WAITANGI TRIBUNAL

Wai 2358

CONCERNING the Treaty of Waitangi Act 1975

AND the National Fresh Water and Geothermal Resources Inquiry

MEMORANDUM-DIRECTIONS OF THE TRIBUNAL

Introduction

1. This memorandum-directions addresses the request by the claimants that the Tribunal make an interim recommendation that the Crown not commence the share float of any of the four Mixed Ownership Model companies named in their claim until it has received the Tribunal's report and recommendations for stage one of this inquiry.

2. This request was initially made by the claimants as a part of their application for urgency. In our direction granting urgency we declined to make any interim recommendation to the Crown at that stage of proceedings (Wai 2358, #2.5.13).

3. The claimants renewed their request for an interim recommendation at the judicial conference of 24 April 2012, requesting that an interim hearing be convened in June 2012 to hear the parties on whether their case example evidence had established a prima facie case, and consequently whether an interim recommendation should be made that the Crown delay any sale of shares in the Mixed Ownership Model companies until the Tribunal has fully heard the claim and issued its report and recommendations for the Crown to consider (Wai 2358, #3.1.95).

4. In memorandum-directions dated 27 April 2012 we declined to hold an interim hearing prior to the hearing of the substantive claims. Instead, we directed that the Tribunal's hearing of the claims would proceed in two stages.

5. Stage one would consider the following issues:

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

   b) Does the sale of up to 49 per cent of shares in power-generating SOE companies affect the Crown's ability to recognise these rights and remedy their breach, where such breach is proven?

      i) Before its sale of shares, ought the Crown to disclose the possibility of Tribunal resumption orders for memorialised land owned by the mixed ownership model power companies?

      ii) Ought the Crown to disclose the possibility that share values could drop if the Tribunal upheld Māori claims to property rights in the water used by the mixed ownership model power companies?

c) Is such a removal of recognition and/or remedy in breach of the Treaty?

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

6. Stage two would consider the following issues:

e) Where the Tribunal has found in stage one that Māori rights and interests in freshwater or geothermal resources were guaranteed and protected by the Treaty, are these rights and interests adequately recognised and provided for today?

f) If not, why not?

i) In particular, is the current situation an ongoing or continuing consequence of past Treaty breaches that have already been identified in Waitangi Tribunal findings in relation to water resources, geothermal resources, or other natural resources (including Crown acquisitions of land in breach of the Treaty)?

ii) In particular, has the Crown asserted rights amounting to de facto or de jure ownership of water and/or geothermal resources? What is the basis of any such assertion, and is it consistent with Treaty principles?

g) If, having considered issues (e) and (f), we find there is a failure to recognise fully the rights and interests identified in issue (a) in stage one of this inquiry, is it causing continuing prejudice to Māori in relation to matters to which the Fresh Start for Fresh Water and/or geothermal resource reforms relate but which those reforms fail to address? If so, is this failure to address such issues itself a breach of principles of the Treaty of Waitangi?

h) Alternatively, could implementation of the Government's proposals under the Fresh Start for Fresh Water and/or geothermal resource reforms, without ascertaining and providing appropriate recognition of the rights and interests identified in issue (a) in stage one of this inquiry, cause prejudice to Māori in breach of principles of the Treaty of Waitangi?

i) If either of these breaches and/or other breaches have been established, what recommendations should be made to protect such rights and interests from such prejudice either by:

i) taking steps to fully recognise those rights and interests prior to the design or implementation of the reforms; or

ii) reworking the reforms so that the reforms themselves take cognisance of, and protect, those rights and interests in such a manner that they are reconciled with other legitimate interests in a fair, practicable, and Treaty-compliant manner.

7. The purpose of splitting the Tribunal's hearing of the claim into these two stages was to enable us to deliver a report and recommendations on the issue of the sale of shares in Mixed Ownership Model companies in as short a timeframe as possible, given the pressing nature of this issue for both claimants and the Crown.

8. In the memorandum-directions of 27 April 2012 the Presiding Officer also advised parties that at the conclusion of the stage one hearings the Tribunal would issue memorandum-directions addressing the claimants' request for an interim recommendation that the Crown delay any sale of shares until the Tribunal had issued its report and recommendations on stage one of the inquiry (Wai 2358, #2.5.19).

9. The hearing into stage one took place at Waiwhetu marae between 9 and 20 July 2012. Written submissions in reply to the Crown's oral closings were received from claimant counsel and counsel for interested parties on 25 July 2012.

