WAITANGI TRIBUNAL

Wai 2357
Wai 2358

CONCERNING the Treaty of Waitangi Act 1975

AND an application for an urgent hearing by Sir Graham Latimer, Tom Murray, Taipari Munro, Kereama Pene, Rangimahuta Easthope, Peter Clarke, Jocelyn Rameka, Eugene Henare, Nuki Aldridge, Ani Martin, Ron Wihongi, Eric Hodge, Walter Rika, Emily Rameka, Maanu Paul, Charles White and Whatarangi Winiata

DECISION ON APPLICATION FOR URGENT HEARING

Introduction

1. On 7 February 2012, two new claims were filed with the Waitangi Tribunal. The first, Wai 2357, concerned the Crown's proposal to sell a minority shareholding in certain power-generating state-owned enterprises ("SOEs") to private investors. The second, Wai 2358, concerned Māori rights under the Treaty in aquifers, springs, streams, lakes, rivers, and geothermal resources.

2. In an application filed on the same date, the claimants requested that the Tribunal accord urgency to the hearing of both claims. The claimants sought that each claim be heard separately, with priority being accorded to the urgent hearing of the Wai 2357 claim.

3. A Crown response to this application was sought by the Chairperson and received, in relation to the Wai 2357 claim, on 23 February 2012, and in relation to the Wai 2358 claim on 24 February 2012. Reply submissions to the Crown position were filed by the claimants on 27 February 2012.

4. A teleconference was convened by the Chairperson on 29 February 2012 to hear the parties on the application for urgency. There were appearances from the counsel for the claimants, the Crown and a number of interested parties who had filed submissions supporting, opposing, or noting their interest in the claims and the application for urgency. At the teleconference, the Chairperson noted that the basis on which the claimants sought urgency had been altered in their 27 February reply submissions, and that they now sought that both claims be heard together, with the Tribunal reporting its findings by the third quarter of 2012 or as soon thereafter as practicable. The Chairperson directed the claimants to revise and refile their pleadings in light of this change, with a response from the Crown and interested parties to follow prior to a

judicial conference that would hear the parties as to whether an urgent hearing should be granted.

5. Before this judicial conference, the Chairperson appointed, under clause 8(2) of the second schedule of the Treaty of Waitangi Act 1975, a panel of Tribunal members to determine the application for urgency. This panel is the Chairperson, Professor Pou Temara, Mr Tim Castle and Dr Grant Phillipson. The panel's function is not to consider whether the claims are well-founded or whether the Crown's conduct is consistent with Treaty principles, but solely to determine whether an urgent hearing of the claims would be justified in all the relevant circumstances.

6. The judicial conference was convened on 13 March 2012. Counsel for the claimants, Crown and interested parties addressed the Tribunal on the application for urgency, including the key criteria of whether significant and irreversible prejudice was likely to be caused to the claimants by current or pending Crown actions; whether there were any alternative remedies available to the claimants; and whether the claimants were ready to proceed urgently to a hearing.

7. For the reasons which follow, the application for an urgent hearing of the Wai 2357 and Wai 2358 claims is granted.

Background

8. In February 2012, the Crown embarked on consultation with Māori over its proposal to remove Mighty River Power, Genesis Power, Meridian Energy, and Solid Energy from the ambit of the State-Owned Enterprises Act 1986 ("SOE Act"). The Crown's plan was to adopt the 'mixed ownership model', already in place for Air New Zealand, by selling up to 49 per cent of its shares in these power companies to private investors.

9. In its consultation document of February 2012, the Government confirmed its intention to retain a controlling interest in all four companies, retaining at least 51 per cent, and otherwise offering shares in those companies for sale over the next three to five years. No private investor would be allowed to obtain a share greater than ten per cent. The sale process would begin with Mighty River Power in 2012. Māori were advised that they would have 'the same investment opportunities as all other New Zealanders'; that is, Māori individuals or collectives could buy shares, using Treaty settlement compensation to do so if they wished. Māori who had not yet settled could either use the cash component of their settlement redress to buy shares in the future, or have the Crown buy shares for them on the stock exchange at the time of settlement, again using the cash component of their settlement. But the issues of Māori participation as investors, and the relationship between the floating of shares and compensation for Treaty claims, were specified as matters outside the scope of the consultation. Māori were also advised that interests in fresh water or geothermal resources were similarly excluded from the consultation.[1]

10. What, then, was the focus of this consultation with Māori? What the Crown said is this: it was consulting Māori to ensure that 'it fully understands Māori views on how Māori rights and interests under the Treaty of Waitangi are affected by the proposals'.[2] Specifically, the removal of the four SOEs from the SOE Act could potentially end the protections provided Māori interests under sections 9 and 27 of that Act. The Government advised Māori that the protections of sections 27A-D, enabling the

[1] New Zealand Government, '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 Maori*', February 2012, attached as annexure TP1 to the affidavit of Tata Parata, Wai 2357 doc A1

[2] Ibid, p 6

Tribunal to order the resumption of land that had been transferred to an SOE, would be retained. In terms of section 9, which provided that the Crown could not act in a manner inconsistent with the principles of the Treaty, the Government proposed three options for consultation: retaining section 9 (applied to the Crown shareholding); including a new provision specifying the Crown's Treaty obligations; or having 'no general Treaty clause'.[3]

The Claims

Wai 2357 – The Sale of Power Generating State-Owned Enterprises Claim

11. After discussion of the Crown's proposals among Māori at Waitangi on Waitangi Day, Sir Graham Latimer filed two claims with the Tribunal on 7 February 2012, seeking an urgent hearing of these claims. The first claim, registered as Wai 2357, concerned the Crown's proposal to transfer up to 49 per cent of shares in the four SOEs to private investors. This claim was made by Sir Graham Latimer on behalf of the New Zealand Māori Council (for all Māori), Tom Kahiti Murray on behalf of the Tai Tokerau District Māori Council, and ten sets of claimants who 'have proprietal interests in significant fresh water and/or geothermal resources':

    a) Taipari Monro, chairperson of Whatitiri Māori Reservation (Poroti Springs), Northland, in the rohe of Ngāpuhi Nui Tonu;
    b) Kereama Pene and Rangimahuta Easthope, as 'owners in Lake Rotokawau', in the rohe of Ngāti Rangiteaorere o Te Arawa;
    c) Peter Clarke and Jocelyn Rameka, 'as owners in Lake Rongoaio', in the rohe of Ngā Hapū o Tauhara;
    d) Eugene Henare, as 'an owner in Lake Horowhenua', in the rohe of Muaupoko;
    e) Nuki Aldridge, Ani Martin, and Ron Wihongi, as Kaumātua of Ngāpuhi and as owners in Lake Omapere, Northland;
    f) Eric Hodge, as 'an owner in Tikitere Geothermal Field', in the rohe of Ngāti Rangiteaorere;
    g) Walter Rika, 'as an owner in Tahorakuri Māori Land Block situate at Ohaaki, Reporoa';
    h) Peter Clarke and Emily Rameka, as 'owners in Tauhara Mountain Reserve (4A2A), Taupo';
    i) Maanu Cletus Paul and Charles Muriwai White, as 'members of Ngai Moewhare, a marae located in the rohe of Ngāti Manawa and a claimant in Te Ika Whenua inquiry'; and
    j) Whatarangi Winiata, for all hapū of Ngāti Raukawa who 'have an interest in the Horowhenua/Manawatu water systems'.[4]

12. In brief, the Wai 2357 claimants alleged that their outstanding Treaty claims in respect of freshwater and geothermal resources could not be redressed solely by the return of land under the section 27B protections of the SOE Act. Nonetheless, any such return of land will be much less likely once the Crown has ceased to be sole owner of the power companies. Also, the Crown's ability to provide practical redress for their Treaty claims, in the form of shares in the power companies, would likely be reduced if privatisation went ahead without section 9 protections. As a result, 'the pool of assets and range of potential remedies' for well-founded claims would be reduced. The claimants sought recommendations that section 9 protections 'not be removed', and that the sale of

[3] Ibid
[4] Statement of Claim, Wai 2357 Paper 1.1.1

shares should not proceed until their claims had been resolved, or an acceptable compromise had been negotiated with the New Zealand Māori Council.[5]

Wai 2358 – The National Fresh Water and Geothermal Resources Claim

13. The second claim, filed by the same claimants and registered as Wai 2358, was labelled the 'National Water and Geothermal Claim'. In brief, the claimants alleged that their customary rights and tino rangatiratanga over aquifers, springs, streams, lakes, rivers, and geothermal resources had been guaranteed by the Treaty of Waitangi in 1840, but that these rights have been systematically violated or denied by the Crown through a number of historical policies or actions, relying either on the common law or statute law. Although such rights (and Treaty breaches) have been identified in previous Waitangi Tribunal inquiries, the Crown's settlement policy refuses recognition of those rights, and therefore redress or compensation in relation to them. As a result, the Crown continues to deny Treaty rights and tino rangatiratanga in respect of freshwater and geothermal resources, which has three prejudicial effects:
    a) Māori are denied the right to profit from 'development uses' of water and geothermal energy;
    b) Māori interests are prejudiced by their lack of control, so that they cannot prevent harm and degradation of significant cultural treasures (taonga); and
    c) Māori who have settled or will settle Treaty claims are denied compensation for prejudicial breaches of their Treaty rights in respect of water and geothermal resources.[6]

14. As remedies, the claimants seek (among other things) binding recommendations for the return of memorialised section 27B properties, and/or a recommendation that 'the claimants be granted a substantial shareholding interest in the Crown's Power Generating State Owned Enterprises'.[7]

15. When the claims were registered, the Tribunal's Chairperson noted that they had been filed after the 1 September 2008 historical claims deadline, and that the Tribunal could therefore only inquire into allegations 'to the extent that they relate to the period after 21 September 1992'.[8]

Application for urgency

16. The claimants initially sought an urgent, but separate, hearing for each of the claims. Counsel submitted that the SOE claim (Wai 2357) should be 'progressed immediately', and that the National Water and Geothermal claim (Wai 2358), 'potentially together with the outstanding historical water claims of participating claimants', should be progressed 'on a secondary but still urgent timetable'.[9]

17. Their grounds for this submission was that the SOE claim was in effect a subset or essential component of the national fresh water and geothermal claim; the Crown's proposed privatisation of power company shares offered a unique and pressing opportunity to provide a remedy for alleged breaches of Māori proprietary and Treaty rights in water and geothermal resources. In its Treaty settlement policies, the Crown 'refuses to recognise any proprietal interests or commercial rights or rights of user to Māori'.[10] This includes 'a refusal to compensate or to provide for future rights in respect

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[5] Ibid
[6] Statement of Claim, Wai 2358 paper 1.1.1
[7] Ibid, para 25.5
[8] Memorandum-directions of the Chairperson, 9 February 2012, Wai 2357 paper 2.5.1
[9] Counsel for claimants, memorandum accompanying application for urgency, 7 February 2012, Wai 2357 paper 3.1.2, para 2
[10] Ibid, para 11

of hydroelectricity (and implicitly geothermal) power generation. It is exactly these rights which reflect forward-looking Māori rangatiratanga aspirations for these resources.'[11] That being the case – and given the possibility that the law may never recognise Māori proprietary rights in water or geothermal resources – the claimants' view is that shares in the power companies are a 'reasonable proxy for the commercial and economic aspect of that rangatiratanga/ownership which they believe should be returned to them'.[12]

18. In essence, the case for urgency at this point was that there is a very short time frame in which this 'reasonable proxy' might be achieved (between now and the first sale of shares), and that without Tribunal intervention, it was unlikely that the Crown would provide the redress sought. Counsel for the applicants submitted: 'Once 49% is sold, it is unrealistic to think that the Crown would buy back shares to vest in Māori. Having guaranteed the public would retain a 51% share, the government would also be unable to provide any of those shares to Māori by way of redress.'[13] Such redress would be even less likely, in the claimants' view, if the law no longer required the Crown to act in accordance with section 9 of the SOE Act. Māori would no longer be able to seek the intervention and protection of the courts. Also, the sale of shares to private investors would create a new class of private interests opposed to resumption orders under section 27B, making it significantly less likely that these could provide any real or effective remedy for well-founded Māori claims. As a result of all these concerns, the claimants believed that the Crown should not start selling shares until their claims had been resolved or a satisfactory compromise had been negotiated.

