

# **Te Ika Whenua - Energy Assets Report 1993**

## **3 The Dams and the Energy Companies Act 1992**

### **3.1 Introduction**

The tribunal commissioned a background research report on "The Aniwhenua and Wheao Schemes and the Energy Companies Act 1992" (A6) from Dr I G Bertram, energy consultant and senior lecturer in economics at the Victoria University of Wellington. This report is a comprehensive study of the origins and historical development of electricity supply authorities and of issues raised in industry restructuring since 1985; also of local authority hydro-development policy, 1973-88; and the history of the Wheao and Aniwaniwa schemes and some issues relating to the pending transfer of generation assets. Dr Bertram was called by the claimants to present his report at the urgent hearing of the present claim.

In this chapter of our report, we shall confine our consideration of Dr Bertram's report and evidence to those parts relating to the present claim: firstly, to the present ownership of the Wheao and Aniwhenua dams and water rights attaching thereto, and secondly, to the purpose and effect of the Energy Companies Act 1992. This evidence was not disputed by the Crown.

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### 3.2 The Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority

A succinct overview of the establishment of the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, also of the establishment of the Aniwhenua and Wheao dams by those bodies is provided in the preface to Dr Bertram's report(A6:1-2):

The Bay of Plenty Electric Power Board (Bay Power) was established by proclamation on 18 August 1925, in response to a ratepayers' petition under the Electric Power Boards Act 1918. The board began operations in 1928. After 45 years as a distributor of electricity purchased mainly from the New Zealand Electricity Department (NZED), the board in 1973 decided to move into generation. A site at Aniwhenua Falls was chosen in 1974, and the 25 MW Aniwhenua hydro scheme ... commenced operation on 3 October 1980.

Further:

The Rotorua Area Electricity Authority (RAEA) was established under the Electricity Distribution Commission Act 1967 by Order in Council dated 9 August 1971, with all the powers, rights, duties, obligations and responsibilities of an electric power board. The main reason for constituting the new authority was to transfer the Rotorua urban electricity distribution system from the control of the Tourist and Publicity Department ... into the hands of a new body covering the rural hinterland of Rotorua as well as the city itself. The new Authority began investigations for a new hydro generation scheme in 1974 and the Wheao site was selected the same year. The 24 MW Wheao scheme entered operation in May 1984, having suffered long delays due to collapse of the canal in December 1982.

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### **3.3 The Aniwhenua and Wheao Hydro Schemes**

In his report Dr Bertram stated that in the late 19th century and early 20th century, numerous small local power generation stations were built by both private and local authority initiatives. From the 1920s through to 1970, as the state electricity system expanded and the national grid was developed, most of these small local stations were phased out. The process of centralisation of electricity supply was almost complete.

During the 1970s several developments led to the renewed expansion of independent generators operating alongside New Zealand Electricity Department. These included the 1973-74 oil shock, nation-wide electricity shortages during the winters of 1973 and 1974, a renewed policy emphasis on regional development by central government, and increased uncertainty as to future wholesale electricity price trends.

In the 1977 budget the government announced the local hydro scheme policy under which it would provide concessional finance for the capital costs of new hydro generation. Grants were to be provided to fund investigation and design work, loans were to be made available to finance construction and further loans from NZED were to be available to cover operating losses in the early years of approved schemes. The policy contained a subsidy element in the availability of investigation grants and cheaper than normal finance for construction. Following the budget announcement the government set up the Committee on Local Authority Hydro Development whose basic function was to make recommendations to government on applications for grants or loans from supply authorities.

The Bay of Plenty Electric Power Board engaged consultants to investigate a local hydro scheme in mid-1973. Preparation of a feasibility report for the Aniwhenua site was authorised in December 1973 and the report made in September 1974 showed the scheme to be technically feasible, financially viable and environmentally acceptable and to have an estimated cost of \$12.5m. Following the obtaining of water rights, ministerial consent and other necessary approval, contracts were let in the second half of 1977 and earthworks commenced before the end of that year. It would appear that the decision to proceed was taken before finance under the 1977 budget became available.

Aniwhenua began generation on 3 October 1980. The 1982 annual report for the board showed that the total cost of the station to 31 March 1982 was \$27,767,203 of which \$24,628,809 was financed by government loan.

The book value of the scheme as at 31 March 1992 was \$21,109,000. Dr Bertram reported that Aniwhenua was breaking even financially by 1985/86 and was able to

trade its way into long-run profit without debt write-offs. He comments that in the years 1989-1992 the profits from Aniwhenua were what kept the board in the black overall, since its trading activities ran at a loss during that period.