10. We now set out our decision on the interim relief sought by the claimants that the Crown delay any sale of shares until the Tribunal has issued its report. It should be emphasised that this direction is not our report on stage one of the inquiry. As stated during the stage one hearing, this report will be released in September 2012, and will contain our findings and any consequent recommendations on the question, posed by the claimants, of whether the sale of shares in Mixed Ownership Model companies should proceed prior to a settling of the question of rights in water preserved under the Treaty of Waitangi.

11. This memorandum-directions will instead deal with the question of whether, in our assessment, the Crown should refrain from commencing the sale of shares prior to the issuing of the Tribunal's stage one report in September. We note that this is an interim direction setting out our assessment of the situation and not, as sought by the claimants, an interim recommendation. For the Tribunal to make a recommendation of this nature, we would first be required to make a finding as to whether all or part of the Wai 2358 claim was well-founded in terms of section 6(3) of the Treaty of Waitangi Act 1975. While we have heard extensive evidence and submissions in stage one of the inquiry, there will still need to be a period of consideration before we are able to make a decision on such findings in our report in September.

12. Prior to canvassing matters relevant to the interim direction sought by the claimants, we consider it important to set out, for the benefit of the parties, the role the Tribunal plays in the Māori-Crown relationship, and the Tribunal's jurisdiction in a claim involving current or former state-owned enterprise lands.

Role of the Tribunal

13. As stated in the Presiding Officer's concluding remarks at Waiwhetu marae on 20 July 2012, at the core of stage one of our inquiry is the question of Māori rights in freshwater and geothermal resources, and the connection between these rights and the sale of shares in Mixed Ownership Model companies. These are matters of national importance, which go to the essence of the Māori-Crown partnership and to the document that founded this partnership in 1840.

14. Since 1975 one of the main responsibilities with which the Waitangi Tribunal has been charged is that of monitoring this partnership to ensure that the Crown upholds its Treaty obligations and that the relationship between Māori and the Crown is a healthy one.

15. For the Tribunal the weight of this responsibility is very real. We consider that in our 37-year history the value of the Tribunal to Māori and to New Zealand has been demonstrated by the robustness and relevance of our reports, and their contribution to the Treaty partnership. As was stated in 2011 in the Wai 262 report:

> It is in the fact that the agreement of Waitangi took the form of a treaty that we see mutual respect for each other's mana, and it is in the Treaty's words that we find the promise that this respect will last forever. This is the essential element of the Treaty partnership confirmed time and again in the courts and in this Tribunal.... It is the core of our national identity. And it is unique.[1]

16. This claim, as with many with which the Tribunal has dealt, asks the Tribunal to take the role of monitoring and ensuring the integrity of the Crown-Māori partnership and relationship. We trust that both Māori and the Crown hear our words and that these words continue to add value to that relationship.

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[1] *Ko Aotearoa Tēnei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262), pp. xviii-xix.

Jurisdiction

17. The Waitangi Tribunal came into existence in 1975 with the passing of the Treaty of Waitangi Act 1975. It should be emphasised that the establishment of the Tribunal was a political response to the demand for a forum to address Māori claims that the Crown was in breach of its Treaty of Waitangi obligations.

18. The Tribunal was established as a permanent commission of inquiry in terms of the Commissions of Inquiry Act 1908. Our jurisdiction, as set out in the Treaty of Waitangi Act 1975, is to inquire into claims of Māori who allege the rights guaranteed under the Treaty of Waitangi have been breached by the Crown, and to make findings as to whether these claims are well-founded (s 5(1)(a) of the Act), in that the claimants will be prejudiced and the Crown actions or omissions complained of breach the principles of the Treaty of Waitangi (s 6(1) of the Act).

19. Where the Tribunal finds that a claim is well-founded, it may make recommendations in terms of s 6(3) of the Act that the Crown take the necessary action to compensate for or remove the prejudice suffered. These recommendations do not bind the Crown.

20. However, in certain circumstances the Tribunal can make recommendations that are binding upon the Crown (s 8A(2)(a) of the Act). This jurisdiction relates to particular memorialised state-owned enterprise, education and railway lands transferred by the Crown and land held under a Crown forestry licence. It should be noted that in their statement of claim the claimants reserve the right to request, by way of remedy, that the Tribunal exercise its binding recommendatory jurisdiction in respect of memorialised state-owned enterprise lands used for the generation or transmission of hydroelectricity or geothermal electricity (Wai 2358, #1.1.1(a), para 33.6).