19. In respect of the Tribunal's criteria for granting urgency, the claimants argued that the original *Lands* case in the Court of Appeal[14] hinged on the prejudice that would arise from the Crown divesting itself of:

> most of the finite resources potentially available for the settlement of Maori grievances. This remains the case for the power generating SOEs in respect of the potential return of commercial and economic interests in (or derived from) water and geothermal resources. The relevant SOEs effectively own or possess the assets and large-scale commercial rights to use water and geothermal energy for power generation. The return of those rights in some practical manner is the redress ultimately sought by claimants in their water and geothermal claims ... The government itself has estimated that the partial sale of these power generating SOEs will deliver $5-7 billion. Those sales are irreversible, and the assets held by those SOEs are irreplaceable. Those figures also helped to identify the massive potential size of prejudice to Maori, if they miss out on appropriate redress related to water and geothermal resources.[15]

Crown response

20. In memoranda filed on 23 and 24 February 2012, the Crown notified the Tribunal that it opposed an urgent hearing in relation to both claims. Although the applications for urgency were the subject of a single submission by the claimants, the Crown responded to them separately.

Wai 2357

21. In its submission on the Wai 2357 claim, the Crown argued that the claimants had not demonstrated 'imminent significant and irreversible prejudice without alternative

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[11] Ibid, para 11
[12] Ibid, footnote 5
[13] Ibid, para 16.4
[14] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641
[15] Counsel for claimants, memorandum accompanying application for urgency, 7 February 2012, Wai 2357 paper 3.1.2, paras 23-26

avenues of redress'.[16] First, the Crown noted that consultation with Māori had just concluded on 22 February. As a result of that consultation, the Crown confirmed that, as the majority shareholder in the four power companies, it would continue to carry out its Treaty obligations. A clause which 'reflects the concepts of section 9' would be included in the upcoming Bill (which would not be introduced to the House before 5 March).[17] This meant that 'there is no prejudice and, with respect, no need for Tribunal intervention'.[18]

22. The Bill itself would simply enable the named SOEs to be removed from the operation of the SOE Act, which prohibits sale of shares. The approach to how the minority shareholding would be disposed of 'is further down the track'.[19] Although there is a high-level political commitment to retaining at least 51 per cent, the Government has not yet decided what percentage will actually be alienated.

23. Secondly, the Crown submitted that the 'claimed rights' of Māori to water and geothermal resources would not be compromised by the privatisation of power company shares. A change in shareholding 'does not prejudice aboriginal/customary rights claims to water'.[20] Māori property rights in water 'have not been established', and there is guidance from the Waitangi Tribunal (in its Wai 262 report) that property rights may not be 'the best way of conceiving the Crown–Māori resource relationship'.[21] Any investigation of Māori rights in water would be detailed, time-consuming, and specific to hapū, iwi, and (many) particular places. These could not be matters for an urgent, short inquiry.

24. In any case, the Crown's view was that Māori rights are simply not affected. Counsel relied on the Court of Appeal's decision in *Te Runanganui o Te Ika Whenua Inc Society v Attorney General* [1994] 2 NZLR 20, which found that Māori Treaty rights did not include a right to generate electricity by the use of water power, and therefore that there could be no legal objection to the transfer of dams to electricity companies. The Court did not consider ownership of generating assets as suitable redress for Māori grievances. The Crown also referred to *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 512, to the effect that negotiations were preferable to injunctions and litigation. Since the Crown had consulted Māori over the policy, was negotiating river settlements with appropriate iwi, and was engaging with Māori in the Land and Water Forum over fresh water issues, there was no need for the Wai 2357 claim to be heard and to interrupt those good and necessary processes.

25. Finally, the Crown rejected the claimants' argument that the privatisation of shares would have a 'chilling effect' on the Tribunal's ability to make section 27B resumption orders. The whole point of such orders was that they enabled the resumption of land that has been transferred out of Crown ownership. But, in any case, the Tribunal would still have to consider the desirability of resumption orders for core operating sites such as power stations, no matter who owns the power companies that rely on them.

Wai 2358

26. In its submission on the Wai 2358 claim, the Crown again argued that the claimants did not meet the Tribunal's criteria for urgency. In summary, it submitted that:

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[16] Crown counsel, memorandum in response to application for urgent hearing, 23 February 2012, Wai 2357 paper 3.1.3, p 1
[17] Ibid. See also Hon Bill English and the Hon Nick Smith to Chief Judge Isaac, 21 February 2012, attached to Wai 2357 paper 3.1.3
[18] Crown counsel, memorandum in response to application for urgent hearing, Wai 2357 paper 3.1.3, p 4
[19] Ibid, p 3
[20] Ibid, p 5
[21] Ibid, p 5

a) The creation of mixed ownership model companies, with sale of shares to private interests, does not prejudice 'aboriginal/customary rights or Treaty claims to water or geothermal resources'.[22] The ability of Māori to 'prosecute claims to ownership interests in those resources' will remain intact, and is an alternative remedy for the claimants.[23] If Māori rights are proven to exist in the future, then all users of water will be affected. It makes no difference whether the users are private, the Crown, or a mixed ownership company. (The Crown did not specify how or by what process Māori could 'prosecute' their claims.)

b) Current and pending Crown policies are concerned with the management and use of water, not its ownership. These issues are vital to Māori. The Crown is committed to a range of processes for engaging with them, including the Land and Water Forum and high-level discussions with the Iwi Leaders Group. This provides an alternative – and, indeed, a preferable – remedy for Māori on fresh water issues. An urgent Tribunal hearing would focus attention on grievances and would interrupt the present dialogue between Māori and the Crown. The Crown accepts that Māori are 'dissatisfied with the current level of recognition of their rights and interests in water and geothermal resources, and the roles practically available to them in resource management processes'.[24] Current dialogue is aimed at developing 'means by which Māori rangatiratanga and control in relation to the[se] resources can be incorporated into a holistic framework that benefits the nation'.[25] If, in the future, Māori ownership or some other form of Māori property rights were found to exist, then the policy and legal framework for the management and use of fresh water could be adapted to accommodate them. Crown Counsel submitted: 'The Government is open to this. While ownership of water has not been considered to date, the Government is committed to further engagement with Māori and their rights and interests in water'.[26]

c) The claimants are not and cannot be ready to proceed, because a national water and geothermal inquiry would require input from 'all individual Māori groups who claim a relationship with those resources'.[27] A 'representative' claim would not be appropriate, rendering it impossible to carry out an urgent inquiry on the subject matter raised by the Wai 2358 claim.

Interested parties

27. In the period between the filing of the claim and the 29 February 2012 teleconference, several Māori groups advised the Tribunal of their wish to be included in these proceedings as interested parties. These groups (and those who registered their interest after the first judicial conference) are listed in an appendix to this decision. Most of the interested parties supported the application for urgency, although they did not make any additional arguments at this point in the inquiry.

28. Some interested Māori parties, however, opposed the application for urgency. These parties were led by the Freshwater Iwi Leaders Group, consisting of Sir Tumu Te Heuheu (Ngāti Tuwharetoa), Tukuroirangi Morgan (Waikato-Tainui), Mark Solomon (Ngāi Tahu), Toby Curtis (Te Arawa), and Brendan Puketapu (Whanganui). The Iwi Leaders Group argued that the issue of rights and interests of Māori in fresh water should be 'progressed through direct dialogue with the Crown at the highest leadership

[22] Crown counsel, memorandum, 24 February 2012, Wai 2357 paper 3.1.9, p 9
[23] Ibid, p 2
[24] Ibid, p 8
[25] Ibid
[26] Ibid, p 7
[27] Ibid, p 11

level, not litigation, at this time'.[28] In their view, their active engagement with the Crown over freshwater governance, allocation, and associated issues was ongoing and would contribute to 'an equitable and enduring freshwater management regime'.[29] The New Zealand Māori Council's claim was therefore 'premature', and not made on behalf of all Māori.

The claimants' reply

29. The claimants responded to the Crown's arguments, and those of the Freshwater Iwi Leaders Group, on 27 February 2012.[30] In essence, the claimants' view was that the Crown had long known of prior Māori rights in water resources, not least because of various Tribunal Reports on the matter. Yet the Crown still insisted on proceeding to sell shares in the power companies without first recognising and providing for the Māori interests. In particular, the claimants argued:

    - Prior rights must be determined before new property interests are created
    - Compensation for irreversible loss must be settled before new property interests are created
    - The denial of a hearing to prove a right is a denial of the right should it in fact exist. (Government has known of the prior Māori claims since the early 1980s – [the Tribunal's] Manukau report).
    - Section 9 requires the Government act consistently with Treaty principles. The sale of shares without a prior inquiry of pre-existing Māori interests or issues of outstanding compensation is contrary to Treaty principles.[31]

30. If the Crown proceeded to sell shares without first identifying and satisfying the Māori interest, then the claimants argued that they would suffer significant and irreversible prejudice. First, private shareholders would be created with a vested interest in 'opposing Māori water claims', and, secondly, assets for the redress of Māori claims would be irreversibly lost.[32] The claimants did not accept the Crown's assertion that percentages for alienation had not yet been decided, pointing to what they considered clear statements in the media that the Government planned to sell the maximum number of shares, not retaining any capacity for redress to Māori 'by way of transfer of share ownership'.[33]

31. In making these arguments, the claimants stressed that previous Tribunal Reports would assist an urgent inquiry but would not remove the necessity for holding it. In particular, Tribunal 'precedent' has not yet included a 'full consideration of springs, aquifers, streams, lakes, swamps and other water bodies, and has not proceeded on a coherent national basis'.[34] Principles established in the Tribunal's river reports are likely to 'hold good' for these other waterways, but that is yet to be determined. A national inquiry is necessary to 'provide further insight' as to how Māori rights should be incorporated in modern regimes, and 'why and how they should result in financial compensation for their breach'.[35] The Crown's present policy, both in terms of Treaty settlements and the sale of these SOE shares, does not provide for compensation to Māori. The claimants' hope was that a prompt national inquiry into Wai 2358, along with water and geothermal aspects of the historical claims of its supporting claimants, would change this situation and allow the Crown's future discussions with Māori (including with the Iwi Leaders Group) to proceed on a properly informed basis. While acknowledging that the Iwi Leaders Group speaks for the tribes it represents, the

[28] Counsel for the Freshwater Iwi Leaders Group, memorandum, 24 February 2012, Wai 2357 paper 3.1.11, p 3
[29] Ibid, p 2
[30] Counsel for claimants, submissions in way of reply, Wai 2357 paper 3.1.17
[31] Ibid, p 2
[32] Ibid
[33] Ibid, p 15
[34] Ibid, p 5
[35] Ibid

claimants' fundamental view was that matters were happening in the wrong order, no matter who was participating in discussions. Rights-definition must come first, and management or governance arrangements second. The Crown's ability as a Treaty partner to redress breaches must also come after rights-definition but before privatisation. Otherwise, the claimants would suffer irreversible prejudice.

