IN THE SUPREME COURT OF NEW ZEALAND

SC 98/2012
[2013] NZSC 6

BETWEEN	THE NEW ZEALAND MAORI COUNCIL First Appellant
AND	THE WAIKATO RIVER AND DAMS CLAIM TRUST Second Appellant
AND	THE ATTORNEY-GENERAL First Respondent
AND	THE MINISTER OF FINANCE Second Respondent
AND	THE MINISTER FOR STATE-OWNED ENTERPRISES Third Respondent

Hearing: 31 January and 1 February 2013

Court: Elias CJ, McGrath, William Young, Chambers and Glazebrook JJ

Counsel: C R Carruthers QC, P D Green and F Geiringer for Appellants
D J Goddard QC, J R Gough and S Kinsler for Respondents
P T Harman for V Winitana, G Morrell and F Timutimu (Interveners)

Judgment: 27 February 2013

JUDGMENT OF THE COURT

A The appeal is dismissed.

B No order is made as to costs.

REASONS

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Introduction

[1] The appeal concerns the restructuring of the Crown's ownership of the State enterprise, Mighty River Power Ltd. When the provisions of the State-Owned Enterprises Amendment Act 2012 are brought into effect in respect of Mighty River Power by Order in Council, the company will be reconstituted as a "mixed ownership model company" under Part 5A of the Public Finance Act 1989.[1] The result will be to permit the Crown to sell up to 49 per cent of the shares in the company which, as a State enterprise, is currently required by legislation to be wholly owned by the Crown. The Crown has announced its intention to bring the legislation into effect in relation to Mighty River Power and to offer 49 per cent of the shares in it by initial public offering (IPO) in the first quarter of 2013.[2]

[2] The New Zealand Maori Council,[3] the Waikato River and Dams Claim Trust[4] and the Pouakani Claims Trust[5] each applied for declarations in the High Court that the bringing into effect of the legislation removing Mighty River Power from the State-Owned Enterprises Act 1986 and the proposed sale of 49 per cent of its shares are unlawful by reason of s 9 of the State-Owned Enterprises Act and s 45Q of the Public Finance Act, both of which prevent the Crown acting inconsistently with the principles of the Treaty of Waitangi. There is an issue as to whether ss 9 and 45Q apply. But, if they do, it is common ground in the litigation that the Crown proposals will be inconsistent with the principles of the Treaty if they would materially impair the ability of the Crown to act on recommendations of the Waitangi Tribunal relating to Treaty breach. The claimed breaches in issue relate to waters used for the generation of electricity and subject to Treaty claim.

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1. Part 5A was inserted by s 9 of the Public Finance (Mixed Ownership Model) Amendment Act 2012 (the Mixed Ownership Amendment Act).
2. Although the present litigation is concerned with Mighty River Power Ltd (since it is the only State enterprise in respect of which decisions have yet been taken) similar issues will arise in relation to the partial privatisation of Meridian Energy Ltd and Genesis Energy Ltd under the same legislation. Because of the potential consequence for their interests in Lake Waikaremoana on a future privatisation of Genesis Energy, intervener status in the present appeal was granted to Vernon Winitana, George Morrell and Frederick Timutimu who claim interests in the lake.
3. A statutory body set up under the provisions of the Maori Community Development Act 1962. It has representative functions for Maori.
4. A trust comprising representatives of the Kiingitanga, Ngati Te Ata, Ngati Koroki-Kahukura, the Pouakani people and the Pouakani Claims Trust, Tuhourangi-Ngati Wahiao, Ngati Tahu-Whaoa and Ngati Hineure, being hapu and iwi with interests in the Waikato River and its catchment.
5. A trust whose representatives are the remaining trustees of the Pouakani Claims Trust. The Trust is the mandated representative of the Pouakani people recognised under the provisions of the Pouakani Claims Settlement Act 2000.

[3] The appellants were unsuccessful in the High Court.[6] Ronald Young J held that the change to the status of Mighty River Power which clears the way for sale of shares is achieved by primary legislation which cannot be questioned for compliance with the principles of the Treaty in the courts.[7] In addition, he held that the proposed actions of the Crown were not in any event inconsistent with the principles of the Treaty because the sale of 49 per cent of Mighty River Power would not materially prejudice Maori claims and interests in the water.[8]

[4] Whether the Judge was right in these conclusions is the principal question on the appeal. The issues raised by the appellants are:

(a) Is the proposed sale of shares in Mighty River Power reviewable for consistency with the principles of the Treaty of Waitangi?

(b) Is Cabinet's decision to bring into effect the State-Owned Enterprises Amendment Act reviewable?

(c) Is the proposed sale of shares in Mighty River Power in breach of s 64 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (Settlement Act)?

(d) Was the consultation undertaken by the Crown with Maori following the recommendation of the Waitangi Tribunal inconsistent with the principles of the Treaty of Waitangi, in breach of s 45Q of the Public Finance Act?

(e) Is the proposed sale of shares in Mighty River Power inconsistent with the principles of the Treaty of Waitangi, in breach of s 45Q of the Public Finance Act?

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6 *New Zealand Maori Council v Attorney-General* [2012] NZHC 3338 [*High Court judgment*].
7 At [64].
8 At [219], [229], [237] and [240]–[241].

[5] The appeal from the High Court is brought directly to this Court[9] at the request of the Crown to meet the time constraints it has in finalising the IPO and realising up to 49 per cent of the value of Mighty River Power for important government purposes. Counsel have cooperated in preparing for and fully arguing the appeal to meet a tight timetable. The Court has however been deprived of the assistance of an intermediate appellate judgment. That circumstance and the fact that some of the arguments touch on fundamental elements of the New Zealand legal order prompt caution in straying beyond matters essential to disposition of the appeal.

[6] The Court is unanimous on all questions on the appeal. Its reasons are expressed in this single opinion.

[7] For the reasons that follow, we are of the view that the proposed sale of the shares (on which the claim of material prejudice is based) is reviewable for consistency with the principles of the Treaty. We explain our reasons for that conclusion, in disagreement with the decision of Ronald Young J on the point, at paragraphs [51]–[68]. Because of this conclusion, it is unnecessary for us to determine whether the proposed Order in Council to bring the State-Owned Enterprises Amendment Act into effect is also able to be reviewed for consistency with the principles of the Treaty.

[8] We have concluded, however, that the partial privatisation of Mighty River Power will not impair to a material extent the Crown's ability to remedy any Treaty breach in respect of Maori interests in the river, for reasons explained in paragraphs [131]–[150]. For that reason, we decide that the appeal must be dismissed.

[9] The appeal points based on breach of s 64 of the Settlement Act and inadequacy of consultation fail for the reasons given at paragraphs [78]–[82] and [83]–[87] respectively.

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9 *New Zealand Maori Council v Attorney-General* [2012] NZSC 115.

Background to the litigation

Treaty claims to waters

[10] The Waikato River and other waters in respect of which Mighty River Power has use rights are subject to long-standing claims of Treaty breach, based on Crown failures to protect Maori in their "full exclusive and undisturbed possession" or "tino rangatiratanga" of their water properties or taonga, as guaranteed by the Treaty. The claims of breach include the damming, diversion, and use of the waters for the generation of electricity by Mighty River Power and its predecessors, originally the Department of Electricity. The Waitangi Tribunal has held in a number of decisions relating to Maori claims of Treaty breach in relation to waters that the claims of Treaty breach are well-founded[10] and that Maori rights in relation of waters of significance, such as the Waikato River, are in the nature of ownership.[11] The Tribunal has rejected Crown contentions that Maori rights were limited to the exercise of kaitiakitanga.[12] It has said that the customary rights of Maori included authority over these resources (recognised in the Treaty guarantee of rangatiratanga[13]) and the right to economic benefit from their use.[14] But it has emphasised that waters are also valued for spiritual and cultural reasons:[15]

> Rivers and other water bodies could be living beings or ancestors. In whakapapa, Maori had kin relationships with these water bodies. Each had its own mauri (life force), its taniwha (spirit guardians), and a central place in tribal identity. And access was jealously guarded and controlled. Travelling by waka, fishing, or other forms of use were only by permission of the tribe which held mana over those waters. The importance of these water bodies to Maori cannot be overstated. These things have long been known.

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10 Waitangi Tribunal *Report of the Waitangi Tribunal on the Kaituna River Claim* (Wai 4, 1984); Waitangi Tribunal *Report of the Waitangi Tribunal on the Manukau Claim* (Wai 8, 1985); Waitangi Tribunal *Mohaka River Report 1992* (Wai 119, 1992); Waitangi Tribunal *The Whanganui River Report* (Wai 167, 1993); Waitangi Tribunal *Ngawha Geothermal Resource Report, 1993* (Wai 304, 1993); Waitangi Tribunal *Te Ika Whenua Rivers Report* (Wai 212, 1998); and Waitangi Tribunal *He Maunga Rongo: Report on Central North Island Claims* (Wai 1200, 2008).

11 *Te Ika Whenua Rivers Report*, above n 10; *The Whanganui River Report*, above n 10; and *He Maunga Rongo: Report on Central North Island Claims*, above n 10. Affirmed in Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) [*Freshwater Report*] at [2.8.3(1)].

12 *He Maunga Rongo: Report on Central North Island Claims*, above n 11, at 1410.

13 At 1410.

14 At 914.

15 *Freshwater Report*, above n 11, pre-publication letter of transmittal, at appendix VII.

[11] In its recent interim report on the *National Freshwater and Geothermal Claim* (a claim heard urgently to consider whether the proposed partial privatisation of the State enterprises would be in Treaty breach and which is more fully described at [21]–[30] below), the Waitangi Tribunal found that "the proprietary right guaranteed to hapu and iwi by the Treaty in 1840 was the *exclusive right to control access to and use of the water while it was in their rohe*".[16] The Tribunal has recognised that the customary authority exercised in 1840 must be adapted to meet modern circumstances and the need for resources to be shared with all New Zealanders.[17] How the Treaty rights may be recognised in modern circumstances is to be the subject of the second stage of the *Freshwater* inquiry, which the Tribunal expects to begin hearing this year. That second stage will build on the finding the Waitangi Tribunal has made in its interim report that Maori rights in relation to water guaranteed by the Treaty are in the nature of ownership. It will inquire into whether such rights and interests are adequately recognised and provided for under existing legislative regulation and whether Crown policies (including those it is developing through its *Fresh Start for Fresh Water* review) are in breach of the Treaty.[18] If Treaty breach is found, the Tribunal will consider what steps should be taken to meet Treaty compliance.

The water consents held by Mighty River Power

[12] As its name suggests, the generating business operated by Mighty River Power is principally based on the Waikato River but includes also geothermal generating facilities. The Waikato hydro system itself comprises eight dams on the river. The Waikato hydro system is operated today with three principal resource consents to dam and divert the river and a number of ancillary consents. All current permits were granted in 2006 by the Waikato Regional Council to Mighty River Power on its application under the Resource Management Act 1991.[19]

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16 *Freshwater Report*, above n 11, at pre-publication letter of transmittal, at appendix VII (The emphasis is in the original).

17 *Freshwater Report*, above n 11, at [1.4.2].

18 The statement of issues for stage two of the inquiry is recorded in an appendix to the stage 1 report. See *Freshwater Report*, above n 11, at appendix 1.

19 The resource consents were granted following a decision of Environment Waikato. See Waikato Regional Council Hearing Committee *Mighty River Power Taupo-Waikato Consents Decision Report* (Environment Waikato, 29 August 2003).

[13] The 2006 permits held by Mighty River Power replaced perpetual rights obtained by the Crown under a number of statutes and powers when the hydro-electricity developments were first undertaken. The first generating capacity was set up in 1918 on the river, but the principal developments occurred from the late 1950s. When the water rights were transferred as part of the assets which passed to the State enterprise Electricity Corporation of New Zealand in April 1988, it was on the basis that the State enterprise would apply for water consents limited to a maximum term of 35 years.[20] Mighty River Power (to which the Waikato hydro system was transferred in 1998[21]) applied in 2001 for the consents granted in 2006 under the Resource Management Act.

[14] The present primary permits are for a term of 35 years (the maximum permissible under the Resource Management Act[22]), expiring on 6 May 2041. Since the rights applied for were for controlled use activities under the Proposed Regional Plan (reflecting the existing use for the damming of water[23]), consent could not be declined,[24] although the term of the permits and the conditions to be attached to them were the subject of a contested hearing in which Maori affected participated. The terms of the primary permits held by Mighty River Power provide for review of conditions on the occurrence of certain events. One such event includes any change to the conditions of consent granted to the operators of the Tongariro Power Development Scheme (which has been the subject of Treaty claims). Another provides:

> Within 12 months of the Crown settling any claim made under the provisions of the Treaty of Waitangi Act (1975) the Waikato Regional Council may, following service of notice on the consent holder, commence a review of the conditions of this consent pursuant to s 128(1) of the RMA for the purpose of ensuring that this consent is in alignment with the provision of any such settled claim.

