IN THE SUPREME COURT OF NEW ZEALAND SC 98/2012

[2013] NZSC Trans 1

**BETWEEN** **THE NEW ZEALAND MAORI COUNCIL**

First Appellant

**THE WAIKATO RIVER AND DAMS CLAIM TRUST**

Second Appellant

**AND** **HER MAJESTY'S ATTORNEY-GENERAL**

First Respondent

**THE MINISTER OF FINANCE**

Second Respondent

**THE MINISTER FOR STATE-OWNED ENTERPRISES**

Third Respondent

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| Hearing: | 31 January 2013 – 1 February 2013 |
| Court: | Elias CJ<br>McGrath J<br>William Young J<br>Chambers J<br>Glazebrook J |
| Appearances: | C R Carruthers QC, P D Green and F Geiringer for the Appellants<br>D J Goddard QC, J R Gough and S Kinsler for the Respondents<br>P T Harman for Proposed Interveners |

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**CIVIL APPEAL**

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**ELIAS CJ:**

E aku rangatira o tena maunga, o tena awa, o tena moana
E nga mana nui o te ao Māori
Piki mai, kake mai, haere mai
Mauria mai nga korero
Mauria mai nga wananga
Kia rongo matou
Kaati tena koutou, kiaora tatou

On behalf of the Court I have greeted those who have come from afar, those of standing in the Māori world, I have welcomed them to this place where we want to hear the thoughts and words expressed on their behalf and on behalf of the Crown. Now in English I greet and welcome representatives of the Crown and counsel for all parties to this hearing of the Supreme Court where we will have the benefit of your perspective on the matters in issue. Madam Registrar, will you call the case to start our proceeding.

**MR CARRUTHERS QC:**

May it please your Honours, I appear with Mr Green and Mr Geiringer.

**ELIAS CJ:**

Thank you Mr Carruthers, Mr Green, Mr Geiringer.

**MR GODDARD QC:**

May it please the Court, I appear with my learned friends Mr Gough and Mr Kinsler for the Crown.

**ELIAS CJ:**

Thank you Mr Goddard, Mr Gough, Mr Kinsler.

**MR HARMAN:**

May it please your Honours, counsel's name is Harman, I appear for the intervener applicants.

**ELIAS CJ:**

Thank you Mr Harman. Yes, Mr Carruthers?

**MR CARRUTHERS QC:**

Yes, may it please your Honours. Just two introductory matters. In the submissions for the appellants we have prepared another copy that gives the references and it also highlights in red, it's not before you at the moment, it also highlights in red some of the gremlins that got into the editing process. There are a few of those and I can deal with them. Madam Registrar has those copies available and it may be sensible to leave distribution of those until the close of the hearing. It simply gives you the references in the bundle of authorities and otherwise that don't appear in the footnotes for the reason that the bundles weren't ready at the stage we filed the submissions.

**ELIAS CJ:**

Yes Mr Carruthers, we'll take those in at the morning adjournment, but I'm sure members of the Court will be working off their own marked up copies.

**MR CARRUTHERS QC:**

Yes, I understood that would be the case which is why I suggested the course I have. The second matter, your Honours, is that I have prepared an outline of the way in which I propose to deal with the oral argument. It's a skeleton that draws only on the material that's in the submissions. In a sense it's a road map as to where I will be going. There's a short introductory section that adds nothing new for the appellants' case but does make reference to what the appellants' answer to the Crown case is and if that would assist your Honours I will have the registrar distribute that now.

**ELIAS CJ:**

Yes, thank you.

**MR CARRUTHERS QC:**

I want to begin by making the appellants' position in relation to the constitutional issues crystal clear. My submission is that nothing in this appeal challenges the supremacy of Parliament. The argument is not that it's beyond the power of Parliament to make laws that are contrary to the principles of the Treaty. Nor do the appellants seek to revisit or review any decision of the legislature. The argument is this: that the fundamental constitutional importance of the Treaty is such that when Parliament creates a power or discretion, that power or discretion can only be used in a manner consistent with the principles of the Treaty unless, of course, Parliament uses express language or there is a necessary inference to the contrary. In this case

Parliament has expressly stated that all relevant powers and discretions must be exercised in a manner consistent with the principles of the Treaty, that's section 9 or 45Q, depending on the state of the legislative process.

So that leads me to this submission: that accordingly the argument is that Parliament can pass laws to enable privatisation, as it has done, but privatisation must be implemented after provision of a mechanism to ensure that the Crown's ability to take reasonable action to comply with its obligation to uphold the principles of the Treaty is not impaired. In this case there is an acknowledged claim by Māori to water resources. The submission is that privatisation will deprive the Crown of the ability to provide Māori with an opportunity for a measure of control over their own water resources. What the Court is being asked to do is to make a declaration that until the Crown implements agreed protected measures, the privatisation is unlawful, and the argument is based squarely on *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA) [*Lands*].

My submission in answer to the Crown's case is this: that the Court of Appeal decision in *Lands* is rightly regarded as one of the most significant in the history of our country. In this appeal the Crown is effectively asking the Court to reverse *Lands*. It's not said in any explicit way but the underlying basis of the submission is that *Lands* is wrongly decided and I submit that the essence of the Crown's argument is that the sale is the purpose of the legislation and that this overrides section 9 considerations. If one goes through the Crown submissions, that's what the Crown is saying. It has said the legislature has said the sale, the privatisation, is the purpose of the legislation and that overrides section 9. Well, that was the essence of the Crown's unsuccessful argument in *Lands*.

The basis of *Lands* is that Treaty principles require that, before assets are transferred, a mechanism to ensure that the transfer does not prejudice Treaty claimants must be agreed between Māori and the Crown or determined by the Court. And that's the essence of the approach that we are adopting in this case: that it is in line with *Lands*. It's not, no part of the Court's function to decide or determine what the mechanism is. It's not for either party, the Crown or Māori, to dictate what it says the mechanism should be. The proper procedure is the procedure adopted in *Lands*. That is, that the parties are to be directed, and were in *Lands* directed by the Court, to consult and consider a proper mechanism that provides protection for the Treaty claim, and it's only in the event of there being an absolute impasse that the matter

comes back before the Court, as was, as was the subject of the orders in *Lands*, but predictably, as has happened often in the past, the parties, when they conferred, were able to reach a proper basis for protection.

Now, in this case what the Crown is contending is that all that's required is really a paternalistic assertion by the Crown that it remains willing to settle Treaty claims, and I'll come to deal with that in more detail in a moment. Absent a protective agreement or a court order, Māori are deprived of recourse to the transferred assets if the Crown is not prepared, following transfer, to settle claims on a basis acceptable to Māori. And the reason that I put the case on the basis of *Lands* is dealt with in the next proposition. The concern in *Lands* that Treaty claimants would be prejudiced by the sale of land by SOEs to private interests was central to the reasoning of the Court in *Lands.* The sale to private interests of shares in power generating SOEs, whose right to use water and geothermal resources at no cost is one of their most important assets, raises similar concern. Just as memorialisation was required to protect the position of Treaty claimants to the land transferred to SOEs, so a mechanism is required to protect claimants to the water and geothermal resources used by the SOEs.

And my submission is: the rationale behind *Lands* applies with even greater force in the present appeal. *Lands* was concerned with a transfer from the Crown to companies 100 per cent owned by the Crown and over which the Crown could, therefore, exert considerable control, taken from one of the decisions of the Privy Council, the resultant barrier was therefore a very low one. That's because of the extent of the control. What is now in issue is transfer to companies partly owned by the Crown over which the Crown will be able to exert significantly less control. The barrier to settlement created by the transfer is therefore a higher one.

And my unashamed submission is that it's astonishing that the Crown should adopt the approach which it is now taking when negotiation between Māori and the Crown under the supervision of the courts has resulted in agreed bases for the settlement of Treaty claims to the other three classes of important tangible assets: lands, forests and fish. Moreover, the different bases which were agreed, memorialisation of lands, stumpage for forests and quota for fish, illustrate how Treaty partners negotiating in good faith can agree on imaginative solutions tailored to the nature of the relevant assets and without any destruction of value. The analogy with the commercialisation of fishing is particularly apt in this case, in my submission.

**McGRATH J:**

Will you be elaborating on that at some point? Why it's apt? Why it's a good analogy?

**MR CARRUTHERS QC:**

I can deal with that now, because the, the, the issue with fish came down to a recognition of the business and activity of fishing. That was essentially what underlay the point of the Waitangi Tribunal in the Muriwhenua claim. It was a recognition of the business and activity of fishing, and that then drove the various stages of negotiation and settlement of the claim with the progressive additions of quota and then the Sealord transaction. So what is submitted here is that the, it's the water resource, the water and geothermal, the water resource that is being used in a commercial way. So that is the basis of the analogy: that you have a resource that is being used for a business and activity of power production, as fish was business and activity of fishing. And so that's the comparison that I draw.

**McGRATH J:**

So is the key to the analogy, then, the business use and the fact that there is activity in relation to that particular act?

**MR CARRUTHERS QC:**

In terms of providing a recognition of the Māori right to that activity, yes.

**ELIAS CJ:**

Is there not another dimension? And that is, in the *Lands* case, as far as lands were concerned the case was about land that was indisputably Crown-owned. It was therefore about preserving the capacity of the Crown to draw on its landholdings in reparation should the Waitangi Tribunal require it. In *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 (CA) [*Fisheries*/*Fish*], there was a proprietary claim, unascertained, the nature of their fishing rights under the then section 18(8), I guess, of the Fisheries Act 1983. So there was a proprietary claim.

This claim, it seems to me, moves in and out of both. Because insofar as, and it was only really reading the Waitangi, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 that it came home that in fact there was a raupatu dimension in that case. So in part the claim is against any remedy that the Waitangi Tribunal may recommend under the Treaty of Waitangi Act 1975, but the claimants also seem to

be, and correct me if I'm wrong, asserting in part unascertained proprietary interests. So that the analogy with the *Fisheries* case was that, just as in that case, it was use rights which were, which the Crown argued were being created that was, and it didn't go very far of course, the *Fisheries* case. It was an interference, it was said, with possible proprietary interests. In other words, there are these two strands, aren't there? There's a Treaty of Waitangi claim, does the Crown retain capacity to make reparation should the Waitangi Tribunal recommend it, but there also seem to be, and correct me if I'm wrong in this, but there also seem to be proprietary claims, although they are unascertained. The Crown describes them as "residual" proprietary interests. But that may have a different impact in the mix.

**MR CARRUTHERS QC:**

Let me answer you on, on two bases. First, you do put the proposition of the claim correctly. There is a proprietary claim going back to the analysis made by the Waitangi Tribunal in this case of the nature, the comparative nature of Māori rights to water resources as at the time, or prior to the Treaty, and looking at how that concept in Māori culture would be recognised in English law. So that's really the essence or the origin of the proprietary claim. Some care is necessary with that when one reads the material and sees the loose reference to ownership of the water. In some instances one can see that, I mean, historically Prime Minister Seddon described Māori rights to Lake Wairarapa as being Pākehā have introduced the fish, you now own the fish and you own the water and that's the way in which that Prime Minister expressed it. So you can see that in inland areas the concept of owning the land under the water, for Māori, is very much in line with having a proprietary right in relation to the water. If one comes to look at a river claim, it's a rather more difficult concept, because there would be iwi interests progressively down the river. So it's not quite a fit to talk about ownership of the water but it is a proprietary right in relation to the water resource and that's the way the claim is put and that's the way that it's recognised in part by the Crown.

**ELIAS CJ:**

Well –

**MR CARRUTHERS QC:**

Can I come –

**ELIAS CJ:**

Yes, I'm sorry.

**MR CARRUTHERS QC:**

I just wanted to deal with the second part but I can wait and deal with that.

**ELIAS CJ:**

That's fine.

**MR CARRUTHERS QC:**

You were talking – your Honour put to me the distinction between *Lands* and *Fish* on the basis of *Fish* having the proprietary interest in relation to ITQ [individual transferrable quota] but also in *Lands*, although there were claims and potential claims, the argument there was still that it was a, the proprietary right that Māori were asserting, that it was a matter of the Crown, although the Crown nominally owned the land, it was still a proprietary right that was being asserted on the basis that the land ought to be transferred to Māori in relation to those claims that were successful. I may have misunderstood –

**ELIAS CJ:**

No, I understand that but the distinction I was drawing was rather between an existing claim in law to a proprietary interest which is arguably available in *Fish* but was not available in relation to the lands in issue in the *Lands* case.

**MR CARRUTHERS QC:**

Yes.

**ELIAS CJ:**

The lands owned by the Crown, and I suppose *Attorney-General v Ngāti Apa* [2003] 3 NZLR 643 (CA) is another example of that. An assertion of a present legal claim.

**MR CARRUTHERS QC:**

Yes.

**ELIAS CJ:**

Yes.

**MR CARRUTHERS QC:**

Now I want to move from there to the written submissions and I'll follow the skeleton that I have put in the outline. In section 4 of the submissions I have dealt with the constitutional position and I really just want to take your Honours quickly through that so that it's squarely before you. I have repeated the sentence on the nature of the challenge and then I submitted: To the extent that the respondents' diminution in control over the power-generating SOEs unavoidably follows from the privatisation, Parliament has determined that the diminution is to occur and the appellants cannot, and do not, challenge it. However, there are various measures which the respondents can implement that will ameliorate the prejudice to Māori caused by privatisation. These mechanisms remain open to the respondents notwithstanding the passage of the privatisation legislation, but cannot be implemented after the privatisation. The infringement of the principles of the Treaty therefore arises on the implementation of the legislation either by bringing the Amendment Act into force or by selling the shares without putting protective measures in place.

**CHAMBERS J:**

Can I just ask one thing there Mr Carruthers? Treaty breaches have historically been remedied in a number of imaginative ways, to use your terminology. Is it the appellants' position that if one of the potential mechanisms for remedy is removed, that in itself means that the particular thing the Crown wants to do cannot be done until remedies are worked out?

**MR CARRUTHERS QC:**

The answer to the question turns on the significance of the measure in relation to the claim. The submission here is that because the water resources claim bites in the first instance on Mighty River Power, the, the transfer would eliminate the ability of the Crown to provide any meaningful remedy to Māori. For example, and it's no part of my argument to be drawn on what is the proper remedy, I have made the submission as to the way in which the remedy ought to be dealt with, but, for example, a management programme for water resources, or a resource rental basis recognising the use of the resource and Māori's proprietary interest in the resource. So it would depend on how important the resource was in relation to the mechanism that is available.

The second part of your Honour's question was if the, if there was no protective measure available, does that stop the Crown proceeding –

**CHAMBERS J:**

No, no, that wasn't my question.

**MR CARRUTHERS QC:**

Beg your pardon.

**CHAMBERS J:**

No, my question was, if what the Crown is proposing to do may remove one possible mechanism for dealing with an assumed Treaty breach, is that enough, on your case, to mean that the Crown should not be able to do what it wishes to do?

**MR CARRUTHERS QC:**

On the facts of this case the answer is yes. But the reason my answer to you a moment ago was a little guarded was that there may be some minor measure in a range of measures that would be eliminated but other measures that would be appropriate, having regard to the nature of the asset in the claim, remaining. So if your Honour's question is directed to this case, my answer is yes.

**McGRATH J:**

Is the issue of principle then, Mr Carruthers, whether the Crown's action in removing a particular possible protection impairs materially the Crown's ability to take reasonable action it's obliged to take according to the principles of the Treaty, using the language of the Privy Council?

**MR CARRUTHERS QC:**

Yes, yes.

**McGRATH J:**

So the resulting situation has to meet that legal principle?

**MR CARRUTHERS QC:**

Yes it does. Yes.

**GLAZEBROOK J:**

Mr Carruthers, it would help me, I know you don't want to be drawn into the possible remedies, but I'm finding it difficult to think of this in the abstract without at some stage being taken through the possible remedies and why the particular transfer in

this case would actually impair the ability of the Crown. Because thinking of it in abstract terms is somewhat difficult.

**MR CARRUTHERS QC:**
Yes.

**GLAZEBROOK J:**
And it doesn't mean that one is trying to pin people to a particular remedy –

**MR CARRUTHERS QC:**
No Ma'am.

**GLAZEBROOK J:**
– because I quite understand the submission, that is, that in fact there's consultation and agreement and imaginative remedies can come out of that which actually may have nothing to do with the remedies that have been suggested. But nevertheless, it's still difficult to – I'm just finding it difficult to look at it in the abstract without understanding why the transfer of shares removes those remedies. And actually, especially the ones that you, you mentioned, which seem to be a more general water issue rather than specifically related to the particular companies. I.e., I think I've written down, which is shorthand, the management basis or the use of resources or royalties I think you mentioned.

**MR CARRUTHERS QC:**
Yes. Yes. Your Honour, may I, may I come to that? Because –

**GLAZEBROOK J:**
I assumed that you would. I was just noting in the sand the difficulty I was having at this point.

**MR CARRUTHERS QC:**
Yes. I'll come to it in two ways. In sections 8 and 9 of the submissions I deal with retention of control and other water interests, and we do discuss mechanisms there. The factual position that I want to come to is to look at what the Crown is saying that it can do or what it may in the future do and analyse how unsatisfactory that is on the evidence. So I'll deal with it in two ways, your Honour, but I will come back to the –

**ELIAS CJ:**

Is not the main focus of your submission that the impediment or the material impairment is in the creation of third party property interests? And that, of course, was a concern in the *Lands* case and it was addressed in relation to land by the memorialisation and it was addressed in relation to water in the settlement by the limitation to a 35-year term. You really need to explain why in relation to water, I suppose, the – that was of course against the background of these interests being held by a state-owned enterprise. You need to, it seems to me, convince us that those mechanisms of protection of Crown capacity are no longer sufficient if a third party interest is, a property interest is introduced into the ownership structure that was envisaged in the *Lands* settlement, the SOE structure.

**MR CARRUTHERS QC:**

The principle is correct and the principle is equivalent to *Lands*. The concern was the creation of third party rights. And that was in a context where I've submitted that the Crown had 100 per cent control, so it was really quite effective. What is happening now is that there is a creation of private rights and the potential to dispose of those private rights. And it, and that is where the impairment arises. Because the Crown, from going from 100 per cent ownership and the ability to effectively control, goes to a position of 51 per cent and the creation of private rights that the 51 per cent won't allow the Crown to interfere with, for example the, any step that would defeat a minority interest claim or would be an oppression on the minority. So that's the difference between any mechanism that was agreed in relation to water under the *Lands* case.

**ELIAS CJ:**

Yes. Yes, no, I understand that.

**GLAZEBROOK J:**

Can I just get it clear? When you say "dispose of those private rights", you're talking about the shares rather than the underlying water are you? Although of course it would probably allow disposal of the underlying rights as well.

**MR CARRUTHERS QC:**

Yes. Yes. The assets that are being disposed of are the shares. But the shares are assets within section 29. So they are still governed by the legislation. And effectively what is happening is that the, it is the control of the assets. Because the shares

control the assets it is effectively the same, the same issue as disposing of the assets themselves. And there are – on that argument I know that the Crown's position is, "Well, we're not disposing of the underlying assets. We're simply disposing of the shares." But that really, to pick up one of the expressions of Justice Cooke, is quibbling with the words and is inappropriate. In fact, I'll go to those two passages straightaway.

**GLAZEBROOK J:**
Can I just, before you do, but in the context that it is only a 49 per cent as against 51. So while it's oppression of the minority in terms of voting, you said control though, but control doesn't really go to private interest, does it?

**MR CARRUTHERS QC:**
Well, it's a –

**GLAZEBROOK J:**
Sorry, I mean, it's a question. Just so that I can understand the argument.

**MR CARRUTHERS QC:**
Well, it is a significant impairment of the Crown's ability to deliver particular results to Māori. For example, if the Crown wanted to enter into a, some sort of co-management arrangement that plainly affected the revenue stream for the company, then there would have to be an issue as to whether the Crown was entitled to take that action in the face of the, the 49 per cent interest. The same sort of enquiry would arise in relation to any sort of resource rental arrangement.

**GLAZEBROOK J:**
So it's sort of a – so the argument is that, just to put it in the terms that you've been putting it in, it's not that control of the assets has gone to third parties, it's that the Crown control of those assets has diminished.

**MR CARRUTHERS QC:**
Yes.

**GLAZEBROOK J:**
And therefore the ability to hand over. Is that a fair –

**MR CARRUTHERS QC:**
That's right.

**GLAZEBROOK J:**
Thank you.

**MR CARRUTHERS QC:**
The ability to satisfy the Treaty right is impaired by the transfer of the 49 per cent.

I was just –

**GLAZEBROOK J:**
Sorry, you were going to some cases.

**MR CARRUTHERS QC:**
Yes. I'll take you to the two passages. The first passage that I want to take you to is in volume 2 under tab 24, and it's the *Lands* case. And I want to take you to page 655, which is in the judgment of the President, Justice Cooke, and I'm at page 665 and I'm at line 38 the paragraph beginning, "We are here concerned". And this is the approach that the, in my submission, the Court should take to the questions of interpretation, for example, the distinction between the shares and the underlying assets. Where the President says, "We are here concerned with interpreting a far-reaching Act passed by the New Zealand legislature. Its significance lies partly in the transformation of State undertakings, partly in its express incorporation of the principles of the Treaty in this field of New Zealand domestic law. Obviously, to echo again a phrase given currency by a great British Judge of our era, it should not be approached with the austerity of tabulated legalism." That's a reference to Lord Wilberforce who, in fact, drew on that expression from de Smith. And then his Honour goes on, "A broad, unquibbling and practical interpretation is demanded. It is hard to imagine any Court or responsible lawyer in New Zealand at the present day suggesting otherwise."

And then the same theme is picked up in *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576 (CA) [*Broadcasting Assets*] which is in volume 3 under tab 29 and I'm at page 583. I'm dealing with proposition 3, which is at line 38, and the issue is set out in proposition 3 and then in proposition 4 his Honour, again the President Justice Cooke, said, "To meet the point just mentioned, the learned

Solicitor-General, in the course of presenting submissions for the Crown that were otherwise helpful and restrained, advanced an argument which he described as 'somewhat subtle'." Then his Honour sets out what the argument was and concludes at the bottom of the page, "This argument for the Crown compels me to say that, in my opinion, a distinction for the purpose of Treaty principles between preserving capacity and using it is the very kind of legal subtlety which should be foreign to the approach to a pact with an indigenous people."

Now your Honours I cite those two passages only to meet any argument with fine distinction between the transfer of the underlying assets and the transfer of shares because in my submission what is in issue here is the extent of control that is lost by the transfer of a 49 per cent interest in what was otherwise 100 per cent owned Crown company.

Going back to the constitutional position, and I'm at paragraph 4.3, and this is the question of the legislation and the mechanisms. So I've submitted that the relevant legislation is silent on these mechanisms so it is not right to say that the legislation prevents the respondents from taking these steps. Indeed in the appellants' submission the relevant acts of the respondent are governed either by section 9 or 45Q, depending on which legislation is in force, it's therefore the appellants' case that Parliament requires that such steps be taken, and this is a submission I elaborate on a little later in the argument. I've submitted that that mirrors what occurred in the *Lands* case and I've dealt with that in the introductory submissions I've made and then I've submitted that the seeds of constitutional confusion were sown by the ultimate result in the *Lands* case. Parliament chose to intervene and then I've dealt with that question of the role of the Court in relation to reform.

From there I want to go to the nature of the right and I'm just moving back a little in the submissions and in paragraphs 2.2 and 2.3 I've identified why the water resources are taonga and I probably don't need to go further than to just draw attention to the High Court judgment in paragraphs 158 to 161 that deal with the extent of the right and if I can just remind your Honours of those paragraphs. I'm in volume 1 of the case and I'm under tab 1 at paragraph 158. Perhaps I should just draw attention to the background of that paragraph by pointing to 156 and 157 and then 158, "The Tribunal concluded, therefore, that the claimants' evidence demonstrated the necessary 'indicia' of ownership and that the closest legal equivalent to these Māori customary rights in 1840 was the common law idea of

ownership. Given the fact that the Treaty of Waitangi guaranteed the continued enjoyment and undisturbed possession of them to Taonga Māori, then this established current Māori proprietary interests in various water bodies. The claimants say, therefore, that they have established claims of proprietary interest to water resources used by MRP (and in the future the other three SOEs). There can be no doubt that the New Zealand Māori Council and the Waikato River and Dams Claims Trust have established that various hapū and iwi have claims of a type of proprietary interest in freshwater and geothermal resources within New Zealand including, of particular relevance in this case the Waikato River, the source of the water used by MRP to generate electricity."

**ELIAS CJ:**

Of course there's recognition in some legislation also of some proprietary interests and I don't understand the Crown to –

**MR CARRUTHERS QC:**

No.

**ELIAS CJ:**

– deny that there may not be established some proprietary interests it's just that they have not yet been established.

**MR CARRUTHERS QC:**

Yes, I think that's fair, the Crown does acknowledge that there are proprietary interests. It's the scope and extent of them that remains unestablished –

**ELIAS CJ:**

Yes.

**MR CARRUTHERS QC:**

And it is, it is for that reason that the mechanism is important, the protective mechanism is important so that the position is protected until those, the extent of those rights has been established.

**CHAMBERS J:**

Yes, as I understand the Crown argument, it's not at the moment about the nature of the right or even its extent that's important. It's all about whether this particular

action will limit in a realistic or material way remedies that might be available in the event that those rights are ultimately established.

**MR CARRUTHERS QC:**

Well, there are two parts to the Crown case, because the Crown also says that the mechanisms that it has in place at the moment, the three that I'll come to on dealing with the evidence, are sufficient to protect the Treaty claim. And so there are two parts to it. And what we say is that in, and for the reasons that I've been discussing, that the transfer of that 49 per cent of the shares is the impairment that means that the Crown cannot actually deal with the river issues in the way in which it would otherwise be able to deal with them because of the creation of the private rights. And there is also the prospect of the issue that troubled the Court in *Lands*, that is, the disposal of the land if it's in a private right, the same is true of assets here. If the transaction is allowed to go ahead, it then puts the assets in the hands of a company with significant private interests with a potential of disposing of those assets or part of them in a way that may well defeat the ability to satisfy the claim. And I think it's, really, one of the emphasis, one of the emphases –

**CHAMBERS J:**

But Mr Carruthers, there will be hundreds and thousands of people who have resource consents to use water from these rivers. The fact that those private interests exist doesn't prevent, does it, the Crown from coming up with a remedy in due course. Should the Māori interests in the water resources be established and a remedy be necessary from the Crown, those other interests won't stop the Crown coming up with a remedy, will they?

**MR CARRUTHERS QC:**

Well if the Crown wants to provide a remedy that's consistent with the Treaty right, the Crown will be put in the position of expropriating private interests.

**CHAMBERS J:**

No, but would it necessarily? I – there may be an argument that in the duration of current resource consents that may be so, but all resource consents in this area tend to be time limited, don't they?

**MR CARRUTHERS QC:**

But we may be talking in some cases of 30 years. And how long is, are Māori to wait to have –

**ELIAS CJ:**

Well you may be talking more than that, because – and is not this a point of distinction with the private water use rights that the electricity-generating capacity necessarily entails huge infrastructure and the practical effect is that those water rights seem to be renewable on request by the SOEs. I'm just looking – it's something I do, I hope somebody is going to tell us, give us a bit of a map of what water rights Mighty River Power, what are we talking about here? But looking at the decision which is included in the materials, the indication there is that electricity generation is a controlled use, which means that the renewal or the right for 35 years must be granted.

**MR CARRUTHERS QC:**

Well I think what that analysis is doing, your Honour, is pointing to the extent of impairment if there is the creation of a private right.

**ELIAS CJ:**

Well I'm asking the question really.

**MR CARRUTHERS QC:**

Yes.

**ELIAS CJ:**

Is there that sort of impairment? Because it does seem to me that the settlement that was achieved in 1987 had two aspects: one was that the transfer was to state-owned enterprises and the second was that the water right was limited to 35 years. Now, if it's not to be – if the SOE is to be taken out as one of the protections, that puts a lot of weight on the 35 years limitation and I'd like to know what, how strong that protection is against proprietary claim. The only indication we've got, I think, in the materials before us, apart from some affidavits speaking about geothermal proposals, and there's some reference to the Tongariro diversion, which of course affects different river systems as well, is the renewal of the principal generating capacity on the Waikato River, and I, as I read that decision the Commissioners had no option but to grant that consent for 35 years.

**WILLIAM YOUNG J:**

Doesn't that depend on where, how it's dealt with in the Regional Plan? If it's a –

**ELIAS CJ:**

Yes. It does.

**WILLIAM YOUNG J:**

– then it's governed by, in a particular way, by the Resource Management Act 1991.

**ELIAS CJ:**

It does. But in the other river litigation we have in front of us Mighty River Power has filed submissions saying that water rights are integral to their assets. And I'm just not sure how far these two things march together. The water right 35 year restriction which was intended to be a protection: is it a strong protection for potential claims?

**MR CARRUTHERS QC:**

I'll have to come back to that –

**ELIAS CJ:**

Yes.

**MR CARRUTHERS QC:**

– your Honour, on the material.

**ELIAS CJ:**

Do we have any indication on the materials before us of what the, what sort of map there is of the water rights that are in issue in respect of this privatisation? Do they include the Tongariro diversion? Do they include some of the geothermal water rights?

**MR CARRUTHERS QC:**

Just as I stand here, your Honour, I'm not sure.

**ELIAS CJ:**

All right.

**MR CARRUTHERS QC:**
I'm not sure, but...

**ELIAS CJ:**
Well maybe I can ask Mr Goddard about that.

**MR CARRUTHERS QC:**
Yes, although I'm prepared to just confer with my juniors on that as to whether we've got material here.

Your Honour, there's material that was before the Waitangi Tribunal and there was an arrangement between counsel of the use that we may make of that. If I could confer with my learned friend Mr Goddard during the break –

**ELIAS CJ:**
Yes, that's fine.

**MR CARRUTHERS QC:**
– I think that might be the –

**ELIAS CJ:**
We don't need to have all the details.

**MR CARRUTHERS QC:**
No, no.

**ELIAS CJ:**
But I would like some overview of what water resources are, have been transferred to or – because there seem to have been some contractual arrangements between the Crown and, first of all, Electricity Corporation –

**MR CARRUTHERS QC:**
ECNZ, yes.

**ELIAS CJ:**
– and then a transfer to what has become Mighty River Power. Some contractual arrangements and in the submissions we received in the *Paki v Attorney-General*

SC7/2010 case for Mighty River Power they're complaining that some of those contractual arrangements haven't been acted on.

**MR CARRUTHERS QC:**
Right.

**ELIAS CJ:**
So it's a bit difficult to know what's at stake, I suppose.

**MR CARRUTHERS QC:**
Yes. Although immediately – whatever is at stake, immediately one can see that if the Crown has 100 per cent control of the SOE it's in a position to deal with the – those arrangements with the SOE in relation, for example, to recognising and performing on an established claim as opposed to the Crown's ability in the event that 49 per cent has been transferred because you, the Crown has then got to face up to the interests of the minority shareholders. But, your Honour, I'll come back to the actual issue concerning the water rights.

**McGRATH J:**
The report at tab 177, which is effectively a decision on the consensus, is an interesting instance of how regulation can operate which needs to be considered, I think, in terms of the adequacy of the system. But it is certainly the 35 – the maximum term of a consent is 35 years and it does appear, that's under the regional scheme, the consent had to be given but it didn't have to be given for 35 years as I read the report. It was only given for 35 years because the Commissioners decided that was an appropriate term in the circumstances and there is the power to impose conditions and there is opportunity for review. Now I don't, I can't judge these matters at this stage but if in the end regulation rather than ownership can deal with these sort of matters, which is what I think the Crown is putting to us, in satisfying Treaty principles, it might well be worth both parties giving some consideration to that report, helpfully included in your case in appeal, as to whether that's enough, whether it's adequate protection.

**MR CARRUTHERS QC:**
Thank you Sir. I'll certainly look at that. I'm moving now to the section dealing with inconsistency with the Treaty and I've noted the test and your Honour the Chief Justice formulated the passage from the Privy Council. I have noted it there.

The test is agreed and it's recorded in the High Court judgment at paragraph 144. Looking at the requirement, the requirement is reasonable action and I've analysed the issue of reasonable action at paragraph 6.1 to 6.4 and I've set out the Crown case on the issue of merely shares being sold but the submission at paragraph 6.2 is that the reasoning results from a misunderstanding of the Crown's obligations under the Treaty. The Crown's primary obligation under the Treaty is not to offer appropriate compensation merely because the Crown is unwilling to recognise an Article 2 interest. Rather, it is an obligation of active protection of the Article 2 interest itself.

And before looking at any issue of compensation the Crown must, to the greatest extent possible, strive to recognise the mana, the take noho and the kaitiakitanga of the respective hapū and iwi in their water resources. This involves recognising both the cultural and economic aspects of that Māori relationship with their water resources. The cultural aspect involves a close relationship between the local Māori and the specific water resource. The economic aspect includes the rights to exploit the water resource for their own benefit (including through the generation of hydro-electricity).

When considering the economic aspect, my submission is that it's essential to understand the difference between mana and money. Mana endowed the holder with the authority over the water resource and this includes the right to charge for the use of it. Money, or financial wealth, does not endow the holder with any such authority.

I have drawn attention to UNDRIP, the United Nations Declaration on the Rights of Indigenous People, and I've set out in paragraph 6.5 Article 28(1), which identifies the right: "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

I noted that the Declaration sets out the right to develop resources by reason of traditional ownership and the express right is supposed by the rights to self-determination set out in the articles that I have noted, including the right to economic development.

Now the Crown case requires the acceptance that the Crown can strive to recognise the mana of the respective hapū and iwi in their water resources without utilising the companies which have been using, and continue to use, those water resources.

