areas of redress make up a balanced settlement package that the claimant group may accept in final settlement of their historical grievances.

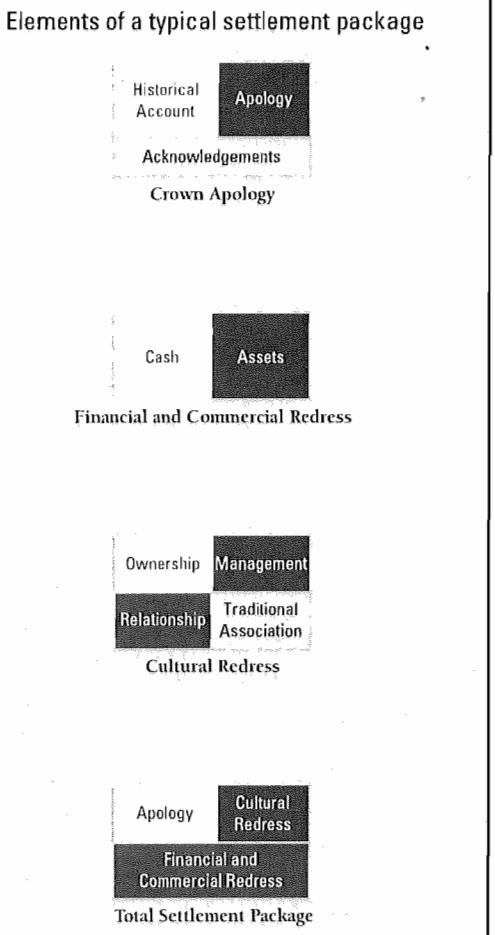



*Figure 3.1: elements of a typical settlement package*

It is now possible to look more closely at each of these three areas of redress – what do the various redress options involve, and what are the issues for claimant groups and the Crown to consider in negotiations?

# Historical Account, Crown Acknowledgements of Breach and Apology

## Significance

Among the first and most important items in a Deed of Settlement are the historical account, Crown acknowledgements and apology, collectively known as the Crown Apology. They may be seen as the first step in reconciling and healing the relationship between the Crown and the claimant group.

The historical account provides a basis for the Crown acknowledgements and apology. It summarises the key facts about the relationship between the claimant group and the Crown that gave rise to a breach or breaches of the Treaty of Waitangi and its principles, as agreed between the Crown and the claimant group. The Crown acknowledgements and apology go on to recognise these breaches and the losses, resentment and grief suffered by the claimant group. In turn, the Crown, by expressing its regret and unreserved apology, lays a foundation for settling the historical claims of the claimant group.

The Deed of Settlement may set out the historical account, Crown acknowledgements and apology in Māori and in English. Claimant groups may also wish to include opening karakia and waiata.

It is now possible to look more closely at each of the elements of the historical account, Crown acknowledgements and apology.

## Contents of the historical account

The historical account is an agreed statement between the Crown and the claimant group that:

- narrates the events that form the factual background and foundation for the historical claims, and
- refers to the Treaty-based relationship between the Crown and the claimant group, and the events that led to the breakdown of that relationship.

The historical account does not need to be complex or long. It should be an accurate summary of the historical background. This gives the text authority and helps the general public to understand the basis for the settlement, because it puts the redress included in the settlement into proper context. In settlement legislation, the historical account or a summary may form the Preamble to the Act.

## Content of the Crown acknowledgements

In the acknowledgements, the Crown accepts its responsibility for breaches of the Treaty of Waitangi and its principles and may go on to recognise:

- the pain and suffering caused by the grievances arising as a result of the Crown's breaches of the of the Treaty and its principles
- contributions the claimant group has made to the public benefit, and
- the consequences of the breach, including landlessness and social impacts.

Depending on their length and form, the Crown's acknowledgements may be included in the settlement legislation.

## Contents of the apology

In the apology, the Crown formally expresses its regret for past injustices suffered by the claimant group and breaches of the Treaty of Waitangi and its principles. It is a clear response by the Crown to the matters set out in the historical account and Crown acknowledgements. The apology makes very significant steps towards:

- recognising the impact of the Treaty breaches on the claimant group
- restoring the honour of the Crown, and
- re-building the relationship between the Crown and the claimant group.

The scope and language of the apology should reflect the seriousness of the grievances for which the Crown apologises, and the nature of the settlement. It should highlight the key breaches and other wrongs for which the Crown accepts responsibility.

The settlement legislation will also include the text of the apology in Māori and English. This means that Parliament approves the apology as a statement of the Crown's views on its past Treaty breaches, and records the settlement of the grievances caused by those breaches.

## Development of the historical account, Crown acknowledgements and apology

*Process*

It is often useful to set up a working party to develop these documents, usually involving historians working for the Crown and claimant group negotiating teams. Usually the claimant group provides information about their view of the Treaty breaches and the events that gave rise to them. The Crown members of the working party may then prepare a draft text of the historical account to be discussed with the mandated representatives. When the working party has reached agreement on the text, they will refer it to the core negotiating teams for approval. A similar process would be followed for the Crown acknowledgements. Then, the Crown will draft its apology and discuss it with the claimant group. The apology will express the Crown's regret for the breaches of the Treaty and its principles described in the historical account and Crown acknowledgements.

*Concessions are made on a "without prejudice" basis*

As with all other aspects of negotiations, the Crown and the claimant groups are not bound by, and do not accept liability for, concessions they make in drafting the historical account, Crown acknowledgements and apology. They are not bound until they have signed the Deed of Settlement. Should negotiations break down, the matters discussed in negotiations cannot be used as evidence in Waitangi Tribunal hearings.

# Financial and Commercial Redress

Financial and commercial redress means the part of the settlement that is primarily economic or commercial in nature, and which is given a monetary value. This value is the redress quantum. Financial redress refers to the portion of the total settlement the claimant group receives in cash and commercial redress refers to any Crown assets, such as property, that contribute to the total redress quantum. In this section we discuss:

- the aims of financial and commercial redress
- limitations on financial and commercial redress and how a redress quantum is negotiated, and
- forms of financial and commercial redress – these include cash and the ways in which Crown and, in some limited circumstances, memorialised State-Owned Enterprise or Crown entity land, can be used in settlements.

## Aims of financial and commercial redress

The key aim of providing a redress quantum to claimant groups is in recognition and settlement of historical claims against the Crown under the Treaty of Waitangi. A guiding principle is that that the quantum of redress should relate fundamentally to the nature and extent of the Crown's breaches of the Treaty and its principles.

Financial and commercial redress also recognises that where claims for the loss of land and/or resources are established, the Crown's breaches of the principles of the Treaty will usually have held back the potential economic development of the claimant group concerned. The Crown does not provide full compensation based on a calculation of total losses to the claimant group, for the reasons explained on page 89, but it does contribute to re-establishing an economic base as a platform for future development.

The Crown does not spell out how claimant groups must use their financial and commercial redress. This is a matter for the claimant group to determine according to the rules of their governance entity. Claimant groups that have settled so far have invested their redress to produce income to fund their long-term development.

## The development of the Crown's approach to financial and commercial redress

The task for the Crown in developing the current settlement policy was to devise an approach to financial and commercial redress that, within a negotiated settlement as a whole:

- enables the claimant group's sense of grievance to be resolved
- contributes to the economic and social development of the claimant group
- is fair between claimant groups, and
- takes account of New Zealand's ability to pay, considering all the other demands on public spending such as health, education, social welfare, transport and defence.

***Discontinuance of the Settlement Envelope***

The concept developed by the Crown in the period 1992-94 to meet the concerns set out above was called the Settlement Envelope, also called the "fiscal envelope". The government of the time set the total dollar amount it assessed that New Zealand as a whole could afford to devote to Treaty settlements. The amount set aside in the Settlement Envelope was $1,000 million in 1994 dollars, to be spent over about 10 years.

The idea of a Settlement Envelope and the amount set aside for it by the government were not well received by Māori. Many Māori thought that it was too soon to set an overall limit or fiscal cap on redress for historical claims. Many were also worried that claims settled later would be at a disadvantage, despite the government's intentions. The total amount of $1,000 million was also seen by many as arbitrary and insufficient.

In 1996, after a number of settlements had been successfully negotiated, the fiscal cap was abandoned.

Crown policy was further modified by a new government in 2000. This policy states that:

- redress should relate fundamentally to the nature of the breaches suffered
- different claimant groups should be treated consistently, so that similar claims receive similar redress, and
- while maintaining a fiscally prudent approach, each claim is treated on its merits and does not have to be fitted under a predetermined fiscal cap.

We now look in more detail at what the redress quantum includes and the factors the Crown takes into account when considering particular claims.

## What redress is included in the quantum?

The term *redress quantum* means the dollar value of cash and assets transferred to the claimant group in settlement of their historical claims. It is also called the *redress amount* and includes:

- cash, and/or
- the market value of commercial assets transferred to the claimant group by the Crown, and/or
- any cash or commercial assets provided to hapū or whānau as redress in recognition of particular hapū or whānau interests (see page 66).

It does not include:

- redress gifted by the Crown, such as the return of wāhi tapu
- redress based on rights and processes rather than on cash or property (for example, a Statutory Acknowledgement or a Right of First Refusal), or
- claimant funding.

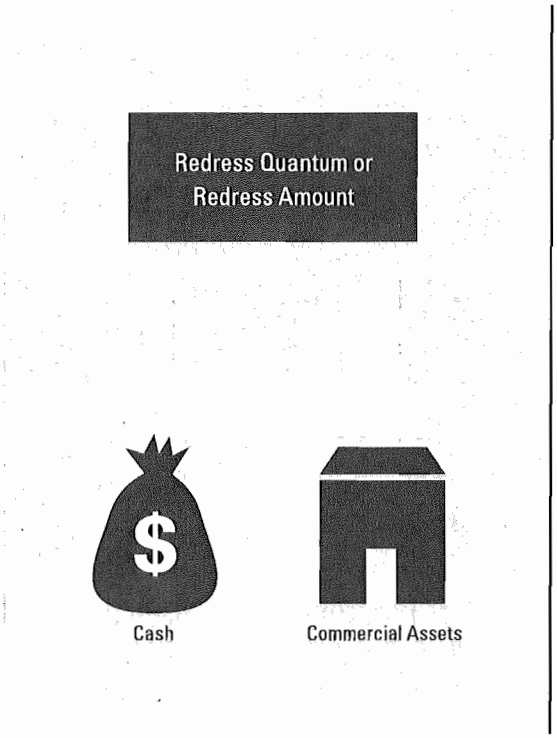



*Figure 3.2: elements of financial and commercial redress*

## Negotiating the redress quantum

Treaty settlements involve more than money, and most claimant groups want to see spiritual, cultural and environmental concerns met as much as economic ones. Nevertheless, the quantum issue will usually be of critical importance in negotiations. The Crown's general approach can be considered under the following headings.