32. In addition, the claimants suggested that it was not impractical to conduct a national water and geothermal inquiry on an urgent footing. Most claimants have already prepared relevant evidence for a Tribunal inquiry or for settlement negotiations, and some already have Tribunal Reports upholding well-founded claims. All claimants 'have continuing traditional knowledge of their taonga'.[36] It was 'highly unlikely', therefore, that additional research would be required: 'The collection and focusing of this material is the core job to hand.'[37] The claimants asserted that they could be ready to proceed with four weeks of preparation, and predicted a similar amount of preparation time for the Crown, thus enabling a rapid urgent hearing. At the same time, the claimants rejected the Crown's argument that they could prove their ownership claims at some time in the future. In their view, litigation in the courts would be time-consuming, expensive, and extremely uncertain as to its outcomes, whereas an urgent Tribunal inquiry could establish the full range of their rights as protected by the Treaty, even (or especially) where those rights have been reduced or compromised. Thus, future rights-definition in the courts was not an appropriate alternative remedy.

33. In respect of section 9 and the upcoming Bill, however, the claimants conceded the Crown's intention to insert a clause reflecting the principles of section 9, and acknowledged that the Bill was simply an enabling piece of legislation which they were not seeking to delay or prevent. Nonetheless, their view was that the retention of section 9 'goes nowhere to addressing the issues'.[38] This was because the 'ongoing issue in the SOE inquiry is not about section 9, but about the decision of the Treaty partner to sell further significant interests in national freshwater resources prior to having full knowledge of Māori interests, and prior to the provision of redress to Māori'.[39]

Teleconference of 29 February 2012

34. After receipt of these submissions, the Chairperson held a judicial conference by way of teleconference on 29 February 2012. The claimants were represented by Ms Donna Hall and Mr Martin Taylor. The Crown was represented by Ms Virginia Hardy and Mr Jason Gough. Interested parties were also present and represented by counsel.[40]

35. Mr Taylor and Ms Hardy indicated that they were ready to proceed with a hearing of the urgency applications. The Chairperson, however, noted that matters had changed significantly as a result of the claimants' reply submissions (discussed above). The focus of the urgency applications had shifted from the introduction of legislation to enable the mixed ownership model for the power-generating SOEs. In particular, the claimants seemed to accept that the Crown's promise to include a clause which

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[36] Ibid, p 12
[37] Ibid
[38] Ibid, p 3
[39] Ibid, p 8
[40] Ms Deborah Edmunds for Te Atiawa Iwi Authority and Ngā Hapū o Ngaruahine; Ms Laura Carter for the Raukawa Settlement Trust; Mr Jason Pou for Wai 549, 846 & 1526; Ms Terena Wara for Wai 2355; Ms Annette Sykes for Wai 354, 647, 662, 1835 & 1868; Ms Justine Inns for Te Rūnanga o Ngāi Tahu; Mr Alex Hope for Roimata Minhinnick of Ngāti Te Ata; Mr Tavake Afeaki for Wai 129, 619, 774, 964, 985 & 1028; Ms Brooke Loader for Wai 824 & 1531; Ms Kathy Ertel and Ms Robyn Zwaan for Wai 144, 945, 795, 1013, 1033, 1666, 2149, 2010, 2340, 1272, 1629, 237, 1787 & 1092; Ms Janet Mason for Wai 996; Mr Stephen Potter for Wai 1826, 1897, 1534, 1589, 2345 & 2354; Mr Jamie Ferguson & Ms Donna Flavell; Mr Roger Bowden; Ms Moana Sinclair; Mr Toni Waho claimant for Wai 151.

'reflects the concepts of section 9'[41] had made that issue immaterial to the urgency applications. Thus, it was no longer necessary to decide the applications before 5 March. Since the time frame had shifted, the Chairperson's view was that the present teleconference was not the best mode of hearing the applications, and the matter should be moved to a judicial conference in Wellington on 13 March. In the meantime, the claimants would need to file revised pleadings, to which the Crown and interested parties could respond.

36. The Crown and claimants agreed that the proposed Bill was no longer an issue and that the timetable could be adjusted accordingly.

37. Ms Annette Sykes, counsel for interested parties (Wai 354, 647, 662, 1835, and 1868), submitted that the exact wording of the replacement for section 9 was still a live issue for her clients. Given that the wording of the replacement clause was not known, and given the potential prejudice that any erosion of section 9 protection might have on Māori, Ms Sykes suggested that it would be appropriate for the Crown to refer the Bill to the Tribunal under section 8 of the Treaty of Waitangi Act 1975.

38. The Chairperson accepted Ms Sykes' submission and directed Ms Hardy to convey this proposal to the appropriate Ministers, and to update the Tribunal on this matter by 2 March.[42]

The Crown's decision not to refer the Bill to the Tribunal

39. Section 8 of the Treaty of Waitangi Act provides that the Crown may refer proposed legislation to the Tribunal for a report on whether its provisions 'or any of them' are contrary to the principles of the Treaty of Waitangi. For Bills, the necessary procedure is for a Bill to have been introduced to the House and then referred to the Tribunal by a resolution of the House. To date, the Tribunal has not been asked to assess a Bill or any of the provisions of a Bill under this section of the Act.

40. On 2 March, Ms Hardy advised that the Minister responsible for the Mixed Ownership Model Bill had decided not to seek a resolution of the House, referring the Bill to the Tribunal.[43]

41. The Mixed Ownership Model Bill received its first reading on 8 March and is currently before the House. As a result, the Waitangi Tribunal has no jurisdiction to consider the Bill or its contents. We discuss the significance of this for the urgency applications below.

Judicial Conference of 13 March 2012

42. On 1 March 2012, the Chairperson confirmed his oral directions in writing, setting a timetable for hearing the urgent applications:
    a) The claimants were to file revised pleadings by 2 March and any additional submissions by 5 March;
    b) The Crown was to file any submissions in response by 7 March;
    c) Interested parties were to file any submissions and applications to be heard by 7 March; and
    d) The application for urgency would be heard at a judicial conference in Wellington on 13 March.

[41] Crown counsel, memorandum in response to application for urgent hearing, Wai 2357 paper 3.1.3, p 1
[42] Memorandum-directions of the Chairperson, 1 March 2012, Wai 2357 paper 2.5.4
[43] Crown counsel, memorandum, 2 March 2012, Wai 2357 paper 3.1.23

43. These dates were subsequently extended for those interested parties who sought additional time to make submissions.

44. On 7 March, the Chairperson appointed the panel to hear the urgency application. On 12 March, he issued memorandum-directions setting a timetable for the judicial conference, so that the submissions of all parties could be considered in a fair and efficient manner. As a means of disciplining the proceedings, the Chairperson asked all third parties in support of the application to select one counsel to present submissions on their behalf, and to confine their submissions to any new or additional arguments over and above those made by the applicants. Also, the Chairperson noted that the affidavits received by the Tribunal addressed evidential matters that should be taken as read. The essential arguments as to urgency would be addressed by submissions.

45. On 13 March, the Tribunal held its judicial conference to hear the application for urgency. Counsel summarised their written submissions and made additional oral submissions. Ms Donna Hall read out an opening statement from Sir Graham Latimer for the New Zealand Māori Council.[44] Sir Graham could not be present but was represented at the conference by Mr Neville Baker and Sir Edward Taihakurei Durie. We then heard submissions as follows:

    a) Ms Donna Hall and Mr Martin Taylor presented submissions for the claimants
    b) Ms Annette Sykes presented submissions for the interested parties in support of the application, supplemented by additional submissions from Ms Kathy Ertel and Mr Darrell Naden
    c) Ms Virginia Hardy, appearing with Mr Jason Gough, presented submissions for the Crown
    d) Sir Edward Taihakurei Durie and Professor Whatarangi Winiata presented reply submissions from the claimants

46. We now summarise the parties' arguments, including their oral submissions at the conference, before proceeding to assess their arguments against the Waitangi Tribunal's criteria for granting an urgent hearing.

The claimants' revised case for urgency

47. On 2 March, the claimants filed revised statements of claim, accompanied by a single application for the urgent hearing of both claims. In addition to relying on their previous submissions (summarised above), the claimants filed additional submissions on 5 March. As noted, we also heard oral submissions at the conference on 13 March.

48. In essence, the claimants' case for urgency was altered in three material respects.

49. First, as signalled in their reply submissions of 27 February, the claimants no longer relied on the section 9 protection as having any relevance to the proceedings. They accepted that the Bill was simply an enabling measure that would go ahead as planned. In their view, their claim concerned what would happen after the Bill was enacted. They urged the Tribunal's 1986 interim report on the SOE Bill as a relevant precedent in this respect. The grounds for urgency rested in the Crown's stated intention to begin selling shares in Mighty River Power in the third quarter (July to September) of 2012, dependent on a favourable market at that time. The other SOEs were on a slower track (to have up to 49 per cent of their shareholding privatised at some time over the next three to five years), but claimants argued that the principles, issues, and Crown processes involved would be the same. The claimants sought an

[44] 'A message from Sir Graham Latimer, Chairman, New Zealand Maori Council concerning the Treaty clause in the State-owned Enterprises Act', 13 March 2012, Wai 2357 paper 3.1.53

interim recommendation from the Tribunal that the Crown delay its first sale of shares until their claims had been heard and reported on by the Tribunal.