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20 It was provided in the sale deed with Electricity Corporation of New Zealand that the rights obtained could be reduced to a term of 35 years without breach of the deed.
21 Mighty River Power was at this time named “Waikato SOE Limited”.
22 Resource Management Act 1991, s 123(d).
23 Waikato Proposed Regional Plan, r 3.6.4.10.
24 At the time the decision was made, s 77B of the Resource Management Act provided that, where a resource consent was required for a controlled activity, the consent authority had no power to decline the resource consent. Section 105(1)(a) was to the same effect. The equivalent provision today is s 87A(2).

As this condition suggests, it was known at the time the consent was granted that the Waikato River was the subject of claims to the Waitangi Tribunal. The condition ensures that, even within the term of the consent, adjustment may be provided to reflect the terms of any settlement of the claims.

The SOE case

[15] The relinquishment of perpetual rights to use water in the transfer to the State enterprises and the 35 maximum year term later imposed under the Resource Management Act reflect the settlement reached in *New Zealand Maori Council v Attorney-General* (*SOE case*).[25] The background to that case was the major governmental restructuring by which the trading operations of the Crown were re-organised as State enterprise companies under the State-Owned Enterprises Act in order to promote the efficient management of the activities transferred.[26] It is necessary to refer to the reasons given in the Court of Appeal in the *SOE case* in some detail when considering the meaning and scope of s 45Q.[27] For present purposes it is sufficient to indicate what the litigation was about and how it was resolved.

[16] In the *SOE case*, the Court of Appeal granted declaratory relief. It declared that the proposed transfer from the Crown to State enterprises of assets from which reparation for Treaty breaches might foreseeably be made on recommendation of the Waitangi Tribunal was inconsistent with the principles of the Treaty. It held that assets could not be transferred until a scheme of safeguards was put in place giving reasonable assurance that lands or waters will not be transferred in such a way as to prejudice Maori claims. That relief was given despite the State enterprises being wholly owned by the Crown. And it was made despite acknowledgement by the Court that the Solicitor-General had a "solid basis" for the submission that "the

[25] *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA) [*SOE case*]. This case is frequently called the *Lands case*; we shall refer to it in this judgment as the *SOE case*, because, as we shall explain, what was in issue in that case was not only land but also water.

[26] The purpose of the changes was described at the time by the then Deputy Chairman of the State Services Commission in evidence set out in the judgment of the Court of Appeal at 651.

[27] See below at [52]–[59].

momentum evidently expected by Parliament would be largely lost" and that the Act as a whole "would be put in limbo for an unpredictable time".[28]

[17] As the declarations made in the Court of Appeal in the *SOE case* indicate, actual and foreseeable claims to the Waitangi Tribunal were concerned with Treaty breach in relation to water as well as land.[29] The two risks identified in the case of transfer of assets without a system of protection for land and waters were that the Crown might be unwilling or unable to negotiate a purchase back from the State enterprise at a full price and that the State enterprise might, in the meantime, have disposed of land to third parties in the course of its ordinary business activities. Disposal to third parties of water rights was not in prospect because the water rights were integral to the businesses of the generating State enterprise. In respect of land, however, there was nothing to prevent a State enterprise from disposing of land surplus to its operations. The Court considered that the existing legislative protection for Treaty claims under s 27 (limited to land already under claim to the Waitangi Tribunal) was inadequate to protect foreseeable claims. It rejected the contention of the Crown that s 27 was a code representing a legislative judgment that transfers of other land complied with the principles of the Treaty.[30] The Court of Appeal directed the Crown to prepare a scheme of safeguards for approval, if necessary, by the Court before the assets could be transferred.[31]

[18] The *SOE* litigation was resolved by agreement, allowing the declarations to be discharged and permitting transfer of the Crown assets, including water rights, to the State enterprises.[32] The basis of settlement included new legislative protections for land transferred to the State enterprises which required memorials on the title, with provision for resumption and return of such land should the Waitangi Tribunal recommend that course.[33] It also contained a protection for claims to water which required the use rights transferred to be limited to 35 year terms, instead of being

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28 At 657–658.
29 At 666.
30 Per Cooke P at 658, Richardson J at 679, Somers J at 696, Casey J at 701, and Bisson J at 716.
31 At 666.
32 At 719.
33 Sections 27A–27D.

perpetual.[34] The letter recording the settlement, dated and produced to the Court of Appeal, provided:

> The Government agrees that it will not transfer to any State Owned Enterprise water rights that have been issued in perpetuity. The Government will seek a variation of such water rights so as to ensure that they are for periods no longer than 35 years.

The development of the mixed ownership company policy

[19] Decisions to proceed in principle with bringing the three electricity generating State enterprises within a new mixed ownership model were taken by Cabinet in December 2011. Because it was appreciated that Maori might wish to seek clarification about how the proposals would affect claims to natural resources (including water), informal consultation with iwi leaders had already been initiated with a forum held in August 2011. The Deputy Prime Minister, Mr English, described in evidence to the High Court the further discussions held with iwi representatives and the New Zealand Maori Council between August 2011 and the introduction of the Bill into the House in March 2012. He and other Ministers explained during the consultation that ss 27A–27D of the State-Owned Enterprises Act would be reproduced in the legislation dealing with the mixed ownership companies, thus preserving the land resumption provisions adopted in 1987 in the *SOE* settlement. They raised with iwi leaders the opportunities the IPO provided for Maori to take up shareholding in the companies, if they wished to do so. There was discussion about advancing settlement moneys for that purpose to those iwi who had not yet entered into Treaty settlements.

[20] The consultation provided Government with the message that many Maori considered that it was necessary to carry s 9 of the State-Owned Enterprises Act into the new legislation so that the Crown would remain bound to observe the principles of the Treaty in its dealings with the mixed ownership company. As a result, Cabinet agreed to the inclusion of an equivalent provision which would apply to the Crown in relation to its actions under the mixed ownership model legislation. The provision discussed became s 45Q of Part 5A of the Public Finance Act. The

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34 Resource Management Act 1991, s 386(2).

consultation also led to the setting up of a working party between senior Ministers and iwi leaders to advance direct Treaty settlement negotiations and the development of policy through the *Fresh Start for Fresh Water* process (which began work in 2009), which includes consideration of Maori interests in water. The protocol under which the engagement between iwi leaders and Ministers is conducted makes it clear that it does not supplant the need for wider engagement in the development of freshwater policy with iwi not represented by the iwi leaders included in the forum.

The freshwater claim to the Waitangi Tribunal

[21] In an urgent claim to the Waitangi Tribunal filed in February 2012, the New Zealand Maori Council sought a recommendation that the Crown should not proceed with the partial privatisation of the three State enterprises which generate hydro-electricity. The Waitangi Tribunal divided the hearing. It considered that it was not reasonable to hold up the privatisation while a full review of how Maori interests in water can be recognised was undertaken. That review was deferred to a second stage of the hearing, which the Tribunal proposed would be heard in 2013.

[22] The Tribunal did however grant urgency to the claim that the sale of shares in the State enterprises would be in breach of the principles of the Treaty. As has been indicated, in its interim report on that urgent inquiry the Tribunal found that Maori interests in waters used by the State enterprises were in the nature of ownership:[35]

> Our generic finding is that Maori had rights and interests in their water bodies for which the closest English equivalent in 1840 was ownership rights, and that such rights were confirmed, guaranteed, and protected by the Treaty of Waitangi, save to the extent that there was an expectation in the Treaty that the waters would be shared with the incoming settlers. In agreement with the *Te Ika Whenua Rivers Report*, *The Whanganui River Report*, and *He Maunga Rongo*, we say that the nature and extent of the proprietary right was the exclusive right to control access to and use of the water while it was in their rohe.

[23] As is described in more detail below, the Waitangi Tribunal accepted that there was a nexus between the Treaty claims to water and the shareholding in the State enterprises which use the waters under claim for generating purposes. Such connection reflected the fact that the water used "underpins what gives the shares in

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35 *Freshwater Report*, above n 11, at [2.8.3(3)].

those companies their value”.[36] The Tribunal accepted however the submission of the Crown and the assurance of the Prime Minister that Maori participation through ownership of shares in the company (if that is what Maori want) was not precluded after the IPO.[37] If that form of reparation for Treaty breach proved appropriate, it considered that shares could be purchased either at the time of the IPO (the Crown having indicated that those iwi which had not received settlements could be financed into their purchases by advances to be deducted from future settlements with them) or later, by purchases on the market.

[24] What the Tribunal thought would, however, be precluded by the partial privatisation was reparation which provided Maori with more authority in relation to the company than went with minority ownership of ordinary shares. Such additional authority was thought necessary to reflect the Treaty guarantee of rangatiratanga and the ownership interest in the waters themselves. On this view, the shares would not be adequate reparation if they were “solely ... an investment opportunity for the purpose of acquiring dividends or selling the shares later at a profit”.[38] Once the IPO had admitted private shareholders in the company, the Tribunal considered that securing special standing for Maori shareholders within the shareholding structure, such as through provision in the company constitution or through a class of special shares to protect their interests, would no longer be available:[39]

> As a result, the very asset being transferred by the Crown, and which is sought by Maori in partial remedy for this claim, will in practical terms be put beyond the Crown’s ability to recover or provide after the sale. Since it cannot be stated with certainty that any other commercial rights recognition will actually come to pass, and given the opportunity exists here and now, and that opportunity is about to be removed beyond the Crown’s practical ability to provide, we consider that the sale must be delayed while an accommodation is reached with Maori.

[25] Because of the inability to provide what it described as “shares plus”, the Waitangi Tribunal recommended in its urgent interim report that the plans for privatisation should not proceed until there had been consultation with Maori through a national hui “to determine a way forward”.[40] Since the Tribunal

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36 At [3.7.2].
37 At [3.9.2].
38 At [3.7.2].
39 See the pre-publication letter of transmittal, at appendix VII.
40 At [3.9.4].

considered there was a nexus established between the asset ("shares enhanced by shareholders' agreements and revamped company constitutions"[41]) and Maori rights in the waters used, the Crown would be in Treaty breach if it proceeded with the sale without "first preserving its ability to recognise Maori rights or remedy their breach".[42] Accordingly, it recommended "that the sale be delayed while the Treaty partners negotiate a solution to this dilemma".[43] The Tribunal recognised that the negotiations would need to be limited because of urgency and that it "would not be possible to devise a comprehensive scheme for the recognition of Maori rights in water in the time available":[44]

> But it should be possible, with good faith endeavours on both sides, to negotiate with all due speed an appropriate scheme in respect of these three power-generating companies. In the narrowest view, the subject for discussion is shares and shareholders' agreements in Mighty River Power. That could include discussion of the use of shares for a number of settlement or rights recognition purposes, where there is not a nexus to rivers utilised by Mighty River Power, such as was raised by Ngati Haka Patuheuheu. As we see it, it would be preferable to take a broader approach in this way and also to consider other commercial options such as royalties at the same time, and perhaps the opportunity to write such matters into the company constitutions; but all that is for the parties to decide. Undertakings could perhaps be negotiated about future forms of rights recognition. We would not want to be prescriptive about these matters.

[26] The Waitangi Tribunal therefore recommended a process of consultation which should be followed before the privatisation continued. It did not identify a solution, indicating that how Maori interests should be recognised and provided for in modern circumstances would be addressed in its final report after further hearings. Rather, it left it to the Crown and Maori to explore ways in which the ownership claim could be protected. The letter transmitting the report suggested that such consultation could be conducted on the "narrowest view" of "shares and shareholders' agreements in Mighty River Power". It could, alternatively, include "discussion of the use of shares for a number of settlement or rights recognition purposes, where there is not a nexus to rivers utilised by Mighty River Power". And, if a "broader approach" in this way were adopted (as the Waitangi Tribunal suggested would be preferable), there should also be consideration of "other

[41] As described in the pre-publication letter of transmittal, at appendix VII.
[42] At [3.9.4].
[43] At [3.9.4].
[44] At [3.9.4].

commercial options" (including royalties, arrangements in the company constitutions and undertakings about "future forms of rights recognition").[45]

The further consultation on "shares plus"

[27] The Crown accepted the recommendation that it investigate the "shares plus" option. It undertook consultation with Maori on the suggestion. Although the Tribunal had recommended a national hui (in apparent response to the urgency from the Crown perspective in meeting the privatisation timetable), the Crown decided, on the basis of the Tribunal's finding that interests in water were localised and specific, that it would be more appropriate to consult groups with direct interest in particular water resources. It wrote to all affected groups setting out the Government's preliminary view that shares with amplified authority would not be appropriate and inviting submissions. Between 18 and 27 September 2012, the Crown held a series of hui at Hamilton, Taupo, Te Kuiti, Whanganui, Tuai and Christchurch. The Deputy Prime Minister led the Crown team. The Crown's presentations explained the view that, although "shares plus" could be one way of providing redress, there were other equally effective ways to provide redress after the proposed sale. Participants were invited to express views as to whether the Government should preserve the "shares plus" option before proceeding with the sale.

