

IN THE WAITANGI TRIBUNAL

WAI 2358

IN THE MATTER OF The Treaty of Waitangi Act 1975

AND A claim by the New Zealand Māori Council
and other co-claimantsAND The National Freshwater and Geothermal
Resource Inquiry

**Memorandum of counsel for the New Zealand Maori Council
and the co-claimants in response to the Presiding Officer's
directions of 13 March 2013**

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Introduction

1. This memorandum is filed on behalf of the New Zealand Maori Council and the co-claimants in accordance with the 13 March 2013 directions of the Presiding Officer.
2. NZMC and the co-claimants support the Presiding Officer's call for responses as per the memorandum of directions and the underlying push to progress the inquiry. The Supreme Court declined to issue an injunction against the sale of Mighty River Power only as a result of a number of concessions in relation to the existence of unrecognised Maori rights to water resources and commitments towards resolving Maori claims to those resources in a reasonable timeframe. This inquiry is an important part of that commitment and continued progress towards its completion is needed should those commitments not be undermined.
3. Based on the concessions made by the Crown it appears likely that the issues that need to be determined at Stage Two can be significantly narrowed. In particular, it is possible that an agreed view may be able to be formed between the Crown and NZMC and the co-claimants on much if not all of the substance of issues (e)-(h).
4. It appears that the Crown accepts that it is presently in breach of the Treaty with respect to the protection and recognition of Maori proprietary rights and interests to freshwater and geothermal resources. A largely common view also appears to have developed between the Crown and the NZMC and the co-claimants as to how that breach came about. The Crown also conceded before the Supreme Court that those parts of its water reform process that have been published to date do not address the issue of Maori proprietary rights and interests, but asserted that more reforms were to come. It may be that the Crown will recognise the value of Stage Two of the Waitangi Tribunal's inquiry in determining what those further reforms ought to be. In

which case, it is hoped that the inquiry may be able to proceed fairly directly to a consideration of issue (i).

5. Counsel has spoken to Jason Gough for the Crown with a view to exploring a common view on the best way forward for the inquiry. Based on those informal discussions it was proposed that before the end of this month, counsel for Crown meet with counsel for NZMC and the co-claimants to explore such a narrowing of the issues. The intention would be to file a joint memorandum setting out the results of that meeting. Following that, it was suggested that a procedural hearing be held before the Tribunal in early May to discuss the outcome of that meeting and all matters raised by the various parties in response to the Presiding Officer's directions.
6. In his memorandum of directions of 13 March 2013, the Presiding Officer asked for responses on four procedural matters. The latter two matters are not relevant to the NZMC and the co-claimants, namely an update from Crown, and notice from parties no longer wishing to participate. The memorandum addresses the other two matters below and, in that context, addresses procedural matters in relation to Stage Two of this inquiry more generally. This memorandum is filed before any joint view can be developed with the Crown and therefore proceeds on the basis that no such narrowing of the issues is achieved.

Stage Two Issues

Whether the proposed issues for stage two accurately cover the issues to be determined in the second stage of inquiry for Wai 2358, or whether they should be added to, amended or otherwise altered.

7. Assuming there is no narrowing of the issues by agreement as discussed above, the proposed issues (e)-(i) as set out in the Presiding Officer's memorandum, accurately cover the issues to be determined in the second stage of inquiry for Wai 2358. However, Stage One is now complete. Therefore, where the statement of the issues refers to possible findings made in relation to issue (a) considered as part of Stage One, that reference can and should now directly state that finding.

8. Briefly here, the reasons for this view are expressed. Following that, submissions are made as to procedural matters concerning the manner in which the Tribunal ought to address those issues.

Reasons why proposed issues are sufficient

9. In any inquiry before the Tribunal, resolving the inquiry requires the Tribunal to be able to answer the following questions:
 - i. is there a problem that needs addressing;
 - ii. is it within the jurisdiction of the Tribunal to address this problem;
 - iii. ought the Tribunal make any recommendations to the Crown towards resolving this problem; and
 - iv. what recommendations ought the Tribunal to make.
10. Resolving the proposed issues for Stage Two will enable the Tribunal to answer these questions in the context of the subject matter of the underlying claim. In particular, the answer to issue (e) and, to a lesser extent, (g) and (h) will enable the Tribunal to answer i. The answers to issues (e)-(h) will enable the Tribunal to answer ii and iii. Lastly, issue (i) directly addresses iv.

