

Te Ika Whenua - Energy Assets Report 1993

5 Consideration of the Issues

5.1 Ownership of the Dams

We have already established that if the provisions of the Energy Companies Act are put into full effect the property in the Aniwhenua dam will pass from the Bay of Plenty Electric Power Board to Bay of Plenty Electricity Limited and the Wheao dam from Rotorua Area Electricity Authority to Rotorua Electricity Limited. The capital in these companies will be variously held by a large number of shareholders. Inherent in the argument for the claimants is that this process will cause prejudice to them in that, if their grievances are established, the possibility of redress will be diminished. Their counsel submitted:

There are substantive Treaty issues which need to be resolved before the transfer of the "fee simple" rights and interest can take place if further prejudice and/or the possibility of further prejudice to the claimants is to be avoided.

If the transfer takes place redress for grievances, if later proved, will be impossible.

Te Ika Whenua do not seek to stop the transfer of interim use rights of the generation assets to energy companies. It is the vesting of the fee simple ownership that represents the main source of prejudice to the claimants. They see such a vesting as effectively denying them the ability to have their substantive issues presented to the Tribunal before they are further and perhaps irreversibly prejudiced.(A7:5-6)

Both the Bay of Plenty Electric Power Board and Rotorua Area Electricity Authority are bodies corporate established by statute, the former being established under the Electric Power Boards Act 1925 and the latter under the Electricity Distribution Commission Act 1967. As statutory corporations they derive their powers from the Acts under which they were created and their performance is limited accordingly. As Dr Bertram pointed out, in view of the thrust of government policy for Electrical Supply Authorities (ESAs) towards corporatisation and possibly privatisation, the issue of who actually owned the assets of ESAs was material. He indicated possible owners as electors, ratepayers, consumers or taxpayers and traversed the various attempts made by government officials to settle just who the true owners of these assets were(A6:15-21).

Official attempts to determine ownership culminated with a legal opinion from Crown Law Office addressed to the Secretary of Commerce, and dated 26 October 1989, in which the following statement is made:

However, I have no doubt that, in the legal sense, there is no "owner" of an electric power board, and no one, other than the board itself, who would be empowered to seek compensation in the event of a board being converted into a company.(A6(a): 66)

That opinion accords with the view of this tribunal. It may be that we have taken an overly simple approach, but there can be no doubt that the creation of power boards and other supply authorities was undertaken by government to facilitate its task of arranging an electricity distribution network throughout New Zealand. The establishment of power boards in local areas with local involvement enabled the government to detach itself from direct responsibility for the distribution of power to the consumer. Power boards have no shareholders and there is no provision in the Act for payment of dividends or for distribution of assets. No persons or group of persons can legitimately claim a right of ownership in the assets of the boards. The boards are, as we have said, a creature of statute and it is only by statute that they can be regulated or any disposition of their assets provided for other than those dispositions which are carried out in the normal course of their business. Only the government by statute has any power of regulation and control of the boards and their assets. On 16 March 1990, the Officials Co-Ordinating Committee on Electricity Restructuring issued a report to Cabinet(A6(a):18-59). On the initial ownership of shares/sales proceeds the committee stated:

Since the legal ownership of ESAs provides no assistance in identifying the recipients of ESC [energy supply company] shares or sales proceeds, the decision must be made on equity or income redistribution grounds. Under these circumstances the decision as to which group should receive the shares or proceeds from sale is properly one for ministers, who are able to reflect the government's view of the equity issues involved. However officials can provide advice on the historical role of each group in relation to ESAs and on the transactions cost associated with distribution to each group of the proceeds or shares.(A6(a):37)

That statement also recognised that the government has the power of regulation and control of the boards and their assets. That recognition was followed through in the Energy Companies Act where the government has provided for the assets of power boards to be transferred to energy companies to be created. Thus, the government clearly regarded those assets as under its power and control, albeit, by legislation. We emphasise that we do not regard these as state owned assets. They are simply assets over which the government has power and control. This position must be contrasted with the situation that will exist once they are transferred to energy companies. Then they will be owned by companies, which will be responsible to shareholders, who by virtue of their shareholding, will own an interest in the assets and undertaking of the companies. In other words, the assets will pass from Crown control to third party ownership,

