IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2025-485-418
[2026] NZHC 375

UNDER	the Declaratory Judgments Act 1908 and the Common Law
IN THE MATTER	of an application for declaratory judgments and directions
BETWEEN	KINGI WINIATA SMILER, WALLACE PATRICK HAUMAHA, ALAN PAREKURA TOROHINA HARONGA, ROBERT VINCENT COTTRELL and TRACEY TANIA HOUPAPA First Applicants
	POUĀKANI CLAIMS TRUST Second Applicant
	NEW ZEALAND MĀORI COUNCIL Third Applicant
AND	THE ATTORNEY-GENERAL Respondent
AND	TE POU TAIAO AND TE WHAKAKITENGA O WAIKATO INCORPORATED Interested Parties
AND	TE RŪNANGA O NGĀI TAHU Interested Party

Hearing:	3 and 4 November 2025. Further submissions: 6 November 2025
Appearances:	M S Smith KC, A T I Sykes and H Z Yáng for First and Second Applicants N R Coates and F E Geiringer for Third Applicant D A Ward and Y Monifar-Yong for Respondent J P Ferguson and W I Gucake for Te Pou Taiao and Te Whakakitenga o Waikato Incorporated (as Interested Parties)

J W J Graham and M A Dalton-Mill for Te Rūnanga o Ngāi Tahu (as Interested Party)

Judgment: 27 February 2026

JUDGMENT OF GRICE J
(Application for Declarations and Directions)

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Introduction

[1] The applicants[1] claim that the Crown has made various general assurances about progressing Māori rights and interests in freshwater which it has failed to honour. These are said to have been made in the context of court proceedings concerning the implementation by the Crown of a mixed ownership model (MOM) for state-owned enterprises (SOEs) in 2012/2013.[2] The applicants say those assurances made to this Court and to the Supreme Court, reinforced by tikanga rights and obligations, have crystalised into a solemn promise to Māori to progress recognition of their rights and interests in freshwater and geothermal assets generally. The applicants say that the Crown has breached the assurances and, given that thirteen years have passed since the assurances, that this Court should intervene by making a declaration that the Crown is bound by them and by making directions requiring the Crown to take steps to make good the breach. The directions would require the Crown to prepare a scheme of safeguards for Māori water rights which would be submitted to the Court for approval or otherwise. In the interim, the applicants seek a further declaration concerning the suspension of the granting of water permits which might affect Māori.[3]

[2] The Crown assurances are said to have been made in affidavits filed in proceedings which were heard on appeal by the Supreme Court in 2013. The affidavits were sworn by the then Deputy Prime Minister, the Hon Simon William English, and the Attorney-General, the Hon Christopher Francis Finlayson on behalf of the Crown.[4] The applicants say the assurances were relied upon by the Supreme Court in *New Zealand Māori Council v Attorney-General* [*MOM* judgment] when it refused to grant relief to the appellants in those proceedings. The decision allowed the Crown to implement the MOM programme in relation to the water rights and geothermal assets owned by a power-generating company, Mighty River Power Ltd (Mighty River), a SOE. The programme opened the way to the sale by public offering of 49 per cent of the shares in the Mighty River MOM.

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1 Unless otherwise indicated or the context indicates otherwise, references to the applicants include the interested parties.

2 *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 [*MOM* (SC)].

3 The declarations and directions sought by the first and second applicants are set out at [89] below.

4 The assurances are said to have been made in affidavits in support of the Crown and relied upon by the Supreme Court in reaching its decision in the *MOM* (SC) judgment.

[3] The applicants say that the Crown assurances made in the course of the *MOM* case, to the effect that it would progress the fulfilment of its obligations to Māori, must be considered against the fact that, at tikanga, Māori have rights and interests in freshwater and were additionally guaranteed protection of their rights and interests in water bodies through the provisions of te Tiriti o Waitangi | the Treaty of Waitangi (the Treaty) in 1840. The applicants say that the Crown assurances were given at a time when freshwater bodies were already in a state of decline and many lakes and rivers were polluted. In addition, they note that Māori have been systematically prejudiced, and locked out of the water allocation regime, by the operation of the 'first in, first served' (FIFS) system.[5] The applicants say the Crown has not addressed Māori proprietary claims in freshwater and that there has been further denigration of water quality. Therefore, the Crown has breached its assurances.

[4] The Attorney-General (the Crown) opposes the claims and says that the Crown assurances were not of the general nature alleged by the applicants. She says the relevant Crown assurances were limited to the effect of the implementation of the MOM programme and sale to the public of shares in those SOEs, including in particular, Mighty River. She says this Court cannot make the declarations or directions sought as they breach comity and the principle of non-interference with parliamentary proceedings in that they would interfere with matters of policy, politics and legislation, which are matters for the Government and Parliament.[6] In addition, the Crown raised a number of objections to the applicants' evidence which I consider later in the judgment.

Scope of the proceeding

[5] This Court dismissed the Crown's application for an adjournment. The Crown argued that the evidence filed in this proceeding is voluminous and goes far beyond

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5 References in this judgment to the reform of freshwater regulations include the recognition of Māori rights and interests.

6 The principle of non-interference is summarised in Phillip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thompson Reuters, Wellington, 2021) at 16.4.2 as follows: "The courts will not allow their processes to be used so as to inhibit the free functioning of Parliament. Thus, a court will not entertain an action to restrain a minister from introducing a Bill into the House. The mirror image is that ministerial undertakings not to promote legislation are unenforceable as a matter either of public policy or of law (if the final act of legislation cannot be unlawful, nor can actions taken to achieve that object)".

the matters raised in the pleadings. Mr Smith for the applicants confirmed to Isac J during an adjournment application hearing that much of the evidence filed is contextual.[7] The New Zealand Māori Council (NZMC) was joined as a third applicant but the first cause of action in its statement of claim was stayed. That cause of action was described as a "freestanding claim of breach of the second article of the Treaty".[8] The Court made it clear that this claim is confined to the "alleged breach of litigation assurances provided by Ministers in 2012 to the Supreme Court"[9] and that the Court would not be undertaking a "wide-ranging inquiry into the Crown's freshwater and geothermal policy in the context of obligations to Māori under the Treaty".[10] I focus on the key issues that were developed in oral submissions.

Formulation of the Crown assurances

[6] In their statement of claim the first and second applicants refer to particular statements in the 2012 affidavits of Mr English (then Deputy Minister and Minister of Finance), labelling them as the Crown Litigation Assurances. I refer to those statements below. The applicants also point to similar assurances made in the affidavit of Mr Finlayson (then Attorney-General and the Minister for Treaty of Waitangi Negotiations).

[7] Leaving aside the actual wording of the statements made, in general terms the applicants' say the Crown Litigation Assurances upon which they rely amount to:

(a) by the first and second applicants, a binding obligation to "urgently address" Māori proprietary claims to water and geothermal resources and to "materially improve" the recognition and protection of water rights for the benefit of Māori.[11] Those applicants submit that what they seek by way of declarations and directions is, in effect, a

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7 *Smiler & Ors v Attorney-General* [2025] NZHC 2606 [joinder judgment] at [13].
8 At [17].
9 At [9].
10 At [9].
11 The statement of claim pleaded that the Supreme Court expected, and the Crown understood from the Supreme Court's judgment, that the Crown needed to:
21.1 urgently address longstanding Māori proprietary claims in relation to water and geothermal resources; and
21.2 materially improve the recognition and protection of tikanga water rights and Tiriti water rights, for the benefit of Māori having such rights.

systemic change to the water management system and in particular a move to a water allocation system that prioritises Māori access to water, as well as the prescription of enforceable environmental limits, and funding for Māori and Māori-led governance of freshwater and geothermal resources.

(b) by the third applicant, NZMC, a declaration that the Crown undertook in 2012 to "give recognition" to Māori rights and interests in freshwater and geothermal resources "through one or more processes". This includes the protection of water resources from environmental degradation or destruction, and the "protection of relationships" that Māori groups have with water resources.[12]

[8] The applicants plead that the Crown Litigation Assurances were made on behalf of the Crown as an enduring entity, as a Treaty partner and on the understanding that they would be relied upon in a manner "consistent with the constitutional, Tiriti and tikanga rights and duties, of both Māori and the Crown."

Tikanga and the Treaty

[9] Tikanga, particularly as it relates to assurances by the Crown and how they are viewed by Māori, is outlined in the joint affidavit of Professor Margaret Mutu and Dr Robert Pouwhare.[13] They say that under tikanga, assurances given by rangatira such as Ministers of the Crown amount to "tatau pounamu"[14] or solemn promises which carry significant weight. This requires that the Crown honours its assurances, otherwise the mana and the mauri of the Crown's word is diminished. The applicants point out that Māori rights to water have existed as a matter of tikanga since before

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12 NZMC also describe these "undertakings" as "assurances" in its statement of claim.

13 The Crown objected to parts of the affidavit evidence of these deponents. I deal with those objections below. I put little weight on this evidence insofar as it suggests the actual meaning of the Crown assurances the subject of this proceeding as the interpretation of the assurances is a matter for submission and for determination by the Court. While under s 25(2)(a) of the Evidence Act 2006 the evidence is not inadmissible only because it deals with the ultimate issue, it must be substantially helpful: s 25(1).

14 Tatau pounamu translates to "greenstone/jade door". It draws on the enduring qualities of pounamu and is a metaphor for lasting peace.

the Treaty was signed in 1840 and were held on a "shared exclusivity" basis.[15] Māori have a special relationship with freshwater consistent with their rights and interests recognised in tikanga which were guaranteed under the Treaty.

[10] Mr Smith for the first and second applicants submits that tikanga and the principles of the Treaty reinforce the rights and interests of Māori in freshwater and the Crown's obligation to actively protect those interests, including proprietary interests. The applicants further say that at tikanga the assurances amount to solemn promises by rangatira — namely the then Deputy Prime Minister and the Attorney-General — to Māori.

[11] The applicants rely on the evidence of tikanga experts, including Dr Robert Joseph, Professor Mutu and Dr Pouwhare, in relation to the nature of tikanga and Māori rights and interests in freshwater. The applicants emphasise that Māori rights to freshwater are grounded in the existential relationship Māori have with their water bodies. Awa and moana are part of Māori whakapapa. They are both ancestors and taonga.

[12] Dr Joseph draws on extensive research in his evidence on tikanga and Treaty obligations. He explains that tikanga Māori is a legal system recognised by the courts as the first law of New Zealand.[16] It is explicitly and implicitly recognised in the Treaty art 2 guarantee of "te tino rangatiratanga …o ratou *taonga* katoa".[17] Dr Joseph notes that tikanga values are aspirational and set a "top line". In comparison, state law sets a "bottom line" below which a penalty may be imposed for breach. Dr Joseph notes that the application of tikanga in any given situation is "deeply contextual". In particular, any discussion of tikanga Māori requires an appreciation of its functioning within Te Ao Māori – the Māori world view.

[13] Dr Joseph explains that tikanga Māori rights, interests and responsibilities in respect of water bodies include rights of a proprietary nature such as controlling use

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15 *Whakatōhea Kotahitanga Waka (Edwards) v Te Kāhui Takutai Moana O Ngā Whānau Me Ngā Hapū O Te Whakatōhea* [2024] NZSC 164, [2024] 1 NZLR 857, [168]–[174].

16 Referring to the Supreme Court in *Ellis v R (Continuance)* [2022] NZSC 114, [2022] 1 NZLR 239 [*Ellis*] at [261] and *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 at [187].

17 Emphasis added.

and access. Before the signing of the Treaty in 1840, a "complex and pervasive network of customary rights and interests based on tikanga Māori" existed. The rights and responsibilities to the whenua (land) and wai (waterways) were based on community consent granted in accordance with tikanga Māori and held by the collective kin groups: whānau, hapū, iwi and confederations. These differentiated rights of access to resources allowed the control, governance and management (rangatiratanga) of water bodies but not through the "ownership" concept of English law.

[14] Dr Joseph notes that in addition to having their own mauri (life-force), water bodies have their own wairua (spirit) and hau (vitality), giving them "a distinct personality or mana (authority)". Waterbodies are ancestors. The health of a water body may be measured by the abundance of wildlife and taniwha that inhabit it. The latter are protectors and ensure safe journeys. To protect the mauri and hau, and the mana, of wai, rāhui —prohibitions instituted across an area — are a common means of conservation until the threat, for instance of pollution, has cleared, and are a method of declaring authority over water bodies. Dr Joseph concludes as follows:

> 79. Where State law prevents access to, or the availability of fresh water in ways that inhibit those kaitiaki relationships, or that diminishes the mauri and the mana of tangata (people), whenua (land) and wai (water), then the State may be in breach of their Te Tiriti o Waitangi obligations, but will also unquestionably be acting unlawfully in accordance with tikanga Maori as the first law of Aotearoa New Zealand.

The present regulatory regime for freshwater and geothermal resources

[15] Mr Bryan Smith is the Chief Advisor, Environmental Management and Adaption, for the Ministry for the Environment (MfE), which is the primary advisor to the Government on environmental matters. In his affidavit, he provides an overview of the Resource Management Act 1991 framework (RMA), details the freshwater policy issues and geothermal resource management issues, sets out the Government's process for reforming freshwater policy undertaken from around 2003 to the present (including its engagement with iwi/Māori) and discusses related matters.

[16] The RMA controls and regulates the use of land and other natural resources. It is a regulatory framework for the use of land but does not deal with ownership of

resources.[18] It applies, subject to some exceptions, to all types of property and title including customary property.[19]

[17] Among other things the RMA governs access to and use of water.[20] It provides a framework for the setting of environmental limits or water quality standards. These, in effect, shape the availability of consents to use or discharge water. The RMA places restrictions on the use of water and geothermal energy unless otherwise expressly permitted.[21] In addition, it restricts discharges of contaminants into water or onto land where the contaminant might enter the water.[22]

[18] In general, the taking, using or diverting of water needs to be authorised by a rule in a regional plan, resource consent or regulation. Most of the responsibilities for the management of freshwater resources are with regional councils and territorial authorities (district councils).

[19] Bryan Smith notes that there is no single provision in the RMA which deals with allocation of water. The RMA provides a framework for the making of plans that structure decision-making about the use of resources and the management of the effect of that use, as well as for the granting of resource consents to use freshwater and for consents to discharge into freshwater. Councils may make rules or set policies in relation to water allocation in regional policy statements or in a regional plan. A rule may allocate the resource,[23] and some regional plans include mechanisms that may facilitate access to freshwater for Māori. Any prioritisation rule or policy must focus

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18 *Te Whānau a Kai Trust v Gisborne District Council* [2022] NZHC 1462 at [86] and [138(a)]. Leave to appeal to the Court of Appeal and Supreme Court was dismissed: *Te Whānau a Kai Trust v Gisborne District Council* [2023] NZCA 55.

19 *Carter v Attorney-General* [2025] NZCA 677 at [71].

20 Control of water was vested in the Crown by s 21 of the Water and Soil Conservation Act 1967 which provides, with limited exceptions, that all uses of water must be expressly authorised by statute. The Crown's right to resources, including in water, is confirmed in s 354 of the Resource Management Act 1991.

21 Section 14 of the Resource Management Act imposes a number of restrictions on the use, taking, damming or diversion of freshwater. Limited exceptions to the prohibition on those activities are set out in s 14(3). Section 14(3)(c) provides an exception for geothermal water taken in accordance with tikanga Māori "for the communal benefit of the tangata whenua of the area" where that taking does not "have an adverse effect on the environment". There is also an exception for an individual's reasonable domestic needs in s 14(3)(b)(i).

22 Resource Management Act, s 15(1).

23 Resource Management Act, s 30 sets out the functions of Regional Councils which includes regulation of water taking, using and discharges.

on classes of activities or the effects of activities, not the status or identity of applicants.[24] The RMA has provisions to adjust consents if the use of the resource under the consent is having adverse effects on the environment.[25] It gives a priority to existing consent holders over new users when seeking a replacement consent.[26]

[20] Bryan Smith refers to the complexity of water management and geothermal resources. In particular, he points to the range of related policy issues such as public health and sanitation, drinking water standards and ecological aspects. In addition, it is difficult to separate water management from wider issues of land use and planning law. He notes that central and local government are required to come up with workable policy solutions requiring "significant value judgments" to be made about how human actions that impact water should be best managed. This involves a significant political element given the strong and diverse views held by people.

[21] Bryan Smith says that the focus of policy work in relation to Māori rights and interests in freshwater has been undertaken without the need to determine and define property rights. These rights and interests involve a wide range of cultural, social and economic aspirations and policy claims. The accommodation or reflection of these in a contemporary resource management system is complex given the need to balance competing values and views — both within Māoridom and between Māori and other interested groups. Bryan Smith notes that many of the changes sought by Māori groups require legislative changes.