***Full compensation for all the economic losses of a claimant group is not available***

It is impossible to put a precise value on the economic losses resulting from most historical Treaty breaches. This is because so much time has passed, and because identifying the effects of various causes on the economic status of the claimant group today is such a complex matter. Also, given the overlaps between many claimant groups, determining the loss to each claimant group would be impossible. European settlement has also brought benefits to Māori that cannot be easily expressed in money terms. However, many commentators estimate that the losses to Māori amount to tens of billions of dollars.

Even if an acceptable method of calculating the losses resulting from the Crown's Treaty breaches could be developed, and if the result was to establish that losses did amount to such huge sums, it is clear that a full compensation or "damages" approach to redress would place too great a burden on the present and future generations of taxpayers. For that reason, it would not be practicable or generally acceptable to the New Zealand public. Negotiations are instead aimed at a fair level of redress, taking all the circumstances into account.

***Factors the Crown takes into account in developing its quantum offer***

In deciding how much to offer, the Crown mainly takes into account the amount of land lost to the claimant group through the Crown's breaches of the Treaty and its principles, the relative seriousness of the breaches involved (raupatu with loss of life is regarded as the most serious), and the benchmarks (measures) set by existing settlements for similar grievances. Secondary factors are the size of the claimant group today, whether there are any overlapping claims and any other special factors affecting the claim.

By considering all these factors for each claim, the Crown aims to ensure fairness and consistency in the quantum offers made to claimant groups. Before determining its quantum offer, the Crown gives mandated representatives the information it has available on the types and amounts of land loss, and on population size. This allows the mandated representatives an opportunity to correct any errors of fact, or present information from other sources.

***What scope is there for claimant groups to negotiate on the quantum offer?***

After the Crown has presented its quantum offer, there will usually be a period of negotiation on the amount to be offered. The mandated representatives may wish to draw various factors affecting their claims to the closer attention of Ministers. A revised offer may be made if Ministers think this is appropriate. The quantum offered should be considered in the context of the settlement as a whole, taking into account the Crown's acknowledgements and apology and any cultural redress being offered.

The Crown will not, however, keep increasing the quantum offered simply to reach a settlement. The final offer must still be affordable and fair in relation to settlements already reached. If the final amount the Crown is prepared to offer is not acceptable to the claimant group, they may prefer to withdraw from negotiations.

Once the Crown and mandated representatives have agreed on the overall quantum or redress amount, there will usually be detailed discussions on the mixture of cash and assets that will make up the agreed amount.

*Cash*

Claimant groups may prefer to take all or part of their redress quantum in cash. A settlement wholly in cash might be suitable, for instance, if no Crown land in the claim area is available for transfer and the claimant groups would like to establish their own fund to purchase properties on the open market or to make other investments. The balance of cash and assets needs to be determined by the mandated representatives in consultation with the wider claimant group before the Deed of Settlement is signed. One benefit of a cash settlement is that it reduces the costs of implementing the settlement for both the Crown and claimant groups. Claimant groups may also see greater flexibility and opportunity in negotiating directly with third party vendors and with banks.

After settlement, investment decisions are a matter for the governance entity to make according to its rules.

## Purchase of Crown properties – OTS landbanks and surplus departmental property

Often, key aims for claimant groups are to rebuild their land holdings and to invest for future development. This reflects the importance of land to cultural identity. One way to achieve this is by taking all or part of the redress quantum in the form of available Crown properties located in the claim area. In this process assets are transferred from the Crown to the claimant group at market valuation, in effect "spending" the redress quantum.

OTS has a system of landbanks covering the whole country that hold a wide range of Crown properties available for use in settlements. The total value of these properties as at March 2002 was $134.9 million. These properties have usually been placed in the regional landbanks at the request of claimant groups after they have been declared surplus to requirements by government departments. They are, therefore, expected to be the first choice of many claimant groups when they are considering their commercial redress. Because they have been set aside specifically for this purpose, choosing these properties allows claimant groups to receive properties that would otherwise have been sold.

Sometimes a property may relate directly to Crown breaches of the Treaty of Waitangi and its principles (for example, the property may be in an area that was confiscated under the New Zealand Settlements Act 1863). Generally, however, the Crown regards commercial properties as substitutable.

Claimant groups can only receive commercial assets if they are in their area of interest, but sometimes other claimant groups have claims that cover the same area. In such cases of overlap, the Crown will only transfer properties where these overlaps have been addressed by the claimant groups or where it is able to offer similar property to the overlapping group or groups.

Land managed by the Department of Conservation is not generally available as commercial redress, but individual sites of special cultural significance may be considered for transfer to claimant groups as part of cultural redress (see page 126).

***Valuation***

Because claimant groups may be taking all or part of their redress quantum in the form of commercial assets, their negotiators will want to make the best use of the money available, and assure the wider claimant group that fair transfer values have been agreed. Similarly, the Crown has a responsibility to taxpayers to ensure it receives fair value for assets transferred through the settlement process.
Both these concerns can be met by providing that properties will be transferred at current market value using an agreed method of reaching a value.
The transfer values will be included in the Deed of Settlement.

Where specific land and property held by Government departments and agencies is not surplus but is sought by claimant groups it may be possible to consider two other options. These are a Right of First Refusal over specific Crown-owned property or the opportunity to own and lease back Crown property.

## Right of First Refusal

Sometimes Crown land that would be very useful to the claimant group concerned is not available for immediate use in settlement. This may be because of the operational needs of the department concerned. In these cases, a Right of First Refusal (RFR) may be negotiated to provide the claimant group with an opportunity to purchase specific Crown properties if they become available in the future.

An RFR means that the claimant group has the right to purchase at market value, ahead of any other potential purchaser, specific surplus Crown land, if the relevant government department decides to sell it within a specified period in the future. An RFR is subject to existing third party rights and statutory requirements such as, for example, the offer back provisions of the Public Works Act 1981.

Rights of First Refusal therefore recognise the importance to claimant groups of rebuilding their land holdings, and their relationship to the land as tangata whenua. An RFR is not valued in monetary terms or counted against the settlement quantum.

An RFR is not usually available on designated properties where that property is in an area subject to unresolved overlapping interests between claimant groups.

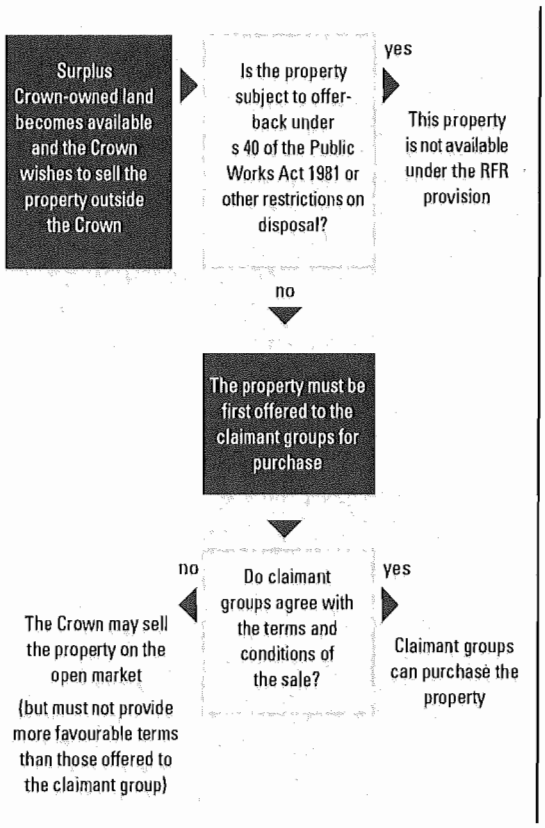



*Figure 3.3: the Right of First Refusal*

### *How a Right of First Refusal works*

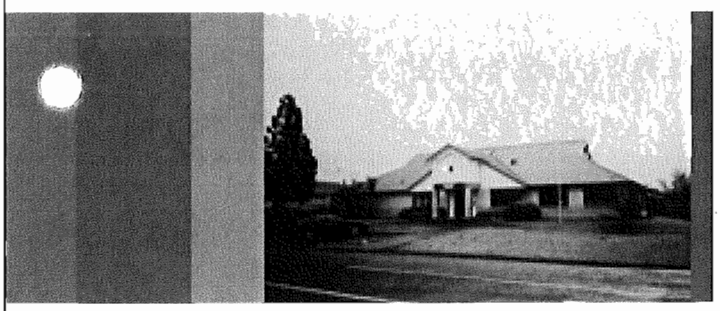
The Crown may offer the claimant group an RFR over specific Crown-owned property. This will:

- last for a limited period of time (for example, run for 50 years from the Deed), and
- allow the vendor department to test value in the market before offering the property to the claimant group.

For each of the specified properties the vendor agency must not sell the land without first offering it to the claimant group. The RFR is subject, as noted earlier, to any existing legal rights to purchase or lease the property. Certain sales to a local authority, SOE or Crown entity are exempt from the RFR but any later sale by such organisations to a third party will be subject to the RFR. Under the RFR an offer will be made to the claimant group who will then have a defined period in which to consider it. If the claimant group does not accept the offer, the vendor department may sell the land on the open market but must not do so on terms more favourable than those offered to the claimant group.

### Own and lease

If a property is neither surplus nor subject to a Right of First Refusal claimant groups may, in certain cases, be able to purchase the property from the government department or agency concerned if it undertakes to then lease back the property to that department or agency. Both the purchase and lease back are to occur at market value and need to be agreed between both the government agency concerned and the claimant group.



*Tūrangi Police Station, transferred to Ngāti Tūrangitukua and leased back to the NZ Police*

### Use of licensed Crown forest land

Another form of Crown-owned property available for use in settlements is Crown exotic forest land. Crown exotic forest land forms a special category of commercial redress, reflecting the arrangements between the Crown and Māori in the Crown Forest Assets Act 1989 (see pages 20-21). Claimant groups may use the settlement quantum to purchase forest lands.