[28] Many of those consulted were disappointed that only the idea of "shares plus" was under consideration at the meetings. They did not consider that such an arrangement met their Treaty claims. In his evidence, the Deputy Prime Minister reported that the response from Maori at the hui to the "shares plus" suggestion of the Tribunal was "lukewarm". Most wanted the Crown to retain full ownership of Mighty River Power until Maori interests in freshwater had been identified and addressed. That was, however, not something the Tribunal had considered it was reasonable to recommend.

[29] Ultimately, after considering the submissions and discussion at the hui and after receiving advice from officials, Ministers concluded that the Crown's capacity to recognise rights and to provide redress would not be impaired by the proposed

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[45] At [3.9.4].

share sale. On the other hand, it appeared to the Crown that the Waitangi Tribunal's suggestion would significantly erode value in the IPO. For these reasons, the Crown announced on 15 October 2012 that it had decided to go ahead with the IPO without adapting the shareholder structure.

[30] The New Zealand Maori Council filed its application for judicial review in the High Court on 19 October 2012. The claims by Pouakani and the Waikato River Trust were made on 2 November 2012 and 6 November 2012 respectively.

Is the proposed sale of shares in Mighty River Power reviewable for consistency with the principles of the Treaty of Waitangi?

[31] In order to understand the appellants' challenge, it is necessary to put s 45Q and the 2012 legislation creating mixed ownership companies into its legislative context. The starting point is the State-Owned Enterprises Act.

The legislative context

[32] In 1986 Parliament established a regime of State enterprises, under which companies were to be formed to acquire State trading undertakings. The long title to the State-Owned Enterprises Act stated that its object was "to promote improved performance in respect of Government trading activities" and, to that end, "specify principles governing the operation of State enterprises".

[33] Part 1 of the State-Owned Enterprises Act is headed "Principles". Section 4 provides that "[t]he principal objective of every State enterprise shall be to operate as a successful business" and, to that end, be as profitable and efficient as comparable businesses not owned by the Crown, be a good employer, and exhibit a sense of social responsibility. Section 5 provides for operational decisions to be made by the directors of each State enterprise in accordance with its statement of corporate intent, which, under s 14(2)(a) and (b), must specify the objectives of the State enterprise and the nature and scope of its activities. Under s 13, Ministers may give the board of a State enterprise directions, with which the board is required to comply, as to the objectives and nature and scope of its activities which should be set out in the

statement of corporate intent.[46] Under s 5(3), the board of the State enterprise is accountable to shareholding Ministers. Section 6 provides that shareholding Ministers are responsible to the House of Representatives.

[34] Part 1 concludes with s 9:

> **9 Treaty of Waitangi**
>
> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

[35] Section 9 has been the subject of definitive judicial interpretation, particularly in the *SOE case*. We shall be returning to that case shortly.

[36] In Part 2 of the Act, s 10 states that shareholding Ministers may subscribe for and hold the shares in State enterprise companies and s 11(1) prohibits a Minister from disposing of or selling any shares. In Part 4, s 22(3) states that shareholding Ministers "may exercise all the rights and powers attaching to the shares in a State enterprise". Section 23 empowers transfer of Crown assets and liabilities to the State enterprises. When assets or liabilities are transferred to a State enterprise, the transfer does not entitle any person to terminate, alter or in any way affect the rights or liabilities of the Crown in the State enterprise under any Act or agreement. On transferring assets under s 23, the Crown can impose conditions on the State enterprise.[47] Section 28 provides for transfer of assets to be effected by Orders in Council.

[37] Sections 27 and 27A–27D deal with Maori land claims and provide for resumption of land transferred to State enterprises on the recommendation of the Waitangi Tribunal and for memorials to be entered on titles to land subject to claims. Sections 27A–27D were added to the State-Owned Enterprises Act by the Treaty of Waitangi (State Enterprises) Act 1988, to give effect to the compromise reached between the Government and the New Zealand Maori Council following the judgment of the Court of Appeal in the *SOE case*.

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46 See *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) [*Broadcasting Assets case* (PC)] at 520.

47 At 520.

[38] A policy of the National Party in the 2011 general election was the partial sale of four State enterprises: Mighty River Power, Genesis Energy, Meridian Energy and Solid Energy. In implementing decisions in principle taken by Cabinet in December 2011,[48] Ministers settled on a scheme of legislative reform to be given effect in two steps by separate statutes. First, the Public Finance Act, which governs the use of public financial resources, would be amended to include provisions for a new "mixed ownership" model of company in which Ministers would hold not less than 51 per cent of the shares, with up to 49 per cent being held by persons other than the Crown. In the second step, the status of the above-named companies would be changed, so that they would cease to be State enterprises. The companies would become mixed ownership companies and the sale of shares up to the set limits would then be permitted.

Principal features of the new legislation

[39] We now refer to the principal features of the new legislation. We begin with the Mixed Ownership Amendment Act.

[40] The Mixed Ownership Amendment Act introduced a new Part 5A into the Public Finance Act headed "Mixed ownership model companies" and comprising ss 45P–45W. Section 4 of the Amendment Act added to the Public Finance Act the new purpose of placing limits on ownership of the companies named in sch 5, being the listed mixed ownership companies.[49] Section 45Q in Part 5A is expressed in identical terms to s 9 of the State-Owned Enterprises Act with an additional subsection:

> **45Q Treaty of Waitangi (Te Tiriti o Waitangi)**
>
> (1) Nothing in this Part shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
>
> (2) For the avoidance of doubt, subsection (1) does not apply to persons other than the Crown.

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48 See at [19] above.

49 Section 4 inserted s 1A(2)(ea) into the Public Finance Act 1989.

[41] Subsection (2) makes clear that only Crown action must be Treaty-compliant. Subsection (1) does not apply to the mixed ownership companies or to the directors of those companies.

[42] Section 45R prohibits Ministers from selling or disposing of shares, or taking other specified action, if that would result in the Crown having less than 51 per cent control of a mixed ownership company.[50] Section 45S sets a 10 per cent limit on the holding of shares or voting securities by persons other than the Crown. Section 45W states that certain provisions in the State-Owned Enterprises Act, including ss 22 and 23 along with some definitions, will continue to apply to mixed ownership companies as if they were State enterprises. The protective scheme in ss 27A–27D of the State-Owned Enterprises Act and provisions in the Treaty of Waitangi Act 1975 concerning resumption[51] are also incorporated into Part 5A. The Mixed Ownership Amendment Act received the Royal assent on 29 June 2012 and came into force the following day.

[43] We now turn to the second step in the legislative scheme, effected by the State-Owned Enterprises Amendment Act. This Act has not yet been brought into force.

[44] The State-Owned Enterprises Amendment Act would amend the State-Owned Enterprises Act by reconstituting four State enterprises as mixed ownership companies. Sections 4 and 5 repeal reference to four companies, including Mighty River Power, in the list of State enterprises in the first and second schedules of the State-Owned Enterprises Act. Section 8 amends the Public Finance Act by providing for the names of the companies to be inserted in sch 5. The effect is to bring the companies under the Part 5A regime when the provisions of the State-Owned Enterprises Amendment Act are brought into force in relation to each company. Section 2 of the State-Owned Enterprises Amendment Act provides for the amendment to be brought into force by Order in Council. Different provisions may be brought into force on different dates.

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[50] The requirement of a minimum 51 per cent Crown ownership applies to every class of share: s 45R(4).

[51] Treaty of Waitangi Act 1975, ss 8A–8H.

[45] It is the present intention of the Government that the State-Owned Enterprises Amendment Act will initially be brought into effect only in respect of Mighty River Power, which is the first company scheduled for partial privatisation as a mixed ownership company. It is intended that the Order in Council will be promulgated shortly before the sale transactions take place. Once the legislation is commenced, bringing a company within the mixed ownership model regime, it remains possible, under s 3C of the Public Finance Act, to reverse the process by Order in Council and remove the company from sch 5 of the Act, but only if shareholding Ministers hold 100 per cent of the shares in the company.[52]

The submissions of the parties

[46] This appeal raises the issue of whether a sale of shares under the statutory scheme will be in breach of the Crown's obligations under the Treaty principles protection provisions. It has been necessary to set out the main provisions of the current and previous applicable legislation in some detail, as the arguments of both parties to the appeal were based on the statutory text and context.

[47] On the legal analysis of the appellants, infringement of the principles of the Treaty will occur when the State-Owned Enterprises Amendment Act is brought into effect by Order in Council, and on subsequent sale of up to 49 per cent of the shares in Mighty River Power, unless proper protective measures are first put in place to preserve Crown capacity to meet its Treaty obligations. This result is argued to be contrary to both s 9 of the State-Owned Enterprises Act and s 45Q of the Public Finance Act. The submission for the appellants was that the prospective sale of shares would be an exercise by the Crown of powers under Part 5A, generally, or the rights of shareholding Ministers under s 22(3) of the State-Owned Enterprises Act, itself preserved by s 45W of the Public Finance Act, to which s 45Q applied. It was therefore subject to the requirements of consistency with Treaty principles.

[48] Mr Goddard responded directly to the argument that the prospective sale would be an exercise of statutory powers under Part 5A generally or s 22(3) in particular. He submitted that the purpose of Parliament in enacting the 2012

[52] Public Finance Act 1989, s 3C(3).

legislation was to enable the Government to sell up to 49 per cent of the shares in the company. It was not part of Parliament's intention that the Crown first determine whether that step was consistent with the principles of the Treaty. Those principles were to be protected by preserving the application of the protective provisions of the memorial regime of the State-Owned Enterprises Act. As well, s 45Q would protect Treaty principles in respect of actions taken under Part 5A, but those actions did not include the sale of the shares. The power of the Crown to sell shares was an incident of their ownership and shareholder powers under the common law and the Companies Act 1993. It was not derived from s 22(3), nor any other provision in Part 5A. Mr Goddard's argument was that the provisions of Part 5A restrict rather than "permit" the power to sell shares – for example by limiting sale to only 49 per cent of shares. As the sale of shares does not involve an act under Part 5A, the Crown argued that s 45Q does not apply to the act of selling shares.

[49] The Crown said that its argument that s 45Q has no application to a sale of shares, and that therefore a decision to sell is not reviewable for consistency with Treaty principles, finds support in observations of the Court of Appeal in *New Zealand Maori Council v Attorney-General* (*Commercial Radio Assets case*).[53] In 1995, two statutes were passed to enable full privatisation of Radio New Zealand. The Radio New Zealand Act 1995 was brought into force by Order in Council soon after receiving the Royal assent. It transferred public radio assets from Radio New Zealand to a newly-formed Crown entity. The result was that Radio New Zealand, a State enterprise, was left holding only commercial radio assets. The Radio New Zealand Act (No 2) 1995 was passed on the same day as the first Act, and it, too, was to come into force on a day appointed by Order in Council. At the time of the proceedings, the second Act had not been brought into force. Once the second Act was commenced, its provisions would have removed Radio New Zealand and the shareholding Ministers from the application of the State-Owned Enterprises Act. Both the prohibition on sale of shares and s 9 of the State-Owned Enterprises Act would cease to apply to the company. In that legislative context, the Court of Appeal said:[54]

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53 *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA) [*Commercial Radio Assets case*].

54 At 166.

> In selling the shares after the (No 2) Act is in force the Crown will not be exercising any statutory power. The (No 2) Act does not expressly authorise sale of the shares though its effect will be to remove the prohibition on the sale of these shares in s 11 of the State-Owned Enterprises Act. The sale would be effected simply by exercise of the Crown's common law right as owner to dispose of the shares.

[50] The Crown said that this passage supported its submission that in selling the shares in Mighty River Power the Crown would not be exercising any power under Part 5A, so that s 45Q did not require that the Crown act consistently with Treaty principles. That section would apply to a transfer of assets to the mixed ownership company under s 23 of the State-Owned Enterprises Act. Section 9 had no application as shareholding Ministers were no longer bound by the State-Owned Enterprises Act.

Our evaluation

[51] It is true that the statutory scheme of the 2012 legislation has common features with that examined in the *Commercial Radio Assets case*, in that under the latter the proposed sale was also to proceed only when separate legislation removing the prohibition on sale of the shares was brought into effect. But there is a crucial difference. In the present circumstances, unlike in the *Commercial Radio Assets case*, the legislation clearing the way for sale provides for the Crown to remain under a continuing obligation to comply with Treaty principles when acting under the statutory provisions governing the mixed ownership companies regime. Furthermore, the move from the application of s 9 to that of s 45Q is seamless. There was no such continuing restraint under the legislation authorising sale of the shares in Radio New Zealand, once it had ceased to be a State enterprise. In the present case, the continuing statutory restraint upon the Crown when acting in respect of a mixed ownership company must be ascertained in light of the continuation of the Treaty protection provision in s 45Q .