Proprietary interests is still the focus

11. It has always been the position of the NZMC and the co-claimants that the distinguishing feature of the claim made that led to this inquiry was the assertion that Maori had proprietary interests in water resources. The claims stood or fell on a finding as to the existence of such interests. Equally, the NZMC and the co-claimants are concerned that this focus is not forgotten when moving into Stage Two.
12. At Stage One, the Tribunal found that Maori held residual proprietary rights and interests in freshwater or geothermal resources. Therefore, references to the rights and interests found at Stage One would be more usefully set out as “the proprietary interests in freshwater or geothermal resources held by Maori” or similar.

13. The nature of the interests that require recognition and protection is particularly important as the discussion inevitably moves onto the topic of management. Repeating what was said in the opening submissions before Stage One (at paras 18 and 19), depending on the detail, management can either be a mechanism by which an owner is able to enjoy that ownership or a tool to misappropriate an owner's interests. It is therefore essential that consideration of management issues are expressly measured against the yardstick of whether or not they are able to recognise and protect any proprietary interests in freshwater or geothermal resources held by Maori.
14. With this in mind and in light of the findings of Stage One, NZMC and the co-claimants set out below a redrafted version of the proposed Stage Two issues. These are intended to be, in substance, exactly the same as the existing issues but with direct reference to the Stage One findings.

e) Are the proprietary interests in freshwater or geothermal resources held by Maori, which the Tribunal found in stage one were guaranteed and protected by the Treaty, adequately recognised and provided for today?

f) If not, why not?

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

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

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

h) Alternatively, could implementation of the Government's proposals under the Fresh Start for Fresh Water and/or geothermal resource reforms, without ascertaining and providing appropriate recognition for the proprietary interests in freshwater or geothermal resources held by Maori, cause prejudice to Maori in breach of principles of the Treaty of Waitangi?

i) If either of these breaches and/or other breaches have been established, what recommendations should be made to the proprietary interests in freshwater or geothermal resources held by Maori from such prejudice either by:

i. taking steps to fully recognise those the proprietary interests prior to the design or implementation of the reforms; or

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

Issues of funding

15. Discussions continue between the Ministry of Justice and NZMC and the co-claimants in relation to Stage Two funding and some remaining issues in relation to the funding for Stage One. For obvious reasons, NZMC and the co-claimants cannot definitively set out for the Tribunal all of their plans for Stage Two, and in particular all of their proposed further evidence, until those funding issues are resolved.
16. The importance of this inquiry is recognised by all. As is the fact that there are a large number of people who have legitimate interests in it. However the inquiry and the participation of interested parties must be affordable or it will not happen (or will not happen in a fair manner). NZMC and the co-claimants are aware of the Ministry's concern in this respect.
17. The extent to which interested parties need to appear (funded by legal aid or otherwise) will differ depending on which issue is under consideration. For that reason, if it is necessary to consider all of the proposed issues it is suggested that Stage Two be further broken into three sub-stages considering in turn, (e) and (f), then (g) and (h), and finally (i). This will assist the efficient and

transparent flow of the inquiry, and funding issues can be considered on their merit in relation to each sub-stage. Such an approach will also mean that the Ministry does not need to fund a work on the later sub-stages if in answer to the previous issues the Tribunal decides that the later issues do not need to be considered.

18. Issues (e)-(h) can all be considered in the abstract or through examples. It is not necessary for the Tribunal to catalogue all breaches and all shortcomings of the reforms. It is sufficient to conclude that some breaches do exist and that the reforms are at least to some degree inadequate. It will be important for the Tribunal to gain an understanding of the range of issues, which NZMC and the co-claimants attempt to achieve through the use of select examples.
19. By contrast, in relation to issue (i) natural justice may require the Tribunal to give every interested party a sufficient opportunity to address the Tribunal on whether any proposed framework adequately addressed the issues being experienced by that interested parties. Doing so in a manner that gives those interested parties easy access to the Tribunal will be a significant undertaking.
20. However, NZMC and the co-claimants do not consider that it would be efficient or productive for the Tribunal to tour New Zealand asking every interested party to propose a framework starting from a blank slate. Instead, it is proposed that the Crown and the NZMC and the co-claimants, in a hearing before the Tribunal if necessary, develop a draft framework. The Tribunal can then hear submissions from all interested parties taking that draft framework as a starting point. The interested parties would not be limited in what they said about the framework, but having a draft could significantly reduce the workload required of the interested parties and their counsel. For instance they may simply agree with the draft or believe it requires minor amendment. Even if an interested party wishes to say that substantial amendment is required, such discussion will be more focused with the existence of a draft proposal.