As was found by the Waitangi Tribunal, the appellants submit that proper redress, referring to UNDRIP, in the absence of the outright return of the water resources must involve some utilisation of the power-generating SOEs themselves. Respecting the mana of the Māori groups whose water is being used by the power-generating SOEs while permitting those companies to continue that use cannot be achieved without giving those Māori groups some genuine authority over the manner in which the water resources are being exploited.

The same view was expressed by Crown counsel before the Waitangi Tribunal when Crown counsel in that case described joint ventures as being "where the conversation needs to head". In making this submission Crown counsel was referring to future ventures only and did not mean to suggest that the power-generating SOEs should retrospectively turn its existing power stations into joint ventures with Māori groups whose water resources they're utilising. However, the logic that underpins the submission applies equally to the existing power stations. Once it is accepted that the very resource which is being exploited is one for the "full exclusive and undisturbed possession" which was guaranteed to Māori, continued exploitation in a Treaty-compliant manner requires the direct and meaningful involvement of Māori.

Retrospective inclusion of Māori will not be possible after privatisation without remedial measures being put in place due to the Crown's loss of control in the power-generating SOEs.

Now it's probably convenient at that point for me to deal with what the Crown is saying it can do or is doing just to examine whether what is being done or what is proposed is compliant with the reasonable action required. In the Crown submissions three mechanisms are identified and if I can just draw attention to pages 4 and 5 of the Crown submissions, paragraph 2.8: "The Crown acknowledges that Māori have rights and interests in water and geothermal resources, as the Deputy Prime Minister confirms in his affidavit. These rights and interests are the subject of the Waitangi Tribunal claims discussed" later in the submissions. And "[a]s the Deputy Prime Minister explains in his affidavit, they are also being addressed

through a number of parallel mechanisms including engagement with iwi led by the Deputy Prime Minister, the 'Fresh Start for Freshwater programme, and historical Treaty settlements." Well, one turns to the evidence on those three issues, there is really no support or encouragement for Māori in what is proposed.

In paragraph 2.4 of our own submissions we have submitted that it's the Crown's current policy not to recognise claims to ownership of water resources on the basis that it's incompatible with New Zealand law, and furthermore the Crown will not provide compensation for interference with water resources for the purpose of hydro-electricity generation, and this is on the basis that the benefits of hydro-electricity generation belong to all New Zealanders.

And I just want to take you to the, to the evidentiary basis for that submission. And if I can take you to volume 4 of the case please? In volume 4 under tab 27.

**CHAMBERS J:**
We don't have tab 27.

**MR CARRUTHERS QC:**
Did I say tab 27? I'm sorry. 67. Under tab 67 is what's known and referred to as the red book that sets out Crown policy on settlement redress. And the issue of, well, of the approach to rivers and lakes, the waterways, begins at page 953 of the case where the red book recognises the significance to Māori and then at the, in the bottom of the right-hand column, "The red book approach is that under common and statute law, claiming ownership implies exclusive possession with the right to prevent others from using the resource. This is a concept that raises many practical and legal difficulties with waterways."

And then at 954 the policy is set out. There is first an acknowledgement that Māori have traditionally viewed a river or lake as a single entity and have not separated it into bed, banks and water. As a result, Māori consider that the river or lake as a whole can be owned by iwi or hapū in the sense of having tribal authority over it. However, while under New Zealand law the banks and bed of a river can be legally owned, the water cannot. This reflects the common law position that water, until contained, for example, put in a tank or bottle, cannot be owned by anybody. For this reason it's not possible for the Crown to offer claimant groups legal ownership of an entire lake, including the water, in a settlement. And then there's that passage about,

"The Crown also considers the benefits of hydro-electricity generation belong to all New Zealanders and it does not provide compensation for any past interference with rivers for these purposes."

And there's an equivalent provision in relation to geothermal at page 963. The geothermal sites, right-hand side, "For geothermal sites, redress through statutory vesting of title will be limited to transferring ownership of land only, because the water, in the form of geothermal steam, cannot be owned.

**ELIAS CJ:**

I had a vague recollection that the Thermal Springs Districts Act 1881 did in fact recognise ownership of springs and that there has been some recognition in New Zealand law and, indeed, that many of the Crown purchases in the early 1850s included purchases of water resources. Just not sure how accurate this is. Yes, in fact I'm sure under the Thermal Springs Act waiariki were specifically recognised as possessed by Ngāti Whakaue.

**MR CARRUTHERS QC:**

Mmm. Would your Honour like me to look at that?

**ELIAS CJ:**

No. You're taking us to this to show us what the Crown attitude is.

**MR CARRUTHERS QC:**

Yes, exactly. Yes.

**ELIAS CJ:**

But that's also manifest in the fact that it has parked, as I think you say, or some of the affidavit evidence says, all claims to proprietorship in water features in all the settlements that have been statutorily concluded. So that the Waikato River Settlement Act specifically doesn't go there and the, one of the others we were looking at too.

**MR CARRUTHERS QC:**

That's right. Yes. And then just rounding that off, the equivalent policy is, is, is set out. The same approach was adopted by the Crown in the hearing before the Waitangi Tribunal. If I can take you now to volume 3? And the whole of this volume

is tab 42 and I'll begin at page 435. You'll see this section beginning at 1.5.3 starts with the evidence of Ms Tania Ott, who's the Deputy Director of the Office of Treaty Settlements, and to the bottom of that page, the second to last paragraph, "Ms Ott stated that the Crown's current Treaty settlement policy does not generally include the vesting of ownership of natural resources because resources such as water and geothermal resources are required for the benefit of all New Zealanders. In relation to water specifically, the Crown is unable to vest ownership as the current legal position as expressed by Ms Ott is that no one owns water and the Crown cannot transfer what the Crown does not own."

Then at 543, under the section 3.6.2, again dealing with Ms Ott's evidence, she described the Crown's approach to redress for historical Treaty breaches in respect of natural resources including freshwater and geothermal resources. In her evidence ownership of these resources is not open for negotiation although there are a number of mechanisms to provide cultural redress to iwi and sometimes to provide commercial redress tailored to the resource in question.

**GLAZEBROOK J:**
I think I've missed the page number.

**MR CARRUTHERS QC:**
543, your Honour. And you'll see it's the second paragraph under that heading, "3.6.2". And then 549, under the heading, "Other possibilities", there's a discussion of royalties and then the very last proposition in that paragraph, Ms Ott stated that royalties were not on the table. 573 –

**McGRATH J:**
Sorry, where was that again?

**MR CARRUTHERS QC:**
That's 549, you'll see the heading, "Other possibilities."

**McGRATH J:**
Got it, thank you.

**MR CARRUTHERS QC:**

Yes. And then through to 573, and I'm dealing with the second to last paragraph, the one-off mechanisms available through the Treaty settlements process may in cases such as the Waikato River Authority provide more for Māori than the land and water forum has recommended but as Ms Ott stated in her evidence natural resources are seldom a part of the Crown's commercial redress and the Office of Treaty Settlements did not see its settlements as providing for a development right in natural resources. So my submission is that in looking at reasonable action in the context of what's expected of the Crown, it's difficult for Māori to derive any confidence or support from the first of the three methods that are really what the Crown is saying is reasonable action to comply with the Treaty.

The second one is even more stark, that is, the Fresh Start for Fresh Water, and just staying with page 573 for a moment there's a discussion of the Fresh Start for Fresh Water in the Land Water Forum and I'll read the whole paragraph, it's the second paragraph on that page. "In essence the Crown's position was based on Māori not having proprietary rights in water and that the rights of tino rangatiratanga and kaitiakitanga will best be recognised through the results of the Fresh Start for Fresh Water programme." As we explained, and referring back to a previous part, "The Land and Water Forum have recommended the creation of a national commission on a co-governance basis with iwi to guide and oversee water management. Iwi representation on regional committees and enhanced iwi participation in resource management planning and consenting processes. But the Land and Water Forum has also recognised that Māori looked at their waterways to satisfy iwi development aspirations and that they have commercial interests in water. Iwi, the forum noted, seek outcomes that retain the capability to satisfy iwi development aspirations including by ensuring future access to water for commercial business. Mr Beatson provided us with the pānui of the 2012 Freshwater Iwi Summit at Hopuhopu which recorded a resolution that iwi confirm they have economic interests in freshwater that need to be acknowledged and provided for. Mr Beatson's evidence, however, did not suggest any ways in which the process he describes will provide for Māori economic interests in their water bodies.

From that background and the description of Fresh Start for Fresh Water and the Land and Water Forum, let me take you to the report of the Land and Water Forum and that's in volume 4 at tab 65 and you'll see that this is the second report in April last year. The approach of the Land and Water Forum to Māori claims is this, if I can

take you to page 847 of the report. From what was being said in evidence to the Waitangi Tribunal, and is one of the initiatives that the Deputy Prime Minister puts in place as reasonable action, the Land and Water Forum says this, I'll read paragraphs 127 and 128, 127 is introductory. "For iwi the contemporary discussion of freshwater invokes legacies marked by their exclusion from decision making by delegated authorities that have not included them and by painful ecological and cultural losses. Iwi consider that these legacies are a fundamental part of their conversations with the Crown and create obligations such as the recognition of iwi rights and interests, clean up of degraded waterways and future forward attention to effective governance participation."

And then crucially this in the context that this is one of the Crown initiatives, "Fundamental issues between the Crown and iwi concerning iwi rights and interests are not on the table in this forum." So while the Deputy Prime Minister might see that as a way forward, Māori can take little comfort from the fact that the Land and Water Forum don't see it that way.

And the third mechanism that the Crown says is in place is engagement with iwi and if I can go to volume 3, this is the report of the – no, this is a decision of the Waitangi Tribunal on the grant of urgency for the hearing. The decision begins at page 635 and if I can take you to 646 and paragraph 50. The paragraph begins, "Secondly the claimants place greater emphasis." Now I want to take you down to the middle of the paragraph, and you'll see the reference to 2012 and then down two lines before that, the sentence beginning, "While the Crown has noted". "While the Crown has noted that ownership is not on the table for discussion, either with the Iwi Leaders Group or any other Māori groups involved in discussion for freshwater reform, the reality is that all rights in water will be affected by the outcomes, including any surviving Māori proprietary and Treaty rights." So they're not on the table.

And then the affidavit of Tukoroirangi Morgan in volume 2 please. If I can just deal with this point, your Honours, and that will bring me to a convenient stage. Under tab 24, and Mr Morgan and his affidavit at page 256, and going on to 257, paragraphs 3 and 4, I was a member of the Freshwater Iwi Leaders Group when it was constituted," then he refers to another affidavit. "[I]t was constituted for the development of a Treaty based engagement with Māori on water management options. However, in the course of that engagement the Crown declined to discuss issues of Māori customary proprietary interests and took the position that such

interests Māori had were in the maintenance of environmental qualities. I understood the Crown's position to be that Māori rights and interests could be met through management regimes. I did not, and still do not, agree with that position but I was unable to shift the Crown from its presumption that the issue was about management only and had nothing to do with the recognition of customary proprietary interests."

So again on the third of the three initiatives identified by the Deputy Prime Minister there's little encouragement or support of Māori's position.

**COURT ADJOURNS:11.31 AM**

**COURT RESUMES: 11.54 AM**

**MR CARRUTHERS QC:**
On the issue that your Honour the Chief Justice raised with me, I've discussed that with my learned friend Mr Goddard and we will look at it over lunch if we can. There's some material that we think would be helpful to have before you.

**ELIAS CJ:**
The other matter we'd like some assistance on, although I think we have a general understanding of it, insofar as the land held by Mighty River Power is concerned, that's subject to the memorialisation, is it?

**MR CARRUTHERS QC:**
Yes.

**ELIAS CJ:**
And does that attach, I should know the answer to this but I don't, does that attach on the transfer from the Crown to the SOE or does it arise after transfer from, on transfer from the SOE? Further transfer? The first is it, Mr Goddard?

**MR CARRUTHERS QC:**
Yes it is.

**ELIAS CJ:**
Thank you.

**MR CARRUTHERS QC:**
Yes. Yes it is.

**ELIAS CJ:**
Yes. Thank you. And –

**McGRATH J:**
At some stage if someone could give us this reference to the statutory provisions, presumably in settlement legislation, that would be helpful.

**MR CARRUTHERS QC:**
All right.

**McGRATH J:**
Don't bother to try now Mr Carruthers.

**ELIAS CJ:**
It may be that Mr Goddard can, when he gets up, can tell us that.

**MR CARRUTHERS QC:**
I know we can deal with it your Honour. I know it's something that I've looked at. But in the time I don't have that at my fingertips.

**ELIAS CJ:**
No, that's fine.

I should also say, Mr Harman, we are granting your client intervener status. And in accordance with our normal practice we'll decide later whether it's necessary for us to hear from you further. Thank you.

Thank you Mr Carruthers.

**MR CARRUTHERS QC:**
Your Honours, I'd got to dealing with the issue of impairment through loss of control, so I'm in section 7 of the submissions. The way in which the loss of control aspect has been analysed is by looking at the key differences between the SOEs and the MOMs, and Appendix 2 tabulates the, those differences and I'll go through them. But, as I've noted, the first five differences occur as soon as the SOE is transformed into an MOM company.

**ELIAS CJ:**
Sorry, where are you...?

**CHAMBERS J:**
Appendix 2 of Mr Carruthers' submissions.

**GLAZEBROOK J:**

Page 10.

**ELIAS CJ:**

Oh I see.

**MR CARRUTHERS QC:**

And I'm just introducing it by reference to paragraph 7.2, so I'm working from 7.2 and I'm going then to Appendix 2.

**GLAZEBROOK J:**

Page 10 of the main appellant's submissions. Is that right Mr Carruthers?

**MR CARRUTHERS QC:**

Yes, that's right. Yes.

So what I was just drawing attention to was that in Appendix 2, the first five differences occur as soon as the SOE becomes an MOM, and then differences 6 to 10 occur once the shares are sold to private individuals. And if I can just take you through the appendix, I don't...

**CHAMBERS J:**

Just before you start on this Mr Carruthers, I share Justice Glazebrook's concern, dealing with this in the abstract, to use her term, I find it difficult to assess the significance of these differences without having it in my mind exactly what remedy or remedies Māori might actually be seeking in the case.

**MR CARRUTHERS QC:**

It is no part of my argument and it is no part of the Māori approach to this issue to formulate what Māori say is a protective mechanism. And that, really, that approach arises because of a number of different views and a number of different approaches that might be adopted, which is why the remedy sought is the declaration in the terms that are outlined in the papers. But let me –

**CHAMBERS J:**

I know in this proceeding all you can get is the declaration.

**MR CARRUTHERS QC:**

Yes.

**CHAMBERS J:**

But it would be useful to know, in broad terms at least, what possible protective mechanisms Māori might seek.

**MR CARRUTHERS QC:**

Well, your Honour, I'm going to answer for you in the same way as I answered Justice Glazebrook, and that is that in sections 8 and 9 that I'm coming to, I, I do deal with various ways in which the Crown might protect Māori's position. And that may well provide at least some tangible, at least something closer to an illustration of the sort of things that may be available.

**CHAMBERS J:**

Right. You press on with what you wanted to tell us about Appendix 2.

**MR CARRUTHERS QC:**

Thank you. But I am sensitive to the issue that both your Honours Justice Chambers and Justice Glazebrook have raised with me, but it is a deliberate approach that comes from the nature of the Crown and Māori relationship that is featured in a number of settlements, and I suppose I've instanced the three important tangible ones, lands, forests and fisheries, and this is really the fifth tangible one that we're really looking for, looking to the Court to adopt the same approach that allows a direction for consultation to try and get a result.

**ELIAS CJ:**

Does it depend, ultimately, on the state in which the water resource is presently or is today to be found? If you had, for example, an undeveloped resource, it may be that the reparation or remedy or proprietary interest that would be asserted at law is actually in the nature of ownership, and that's what the claimants would be seeking. In other cases it may not be reasonable to seek that because of the nature of the resource and its importance, perhaps, in the national scheme. Is it not that you really can't, you can't answer except in terms of specific geographical features or, sorry, I'm trying to use a neutral word rather than talk about water. But it could be a river, it could be a lake, it could be a stream, it could be a spring. And the responses

reasonably available may differ according to the circumstance in which that resource is to be found.

**MR CARRUTHERS QC:**

With respect, I agree entirely, your Honour, and I did instance, when I was opening the appeal, the difference between a lake where there is, there can be an entirely different concept of owning the land on, all around the lake and the concept of the water being an integral part of that concept of ownership as opposed to the Waikato River where the water keeps going and, as your Honour has observed, there are other interests. But my submission is that the focus must always be on looking at what the Article 2 right was and devising a remedy that focuses on mana rather than money. That's probably a rather crude way of putting it. But it is looking at redress of the right as near as may be, and as your Honour has correctly pointed out, there may be circumstances like major development of the kind that is on the river, that does limit the nature of the redress that the Crown is able to provide.

**ELIAS CJ:**

Or that Māori can reasonably expect.

**MR CARRUTHERS QC:**

Yes. Yes.

**ELIAS CJ:**

And one gets a sense of that reading the Commissioner's report in connection with the principal development on the Waikato River.

**MR CARRUTHERS QC:**

Mmm. Yes.

**ELIAS CJ:**

And the attitude taken by the Māori who were represented at that hearing.

**MR CARRUTHERS QC:**

Yes. But your Honours, I will try and be as explicit as I can over some of the mechanisms that may require consideration in the process that we argue for. I was taking you to Appendix 2 and looking at the first six differences which occur

immediately with the transfer. I don't need to read the text, but if I can just draw attention to the headings and leave your Honours to deal with the text in due course.

There's the contrast between social responsibility and acting in the best interests of the company with the conventional Companies Act obligations. Number 2, the Crown exerting control through the statement of corporate intent and that loss of control that there will be no need for Crown approval to sell substantial assets, leaving aside, as I've noted, the issue of major transaction. Step 3, no oversight by the Ombudsman. Step 4, not subject to the OIA. Then in five, the Crown can require non-commercial activities and there's no such issue after removal. Six, the shares cannot be sold, and of course the concept is that the Crown can sell up to 49 per cent of the shares, and then – I'm sorry, I've taken you one step too far. Step 6 is the first of the issues that arise once the shares are sold, and that's, six, of course, is the sale of the shares.

**McGRATH J:**
Once the Act comes into effect.

**MR CARRUTHERS QC:**
Yes. Yes, that's right. Yes.

So, your Honour, it's in fact once this, once the shares are sold, the Act comes into effect. But the shares aren't at that point disposed of. There's still –

**McGRATH J:**
But they can be disposed of?

**MR CARRUTHERS QC:**
Exactly. That's the power to dispose of them. And for practical purposes we're not in difference with one another, but it's simply a distinction between the actual sale and the power.

**ELIAS CJ:**
Mr Carruthers, are you going to expand on this? Because I have a question relating to the Crown control.

**MR CARRUTHERS QC:**

May I invite your Honour to ask the question?

**ELIAS CJ:**

All right. The way the Crown presently exerts control of an SOE is a fairly limited or indirect form of control. There's not power to give directions in connection with particular matters, is there? It's only control through the statement of corporate intent.

**MR CARRUTHERS QC:**

Yes, which – and it's really the oversight of the shareholding ministers.

**ELIAS CJ:**

Yes.

**MR CARRUTHERS QC:**

But you're right, it's not a power to direct management.

**ELIAS CJ:**

No. But I see that from your column where you talk about section 13, oh, section 14, you say that it "includes the objectives, nature and scope of the activities undertaken". I wonder whether we can go to section 14(2), because that seems to be the most intrusive power currently able to be exercised by the Crown through the shareholding ministers, isn't it?

It's only of a kind referred to in paragraphs (a) to (h) of section 14(2). Is that the principal control?

**MR CARRUTHERS QC:**

Yes. Section 14 is the principal control, yes. Your Honour –

**McGRATH J:**

It seems pretty important in the *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 (PC) case. In – by the Privy Council, what the Crown could do with section 14.

**MR CARRUTHERS QC:**

Yes. That led to the conclusion about the importance of being an SOE in the sense that –

**McGRATH J:**
Yes. What Ministers could require a SOE to do was seen by the Privy Council as pretty significant when it came to section 14.

**MR CARRUTHERS QC:**
Yes.

**McGRATH J:**
As I recall. I don't think section 14 should be downplayed too much as a mechanism while state-owned enterprises legislation is in effect for the Crown to secure compliance with the principles of the Treaty and therefore as to the loss of potential protection when it goes.

**MR CARRUTHERS QC:**
And that's what led the Privy Council to use that expression about the extent of the Crown's control, I just can't put my finger on it.

**McGRATH J:**
Don't worry. It's just worth bearing in mind. I don't think we need to go to it.

**MR CARRUTHERS QC:**
No, your Honour, I agree but with respect I also agree with your Honour about the importance of section 14 in the sense that that is the – that does provide a significant control that the Crown loses.

I was dealing with the steps from 6 onwards, that is the steps that occur once the transfer is made from a SOE to a MOM. I've dealt with 6, 7, no duty to private shareholders, then duties are owed to private shareholders and they are significant conduct oppressive unfairly prejudicial to individual shareholders then step 8, under a SOE Crown can amend the constitution and then under a MOM amending the constitution will require private shareholder support. Nine, Crown can approve major transactions. Major transactions will require private shareholder support. Crown, in 10, Crown can set dividends and then dividends are a matter for shareholders. So what we then submit – I think your Honour Justice McGrath, there's that passage at

7.1, I couldn't see it for looking, the Crown can exert considerable control over the state enterprise and that's the reflection of section 14.

Going to 7.3, the submission is that the problem with giving Māori direct and meaningful involvement in the power-generating SOEs after privatisation is, in my submission, clear from the table. Such measures will have to be implemented without the power to amend the company constitutions or by influencing the companies through a statement of corporate intent. The measures cannot constitute major transactions. To be approved by the board, the measure would need to be in the best interests of the companies. The measures cannot be oppressive, unfairly discriminatory, or unfairly prejudicial to any minority shareholder.

Now the Crown has suggested that some of these difficulties can be overcome by providing Māori with a derivative instrument. That instrument would be wholly divorced from the companies themselves but which exactly mirrors any desired financial return based on those companies.

And my suggestion is that that doesn't really focus on the issue. It isn't to understand the issue and as I've emphasised already, the nature of the redress is associating that redress as closely as practicable to the Treaty right if the Treaty right cannot be completely replicated in the way in which your Honour the Chief Justice discussed with me a moment ago.

So in addition to loss of control the Crown will also be disposing of the respective assets. The assets will cease to be available for the fulfillment of any Treaty obligations. That is, the underlying assets.

**WILLIAM YOUNG J:**
But aren't they? I mean, aren't all the, isn't all the physical infrastructure subject to claims? By the memorialisation process?

**MR CARRUTHERS QC:**
The land?

**WILLIAM YOUNG J:**
Yes.

**MR CARRUTHERS QC:**

Yes.

**WILLIAM YOUNG J:**

Most of the assets presumably are on the land aren't they?

**MR CARRUTHERS QC:**

I suppose you'd have to regard a hydro-electric dam as a fixture, yes.

**WILLIAM YOUNG J:**

But that's the point I'm really trying to – leaving aside the claim to running water, aren't the claims that might be advanced able to be given effect to under the memorialisation process?

**MR CARRUTHERS QC:**

There's a distinction between satisfying the Treaty right by provision of land in whatever form and recognizing the right in relation to water or the water resource, whether it's water or geothermal, and – for example –

**WILLIAM YOUNG J:**

I was trying to distinguish that. Leaving aside the –

**MR CARRUTHERS QC:**

I beg your pardon.

**WILLIAM YOUNG J:**

Yes. I probably put it wrongly. Leaving aside the claim to the water resource, I said running water, but claim to the water resource –

**MR CARRUTHERS QC:**

Yes.

**WILLIAM YOUNG J:**

– the claims are protected under the memorialisation procedure, aren't they?

**MR CARRUTHERS QC:**

Yes, your Honour, that –

**ELIAS CJ:**

Unless they're claims to the entity, to the river, to the spring, to the lake.

**MR CARRUTHERS QC:**

Yes but his Honour Justice Young was putting that to one side.

**ELIAS CJ:**

Well I'm not sure that you can exclude without – I'm not sure that it's simply the sum of its parts.

**MR CARRUTHERS QC:**

No. Which was the response I initially made, that it's a matter again of making sure the redress is actually of or in relation to the right and just looking at the tangible physical resource of land and fixtures doesn't actually focus on redress of the right.

In this next section that I've called in the written submissions "Retention of control" but it also deals with resolution of the claims in sections 8 and 9 and I'll go through these because this is really the, probably the only discussion we have of some ways in which mechanisms may be devised.

**GLAZEBROOK J:**

Can I just, before you do that, and I think to a certain extent, as you said, the next section answers this question, but it's a necessary consequence of the legislation itself, isn't it, that section 14 of the SOE Act disappears.

**MR CARRUTHERS QC:**

Yes.

**GLAZEBROOK J:**

So a lot of the issues about the loss of control, while they are quite clearly, they quite clearly happen, but don't they happen just as a necessary effect of the legislation, which you're not challenging?

**MR CARRUTHERS QC:**

The –

**GLAZEBROOK J:**

I suppose the corollary of that is that any redress would have to, if you're not challenging the legislation, be within the confines of what has already happened in terms of that loss of control that happens as a necessary result of the legislation.

**MR CARRUTHERS QC:**

The – right at the moment, section 9 and section 14 are in force. They apply at the moment. So what is being examined is whether the bringing into force of the Amendment Act impairs the ability of the Crown to provide reasonable action on the, in relation to the Treaty claim. So –

**GLAZEBROOK J:**

But you can't be arguing, and I don't think you are, that section 9 can mean that the MOM legislation, if we can call it that in its shorthand form, can never be brought into effect.

**MR CARRUTHERS QC:**

No, no.

**GLAZEBROOK J:**

So it must be assumed that there are Treaty-compliant ways of selling 49 per cent and operating under the MOM regime that still mean that section 14 goes and all of the – and there is the ability to sell 49 per cent. Which is why I said the corollary of what I said is that any of the measures that alleviate that situation or are Treaty-compliant must be in accordance with a MOM company that has 49 per cent in private ownership and has lost the section 14 protection. I'm not sure I've expressed that –

**MR CARRUTHERS QC:**

No, no. The argument is not that the legislature cannot pass the legislation and that the Crown cannot sell the 49 per cent. The argument is that in order to take those steps the Crown must put in place the protective mechanism. Because it's the Crown's obligation to protect the Treaty right before the disposal of those assets. Now, that necessarily means that the protective mechanism must be in place before the Amendment Act is passed.

**GLAZEBROOK J:**

But if you look at the *Lands* settlement, I suppose, as a, as the starting point for a lot of this, I suppose the protection put in place for land was the claw-back provision. If you convince us that there is material deterioration in the position through this Act coming into effect and you're looking for a protective mechanism, one might be, without thinking what ultimate remedies would be put in place, some similar claw-back mechanism for water rights, I suppose.

**MR CARRUTHERS QC:**

Yes.

**GLAZEBROOK J:**

It isn't necessary to go to a remedy. It's necessary to go to – if you're right in your premise, and that's the critical thing, that the steps that the Crown is taking will make the position of the claimants more difficult, then it's just a question of looking to see, or it may be a question of looking to see not whether it can be done at all but whether it can be done on a basis that preserves the same rights.

**MR CARRUTHERS QC:**

Yes. Yes. Yes, I think yes, your Honour. That captures the appellants' position. There's no question that the legislature can, can implement the legislation that it's passed. But before that can be done the Crown must satisfy its obligation under the Treaty, which is to put in place a protective mechanism, and I agree entirely with your Honour that whatever, we're not talking about the ultimate remedy or the ultimate resolution. We're looking at what might be an equivalent mechanism to memorials and it's always been a source of wonder as to who devised the memorials idea, because it was a truly imaginative solution to the *Lands* issue.

**CHAMBERS J:**

And the memorials though, as Justice Young has put to you, are a potential remedy for water, even though they're memorials over land, aren't they?

**MR CARRUTHERS QC:**

Well, that's really the debate which Justice Young was having with me. The answer, the answer is no. It's not an answer to provide land or some interest in land to satisfy a claim of mana over water.

**CHAMBERS J:**

Well isn't that as much a remedy representing mana as giving some shares in Mighty River Power, say?

**WILLIAM YOUNG J:**

Which owns those assets. I mean –

**MR CARRUTHERS QC:**

Which – yes.

**WILLIAM YOUNG J:**

I mean, if giving shares in Mighty River is an appropriate remedy, wouldn't it be equally the case of giving a remedy in relation in underlying assets is an appropriate remedy?

**MR CARRUTHERS QC:**

Well it does beg the question as to whether giving shares is actually an appropriate remedy to recognise the water resources claim.

**WILLIAM YOUNG J:**

Right.

**GLAZEBROOK J:**

Well it was submitted in the Waitangi Tribunal that it wasn't and it wasn't sufficient. That there needed to be some control aspect as well. Although presumably if you control the assets you control the, what goes through those assets, at least in terms of the...

**MR CARRUTHERS QC:**

Well, but – yes, your Honour's right. If you do have control, yes.

**ELIAS CJ:**

How are these assets valued? I'm just thinking about which comes first in terms of what's valuable. Is it the water resource or is it the structure? I'm just thinking about the submission by Mighty River that their assets, that their value is totally tied up with the water right.

**MR CARRUTHERS QC:**

Well it becomes chicken and egg, doesn't it, really? If there's no water there's no value in –

**ELIAS CJ:**

No.

**MR CARRUTHERS QC:**

– what's sitting on the banks of the Waikato River.

**ELIAS CJ:**

Right.

**MR CARRUTHERS QC:**

Yes. And on the other hand, there is, there is no return to the shareholding Ministers without the, without the dams sitting, using the water. But I mean the issue there is that in relation to the claim for water resources there is zero cost to the SOEs and no return to Māori, no control to Māori, which of course is at the heart of the claim.

I go on in section 8 to look at the retention of control, and this really follows from the analysis that I've made in section 7. And then I've looked at those mechanisms that are available now and won't be available after privatisation, and at 8.2, significant control in the companies could be retained from amending the constitution. This could take the form of giving the Crown additional authority over the decisions of the companies in order to preserve the ability of the companies to enter into arrangements with Māori in the future, regardless of whether those arrangements are in the best interests of the company. At present the respondents have the power to amend the constitution so as soon as more than 25 per cent of a MOM company is sold the ability to amend the constitution will be lost. As soon as a single share is sold to a private shareholder the ability to amend the constitution will also be lost to the extent that doing so would be unfairly prejudicial to the minority shareholder or shareholders.

There's a discussion there about the criticism of the way in which the oral submissions were made in the Court below, but in fact what was being done was simply responding to what the Waitangi Tribunal had proposed.

And just pausing there for a moment, the criticism that Māori have not advanced any proposal to, as to an appropriate mechanism really loses sight of the whole question of the constitutional owners. The obligation is on the Crown to protect Māori under Article 2. It is not for Māori to dictate to the Crown, or even in the context of the litigation to be called on to provide the mechanism that protects. In many respects it's difficult for Māori to know the metes and bounds of the ability of the Crown to provide a protective mechanism. That is for the Crown and it is the Crown's obligation. And it certainly does not sit happily for the Crown to be criticising Māori for not providing a suggested mechanism. One of the features in this case is that even now Māori do not know what the public are going to be told about Māori claims or Māori interests when the share float is made after the legislation comes into force. The criticism that's being made by the Judge and also by the Crown is, in my submission, misplaced. The obligation is the other way round. The obligation under the Treaty is for the Crown to provide the protection.

Then I've gone on to submit as an –

**ELIAS CJ:**

That might be right but, after all, these claims have been around for a very long time, and to the extent – and it harks back to the point I put to you at the beginning, that there seems to be a blurring of Treaty of Waitangi Act claims for reparation and to assist the Crown in fulfilling its Treaty responsibilities, which are not legal claims. They're political claims and the Tribunal assists the Crown in those. And there are proprietary claims which haven't been asserted yet. And I mean, it may be said, well, the Crown, in terms of its Treaty of Waitangi Act responsibilities, has parked this issue. But it must fairly be said that so too have Māori because they haven't – I'm not saying they should go to Court to assert proprietary interests, but it is, that is available. And this may be not in connection with some of the significant assets that are being spoken of here not in Māori ownership. There's no traditional right that can be asserted. But more general rights have not been, whether they exist in the common law of New Zealand has yet to be investigated.

**MR CARRUTHERS QC:**

No. Yes. I understand the distinction and accept that there is a difference between the proprietary rights claims that necessarily Māori must assert for the Crown to be able to deal with and the nature of the claim under the Act and it was in respect of

that claim that my submission was directed. But I accept entirely the criticism that your Honour makes of the –

**ELIAS CJ:**
Well, it's not really a criticism. It's just to make the point that there are two parties.

**MR CARRUTHERS QC:**
Yes. Yes. I didn't mean criticism in any pejorative way at all. Just in the way that conventionally it can be used.

I've gone on to submit at paragraph 8.5 another method by which the interest may be protected. I've submitted that potential rights for Māori could also be retained through the creation of a special class of shares. Rights could be attached to the class of shares with the shares being retained by the Crown, similar to the creation of the Telecom Kiwi share. Again, while this measure could be implemented now, it would not be possible once the companies have minority shareholders. And the sort of rights that could be attached to the class of share would be rights of the kind that are reflective of the ability of Māori to participate in the management of the actual water resource.

A special class of shares with rights attached to them was also put forward by the Waitangi Tribunal. The Crown considered –

**GLAZEBROOK J:**
Would they be a special class of shares held by the Crown as part of their 51 per cent? Or – because it's – I'm just not sure how that fits in with the legislation, that's all.

**MR CARRUTHERS QC:**
Well, the Crown...

**GLAZEBROOK J:**
I mean the legislation is fairly, relatively prescriptive, I think. I'm not talking about the Companies Act legislation. I'm talking about the MOM legislation.

**MR CARRUTHERS QC:**

No, no, I understand that. But it only – the legislation is prescriptive in the sense that the Crown cannot have less than 51 per cent control of the company. So...