[52] At this point it is helpful to consider how s 9 of the State-Owned Enterprises Act was interpreted and applied by the Court of Appeal in its judgment the *SOE*

case, a decision already discussed[55] and of great authority and importance to the law concerning the relationship between the Crown and Maori.

[53] The *SOE case* was concerned with the Crown's power under s 23 to transfer the operating assets of its trading undertakings, in particular land, to the new State enterprises. Permitted methods included, but were not confined to, outright transfer of such land. Section 27 set out particular safeguards for land transferred to State enterprises, in respect of claims already lodged with or determined by the Waitangi Tribunal, but did not provide for claims lodged after the State-Owned Enterprises Act came into effect. In such cases the land would not be available for settlement of claims which the Tribunal held were deserving of a remedy.

[54] The Court of Appeal considered submissions of the Crown which sought a narrow meaning for s 9, because a broad reading of its text would not align with the policy decisions of Parliament concerning the effective operation of State enterprises. Further protections than those expressly provided for in the Act would have "inconvenient practical consequences" for the statutory policy.[56] Parliament could not have intended that the transfer of assets under the Act should be delayed as the appellants sought, as that would put the whole State enterprise scheme "in limbo".[57] The Crown submitted that s 9 should accordingly not be read as fettering transfer of land to State enterprises and s 27 should be seen as an exclusive code for protection of Maori claims to land in accordance with the principles of the Treaty.[58]

[55] The Court of Appeal firmly rejected that narrow approach to the meaning of s 9. It held that s 9 was a provision expressing a broad constitutional principle while s 27 merely gave that principle practical effect in the particular case of land subject to claims at the time of the enactment. Cooke P said of s 9 that:[59]

> ... the firm declaration by Parliament that nothing in the Act shall permit the Crown to act inconsistently with the principles of the Treaty must be held to mean what it says. Cases will arise when the machinery provisions made for meeting Maori land claims by s 27 will not be enough ...

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55 At [15]–[18] above.
56 *SOE case*, above n 25, at 657 per Cooke P.
57 At 657.
58 At 658.
59 At 660–661.

> … what is now our responsibility is to say clearly that the Act of Parliament restricts the Crown to acting under it in accordance with the principles of the Treaty. It becomes the duty of the Court to check, when called upon to do so in any case that arises, whether that restriction has been observed and, if not, to grant a remedy. Any other answer to the question of interpretation would go close to treating the declaration made by Parliament about the Treaty as a dead letter ...

[56] Richardson J identified further reasons why s 9 had to be given full effect:[60]

> ... the importance the legislature attached to compliance with the principles of the Treaty is reflected in the enactment of s 9 as a governing principle of the legislation. ...

and

> ... rather than viewing s 9 as a provision outwardly raising expectations then dashing them by a process of inference from other provisions, its true function in the Act should be recognised as constituting a general proscription of any conduct in breach of the principles of the Treaty and as such being a governing consideration in the exercise of the powers under s 23, with s 27 then being seen as specific machinery for dealing in due time with such land held by State-owned enterprises.

[57] Other members of the Court made similar observations concerning s 9. Somers J described it as a "paramount provision" and referred to the "apparent predominance of its provisions".[61] Casey J referred to its "strong and unambiguous language" having an "overriding result on the rest of the Act".[62] Bisson J said that s 9 introduced to the State-Owned Enterprises Act "a safeguard" so that the "dramatic legislative change" would not frustrate applications of Maori to the Waitangi Tribunal concerning their Treaty claims.[63]

[58] We observe in passing that, if the Crown had thought the Court of Appeal had approached s 9 wrongly, it could have appealed to the Privy Council. It did not. Nor did it challenge the *SOE case* in this appeal.

[59] The Court of Appeal's recognition that s 9 stated a fundamental principle guiding the interpretation of legislation which addressed issues involving the relationship of Maori with the Crown, must accordingly form the basis of the

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60 At 680.
61 At 696.
62 At 701.
63 At 710.

approach of New Zealand courts to any subsequent legislation requiring that the Crown act consistently with Treaty principles. The judgment gives no support to narrow approaches to the meaning of such clauses. In re-enacting the identical provision to act consistently with Treaty principles, in the mixed ownership companies legislation, Parliament's purpose is that the Treaty provisions in Part 5A carry the broad meaning, and be given the broad application reflected in the judgments of the Court of Appeal concerning s 9 in the *SOE case*. The Parliamentary purpose is clear: s 45Q must receive the same interpretation as s 9 of the State-Owned Enterprises Act has received, particularly from the Court of Appeal in the *SOE case*, and also from the Privy Council in *New Zealand Maori Council v Attorney-General* (*Broadcasting Assets case*).[64] Section 45Q brings with it the heritage of s 9 and this Court, reflecting what is the purpose of Parliament, must invest it with equivalent significance. It is on that basis that we address the arguments of counsel concerning the legislation.

The effect of s 45Q

[60] Once a company is in the mixed ownership companies regime, s 45Q of the Public Finance Act provides, as we have said, that nothing in Part 5A permits the Crown to act in a manner that is inconsistent with the principles of the Treaty. It is very significant that Parliament has used in Part 5A the identical Treaty provision contained in s 9 of the State-Owned Enterprises Act.

[61] Parliament's enactment of s 45Q demonstrates a concern that there is potential Crown action under Part 5A which might, but for the restraint imposed by s 45Q, be inconsistent with the principles of the Treaty. The part effectively deals with only one matter: the setting up and ownership of mixed ownership companies. Parliament must have intended that all acts of the Crown in relation to share ownership be exercised in a Treaty-consistent manner. Mr Goddard submitted s 45Q could not bite on the act of selling shares because the Crown could do that in any event as owner of them. We cannot accept that submission. While State enterprises are and mixed ownership companies will be like ordinary companies in most

64 *Broadcasting Assets case* (PC), above n 46.

respects, the Crown's status as shareholders is constrained by the relevant legislation. Under the State-Owned Enterprises Act, the Crown cannot sell shares. Under Part 5A, the Crown's ability to exercise its ownership will remain constrained.

[62] Further, Mr Goddard's submission reduces s 45Q to mere window-dressing, something quite inconsistent with curial treatment of the same provision in the State-Owned Enterprises Act. As Mr Goddard emphasised in the balance of his submissions, the Government's mixed ownership model policy is very limited. It does not envisage the transfer of more Crown assets to mixed ownership companies. All it involves is the sale of some of the shares in particular State enterprises to the public. Nothing else changes so far as Crown assets are concerned.

[63] Giving effect to s 45Q in a manner that does justice to the provision's heritage in the *SOE case* requires rejection of Mr Goddard's technical arguments that when selling shares the Crown is not acting pursuant to Part 5A, so that s 45Q does not apply. Giving meaningful effect to s 45Q requires a realistic approach to the legislative scheme that governs the sale of shares in mixed ownership companies. Part 5A effectively permits the Crown to do something with the shares which currently is prohibited. As an action permitted to that extent by Part 5A, a sale of shares must be conducted in accordance with s 45Q.

[64] We therefore hold that s 45Q does render reviewable the proposed sale of shares in Mighty River Power by the Crown, for compliance with the principles of the Treaty.

Alternative submission: s 22(3)

[65] We mention for the sake of completeness an alternative submission advanced by Mr Carruthers, based on s 45Q and s 22(3) of the State-Owned Enterprises Act, a provision incorporated into Part 5A by s 45W(1). Section 22(3) reads as follows, when modified as required by s 45W(1):

> Each shareholding Minister may exercise all the rights and powers attaching to the shares in a [mixed ownership company] held by that Minister.

[66] Mr Carruthers submitted that one of the powers attaching to the shares in Mighty River Power was the power to sell them. Section 45Q would therefore operate to prevent that act if the proposed exercise of the power was inconsistent with the principles of the Treaty.

[67] Mr Goddard submitted the appellants' argument misunderstood the purpose and effect of s 22 of the State-Owned Enterprises Act. That section, he submitted, did not confer any powers in relation to shares on any person. The function of s 22 was to identify *who* held the shares in a State enterprise and *who* can exercise the rights and powers conferred on the holder of the shares by the Companies Act 1993.

[68] We do not need to rule on that alternative submission as we are satisfied the appellants' principal submission as to the effect of s 45Q is correct.

Is Cabinet's decision to bring into effect the State-Owned Enterprises Amendment Act reviewable?

[69] We have explained above why Parliament, while providing for the immediate commencement of the Mixed Ownership Amendment Act,[65] left it to the Executive to determine when the State-Owned Enterprises Amendment Act should come into force. The four State enterprises earmarked for sale were to remain subject to the State-Owned Enterprises regime until such time as the Government determined the shares in them should be sold.

Submissions of the parties

[70] We set out briefly the respective submissions of the parties on this issue. Mr Carruthers submitted that the Crown should be able to sell shares in Mighty River Power only if it could do so in a Treaty-compliant manner. He submitted that the proposed sale was not Treaty-compliant, with the consequence that not only the sale should be prevented (pursuant to s 45Q) but also the Act transferring Mighty River Power to the mixed ownership companies regime (the State-Owned Enterprises Amendment Act) should not be brought into force until such time as the

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[65] Section 2.

Crown could demonstrate a Treaty-compliant sale programme. He further submitted that a special consideration in this case was the fact that the Crown, with respect to Mighty River Power, is already subject to Treaty obligations by s 9 of the State-Owned Enterprises Act. He developed an argument in this regard that, because 23 of the Interpretation Act 1999 provides that "an amending enactment is part of the enactment that it amends", the commencement of the State-Owned Enterprises Amendment Act is subject to the Treaty obligations contained in s 9 of the principal Act.

[71] The Crown does accept that an Order in Council providing for the commencement of primary legislation is made in the exercise of a statutory power and therefore capable of review by the courts.[66] However, Mr Goddard submitted (and we accept) that the courts should ensure that there is not "an unwarrantable intrusion into the function of Parliament".[67]

[72] The Crown does not accept that s 9 of the State-Owned Enterprises Act applies to the commencement power contained in the State-Owned Enterprises Amendment Act and submits that the appellants' argument to the contrary is inconsistent with the purpose of s 23 of the Interpretation Act.

[73] Mr Goddard submitted that, in the absence of specific applicable legislation in the form of s 9, it cannot reasonably be argued that the principles of the Treaty must be complied with or that they are a mandatory relevant consideration when the Executive fixes a date on which primary legislation comes into force. It submits that this would be tantamount to giving the courts and the Executive the function of reviewing the substance of primary legislation, which is inconsistent with New Zealand's constitutional arrangements.

[74] The Crown further submitted that, as in the *Commercial Radio Assets case*, the underlying contention of the appellants is that the mixed ownership model legislation

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[66] *Commercial Radio Assets case*, above n 53 at 164.

[67] *Commercial Radio Assets case*, above n 53, at 165. See also *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513 (HL), in particular the speeches of Lord Browne-Wilkinson at 550–551 and Lord Nicholls at 574–575.

itself is inconsistent with Treaty obligations.[68] A review of the policy of legislation is outside the function of both the Executive and the courts.

Our assessment on the commencement issue

[75] For reasons we can explain shortly, we are satisfied that the only thing that occurs on the commencement of the mixed ownership model legislation is the transfer of companies from the State enterprise regime to the mixed ownership model regime. Because of the seamless application of ss 9 and 45Q, the mere transfer of the companies from the State enterprise regime to the mixed ownership model regime does not alter the Crown's obligations to act in accordance with the Treaty.

[76] Section 9 of the State-Owned Enterprises Act applies while the companies remain State enterprises and s 45Q, which is in the same terms, applies when they become mixed ownership companies. It is true that s 45Q only applies to Crown acts and not to the acts of the company or any third party shareholders once any sale has taken place. But, for the reasons we have given, we are satisfied that s 45Q applies to the sale of shares by the Crown.[69] Further, if a share sale does not take place in relation to any particular company, then it can be returned to the State enterprise regime under Part 5A.[70]

[77] In these circumstances, the real issue in this case is whether or not the sale of shares will be Treaty-compliant. This is discussed below. We do not need to consider the commencement issue further.

Was the Crown in breach of s 64 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010?