[22] Discussions on freshwater issues began in 2003 and included hui with Māori and input from a group of iwi technical advisers in 2005. The Fresh Water Iwi Leaders Group (ILG or FILG) was established by the Iwi Chairs Forum. The latter comprises the chairpersons or representatives of approximately 70 iwi organisations from around New Zealand. Policy work was undertaken in 2006 toward developing a

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24 See *Hauraki Marae Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-999, 4 March 2004 (applied in *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 280); compare *Ngāti Mākino Heritage Trust v Bay of Plenty Regional Council* [2014] NZEnvC 25 and *Federated Farmers of New Zealand Inc v Bay of Plenty Regional Council* [2020] NZEnvC 213.

25 Resource Management Act, s 128.

26 Section 124B.

National Policy Statement (NPS) for freshwater. Bryan Smith goes on to set out the main steps in the reform process in detail, to which I return below.

Water quality and allocation

[23] Dr Mahina-a-rangi Joy Baker, a Resource Management Consultant, filed an affidavit for the applicants. She notes that the rights of Māori in water and its associated resources such as mahinga kai are taonga. They are subject to tikanga Māori derived rights and responsibilities related to water and its associated ecosystems. Dr Baker says the recognition that Māori seek in relation to rights, interests and responsibilities includes the ability to implement tikanga Māori derived rights and responsibilities based on three concepts. These are tino rangatiratanga, kaitiakitanga and manaakitanga over water and its resources.[27] This recognition includes regulating the effects of human activities in relation to water as well as proprietary rights to access and use of water and its associated values such as mahinga kai.[28]

[24] In that respect, the applicants say that not over allocating water is crucial to Māori rights and responsibilities in water, especially rivers. This is because the more water that is allocated for use, the lower the volume of the flow of water in the waterbody which may result in lower water quality. This link was explained in the affidavits of Dr Baker and Dr Michael Kevin Joy, an expert in ecology. Lower river flow volumes reduce the available habitat and therefore invertebrate species richness, abundance and density. In addition, it reduces the habitat for fishing and can impact on feeding and spawning. The lower the river flow the lower the water level, which

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27 Dr Baker defines these concepts as follows:
"Tino rangatiratanga: the rights and responsibilities expressed through the power and authority to regulate people's relationship to and use of water, including rights to access water and its resources".
"Kaitiakitanga: an inherited right and responsibility arising from and reinforcing rangatiratanga, to care for water, its associated resources and the well-being of people as an extension of their connection to water".
"Manaakitanga: an inherited right and responsibility that arises from and reinforces rangatiratanga to politically, economically and socially care for others, including in how water use is regulated and cared for."

28 Dr Baker attaches a paper: "Te Ātiawa ki Whakarongotai Response to Kiwi Road Application, 7 December 2015" that refers to the National Policy Statement for Freshwater Management (NPS – FM) 2014. It defines "mahinga kai" as: "mahinga kai generally refers to indigenous freshwater species that have traditionally been used as food, tools or other resources… For this value, kai would be safe to harvest and eat and knowledge transfer is present".

increases temperature and nutrient levels of the water body. In turn, this increases the frequency of algae blooms. In simple terms, these deplete oxygen in the water at certain times of the day which results in some species being unable to live in the water. This harms the mauri of the water body itself. It also negatively impacts the relationship Māori have with their waters and their associated cultural practices.

[25] The applicants submit that this undermines the right to use water because, in accordance with tikanga and kaitiaki responsibilities, Māori cannot take water unless ecosystem health is first achieved.

[26] The applicants say that the FIFS water allocation system in existence in 2012 was known to, and continues to, fail to recognise Māori rights and interests in water. It placed Māori on a level playing field with strangers to the water, locked Māori out of their access rights and use, and also undermined Māori kaitiakitanga responsibilities by permitting catchments to be overallocated, adversely impacting the health of water bodies. Information from relevant local authorities was produced showing the aggregated water permit allocations granted in some regions had exceeded 1,000 per cent.[29]

Water allocation — FIFS

[27] The FIFS system has been developed by the courts such that where there are competing consent applications to take or use the same resource, the first complete application is decided first without consideration of others.[30]

[28] The FIFS system dictates that grants for water consents and permits are decided in order of application and are subject to consent renewals. Decision makers do not have to prioritise higher value uses. The Waitangi Tribunal has noted this has been a major weakness in the freshwater reform regime since 2004, resulting in the catchments becoming fully or over allocated, leaving no room for new entrants, and

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29 Dr Baker relies on various reports from the Greater Wellington Regional Council's website to form her conclusions on the water allocation statistics. See "Natural Resources Plan Water Allocations" Greater Wellington Regional Council <https://plan-limits.eop.gw.govt.nz/limits/gw/allocation>.

30 *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 at [18].

putting undue pressure on the resources.[31] The result is, it is submitted, that the system failed to take into account Māori rights and interests in water in three ways. First, it is inconsistent with the rangatiratanga rights of Māori and fails to recognise Māori rights and interests in freshwater to enable access to and use of the water that Māori need. Secondly, FIFS denies Māori who lack water take and discharge rights their entitlement to economically benefit from water over which they have rangatiratanga rights. Thirdly, there has been an over-allocation which has damaged the mauri of the water and undermines the kaitiaki responsibilities and relationships Māori have with water.

[29] The applicants give a number of specific examples of Māori who have been unable to obtain water rights for the development of land which they had owned and occupied since before the settlors arrived. In addition, land blocks (including Māori freehold land) have remained underdeveloped for generations due to whānau returning home to their whenua and finding that water rights had been exhausted. As a result of the difficulties of both the FIFS system and the worsening water quality,[32] the quality and availability of water has diminished, prejudicing Māori and enhancing the Crown's legal duties.

[30] The applicants say that there are options for water allocation which better respond to Māori rights and interests. They point to allocation systems identified by officials. For instance, Mr Bryan Smith for the Crown refers to work done by officials in 2016/2017 which identified six potential allocation models. The applicants say all of these would have provided for better Māori participation and access. For example, potential models included applications for allocation being based on administrative merit assessed and decided by relevant councils according to defined criteria. The criteria were expected to provide for Māori interests. A further alternative suggested was an auction-based model in which Māori would receive part of the auction proceeds to enable them to participate in auctions for water and discharge rights.

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31 Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Resources* Claims (Wai 2358, 2019) at 109.

32 Dr Michael Kevin Joy identified a key problem as being the defuse discharges from fertilisers, in particular, synthetic nitrogen.

Events leading to the *MOM* proceedings

[31] The focus of this proceeding is relatively narrow and based on the terms of the 2012 assurances given by the Deputy Prime Minister and the Attorney-General in the MOM proceedings, interpreted against the relevant context, and as relied upon by the Supreme Court.

[32] In May 2011, at the same time as the freshwater reforms were underway, the Crown announced that it intended to establish MOM companies for four SOEs: Mighty River, Meridian Power, Genesis Power and Solid Energy. In December 2011, following the November 2011 election, Cabinet decided in principle to proceed with a MOM and that Mighty River should be the first company prepared for a public offering. In the announcement the Crown noted that it intended to consult Māori on the decision before introducing the legislation.[33]

Waitangi Tribunal inquiry

[33] In March 2012, the Waitangi Tribunal granted an application for an urgent hearing into two claims about Māori proprietary rights in freshwater bodies and geothermal resources.[34] The inquiry was divided into stages. The hearings on Stage 1 were held under urgency in 2012 and dealt with the impact of the Crown's proposed sale of shares in the state-owned power companies. The interim Stage 1 report was released in August 2012 and the final report was released in December 2012.[35]

[34] Before the Tribunal, the claimants argued that Māori have unsatisfied or unrecognised proprietary rights in water (including a commercial aspect) and would be prejudiced by Crown policies which refused to recognise those rights. The claim by Māori was not for sole or exclusive ownership of all flowing water. The claimants recognised the rights of non-Māori to share in the use and benefit of water. The claim was based on an ongoing breach of Māori residual proprietary rights which were

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33 Bill English "Next steps in mixed ownership programme" (press release, 16 December 2011).

34 These were the *Sale of Power Generating State-Owned Enterprises* (Wai 2357) and the *National Freshwater and Geothermal Resources* (Wai 2358) claims about the Crown's resource management reforms and the recognition and provision for Māori rights and interests in water.

35 Waitangi Tribunal *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012).

guaranteed and protected by the Treaty from 1840 onwards. Where the rights could not be fully restored, the claimants sought compensation.

[35] The Tribunal pointed out that the prioritisation of the inquiry into the conversion of the SOEs into MOM companies was to meet the desire of the Government to offer shares in Mighty River for sale in the third quarter of 2012. The claimants had argued that beyond the sale (of 49 per cent of the shares to private investors), it would be too late to protect their commercial interests by shares in the company, "by a levy or royalty" or by some other means.[36]

[36] The Tribunal noted the Crown position was that it accepted that Māori may be able to prove some kind of property rights in the future short of full ownership of water. However, the Crown said its ability to recognise or protect such rights would not be affected in any way by the partial privatisation of the SOEs. It said that by means of current dialogue with iwi, stakeholder development of policy and further consultation with all Māori, the Crown intended to reform the resource management regime and provide more effectively for Māori rights and authority in respect of water. The Crown told the Tribunal that it was open to considering the claims of Māori proprietary rights and that the sale of shares in the MOM companies would not deter it from providing an agreed form of rights recognition. The Crown further took the view that the shares were not an appropriate way of recognising Māori rights, but in any event, shares were "fungible" and could be repurchased for Māori if necessary.[37] The Crown also told the Tribunal that private shareholder resistance would not be an effective bar to implementation of a "modest" levy or royalty.[38]

[37] The Tribunal noted, importantly, that its findings on the nature of Māori rights in water were subject to the proviso that the Tribunal did not determine who had the relevant mana whenua and mana moana rights. It found that the evidence demonstrated that hapū or iwi exercised te tino rangatiratanga and customary rights in 1840. Consistent with tikanga Māori, their rights were based on a physical and metaphysical relationship with their taonga, the water bodies. These included

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36 Waitangi Tribunal *Stage 1 Report* (Wai 2358, 2012), above n 35, at 2.
37 At 123.
38 At 127.

authority and control over access to and use of the resources as well as kaitiaki responsibilities to care for and protect the resources. Rights and interests might be shared between hapū but were always exclusive to specific kin groups. Access and use by outsiders required permission and often payment of a traditional kind. The closest legal equivalent to the Māori customary indicia of ownership in 1840 was "full blown" ownership of property in the English sense.

[38] Further, the Tribunal noted that both texts of the Treaty supported a finding of ownership in 1840. Article 2 of the Treaty guaranteed this "ownership".[39] The authority and control embodied in rangatiratanga was a standing qualification to the Crown's kāwanatanga. However, Māori rights and interests were altered by the Treaty compact. First, by allowing for settlement of tauiwi (non-Māori) and a grant to them by Māori of non-exclusive use rights in the water. Secondly, the Crown's obligation as kāwanatanga or governor was to balance the interests of many. Nevertheless, Māori were the Treaty partner, and the Crown must be fair and comply with Treaty principles. A sliding scale was required to determine what degree of priority should be accorded to Māori interests. The balancing of interests, including the interests of the taonga itself, might indicate that kaitiaki control could be appropriate in one case while a partnership and sometimes kaitiaki influence would suffice in others. The third way in which the Treaty modified rights in water was that there should be mutual benefit between settlors and Māori from settlement. This included Māori being entitled to develop their properties protected by law.

[39] The Tribunal in its interim Stage 1 report noted that the Crown had made "formal assurances" to it.[40] The assurances were made on behalf of the Crown by Ministers, Mr English, the then Deputy Prime Minister and Mr Nick Smith, the then Minister for the Environment, in a 21 February 2012 letter. The Tribunal referred to an extract from the Crown submissions, relating to that letter from the Deputy Prime Minister and the Minister for the Environment, that there was no intention by the Government that the MOM process would prejudice "in any way the work being done on rights and interests in water and natural resources".[41] The letter went on to say that

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39 At 78.
40 At 236.
41 At 135.

the Crown as the majority shareholder would continue to exercise its Treaty obligations to iwi and that the Government intended that the legislation to implement the MOMs would include a provision reflecting the concepts of s 9 of the State-Owned Enterprises Act 1986 (SOE Act).[42] In addition, the Crown submitted it would not be relying on the reforms to say that there was "any diminution in those rights and interests".[43]

[40] The Tribunal also reproduced extracts from a 2009 letter by the then Prime Minister, the Rt Hon John Key, to the ILG acknowledging that iwi had specific interests and rights in freshwater and agreeing to discuss the draft National Policy on Water with the ILG prior to the policy going to Cabinet.[44] The letter went on to say that property rights and interests and direct iwi involvement in phase 2 of the RMA review would be on the agenda. The Tribunal referred to the Crown submissions and evidence that in that context, property rights "short of full ownership in water" were on the table for discussion.[45]

[41] The Crown's statements were summarised by the Tribunal as including "that nothing which arises from the sale of shares will be allowed to prevent it from providing appropriate rights recognition afterwards".[46] The Tribunal noted that "various forms of commercial redress are possible, not that they are or will be on offer."[47]

[42] In relation to the issue of whether the MOM programme would prevent the appropriate rights recognition once Māori rights in water had been clarified, the Tribunal noted that it accepted the Crown's assurances that it was "open to discussing the possibility of Māori proprietary rights (short of full ownership), that it would not be 'chilled' by the possibility of overseas investors' claims, and that the MOM

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42 Section 9 of the State-Owned Enterprises Act 1986 provides that Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

43 Waitangi Tribunal *Stage 1 Report* (Wai 2358, 2012), above n 35, at 134. The Tribunal also referred to the Privy Council judgment in *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 [*Broadcasting Assets*] that a failure to honour a Crown assurance could give rise to a successful challenge on an application for judicial review based on "legitimate expectation", at 136.

44 Waitangi Tribunal *Stage 1 Report* (Wai 2358, 2012), above n 35, at 134.

45 At 135.

46 At 237.

47 At 237.

programme would not prevent it from providing appropriate rights recognition…".[48] However, the Tribunal said that in one area the Crown would not be able to provide appropriate rights recognition or redress after the partial privatisation. That was in relation to developing a "shares plus" option. That referred to the provision to Māori of shares or special classes of shares which could provide Māori with "a meaningful form of commercial rights recognition".[49] The Tribunal found that it was for the parties to decide the way forward following a suggested national hui to be convened by the Crown, iwi leaders and the NZMC. That discussion would include, in the narrowest view, the shares and shareholders agreement in Mighty River. But the Tribunal noted it was preferable to take a broader approach and consider other commercial options such as royalties at the same time.

[43] As a result of the recommendations of the Tribunal in its Wai 2358 interim Stage 1 report, the Government delayed the initial public offering from March to June 2013 to enable consultation to be undertaken with affected parties. It undertook consultation with Māori on the "shares plus" option suggested by the Tribunal. However, the Government concluded that the option was not workable and moved to proceed with the share sales without implementing it.

[44] The NZMC and others then commenced the *MOM* proceeding. They sought judicial review in the High Court of the Ministers' decision to issue an order-in-council to change the status of Mighty River from an SOE to a MOM.[50] The primary ground of review was that the Crown was acting inconsistently with the principles of the Treaty unless it implemented protective mechanisms to provide for redress and protect Māori proprietary rights to water and geothermal resources before making the decisions to change the status of the relevant SOEs to MOMs.[51] The claimants said the decisions were subject to the Treaty clause in s 9 of the SOE Act or in s 45Q of the Public Finance Act 1989. A number of other grounds were also advanced.

[45] The 2012 affidavits of Mr English and Mr Finlayson, said to contain the relevant Crown Litigation Assurances, were filed in the *MOM* proceeding.

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48 At 142.
49 At 142.
50 *The New Zealand Māori Council v Attorney General* [2012] NZHC 3338 [*MOM* (HC)].
51 At [49].

The affidavits filed in the MOM proceedings containing the Crown assurances

[46] Mr English said the purpose of his affidavit dated 7 November 2012 (the English affidavit) was to "explain Cabinet's decision and the context to that decision, being the policy of the MOM programme" as well as "the engagement" he had had "on behalf of the government, with iwi leaders on rights and interests in water and geothermal resources, and the government's ongoing commitment to Treaty settlements and to water reform through various policy initiatives".[52] In the introductory part of his affidavit, Mr English described the MOM programme and its economic goals. The affidavit goes on to describe the Government's main objective, which was to contain the core Crown net debt, which he said had increased as a result of the global financial crisis from roughly $10 billion to just over $50 billion. Mr English described his Government's approach to the review of the RMA and its agreement "that there would be no disposition or creation of property rights or interests in water without prior engagement and agreement with iwi and that iwi would have involvement in phase 2" of the RMA review. He also noted that the recognition for Māori rights and interests had been firmly on the agenda of discussions between Ministers and the ILG since 2009 and that those discussions were constructive. Further, Mr English described the framework for addressing historical breaches of the Treaty. He noted the "complex and multifaceted" questions would take time to work through to ensure workable and sustainable solutions and also that it would involve discussions at both a national/policy level but also with iwi/hapū "with particular rights and interests" in specific resources.