If the Crown and claimant groups agree that licensed Crown forest land will form part of the settlement redress, the following points apply:

- the Crown own the land not the trees, so only the land is available for use in settlement
- the licence-holder owns the trees and the right to occupy the land to cut them
- land is transferred subject to existing Crown forestry licences, and the claimant group becomes the licensor instead of the Crown
- on settlement, the Crown issues termination notices to the licence holder(s)
- the termination period will be a maximum of 35 years
- as the last crop of trees is harvested on each area, the licence on that block terminates – this enables the claimant group owners to use the land as it becomes available
- the claimant group can receive the accumulated rentals held by the Crown Forestry Rental Trust. This is in addition to the redress quantum
- after transfer, the claimant group receives the future rentals from the licensee until the licence is extinguished when the last crop is harvested, and
- the settlement legislation will:
  - provide for the transfer of the land as if the Waitangi Tribunal has made a binding recommendation on the Crown forest land being used in settlement, and
  - provide that the claimant group can receive no further remedies under the Crown Forest Assets Act 1989 in relation to claims to licensed Crown forest land.

As with other commercial redress, there also needs to be a valuation process by which the market value of the land is determined so that it can be included in the Deed of Settlement as part of the total quantum of financial and commercial redress received by the claimant group. Other matters to be considered are whether any easements (such as rights of way) are required.

Where licensed Crown forest land is transferred and may contain sites of importance to other claimant groups, settlement legislation can provide for access to sites that are registered as wāhi tapu with the NZ Historic Places Trust.

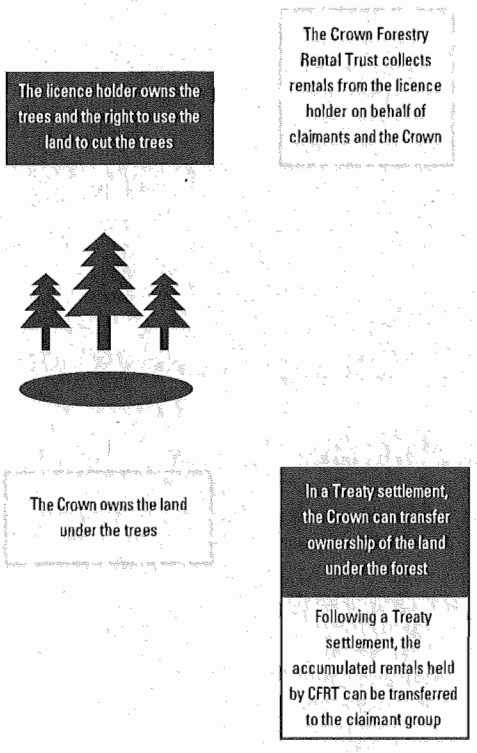



*Figure 3.4: licensed Crown exotic forest land in settlement*

## State-Owned Enterprise and Crown entity land

State-Owned Enterprises (SOEs) are public companies owned by the Crown established under the State-Owned Enterprises Act 1986. Examples are New Zealand Post Limited and Land Corporation Limited (Landcorp). Crown land transferred to SOEs on their establishment is subject to the statutory memorial system noted on page 31. This memorial system also applies to land that was transferred to rail companies and tertiary education institutes. This enables the Waitangi Tribunal in specified circumstances to order the Crown to resume memorialised properties to resolve a well-founded Treaty claim. Sometimes SOE property is also available for settlement purposes when a specific property is surplus to the requirements of the SOE and it is a willing seller.

Crown entities are listed in the Fourth Schedule of the Public Finance Act 1989 and include:

- District Health Boards (formerly Crown Health Enterprises)
- Crown Research Institutes
- Boards of Trustees for state schools, and
- tertiary education institutions.

In some cases, Crown entities such as hospitals may own the land they occupy. Crown entity property is not available for use in settlements unless it is surplus, or there are exceptional circumstances and the entity is a willing seller. Ministers cannot generally direct Crown entities about how they should deal with their land.

Also, for both SOE and Crown entity-owned land:

- the property must be cleared of any offer-back rights under section 40 of the Public Works Act 1981, or of other overriding third party property rights, and
- any overlapping claims must have been addressed to the satisfaction of the Crown.

Working through the processes to transfer SOE and Crown entity land is difficult and time-consuming, adding to transaction costs for both the claimant group and the Crown. The claimant group should consider whether cash to buy properties of their choice on the open market would be a better option.

*Specialist advisers*

Depending on the number and type of commercial properties involved in the settlement, both the Crown and mandated representatives will probably need to employ specialist advisers such as commercial lawyers, valuers and property consultants. This should be taken into account in planning and budgeting.

## Natural resources including geothermal and mineral resources

Natural resources are not available for general use in settlements in the way that cash or surplus lands are. There are three main reasons for this:

- there are existing arrangements for allocating and managing natural resources on a national basis (for instance, geothermal energy is managed under the Resource Management Act 1991). It would not normally be appropriate to create different arrangements through Treaty settlements
- transferring rights to natural resources would lead to significant risk for both a claimant group and the Crown. For the claimant group, there is no guarantee of income from such rights and any income derived from such rights may vary considerably over time. This income, therefore, may not meet the expectations of the claimant group. Because of the uncertainty of income, it is also often very difficult to value such resources, and
- the Crown owns and manages nationalised minerals (including petroleum, uranium, gold and silver) under the Crown Minerals Act 1991, in the national interest. It considers that it should continue to do so. These resources are therefore not available for use in Treaty settlements.

However, Māori (like any other individuals or companies) can use cash received in settlement to invest in natural resource developments, through the usual market and resource management processes.

*Surplus natural resource-based assets*

If the Crown or a Crown entity has surplus natural resource-based assets in a claim area – for example, a small hydro-electric or geothermal power station, these assets may be considered for use in a settlement if the quantum allows. As with other commercial assets, transfer to the claimant group would be at market valuation. Redress involving claimant groups' **cultural** interests in natural resources is discussed in the section *Cultural Redress: Resources and Interests*, starting on page 107.

## Taxation and interest on settlement redress

***Settlement redress is not income or the supply of goods or services***

Redress is transferred to claimant groups to settle their historical claims against the Crown. It is the Crown's understanding that payments of this nature are not income (for the purposes of income tax), or the supply of goods and services (for the purposes of goods and services tax (GST)). In accordance with these understandings, the Crown may provide indemnities in Deeds of Settlement. This means that if a claimant group is found liable to pay either income tax or GST on the redress provided by the Crown, the Crown will pay the amount of the liability to the claimant group. This provision may not be needed in future if the Inland Revenue Department continues to make rulings that accept redress is not subject to either income tax or GST.

*Income generated from settlement redress is subject to applicable tax*

However, the indemnities provided by the Crown do not go beyond the initial transfer of the settlement redress. Any subsequent dealings with the settlement redress, and any income generated are subject to the same tax laws applying to everyone else. Claimant groups are, of course, able to seek independent advice on how to manage their affairs for tax purposes. The Crown will not use settlement legislation to provide specific tax advantages to groups that have received settlement redress.

*Any payment of interest on the quantum is separate from redress and subject to income tax*

If settlement legislation is required to make a settlement complete, there may be a significant delay between signing the Deed of Settlement and the payment of cash or transfer of other assets. Depending on the expected length of the delay, the Crown and claimant groups may need to negotiate whether the Deed should provide for interest on the redress quantum from the date of the Deed to when it is actually paid. This will maintain the value of the settlement to the claimant groups. Interest is paid in a lump sum with the settlement quantum, but does not form part of the redress quantum. This is because it is a transaction cost rather than redress. If the Crown agrees to pay interest, the rate of interest will depend on market conditions and, as with any interest receipt, tax may be payable.

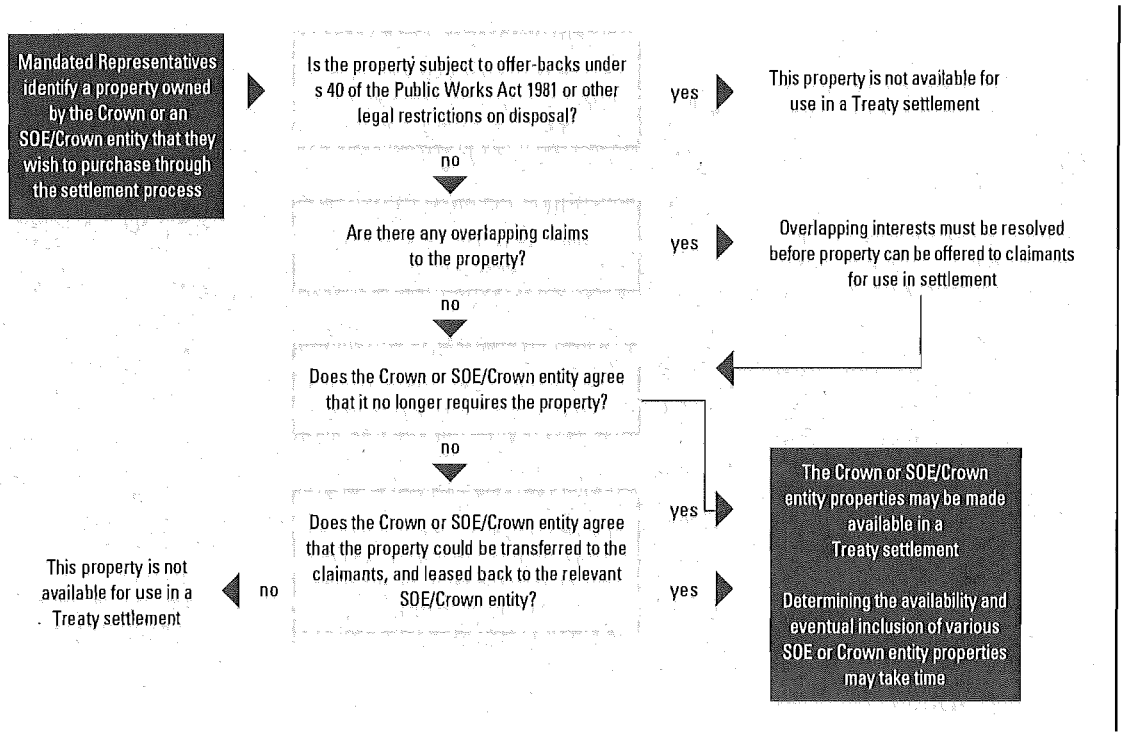



*Figure 3.5: selection process for commercial properties*

## Rivers and lakes (waterways)

***Significance to Māori***

The Crown acknowledges that rivers and lakes have great significance for Māori. The Crown also acknowledges that, while the common law originating in England has different rules on ownership for the bed, banks and water, Māori have traditionally viewed a river or lake as a single entity. From Waitangi Tribunal reports, other publications and negotiations to date, the Crown understands that to a claimant group rivers and lakes can be or represent any or all of the following:

- the embodiment of or creation of ancestors
- a key aspect of tribal and personal identity
- the location of wāhi tapu
- sources of water, food and other resources such as hāngi stones and pounamu
- part of traditional travel routes and trading networks
- boundary markers and part of traditional tribal defences, and
- possessors of mauri, the life force or essence that binds the physical and spiritual elements of all things together.