The Rotorua Area Electricity Authority began investigation into a local hydro scheme in 1974. Its consultants after considering several alternatives recommended that a scheme on the Wheao and Rangitaiki Rivers was economically the most attractive. Necessary planning, environmental and other consents were obtained in 1977. Loan finance was approved by the Committee on Local Authority Hydro Development in February 1979, contracts let in late 1979 and work begun in the last month of that year.

Dr Bertram reported that the scheme struck problems in that the Wheao canal collapsed in December 1982 at which time the scheme had virtually been completed. Cost escalation was also a feature in that in July 1976 the estimated cost was \$9.5m and by April 1978 it had risen to \$17.7m with the expectation that it would rise to \$29.5m by the time of completion in 1982. The secretary-treasurer of the authority in the 1986 annual report showed a provisional final costing of \$52,738,324 of which \$44,075,795 was provided by government loans and \$5,283,566 was provided by recovery from insurance. An Audit Office study listed the total cost of Wheao \$46.6m but Dr Bertram considered that that figure almost certainly excluded capitalised interest which was included in the Rotorua Area Electricity Authority figure of \$52.7m cited in its report.

The first power generated from the scheme was in May 1984 and the completed station was handed over in July 1984. Dr Bertram noted that the cost escalation and amount of loan finance required brought difficulties in both financing and servicing the debt. In 1989 the government agreed to write off part of the debt amounting to \$24,863,359 and in 1989- 1990 a surplus on power generation was achieved. Dr Bertram commented:

Obliged to compete with the NZED bulk tariff, however, the scheme never came close to earning a surplus (and would still be in the red today) until government wrote off \$25m of its debt in March 1989.(A6:45)

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### **3.4 Water Rights**

From 1908 to 1987 the Crown conferred upon itself the sole right to use water in lakes, falls, rivers and streams for generation and storage of electricity under section 267(1) Public Works Act 1908, followed by section 306(1) Public Works Act 1928 and then, section 25 Electricity Act 1968. All power generation schemes undertaken in this period had to obtain a licence for the use of water on terms determined by the Crown. Section 3 Electricity Amendment Act 1987 repealed section 25 Electricity Act 1968 thus extinguishing the requirement for direct Crown consent to be secured for any use of water for power generation.

Crown control over natural water remained under section 21 Water and Soil Conservation Act 1967, the provisions of which were retained by section 354(b) Resource Management Act 1991. Under this legislation the power to grant rights for the use of natural water was to be exercised by regional water boards instead of by ministerial discretion(A6:27-28).

Water rights for the Wheao and Aniwhenua hydro schemes are held by the Rotorua Area Electricity Authority and the Bay of Plenty Electric Power Board respectively.

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### **3.5 The Energy Companies Act 1992 (the Act)**

The Energy Companies Act was enacted in 1992, and amended later that year. It provided for the formation of energy companies, the vesting in such companies of the undertakings of electric power boards and the electricity and gas undertakings of local authorities, and the dissolution of electric power boards.

The Crown, in its opening submission, stated that the fundamental objective of the Act was:

to ensure a commercial and efficient approach to electricity distribution and supply through the incorporation of electric power boards and municipal electricity departments.(A9:1)

The legislation "established a process of corporatisation, not privatisation". If neither guaranteed nor compelled the passing of electric power board assets to private interests. The question of ownership was "devolved to the local community".(A9:11-12) Section 18 of the Act required each power board or local authority with an energy undertaking to prepare and submit to the Minister of Energy not later than 31 December 1992 an establishment plan relating to the transfer to an energy company of its energy undertaking.

Such establishment plans were to include information which identified and valued the energy undertaking to be vested in the relevant energy company, a share allocation plan, draft memorandum and articles of association, a statement of corporate intent in most instances, as well as other details the Minister required.

Section 19 of the Act provided for joint establishment plans to be submitted (upon endorsement by any interim trustees appointed pursuant to section 4) and sections 23 and 24 of the Act required certain consultative procedures to be followed in respect of interim trustees and the public.

The Minister could approve any establishment plan submitted in accordance with the various provisions of the Act, or could decline to approve and require a revised establishment plan to be submitted "not later than 6 weeks after the date on which that approval was declined or such later date as the Minister ... may allow."

The new energy companies (where an existing company was not to be used) were to be formed and registered under the Companies Act 1955 no later than 1 April 1993. Any variance from this date had to be approved by the Minister.

This deadline was, along with the other matters laid before the registrar of the tribunal at the conference held in Wellington 18 January 1993, a major factor in the chairperson's decision to accord the matter urgency. Consequently the urgent hearing was set down for 8-10 March 1993.