50. Secondly, the claimants placed greater emphasis on the Crown's present engagement with Māori about the management and use of fresh water, especially the Fresh Start for Fresh Water initiative. In their view, the Crown's SOE policy was only part of an across-the-board revision in 2012 of the platform for water management and, they argued, effectively for water ownership. The Fresh Start for Fresh Water programme would result in the creation of new private rights in water, including tradable use rights. When added to the creation of new private interests by way of privatising shares in the power companies, a formidable array of private rights in water would be created in 2012, adding a further and powerful layer of opposition to Māori rights, and reducing the prospect of those rights ever receiving proper recognition or proper compensation for past breaches. While the Crown has noted that ownership is not on the table for discussion, either with the Iwi Leaders Group or any other Māori groups involved in discussions for freshwater reform, the reality is that all rights in water will be affected by the outcomes, including any surviving Māori proprietary and Treaty rights. As with the privatisation of shares in the SOE, the claimants' position is that the freshwater management and allocation reforms should not proceed until the prior Māori rights have been identified and a process created for their recognition (no doubt involving compromises on all sides). Only then can a systematic remedy be provided for long-term, sustained Crown breaches of Māori Treaty rights in water and geothermal resources. In the claimants' view, the Crown will be in breach of the Treaty principle of redress if it does not move in time to enable their just rights to be addressed.

51. The claimants acknowledged that the Crown's present discussions with iwi leaders may be appropriate for the groups represented by those leaders, but the claimants seek a benefit for all Māori, and consider that the risk to them is too great if discussions take place without a prior definition of Māori rights. Thus, Crown engagement with iwi leaders and others over matters of freshwater management is not an alternative remedy for the claimants; indeed, it is a source of potential prejudice. As a result, the claimants sought the 'deferral of the Fresh Start for Fresh Water and Iwi Leaders Forum discussion programmes until all Māori claims have been determined and all Māori are able to participate equally in redress discussions'.[45]

52. Thirdly, the claimants sought a Tribunal inquiry and report by 1 June 2012, revising their earlier estimate of October by some months. In oral submissions, Mr Taylor suggested that an urgent inquiry of this type might take between four and six months. As a result, the claimants spent considerable time arguing as to how this might be feasible in respect of a national, comprehensive inquiry into all water and geothermal resources. The claimants proposed that an urgent inquiry should focus on two matters:
    a) representative case examples that allow definition of Māori customary, proprietary, and other rights protected or guaranteed by the Treaty of Waitangi, that can be used to set a national framework for rights definition; and
    b) the relief sought by the claimants, that is a 'framework by which those interests can be provided for in water use planning and compensated for where they have been compromised or are used by third parties'.[46]

    On this basis, the Tribunal would conduct a rapid inquiry focused on the following issue questions:

    - Do the case examples indicate a proprietary interest in water [or geothermal resources]?
    - Do the case examples illustrate or evidence the breach of such interests?

[45] First Amended Statement of Claim, 2 March 2012, Wai 2357 paper 1.1.1(a), para 12.5
[46] Counsel for claimants, memorandum enclosing inquiry management plan, 12 March 2012, Wai 2357 paper 3.1.50, para 4(a)

- Do they inform the nature of the interests and the framework by which such interests might today be provided for or compensated?[47]

Particular hapū or iwi claims would not be addressed, other than as case examples, although 'particular solutions for particular cases', including the compensation appropriate for particular cases, 'constitute a second step' for the inquiry which 'may or may not need to proceed under urgency'.[48]

53. In the claimants' submission, some case examples such as major rivers have already been completed, referring to the Tribunal's reports on the Mohaka River claim, the Whanganui River claim, and the Ika Whenua Rivers claim. In most or all other categories, case examples have been researched for the Tribunal's district inquiries, and the evidence of kaumātua would also be readily available. Thus, in the claimants' view, no additional research would be required and the claimants are ready to proceed. A brief period of preparation would still be necessary, including the use of a group of experts to categorise rights in the various water resources, identify the methods by which those rights may have been breached, and design a framework for how they may be provided for today. Following the production of this evidence, the claimants suggested ways in which the hearings could be tightly managed so as to proceed expeditiously and efficiently. In their view, it would be possible for the Tribunal to report in June (or soon after), but – as noted – they seek an interim recommendation for the Crown to delay any sale of shares until the Tribunal has reported.

54. Otherwise, the claimants' position was as set out in earlier submissions (summarised above).

Additional arguments in support of urgency (interested parties)

55. Many interested Māori parties supported the application for urgency, and made submissions in agreement with the case outlined by the claimants. The following arguments were put to us:

    a) Binding international agreements may prevent the New Zealand Government from favouring domestic investors over foreign investors once the sale of shares begins. Thus, if the Crown does not provide in some way for the Māori interest in the immediate future, it may be too late to do so once the sales process has begun. At the same time, international agreements (such as the General Agreement on Tariffs and Trade) allow the Crown to give favourable treatment to Māori. Yet the Crown is not contemplating doing so in this case, and will not unless the Tribunal follows earlier panels and intervenes.

    b) International agreements may also hinder or even prevent the New Zealand Government from giving effect to binding resumption orders for land presently owned by the power-generating SOEs, once foreign investors hold shares.

    c) Rights recognition in the ordinary courts is not an alternative remedy for the claimants, because the courts do not have a restorative function. The focus in the courts would inevitably be the legal erosion of rights. The very same focus in an urgent Tribunal inquiry, however, could be restorative and would take the Treaty principles into account, including the principle of redress.

    d) The seriousness of the position for Māori should not be underestimated. The loss to Māori in deferring a hearing (and by that hearing the definition of prior

[47] Ibid, para 5
[48] Ibid, para 4(b)

rights) will be much greater than the loss to the Crown if the sale of shares is deferred for a short period. New Zealand as a nation must confront the long-delayed definition of Māori rights in fresh water before it is too late – and the timing of 'too late' is measured in months if Māori rights are not defined and protected before the SOE sales begin and water management/allocation regimes are reformed. The new water regime will be transformative of Māori rights, both de facto and de jure, and 'will or may further crystallise illegal and illegitimate private rights in water'.[49]

e) At all costs, a situation of conflict between Māori and 'mum and dad' investors in the New Zealand public must be avoided. Investors must be made aware of Māori rights, and warned that the possible future recognition of Māori rights in water may affect their asset. Hence, some form of memorial on the shares may be appropriate for the sake of the share-buying public, the Māori interest, and the honour of the Crown.

f) The Tribunal should not put too much weight on the existing dialogue between the Crown and iwi leaders. Māori have a right under the Bill of Rights to be heard, and, according to the recent Supreme Court decision in *Haronga*,[50] Māori claimants have a right to be heard even when others are in negotiations. Denial of a hearing to prove a right is denial of the right. And while SOE sales and freshwater management discussions may not appear on the surface to affect prior Māori rights, the practical reality is that they will have a devastating impact on Māori, especially those whose claims have not yet been heard. The simple fact of the matter is that Māori claimants without Treaty settlements live in poverty and must rely on the New Zealand Māori Council and Māori leaders to take claims like this one to the Tribunal on their behalf, for the benefit of all Māori.

g) The Crown has not acted on the findings and recommendations of the Ika Whenua Rivers Tribunal, which has a specific significance for the hapū who brought that claim but also a general significance as to the need for a further Tribunal hearing and recommendations.

The Crown's revised submissions opposing urgency

56. Ms Hardy for the Crown relied on her previously filed submissions (summarised above). She also argued that additional Waitangi Tribunal findings about Māori water rights (including property rights) are simply not required. The Crown is already well informed, she submitted, by the many relevant reports of the Waitangi Tribunal, including the river reports referred to by the claimants and the Wai 262 report. In response to a question from the Tribunal as to whether the Crown had accepted and acted on the findings of those reports, Ms Hardy responded that the Crown had not done so in all cases.

57. In order to add materially to the existing findings, Ms Hardy's submission was that the Tribunal would need to go to an enormous level of detail on a national scale, including for all aquifers, swamps, wetlands, and streams. In the Crown's view, a broad brush framework for rights-resolution already exists, and the kind of detailed rights definition sought by the claimants is unnecessary. The Tribunal, she told us, should be sceptical of the claimants' submission that they are ready to proceed, and that this kind of inquiry could be conducted according to an urgent timeframe.

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[49] Counsel for Te Rarawa, memorandum, 7 March 2012, Wai 2357 paper 3.1.34, p 5
[50] *Haronga v Waitangi Tribunal* [2011] NZSC 53

58. Also, Ms Hardy understood the claimants to accept that – ultimately – a Crown-Māori dialogue would be the endpoint for agreeing (and therefore defining) rights, and integrating them with existing rights and regimes. Since the Waitangi Tribunal's usual recommendation is that the claimants and the Crown should negotiate, the Crown's view is that an informed Crown is already conducting a dialogue with Māori and the endpoint has already been reached, without the need for an urgent Tribunal inquiry. It would be 'perverse', in counsel's submission, to interrupt that dialogue with 'litigation'.[51] Because the Iwi Leaders Groups has a confined mandate, the Crown recognises that wider engagement with Māori will be necessary, but discussions with the Iwi Leaders Group are a good start for a focused dialogue on freshwater interests. Ms Hardy submitted that 'an approach that involves shared policy development is superior to a model through which the Crown develops policy unilaterally and then enters into consultation and/or specific negotiations with Māori'.[52]

59. Also, if definition of legal rights is in fact required, then the Waitangi Tribunal is not the appropriate body to do it. The Tribunal is a forum for the definition of Treaty interests (of Māori and the Crown) and the balancing of those interests. One implication of this argument was that claimants have an alternative (or, rather, sole) path for rights definition in the courts.

60. In terms of concrete rights recognition, the Crown understood the claimants to now be seeking three possible outcomes: compensation payments, adjustment to management regimes to incorporate their interests, and/or a resource rental. None of these outcomes would be irreversibly prejudiced by the Crown's sale of shares in the SOEs. The sales would not transfer an asset – in this case, a property right in water – and so there is no direct prejudice. Nor is it possible to demonstrate that the creation of private interests would create an environment more hostile to Māori water rights; electricity consumers will ultimately bear the cost of resource rentals, whether the power companies are state-owned, privately-owned, or a mixed model ownership.

61. In making this submission, Ms Hardy relied in part on the letter to the Chairperson from the Hon Bill English, Deputy Prime Minister, and the Hon Nick Smith, Minister for the Environment, of 21 February 2012. In that letter, the Ministers stated that 'the sale of shares is not intended to prejudice the rights of either iwi and Maori, or the Crown, in the natural resources used by [the] mixed ownership companies'.[53] In the Ministers' view, the proposed legislation would not affect 'any rights or interest in water or other natural resources used in the generation of electricity or affected by such use, including lakes, rivers, and the associated waters, beds and other parts, or geothermal resources'.[54] They also affirmed that the Government would not 'seek to rely on the changed status from SOE to mixed ownership to suggest any diminuation in the claimed rights'.[55] The Ministers did not specify what rights *the Crown* was claiming in relation to these water and geothermal resources, and Crown counsel was unable to clarify this matter at the conference in response to questions from the Tribunal.