These complex and significant associations underpin Māori claims to ownership and other redress over rivers and lakes.

***Claimant group interests***

In negotiations on cultural redress for rivers and lakes, claimant groups may wish to protect or promote their interests in the following ways:

- obtaining ownership of the riverbed
- improving their ability to exercise kaitiakitanga through improved participation in resource management processes
- promotion of the health of the waterway, particularly as a source of food, through the control of pollution
- promotion of sustainable fishing and other harvesting (see customary fisheries issues on page 117)
- control of access to all or part of the waterway, for example, to prevent damage or inappropriate access to wāhi tapu in or near the waterway
- being able to pass on or enhance traditional skills and knowledge
- preserving or re-establishing the numbers of indigenous plants and animals
- the use of the traditional name for the waterway or sites in and along the waterway, and
- access rights to cultural resources such as hāngi stones.

***The Crown's interests and approach***

Like claimant groups, the Crown is also concerned about the health of rivers and lakes and maintaining or improving this where possible. The Crown also wants to manage waterways in the best interests of all New Zealanders and to protect existing rights of public access to waterways. Within this overall framework, it is prepared to offer redress to meet many of the aims of claimant groups for waterways, and in this way recognise the cultural significance of these resources.

Under common and statute law, claiming ownership implies exclusive possession with the right to prevent others from using the resource. This is a concept that raises many practical and legal difficulties with waterways.

***New Zealand law does not provide for ownership of water in rivers and lakes***

As noted earlier, the Crown acknowledges that Māori have traditionally viewed a river or lake as a single entity, and have not separated it into bed, banks and water. As a result, Māori consider that the river or lake as a whole can be owned by iwi or hapū, in the sense of having tribal authority over it. However, while under New Zealand law the banks and bed of a river can be legally owned, the water cannot. This reflects the common law position that water, until contained (for example, put in a tank or bottled), cannot be owned by anybody. For this reason, it is not possible for the Crown to offer claimant groups legal ownership of an entire river or lake – including the water – in a settlement.

The Crown also considers that the benefits of hydro-electricity generation belong to all New Zealanders and it does not provide compensation for any past interference with rivers for these purposes. However, negotiations can explore redress options for specific grievances relating to rivers or lakes such as the flooding or destruction of wāhi tapu or effects on traditional fisheries that arise from Crown actions.

***Economic interests***

If claimant groups have economic rather than cultural aims involving waterways, these are considered as part of *Financial and Commercial Redress* (see page 87). Large hydro dams of national importance are not available for use in settlement, but smaller dams may be available for transfer at market value, depending on the redress quantum (the total monetary value of the redress provided by the Crown).

The idea of charging for public access to waterways for recreational use is also not acceptable to the Crown. Free and generally unrestricted public access to waterways is part of the New Zealand way of life, and the Crown does not wish to alter this through the settlements process.

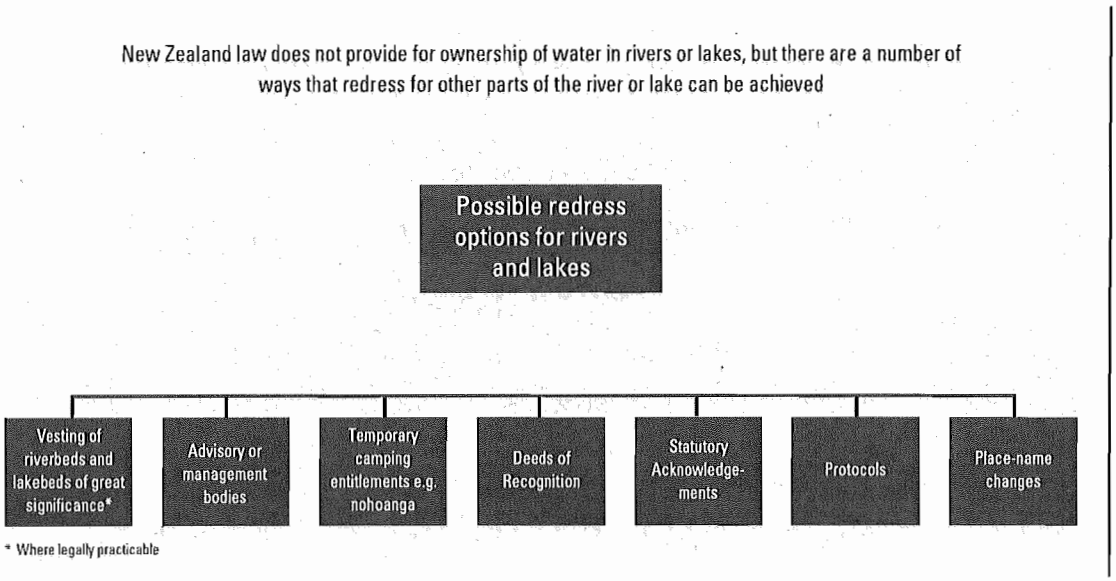



*Figure 3.7: some redress options for rivers and lakes*

*Redress options for waterways*

Within the limitations noted above, there are still many constructive and effective ways in which to meet claimant groups' cultural interests in lakes and rivers in settlements. The diagram on the previous page gives an overview, with more detail in the table above.

The options are designed to meet the interests and objectives of the claimant group through:

- claimant group involvement in the management or decision-making in relation to a waterway, and/or
- improved access to places where traditional foods, aquatic species or other resources can be gathered.

| *Redress options using statutory instruments for rivers and lakes* | *Further detail (page)* |
|---|---|
| Statutory vesting of fee simple estate (transfer of legal ownership of land under the water, where legally practicable), available only for rivers or lakes of great significance, and subject to a number of conditions | 126 |
| Statutory Acknowledgements | 132 |
| Deeds of Recognition | 133 |
| Protocols | 133 |
| Camping entitlements (Nohoanga or Ukaipo) | 134 |
| Place-name changes | 125 |

The range of options provides a great deal of flexibility in developing solutions to deal with each situation on a case by case basis. More detail on statutory instruments is in the section *Cultural Redress: Statutory Instruments* starting on page 126.

In addition, existing legislation recognises **Māori customary freshwater fishing rights**, and new regulations are being developed for the South Island, pursuant to the Ngāi Tahu settlement, to improve the ability of iwi to manage these rights on a local basis. These provisions and developments are noted on pages 117-118.

## Wetlands and lagoons, indigenous forests and tussock lands

*Significance to Māori*

These types of areas or ecosystems are grouped together as they often raise similar issues in negotiations. The available redress options are also similar across the range of such sites.

*Wetlands and lagoons*

There were once many more wetlands and lagoons in New Zealand, and they were valuable sources of traditional food and plants for Māori. Drainage and the development of agriculture, industry and housing have greatly reduced such areas, and they often face threats from pollution and introduced plants and animals.

*Indigenous forests*

Indigenous forests may be important for their links with tūpuna and tribal history, as locations of wāhi tapu and as sources of food and other natural resources such as logs for carving or medicinal plants.

*Tussock lands*

Such areas can seem barren compared to forests, but they still have great significance for their cultural associations or as sources of food and other natural resources. For instance, in the Ngāi Tahu settlement the transfer of the High Country Stations to Ngāi Tahu recognised the wide range of associations that these areas had for the iwi.

"TP3"

Ministry for the Environment
Manatū Mō Te Taiao

Environmental stewardship for a prosperous New Zealand
Tiakina te taiao kia tonui a Aotearoa

# Key Issues Emerging from Consultation

## Te riri me te mamae [anger and pain]

### General frustrations

One of the most striking and consistent themes to emerge from the hui is the anger, pain and sorrow many Māori individuals and communities feel due to the current state of New Zealand's freshwater resources, particularly the effects of pollution and over-allocation of water. Many things underlie these feelings - pain at the damage which has been caused to Papatūānuku (the waterways are seen as her veins) and the mauri of waterways, the cultural offence caused by practices such as sewage and effluent discharge, the damage to and loss of mahinga kai, damage to the health of those who rely on that mahinga kai, the loss of cultural wellbeing caused by degradation of the mauri of the waters, the cumulative effects on all aspects of wellbeing and much more.

For Māori, issues around water allocation and quality are not new, and many communities have been dealing with the impacts of declining water quality for years. Consequently, there is widespread frustration at a lack of action over the years on water management issues, which was reflected in the annoyance and even anger expressed by many hui participants in their verbal submissions (although almost all submitters remained courteous in the expression of their anger).

Poor water quality and declining quantities of water were raised as an issue at almost all of the hui, especially in regions with extensive dairy farming or sewage discharges to freshwater bodies.

Many people stated quite specific concerns about the impacts of poor water quality on both the waterways they relate to and their local community. These were often based on their own experience or knowledge of local impacts, or feared local impacts. The criticisms which were most commonly expressed were that water management did not give proper priority to the environment, that poor water quality and quantity had significant effects on indigenous species in waterways (including mahinga kai and taonga species), that some types of pollution were highly offensive in cultural terms, and that human health was being affected by water-borne pollutants or contaminated food sources.

While hui participants sometimes spoke about water quality issues in general terms, many also complained about water quality degradation caused by particular activities in their area (for example, sedimentation from subdivision, roads, or forestry; discharges from industry, sewage works or farming; fall in water levels due to forestry or abstraction for irrigation). These comments were frequently linked with the speaker's personal familiarity with the quality of waterways in the area, and the activities causing the impact.