21. Our powers relevant for this memorandum-directions are to be found in s 8(2)(a) of the second schedule of the Act, which enables the Tribunal to make directions of the type sought by the claimants.[2]

Interim Direction

22. The direction that the claimants seek is akin to an interim injunction in the High Court. Their view, as expressed in their memorandum of 24 April 2012 and at the judicial conference of the same date, is that the Crown should not sell any shares in the Mixed Ownership Model companies until the Tribunal has heard their substantive claim and issued its findings and any accompanying recommendations. Essentially they seek to preserve the status quo until their claim has been heard and reported on. This claimant request was echoed during the course of the hearing.

23. The Crown recognised this and described the nature of the proceedings in stage one of the Tribunal's inquiry as being 'tantamount to an injunction' and 'of an injunctive nature' (Wai 2358, #3.3.15, paras 7 and 12). Also in oral submissions to the Tribunal Crown counsel stated that "in a way, this part of the inquiry is an injunction". Viewing the recommendations requested by the claimants in stage one in this light, the interim direction sought prior to the release of the Tribunal's report on this stage can be seen as analogous to interim injunctive relief in the courts of general jurisdiction.

24. As set out above, the claimants' initial request for an interim recommendation prior to the stage one hearings was declined. This was on the basis that the Tribunal had, at the stage the request was made, received only minimal evidence which it could consider in relation to such a direction. Substantial evidence has now been placed before us, and we consider that we are now in a position where we can address the

[2] See, for example, Wai 422, #2.1; Wai 796, #2.9.

claimants' request, in the form of an interim direction, prior to completing our report and recommendations on stage one of this inquiry.

25. In deciding whether the interim direction sought by the claimants should be made, we consider that the principles applied by the courts of general jurisdiction in determining an application for an interim injunction, as set out in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*,[3] *Esekielu v Attorney-General*,[4] *Carlton & United Breweries Ltd v Minister of Customs*,[5] *Petherick v Commissioner of Inland Revenue*[6] and *Attorney-General v Mahuta*[7] are relevant. There is no single test, but adopting these principles, the considerations for the Tribunal are:

    a) Whether there is a serious question to be tried or inquired into; and

    b) Whether the balance of convenience favours making an interim direction that the Crown should preserve the status quo until the release of the Tribunal's report and recommendations.

26. The overarching consideration for the Tribunal must be that, if there is a reasonably arguable case, then the position of the parties should be preserved.

27. If there is a serious question raised by the claim, and if the balance of convenience favours maintaining the status quo, then in our view this would make out a sufficient basis for an interim direction concluding that the Crown ought to delay any sale of shares in the Mixed Ownership Model companies until it has had the opportunity to receive the Tribunal's stage one report and consider its findings.

Is there a serious question to be inquired into?

28. In stage one of the inquiry, the claimants (and interested parties that support their position), submitted first that the Treaty of Waitangi guaranteed and protected rights of rangatiratanga, kaitiakitanga, mana, control and management in freshwater and geothermal resources to Māori. Secondly, the claimants submitted that the Crown's proposed sale of shares in presently state-owned companies that generate electricity from freshwater resources removes the Crown's ability to both recognise these Treaty rights and provide a remedy for their past or ongoing breach.

29. In relation to the question of what rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty, it is acknowledged by all parties to this inquiry that a number of previous Waitangi Tribunal reports have considered and made findings as to Treaty rights and interests in freshwater and geothermal resources.

30. These reports include, amongst others, the 1984 *Kaituna River Report* (Wai 4), the 1985 *Manukau Report* (Wai 8), the 1992 *Mohaka River Report* (Wai 119), the 1993 *Ngawha Geothermal Report* (Wai 304), the 1998 *Te Ika Whenua Rivers Report* (Wai 212), the 1999 *Whanganui River Report* (Wai 167),), the 2008 report *He Maunga Rongo: The Report on Central North Island Claims, Stage 1* (Wai 1200), and the 2011 report *Ko Aotearoa Tēnei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262).

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[3] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129.
[4] *Esekielu v Attorney-General* (1993) 6 PRNZ 309.
[5] *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423.
[6] *Petherick v Commissioner of Inland Revenue* (1997) 11 PRNZ 92.
[7] *Attorney-General v Mahuta* CA71/99, 1 April 1999.