[78] The Settlement Act recorded a settlement with respect to the Waikato River. The overarching purpose of the settlement was to "restore and protect the health and

68 *Commercial Radio Assets case*, above n 53, at 166.
69 At [63]–[64] above.
70 See Public Finance Act 1989, s 3C.

wellbeing of the Waikato River for future generations".[71] The Act gave effect to the settlement of raupatu claims under a deed between the parties dated 17 December 2009.[72] It provided for co-management arrangements for the river.[73]

[79] It is section 64 which is in contention in this case. It reads as follows:

> **64 Creating or disposing of interests**
>
> (1) The Crown and Waikato-Tainui acknowledge that—
>
> (a) they have different concepts and views regarding relationships with the Waikato River (which the Crown would seek to describe as including "ownership"):
>
> (b) the 2009 deed and this Act are not intended to resolve those differences:
>
> (c) the 2009 deed and this Act are primarily concerned with management of the Waikato River to—
>
> (i) achieve the overarching purpose of the settlement:
>
> (ii) recognise the special relationship of Waikato-Tainui with the Waikato River.
>
> (2) This section applies if the Crown, a Crown entity, a state enterprise, or a mixed ownership model company proposes doing any of the following actions in relation to a property right or interest in the Waikato River:
>
> (a) creating it:
>
> (b) disposing of it:
>
> (c) starting a statutory or other process to create it:
>
> (d) starting a statutory or other process to dispose of it.
>
> (3) The Crown, Crown entity, state enterprise, or mixed ownership model company must engage with Waikato-Tainui in accordance with the principles described in the Kiingitanga Accord before doing the action.
>
> (4) In subsection (2), **dispose of or create a property right or interest**,—
>
> (a) in relation to a Crown entity or state enterprise, includes only activities—

71 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 3.
72 Section 4(a).
73 Section 4(g).

(i) that relate to an asset held by that entity or enterprise; and

(ii) the nature of which is such that the entity or enterprise would either in the ordinary course, or as a result of a statutory requirement or under a statement of intent or otherwise, consult with the responsible Minister or the shareholding Ministers, as the case may be; and

(aa) in relation to a mixed ownership model company, includes only activities that relate to an asset held by that company; and

(b) does not include—

(i) any decision in relation to which consideration is required to be given to the vision and strategy under section 17; or

(ii) any decision relating to a permit under the Crown Minerals Act 1991.

[80] Mr Carruthers submitted that the Crown, before pursuing the sale, was required to engage with Waikato-Tainui in accordance with the principles described in the Kiingitanga Accord and it had failed to do so. Ronald Young J rejected this argument. He held that the Crown, by proposing to sell the shares in Mighty River Power, was not starting a "statutory process to dispose of a property right or interest in the Waikato River".[74] Mr Carruthers submitted that the Judge's interpretation of s 64 was "too narrow and technical".

[81] Section 64 is part of the provisions dealing with redress in relation to "certain assets".[75] We accept that the water permits used by Mighty River Power are properly regarded as interests in the Waikato River (differing in this from the position taken in the High Court in reliance on the fact that s 122 of the Resource Management Act provides that resource consents, of which water permits are a kind, are not property). They were "assets" within the definition of the State-Owned Enterprises Act,[76] as the Crown acknowledged, and passed to the State enterprise that became Mighty River Power. For the purposes of the Settlement Act, they may

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74 *High Court judgment*, above n 6, at [334].
75 A purpose of the Act identified in s 4(h).
76 State-Owned Enterprises Act 1986, s 29(1)(e).

well be "property" and are in our view certainly an "interest" caught by s 64. If excluded from the application of s 64, it is difficult to see what could be within the meaning of "certain assets" (in the heading to the part containing s 64) or an "interest" in the Waikato River (referred to in the text of s 64), of concern to the negotiating parties and able to be created by a statutory or other process.[77] The difficulty for the appellants lies not in whether or not water rights are property rights or interests in the Waikato River, but in whether the IPO constitutes a disposal by the Crown of any such property rights or interests held by it.

[82] We are unable to accept that the partial privatisation of Mighty River Power constitutes disposal of property or interests held by the Crown in the river. The rights and the associated land in the river bed held by Mighty River Power (which are undoubtedly "property") are not being disposed of and will continue to be held by it. Should Mighty River Power wish to dispose of such interests, it is obliged to engage with Waikato-Tainui in accordance with the principles in the Kiingitanga Accord before doing so. The purpose of the settlement is not affected by the change in the ownership of Mighty River Power which, as a mixed ownership company, is bound by the provisions of s 64. It is not a technical interpretation of the legislation to accept that the holder of the interest in the river is not disposing of its interest. Nor is there any basis for treating the Crown as the owner of assets it has transferred under the provisions of the State-Owned Enterprises Act.

The adequacy of the consultation following the *Freshwater Report*

[83] It is not in contention that, following the recommendations of the Waitangi Tribunal in its interim report on *Freshwater*, it was necessary for the Crown to consult further with Maori. And that is what happened. The appellants argue that the consultation was too rushed. But that was in accordance with the Waitangi Tribunal's recommendation. The Tribunal was mindful of the urgency for the Government in implementing the privatisation and, for that reason, recommended a single national hui, urgently convened.[78]

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77 The Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 64(2)(c).
78 *Freshwater Report*, above n 11, at [3.9.4].

[84] It was also suggested that the scope of the consultation was too narrow. But that, too, was in accordance with the Waitangi Tribunal's recommendation which, while opening up the possibility of wider engagement, was careful not to be prescriptive. While it left to Crown and Maori the option of widening the scope of the consultation, the Tribunal indicated that the narrower consultation on "shares plus" would suffice to meet its recommendation.[79]

[85] Although the Waitangi Tribunal is not to be criticised in the circumstances of this urgent report, it is also relevant in assessing the adequacy of the engagement that some of the ideas it floated as possibilities for the discussion raised very large questions which could not properly or responsibly have been addressed by the parties in the limited time the Tribunal acknowledged to be available. They are questions that the Tribunal will consider in the second stage of its *Freshwater* inquiry. And the Deputy Prime Minister was well justified in the view that rushing such significant issues is not the way to lead to sustainable solutions to important matters that have vexed New Zealand society since earliest days.

[86] It has also been suggested that the consultations were an empty exercise in which the outcome was pre-determined. In considering this submission, it has to be acknowledged that the Tribunal's "shares plus" idea was a concept only. Questions of feasibility were not sufficiently ventilated in the Waitangi Tribunal processes. Indeed, the idea was not one developed by the claimants, who argued that the privatisation should not proceed until Maori interests in the waters used were ascertained and addressed. In those circumstances, it was appropriate for the Crown to consult with Maori to find out whether they indeed wanted a solution in the "shares plus" mould, and to test the feasibility of the proposal both through consultation and by obtaining advice from officials.

[87] The fact that the Crown ultimately rejected the Waitangi Tribunal suggestion as inappropriate is not a basis from which it can be inferred that the consultation was empty or pre-determined. Indeed, this complaint is difficult to separate out from the substantive issue of Treaty compliance in the privatisation. If the Crown was justified in considering that the privatisation did not set up an impediment to

[79] As discussed above at [26].

recognition of Maori interests in water, it is difficult to infer that the consultation was inadequate simply from the fact that the idea of "shares plus" was rejected and there was no change in the Crown's proposal as a result. For these reasons, we consider there is nothing in the consultation point that is not resolved with the substantive issue of whether the sale of shares was consistent with the principles of the Treaty.

Is the proposed sale of shares in Mighty River Power consistent with the principles of the Treaty of Waitangi?

What is the test?

[88] In the *Broadcasting Assets case*,[80] the Privy Council identified the test to be applied for deciding whether a proposed transfer of assets to a State enterprise would breach s 9 of the State-Owned Enterprises Act:[81]

> The answer depends on whether the transfer of the assets could now or in the foreseeable future impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty.

In the same case the Privy Council also said:[82]

> Section 9 is not a statutory provision which requires the Crown to establish, as Miss Elias argues, as precedent fact, that the transfer would not be inconsistent with the principles of the Treaty. The decision in *Khera v Secretary of State for the Home Department* [1984] AC 74, on which she relied, was dealing with a different situation where the Crown's conduct would be unlawful except in a case of an illegal entrant so the Crown had to establish that their actions related to an illegal entrant. Here, on the other hand, the conduct of the Crown was only not permitted if it fell foul of s 9; accordingly, the onus was on the appellants to show that the transfer was not permitted in the normal manner. But, as is usually the situation, the outcome of this case does not depend on any question of onus of proof. Equally the Solicitor-General and the majority of the Court of Appeal (if this is what they were saying, which is by no means clear) were mistaken in suggesting that as the question of the manner in which the Crown chooses to fulfil its obligations under the Treaty is a matter of policy the Court has no power to intervene unless the Court is satisfied that the policy is unreasonable in a *Wednesbury* sense. The question is a matter on which the Court must form its own judgment on the evidence before the Court.

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[80] *Broadcasting Assets case* (PC), above n 46.

[81] At 519.

[82] At 524.

[89] In deciding whether proposed Crown action will result in "material impairment", a court must assess the difference between the ability of the Crown to act in a particular way if the proposed action does not occur and its likely post-action capacity. So impairment of an ability to provide a particular form of redress which is not in reasonable or substantial prospect, objectively evaluated, will not be relevantly material.[83] To decide what is reasonable requires a contextual evaluation which may require consideration of the social and economic climate. As the Privy Council pointed out:[84]

> While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant.

As well, where the capacity to provide a particular form of redress will be materially impaired, the courts must also consider whether the Crown will nonetheless have the capacity to provide other forms of redress which are equally effective.

[90] On this basis:

(a) Before intervening, the Court must be brought to the conclusion that the proposed privatisation is inconsistent with Treaty principles;

(b) There will be inconsistency, if the proposed privatisation would "impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty"; and

(c) The Court must address this issue directly and form its own judgment, along the lines discussed in [89].

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83 The expression, "substantial prospect", comes from the judgment of Cooke P in *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) [*Te Ika Whenua*] at 27.

84 *Broadcasting Assets case* (PC), above n 46, at 517.

[91] We also mention at this stage the United Nations Declaration on the Rights of Indigenous Peoples,[85] which was affirmed by New Zealand in April 2010.[86] Mr Carruthers relied on art 28(1) of the Declaration, which reads as follows:

> Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

[92] We do not find it necessary to consider the Declaration further. We doubt if the Declaration adds significantly to the principles of the Treaty statutorily recognised under the State-Owned Enterprises Act and Part 5A of the Public Finance Act. We accept, however, that the Declaration provides some support for the view that those principles should be construed broadly. In particular, it supports the claim for commercial redress as part of the right to development there recognised.

The underlying claims

[93] The appellants maintain that there are a number of claims to the Waitangi Tribunal of Treaty breach in respect of waters (some already the subject of Waitangi Tribunal reports that they are well-founded, others still to be heard) which may be affected adversely by the proposed privatisation. These claims have been reviewed at length by the Tribunal in its *Freshwater Report*[87] and in the High Court judgment of Ronald Young J.[88] They have also been discussed earlier in this judgment. Most claims invoke the jurisdiction of the Waitangi Tribunal to recommend to the Crown how its Treaty obligations may be discharged, including by reparation. These claims

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85 *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, A/Res/61/295, (2007).

86 (20 April 2010) 662 NZPD 10229–10240.

87 *Freshwater Report*, above n 11.

88 *High Court judgment*, above n 6.

under the statutory jurisdiction of the Tribunal are the most significant[89] for present purposes.[90] In addition to the claims which invoke the statutory jurisdiction of the Waitangi Tribunal, existing or foreshadowed claims to waters include claims of right addressed to the courts based on aboriginal title and breach of fiduciary duty.

[94] All Waitangi Tribunal claims relate to one or more of the following complaints: (a) the wrongful use of the claimants' waters, and associated land, (b) the circumstances and manner in which the claimants were dispossessed of waters and associated land, (c) the effect of Crown action (or inaction) on the waters and the surrounding environment, and (d) past and future management of geothermal resources and, in the case of rivers, the exclusion of Maori from their development, governance and management by legislation and Crown actions including the Water-power Act 1903, the Water and Soil Conservation Act 1967 and the Resource Management Act.

Evolution of statutory regimes controlling the use of water

[95] From 1903, the sole right to use water to generate electricity was vested by legislation in the Crown.[91] The Water-power Act made provision for delegation of the right to local authorities.[92] The Water and Soil Conservation Act extended the vesting in the Crown of the right to take natural water or dam rivers or streams for all purposes, except for domestic and stock consumption and for fire-fighting.[93] The power to grant consents was exercised by Regional Water Boards. The legislation made no mention of Maori interests in water or connections with waters of significance to Maori.[94] Only in 1983 was the legislation amended to provide that one member of the National Water and Soil Conservation Authority was to be

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89 *Freshwater Report*, above n 11, at [1.2] and [2.2].