[47] Mr English outlined the National led Government's commitment to a programme of reform of New Zealand's freshwater policy. This was through the May 2011 Fresh Start for Fresh Water Programme. He noted that there were three aspects to the engagement with Māori in relation to that programme: direct engagement between iwi and the Crown which was occurring through ongoing discussions between FILGs and Ministers; a land and water forum (a non-governmental forum comprising of stake holders from all relevant sectors

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[52] Mr English also filed an affidavit dated 12 November 2012 with corrections to his earlier affidavit, however for the purposes of this proceeding the later affidavit is not relevant. The second affidavit dated 12 November 2012 clarifies the attendees at a meeting and that the reference to the Iwi Leaders Forum should have been a reference to the Iwi Chairs Forum.

including iwi); and policy development with Crown officials in concert with the Iwi Advisors Group (IAG), a group that advised the ILG.

[48] Mr English referred to historical Treaty settlements which made it clear the Crown acknowledged the "mana, rangatiratanga and kaitiakitanga of the claimant groups in natural resources". Mr English said that the MOM programme would not affect the continuing process of ascertaining and recognising Māori rights in respect of water and geothermal resources. He then went on to refer to the Waitangi Tribunal inquiry. Mr English noted that the Tribunal had largely accepted the Crown's submission that it would be able to recognise the rights of Māori in freshwater and geothermal resources and provide all forms of redress after the sale of shares in the MOM companies. He went on to note the Tribunal's finding that one form of redress, the "shares plus" option, would not be available after sale. Mr English said that the government had consulted on the "shares plus" proposal, but it concluded that the scheme would be either be replicable after sale by other mechanisms or else not workable in practice. Cabinet had decided not to proceed with the "shares plus" concept.

[49] Mr English, in summary, said that the sale of the minority shareholdings in the MOM companies would not compromise the ability of the Crown to recognise relevant Māori rights and interests, nor the Crown's ability to respond to relevant Waitangi Tribunal recommendations and findings.

[50] The affidavit of Mr Finlayson filed in the *MOM* proceeding is also dated 7 November 2012. He referred to the decision making in which he had participated concerning the Cabinet agreement in December 2011 to extend the MOM programme to enable the sale of the minority shareholdings in Genesis Power, Meridian Energy, Mighty River and Solid Energy. Mr Finlayson said he had been mindful both of the principles formulated by New Zealand courts in relation to the Crown's Treaty obligations, but also of the principle that:

> …a government is entitled to pursue its legislative and policy programmes but that it should not, in doing so, unreasonably compromise its capacity to provide for well-founded Treaty claims if a decision it intends to make is such that appropriate redress for an extant Treaty claim could not be provided.

[51] Mr Finlayson went on to say that he was satisfied that the sale of the minority shareholdings in the MOM companies would not compromise the Crown's ability to recognise Māori rights and interests in water and geothermal resources, nor compromise the Crown's ability to respond appropriately to the outcomes of the Waitangi Tribunal's work in that area.

[52] Mr Finlayson also noted that the MOM programme would not change his commitment "as Minister, and the Crown's commitment" to make provision for past actions that were inconsistent with Māori rights and interests through the redress provided in Treaty settlements. He referred to the Crown's Treaty settlement framework and gave examples of how the "mana, rangatiratanga and kaitiakitanga of claimant groups and natural resources" could be acknowledged, by reference to the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 and the Taiaroa Lakes Settlement Act 2008. Mr Finlayson also referred to other means of providing redress over water and geothermal resources, such as: vesting of land, riverbeds or lake beds and gifting back of land of outstanding significance; vesting of reserves; overlay classifications administered by the Department of Conservation; statutory acknowledgments concerning sites of significance including rivers, lakes and wetlands which enhance a group's ability to participate in RMA processes; and appointments to advisory committees which advise Ministers directly on relevant matters.

[53] Mr Finlayson also referred to other mechanisms in which Māori involvement was effected. These included deeds of recognition, protocols issued by a Minister on how a department will exercise its functions, place name changes, and joint or advisory management committees under the Reserves Act 1977 and Conservation Act 1987 to advise on the management of a site or area of importance. Mr Finlayson said the MOM programme had no bearing at all on his commitment and that of the Government to continue to provide Treaty redress of the type of which he had given examples. Mr Finlayson noted he was also well informed on the engagement that Mr English and other Ministers had had with iwi leaders on contemporary rights in water and geothermal resources. Finally, he stated "the MOM programme has no bearing on the

Government's commitment to continuing with that work or on the outcomes that may be able to be achieved".[53]

The *MOM* judgments

[54] This Court issued its *MOM* judgment on 11 December 2012. It found that the Crown's MOM decisions were not reviewable and that neither the Treaty provision in s 9 of the SOE Act nor that in s 45Q of the Public Finance Act applied to the decisions.[54] In any event, the Court found that the sale was not inconsistent with the principles of the Treaty and that there was no nexus between the sale and the need to provide for Māori proprietary claims to water.[55]

[55] The applicants were granted leave to appeal directly to the Supreme Court.

[56] The Supreme Court found there was a statutory obligation on the Crown to act consistently with the Treaty. It said that s 45Q of the Public Finance Act was an equivalent provision to that of s 9 of the SOE Act.[56] The proposed sale of the shares must be conducted in accordance with s 45Q and therefore was reviewable for compliance with the principles of the Treaty.[57]

[57] The Supreme Court said that although the "shares plus" suggestion of the Tribunal had been rejected by the Crown, the consultation by the Crown had been adequate.[58] The Supreme Court then turned to the test that it was required to apply in determining whether the proposed sale of shares in Mighty River was consistent with the principles of the Treaty.[59] The Court was required to 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. Such impairment must be objectively assessed and

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53 Mr Finlayson also swore an affidavit in these proceedings dated 21 August 2025. I attach little weight to that affidavit in view of the fact that the issues in this proceeding turn on the assurances and the actions of government ministers at the time, rather than recollection of what was intended from a distance of 12 or 13 years.

54 *MOM* (HC), above n 50, at [342].

55 At [345(a)].

56 *MOM* (SC), above n 2, at [59].

57 At [64].

58 At [87].

59 At [88]–[89].

to be relevant must be "in reasonable or substantial prospect".[60] This required a contextual evaluation which would change depending on the situation at any particular time. It referred to comments of the Privy Council in *Broadcasting Assets* to the effect that decisions by the Crown in times of recession not to become involved in heavy expenditure in order to fulfil its obligations might be regarded as acting reasonably but would not acceptable when the economy was buoyant.[61]

[58] The Court noted that before intervening, it was first required to be brought to the conclusion that the proposed privatisation was inconsistent with Treaty principles. Secondly, there would be inconsistency if the proposal would "impair, to a material extent, the Crown's ability to take the reasonable actions which it is under an obligation to undertake in order to comply with the principles of the Treaty". Thirdly, the Court must address this issue directly and form its own judgment.[62]

[59] The Supreme Court referred to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which had been affirmed by New Zealand in April 2010. It heard argument on art 28(1) which relates the right of indigenous peoples to redress for resources they have traditionally owned or used which have been taken without their consent. However, the Court did not find it necessary to consider that further as it added nothing to the statutory recognition of the Treaty principles in the SOE Act.

[60] The Supreme Court went on to summarise the statutory regimes controlling the use of water, noting the provisions for Māori participation through iwi when waters of significance to them are affected, and pointing out that this would be a matter for consideration in the Waitangi Tribunal in the second stage of its *Freshwater* inquiry.

[61] The Supreme Court then referred to the Crown's acknowledgement that Māori have interests and rights in relation to particular waters, but that so far it had not been prepared to negotiate for recognition of Māori property in waters or for their participation in the economic benefits for use of waters. The Court also noted that the

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60 At [89].
61 At [89].
62 At [90(a)-(c)].

Crown had been prepared to negotiate co-governance and co-management arrangements, under which Māori have a substantial say in control of particular rivers through Treaty settlements. In addition, the future of freshwater management and the RMA were under active review.

[62] The Supreme Court evaluated the competing positions of the parties by reference to the impact of privatisation on land claims, ownership and control of the power-generating companies and the more general reform of the law relating to the governance and management of water.[63]

[63] The Court noted that a "material impairment" had been relatively easy to infer in the *Lands/SOE* case where the proposed Crown action had the potential to put land, which they wished to resume, beyond Māori claim.[64] However, the Court noted, it was not so easy to infer where the Crown retained substantial capacity to provide redress as the majority shareholder. In addition, the Supreme Court noted that Māori could be confident that "in the current legal and social environment" their claims would be addressed, which had not been "as clear in 1987".[65]

[64] In the Supreme Court, the appellants had argued that the shares should not be sold without a protective mechanism to safeguard Māori rights. The Crown contended privatisation was neutral and would not prevent the Crown from responding appropriately to remedy breaches of established interests in water. The Supreme Court noted that the Crown's argument that the use regime and existing regulation of water, including the limit on duration of water rights imposed following the *SOE* case, was comparable to protection through the memorialisation of land.

[65] The Supreme Court noted the views of the Tribunal in its report, including the "shares plus" concept suggested by the Tribunal. The Court agreed with the Tribunal's rejection of the contention that that privatisation should be halted on the basis that it

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63 At [133]–[147].

64 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641; (1987) 6 NZAR 353. Frequently called the *Lands* case but referred to by the Supreme Court in the *MOM* (SC), above n 2, as the *SOE* case. I refer to it as the *SOE* case from here on in this judgment.

65 *MOM* (SC), above n 2, at [115].

would diminish the capacity of the Crown to provide redress for unconnected Treaty claims as the Crown had capacity to meet those claims. The Court noted:

> [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.

[66] The Supreme Court then went on to note:

(a) The effect of privatisation on direct claims against lands of the power generating companies was significantly protected by the memorial regime operating under the SOE Act.

(b) Ownership and control of the companies would be diminished by privatisation and would limit the possibility of some options for redress such as "shares plus", royalties or reparation, out of the relevant water assets. However, the materiality of this was affected by the following considerations:[66]

(i) That the current power generating assets and the significance for the wider economy could not be ignored;

(ii) That given the vast public expenditure associated with the power generating infrastructure, "the courts should be slow to insist" on protective measures which prevent the Crown from obtaining the full value for the benefit of the country as a whole.[67]

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66 At [135]–[136(e)].
67 At [136(b)].

(iii) That the use and control, as the Tribunal described the ownership interest guaranteed by the Treaty, may be augmented by specific settlements. Some ownership interests might be addressed through regulatory reform, but that is to be assessed against opportunities for "real authority" in relation to waters of significance.[68]

(iv) That the significance of the shares as a means of redress should not be overstated — they are only a proxy for the underlying claims.

(v) That water rights, unlike the ownership of land, are limited to 35 year terms, although the reality is such rights are likely to be renewed where used for electricity generation. The terms of the current permits must be reviewed to conform with any Treaty settlement.

[67] In addition, the Supreme Court noted there was no reason to think the Crown would lack the capacity to buy back shares and retain a commensurate measure of influence. The Supreme Court said it was difficult to see that the "shares plus" option would produce reparation more beneficial to Māori aspirations than could be achieved by regulatory reform and associated settlements. In addition, the option would have the effect of defeating the purpose of the Crown obtaining full value. Similarly, the Supreme Court found it was not easy to envisage the imposition of a royalty scheme. Royalites would likely attract opposition from companies and their shareholders, result in power cost increases, and distort competition among electricity suppliers. The Court considered that dividend revenue could provide redress in respect of the continuing operation of the dams if ever necessary. It also noted that the 35 year term of review of the water permits allowed review of the permit terms, should they be affected by a Treaty settlement.

[68] Referring to the primary concern of the appellants about the management of water under the operation of the RMA, the Supreme Court noted two issues of concern

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[68] At [136(c)].

had been expressed. The first was the general governance and management currently vested in regional councils. The second was that privatisation would increase the number of commercial stakeholders in the current water control regime and so limit the likelihood of more general recognition of Māori interests in water. The Supreme Court noted relevantly in response to these concerns:

(a) The RMA as currently enacted provided "substantial recognition" of Māori interests.[69]

(b) The explanation by the Deputy Prime Minister of the engagement with Māori and their involvement in the review of the RMA.

(c) The acknowledgement of the Crown set out by Mr English of Māori rights and interests in geothermal resources, ongoing identification of those interests in Treaty settlements, and parallel mechanisms. The Court noted that the Crown's position was 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, protection, use, access and allocation, and/or charges or rentals for use…" and the Court "… should accept that is not an empty exercise".[70]

[69] Against that background, the Supreme Court noted the concerns about the increase in stakeholders who would be involved in the current regime's impending reform but said "…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".[71] The Supreme Court went on to comment that the interest in the reform process taken by shareholders in MOM companies would not be materially different from that of commercial water users.

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69 At [143].
70 At [145], citing the affidavit of Mr English.
71 At [146].

[70] In conclusion, the Supreme Court noted that the social and legislative contexts gave more confidence to Māori that their claims would be addressed, which was "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 Māori interests specifically".[72] Additionally, the Tribunal would be concluding its *Freshwater* inquiry and the Crown would be required to respond to its recommendations. The Court noted that sustainable settlements need time to be worked out and that commercial redress "under pressure of the present dispute would be unlikely to produce a durable solution".[73] It noted the relevant policy initiatives and the assurances given in the litigation, saying that it appeared "the message that there is need for action on these claims has been accepted".[74]

[71] The appeal was dismissed with the Supreme Court concluding:

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

Developments in freshwater regulation since the *MOM* proceedings

[72] Mr Bryan Smith for the Crown provided further detail on the main steps in the policy reform process from 2009 onwards. These included the *New Start for Fresh Water* (June 2009), *Fresh Start for Fresh Water* (May 2011), and *Freshwater Reform 2013 and Beyond* (March 2013). The 2013-2016 period included intensive engagement work with the ILG and the IAG (comprising technical advisors that supported the ILG). The *Next Steps for Freshwater* discussion document was released 2016. Mr Smith listed the key outcomes during this period:

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72 At [147].
73 At [148].
74 At [148].

(a) The NPS-FM 2011 (which came into effect in July 2011) included requirements for regional councils to set limits, targets and timelines to address overallocation and to maintain or improve water quality;

(b) Directions on water quality, integrated management and tangata whenua interests, and requirements for councils to set limits for water quality and quantity;

(c) The introduction of the 2014 National Objectives Framework. This was a framework for Māori to work with iwi, hapū and wider communities to identify all the values people have for water bodies in their area and set objectives for freshwater quality. It included bottom lines to assist with limit setting;

(d) A requirement in the NPS-FM 2014 for councils to involve Māori in freshwater management, and to work with iwi and hapū to ensure that their values are identified and reflected in freshwater management;

(e) In 2014, the introduction of the concept of "Te Mana o te Wai" in the NPS-FM, which was expanded on in a 2017 amendment; and

(f) The inclusion of "Mana Whakahono ā Rohe" (iwi participation) arrangements in the RMA through the Resource Legislation Amendment Act 2017.

[73] Bryan Smith emphasises that the options for freshwater were developed by successive governments and the emphasis of the reforms at particular points in time reflects the priorities of the government of the day. He notes that the reform process proceeded over many stages, reflects the complexity of the task and is complicated by incomplete or developing science. In addition, he notes that different groups engaged at various points in time. A common feature of the reforms has been that the water quality and allocation issues varied over different regimes and catchments, therefore the governments' focus has been on finding catchment-based solutions rather than a "one size fits all" solution.

[74] Based on the evidence of Bryan Smith, the Crown summarises the approach of successive governments to the recognition of Māori rights and interests through the regulatory regime as having the following features:

(a) A focus on how Māori aspirations may be accommodated or reflected in a contemporary system for resource management;

(b) There is no "single" Māori perspective on freshwater; and

(c) Different Māori groups have put forward different proposals for recognition of Māori rights and interests in freshwater. For instance, NZMC suggested the establishment of an independent water commission and a reset of "iwi bias" in the RMA in favour of hapū. The ILG, by contrast, has not supported that proposal and argued it was not "practical for all hapū to consistently participate in a range of different freshwater processes".

[75] For the applicants, Mr Bruce Stirling, an historian specialising in Treaty of Waitangi and Māori Land Court claims, research and negotiations as well as related resource claims, traces in his affidavit the progress of the Crown's steps toward any recognition of Māori interests in water. He notes that the Water and Soil Conservation Act 1967 "…effectively nationalised freshwater use rights that had previously resided by common law in those with a legal right of access to that water". Mr Stirling says there had been growing concerns by Māori about the 1967 Act and in particular that it did not recognise Māori people and their connections to freshwater. The National Water and Soil Conservation Authority, which had been established in 1983 under the Water and Soil Conservation Act included one Māori appointee on the 15 member Authority. In 1985 it issued a direction to all catchment authorities that Māori interests needed to be considered in all reports prepared by such authorities and the authorities were "to refer to any Māori interests or values affected by or related to any water and soil proposal".