**GLAZEBROOK J:**

Well just one – and you've also got to – because – I mean, I suppose the Crown could have the 51 per cent and could add these things in for itself, but whether it could ever transfer them to Māori under the current legislation without amending it is another matter, and I would think they couldn't amend it because there's a 10 per cent limit on holdings. And if there's a special class of shares that actually creates a wider management right than would be implied in a 10 per cent voting interest, I wouldn't have thought this could be done.

**MR CARRUTHERS QC:**

Well, I – that –

**GLAZEBROOK J:**

You could – I suspect you could create the special class of shares held by the Crown.

**MR CARRUTHERS QC:**

Exactly. Yes.

**GLAZEBROOK J:**

Because the Crown can really do what it likes. It would mean that it would be selling less than 49 per cent, probably.

**MR CARRUTHERS QC:**

Yes it would be. Yes.

**GLAZEBROOK J:**

But that it – I think it can do that. But, although not really in what was contemplated by the legislation. But I don't think it could transfer them later –

**MR CARRUTHERS QC:**

No, no.

**GLAZEBROOK J:**

– without changing the legislation, and there is an issue about saying that one can't – well, then one would probably be challenging – if one says one can only create appropriate redress by changing the legislation, then the Court is challenging the legislation at that stage isn't it?

**MR CARRUTHERS QC:**

Yes it is. And the submission goes off on the premise that the Crown would continue to hold that special class of share, but it would be a class that provided redress for Māori in some way.

Your Honour, many of the suggestions do bristle with difficulties. And it's one of the reasons why the consultative process is necessary: to really sort through what is an appropriate way of protecting the position.

**CHAMBERS J:**

It does seem to me though, Mr Carruthers, that in a sense this discussion you've been having with Justice Glazebrook highlights a potential inconsistency in your argument in that, in truth, don't submissions of the kind you're making in 8.5 and 8.6 amount to a challenge to the legislation? Which is the very thing you've also said you're not challenging.

**MR CARRUTHERS QC:**

No. There's – if we take 8.6, there is no reason why the Crown could not create in its 51 per cent or even more than that a class of share. The obligation isn't to sell 49 per cent. The Crown can sell up to 49 per cent. It can create a class of share that carries with it rights that relate to the Treaty right. But your Honour, the only point of this discussion is to look at what might be, what the Crown may be able to do in order to protect the position prior to the legislation coming into force.

**ELIAS CJ:**

What is the – remind me. Is the 51 per cent the minimum that must be retained?

**MR CARRUTHERS QC:**

Yes.

**ELIAS CJ:**

So the Crown could retain more?

**MR CARRUTHERS QC:**

That's right.

**ELIAS CJ:**

So a protective mechanism might be that the Crown will not divest itself of, I don't know, will divest itself of only 25 per cent of the shares –

**MR CARRUTHERS QC:**

Yes, or –

**ELIAS CJ:**

– until there is some resolution.

**MR CARRUTHERS QC:**

Or you could have something in the nature of a Kiwi share that carries with it particular rights.

**ELIAS CJ:**

But that would have to be on amendment to the legislation, and that's a downstream –

**MR CARRUTHERS QC:**

Yes.

**ELIAS CJ:**

– solution.

**MR CARRUTHERS QC:**

Yes.

**ELIAS CJ:**

Whereas we are talking about the current legislation and whether some protective mechanism ought reasonably to be adopted consistently with the legislation.

**McGRATH J:**

It wouldn't have to be by legislation necessarily, would it?

**MR CARRUTHERS QC:**

The company must have power at the moment to pass a resolution creating, creating different classes of shares. Now I have, I don't –

**McGRATH J:**

And your point is that those, as I understand it, that those shares could be within the 51 per cent –

**MR CARRUTHERS QC:**

They could be within.

**McGRATH J:**

– that the Crown is going to continue to hold?

**MR CARRUTHERS QC:**

Yes. They could –

**McGRATH J:**

I actually read in 8.5 of your submissions, "Rights could be attached to the class of share with the shares being retained" as within the shares being retained.

**MR CARRUTHERS QC:**

Well –

**McGRATH J:**

It doesn't seem to me that need be done by legislation. The company lawyers are fully capable of drafting and giving effect to that through restructuring the constitution, I would think.

**GLAZEBROOK J:**

But the problem is then they're then available for redress to Māori without breaching the 10 per cent, or the, they – the 10 per cent requirement. So if the argument is you create a special class of share and then transfer them to Māori, you can't do that –

**McGRATH J:**

Mr Carruthers' point, as I understand it –

**GLAZEBROOK J:**

– if that would give you more than 10 per cent.

**ELIAS CJ:**

But that's –

**McGRATH J:**

– is that he's retained his clients, sorry, the Crown is retaining the shares and, but enhancing control before the 49 per cent of the shares are sold.

**MR CARRUTHERS QC:**

Yes. And, your Honour, it could be within the 51 per cent or it could be part of the 49 per cent. So the Crown could retain 51 per cent plus another group of shares. So, just –

**GLAZEBROOK J:**

But what does that do for Māori? That's what I couldn't understand, because I'm less – it's then available to be transferred to Māori. It's done nothing for them.

**MR CARRUTHERS QC:**

Well, it – no. Because it would depend on what rights were attached to those shares. For example, the extent to which Māori might participate in issues that affect the management of water in the particular company that provide a particular return for Māori for use of the water. I mean, issues like that, issues that are probably really beyond my ability to actually formulate –

**GLAZEBROOK J:**

What, so the special –

**MR CARRUTHERS QC:**

– in an imaginative –

**GLAZEBROOK J:**

– class of shares would already have rights that gave Māori control, which would have to – because the Crown has to retain 51 per cent of control.

**CHAMBERS J:**

Yes. It has to come out of the 49 per cent.

**GLAZEBROOK J:**

And nobody can have more than 10 per cent, nobody other than the Crown can have more than 10 per cent.

**MR CARRUTHERS QC:**

Well the – in the 51 per cent, the Crown would still be retaining its 51 per cent.

**GLAZEBROOK J:**

I understand in the initial stages the Crown would be retaining its 51 per cent. What I don't understand is how, down the track, without breaching the legislation, that would then give Māori control over the underlying assets of the company without breaching the 10 per cent.

**ELIAS CJ:**

Well it might require change of legislation as part of any ultimate settlement. Just as the Crown suggests that there may be amendments to the Resource Management Act that are required down the track.

**McGRATH J:**

I thought Mr Carruthers was proposing, was not saying that it was important for protecting the right to transfer shares to Māori.

**MR CARRUTHERS QC:**

That's right.

**McGRATH J:**

It was protecting Crown control through in the 51 per cent which would be enhanced and its ability, therefore, to deliver for Māori more than a 51 per cent shareholder normally could do. And that that was going to be, it was possible for that to be exercised to protect Treaty principles in the future.

**MR CARRUTHERS QC:**

Your Honour, that's correct, and in answer to your Honour Justice Glazebrook, it's not a matter of having to transfer the shares in order to deliver rights attaching to those shares. It can be a special class of share that provides for particular rights for Māori to participate in the business in the way – in business of the company in a –

**GLAZEBROOK J:**

So what – the particular class of shares would be held by the Crown but they would be shares that will allow a totally third party to exercise all the voting rights in respect of those shares? Or the underlying rights attached to the shares?

**MR CARRUTHERS QC:**

Or –

**GLAZEBROOK J:**

That just doesn't fit, to me –

**MR CARRUTHERS QC:**

Well...

**GLAZEBROOK J:**

– with the 10 per cent limit, that's all.

**MR CARRUTHERS QC:**

Or that in relation to that parcel of shares the Crown acts in relation to the way in which particular Māori interests direct.

**WILLIAM YOUNG J:**

That's hardly consistent with 51 per cent ownership, which might be thought to buy all the incidents of ownership.

**MR CARRUTHERS QC:**

Well, your Honour –

**GLAZEBROOK J:**

But also there's a 10 per cent limit. Oh, and actually they have a lot of trust sort of provisions in here in respect anyway that says if you're holding it on trust or as agent

for someone else, for, of course, absolutely obvious reasons. I.e. the provisions that say, “Oh, well no, these are my shares but I’m voting them on behalf of” –

**ELIAS CJ:**

If you’re a funds manager you can have more than 10 per cent.

**GLAZEBROOK J:**

But you can't be a funds manager and say, “I’ve got 10 per cent only,” when in fact you’re holding it on behalf of someone with 40 per cent.

**ELIAS CJ:**

There are of course a number of claimants in the Waikato River –

**GLAZEBROOK J:**

A section 45S –

**ELIAS CJ:**

– so 10 per cent for each might be fine.

**GLAZEBROOK J:**

Oh well it may well be, that’s right, it may well be but it still doesn’t give them the control because all it does is give you 10 per cent of voting rights in the company which, if you add them together, might stop a special resolution but that’s as far as it goes because my understanding was the control that was being sought through this special class was really of the underlying, which was going to be much more than merely a 10 per cent voting right in the company.

**MR CARRUTHERS QC:**

I think I come back to the whole purpose of the submission is simply to examine ways in which the interest may be protected pending a final claim and I started with amending the constitution. I’ve looked at the issue of classes of share and acknowledged that it does bristle with difficulties, it does need to be thought through and it does need to be consulted on but it’s simply that these are ways in which the Crown may be able to act to protect the position of Māori proprietary rights pending final resolution of the claims.

**GLAZEBROOK J:**
Is put at your highest, the submission is that this just shouldn't go ahead without that opportunity of consultation and proper consultation on the Treaty-compliant way of implementing the MOM legislation, is that –

**MR CARRUTHERS QC:**
That's –

**GLAZEBROOK J:**
– that's put at its highest and that that is part of the social contract, if you like, that comes under the Treaty in terms of the issue that you said, in terms of an agreed position?

**MR CARRUTHERS QC:**
Yes, that's not putting it at its highest your Honour, that's putting another part of the case, an important part of the case, where procedurally – what I'm looking at is substantively –

**GLAZEBROOK J:**
Well no, I was actually saying that that's – that actually seems to me to be what you're saying here is actually the substantive part, it's not a procedural issue, it's effectively that substantively until there has been a mechanism agreed then there shouldn't be the transfer –

**MR CARRUTHERS QC:**
Oh yes –

**GLAZEBROOK J:**
– so it's not a procedural point. I understand that there's a procedural point later. What I'm putting to you is that, at its highest, you're saying substantively until there is a mechanism in place, that there shouldn't be a transfer, is that –

**MR CARRUTHERS QC:**
Yes, I am saying that, yes.

**GLAZEBROOK J:**

And the mechanism has to be one that's agreed between them in the normal course of negotiation or alternatively, it might be something that then has to come back, is that –

**ELIAS CJ:**

Well in the *Lands* case it would've had to have been resolved by the Court if it hadn't been agreed.

**GLAZEBROOK J:**

Exactly, exactly.

**ELIAS CJ:**

Yes.

**GLAZEBROOK J:**

As the backstop but that –

**MR CARRUTHERS QC:**

Yes and that's the way in which I've consistently put it too, the default mechanism is that it comes back to Court but the –

**McGRATH J:**

Well I wouldn't want to encourage the suggestion that it's the Court's responsibility to devise the protective schemes ultimately.

**ELIAS CJ:**

No.

**MR CARRUTHERS QC:**

No and –

**McGRATH J:**

The Court can give an authoritative opinion, subject to the legal context, on whether or not a particular proposal complies with Treaty principles if the parties are in dispute about that.

**MR CARRUTHERS QC:**

Yes and –

**McGRATH J:**

I mean I understand, I think you, Mr Carruthers, in the end have a bedrock proposition that it's not you who wants to do something that's, as far as you're concerned, is contrary to Treaty principles –

**MR CARRUTHERS QC:**

Yes.

**McGRATH J:**

– you can come up with some suggestions about how the party that does want to do that should deal with it but if in the end something that complies is not put up, you want the sale of the shares to be restrained –

**MR CARRUTHERS QC:**

Yes, yes –

**McGRATH J:**

– and effectively declarations being the mechanism?

**MR CARRUTHERS QC:**

That's right and, as your Honour has observed, it's not part of my argument to invite the Court to formulate a proposal or directive. My argument is consistent with what was done in *Lands*, what was done in *Forests* and what was done effectively in *Fish* as well.

**ELIAS CJ:**

Is that a – do you want to take the adjournment at that stage Mr Carruthers?

**MR CARRUTHERS QC:**

I –

**ELIAS CJ:**

Where do you want to go to? Perhaps you could indicate what you're proposing to cover after this?

**MR CARRUTHERS QC:**

I am in section 8 and I'm just looking at the balance of section 8 because I think that it just covers, in another way, submissions that I've already made in exchanges with the bench and that would lead me to section 9. It probably – if it's convenient to your Honours, it probably is a – that is a convenient point for me to just revisit what I need to do in the remainder of section 8 and section 9 and tidy that after the luncheon adjournment.

**ELIAS CJ:**

Yes, thank you Mr Carruthers. Mr Carruthers, do you expect to complete this afternoon?

**MR CARRUTHERS QC:**

Yes, I do. In fact, I expected to be a little further through but I certainly do expect to complete this afternoon and have my learned friend some distance into his submissions too.

**ELIAS CJ:**

Yes, thank you. All right, we'll take the lunch adjournment.

**COURT ADJOURNS: 12.56 PM**

**COURT RESUMES: 2.16 PM**

**MR CARRUTHERS QC:**
...a report from the Electricity Authority. My learned friend Mr Goddard has provided that and we are handing that up by consent.

Page 21 sets out the location of the electricity generators, and more relevantly, in response to your Honour the Chief Justice's question, is page 22 that gives situation, owner and capacity. It may not quite deal with the issue in the way in which you had in mind, your Honour, but it provides some information as to the various hydroelectric plants.

**ELIAS CJ:**
This is the Electricity Authority, so this covers everybody? All the –

**MR CARRUTHERS QC:**
Yes.

**ELIAS CJ:**
– generating capacity? No, my query was really related to Meridian and related to some of the evidence that we have before the Court, because it's not clear to me whether Meridian has interests in the Kaituna River, for example, which there's evidence on in relation to the Tongariro diversion or in relation to Lake Waikaremoana, which is the intervener's interest. I just wasn't sure whether that is, these are all assets that have been, or interests that have been transferred to Mighty River Power. And there's suggestions also of geothermal interest. In the evidence. But I wasn't sure whether they were connected to Mighty River Power. But maybe Mr Goddard will be able to help further with that.

**MR CARRUTHERS QC:**
Well just dealing with Waikaremoana, Tuai is the generator from Waikaremoana. Yes, and that's a Genesis outlet.

**ELIAS CJ:**
Oh, Genesis. I see.

**MR CARRUTHERS QC:**

Rangipo, which is part of the Tongariro development, is Genesis. And I think your Honour through that table can get an idea from the location –

**ELIAS CJ:**

I see.

**MR CARRUTHERS QC:**

– and the ownership of –

**ELIAS CJ:**

Thank you.

**MR CARRUTHERS QC:**

– of the way in which it works.

**ELIAS CJ:**

Thank you.

**MR CARRUTHERS QC:**

Your Honours, I've got to section 9 of the submissions, and I don't need to dwell on that at all. Section 9 just deals with the water claims that are not affected by the transfer to Mighty River Power, for example. But what needs to be looked at is with Lord Woolf's dictum in mind, is the reality of the manner of resolution, and then in 9.8 I've tabulated a series of issues that, again, I can just allow your Honours to read and I don't need to deal with in any detail.

And your Honours, that brings me to section F of my outline on commencement and to section 10 of the submissions. Your Honour the Chief Justice just asked me about timing and I can offer this: in the outline, the purpose of it was to just set the proposition that I was arguing for and give your Honours the reference to the submissions. And unless you, there were parts of the submissions that you wanted me particularly to take you through, I could deal with the proposition that I want to put, direct you to the submissions as I've noted them, and really move through my outline quite quickly with a view to finishing quarter to three, 3 o'clock at the outside if that suits. So, in a sense, it would be if the Court wants to stop me at any point and ask me to elaborate I'll do that. I want to elaborate a little on the proposition on

*Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590, [1941] AC 308 (PC) [*Hoani's Case*], but beyond that I think the submissions largely speak for themselves.

So let me deal with justiciability, and in my outline at section F(1) at paragraph 23 there's an agreement, there's agreement that the commencement power's justiciable and the issue really comes in as to the circumstances in which the Court will intervene. My submissions is that *New Zealand Māori Council v Attorney-General* [1996] 3 NZLR 140 (CA) [*Commercial Radio Assets*] is distinguishable and I've outlined the grounds for distinguishing that case in paragraphs 10.4 to 10.6.

Some help about the justiciability of the commencement power comes from *R v Secretary of State for the Home Department, ex parte Fire Brigades Union & Others* [1995] 2 AC 513 (HL), which really supports the appellants' case that really that was an occasion on which the Court intervened on a commencement power and said that the Secretary of State had misused the power by not making a decision as to commencement or keeping the decision as to commencement under review but by just saying that it wouldn't be brought into force and putting in place some alternative mechanism under the prerogative. So my submission is that the power is justiciable and the issue is when will that power be exercised?

And the underlying submission here is that the distinction's got to be drawn between the legislative power, that is the legislature acting, and the point at which the Crown has to act as Crown, as the Treaty partner. So that the Crown has to be satisfied that the Treaty, that its obligations under the Treaty are protected. And it's in that context that the submission is that the Court has the power to intervene in the manner in which the appellants argue for to provide the protective mechanism.

It's submitted, and the submission is that a very narrow view was taken in the *Commercial Radio Assets* case of that power, and that may reflect, it may reflect more on the facts of that case than it does on the facts of this case, because here there is, in my submission, a much closer connection between the Treaty claim, the Treaty right that's in issue, and the assets that are in issue as opposed to the way in which the Court reasoned it in *Commercial Radio Assets*.

So moving on to F(2), reviewability for inconsistency. The propositions are these: that section 9 continues to apply, that is, to the Amendment Act and the

commencement power by virtue of section 23 of the Interpretation Act and in this respect the submissions disagree with the analysis made in the High Court. I've set out the reasoning in paragraphs 11.2 to 11.8. one of the features of *Commercial Radio Assets* is that Parliament deliberately decided that the Amendment Act would not be read as part of the principal Act, and I've done the, I've given you the reference to that analysis. So unlike *Commercial Radio Assets*, Parliament in this case has determined that sections 9 and 23 will continue after commencement.

Now, I come to *Hoani's Case*, and my submission is that that part of the decision that deals –

**CHAMBERS J:**
How does section 9 operate though if the 2012 Amendment Act isn't actually in force? How does it bite?

**MR CARRUTHERS QC:**
Section 9 operates on the power to bring the Act into force. Because section 9 still exists and the power would have to be exercised consistently with the Treaty. So that's where the Crown obligation has to be considered in looking at the commencement power. My submission, your Honour, is that the commencement power cannot be so narrow as to just simply identify the date at which it comes in because the Crown has separate obligations from the legislature, then the section 9 power needs to be considered by the Crown as part of the exercise by the executive by Order in Council or the Governor-General by Order in Council.

**WILLIAM YOUNG J:**
I think you accept that this isn't really the approach taken in the *Commercial Broadcasting Assets* [*sic*]?

**MR CARRUTHERS QC:**
Yes, yes I do. Yes I do.

**WILLIAM YOUNG J:**
Right. Because it's the same issue, effectively, wasn't it?

**MR CARRUTHERS QC:**
Yes.

**WILLIAM YOUNG J:**
Different context.

**MR CARRUTHERS QC:**
They're different – yes. Yes, different context, your Honour, and it's – this – it's only a sense from the case, but much of the reasoning in the case seems to be driven by the conclusion of the Court at a reasonably early stage that there was a disconnect between the Treaty right and the particular asset, the commercial radio assets that were in issue. Now, it's not quite put that way, but that's the sense that seems to come from the case, which makes it different from the present case, in my submission.

**McGRATH J:**
That's perhaps not so much part of its reasoning on whether or not the commencement power should be refused though. Just, you know, for me, one – I'm not sure whether going along the route you're suggesting is really going to help things, if I can put it this way, in the long term in this area. It would be reasonable enough for the departments involved to propose legislation that just came into effect. Statutes could be tweaked a bit to do that. What instead they're doing is, for the sake of tidiness, I suspect, the departments, the main department involved and Ministers they report to really don't want to keep the state-owned enterprises regime operating right up until the sale takes place. And then to take the company out of that regime and put it into the new regime, transforming it, as you put it, as soon as the sale's about to take place because it's tidier, in a way.

**MR CARRUTHERS QC:**
Yes.

**McGRATH J:**
Now where in terms of the sort of application of Treaty principles generally does it help to say that the legislation could not be brought into effect? I mean I know there are constitutional arguments that the courts defer, that they don't treat these matters as justiciable but what I really want to put to you is that this particular argument in relation to reviewability of the commencement power and that the Court should review it in this case isn't going to help at all in terms of Treaty jurisprudence.

**MR CARRUTHERS QC:**

I understand your Honour's proposition very clearly and I think I am compelled to agree with it when one is looking at it in the long-term. I expect I am driven to the submission that in this case when is it and what opportunity does the Crown have to look at its obligations under the Treaty and what are the mechanisms and this is one of them but I acknowledge immediately that it is subject to the proposition that your Honour has put, that in the long term it's probably not a helpful outcome for Treaty jurisprudence.

**McGRATH J:**
It does involve a rather unorthodox attitude by the Court to review of something that looks highly legislative in character even though, as the Court of Appeal in the *Commercial Radio* case said, it is an Order in Council so it's executive power.

**MR CARRUTHERS QC:**
Yes.

**McGRATH J:**
So anyway that's fine, that's a straightforward answer and your point really is that never mind what's done in future cases, you've got to deal with the legislation in this case.

**MR CARRUTHERS QC:**
And in this case if not then when and how.

**ELIAS CJ:**
It might also be said that this slippery slope has been there for some time and that instead – that the lesson was learned that it's not a good idea to enable transfer of assets, it's better to provide for the effect in the way that's happened here, so we're already halfway down that. But the question I had relates to the Order in Council because it seems to me that one of the interpretations is that the State-Owned Enterprises Amendment Act isn't the source of the power to make the Order in Council, it simply describes the effect. It's a bit like sawing off the branch that you're sitting on to say that they're both acting under an Act that hasn't been brought into effect and they're bringing it into effect. Something must happen first and it occurred to me that it's only the effect that's provided for in the State-Owned Enterprises Amendment Act. The Order in Council itself, I'm not sure whether it needs any statutory empowerment and that, though, leads me on –

**CHAMBERS J:**

It must be some other statute that –

**ELIAS CJ:**

Why.

**CHAMBERS J:**

Or perhaps standing orders or something that gives authority, I see your point entirely.

**MR CARRUTHERS QC:**

Section 11 of the Interpretation Act –

**ELIAS CJ:**

What does that say?

**MR CARRUTHERS QC:**

It says that power in an act that's not yet commenced can be exercised for the purpose of bringing it into operation.

**ELIAS CJ:**

Thank you. Well there you are, you can sit on a branch and saw it off.

**MR CARRUTHERS QC:**

So I was coming to –

**ELIAS CJ:**

So the Order in Council is by section 11 made under the Amendment Act, yes, thank you.

**MR CARRUTHERS QC:**

Just coming to *Hoani's Case*, I've submitted that that part of it dealing with the status of the Treaty should now be overruled in the light of legislative cultural and jurisprudential developments in the intervening 70 years, not 80 years in the copy that will be in front of your Honours which has been corrected, and particularly in the last 25 years. And this is to pick up the observation of Justice Cooke in *Lands*, and I've given the reference in the footnote where he comments particularly on the

legislative developments but in the years since *Lands* the Treaty jurisprudence has developed to the point where one can draw on cultural and also the jurisprudential developments to say that the *Hoani* case, in that respect in relation to the Treaty, should no longer be followed. One has the sense in some of the cases where the Treaty jurisprudence has been considered that the Courts have been careful to work around the *Hoani* case rather than confront it but this may well be time –

**ELIAS CJ:**

I'm not sure that it's necessary to go there at all on your argument.

**MR CARRUTHERS QC:**

All right.

**ELIAS CJ:**

Because you have the acceptance by the Crown that there are some Māori interests and rights undefined in waters so you're not driven to saying that the Treaty has direct effect, that's been accepted, so we're proceeding on that basis. The – I just don't see what aspect of the case bites.

**MR CARRUTHERS QC:**

I suppose it's really the next proposition that I've got under 30 that where discretions are given to the executive by Parliament then it must be assumed that they, it must be assumed to be constrained by a requirement of consistency with the principles of the Treaty in the absence of express words. It's probably no more than recognising that proposition which would be otherwise inconsistent with the *Hoani* case because one would have to say well –

**ELIAS CJ:**

There's quite a lot of authority on that for you that is inconsistent with the case because the Treaty has been a relevant consideration and in any event we've got legislation here that's full of Treaty references.

**MR CARRUTHERS QC:**

Yes, yes.

**ELIAS CJ:**

And the statute of this Court refers to it. It's not as if it doesn't exist in New Zealand law.

**MR CARRUTHERS QC:**

No but the –

**WILLIAM YOUNG J:**

What's the point you're actually addressing? What's the propo – to say the *Hoani* case shouldn't be followed is a proposition but to what argument is it addressed?

**MR CARRUTHERS QC:**

It's addressed, it's really addressed to the general discretion of the Court or the exercise of a power by the Court which the submission is that that must be, that power or discretion must be exercised consistently with the Treaty unless there's an express words or necessary inference to the contrary, that's the only proposition that the submission is directed to.

**McGRATH J:**

Is it contingent on this Mr Carruthers? Do you only get to the argument if you fail on the argument that section 45Q applies to the share sale? If section 45Q applies you don't have to go down the road of review.

**MR CARRUTHERS QC:**

No. If I can bring the argument under section 9 or at the time of the sale under 45Q, that's right, the principles of the Treaty –

**McGRATH J:**

Well at the time of the sale –

**MR CARRUTHERS QC:**

Yes.

**McGRATH J:**

– section 9 is not the provision which applies, section 45Q is the provision which applies.

**MR CARRUTHERS QC:**

Yes.

**McGRATH J:**

The Act's come into force on this proposition.

**MR CARRUTHERS QC:**

Yes.

**McGRATH J:**

And so –

**GLAZEBROOK J:**

So section 9 applies to the commencement date though you say?

**MR CARRUTHERS QC:**

Yes, yes. Once the Act is commenced then one moves to 45Q...

**McGRATH J:**

Let's say, if the Court were to take the view that the Act can properly be commenced without regard to section 9 or 45Q –

**MR CARRUTHERS QC:**

Yes.

**McGRATH J:**

– you then, your next position is that section 45Q applies to the share sale –

**MR CARRUTHERS QC:**

Yes.

**McGRATH J:**

– and if the Court were to be with you on that, you don't have to get to your *Hoani Te Heuheu*?

**MR CARRUTHERS QC:**

No, no, no, yes.

**ELIAS CJ:**

But otherwise, your argument is a straight administrative law argument that in context, where interests protected by the Treaty are affected, the executive must take those interests into account?

**MR CARRUTHERS QC:**

Yes, it –

**McGRATH J:**

It's not so much an administrative law argument –

**MR CARRUTHERS QC:**

No, it's –

**McGRATH J:**

– it's a monism/dualism argument in terms of the application of Treaty law without incorporation in statute –

**MR CARRUTHERS QC:**

Yes, that's –

**McGRATH J:**

– and it says the Treaty has a special place, so it's more than just administrative law.

**MR CARRUTHERS QC:**

Well the – it is both, isn't it? It can be looked at as administrative law analysis, as the Chief Justice has observed, but your Honour is correct with respect, that it is as a separate substantive issue, yes.

**WILLIAM YOUNG J:**

So say section 9 and section 45Q don't apply, so that all that's left is a decision by the Crown as owner to do something with some shares it owns, you say that that decision is subject to an administrative law regime which includes the Treaty of Waitangi?

**MR CARRUTHERS QC:**

To an administrative law regime?

**WILLIAM YOUNG J:**

Well it's subject to administrative challenge –

**MR CARRUTHERS QC:**

Sub – yes –

**ELIAS CJ:**

Well it would be unreasonable for them to –

**MR CARRUTHERS QC:**

Yes, yes.

**ELIAS CJ:**

Yes.

**WILLIAM YOUNG J:**

Now what would the test be, would it be that they can't sell unless it's in conformity with the principles or with the Treaty of Waitangi, or is it not possible for the Crown to sell unless it has regard to the Treaty because they're quite different?

**ELIAS CJ:**

Well it's not a section 9 threshold, it's a reasonableness standard, a contextual reasonable standard.

**GLAZEBROOK J:**

Well it may be but if it is that dualism –

**ELIAS CJ:**

No, that's a different –

**GLAZEBROOK J:**

– issue, that actually goes further because the proposition you've got at paragraph 30 actually goes further –

**MR CARRUTHERS QC:**

Yes, it does.

**GLAZEBROOK J:**

– than merely saying, in the same way under the Immigration Act 2009, that you take into account the Children's Convention. Your proposition goes further in paragraph 30 –

**MR CARRUTHERS QC:**

Yes, it does.

**GLAZEBROOK J:**

– it actually says that –

**ELIAS CJ:**

It's the dualist –

**GLAZEBROOK J:**

– in fact yes, you can legislate contrary to it but you have to do it explicitly, so if it's not mentioned then it's taken account not merely as a relevant consideration but as something more than that.

**MR CARRUTHERS QC:**

With respect, yes that's –

**GLAZEBROOK J:**

Yes. So it is going further than has been – it possibly is going further than has been gone before in terms of relevant considerations that administrative law for international conventions –

**MR CARRUTHERS QC:**

Yes.

**GLAZEBROOK J:**

– and the (inaudible 14:43:34) –

**ELIAS CJ:**

Well it's *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) though, isn't it?

**MR CARRUTHERS QC:**

It picks up that whole issue of legality, that's really where the argument goes.

**ELIAS CJ:**

Well the Water and Soil Conservation Act did not have any Treaty reference, nor any Māori reference and Justice Chilwell said it was a relevant consideration, contextually.

**MR CARRUTHERS QC:**

Yes.

**ELIAS CJ:**

It concerned the Waikato River.

**GLAZEBROOK J:**

Yes, all I'm saying is I think Mr Carruthers' argument goes further than merely relevant consideration.

**ELIAS CJ:**

Oh yes, yes, I understand, yes.

**GLAZEBROOK J:**

Because I don't understand the Crown either to say that it isn't a relevant consideration but just that it's been considered.

**MR CARRUTHERS QC:**

Yes. In the new version of the submissions, picking up the errors, just if I can draw attention to paragraph 11.19 which is the section I'm dealing with right at the moment under section 11. Three lines up from the bottom, discretion can only be used in a manner consistent with the principles of the Treaty, not "inconsistent", and you'll see some extensive footnotes and there's extensive material in bundle 5 but if I can – on this issue of legality, if I can just draw attention to the article by Claudia Geiringer on the principle of legality and the Bill of Rights Act. There's quite an important discussion of the principle of legality in relation to international instruments and by analogy, the Treaty falls into the analysis that she makes. If I could just give you the reference, it's volume 5, it's tab 68 and the page number is 77, it's the summary of Part 3A of her article and that's where the submission is drawn from.

Then I've looked at the – I'm now at section 12 of my written submissions and I deal with that in part G of the summary, I'm on page 6 of my outline. I've submitted that the amendment of the constitution which is required and the sale of the shares involve a statutory power under section 23(3) which is our case, or a common law power which is the Crown's case and susceptible to review in the way that I've identified.

This is where I come back to the argument that the Crown makes, that the Crown's submission necessarily is that the sale is the purpose of the legislation and that this purpose overrides the section 9 considerations and I made the submission earlier when I opened the appeal, that that is contrary to *Lands*.

Now, I've then gone on to look at the reviewability for inconsistency, the constitution has to be amended and I've made the reference there. The amendment to the constitution means this, in the appellants' submissions, that the shareholding ministers must exercise rights and powers attaching to the shares under section 23 which will be – under section 23 of the Act –

**WILLIAM YOUNG J:**
Sorry, this is section 22(3), is it?

**MR CARRUTHERS QC:**
Section 22(3), yes, excuse me, your Honour.

**ELIAS CJ:**
Is this the SOE Amendment Act?

**MR CARRUTHERS QC:**
No, it's the SOE Act.

**WILLIAM YOUNG J:**
But does that apply once it becomes a MOM?

**MR CARRUTHERS QC:**
Yes.

**WILLIAM YOUNG J:**
It's tab 8.

**MR CARRUTHERS QC:**
Yes, tab 8.

**WILLIAM YOUNG J:**
Oh, that's a continuing provision, is it?

**MR CARRUTHERS QC:**
Yes and that amendment must be done in a manner that's consistent with the principles of the Treaty and that's either section 9 or 45Q, depending on when the amendment is made and I've done the analysis on that –

**McGRATH J:**
So that applies to transfer of assets, is that the –

**MR CARRUTHERS QC:**
Yes and assets –

**McGRATH J:**
– and all assets have presumably been transferred here, haven't they, to MRP?

**ELIAS CJ:**
Not according to the submissions we've received in the other case but that's a –

**McGRATH J:**
Mighty River Power doesn't think so but putting that aside, I think that the way this case has been run, we're looking only at share sales, we're not looking at review of transfer of any assets to Mighty River Power?

**MR CARRUTHERS QC:**
Well the shares are assets under section 29.

**McGRATH J:**
Section 29 of the...

**MR CARRUTHERS QC:**

Of the SOE Act. Assets means any real or personal property of any kind.

**McGRATH J:**

Must mean the property of the company though.

**GLAZEBROOK J:**

But it – am I on the right section 23?

**McGRATH J:**

It must mean property of the – sorry.

**GLAZEBROOK J:**

Because doesn't this talk about transferring to the state entity rather than transferring the shares in the state entity? So it might –

**MR CARRUTHERS QC:**

Oh, I see.

