The Right Honourable John Key
Prime Minister

The Honourable Dr Pita Sharples
Minister of Maori Affairs

The Honourable Christopher Finlayson
Minister for Treaty of Waitangi Negotiations

The Honourable Bill English
Minister of Finance

The Honourable Tony Ryall
Minister for State Owned Enterprises

The Honourable Amy Adams
Minister for the Environment

Parliament Buildings
WELLINGTON

The Waitangi Tribunal
141 The Terrace
WELLINGTON

24 August 2012

E te Pirimia, e nga Minita, tena koutou

Enclosed is our interim report on the National Freshwater and Geothermal Resources claim, which we heard urgently at Waiwhetu Marae from 9–16 July and 19–20 July 2012. It is a truncated version of our full report, which will be published later in the year. We are making this early, pre-publication version available as requested by the Crown so that Ministers can give appropriate consideration to our findings and recommendations before the Government makes decisions as to whether to proceed immediately with the sale of shares in Mighty River Power. While the final report will be edited, further text added, and references completed, the substance of our findings and recommendations will not change.

The New Zealand Maori Council, in conjunction with 10 co-claimant hapu and iwi, filed the National Water and Geothermal Resources claim in February of this year, in response to the Government's proposal to sell up to 49 per cent of shares in the power-generating State-owned Enterprises (SOEs) Mighty River Power, Meridian Energy, and Genesis Energy. One hundred and one Maori iwi, hapu, and individual claimants registered an interest in our inquiry, most of them in support of the claim. In March 2012, we granted the claimants an urgent hearing because it appeared that the imminent sale of shares in Mighty River Power (in the third quarter of this year), and the prospective decisions in the Fresh Start

for Fresh Water programme, could result in irreversible prejudice to Maori interests if they were carried out without first protecting the Crown's ability to recognise Maori rights in water or remedy breaches of those rights.

We have since, after hearing the evidence and submissions of the parties, come to the view that there is a nexus between the asset to be transferred (shares in the power companies) and the Maori claim (to rights in the water used by the power companies), sufficient to require a halt if the sale would put the issue of rights recognition and remedy beyond the Crown's ability to deliver. 'Where there is that nexus', Crown counsel rightly told us, 'then there should be a halt'. We explain the nature of the nexus in chapter 3 of our report, and will return to the point below.

Although the claim was filed in February 2012, it is but the latest in a long series of Maori claims to legal recognition of their proprietary rights in water bodies, many of which date back to the nineteenth century. Having heard the evidence of tribal leaders from around the North Island, we are satisfied that this claim has a long pedigree: it has its origins in the unique customary rights and authority which Maori asserted over their water bodies in 1840 (and still assert today); and in their many attempts to get the New Zealand state to accord them legal recognition and protection of their rights over the past 150 years. One example is Lake Omapere in Northland, where Ngapuhi hapu first attempted to secure a Native Land Court title in 1913 and finally succeeded in 1955, after forty years of litigation with the Crown. The claimants and all the interested parties now find themselves in the position of once again – in 2012 – trying to get the state to recognise and protect their proprietary rights in their water bodies.

The New Zealand Maori Council has provided the leadership for the conduct of this claim in the Tribunal, in accordance with its statutory role (since 1962) to make representations to any authority in the interests of all Maori. In this claim, they seek just such a benefit for all Maori: the establishment of a framework by which Maori proprietary rights in their water bodies can be recognised (where that is possible) or compensated (where recognition is not possible).

While the Crown says that Maori rights in water are not yet fully defined, and that no one can own water, the claimants' position is that article 2 of the Treaty of Waitangi guaranteed them the 'full, exclusive and undisturbed possession' of their properties (in English) and te tino rangatiratanga (full authority) over their taonga (treasured possessions) (in te reo Maori). They presented conclusive evidence that Maori hapu and iwi had customary rights and authority over water bodies – as distinct from land – in 1840. Maori people relied on their rivers, lakes, and other water resources for much of their daily food, their clothing and housing, transport and trade, and the other physical necessities of life. This made the water resources highly valued taonga.

But the water bodies were also valued for spiritual and cultural reasons. 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. Judge Acheson's 1929 judgment granting ownership of Lake Omapere to Ngapuhi demonstrates the point, and we have reproduced parts of that judgment in chapter 2 of our report.

Just as this latest 2012 claim is by no means the first Maori water claim, nor are we the first Tribunal to hear and report on such a claim. We draw your attention in particular to the Tribunal's reports on the Kaituna River claim (1984), the Manukau claim (1985), the Mohaka River claim (1992), the Ngawha Geothermal Resource claim (1993), the Te Ika Whenua Rivers claim (1998), the Whanganui River claim (1999), and the Central North Island claims (2008). We describe the important findings and recommendations of those Tribunals in chapter 2 of our report. In essence, it has been found that Maori possessed their water bodies as whole and indivisible resources, in customary law and in fact. Maori did not possess only the beds of rivers or lakes; they possessed water regimes consisting of beds, banks, water, and aquatic life. We agree with the findings of the Te Ika Whenua Rivers Tribunal, the Whanganui River Tribunal, and the Central North Island Tribunal that the closest English cultural equivalent to Maori customary rights in 1840 was full ownership. While Maori custom was not *the same as* ownership, ownership was its closest equivalent. As at 1840, ownership in English law included rights of exclusive access and control.