[76] Mr Stirling says that from the time of the judgment in the *MOM* proceeding in February 2013, the Crown took various steps evidenced by meetings of relevant

groups, the promulgation of papers by officials and legislative steps towards reform but that these have now stalled. For instance, he notes that in March 2015 Ministers and the ILG had agreed to four priority work streams for freshwater: "Recognition; Water Quality; Governance, Management and Decision-Making; and Economic Development". Consultation with Māori followed. In June 2015, the IAG provided four draft reports to the Crown that addressed the priority work streams. Regular references had been made to the need to recognise Māori interests. For instance, a report from the Land and Water Forum[75] to the Government in November 2015 noted that "resolution of iwi rights and interests in freshwater" was essential and the responsibility for agreeing on how to achieve this rested with the Crown and iwi.

[77] Mr Stirling notes that the MfE consultation document, *Next Steps for Freshwater* (February 2016), stated that the freshwater management system could "be improved to recognise and provide for iwi and hapū rights and interests", and that the Government was committed to addressing iwi and hapū rights and interests in freshwater. A paper on water allocation options by officials went to Cabinet in 2017. Further progress ceased in August 2017 in the lead up to the general election.

[78] Further, Mr Stirling says that from 2018 to 2023 there were further steps including an October 2018 MfE report entitled *Shared Interests in Freshwater A New Approach to the Crown/Māori relationship for Freshwater*. The Minister for Māori/Crown relations and the Minister for the Environment at that time stated in the introduction, "we know we cannot address water quality without a concurrent and substantive discussion with Māori".[76]

[79] In the meantime, the Waitangi Tribunal Wai 2358 Stage 2 *Freshwater* inquiry continued.[77] Kahui Wai Māori provided a report to the Minister in April 2019 advising the Government to, among other things, "recognise iwi and hapū rights" to water by "giving effect to iwi/hapū [having] retained customary dominion [ownership] of

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75 The Land and Water Forum was published by the Land and Water Trust, chaired by Alastair Bisley.

76 Ministry for the Environment and Māori Crown Relations Unit *Shared Interests in Freshwater: A New Approach to the Crown/Māori Relationship for Freshwater* (Ministry for the Environment, October 2018) at 4.

77 Waitangi Tribunal *Stage 2 Report* (Wai 2358, 2019), above n 31.

freshwater".[78] The report recommended an urgent process between iwi/hapū and the Crown to enable ownership issues to be discussed and implemented over a three-year period.

[80] Mr Stirling says a new phase of government resource management reform began later in 2020. This was broadly based on a report by retired Court of Appeal Judge, Tony Randerson. The report noted that the Government had yet to resolve Māori rights and interests in freshwater "although this is considered to be an important element in reform".

[81] Mr Ferguson for Te Pou Taio/Te Whakakitenga o Waikato (together referred to as Te Pou Taio/Waikato), outlines in detail the more recent steps relating to the reform of the RMA. He notes that at various points after 2012, progress was made in relation to some matters within the suite of elements that related to Māori rights and interests. These included the development and inclusion within the NPS-FM 2020 of Te Mana o Te Wai as a fundamental concept with principles, a hierarchy of obligations and an overarching objective and policy direction to be given effect to by local authorities. Protection of the health and well-being of the water was first in the hierarchy. It also included an implementation direction requiring local authorities to actively involve tangata whenua in freshwater management and decision-making processes, and an implementation direction requiring local authorities to identify and provide for Māori freshwater values.

[82] Mr Ferguson also points to the previous government's development and enactment of the Natural and Built Environment Act 2023 (NBEA) which replaced (until it was repealed) the RMA, and was to become operative on a staged basis through a transitional period. The NBEA included an overarching purpose of upholding te Oranga o te Taiao.[79] It also included an obligation for all persons

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78 Kahui Wai Māori – the Māori Freshwater Forum are a group established by the Ministry for the Environment in 2018 for the purposes of facilitating engagement between Māori and the Crown on freshwater reform, amongst other things.

79 Natural and Built Environment Act 2023, s 3, the purpose section, defines Oranga o te Taiao as meaning:
(a) the health of the natural environment; and
(b) the relationship between the health of the natural environment and its capacity to sustain life; and

exercising powers and performing functions and duties under the Act to give effect to the principles of te Tiriti.[80] Various outcomes were required to be achieved at a national and regional level related to the mana and mauri of air, water and soil.[81] The NBEA provided for the relationship of iwi and hapū with, and their exercise of rights and obligations under tikanga in respect of, their ancestral lands, water sites, wāhi tapu, wāhi tūpuna and other taonga.[82] It also provided for the establishment of the National Māori Entity to provide independent monitoring of the cumulative effect of decisions made by persons exercising powers and performing functions and duties in giving effect the principles of te Tiriti o Waitangi under the Act.[83] Further, it required the Minister to establish the Freshwater Working Group (FWG) to consider and make recommendations on matters relating to freshwater allocation and a process for engagement between Crown and iwi/hapū at regional and local levels on freshwater allocation.[84]

[83] The NBEA sought to address the issue of FIFS consenting by requiring regional planning committees to include allocation methods for freshwater within the NBEA plans which must be based on the allocation principles of environmental sustainability, efficiency and equity. The legislation referred to the preservation of "any" Māori rights and interests in freshwater, consistent with the assurances made in the *MOM* proceeding, but did not create or transfer any proprietary right or interest in freshwater or geothermal assets.[85]

[84] Mr Ferguson acknowledges that these initiatives did not resolve the issue of Māori rights and interests in relation to matters concerning the proprietary interests in allocation, but says they were "a step forward at least". They also, Mr Ferguson

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(c) the relationship between the health of the natural environment and the health and well-being of people and communities; and
(d) the interconnectedness of all parts of the environment; and
(e) the relationship between iwi and hapū and te Taiao that is based on whakapapa.

80 Section 5.
81 Section 6(1)(a)(i).
82 Section 6(12).
83 Sections 66–67.
84 Sections 96–97.
85 Section 750(1)(a). This refers to the preservation of "any rights or interests in freshwater of geothermal resources …consistent with assurances recorded" in the *MOM* (SC), above n 2, at [145]. That paragraph is set out at [103] below. Section 750(2) states that the Act does not create of extinguish relevant rights or interests.

submits, expressly acknowledged the ongoing obligation on the Crown in respect of the Crown Litigation Assurances.

[85] Mr Ferguson notes that the current government has announced a review of the NPS-FM 2020, has suspended work giving effect to that NPS and has prevented consent authorities from having regard to the Te Mana o Te Wai hierarchy obligations (contained in the NPS-FM 2020) in considering resource consent applications.[86] The Resource Management Act (National and Built Environment and Spatial Planning Repeal and Interim Fast Track Consenting) Act 2023 repealed the NBEA and reinstated the RMA.

Recent developments

[86] Mr Stirling further outlines steps taken by the present Government in relation to the proposed resource management reform leading to the March 2025 expert advisory group,[87] called "Blueprint for Resource Management Reform" (the Blueprint). The Blueprint noted that the rights and interests of Māori "go well beyond what are recognised and provided for in Treaty settlements".[88] In relation to water allocation, the Blueprint referred to the Crown having acknowledged Māori rights and interests in water since 2003/2004.[89] In March 2025, the MfE produced a Regulatory Impact Statement on the current Government's proposals (based on the Blueprint) to replace the RMA.[90] It recommended that different allocation approaches should be introduced in the primary legislation while leaving secondary legislation to "either enable or require" the allocation approaches to be used.[91] This was said to provide a "managed approach to transition, enabling progress with Māori on addressing rights and interests".[92] It recommended a "staged approach for allocation

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86 Resource Management (Freshwater and Other Matters) Amendment Act 2024, ss 21 and 23.

87 Comprising of Janette Campbell, Mark Chrisp, Kevin Counsell, Gillian Crowcroft, Christine Jones and Rukumoana Schaafhausen.

88 Report from the Expert Advisory Group on Resource Management Reform *Blueprint for Resource Management Reform: A Better Planning and Resource Management System* (Ministry for the Environment, March 2025) at 36.

89 At 53.

90 Ministry for the Environment *Regulatory Impact Statement: Replacing the Resource Management Act 1991* (12 March 2025).

91 At 13.

92 At 13.

within limits and links with Crown commitments on Māori freshwater and interest[s]".[93]

[87] On 9 December 2025, following the hearing on this matter, two Bills were introduced into the House which, if passed, would replace the RMA. Public submissions have been called for on the Planning Bill and the Natural Environment Bill which will be considered by the Environment Committee.[94]

[88] To return to the focus of this proceeding, I next set out the details of the declarations and directions sought.

The declarations and directions sought

[89] The first and second applicants,[95] seek that the Court make declarations and directions as follows:[96]

> 32.1 to make declarations:
>
> (a) that the Crown is in breach of the Crown litigation assurances;
>
> (b) that the Crown is acting contrary to tikanga as law, as the Crown litigation assurances engaged the principle of takahi mana (your word is your bond), requiring utu (a timely restorative process) in order to achieve ea (balance where tikanga water rights and Tiriti water rights are appropriately recognised and protected);
>
> (c) that the Crown is in breach of Article I of te Tiriti, as its kawanatanga role/responsibilities do not permit it to allow the prejudice to Māori that is intensifying through Crown inaction; and
>
> (d) that the Crown is in breach of Article II of te Tiriti by not timely recognising and protecting the Māori water rights that exist; and

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93 At 13.

94 Planning Bill 2025 (235-1) and Natural Environment Bill 2025 (234-1).

95 The statement of claim (application for directions) dated 26 June 2025 states that the first and second applicants sue on behalf of themselves, the rohe and Māori groups of whom they are representative of, and "other persons entitled to protection under [Art 2 of te Tiriti/the Treaty]". The representative rohe are attached to the statement of claim as Schedule 1 and is reproduced at the end of this judgment as Attachment 1.

96 In relation to the reference to "takahi mana" in cl 32.1.b) of the claim, the statement of claim defines takahi mana as "your word is your bond". In their joint affidavit, Professor Margaret Mutu and Dr Robert Pouwhare additionally define takahe mana as, literally "to trample or violate power, authority, prestige or status". They say that it refers to acts which disrespect or undermine the mana of an individual, group or institution, damaging relationships and breaching responsibilities owed within tikanga.

32.2 to make directions that:

(a) within 21 days from the delivery of the Court's decision the Crown is to prepare a scheme of safeguards giving reasonable assurance that water take and discharge rights will not be allocated in such a way as to prejudice Māori water rights;

(b) the scheme is to be submitted to the applicants for agreement or comment as to whether it adequately gives effect to the intention of the Court as stated in its decision, with such agreement or comment to be given by the applicants within 21 days after receipt of the scheme;

(c) the scheme as finally proposed by the Crown and having regard to the applicants' agreement or comments is then to be filed in the Court and an early hearing will be arranged at which the question whether it should be approved will be considered; and

(d) leave is reserved to the parties to apply in writing for any incidental directions; and

32.3 to make a declaration that in the meantime the Crown ought not to permit the grant of new or renewed take and discharge rights in any catchment where the effect of granting such rights would mean that Māori who hold tikanga water rights and Tiriti water rights are unable to obtain the take or discharge rights necessary in order to exercise those rights.

[90] The applicants say the declarations and directions are modelled on those made by the Court of Appeal in the *SOE* case.[97]

[91] The NZMC says its submissions and pleadings are intended to complement those of the first and second applicants. While it seeks different relief to that of the first and second applicants, it says that does not undermine their claim. In its statement of claim dated 29 August 2025, NZMC's second cause of action seeks the following:[98]

A. A declaration that:

In 2012, the Crown acknowledged that Māori had rights and interests to water resources that were protected by the Treaty of Waitangi, and it undertook to give recognition to those rights and interests through one or more processes. The Crown has breached that undertaking in that those processes have all since concluded without any meaningful change with respect to the recognition and protection of the rights and interests of Māori in water resources.

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97 *SOE* case, above n 64, at 666.

98 This is the only cause of action relevant to this proceeding. In the joinder judgment, above n 7, NZMC's wide ranging first cause of action was stayed, at [17] and [19(d)]. Only its second cause of action is heard in this proceeding.

[92] Te Rūnanga o Ngāi Tahu (TRoNT) was also granted leave by consent to join the proceeding as an interested party.[99] It represents Ngāi Tahu and supports the first and second applicants' position in relation to their first declaration (cl 32.1, the assurances and breach) but not in relation to the cl 32.2 directions. Its takiwā (the iwi's tribal area) covers much of Te Waipounamu (the South Island) and it has been involved in a significant claim seeking declarations as to its rights relating to freshwater there. That was heard in the High Court at Christchurch over eight weeks in 2025 and a decision is awaited.

[93] TRoNT says it has spent five years litigating the issue at considerable "time, effort and expense to the tribe". In this proceeding, it seeks to ensure that Ngāi Tahu rights, which have been recognised in a Treaty settlement and legislation,[100] are not affected by any declarations. Therefore, they seek recognition of their rights and claims in relation to the water in any declarations issued by this Court.

[94] Te Pou Taiao[101]/Waikato were also joined as interested parties on conditions.[102] They support the first and second applicants' first declaration but support Ngāi Tahu's position in relation to the cl 32.2 directions. Te Pou Taiao/Waikato also seek to be part of any negotiations and to be heard on further steps which might eventuate if the directions are made. Mr Ferguson notes that while his clients were not a party to the *MOM* proceedings, their interests were actively represented in the proceeding which had been advanced on behalf of and for the benefit of the hapū, including Waikato hapū, with interests in the Waikato River and its waters.[103] Mr Ferguson says that the Crown knew that those parties were reasonably relying on and expecting the fulfilment of the Crown assurances. He submits that they should not be dismissed as a "static,

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99 *Smiler & Ors v Attorney-General* HC Wellington CIV-2025-485-418, 18 September 2025 (Minute of Isac J). Later, on 16 October 2025, TRoNT was granted leave to file an affidavit of Professor Te Marie Tau in *Smiler and Ors v Attorney-General* [2025] NZHC 3090 [evidence judgment].

100 See the Ngāi Tahu Claims Settlement Act 1998.

101 Te Pou Taiao has engaged with the Crown on water interests and rights, originally under the Freshwater Iwi Leaders Group which was established in 2007 in response the Labour Government's sustainable programme of action.

102 Joinder judgment, above n 7, at [8] and [20(a)].

103 Referring to *MOM* (SC), above n 2, at [2]. The Te Pou Taiao/Waikato submissions also summarised the Te Pou Taiao (the environmental branch of the National Iwi Chairs Forum) engagement. It was established in 2005 and comprises the chairpersons of about 70 iwi across Aotearoa. It operates as a platform for sharing knowledge and information between iwi and it convenes quarterly hui each year which are hosted at different marae.

temporal or mere political affirmation" as portrayed by the Crown, but rather that the Crown Litigation Assurances imported an expectation that active and effective progress would be made and a corresponding obligation on the Crown to make such progress.

[95] Te Pou Taiao/Waikato acknowledge and defer to the position of TRoNT that TRoNT's rights and interests in freshwater/wai Māori should be respected and reflected in the nature and scope of any declaration or directions made. In that respect, they say any directions should:

> (i) require the Crown to develop the scheme of safeguards in collaboration with the Applicants, Te Pou Taiao and Waikato, and Ngāi Tahu (subject to Ngāi Tahu's position regarding the extent to which any declarations should apply to their interests);
>
> (ii) ensure that the timing of the development of the scheme is realistic for meaningful collaboration (but accepting that, absent further assurances from the Crown, there is only a very limited opportunity to develop a scheme before the date the Government has signalled for the intended introduction of legislation following final policy decisions being made); and
>
> (iii) enable the active participation of Te Pou Taiao and Waikato, and Ngāi Tahu (subject to Ngāi Tahu's position regarding the extent to which any declarations should apply to their interests), in any further Court process and/or hearing in respect of the Crown's proposed scheme.

Submissions on the Crown Litigation Assurances

[96] To recap, the applicants say that the Crown Litigation Assurances were made by the then Deputy Prime Minister, Mr English, and the Attorney-General, Mr Finlayson, in their affidavits dated 7 November 2012.

[97] Mr Smith for the applicants submits that the promises by the Deputy Prime Minister were made not just to fend off litigation but to reassure Māori generally that their interests in water would be progressed.

[98] Further, Mr Smith points to passages in the *MOM* judgment as suggesting that the Supreme Court relied on the Crown assurances as general assurances to progress reform to benefit Māori. In particular, he refers to following comments by the Supreme Court in its judgment:

(a) That the Waitangi Tribunal has found in a number of reports concerning claims of Treaty breaches in relation to waters, that the claims are well founded and that Māori rights in relation to waters of significance, such as the Waikato River, are in the nature of ownership.[104] Māori rights are not limited to the exercise of kaitiakitanga, but include authority over the resources, recognised in the Treaty guarantee of rangatiratanga and the right to economic benefit from their use.

