CHAPMAN TRIPP

INFRASTRUCTURE & PROJECTS

brief counsel

6 JULY 2012

# Waitangi Tribunal to fast-track water and asset sales inquiries

The Waitangi Tribunal will next week hear a claim led by the Māori Council that the proposed partial share floats in Mighty River Power, Genesis, Meridian and Solid Energy are in breach of the Crown's Treaty obligations.

It is racing against the clock to provide an interim report on the Treaty ramifications of the mixed ownership model in time for the Mighty River Power partial share float, expected in the third quarter of this year.

The Tribunal will then conduct an urgent inquiry into broader Māori water and geothermal rights so that its findings can inform late stage negotiations between Māori and the Crown on the new freshwater management regime and the treatment of geothermal resources in the Phase Two Resource Management Act *(RMA)* reforms, both of which are scheduled for late 2012.

The Government will have discretion over whether it adopts the Tribunal's recommendations – or ignores them.

## The claims

Sir Graham Latimer on behalf of the New Zealand Māori Council (for all Māori) and ten co-claimants with proprietal interests in significant freshwater and/or geothermal resources filed the two claims in February this year and asked that they be heard urgently.

The Tribunal granted the urgency application[1] on 28 March, and will begin the first of the hearings on Monday.

The claimants argued:

*in respect of Mighty River Power, Genesis, Meridian and Solid Energy...*

- that their Treaty claims in respect of freshwater and geothermal resources could not be redressed solely by the return of land under the section 27B protections in the State Owned Enterprises *(SOE)* Act
- that any such return of land would be much less likely once the Crown was no longer the sole owner as the private shareholders would have a vested interest in opposing Māori claims and the opportunity for a free share allocation to Māori would have been either effectively lost or much diminished

*in respect of freshwater and geothermal resources...*

- that although previous Tribunal inquiries had found that Māori have customary rights and tino rangatiratanga over aquifers, springs, streams, lakes, rivers and geothermal resources, these rights have been systematically violated or denied by successive governments
- the Fresh Start for Fresh Water programme will establish new private rights in water, including tradable use rights, creating "a further and powerful layer of opposition to Māori rights and reducing the prospect of those rights ever receiving proper recognition or proper compensation for past breaches".

## The remedy sought

The claimants acknowledge that the law may never recognise Māori proprietary rights in water or geothermal resources but argue that shares in the power companies are "a reasonable proxy" for the commercial and economic aspect of that rangatiratanga or ownership which they believe should be returned to them.

The application for urgency was opposed by the Freshwater Iwi Leaders Group (comprising Sir Tumu Te Heuheu, Tukuroirangi Morgan, Mark Solomon, Toby Curtis and Brenda Puketapu) who argued that Māori interests should be "progressed through direct dialogue with the Crown at the highest leadership level, not litigation, at this time" and that the Māori Council did not speak for all Māori.

Subsequently the Group withdrew their objection to an urgent hearing provided the focus was limited to:

- the particular waters and geothermal resources used by the power-generating SOEs, and
- the Crown's protection of those resources in relation of the sale of shares in the companies.

The Group supported the urgency application in respect of the partial asset sales and their effect in foreclosing the Crown's ability to use SOE shares for settling Treaty claims or as a "proxy" for Māori rights in water.

## The Tribunal's deliberations

The Tribunal accepted the claimants' arguments that:

- they were likely to suffer irreversible prejudice if SOE shares were sold without preserving the ability of the Crown to remedy any well-founded claims of Treaty breach, and
- the Crown was unlikely post-float to repurchase shares to allocate to Māori.

The Tribunal did not accept that the talks between the Crown and the iwi leaders provided an alternative remedy to the issue as they did not include the question of Māori rights in water, instead leaving it "to possible discussion towards the end of the process, late in 2012".

## Other developments

The Supreme Court last week in *Paki & Others v Attorney-General* found for the Māori appellants on a specific, preliminary matter in relation to their wider claim relating to five blocks of land along the left bank of the Waikato River at Pouakani.

At issue was whether that section of the river was "navigable" and therefore the property of the Crown under section 14 of the Coal-mines Amendment Act 1903. Both the High Court and the Court of Appeal had found that a river which is navigable in substantial part has that status throughout. However the Supreme Court reversed these decisions, finding by a 4:1 majority that "navigable" is to be assessed on a segment by segment basis.

Ngati Tuwharetoa is also considering legal action against the Mighty River Power and Genesis partial share floats and has been in discussion with the Government over its concerns. Finance Minister Bill English has not ruled out using a shareholding[2] to settle the claim – either by holding out some shares from the initial float or by repurchasing shares on the open market.

## Likely outcomes

Under common law – and Roman law before that – flowing water cannot be owned by anyone. However, Māori have traditionally viewed a river as a single entity - not separated into bed, banks and water.

Previous Tribunal panels have ruled that the Treaty of Waitangi guaranteed what Māori possessed, and that this must be determined by reference to a Māori perspective. Applying those principles they have found Māori have customary rights, sometimes equivalent to English law proprietary rights, in the Rangitaiki River, the Whirinaki River, the Wheao River and the Whanganui River and tributaries.

The Crown is very unlikely to agree to provide something it does not recognise itself as owning to settle the Treaty claims. What the Crown does do is regulate use of water resources through legislation such as the Resource Management Act.

A possible Crown response is to offer a co-management regime for the management of water and geothermal resources of the type already contained in the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act.

Such a solution will not be affected by offers of minority shareholdings in SOEs to mum and dad investors. So the Government could ignore a Tribunal recommendation. But any further privatisation of regulatory powers in this manner could concern users of water and geothermal resources – and those mum and dad investors.

## Footnotes

1. http://www.chapmantripp.com/publications/Documents/2012%20Waitangi%20Tribunal.pdf
2. http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10815604

JACK HODDER SC – PARTNER
T: +64 4 498 4944
E: jack.hodder.sc@chapmantripp.com

STEPHEN LOWE – PARTNER
T: +64 9 357 9042
M: +64 27 490 4633
E: stephen.lowe@chapmantripp.com

ANDREW WOODS – PARTNER
T: +64 3 353 0025
M: +64 27 436 0208
E: andrew.woods@chapmantripp.com