31. Certain relevant findings in relation to freshwater resources which demand articulation include:

- In the *Kaituna River Report* the Tribunal found that the Kaituna river was owned at and before 1840 by Ngāti Pikiao and Te Arawa; that this traditional ownership carried with it the free and uninterrupted right to fish the river, the estuary and the sea, together with the use and enjoyment of flora adjacent to it; and that such traditional rights had continued uninterrupted up until the present day. These traditional rights were found to be taonga guaranteed and protected by the Treaty of Waitangi, with the Tribunal recommending that a proposed pipeline discharging effluent into the river be abandoned as it was contrary to the principles of the Treaty, and that research undertaken into the discharge of such waste on the land 'in a suitable and practical manner'.

- In the *Mohaka River Report* the Tribunal found that rangatiratanga held by Ngāti Pahauwera and others over the Mohaka river pre-Treaty 'amounted to more than simply ownership of the river and its resources. It included the ability to control those resources in a manner determined by the tikanga, the customs, of the tribe itself to ensure their protection for future generations.'[8] Considering the effect of the Treaty on rangatiratanga over the Mohaka River, the Tribunal stated:

  > As we have said earlier, the exchange of sovereignty for the guarantee of rangatiratanga created a partnership between the parties requiring each to act in good faith toward the other. In the context of this claim we take that to mean that the parties are bound to recognise the interests of each other in the river.
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  > In the public interest the Crown has a responsibility to ensure that proper arrangements for the conservation, control and management of the river are in place. That responsibility, however, must recognise the Treaty interest of Ngāti Pahauwera by seeking arrangements which allow for the exercise of their tino rangatiratanga over the river. It is in the nature of the partnership that Crown and Māori seek arrangements which acknowledge the wider responsibility of the Crown but at the same time protect tribal tino rangatiratanga.[9]

- In the *Ika Whenua Rivers Report* the Tribunal found that rights, sometimes equivalent to English proprietary rights, were guaranteed to certain Māori groups (jointly called Te Ika Whenua in the report) in the Rangitaiki River, the Whirinaki River and the Wheao River by the Treaty, stating:

  > As at 1840, Te Ika Whenua were entitled to the full use and control of their rivers. The rivers were theirs and nobody could obtain use rights other than by submitting to their jurisdiction and control and through their authority or acquiescence.
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  > The Treaty promised to Māori in respect of their taonga – the rivers – full, exclusive, and undisturbed possession, something more than mere common law rights. This encompassed the two separate elements of tino rangatiratanga and full rights of use referred to above. Accordingly, Te Ika Whenua were entitled, as at 1840, to have conferred on them a proprietary interest in the rivers that could be practically encapsulated within the legal notion of ownership of the waters thereof. The term 'ownership' conflicts with the common law view because the waters were not captured but flowed on and were consequently available to other users downstream. Protection of those users' interests by way of preservation of the resource would be provided for by custom and protocol. Notwithstanding this limitation, the right of use and control of their rivers rested with Te Ika Whenua. We therefore describe the 'ownership' or property or proprietary right of Te Ika Whenua of or in their rivers as being the right of

[8] *Mohaka River Report* (Wai 119), p.19.
[9] *Mohaka River Report* (Wai 119), p.65.

full and unrestricted use and control of the waters thereof – while they were within their rohe.[10]

- In the *Whanganui River Report* the Tribunal found that the closest English law equivalent for the Māori customary rights that had been guaranteed and protected by the Treaty was ownership of a water resource, without distinction between its bed, banks, water, fisheries, or aquatic plants. The Tribunal observed that private ownership of water resources was also possible in England in 1840, by means of the rights by which riparian owners controlled access to and use of such water resources. The Tribunal found that exclusive possession and tino rangatiratanga guaranteed by the Treaty of Waitangi is still in force today in relation to the Whanganui river and its tributaries, except insofar as rights have been appropriated by others in breach of Treaty principles.