The principal objective of the energy companies would be "to operate as a successful business" with regard "among other things, to the desirability of ensuring the efficient use of energy."(s36 of the Act)

The transfer of energy undertakings held by boards to successor companies was to occur on a date appointed by the Governor-General by Order in Council. The transfer should take place not later than 1 April 1992, or such later date as the Minister in any particular case might allow(s56 of the Act).

One point concerning the procedures laid down for the transfer of energy undertakings of electric power boards and local authorities needs to be noted here. The Electricity Task Force, comprising government officials and industry representatives had reported, in September 1989, that during the transition process, many intricate and sensitive details would need to be worked out, for example, identification of how water rights, water royalties and Maori land issues were to be handled prior to any privatisation in the industry(A2:35). The Act, however, contained no provision to delay or prevent the transfer of power board or local authority assets to private ownership to protect Maori interests arising from claims before the Waitangi Tribunal, notwithstanding such assets might be part of the settlement recommended by the tribunal.

The only legislative protection for Maori interests in such assets, then, was Section 8 of the 1991 Resource Management Act which requires "all persons exercising functions and powers under it, in relation to managing the use, development and protection of natural and physical resources" to "take into account the principles of the Treaty of Waitangi".(cf Wai 119:67)

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### **3.6 The Establishment Plans - Bay of Plenty Electricity Limited and Rotorua Electricity Limited**

When the provisions of the Energy Companies Act 1992 are implemented by the Minister and by Order-in-Council, the assets comprised in the Aniwhenua and Wheao schemes will pass from their respective owners, the Bay of Plenty Electric Power Board and the Rotorua Area Electricity Authority, to respective energy companies created by the Board and the Authority in accordance with the terms of the Act. Those companies will have shareholders who, by virtue of their shareholding, will hold interests in the assets and undertaking of the companies. It is appropriate that we look, albeit briefly, at the structure of those companies.

A copy of the establishment plan for Rotorua Area Electricity Authority forms part of the record of inquiry and is recorded as A5 in the Record of Documents(Appendix 4). Under this plan an energy company is to be formed with the name Rotorua Electricity Limited. The company is to have a capital of \$30 million comprising 60 million fifty cent shares.

Essential to this plan is the formation of a community trust for charitable and community purposes under the name Rotorua Energy Charitable Trust. Of the 60 million shares, 33,469,288 shares are to be issued to the Trust and to consumers, and the remaining shares are to be held unallocated. The Trust is to receive 51 per cent of the shares that are allocated and the remaining shares which are issued are to be issued to account holders of Rotorua Electricity.

The assets and undertaking of the Rotorua Area Electricity Authority which include the Wheao dam and associated water rights would be transferred to Rotorua Electricity Limited.

The revised establishment plan for Bay of Plenty Electric Power Board also forms part of the record of inquiry and is recorded as A4 in the Record of Documents (Appendix 4). This plan was produced in December 1992 and under it the power board will form an energy company under the name Bay of Plenty Electricity Limited. The energy undertaking of the board including the Aniwhenua dam and associated water rights will be transferred to the company.

The capital of the company is to be \$40 million, comprising 40 million one dollar shares. Issued capital will comprise 27 million one dollar Class A rebatable voting shares and 375,000 one dollar Class B ordinary dividend earning voting shares. The balance shares will be retained as unissued capital.

The Class A shares will be issued free of charge to customers of Bay of Plenty Electric Power Board and will be non-dividend earning but will be eligible for rebates. That means that the shareholder will qualify for an annual rebate on electricity charges.

150,000 of the Class B shares will be issued free of charge to a shareholders society to be known as the Bay of Plenty Electricity Shareholders Society. The balance of the Class B shares will be available for purchase by employees of the new company.

Restriction on transfer of shares is proposed and no single shareholder will be entitled to hold more than 20 per cent of the total number of shares allocated in any class.

It is to be noted that the restriction on transfer of shares is not to apply to persons who wish to sell their shares to the purchaser of their property or to persons who wish to transfer their shares to their iwi.

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### **3.7 Projected Transfer of Assets**

The claim before this tribunal refers specifically to the Wheao and Aniwhenua hydro schemes and water rights associated with them. The establishment plans referred to above, if approved and put into effect by the Minister of Energy, will result in the transfer of those assets to Rotorua Electricity Limited and Bay of Plenty Electricity Limited respectively. Both those companies will have a substantial capital and shares comprising that capital will be allocated among a variety of shareholders. Although there are some restrictions on share transfer, the shares will be tradeable on the open market and the value of those companies' assets including the dams will eventually be taken into account when values for the shares in the respective companies are established on that market.

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*Waitangi Tribunal, Department of Justice, Wellington.*