90 In most cases, the function of the Tribunal is recommendatory only and the Crown can decide whether or not to accept the recommendations. Under s 27B of the State-Owned Enterprises Act, however, land which has passed to state enterprises must be compulsorily returned to Maori if the Tribunal so recommends. Claims to waters often include associated claims to land in respect of which the powers under s 27B are available.

91 Water-power Act 1903, s 2(1).

92 Section 3.

93 Water and Soil Conservation Act 1967, s 21(1).

94 *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC).

appointed following consultation with the Minister of Maori Affairs "to represent the interests of the Maori people in relation to natural water".[95]

[96] The Water and Soil Conservation Act has been the subject of claims of breach to the Waitangi Tribunal since it was set up in 1975.[96] It was the legislation in effect in 1987 when the *SOE case* was decided.

[97] The Resource Management Act provides that the maximum term for which a water right can be granted is 35 years.[97] In addition, the Act provides important recognition for Maori connection to waters and to lands of significance to them in decision-making under the Act. Section 6 of the Act lists "matters of national importance" which all persons exercising powers and functions under the Act are to "recognise and provide for". The list includes "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga". Under s 7 all those exercising powers and functions under the Act are required to have "particular regard" to kaitiakitanga.[98] By s 8 of the Act all persons exercising powers and functions under it are required to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)". This Act substantially improved the recognition of Maori in relation to the management of waters.

[98] The Act was amended in 2005 to strengthen the role for Maori by creating an obligation to consult with tangata whenua in the preparation of a proposed policy statement or plan if they may be affected by the policy statement or plan.[99] A further amendment provided for public authorities and iwi to enter into joint management agreements under which decisions taken have the legal effect of a decision of the local authority.[100] In addition, local authorities now must have regard to planning documents of iwi authorities in the preparation of their own plans and policy statements.[101] Regional policy statements must set out the resource management

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95 Water and Soil Conversation Act 1967, s 5(1)(c)(iv).
96 See, for example, *The Whanganui River Report*, above n 10, at 255.
97 Resource Management Act 1991, s 123(d).
98 Defined as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includ[ing] the ethic of stewardship": Resource Management Act 1991, s 2, definition of "kaitiakitanga".
99 Schedule 1, cl 3(1)(d).
100 See s 2, definition of "joint management agreement", and ss 36B–36E.
101 Sections 61(2A), 66(2A) and 74(2A).

issues of significance to the region's iwi authorities.[102] There is also provision under the Act for local authorities to transfer functions to iwi authorities after following a requirement of special consultation under the Local Government Act 2002.[103] In addition to enhanced direct authority under the Act, the recognition of the special place of iwi enables Maori to participate from a position of some strength when waters of significance to them are affected. Whether this is sufficient to discharge the Treaty obligations in modern circumstances will no doubt be the subject of consideration by the Waitangi Tribunal in the second stage of its *Freshwater* inquiry.

Positions of the parties as to ownership interests in water

[99] The Crown's general negotiating stance has been set out in what is known as the "Red Book", a publication to inform Maori about the settlement process. To date the Crown has not been willing to negotiate for recognition of Maori property in water or for commercial redress in relation to any interference with it in the development of generating capacity. The relevant passage in the Red Book is as follows:[104]

> ***New Zealand law does not provide for ownership of water in rivers and lakes***
>
> As noted earlier, the Crown acknowledges that Maori have traditionally viewed a river or lake as a single entity, and have not separated it into bed, banks and water. As a result, Maori consider that the river or lake as a whole can be owned by iwi or hapu, in the sense of having tribal authority over it. However, while under New Zealand law the banks and bed of a river can be legally owned, the water cannot. This reflects the common law position that water, until contained (for example, put in a tank or bottled), cannot be owned by anybody. For this reason, it is not possible for the Crown to offer claimant groups legal ownership of an entire river or lake – including the water – in a settlement.
>
> The Crown also considers that the benefits of hydro-electricity generation belong to all New Zealanders and it does not provide compensation for any past interference with rivers for these purposes. However, negotiations can explore redress options for specific grievances relating to rivers or lakes such as the flooding or destruction of wahi tapu or effects on traditional fisheries that arise from Crown actions.

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[102] Section 62(1)(b).
[103] Local Government Act 2002, s 83.
[104] Office of Treaty Settlements *Settlement Redress* at 111.

[100] The stance set out in the second of the two cited paragraphs is consistent with the approach taken in the judgment of the Court of Appeal in *Te Ika Whenua*,[105] which diverges somewhat from that taken by the Waitangi Tribunal.[106] The Tribunal's position is that claimants may be entitled to commercial redress for the use of rivers for electricity generation and that this might be in the form of both compensation for past losses[107] and royalties for future use.[108] It takes the same view in respect of geothermal resources.[109]

[101] In submissions to the Waitangi Tribunal and in the course of the hearings in the High Court and this Court, the Crown accepts that some hapu will have interests in particular waters and that their interests are protected by art 2 of the Treaty.[110] Counsel confirmed the position taken by the Crown before the Tribunal (in what may be a development of the view expressed in the Red Book and adopted in the historic settlements) that it is "open to discussing the possibility of Maori proprietary rights in water, short of full ownership". Such interests are however unascertained, including as to their nature and extent. How they may be given effect in modern conditions consistently with Treaty responsibilities and other government obligations is also far from clear. For their part, the appellants accept that use patterns established since 1840 and modification of particular waters through development (especially since the development of hydro-electricity generating capacity from the beginning of the 20th century) necessarily impacts upon what interests can reasonably be available to them by way of reparation for Treaty breach.

An overview of the competing positions as to the extent of available Treaty claims

[102] The appellants' position before us, corresponding to that of the claimants before the Tribunal in the *Freshwater Report*, is as follows. As at 1840, they had rights in relation to waters (including lakes and rivers) and geothermal energy which

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105 *Te Ika Whenua*, above n 83. At 26, the judgment also refers to the view of Maori that a river is "a whole and indivisible entity, not separated into bed, banks and waters" but does not discuss common law rules as to the ownership of water.

106 See in particular *Freshwater Report*, above n 11, and *Te Ika Whenua Rivers Report*, above n 10.

107 *Freshwater Report*, above n 11, at [3.9.1] and *Te Ika Whenua Rivers Report*, above n 10, at [10.4].

108 *Freshwater Report*, above n 11, at [3.8.3(1)].

109 *He Maunga Rongo: Report on Central North Island Claims*, above n 11, at 1590 and following.

110 See *Freshwater Report*, above n 11, at [2.3].

were guaranteed under art 2 of the Treaty and were broadly equivalent to ownership. In breach of the Treaty, the Crown, via the Water-power Act, the Water and Soil Conservation Act and the Resource Management Act, has exercised control and management of rivers and lakes without their consent. As a result, their waters have not only been significantly affected to their detriment (involving environmental degradation and loss of, or interference with, customary uses), but the appellants have also been deprived of the ability to develop them for their own purposes and they have not derived any direct financial benefit from their exploitation. Broadly similar claims are made in relation to geothermal waters. Claims to share in the economic benefits from use of waters are part only of the claims. They include claims for cultural and spiritual deprivation, as we have already explained.[111]

[103] The Crown acknowledges that Maori have interests and rights in relation to particular waters. It has not been prepared, so far, to negotiate for recognition of Maori property in waters or for their participation in the economic benefits obtained from the use of waters (as through royalties paid to them).[112] It is, however, prepared to encourage and facilitate joint ventures in the generation of electricity using waters in which Maori are interested in the future. It is also prepared to negotiate co-governance and co-management arrangements under which Maori have a substantial say in the control of particular rivers through Treaty settlements.[113] As well, the future of freshwater management (and thus the Resource Management Act) has been under active review pursuant to a process known as *Fresh Start For Fresh Water* conducted by the Land and Water Forum. This has included extensive consultation with Maori. There are also parallel discussions between government ministers and the Freshwater Iwi Leaders Group.

[104] Although the Crown's general negotiating stance is against the recognition of ownership interests or the provision of commercial redress in respect of existing generating capacity and its future use, the Crown has undertaken that it will not rely on the privatisation of the generating companies so as to diminish any claimed

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[111] See above at [10].

[112] See *Freshwater Report*, above n 11, at [3.6.2(2)] where the Crown witness is recorded as saying that such royalties are not "on the table".

[113] For instance in relation to the Waikato River through the Waikato River Authority, and in relation to the Rangitaiki River through the Rangitaiki River Forum.

rights. This position was set out in a letter of 21 February 2012 from Ministers to the Tribunal:

> …
>
> The Crown wishes to acknowledge and confirm to the Waitangi Tribunal and to iwi and Maori that the sale of the shares is not intended to prejudice the rights of either iwi or Maori, or the Crown, in the natural resources used by those mixed ownership companies. Government does not consider the legislation will 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.
>
> Government confirms here that in relation to claims to the Crown about such rights and interests, Government will not seek to rely on the changed status from SOE to mixed ownership [to suggest] any diminution in the claimed rights.
>
> The Crown also confirms that as the majority shareholder in the mixed ownership companies, it will continue to exercise its Treaty obligations to iwi. The Government is intending that the legislation to implement the mixed ownership model include a provision which reflects the concepts of section 9 of the State-Owned Enterprises Act.
>
> …

[105] The Deputy Prime Minister and the Attorney-General have given additional assurances in the affidavits filed in these proceedings. In the case of the Deputy Prime Minister these assurances include expressions of confidence that the mixed ownership companies programme will not compromise the Government's "work to achieve recognition of and redress for Maori rights and interests in water and geothermal resources"[114] and confirmation that the programme (including any potential sale to foreign investors) will not have any "chilling effect" on the willingness of the Crown to provide appropriate rights recognition and redress.[115] The Attorney-General, in his affidavit stated:[116]

> I have been satisfied that, however the rights and interests of Maori in water and geothermal resources may be defined …, the sale of minority shareholdings in the [mixed ownership] companies will not compromise the Crown's ability to recognise those rights and interests, will not compromise the Crown's ability to respond appropriately to the outcomes of the Waitangi Tribunal's work in this area, and will not change my commitment as Minister, and the Crown's commitment, to make provision for past actions

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114 As contained at [44] of the affidavit of the Deputy Prime Minister of 7 November 2012.

115 At [50] of the same affidavit.

116 At [4] of the affidavit of the Attorney-General of 7 November 2012.

> that are inconsistent with those rights and interests through redress provided in Treaty settlements.

Treaty settlements involving water

[106] Despite what may seem to be differences between the negotiating stances on ownership issues of the Treaty partners, a number of settlements of historic grievances with iwi have addressed their connections with specific waters. Such settlements in recent years have included legislative and Crown acknowledgement of specific Maori relationships to waterways, lakes, and springs, and by specific provision for Maori participation in management of such features.

[107] Of particular importance in relation to Mighty River Power, the long-standing Waikato-Tainui Raupatu Treaty claims in respect of the Waikato River have received substantial redress under the terms of the Settlement Act, to which we have referred. Although the water rights held by Mighty River Power are not confined to the part of the river affected by the Act, the Act illustrates the extent to which the Crown has so far recognised and provided for Maori interests in waters of significance. It also illustrates the range of mechanisms available to the Office of Treaty Settlements under present policies to address historical Treaty breaches.

[108] Of importance in relation to the present litigation is the position recorded in s 64 of the Act, reflecting an approach to date consistently maintained by the Crown in respect of dealings with other iwi and hapu, that Crown and Waikato-Tainui:[117]

> have different concepts and views regarding relationships with the Waikato River (which the Crown would seek to describe as including "ownership"): …

[109] The Act is "not intended to resolve those differences" but is, rather, "primarily concerned with management of the Waikato River to achieve the overarching purpose of the settlement and recognise the special relationship of Waikato-Tainui with the Waikato River".[118] The "overarching purpose of the settlement" is defined in s 3 as being "to restore and protect the health and wellbeing of the Waikato River for future generations".

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117 Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 64(1)(a).
118 Section 64(1)(b)–(c).

[110] In the Act, the Crown undertakes to work for "a settlement that will recognise and sustain the special relationship of Waikato-Tainui with the Waikato River",[119] which is defined to include the "body of water" itself.[120] The Act provides a "vision and strategy" statement[121] for the river, which is deemed to be part of the Waikato Regional Policy Statement and which prevails in cases of inconsistency before the Regional Policy Statement can be amended, as it must be to ensure conformity.[122] Under the Act, any person exercising powers or carrying out functions in relation to the Waikato River or its catchment is obliged to have "particular regard" to the vision and strategy framework.[123] Under s 64 of the Act, whenever a mixed ownership company proposes, in relation to an asset held by the company, to create or dispose of an interest in the Waikato River (including by "starting a statutory or other process"), it is required to "engage with Waikato-Tainui in accordance with the principles described in the Kiingitanga accord".[124] The Act also contains obligations of co-management of sites of particular significance such as wahi tapu.