Evidence

Submit a summary of evidence which they propose to file with the Tribunal in support of their case for stage two issues, including a bibliography of evidence which they intend to rely on.

21. For the reasons above, NZMC and the co-claimants are not in a position to name their deponents or provide a bibliography. However, to assist the Tribunal, NZMC and the co-claimants set out their broad intentions with respect to evidence. In addition to anything set out below, it is understood that the expert group who assisted during Stage One remain available.
22. In relation to issue (e), NZMC and the co-claimants accept that it would be for them to prove their position in relation to this issue and for the Crown to respond. Significant evidence on this issue was provided to the Tribunal during Stage One and it is not intended to be expanded upon as part of Stage Two.
23. In relation to issue (f), NZMC and the co-claimants again accept that it would be for them to prove their position in relation to this issue and for the Crown to respond. The historical work of David Alexander, filed as part of Stage One, goes directly to this issue. In addition, it is possible to infer a great deal about this issue from the evidence filed in relation to issue (e).
24. In relation to issues (g) and (h), NZMC and the co-claimants are of the view that the Crown needs to take the lead and it will be for them to respond. This is certainly the case if the Crown wishes to rely on hitherto unknown future reforms. Certainly NZMC and the co-claimants are aware of the proposed reforms that have, for example, been published by the Land and Water Forum and these should be before the Tribunal. However, it is understood that the Crown accepts that such reforms to date do not adequately address issues in relation to Maori proprietary rights and interests in freshwater and geothermal resources. If the Crown intends to point to other further reforms as addressing those issues then the Crown needs to provide detail before NZMC and the co-claimants will be in a position to respond. If this issue is to be contentious, it is likely that a significant amount of further evidence will need to be adduced. NZMC and the co-claimants have identified some

people with expertise in relevant fields who should be able to respond to evidence from the Crown.

25. The position in relation to issue (i) will depend to a great deal on the resolution of evidence in relation to issues (g) and (h). In other words, what needs to be done in relation to a framework depends on what is not otherwise successfully achieved through other proposed government reforms. NZMC and the co-claimants filed some broad brush evidence at Stage One on possible frameworks. However, it is expected that Stage Two will need to go into these issues in a great deal more detail with a corresponding need for more detailed evidence. It is intended that such evidence will include further detailed evidence from some of the experts who presented at Stage One.
26. Lastly on the issue of evidence, NZMC and the co-claimants believe that some Crown entities will be able to provide valuable assistance to the Tribunal during Stage Two. The Tribunal may wish to consider inviting participation from those entities. For example, representatives from the Department of Conservation and the Ministry for the Environment are likely to be able to be of assistance in relation to all of the proposed issues. Also, in submissions at Stage One, counsel pointed the Tribunal to work done by the Human Rights Commission on problems with Maori representation and participation in local government. Decisions of water management rest almost entirely with regional councils making this work of the Commission highly relevant to the problems faced by Maori in relation to their water resources and the effectiveness of proposed solutions.

Co-claimants

27. The group of co-claimants joining with the NZMC has changed slightly since the filing of the original claim. Some major groups have joined, as has or will be communicated to the Tribunal separately. Some individuals have sought separate representation for Stage Two and have communicated this to the Tribunal. The use of the term “co-claimants” in this and future documents is not intended to purport any continued representation of those individuals who are now separately represented.

Conclusion

28. The issues that need to be resolved have not changed. However, the process culminating in a decision of the Supreme Court may have significantly advanced resolution of those issues. NZMC and the co-claimants need an opportunity to further discuss this issue with the Crown and hope that those discussions will significantly narrow the issues. If not, NZMC and the co-claimants seek directions in relation to proposal for three sub-stages which will raise different issues of funding and different evidential issues.

5 April 2013

A handwritten signature in black ink, appearing to read 'Felix Geiringer', written in a cursive style.

Felix Geiringer

Counsel for NZMC and the co-claimants