- In the Wai 262 report on indigenous flora and fauna and intellectual and cultural property, *Ko Aotearoa Tēnei*, the Tribunal considered Treaty rights over the environment as a whole, including rivers and other freshwater and geothermal resources. Considering what rights in relation to the environment were guaranteed to Māori under the Treaty, the Wai 262 Tribunal found that the Crown 'must actively protect the continuing obligations of kaitiaki towards the environment', with such protection encompassing control by Māori of environmental management in respect of taonga, where it is found that the kaitiaki interest should be accorded priority; partnership models for environmental management in respect of taonga, where it is found that kaitiaki should have a say in decision making but other voices should be heard; and effective influence and appropriate priority to the kaitiaki interests in all areas of environmental management when the decisions are made by others. Considering the question of 'ownership' in relation to the environment and the principles of the Treaty of Waitangi, the Wai 262 Tribunal noted that:

  > [A]lthough the English text [of the Treaty] guarantees rights in the nature of ownership, the Māori text uses the language of control – tino rangatiratanga – not ownership. Equally, kaitiakitanga – the obligation side of rangatiratanga – does not require ownership. In reality, therefore, the kaitiakitanga debate is not about who owns the taonga, but who exercises control over it.[11]

32. Certain relevant findings in relation to geothermal resources to which attention should be drawn include:

- In the *Ngawha Geothermal Report* the Tribunal stated that '[t]he tribunal has found that at the time of the Treaty, and for a long time before 1840, the hot springs of Ngawha and the associated sub-surface geothermal system were a sacred taonga over which the hapū of Ngawha had rangatiratanga. In this sense they "owned" the Ngawha geothermal resource.'[12] The Tribunal went on to hold that:

  > [A]lthough the claimant hapū no longer have an exclusive interest in the sub-surface geothermal resource they necessarily retain a substantial interest in the resource. The preservation of their taonga, the Ngawha hot springs, necessarily depends on the preservation and continued integrity of the underlying resource which manifests itself in their hot springs and pools. It is totally unrealistic to isolate or divorce their interest in the Ngawha hot springs from the geothermal resource which finds expression in them.[13]

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[10] *Te Ika Whenua Rivers Report* (Wai 212), p.124.

[11] *Ko Aotearoa Tēnei: A Report Into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262), p.270.

[12] *Ngawha Geothermal Resource Report* (Wai 304), p.133.

[13] *Ngawha Geothermal Resource Report* (Wai 304), p.135.

Against that evidential background the Tribunal held in respect of the Government's intended drilling of wells for geothermal power generation purposes 'that the Crown has acted in breach of Treaty principles in failing to ensure that the Geothermal Act 1953 and s 354 of the Resource Management Act 1991, which preserves existing rights to geothermal resources under the 1953 Act, contain adequate provisions to ensure that the Treaty rights of the claimants, in their geothermal resource at Ngawha, are fully protected. As a consequence the claimants have been, and are likely to continue to be, prejudiced by such breach',[14] and that '[t]he tribunal finds that the Resource Management Act 1991 is inconsistent with the principles of the Treaty in that it omits any provision which ensures that persons exercising functions and powers under the Act are required to act in conformity with the principles of the Treaty of Waitangi.'[15]

- In relation to Central North Island iwi, the Tribunal found in *He Maunga Rongo: The Report on Central North Island Claims, Stage 1* that:

> [A]t 1840 when the Treaty was signed the Crown guaranteed that in exchange for kawanatanga it would protect Central North Island Māori in the exercise of their tino rangatiratanga and authority at the regional level over the entire underlying common heat and energy system known as the TVZ [Taupō Volcanic Zone]. It also guaranteed to protect the autonomy and authority of each iwi and hapū residing at the district level in the exercise of their tino rangatiratanga over the specific geothermal resources and fields of that zone.[16]

33. Together with consideration of these Waitangi Tribunal reports, at stage one of the inquiry we heard the evidence of claimant witnesses from Ngāpuhi, Te Arawa, Ngāti Kahungunu ki Heretaunga, Pouākani, Ngāti Te Ata, Ngāti Rangi and Muaūpoko setting out their relationship with particular freshwater resources, including rivers, lakes, springs, and aquifers, and geothermal areas. While these witnesses expressed their ongoing relationship with these water bodies in a number of different ways, they all asserted a level of ongoing rangatiratanga, kaitiakitanga, and mana over them, interpreted variously as being equivalent to property rights, a right to control and manage, and a duty of care in relation to the resource. In their submissions, the claimants then invited the Tribunal to draw from this evidence, and the previous Tribunal findings on specific water bodies, a general set of rights recognised and preserved for Māori in the Treaty of Waitangi in relation to freshwater and geothermal resources.