**GLAZEBROOK J:**

– it might include shares, but it would be shares held by the state entity –

**MR CARRUTHERS QC:**

Yes.

**GLAZEBROOK J:**

– or transferred to the state entity.

**ELIAS CJ:**

So it doesn't seem to have anything to do with what is proposed here, Mr Carruthers. Is it section 22?

**GLAZEBROOK J:**

Is it – I think it's section 22, isn't it?

**ELIAS CJ:**

I think it's section 22.

**WILLIAM YOUNG J:**
It's section 22(3).

**GLAZEBROOK J:**
Yes.

**McGRATH J:**
Yes.

**GLAZEBROOK J:**
Yes, I think that's right. It's section –

**McGRATH J:**
And the issue is whether these are powers are attaching to shares, as I understand it. That's where the Crown joins issue.

**ELIAS CJ:**
But is this because you say they have to change the constitution of the company?

**MR CARRUTHERS QC:**
Yes.

**ELIAS CJ:**
So that's the power that's being exercised?

**MR CARRUTHERS QC:**
Yes.

**ELIAS CJ:**
It's not the sale of the shares, because that would be a very odd interpretation of section 22(3).

Why do you say – I'm sorry, I haven't caught up with this. What, why do you say that the constitution of the company has to be changed? Is that because it mirrors the statutory restriction on ownership, or...

**MR CARRUTHERS QC:**

Yes. That the clause 8.1 of the constitution of Mighty River Power –

**ELIAS CJ:**

Where do we find that?

**MR CARRUTHERS QC:**

I – if you go to paragraph 13.1 of the written submissions I've set it out. The constitution, consistently with section 11, provides that, "Every share in Mighty River Power must be held on behalf of the Crown by a Minister of the Crown." So that, the constitution needs to be amended.

**CHAMBERS J:**

Please excuse me if I'm totally off the wall here, but is there a statutory provision relating to the amendment to the constitution, or is that simply something that is obviously going to have to be done because clause 8.1 of the constitution won't be applicable to a MOM?

**MR CARRUTHERS QC:**

That's right.

**CHAMBERS J:**

Right.

**MR CARRUTHERS QC:**

Because the shares will not be held –

**CHAMBERS J:**

Correct.

**MR CARRUTHERS QC:**

Yes.

**CHAMBERS J:**

Yes.

**MR CARRUTHERS QC:**

Now, your Honours, I think I see what I've done that – in paragraph 34 of the outline the reference to 23 is to 22(3), and I apologise for that. It not only misled you, it misled me as well.

**MCGRATH J:**

So what do you say then to the argument that the powers attaching to the shares don't include an owner's right to sell shares? I'm looking at section 22(3) and the phrase, "powers attaching to the shares".

**GLAZEBROOK J:**

Well at this point you're just looking at the amendment to the constitution though, aren't you? Which probably is a power attaching to the shares –

**ELIAS CJ;**

It is.

**GLAZEBROOK J:**

– I would've thought.

**CHAMBERS J:**

But just so that we're absolutely clear, I'm very suspicious, Mr Carruthers, when I see, "section 9 oblique 45Q" that counsel haven't been able to quite work out in their own mind which it is. It would be 45Q, wouldn't it?

**ELIAS CJ:**

Well it depends when they do it.

**CHAMBERS J:**

No, because the constitution can't be amended until such time as Mighty River has been brought within the MOM regime, can it? They couldn't change the constitution while it remains a state-owned enterprise.

**ELIAS CJ:**

Well they probably could. They just can't act on it.

**GLAZEBROOK J:**

Yes, I think that's probably right.

**MR CARRUTHERS QC:**

Yes. Yes, you would be able to – the Crown, the shareholding Ministers could pass a resolution amending the constitution to take effect on the coming into force of the State-Owned Enterprises Amendment Act.

**ELIAS CJ:**

And that almost certainly –

**CHAMBERS J:**

But it's not a power that's permissible under the constitution. They have no power to do that.

**ELIAS CJ:**

They've got to change the constitution, but what they can't do, what the legislation doesn't permit is selling the shares. So they can't sell the shares until the Act comes into effect but they can change the constitution because the Act is pretty indifferent about what's in the constitution.

**McGRATH J:**

It's a preparatory step.

**ELIAS CJ:**

It's a preparatory step. It almost certainly will be done, I would've thought, before the Act comes into effect.

**McGRATH J:**

Or the day of, yes.

**ELIAS CJ:**

They have to get all the ducks lined up, I think.

**MR CARRUTHERS QC:**

Well I would've thought so.

**CHAMBERS J:**

No, because they don't actually have to do anything under the Public Finance Act. They don't have to sell these shares. They can – as you yourself said, it's not written in concrete that they have to sell 49 per cent.

**MR CARRUTHERS QC:**

No, no. But to just put to rest the suggestion that the appellants can't make up their minds whether it's section 9 or 45Q, in fact it could be done under either section, and that is simply a matter of timing in the way in which we've been discussing.

**GLAZEBROOK J:**

So you've got 9/45Q because if it's before the Amendment Act comes into force it's 9, if it's after it's section 45Q.

**MR CARRUTHERS QC:**

45Q.

**GLAZEBROOK J:**

Is that...

**MR CARRUTHERS QC:**

Yes, you're right.

**GLAZEBROOK J:**

So it's not an alternative, it's timing.

**MR CARRUTHERS QC:**

No, it's timing. Mmm.

**GLAZEBROOK J:**

It is an alternative but it depends upon the time, doesn't it?

**MR CARRUTHERS QC:**

And then I dealt with the right to sell shares. There's an issue about *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) that I raised in the written submissions and I – there are authorities in this Court on the proposition

that where, where a statutory provision deals with what was the common law position, the statutory provision prevails and I'm not sure that much will turn on that.

**GLAZEBROOK J:**

What is the statutory provision though? Because the Crown says that the right to sell the shares is just a function of ownership and it's not dealt with in Part 5A and therefore 45Q doesn't apply. And they also say that section – at that stage the question that Justice McGrath asked you about, section 22(3) not, not in fact relating to a sale of shares but merely rights exercised, rights attaching to the shares like the power to vote, et cetera. Because then you might have to fall back on your argument of inconsistency rather than statutory provision.

**MR CARRUTHERS QC:**

Right. Yes, yes.

**GLAZEBROOK J:**

But when you do have two statutory provisions it might be up higher. You might have a higher ability, or the Crown would say lower because they've already dealt with it explicitly, but... Sorry, there are probably about four or five propositions mixed up in that.

**ELIAS CJ:**

Well, is the –

**MR CARRUTHERS QC:**

I think we're at one in –

**McGRATH J:**

Yes.

**MR CARRUTHERS QC:**

– understanding the way that it works.

**GLAZEBROOK J:**

Well we can take it step by step.

**MR CARRUTHERS QC:**

No, no, no, your Honour.

**GLAZEBROOK J:**

First of all –

**MR CARRUTHERS QC:**

I'm content with the way in which you dealt with it. That's...

**McGRATH J:**

But you do have to, I think, at some stage, you do say that the phrase, "attaching to shares" in this thing isn't just referring to Companies Act powers and constitutional powers. You say it includes any power to sell the shares.

**MR CARRUTHERS QC:**

Yes I do. That's –

**McGRATH J:**

And how – even if it might be characterised as a common law power, not a statutory power.

**MR CARRUTHERS QC:**

Well, I – yes, that's right. I've categorised it as a statutory power because I have submitted that 22(3) rights attaching or powers attaching to the shares is a power to sell them, and that requires it to be exercised in that way, but there is the alternative analysis that has been discussed.

**McGRATH J:**

If the Court was not with you on that, if the Court concluded that the powers attaching to the shares did not actually include the power to sell the shares, it was the powers that arose under the Companies Act, do you have any residual argument as to why section 45Q because that's the provision that would be applying by this stage, applies to the sale of shares? I mean, I can't see that it's going to apply to anything else myself, that's the difficulty I've got. I'm wondering how you can formulate that into a proposition?

**MR CARRUTHERS QC:**

Well I've made the submission in paragraph 38, that even if it's exercising a common law right, that right can't be exercised in a manner inconsistent with the principles of the Treaty and –

**McGRATH J:**

That's your *Hoani* if you get it wrong argument?

**MR CARRUTHERS QC:**

Yes and that's the analysis I've made in 13.17 and 13.18, yes.

**CHAMBERS J:**

Isn't it enough in your case, though, Mr Carruthers, to say, well, it may be both?

**MR CARRUTHERS QC:**

Yes.

**CHAMBERS J:**

There may have been that power at common law but Parliament has also conferred the power and that's enough to bring you within 45Q?

**MR CARRUTHERS QC:**

Yes your Honour, I can put it that way, although classically, relying on *De Keyser* and the way in which that's been applied in this Court, it's probably more accurately put as being the statutory power having overtaken the common law power that that – in the sense that there's no room for the common law power to operate, but your Honour –

**McGRATH J:**

Well that's a constitutional principle and I get that but don't you also have as an argument the simple fact that section 45Q is there and that Parliament must have intended its language to have some meaning and in those circumstances, if you like, looking at the way the *Lands* case operates it must be – the Court won't leave that as a meaningless provision, or a provision that applies in a very small and incidental way, the Court will treat it as a direction from Parliament to, in effect, the Courts if necessary, to make sure that anything that happens under the Public Finance Act Part 5A is consistent with the Treaty?

**MR CARRUTHERS QC:**

Yes, well the –

**McGRATH J:**

Is that a proposition that in the end you have as a middle proposition between the –

**MR CARRUTHERS QC:**

Well I do and that's, I mean, I've married that with section 9 in paragraph 37 of the outline but it consid – entirely by itself that the suggestion that it doesn't apply is inconsistent with the Court's interpretation in *Lands*, so that's exactly a proposition that I do embrace, yes.

**McGRATH J:**

Thank you.

**MR CARRUTHERS QC:**

I've now got to deal with consultation and there are essentially three propositions on consultation that I can deal with quite quickly. The first is the scope of consultation and the underlying submission is that the process was really emasculated by the narrowness of the ground chosen by the Crown to consult. I've drawn attention to the duty to consult and given the references. I emphasise article 32(2) of UNDRIP which spells out a specific reference to consultation – article 32(2), it's in the authorities, volume 4, under tab 56 and the proposition is this: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation, or exploitation of mineral, water or other resources." So it's a wide requirement for consultation.

The second proposition concerning consultation is the audience that the Crown chose and I dealt with that in the written submissions in the passages that I have referred to in paragraph 43 of the outline. Again, I've referred to UNDRIP. The limited time and resources that were afforded the opportunity to consult and the fourth one concerns what the appellants as predetermination and that goes back to the Crown's really settled position, or settled view, on the relevant issues and the refusal to discuss those issues during the consultation.

I've dealt then separately with the issue of the River Settlement Act and the written submissions deal with that analysis and the final section of the outline deals with the failure to wait. So again, this is a procedural – the consultation, as the exchange with Justice Glazebrook earlier showed, falls in two ways. In this part of the argument I've analysed it procedurally and the failure to wait is analysed procedurally as well in the sense of the Crown acting unreasonably without waiting for the completion of the inquiry.

Your Honours, I've rather moved through that quickly but I have done so on the basis that the written submissions are quite comprehensive on those issues that I've dealt with since lunch and I'm content to rely otherwise on the written submissions. Unless your Honours have questions of me, those are my submissions in support of the appeal.

**GLAZEBROOK J:**
In terms of the failure to wait, would it have been – it doesn't seem to me it would have been in the contemplation of Parliament in passing that legislation that it was to wait for the completion of what could be a very long process. So how does that relate – because Parliament, one assumes, must have assumed that that legislation would come into effect relatively promptly, subject to the preparation for sale et cetera, rather than waiting for a long period?

**MR CARRUTHERS QC:**
In a –

**GLAZEBROOK J:**
Because it's likely to be a long period, isn't it, because it's not an easy inquiry, the second stage?

**MR CARRUTHERS QC:**
No, no, it's not an easy inquiry but I expect – again, it comes back to looking at what the Crown obligation is to protect the Treaty right and whether a proper part of a mechanism is in fact to wait, an aspect of mechanism is the requirement to wait. So I think the way in which I would put it is this, your Honour, that it is the Crown's obligation to protect the right under Article 2. The mechanism that the Crown and Māori agree on may well involve, on a reasonable basis, the completion of the inquiry and I probably can't put it any higher than that.

Those are my submissions, if your Honours please.

**ELIAS CJ:**

Yes, thank you. Now Mr Harman, we've read your submissions and we don't think we'd be further assisted by hearing from you orally, given the thoroughness of the submissions that you've made.

**MR HARMAN:**

Obliged, Ma'am. If I may ask if the Land and Water Forum volume 3, volume 2 was referred to by Mr Carruthers, that was referred to by Ms Cull, I wrote in my submissions and offered to his Honour Justice Ronald Young. I'm unaware if volume 3 has made it onto the case on appeal but I did have copies prepared of that and also the decision of *R v Her Majesty's Treasury, ex parte Smedley* [1985] QB 657 which was the UK Parliament looking at an Order in Council review that I also mention in my submissions. I have copies of those documents here and I wondered if I might tender those, Ma'am?

**ELIAS CJ:**

Yes, thank you, if you could just pass those to the registrar.

**MR HARMAN:**

If I can take two minutes, Ma'am, just to run through the paragraphs very quickly, four paragraphs of that report, to save the –

**ELIAS CJ:**

Yes.

**CHAMBERS J:**

Thank you.

**MR HARMAN:**

Thank you Ma'am. Page 42, recommendation 31, so this is in terms of the submission that this is the actual context of this Fresh Water Start [*sic*] programme.

**ELIAS CJ:**

Sorry, 42?

**MR HARMAN:**

Page 42.

**ELIAS CJ:**

I think we do have this in fact down –

**CHAMBERS J:**

Yes, I think we do somewhere.

**MR HARMAN:**

I did put it in an electronic copy with my –

**ELIAS CJ:**

I think we've got it in one of the bundles. I'm sorry, we were referred to it earlier today too.

**GLAZEBROOK J:**

That was the second one I think.

**ELIAS CJ:**

Oh, a second one, I see. Yes, sorry –

**MR HARMAN:**

This is the one that came –

**ELIAS CJ:**

– the third, this is the third, yes.

**MR HARMAN:**

Yes and this came out two weeks just prior to the High Court hearing before Justice Ronald Young and the recommendation for the 31 there, "Changes to the allocable quantum in response to unforeseen circumstances made through regional planning processes and national instruments," paragraph, page – the long and the short of this submission is that this is virtually a rerun of the ITQ fish quota scenario where there's going to be a total allowable catch, i.e. an allocable quantum, here it's called water as opposed to fish. That recommendation 31 – this is going to be done by regional planning processes, or national instruments and I think the well known example of

Environment Canterbury and the temporary appointment of commissioners would question there, with respect.

**McGRATH J:**
So which page are you referring us to?

**MR HARMAN:**
That's page 42 and recommendation 31, your Honour Justice McGrath.

**McGRATH J:**
Thank you.

**ELIAS CJ:**
Sorry, what is the status of this document?

**MR HARMAN:**
This is that part of that – the final volume in the Fresh Water Start [*sic*] programme.

**ELIAS CJ:**
But it's not been adopted, has it, it's not –

**MR HARMAN:**
Nothing, none of the three volumes –

**ELIAS CJ:**
So it's just a proposal?

**MR HARMAN:**
Yes, it is, Ma'am.

**ELIAS CJ:**
Yes, thank you.

**MR HARMAN:**
Page 44, recommendation 36, it deals with the, "Once a scarcity threshold has been reached, all new water takes will need to be explicitly managed to maintain the limit and protect existing authorisations from derogation." That goes to the point of the

principle of non-derogation arising out of *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (HC) case, the one which Justice Young, in my submission, we diverged on that. As an incident of property right, we were saying derogation applies, there it is there, page 48.

This goes to the term, your Honour Chief Justice mentioned of this terms beyond 35 years, page 48, paragraph 212. In essence, what it says is he or she with large money investing in these things, they can attract more than 35 years and that also is on top of the submissions in regards to the Resource Management Act that I made in my submissions about what your Honour Chief Justice mentioned earlier about water permits virtually being renewable as of right and, in my humble submission, that really does go to the protection that my client saw as being extended to Māori in the *Māori Council* case.

Those are my submissions.

**ELIAS CJ:**
Thank you Mr Harman. Yes, thank you Mr Goddard.

**MR GODDARD QC:**
I have a short road map of submissions which, with the permission of the Court, I'll provide through Madam Registrar but before even I turn to that, perhaps I can make a few preliminary comments. The first is that, as your Honour observed earlier today, the Crown acknowledges, as it did before the Tribunal, as it has in other contexts, that Māori have rights and interests in freshwater and in geothermal resources and the Crown expressly confirmed to the Tribunal that it is open to discussing the possibility of Māori proprietary rights in water short of full ownership and that's recorded in my submissions at paragraph 3.4.

Second, the Crown has consulted on the Treaty implications of the MOM programme. There were three formal rounds of consultation, as well as informal consultations, and has carefully considered these matters. And the Crown has through that process satisfied itself that with the safeguards prescribed in the mixed-ownership model legislation, the commencement of that legislation and the sale of up to 49 per cent of the shares in the relevant companies will not, in the language of the test approved by the Privy Council in *Broadcasting Assets* will not impair to a material extent the Crown's ability to take the reasonable action which it's under an obligation

to take in order to comply with the principles of the Treaty. The Crown has carefully considered the various tools that are in its toolbox for rights recognition and redress, and after careful consultation and consideration, it has concluded that that toolbox will not be materially impaired by proceeding with the proposed share sales.

**CHAMBERS J:**

Where do we see a list of the tools in your toolbox?

**MR GODDARD QC:**

The principal tools are discussed in sections 8 and 13 of my submissions. They are referred to in the evidence of the Deputy Prime Minister and they're also discussed at some length in the evidence of Ms Sandra Cook of Ngāi Tahu, who in her affidavit, which is an important part of the evidence in this case, explains where Ngāi Tahu sees the discussion as being, where it sees the real action as being. She confirms that in the view of Ngāi Tahu this is a diversion from the real issue, which is the impact on Ngāi Tahu's exercise of its rights, which Ngāi Tahu vigorously asserts, the impact on those rights of the resource management regime which both permits others to interfere with the rights Ngāi Tahu claim and prevents Ngāi Tahu from exercising those rights. So, Ngāi Tahu say and Ms Cook says in explaining the views of Ngāi Tahu, the real action is around the review that is currently being undertaken of the freshwater management regime under the Resource Management Act, both in Fresh Start for Freshwater and also in the direct discussions that are taking place between iwi leaders and the Crown.

1520

And the evidence of the Deputy Prime Minister and Ms Cook marries up, as one might hope, exactly in terms of identifying which issues are on the table and expressing the same view that that is the space within which the parties will need to continue a conversation, a complex conversation, a conversation that raises difficult issues that are unlikely to be resolved overnight, but nonetheless continuing conversation about how best to reflect the rights and interests of Māori in New Zealand's freshwater governance and exploitation regime.

**ELIAS CJ:**

But that is if the discussion is about management.

**MR GODDARD QC:**

No. It also – the Resource Management Act is also the legislation that effectively determines who can exploit water for commercial purposes and, Ngāi Tahu say, precludes their exploitation of their water resource for commercial purposes.

**ELIAS CJ:**

No. No, my point was it's about use and exploitation, as you say. It's not about tūpuna awa or those sort of concerns. I didn't see anything in Ms Cook's affidavit directed at those sort of wider concerns which have been at the fore of the evidence put by the appellants in this Court.

**MR GODDARD QC:**

I'm not sure that it's quite right that that's the issue which is at the fore of the plaintiffs' evidence and, to the contrary, some of those broader cultural and spiritual issue are being addressed, for example through historical Treaty settlements, and my learned friend took –

**ELIAS CJ:**

But not in terms of, for example, the historical Treaty settlement about the Waikato River. Because that's a historical settlement.

**MR GODDARD QC:**

In terms of recognition of mana and participation in governance –

**ELIAS CJ:**

In governance.

**MR GODDARD QC:**

– there is recognition. The only issue that was –

**ELIAS CJ:**

Parked.

**MR GODDARD QC:**

I'll can check back on the provision, but parked I think is a good term that your Honour suggested earlier was –

**ELIAS CJ:**

Well I think it appears –

**MR GODDARD QC:**

– the question of ownership of –

**ELIAS CJ:**

– in some of the Crown's –

**MR GODDARD QC:**

– the river –

**ELIAS CJ:**

– material.

**MR GODDARD QC:**

– so it's that ownership of the river issue.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

And when my learned friend Mr Carruthers was asked, "Well, what are the sorts of, what are the forms of recognition that Māori seek that will be precluded by the sale?" he came back time and time again to the payment of a royalty or some sort of financial return for use of the river or to a say in the management and control of the river. The Crown accept absolutely that those concerns are among the concerns expressed by Māori and is discussing those in the various fora that are referred to by Mr English and by Ms Cook.

**CHAMBERS J:**

I know you're going to come to it later, but just to pick up on the points you've just made, wouldn't, for instance, the payment of a royalty regime be much harder to achieve once a company like Mighty River was not entirely state-owned?

**MR GODDARD QC:**

The evidence, which is what the Court, at the end of the day, acts on is, the only evidence before the Court on that is the evidence from the Deputy Prime Minister and from the Attorney-General, both of whom have confirmed to the Court that the ability and willingness of the Government to take such steps will not be affected by this sale. And the reason for that, your Honour, is, and I'll just, in short compass, that there are already so many other stakeholders in the use of water in New Zealand that the change brought about by this transaction is not material. For example, if what we're talking about is a royalty regime, it's difficult to imagine that that would be advanced by imposing a royalty obligation on some users of water for hydrogeneration but not others. The distortionary effects of that, the perverse consequences are obvious. But that means immediately that what we're talking about already today is a resource that's used by a number of privately owned entities, and I think Contact would be the most striking example, but also TrustPower, and the list that the Court's been given I think has one or two other smaller players. So if the issue is one of imposition of a royalty, even as narrowly as on generation and I'll come back to that, already there are private interests in play. Ministers have said this change will not make a material difference to our willingness to contemplate that.

The issue is broader though, because as the Court noted in discussion with my learned friend earlier today, hydrogenation consents are only a small fraction of the commercial users of water in New Zealand. The figures in the evidence, I think, suggest that about 1 per cent of resource consents, a couple of hundred out of 200,000 as at about 2010, relate to hydrogenation.

**GLAZEBROOK J:**

Do the numbers really mean – because obviously this is a big use of water as against something that –

**MR GODDARD QC:**

The picture is of course more complex.

**GLAZEBROOK J:**

But do we have – all I'm really asking, is there anything in the evidence that says anything about volumes etcetera as against numbers?

**MR GODDARD QC:**

There's not, and the reason is that story starts to become very complicated very quickly –

**GLAZEBROOK J:**

I'm sure it does, yes.

**CHAMBERS J:**

This water comes back in.

**MR GODDARD QC:**

– because then when, as I must say I did at an earlier stage, one simplistically says, "Well can you give me an idea?", then the people who understand this sort of thing start to talk about consumptive versus non-consumptive uses and make the point, "Well, this may be a smaller quantity but it goes from the river and it's gone forever, whereas the hydro water stays in the river but there are interferences with it.

**ELIAS CJ:**

Except through the Tongariro diversion.

**MR GODDARD QC:**

Except through that diversion. And also, to be precise, part of the Manapouri scheme, which discharges to the sea.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

So some of those refinements are identified in Ms Wansbrough's evidence from the Ministry for the Environment.

**ELIAS CJ:**

But you can see that in the context of extractive use for irrigation purposes and so on, the 35 year term has some real meaning. But in the context of these huge infrastructure users, how realistic is the 35 year term? Because that 2006 determination suggests that it's worth very little protection.

**MR GODDARD QC:**
There are quite a few steps in that analysis and let me just pick some of them up, at least today.

First of all, that is an important difference from the permanent alienation of land that was in issue in the *Lands* case, 35 years versus forever, and that of course was reflected in the settlement that was reached between the parties at the end of the *Lands* case, which had two limbs: the memorial regime to enable claw-back of land, and I'll go to the provisions later, your Honour, but a time limit of 35 years in respect of water rights, because at that stage the Crown had, among its portfolio of water rights, certain perpetual rights, and the resolution, as the Court will know, was that the generators, ECNZ, as it then was, should not receive rights stretching out beyond 35 years. And that means, first of all, well, there is no right under the Resource Management Act to a further consent after the term of one's existing consent expires; second, what above all could not be suggested is that there is any even reasonable expectation of an extension on the same terms. So what is completely up for grabs –

**ELIAS CJ:**
Are the conditions.

**MR GODDARD QC:**
– every 35 years is how much – whether you'll get an extension is up for grabs, but Your Honour's right, there are practical reasons why a party that's made a large infrastructure investment would hope that, in applying the Resource Management Act tests about sustainable use of resources, some attention would be paid to the futility of having a large dam capable of generating electricity which will be used by all New Zealanders sitting idle.

It's not decisive. It's a relevant factor. But it's plainly going to have an influence. But whether that extension will be for a shorter period or a longer period is entirely up for grabs, and I'll draw the Court's attention tomorrow when I have copies to some litigation around exactly that issue, some consents, and I think it was Genesis, where there was litigation about whether it should be a 10 year extension or a 35 year extension.

**CHAMBERS J:**

It came before the Court on appeal, from memory. But in any event, on your argument, if one's looking at perhaps the most likely remedial provision, namely a royalty, on your argument it is simply going to have to apply, should that be the negotiated solution, to existing resource consents because of the distorting effect of bringing it in only as resource consents came to an end?

**MR GODDARD QC:**

Yes, I think that is very likely to be –

**WILLIAM YOUNG J:**

Well was that actually the point you're making? I thought you were saying –

**MR GODDARD QC:**

I'm –

**WILLIAM YOUNG J:**

– that you couldn't have some users of water paying royalties while others didn't, so you couldn't really have these power companies being required to pay royalties if Contact Energy didn't.

**MR GODDARD QC:**

His Honour anticipated a point I was coming to. So that was certainly one point I was making, your Honour, is that one would expect this to be applied across the board to all similarly situated enterprises if royalties were the answer. The question of whether similarly situated is as confined as just hydro, so it's a significant (inaudible 15:31:45), or whether in fact one might not consider that it was broader, is, I think, an important factor to bear in mind.

**ELIAS CJ:**

Well it's also a factor that the remedy would not to be tailored to the particular claim. It may not be – I mean, you have taken issue with the fact that there is a dismissive reference to a Crown attitude about water, that it isn't just about water, but your submissions are all directed at use of water. They're not directed at the particular feature which is under claim by particular claimants. So it really is quite an...

**MR GODDARD QC:**

And that is because no particular feature under claim by particular claimants has been identified by the appellants that the Crown would – where, in respect of which, to address which, the Crown would be in a materially worse place after the sale than before. And I'll come back to my learned friend's submissions about where the burden lies, but it seems to me that, again, what one has to, enquiring to Treaty consistent, one has to ask is, well, what is the question? The question is, is the capacity the ability to provide rights recognition? That's the first step. Or redress if rights are not recognised, cannot recognise, materially impaired? Well, what rights are we talking about? And what are the mechanisms of recognition or redress that are materially impaired? That, I think, must be something that the appellants identify in circumstances where the Crown comes to the Court saying, "We have enquired into this in good faith and, based on our enquiries, we do not think that there are any material impairments." And unless the plaintiffs below, the appellants in this Court, can say, "No, no, you've got that wrong. Here are the material impairments," then the claim just can't get off the ground.

So I will come back to my learned friend's submissions about where the responsibility for identifying interim protected measures might lie, which is a little bit more complicated than my learned friend suggested, but you only get into that discussion if you have established that there is something that needs protection. The Crown considers that it's engaged in a process in good faith to identify those concerns.

It is important, I think, to bear in mind that the Waitangi Tribunal conducted an enquiry which was intended to address precisely that issue: were there reasons why the Crown should not proceed with the MOM programme? That was the whole point of having the stage 1 hearings. That's what they were about. And the Tribunal concluded that there was only one respect in which the capacity of the Crown would be materially impaired. The fact that that conclusion was the one the Tribunal reached is relevant to the reasonableness of the Crown concluding that there are no other concerns, because in that the Crown is effectively accepting the advice of the Tribunal that there are not other forms of rights recognition or redress that are materially affected.

Then what the Crown has done is go through a third round of formal consultation in connection with its programme directed to that particular concern to try to understand whether there was something that the Crown had overlooked which could be

delivered by means of the shares plus concept and which could not be delivered equally well or as better through other means post sale. And, again, the Crown has reached a conclusion that there is not and the reasons for that are set out partly in the evidence and partly in my submissions.

So there has been a very careful process of consideration of Treaty implications. The Crown has identified the principal tools in its toolbox for addressing these longstanding issues, and they are reform of the relevant statutory regime. Significant Māori interests share that view, and the example of that that's before the Court is the evidence from Ngāi Tahu. The Tribunal considered that that was right except in one respect, and the Crown enquired further into that and satisfied itself that there was nothing that could deliver, on further analysis because it was an issue identified by the Tribunal which was not canvassed in depth in its report or before it, that there's nothing that could be done under that that couldn't be done as well or better in other ways. So if you can do something as well or better with other tools in your toolbox, then parting with one tool does not materially affect your ability to do the job. The builder who turns up with adequate tools in their toolbox that do the job is not materially impaired by having left an irrelevant tool, an additional tool that they don't need as well, behind.

**ELIAS CJ:**
Sorry, so the answer to the toolbox question is reform of the Resource Management Act?

**MR GODDARD QC:**
Above all, yes. That's where the action is.

**ELIAS CJ:**
Well what else is there?

**MR GODDARD QC:**
Well, there's also historical Treaty settlements –

**ELIAS CJ:**
Well, but look at the Waikato River settlement. It parks the question of ownership.

**MR GODDARD QC:**

It parks – yes, ownership. But it does address – Your Honour was asking earlier about various cultural and spiritual facets, and those are addressed. Recognition of mana is addressed in the legislation. Recognition of kaitiakitanga.

**ELIAS CJ:**

You mean declarations to that effect?

**MR GODDARD QC:**

A mix of declarations –

**ELIAS CJ:**

And –

**MR GODDARD QC:**

– and active involvement in governance, which is of course a fundamental aspect of recognition of mana. And cultural association is to say, "Yes, you have an association with this river and you should have a meaningful voice in how it is managed." But you don't provide, the Crown says, a meaningful voice in how the resource as a whole is managed by providing a voice in relation to the management of one user, to the extent that that can be accommodated in fact in company law terms. That's a very indirect and ineffective way of providing the real and meaningful connection with the resource. It's incredibly indirect, much more indirect, as the Court observed in discussion with my learned friend, than, for example, a stake in the asset, which is an option under the memorial regime. So my submission is not that that's a particularly sensible tool either, but it's certainly one which is not affected by the partial share sale and it's certainly much more direct than a share in a company which owns an asset which has a right to use, for a limited amount of time, subject to certain conditions which can be revisited, water in the river.

I did want to come back to the point about the time-boundedness and the potential for the need to apply for a new consent when an existing consent expires. The ability to revisit at that time all the conditions attached to the consent, and I wanted to make the point that another way in which these, the rights to use water under the Resource Management Act differ from land is that they are creatures of statute, and that even during the term of such a consent all holders of such rights know that there can be regulatory change.

And the likelihood in relation to regulatory change in relation to freshwater management regimes has been very well signalled, and the Court has seen the work of the Land and Water Forum, which is part but only part of Fresh Start for Freshwater.

My learned friend seemed to suggest at certain times that if things weren't within the scope of that forum they weren't within the scope of the reforms. That's not right. There are some things that are helpfully addressed through a forum of that kind and others which are better addressed in other ways and through other dialogues. But certainly that there is the potential for significant change during the life of existing consents to the freshwater management regime in New Zealand, something which no holder of a resource consent could be unaware of.

So, time-bounded statutory rights, creatures of statute subject to change, likely in fact to be changed as a result of the processes that are currently running, processes which, in the Crown's submission, are the most direct, the most meaningful tool in the toolbox for addressing the concerns that have been raised. Ngāi Tahu agree. And that's not an insignificant fact, as perhaps underscored there by the scale of the Meridian hydro capacity, which, as the information provided in Court shows, by itself is larger than the combined hydro capacity of Mighty River Power and Genesis, and the whole of that capacity, as Ms Cook says in her affidavit, is within the takiwā of Ngāi Tahu. So they have more at stake on that.

**ELIAS CJ:**
Well, that's debatable isn't it? I mean they, it does turn on cultural considerations as well.

**MR GODDARD QC:**
That's also right.

**ELIAS CJ:**
So I'm not sure that it's an appropriate submission really for us to accept, that they have more at stake.

**MR GODDARD QC:**
No, I think I probably went too far in that submission. What I would say is that they obviously have a great deal at stake.

**ELIAS CJ:**

They have certainly more to gain.

**MR GODDARD QC:**

They have a great deal at stake. They have an obvious interest in this process and the fact that they share the Crown's view about which tools are significant, which tools matter, is something the Crown can reasonably take into account in forming its own view on the reasonableness of its approach and something which is relevant to the Court's assessment. I think that's the right way to put that submission.

So – and finally, having emphasised the care that the Crown has taken to consider Treaty issues and satisfy itself that there is no material impact on its ability to meet obligations under the Treaty, let me mention the legal argument that these decisions are not in fact reviewable before the Courts for Treaty compliance, for a number of reasons canvassed in my written submissions. Logically that's prior to the, "Well, is there a problem?" but in fact the approach that the Crown has taken is to grapple with its obligations, to attempt it discharge them in good faith, and it does, it says it has done so, but it does also say that when one looks at this legislation and its place in the statute book as a whole the institutional arrangements in New Zealand for reviewing Treaty compliance do not extend to review of these particular decisions for Treaty compliance before the Courts.