### Consultation and process issues

There is support for the Sustainable Water Programme of Action kaupapa - some hui participants felt that the Sustainable Water Programme of Action was a good initiative with the potential for positive change. Engaging with Māori and local communities early in the policy development process and the opportunity to discuss issues at the hui was also supported by some, although the general view was that the hui should be the first step in a longer ongoing process of engagement with tangata whenua on freshwater management.

The climate of consultation on the Sustainable Water Programme of Action was influenced by Māori experience in other local and central government consultation processes. Some hui participants expressed cynicism about the central government approach to consultation, mostly due to late engagement with Māori resulting in non-meaningful consultation on issues in the past. Some also stated that past consultation has left them feeling as though their views were not incorporated into the feedback or the final policy, or that decisions had already been made prior to the consultation.

'Hui fatigue' was also cited as an issue by some participants, who find that attendance of hui can be a time-consuming commitment, with the same iwi and hapū members often required to attend hui and provide input for consultation on a number of concurrent issues without financial compensation for their time. Hui fatigue was expressed as an issue at the Sustainable Water Programme of Action hui, as they closely followed hui for foreshore and seabed, land access and aquaculture reforms, and the Review of the Resource Management Act 1991, with Treaty negotiations also proceeding in some areas.

This is the annexure marked "TP 3" and referred to in the affidavit of **TATA PARATA** sworn at Wellington this 7th day of February 2012 before me:

JP / (Deputy) Registrar/ Solicitor of the High Court of New Zealand

There were some other specific criticisms and dissatisfactions expressed regarding the Sustainable Water Programme of Action consultation process. These included inadequate advertising, notification and provision of information (mostly in the first week of the hui where there were problems with advertising), inadequate resourcing for Māori to participate in government processes, complaints about the venues and locations chosen (including the desire of many for engagement to take place at hapū or marae level), and the relatively short time available to consider the information and make written submissions.

The general nature of the government presentation meant that many participants did not have sufficient information to discuss some of the technical or unfamiliar aspects of the Sustainable Water Programme of Action. Discussion of some issues and actions (for example, those around market mechanisms as a tool) was limited and only took place in very general terms, due to a lack of detail in the presentation and the discussion document itself.

There were also some concerns that the information from the hui would not influence the policy process, and that the discussion document showed a lack of understanding or consideration of issues for Māori (see following section). Fears were expressed at some hui that the Sustainable Water Programme of Action could lead to privatisation of water, and if so, the consultation was insufficient.

The hui presenters gave undertakings at the hui in order to assure the participants that the Sustainable Water Programme of Action consultation process is genuine. Participants were told that minutes of the hui would be supplied to Ministers and treated as formal submissions, that the hui would be reported back separately so that the views expressed would remain clearly differentiated, and that this consultation round was part of the initial stage of developing policy for the Sustainable Water Programme of Action, with no decisions on the shape of the final policy package having yet been made.

## Scope of the Sustainable Water Programme of Action and the discussion document

The absence of any discussion of high-level Treaty issues (including issues around ownership of water) from the Sustainable Water Programme of Action discussion document *Freshwater for a sustainable future* was criticised at many hui. There was also particularly strong criticism from many of the hui that the discussion document makes little or no reference to Māori viewpoints, issues, and values. The absence of such references was alienating to many. Concerns were also raised that proposed actions to enhance Māori participation was only listed 11 out of 13 actions, when it should be at or near the top of the list, to reflect the Treaty relationship. The lack of prominence given to the issues for Māori has led to some participants in the hui being unwilling to fully engage.

Themes emerged regarding the scope of the Sustainable Water Programme of Action, and its sustainable development context. Many felt that a reprioritisation was needed to create an approach more in line with the principles of kaitiakitanga, with factors other than economic ones being given greater priority, and that the emphasis should be on enhancing rather than exploiting the water resource.

There was also a feeling in some areas that the Sustainable Water Programme of Action was not taking enough of a holistic view, as it did not consider issues and actions around urban water management, including stormwater and sewage treatment, or effects of freshwater management on the coastal environment and estuaries.

In relation to Māori participation in the Sustainable Water Programme of Action process, many at the hui supported the work done to date by the Māori Reference Group but sought changes to its composition. There was some support for a broader reference group with members from around the country representing waka or iwi.

## The need to deal with Treaty issues around ownership and partnership

As noted above, many people felt alienated by the lack of discussion of high-level Treaty issues, Treaty claims or Māori values in the discussion document. A few saw the question of freshwater management as essentially a Treaty issue. Many participants called for the Treaty to be a factor in determining the appropriate level of Māori involvement in freshwater management, and wanted consideration of the Treaty relationship to be a priority within the Sustainable Water Programme of Action.

Many speakers were of the view that Treaty-based relationship and ownership issues must be addressed before any major changes to water management can be considered, with some stating that this was especially so where changes which might result in auctioning or tendering of water rights, or privatisation of the resource, were being considered. Some participants asked for government to work to address and clarify some of the uncertainties around property rights in fresh water. A few submitters wanted it to be much clearer whether the Crown was assuming ownership or management rights. Article 2 issues, particularly the need to protect water as a taonga and give Māori the power to protect their taonga themselves, were also raised.

The Treaty settlement process was raised as an issue in some areas. Many iwi have claims with freshwater and natural resources aspects in the hearings or negotiations phases. Some have settlements which recognise interests in freshwater resources through mechanisms such as statutory acknowledgements.

There was a concern that those currently managing freshwater resources did not have a good understanding of the significance of historical Treaty claims and the issues they raised.

Hui participants expressed a wide range of views on the underlying ownership issues. Some have stated that Māori consider that the water resource belongs to them. A similar comment was that Pākehā have never bought the water resource, but assume they have the right to manage it. Others described the relationship of Māori to water as that of a rights-holder, compared to the interests of others who were stakeholders. Another point of view expressed was that no-one owns the water but someone has to manage it, and the question is who should do that.

Regardless of the views on ownership, there was a general consensus that iwi and hapū have some form of customary rights or interest in water, with a greater interest in its use and management than those who are seen as stakeholders.

Almost all of those who discussed the use of market mechanisms such as tradable property rights in water, or auctioning or tendering of rights to use water were opposed to such proposals. There was a common view that freshwater is essential to all, and that market-based approaches would advantage a wealthy minority at the expense of others. Some also felt that an increase in commercialisation would be a threat to the environment. The option also raised ownership issues for some, and a fear that Māori interests would be traded off or extinguished.

There was a view at some hui that the current system did not encourage water users to recognise the true cost and value of water, and that some forms of charging for the use of the water resource would be desirable because they encouraged efficiency and a greater valuing of the resource.

## Kaitiakitanga o Papatūānuku [water management]

### Traditional water management philosophies

The cultural perspective described by hui participants was one which is still influenced by the traditional Māori world view. Water was described as the essence of life and the lifeblood of Papatūānuku, often reflected in the use of the word 'mauri' (which can be translated as 'life force'). The significance of the tapu and wairua of water was also discussed. Participants recounted how fresh water is integral to their cultural and personal identity and wellbeing - rivers and lakes carry ancestral connections, identity and wairua for whānau, hapū and iwi, as reflected in all tribal pepeha and personal mihi. This importance was not only described in spiritual terms. Participants also described the value of freshwater as a resource that promotes social wellbeing for Māori communities and individuals through the capacity of healthy waterbodies to provide food, resources, and opportunities to maintain traditional connections and practices such as manaakitanga. The value of access to fresh water for the development of land or other economic and employment opportunities was also discussed.

The perspective that water always comes first as a resource, can be explained by the spiritual and cultural concepts underlying this, and are reflected by one of the whakataukī shared at the hui: 'Tuatahi ko te wai, tuarua whānau mai te tamaiti, ka puta ko te whenua' - when a child is born the water comes first, then the child, followed by the afterbirth ('whenua', which also carries the interpretation of earth, land and Papatūānuku).

Hui participants shared many aspects of traditional water management practices which are rooted in the principles of kaitiakitanga and care for Papatūānuku. As described at the hui, these practices are based on an approach which:

- emphasises responsible management through care, healing and replenishment of Papatūānuku rather than exploitation without replenishment
- does not distinguish between physical and spiritual approaches
- recognises the various states of water (including wai tapu, wai ora, wai kino, wai piro and wai mate [Waiora - waters of life, purest form of freshwater, gives and sustains life, can rejuvenate damaged mauri, counteracts evil. Waimate - dead water, has no regenerative capacity, mauri is lost, can contaminate other mauri of living things or other waters. Waitapu - waters of death, waters are tapu due to loss, restrictive (Jane West, presentation, WaiMaori Water Values, 2005).] )
- focuses on the protection and restoration of the mauri or life force of the water
- focuses on the health of waterways and their ability to replenish and heal themselves
- takes a holistic and whole-of-catchment approach to managing water.

The use of traditional Māori indicators for assessing the health and mauri of the water, such as the presence or absence of particular species were also discussed in many places. There was a desire for a much wider recognition of the value of mātauranga Māori (traditional knowledge) and the information about freshwater held within local communities to be complementary with current monitoring principles.

A few participants also cautioned that there was not a single Māori approach to water management, or a single set of traditional values for freshwater, but that each iwi and hapū have their own practices and

values. While there was a lot of consistency in the values expressed at hui, various examples of different tribal approaches were explained. For example, some iwi agreed with the 'mountains to the sea' approach taken by the Sustainable Water Programme of Action; while other iwi spoke of freshwater from puna (springs) to the sea, and their water management practices that reflect the groundwater origins of rivers and streams.

## Strong desire to be involved in decision-making and management at all levels

One of the fundamental complaints expressed at many of the hui was that the current water management system does not recognise the role of Māori as kaitiaki, or recognise the responsibilities and duties that come with kaitiakitanga within the water management system. Māori would like to see their concepts and values, such as giving effect to or restoring the mauri of waterways, as part of the water management framework.

As outlined above, there is a wide range of views on the underlying ownership interests in water, but a general consensus that Māori should have a special place in water management. Some expressed the view that more Māori participation in decision-making was necessary to protect Māori values and interests, which were otherwise invariably outweighed by national or majority interests. For most at the hui, the proposed action of 'enhance Māori participation' in the Sustainable Water Programme of Action discussion document did not go far enough to achieve a suitable role for Māori in water management.