34. Notably, the Crown has not sought to challenge the existence of such rights, albeit with the qualification, stated by Crown counsel and several Crown witnesses, that in their submission there cannot be any 'ownership' of a freshwater resource. Crown counsel and witnesses, however, acknowledged that Māori have rights in freshwater resources, without at this stage clarifying the content and extent of such rights as recognised by the Crown. In fact, Crown counsel began the oral presentation of his closing submissions to the Tribunal with the clear statement that:

> The Crown has never disputed that Māori have rights and interests in water. The first question that you ask in your list of questions is 'what rights, if any, do Māori have?' And that really gives rise to two questions, because the use of the phrase 'if any' means that the first question is 'do Māori have rights and interests in water?', and the second question is 'if so, what are they?' So to that very first question, the Crown has said, and says now, and repeats again, unequivocally and unqualified, the answer is 'yes'.

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[14] *Ngawha Geothermal Resource Report* (Wai 304), p.142.
[15] *Ngawha Geothermal Resource Report* (Wai 304), p.147.
[16] *He Mauga Rongo: The Report on Central North Island Claims, Stage 1* (Wai 1200), p.1500.

35. While the Tribunal's inquiry is concerned with rights preserved under the Treaty of Waitangi, there was some evidence canvassed by counsel as to whether there could be equivalent recognition of the property rights asserted by the claimants at common law. The Court of Appeal in *Ngāti Apa v Attorney-General* appears to have left the door ajar to consider the determination of such rights, stating that

> The common law as received in New Zealand was modified by recognised Māori customary property interests. If any such custom is shown to give interests in foreshore and seabed, there is no room for a contrary presumption derived from English common law. The common law of New Zealand is different.[17]

36. In the same judgment, Chief Justice Elias stated that:

> Any property interest of the Crown in land over which it acquired sovereignty therefore depends on any pre-existing customary interest and its nature.... The content of such customary interest is a question of fact discoverable, if necessary, by evidence.[18]

37. While the decision in *Ngāti Apa v Attorney-General* was limited to the issue of customary interests in the foreshore and seabed, it does raise the question, which the claimants have brought to us, of the extent of pre-existing Māori rights and interests in water and the need to examine these rights and their ongoing status.

38. It should also be noted that courts in Australia[19] and the United States[20] have considered this question and found the existence of customary title in water bodies.

39. Furthermore, the High Court (Full Court) decision in *Aoraki Water Trust v Meridian Energy* was cited by claimants as authority supporting the proposition that notwithstanding the provisions of s 122 of the Resource Management Act 1991, which declare that resource consents are neither real nor personal property, the common law may recognise property rights in water. Particular sections of the Court judgment were cited stating that, in relation to a permit held by Meridian Energy:

> [A] permit specifically allows the holder to remove property, in this case water, for its own purposes subject to express conditions, even though the resource is owned by the Crown.... While permits are not themselves either real or personal property, what is determinative in our view is that, when granting consent, [Canterbury Regional Council] created the right in Meridian to take, use or divert property, being surface water in Lake Tekapo, for a defined term.... Mr Milne's concession that Meridian's consents are of considerable economic value is explicable only on the basis of a recognition that such value derives from the holder's rights to use the property in accordance with its permits.[21]

40. It therefore seems clear to us that given Treaty rights of a proprietary nature have been found to exist in specific freshwater bodies in previous Tribunal reports; the Crown has acknowledged that Māori do have rights in fresh water generally; and New Zealand's Court of Appeal has left open to question the nature and extent of such rights and interests; these issues warrant serious inquiry. Putting it another way, they are serious issues to be inquired into.

41. There is then the second core question heard in stage one of this inquiry of whether the sale by the Crown of shares in companies that generate electricity from freshwater

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[17] *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643, para [86].
[18] *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643, para [31].
[19] *The Northern Territory vs Arnhem Land Aboriginal Trust* (2008) HCA 29; *Yorta Yorta Aboriginal Community vs Victoria* (2002) 194 ALR 358.
[20] *Winters v United States* (1908) 207 US 564; *Arizona v California* (1963) 373 US 546.
[21] *Aoraki Water Trust v Meridian Energy* [2005] 2 NZLR 268, paras [34]-[35].

resources would affect the Crown's ability to both recognise any Māori Treaty rights in these resources and provide a remedy for their past breach, if proven.

42. The claimants submit that the asserted Māori Treaty rights in water require a change in the power-generating companies' model for use of the water resource to recognise these rights, and that such an alteration will be either legally or practically impossible for the Crown to implement if shares in these companies have been sold to private investors. The claimants assert that the sale of part of the shares in the SOE companies before settling the nature and extent of Māori rights in respect of the water relied upon for the generation operations and profits of those companies is a breach of the Crown's Treaty duties to acknowledge and respect the pre-existing Māori rights guaranteed by the Treaty in respect of that same water.