In chapter 2 of our report, we make the finding 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*. In making this finding, we did not accept the Crown's submission that Maori rights should be conceived of only as kaitiakitanga or stewardship. We do, however, note that the Treaty changed Maori rights even as it protected them. Article 1 gave the Crown kawanatanga (governance) powers, which included the ultimate right to manage water in the best interests of all. But, as we discuss in chapters 2 and 3, that right is qualified by the Article 2 guarantee of rangatiratanga (control) to Maori. Also, by agreeing to the Treaty bargain, Maori are held to have shared many of their water bodies by the grant of non-exclusive use-rights to the incoming settlers. The Treaty also envisaged that some land and resources would be alienated by Maori to the Crown, by their free, willing, and informed choice. The claimants accept that Treaty-compliant alienations may have occurred, that some water bodies have been shared, and that the Crown has kawanatanga rights. The result, in the finding of the Te Ika Whenua Rivers Tribunal (with which we

agree) is that Maori still have *residual* proprietary rights today. How residual those rights may be is a matter into which we will inquire in stage two.

As we discuss in chapter 1 of our report, the claimants do not seek to benefit from non-commercial uses of the water bodies in which they have these proprietary rights. Nor do they seek a commercial benefit from uses that do not generate an income stream. What they do seek is recognition of their property rights, payment for the commercial use of water in which they have property rights (particularly its use for electricity generation), and enhanced authority and control in how their taonga are used.

There has been much criticism in the public arena of Maori making this claim, but what we say is that property rights and their protection go to the heart of a just legal system. This is not an opportunistic claim. The right of New Zealanders to use their properties entails a right to develop them and to profit from their use; as to the latter right, in the words of the Whanganui River Tribunal, 'that is the way with property'. We were disappointed that the Crown chose to ignore all previous Tribunal findings about Maori rights to develop their properties, and relied instead on a single dissenting opinion delivered in 1999, which on closer analysis, as we have explained in chapter 3, also accepted the right to develop customary resources possessed by Maori as at 1840. We have no hesitation in saying that such a right is also endorsed by the UN Declaration on the Rights of Indigenous Peoples, which New Zealand affirmed in 2010.

In our view, the recognition of the just rights of Maori in their water bodies can no longer be delayed. The Crown admitted in our hearing that it has known of these claims for many years, and has left them unresolved. The issue of 'ownership of water' was advanced by the Crown as a deal breaker but it need not be. Maori do not claim to own all water everywhere. Their claim is that they have residuary proprietary interests in particular water bodies. We know in the twenty-first century that New Zealand is a stronger country partly because of its increasing commitment to biculturalism and to the mutual respect and accommodation of Maori and non-Maori rights and interests. Maori culture cannot be relegated and the rights that arise from that culture cannot be ignored. Maori are the Crown's Treaty partner, and not just another interest group. The Crown's balancing of interests must be fair and Treaty compliant. Maori Treaty rights cannot be balanced out of existence. The closest English equivalent in 1840 was ownership; the closest New Zealand law equivalent today is residuary proprietary rights. It is long overdue for the Crown Treaty partner to recognise its obligation to seek a mutually agreed and beneficial resolution with its Maori Treaty partner.

Stage two of the Tribunal's inquiry may assist with that task. As we noted, the extent to which the residual proprietary rights of Maori should now be recognised – where such recognition is possible – is a matter that will be covered in more detail in stage two, where we consider a framework for how Maori rights in water can be reconciled with the legitimate

rights and interests of others. In stage one, having defined the nature of the Maori rights protected and guaranteed by the Treaty in 1840, we then concentrate on three issues arising from the proposed Mixed Ownership Model (MOM) share sales:

- *Does the sale of up to 49 per cent of shares in power-generating SOE companies affect the Crown's ability to recognise these rights and remedy their breach, where such breach is proven?*
- *Is such a removal of recognition and/or remedy in breach of the Treaty?*
- *If so, what recommendations should be made as to a Treaty-compliant approach?*

We address these issues in chapter 3 of our report. We summarise our answers here as to why the Crown will be in breach of Treaty principles if it proceeds to sell shares without first providing Maori with a remedy or rights recognition, or at least preserving its ability to do so.

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

We accept the Crown's evidence and submission that it will be able to provide almost all forms of commercial rights recognition and/or remedy after the sale. First, we received a formal assurance from the Crown that Prime Minister John Key's letter of May 2009, and the subsequent protocol arranged with the Freshwater Iwi Leaders Group, has placed the issue of Maori proprietary rights on the table for future discussion. We were also told that the Crown is open to the possibility of Maori proprietary rights existing, so long as those rights are not held to amount to full ownership. We trust that our report has now clarified this matter for the Crown: the commercial rights are of a residual proprietary nature, while in Maori terms there are rangatiratanga rights involving mana and kaitiakitanga responsibilities in respect of their taonga. In chapter 2, we urge the Crown to carry out the recommendations of the Wai 262 Tribunal for giving effect to kaitiaki rights, a matter we will revisit in more detail in stage two of this inquiry.