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5.2 Consultation with Maori

Paragraph 9.1(a) of the particulars of urgent claim contends that the claimants are, or are likely, to be prejudicially affected by certain policies and practices of the Crown that are inconsistent with the principles of the Treaty of Waitangi including:

The omission of the Crown to institute and employ a process of consultation with the claimants when the Crown is purporting to develop policy or legislation or any other exercise of Article I powers [of kawanatanga or government] that will impact upon the Article II guarantees [of tino rangatiratanga or chieftainship] made by the Crown to the claimants and affecting their claim before the Waitangi Tribunal;...(1.1(d): 12)

In response, counsel for the Crown submitted:

The Crown has not acted inconsistently with the principles of the Treaty by failing to consult with the Claimants. The principles of the Treaty do not require the Crown to consult in the manner alleged in paragraph 9.1(a) of the statement of claim. Prior to the enactment of the ECA 1992 the Crown, consistent with its Treaty obligations to act reasonably and in good faith to its treaty partner, consulted with Maori about its intention to corporatise the electricity supply authorities ("ESAs").

The consultation process, consistent with the development of broad base national policy, was initiated in the first instance by the Crown, by inviting a number of Maori organisations including the National Maori Congress, the [New Zealand] Maori Council, and the National Maori Women's Welfare League, to meet and discuss the proposed reforms.

As the Tribunal noted in the Fisheries Settlement Report 1992 (WAI 307), the Crown, in developing broad base policy, is not required to consult with every interested party. The Crown has in this case discharged its Treaty obligations to consult. The principles of the Treaty do not require the Crown to consult with all iwi when dealing with broad base national policy such as that contained in the ECA 1992.(A9:3)

The submissions then referred to a number of consultations with Maori including:

(i) correspondence in October 1991 and 24 January 1992 by Sir Peter Elworthy, chairman of the Electricity Distribution Reform Unit, inviting the New Zealand Maori Council, the National Maori Congress, the Maori Women's Welfare League and the Federation of Maori Authorities to a meeting to discuss the Crown's reform proposals(A9;A9(e));

(ii) a meeting by the Electricity Distribution Reform Unit with the Maori Women's Welfare League on 19 November 1991(A9:4);

(iii) a meeting between the Crown including the Minister of Energy, Mr Luxton, with the National Maori Congress and representatives of iwi with interests in water and geothermal resources on 28 January 1992(A9:4; A9(f)); and

(iv) submissions made by a number of Maori organisations including the National Maori Congress, the Tainui Maori Trust Board and the Whanganui River Maori Trust Board to the Parliamentary Select Committee on Planning and Development which reported back to the House on the Energy Sector Reform Bill (A9:4;A9(b);A9(c);A9(d)).

With regard to these consultations the Crown submitted:

The National Congress specifically recommended to the select committee that the Bill needed to be redrafted to provide a place for the Treaty. Congress claimed that Maori have an equitable interest in the ownership of the ESAs and that the Crown had an obligation to ensure preservation of options for the resolution of Treaty claims. Similarly, the Whanganui River Trust Board recommended that the Bill include effective recognition of the Treaty and other necessary protection of the claims of the Whanganui Trust Board. Each of these submissions was based on a claim, similar to that of the Claimants here, that since the Crown has not formally negotiated with or acquired from Maori their tino rangatiratanga rights in respect of water resources, this taonga still belongs to them.

The thorough consultation process outlined above enabled the Crown to make an informed decision about the impact of the proposed legislation upon Maori interests and whether the legislation would be inconsistent with its Treaty obligations. As Dr Bertram has reported (Volume I pp 21-22) the Crown has given specific consideration as to whether or not a proportion of supply authority shares should be held back by it for the settlement of claims.