(b) That the waters are also valued for their spiritual and cultural dimensions, including that rivers and other water bodies could be living beings or ancestors. The waterways have whakapapa relationships for Māori. They each have their own mauri (lifeforce), taniwha (spirit guardians) and essential place in tribal identity.[105]

(c) That the Waitangi Tribunal has recognised that the customary rights exercised by Māori in 1840 must be adapted to meet modern circumstances and the need for resources to be shared with all New Zealanders.[106] How Treaty rights might be recognised in modern circumstances was to be the subject of Stage 2 of the *Freshwater* inquiry, which would inquire into whether such rights and interests were adequately recognised and provided for under existing legislation, and whether developing Crown policies were in breach of the Treaty.[107]

(d) That the Crown had accepted, in its submissions to the Waitangi Tribunal and in the course of the proceedings, that "some hapū will have interests in particular waters and their interests are protected by art 2 of the Treaty".[108] In addition, it was "open to discussing the possibility of Māori proprietary rights in water, short of full ownership". Such interests were however unascertained, including

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104 At [10].
105 At [10] citing the Waitangi Tribunal *Stage 1 Report* (Wai 2358, 2012), above n 35, at appendix VII.
106 At [11].
107 At [11].
108 At [101].

as to their nature and extent and how they might be given effect to in modern conditions "consistent" with the Treaty. In addition, modern use of water including hydroelectricity generating capacity "necessarily impacts upon what interests can reasonably be available to them by way of reparation for Treaty breach".[109]

(e) That the Crown in its negotiations acknowledges that Māori have interests and rights in relation to particular waters, but it has not been prepared to negotiate on economic benefits obtained from use of those waters such as royalties. It has been prepared to encourage and facilitate joint ventures in the generation of electricity, and to negotiate co-governance and co-management arrangements under which Māori have a substantial say in the control in particular rivers through Treaty settlements. In addition, the future of freshwater management (and the RMA) has been under active review pursuant to a process known as the *Fresh Start for Freshwater* which had included extensive consultation with Māori and parallel discussions between government Minsters and the ILG.[110]

[99] Mr Smith also submits that that the Crown had 35 years from the enactment of the RMA in which to meet its obligations to Māori in relation to freshwater as articulated in the Crown Litigation Assurances. This is based on the 35 year term of the resource consents and is said to give rise to a moral duty to resolve Māori rights and interests within that time frame.

[100] Mr Smith further submits that the honouring of the Crown Litigation Assurances was the quid pro quo for the $4.2 billion which the Crown received for the selling shares in the MOMs. The enforcement of the assurances therefore upholds justice and the rule of law.

[101] The Crown says that a fundamental flaw in the applicants' argument is that the then Deputy Prime Minister's assurances to the Court were not as general as suggested

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109 At [101].
110 At [103].

by the applicants, nor were they relied upon by the Supreme Court as general assurances. It says that the applicants' arguments separate the assurances from the issue of partial privatisation, which was in fact the focus of the English affidavit.

[102] The relevant affidavits of Mr English and Mr Finlayson, Dr Ward for the Crown submits, were sworn in the face of the *MOM* proceeding.[111] It was common knowledge that any final decisions would be for Cabinet. The Crown submits that the assurances were only about the effect of the MOM programme on the Government's reform process, noting that Mr English stated: [112]

> 77. The government is committed to recognising in appropriate ways Maori rights and interests in water and geothermal resources. The process of ascertaining the nature and extent of those rights and interests, and how best to recognise them today, is under way in a number of fora. This is not an overnight task: as I said earlier in this affidavit, it involves complex and multi-faceted issues that need to be discussed at both the national and local levels, and it will take some time to develop appropriate outcomes that are workable and sustainable, and that enjoy broad support.
>
> 78. Ministers have carefully considered the views of the Wai 2357/2358 claimants, the Waitangi Tribunal's interim report, and the views expressed in the course of the consultation processes that have been carried out in relation to the MOM programme generally, and the "shares plus" concept. Ministers have taken advice from officials, and tested that advice through consultation with Maori interests. Taking all of this into account, Ministers are firmly of the view that, however Maori rights and interests in water are defined, the sale of minority shareholdings in the MOM companies:
>
> 78.1 will not compromise the Crown's ability to recognise those rights and interests;
>
> 78.2 will not compromise the Crown's ability to respond to and [sic] findings and recommendations that the Waitangi Tribunal may make in relation to those rights and interests; and
>
> 78.3 will not affect in any way the Crown's commitment to provide redress in respect of past actions that are inconsistent with those rights and interests.

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111 Mr English swore two affidavits in the *MOM* proceedings. It is the first affidavit dated 7 November 2012 which is relied on by the applicants.

112 The references to Wai 2357/2358 are to the following two Waitangi Tribunal reports: *The Interim Report on the National Freshwater and Geothermal Resources Claim* (Wai 2357, 2012) which related to the privatisation of SOEs; and *The Stage 1 Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012). Stage 1 of Wai 2358 was published in August 2012 and Stage 2 was published in August 2019.

[103] Dr Ward submits that it is not possible to extract a specific obligation to reform part of a statutory regime, specifically the FIFS allocation model, from Mr English's statements in his affidavit nor as they were referred to by the Court. Dr Ward notes that the relevant statements were referred to by the Supreme Court as follows:[113]

> [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". 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, 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." 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).
>
> (footnotes omitted)

[104] Dr Ward notes that it is clear from the affidavits of Mr English and Mr Finlayson that the Government was still in the process of identification of the rights

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113 *MOM* (SC), above n 2.

and interests of particular iwi and hapū in water and geothermal resources. However, he says that no crystalised obligations are apparent from the affidavits nor was the Supreme Court relying on any generalised assurances in that respect.

[105] Dr Ward notes that the assurances by the Crown were part of a range of relevant considerations that the Supreme Court reviewed in the course of its determination as to whether or not there would be a "material impairment" if the MOM proposal was implemented. This required the Supreme Court to assess the difference between the ability of the Crown to act in a particular way if the proposed action did not occur and its likely post-action capacity.[114]

Legal principles

Tikanga and the Treaty

[106] Drawing on case law and in particular the Law Commission's report, *He Poutama,*[115] the Court of Appeal in *R v R* recently reiterated the importance of tikanga,[116] noting the Supreme Court had recognised it as the first law of Aotearoa New Zealand.[117] *He Poutama* sets out a number of considerations in relation to the application of tikanga and the common law which were summarised by the Court of Appeal as follows:

(a) The common law cannot give effect to tikanga where to do so would be contrary to statute or to "fundamental principles and policies of the law".[118]

(b) Context is all important. Tikanga must be considered "where it is relevant to the circumstances of the case". The evolution of the common law "is able to assess the compatibility of tikanga and common law principles".[119]

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114 *MOM* (SC), above n 2, at [89]–[90].
115 Law Commission *He Poutama* (NZLC SP24, 2023) [*He Poutama*].
116 *R v R* [2025] NZCA 470, [2025] 3 NZLR 336.
117 At [45].
118 At [58] referring to *He Poutama,* above n 115, at 223.
119 At [47].

(c) Tikanga is multifaceted. It involves interconnected principles, and two or more tikanga principles may be relevant to an issue.[120]

(d) Tikanga informs processes as well as outcomes.[121] The manner in which disputes about tikanga are resolved needs to be in accordance with tikanga, and not all Māori view the judicial process as tikanga-consistent.[122]

(e) Judges must increasingly engage with tikanga, but they have neither the mandate nor the expertise to develop or authoritatively declare the content of tikanga.[123] There are limits on the way tikanga can engage with court decisions, legislation or "fundamental principles and polices of the law".[124]

[107] The Crown is not bound to follow tikanga in and of itself.[125] But that does not mean that the Crown is not *subject* to tikanga. It can be subject to tikanga, for instance, where a statute requires it or where the Crown has, by its clear conduct, generated a legitimate expectation it will follow a tikanga process in making a statutory decision.[126]

[108] Tikanga "does not have unfettered free reign in terms of determining the outcomes, … its relevance needs to be [confined] carefully in the context of each individual case and of course each individual area of law in which [its relevance is] being asserted".[127]

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120 At [50].
121 At [55].
122 At [55], referring to *Ngāti Whātua Ōrākei Trust v Attorney-General* (No 4) [2022] NZHC 843, [2022] 3 NZLR 601 at [362].
123 *R v R*, above n 116, at [57].
124 At [58] quoting from *He Poutama,* above n 115, at 223.
125 *Ngāti Whātua Ōrakei Trust v Attorney-General* (No 4), above n 122, at [570].
126 See, for example: *Hart v Director General of Conversation* [2023] NZHC 1011, [2023] 3 NZLR 42 where officials and Ministers made promises about process applying to a general discretionary power in a statute.
127 *R v R*, above n 116, at [67], quoting the oral submissions of Ms Coates.

[109] Glazebrook J and Winkelmann CJ observed in *Ellis v R (Continuance)* that "tikanga may play a role in developing the law[128] but, as noted by Boldt J in *Delamere v Minister of Immigration*, the Court's decision in *Ellis* does not mean that "clear and settled law must change".[129]

[110] The Law Commission noted that as yet, no case has found tikanga determinative of how a common law action should be formulated.[130] For instance, in *Sweeney v Prison Manger, Spring Hill Corrections Facility,* Lang J declined to recognise a novel tort of "unjustifiable damage to mana".[131] The proposed tort would have cut across (and was likely to be inconsistent with) common law principles that the courts had already developed in relation to the tort of misfeasance in public office.[132]

[111] However, Williams J in *Ellis* noted that common law is structurally more sensitive to context, than is legislation. Even where there appears to be no space for tikanga to apply, for instance if there are binding authorities for principles of common law that leave no room for tikanga to apply,[133] it may be necessary to ask whether space should be made by distinguishing leading authority on the point such as to justify adjustment of the relevant principle.[134] In determining what weight tikanga should carry, context is the best guide. Williams J said where a dispute takes place "entirely within Te Ao Māori" or all the disputants expect that tikanga should be the controlling law, then tikanga should be the controlling law which resolves the dispute, whether this be by the community or the courts. In disputes "taking place at the point of intersection between Te Ao Māori and the wider community", there must be

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128 In *Ellis*, the Supreme Court noted that "tikanga may play a role in developing the law", above n 16, per Glazebrook J at [117], Winkelmann CJ at [164]–[165] and Williams J at [264]–[265]. I note that the Supreme Court was not unanimous on the role of tikanga. Winkelmann CJ and Glazebrook and Williams JJ comprised the majority on this point. O'Regan and Arnold JJ agreed that tikanga was and is recognised in the development of the common law where it is relevant, but did not consider that *Ellis* was a suitable case for the court to make pronouncements of a general nature about the incorporation of tikanga into common law, at [279]–[281].

129 *Delamere v Minister of Immigration* [2025] NZHC 3008 at [15].

130 *He Poutama*, above n 115, at 8.65.

131 *Sweeney v Prison Manger, Spring Hill Corrections Facility* [2024] NZHC 1361 at [69]–[87].

132 At [72]. Similar considerations arise where the common law has already developed rules or principles that must be taken into account when considering the legal effect given to promises made on behalf of the Crown.

133 *Ellis,* above n 16, at [264].

134 At [267].

"careful weighing of common law and tikanga principles according to the facts and needs of the case".[135] In such cases "tikanga will be an ingredient in a broader analysis" but that analysis must encompass common law rules and principles.

[112] In addition, this Court is bound by authority that the Treaty is not a source for directly enforceable legal rights.[136] Treaty principles, however, are relevant to statutory interpretation and may have a direct influence in judicial review, particularly where the decision under review was made under legislation containing a Treaty clause. In *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* in relation to Treaty clauses, Ellen France J noted that:[137]

> . . . the move to more finely tuned subtle wording does not axiomatically give support to a narrow approach to the meaning of such clauses. Indeed, the contrary must be true given the constitutional significance of the Treaty to the modern New Zealand state. The courts will not easily read statutory language as excluding consideration of Treaty principles if a statute is silent on the question… an intention to constrain the ability of statutory decision-makers to respect Treaty principles should not be ascribed to Parliament unless that intention is made quite clear.

[113] I now turn to the relevant common law principles.

Interpretation of Crown assurances — Legitimate Expectation

[114] While the applicants do not explicitly plead legitimate expectation, that is the public law doctrine which has developed to respond to a claim that a Crown agent has given assurances that the Crown will act in a certain way, as is claimed here. Legitimate expectation is based on the administrative law principle that government and public authorities should act fairly and reasonably.[138] Insofar as it relates to assurances, the doctrine requires the applicant to establish an expectation arising from

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135 At [267] per Williams J.

136 *Te Heuheu Tūkino v Aotea District Maori Land Board* [1941] NZLR 590 (PC). Recently discussed in *Smith v Attorney-General* [2024] NZCA 692, [2025] NZLR 1 from [143]. At [147] the Court of Appeal said it had not been necessary to decide whether the Treaty was directly enforceable absent statutory recognition, because relevant legislation generally requires consideration of the Treaty and where absent, its "powerful position in our constitution" generally makes Treaty considerations relevant.

137 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [151]. Williams J agreed at [297].

138 *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [121].

a promise that a Crown actor will act in a certain way.[139] As the doctrine is based on fairness, the expectation must be reasonable.[140] A hope or an unsubstantiated belief will not found such an undertaking.[141]

[115] Where a legitimate expectation is claimed, the inquiry generally has three steps.[142]

[116] The first requires establishing the nature of any commitment made by the Crown actor. This is a question of fact determined against all of the surrounding circumstances. The representation being relied on must have been made in clear, unambiguous and unqualified terms.[143] A promise that is "ambiguous in nature" is unlikely to give rise to a legitimate expectation.[144] A settled commitment is required.[145] Evidence of an "open and constructive dialogue between parties…" without "considerably more" will not suffice.[146]

[117] The usual approach to interpretation of the meaning of a statement said to give rise to an undertaking is an objective task. The words, read in light of the relevant context, are central. For instance, in contract the aim is to ascertain the meaning which the contract would convey to a reasonable person with all the background knowledge reasonably available to the parties at the time the contract was formed.[147] The meaning of an assurance is assessed by asking how it could reasonably be understood by the person to whom it was communicated — an objective, not a subjective standard.[148] Similarly, whether a representation founds an estoppel in private law is

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139 At [123]. Legitimate expectations can also arise from the adoption of a settled practice or policy which an applicant can reasonably expect to continue to apply to them. This particular type of legitimate expectation is not relevant to this proceeding.

140 *Radhi v The District Court at Manukau* [2015] NZHC 3347 at [51]; and *Talleys Fisheries Ltd v Cullen & Ors* HC Wellington CP 287-00, 31 January 2002 at 47–48.

141 *Radhi*, above n 140, at [51] citing *Te Heu Heu v Attorney General* [1999] 1 NZLR 98 at 127.

142 *Comptroller of Customs*, above n 138, at [125].

143 *Talleys Fisheries Ltd,* above n 140, at 48.

144 *Comptroller of Customs*, above n 138, at [125]. Legitimate expectation is distinguished from a "mere hope" that a particular outcome will be gained, at [124].

145 At [125].

146 *Green v Racing Integrity Unit Ltd* [2014] NZAR 623; [2014] NZCA 133, at [32].

147 For instance in relation to contractual interpretation see: *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

148 See the authorities referred to in De Smith's *Judicial Review* (9th ed, Sweet & Maxwell, London, 2023) at 7-022; and *New Zealand Federation of Commercial Fishermen Inc v Minister of Fisheries* HC Wellington CP237/95, 24 April 1997 at 130 referring to the passage: "Sir Tipene's subjective beliefs are not, in themselves, a basis for legitimate expectations".

assessed objectively (by the standard of the reasonable person in the position of the representee), not on the basis of subjective belief.[149] The ramifications of public law promises are often more significant than undertakings or promises enforceable in private law. This underscores the need for certainty and specificity so that the assurer knows what they must do and the person relying on the assurance is able to enforce the promise.[150]

[118] The second step is to determine whether the applicant relied on the promise or practice and whether that reliance is legitimate. This involves consideration of whether the applicant's reliance on the assurance was reasonable in the context.[151] There must exist no good reason for the Crown to step away from that promise or undertaking.[152]

[119] The final step is for the court to decide what, if any, remedy should be provided if a legitimate expectation is found.

The principle of non-interference

[120] The principle of non-interference in parliamentary proceedings was described by the Court of Appeal in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* as follows:[153]

> There is an established principle of non-interference by the Courts in parliamentary proceedings. Its exact scope and qualifications are open to

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149 *Volbar Restaurants Ltd v St Lukes Square Ltd* HC Auckland CP1051/90, 25 February 1992 at 25. NZMC submit an estoppel arises which is considered below. The Court of Appeal in *Comptroller of Customs,* above n 138, observed at [156] that given the doctrine of legitimate expectation "it may be seriously doubted whether there is any room for the private law doctrine of estoppel in a public law setting".