[111] Comparable settlements and legislation have been entered into with other iwi and hapu. They include settlements with Ngati Manawa (2012), Ngai Tamanuhiri (2012), Raukawa (2012), Ngati Pahauwera (2010) and in respect of Tapuika (2012). In none is there Crown agreement on Maori claims of ownership interests in water. All concern management of use and access to waters and recognition of the special connection of Maori.

[112] In explanation of the mechanisms available to the Office of Treaty Settlements (and which are manifested in the Settlement Act), the Deputy Prime Minister explained that the framework includes "acknowledgment of mana, rangatiratanga, and kaitiakitanga" and "[t]he provision of redress that, despite being in settlement of historical claims, is contemporary in nature, forward looking and [providing for] on-going rights and interests".[125]

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119 Preamble, cl (17)(n).
120 Section 6, definition of "Waikato River".
121 Section 9.
122 Section 11.
123 Section 17(3).
124 Section 64(3).
125 Affidavit of the Deputy Prime Minister, above n 114, at [42].

[113] Recognition of Maori interests in water is clearly still a work in progress. In his evidence to the High Court, the Deputy Prime Minister relied on the existing framework for Treaty settlements and the initiatives underway to review the regulation of freshwater (including through the Waitangi Tribunal inquiry) as part of the Crown's overall and ongoing response to Treaty claims. That process, which has clearly accelerated in recent years, is the context in which the materiality of the change in ownership of Mighty River Power must be assessed.

Treaty principles and the SOE case

[114] The appellants relied heavily on the *SOE case*.[126] They say that the Crown is to be treated as the owner of the assets transferred to the State enterprises, despite the corporate form adopted. They maintain that the sale of up to 49 per cent of the shares in the generating companies would fundamentally change the relationship between the Crown and the generating companies, and in particular limit the Crown's ability to provide appropriate redress for Maori through providing for their participation in the State enterprise or distribution to them of the assets under claim. Accordingly, on the appellants' argument, we should treat the *SOE case* as directly applicable.

[115] Assessment of "material impairment" (the test later used by the Privy Council, as set out above at [88][127]) was relatively easy to infer when the proposed Crown action clearly had the potential to put beyond Maori claim particular or substituted land which they wished to resume. It is not quite so easy where what is to be sold is a minority stake in Mighty River Power rather than the assets which are primarily subject to Treaty claims. The Crown will retain substantial capacity to provide redress in the form of shares, if that is seen as appropriate. The Crown will retain at least 51 per cent of the shares and therefore majority control over the company. And, to the extent that the generating assets include land, they remain subject to the resumption regime. As well, and to anticipate a point which will shortly be made, in the current legal and social environment, Maori can be confident

[126] *SOE case*, above n 25.
[127] *Broadcasting Assets case* (PC), above n 46, at 519. Their Lordships referred to impairment "to a material extent".

that their claims will be addressed, something which was not as clear in 1987 as it is now.

How the privatisation of the power-generating companies might impair the ability of the Crown to respond to claims – the contentions of the parties

[116] The position of the appellants is that the power-generating companies have acquired their wealth by using taonga (water resources) in which Maori claim proprietary interests, in some cases extending to claims of outright ownership. They see the existence and operation of those companies as directly resulting from breaches of Treaty principles.

[117] The appellants maintain that, before considering issues of compensation, the Crown must, to the greatest extent possible, strive to recognise the mana (authority), take noho (use) and kaitiakitanga (care) of the respective hapu and iwi in their water resources. This involves recognising the cultural and spiritual relationship between local Maori and the specific water resource, as well as recognising the economic aspects of that relationship, including development and exploitation rights in relation to those water resources. The appellants say that mana endowed the holder with authority over the water resource, including the right to charge for the use of it. They consider that the introduction of such charges (or other recognition of their mana) would face an impossible hurdle once third parties become shareholders in the generating companies.

[118] The appellants argue that, in the absence of the outright return of the water resources, proper redress must involve some utilisation of the power-generating companies themselves or their assets (and, in particular, use rights to water). Without such utilisation, Maori claims will be able to be met only through financial compensation which will continue the alienation from their tupuna awa and other waters. They say that financial compensation would be an inadequate recognition of their Treaty rights and the right to development implicit in the guarantee of their property as recognised by the United Nations Declaration of the Rights of Indigenous Peoples. So they say that until their claims are ascertained by the Waitangi Tribunal in its *Freshwater* inquiry and the Crown has made any reparation,

the Crown should retain the capacity to allow them to obtain redress through participation in the ownership of the developments that have been imposed upon them.

[119] The appellants also suggest that the power-generating companies provide a mechanism by which compensation might be provided for Treaty breaches with regard to water resources, even where such breaches are not directly associated with power-generating capacity. As well, the appellants have a broader concern. They say that partial privatisation of the power companies will make it more difficult to implement general reform in relation to the management of water resources. Requiring users of water to pay for its use is likely to be opposed by those users. The partial privatisation of the power-generating companies will substantially increase the number of those who could be expected to voice such opposition.

[120] The appellants argue that the shares should not be sold until a system of protection is introduced, which is comparable to the memorials and resumption provisions in respect of lands that followed the *SOE case*.

[121] The Crown contends that privatisation is neutral in its effect on the Treaty claims and will not prevent the Crown responding appropriately to remedy breaches of established interests in water. As well, counsel for the Crown in oral argument maintained that the existing regulation of water (which includes the use regime established by legislation and the limit on duration of water rights imposed following the *SOE case*) was indeed comparable to the protection through memorialisation of land.

The views of the Waitangi Tribunal

[122] We have already discussed the interim report of the Waitangi Tribunal in the *Freshwater Report*,[128] but there are aspects of the report which warrant particular reference in the present context.

[128] See above at [21]–[26].

[123] The first is the summary which the Tribunal provided of the framework for rights recognition advanced by the claimants. This involved three components:[129]

(a) Shares in the generating companies, involving either (i) a "swap" of ownership rights in the rivers for shares in the companies, or (ii) a "shares plus" arrangement giving successful claimants shares with enhanced rights of control.

(b) "Modern water rights" – meaning the establishment of a new water control regime under which Maori have power to issue water permits (becoming in effect the consent authorities) or may be allocated water permits which they could lease on to power-generating companies.

(c) A royalty regime under which Maori were paid royalties for the use of water.

[124] Secondly, some of the claimants' assertions as to impairment were rejected, most relevantly the contention that privatisation should be halted because it would materially impair the ability of the Crown to remedy Treaty breaches which were not related to the activities of the generating companies. This argument proceeded on the basis that the assets of generating companies should be seen as available to meet unrelated claims, say for instance for degradation to rivers caused by farming. In this respect, the Tribunal considered that there was an insufficient nexus between the underlying claims and the assets being sold.[130]

[125] Thirdly, the Tribunal noted that "a commercial option for rights recognition or redress (where recognition is not possible) is essential" and then went on:[131]

> In our view, the Crown is correct that it will still be able to provide many such options after the sale of shares in the MOM companies. We think that the claimants' evidence has shown that it will be significantly more difficult for the Crown to do so once it has introduced thousands of 'mum and dad' investors into the political mix. We suspect that the Crown's evidence underestimated the political obstacle that these new interests will put in the way of a tax, levy, royalty, or resource rental for the use of water to generate

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[129] *Freshwater Report*, above n 11, at [3.6.1].
[130] At [3.7.4].
[131] At [3.9.2].

electricity. We note ... evidence ... that, as with the emissions trading scheme, a new regime could be introduced sector by sector. The Crown could start with hydroelectricity (it is already empowered to charge royalties for geothermal energy), and it would surely be much easier to do so before there are private interests in the companies which command three-quarters of New Zealand's hydro generation capacity. But it will not be impossible for the Crown to introduce this kind of rights recognition or redress after the partial privatisation of the MOM companies. As the Crown says, it will have to balance the interests concerned (including the possibility of consumer price rises) in a Treaty-compliant manner. But we note the Crown's own evidence and submissions that it may be possible to provide a commercial option that does not affect profit or result in price rises. We also note the fact that the 'zero cost for water' may be about to disappear in any case, if charges for water permits are introduced to help increase efficiency. As we said earlier, such charges might be paid to or shared with Maori.

> We accept the Crown's assurances, given as part of our inquiry, that it is open to discussing the possibility of Maori proprietary rights (short of full ownership), that it will not be 'chilled' by the possibility of overseas investors' claims, and that the MOM policy will not prevent it from providing appropriate rights recognition once the rights have been clarified. We trust that our report has now clarified the rights for the Crown.

[126] The Waitangi Tribunal had earlier in its report discussed the concept of "shares plus", involving the creation of a special class of share with special voting or other rights, which could be vested in Maori claimants. As it recognised, the creation of special classes of shares for this purpose would have to be attended to before, rather than after, privatisation. It then returned to this topic immediately after the passage we have just cited:[132]

> But there is one area in which the Crown will not be able to provide appropriate rights recognition or redress after the partial privatisation, and that is in the area that we have termed 'shares plus': the provision of shares or special classes of shares which, in conjunction with amended company constitutions and shareholders' agreements, could provide Maori with a meaningful form of commercial rights recognition. As we have found, 'shares plus' are not 'fungible' and company law would in practical terms prevent the Crown from providing this form of rights recognition after the introduction of private shareholders, certainly after the sale of more than 25 per cent of shares and arguably before that too. The detailed analysis of company law and of the parties' evidence and submissions that supports this finding is set out above in sections 3.7.3 and 3.8.2.
>
> We conclude therefore that the sale of up to 49 per cent of shares in power-generating SOE companies will affect the Crown's ability to recognise Maori rights and remedy their breach, where such breach is proven.

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132 At [3.9.2].

[127] There is one point we should make about the passage cited at [125] from the *Freshwater Report*. In that passage the Tribunal seems to have concluded that because certain forms of redress would not be impossible after privatisation, the material impairment test was not satisfied. We agree with Mr Carruthers, for the appellants, that material impairment may be demonstrated in relation to a particular form of redress even if, after the privatisation in question, such redress is not impossible.

The approach of Ronald Young J in the High Court

[128] In rejecting the contention that the privatisation of the power-generating companies would materially impair the ability of the claimants to secure redress, Ronald Young J concluded that legislative change to provide redress would be as possible after privatisation as it is now. He saw little connection between shares in a power-generating company (even shares with enhanced rights) and the rights which the claimants were asserting.[133] He considered that the "shares plus" proposal was not consistent with Part 5A of the Public Finance Act and, in particular, the requirement that the Crown have a 51 per cent interest in every class of shares.[134] As well, if implemented, the "shares plus" proposal would not provide an effective mechanism for Maori to obtain control over water resources and a commercial return associated with their exploitation.[135] On the other hand, such implementation would seriously prejudice the ability of the Crown to realise full value for the 49 per cent of the shares which are to be sold.[136] He stressed that the obligation of the Crown was to take "reasonable" action and he had no difficulty in concluding that this did not extend to implementing the "shares plus" proposal.[137]

[129] Ronald Young J also rejected the argument that the privatisation of the power-generating companies would make it more difficult to introduce a royalty payment system for the use of water:

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133 *High Court judgment,* above n 6, at [188].
134 At [194]–[195].
135 At [195].
136 At [199].
137 At [208]–[209].

> [227] ... In my view there is nothing to suggest that it will be any more difficult to institute a rental (or royalty) payment system for water after the sale of shares in [Mighty River Power]. Such a rental system would likely relate to most, if not all, commercial use of water. It could hardly be introduced for [Mighty River Power's] use only. It would likely require amendment to the Resource Management Act 1991.
>
> [228] Parliament is free to introduce such changes to the water use regime as it chooses. There would be no unfairness to investors in MOMs or indeed any entity currently using water for free to be faced with a change for the resource. While this may be a change to the commercial basis on which such entities operate, investors will no doubt be aware of such potential changes. Commercial entities are subject to regulatory change which can affect commercial profitability (see, for example, the Emissions Trading Scheme and the Resource Management Act).

[130] The Judge also concluded that if shares in the power-generating companies were eventually seen as an appropriate mechanism for providing relief, the Crown could, if necessary, buy on the open market such shares as were necessary.[138]

Our approach – a preliminary comment

[131] Two aspects of the case can be dealt with briefly:

(a) Mr Carruthers did not seek to argue that the viability of aboriginal title claims at common law to the assets of the power-generating companies would be affected by whether the power-generating companies remain State enterprises or become mixed ownership companies. So we propose to proceed on the basis that the proposed privatisation will not have any effect on such claims.

(b) We consider that the Tribunal was correct in rejecting the contention that privatisation should be halted on the basis that that it would diminish the capacity of the Crown to provide redress for Treaty claims unconnected with the development and use of the power-generating capacity of Mighty River Power.[139] The Crown has capacity to meet such claims and there is no logical reason why it

138 At [239].
139 See above at [124].

should be required to retain, against its will, particular assets (in this case the shares in the generating companies), which are unconnected in any meaningful way to the underlying Treaty claims.