**ELIAS CJ:**

One view, of course, of the 35 year term is not simply that it would enable reassessment each 35 years but that in 35 years there would be opportunity to address the claims. The ownership claims haven't been addressed during the last 20 years. What – how are they to be addressed if there's the privatisation that is underway? Does that not complicate the ability to address those claims?

**MR GODDARD QC:**

Not materially, no. And I think –

**ELIAS CJ:**

Well why do you say that? Because in fact use is the main part of ownership? Is that...

**MR GODDARD QC:**

Well I think, to the extent that use obviously is a part of ownership the potential – I mean, there have been significant regulatory reform within that 20 year period of the introduction of the Resource Management Act which gives significant recognition to the importance of the Treaty in making such decisions as part of that, for example. And there have been steps taken through a number of historical settlements to provide a voice in relation to governance and the uses made of the resource, the management of the resource. To the extent that matters other than use are included within this, the concept of ownership, which is a complicated and culturally determined concept, which is one of difficulty, those in my submissions are most clearly of all not affected by this partial share sale because the only entitlements that are held by these entities, part of which are being sold, are use rights. So the position in relation to other types of rights is unaffected.

**ELIAS CJ:**

But the use rights are a major part of the – I'm just grappling really for another concept, another word other than ownership. Because as you say, it's opaque.

**MR GODDARD QC:**

It is.

**ELIAS CJ:**

It doesn't really help. But if one takes the Treaty language, "full exclusive and undisturbed possession", you have to accept that use, the use rights are a substantial infringement of that guarantee.

**MR GODDARD QC:**

Yes. And they're infringed by the resource management legislation and that's why the action in relation to addressing that is with the resource management legislation. If there's a right – if and to the extent that there is a right protected by the Treaty vested in a particular Māori group to exercise exclusive and undisturbed possession in relation to a particular water resource, and your Honour's point earlier that much must turn on the nature of the particular resource and the connections with that group and how it's being used today in terms of reasonable action under the Treaty, all of these things are part of the picture. But to the extent that there is such a claim in respect of a particular resource, what interferes today with its exercise is the resource management legislation. And if you're talking about recognition of rights

rather than redress, compensation for having taken away, which my learned friend emphasises is at the forefront of the appellants' case, you can only do that by tackling the thing that takes the rights away. It's the Resource Management Act.

**GLAZEBROOK J:**

Isn't the issue really, though, that if in amending the Resource Management Act you're doing so because of issues of resource management, effectively the management of the water, making sure there's not too many people using it, making sure that it's a renewable resource in a proper sense, but can you really use the Resource Management Act to, because there has been Māori interests that haven't been looked after properly not related to the Resource Management Act, and the reason I say – of course you could to the extent that the Government, the legislation, the legislature can do whatever it likes, but just in terms of saying that that's the most appropriate regime to redress Māori issues in terms of management, up to now the Government hasn't expropriated property in third party hands in order to fulfil Treaty claims. And that's been a principle that it's said that it won't do and I can't imagine that it's going to do it in future. Obviously when I say "expropriate", it would do so with suitable compensation in any event if it did do so, but it hasn't so far and one can't imagine a policy environment in which it would.

**WILLIAM YOUNG J:**

I think it has actually. In relation to Māori leases, they were effectively expropriated –

**GLAZEBROOK J:**

Oh, yes.

**WILLIAM YOUNG J:**

– but with compensation. Māori reserve land leases.

**GLAZEBROOK J:**

Well, it's – one can understand that you might do that, but not in –

**ELIAS CJ:**

Was that under the Treaty of Waitangi Act settlements?

**WILLIAM YOUNG J:**

No, it was – well it was a recommendation of the Waitangi Tribunal.

**MR GODDARD QC:**

Yes. So, but again, I think –

**GLAZEBROOK J:**

But it's just –

**MR GODDARD QC:**

Your Honour's question has quite a few parts and let me see if I can respond to some of them. First of all, when I say that the focus of reform should be the – would need logically to be the resource management regime, the reason I say that is that it's that regime that at present represents the interference with the rights that are claimed by certain Māori groups. But your Honour is right that one of the options for consideration may be, because the evidence, and my submissions refer to this, or other freshwater regimes, may be to identify certain matters that are appropriately dealt with in the resource management regime and others that are more appropriately dealt with in some other mechanism. It's very common to have the resource management regime intersecting with other –

**GLAZEBROOK J:**

No, no, I understand that.

**MR GODDARD QC:**

– ownership interests or –

**GLAZEBROOK J:**

It was really just to say –

**MR GODDARD QC:**

Right.

**GLAZEBROOK J:**

– if you're looking at it in a resource management sense you'd be looking at it in terms of management of water. One wouldn't have thought the primary purpose of that was to redress Māori claim. Māori claim, you would've thought, you'd be redressing after you work out what those rights are and then work out –

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

– the most sensible way of accommodating them.

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

And it is going to be difficult, albeit not impossible, to offer some redress with third party claims. I'm just saying it's going to be less likely that that will occur in that way, isn't it?

**MR GODDARD QC:**

There – and that is the point at which I think my submission is yes, of course in making decisions in this policy space and working out what's reasonable to do, for example, which is an integral part of the Treaty responsibility, the Government will need to consider the impact on certain categories of existing users, and the appellants are also sensitive to that. They refer in their submissions, argument, for example, to not wanting to prejudice the use of water for agricultural purposes, because they understand that that is an important part of the New Zealand landscape and economy today that needs to be taken into account. But the fact that those issues exist is not materially changed by the proposed sale. That's the key point I was endeavouring to make earlier. The issue of an existing range of uses of the water resource for a whole range of purposes in New Zealand by a mix of users, mostly private sector, some SOEs, is already part of the landscape, and the question is not whether that is a hindrance to some forms of possible response to the claims. The question is whether the ability of the Crown to respond to those claims is prejudiced, is made materially worse by the particular action is proposed and which the appellants are challenging before this Court. And my submission is, based on the evidence and on the analysis I'll go through of the legal framework, that the particular proposed sales that are the subject of this litigation will not have a material impact on the availability of responses to the claims that have been advanced.

And I'll come back to it but both the Deputy Prime Minister and the Attorney-General in their affidavits emphasise that they have considered whether the ability of the

Crown, ability of the Government to respond to these claims would be affected however Māori rights and interests are defined, because the Government well understands that that process of definition, description, identification, is underway and is not yet complete. And the decisions that have been made, by Parliament in the legislation and by the Government under that legislation, are not dependent on a particular conception of what those rights and interests are.

**ELIAS CJ:**
Say that again?

**MR GODDARD QC:**
I'll try to do it a more concise –

**ELIAS CJ:**
"Are not dependent on a particular conception..."

**MR GODDARD QC:**
Are not dependent on a particular view of what those rights and interests are. The – even –

**ELIAS CJ:**
But for Māori, Māori may have a particular conception of what their rights and interests are which doesn't match the Crown's conception.

**MR GODDARD QC:**
But the Crown is not proceeding on the basis of a particular perception. The Crown is saying, "Is what we're doing going to affect our ability to provide rights recognition or redress if Māori are right or if some other answer is arrived at?"

**ELIAS CJ:**
Well what about the fact that these are assets of the Crown, significant assets of the Crown which impact directly on, in this case, the Waikato River, and which you acknowledge interfere with full, exclusive and undisturbed possession which may be part of the claim. Why would the Crown, and this is really what Justice Glazebrook was putting to you, why would the Crown create third party rights in those assets? Why is the creation of third party rights in those assets not an additional impediment to some of the range of responses the Crown might develop? And isn't that really

what was in issue in the *Lands* case? Where the Crown had significant landholdings and the system of protection which was put in place was one to ensure that third party rights would not be created, even though the actual transfer was only to wholly owned SOEs.

**MR GODDARD QC:**

Again, there are quite a few steps in that, but let me perhaps deal with the last of them first. The concern, the primary concern in the *Lands* case was that the very thing being claimed, land, itself a taonga, was being passed to SOEs in a way which, if it didn't fall within the old section 27, left the SOE free to dispose of it to third parties with the result that it was gone forever.

**ELIAS CJ:**

Well what I'm putting to you is that the evidence that the claimants have filed here indicates that was is in issue here is a river.

**MR GODDARD QC:**

And none of – and the river is not being dealt with or disposed of. No property right or interest in the river exists or is being brought into existence by this transaction.

**ELIAS CJ:**

No I understand that.

**MR GODDARD QC:**

What is happening is that there is a limited use right held by, let's focus on Mighty River Power, and part of the ownership of that company is being sold, but the limited use right that Mighty River Power holds is not permanent. It is already subject to conditions. It's a creature of statute and it is open to review both as part of any generic review of the statutory regime governing fresh water, and there's one on foot, and also more specifically as and when each consent comes up for grabs and in certain other circumstances during its life. Let me not miss that completely either but that's not as significant an opportunity for considering these issues.

So what the Crown says is that any material option – well, first of all it says that in fact no material option, no meaningful and real option for providing, for recognising an interest in the river is lost here, but also that the tools of most relevance necessarily involve regulatory reform and the ability of the executive to propose such

measures and of Parliament to enact them is not affected in a material way by these proposals that the difference made by a minority stake in three users of these resources is not material. And the evidence on that is before the Court comes from Ministers and is not contradicted. And, importantly, it was largely, with one exception which I'll deal with tomorrow, shares plus, accepted by the Tribunal. Which must have a bearing on the question of whether the Crown is putting out of its ability the taking of reasonable steps to protect rights.

I'm conscious of the time.

**ELIAS CJ:**
We'll take the afternoon adjournment. Now how do you think you're going?

**MR GODDARD QC:**
Well I've almost begun. I do want to just skip through the legislation a little bit because I'm a bit concerned that these arguments are elusive in the abstract and that it's helpful to do the pedestrian thing of going through the two Acts that are at the heart of this.

**ELIAS CJ:**
That will be helpful.

**MR GODDARD QC:**
I propose to do that tomorrow morning. I do want to take the Court to a couple of affidavits because it's also been a slightly fact-free – no, that's not fair. Additional facts will assist the Court, I think, in looking at these issues. And then I'm going to work through briefly the questions of reviewability of the decisions and consistency with the Treaty, but I can be quite quick on those once I've identified clearly the relevant features of the statutory regime and some key aspects of the evidence.

**McGRATH J:**
For my part, Mr Goddard, I very much welcome hearing that you're going to have some focus on the facts. We agreed, for better or worse, to take this case direct. We don't have the advantage of extensive findings of fact that we normally get reviewed by the Court of Appeal, and that part's very important and we're going to have to have the facts aboard, either totally from our own efforts or with the assistance of counsel.

**MR GODDARD QC:**

And that's one of the reasons why I want to do that, your Honour. I am conscious that that means that I will be less glamorous and constitutional than my learned friend, but I think to begin at that prosaic level will nonetheless be helpful.

**COURT ADJOURNS: 4.02 PM**

**COURT RESUMES ON FRIDAY 1 FEBRUARY 2013 AT 10.02 AM**

**ELIAS CJ:**
Yes, Mr Goddard.

**MR GODDARD QC:**
Your Honour. I'll work mainly from my road map and I'll begin by looking at the legislation that's central to this case, the legislation enacted by Parliament in June last year. I'll then look at some of the factual material that really is an interpolation after item 2 in my road map and then I'll deal with the legal issues that are covered in the rest of the road map.

As I say in paragraph 1 of my note, the legislation originally won Bill, ultimately divided into two Bills, two Acts, provides for Mighty River Power and three other companies to cease to be state-owned enterprises and become mixed ownership model companies. The reason it was enacted was to enable the Crown to sell up to 49 per cent of each of these companies and in order to do that, it was necessary to disapply the prohibition on sale and the State-Owned Enterprises Act and it includes in Part 5A of the Public Finance Act, the new mixed ownership model regime, a set of provisions which was intended by Parliament which was carefully crafted to preserve post-sale the Treaty (inaudible 10:04:19) and protection regime that currently applies in relation to these companies. So Parliament turns its mind to the regime that should apply after a sale in order to protect Māori interests under the Treaty and the legislation reflects that.

It's probably helpful to begin with the Bill which is in volume 4 of the authorities, it's the lurid orange one, at least in my set, under tab 46 and to begin, right at the beginning with the explanatory note and the general policy statement, "The Government plans to sell a minority of shares in Genesis Power, Meridian Energy and Mighty River Power Limited and Solid Energy New Zealand Limited. As these are currently state enterprises, it's necessary to pass legislation that enables the Crown to remove these companies from the ambit of the SOE Act, although sections 22 to 30(1) and a provision similar to section 9 of that Act, will continue to apply. The companies will also be removed from the ambit of the Official Information Act and the Ombudsman Act. The new legislation will restrict the Crown from holding less than 51 per cent of the voting rights in each of the companies and will restrict non-Crown

individuals and entities from holding more than 10 per cent of the voting rights in each of the companies." Those provisions evolved as the legislation went through the house and I'll look at the final versions of those because they're quite important for aspects of the argument.

The way those caps will work is discussed and then over the page, page 2 of the Bill, "The main purpose of moving these companies to the mixed ownership model is to raise five to seven billion dollars which the Crown will invest through the future investment fund in new schools, hospitals, roads and rail and other public assets and used to control debt."

And the other objectives of the mixed ownership model are identified to: "give New Zealanders an opportunity to invest in the market and large New Zealand companies", "strengthen the stock market", "improve the public scrutiny of the companies, creating sharper incentives to run them efficiently", and "allow the companies to raise the capital they need without having to rely solely on the Government for equity". The intention is foreshadowed that the Bill will be eventually be divided into two separate Bills at the Committee of the whole stage. That's what happened.

"Clause by clause analysis". Normally one would skate over the description of clause 2 but it is worth, I think, looking at here since the commencement provision is at the focus of the appellants' case. Clause 2, the commencement clause, Part 2, that's the part that amends the Public Finance Act and the relevant schedules come into force on the day after the date on which the Bill receives the royal assent. Part 2 establishes the mixed ownership model. "The rest of the Bill comes into force on a date to be appointed by Order in Council and orders may be made bringing different provisions into force on different dates."

Then the reason is explained and that is the usual practice resulting from a review of commencement provisions of this kind by the Regulations Review Committee in I think 1996, expressing concern about the use of such provisions and the ability to scrutinise whether the power is exercised in the manner and for the reasons contemplated the Government –

**WILLIAM YOUNG J:**

So, just pausing there. The Regulations Review Committee has made a recommendation – sorry, when was that?

**MR GODDARD QC:**

1996 I think, it's discussed in Burrows and Carter at, I think page 595 and 6, let me just check that, 565 and 6, I was close. The Government response indicated that a practice would normally be adopted of using such deferred commencement powers only where there was a good reason to do so and identifying the reason for doing so, in the explanatory note, to enable enhanced scrutiny of the way in which the power was subsequently exercised, or not exercised, that often being in fact the concern.

So it's not by accident that the explanatory note goes on to say, "This is to enable the SOE Act and the Official Information Act and the Ombudsman Act, to be disapplied at different times in relation to each of the four companies and for the relevant company to become a mixed ownership model under new Part 5A. It's the Government's intention that this will not occur for a company before a decision is made to proceed with a partial sale of shares in the company", and again, the reason for that which is discussed elsewhere in the legislative history, is this idea that the public sector accountability regime will continue to apply up to the point when shares are sold, the company is listed and it becomes subject to private sector scrutiny regime, such as continuous disclosure under the stock exchange's listing rules.

So you continue one form of accountability regime until the other cuts in and this is a common approach, it's referred to as an established approach, I think, in the *Broadcasting Assets* or possibly *Commercial Radio Assets* case, we'll come to that later and in turn, looks back to Telecom which was dealt with in this way.

**MCGRATH J:**

And I suppose it covers the possibility that the price might not be acceptable to the Government. The price available for the shares of particular company might not be acceptable to the Government so that the body may stay in Government ownership for a lot longer than it was initially contemplated.

**MR GODDARD QC:**

Precisely, your Honour. First of all there's the fact that preparatory work needs to be done, both by the Crown in relation to a sale and by the company itself to be ready

for sale and the precise timeframes for that can't be predicted when the legislation goes through, but also these actions take place in a changing and uncertain world and if market conditions were to move adversely or if some feature of the New Zealand electricity market were to develop in a way which made a sale imprudent one would not expect a sale to take place. If a sale doesn't take place one wouldn't want the Ombudsman Act and Official Information Act to have been disapplied and the company to be sitting in an accountability limbo, as it were, between the public sector or state enterprise accountability regime and the accountability regime that applies to the state entities.

**CHAMBERS J:**
At what point in Mr Crawford's timetable does the Government envisage the Order in Council would come into effect?

**MR GODDARD QC:**
The Order in Council would come into effect shortly before the sale proceeded, and that could be influenced by a range of factors such as sensible dates for reporting regimes and things like that as well as the particular date of the sale.

**CHAMBERS J:**
But when you say, "the sale proceeded", that's a rather vague – what I'm trying to carry on from Justice McGrath's question is, does it get, come into effect at the start of the sale process or right at the end of the sale process, just prior to allocation of shares?

**MR GODDARD QC:**
I'm sorry, I understand the question now, and the answer is the former, at the start of the sale process. The idea is that a firm decision will be made to sell a particular company on a particular timetable, subject to extraordinary changes of circumstances. At that point it will be moved from one regime to the other.

**ELIAS CJ:**
What – why do you say that though? Because it would be perfectly consistent with what's said here for the Government, having made the decision to proceed with the partial sale, to specify that the date it will come into effect is the date on which the sale is made. I'm just not sure whether it's as clear as that, that having made the decision then it will come into effect.

**MR GODDARD QC:**

I was describing what the intention was of the Government as described in Mr Crawford's evidence, and I think that's influenced in part by the issues that were canvassed in the *Commercial Radio Assets* case about whether it was lawful to contract to sell or take certain steps directed towards a sale at a time when the company was still –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– under the State-Owned Enterprises Act.

**CHAMBERS J:**

That's exactly what I had in mind.

**ELIAS CJ:**

I see. Yes.

**MR GODDARD QC:**

I think it would be unwise –

**ELIAS CJ:**

Yes, I see.

**MR GODDARD QC:**

– to proceed in that way given the concerns that the Court expressed about ministers possibly having gotten ahead of themselves in those respects, and as a result the expectation would be the decision – what your Honour will see as we go through the legislative history is that the possibility was identified that the company might be moved out of the SOE Act into the MOM regime, the sale process commenced, but then for some extraordinary reason it not proceed, and a new clause was inserted at the Select Committee stage to enable it to be pulled back. So that possibility is dealt with. And that really –

**McGRATH J:**

It's to enable the company to be returned to the SOE Act –

**MR GODDARD QC:**

Yes.

**McGRATH J:**

– regime as I read that provision.

**MR GODDARD QC:**

That's exactly right your Honour. If for extraordinary exceptional reasons, despite having made a definite decision to proceed with the sale subject to extraordinary events they materialise. I think that sentence got lost somewhere along the way, but...

**ELIAS CJ:**

So the proceeding in advance is to keep at bay some of the concerns in the *Fire Brigades* case or *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC) or something like that. Yes.

**MR GODDARD QC:**

Yes, it's the *Fitzgerald v Muldoon* and *Commercial Radio Assets* concern that ministers shouldn't be taking steps directed towards procuring an outcome that's currently proscribed by legislation. And so the idea is that once one gets to the point of taking formal steps directed towards that, rather than general preparation, presale housekeeping, it is appropriate to commence the legislation in relation to the particular company. It will then spend some time under the MOM regime before, all being well, a sale proceeds. If something extraordinary happens, a sale doesn't proceed at the expected time and it cannot be implemented shortly afterwards, there is now in the Act as passed an ability to claw it back to the SOE regime.

**ELIAS CJ:**

Nevertheless, leaving aside that timing point, what this does make clear is that it's linked, as it is in the appellants' case, that the decision to bring within the mixed-ownership model regime is linked with a decision that to proceed with sales of the shares.

**MR GODDARD QC:**

The timing of the legislation coming into force is linked to that decision.

**ELIAS CJ:**
Yes, that's what I mean.

**MR GODDARD QC:**
Yes.

**ELIAS CJ:**
Yes, thank you.

**MR GODDARD QC:**
That's right. And that, that is indeed right as a matter of fact. It doesn't, for the reasons I'll go through, have the legal consequences suggested by the appellants, but that basic link is certainly there.

Then we get into the clause-by-clause analysis of the provisions of the Bill, and it's perhaps easiest to read this while looking at the relevant clauses. And in fact let me begin at once by looking at that commencement clause, clause 2 of the Bill, which is on page 3 of the Bill, immediately after the explanatory note. I just note at this point that the title of the Act here is, in clause 1, is said to be the Mixed Ownership Model Act, and the commencement provision sits outside the two parts that amend, respectively, the State-Owned Enterprises Act and the Public Finance Act. I don't think it could conceivably be argued in relation to the Bill as introduced that the commencement power is part of the State-Owned Enterprises Act and is subject to the restrictions in it. It sits outside it and governs it. And one of the slightly surprising aspects of the appellants' case is that it's, the decision to divide this Bill into two Bills and include the commencement clause in the State-Owned Enterprises Amendment Act that, at the last minute, subjected it to the section 9 restriction that wouldn't otherwise have applied via section 23 of the Interpretation Act, that's only one indication that that's not what was intended. I'll come to others, but I just thought I'd flag at this stage that if one read this Bill one would not, looking at clause 2, say, "Ho ho, this is part of the amendments to the State-Owned Enterprises Act and therefore arguably subject to any restrictions on the exercise of powers in that Act via section 23", even if one were clutching a copy of the Interpretation Act close to one as one read this.

So we've got that clause. Then we've got Part 1, "Provisions for companies to cease to be State enterprises", and this is done by a series of clauses, each of which

amends particular enactments. First of all there are amendments to the State-Owned Enterprises Act, and that's done simply by repealing items in the schedules relating to the relevant companies. So, for example, we see in clause 4, "In Schedule 1, repeal the item relating to Genesis Power Limited." It's not structured as the conferment of any sort of power or discretion on the executive to take about the enactment of its own force removes the company from the Act. All that is left to be determined is the time of commencement of that legislative decision. Ditto with Schedule 2 in clause 6, and then we see the amendments to other enactments, the Ombudsman Act, the Official Information Act, and so on.

And then we get to Part 2.

**McGRATH J:**
So just, so when the Act speaks of being able to bring different provisions into force on different dates, section 4(3) in relation to Mighty River Power can be brought into effect even though the rest of section 4 is not?
1020
**MR GODDARD QC:**
Yes, your Honour and I actually included, because I thought it may be helpful to the Court, a draft of the proposed Order in Council as an appendix to my submissions. It's on page 36 of my submissions and it does, as I said, it brings into force sections 1 and 2 and that's the hoisting yourself up via section 11 of the Interpretation Act point that the Court explored with my learned friend and me yesterday and then –

**ELIAS CJ:**
But in effect, this doesn't change, does it, in terms of the Bill as enacted?

**MR GODDARD QC:**
This clause doesn't which is why it is useful to look at it now and just match it up to the explanatory note.

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**

So yes, this just removes it and then yes, coming back to your Honour Justice McGrath's question, your Honour will see that it's sections 3 and then 4, subsection (3) and –

**McGRATH J:**

Yes, spotted that, thank you.

**MR GODDARD QC:**

Then going back to the explanatory note, page 4 of that note, discusses Part 2, ongoing provision for mixed ownership model companies. This is the regime that will apply to those companies once they are no longer state enterprises, once they gone across and the Court will see that there's a description of clause 16 as inserting a new Part 5A in the Public Finance Act which provides as follows, it's summarised and in particular, "New section 45Q provides that nothing in new Part 5A shall permit the Crown to act in a manner that's inconsistent with the principles of the Treaty of Waitangi. Consultation with Māori has been undertaken to get a view from Māori on how the Crown's obligations under the Treat of Waitangi should be reflected in the Bill." So that was that first round of formal consultation.

I'll go through Mr English's affidavit and describe that in a bit more detail but there was a first round of consultation pre-introduction. "Many Māori considered that the status quo under section 9 should be preserved for the mixed ownership model companies. Accordingly, new section 45Q has the same wording as section 9 but refers to new Part 5A rather than the SOE Act because new Part 5A is the legislation that governs the mixed ownership model companies. In both cases the provision binds the Crown only."

Then the other clauses are described. Turning over the page to page 6, the bullet point concerned with the new section 45X. Now this is what became section 45W in the Act as enacted, "Continues to apply sections 22 to 30(1) of the SOE Act and provisions in certain other enactments to mixed ownership model companies despite those companies ceasing to be state enterprises." The provisions deal with ministers' shareholdings and at section 22 – and I'll look at that because that's an important provision in the appellants' arguments as well.

"The transfer by the Crown to state enterprises of land, other assets and liabilities, sections 23 to 29A, in broad terms the continued application of those provisions has the effect of ensuring that all processes for the transfer of assets to these companies can be completed despite the companies no longer being state enterprises. The continued application of those sections also ensures that the Crown's obligations to resume land, or interests in land and return it to Māori in certain circumstances, provided for in sections 27A to 27D of the SOE Act, continue to apply."

Then there's some other provisions of less relevance and then the last sub-bullet point, "The provisions deal with recommendations of the Waitangi Tribunal in respect of land transferred to or vested in a state enterprise, sections 8A to 8H of the Treaty of Waitangi Act." So that's the memorial regime, 27A to 27D of the SOE Act and 8A to 8H of the Treaty of Waitangi Act, picking up your Honour Justice McGrath's question yesterday and those memorials are – I'll look at the provisions later but in short, the memorials are entered on a title when it's transferred to the state enterprise by the Crown –

**McGRATH J:**
Yes, yes.

**MR GODDARD QC:**
– and it then remains on the title, whether it's held by the state enterprise or passes into the hands of a third party and what the legislation provides is that the Waitangi Tribunal can make orders for resumption of the land, or interests in land. The Crown must then buy it back under the Public Works Act. The person who holds the land, whether the state enterprise or a third party, is not entitled to be heard in relation to that resumption application and there's a compensation regime.

**McGRATH J:**
Yes.

**MR GODDARD QC:**
So those are the key, I think, provisions of –

**McGRATH J:**

Nothing you've covered so far really is relevant as to why section 9's terms were continued in section 45Q, other than what is said at the foot of page 4 and the top of page 5, is that right?

**MR GODDARD QC:**

That's right and that's all the explanation there is in the explanatory note. There's a quite frequent –

**McGRATH J:**

Good, that's what I thought, yes.

**MR GODDARD QC:**

– reference to that fact in the debates in the House, all of which are in this volume of the authorities but none of them provide any particular illumination in relation to the issues with which this Court is considered –

**McGRATH J:**

Thank you, that's helpful.

**MR GODDARD QC:**

– except to show that the issue was squarely before Parliament and was discussed but one can spend, as is so often the case, frustrating hours trundling through debates, only to end up better informed but no wiser at the end.

**McGRATH J:**

Well, from our point, there's nothing you're drawing on to say that's a clincher for –

**MR GODDARD QC:**

No and nor are the appellants, neither of us rely on anything in the debates. The report back – so the Bill was introduced, it was referred to the Select Committee, there were I think some 1,489 submissions, it received in writing, oral submissions from 124 submitters, including many Māori submitters, that's expressly noted in the debates and the report back is under tab 47. I don't need to spend a lot of time on this. It recites again the purpose of the legislation. It identifies the claw-back provision and its rationale on page 2. So under the heading, "Transfer of companies," the Court will see, last paragraph, "As a contingency measure

recommended by a majority an amendment to other transfer to be reversed by Order in Council." That's the new section 3C of the Public Finance Act.

The select committee heard a great deal of evidence in relation to the protection of Māori interests and that topic is discussed – well it's touched on further up on page 2 where it says, "Part 5A would place limits on the ownership of these companies and the majority of us consider it would provide for the protection of Māori interests," but then there's a heading, "Protection of Māori interests," at the top of page 6 and following submissions by Waikato-Tainui during consultation on the Bill, an amendment to section 64 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, extending the consultation obligation imposed on SOEs to mixed ownership model companies was included in this legislation and I'll look at section 64 as amended a little later but again, what I want to emphasise that the whole question of how Māori interests should be protected in an environment where the Crown had sold down its shareholding to 51 per cent was considered by the legislature and the legislation that resulted was intended to reflect what Parliament saw as an appropriate set of balances, checks, controls.

The Bill after being reported back, went through the usual stages, was divided into two Bills at the end of the committee of the whole stage and finally enacted as the two Acts which are at the heart of these proceedings. Just look quickly at each of those. First of all, in volume 1 of the authorities, the white volume, under tab 5, the amendments to the Public Finance Act. So we have the Public Finance (Mixed Ownership Model) Amendment Act. The Act received assent, on 29 June and section 2 provides that it comes into force on the day after the date on which it receives the royal assent, so it came into force on 30 June last year. So this legislation is in force.

That's also not without its importance because really, what the appellants are arguing, is that the scheme in this Act which is in force is inadequate to protect their interests and that the executive should take steps to introduce remedial measures, their language, in relation to those inadequacies before it commences the other legislation, the amendments to the State-Owned Enterprises Act that move companies from that regime to this one. So it is really, in substance, a criticism of the legislation, a challenge to the adequacy of the legislation to protect Māori interest and an argument that more needs to be done by the executive before it gives effect to the legislation that transfers the companies from one to the other.

So this legislation is in force. The new section 3C, the company claw-back provision, is at the foot of page 3 and then clause 9 inserts the new Part 5A and there are a few things that I think should be noted about this. First of course, section 45Q and it's important to read the words of the clause, trite to say that interpretation is a matter of text and purpose. Here, both point towards a more limited sphere of operation for section 45Q than the appellants contend for, "Nothing in this part shall permit the Crown to act in a manner that's inconsistent for the principles of the Treaty."

So what this is saying is that the powers conferred by this part, by this legislation, are not to be used to enable the Crown to act in a manner inconsistent with the principles. It doesn't purport to regulate the exercise that power is derived from other sources and that's an important –

**ELIAS CJ:**
It's Part 5A.

**MR GODDARD QC:**
Part 5A.

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**
Sorry –

**ELIAS CJ:**
So you said that in – I thought you said "in this Act"?

**MR GODDARD QC:**
No, in this part of this Act.

**ELIAS CJ:**
In this part, yes.

**MR GODDARD QC:**
And the same was true of course, of section 9 of the State-Owned Enterprises Act and that's a distinction that was adverted to in passing by a number of the Judges in

the *Lands* decision and explicitly discussed by Justice Somers, that it was the powers conferred by the SOE Act that could not be exercised inconsistently with the principles of the Treaty and it was precisely because –

**McGRATH J:**
But in this Act Mr Goddard, could you just take us through what powers you're saying that the provision is confined to because I hope I have signalled that I am not yet fully aboard with the submission.

**MR GODDARD QC:**
Yes and in short –

**GLAZEBROOK J:**
Can I just also say that it – just it doesn't say "powers", it says, "nothing in this Part", so it's not talking about powers necessarily because this Part does set up the mixed ownership model companies themselves and that whole regime. So arguably, that part deals with all of the powers that a mixed ownership model company would have.

**MR GODDARD QC:**
Well the argument –

**CHAMBERS J:**
You have to look at subsection (2) however –

**GLAZEBROOK J:**
So it's not the powers conferred by the statute that are talked about in 45Q?

**MR GODDARD QC:**
There are, I think, two reasons why, as a matter of text, that's not the right approach and also some purpose arguments which I'll come to. As a matter of text, first of all, subsection (2) is inconsistent with treating this as applicable to everything that a mixed ownership model company does for example and the powers of a company which is –

**GLAZEBROOK J:**
Well I wasn't suggesting that. It obviously has to be whatever the Crown does in respect of that but that doesn't diminish the argument, does it?

**MR GODDARD QC:**

No but your Honour put it to me in terms of the powers of the company and so I was saying it – it's the Crown –

**GLAZEBROOK J:**

Yes, well corrected.

**MR GODDARD QC:**

– a small point but an important one –

**ELIAS CJ:**

It's in the setting up, or it's in the launching, is it?

**MR GODDARD QC:**

Well it's mostly in relation to transfers of assets still, that's the key provision that remains subject to 45Q(1) and that's the essence of the submission. I'll come to that but there are a range of – the powers to transfer assets continue to apply but section 9 no longer applies and, just as the main provision to which section 9 had significant application under the SOR Act, was section 23, the transfer power. So too here, the function of 45Q(1) is to restrict the exercise of that transfer power.

**McGRATH J:**

What seems to me to be a significant difference though, is that in this case the transfer of assets is nowhere near as significant as it was for state enterprises. In this case, the state enterprise is up and running, presumably had all of its operating assets necessary for that purpose transferred way back and the provision is there, I would suggest, probably to cover a few incidentals, concerning which Mr Hodder seems to have concerns apparently but putting that aside, this literal interpretation is, Mr Goddard, all very well but I'm just worried that you're focusing in relation to the – on the power to transfer assets to something that isn't really very meaningful in this legislation?

**MR GODDARD QC:**

It certainly is a power which was deliberately continued to enable things to be tidied up but your Honour's – and that's what the explanatory note essentially says and your Honour's exactly right, there are loose ends which need to be tidied up in relation to these entities and that indeed may still need to be tidied up after even a

sale where the process is partway through and this ensures both that that can happen and that the constraints on that continue to apply.

**ELIAS CJ:**

Is it not though also concerned with the transferee which is not – hasn't emerged fully armed from the head of Jupiter or whatever, still has to have a constitution set and matters of that sort. Is that part of this?

**MR GODDARD QC:**

No your Honour because it's the same company that – there's no new company being created, no new assets –

**ELIAS CJ:**

No.

**MR GODDARD QC:**

– all that's happening is that some of the existing shares are to be sold in an existing company.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

So there is no – there will – his Honour Justice McGrath is exactly right, that there will not be any significant asset transfers as part of the mixed ownership model programme –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– the assets are, for the most part, where they're supposed to be in the company –

**McGRATH J:**

That was done years ago.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

Yes but there are loose ends –

**McGRATH J:**

There are loose ends. So far, does that mean that section 45Q is a provision that's there to cover loose ends.