150 Relating to private law, in *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 65, [2021] 1 NZLR 696, the Supreme Court affirmed the objective approach to contract interpretation at [43] (per Winkelmann CJ and Ellen France J). Evidence of a party's subjective intention or belief as to the meaning of an agreement that was not communicated to the other party prior to contract formation is inadmissible, this material being irrelevant to the objective task of interpretation, at [68].

151 *Comptroller of Customs*, above n 138, at [126].

152 *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Incorporated v The Attorney-General of New Zealand (on behalf of the Crown)* [2020] NZHC 1882 at [695].

153 *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) [*Sealords*] at 307-308. Since then, the courts have reiterated the principle of non-interference. For instance, in *Te Rūnanga o Ngāti Whātua v Attorney-General* [2024] NZHC 2271, [2024] 3 NZLR 218 at [36]; and *New Zealand Educational Institute Te Riu Roa Incorporated v Minister of Education* [2025] NZHC 2964 at [31].

> debate, as is its exact basis. Sometimes it is put as a matter of jurisdiction, but more often it has been seen as a rule of practice; see as to this principle and its basis *Bilston Corporation v Wolverhampton Corporation* [1942] Ch 391, Simonds J; *Redijfusion (Hong Kong) Ltd v Attorney-General of Hong Kong* [1970] AC 1136, a Privy Council case relating to a non-representative colonial legislature and of authority limited by the dissent of Lord Morris of Borth-y-Gest; *Pickin v British Railways Board* [1974] AC 765 in the House of Lords; *Eastgate v Rozzoli* (1990) 20 NSWLR 188, which includes a valuable review of authorities and discussion by Kirby P; and *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323, a recent decision of Robertson J that the Government could not commit Parliament not to legislate. Those are but some of the numerous authorities on the principle. However it be precisely formulated and whatever its limits, we cannot doubt that it applies so as to require the Courts to refrain from prohibiting a Minister from introducing a Bill into Parliament.

[121] The fundamental reasons for the principle of non-interference are the separation of powers and parliamentary sovereignty. It operates to ensure that the courts do not allow their processes to be used so as to inhibit the free functioning of Parliament.[154] The courts' reluctance to interfere extends to both the introduction of legislation by Ministers and the preceding formulation of government policy.[155]

[122] However, the Supreme Court in *Ngāti Whātua Ōrākei Trust v Attorney-General* noted that there remain questions about the exact scope, qualifications and basis of the principle of non-interference, but that:[156]

> [46] It would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice to take the advice leading up to that decision out of the reach of supervision by the courts. That would be to ignore the function of the courts to make declarations as to rights. In that respect, it is relevant that the observations in *Milroy* were made in the context of acceptance by counsel for the appellants that the officials' advice did not affect the rights of any person or have the potential to do so.

[123] Elias CJ in *Ngāti Whātua* noted that the principle of non-interference did not mean that the courts could not consider disputes touching on the subject matter of a

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154 Joseph, above n 6, at 16.4.2.

155 *Milroy v Attorney-General* [2005] NZAR 562 (CA), at [15]–[18]; *Skills Active Aotearoa Limited v Minister of Education* [2019] NZHC 2800 at [55], quoting from the Canadian Supreme Court decision in *Mikisew Cree First Nation v Canada* [2018] SCC 40, [2018] 2 SCR 765 at [2], Krakatsani SJ writing on behalf of herself, Wagner CJ and Gaskin J.

156 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [46]–[47] (per William Young, O'Regan and Arnold JJ).

Bill.[157] Nevertheless, the proviso remained that the court could not preclude parliamentary consideration in making determinations as to rights.[158]

[124] More recently, in this Court, Cooke J in *Hata v Attorney-General (No 2)* summarised the non-interference principle by reference to the language of "political questions" and "legal questions". Political questions are those which concern the legislative or pre-legislative process and are for Parliament to decide. Questions of law, on the other hand, are for the court to decide.[159] He described the divide as follows:

> [32] As the majority said in *Ngāti Whātua* the exact boundaries of the non-interference principle are evolving and are becoming more clearly identified. The developments referred to above can be thought of as part of the evolution of constitutional maturity. These developments suggest that the real dividing line is identified by distinguishing between legal questions that are for the court to decide, and political questions that are for parliament. It is of constitutional importance that there is right of access to the court so that parties may obtain determinations of their legal rights. This is a fundamental right at common law which is reflected in the New Zealand Bill of Rights Act 1990. The court should not, however, exercise this jurisdiction in a way that interferes with the role of parliament. What parliament considers, and does, is entirely a matter for it. This approach accords with the judgment of Elias CJ in *Ngāti Whātua*, and with the constitutional principles recognised in *Fitzgerald v Muldoon*.
>
> (footnotes omitted)

[125] The merits of legislation are for Parliament, and whether the legislation is "wise" or there is a sufficient "mandate" for such legislation "are political questions for political judgment. The Court is not concerned with such questions".[160] It is also well established that Parliament cannot bind itself to enact legislation whether by contract or undertaking.[161]

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157 At [112] (per Elias CJ).
158 At [115] (per Elias CJ).
159 *Hata v Attorney-General (No 2)* [2023] NZHC 2919 at [32].
160 *Sealords*, above n 153, at 309.
161 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 at [95].

Declarations

[126] A declaration is a "formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs".[162] Declarations are available under the inherent jurisdiction of the High Court.[163] At common law declarations may be granted as to rights and duties. The Declaratory Judgments Act 1908 provides a 'standalone' jurisdiction to make binding declarations of right which may be invoked even if there is no *lis* (a lawsuit),[164] or if the case only involves hypothetical issues.[165]

[127] In *Timaru District Council v Minister of Local Government* Mallon J considered an application for declarations in relation to the reform of water infrastructure assets (the Three Waters reforms). Mallon J summarised the declaratory jurisdiction, noting:

(a) It is the court's role to say what the common law fundamental values and principles are. They may be the subject of the declaratory judgment regime but "always subject to the court's discretion".[166]

(b) Even where the declarations sought relate to a core principle of law, declaratory relief must accurately reflect that principle.[167]

(c) Declaratory relief will not be granted where the declaration sought is "at a level of abstraction devoid of utility".[168]

[128] In that case, three of the District Councils who owned or managed the relevant assets sought declarations: that local government is an important and longstanding component of the democratic governance of New Zealand; specifying important and

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162 Itzhak Zamir and Jeremy Woolf *Zaimr & Woolf The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at 1-02.

163 *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [63]–[65]; and observation by Elias CJ in the Supreme Court in *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [118].

164 Stephen Todd and others *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at 1535.

165 *Timaru District Council v Minister of Local Government* [2023] NZHC 244, [2023] 3 NZLR 572, at [90].

166 At [107].

167 At [120].

168 At [120].

longstanding principles and features of the democratic governance of New Zealand at local community level; and the Council owners' rights in the assets.[169]

[129] In refusing to exercise her discretion to grant the declarations sought, Mallon J noted that the proposed declaration to the effect that democratic decision making in local government is "an important and long-standing component of the democratic government of New Zealand" was not an appropriate declaration for her to make. Not because the statement was not a core principle of our law, but because the declaration did not accurately reflect that principle, and the level of abstraction of the declaration made it devoid of utility.[170] It did not reveal or define what the sphere of governance is or can be.[171] In addition, a further declaration sought specifying principles and features of local government, was expressed in terms which were too general. While it reflected historical and present features of government, it was expressed in overly broad terms without reference to the legislation under which the principles functioned. Her Honour also concluded that declaratory relief in relation to statements of "features" and "principles" did not have utility.[172] In addition, the proposed declarations were drafted in "an attempt to avoid the principle of non-interference with the legislative process … [while] … they largely [set out] uncontroversial historic features of local government".[173] In relation to the declarations sought regarding various property rights, Mallon J said they were too general to have any utility. She noted that the councils' rights of ownership sat within a complex legislative and regulatory framework that was not covered by the declarations as sought.[174]

[130] Mallon J also noted that the declarations had been drafted in an attempt to avoid infringing the principle of non-interference with the legislative process when their real point was to use the Court process to influence the legislative process that was underway. This was contrary to the Court's proper role.[175]

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169 At [81].
170 At [120].
171 At [120].
172 At [123].
173 At [123].
174 At [142].
175 *Ngāti Whātua Ōrākei Trust,* above n 156, at [36].

Analysis

The Content of the Crown assurances

[131] The starting point is the claim as pleaded. That defines the Crown Litigation Assurances upon which the applicants rely by reference to excerpts from Mr English's affidavit. The main points which can be taken from the excerpts, insofar as relevant here, are that:

(a) there have been ongoing claims by Māori to rights and interests in water;

(b) the Crown acknowledges that Māori have rights and interests in freshwater and geothermal resources but that no-one owns water;

(c) there had been ongoing discussions between the Crown and Māori representatives on freshwater regulation and Māori rights and interests since 2009; and

(d) that the MOM programme would not affect the continuing process of ascertaining and recognising Māori rights and interests in the resources, and further that the sale of minority shareholdings in SOEs would not compromise the willingness of the Crown to provide appropriate forms of rights recognition or redress.

[132] The pleading refers to the "Conclusions" section in the English affidavit, including that the regulatory reform task "involves complex and multi-faceted issues that need to be discussed at both the national and local levels, and it will take some time to develop appropriate outcomes that are workable and sustainable, and that enjoy broad support". The pleading reproduces Mr English's summary as follows:

> 79. In summary, the government's ability and commitment to provide appropriate recognition for Māori rights and interests in water and geothermal resources, and to develop mechanisms for redress for breaches of those rights and interests, will not be affected by the MOM programme. That commitment continues unchanged alongside the government's commitment to the country to achieve the benefits of the MOM programme.

[133] From there the applicants plead that the Supreme Court characterised the evidence of the Deputy Prime Minister and the Attorney General as giving "assurances". Further, they plead that the Supreme Court had noted the following: an acknowledgement by the Crown that Māori have rights and interests in water and geothermal resources; the Crown's position that identifying and giving effect to those rights and interests must involve mechanisms that relate to ongoing use of those resources; that progression of those issues was not an empty promise; and that from the policy initiatives and the litigation assurances the message had been accepted that there was "a need for action" on proprietary claims. The statement of claim continues, stating that the Supreme Court therefore relied on the assurances to reject the NZMC's case and that the Crown received the benefit of a judgment in its favour because the Supreme Court concluded that the MOM programme would not materially impair the Crown's ability to take the reasonable action it "was obligated to take to comply with Tiriti principles".

[134] There is little contest about the statements of the English affidavit as pleaded. The Crown has acknowledged Māori rights and interests in water but not of an ownership nature. As the Supreme Court recorded, the Crown was open to the possibility of discussing Māori proprietary rights in water short of full ownership, but those rights are unascertained including as to their nature and extent.[176] The Court noted the work being done on the reforms carried out by the Government as outlined by Mr English and Mr Finlayson.

[135] Reading the Supreme Court judgment as a whole it is clear that the Court took the Crown assurances as being limited to a commitment by the Crown that the privatisation and sale of the minority shareholdings would not affect the continuing reform of the regulation of freshwater, including the process of ascertaining and recognising Māori rights and interests. Nor would the reforms affect Treaty claim redress.

[136] Following the passages particularly identified by Mr Smith set out above at [98](a)-(e)], the Court noted that although the Crown's general negotiating stance was

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[176] *MOM* (SC), above n 2, at [101].

against recognition of ownership interests or the provision of commercial redress in relation to existing generating capacity and its future use, "the Crown has undertaken that it will not rely on its privatisation of the generating companies so as to diminish any claimed rights".[177] The Court then set out parts of the letter dated 21 February 2012 from government Ministers to the Waitangi Tribunal confirming that the sale of the shares was "not intended to prejudice the rights of either iwi or Māori or the Crown in the natural resources used by those mixed ownership companies".[178] In that letter, the Ministers confirmed that as the majority shareholder in the MOM companies, the Crown would continue to exercise its Treaty obligations to iwi.[179]

[137] The Supreme Court went on to say that the Deputy Prime Minister and Attorney-General had given additional assurances in their affidavits.[180] The assurances of Mr English included "expressions of confidence" that the MOM programme would not comprise the Government's "work to achieve recognition of and redress for Māori rights and interests in water and geothermal resources".[181] In addition, the programme would not have any "chilling effect" on the willingness of the Crown to provide appropriate rights, recognition and redress. This was confirmed by the Attorney-General.[182]

[138] Therefore, on their face the Crown assurances as given and as taken by the Supreme Court were not general assurances but rather were limited to assurances about the effect of the MOM programme on the ongoing work by the Government on the RMA reforms, which included the recognition of Māori rights and interests in water and that the programme would not affect ongoing Treaty redress.[183]

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177 At [104].
178 At [104].
179 At [104].
180 At [105].
181 At [105].
182 At [105].
183 The Tribunal was cognisant that the Crown assurances were limited, summarising them as assuring that "that nothing which arises from the sale of shares will be allowed to prevent it from providing appropriate rights recognition afterwards", Waitangi Tribunal *Stage 1 Report* (Wai 2358, 2012), above n 35, at 235-237.

[139] In addition, the relinquishment of perpetual rights to water use, and the 35 year maximum term of the consents, flowed from the settlement reached following the *SOE* decision on the transfer of Crown assets to SOEs.[184] That case had considered the Mighty River hydroelectricity development rights and water rights and their transfer to the State. One term of the transfer was that the SOE would apply for water consents limited to a maximum term of 35 years.[185] The primary permits for Mighty River were for a term of 35 years expiring on 6 May 2041 and allowing a review of conditions on the occurrence of certain events.[186] The Supreme Court references to the 35 year term of consents were to a part of the existing regulatory scheme, which was relevant to the consideration of whether the MOM programme gave rise to a material impairment. The reasonableness of the Crown's action needed to be assessed by the Supreme Court against the RMA as it was enacted. The relevance of the 35 year term of the permits was that it gave the opportunity for review of the relevant consents when they came up for renewal. In addition, the terms of water permits held by Mighty River allowed for review should they be affected by a Treaty settlement.[187] There is therefore no basis for the applicants' argument that the Crown had 35 years in which to develop a scheme of the nature contemplated by the applicants for the regulation and recognition of rights and interests in fresh water.

[140] The assurances as given and as taken by the Supreme Court were limited to the effect of the MOM programme on the government freshwater reform process including recognition of the rights and interests of Māori and ability of the Crown to provide Treaty settlement redress. They do not, amount to unambiguous and clear assurances for which they contend. Nor do they give rise to an enforceable legitimate expectation.

The tikanga and Treaty context

Tikanga

[141] Ms Coates for NZMC submits that the rights and interests of Māori in freshwater and waterbodies have been well established. She notes that the relationship

184 *SOE* case, above n 64.
185 *MOM* (SC), above n 2, at [13].
186 At [14].
187 At [141].

between tikanga and water is not just contextual but central to the consideration of the assurances made by the Deputy Prime Minister. She refers to a 2017 report, *Ngā Wai o Te Māori Ngā Tikanga me Ngā Ture Roia* prepared for the NZMC.[188] That report considered the state's limited recognition of tikanga as it affected water, contrasting with the larger recognition of tikanga in the past. It considered that a larger recognition of tikanga was due, in terms of the existing legal doctrines and precedents of the common law states, including New Zealand.[189]

[142] In addition, Ms Sykes for the applicants emphasises, referring to the joint affidavit of Professor Mutu and Dr Pouwhare, that at tikanga the Crown assurances would be considered binding as there has been a "takahi mana", and that legal enforcement would enforce utu (restoration or redress) and achieve ea (settlement or resolution). The applicants say that the rights and interests for which recognition is sought are consistent with tikanga rights and interests, the pre-existing moral obligations of the Crown to protect Māori freshwater rights and interests, and with the art 2 Treaty guarantees to Māori which crystalised through the Crown assurances into justiciable legal promises. The applicants say the Crown has failed to address water allocation problems and water degradation, despite it having had more than enough time to do so.

[143] The applicants seek to convert the limited Crown assurances into a promise to materially improve the recognition and protection of water rights for the benefit of Māori. Such reforms require a systemic change to the water management system and the allocation of rights to water.

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188 Edward Taihākurei Durie and others *Ngā Wai o Te Māori Ngā Tikanga me Ngā Ture Roia* (The Waters of the Māori: Māori Law and State Law) (Paper prepared for the New Zealand Māori Council, 23 January 2017).

189 Durie and others, above n 188, at 12.

[144] As the Crown submits, tikanga and the Treaty are not directly enforceable against the Crown, and the Crown is not bound to follow tikanga.[190] The established authority in that regard binds this Court.[191]

[145] However, tikanga is plainly relevant here as the matters in contention are "at the point of intersection between Te Ao Māori and the wider community"[192] and because wai is central to te Ao Māori. However, while "tikanga will be an ingredient in a broader analysis",[193] that analysis must include consideration of the relevant common law principles.[194] The Crown assurances as given and taken were limited to the effect of the MOM programme on the freshwater reforms. Viewing the assurances through a tikanga lens, neither "takahi mana" nor "tatou pounamu" operate to change the meaning of the assurances as outlined above.