Submissions of interested parties (formerly in opposition to urgency)

62. In submissions made at the conference on 13 March, Mr Jamie Ferguson helpfully clarified the position of the Iwi Leaders Group and of Ngāi Tahu. In a written submission, Ngāi Tahu 'actively supports and encourages any iwi or hapū who have a mandate to take claims on their own behalf to do so in the forum of their choice and in

[51] Crown counsel, memorandum, 7 March 2012, Wai 2357 paper 3.1.37, p 7
[52] Ibid, p 6
[53] Hon Bill English and the Hon Nick Smith to Chief Judge Isaac, 21 February 2012, attached to Wai 2357 paper 3.1.3
[54] Ibid
[55] Ibid

their own time'.[56] But, as the New Zealand Māori Council does not represent Ngāi Tahu, the iwi 'reserve the right to be a party to any process where the claims of another may impact on Ngāi Tahu's existing rights and interests'.[57] As Ngāi Tahu have customary and traditional associations with freshwater in 'approximately 50% of the geographical area of Aotearoa/New Zealand', they clearly have an interest in the subject under claim.[58]

63. In oral submissions, Mr Ferguson also clarified the position of the Iwi Leaders Group. As their position appeared to have changed significantly from their previous submission, we think it necessary to note the salient points in detail.[59] Mr Ferguson told us that the 'key issue' for the Iwi Leaders Group (and the interested parties in support of the Iwi Leaders Group) is that 'it takes issue not with the rights of iwi, hapū or other groups to progress claims before this Tribunal, but for any of those groups to say that it does so on behalf of all Māori'. Also, a national inquiry that looks at case studies 'all over the country' is naturally of interest to all iwi and hapū, and the Iwi Leaders Group have concerns about the practicality of such an inquiry being conducted on an urgent footing. In their view, an urgent Tribunal inquiry should focus on:

> the four SOEs that have particular extant resource consents in relation to a number of power stations, some geothermal (mostly hydro), that are identifiable and relate to specific catchments. There is obviously an issue for this Tribunal to deal with in terms of the nexus between those SOEs and those particular uses of water and the protections that the Crown has said exist in terms of safeguarding those interests post-sale of shares. That is for this Tribunal to consider. But if one is looking at a more wholesale national inquiry, then the view that has been expressed is that we think that's premature, that we'll see a whole lot of resources being diverted. One would hope it would not divert the Crown's interest in continuing the dialogue that's occurring, but certainly that dialogue must continue as Crown policy continues, and unless the Crown is going to stop its policy-making today, which I doubt it is and the Tribunal has never suggested that it should, then that engagement needs to occur to continue to advance those issues as much as possible.[60]

64. In summary, we understand the position of the Iwi Leaders Group (and the interested parties in support of that group), as expressed by their counsel, to be that they do not object to the claimants obtaining an urgent hearing if it focuses on:
    a) the particular waters and geothermal resources used by the four power-generating SOEs; and
    b) the Crown's protection of Māori interests in those resources vis-a-vis the sale of shares.

    They do, however, consider a full national inquiry to be 'premature', and possibly unmanageable in an urgent timeframe. Their 'key issue', however, is that the New Zealand Māori Council does not represent all Māori.

The claimants' reply

65. The claimants' reply submissions were made orally by Sir Edward Taihakurei Durie and Professor Whatarangi Winiata.

66. Sir Edward clarified that the New Zealand Māori Council does not claim to represent all Māori or to have filed a claim on behalf of all Māori, but that the claim is intended for the benefit of all Māori. That, we were told, is a core statutory function of the New Zealand Māori Council. The ten co-claimants agree that what the Council is seeking would indeed be beneficial to all Māori, but they retain their independence.

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[56] Counsel for Te Rūnanga o Ngāi Tahu, memorandum, 12 March 2012, Wai 2357 paper 3.1.56, p 1
[57] Ibid, p 2
[58] Ibid
[59] The following quotations are from the oral submissions of counsel for the Freshwater Iwi Leaders Group, 13 March 2012
[60] Counsel for the Freshwater Iwi Leaders Group, oral submissions, 13 March 2012

67. In response to the question 'if the claimants agree that customary rights are not being extinguished, what is the urgency?,' the claimants' view was that the sale of shares without protection of Māori interests, and the wholesale reform of freshwater management, will be tantamount to an extinguishment. Rights will be replaced by a management plan or not replaced at all, but they will nonetheless be lost. 'In a democratic capitalist society,' we were told, 'you get the rights right first, you do the management thing later.'[61] The claimants reasserted that their rights must be defined and protected before management regimes were finalised. The intention that ownership issues might be addressed by the Crown and iwi leaders after the management system was overhauled would simply come too late to be of any real effect.

68. Both Sir Edward and Professor Winiata emphasised that it was urgent for Māori rights to be defined and protected or compensated before share sales, or else the new private owners would have an expectation (whether legitimate or not) that their company had a right to use water at zero cost. The irreversible prejudice is that 'once sold, the Crown will never be able to retract from that position without admitting to the fact that it put up shares for public subscription without a proper disclosure of the fact that there were claims in respect of it that had some proper basis'. In the claimants' view, the Government is selling shares on the basis that the use right to water is free, when Māori say that it is not, and can prove to the Tribunal that it is not. The claimants wished to clarify that they think there is a direct analogy between this situation and previous fisheries claims in respect of transferable quota, because a use-right 'is being alienated to others in which Māori have a proprietary interest'. This is, in the claimants' view, a very direct and likely irreversible form of prejudice.

69. In response to the Crown's suggestion that existing Tribunal jurisprudence is sufficient for the purpose of informing the Crown as to Māori customary or Treaty rights in water, Sir Edward noted that the reports to date deal with select waterways or geothermal resources but do not address the kind of framework necessary to give effect to rights, to restore rights, or to provide redress for compromised rights. Acknowledging the findings of the Tribunal in the *Ika Whenua Rivers Report*, that Māori have proprietary interests in their rivers which now have to be shared with non-Māori, Sir Edward commented:

> What *Ika Whenua* left undone was the framework by which sharing might be considered, and that's the question for this Tribunal. Now, here's the point. This Tribunal, in my view, is the only body in New Zealand that can address it from a bicultural perspective. What this Tribunal has effectively been charged to do since 1975 is cross the cultural divide, explain one world to the other, and find the way whereby all interests, Pākehā and Māori, can be accommodated within the Treaty framework.[62]

The Tribunal's jurisdiction while the Bill is before the House

70. As noted above, the Mixed Ownership Model Bill was introduced to the House of Representatives on 5 March 2012. Under the provisions of section 6(6) of the Treaty of Waitangi Act 1975, the Tribunal has no jurisdiction 'in respect of any Bill that has been introduced into the House of Representatives unless the Bill has been referred to the Tribunal pursuant to section 8 of this Act'.

71. The Tribunal may not, therefore, undertake any inquiry into the provisions of the Mixed Ownership Model Bill while it remains before the House. Counsel have addressed us in their submissions as to whether the Wai 2357 and Wai 2358 claims contain any issues that would require the Tribunal to inquire into this Bill.

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[61] This and the following quotations are from the oral submissions of Sir Edward Taihakurei Durie by way of reply, 13 March 2012

[62] Sir Edward Taihakurei Durie, oral submissions on behalf of the claimants in way of reply, 13 March 2012

72. The parties agree that the Mixed Ownership Model Bill is a piece of enabling legislation which, if enacted, will remove the four power-generating SOEs from the ambit of the SOE Act.

73. In the Crown's view, the Bill enables its stated policy to sell a minority of shares in the four power-generating companies. Crown counsel noted that the claimants do not challenge privatisation of the power-generating companies per se. In the Crown's view, the Wai 2357 SOE claim is essentially one for the 'preservation of remedy' (by means of a share in the power companies) for the matters raised in the Wai 2358 national water and geothermal claim. On that basis, the Crown accepted that the Tribunal has jurisdiction to inquire into both claims despite the introduction of the Bill on 5 March 2012.

74. The claimants' view is that they do not challenge the policy contained in the Bill. Rather, they seek an urgent hearing so that the Crown is fully informed as to their rights before the sales enabled by the Bill commence. The Crown's stated intention to start selling shares in Mighty River Power in the third quarter of 2012, in the absence of any protection of Māori interests, is both the core of the Wai 2357 claim and the prospective Crown action which justifies an urgent hearing of it. The Crown calls this 'preservation of remedy'. It is the claimants' view, therefore, that the Bill does not prevent the Tribunal from proceeding to an urgent hearing of their claims. The claimants have also amended the Wai 2357 claim to excise their initial pleadings in relation to the removal of the power-generating companies from the SOE Act and from the coverage of section 9 of that Act. The Bill implements the Crown's policy in relation to this issue and, as recognised by the parties, removes consideration of it from the Tribunal's jurisdiction while the Bill is before the House.

75. In summary, the claimants and the Crown agree that there is no jurisdictional bar to the Tribunal hearing the Wai 2358 claim while the Bill is before the House. The Crown also accepts that the Wai 2357 claim can proceed as a claim for the 'preservation of remedy'. The Tribunal accepts these submissions. There is no bar to the Tribunal hearing the claims as currently pleaded.

Grounds for urgency

76. The Waitangi Tribunal's 2009 practice note *Guide to the Practice and Procedure of the Waitangi Tribunal* sets out the criteria that the Tribunal is to consider when determining applications for an urgent inquiry.[63] The Tribunal will grant urgency only in exceptional cases. It has particular regard to whether:
    a) The claimants can show that they are suffering, or are likely to suffer, significant and irreversible prejudice as a result of current or pending Crown actions or policies;
    b) There is no alternative remedy that it would be reasonable for the claimants to exercise; and
    c) The claimants are ready to proceed urgently to a hearing.

77. In addition, the Tribunal will consider other factors, including whether:
    a) The claims challenge an important current or pending Crown action or policy; and
    b) Any other grounds for urgency have been made out.

78. These criteria are a refinement of similar considerations originally set out by the Tribunal in an 18 July 1991 practice note entitled 'Claim Priorities'. Applications for

[63] The Tribunal issues practice notes under the authority of cl 5(10), schedule 2, Treaty of Waitangi Act 1975

urgency have been considered in relation to these factors, or earlier iterations of them, since that date.