While some spoke about improving the existing Māori role in water management, most participants sought a more active role in decision-making around water at a governance and management level, and more use of ongoing joint management arrangements for water bodies. Many also sought an appropriate role for at the Māori hapū/marae level. A few sought fundamental changes to the current system, such as recognition of Māori customary ownership of or rangatiratanga over water resources, and the Government approaching iwi and seeking permission for any matters to do with freshwater. This was, however, a minority view, with most participants seeking a partnership role for Māori in water management.

In many areas there was also an interest in forming more practical partnerships and relationships with local authorities over water management issues, such as local Māori communities working more closely with councils on water quality monitoring. In some areas people had already gained relevant monitoring skills and qualifications, and were keen to work with councils to improve monitoring practices and create employment opportunities in communities.

Participants of hui felt that improved Māori participation was a means of improving outcomes for all, not just for Māori. There was a strong sense that almost all of the community, including Māori, were seeking the same outcomes in terms of healthy waterways, and that Māori would therefore be acting in the interests of all. Many participants spoke of the advantages that greater Māori participation would bring, because they felt that Māori brought a particular passion for healthy waterways and special knowledge to water management.

Participants also felt there would be benefits for all from greater adoption of Māori water management approaches and principles because of the Māori focus on kaitiakitanga, health and wellbeing as well as economic factors (ie, a balancing of the components of the sustainable development approach), compared to what they saw as the focus of councils largely on economic benefits. As a result, many participants would like to see Māori as kaitiaki playing a much more active role in determining, monitoring and enforcing minimum standards for water, among other things.

The capacity and capability of iwi and hapū to engage with councils in both consultation processes and decision-making or joint management was raised as an issue in some areas, as many organisations lack the structures and resources to engage as they would like. This was seen as a major impediment to greater Māori participation. While some iwi have resource management units staffed by full-time staff, most iwi and hapū rely on voluntary contributions and people undertaking unpaid work to deal with councils and Resource Management Act processes. A common suggestion at the hui was that central and local government should make greater provision of resources to allow Māori organisations to participate effectively (perhaps through direct resourcing or shared funding with councils), which would lead to higher quality engagement and better Māori involvement. Many participants also sought assistance to develop technical/scientific skills to complement the mātauranga Māori (traditional knowledge) and kaitiaki skills already existing in Māori communities.

It was often noted that iwi and hapū are not resourced by local or central government to take part in the consultation processes under the Resource Management Act or with central government. This could result in limited resources being stretched far too thinly. It was also seen as a distinct disadvantage when dealing with other parties, such as council staff or lawyers, who are paid for their time, while iwi participants are not.

### Strong support for community-based solutions

Many hui participants suggested that communities and individuals were responsible for protecting and restoring the quality and mauri of waterways. Numerous examples were given of successful community-led projects which have effectively addressed water quality issues and changed behaviour, such as the 'Wanting Ahipara's Infected River Open Again' project run by Ahipara School in Northland. While some existing projects had received financial help from councils, many people were frustrated that other programmes did not receive any help for doing what was seen as the council's responsibility. There was a call for councils to resource groups with a passion for the work. It was also noted that these projects were often important for building better relationships with councils.

There was strong and widespread support for public education to be provided by central or local government to raise public awareness of water issues and promote water efficiency measures and better land management practices. Providing education about freshwater issues for children, councillors and farmers was seen as a high priority. This included introducing more education on water management to schools, educating councillors on environmental issues and tikanga, and providing land users with information on the impacts of water use. It was noted that water efficiency measures (eg, use of rainwater tanks for non-drinking water) which were once common are no longer widely used, and that these should be encouraged or required. It was felt that far less regulation would be necessary, and councils would be better able to achieve compliance, if the underlying problems with water management were understood.

## Te kawanatanga me te iwi Māori [relationships with local and central government]

### Variable relationships with central and local government

Given that most resource management is undertaken at local government level, existing relationships between Māori and regional and territorial authorities formed part of the background to consultation. Different hui reported variable relationships with local government. Some hapū and iwi reported good relationships and information-sharing processes with both councils and the wider community, while others spoke of poor relationships with councils and a feeling of exclusion from the decision-making process. Even in areas where relationships were generally good, nearly all hui participants who addressed this point sought a far greater and more active role for iwi and hapū in decision-making for freshwater management. There was a general view that the views and needs of other sectors of the community, such as farmers or industry, would always outweigh Māori concerns in local government decision-making.

Some hui participants considered that the inability or unwillingness of local authorities to work with tangata whenua, or to involve iwi in planning as the Resource Management Act provides for, as a significant barrier to high-quality Māori participation in water management. For this reason, some participants requested that central government take a greater role in water management (although others were nervous about greater central government involvement). It was felt that central government had a responsibility to provide guidance to local authorities on how to meet their obligations, and to ensure that Treaty matters were considered and honoured.

### Issues around the way the Resource Management Act is implemented

A number of hui participants expressed faith in the Resource Management Act as a world-leading overarching framework for managing water resources, and saw it as a definite improvement on earlier practices. While confidence in the Resource Management Act as a piece of legislation was expressed at a number of the hui, concerns were expressed about the effectiveness of the resource consent system in promoting efficient use of water. Some hui participants felt that the Resource Management Act was very poorly implemented by councils. Some participants suggested that the water management system should provide requirements for much stricter limits for minimum flows and water allocation and more enforcement. A review of all water permits in a catchment or region at the same time, and tools to allow councils and the community to address allocation issues using an 'integrated catchment' approach were also suggested.

The variable performance of councils in meeting their obligations under Part II of the Resource Management Act, as well as monitoring water standards and monitoring and enforcing resource consent conditions, was noted at a number of hui. Considerable dissatisfaction was expressed with the performance of councils in addressing water quality and allocation. It was also noted by many hui attendees that many councils could not provide good information on the total amount of water being taken. It was also suggested that councils have not sufficiently investigated the cumulative effects of water allocation and discharges. Some hui attendees considered that central government should monitor council performance to ensure that councils enforced compliance with consent conditions under the Resource Management Act. Some felt that, in smaller areas, there was not a sufficient gap between council governance and management structures, and that compliance staff were put under political pressure. Others complained that those with close relationships with councils received preferential treatment when often scarce resources were allocated.

Many at the hui felt that central government should play a greater role in setting standards for water quality, and that standards set should ensure water is safe to swim in and drink. There was also support for central government setting standards for council monitoring of water quality, and introducing central government monitoring of council compliance and performance with regard to the Resource Management Act. There was dissatisfaction that, in the 14 years since the Resource Management Act was passed, no national environmental standards on water have been developed. Some participants did, however, caution that setting national standards carried a risk, as they could encourage council performance only to the minimum level set in the standards. Others were concerned that setting a national standard might not reflect standards appropriate for their region or circumstances.

There was support for clearer direction and guidance from central to local government, in the interests of consistency across the country. This was a particular issue for iwi or hapū whose rohe includes more than one council.

## Ngā take a momo rohe o Aotearoa [regional issues]

### Regional concerns/focus

At each hui we heard about specific regional water issues including water quality problems, water allocation issues, and issues surrounding access to and ownership of freshwater. Issues were different in each region. Participants stated:

- water quality problems resulting from sewage, farm and industrial discharge, and council relationships
- allocation issues and property rights
- poor relationships with local councils and lack of opportunities to participate in water management
- balancing iwi and hapū interests in freshwater resources with the 'national interest' or majority interests where there has been significant hydro-electric development
- protecting access to freshwater for land use purposes, and ensuring that councils recognise freshwater interests and accordingly engage in ongoing consultation.

[ Previous|Next ]

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"TP4"

Waatea 603 AM
Urban Maori Radio

# Maori Divided on Water Ownership Strategy

## Wednesday 22nd September, 2010

The chair of Hawkes Bay iwi Ngati Kahungunu, Ngahiwi Tomoana, says there are major difference among Maori on water policy.

The Land and Water Forum, which includes a wide range of stakeholders including iwi, today released its report on freshwater management, including a recommendation that a National Land and Water Commission be established on a co-governance basis with iwi.

The report said it didn't consider the issue of iwi rights and interests in water, because that is subject to separate discussions betwen iwi and the Crown.

Mr Tomoana says a hui earlier this month of the Iwi Leaders Group was unable to achieve consensus on the issue.

"The iwi views ranged from one extreme to the other, one for privatization, others for customary ake tonu atu. It's about trying to get that iwi view, the one that's more prevalent," he says.



Print CANCEL

This is the annexure marked "TP4" and referred to in the affidavit of **TATA PARATA** sworn at Wellington this 7th day of February 2012 before me:

JP / (Deputy) Registrar/ Solicitor of the High Court of New Zealand

"TP5"

Waatea 603 AM

Urban Maori Radio

# Water Ownership Critical for Future Management

Monday 11th October, 2010

The head of a trust set up to promote Maori interests in freshwater fisheries says ownership of fresh water is as big an issue for Maori as the foreshore and seabed.

Morrie Love says while the government may see the recent report of the multi-sector Land and Water Forum as a way forward on water reform, it will fail it skirted the issue of ownership.

He says Te Wai Maori Trust believes Maori have not lost their customary ownership of water, because it was overlooked by settlers.

"The Maori food source was very much centred on the rivers with fish and birds, not many land mammals, so water was really the definitive thing. In English law of course the land was divided and land was the defining element," Mr Love says.

He says the government needs to engage with iwi and Maori if it wants to sort out a robust system for water allocation.



Print CANCEL

This is the annexure marked "TP5" and referred to in the affidavit of **TATA PARATA** sworn at Wellington this 7th day of February 2012 before me:

JP / (Deputy) Registrar/ Soliciter of the High Court of New Zealand

"TP6"

TUESDAY, MAY 10, 2011

# Water policy ignores untested ownership right

An expert in indigenous land and water rights believes the government could be picking a fight with Maori on freshwater management.

Jacinta Ruru, a senior law lecturer at Otago University, says the water national policy statement released yesterday sticks with the official line that no one can own the water.

She says that conflicts with common law understandings of indigenous rights.

"We have a doctrine, part of our legal system, that is recognising indigenous peoples' prior ownership of lands and management prior to the change in sovereignty, and although that hasn't been applied too much in New Zealand, it is the potential under the doctrine of native title whether that doctrine is going to recognized Maori ownership of water," Ms Ruru says.

The Maori Party has welcomed the water reform as acknowledging the significant relationship between iwi and fresh water.