43. Evidence and submissions were presented at the hearing as to the possibility that any Crown measures to recognise Māori rights in water after a share float could be subject to legal challenge by international investors under New Zealand's commitments under various international treaty and trade instruments. In addition to the potential for such legal challenges to bind the Crown, the claimants submit that the likelihood of challenges would have a 'chilling effect' on the Crown's willingness to recognise Māori property rights in water to the extent asserted by the claimants. The claimants also submitted that there would be, as a practical matter, pressure brought to bear on the Crown by private shareholders not to implement any policy that would have the effect of diminishing the value of shares in power-generating Mixed Ownership Model companies, including any recognition of Māori property rights in water that would have the effect of imposing constraints or a cost on the use of water by such companies. Finally, the claimants submitted that the sale of shares in power-generating Mixed Ownership Model companies can be equated to selling shares in the water utilised by these companies, as the companies rely on the water resources they control for the generation of power, and in many instances have exclusive rights to control and use such resources for a specified period (commonly 35 years).

44. The Crown disputes these contentions, submitting that the partial sale of shares in the power-generating companies does not affect the Crown's ability to recognise Māori rights in the water resources utilised by these companies, where such rights are later proven.

45. In relation to the legal challenges proposed by the claimants, the Crown submits that any such challenges are unlikely to be upheld, and as such will have no 'chilling effect' on the Crown. In relation to the pressure that may be put on the Crown to not enact any recognition of Māori rights in water in a manner that would potentially devalue shares in Mixed Ownership Model companies, the Crown submits that there are many means by which such recognition could be effected without any impact on share values. Even where recognition could affect share values the Crown submits that it would not avoid taking such action, pointing to the recent implementation of the Emissions Trading Scheme as an example of the Crown enacting socially responsible policy despite the financial burden that such policy places on individual landowners. The Crown emphasised that the possibility of future Crown steps to recognise Māori rights in water would be listed in the 'risks' section of the prospectus for the initial public offering of shares in any power-generating Mixed Ownership Model company, so that all potential investors would be aware of the possibility of future action by the Crown to recognise Māori rights in water.

46. In relation to the argument that the sale of shares in Mixed Ownership Model companies is effectively the sale of shares in the water resources utilised by these companies, the Crown submits that there is no clear nexus between shares in a power-generating company and rights in the water used by that company, and that any Crown action to recognise Māori rights in water will be arrived at independently of whether the

shareholding of the Mixed Ownership Model companies is altered. The Crown also submits that as there are already a number of completely privately-owned companies that generate power from water resources, the additional sale of shares in Mixed Ownership Model companies will not in any way alter the Crown's response when it comes to considering and implementing policy in relation to Māori water rights.

47. Regardless of whether the claimants' evidence, in our deliberations and stage one report, is found to establish a connection between any Treaty rights in water and the sale of shares in the companies in question – and, further, whether such a connection establishes a Treaty breach on the part of the Crown – the claimants' position as put to us at this stage is not an implausible one. Where the Crown alters the nature of the shareholding of a Crown owned body utilising freshwater resources, it is in our view arguable that this may alter its ability, either in a legal or practical sense, to recognise any proven Treaty rights in such resources, or to remedy their breach.

48. As a result of this discussion, we are of the view that the second core question in stage one is also of substance and warrants serious inquiry.

Balance of Convenience

49. As we have found that there is a serious question to be inquired into, we must now consider whether the balance of convenience favours making an interim direction concluding that the Crown should preserve the status quo until the release of the Tribunal's report and recommendation into stage one issues.

50. The claims before us are premised on the argument that to sell shares in the power-generating Mixed Ownership Model companies would compromise the Crown's ability to recognise Māori Treaty rights in water and remedy this prior breach. Clearly, were shares in one or more Mixed Ownership Model companies sold prior to the Tribunal's report, the Crown would have limited its ability to address the report if the Tribunal finds in favour of the claimants.

51. We are aware that were the Tribunal to make recommendations in favour of the claimants in its stage one report, the Crown has stated that it could repurchase any shares sold in the Mixed Ownership Model companies. This is, however, only a partial factor in weighing the balance of convenience, as the shares, once sold, can only be repurchased from a willing seller and may require a prohibitively expensive outlay. The only other option available to the Crown, were it to wish to return the Mixed Ownership Model companies to full Crown ownership, would be to pass legislation compulsorily reacquiring the shares sold in the companies.