Consultation does not of course require open-ended negotiation. In *New Zealand Maori Council v Attorney- General* [1987] 1 NZLR 641 ("the Lands case") Richardson J formulated the duty to consult in this way:

"In truth the notion of an absolute open-ended and formless duty to consult is incapable of practical fulfilment and it cannot be regarded as implicit in the Treaty. I think the better view is that the responsibility of one treaty partner to work in good faith fairly and reasonably towards the other puts the onus on a partner, here the Crown, when acting within its sphere to make an informed decision, that is a decision which is sufficiently informed as to the relevant facts and law to be able to say it has had proper regard of the impact of the principles of the Treaty. In that situation it will have discharged the obligation to act reasonably and in good faith." (at p.683)

The Crown has fairly and properly informed itself of the impact of the principles of the Treaty. It has not acted inconsistently with the Treaty principles as the Claimants allege.(A9:4,5)

Counsel for the Crown then directed his attention to the possibilities of consultation under the Energy Companies Act 1992. He contended that the Act specifically provided for a consultation process which gave Maori the right to participate in the transfer process and to have their views taken into account in determining the ownership structure of the assets to be transferred. Thus Maori had the further opportunity to be heard on such matters as those concerning the claimants in the instant case, namely the desire to share in the income of future operations of ESA assets. He pointed to the fact that local Maori had been specifically consulted by both the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority(A9:5,6).

The tribunal fails to see any merit in such argument or the significance of such consultation. The Act does not recognise the Treaty of Waitangi. Such consultation is on the basis of the recognition of the local Maori as consumers or interested groups. It is not a recognition of rights or claims under the Treaty of Waitangi, Nor is it a recognition of any rights or claims to assets.

The tribunal's view is reinforced by the attitude taken by the hearings committee on the joint establishment plan for the Rotorua Area Electricity Authority and Tauranga Electric Power Board when land ownership issues and Treaty of Waitangi claims were raised.

The secretary's summary of submissions on such plan, contained within the Rotorua Electricity Establishment Plan, states:

Maori Issues

Iwi from Rotorua and Tauranga supported the direct consumer ownership proposal with the intention of aggregating their shares to gain a sizeable share of the company and providing a mechanism to enable Maori interests to retain control of shares initially allocated thereby helping to ensure continuing local ownership.

Several other Maori submissions raised land ownership issues and Treaty of Waitangi claims which were considered to be outside the scope of the Hearings Committee as the matter was between Central Government and the Maori claimants not the Board.(A5: secretary's summary, p6)

It seems to the tribunal that when one talks of energy reform proposals, one tends to associate this with the whole infrastructure of state power generation and distribution; also distribution to the consumer by electric power boards or other agencies. The major river tribes have lodged claims against the rivers on which the state hydro schemes are located. Energy supply authorities, such as the Rotorua Area Electricity Authority and the Bay of Plenty Electric Power Board also have hydro power generation schemes, but these are generally on a small scale and relatively few in number when compared with national schemes. The Energy Companies Act 1992 affects particularly those Maori claimants who have lodged claims against rivers on which those small hydro schemes exist and which under the Act will pass to energy companies. Maori people generally are not affected by the changes in any manner different from all New Zealanders, except where their Treaty rights are affected.

Evidence was given on behalf of the claimants that they were never consulted by the Crown. They had lodged a claim against the rivers and notice of that claim would have been given to the appropriate government department or agency. The Crown did not contest this evidence. Instead it sought to justify its lack of consultation by referring to consultation with the national and other organisations referred to earlier and by submitting:

The principles of the Treaty do not require the Crown consult with all iwi when dealing with a broad base national policy such as that contained in the ECA 1992.(A9:3)

The tribunal cannot accept this submission applies in the present case. Such argument may apply when a policy has wide- ranging effect over Maori assets, but surely, the test as to what consultation is necessary depends upon the effect of the legislation. The Act will serve to transfer a small number of hydro schemes and in this regard has limited effect. Even the Crown regarded the legislation in this light (A9(f)). The claimants are specifically concerned and we cannot understand why they were not involved in the consultation process.