This is the annexure marked "TP 6 " and referred to in the affidavit of **TATA PARATA** sworn at Wellington this 7th day of February 2012 before me:

JP / (Deputy) Registrar/ Solicitor of the High Court of New Zealand

Barrister

"TP7"

# DISCUSSION ON FRESHWATER
# A WAI MAORI PERSPECTIVE

**Historical Context**

- Water regulated by whanau and hapu as vital resource for pa and kainga. It is an integral political, spiritual and economic resource.
- Health of the water reflects health of people and is intimately linked with identity.
- Undivided entity – included lakes, lagoons, rivers, swamps, their associated beds and the adjoining land.
- Colonisation introduced a new way of managing the freshwater resource. Maori concept of water systematically fragmented.
- Crown's interpretation of Treaty is that they maintain sovereignty over water.

**Present State**

- Evolution of statute in New Zealand has led to uncertainty regarding rights in freshwater creating a tension between the Maori and Crown world views.
- Iwi have sought recognition of their tino rangatiratanga through the Waitangi Tribunal and the Treaty settlement process.
- In 1991 the introduction of the Resource Management Act manages all water resources.
- In 2003, the introduction of the Sustainable Water Programme of Action to improve the management of freshwater, protect freshwater resources into the future and acknowledge the fundamental importance of water to all New Zealanders.
- Iwi and Maori continue to have a strong interest in water quality and quantity and the life supporting capacity of water and will continue to have economic aspirations in water.

**Pathways for freshwater discussion – Wai Maori perspective**

- Rights based approach
  - Maori customary rights in water
  - Maori customary rights of In land waterways
- Management and use of water
  - Development of a robust management framework
  - Participation in the management of freshwater
- Habitat sustainability
  - Protection and enhancement of freshwater environment
  - Freshwater research

This is the annexure marked "TP7" and referred to in the affidavit of **TATA PARATA** sworn at Wellington this 24th day of February 2012 before me:

JP / (Deputy) Registrar/ Solicitor of the High Court of New Zealand

## Purpose

1. The purpose of this paper is to discuss the significance of freshwater to iwi and Maori and describe the present state of freshwater management in New Zealand. This paper also identifies key strategic areas for iwi and Maori for their own discussions on freshwater.

## Background

2. On 12 November 2007 Te Wai Maori Trustee Limited (Wai Maori) hosted a freshwater wananga in Wellington. The participants provided the mandate for Wai Maori to develop a guiding document that scopes iwi and Maori future in freshwater. This paper is also in response to the numerous conversations that are occurring amongst iwi and Maori regarding freshwater in light of the proposed policy change to water management in New Zealand.

## Historical Context

*Maori and Water*

3. Maori regulated fresh water and freshwater fisheries through kaitiaki and tohunga, whanau and hapu as vital resources for pa and kainga. What developed was a complex system of management including the use of rahui or temporary restriction and tapu for more permanent bans on the use of a water resource. Many iwi have proverbs about the unity of people and water. For example in the Whanganui area there is a saying 'ko au te awa, ko te awa ko au' (I am the river and the river is me).

4. Water formed part of an undivided entity whereby iwi did not distinguish between lakes, lagoons, rivers, swamps, their associated beds or the adjoining land. Maori land was not restricted to the waters edge but extended to the bed of the water body.

5. Waters were also ranked. From the sacred puna wai to the water in common use, wai maori and those of very limited use such as wai kino. Water and identity are intimately linked. For Maori certain things are believed to have or could be imbued with a mauri, or life essence and water or water bodies were believed to have a mauri of its own. Water with a healthy mauri will sustain healthy ecosystems and support cultural uses.

6. Mahinga kai was pertinent to the survival of iwi. They depended upon the knowledge of mahinga kai and participation in gathering from mahinga kai was important for maintaining traditional practices. It was also important that water quantity and quality was maintained as they impacted on these cultural values and traditional knowledge and practices.

7. Particular rights regarding natural resources are reflected in the Treaty of Waitangi through Article Two and in particular in the Maori version, the terms whenua, kainga and taonga and in English through the meaning of lands, estates and 'their fisheries'. Article Two of the Treaty of Waitangi guaranteed Maori full rights of ownership (exercise of tino rangatiratanga) of their lands, estates, forests, fisheries and other property. These rights exist until extinguished by the Crown.

*Crown and Water*

8. Since colonisation, the Maori concept of water as an undivided entity and as part of a system of lakes, rivers, lagoon's, swamps, their associated beds, and adjoining lands has been systematically fragmented. The Crown's interpretation of the Treaty of Waitangi is that they maintain sovereignty over Maori interests in water and since the Treaty of Waitangi it appears that considerable effort, primarily through statutory intervention, has been made by the Crown to vest ownership of water resources in itself (Durette, 2007).

9. Early statutes such as the Water Power Act 1903 vested in the government the 'sole right to use water in lakes, falls, rivers or streams' for the purposes of generating electricity. Also the Water and Soil Conservation Act 1967 vested in the Crown the 'sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste in to any natural water, or use natural water'. Under the Coal Mines Act all beds of navigable rivers have been vested in the Crown.

10. For non-tidal, navigable[1] rivers there is the English common law presumption above the tidal limit whereby, the owners of the riparian land (land with river frontage) own the river to the centre line or in the case of lakes to the centre point. The ownership regime only applied to the beds of the river and not the water. This is the *ad medium*

[1] Navigable rivers were a river of sufficient width and depth to be used for the purpose of navigation by boats, barges, punts or rafts.

*filum aquae* rule and therefore the beds of non-tidal navigable rivers are privately owned unless a particular Act has stated otherwise.

11. The practices of early Pakeha settlers conflicted with Maori law. For example a number of activities such as the transportation of logs down rivers which destroyed eel traps, and the introduction of trout, which decimated indigenous species of fish, destroyed Maori practices around food collection, as well as disrupting resource use rights (Bargh, 2007). This leads to the loss of traditional practices relating to the management of these entities.

**Present Situation**

12. The Maori and Pakeha conflicting positions regarding water has created a tension between these two world views. Iwi and Maori still maintain tino rangatiratanga over water and seek to manage as an undivided entity. However the impact of colonisation and the subsequent imposition of a statutory regime have meant that iwi and Maori have had to adapt and develop a completely different way of managing the freshwater resources. The interconnected Maori model of river, lakes, swamps, lagoons, river/lake beds and the adjoining land has been fragmented and replaced with a Pakeha model that had strong rules about land ownership with water being a common commodity.

*Ownership and Rights to Water*

13. Iwi have sought recognition of tino rangatiratanga through the Waitangi Tribunal and the Treaty settlement process. The Waitangi Tribunal in the Whanganui River Report found that the river was property that Maori possessed and it was claimed in the Mohaka River, Te Ika Whenua Rivers and the Whanganui River claims that rivers are taonga. In all three claims, the Waitangi Tribunal found that these rivers were unquestionably taonga of the claimants, over which they exercised dominion and were thus subject to the treaty guarantees.

14. The Treaty claim process provides one avenue for negotiation and clarification of water rights and can potentially provide opportunities for Maori to influence management of water resources (Durette, 2007). Treaty settlements with respect to water are limited but have included mechanisms with respect to lakes such as Waihora and Wairewa (Lakes Ellesmere and Forsyth) in Ngai Tahu's rohe, Lake

Taupo with Ngati Tuwharetoa, Te Arawa Lakes, and Waikato River with Tainui waka and geothermal water in Ngati Tuwharetoa ki Kawerau tribal boundaries.

15. These include models of co-management such as the Waikato -Tainui Agreement in Principle that sets up bodies to work from a shared and agreed vision while the Te Arawa Lakes model provides for a degree of ownership of the bed of the lakes and some role in management.

16. These will form the basis of likely future arrangements but fall short of true co-management where the iwi will be co-consent authorities and co-approve regional policies, plans and consents. Future settlements on water will struggle not to follow the two large precedents of Te Arawa Lakes and Waikato-Tainui, however these must be carefully examined to see if they are appropriate in other circumstances.

17. These negotiations are in keeping with the Crown's interpretation of the Treaty of Waitangi and full control of water is never quite transferred to Maori. But the settlements represent a means for Maori to secure meaningful rights in water that are made into legally binding documents and legislation (Durette, 2007).

*Management*

18. Maori have adopted a number of ways to deal with the management of water resources in the current environment such as kaitiakitanga, rahui, wai tapu and wai maori. Kaitiakitanga gives the responsibility of specific iwi appointed representatives to carry out particular functions, to keep and guard iwi interests and taonga while rahui is an act of prohibition used to conserve or replenish a resource and is often temporary.

19. Wai tapu and wai maori is where water may be considered tapu, or sacred because of its properties in relation to other water, tapu places or objects. Water bodies may be designated for common use as wai maori, and are not restricted by the prohibitions of tapu.

20. Within modern Maori resource management, restoring the ecological and spiritual integrity of degraded waterways is an important principle. This includes replenishing water quantity, improving water quality, and habitat restoration.

21. Within New Zealand, freshwater is managed by regional councils who are responsible for the water bodies within their boundaries through implementation of the Resource Management Act 1991 (RMA). They manage water allocation and quality issues by means of regional policy statements and regional plans (which can specify the amount of water that can be taken from certain water bodies and state how the water is allocated to users) and through the resource consent process.

22. There are two types of provisions that provide for Maori participation in the RMA. The first type is the provisions in part ii of the Act, namely Section 6(e), 7(a) & 8. The second type of provision arises as a direct result of the sections which require local authorities to consult or inform iwi or tangata whenua.

23. Section 6(e) specifically refers to water. It states that as a matter of national importance authorities shall recognise the 'relationship of Maori and their culture and traditions with their ancestral water'. Section 7(a) refers to kaitiakitanga as another 'matter' to have regard to in exercising their functions, and powers under the RMA. Section 8 is the specific reference to the principles of the Treaty of Waitangi as another matter to recognise in exercising their functions and powers. The Waitangi Tribunal has also articulated a number of resource specific principles one of which states that the spiritual and cultural significance of a freshwater resource to Maori can only be determined by tangata whenua who have traditional rights over the river.

24. However, Maori participation in environmental management depends, to an extent on the commitment of local authorities to follow the spirit of the legislation. Many Maori expect that they will be involved in environmental management processes relating to water and one of the main issues for them is the incorporation of cultural values into water management (Bargh, 2007).