Secondly, the Crown says that it will not be beyond its ability to provide some form of commercial rights recognition post-MOM, whether it be modern water rights (where Maori grant or own water permits for hydro and geothermal power), a royalties regime, joint ventures, or some other form of commercial benefit. We took the claimants' point that providing this kind of rights recognition may be much more difficult after private shareholders have been introduced into the mix, but we accepted that it will not be impossible. We accepted the Crown's argument that the arrangements currently available or under consideration for enhancing Maori authority in water management, which include such mechanisms as the Waikato River Authority, will not be affected by the sale of shares in these companies. Subject to the finding we set out below, we have accepted the Crown's formal

assurances that nothing which arises from the sale of shares will be allowed to prevent it from providing appropriate rights recognition afterwards. We observe that the Crown's position is that these various forms of commercial redress are possible, not that they are or will be on offer.

The reservation noted above is that the claimants established to our satisfaction one vital matter that will be affected: the shares themselves. The claimants conceded that shares on their own will not give them a very meaningful recognition of their water rights. Nonetheless, shares in conjunction with shareholders' agreements and revamped company constitutions could, if properly crafted, give them enhanced power in these companies that control and use their taonga and profit from them, and thus a meaningful form of rights recognition. After careful consideration of the submissions we received from Crown and claimant counsel as to New Zealand company law, we agreed with the claimants that, in practical terms, the Crown will not be able to provide such recognition after it sells shares to private investors. 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.

▸ *Is such a removal of recognition and/or remedy in breach of the Treaty?*

The Crown's Treaty duty in this case is the active protection of the Maori rights to the fullest extent reasonably practicable, and to provide remedy or redress for well-founded Treaty claims. We have found in chapter 3 that there is a nexus between the asset (shares enhanced by shareholders' agreements and revamped constitutions) and Maori rights in the water bodies used by the power-generating companies. We have found that company law will, in practical terms, prevent the Crown from providing or recovering the asset sought after partial privatisation of the companies. If the Crown proceeds with its share sale without first creating an agreed mechanism to preserve its ability to recognise Maori rights and remedy their breach, the Crown will be unable to carry out its Treaty duty to actively protect Maori property rights to the fullest extent reasonably practicable. Its ability to remedy well-founded claims will also be compromised. We find in chapter 3 of this report that the Crown will be in breach of Treaty principles if it so proceeds.

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

The claimants say that shares in the power-generating MOM companies, in conjunction with shareholders agreements, will go some way towards meeting the Crown's Treaty obligation. We agree. But not all of the affected Maori groups want shares. Those who do may want them in combination with other commercial forms of rights recognition or redress.

And there is also the issue to be considered of whether shares in these companies represent a development right for all Maori, regardless of whether their particular water bodies are used (or may be used in the future) by the MOM companies. We are also conscious that some affected Maori groups did not participate in our inquiry. But this is not a matter that can be moved forward by discussions with the Iwi Leaders Group alone.

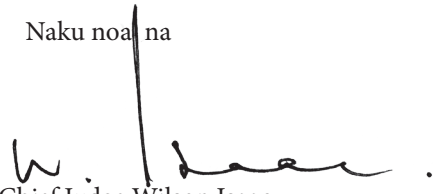
We recommend that the Crown urgently convene a national hui, in conjunction with iwi leaders, the New Zealand Maori Council, and the parties who asserted an interest in this claim, to determine a way forward. In our view, such a hui could appropriately be held at Waiwhetu Marae. We recognise the Crown's view that pressing ahead with the sale is urgent. But to do so without first preserving its ability to recognise Maori rights or remedy their breach will be in breach of the Treaty. As Crown counsel submitted, where there is a nexus there should be a halt. We have found that nexus to exist. In the national interest and the interests of the Crown-Maori relationship, we recommend that the sale be delayed while the Treaty partners negotiate a solution to this dilemma.

In our view, the scope of such negotiations will need to be limited if a timely solution is to be found. It would not be possible to devise a comprehensive scheme for the recognition of Maori rights in water in the time available. But it should be possible, with good faith endeavours on both sides, to negotiate with all due speed an appropriate scheme in respect of the 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. Undertakings could perhaps be negotiated about future forms of rights recognition. We would not want to be prescriptive about these matters. All that is for the Treaty partners to decide.

In completing our recommendations, we were acutely aware that the matters in this claim are of national importance and at the core of the Maori-Crown partnership sealed in 1840. We therefore trust that our report and recommendations will be read and considered in good faith, respecting the mana of each Treaty partner.

No reira kati mo tenei wa

Naku noa na



Chief Judge Wilson Isaac

Presiding Officer