The evidence would suggest that the Crown, in ignoring specific claims and seeking consultation with national Maori organisations, failed to perceive the nature and effect of the Energy Companies Act on local claimants such as Te Ika Whenua. It seems that the attitude of the Crown was to disregard or possibly misconstrue the effect of the Bill on the transfer of the small hydro schemes. The Crown's position could perhaps be exemplified in an undated letter from the Minister of Energy, Mr Luxton, to the National Maori Congress in response to a letter from it to him dated 28 January 1992 wherein he stated:

In respect of interests in water and land stemming from reform in the energy sector, any such implications would be largely associated with reform in generation or transmission. The Energy Sector Reform Bill

focuses on the distribution part of the electricity and gas industries and does not have any legislative provisions relating to ownership or control of the generation or transmission of electricity. I recognise that Electricity Supply Authorities do undertake a small amount of electricity generation, but the Bill provisions would not directly effect any change in ownership of these authorities.(A9(f))

Accordingly while we agree that there has been some effort to consult, there has not been consultation with the people directly concerned with the impact of the Energy Companies Act 1992, such as the claimants. Counsel for the Crown referred to the "duty to consult" formulated by Mr Justice Richardson in "the Lands case" and submitted that the Crown had fairly and properly informed itself of the impact of the principles of the Treaty(A9:4-5). We disagree. The lack of consultation with the claimants means that we cannot say that the Crown has put itself in a position to make an informed decision, that is a decision which is sufficiently informed as to the relevant facts and law to be able to say that it has had proper regard of the impact of the principles of the Treaty.

Waitangi Tribunal, Department of Justice, Wellington.

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5.3 Are the Claimants Prejudicially Affected?

The argument put forward by the Crown was that, regardless of the proposed transfer of the dams, it still had the capacity to provide redress for a breach of the principles of the Treaty of Waitangi (as yet to be established)(A9:7). Counsel cited the decision in *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 ("Broadcasting Assets")(ibid). There the Court of Appeal held that the proposed transfer of broadcasting assets to Radio New Zealand Limited and Television New Zealand Limited would not be contrary to the principles of the Treaty because the capacity of the Crown to fulfil its Treaty obligations remained unaffected. McKay J held at pp 602-603:

The situation in this case differs from that in *New Zealand Maori Council v Attorney-General* [the Lands case]. There the asset which the Crown was proposing to transfer was land which was subject to Treaty claims. Here, the assets are not themselves the subject of actual potential Treaty claims. They are assets used by the Crown for broadcasting purposes, and in this way become linked to the Crown's discharge of its Treaty obligation to protect the Maori language. The Crown proposals involve a commitment to enter into a contract with Television New Zealand Ltd and Radio New Zealand Ltd prior to the transfer of assets to them which would guarantee access to the transmission and production facilities for Maori broadcasters. Even apart from such contractual arrangements, the particular assets are not essential for Maori broadcasts. They are substitutable, at least to the extent that funds are made available.

At present the generating assets, while owned by power boards, are under the direct legislative control of the government as is evidenced by the Energy Companies Act. While these assets remain under such ownership, there is still the distinct possibility, in the event of a successful claim, of negotiating with the Crown over these assets as part of the settlement process. Once they are transferred to energy companies they effectively belong to those companies. There would then be no simple way whereby arrangements in respect of those assets could be made with the Crown as part of a settlement. If the Crown were by legislation to impose conditions in respect of those assets, it would then be faced with having to compensate the respective energy companies for any losses that might result. We would see any government as being reluctant to involve itself in such a situation. The capacity of the Crown to make redress in the event of a successful claim would be greatly impaired by the transfer of these assets.