52. The sale of shares in Mixed Ownership Model companies could therefore cause a significant disadvantage to the claimants, were their claims to be determined to be well-founded by the Tribunal.

53. The delay of an initial public offering of Mixed Ownership Model company shares would, however, have significant implications for the Crown. Crown counsel have stressed to us the complicated and detailed work involved in preparing a share float of this nature. They have also submitted that the sale of shares in the power-generating Mixed Ownership Model companies is a major policy initiative of the current government. That point is well made and accepted by us. The Tribunal must always take care in considering whether to direct that the Crown ought to delay a policy initiative, particularly one of this scale (and upon which budgetary considerations and other policy initiatives are dependant), to enable an as-yet-unproven claim to be heard and recommendations made. The inconvenience to the Crown of a prolonged delay to the proposed share sale would clearly exist.

54. However, the timing of the proposed share float is an important factor in assessing the balance of convenience, and with the Tribunal planning to release its stage one report in September, it may be that in reality the Crown's planned share float may not be delayed at all (or might only be subject to a minimal delay). The Crown's witness, Mr John Crawford, Deputy Secretary of the Treasury, advised that the latest possible time for selling shares this year in the September–December slot is the first week in December.

55. The Crown have, through their counsel, stated that they are not in a position to confirm when the initial public offering (IPO) of the first Mixed Ownership Model company, Mighty River Power, will occur. As noted, Mr Crawford gave evidence that this IPO would take place in a slot between September and the first week of December. When questioned on what would be contained in the 'risks' section of the IPO prospectus dealing with Treaty of Waitangi issues, this witness told us that Treasury is awaiting the Tribunal's report on stage one of the inquiry before drafting this section of the prospectus. When it was put to him at hearing that the Tribunal intended to issue its report in September, the witness stated that, without wanting to commit the Crown with his statements, that this was "the sort of timing that we have in the back of our mind".

56. We note that in closings Crown counsel sought to modify this position slightly, stating that the Crown hoped to receive the Tribunal's report 'by the end of August'. Taking this submission along with the statements of the Treasury witness, the Tribunal infers that there will either be a minimal delay to the Crown's current plans if a report is issued in September, or no delay at all.

57. For these reasons, we find that the balance of convenience favours the maintenance of the status quo and the preservation of the position of the parties until the Tribunal has issued its findings on the issues before it in its stage one report.

Conclusion

58. As previously stated, this is an issue of national importance. It is also an issue which has been before Māori and the Crown for a considerable time, a fact which is reflected in the previous Waitangi Tribunal reports on freshwater and geothermal issues and in the acknowledgments made by Māori and the Crown during the hearing of this claim.

59. In the interests of the Māori-Crown relationship, and all New Zealanders, the issues raised in this stage of the inquiry are serious ones that warrant measured consideration.

60. We also consider that the balance of convenience favours maintenance of the status quo.

61. We therefore conclude that the Crown ought not to commence the sale of shares in any of the Mixed Ownership Model companies until we have had the opportunity to complete our report on stage one of this inquiry and the Crown has had the opportunity to give this report, and any recommendations it contains, in-depth and considered examination.

62. Finally we consider the words of Cooke P in the *Radio Frequency (No.1)* case are apposite to this situation:[22]

> In short I am driven to hold that no reasonable Minister, if he accepted that the Crown is bound to have regard to Waitangi Tribunal recommendations on Māori broadcasting, could do other than allow the Tribunal a reasonable time for carrying out its inquiry. To allocate frequencies without waiting would be to abort its inquiry and

[22] *Attorney-General v NZ Māori Council* [1991] 2 NZLR 129, p.139

probably contrary also to the purpose of the Treaty of Waitangi Act 1975. It would deprive the Government of the day of the opportunity of taking into account in an effective way highly relevant considerations, namely the findings to be made by the Tribunal.

The Registrar is directed to send a copy of this direction to counsel for the claimants, Crown counsel and all those on the distribution list for Wai 2358, the National Fresh Water and Geothermal Resources Inquiry.

DATED at Wellington this 30th day of July 2012

Chief Judge W W Isaac
Presiding Officer

Professor Pou Temara
Member

Dr Robyn Anderson
Member

Dr Grant Phillipson
Member

Mr Tim Castle
Member

Mr Ron Crosby
Member