79. Considering the large volume of determinations on urgency made since 1991, some useful precedent should be noted:

    a) Urgency should only be afforded where there is genuine need to receive a report and irreversible consequences may flow from any delay in processing the claim.[64] These consequences must lead to a result that is likely to be so important or notable, that it causes unalterable or irrevocable detriment to or disregard for the claimants' rights.[65]

    b) In establishing that they are 'likely' to suffer significant and irreversible prejudice, claimants must show that it is more probable than not that they will suffer this prejudice.[66]

    c) The significance of the prejudice must be such that it justifies the reallocation of Tribunal resources so that an urgent hearing can take place.[67]

    d) Significant prejudice may be caused to claimants where the Crown is likely to create a 'benchmark' in pending settlements with other claimant groups that would preclude the Crown from addressing the issues raised by the claimants seeking urgent inquiry in future negotiations.[68]

    e) Where the existence of section 27B memorials over relevant land provide an adequate protection for the claimants in the circumstances, significant and irreversible prejudice justifying urgency will not exist.[69]

    f) Where claimants seek to traverse an issue already heard and reported on by the Tribunal in a previous inquiry, this will not necessarily preclude the granting of urgency. Considering this situation in relation to an application for urgency by Wai 955, Chief Judge Williams (as he was then) found that:

> The pragmatic appeal [of refusing urgency on this ground] is plain. Pragmatism, however, must not be allowed to defeat the purpose of the Tribunal's unique responsibility to assess Crown conduct against the principles of the Treaty of Waitangi.
>
> The long title to the Treaty of Waitangi Act 1975 states that the Tribunal exists in order to 'provide for the observance, and confirmation' of the Treaty principles. I am satisfied that that purpose would not be best served if it were the Tribunal's practice never to inquire as a matter of urgency into any claim that involved replication of arguments and evidence already reported on. Consider, for example, a situation where a Tribunal report has found Crown breaches of Treaty principle and, later, a new claim is made about very similar circumstances. The advent of the fresh claim may indicate continuing problems with the Crown's ability or willingness to comply with its Treaty obligations in the particular circumstances. Should that be so, a Tribunal practice of accepting that the Crown will have taken due account of the earlier report and that no useful purpose could be served by a Tribunal inquiry into the new claim could be seen to encourage, or at least countenance, the Crown's non-observance of Treaty principles.
>
> The result is that it will not be fatal to an application for urgency that the claim involves significant replication of the issues, argument and evidence already heard and reported on by the Tribunal in connection with an earlier claim. However, given the limitations on the

[64] Waitangi Tribunal, Memorandum, 5 April 1995, Wai 431 (Tertiary Education), paper 2.19
[65] Waitangi Tribunal, Final decision on application for urgency, 23 June 2006, Wai 837 (Te Arawa Lakes Settlement), paper 2.40
[66] Ibid
[67] Ibid
[68] Waitangi Tribunal, memorandum-directions, 12 May 2000, Wai 796 (Petroleum), paper 2.9
[69] Waitangi Tribunal, memorandum-directions, 12 June 2000, Wai 848 (Tokoroa Post Office Site), paper 2.3

> Tribunal's resources, it will not embark lightly on any inquiry the substance of which has already been traversed. Instead, the Tribunal would need a very good reason to take a second look.[70]

g) Likely prejudice may be aggravated where the Crown has chosen not to consult with Māori in relation to the relevant act or policy.[71] However where consultation has occurred and the claimants still seek urgency, the Tribunal will be unlikely to grant an urgent hearing unless the claimants have first raised their concerns with the Crown's consulting body.[72]

80. There has also been some commentary in the ordinary courts on the considerations the Tribunal should apply in determining urgency:

a) In *Haronga v Attorney-General* the Supreme Court found that where the Tribunal's ability to exercise its binding jurisdiction to recommend the return of Crown forest lands is likely to be removed as the result of pending Crown actions, and the claimants seek such binding orders as redress, this will be a powerful factor in favour of granting an urgent hearing.[73]

b) In *Attorney-General v Mair* the Court of Appeal found that in assessing whether significant and irreversible prejudice may be caused to the claimants, the Tribunal may balance such prejudice against the prejudice that would be caused to other groups were urgency to be granted.[74]

81. Finally, and as has been noted on a number of occasions, we emphasise that while all of the above factors are relevant considerations in determining an application for urgency, where one or more cannot be shown it will not necessarily be fatal to the application. In determining whether a claim presents an exceptional case justifying urgency, the Tribunal has a discretion to exercise. It must have regard to the law, its statutory functions and responsibilities, and all relevant facts, and determine whether a case warrants prioritisation on the Tribunal's hearing schedule accordingly.

Assessment of the Grounds for Urgency

Are the claimants likely to suffer significant and irreversible prejudice?

82. As currently pleaded, the Wai 2357 and Wai 2358 claims are about rights: customary, legal, proprietary, and Treaty rights (including a right of development); and commercial redress for any loss, diminution, or usurpation of those rights. In particular, the claimants say that they have a range of rights in water and geothermal resources, which were guaranteed and protected by the Treaty of Waitangi in 1840, but which have since been ignored, interfered with, or usurped for a period of 172 years. In the 1980s, the Crown was about to transfer significant assets to SOEs without considering their necessity for settling Treaty claims, but was stopped in its tracks by the courts and compelled to negotiate an agreement with Māori. Now, the claimants say that history is about to repeat itself: the Crown proposes to transfer up to 49 per cent of its shares in the power-generating SOEs to private buyers, without reserving a share for Māori. If that happens, the claimants' view is that they will suffer significant and irreversible prejudice:

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[70] Waitangi Tribunal, memorandum-directions, 15 March 2002, Wai 955 (Mokai School), paper 2.7, pp 16-17
[71] Waitangi Tribunal, memorandum-directions, 29 April 2003, Wai 967 (Wellington Hospital Endowment Lands), paper 2.21
[72] Waitangi Tribunal, memorandum-directions, 18 July 2007, Wai 1306 (Ngāti Rehia Marine Reserve), paper 2.5.2
[73] *Haronga v Waitangi Tribunal* [2011] NZSC 53 at [105]
[74] *Attorney-General v Mair* [2009] NZCA 625 at [55]-[65]

a) Shares, which could have been used as a practical form of redress for Crown breaches of the Treaty in respect of Māori rights in water or geothermal resources, will have been transferred out of Crown ownership. Once the 49 per cent threshold is reached, the Crown must retain the remaining 51 per cent (which would not, therefore, be potentially available for the settlement of well-founded claims).

b) Given the current legal framework in New Zealand, which says that water and subterranean geothermal resources cannot be owned, shares – which might represent the only practical recognition that the Crown can ever give to Māori proprietary rights – will have been transferred out of Crown ownership. Again, once the 49 per cent threshold has been met, the remaining 51 per cent could not be used for the recognition of Māori rights.

83. The Crown did not engage directly with these propositions. It maintained that it is in discussions with iwi leaders and other Māori about rangatiratanga and control in respect of fresh water, that ownership or customary rights may be discussed at the end of that process, and that the key issues are not really about ownership of the resource. When asked by the Tribunal whether the Crown might reserve a portion of the shares for Māori, Crown counsel replied that she would have to seek instructions on that matter. The Crown accepts that it has a Treaty duty to preserve its ability to remedy Treaty claims: 'The Court of Appeal decisions about section 9 issues have emphasised the Crown's obligation of preserving capacity to remedy Treaty breaches.'[75] But, in the Crown's view, it has already done so by enacting sections 27A-D of the SOE Act. Those protections will remain and the Crown will be able to use land owned by the Mixed Ownership Model companies if necessary for the settlement of claims; in the Crown's view, that is as far as it needs to go to preserve a remedy in the case of the four power-generating SOEs.

84. In the Crown's February consultation document, the Government stated that Māori would have the same opportunity as all other citizens to buy shares, and that they could use their settlement compensation to do so, whether at the time of first offer or later on the share market. In other words, the Crown did not at that point intend to use shares in the power-generating SOEs to settle Treaty claims. Māori would have to buy shares using their own money, including the cash component of a Treaty settlement. While it has not so far entertained a scenario in which it would use shares as a component of settling Treaty claims or as a 'proxy' recognition of Māori water rights, the Crown did point out that shares are 'fungible' items, readily purchased on the market, and thus there is no *irreversible* prejudice because the Crown can always repurchase some later if necessary. The claimants' response was that the Crown was very unlikely to repurchase shares for that purpose, once it had sold them, and may not often be in a financial position to do so in any case.

85. In our view, this question turns on whether the claimants would be able to demonstrate that they have customary rights, sometimes amounting to the equivalent of legal ownership in the English common law sense, and which were protected and guaranteed by the Treaty in 1840. While this turns on the facts of particular cases, the Crown and the claimants agreed that the Tribunal has already made relevant findings in the Mohaka River, Whanganui River, and Ika Whenua Rivers claims. Similarly, relevant findings have been made about customary rights in subterranean geothermal resources for stage one of the Central North Island claims. In its own words, the Crown is already informed of the Tribunal's findings as to Māori rights, although it argues that Māori property rights in water 'have not been established', and that there is guidance from the Waitangi Tribunal (in its Wai 262 report) that property rights may not be 'the

[75] Crown counsel, memorandum in response to applications for urgent hearing, Wai 2357 paper 3.1.3

best way of conceiving the Crown–Māori resource relationship'.[76] Also, the Crown suggests that many Māori may not see relationships with water in terms of rights.

86. We have considered the findings of the Ika Whenua Rivers Tribunal and the Whanganui River Tribunal, which were put to us by the claimants. They maintain that there is a prima facie case for the existence of Māori customary rights, sometimes amounting to full ownership rights, in other waters as in those rivers. Similarly, we have considered the findings of the Central North Island Tribunal as to extant customary rights in subterranean geothermal resources. Were the Wai 2357 and Wai 2358 claims to be considered well-founded, an inquiry panel might well find that shares in the power-generating SOEs were an appropriate form of redress for Crown breaches of those rights. The claimants have put this to the Tribunal in their statements of claim and their submissions. An urgent hearing would inevitably have to consider this point. It would also have to consider the Crown's argument that the Tribunal should follow the Wai 262 Tribunal and conceive of contemporary Māori interests apart from or outside the framework of property rights. It would also have to consider the argument that customary Māori relationships with water should not be conceived of in terms of rights. Either way, an urgent inquiry would consider these questions, which are at issue while a possible remedy (in the form sought by the claimants) is still in Crown ownership.

87. It follows that the claimants are likely to suffer irreversible prejudice if SOE shares are sold without preserving the ability for the Crown to remedy any well-founded Māori claims of Treaty breach. The claimants have argued that the denial of a hearing to prove a right is a denial of the right. We agree that this would likely be the outcome if an urgent hearing is not granted.

88. We also accept the claimants' argument that the Crown is unlikely to repurchase shares once they have been sold. For fiscal reasons alone, the argument is compelling. We think that the prejudice – should Māori claims prove well founded – will likely be irreversible, even if shares are fungible and can be more readily repurchased by the Crown than other forms of property.

89. The claimants identified a third form of prejudice that they believe they are likely to suffer. Essentially, their argument is that the Māori water rights themselves are about to be irreversibly eroded, to the significant and irreversible prejudice of the rights holders. This argument focused on two pending Crown actions: the sale of shares in the power-generating SOEs; and the development of a new regime for the management, governance, and allocation of water. In both cases, the claimants suggested that their prior rights must be identified and defined by the Waitangi Tribunal, and commercial redress or rights recognition considered, before new private interests and rights in water are created. These likely new rights ranged from the shareholdings of private investors in the Mixed Ownership Model companies to tradable use-rights in fresh water.

90. We do not accept the claimants' argument that the sales of shares will have a 'chilling effect' on the Tribunal's ability to order resumption of land under section 27B. We agree with the Crown that the inclusion of a private shareholding in the companies will make no difference, and that the more likely 'chilling effect' would be the inextricable link between the companies' core functions and assets such as power stations. Nor do we accept the claimants' argument that an asset in which Māori claim property rights, a use-right in water, is being transferred. What are being transferred are shares in the power-generating companies.

