Wai 2358: The Interim Report on the National Freshwater and Geothermal Resources Claim

Introduction

The purpose of this memorandum is to summarise the key findings of the Waitangi Tribunal as contained in its interim (pre-publication) report on Wai 2358. This report totals 275 pages and the Tribunal promises an even longer version when it is finalised. Some commentary on the findings (or more often the possible questions and issues raised by the findings) is interspersed through the summary in italics.

Background

Claim 2358 was filed by the New Zealand Maori Council and ten co-claimant hapu and iwi in February 2012 in response to the Government's proposal to sell 49% of the shares in the State Owned Enterprises (SOEs) Mighty River Power, Meridian Energy and Genesis Energy.

In March 2012, the claimants were granted an urgent hearing by the Tribunal to address four questions. These were:

1. What rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi?
2. Does the sale of up to 49 per cent of shares in power-generating SOE companies affect the Crown's ability to recognise Maori rights and remedy their breach, where such a breach is proven?
3. Is such removal of recognition and/or remedy in breach of the Treaty?
4. If so, what recommendations should be made as to a Treaty-compliant approach?

The Tribunal hearing was held at Waiwhetu Marae from 9-16 July and 19-20 July 2012. All other questions or issues relating to the claim have been set aside for the second phase of the Tribunal's investigation. Phase 2 includes some very difficult and case-specific questions about the degree to which rights have surrendered or extinguished, and the degree to which the Maori proprietary rights are therefore residuary today.

Tribunal Findings

Question 1.

Consistent with earlier Waitangi Tribunal reports on water and rivers, this Tribunal found that Maori had rights and interests in their water bodies for which the closest English equivalent in 1840 was legal ownership. The nature and extent of that proprietary water right was the exclusive right to control access to and use of the water while it was in their rohe. Furthermore, Maori had a

development right in their properties, the water bodies of New Zealand. However, the Tribunal also found that the signing of the Treaty had a significant effect on these rights in that Maori were thereby held to have shared their water bodies by the grant of non-exclusive use rights to the incoming settlers. The claimants themselves do not claim sole or exclusive ownership of all flowing water today and accept that Treaty compliant alienations may have occurred. The claim is that there are residual proprietary rights in particular water bodies. Without making any particular findings relating to the rivers used by the SOEs, the Tribunal accepts this general claim. Its answers to questions 2, 3, and 4 are based upon a presumption that residual proprietary rights will be found that are of a nature and scale that their proper recognition would not be possible if the sale of 49% of shares in the three SOEs proceeded as planned by the Government.

The Tribunal sidestepped the question of whether their findings above also applied to aquifers and ground water. "In the absence of specific submissions, we lack the evidence and legal argument to make a finding about the nature and extent of Maori rights in aquifers and ground water in 1840. Our findings above at 2.8.3(1) should not be read as applying to aquifers or ground water."[1]

This is a weakness in the Tribunal's interim findings as it is forced to make presumptions about appropriate remedies to breaches that have not been clearly established. Conceivably, those breaches may be particular (relating to certain hapu and iwi) or general (relating to all Maori) or a mixture of both. It is noticeable that some iwi with an interest in waters used by the SOEs have not provided evidence to the hearings and although the Maori Council has presented itself as representing the interests of all Maori in the issue, it is not clear that it has a mandate to do so.

The processes by which legitimate alienations might have occurred and the effect of breaking up the bundle of rights that was equivalent to ownership of water bodies in 1840 through 'sharing' or through selling land that comprises the catchments of rivers on residual rights have not been identified. Presumably, this is because these effects are case-specific. If this is the case, then it follows that the relationship between these situations and any general Maori claim will also be case-specific. Logically, individual claims cannot be settled without individual investigation and general claims cannot be settled prior to individual claims without risk that general remedies will compromise the recognition of, or compensation for, individual claims at the hapu or iwi level.

The Government Position

Also consistent with its response to earlier Tribunal reports, the Government maintains the position that no-one owns water (including the Government). It recognises that Maori have rights or interests in water and that the full nature and extent of those rights has not been defined. However, the Government position is that, when investigated, those rights would not amount to ownership.

The Government presented two arguments to support its position that Maori did not own water bodies in 1840:

1. Ownership would be inconsistent with the common law
2. Many claimants provided evidence that Maori did not think of ownership in the same way as Europeans and therefore reject the notion that ownership and rangatiratanga should be used as synonyms.

[1] Wai 2358, page 109

The first argument had been addressed clearly by the Tribunal previously. "In terms of both the general law and the Treaty, that which Maori possessed must be determined by that which they possessed in fact, and not by reference to what may legally be possessed in England".[2]

Second, this Tribunal rejected the current attempt of the Crown to use the claimants own evidence against themselves through selective reading. The overall content of that evidence was that rangatiratanga incorporated many of the incidents of ownership recognised under English law but went further. Ownership was essentially a subset of rangatiratanga.