The situation in the Broadcasting Assets case can be clearly distinguished from that in the present case. In the Broadcasting Assets case, ownership rights to a traditional resource, highly prized for sustenance, were not at issue.

We find, therefore, that the claimants' position is likely to be prejudicially affected by the proposed transfer of the dams in accordance with the Energy Companies Act 1992.

Waitangi Tribunal, Department of Justice, Wellington.

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5.4 Is the Proposed Transfer of the Dams Inconsistent with Treaty Principles?

The substantive claim relates to the Rangitaiki and Wheao rivers. Essential ingredients of the claim are the denial of tino rangatiratanga in the granting of water rights and the erection of power schemes. The effect on the rivers and the claimants food sources, particularly eels, are said to be, in their terms, disastrous.

In the event of the substantive claim being successful, the water rights for power generation and the two dams could be material in any settlement proposed between the claimants and the Crown. If it is found that any of the elements of ownership, control or tino rangatiratanga have been denied to the claimants in breach of the principles of the Treaty of Waitangi, then we envisage a settlement might involve questions of payment for water rights, ownership of the dams and payment for power generated. The claimants have mentioned specifically the loss of the eel population and the lack of the water flow so that provision for construction of eel by-passes and reduced water use for power generation could be further possibilities. In this scenario, the assets themselves would be directly affected.

The Crown, in response to the claimants' original requests (see above 1.2), presented the following argument:

The capacity of the Crown to grant redress in the specific terms sought above is unaffected by the ECA 1992. The ECA 1992 does not impact upon the Crown's capacity to recognise ownership of the rivers compensate the Claimants for the loss of income, or to liaise with the two authorities to build appropriate channels for eels.

As to the claim that the Crown make an appropriate mechanism to enable the claimant to share in the income of the future operation of the dams, the ECA 1992 itself specifically provides for a mechanism (namely shares) in an energy company so that the Claimants and other Iwi in the Bay of Plenty and Rotorua areas can share in the income of the two dams. As already indicated, the Bay of Plenty Establishment Plan allows Maori to aggregate their shares and thus to exert greater influence over the new energy company in a manner which the Crown understands is consistent with collective Maori ownership and control. It is conceivable that with such greater control and influence, Maori could direct that the new energy company build appropriate channels for eels to migrate up and down the rivers.(A9:12-13)

We would agree with the statement that the ECA 1992 does not impact upon the Crown's capacity to recognise ownership of the rivers, compensate the claimants for the loss of income, or to liaise with the two authorities to build appropriate channels for eels. We would also agree that there might be no impact on the capacity of the Crown to act positively, but the desire or willingness of the Crown to so act could be greatly affected. The transfer of the dams and water rights to energy companies, third parties with shareholders holding rights would have become a *fait accompli*.

In recent months, there has been much discussion over claims and recommendations affecting the rights of third parties, and, seemingly, a general reluctance to see those rights affected. By way of example, we refer to the introductory speech of the Minister of Maori Affairs introducing the Treaty of Waitangi Amendment Bill 1993 prohibiting recommendations by the tribunal that the Crown acquire ownership of any land or interest in land held by any person(A7(b):11). We question therefore the proposed creation of such rights in respect of such assets before the substantive claims are determined. Furthermore as regards liaison by the Crown with the two companies over construction of eel channels, the question of successful negotiation would depend on the willingness of a third party.

As regards the submission that Maori by aggregating their shares could exert a greater influence, this is nothing more than the ordinary entitlement of each consumer. It is not an additional share allocation to compensate Maori for breaches of the Treaty. We cannot accept the submission that the proposed share allocations are a mechanism which go to satisfy the claimants' claims. Nor can we accept the Crown's understanding that greater influence over the company is consistent with collective Maori ownership and control. Certainly it is not consistent with Treaty principles of *tino rangatiratanga* and partnership.

Over the past few years there have been a number of cases all determined by the Court of Appeal in connection with proposed transfer of Crown owned assets. The first of these was *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 "SOE Case". In that case at page 664 of the report the President of the Court of Appeal Cooke, P said:

What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's *Te Atiawa*, *Manukau* and *Te Reo Maori* reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation.