25. The water rights and water management debate has gained momentum with the introduction of the Sustainable Water Programme of Action (SWPoA) in 2003. The government agreed to a strategy to improve the management of freshwater, protect freshwater resources into the future, and acknowledge the fundamental importance of water to all New Zealanders (Ministry for the Environment, 2006). The strategy focuses on three national outcomes for freshwater:

- Improve the quality and efficient use of freshwater by building and enhancing partnerships with local government, industry, Maori, science agencies and providers and rural and urban communities;
- Improve the management of the undesirable effects of land use on water quality through increased national direction and partnerships with communities and resource users; and
- Provide for growing demands on water resources and encourage efficient water management through increased national direction, working with local government to identify options for supporting and enhancing local decision making, and developing best practice.

26. The SWPoA aims to improve Maori engagement and participation in water management but Maori expressed concerns as to whether it will protect cultural values in water, provide a role in decision-making about water allocation that reflects the Treaty relationship, and allow for economic access (Ministry for the Environment, 2005).

27. It is the third outcome that contains the bulk of any likely legislative change and could have potentially the greatest impact on Maori interests in water as it is centred on processes for deciding who can have access to the water and how much water needs to be reserved for in-stream values such as environmental values and cultural uses (Bargh 2007).

28. The RMA provides the ability to transfer resource consents to take and use water from one location to another within the same catchment, and to discharge contaminants into water bodies. Transfers can currently only occur within the boundaries established by regional water plans. All the conditions, expiry dates, monitoring requirements or environmental performance standards, that attach to the consent are transferred with it.

29. The SWPoA proposes to investigate the current practice for transferring water consents and to determine whether separating the "take" and "use" aspects of consents will assist councils in using the transfer provisions in the RMA. Currently water permits are issued in many different forms. Some grant a certain volume of water for a specified use while other permits are issued without stating a specific use. The SWPoA will examine whether separating the "take" and site specific "use"

components of the permit could facilitate a focus on the different effects of the take of the water from the water body and the site-specific effects of the use of the water.

30. Separating the "take" and "use" aspects of water consents could also facilitate the use of "cap and trade" solutions, such as the proposed regime for Lake Taupo, to ensure a percentage reduction over time of nutrients entering the lake. This approach involves setting a maximum amount of discharge allowed to enter the lake and then providing for the transfer of discharge consents between land-users. The transfer of consents would occur within the total level of discharge allowed for the catchment (the cap). This approach could be more readily applied to other catchments where water quality is a problem, and could also be applied to transferring water use permits within set allocation limits for specific water bodies. The separation of "take" and "use" aspects of consents could help facilitate the trading within allocation limits, or maximum levels of discharge.

31. Bargh (2007) has concerns regarding the 'cap and trade' strategy and believes that will encourage the further introduction of the market mechanism to the use and allocation of water. Market mechanisms have already been introduced in some areas of the country to water allocation which has facilitated the establishment of public-private partnerships and privatisation. While some proponents of the efficiency of market mechanism believe that it promotes conservation and ensures greater choice for the consumer, the concern is that companies are driven by profit and there are uneven levels of power and influence in the water sector when the market mechanism is used. Maori tend to be at the end of this influence.

32. The establishment of a water market would also require both the recognition of customary rights in water but also the consideration of innovative approaches that give such rights commercial (or quasi-commercial) status (Schroder, 2004). Water strategies have focussed on the protection of indigenous customary values rather than using the emerging water markets to advance the economic position of indigenous people.

33. This is possible as evidenced in New Zealand's experience with fisheries. The fisheries experience has demonstrated that claims to water resources could eventually develop into some significant rights through judicial and legislative action, combined with strong government policy aimed at securing meaningful rights for Maori (Durette 2007). At the very least, it has served to bring Maori resource issues to the fore in New Zealand. It demonstrates how claims to water resources could be resolved in a mutually beneficial manner. It is arguable that Maori fishing rights have evolved to such an extent that it would be difficult to argue a historical connection anymore in many aspects of their participation in the fishing industry.

34. Given the evolution of water law in New Zealand whereby the government used a range of legislation to define water rights and vest in itself the ability to manage and allocate the water, where does this leave iwi and Maori?

**Pathways for freshwater discussions**

35. While this document focuses significantly on the historical and contemporary context of freshwater for iwi and Maori, this section aims to assist iwi and Maori in identifying their own pathways for discussions in freshwater.

36. Identified are three areas including; rights based approach, use and management of freshwater, and habitat sustainability. Wai Maori believes these are strategically important areas for iwi and Maori that occur at a regional level and national level. Iwi and Maori need to consider who is the most appropriate body to represent iwi and Maori interests.

37. Discussion is already occurring through a Te Taumata Korero comprising of iwi with strong interest in freshwater. This group has engaged with Ministers and the Prime Minister - specifically in relation to the SWPoA - to discuss iwi and Maori interests in freshwater. On particular issues, a collective effort is required to strongly influence of development of, for example, policy reform. Te Ohu Kaimoana Trustee Limited (Te Ohu) and/or Wai Maori have experience (Shared Fisheries) and capability to engage on these issues.

Rights based approach

*Maori Customary Rights in Water*

38. Tino rangatiratanga for Maori is reaffirmed in the Treaty of Waitangi and is therefore the starting point for determining Maori resource rights. Currently, there is legal uncertainty about the nature and extent of any Maori rights in freshwater and the use of market-based instruments for the allocation of freshwater resources raises the issue of freshwater ownership. This therefore questions whether it is possible for the Crown to create a property right in water that they do not own.

39. Any proposals to extinguish Maori customary rights in water must be negotiated with Maori as prior to colonisation, Maori held all the rights and simply possessed a river or lake or other water body including the bed, banks and the flow as a single entity.

*Maori Customary Rights of In land Waterways*

40. The introduction of the Foreshore and Seabed Act 2004 (FSSB) has parallels to the clarification of ownership and treaty rights in water for iwi and Maori. The FSSB was introduced in 2004 as a result of the application to the Maori Land Court by the iwi of Te Tau Ihu in 1997 for a declaration that the foreshore and seabed of the Marlborough Sounds was Maori customary land under Te Ture Whenua Maori Act 1993 (Te Ope Mana a Tai, 2003). This was to prevent tendering of coastal space by the Crown.

41. The result was the Crown legislated, imposing their ownership over the foreshore and seabed and provided pathways for iwi to determine territorial rights order or customary rights order. To date, Ngati Porou and Te Whanau a Apanui have signed heads of agreement that describe a range of tools and instruments to recognise Ngati Porou and Te Whanau a Apanui's customary interest in their seabed and foreshore. Ngati Pahauwera has an application for a customary rights order and the same acknowledgement given to Ngati Porou and Te Whanau a Apanui has been provided by the Crown. However, the Crown is still to respond to remaining issues including the ownership of the river and whether this has been extinguished (Powell, 2008).

42. It is on this basis that iwi and Maori could consider applying for declaration that the bed of a water body is Maori customary land or that held in a fiduciary capacity on behalf of the customary owners. This approach was followed by the iwi of Te Tau Ihu in the Marlborough sounds and has been utilised by a number of iwi in relation to lakes.

43. By asserting tino rangatiratanga over in land waterways Maori can potentially have a substantial involvement in the decision making relating to the management of that particular water body. Owners would be able to undertake their own developments (still pursuant to the RMA) but these could be given priority.

Management and Use of Water

*Development of a robust management framework*

44. Maori rights to participate in management of water are recognised through both legislation and recent Treaty settlements. The control of water and water resources has traditionally been vested in the government however there can be a coordinated effort for stronger role in the management of water from co-management arrangements, devolution of responsibilities, and involvement in the development of national policy statements. Co-management structures have a strong legal basis that obliges the government to engage Maori in natural resource management.

45. Iwi and Maori have a right to participate in the preservation of water resources for future generations. The development of an appropriate framework for interacting with iwi on key matters including issues of national importance to Maori are important to ensure better input into the decision making process (Te Ohu Kaimoana, 2004).

*Participation in the Management of Freshwater*

46. Iwi and Maori can continue to engage with regional councils under the provisions that provide for Maori participation in the RMA. The first is the provisions in part ii of the Act and the second arises as a direct result of the sections which require local authorities to consult or inform iwi or tangata whenua.

47. When regional and territorial authorities prepare or change plans required under the RMA, they must notify the relevant iwi authorities. They must also take into account any relevant planning document recognised by an iwi authority and lodge with the

council, the extent that it's content has bearing on resource management issues of the area. These planning documents are commonly referred o as 'iwi management plans'. Regional coastal plans are prepared by the regional council concerned, in consultation with the Minister of Conservation and the iwi authorities of the region (Te Puni Kokiri, 2006). Co-management is also available under the RMA but to date, no Maori group has been delegated this responsibility.

Habitat Sustainability

48. There are whanau and hapu groups that continue to protect and enhance their freshwater, freshwater species, and the adjoining land regardless of the discussions occurring around ownership. Wai Maori is aware that there is a strong desire that iwi and hapu reassert their mana over their freshwater fisheries recognising that restoring habitats is the foundation upon which fisheries can develop. These groups participate in central and local government processes to ensure the sustainability of their waterways.

49. Whakaki Lake Trust is an example of this. Their vision included restoration of their wetland, a secure economic future and providing for future generations. The project started in 1996 with the restoration of the natural flow of the main Rahui river flowing from the Whakaki Lake and opening it back to the sea.

50. Whanau and hapu also undertake a range of freshwater research to achieve their freshwater aspirations. This research is an effective way to advance Maori interests in freshwater. The research contributes to a broadening of Maori knowledge on freshwater fisheries restoration, protection, management and/or development.

**Summary**

51. This document discusses the significance of freshwater to iwi and Maori and provides the contemporary context for water ownership, use and management in New Zealand. Wai Maori consider this the start of the conversation on freshwater.

52. There exists a plethora of issues that effect iwi and Maori interests in freshwater however, Wai Maori has presented options that serve to assist iwi and Maori in their own discussions in freshwater.

**Summary**

53. This document serves as an over-aching discussion on freshwater by providing a historical and contemporary context for water ownership, use and management in New Zealand. Wai Maori consider this the start of the conversation on freshwater.

54. There exists a plethora of issues that effect iwi and Maori interests in freshwater and this document attempts to provide options for iwi and Maori in their own discussions in freshwater.

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