Essentially, the Crown position is that Maori rights secured under Article II of the Treaty can be no different than rights provided under English common law in 1840. This position is convenient as it denies any responsibility for the Crown to investigate and codify Maori customary rights so that they may be legally secured and guaranteed as promised in the Treaty. However, it is also a position that is untenable at the general level and has already been abandoned by the Government in other settlements such as the Fisheries Settlement where it was accepted that Maori had rights and interests in fisheries of a nature and extent quite different to anything available in England.

Ms Ott (of the Office of Treaty Settlements) stated that the Crown's current Treaty settlement policy does not generally include the vesting of ownership of natural resources because resources such as water and geothermal resources are required for the benefit of all New Zealanders. In relation to water specifically, the Crown is unable to vest ownership as the legal position, as expressed by Ms Ott is that no one owns water and the Crown cannot transfer what the Crown does not own.

This brief submission concentrates further errors of fact and logic central to the current Government position. The Crown can (of course) vest ownership in things it does not own. The Crown does not have to claim ownership of radio frequencies in order to allocate and recognise rights in the spectrum. The process of vesting of rights does not have to be one of transfer. Maori are not claiming ownership of water but residual rights to control and use water that would be subject to some overarching environmental regulation.

Similarly, Maori do not claim ownership of fish in the sea but rights to manage fishing and harvest fish. The Government does not have to own fish to recognise these rights. Hopefully, Ms Ott is not saying that the Fisheries Settlement is contrary to the Crown's current Treaty settlement policy because it vested ownership rights in quota? Finally, the recognition that a natural resource is important to the well-being of a society is not an argument that it should be un-owned. The weight of historical evidence is that such resources are best conserved and most efficiently used within a framework of secure private rights.

The Crown's position is that Maori rights of tino rangatiratanga and kaitiakitanga are not proprietary rights and can be best given effect through participation in resource planning and consenting processes. The extent of such involvement could be adjusted on a 'sliding scale' depending upon the outcome of particular investigations. The Crown suggested that kaitiakitanga is the true and practical expression of Maori rights in respect of environmental matters, including water resources. *The Crown is hardly best qualified to make this suggestion*.

[2] Waitangi Tribunal, The Whanganui River Report, 1999, p291.

The Government considers that it has kawanatanga rights to manage water by setting limits on its use and establishing systems for allocating water to balance the interests of the many groups with rights and interests in water.

It is inherent within this statement that no rights or interests are above being 'balanced'. Furthermore, the role the Crown has arrogated for itself with respect to water is not simply one of environmental management but of economic management in that, under the Resource Management Act, the Government has established a system to control and allocate use rights of various kinds in water that are property rights. As mentioned, it is not necessary for the Government to claim to own water in order to exercise critical incidences of ownership (the right to manage, the prohibition of harmful use, the granting of rights to use and rights to possess water). While it exercises these particular legal relations that comprise the components of the institution 'ownership' no other person or group can exercise them.

It is sophistry for the Government to disavow ownership while exercising the rights and prerogatives of ownership. Charging royalties for water use would be a further unilateral expansion of these rights. Ownership is as ownership does. As Ben Couch (a former Commissioner of Te Ohu Kai Moana) once remarked "I come from a country electorate where life is not too complicated. Back there, when we see an animal that looks like a sheep, grows wool, and is not too bright, we decide it probably is a sheep.[3]*"*

For their part, claimants accept that Government has a legitimate role in the management of water resources, particularly in protecting water quality. *That role is not incompatible with the recognition of Maori proprietary rights in water any more than the role of Government in protecting the terrestrial environment is incompatible with private land ownership.*

Question 2

This question revolved around establishing whether there was a nexus between the sale of 49% of shares in power-generating SOE companies and the ability to recognise Maori rights in water or remedy breaches in the Crown duty to protect such rights. The SOE shares have value and therefore the capacity to fund Crown obligations for any general claim to compensation relating to water. The Maori Council suggested that SOE shares could be used to settle general Maori claims over water resources not actually utilised by the SOEs. The Crown submitted that shares in a company are not an appropriate way of recognising Maori rights. (*This is ironic for anyone familiar with the Sealord settlement*).

Not all claimants wanted shares and those who did described them as a partial solution. This sentiment was behind the concept that settlement could possibly be achieved through a formula of 'SOE shares plus'. The suggested content of the plus part was variable including possible royalties, regulatory influence, inclusion in new joint ventures or a special governance status within the SOEs.

The Tribunal agreed with Crown submissions that the proposed sale would not impair the ability of the Crown to provide <u>almost all</u> forms of commercial rights recognition and/or remedy after the sale. However, the Tribunal also found that the Crown would possibly be unable to establish a special class of Maori shares in the SOEs after the sale if that was agreed that such shares would be a

[3] Couch, Ben (An original member of the Treaty of Waitangi Fisheries Commission and Member of Parliament for Wairarapa) New Zealand Parliamentary Debates, 1977.

component of any agreed settlement between Crown and Maori over water claims. The preservation of this 'shares plus' possibility was the nexus found by the Tribunal between Maori rights in water and the sale process.