The Court of Appeal was clearly enunciating and approving the same proposition that had previously been pronounced in the Waitangi Tribunal reports referred to by the President.

In the present case, the evidence before the tribunal shows that the Crown proposes, per medium of the Energy Companies Act 1992, to transfer assets which are an integral part of the claimants' case. While these assets are not directly owned by the Crown, they are certainly under its control. Energy companies, however, will be independent of Crown control and will be owned by shareholders. Such transfers will greatly affect the possibility of any fair, equitable and just settlement of the claimants' claim.

The effect of the Act and the transfer of these assets on this claim is not consistent with the fiduciary obligations placed on the Crown by the Treaty of Waitangi. We find it inconsistent with the principles of the Treaty that these particular assets should be transferred into third party ownership while they are the subject of claims. We do not think that the Crown should arrange for the disposal of these dams and water rights while they are so affected and thereby prejudice the claimants' position.

Waitangi Tribunal, Department of Justice, Wellington.

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5.5 Is the Legislation in Breach of Treaty Principles?

The Crown submitted that it was not "inconsistent with the principles of the Treaty for the Crown to exclude any specific reference to the Treaty legislation, or, in this case, to specifically exclude a Treaty protection clause".(A9:14) We accept that it is not necessarily inconsistent. The fact that the Crown has so legislated does not mean that the principles of the Treaty have been satisfied. The Crown further submitted that for the Tribunal to conclude that such a clause should have been included "would be to usurp the sovereignty of Parliament".(A9:14) We cannot accept this submission. The Waitangi Tribunal is empowered under its Act to inquire into and determine and make recommendations in cases where it finds breaches of the Treaty.

We quote again from the decision of Cooke, P in the "SOE Case" referred to above at page 664:

In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty. It was argued for the applicants that whether in any instance the transfer of a particular asset would be inconsistent with the principles of the Treaty is a matter of fact. That is so, but it does not follow that in each instance the question will admit of only one answer. If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.

I use "reasonably" here in the ordinary sense of in accordance with or within the limits of reason. The distinction is between on the one hand what a reasonable person could do or decide, and on the other what would be irrational or capricious or misdirected. Lawyers often speak of *Wednesbury* unreasonableness, in allusion to the case reported in [1948] 1 KB 223, but I think that it comes to the same thing.

As has been previously stated in the present case, it appears that the Crown has failed to satisfy itself as to the effect of the Act on the Te Ika Whenua claim. This is hardly surprising when one considers the views of the majority of officials (Treasury, Ministry of Commerce, Department of the Prime Minister and Cabinet and the SOE unit) dissenting from the assumptions and recommendations made by Manatu Maori

and Justice. Those views are reported in the Official Co-ordinating Committee paper to Cabinet State Agencies Committee, dated 16 March 1990:

ESAs/MEDs are not part of the Crown (nor is it intended that ownership pass to the Crown) and hence land held by them is non-Crown land. They are not subject to the provisions of the Treaty of Waitangi Act.(A6(a):54)

The above statement portrays a very narrow view of the Treaty of Waitangi Act 1975. That legislation extends to consideration of any enactment or act or omission which is contrary to the principles of the Treaty. As can be seen from our later comment on the substantive claim (chapter 6) we find there are serious questions to be answered on the application of the principles of the Treaty to the proposed transfer of assets under the Energy Companies Act.

As the Crown has failed to satisfy itself as to the effect of the Act in the Te Ika Whenua claim the Crown can hardly be said to be acting reasonably and in good faith in the terms of Cooke, P in "the SOE case" cited above.

The absence of any protective mechanism in the legislation denied claimants any recourse to the Courts to enforce their Treaty rights and left them no alternative but to bring a claim to the Waitangi Tribunal.

Waitangi Tribunal, Department of Justice, Wellington.