[132] While asserting generally that privatisation would materially impair their rights to redress for Treaty breaches, the appellants were not very specific as to the particular respects in which this was said to be so – that is, by identifying specific relief which is substantially in prospect and would become materially harder to obtain post-privatisation. It is not easy to identify such prejudice except by careful analysis of particular claims and the waters to which they relate and the case was not conducted at that level of specificity. So the comment we have just made is not a criticism of the appellants. Nonetheless, in a case where we are asked to infer material impairment (a matter not easily susceptible to evidential proof) the lack of specificity makes assessment more difficult.

[133] We have already referred to the framework for relief advanced by the claimants in the Waitangi Tribunal.[140] In the succeeding sections of this part of these reasons we will evaluate the competing arguments by reference to the impact of privatisation on (a) land claims (b) ownership and control of the power-generating companies and (c) more general reform of the law relating to the governance and management of water. A final contextual consideration which we will also address is the current social and legislative environment in relation to Treaty rights.

The effect of privatisation on direct claims against the lands of the State enterprise power-generating companies

[134] The memorial regime under s 27A of the State-Owned Enterprises Act and the continuing operation in relation to mixed ownership companies of the resumption procedures provided for under s 27B of that Act is significant protection for land interests.[141] The practical effect of the continued operation of the resumption procedures is that outstanding claims[142] for resumption in relation to the dams (and

140 Above at [123].
141 Above at [18].
142 We were told that a number of claims in relation to dams have been settled and that the memorials in relation to those dams have been removed.

any other memorialised property) of the mixed ownership companies will be unaffected by privatisation.

The significance of privatisation in relation to the ownership and control of the power-generating companies

[135] Crown ownership and control of the power-generating companies will undoubtedly be diminished by privatisation. Once the power-generating companies become mixed ownership companies and have private shareholders, they will have to be run in a way which is consistent with the rights of the minority shareholders and directors will be required to act in a manner which is in the best interests of the company concerned. The important features of the way in which State enterprises operate, including their relationship with shareholding Ministers,[143] were stressed by the Privy Council in the *Broadcasting Assets case.*[144] They will no longer be present. This means that privatisation might preclude or limit the possibility of some options for redress which would otherwise be possible: for instance, the "shares plus" proposal, or royalty regimes which are particular to the State enterprise power-generating companies, or reparation out of the water assets of the State enterprise.

[136] In assessing the materiality of this, certain considerations must be kept in mind:

(a) Irrespective of whether privatisation occurs, the current power-generating infrastructure and its significance for the wider New Zealand economy are facts on the ground which will not be ignored. The appellants are not seeking, and in any event the Crown could not agree to, settlements which would be inconsistent with the continuing efficient operation of the current power-generating capacity.

(b) Given the vast public expenditure associated with the construction of the power-generating infrastructure, the courts should be slow to insist on protective measures which would prevent the Crown from

143 See above at [33] and [36].
144 *Broadcasting Assets case* (PC), above n 46, at 520.

obtaining full value – for the benefit of the country as a whole – when the shares in the mixed ownership companies come to be sold. A clear purpose of the mixed ownership model legislation is that the Crown should obtain full value and it would be a strong step for the courts to insist on protective measures which were inconsistent with that end.

(c) The Waitangi Tribunal described the ownership interest guaranteed by the Treaty in terms of use and control.[145] In large part, this may be more directly delivered through changes to the regulatory system, augmented by specific settlements, as Crown policy proposes. Regulation of water use and control is under review by the Crown and the settlements have indicated the willingness of the Crown to consider extension of Maori authority in connection with specific waters. There may be some ownership interest insufficiently addressed by regulatory reform, but the significance of the interest needs to be assessed against the opportunities under consideration for real authority in relation to waters of significance. That is the context in which the materiality of the sale of a minority interest in a company using the waters must be considered.

(d) In assessing the significance of shares as redress, it is important to recognise that they can only be a proxy for the underlying claims (as the Waitangi Tribunal has recognised) and this is particularly so where such shares could be sold once received. So the significance of shares as a means of redress should not be overstated.

(e) Water rights, unlike the ownership of land, are limited to 35 year terms. Although in reality such rights are likely to be renewed while used for electricity generation, the terms of renewal remain under review. Indeed, under the current permits for Mighty River Power, the terms must be reviewed to conform with any Treaty settlement.[146]

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[145] *Freshwater Report*, above n 11, at [3.6.1(3)].
[146] See above at [14].

[137] The Crown claims that, if required to settle claims with shares, it would be able to do so by buying them back. We agree. There is no reason to think that the Crown will lack the capacity to do so. It follows that following privatisation, the Crown will retain an appropriate level of capacity to offer Maori shares and, associated with this, a commensurate measure of influence.

[138] As we have explained, Part 5A of the Public Finance Act requires the Crown to hold a 51 per cent interest in every class of shares. The "shares plus" proposal is not really compatible with this requirement and is thus inconsistent with the mixed ownership model provided for in the legislation.[147] More importantly, it is difficult to see that "shares plus" would produce reparation that would be more beneficial to Maori aspirations in relation to water[148] than can be achieved by regulatory reform and associated settlements. As noted too, it is plainly a purpose of the legislation that the Crown should obtain full value and insistence on a "shares plus" arrangement would have the effect of defeating that purpose.

[139] It is not entirely easy to envisage the imposition of a royalty regime on the generation of electricity which was confined to the State enterprise power-generating companies, and there are currently two substantial private power-generating companies, Contact Energy Ltd and Trust Power Ltd. Any proposal to impose royalties on electricity generation would be likely to attract opposition from those companies and their shareholders, as well as the Crown (which has so far refused to contemplate such arrangements) and the public at large, who would be affected by likely consequential increases in power costs. The introduction of private shareholders in mixed ownership companies would thus not have a material effect on the level of opposition. As well, as Mr Goddard pointed out, a targeted levy on

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[147] There is scope for debate as to the significance of this inconsistency as Treaty settlements are often implemented by statute. Thus the settlement of the *SOE case* involved amendments to the State-Owned Enterprises Act. On the other hand, the orders made by the Court of Appeal in the *SOE case*, above n 25, at 666 did not address statutory amendments and there is nothing in the judgments to suggest that the State-Owned Enterprises Act could not be implemented consistently with Treaty principles. It might be thought a bold step for a court to conclude that a recent statute could not, as enacted, be implemented consistently with Treaty principles.

[148] Given that the duties of directors are to the company rather than to particular shareholder groups, special voting rights, for instance, would give Maori no direct, and little indirect, influence (let alone control) over the governance or management of a mixed ownership company. Any attempt to impose special rules in relation to mixed ownership companies which had the effect of giving a particular shareholder group direct influence over its governance would be problematic and would significantly impair what would otherwise be the realisable value of the shares to be sold.

Mighty River Power would distort competition among electricity suppliers. It must also be remembered that the corollary of the retention of a 51 per cent stake in the power-generating companies is that the Crown will derive what will almost certainly be a substantial dividend revenue which would be available, should this ever prove to be necessary, to provide redress in respect of the continuing operation of the dams.

[140] It can be accepted that reparation by transfer of the water permits themselves to Maori will not be in realistic prospect after privatisation because it would expropriate value in the company from private minority shareholders. Since it is however implausible to suggest that the use of the water could be withheld from the generation of electricity through the significant assets owned and maintained by Mighty River Power, in effect proprietary recognition through the water permits is likely to be of value as reparation only to provide a basis for payment to Maori of royalties in respect of the particular waters used (rather than under a royalty system imposed more generally on all users). It is difficult, in substance, to distinguish such remedy from compensation, which the Crown is able to supply directly should it be appropriate.

[141] In addition, the 35 year term of the permits gives opportunity for review on their renewal. In addition, the terms of the water permits held by Mighty River Power allow review should they be affected by a Treaty settlement, as has already been described.[149] Given these circumstances and the wider context now provided in legislation for recognition of Maori authority in relation to waters (discussed in what follows), we consider that the Crown was justified in suggesting that protection of Maori in the waters comes close to the memorialisation protection put in place for land.

The effect of privatisation on more general reform of the law relating to the governance and management of water

[142] A primary concern of the appellants is the way in which water is managed under the Resource Management Act. There are two aspects to this concern – one

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[149] See above at [14].

addressed to the general governance and management (currently largely vested in regional councils) and the other to their lack of ability to derive income from the exploitation of what they see as their water resources. Addressing these issues would involve changes to the Resource Management Act. The concern is that privatisation will increase the number of commercial stakeholders in the current water control regime and in this way tend to limit the likelihood of more general recognition of Maori interests in water.

[143] In assessing these arguments, it must be remembered that the Resource Management Act currently provides substantial recognition of Maori interests.[150] We have already discussed the relevant provisions of that Act and the current water permits held by Mighty River Power which are able to reviewed following any relevant Treaty settlement.

[144] Also material is the current *Fresh Start for Fresh Water* process, which is being conducted against agreements that no disposition or creation of property rights in water will be undertaken by the Crown without first engaging with iwi and that iwi will be involved in the second stage of reviewing the Resource Management Act, a long-term and difficult project needed to bring about sustainable change. The Deputy Prime Minister explained in his evidence that engagement with Maori in relation to the *Fresh Start for Fresh Water* programme is being conducted in three ways: through direct engagement between iwi and the Crown through the Freshwater Iwi Leaders Group and Ministers; through Maori membership of the non-governmental Land and Water Forum; and by engagement by officials in developing policy with the Iwi Advisers Group (which advises the Iwi Leaders Group).

[145] Mr English summarised the Crown position as being that it acknowledges that Maori have "rights and interests in water and geothermal resources". Identifying those interests is being addressed through the "ongoing Waitangi Tribunal Inquiry" and a number of "parallel mechanisms".[151] The Crown position is that any recognition must "involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care,

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150 See above at [97]–[98].
151 Affidavit of the Deputy Prime Minister, above n 114, at [29].

protection, use, access and allocation, and/or charges or rentals for use. Currently the Ministry for the Environment has responsibility for progressing policy development around these issues."[152] The Court should accept that it is not an empty exercise.

[146] It is against this background that the Court must assess the concerns of the appellants that the introduction of private shareholders into the mixed ownership companies will increase the number of people with a stake in the current regime and thus impede reform which would be beneficial to Maori. While these concerns are understandable, it is difficult to see how privatisation will make a material difference to the ultimate outcome. The Crown sees general reform as being necessary, a view that does not appear to be substantially in dispute. And the interest which shareholders in the mixed ownership companies can be expected to take in the reform process will not be materially different from that of commercial users of water (including the two privately-owned power-generating companies).

The current social and legislative environment in relation to Treaty rights

[147] The changes in the social and legislative context since the *SOE case* was decided have already been described. They are reinforced by the explanations given by Ministers in the course of these proceedings and are further evolving under the initiatives to address freshwater more generally and the recognition of Maori interests specifically.

[148] The Waitangi Tribunal will, in due course, conclude its *Freshwater* inquiry and the Crown will be required to respond to its recommendations. It is, of course, uncertain what the ultimate outcome will be, but the trend since the *SOE case* should provide reassurance that Maori claims are not being ignored. Sustainable settlements need time to work out, as the Deputy Prime Minister has pointed out. This means that taking advantage of what the Waitangi Tribunal saw as a "here and

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[152] At [29]. See also Land and Water Forum *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity, and Freshwater Policy- and Plan-Making Through Collaboration* (2012) and Land and Water Forum *Third Report of the Land and Water Forum: Managing Water Quality and Allocating Water* (2012).

now” opportunity[153] for providing commercial redress under pressure of the present dispute would be unlikely to produce a durable solution. This is not to say that the water claims should be parked. The Waitangi Tribunal has emphasised the need for urgency in addressing proprietary claims. It appears from the policy initiatives and from the assurances given in the litigation that the message that there is need for action on these claims has been accepted.

Conclusion on this issue

[149] As is apparent, we are prepared to accept that privatisation may limit the scope to provide some forms of redress which are currently at least theoretically possible. But in assessing whether this amounts to “material impairment”, regard must be had to (a) the assurances given by the Crown, (b) the extent to which such options are substantially in prospect, (c) the capacity of the Crown to provide equivalent and meaningful redress, and (d) the proven willingness and ability of the Crown to provide such redress.

[150] For the reasons given, we are not persuaded that a material impairment arises from the proposed sale of shares.

Result

[151] We dismiss the appeal. We have decided there should be no order as to costs. While the appellants have failed as to the ultimate result, they nonetheless succeeded on an important point of principle, namely that the Crown was bound to comply with the principles of the Treaty before deciding to sell the shares.

Solicitors:
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153 See above at [24] and n 39.