**MR GODDARD QC:**

It's there to deal with those, yes and –

**McGRATH J:**

Well it's –

**MR GODDARD QC:**

to ensure that the protections, the important protections in relation to those outstanding issues, some of which are outstanding because of precisely the sorts of concerns raised by the appellants, are not lost.

**McGRATH J:**

It doesn't seem to me to be entirely within the spirits with which the Court of Appeal in the *Lands* case approached section 9, to treat section 45Q as a provision that's really only addressed to loose ends and isn't addressed to the substantial thing that happens under this Act, the empowerment of transfer of shares.

**MR GODDARD QC:**

In my submission that would – that's effectively an argument that 45Q does more under this Act than it was doing under the State-Owned Enterprises Act, that it has a wider sphere of operation because the whole basis on which the *Lands* case proceeded was that section 9 was a restriction on the powers conferred by the SOE Act. Those are the terms in which the orders were made by the Court, that those powers should not be exercised in the manner and indeed, an important part of the reasoning of the Court and in particular Justice Somers, was that if one looked at the powers conferred by that Act, the significant power was the power to transfer assets,

in terms of which powers might engage Treaty concerns and section 9, if it wasn't treated as focused as mainly that, wouldn't have much to do –

**CHAMBERS J:**
Well, let's just look at the wording though of 45Q. It talks about the Crown acting. Now, I agree that may be a synonym for "powers", but that's, it's relating to actions of the Crown.

Now let's turn to 45R. "No minister may take any of the following actions". The first action mentioned is selling. So why doesn't 45Q(1) apply to that particular Act?

**MR GODDARD QC:**
Because the ability to sell is not something that this Part permits. This Part does the exact opposite. 45R –

**GLAZEBROOK J:**
It doesn't say anything about that though, does it? It just says, "Nothing in this Part shall permit the Crown to act in a manner that's inconsistent with the principles". If you read that as it is, nothing in there allows you to act inconsistently with the principle, which means don't you have to act consistently with the principles? And if you're a mixed ownership model company which is created under the Act and therefore any of the powers anybody exercises in relation to that company are related to that Part, because these don't exist apart from that Part. They are not creatures of anything other than statute.

**MR GODDARD QC:**
But they are –

**GLAZEBROOK J:**
I mean I'm not sure it gets the appellants anywhere.

**MR GODDARD QC:**
No.

**GLAZEBROOK J:**
So I'm not suggesting it does.

**MR GODDARD QC:**

I am wondering how much time I should spend on this. But I can't resist having one more crack at explaining the textual analysis.

**GLAZEBROOK J:**

Well we understand, I think, the analysis.

**MR GODDARD QC:**

Which is, when it says, "Nothing in this Part shall permit", the most natural reading of that is that it constrains the acts the permission to do which is sourced from this Part of this Act. So if your ability to do the act, if your freedom to do it derives from other sources then you are not constrained in doing that act. And that is why I say that, for example, selling shares, which is an ability conferred by the general common law to sell your own personal property and perhaps, to some extent, the Companies Act, is something – if one imagines this Part not applying to a company, suppose that it were to be removed from the State-Owned Enterprises Act and this Part were not to be applied to it. It was just taken out, which is what happened to the commercial Radio New Zealand company. The result, as the Court of Appeal said in that case, was that the common law power to dispose of shares was available to the Crown. It wasn't sourced from any legislation.

Now, in the – and the same is true here. The ability to sell shares in these companies comes from the disapplication of section 11 in the State-Owned Enterprises Act. It comes from taking them out of those schedules. It doesn't in any way come from having put them into here. What putting them into here does is impose a new set of restrictions on what can be sold, but it doesn't, it isn't the source of permission to sell.

**CHAMBERS J:**

On your argument could you give us an argument of an act under this Part, by referring to a particular section, on which you say section 45Q(1) would bite?

**MR GODDARD QC:**

Yes. Section 45W provides for certain provisions of the State-Owned Enterprises Act, sections 22–30(1), to apply to these companies. By virtue of that the Crown is permitted to exercise the section 23 asset transfer power and the section 29 Order in Council power to, again, relating to asset transfers. Those are

powers which the Court is permitted to exercise by this Part, by section 45W, and therefore they are plainly constrained by section 45Q.

**GLAZEBROOK J:**
Can I just check, because –

**McGRATH J:**
No one's disputing that.

**CHAMBERS J:**
And what about the power under section 22(3) of the State-Owned Enterprises Act?

**MR GODDARD QC:**
That is – section 22(3), perhaps if we go to that since your Honour's asked. I was going to –

**CHAMBERS J:**
Tab 8.

**MR GODDARD QC:**
– come to it later but that's a logical time, or as logical as any.

**McGRATH J:**
So you've finished the convention of power thing now really haven't you?

**MR GODDARD QC:**
I really have. I deal in my written submissions with why this would be a surprising consequence of section 23 of the Interpretation Act to constrain the power to amend an Act by reference to the purpose of the principal Act and I – the main two arguments on that, which is the only other point, are first that often an Amendment Act significantly departs from the purposes of the principal Act. It's why you're amending it. So it would be bizarre to suggest that your decision on whether or not to commence the amendment had to be exercised for the purposes of the principal Act when the whole point of the amendment is to change them? So that just can't work as a general proposition, and yet that's an integral part of that argument.

Second, if one pauses and asks in the real world why we sometimes see deferred commencement provisions, the reason is the practicalities that I referred to a moment ago of getting ready to administer an Act. It is not to require the executive before commencing the Act to revisit the wisdom of the policy in the legislation, to consult again in relation to it and make new decisions about whether it's a good policy. That is simply not what deferred commencement powers are for, and that is all I have to say about commencement.

**CHAMBERS J:**
All right. 22(3).

**MR GODDARD QC:**
22(3). What is section 22 of the State-Owned Enterprises Act doing? Section 22 is addressed to certain practical issues in relation to the name in which shares are held. It is not the source of any powers. It simply says who is going to hold the shares. The problem from a company law perspective, to which this responds, is that you have to vest shares, normally, in the name of a legal person. Minister of X is not a legal person. So if you want ministers to hold shares you'd have to transfer it every time ministers change and that happens with some regularity. And in the absence of a provision like section 22 you have to do what the Crown has done in relation to Air New Zealand, which is the shares are registered in the name of Her Majesty the Queen acting by and through her Minister of Finance. One slight complication with that back in 1986, before the enormously important Companies Act 1993 did away with all sorts of strange restrictions on our company law, was that you had to have at least two shareholders. And so this was designed to let you have two ministers on the title using their office name despite the companies regime and to say that these are, we can do this and they can exercise the powers, even though otherwise that doesn't fit with the Companies Act 1955 or, it must be said, the rules under the '93 Act about who can hold shares. It has to be some legal person.

So all 22 does is say despite all that company law stuff, "Shares in a State enterprise held in the name of a person described as the Minister of Finance or the responsible Minister shall be held by the person for the time being holding the office", so that's the who, and, "Notwithstanding any other enactment or rule of law," it's not necessary to have a transfer every time you get a new minister, and the, "shareholding Minister", whoever that is from time to time, can "exercise all the rights and powers". This is machinery to do with the names in which the shares are held. It does not

confer any powers at all. It's a very boring provision of the kind that company lawyers like, but it does not have the sweeping consequences contended for by the appellants.

Right. That's that one.

**GLAZEBROOK J:**
Can I just come back to a point? From the explanatory note, what it looked like was that the – Parliament was saying that, "We've got section 9. There's been concerns that section 9 doesn't – of the SOE Act, "doesn't apply so we're introducing section 45Q." Introduce it in exactly the same terms –

**MR GODDARD QC:**
To do exactly the same thing.

**GLAZEBROOK J:**
So what are you suggesting section 9 does in the SOE Act? Because I would've thought it applies to any act of the Crown in relation to an SOE. Is the difference that you're suggesting that apart from, I suppose – well I would've thought it applies more generally. You're saying even that is very narrow and only applies to transfers in or out or anything explicitly set up under the SOE Act?

**MR GODDARD QC:**
I –

**GLAZEBROOK J:**
Although of course SOEs are a creature of the SOE Act and therefore...

**MR GODDARD QC:**
They're not – I think your Honour's described mixed ownership models as "a creature of Part 5A" and now state-owned enterprises as "a creature of the State-Owned Enterprises Act". I think one needs to bear in mind that they are companies first and foremost and creatures of the Companies Act, and then there is an overlay of additional provisions. In relation to an SOE, the SOE Act. In relation to a MOM, the MOM regime. Most of what is done in relation to either a state-owned enterprise or a mixed ownership model company is not done under that legislation, it is done under the ordinary rules that govern the operation of companies and the restrict –

**GLAZEBROOK J:**

So the argument, just to be clear, your argument is the same in respect to the –

**MR GODDARD QC:**

Yes.

**GLAZEBROOK J:**

– that it only applies to the explicit powers given in the particular Act and doesn't apply to acting any other way in relation to either the state-owned enterprise or the MOM?

**MR GODDARD QC:**

Exactly so your Honour. I say that –

**GLAZEBROOK J:**

So they can do what they like as long as they're acting under a power that isn't explicitly conferred by the legislation, whether Treaty compliant or not, that's the argument?

**MR GODDARD QC:**

The argument is –

**GLAZEBROOK J:**

Is it subject to –

**MR GODDARD QC:**

– that's a little cruder than I would prefer to put it –

**GLAZEBROOK J:**

Well isn't that actually what –

**MR GODDARD QC:**

– sorry, with respect. What I would say –

**GLAZEBROOK J:**

– what's being argued?

**MR GODDARD QC:**

– is that –

**ELIAS CJ:**

Why don't you want to be crude about this? I mean, don't you have to be –

**MR GODDARD QC:**

Because –

**GLAZEBROOK J:**

That's your argument.

**MR GODDARD QC:**

No, it isn't my argument your Honour because I'm not saying that nothing restrains the Crown –

**GLAZEBROOK J:**

Well unconstrain –

**MR GODDARD QC:**

– from acting inconsistently with the Treaty. A lot of my argument is about institutional arrangements and the point that there are some steps which the Crown may take which – where arguments about whether or not it's consistent with the Treaty happen before the Waitangi Tribunal. These are issues on which reasonable people can disagree and there are two quite distinct issues. One is, is there an obligation and the second is, what are the institutional arrangements for determining differences of view about the content of that obligation and to say, as the Crown does here, we have certain obligations under the Treaty, but that is not the same as to say and compliance with those obligations is open to challenge in the Courts. Some obligations are – the basic position, established by the Treaty of Waitangi Act 1975, is that acts of the executive which any Māori person considers may be inconsistent with the Treaty, can be the subject of a contemporary claim before the Tribunal. The Tribunal makes a recommendation, that's resolved in the political domain, to pick up your Honour the Chief Justice's term yesterday.

There are some matters where Parliament expressly provides in legislation that certain powers must be exercised, having regard to the Treaty or consistently with

the principles of the Treaty, there are various different formula that have been used and whenever such a formula is used it is then the role of the Courts to ensure that the relevant power is exercised in a manner consistent with the constraint in the form prescribed in the legislation but it's not an accident that different Treaty clauses use different formulations and it is an important part of the role of the Court, when applying a Treaty clause, to understand, as a matter of ordinary interpretation, how far the Courts are to supervise Treaty compliance and at what point the institution for securing that is the Tribunal and that's the line I'm contending for. So –

**McGRATH J:**
Is it the case that the strongest form of Treaty provision that has been made in modern times has been applied here?

**MR GODDARD QC:**
Yes.

**ELIAS CJ:**
Sorry, the strongest form of?

**MR GODDARD QC:**
In the sense that it requires compliance with the –

**McGRATH J:**
Of statutory Treaty provision that is applied in legislation, has been applied here. I mean, thank you for your suggestion that we remember our functions, constitutional functions Mr Goddard but we will also surely, have regard to the fact that a very strong provision, I suggest the strongest has been applied here and that the effect of that provision, it's constitutional importance in itself, was spelt out very fully in the *Lands* case.

**MR GODDARD QC:**
Absolutely and I certainly – I'm very conscious in this Court and given the long exposure that particular members of it have had to these issues, that I don't want to repeat the obvious, or to sound like I'm preaching but I was trying to response to the suggestion that I was arguing that the Treaty just didn't apply and I was saying no, my argument was more subtle than that, my argument was about which aspects are Treaty compliance are before the Court –

**ELIAS CJ:**

Well your argument is that there has to be a power under the legislation that's being exercised, the section 9 or section 45Q to bite on.

**MR GODDARD QC:**

Yes and –

**ELIAS CJ:**

Yes. I would have thought that, leaving aside Justice Somers who is an outlier on this point, that that is perhaps not consistent with the approach taken in the *Lands* case but I imagine you'll come on to look at the *Lands* case?

**MR GODDARD QC:**

I hope to, although I think timing is going to be a challenge today but –

**ELIAS CJ:**

All right, can I just put to you a sort of – what in fact is happening here. In the *Lands* case the Crown was seeking to corporatide the manner in which it held its assets and that was objected to on the basis that the corporate imperatives, through the SOE models, would get in the way of the Crown using its ownership to respond to Treaty of Waitangi Tribunal recommendations?

**MR GODDARD QC:**

The first part I'm absolutely with your Honour. The second part I think is not how I understand the main focus of the objection to have evolved which was the risk of assets being disposed of in turn by the state enterprise and being lost permanently to Crown control and that's a theme that comes through very strongly in the judgment –

**ELIAS CJ:**

That was in part and that was perhaps significant in the resumption settlement but what we have here is the next step, with the Crown no longer having ownership of the entity that holds the assets and your argument has to be that section 9 and section 45Q just don't bite on that at all?

**MR GODDARD QC:**

That's one of my arguments. Of course, the argument which I foreshadowed yesterday and which I do want to spend some time on it because, in my submission,

it is actually the simplest way to approach this case, is whether the particular transactions contemplated have a material effect on the Crown's ability to recognise rights and provide remedies –

**ELIAS CJ:**

Yes, yes.

**CHAMBERS J:**

Well speaking for myself Mr Goddard, I can indicate that I think that's where you should put the bulk of your effort because it does seem to me – I do not have the background in Treaty matters that some of my colleagues have but it does seem to me that the *Lands* case, the law generally has moved on considerably since then and it is increasingly common for treaties of all kind to be taken into account when assessing, interpreting legislative instruments but also in assessing Crown actions and that therefore, speaking for myself what's going to be of most use, is finding out what you say about the facts and why you say the proposed programme of MOMs is not inconsistent with the Treaty?

**MR GODDARD QC:**

And I do want to do that but I wouldn't want to lose sight of the, in particular, the argument that it's inappropriate to review on the grounds put forward by the appellants, the exercise of a commencement power, that is to pick up his Honour Justice McGrath's point –

**CHAMBERS J:**

Yes, well I see your argument on that –

**MR GODDARD QC:**

– so closely associated with the legislative act, really not very different from the executive role in, for example, recommending the royal assent. The executive comes into the legislative place there but one would I think, struggle to suggest that that was reviewable because it's so intimately connected with the legislative process. The same is true of the exercise of a commencement power at a later date –

**CHAMBERS J:**

Well I can certainly see that argument about commencement powers.

**MR GODDARD QC:**

Yes and all seven Judges in the *Commercial Radio Assets* case took that approach. Justice Thomas' dissent was on different grounds. So that was a seven Judge Court of Appeal that said yes, this is quite an important demarcation. So on that, I wouldn't want to be lost but –

**CHAMBERS J:**

Well I'm not suggesting you give away any arguments –

**MR GODDARD QC:**

– just what I should emphasise, yes –

1100

**GLAZEBROOK J:**

– I'm merely suggesting, speaking for myself, where in the time available I would find most use.

**MR GODDARD QC:**

And I do intend to spend the bulk of the rest of my time on that. Can I just pick up your Honour's reference to the way in which, for example, reference is made to treaties, and that's a large subject in itself, and just to say that that is one aspect of the basic injunction in section 5 of the Interpretation Act to interpret legislation having regard to its text and its purpose, and the more closely legislation is linked to a particular international obligation, the more likely it is that Parliament's purpose was either to give effect to it or not to act inconsistently with it. The less close the association, the less information one obtains about the purpose of a particular provision from that. So I think one can integrate that into the purpose analysis overall and that also assists with the difficult question that otherwise arises of the weight to be given to obligations under a treaty or other instrument as compared with other indications of purpose. And all I will say on that, before turning to Treaty compliance in this case, is that the more direct indications of purpose in this case from the statutory scheme point strongly towards an intention that the exercise of powers under this legislation after the Crown has become a 51 per cent or whatever shareholder should be constrained, but that the process of getting there should not be constrained by the Treaty obligation; that that produces surprising and unexpected results in terms of the role of the executive in reviewing, effectively, whether Parliament got it right in setting out the protective regime in Part 5A.

**GLAZEBROOK J:**

But you're –

**ELIAS CJ:**

But couldn't that equally have been said in the *Lands* case? Because the policy of that legislation was to enable the Crown to put its commercial assets into corporate form. If, at that stage – and so that was the legislative policy, and yet section 9 bit. If at that stage the policy had been to transfer the assets into a mixed ownership model, don't you think the screams would have been even louder? And it seems rather odd that by a two stage shuffle the result is so very different, Mr Goddard.

**MR GODDARD QC:**

The core purpose of the state-Owned Enterprises Act –

**ELIAS CJ:**

It was about ownership. It was about Crown ownership of assets.

**MR GODDARD QC:**

It was – no, it was about the Crown conduct of commercial undertakings. So there are quite a few SOEs that had no material assets but where business is carried on by Government departments. For example, valuation. Quotable Value Limited were transferred. So –

**ELIAS CJ:**

Yes, but no Treaty claims are affected.

**MR GODDARD QC:**

But that's really my point, is that the core policy of that Act wasn't about transfer of ownership of assets. The core policy of that Act was about the governance and management of state-owned businesses and –

**ELIAS CJ:**

Well that may have been the purpose being pursued, but the effect was to transfer from direct ownership into a corporate entity, the state-owned enterprise.

**MR GODDARD QC:**

But –

**ELIAS CJ:**

But it was wholly owned.

**MR GODDARD QC:**

But all the Judges emphasised that there was no need to transfer assets permanently in order to achieve the objectives of that Act, that section 23 contemplated a range of different ways in which assets could be made available to state enterprises, management contracts, leases, various other arrangements, and that it was, in making the choice between those various approaches, that section 9 of particular importance. So, for example, at the time the case came before the Court of Appeal the SOEs were up and running. The core policy of the legislation had already been given effect and where assets, land in particular, was subject to the litigation, it was being used under short-term management contracts rather than with any transfer of ownership and there was no concern about that. The interim orders obtained by the plaintiffs, as your Honour will know better than I do, prohibited the use of the statutory powers conferred by that Act to effect any permanent transfer or long-term, I think it was, contract or arrangement in relation to the assets pending the decision of the Court. So the core policy was actually in operation at the time this was before the Court. For its complete implementation the transfer of certain assets outright was desirable and that was emphasised. The Solicitor-General in that case made the submission that there were considerable inconveniences associated with not having the assets permanently transferred, but considerable inconveniences is not the same as cannot implement the core policy of the legislation, and here the point of this legislation is to sell shares. And you can't sell them for a little while.

**McGRATH J:**

I think the *Lands* case, really, a further core policy of the legislation was that reflected in section 9. I mean, to think that's what the effect of the judgment is.

**MR GODDARD QC:**

Yes.

**McGRATH J:**

So that you can't look at the case as merely incidentally dealing with the mechanics of transfer within the scope of a core policy of corporatisation. You've got to look at the policy as, the core policy as being corporatisation in a manner consistent with the principles of the Treaty.

**MR GODDARD QC:**

Yes. And – I think I should probably respond to the encouragement that I've now had to his Honour Justice Chambers, and other members of the Court really, to focus on the question of consistency with the Treaty, and I deal with that on pages 2 and 3 of my roadmap and sections 8 and 11 of my, 8 and 13, sorry, of my full submissions. 8 is in relation to the commencement power and 13 is in relation to sale of shares.

It perhaps is worth starting with section 8 of my full submissions and it's common ground, both parties before this Court accept, that the relevant test is the test identified by the Privy Council in the *Broadcasting Assets* case, and I set out the relevant passage from that decision in paragraph 8.1 of my submissions. The Crown contended in that case, as it does here, that, "it is fulfilling its obligations and in any event the transfer of the assets by vesting them in the state enterprise would not be inconsistent with the principles of the Treaty". "Whether the Crown is correct in this contention is a question which is central to the outcome of this appeal." And obviously it would also be decisive in relation to this appeal. "The answer depends on whether the transfer of the assets could now or in the foreseeable future impair, to a material extent, the Crown's ability to take the reasonable action which it is under an obligation to undertake in order to comply with the principles of the Treaty."

So the question is, what changes as a result of what the Crown now proposes to do and will that change, materially impair, the Crown's ability to take reasonable action in order to comply with the principles of the Treaty?

The burden is on the plaintiffs, the appellants before this Court, to identify a material impairment of the Crown's ability to discharge its obligations under the Treaty. It was argued by counsel for the appellant in the *Broadcasting Assets* case in the Privy Council that the burden fell on the Crown to show as a precondition to the valid exercise of power that there was no Treaty inconsistency, and that was rejected by their Lordships.

**ELIAS CJ:**

Well that was what the (inaudible 11:09:37) argument. They didn't accept that it was a jurisdictional fact.

**MR GODDARD QC:**

Precisely, your Honour. Not a jurisdictional fact, not a precondition, burden in the normal way. They then, their Lordships then went on to say, of course, that burden –

**ELIAS CJ:**

But assessed realistically.

**MR GODDARD QC:**

Yes. Assessed realistically. But it is nonetheless incumbent on the appellants to show why, in circumstances where the Government says, "We've turned our minds to the Treaty and we consider that this does not impair our ability to take reasonable steps to comply with the principles of the Treaty", why it is that that's wrong.

**ELIAS CJ:**

Isn't there something, some indication though of acceptance of the appellants' perspective in the section 27 claw-back provisions? There is in there an indication that private ownership is a substantial impediment. I mean, this is not to foreclose on your principal argument which is that there is no impairment in the transfer of shares but the notion of private interlopers does flavour the legislation.

**MR GODDARD QC:**

Private permanent interlopers. It's no accident that different resolutions were adopted in relation to land and water in *Lands* and I'm going to come back –

**ELIAS CJ:**

Against – in both cases, Crown full ownership of the SOEs.

**MR GODDARD QC:**

But also against, in both cases, a concern about the potential for disposal to third parties and the answer in relation to water rights was that they should not have a term of more than 35 years and I'll take your Honour to a reference to that as being the solution in the Waikato River Settlement Act –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– and your Honour will also, I think, remember that in the *Muriwhenua* litigation, in relation to fisheries, the concern was, above all, the creation of permanent ITQ and the position of the plaintiff/appellants in that case was that time bounded quota would not raise the same concerns. So for example, in relation to rock lobster which had a 25 year term because it was finite there wasn't that concern and there was an invitation effectively to come back for modification of the interim orders if the permanent quota in relation to squid and paua could be dealt with a time bounded way and there was –

**ELIAS CJ:**

But the purpose of time bounding was to permit claims to be dealt with and then picked up on their merits by the Crown which had the capacity to use the resource to meet any recommendations.

**MR GODDARD QC:**

And in my submission, that is exactly what is now and will be after a partial share sale, the position in relation to water used by these companies. First, they have no entitlements going out beyond whatever unexpired portion of the 35 year period they hold but second and even more importantly, in relation to water than was the case for example in relation to quota, it is absolutely up in lights, it is well-heralded that the terms on which entitlements to use water are conferred under the Resource Management Act, are the subject of a current review and that it is possible that there will be significant changes to the management regime and to the costs associated with use of water –

**ELIAS CJ:**

Does this mean that the mixed ownership model companies will be valued on the basis of the 35 year life?

**MR GODDARD QC:**

One would expect a valuation to proceed on the basis of current entitlements to use whatever is left of their 35 years and then to reflect a range of downside contingencies I suppose and upside contingencies. A downside contingency, one would have to accept, would be the potential for regulatory change during that period. This is something that everyone has to grapple with in valuing companies. Think of

owning a forestry entity at the moment and the regulatory uncertainty around, you know, that has existed around emissions trading –

**CHAMBERS J:**

And presumably, the prospectus will have to –

**MR GODDARD QC:**

Yes.

**CHAMBERS J:**

– clearly point out to potential investors that these things are all possible?

**MR GODDARD QC:**

The prospectus will need to disclose all material facts in relation to the companies that are the subject of the sale and so obviously, one disclosure has to be that you've only got a certain amount of right to use water and then you have to, even if nothing changes, reapply and you might not get 35 years for example. Your Honour is quite right that litigation in relation to the Wanganui River did reach the Court of Appeal, where the environment – I think the original consent granted by the consenting authority was for 35 years. On appeal, the Environment Court reduced it to 10 years and there were then various appeals on administrative law issues and it was eventually settled by the parties with an agreement to a 35 year term but with certain conditions for review built in by consent. So terms up for grabs, renewals up for grabs but –

**ELIAS CJ:**

Do you happen to know whether these uses, in terms of electricity generation in all cases, are controlled uses under the various regional plans?

**MR GODDARD QC:**

I don't know whether that's the case under every regional plan or not –

**ELIAS CJ:**

No, no, mmm.

**MR GODDARD QC:**

– and it must – well it is a matter for each regional plan and it must depend on the particular type of consents required for the different types of electricity generation operation, they're not all the same and also of course –

**ELIAS CJ:**

But it really does, if one is being realistic, there must be – planners are going to have to provide for renewal, there has to be some certainty in the national interest. So I'm just wondering about the –

**MR GODDARD QC:**

I think it was –

**ELIAS CJ:**

– reality of the 34 year term Mr Goddard, as a protection?

**MR GODDARD QC:**

The reality of it as a protection, in my submission, is much greater than the reality of the for example, memorial regime. It operates above all, as a flag –

**ELIAS CJ:**

There's been no resumptions, have there?

**MR GODDARD QC:**

I would need to check that, there is certainly an application live at present –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

My learned friend tells me that Turangi township was –

**MR HARMAN:**

With respect Ma'am, it was in the 90 day period, the resumption order was never carried out in Turangi, they settled.

**ELIAS CJ:**

Yes, thank you. Anyway, it's irrelevant.

**MR GODDARD QC:**

But above all, what the limited period does and what the well-signalled regulatory review underway at present does, is signal to anyone thinking of acquiring an interest in these companies, that the potential for change to entitlements, for change to the management regime, for change to the cost structure, is on the table. Coming back to your Honour's question, yes of course, when one looks at the value to be put on shares one has to take into account the prospect of renewal beyond those times but also the prospect that that would be for a different period, or on different terms which reflect more accurately – sorry, which reflect claims that have been acknowledged by the Government and implemented by that time –

**ELIAS CJ:**

Mr Goddard, one of the reasons why the limited timeframes were acceptable was to permit opportunity for claims to be processed and recommendations to be made. That aspect of the protection, it seems to me on the material that we have, is relatively illusory which is why one looks at the other aspect of it which is Crown ownership.

**MR GODDARD QC:**

In my submission, your Honour, it's not illusory and to the contrary, there are processes on foot and I'll take the Court to the evidence on those which are directed to a conversation that is a difficult conversation and a long conversation but which is being undertaken in good faith with a view to addressing these claims. Now that's in relation to certain – effectively commercial interest in water. Can I also emphasise that what has been happening in the interim, in this period, is not that these issues have been ignored and when I take the Court to the Waikato River legislation for example, what the Court will see is a very – and I'll do that in the context of the Attorney-General's evidence about mechanisms for recognising relationships with rivers, a very significant recognition of the mana of the people in relation to the river, of the mana of the river –

**ELIAS CJ:**

But it sets out, that legislation sets out that there are still unmet expectations and aspirations which remain to be sorted out. The appellants' case is simply that until

the Crown sorts it out and works out what the Māori interests are, introducing third party ownership is going to create a further impediment. That's the area of –

**MR GODDARD QC:**
That's the argument. And the response is that there is no material change to the impediments to working that out and giving effect to it. And there is, that I'll deal with that in submissions, but there's also the evidence before the Court that there are no material impediments. And it was accepted by the Tribunal that there was only one respect in which there was, the Tribunal thought, a material impediment. That's the shares plus concept, which has been the subject of further analysis and which, in my submission, based on the evidence before the Court and the analysis in my submissions, is not, in fact, a relevant impediment.

So, again, I can't emphasise too strongly, that the fact that these are difficult issues and that it's taking time to resolve them is I think acknowledged by all parties. The appellants say it's taking too long, but that these are difficult issues even without the mixed ownership model programme, I think it is reasonably plain. And the question is not are these hard but will the implementation of this programme make it harder? Will there be a material change? And that is the point to which my submissions are directed.

So what are the interests we're talking about? My 8.2, rights and interests of Māori in freshwater and geothermal resources, and I accept, the Crown accepts that it would be inconsistent with the principles of the Treaty to take steps that would prevent the Crown from recognising such rights and interests or that would impair to a material extent the Crown's ability provide redress for well-founded claims in relation to breaches of the Treaty in respect of such rights and interests. But, taking things a step at a time, first of all, the transfer of Mighty River Power from one statutory regime to the other doesn't in any way affect those rights and interests and doesn't affect the ability of the Crown to recognise them or to provide appropriate redress.

**GLAZEBROOK J:**
Can I just check where we – are we on your submissions or are we on –

**WILLIAM YOUNG J:**
8.3 of the main submissions.

**MR GODDARD QC:**

We're on my submissions at 8.3.

**GLAZEBROOK J:**

Right. Thank you. Just I'd lost them earlier. I had to undertake some housekeeping to find them.

**MR GODDARD QC:**

And the reason for that is set out in 8.4 and following: firstly, that the transfer of the company from one Act to the other doesn't affect the ownership of shares. It doesn't actually affect the ownership and control of any asset owned by the company. Claims to land remain fully protected by the continued application of the memorial provisions and there's no other property owned by the company in respect of which it's suggested that Māori have a direct claim under the Treaty.

**ELIAS CJ:**

What do you mean by that? Sorry, why, I mean, why is not a claim to a river a direct claim under the Treaty?

**MR GODDARD QC:**

It's not property owned by Mighty River Power.

**ELIAS CJ:**

But if you have the exclusive rights to take a certain volume of water, you've got a large part of the...

**MR GODDARD QC:**

You've got a use right subject to certain conditions and bounded in time. It's not...

**ELIAS CJ:**

But it must necessarily impact upon the claim.

**MR GODDARD QC:**

Yes. It does if the question – so, so – it's relevant to assessing, obviously, that bigger question of capacity but I'm just making – the starting point has to be, "Are there assets held by the company which are themselves the subject of the claim?" That was a distinction that was seen as important by the Courts in the context of

*Broadcasting Assets*, *Commercial Radio Assets*: that the assets that were the subject of the claim were not being transferred. And –

**ELIAS CJ:**
But in the SOE case –

**MR GODDARD QC:**
They were.

**ELIAS CJ:**
– in the *Lands* case – no, they weren't. They were lands, they were the lands back from which the Crown could make restitution, because very often the actual land that the claimants would like to have had has, had gone into third party hands.

**MR GODDARD QC:**
So that's the –

**ELIAS CJ:**
So it was a capacity argument.

**MR GODDARD QC:**
Yes. And it was concerned, I think, with both limbs. First of all, there was land held by the Crown which was directly the subject of claims.

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**
And so there what you had was the very thing being claimed being transferred in a way that could result in its permanent loss from Crown control, and that was addressed –

**ELIAS CJ:**
That was quite small, however.

**MR GODDARD QC:**

And then there was the question of providing other land as a form of redress, and there again it was the distinctive nature of land as compared with other forms of financial redress.

**ELIAS CJ:**

Well you say the distinctive nature of land, but if the claimants say, and have said in a number of previous Waitangi Tribunal claims, that water, sorry, I'm trying to think, features –

**MR GODDARD QC:**

Resources.

**ELIAS CJ:**

Well, it's not resources.

**MR GODDARD QC:**

Features.

**ELIAS CJ:**

A river, a spring, a lake, also have to them that special distinctive –

**MR GODDARD QC:**

Yes.

**ELIAS CJ:**

– claim, connection.

**MR GODDARD QC:**

And then we need to ask, "What are the various ways in which the Crown can recognise that distinctive relationship or provide redress if there have been past failures to recognise it?" And that's where the position in relation to water becomes a little bit more diverse than in relation to land, because you don't just have this crude concept of ownership operating and ownership getting away. There is already a whole set of mechanisms that are being used today to recognise special relationships with water features and to recognise – and perhaps it's worth just looking at one of them, because I think it is quite helpful as context, just before the

adjournment. If we look at volume 1 of the authorities, tab 14, the Waikato-Tainui raupatu claims legislation, which is one of the examples given by the Attorney of ways in which the Crown is recognising Māori rights and interests in water, what we have to begin with is a preamble that recites the relationship of Waikato-Tainui –

**ELIAS CJ:**

And recites the consistent claim which has been advanced, that the Waikato River does not belong to the Queen of England.

**MR GODDARD QC:**

Absolutely. And it records, after setting out that history, the continuing commitment to the search of – so we have the basic acknowledgement of the relationship in the first few clauses.

**McGRATH J:**

So is there any particular clause you're wanting us to mention?

**MR GODDARD QC:**

I did want to –

**McGRATH J:**

I don't want you to read them, but just...

**MR GODDARD QC:**

Yes. I did want to emphasise, first of all, clauses 1 and 2 –

**McGRATH J:**

So that's on page 6?

**MR GODDARD QC:**

– because – on page 6. Her Honour the Chief Justice asked me about the tūpuna awa concept and whether that was being recognised, and in my submission yes it is, and, here, and nothing –

**ELIAS CJ:**

I asked you that in a different connection. I know that there's a declaratory connection here.

**MR GODDARD QC:**

But there's more than that, and let me come to that.

**ELIAS CJ:**

I understand that. I've read this legislation.