The creation of a special class of Maori shares in SOEs has a number of negative impacts that militate against its use in a settlement. If they are to allow Maori to force the SOE to pay Maori more for water, such payments would be better addressed under a proper royalty regime. If they are to force the SOE to adopt environmental practices more sensitive to Maori concerns, such husbandry issues would be better addressed under a wider environmental regulatory framework. If they are to force the SOE to pay higher dividends to Maori to address Maori economic needs, such benefits would be better delivered by addressing the number of shares allocated to Maori rather than the creation of a special class of shares. The Tribunal has therefore called for a deferral of the sale to accommodate a concept that appears to be a bad idea generally.

A representative view of some claimants was that (for instance) Mighty River Power is a 'water business' and (as holders of residual proprietary rights in water) Maori should be able to obtain a return from those who receive a direct income stream from the use of the water itself.

This view begs many questions. It does not follow that Maori residual proprietary rights in water preclude the existence of other proprietary rights in water or that those other right holders have a responsibility to must remit water royalties or profits from their businesses to Maori. Any such obligations would be a function of the exact specifications of those residual Maori proprietary rights – if they existed at all. These specifications have not been established.

Second, the concept of a 'water business' does not stand close examination. Water is essential to all life and to a great many industrial processes. This is why the ownership of water is understandably a highly charged topic, especially if that ownership has any aspects of monopolistic control associated with it. The exercise of control over access to water as a critical factor of production has the potential power to expropriate all profits and all sunk investment in that production. This is true for any other factor of production that is essential, even those that are not scarce, such as rights to oxygen or gravity. That the Crown has vested in itself the sole right to control and use natural water in New Zealand does not alleviate concerns over potential abuses of those monopoly powers. A royalty regime on water is potentially a regime with power to tax the use of something that is essential with no obvious natural boundaries on how that power might be moderated or disciplined.

The claimants appear to be sensitive to this issue and therefore have sought to provide assurances that Maori claims to water will not affect domestic water uses, agricultural uses and 'indirect' uses. Rather, claimants wish to obtain economic benefits only from those who receive a direct revenue stream from the use of water (including the three SOEs). This is not a clear distinction, or perhaps not even a coherent one. Moreover, the intended basis or formula for such Maori water charges is not clear. It could be to compensate for foregone customary use (opportunity cost), it could be a market price (assuming a market) or it could be everything that the user can bear to pay in order to avoid exclusion.

The SOEs are not water companies, they are energy companies. They do not use water per se, they use kinetic energy released from the mass of water moving under the influence of gravity. The natural state of affairs is for this energy to be 'lost' from the water in the course of its journey to the

sea. Many of the effects of these companies on Maori customary water rights were associated with the construction of dams, not the day to day operation of generators.

Question 3

On the basis above the Tribunal has found that to proceed with the sale without first determining whether 'shares plus' is a necessary part of any arrangement to protect Maori property rights or to remedy well-founded claims would be to create a new Treaty breach.

A Treaty breach is a serious matter and it is not good for the reputation of the Tribunal to base such a prospect (even a tentative one) upon reasoning that is as flimsy as that used to establish the nexus between water settlements and the possible creation of special classes of shares in three SOEs. The Tribunal is on shaky ground when it seeks to proscribe the possible form or currency of a settlement before defining the nature of the associated Treaty breach.

Question 4

The finding above raises the question of how the Crown could satisfy itself that it was safe to proceed with the sale of SOE shares without creating a new Treaty breach. The Tribunal recommends that the Crown urgently convenes a national hui, in conjunction with iwi leaders, the New Zealand Maori Council and the parties who asserted an interest in this claim (approximately 100 Maori iwi, hapu, or registered claimants) to 'determine a way forward'. The Tribunal's suggested subject for discussion at the hui should be 'shares and shareholder's agreements in Mighty River Power'. In the event that no agreement was achieved at the hui, it is not clear whether the hui itself could be taken as evidence that the Crown could therefore proceed to offer shares for sale in good faith.

This rather weak recommendation glosses over the confusion surrounding claims to water – confusion that the Tribunal has thus far done little to eliminate. All parties seem to agree that claims over water bodies are particular and require individual investigation. Beyond this fact, it is not clear what important common ground could be established by the suggested hui. It could be argued that the same situation applied to the fisheries settlement and yet an agreed allocation of assets was eventually thrashed out from a single compensation pool. There are two reasons why the fisheries settlement does not seem to be an apt model:

1. *The core currency of the fisheries settlement was a well-defined perpetual property right in the resource itself (ITQ). It covered all commercial species and all fisheries within the New Zealand Exclusive Economic Zone.*
2. *Allocation of commercial fisheries assets did not proceed below the iwi level. It appears that water rights of hapu are already recognised meaning that allocation of a water compensation pool would have to work at that level. The practicality of such a process is doubtful.*