[146] In addition, the declarations and directions sought are not based on "clear and unambiguous" promises to reform the regulation of freshwater. Therefore, even if it had been pleaded, the assurances do not meet the requirements of the doctrine of legitimate expectation. Nor do the claims relate to any particular public decision, involve the interpretation of a statute, or the determination of a property rights claim by specific iwi or hapū whose specific rights and interests may be governed by

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190 *Ngāti Whātua Ōrakei Trust*, above n 122, at [570], [576] and [582]. *Sweeney,* above n 131, at [85]; *Hata v Attorney-General* [2025] NZHC 519; [2025] NZAR 241, at [156] (on appeal at present).

191 In *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Incorporated*, above n 152, at [697], Fitzgerald J commented that "difficult issues … arise as to whether the claim ultimately involves direct enforcements in the courts of the principles of the Treaty, which as the law presently stands, is not possible". That case included a claim of legitimate expectation based on discussions and negotiations with the Crown for redress for Ngāti Te Ata's historical Treaty grievances. The High Court rejected that claim, confirmed on appeal in *Minhinnick v Attorney-General* [2025] NZCA 584 at [690] which was delivered two days after the hearing of this case. The Court of Appeal noted that there was no reason why a legitimate expectation could not be established in the context of Treaty settlement negotiations given a clear promise to act in a certain way, at [683]. However at [683], it referred to the observations of Arnold J in *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62; [2016] 1 NZLR 1056, that many decisions about the "nature, form and amount of redress" made in connection with Treaty settlements are "quintessentially the result of policy, political and fiscal considerations that are properly the domain of the executive rather than the courts".

192 *Ellis*, above n 16, at [267] (per Williams J).

193 At [267] (per Williams J).

194 At [256] per Williams J: "It is plain, at least to me, that these tikanga principles provide a very helpful perspective on the issues in this case. This is not because they provide any particular answer. Rather it is because the Māori legal tradition, whose values are so different from those of the common law, still echoes, in its own way, the underlying considerations which the common law takes into account".

tikanga-ā-iwi. Just as the deployment of tikanga generally to effect a general change in Crown policy or practice without application to a particular decision will not ground a successful judicial review,[195] tikanga will not ground directions which seek to effect systemic changes to the management and allocation of freshwater.

[147] Tikanga values are aspirational in that they set a "top line", not a "bottom line" below which a penalty may be imposed.[196] Their application by the Court requires some context in the form of a particular public decision, interpretation of statute or application to specific facts.[197] Those are missing in this case.

The Treaty

[148] Mr Smith for the applicants also submits that the Crown assurances are legally enforceable as they are grounded in statute. He refers to s 9 of the SOE Act, the Treaty clause, which led the Court of Appeal in *SOE* to find that the decision to transfer land to SOEs was amenable to review.

[149] But this is not a judicial review case. In the absence of the applicants seeking a review of some decision or other act by the Government, the proceeding has no recognised justiciable basis. Dr Ward for the Crown points out that judgments such as in the *SOE* case (on which the applicants say that they have modelled their directions sought) and the *Broadcasting Assets* case were precipitated by and concerned with transfers of assets and the exercise by the Crown of powers which were subject to statutory Treaty clauses.

[150] The Court of Appeal in the *SOE* case noted that s 9 was a "firm declaration by Parliament that nothing in the Act shall permit the Crown to act inconsistently with the principles of the Treaty [and] must be held to mean what it says".[198] The Court further noted that the choice by Parliament of the expression "inconsistent with the principles of the Treaty of Waitangi" in s 9 was deliberate. It reflected a partnership and placed an onus on the Crown to make an informed decision by satisfying itself,

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195 *Delamere*, above n 129.
196 *SOE* case, above n 64, at 660.
197 At 660.
198 At 660.

before transferring the land to the SOEs, that known or foreseeable Māori claims do not require retention of certain land.[199] *SOE* was a judicial review case involving a specific Crown decision subject to s 9. Any analogy to this case fails as here there is no specific Crown decision pointed to nor is there a relevant statutory Treaty clause. Additionally, statements by the Court of Appeal in the *SOE* case to the effect that the parties to the Treaty owed each other obligations of good faith were later clarified by the Court of Appeal in *Paki v Attorney General*. The Court there noted that the *SOE* case did not stand for the proposition that the Treaty itself gave rise to enforceable fiduciary duties.[200]

[151] As the Crown submits, the context of the Treaty principles as asserted by the applicants is indirect and vague. Treaty analysis does not admit of only one outcome even where the Treaty is incorporated in a statute, is used to interpret a statute, or is a consideration relating to a reviewable decision. None of those situations arise here. The consistent approach of the courts has been that where the Treaty is engaged, the court must identify relevant Māori interests, other relevant interests, and undertake a thorough assessment of how all those factors should be weighed in a manner consistent with Treaty principles, in light of a relevant decision.[201] How the Treaty impacts a particular statutory decision or statutory scheme requires a focus on the circumstances of that particular statutory decision or scheme.

[152] The conversion of Mr English's statements into general assurances for reform would sidestep the Minister's obligation to carefully consider all the relevant circumstances, including economic and social conditions, as a part of the application of the Treaty's active protection principle. It would also bypass the parliamentary and legislative processes. The required careful assessment of relevant Māori and other interests, and proper assessment of how all those factors should be weighed in a manner consistent with Treaty principles (or tikanga), in a specific context would be inappropriately avoided.

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199 At 664.

200 *Paki* v *Attorney General* [2009] NZCA 584; [2011] 1 NZLR 125 at [103].

201 *Broadcasting Assets*, above n 43, at 517; *SOE* case, above n 64, at 664 (per Cooke P), 673, 680 and 683 (per Richardson J) and 703 (per Casey J).

[153] The evidence suggests that successive governments have continued to work on the freshwater reform processes, including by the passing of legislation. The applicants say that the Crown is not making sufficient progress and that some of the options taken may not be beneficial to Māori rights and interests. The directions sought by the first and second applicants require the Court to deliver a "scheme of safeguards" for water allocation that will not prejudice Māori water rights. That requires the development of policy under the supervision of the Court and would require the repeal of the RMA and the passing of new legislation.

[154] It is relevant that the Supreme Court in the *MOM* judgment was mindful that any general reform of the RMA and water allocation would require legislative reform,[202] noting as a matter of context that in 2012/13 the RMA "currently provides substantial recognition of Māori interests".[203]

[155] The comments of the Waitangi Tribunal on how reforms should be progressed also point to the fact that the process is a political, not a legal, process. The Tribunal noted the complexity of the task and need for political decisions. For instance, it referred to a sliding scale to determine what degree of priority should be accorded to Māori interests.[204]

[156] A note of caution was also sounded by TRoNT that this proceeding had the potential to undermine its claims to rangatiratanga over wai Māori in Te Waipounamu. The first cause of action in Ngāi Tahu's Te Waipounamu proceeding is advanced based on its rangatiratanga acknowledged in its Treaty Settlement and as a matter of tikanga and Crown assurances. The second cause of action pleads a novel claim alleging a relational duty of good faith owed by the Crown in relation to wai Māori in Ngāi Tahu's takiwā.[205] TRoNT says it also seeks declarations that the Crown ought to work in partnership with Ngāi Tahu to design and implement a freshwater scheme in the takiwā.

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202 *MOM* (SC), above n 2, at [142]
203 At [143].
204 Waitangi Tribunal *Stage 1 Report* (Wai 2358, 2012), above n 35, at 2.8.3(1).
205 It noted that the claim involved hearing evidence from numerous witnesses.

[157] Essentially, the directions sought by the first and second applicants seek to halt the reform process and redirect it under the supervision of this Court. The issues arising in that process involve not only Māori generally, who have a recognised special relationship with the Crown as Treaty partner, but other interested parties who hold multiple private interests, including through existing water permits. They also have a right to be heard. The interests in freshwater also require the input of whānau, hapū and iwi in relation to rights and interests in specific waterways. Different water bodies are regulated by local and regional authorities implementing the RMA related legislation and regulations. Additionally, they are regulated through national policies promulgated as secondary legislation, and local district plans promulgated through the local government processes tailored to local conditions. The reform process being undertaken involves the development of policy and requires the making of decisions which are political in nature. Systemic reform requires choices between competing policy options where reasonable minds may differ. As Elias CJ pointed out in *Proprietors of Wakatū v Attorney General*, the Crown "wears many hats and represents many interests" and owes obligations to all.[206] This Court is ill-equipped to deal with the multifaceted and complex matters inherent in the general systemic reforms required. The processes involved are political and underway in Parliament at present. It would be inappropriate for this Court to influence those processes even by way of declaration or directions.[207]

[158] To avoid the complication of the need for primary legislation, the applicants suggest that the Crown could issue a NPS on freshwater which directs local authorities to prioritise Māori interests in access to water. An NPS is made under the RMA, following a process involving public consultation. It is intended to provide national consistency for the management of water and, once approved, becomes legally binding. A regional authority must implement the NPS at a local level by giving "effect to" it in its regional plan and in its regional policy statement. Amendments to those documents involve a statutory process. This includes consultation, public notification and hearing of submissions before the amendments become operative. An NPS is issued by the executive, finalised after consultation by the Minister and

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206 *Proprietors of Wakatū v Attorney General* [2017] NZSC 17, [2017] 1 NZLR 423, at [379] (per Elias CJ).

207 See comments above by Mallon J at [126]–[129].

approved by Cabinet.[208] It is secondary legislation. The principle of non-interference applies equally to secondary legislation.

[159] In addition, Mr English could not make assurances about future legislative proposals which would be binding on subsequent governments or Parliaments. The decision concerning the content of legislation is a matter for Cabinet and must go through the parliamentary process. Members of the executive cannot restrict the legislative competence of Parliament and nor will an agreement which purports to bind what Parliament may consider be enforced.[209]

[160] Finally, tikanga and the Treaty principles will provide essential context as outlined above, but the law as it presently stands does not allow them to displace clear and settled principles of law.[210] The extrapolation of Crown assurances — limited to the effect of the MOM programme — into general Crown undertakings for systemic reform would require policy development and ultimately the passage of legislation. The declaration and directions sought would displace:

(a) The public law doctrine of legitimate expectation. While it is not argued that the assurances give rise to legitimate expectation for which the Court will grant relief, by implication the applicants seek the doctrine be expanded or avoided so as to generally allow the applicants to hold public actors to account for commitments they have made.

(b) The settled constitutional principle of non-interference. In this case the Court cannot create or enforce a legal obligation without intruding into significant policy and political decisions. These are the tasks of the legislature and require public and political debate. As recent decisions of this Court have emphasised, it is the substance and the way the Court responds that is important and dictates whether a challenge infringes

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208 This process was streamlined by amendments to the RMA in the Resource Management (Freshwater and Other Matters) Amendment Act 2024.

209 In *Rothmans Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 at 331, Robertson J noted his concern that a declaration sought which could be misinterpreted as an interference with the government's right to introduce and progress legislation which "would be to have the process of the Court abused".

210 *Hata v Attorney-General*, above n 190, at [101] citing *He Poutama*, above n 115, at [8.39(f)]. Referred to with approval by the Court of Appeal in *R v R*, above n 116, at [46].

> the principle of non-interference, rather than the way that it is pleaded.[211]

Review for constitutional compliance

[161] Mr Smith also refers to the Canadian Supreme Court decision in *Ontario (Attorney-General) v Restoule,*[212] in which the Court, under its constitutional jurisdiction, interpreted an historic treaty. The Court made directions requiring the executive to repair the breaches of that treaty, however it left it up to the executive branch to determine the best means of doing so. Mr Smith submits that the Canadian Court's approach is analogous to the approach the applicants are asking this Court to take.

[162] The Supreme Court of Canada noted that under the Canadian Constitution "it is very much the business of the courts to review exercises of Crown discretion for constitutional compliance",[213] and to order the Government to repair breaches of its constitutional obligations.[214] The Court concluded that an "augmentation clause" in the relevant treaty, contrary to the submissions of the Attorney-General, did not act as a limit or cap on the total collective annuity payable under the treaty.[215] The Canadian Supreme Court gave directions for the Crown to consider the provisions of the "augmentation clause" from time to time, and exercise its discretion to consider whether it could increase the annuities appropriately.[216] Compensation was also directed.[217]

[163] The Crown notes that *Restoule* reflects the Canadian approach to relief for breach of higher constitutional law and reflects the particular constitutional settings adopted there. Canada has given aboriginal and treaty rights constitutional protection by virtue of s 35 of the Canadian Constitution Act 1982. The Canadian Courts have

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211 *Te Rūnanga o Ngāti Whātua v Attorney-General,* above n 153, at [48] referring to Cooke J's comments.
212 *Ontario (Attorney-General) v Restoule* [2024] SCC 27.
213 At [299].
214 At [299].
215 At [296].
216 At [309].
217 At [304].

the power to strike down legislation that unjustifiably infringes those constitutional rights.[218]

[164] About the same time that Canada put those constitutional provisions in place, a supreme law constitution was under consideration in New Zealand. An equivalent to s 35 of the Canadian Constitution Act was referred to in the White Paper for the New Zealand Bill of Rights Act 1990.[219] This option was rejected and has never been taken up.[220] Dr Ward points out that New Zealand therefore has not adopted similar constitutional settings to those of Canada. In addition, around the same time that these constitutional debates were taking place in New Zealand, the Waitangi Tribunal was given its retrospective jurisdiction.[221] That decision, Dr Ward submits, reflects the different choices made in New Zealand to those made in Canada on constitutional arrangements.

[165] The Crown points to the fact that the Waitangi Tribunal may consider legislative policy and design as part of its inquiry process. The Tribunal's recommendatory jurisdiction is far broader and more flexible than any judicial review or declaratory procedure. The Crown says that the Tribunal is the correct forum for the issues raised by the applicants.

[166] The Crown also notes that the Canadian cases have generally involved claims: to specific rights; established in forensic trial settings; and relating to specific lands or water.[222] In addition, Dr Ward submits that Canadian courts have held they cannot impose constraints on the development of legislation, as when Ministers develop

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218 Canadian Constitution Act 1982, s 52(1).

219 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984-1985] I AJHR A6.

220 Full commentary on rejection of the "supreme law" and Treaty aspects of the proposed Bill of Rights Act: Matthew S R Palmer "New Zealand Constitutional Culture" [2007] 22 NZULR 565 at 585; Paul Rishworth "The birth and rebirth of the Bill of Rights" in Paul Rishworth and Grant Huscroft (eds.) *Rights and Freedoms: the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Brookers, Wellington, 1995).

221 Treaty of Waitangi Amendment Act 1985. This amended the Treaty of Waitangi Act 1975 extending its jurisdiction to events that occurred "at any time on or after 6 February 1840".

222 Citing the example of the *Cowichan Tribes v Canada (Attorney-General)* [2025] BCSC 1490. This case was aboriginal title case concerning an area of land of approximately 1,846 acres. That case was heard over 513 trial days during which the Court heard oral history and expert evidence on a range of topics.

legislation they act in a parliamentary capacity. This reflects the approach endorsed in New Zealand.[223]

[167] Mr Smith relied on *Restoule* in support of his submission that it was open to this Court to make directions that the Crown take steps to repair its breaches of the Treaty in the circumstances of this case. However, while the nature of the declarations sought in this case may be similar, New Zealand courts do not have the same constitutional jurisdiction as was exercised by the Canadian Court. Therefore, *Restoule* is of little assistance in this case.

United Nations Declaration on Indigenous People (UNDRIP)

[168] Ms Coates for the NZMC also drew attention to UNDRIP, a non-binding declaration endorsed by New Zealand in 2010. The key rights include those to self-determination, land rights, cultural preservation and free prior and informed consent for decisions affecting indigenous communities. Ms Coates emphasised the provisions of arts 25 and 26. Article 25 relates to spiritual relationships to lands, territories, waters and resources and the right to uphold responsibilities to future generations. Article 26 upholds the rights of indigenous people to lands, territories and resources they have traditionally owned, occupied or otherwise used or acquired, and the legal recognition to these required by the State in respect of indigenous customs and land tenure systems. Further, art 29 relates to environmental protection. It provides that indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands and resources, and that states must take effective measures to ensure that protection.

[169] UNDRIP is not part of New Zealand domestic law and not a direct source of legal rights.[224] Nevertheless, the courts may have regard to it in the development of

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223 *Mikisew Cree First Nation*, above n 155, endorsed in *Te Rūnanga o Ngāti Whātua v Attorney-General*, above n 153, from [72]; *Skills Active Aotearoa Limited,* above n 155, at [58]; and *New Zealand Grey Hound Racing v Attorney-General* [2025] NZHC 2665 at [47].