[76] Ibid, p 5

91. Nonetheless, while the Crown is technically correct that the transfer of shares in the power companies will not change Māori customary rights in water (since the companies' right to use the water is already in place, regardless of who owns the companies), we also think that there is strength in the claimants' argument that public opposition to any future articulation of Māori rights would be significantly increased by transferring the shares. As the claimants put it, this opposition would likely come from two sources: the Crown, which transferred the shares on the basis that there is zero cost for the companies' use of water to drive their turbines; and the shareholders, who made bona fide purchases of shares on that understanding.

92. We also accept that there is some force to the claimants' view that their rights may be irreversibly prejudiced if critical decisions about water are made without being able to take proper account of or give effect to Māori rights. Again, since the Tribunal's river reports indicate that such rights may exist, a hearing of the Wai 2358 claim might well find that new private rights in water should not be created unless or until prior Māori claims have been properly addressed. For this to be effective, an urgent inquiry should be commenced as soon as possible, since, as Mr Ferguson submitted, the water reforms process has been gaining momentum since 2007. Major decisions are expected in late 2012.

93. In summary, the Waitangi Tribunal found in its *Ika Whenua Rivers Report* and its *Whanganui River Report* that Māori have customary rights, sometimes equivalent to English proprietary rights, in the Rangitaiki River, the Whirinaki River, the Wheao River, and the Whanganui River (and its tributaries), and that the Crown has breached the Treaty in respect of those river rights. The claimants submit that they can demonstrate such rights in other freshwater resources. If Māori do have well-founded claims of Treaty breach in respect of water rights, they will suffer significant prejudice if the Crown sells 49 per cent of shares in the power-generating SOEs without first providing (or reserving the ability to provide) redress for any such well-founded claims. Also, Māori seek an urgent hearing to establish whether they have extant property and Treaty rights in water that, given the current legal regime, may never have a better opportunity for 'proxy' acknowledgement than by becoming shareholders in these water businesses. Here, again, we consider that the claimants are likely to be prejudiced if the Crown disposes of shares worth between five and seven billion dollars before the Tribunal determines whether this aspect of the claims is well founded. Although, technically, shares may be readily repurchased on the stock exchange if the claims were to be upheld at a later date, we agree with the claimants that the prospect of this being considered affordable is remote. Finally, we agree with the claimants that the sale of shares on the basis of a zero cost for water will likely create significant opposition to future recognition of their rights, should such rights be proven and need to be accommodated (as the Crown accepts they may be) at a future date.

94. For these reasons, we consider that the claimants are likely to suffer imminent, significant and irreversible prejudice if the Crown does not retain the ability to either recognise any proven rights in water and geothermal resources or to provide appropriate redress for any well-founded Treaty claims. Previous Tribunal panels have found that some such rights exist in relation to particular rivers and iwi, and that Treaty principles have been breached in respect of those rights. The Crown's argument that Māori rights and interests in water are better provided for in a fair and long-lasting governance and management regime is one that needs to be urgently tested, before the transfer of shares from Crown ownership begins and before the water reform process reaches its final stages.

95. Having accepted these grounds for significant and irreversible prejudice, the Tribunal does not need to assess the related question of the Crown's international treaty obligations, and what effect these might have on the Crown's ability to provide redress

after shares are transferred. That matter is complex and we do not have full information on the point.

Is there an alternative remedy available to the claimants?

96. In the Crown's submission, there is an alternative remedy available to the claimants. The Tribunal's approach, we were told, is 'generally to encourage continued inquiry and dialogue'.[77] A Crown-Māori dialogue on the governance, management, and allocation of water is already happening, in the form of:
    a) participation by the Iwi Leaders Group (and their advisers) in the Land and Water Forum;
    b) high-level discussions between the Iwi Leaders Group and Ministers; and
    c) future wider consultation with Māori (it being agreed by all concerned that the Iwi Leaders Group do not speak for all Māori).

97. We note first our concern that geothermal resources are not part of any dialogue. From the affidavit of Mr Guy Beatson, Deputy Secretary Policy in the Policy Division of the Ministry for the Environment,[78] and as confirmed by Crown counsel at the conference, geothermal resources will eventually be included in stage two of the resource management reform process, which is not due to start until late 2012. As with water, it is unlikely that stage two of the resource management reform process will consider questions of ownership.

98. Secondly, the Crown–iwi leaders' dialogue does not include the question of Māori rights in water, which is being left to possible discussion towards the end of the process in late 2012. Instead, dialogue is proceeding on the basis that Māori rights (of whatever nature) are not affected by the outcomes of the freshwater management reforms, including the possible creation of tradable use rights in water. The claimants take a different view. They maintain that rights must be properly defined before they can be reconciled with the admitted rights of others, so that all rights may then be integrated into a fair, durable regime for the governance and management of water. The Iwi Leaders Group suggests that a process of rights definition in all waters would be premature at this stage of their dialogue with the Crown.

99. We note, however, the Iwi Leaders Group's suggestion that an urgent inquiry could rightly be held into the Wai 2357 claim, and those waters and geothermal resources used by the four power-generating SOEs in which shares will be sold. It seems to be the iwi leaders' view that their dialogue with the Crown need not be interrupted by such an inquiry, although a wider inquiry into all waters might divert the Crown's attention and disrupt ongoing and fruitful discussions.

100. The claimants and the Iwi Leaders Group agree on at least one thing: current discussions with the Crown will not provide a remedy for the foreclosure of the Crown's ability to use SOE shares for settling Treaty claims, or as a 'proxy' recognition of Māori rights in water. The iwi leaders support a hearing of Wai 2357 and related parts of Wai 2358. Nor has the Crown suggested that this particular matter will be discussed with the Iwi Leaders Group or the wider Māori community. We agree with the claimants, therefore, that there is no alternative remedy for them in the current Crown–Iwi Leaders' Group dialogue.

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[77] Crown counsel, oral submissions, 13 March 2012 (quoting Crown counsel, memorandum, 7 March 2012, Wai 2357 paper 3.1.37, p 7)
[78] Guy Beatson, affidavit, 24 February 2012, Wai 2357 doc A3

101. There remains the question of whether the continuation of this dialogue (and future, wider consultation to follow it) provides a fair and possibly better alternative to an urgent Tribunal hearing of the Wai 2358 claim.

102. This was certainly the view of the Crown and of the Iwi Leaders Group, and of those tribes in support of the Iwi Leaders Group, at the judicial conference. Mr Ferguson, in his submissions for Ngāi Tahu, put to us that the conditions of the 1980s are long gone, when disempowered iwi needed the New Zealand Māori Council to act on their behalf. Ms Sykes, however, in her submissions in support of the claimants, observed that many Māori, especially those without Treaty settlement assets, still need organisations and leaders like the Council to carry matters forward that they cannot carry themselves. As we see it, there are many Māori in support of each side of this debate. And, since the Iwi Leaders Group and their respective iwi have expressed a wish to participate fully in the inquiry if urgency is granted, both sides would come together if an urgent hearing were to be held, making it a truly national inquiry. We do not believe, therefore, that an urgent hearing would divide and polarise Māoridom. Both the claimants and the Iwi Leaders Group intend to participate fully in an inquiry if it is granted. We are more concerned that, as Ms Ertel submitted, failure to grant an urgent hearing might deepen differences between Māori and non-Māori down the track, once shares in the power companies have been sold to the general public.

103. In our view, there are two key points to consider. The first is the question of whether the current Crown–Māori dialogue is an alternative remedy for the claimants. It is not, for the simple fact that it does not include them. Nor are there any plans to include them, except for an intention to conduct broader-based consultation on the freshwater management regime in the future. We do no doubt that the intention to conduct broader-based consultation is honest, well-meant, and entirely appropriate. But it is no substitute for the fact that the Crown is not presently in discussion with the many Māori represented by the claimants in these proceedings, and there is no immediate intention of being so.

104. The second point is that 'litigation', as the Crown and Iwi Leaders Group called it, might disrupt the discussions which *are* taking place at present. Again, we note the Iwi Leaders Group's concession that an urgent hearing of Wai 2357 and of Māori rights in the water and geothermal resources used by the SOEs would be appropriate and need not interrupt their discussions with the Crown. Also, we note the intention of these iwi to participate fully in an urgent inquiry if one is granted. The question then becomes whether the Crown would wish to continue its Fresh Start for Fresh Water discussions with the Iwi Leaders Group in those circumstances. Ms Hardy stated in oral submissions that the Crown–Māori dialogue could not proceed 'in parallel' with an urgent hearing. That is a matter for the Crown and the respective iwi to resolve. We do not think, in all fairness, that this should have any material effect on whether the claimants can obtain an urgent hearing of their claims.

105. The claimants, however, have sought a halt to dialogue between the Crown and the Iwi Leaders Group, and of the whole Fresh Start for Fresh Water programme, until their claims have been heard and reported upon. This proposition would have merit if such discussions were almost complete and final decisions were about to be made, but, as we understand it, that is not the case. In our view, the Crown and those Māori leaders with whom it is in discussion should continue those discussions in the meantime. We encourage the Crown and Māori to make what progress they can while we hear the claims. (We hope, too, that this may result in less polarised Crown–Māori positions in an urgent inquiry into the Wai 2357 and Wai 2358 claims.)

106. At the same time, we are persuaded by the claimants' submission that 'prior rights must be determined before new property interests are created' and 'compensation for

irreversible loss must be settled before new property interests are created'.[79] We expect that the Crown, as a responsible Treaty partner acting in good faith towards all Māori, would carefully consider any findings and recommendations made by the Tribunal as a result of an urgent hearing, and would give those findings and recommendations their due weight in eventual discussions and decision-making with all Māori groups and leaders with an interest in water or geothermal resources. There is still time for this to occur, even if discussions between the Crown and the Iwi Leaders Group continue in the meantime. But it is incumbent upon the Tribunal, the Crown, and the claimants to ensure that an urgent inquiry can be completed in time to have its due weight in the freshwater management reforms.

107. The other possible remedy to consider is litigation. The Crown argued that the Waitangi Tribunal is not an appropriate body to determine the existence (or otherwise) of legal rights, and that the courts are the only forum for defining property rights. Taken to its logical conclusion, this argument would mean that the claimants, in seeking a definition of their property rights, have a more appropriate remedy in the courts. In response to questions from the Tribunal, Crown counsel rejected this proposition. Her submission was that the current Crown–Māori dialogue is far preferable to litigation. Mr Taylor and Ms Ertel, in their submissions, maintained that the courts are not preferable to the Tribunal for pursuit of the present claims. They emphasised that they are seeking 'reinstatement' and 'restoration' of lost rights, as well as commercial redress for rights lost or reduced in breach of the Treaty, and appropriate recognition of surviving rights. The courts cannot take a restorative approach to rights, whereas the Waitangi Tribunal can determine what rights were protected or guaranteed by the Treaty, whether those rights have been so protected, whether compensation is due if they have not been protected, and how such rights might be accommodated in Treaty terms today. Sir Edward Taihakurei Durie also pointed out, on behalf of the claimants, that the Waitangi Tribunal is a unique body for explaining the nature of Māori rights, the Crown's Treaty duties in respect of those rights, and how the interests of Māori and non-Māori should be accommodated, given its unique Treaty jurisdiction and its bicultural makeup and expertise.