**MR GODDARD QC:**

Yes. I'm sure. And I wanted then to just touch on, in terms of particular clauses, noting clause 12 refers to a negotiation of claims resulting in a settlement in 1995 which excluded and preserved claims in relation to the river. And it's not right to say that the whole of the river issue obviously is still parked, your Honour. That's really what I want to pick up. Because what we then have recited in 13 is that there have been productive discussions in relation to the river.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

And what's parked is much smaller now. It's not the whole of the river relationship. And the (13) recites the litigation in the 1980s and notes at the end of page 8, going over to 9, "The Crown agreed not to transfer water rights, issued in perpetuity, to any state enterprise. The new resource management regime included limits for the period for which water rights could be granted." So that concept of finite rights is recognised there as part of the response to those concerns. And then in (16) the reference to the continued pursuit by Waikato-Tainui of, "justice for their Raupatu claim and protection for the River", te mana o te awa and mana whakahaere sustaining the claim. And then we have a set of Crown acknowledgements, including acknowledgements of the relationship, that, in (g), "to Waikato-Tainui, the Waikato River is a single indivisible being"; and (m), "the Crown respects the deeply felt obligation of Waikato-Tainui to protect te mana o te awa". "The Crown seeks a settlement that will recognise and sustain the special relationship of Waikato-Tainui with the River," and so on. And then we have, if I can just draw your Honour, the Court's attention.

Actually, it's half past and I'm going to take a few minutes to go through just four or five clauses.

**COURT ADJOURNS:11.30 AM**

**COURT RESUMES: 11.51 AM**

**ELIAS CJ:**
Yes, Mr Goddard.

**MR GODDARD QC:**
Your Honour, I was just going to draw the Court's attention, very briefly, to a few more features of the Waikato River legislation and then I'm going to turn finally, to the evidence which I keep promising but then not quite reaching. So I'm very firmly committed to doing that within the next five to 10 minutes. I had looked at the preamble to the Act and the recognition of the relationship between the Waikato-Tainui and the river there.

Then of course, what we have in section 4, the purpose of the Act, to do certain things including in B, "Recognise the significance of the Waikato River to Waikato-Tainui, recognise the vision and strategy for the river and establish and grant functions and powers to the Waikato River authority", the authority which – and so on, gives effect to co-management arrangements for the Waikato River as referred to in G and (5), identifies the guiding principles of interpretation, "The vision and strategy intended by Parliament to be the primary direction setting document for the river and activities within its catchment which affect the river and the Act to be interpreted in a manner that furthers that."

Then again, just in terms of the steps that can be taken to recognise Māori rights and interests in a river and it will be completely unaffected by the step. We see a very significant example in this Act, section 8 for example, the settlement redress through legislation and the statement of significance of the Waikato River to Waikato-Tainui. I'm not going to read through that but that is a recognition of the significance of the river to Waikato-Tainui –

**ELIAS CJ:**
Can I just ask you, when I was looking at this I marked up that there's a definition of the mixed ownership model company but I couldn't find any substant – on my quick read through, I didn't find any substantive use of that term?

**MR GODDARD QC:**

It's used in section 64 which I'll come to in a moment because that's the provision on which the appellants in part rely.

**ELIAS CJ:**

Oh yes, yes, actually I did find it, I have highlighted it which shows mind like a sieve.

**MR GODDARD QC:**

So there's the statement in section 8 and then provision for the role of the Waikato River iwi to participate in the management decisions in relation to the river, to engage in various customary activities, dealt with in section 56 and following. Then provision for the affects of the vision and strategy and the way in which that must be taken into account by all decision makers making decisions in relation to the river. So this is designed to be and is a recognition of the relationship –

**McGRATH J:**

So where was that provision taken into account?

**MR GODDARD QC:**

That's –

**CHAMBERS J:**

Section 56 says it.

**MR GODDARD QC:**

– the customary activities –

**McGRATH J:**

Thank you, got it, yes.

**MR GODDARD QC:**

Yes but the broader co-management arrangements are included in provisions, not all of which are in this extract. From the table of contents, your Honour will see that there's a heading, "Co-management arrangements," just above section 35 and then a whole raft of provisions which have that effect and that's described in the evidence of the Attorney-General.

What has been parked is dealt with in section 64 and the point I want to make is that it's a reasonably narrow area that has been parked and the focus there is on commercial interests in the river and that's why I've sought to emphasise the further steps that would need to be taken to recognise interests of that kind. So –

**ELIAS CJ:**
Are water rights assets held by a mixed ownership model company?

**MR GODDARD QC:**
They –

**ELIAS CJ:**
I see there's a reference in subsection (4)(aa) to activities that relate to an asset held by that company.

**MR GODDARD QC:**
That would certainly extend to parts of the riverbed for example. I think in the broader sense –

**ELIAS CJ:**
Well what about the water rights?

**MR GODDARD QC:**
– a water right would be such an asset but what I was hoping not to engage with because it doesn't change as a result of this transaction, is the harder question of whether subsection (2) applies because that's just a qualification to the operative provision in subsection (2), "This section applies if the Crown, or Crown entity, a state enterprise, or a mixed ownership model company proposes doing any of the following actions in relation to a property right or interest in the Waikato River", and the Resource Management Act expressly provides that consents are not real or personal property so –

**ELIAS CJ:**
Well they're jolly close to it, aren't they? How were they treated in the transfer from the Crown to Electrocorp?

**MR GODDARD QC:**

There is – they weren't resource consents under the Resource Management Act is the short answer there. The Resource Management Act postdates –

**ELIAS CJ:**

No, that's right.

**MR GODDARD QC:**

– those transfers.

**ELIAS CJ:**

Yes but were they transferred as assets?

**MR GODDARD QC:**

Give the very broad definition of assets in the State-Owned Enterprises Act to include almost anything of any value, one would expect –

**ELIAS CJ:**

One would expect that and certainly –

**MR GODDARD QC:**

– that they would, they were dealt with under section 23 –

**ELIAS CJ:**

– Mr Hodder's submission suggests –

**MR GODDARD QC:**

Yes, I think that they are assets, in that broad sense of the SOE Act and that they are within section 23 and dealt with under that section, is not in contention –

**ELIAS CJ:**

What is the – I'm just thinking about this as a model and thinking about the approach in the *Lands* case of providing safeguards against future claims. What's the impediment to having something like section 64(2), tidying up that rather nice point about property rights? I mean, because I think it's probably property right or interest. Interest must be wide enough to include – in other words, isn't this an easy thing that

could be done to ensure that Māori with claims to particular water courses are advised before any of these sort of steps are being taken?

**MR GODDARD QC:**
This, in a sense, has been done and it was the mixed ownership model legislation that inserted these references in here. So it's not a question of more –

**ELIAS CJ:**
But it's not general, it's part of a – this is part of a – this is only specific to the Waikato?

**MR GODDARD QC:**
Yes and I see what your Honour means but again, what that illustrates is that – I need to take that in a few steps I think. Your Honour is identifying this as a possible protective mechanism if there is a Treaty problem but we still have to deal with the first question of whether –

**ELIAS CJ:**
I understand that, yes.

**MR GODDARD QC:**
– there is a Treaty problem and your Honour is right to say, and this is what my learned friend said, that if one comes to protective mechanisms, there are a range of things one might do, and I agree with my learned friend that that would be something which would be the subject of a conversation, but the prior issue with which this Court is concerned is, is there in fact a Treaty problem? Is the ability –

**ELIAS CJ:**
But we are also interested in practical steps that could be taken because that may reflect on whether the Crown is acting reasonably or in conformity with section 9 or section 45Q if it applies, and that is why there's been speculation during the course of the hearing.

**MR GODDARD QC:**
It would be a little odd to find that in legislation which inserted a regime of this kind in this Act but didn't adopt it generically. The executive was required to pause in

implementing the legislation until there was a generic equivalent. That's precisely the sort of issue that, in my submission –

**ELIAS CJ:**

Well section 27 was a generic –

**MR GODDARD QC:**

Is –

**ELIAS CJ:**

– provision that was inserted.

**MR GODDARD QC:**

Yes, and this is not generic was your Honour's point. It addresses –

**ELIAS CJ:**

Yes. Yes, sorry.

**MR GODDARD QC:**

– a particular regime –

**ELIAS CJ:**

I thought you were saying –

**MR GODDARD QC:**

– agreed in relation to a particular river.

**ELIAS CJ:**

– that it would be odd to pause a process in order to put in generic legislation –

**MR GODDARD QC:**

No.

**ELIAS CJ:**

– but I'm simply saying that that did happen.

**MR GODDARD QC:**

No, what is was suggesting rather was that the extent to which the safeguard, safeguard of this kind is appropriate was considered and it was inserted in this particular statute to suggest that – and again we need to think to keep distinct the question of interim measures while particular rights and interests are identified and responded to and whether there is any impediment to the recognition of rights and interests. The main submission I'm making based on this legislation is that it illustrates the sort of step that can be taken after as well as before a partial share sale.

**ELIAS CJ:**

I know, but one of the things that one is struck by, last night I read the Waitangi Tribunal report, is how long these claims have been around and in how many forums they have been advanced. And while issues such as ownership or proprietary interests are parked, more and more interests affecting third parties arise which must inevitably provide an impediment to a direct response.

**MR GODDARD QC:**

Let – it seems to me that whether the particular interests that will arise as a result of sale of shares will impede a direct response is essentially a factual enquiry.

**ELIAS CJ:**

Well that's the preliminary point.

**MR GODDARD QC:**

Yes.

**ELIAS CJ:**

But if we are asking, "What are the practical steps that could be taken?" This, with some adaptation, would at least deal with the death by 1000 water rights provisions. Particularly the reference to creation of further interests.

**MR GODDARD QC:**

Although in relation to water as opposed to land associated with the river the only person who can create interests is the Crown. Because that would require legislative action. So I agree absolutely with your Honour that the creation of interests would be

a concern. Property rights in water like quota in fishing. But the point here is that that is something which only the Crown can do. And –

**ELIAS CJ:**

Well can't it be done by people applying under the Resource Management Act to consent authorities?

**MR GODDARD QC:**

But they don't create a property interest by making an application.

**ELIAS CJ:**

No, but what's required here, this provision seems to require notification, which at least enables those whose interests are going to be perhaps adversely affected to take steps.

**MR GODDARD QC:**

But that's already accommodated in the Resource Management Act. There's a whole notification regime under that so it would be very odd if this was an overlay on that, and it's not intended to be, in my submission. That is a self-contained process involving notice, involving taking account of the principles of the Treaty, and these are issues which are actively canvassed in the course of consent hearings and I've already referred, for example, to the litigation in relation to the Whanganui River, Genesis consents, and the way in which those concerns were accommodated in a settlement that was reached in relation to those consents.

**ELIAS CJ:**

And sorry, I shouldn't hold you up anymore, but disposal. At the moment there is no regime for disposing water rights, is there?

**WILLIAM YOUNG J:**

It can be transferred, can it?

**MR GODDARD QC:**

They – in certain limited circumstances, depending on the nature of the right, yes. If they're attached to a particular parcel of land they pass with the land and –

**ELIAS CJ:**

So that really would, that would apply to –

**MR GODDARD QC:**

Yes.

**ELIAS CJ:**

– probably, to all the water rights here?

**MR GODDARD QC:**

Yes.

**ELIAS CJ:**

Because they will be, they will go with the land.

**MR GODDARD QC:**

Assuming, without deciding, without wanting really to embark on it, that the water rights are an interest in the river, and I'm not sure that that is in fact the right way to think about them at all, then that would follow. But I do want to emphasise that I don't think that that is the better reading of this provision. When we talk about creating rights or interest in a river it's important to look back at the definition of it, which, as well as referring, it's back on page 17 of the Act, as well as, and the relevant definition is the one in paragraph (c). There are different definitions for different purposes but the one that applies to section 64 is paragraph (c), as well as references to the body of water known as the Waikato River, tributaries, streams and watercourses, lakes and wetlands. There's a specific reference to the beds and banks of the water bodies. Now obviously, to the extent that a mixed ownership model company has a title or a lease of the beds and banks are part of the river, if it creates a property interest in that by subleasing or granting an easement, this applies directly. In relation to the body of water known as the Waikato River the creation of property rights or interests, in my submission, is something that can really only be done by the Crown through regulatory reform. And this chimes with some of the evidence I think I'll take the Court to in a moment where certain assurances have been given by the Crown to iwi leaders that the Crown will not, of a generic kind, will not take steps to create property interests in freshwater resources until certain engagement processes have been undertaken.

I think I should move on to the evidence that I want to take the Court to in relation to what is proposed and why the Crown says that it does not affect its ability to recognise rights and interests in water. So volume 2, affidavits of the case on appeal, under tab 34, the evidence of the Deputy Prime Minister, Mr English. The affidavit covers a number of topics, including the origins of the mixed ownership model programme. At paragraph 3, Mr English notes the engagement that he's had on behalf of 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. Now the background to the mixed ownership model programme, the steps that were taken to herald it before the last election, the informal consultation that preceded the election and the formal consultation that followed it are all discussed in the affidavit, with the formal consultation being addressed at paragraph 21 and following.

And as the Deputy Prime Minister says at 24, "The consultation was intended to ensure the Government fully understood Māori views on how Māori rights and interests were affected by the proposals and in particular to explore Māori interests around section 9 of the SOE Act at sections 27A to 27D in what might effectively be expressed in the new legislation."

There's references to the steps that were taken in the light of that consultation, and then at paragraph 28 the Minister addresses the topic of recognising Māori rights and interests in water. He begins by acknowledging that Māori have rights and interests in water in geothermal resources, that that's been made clear in the course of the Waitangi Tribunal inquiry and then at 29, "in addition to the ongoing Waitangi Tribunal inquiry," which is of course an important forum in which these issues are being explored which will result in recommendations being made to the Government which the Government will take into account and respond to in the manner contemplated by that regime –

**ELIAS CJ:**

But against the background that the Waitangi Tribunal itself rehearses, at the beginning of its report, of all the previous recommendations made, it gets a bit repetitive.

**MR GODDARD QC:**

The Tribunal certainly saw value in a further inquiry and didn't consider that it was not a useful use of it resources to conduct it and make the recommendations –

**ELIAS CJ:**

No but it did say, "We've made these recommendations before," and lists about five reports I think in which it has, yes.

**MR GODDARD QC:**

Yes and again, the question is not, with respect, whether the response to date in relation to that has been as swift or as comprehensive as (inaudible 12:11:38) –

**ELIAS CJ:**

No.

**MR GODDARD QC:**

– the question is what will change as a result of sales of shares in three companies and the mechanisms that are underway at present which enable these issues to be addressed are described in this affidavit and the Attorney's.

So 29, "In addition to the Waitangi Tribunal inquiry these issues are being addressed through a number of parallel mechanisms," and as the Minister says, "The recognition of rights and interests in freshwater and geothermal resources must by definition involve mechanisms that relate to the ongoing use of those resources and may include decision making roles in relation to care, protection, use, access and allocation and/or charges for rentals or rentals for use." So all of these matters are on the table and are being addressed through these processes.

As Deputy Prime Minister, he's charged with overseeing engagement between the Government and iwi on these issues. The process for that is described and at 32, he says, "The core of the engagement is through Fresh Start for Freshwater and through Treaty settlement negotiations." The freshwater reform, the Fresh Start for Freshwater process which has three aspects, involves direct engagement between iwi and the Crown and the Land and Water forum. An important part of it but only one part and policy development by Crown officials is in consultation with the iwi advisors' group.

**ELIAS CJ:**

All directed at water management options, which is the complaint the appellants make?

**MR GODDARD QC:**

All directed at the issues described in paragraph 29, mechanisms relating to ongoing use, including decision-making roles and/or charges of rentals for use and that's because all other aspects of rights and interests in water are being addressed through the Treaty settlement process. So the appellants have not identified anything that falls outside those two streams of work.

**ELIAS CJ:**

You mean as in the Waikato River settlement?

**MR GODDARD QC:**

For example.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

So the question is what is missing from those two streams and how will that change? My submission is first, that nothing is missing, it's not all being dealt with in one place but across a number of initiatives. All rights and interests claimed are being addressed and nothing will change as a result of the sale of shares in the companies, on either stream.

**ELIAS CJ:**

Where is the right parked in the Waikato River settlement being addressed, the claim to the river?

**MR GODDARD QC:**

The claim to the river, in relation to mana, kaitiakitanga, all those issues, being addressed to a substantial degree in that Act –

**ELIAS CJ:**

No, I understand that, yes –

**MR GODDARD QC:**

– what is left is the issue around property rights and interests, that's what's parked and that's why that's what has to be consulted on. That is being addressed through the Fresh Start for Freshwater.

**ELIAS CJ:**

Through royalties. That's the only thing on the table that's dealing with that, isn't it, or is it control as well?

**MR GODDARD QC:**

Control and royalties, all the things identified in 29, decision-making roles in relation to care, protection, use, access and allocation and/or charges or rentals for use, all of that is on the table and when one asks what one means by ownership, there's nothing left. When one asks what rights and interests are being claimed that are not responded to through one or other source, nothing has been identified by the plaintiffs. There's been a process and what they're saying, what is missing from this jigsaw and what is not being addressed will be harder to address as a result of this, and there has been nothing identified. That's the essence of the Crown's submission.

The Crown has in good faith tried to identify all claimed rights and interests and identify ways of addressing those and believes it has. It hasn't got there on everything but nothing will change in relation to the process of working towards it as a result of these transactions and that's the question for the Court.

**ELIAS CJ:**

I understand that, yes.

**MR GODDARD QC:**

So, the three elements of Fresh Start for Freshwater described in 34. The protocol that governs that is described at 38 and is important: "At the outset of discussions between ministers and the iwi leaders group, it was agreed that there would be no disposition or creation of property rights or interests in water without prior engagement", and the words "and agreement" are in fact not an accurate quote from the version of the protocol that was finally agreed. That's corrected in Mr English's second affidavit under tab 35. So perhaps it's simpler just to put a line through those and it's the correct version that's referred to by Ms Cook also in her evidence.

**GLAZEBROOK J:**
So what are we putting a line through and what are we leaving?

**ELIAS CJ:**
"And agreement".

**MR GODDARD QC:**
Sorry, "and agreement".

**GLAZEBROOK J:**
That's what I thought, I was just checking.

**MR GODDARD QC:**
Yes, your Honour, sorry. So: "There would be no disposition or creation of property rights or interests in water without prior engagement with iwi and that iwi would have involvement in phase 2 of the Resource Management Act review." So that's where the loose ends lie and that's the commitment that's been given and this is the process by which those concerns are being addressed.

The various phases of the review are described and then the last four lines of 38, "These are important and difficult issues that need to be addressed in a measured, consultative and balanced way. It would be counterproductive to rush this process as that would increase the risk of inappropriate outcomes and would imperil the broad support that's needed for sustainable change in this field." At 39, "The nature of appropriate recognition for Māori rights and interests in water and geothermal resources has been firmly on the agenda of discussions between ministers and the iwi leaders group since early in 2009 when those discussions began."

Again, your Honour may say well why 2009, why not 1989 but that's not the issue in this case. Then after describing that, notes that the three – top of page 10, "At the 3 August 2011 meeting, members of the iwi leaders group confirmed their commitment to commencing. When appropriate, a direct and high level dialogue between the iwi leaders group and other prominent iwi leaders and ministers on Māori rights and interests in water and geothermal resources."

Then historical Treaty settlements. It's important not to overlook this, or to ignore the potential for tailored Treaty settlements, going beyond the forms of redress discussed

in the red book which are the forms of redress already approved by Cabinet but the red book notes that other steps can be and are approved and the Waikato River legislation we saw is an example of that. Anyway –

**ELIAS CJ:**
Can you remind us where we find the red book, I just want to make a note of it here?

**MR GODDARD QC:**
Volume 4, tab 27, I'm grateful to my – 67.

**ELIAS CJ:**
Thank you.

**MR GODDARD QC:**
I'm even more grateful. Then turning to historical Treaty settlements, 41 refers to the range of mechanisms available. 42, "That framework has developed to provide for the recognition and expression of rights and interests in natural resources in two respects. First, the acknowledgement of mana, rangatiratanga and kaitiakitanga and second, the provision of redress that despite being in settlement of historical claims, is contemporary in nature, forward looking and that provides for ongoing rights and interests. A number of Treaty settlements have made it clear that the Crown acknowledges the mana, rangatiratanga and kaitiakitanga of claimant groups and natural resources." Some examples are provided.

What the Deputy Prime Minister says in 44, is that, "This brief overview illustrates that the Crown has been engaging with iwi Māori on rights and interests and natural resources in a number fora and through the Treaty settlement process has been and is developing mechanisms for the redress of breaches of those rights and interests. It involves a number of complex and multi-faceted questions. The process will involve discussions at a national policy level and also at a local level around the country with iwi hapū with particular rights and interests in specific resources. The MOM programme should not and will not cut across these continuing discussions. I am confident that the Government will not be in any way compromised in continuing its work to achieve recognition of and redress for Māori rights and interests in water and geothermal resources as a result of the MOM programme."

It's developed in following paragraphs. We can skip over 45. There's a reference to the Waitangi Tribunal inquiry and then at 49, "At the hearing the Crown sought to explain why the partial share sales would not affect its capacity to provide appropriate rights, recognition and redress. The claimants before the Tribunal argued," and this picks up the question that your Honour has also put to me I think today –

**ELIAS CJ:**
Sorry, where are you?

**MR GODDARD QC:**
50, your Honour.

**ELIAS CJ:**
Yes, thank you.

**MR GODDARD QC:**
"The claimants before the Tribunal argued that even if the Crown is able to provide rights, recognition and redress after a partial sale, its willingness to do so will be affected by the existence of private shareholders in the MOM companies." That's the question really that a number of members of the Court have put to me over the last day or so.

"As I confirmed to the Tribunal, that is not the position. There will not be any chilling effect on the willingness of the Crown to provide appropriate forms of rights, recognition or redress as a result of a partial sale of shares in MRP or other MOM companies." Why? Well the Minister goes on to explain that. "Any changes to the allocation of water and geothermal resources that may ultimately be necessary to provide recognition for Māori rights and interests in water would affect all SOEs, MOMs, fully privatised generating and retailing companies, such as Contact Energy and TrustPower and all other commercial users of water. The fact that MOMs may have some private shareholdings by then will not be a factor that will make a difference in any policy decision that will need to be made. The issues are much broader than that. The applicants have suggested a potential rights recognition measure that saw for example, the introduction of a water tax or levy would reduce profits and the value of assets in MOM companies, such that in the face of opposition from private shareholders, the Government would be disincentivised to provide rights

recognition of that sort. In the first place, it can be said that claims by Māori to rights and interests in water have been expressed for many years and that over the last 20 years investment in hydro and geothermal power stations has proceeded by successive governments and private companies and joint ventures, including by private companies."

54, "Companies regularly have to deal with marketplace changes, including changes in competitive dynamics, new laws and taxes and regulatory process outcomes. There are so many private shareholders in New Zealand companies relying on water permits that the MOM programme could not and will not make a difference to the Government's commitment to recognise and make appropriate provision for Māori rights and interests in water and geothermal resources –

**ELIAS CJ:**
But that's on the basis that it's going to be an across the board sharing of pain and that there has to be a legislative response. The Crown, as owner, can make a response out of its assets.

**MR GODDARD QC:**
This is the Crown saying this is a reasonable response –

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**
– which we, as a matter of policy, intend to pursue and that will discharge our Treaty responsibilities and as long as that is open and remains open and is not affected, we are not diminishing our capacity to resolve matters in accordance with the Treaty. It is not part of the obligations of the Crown to keep in its toolbox, in its cupboard, whatever metaphor one might like to adopt, every possible mechanism for responding to rights and recognition. The obligation is to take reasonable steps and not to materially diminish capacity –

**ELIAS CJ:**
And ultimately that might be entirely right, that it is a sufficient response but until the details are known – it's the precautionary element of the appellants' case that I'm asking you about.

**MR GODDARD QC:**

And then the question becomes – and this is where the abstraction of the appellants' case does pose difficulties. What is it that will not be able to be done that's important if the precautions are not taken and nothing has been identified that cannot be dealt with, not only as well but usually better, through mechanisms otherwise than via ownership of three particular companies.

For example, if we're talking about decision-making in relation to the management of a river, you achieve that by participating in decisions about the management of the river as a whole not –

**ELIAS CJ:**

I'm not so worried about management issues because I think they are – there are significant steps being taken but take, I suppose, a river is really quite, is more complex but take a lake with hydro capacity on it, say Waikaremoana or something like that, suppose ultimately there's a recommendation that the lake ownership, the whole lake, be transferred, does not the fact that the Crown owns the SOE that will be mainly affected by that decision, does that not make it easier for the Crown to take that step?

**MR GODDARD QC:**

No.

**ELIAS CJ:**

It's its property.

**MR GODDARD QC:**

Because the ability of the Government to consider such a recommendation and to act on it if it thinks fit, is not – and this is the evidence of the relevant ministers, going to be affected by the presence of minority public shareholdings in a particular user, even the main user of that resource and that's because the existence of these claims is very well-known and the sale of shares does not involve the permanent alienation of any asset that would then have to be clawed back in a way for which there is no legal mechanism because all that the companies have are time-bounded statutory use rights which are subject to change and review. Nothing is –

**ELIAS CJ:**

Well under section 27, protection to enable the Crown to transfer its assets to SOEs in relation to land, third party owners aren't heard on the resumption hearings. There's nothing equivalent to that in terms of the water rights.

**MR GODDARD QC:**

There is really because what those memorials are, are a flag that you may not have this forever, it may be resumed if certain things happen because –

**ELIAS CJ:**

You say the fact of time limitation is sufficient flag?

**MR GODDARD QC:**

Yes and the statutory regime, it's exactly the safe sort of – it is a flag that you do not have this forever, you only have it for 35 years and even within that period it's subject to all the regulatory review processes which are currently underway.

**ELIAS CJ:**

And you will come on to address the reality of renewals, will you?

**MR GODDARD QC:**

I don't –

**ELIAS CJ:**

Given that the Privy Council says that these matters have to be assessed realistically and given – the only material I think we have on that is the decision of the commissioners in respect of the hydro development on the Waikato River?

**MR GODDARD QC:**

There's no argument, that I'm aware of, that the likelihood of renewals will change as a result of these partial share sales. So it's a constant that does not change and obviously, the regulatory framework within which any renewal takes place, is again subject to the same sort of warning flag that applies to memorialised land. The flag that says the whole of our mechanism for allocation of freshwater resources, whether or not there are charges associated with it for example, for efficiency purposes, to deter inefficient use of water, wasteful use of water and whether some of that, or all of that, would go to Māori, is all up for grabs.

So none of that bedrock context changes as a result of these sales and that is, in my submission, as effective to ensure –

**ELIAS CJ:**
How did they change then in the *Lands* case, are you forced to argue that the *Lands* case was wrong?

**MR GODDARD QC:**
No, not at all.

**ELIAS CJ:**
All right, how did they change the capacity to meet the claims in the way in which you say the claims for water can be met here?

**MR GODDARD QC:**
Well first of all, in relation to water which was addressed in the settlement, no legislation –

**ELIAS CJ:**
Against the background of Crown ownership of SOEs.

**MR GODDARD QC:**
But also against the backdrop of the potential for assets to be sold by the SOEs which was absolutely identified as –

**ELIAS CJ:**
But there wasn't the capacity to sell water rights.

**MR GODDARD QC:**
Well the extent to which they were transferable as a matter of law –

**ELIAS CJ:**
Yes, it would depend on that.

**MR GODDARD QC:**
– would depend on the particular statutory regime. I don't think –

**ELIAS CJ:**

But in any event, the time-bounded nature of that –

**MR GODDARD QC:**

Was key there.

**ELIAS CJ:**

– was key there, yes.

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**MR GODDARD QC:**

And was seen as a sufficient protection for the concerns that were then raised.

**ELIAS CJ:**

Against the background of Crown ownership.

**MR GODDARD QC:**

And then the question is whether the potential for a minority shareholder to pass away changes anything in that, and when one asks, "Well, what are the steps that might be taken to recognise Māori rights and interests?" in my submission the answer is no. And nothing has been identified in respect of which that's not true. The Tribunal only identified one concern, shares plus, which I will at some stage reach. But that wide range of options for – the Tribunal, first of all, identified that many mechanisms for recognition of mana, rangatiratanga, kaitiakitanga, exist and didn't identify any concern about changes to those aspects of the existing regime. What the Tribunal said was any form of recognition of Māori rights and interests in water is going to have to have a commercial dimension, and then it went on to inquire about whether that commercial dimension of rights recognition would be impaired by the share sales. It accepted that a wide range of mechanisms would still remain to the Crown and, at the end of the day, only identified one which it thought would cease to be available as a result of the proposed share sales, and my submissions deal with why that is not in fact an option that is available.

What I didn't do when I was, which I should have done, when I was looking at the public finance legislation, but I was lured into a different conversation, was identify that in the legislation as enacted the Crown is required to hold not 51 per cent of the company as a whole but 51 per cent of every class of shares. Just picking up some questions from your Honour Justice Glazebrook yesterday. So for example, if a

separate class is created involving particular control rights the Crown has to hold 51 per cent of that class. And that there are the anti-avoidance provisions that your Honour identified to prevent holding it in name while allowing the way the powers are exercised in fact to be dictated by someone else. So, sorry, just filling in that gap there. Yes.

Yes, my learned friend says ownership and voting rights of every class have to be held as to at least 51 per cent by the Crown.

So after saying, well, this is not going to make a difference to the Government's commitment the Deputy Prime Minister goes on to consider the Government's response to the Tribunal's interim report. He notes at 60 that the Tribunal largely accepted the Crown's submission that the Crown will still be able to recognise rights of Māori in freshwater and geothermal resources and provide almost all forms of redress after a partial sale of shares in MOM companies but found that one form of redress, the so-called shares plus, would not be available after a sale and the nature of that has been described, the consultation that was undertaken.

And I think perhaps given the time I should jump to the conclusions in paragraphs 77 to 79. And again the Deputy Prime Minister reiterates that, "The Government's committed to recognising in appropriate ways Māori rights and interests to the 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 underway in a number of fora. This is not an overnight task. It involves complex and multifaceted issues."

78, "Ministers have carefully considered the views of the claimants, the Waitangi Tribunal's interim report and the views expressed in the course of the consultation processes", plural, "that have been carried out in relation to the MOM programme generally and shares plus." The Minister has taken advice from officials and tested that advice through consultation with Māori interests.

"Taking all of this into account, Ministers are firmly of the view that however Māori rights and interests in water are defined the sale of minority shareholdings in the MOM companies first of all will not compromise the Crown's ability to recognise those rights and interests, second, will not compromise the Crown's ability to respond to", that should say, "any findings and recommendations the Waitangi Tribunal may make

in relation to those rights and interests, and third, will not affect in any way the Crown's ability to provide redress in respect of past actions that are inconsistent with those rights and interests."

"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 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."

And then I wanted to take the Court to the Attorney-General's affidavit under tab 36. And the Attorney-General refers in paragraph 2, "The Treaty settlements are one of the most fundamental areas of Government activity in New Zealand and have been over the last 20 years. The affidavit of Mr English describes the decision-making process which led to Cabinet agreeing to extend the mixed ownership model. I participated in the Cabinet's decision-making. Throughout I have been mindful of the principles that have been formulated by New Zealand's courts in relation to the Crown's Treaty obligations. In particular I have been mindful of the principle that the 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.

"I have been satisfied that however the rights and interests of Māori in water and geothermal resources may be defined, and that is the subject of significant work on the part of the Government, the sale of minority shareholdings in the MOM companies will not compromise the Crown's ability to recognise those rights and interests, will not compromise the Crown's ability to respond appropriately to the outcomes of the Tribunal's work in the area, and will not change my commitment as Minister and the Crown's commitment to make provision for past actions that are inconsistent with those rights and interests through redress provided in Treaty settlements."

And the Attorney-General then, in his capacity as Minister for Treaty Settlements, describes the work that he's been doing on that and says that, at the bottom of that page 1, going over to 2, that he and his officials have been, "going to some lengths to provide redress that, while in settlement of historical claims, is contemporary in

nature, forward looking, and provides for ongoing rights and interests". He talks about the way in which the Treaty settlement framework has developed to achieve this, "First, through the acknowledgement of mana, rangatiratanga and kaitiakitanga, and secondly, through mechanisms that involve claimant groups' management and decision making in relation to a freshwater or natural resource, together with improved access to places of traditional food, aquatic species or other resources can be gathered."

And the various mechanisms that have been used are illustrated in the following paragraphs. Three particular examples are given. And at 17, after working through those examples, the Minister says, "The MOM programme has no bearing at all on my commitment and that of the Government to continue to provide Treaty redress of the type that I have outlined. I am well-informed also on the engagement that Hon Bill English and other Ministers have had with iwi leaders on contemporary rights and water and geothermal resources as outlined in Mr English's affidavit. 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."

Now that's not just the view from one side of the table in these conversations. Moving very quickly over Mr Crawford's affidavit, which sets out the time constraints that apply to IPOs, and Mr White's detailed affidavit under tab 38 in relation in particular to the shares plus consultation, and I should also say Ms Wansbrough's affidavit under tab 39, which paints an overview of the water consent, water permit environment by numbering in, by, in terms of growth.

We come under tab 41 to the affidavit of Ms Cook of Ngāi Tahu, who confirms, at paragraph 1, that she's authorised to make the affidavit of Te Rūnanga o Ngāi Tahu, and sets out some background, including, at 6, that, "The Ngāi Tahu takiwā covers the largest geographic area of any tribal authority in New Zealand, contains many thousands of water bodies, including some of New Zealand's largest hydroelectric schemes, Manapouri, Clutha and Waitaki schemes. Large irrigation schemes as well and the active involvement of the Ngāi Tahu takiwā in – sorry, the size of the takiwā and extent of water bodies means that her Rūnanga is actively engaged in various resource management activities.