224 *Taylor v Attorney General* [2016] NZHC 355, [2016] 3 NZLR 111 at [155]; *Greenpeace of New Zealand Inc v Minister of Energy and Resources* [2012] NZHC 1422 at [141]; Susan Glazebrook "The Declaration on the Rights of Indigenous Peoples in the Courts" (2020) 7 Te Tai Haruru: Journal of Māori and Indigenous Issues 50 at 52.

the common law.[225] However, in view of my findings on the meaning of the Crown assurances, UNDRIP does not add anything material in this case.

Estoppel

[170] The NZMC also argued, although did not plead, estoppel and contempt of court.

[171] The NZMC submits that the Crown assurances gave rise to an actionable estoppel by acquiescence as Mr English had a duty to speak up and tell the Supreme Court it could not rely on his statements. Mr Geiringer for the NZMC points to a NZMC press release issued immediately after the Supreme Court *MOM* judgment, which refers to the "Crown's undertakings" as giving Māori a basis to believe, for the first time in many decades, that the Crown will "now take genuine steps to resolve the water claims". The press release went on to say that NZMC was determined to hold the Crown to its undertakings.[226] The press release said, in relation to the *MOM* judgment, that the impairment of the Crown's future ability to provide redress in relation to various Māori water claims, following the sale of the power generating SOEs as MOM companies, needed to be balanced against other factors. Further, it stated that the Supreme Court noted the "extensive promises and undertakings" made by the Crown during the course of the proceedings to the effect that the Crown would take "real steps to address the various Māori water claims and would not be deterred by any impairment resulting from the sale".

[172] Mr Geiringer submits that if the Crown had intended to rely on a legalistic reading of its assurances, given the understanding expressed by the NZMC in its press statement, the Crown should have told the world and the Waitangi Tribunal back in 2013 that it did not mean its assurances to be as wide as portrayed. Mr Geiringer says that as a result of the assurances given by the Crown, the Tribunal changed the terms of its inquiry in the *Stage 2 Freshwater Report* making them narrower than they would have otherwise been. In addition, the Crown should have "written to the Supreme Court" quickly pointing out that the Court had misapprehended the Crown

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225 *Takamore v Clarke* [2011] NZCA 587, [2013] 1 NZLR 573 at [240].

226 New Zealand Māori Council "Immediate Comments on Supreme Court Decision" (press release, 27 February 2012).

assurances, that the Crown had no intention of progressing Māori interests, and nor did it want the Court to rely on the assurances. Instead, Mr Geiringer says the Crown has sat on its hands and allowed the mistaken belief that it would honour its assurances to subsist.

[173] Mr Geiringer, citing *Wilson Parking New Zealand Limited v Fanshawe 136 Limited*, submits that at equity an estoppel arose based on the Crown assurances. It arose due to: a party creating or encouraging a belief or expectation held by another; the representation of that belief or expectation being clearly expressed; the other party relying on the representation to its detriment; and that it would be unconscionable for the promising party to resile from its representation.[227]

[174] Mr Geiringer suggests this is a case of estoppel by acquiescence and refers to the decision in *U E B Industries Limited v Church.*[228] *U E B Industries Limited* was a decision of this Court in relation to an alleged contract to deliver displays, inserts and cartons. White J found on the evidence that the defendant had led the plaintiff to believe that he would accept performance of the agreement in a manner different from that provided in the contracts.[229] The defendant's silence on that point was significant and the Judge found the reasonable inference was that the defendant had accepted the terms of a letter setting out new arrangements. These had been made when the contracts were still executory and consideration for the variation was found in the mutual surrender of rights or the conferment of benefits on each party by the variation.[230] The Judge emphasised that the parties were in agreement as to the essentials, and therefore there "was consensus ad idem". So, the reasonable inference he found was that "there was the intention to create legal relations in the sense that the promises of each side in achieving the variation were to be enforceable as contractual promises."[231]

[175] The decision in *U E B Industries Limited* was based on the finding of a contract. The decision has no application here as there is no alleged contract. In addition, there

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227 *Wilson Parking New Zealand Limited v Fanshawe 136 Limited* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].
228 *U E B Industries Limited v Church* HC Wellington A528/77, 16 October 1981.
229 At 7.
230 At 9.
231 At 9.

is no clearly expressed representation of the nature alleged by the applicants. I have found that the Crown assurances were limited to the effect of the MOM programme. Neither silence nor acquiescence would give rise to an estoppel in this case. The limitations on the Crown assurances were clear in Mr English's affidavit and the Supreme Court recognised the limitations of the assurances, so there was no legal duty on the Crown to speak in the circumstances as no reasonable third party would have expected that it was necessary to correct an error.[232] In addition, the press release was made by a party to the *MOM* proceedings who can be taken as knowing the correct position in relation to the assurances. In those circumstances, the press release by the NZMC would be unlikely to put the Crown under any obligation to speak, even if it had been brought to its attention. Therefore, estoppel fails on the facts.

[176] In any event, estoppel is essentially a private law principle and does not fit easily into the public law context which has developed the doctrine of legitimate expectation to respond to claims of promises by public actors. In this case there is no "clear and unambiguous promise or undertaking" upon which it would be reasonable to rely.[233]

[177] Mr Geiringer also submits that the Crown realised $4.2 billion in the sale of the MOM shares which adds weight to its obligation to reform freshwater regulation and to recognise Māori rights and interests. However, while the Supreme Court noted that the Crown would benefit from the funds it received from the sales, that benefit would not meet the requirements for the doctrine of legitimate expectation or an estoppel in this case.

[178] I conclude that the doctrine of estoppel has no application here.

Contempt of court

[179] Mr Geiringer also submits that the Crown Litigation Assurances gave rise to a contempt of court.

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232 *Infinity Enterprises NZ Ltd v Kinara Trustee Ltd* [2020] NZCA 309, [2020] 3 NZLR 626 at [102]–[103].

233 *Te Ara Rangatū o Te Iwi o Ngāti Te Ata Waiohua Incorporated*, above n 152, at [700]–[711].

[180] Mr Geiringer refers to s 16 of the Contempt of Court Act 2019 which allows the court to enforce certain orders and undertakings on application from specified people. It must be proved beyond reasonable doubt that:[234]

(a) The court order or undertaking being enforced has been made in clear and unambiguous terms and is clearly binding on the person;

(b) The person had knowledge or proper notice of the terms of the court order or undertaking being enforced; and

(c) The person has, without reasonable excuse, knowingly failed to comply with the court order or undertaking being enforced.

[181] In this case there is no Crown undertaking in "clear and unambiguous terms". In addition, is not clear who the person making the binding undertaking is — neither Mr English nor counsel in the *MOM* proceedings are parties to this proceeding.

[182] The alternative argument is that equity should step in to prevent the Crown from reneging on its promises to the Court and Māori, however this was not developed in detail. I have found there were no general assurances to reform freshwater regulation, and it was not argued that the Crown reneged on the limited assurances it did make. While this Court has an inherent jurisdiction to prevent abuse of its processes there is no evidence of such abuse of process here.

[183] Contempt of court therefore has no application in this case.

Conclusion

[184] To recap, the key declarations sought at cl 32.1 of the first and second applicants' statement of claim are:[235]

32.1 to make declarations:

(a) that the Crown is in breach of the Crown litigation assurances;

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234 Contempt of Court Act 2019, s 16(3)(b)(i)-(iii).
235 The declarations and directions sought are set out in full above at [89].

(b) that the Crown is acting contrary to tikanga as law, as the Crown litigation assurances engaged the principle of takahi mana (your word is your bond), requiring utu (a timely restorative process) in order to achieve ea (balance where tikanga water rights and Tiriti water rights are appropriately recognised and protected);

(c) that the Crown is in breach of Article I of te Tiriti, as its kawanatanga role/responsibilities do not permit it to allow the prejudice to Māori that is intensifying through Crown inaction; and

(d) that the Crown is in breach of Article II of te Tiriti by not timely recognising and protecting the Māori water rights that exist;…

[185] The Crown assurances referred to in cl 32.1(a), do not give rise to legally enforceable promises of the nature contended for by the applicants. In effect the applicants ask that the assurances be extended beyond the actual assurances given and taken. Those assurances were limited to the effect of the MOM programme on the Crown progressing freshwater regulatory reforms and providing Treaty redress. The applicants seek to convert those assurances into a promise by the Crown to effect systemic reforms and recognise Māori proprietary interests in water. That is a significant change in meaning. The context of tikanga and the application of Treaty principles cannot effect that change.

[186] The declaration sought by NZMC is also prefaced on the Crown assurances providing a general undertaking to "give recognition to those rights and interests through one or more processes" and the Crown having breached that undertaking. That is not an accurate statement of the Crown assurances.

[187] The evidence does not suggest that the Crown is in breach of the limited assurances which it gave in the *MOM* case. The applicants point to slow progress being made by the Crown in the freshwater reforms and lack of benefit to Māori. As the Crown submits, the proper body to undertake that type of accountability review is the Tribunal, which is "the body to which claims that the Crown has failed to meet its political obligations under the Treaty must be addressed".[236]

[188] In addition, the analogy that the applicants seek to draw between this case and the *SOE* case is not apt. This is not a judicial review case and no decision nor proposed

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[236] *Paki v Attorney-General (No 2)* [2014] NZSC 118, [2015] 1 NZLR 67 at [165] (per Elias CJ). See also *Skerrett-White v Minister for Children* [2024] NZCA 160, [2024] 2 NZLR 493 at [84].

decision concerning freshwater is challenged.[237] The declarations sought are inconsistent with the existing doctrine of legitimate expectation and non-interference with parliamentary processes. The courts will not grant declarations inconsistent with existing common law.

[189] Finally, the real point of the declarations and directions sought in this proceeding are to effect a change in the resource management framework and the continuing operation of the RMA. That requires a political and parliamentary process, and the Court cannot declare or supervise an alternative process.

[190] For the reasons set out above, the applications for declarations and directions made by the first, second and third applicants are dismissed.

Objections to evidence

[191] The Crown made a number of objections to the affidavit evidence filed by the applicants before the hearing. At the hearing, Dr Ward indicated that most objections were not pursued in the interests of focussing on the substantive issues and noted that much of the material in issue was only contextual. The Crown maintained objections in relation to parts of the joint affidavit of Professor Mutu and Dr Pouwhare, who had qualified themselves as experts in tikanga. The applicants in response redacted some parts of those affidavits.

[192] However, parts remain which the Crown says amount to submissions as to the meaning of the alleged assurances and trespass into the Court's determination of the ultimate issue.[238] While the evidence is given in the context of tikanga and the meaning which might be ascribed to the assurances through a tikanga lens, the objections have some merit. The Crown suggested that the objections may be treated as going to the weight of the evidence. That is how I have treated them, as I noted above.[239]

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237 In judicial review the Court may make directions or interim orders under s 15(3) of the Judicial Review Procedure Act 2016 (formerly s 8(2) of the Judicature Amendment Act 1972).

238 Evidence Act 2006, s 25(2)(a) provides that an expert opinion is not inadmissible simply because it is about the ultimate issue in a proceeding. However, the expert opinion must be substantially helpful.

239 At [9] above.

[193] The Crown maintains its objection in relation to the expert evidence of Ms Anne Carter. Ms Carter's evidence largely dealt with summarising the Crown's freshwater policy initiatives from 2012 to 2025, and commenting on whether they have specifically addressed Māori rights and interests in freshwater and geothermal resources. She comments on a Departmental Report to a Select Committee in relation to the Resource Management (Consenting and Other System Changes) Amendment Act 2025. After summarising the provisions of the paper, she comments negatively on the fact that no amendment was made to the impugned provisions despite submissions received and the analysis of officials.

[194] The Crown says that Ms Carter's comments are made for the purposes of drawing adverse inferences against the Crown and therefore it is a breach of s 11 of the Parliamentary Privilege Act 2014. That provides:

> **11 Facts, Liability, and Judgments or Orders**
>
> In proceedings in a court or tribunal, evidence must not be offered or received, and questions must not be asked or statements, submissions, or comments made, concerning proceedings in Parliament, by way of, or for the purpose of, all or any of the following:
>
> (a) Questioning or relying on the truth, motive, intention, or good faith of anything forming part of those proceedings in Parliament:
>
> (b) Otherwise questioning or establishing the credibility, motive, intention, or good faith of any person:
>
> (c) Drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament:
>
> (d) Proving or disproving, or tending to prove or disprove, any fact necessary for, or incidental to, establishing any liability:
>
> (e) Resolving any matter, or supporting or resisting any judgment, order, remedy, or relief, arising or sought in the court or tribunal proceedings.

[195] The definition of "proceedings in Parliament" includes a presentation or a submission of a document to, and the preparation of a document for the purposes of or incidental to the transacting of any business of, the House or a committee.[240] The relevant Departmental Report falls within that definition.

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[240] Parliamentary Privilege Act 2014, s 10(2)(b) and (c).

[196] Section 13 provides that a document relating to proceedings in Parliament may be used in a court for the purposes of ascertaining the meaning of the enactment. Section 15(1) allows it to be used as evidence for the purpose of a relevant historical event or other fact so long as it is done "with no impeaching or questioning of the proceedings in Parliament".

[197] The Court must identify the purpose for which the party seeks to adduce evidence of the parliamentary proceedings.[241] In this case the purpose is for drawing negative inferences based on what was said or done in the course of the parliamentary proceedings. Therefore, the paragraphs containing those comments are in breach of s 11 and are not admissible.[242] The summary of the paper which precedes those paragraphs is unobjectionable as it sets out the historical facts.

Costs

[198] If the parties cannot agree on costs, an application should be made by way of memorandum filed within seven days and any response within a further seven days. Any reply should be within a further five days.

Grice J

Solicitors:
Gibson Sheat, Wellington and Annette Sykes & Co Ltd, Rotorua: for First and Second Applicants
Lee Salmon Long, Auckland for Third Applicant
Crown Law, Wellington for Respondent
Whāia Limited, Wellington for Te Pou Taiao and Te Whakakitenga o Waikato Incorporated (as Interested Parties)
Chapman Tripp, Auckland for Te Rūnanga o Ngāi Tahu (as Interested Party)

241 Joseph, above n 6, at 495.
242 Paragraphs [81]–[87] of Ms Carter's evidence.

Attachment 1

SCHEDULE 1: REPRESENTED ROHE AND GROUPS

Pouākani – Wairarapa – Te Whanganui-a-Tara

1. Craig Graeme Rangituhua Ahipene for Pouākani Claims Trust
2. Kingi Winiata Smiler for Wairarapa Moana ki Pouākani Incorporation
3. Sonya Amena Rimene for Rangitāne Tū Mai Rā Trust
4. Jack Lexington Morris for Rangitāne o Wairarapa
5. Anaru Winiata Smiler for Wellington Tenths Trust
6. Rebecca Elizabeth Mellish for Palmerston North Māori Reserve Trust

Te Arawa

7. Wallace Patrick Haumaha for Te Arawa Lakes Trust
8. Gary Joseph Babbington Tahana for Rotoiti 15 Ahu Whenua Trust
9. Barnett Moihi Tahuiwi Vercoe for Paehinahina Mourea Trust
10. Barnett Moihi Tahuiwi Vercoe for Paengaroa North B.10 A Trust
11. Ivor Richard Karaka Aterea Jones for Te Tahuna Trust
12. Piatariihi Carey Bennett and Colleen Arihana Skerrett-White for Ngāti Pikiao Environmental Society
13. Colleen Arihana Skerrett-White for Paengaroa South 5 Trust
14. Damian Hona Tetokotu White for Haumingi No. 3 Trust
15. Frederick Whetu Whata for Taumanu Trust
16. Tony Aterea Whata for Tautara Matawhaura Land Trust
17. Te Ringahuia Hata for Tuahine Charitable Trust
18. Piki Thomas for Ngāti Pikiao Iwi Trust
19. Nelson Te Whiwhi Meha for Rotomā No 1 Incorporation

Tairawhiti Whenua

20. Alan Parekura Torohina Haronga for Mangatu Blocks Incorporation and Wi Pere Trust Board Incorporated

21. Ratahi Cross for Ngai Tukairangi Trust

22. Hayden Swann for Whangara Farms and Mangaotane Station Trust

23. Ben Tahata for Anaura Incorporation

24. Hilton Eruera Collier for Whetumatarau B45B Trust, Rakaihoea Farming and Waitangi A1A2 Trust

25. Philip Hope for Pourau-Pohue

26. Moana Puha for Awatere B Trust

Awhina Group

27. Robert Vincent Cottrell for Awhina Management Ltd

Te Moana o Toi – Tauranga Moana

28. Paora Stanley for and on behalf of Ngāi Te Rangi Fisheries AHC Limited

29. Ratahi Cross for Te Awanui Huka Pak Ltd

30. Ratahi Cross for Ngāi Tukairangi Orchard Trust

Federation of Māori Authorities

31. Tracey Tania Houpapa for the Federation of Māori Authorities

32. Dr Tanira Kingi for Ngāti Whakaue Lands Trust.