108. It is apparent, therefore, that neither the Crown nor the claimants regard the courts as an alternative remedy. We accept this position.

109. We also note that it has been long established that the Tribunal can define the content of the law and of legal rights for the purpose of determining the law's consistency with the principles of the Treaty, and for determining whether legal rights have been abrogated in breach of the Treaty. The Tribunal, of course, is not a court and does not purport to exercise the role or jurisdiction of a court.

Do the claimants challenge an important Crown action or policy?

110. The claimants challenge two Crown policies or actions of vital importance to all Māori and indeed to all New Zealanders: the Crown's intention to sell shares in the power-generating SOEs without first reserving means to redress well-founded Treaty claims or providing practical recognition of Māori rights in water; and the Crown's policy to reform freshwater governance, management, and allocation regimes without first defining and provide for Māori customary, proprietary, and Treaty rights in water. The Crown's view, as we have noted, is that customary or proprietary rights will not be affected by what is planned, and – even if they were – Māori interests should not be considered in a property rights-based framework but in other ways.

[79] Counsel for claimants, submissions in way of reply, Wai 2357 paper 3.1.17, p 2

111. The claimants and the Crown have widely divergent views on these fundamental questions, which in turn are fundamental to Crown–Māori engagement over what the claimants termed the 'final frontier': fresh water. This is a matter of critical importance to all Māori, to the Crown, to the Treaty partnership between them, and to the nation.

Are there any other grounds justifying a grant of urgency?

112. At Te Hapua in December 1986, at the first hearing of the Muriwhenua fishing claim, the claimants drew the Tribunal's attention to the State-Owned Enterprises Bill and the risk that Crown lands would be put beyond the possibility of use for redress of their claims. The Tribunal felt that the matter was so urgent, and of such import to Māoridom, that it made an interim report to the Minister the same day (which has been cited in these proceedings).[80] At that hearing, the Waitangi Tribunal gave the following waiata:

> Karanga ra, e Rata
> Te hiku o te ika e
> Whakaripo ake nei e
>
> Tenei a Tai
> Whakamana Te Tiriti e
> Te ope nei e
>
> Tainui e
> E tama Rawiri
> Paora e
> Whakaterehia rā
>
> Maranga mai
> Te iwi oho ake rā
> Tauiwi tahuri mai e
> Whatungarongaro
> Toitū te whenua e
>
> The clarion voice of Rata calls
> The movement in the tail of the fish responds.
>
> In our midst we now have Tai
> Now is the time to give strength to the Treaty.
> Here too is the ope, all members of the Tribunal.
>
> Tainui (Koro, Minister of Maori Affairs)
> Rawiri (David, Prime Minister) and
> Paora (the Governor General)
> Through you, this fish can swim.
>
> Maori people rise and be vigilant
> Tau-iwi (Pakeha and others)
> The time is now to face each other.
>
> As the light of the eye and the life of things living
> fade from sight,
> only the land is seen to remain,
> constant and enduring.[81]

113. Now, as then, the Tribunal has been called upon to consider urgently the transfer of an asset that might be essential for the redress of Treaty claims, should such claims prove well founded. All Māori are either involved in or affected by these claims. Also, the claims concern very large interests, whether economic or otherwise, for all New Zealanders. Water is of vital importance to everybody. As we see it, this strengthens the need for an urgent hearing so that Māori interests may

[80] Waitangi Tribunal, *Muriwhenua Fishing Report*, Government Printing Office, 1988, p 5
[81] Ibid, p lx

receive such recognition and protection as is just and compliant with Treaty principles, in a manner that is fair to all New Zealanders.

Are the claimants ready to proceed?

114. We deal with this question last because we consider it to be determinative of whether an urgent inquiry *can*, as opposed to *should*, take place. The question of the claimants' readiness to proceed, and the question of whether an inquiry into these claims is practicable in an urgent timeframe, has been very difficult to assess.

115. The Crown put to us that a hearing of Wai 2358 requires an exhaustive and detailed examination of all waters and geothermal resources throughout the country, on a place by place, hapū by hapū, iwi by iwi basis. There are certainly grounds to think so in the Wai 2358 statement of claim and some of the submissions that we have received.

116. Mr Ferguson, in his submission for the Iwi Leaders Group, suggested that the Tribunal should inquire into Wai 2357 and the relevant parts of Wai 2358, on the basis that there is a nexus between the four power companies and the particular waters and geothermal resources that they use. An urgent inquiry, he told us, should be limited to in that way.

117. In their submissions of 12 and 13 March, the claimants proposed an 'inquiry management plan' to focus and discipline an urgent inquiry. We have summarised some of the main points above in paras 52-53. The claimants submit that they are ready to proceed because they do not require any fresh research, due to the wealth of evidence already filed in previous Waitangi Tribunal inquiries. They also submit that the evidence of kaumātua as to Māori rights will be readily obtained in time for hearings. What remains, in their view, is the necessity for a group of experts to tie it all together and develop evidence 'categorising rights by water resource type, identifying methods by which they may have been breached and how they may be provided for today'.[82]

118. In addition to saying that they are ready to proceed in terms of research and evidence, except for the work of the experts' group, the claimants suggest that an urgent inquiry should be focused on rights definition and relief definition, and should be confined to the case examples of the ten sets of co-claimants in the Wai 2358 claim. They recognise, however, the practical difficulties that may emerge if many other Māori groups (interested parties in the present proceedings) should seek to have their claims joined to the inquiry or to be heard as interested parties. As we understand it, the claimants' proposed solution is to involve interested parties in the preparation of the expert group's evidence (which uses the ten case examples), and then to confine the hearing to that evidence alone. Next, the Tribunal would hear groups with particular cases relevant to the four SOEs where there are separate issues to consider about the resources used by those SOEs. After that, the Tribunal should hear the Iwi Leaders Group, hear the Crown, and then hear the claimants in reply.

119. The claimants also suggested that it will eventually be necessary to hear hapū and iwi on their particular cases, including interested parties, but that this would 'constitute a second step. That step may or may not need to proceed under urgency'.[83] In other words, the claimants envisage a two-stage process, with the first stage focusing on a framework of Treaty rights definition, types of breach (if established), and a design for

[82] Counsel for claimants, memorandum enclosing inquiry management plan, 12 March 2012, Wai 2357 paper 3.1.50, para 4(b)
[83] Ibid

remedy, conducted urgently, and a second stage directed at considering individual hapū or iwi.

120. Is this a realistic plan? The Crown suggests that we should be sceptical of the claimants' statement that they are ready to proceed. In particular, Ms Hardy cautioned that the preparation of evidence by the experts' group may take some time.

121. Certainly, it is the case that a very large body of relevant research has already been filed in previous Tribunal inquiries, along with written or audio recordings of relevant kaumātua evidence. Some of that evidence has been reported on by the Tribunal, although some has been filed in inquiries on which the Tribunal has only reported in part, or for which no Tribunal report has yet been completed. We have a concern that, since the case examples are to be drawn from claimants who have not yet settled, not all of the co-claimants can necessarily rely on research already completed for other inquiries. But we expect that most of them will be able to do so.

122. That being the case, we accept that the claimants will be ready to proceed once relevant research and kaumātua evidence in other inquiries has been identified and filed on the Wai 2358 Record, once kaumātua witnesses have been briefed, and once the experts' group has produced its evidence. This process will necessarily take some time, but our view is that it should be able to be done within the timeframe necessary for an urgent inquiry.

123. On balance, we are satisfied that the claimants will be ready to proceed within an urgent timeframe.

124. As to the question of how exactly to focus and constrain matters so that they may be heard within a practicable and urgent timeframe, that is a matter that can only be decided by the Tribunal appointed to hear the claims. The availability of Tribunal resources to hold such an inquiry, bearing in mind the balance of the Waitangi Tribunal planning for this financial year and early into the next financial year, will also be an important consideration.

The Tribunal's Decision

125. Against the criteria for urgency, we are of the view that the claimants are likely to suffer significant and irreversible prejudice, that no other remedy is available to them, and that they will be ready to proceed on an urgent basis. We also accept that the claims address proposed Crown actions and policies of national importance. Accordingly, we grant the claimants' application for an urgent inquiry into the Wai 2357 and Wai 2358 claims.

126. In terms of interim relief, the applicants sought an interim recommendation from the Tribunal that the Crown delay its first sale of shares until their claims had been heard and reported. They also requested that the dialogue between the Crown and the Iwi Leaders Group, along with the Fresh Start for Fresh Water reform process, be similarly delayed. We decline to make any interim recommendation at this point.

127. The first proposed sale of shares is for Mighty River Power, presently scheduled for the third quarter of 2012. The sale of shares in Solid Energy, Meridian Energy, and Genesis Energy is, as we understand it, due to follow later. Given the nexus between Mighty River Power and a confined set of waters and geothermal resources, as noted by Mr Ferguson, we expect that the Tribunal could issue an interim report before or soon after the commencement of a share sales process for Mighty River Power. That would be a matter for the Tribunal appointed to hear the Wai 2357 claim.

128. Decisions in terms of freshwater management reforms, we were told, are likely due at some time in late 2012. Also, the Crown may begin discussions with the Iwi Leaders Group about Māori property and other rights in water at that point. Consideration of geothermal resources, as part of stage two resource management reforms, is not due to start until late 2012. Given these timeframes, an urgent, focused inquiry should enable the Crown and claimants to participate in late-stage discussions about fresh water, and early-stage discussions about geothermal resources, with the assistance of a Tribunal report on the Wai 2358 claim. It is not for this panel to decide how issues for the Wai 2358 inquiry should be defined and the case managed, so that an urgent hearing of these complex and difficult matters can realistically be conducted on an urgent footing. The Tribunal appointed to hear the claims will need to grapple with that issue, together with the parties. To date, only Māori interested parties have come forward. We anticipate that others with an interest may also seek to be heard, which will need to be managed carefully if an urgent hearing is to be completed in the proper timeframe.

129. The Crown has signalled that the mere fact of an urgent inquiry will stop its discussions with the Iwi Leaders Group. That is a matter for them but we see no reason why those discussions cannot continue in parallel with an urgent hearing.

130. The claimants submitted that the denial of a hearing to prove a right was tantamount to a denial of the right. We agree. We direct an urgent hearing accordingly.

The Registrar is directed to send a copy of this decision to counsel for the claimants, Crown counsel and all those on the distribution list for:

- Wai 2357, the Sale of Power Generating State-Owned Enterprises Claim; and
- Wai 2358, the National Fresh Water and Geothermal Resources Claim.

DATED at Wellington this 28th day of March 2012

Chief Judge W W Isaac
Chairperson

Professor Pou Temara
Member

Mr Tim Castle
Member

Dr Grant Phillipson
Member