What, then, is Ngāi Tahu's view of what's happening and whether the partial share sales will affect the ability of the Crown to engage meaningfully with it to recognise its rights and interests in water?

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At 10, the scope of settlement and what's excluded from it to date is recited and then at 11, "In relation to rights and interests in water, Ngāi Tahu has taken the position that we continue to have a full range of rights and interests in water as guaranteed under the Treaty of Waitangi. Ngāi Tahu considers that those rights and interests are extant and have never been extinguished. In Ngāi Tahu's view, those rights and interests were not affected by the privatisation of Contact Energy in '99, nor does Ngāi Tahu consider that its rights and interests with be affected by the proposed sales of shares in MOM companies, including Meridian and Genesis, both of which operate significant hydro electric generation schemes on waterways within our tribal takiwā. In fact, all of the current water generating assets of Meridian are within the Ngāi Tahu takiwā."

At 13, "The simple fact is that it's not the ownership of these electricity companies, whether owned wholly as state-owned enterprises, or partly by the Crown as MOM companies, or privately owned, as in the case of Contact, that impacts or has the potential to impact on the rights and interests of Ngāi Tahu. Ngāi Tahu's rights and interests are affected directly by the legislative and regulatory regime that governs the governance, management and use of fresh water in New Zealand currently found in the Resource Management Act. The resource consents presently held and exercised by the MOM companies comprise only a minute portion of the resource consents which affect the waterways within Ngāi Tahu takiwā and this is undoubtedly the same throughout the country. There are tens of thousands of resource consents affecting our waterways, the vast majority are already privately held. It is the legal status of those consents, including whether they comprise a property right in water and the regime which manages their grant operation and review, not the private or public ownership of the consent holders which is the critical issue."

Then again, the point about this being where the action is. "It's the present fresh water regime which presently operates to both frustrate the full expression and exercise of Ngāi Tahu's rights and interests and risk the future health and wellbeing of our waterways. It is therefore reform of that regime, not the partial sale of shares in the MOM companies which will be decisive in remedying both the issue of Ngāi Tahu's rights and interests and the future health and wellbeing of our waterways.

Any change to that regime will necessarily affect all resource consent holders regardless of whether they are privately or publicly owned in whole or part. It is the reform of that regime that must, in Ngāi Tahu's view, appropriately recognise and provide for the cultural and economic rights and interests to the iwi in water, alongside the interests of both existing water users and the public."

The engagement that's taken place is then described and at 16, Ms Cook explains that, "Ngāi Tahu and other iwi have been engaged in a range of processes, including direct discussions with the Crown through the fresh water iwi leaders group which have sought to advance the appropriate recognition of iwi rights and interests in the context of the Crown's ongoing review and reform of the fresh water regime." So the review is happening, Ngāi Tahu is involved and this is – "The Crown has made it clear that the issue of iwi rights and interests is a matter that will be the subject of direct engagement. Two, the Crown will not make decisions that will involve the disposal or creation of any property rights or interests in water without prior engagement with iwi." So that reflects the corrected version of Mr English's comment on that."

"Third, that the partial sale of shares in the MOM companies will not affect any rights or interests that iwi have in relation to water or other natural resources, or any ability to claim such rights and interests. In view of that ongoing engagement with the Crown and the Crown's associated assurances, Ngāi Tahu has taken the view that it's premature to resort to either the Tribunal or the Courts to deal with the issue of rights and interests in fresh water at the present time," and the preference to engage directly with the Crown in various fora as explained and how that is done.

Perhaps just one last – at 18 there is an important point, "The Crown, from the Prime Minister down, has acknowledged that Māori have rights and interests in water. We have therefore been working with the Crown to explore how to give affect to those rights and interests in a way that would be acceptable to both iwi and the general public. This is a matter of considerable complexity." So again, that chimes with what ministers are saying.

The work of the various groups is described below and at 28, Ms Cook explains that the work of the fresh water iwi leaders group has always been and continues to be, among other things, at 28.4, "[f]ocused not on the issue of rights alone but on the

intrinsically interconnected rights, relationships and responsibilities that iwi have in respect of fresh water".

At 29, "The iwi leaders' group has been clear that the provision for iwi rights and interests must be substantive and meaningful which means being able to both express our mana and meet our obligations as kaitiaki by making decisions around how our wai is used and knowing we have set rules and limits to ensure quality and quantity of wai is sufficiently high to protect the Māori of the wai and enable us to undertake our cultural practices and three, importantly being able to fairly share in the economic benefits of the use of our wai. The ongoing engagement of the fresh water iwi leaders group, with the Crown, has focused on these important matters."

Last paragraph, at 36, "Of particular importance in relation to the context in which the engagement between the freshwater iwi leaders' group and the Crown has taken place and will continue, is the reconfirmation by the Deputy Prime Minister of the Crown's fundamental assurance that there will be no disposition or creation of property rights or interests in water without prior engagement with iwi. Ngāi Tahu's firm understanding is that if there is to be any contemplation by the Crown of the creation of property rights or interests in water, or the consequent disposal or transfer of such rights, that issue will be considered as part of the Crown's fresh water review and reform process and will be the subject of direct and substantive engagement with the freshwater iwi leaders' group." So the Crown –

**ELIAS CJ:**
What's the significance of that because that's really – that assurance is consistent with the fact that the Crown does not yet have a policy in relation to property rights because it's not treating consents as property rights, they are management tools.

**MR GODDARD QC:**
Yes, they're limited use rights.

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**
Exactly, so what this is saying is if there's going to be any sort of, you know, quota or entitlement –

**ELIAS CJ:**

But one would expect that but, as I understand it, the Crown really has no plans – in fact, doesn't think that there should be property rights recognised, except perhaps in relation to residual property rights of Māori.

**MR GODDARD QC:**

The way in which water is allocated, the nature of the entitlements to use water and their duration and the obligations attached to them, are all matters that are currently under review and that's the point that is being made here, that the review is broad enough to encompass all those matters and it is the appropriate forum in which to tackle them and that work will not be affected by sales of minority interests in these three companies and again, if one comes back to the basic test of consistency with the principles of the Treaty, the Crown says that it believes both that that is right and also that it is confirmed in that understanding by the fact that it has ongoing processes of engagement where that view is shared by those with whom it is engaging, not all but that it is a reasonable view is confirmed by the fact that significant interests do share it.

So that loops back really to where I began which is, if we ask, what are the mechanisms by which the Crown could reasonably take action to recognise rights and interests in water? My submission is that those mechanisms are related to reform of the regulatory regime in relation to water and also to historical Treaty settlements and that neither of those streams of work is affected in any material way by the partial share sales.

Now, that's the evidence on that and it's evidence that is not contradicted by any other evidence before the Court. There is not and could not be any question about the good faith of the commitments expressed by the ministers in their evidence to continue with these processes unaffected by the partial share sales.

So what then of how that approach faired in the Tribunal? Well, coming back to my roadmap, I've mostly covered paragraph 7. I've worked through the fact it's not the shares in Mighty River Power that are the subject of a Treaty claim, that claims to land are protected by the memorial regime. I've responded to questions from your Honour the Chief Justice about 7.3 and clarified what I mean by that, and that the transfer doesn't affect in any way the resource consents held by MRP, which

continue to be time-bounded and subject to the same conditions and subject to review both during and at the expiry of their term.

And then the point I've just been dealing with based on the evidence, that claims to interests in water, and the examples given by my learned friend, I think, were telling on that. Claims for royalties or decision rights on allocation, those were the two examples that my learned friend gave of forms of rights recognition that ought to be provided, he said, and which might not be provided following these sales. Both of those would require changes to the Resource Management Act or a completely new statutory regime. That was your Honour Justice Glazebrook's point that, to the extent that rights or interests are conferred, one might not do it in sustainable management statute. There might be something else that sat alongside it. And the proposed share sales don't affect the, obviously, the ability of the executive to promote such legislation or the ability of Parliament to enact it, and the evidence is that it will not affect their commitment because the incremental effect on the complexity of these issues of the partial share sales is not material. And there's simply no evidence before the Court on which a different conclusion could properly be reached, in my submission.

**ELIAS CJ:**

I haven't by any means read all the material before the Court, but I wondered whether you would comment on some material that's been put forward by the appellants at volume 5, tab 82, which is annexed to the affidavit in volume 2 at tab 16. And that relates to an application apparently for resumption of land on which there's geothermal activity. It's not quite clear from the Crown's memorandum in response, which we only have page...

**MR GODDARD QC:**

38 and 52, I think, but I'm just guessing.

**ELIAS CJ:**

38. I don't know why we go from 38 to 52, but it does appear as if one of the reasons why resumption of land – there are just two points in this. One is that it does appear that one of the reasons why resumption of land is opposed by the Crown is that it will prevent develop of the geothermal, it may prevent development of the geothermal resource. It's not quite clear, but that seems to be what's being said in the paragraphs at the top of page 38. But then there's the indication of the value that the

Crown would be obliged to stump up to Contact Energy for. And an indication in paragraph 165 –

**WILLIAM YOUNG J:**
What page is this on?

**ELIAS CJ:**
This is 1088, that the value of the plant and so on – it's the value of the generating capacity that has to be assessed, which can't be separated out by, from the water right, effectively. I mean, is this the sort of thing that is going to crop up in resumption applications?

**MR GODDARD QC:**
That what is sought to be resumed has been developed to a point where resumption transfers value that is outside the range of what is reasonable –

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**
– yes, it is a matter that can properly be raised in the context of a resumption application. That arises regardless of the ownership.

**ELIAS CJ:**
Oh, of ownership. I understand that.

**MR GODDARD QC:**
That's all – so it doesn't – whether the Crown is parting with the asset direct –

**ELIAS CJ:**
The indication in the affidavit, which may be a highly contestable one, one doesn't know, but the indication in the affidavit is that, this is paragraph 13, that Contact Energy were very blunt about what they were going to do if there was a move like this. It's just that it –

**GLAZEBROOK J:**
Whereabouts is that affidavit, sorry?

**ELIAS CJ:**

This is page 191 of volume 2?

**MR GODDARD QC:**

Yes, I...

**ELIAS CJ:**

It's just there are – there probably are not many examples, because there isn't much privatisation of energy exploitation yet. But –

**MR GODDARD QC:**

The value of the asset that is sought to be resumed and its broader economic significance are going to be matters that are relevant to the Crown's enthusiasm –

**ELIAS CJ:**

Yes, yes.

**MR GODDARD QC:**

– for a resumption application.

**ELIAS CJ:**

Well one can understand that. It's perfectly understandable. I wasn't trying to suggest that there was anything wrong in it. What I was really drawing to your attention is that it may be, and it's perhaps not insignificant, that this is an example of where a private operator is in a position to exert quite a lot of pressure. We have assurances that ministers are not going to be swayed by that. But...

**MR GODDARD QC:**

That – what – yes. They're not going to be swayed by the change in sources of pressure in relation to water reform. It is already, as the affidavits on both sides of the discussion acknowledge, a difficult issue that can only be resolved in a way that commands enduring support from both iwi and the public, and what the ministers are saying is that the process will become neither harder nor, I assume, easier, it will not be affected by this particular share sale in three companies, and that's because it is already a much broader issue, and it's only whether it changes the matters here.

**ELIAS CJ:**

Well I'm just wondering how susceptible of proof it is and how realistic it is to expect proof that introducing third party ownership is going to make matters more difficult. That was an inference that the Court was willing to draw in the *Lands* case but you're asking us not to here and you're saying there should've been evidence. I'm just really wondering what evidence there can be.

**MR GODDARD QC:**

And the reason for that is the very different nature of the type of third party involvement. To take it in a broader sense, we're talking about here, we're talking about ownership of shares, not a block of land, and we're talking about an involvement that is an investment in a company which holds, I'm starting to sound like a stuck record I suspect, certain statutory rights limited as to the entitlements they confer, limited as to their duration, and susceptible of review in the course of a process which is extremely well-signalled. So these water rights are much more like memorialised land than they are like plain vanilla land. That's, in a sense, the submission that I'm trying to make. And that's consistent –

**ELIAS CJ:**

Well, depending on how they are treated in the consent process. If they are controlled uses then whether or not they get renewed is not on the table.

**MR GODDARD QC:**

But the question of whether or not they are controlled uses is itself just one aspect of the regime that's under review. It's quite wrong to take that as a given, your Honour. The whole concept of different categories of use, of the extent of expectation of renewal, of the conditions to which they can be subject, of their duration: these are all things that are up for grabs.

**ELIAS CJ:**

But if you –

**McGRATH J:**

Help us. If you could demonstrate that by reference to the Commissioner's report on consents that we were referring and talking about yesterday. Because that is a decision which does raise some matters. It would be a concrete way, perhaps, of you putting those points.

**MR GODDARD QC:**

I can do that and I will but I want to begin by saying that of course, commissioners have to decide it under the regime, as it exists now and the main thrust of my submission is that it's that framework that's up for grabs and that what –

**WILLIAM YOUNG J:**

Including the regional plan, presumably?

**MR GODDARD QC:**

Including the regional plan. The regional plan is an instrument made under a regulatory regime which may change in very significant respects. If the issues described by ministers as part of the Fresh Start for Freshwater review are addressed in the way that's contemplated, then regional plans are not a given across that –

**ELIAS CJ:**

No, but in setting them, the sort of material of valuation in which the Crown counsel acknowledges, that these assets are going to be stranded if they don't have their water rights, is going to point to renewal, isn't it, as a matter of reality?

**MR GODDARD QC:**

But then my next, I guess – obviously when one talks about decisions about sustainable use of resources, one would be slow to strand –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– completely a valuable asset that has, you know, achieves many of the goals identified in the Resource Management Act but again, the –

**CHAMBERS J:**

It's probably pretty unlikely that iwi are going to be suggesting realistically stranding of such assets –

**ELIAS CJ:**

Yes and they haven't –

**MR GODDARD QC:**

And my learned friend Mr Geiringer –

**ELIAS CJ:**

– in the Waitangi Tribunal they didn't –

**CHAMBERS J:**

Yes.

**MR GODDARD QC:**

– said below that the argument is not that the dams should be removed. The argument is not – so, again that doesn't change, with respect your Honour. The key point is that the likelihood that there will continue to be hydro-generation on these rivers is not something which the appellants are saying will change as a result of recognition of their rights and interests. So again, I think that's part of the background which stays constant.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

There are a lot of issues which one can identify about the fresh water regime that exists now and about the process for reform but the critical is, what changes as a result of the sale of up to 49 per cent of the shares in each of the three companies, and the question is whether that change is material and what the courts have repeatedly emphasised, the Privy Council in *Broadcasting Assets*, the Court of Appeal with seven Judges again, in *Commercial Radio Assets*, was that what is prohibited by section 9 is a material deterioration in the ability of the Crown, viewed realistically, to respond to well-founded claims –

**ELIAS CJ:**

But if you have an impediment to full exclusive and undisturbed possession in the form of a dam which provides much needed hydro-electricity to the company, so it is going to continue in existence. Isn't the appellants' case that you need to confront – the ownership of that dam is an obvious way to make reparation, just as the additional land held by the Crown in the *Lands* case was a way to make reparation?

**MR GODDARD QC:**

We, I think, need to be a little bit careful about dams and consents because of course, to the extent that the dam is on land and is a fixture, as the Court pointed out the other day, there is already a mechanism in place which is unchanged.

**ELIAS CJ:**

Yes but then you're going to be confronted with the fact that it's $6 million or something will be stranded.

**MR GODDARD QC:**

But that doesn't change.

**ELIAS CJ:**

No, I understand that. Yes, I understand that argument.

**MR GODDARD QC:**

And that's the key thing. Yes, that is, there is – there are a whole set of existing interferences in the rights and interests claim by Māori. When one asks what reasonable steps might be taken to, you know, under the Treaty to recognise those rights and interests as established and recognised then, as your Honour pointed out to my learned friend the other day, what is reasonable will depend in part on the extent of development of the resource.

So again, the fact that certain things may be unlikely, even to be claimed, or if claimed resumed, is not relevant to this case unless the answer will change as a result of the sale of a minority interest in these three companies and there is no reason to think that anything will change on those dimensions.

**ELIAS CJ:**

All right, thank you.

**MR GODDARD QC:**

I've gone well past, sorry.

**ELIAS CJ:**

No, my fault. So we'll take the luncheon adjournment and resume at 2.15.

**COURT ADJOURNS: 1.05 PM**

**COURT RESUMES: 2.17 PM**

**MR GODDARD QC:**
I finished just before lunch, your Honour, on the point which is central to this part of the case: that when asking if proposed Crown action is consistent with the Treaty, the key questions are what are changes in the environment for rights recognition and redress as a result of that action, and is that change material to the ability of the Crown to recognise rights, to provide redress? So if a form of redress is unlikely before the action it's irrelevant that it's equally unlikely after the proposed Crown action. What the Crown has to be into is whether there are likely, realistic, meaningful forms of right recognition or redress which are prejudiced to a material extent by the proposed action.

And I had dealt with one form of rights recognition and redress, Treaty settlements, and made the submission based on the evidence that that wasn't affected in any way by the proposed share sales, and I dealt with regulatory reform, in particular through Fresh Start for Freshwater and identified the evidence and reasons in that evidence supporting the Crown's view that there is no material change to the prospect of meaningful rights recognition through regulatory reform as a result of these partial share sales.

Your Honour asked earlier today about ownership interests in the companies as a form of recognition or redress, and it, I think, is important to note that an ownership interest in the sense of ordinary shares, providing ordinary shares as part of a settlement of claims remains squarely on the table as well after a sale of a minority stake. That can be done in any of a number of ways. The Crown might decide to retain more than 51 per cent of the company, leaving it with a stock of ordinary shares for that purpose, or the Crown could go into the market to buy the shares for that purpose, or most simply of all, and the option which raises the least number of issues in terms of, for example, securities legislation, takeovers legislation, the Crown could simply provide funding by agreement to a claimant group to itself go into the market to acquire an agreed number of shares in the relevant company. So the –

**ELIAS CJ:**
How is there Securities Act complications in the other solutions you said?

**MR GODDARD QC:**

It would more be if the Crown already has 51 per cent and goes out into the market to acquire shares itself before transferring them on to someone else, some issues could arise which would not arise if the claimant was simply provided with funding –

**ELIAS CJ:**

And wouldn't arise –

**MR GODDARD QC:**

– to itself go out into the market.

**ELIAS CJ:**

– if the Crown retained more than 51 per cent.

**MR GODDARD QC:**

Exactly. Yes. Also right. So – but there's one very simple option which is not precluded, even by a sale of 49 per cent of shares, which is the provision of any agreed number of ordinary shares as part of a resolution.

So I'm about to turn to shares plus, but what I think needs to be emphasised is that the provision of ordinary shares is not in any way precluded by the partial share sale and that the provision of almost any form of rights that could be attached to shares also is not precluded by the partial share sale. Now, my submissions work through in some detail, you might say tedious detail, how that's –

**ELIAS CJ:**

I didn't understand the appellants really to be relying very much on the shares plus idea which was come up with by the Tribunal, and it is, am I right, that shares plus is simply shares plus amendment to the constitution to give special powers to the –

**MR GODDARD QC:**

To Māori –

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

– interests. By shares or by amendment to the constitution or some combination of the two. And yes, my sense is that that plays a much less central role in the argument in this Court than it did below and I'm not going to deal with it at the same length for that reason. But the only reason I wanted to go to it was to say that almost every form of right that could be attached to shares can be provided after a partial share sale just as well as before. The one form of right that could not is a share or class of shares that conferred decision rights in relation to management matters that would otherwise be reserved for the board, and the Tribunal, quite rightly, said, "Well, once you no longer have ownership of all of the shares in a company it's much harder to change the constitution to provide for such shares."

But there are two problems at least that that's a meaningful form of rights recognition or redress. One is that if you're trying to confer a meaningful voice in relation to the resource, this is a very clumsy and indirect way of doing it, and the other option is the other tools that remain in the toolbox are much better. And the second is that –

**ELIAS CJ:**

Is it possible to, for the Crown as owner of the SOE to require it to disgorge particular water rights and land and for the Crown to resume that in the meantime, those in the meantime?

**MR GODDARD QC:**

Yes...

**McGRATH J:**

Not unless it took the land as well.

**MR GODDARD QC:**

It would have to do it –

**McGRATH J:**

Because the land –

**ELIAS CJ:**

Yes. No, I see that –

**MR GODDARD QC:**

It would have to do it either by agreement or possibly by taking legislative power to do so. And I don't know that resuming assets falls within the scope of section 7, the non-commercial activities provision. I suppose I think that would be quite a stretch. So I doubt that that's something which is open under the current statutory regime. And, again, I think what that question requires a focus on is the likelihood of that happening before and after the proposed share sale, because if that doesn't change, then again it's not material.

And I was going to mention, without going to the three cases identified in paragraph 8 of my roadmap, as cases all of which turned on this question of, "What changes?" and in all of which the courts concluded that nothing materially changed. And *Te Runanganui o Te Ika Whenua Inc Society v Attorney-General* [1994] 2 NZLR 20 (CA) is directly relevant to the question your Honour just asked me because the reasoning of the President for the Court was that it – the concern in that case was that two dams would forever be removed from the ability of the Crown to exercise statutory powers to resume them and hand them over to claimants. Your Honour will remember, again I'm at a disadvantage in relation to members on the Court on the facts of this case I think, but there were two dams that were to be transferred from electric power boards to energy companies as part of the broader reforms of the sector. And there was a statutory power to acquire assets from an electric power board but not from an energy company. And the question the President asked in the judgment of the Court was, "Is there a realistic prospect of this power being exercised such that there is a material change in the ability of the Crown to provide, to recognise rights?" And what the President said was, "Well no. It's just not realistic that the dams would be resumed and provided as part of settlement redress now, so nothing changes on that dimension, and all the other forms of rights recognition and redress that might be provided are not materially affected by the proposal."

So – I think a number of the members of the Court have gone straight to that case. It's under tab 41 of volume 3. And judgment of the Court delivered by President Cooke. The Waitangi Tribunal, it's noted on page 22, had recommended in an interim report and then a full report that the Wheaeo and Aniwhenua schemes and water rights should be retained until the substantive claim of Te Ika Whenua to the rivers had been heard and determined. And in the context of this application for interim relief the Court said over on page 23 at line 36, "In the present case a major factor must be the strength or otherwise of the case of the appellants. As the

legislation stands now, the Crown has only limited powers over electric power boards and authorities. In general they are not agents of the Crown. But there is power under section 95 and 96 to purchase electric works compulsorily at a price to be determined by arbitration," and "That power will cease".

"If there were any realistic prospect that by compulsory purchase or otherwise the Crown would take steps to bring about a complete or partial vesting of the dams in the tangata whenua, or that a Court might order such a vesting, we think that this Court should give at least serious consideration to making an order which would keep those prospects open. It is because, in the light –

**ELIAS CJ:**
Those were third party rights though, weren't they? Third party ownership.

**MR GODDARD QC:**
Yes, but susceptible of compulsory acquisition.

**ELIAS CJ:**
Of compulsory acquisition.

**MR GODDARD QC:**
Which would no longer be the case, which has some parallels with the question your Honour was asking with SOEs.

**ELIAS CJ:**
Well, I suppose on the appellants' argument it was pretty material that it was a third party that had the ownership rights and which would be dispossessed.

**MR GODDARD QC:**
But subject to an entitlement to compensation under existing statute.

**ELIAS CJ:**
Yes. Yes.

**MR GODDARD QC:**
Again, a little like land that can compulsorily be resumed. The key point that I wanted to take from this was that the Court considered that an unlikely prospect remained

unlikely, that everything that was otherwise open in terms of rights, recognition or redress, was unaffected and therefore it was not appropriate for the Court to intervene.

That's discussed on pages 23, really right through to the end but there's, for example, a passage indicative of the Court's thinking on page 26, at line 30 and following, there's reference to the obstruction of free passage of migrating eels up and down the river and Māori grievance but, "[t]he assumption of the control over the rivers implicit in the construction of the dams is more fundamental. If control has been assumed without consent, there may well have been breaches of the Treaty, as the Crown acknowledges but as to these two dams, non-Māori control has been an accomplished fact for a decade and more, the clock cannot be put back and Māori remedy lies in the Waitangi Tribunal claim or conceivably in Court action based for instance on Māori customary title or fiduciary duty." So your Honour's point that assertion of aboriginal title, Māori customary title, remains unaffected by any of the proposed actions.

So over on 27, at line 8, "The real difficulty facing the appellants is not the absence of a judicable issue but the absence of any substantial prospect of obtaining relief affecting the ownership of the dams. If they have meritorious then there are other remedies."

So the conclusion, down at line 24, "The reason why the present appeal does not succeed is simply that rights to or in the dams themselves are not held by Māori, nor is there any substantial prospect of a change in that regard, yet Māori claims to remedies not extending to the ownership of the dams will not be affected by the proposed transfers."

So that the unlikely remains unlikely is irrelevant. If everything that is likely that is meaningful and realistic remains viable is not materially prejudiced, then again there is no Treaty objection to the proposed action.

That, I think, deals with my eight and nine. There has been extensive consultation on whether the Crown has missed anything that could be done by shares plus before a sale but not afterwards, that's meaningful and relevant and nothing has been identified, either in the course of that process or before the Court and then I come back to the general point, paragraph 11, that whether, in relation to shares plus, or

more generally, no reasonably specific example has been provided of a meaningful form of rights, recognition and redress, that would be available pre-sale and, I should say, is likely pre-sale but not post-sale. And in the absence of reasonably concrete identification of prejudice of that kind which enables the likelihood of it before and after to be tested, then there's no proper basis for suggesting that the proposed partial share sales would be inconsistent with Treaty obligations, or in particular that it's unreasonable for the Crown in the exercise of kawanatanga to implement the reforms which are being pursued for the range of policy reasons that were set out in the explanatory note to the Bill.

Indeed, in my submission, the Crown's evidence goes further than saying that the appellants have failed to identify such an example. It actually shows that all forms of rights, recognition and redress which are meaningful which respond to the claims made remain on the table and are not materially affected as to either their availability or their likelihood by the proposed partial share sales.

Now I touch on process challenges in points 12 to 14 of my note and it's dealt with in a bit more length in section 14 of the submissions but I don't – unless there are specific issues that the Court wishes to raise with me, I don't propose to expand on the written submissions.

**ELIAS CJ:**
No, that's not necessary.

**MR GODDARD QC:**
And I identify at 15, some of the key differences from the *Lands* case but I think those have been touched on at various points in the course of my submissions so far. The first really goes to whether there is any inconsistency with Treaty obligations and the second – as does the third, the second is rather more one of authority and reviewability.

That, subject to any questions the Court may have on any of the issues covered in the Crown's submissions, leaves me with just one issue that I have discussed with my learned friend Mr Carruthers and that I should touch on at the end of this which is the timing constraints in relation –

**McGRATH J:**

You're not going to go to – you don't think you can derive anything that will illuminate matters further for us in relation to that commissioner's report?

**MR GODDARD QC:**

Oh, I'm sorry your Honour –

**McGRATH J:**

I mean, if you feel that there's nothing helpful there but it was –

**MR GODDARD QC:**

No, let –

**McGRATH J:**

– I suppose I'm wondering whether I've got an understanding of its significance, that's all.

**MR GODDARD QC:**

Let me make sure that – it's under tab 177 in volume 10 and let me just identify what, in my submission, are the important features of that decision. The – as your Honour notes, this is the decision of the commissioners on the application by the Waikato SOE, Mighty River Power, for the resource consents. It is considered de novo, it's quite clear that there's no entitlement to receive these consents merely because water has in the past been taken but, as your Honour the Chief Justice pointed out, the existence of the assets on the river is a relevant factor –

**ELIAS CJ:**

No, no, I think that's not what's decided. What's decided is that this is a controlled use and therefore the consent must be granted subject to conditions.

**MR GODDARD QC:**

But that's not a right derived from having previously held water rights –

**ELIAS CJ:**

I understand that.

**MR GODDARD QC:**
– so I'm going to come –

**ELIAS CJ:**
Yes.

**MR GODDARD QC:**
– I'll come to the controlled. So then I think, after going through the evidence, at page 2527 of the case on appeal, there's a discussion of the regional policy statement and the matters that must be taken into account that are addressed in it because that's the operative regional policy statement and that includes, as factors that are taken into account, section 2.1 Treaty of Waitangi and matters of significance to Māori but then, the passage that your Honour's referring to begins over the page, 7.2, "Proposed Waikato regional plan. The status of the primary application. Decisions on consent applications must be made according to the status that the activity holds under the proposed Waikato regional plan at the time the decision is made, not at the time of application, nor the time of hearing." More than one section relevant, most still subject to reference and therefore not operative."

"However, rule 3.6.4.10 of the proposed Waikato regional plan relates specifically to the activities which are the subject of the primary applications which we're addressing in this case. The rule has been amended by a consent order issued by the Environment Court on 9 April 2003 and most of the rule is now operative. Under the amended rule, the primary applications are now controlled activities. Therefore, we have no choice but to grant those consents and we can only impose conditions that rate to the matters over which control has been reserved in the proposed regional plan."

So pausing there, as the Court well knows, activities can have various different statuses, for example, a discretionary activity in which consent may or may not be granted. "A controlled activity, consent must be granted but conditions can be imposed in relation to matters over which control has been reserved –

**ELIAS CJ:**
I don't think controlled activities were a category under the legislation in place in 1987.

**MR GODDARD QC:**

No. It's a creature of the –

**ELIAS CJ:**

Resource Management Act.

**MR GODDARD QC:**

– Resource Management Act. Although, there were more complex arrangements for what I think would be described –

**ELIAS CJ:**

Oh yes, well there were –

1440

**MR GODDARD QC:**

– as grandparenting of existing use rights –

**ELIAS CJ:**

– of course permanent water rights.

**MR GODDARD QC:**

Yes. So it was a very different environment.

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

The first thing I want to draw out from this is that that has not – the fact that these were controlled activities was not always the case. They became controlled activities as the result of a process of plan change under the Act, having regard to the principles of the Act and it was a contested process, as the reference to consent orders issued by the Environment Court, I think illuminates.

So there have been opportunities to be heard on this. The result is that that's the particular status of these activities under this proposed plan but it's just a function of this place and this time, it need not be the case, it's not automatic for hydro and then, when one looks at –

**McGRATH J:**

When it speaks of "we have no choice but to grant those consents", is that really saying we have no choice but to grant a consent, some form of consents?

**ELIAS CJ:**

Yes.

**MR GODDARD QC:**

Exactly, exactly and that's illuminated by the rule which follows. So 3.6.4.10, it sets out below, as amended by the Environment Court, "Unless authorised by 3.6.4.5, any damming of water diversion, useful operation of existing (inaudible 14:41:22), that was lawfully established or authorised before the date of notification is planned as a controlled activity requiring resource consent." Certain things excluded which are not relevant here, then, "Waikato Regional Council reserves control over the following matters," and then there's a long list of the matters over which control is still reserved and in respect of which conditions can be imposed, including measures to provide for the passage of fish and then, about three from the bottom, "Measures to control the effects of the activity on the relationship tangata whenua as kaitiaki have with the water body," and as the commissioners go on to explain, at the bottom of that page, last paragraph, "Whilst not able to decline the applications, we are still able to impose a range of conditions on the consents as granted, so long as those conditions relate only to the matters over which a control has been retained and those conditions do not result in the frustration of the consents."

Then there's a discussion however, how the baseline for determining the consents remains the non-continuation of the activity. The question of term of the consent and how that fits is dealt with on page 72 of the decision, page 2560 of the case on appeal –

**ELIAS CJ:**

There's a presumption, isn't there – I thought there was something that said –

**MR GODDARD QC:**

No. No, there's no presumption in relation to how long it should be. The default in the Act, in the absence of a term being specified is five years, that might be what your Honour is thinking of. So if the consent –

**ELIAS CJ:**

Oh yes, yes, I think that was it –

**McGRATH J:**

The presumption is the duration, I see that in policy 6, consent duration, is that what –

**MR GODDARD QC:**

Yes, exactly your Honour. So – oh, that presumption, for the duration applied for –

**ELIAS CJ:**

Yes, that's what I was referring to, yes, I thought I'd read that, yes.

**MR GODDARD QC:**

– unless an analysis indicates a different duration is more appropriate. What it just says is, there needs to be a reason not to grant the consent, the term applied for, it's not a very hefty presumption at all –

**McGRATH J:**

No.

**MR GODDARD QC:**

– and that the request was for 35 years, the maximum term allowable is noted at the top of section 12. The Council staff report. There were arguments from several submitters for shorter terms and the reasons for those are discussed. The point that your Honour the Chief Justice is making, "In our view, we should not unnecessarily restrict the term, the applications relate to a major infrastructure asset. The applicant has some right to expect but should not lead to repeat such a large scale consenting project again in the near future consistent with terms granted to other hydro operations."

Then importantly, the last paragraph, on page 72, "Further, under the RMA, there is provision for review of consents." Some concerns about the 35 year term when potential affects are not well understood. What the commissioners say at the foot of the para, "We've included conditions which provide the optimisation for review should certain circumstances come to pass," and those are included as conditions 8.1 to 8.7.

"For the reasons discussed above, it's our view that 35 years is an appropriate term for any consents granted."

So first of all, the status of this activity is contingent, it's determined by a subordinate instrument issued under the legislation that obviously can be overridden by the legislation and indeed which will be affected to a material extent by the 2010 legislation in relation to the Waikato River that I took the Court to earlier today because the vision and strategy to be developed under that Act is the paramount policy instrument for the river now. So there's already been modification in that sense to the decision-making regime under which any future commissioners would operate and it remains up for grabs in relation to the Fresh Start for Freshwater review and the conversations with iwi described by ministers but, even within the existing framework, the ability to provide consents to reflect the concerns and interests of tangata whenua and kaitiakitanga is fully in play and the question of term and review is up for grabs. Is that the sort of review your Honour –

**McGRATH J:**
That has certainly clarified matters further for me than I was able to do for myself, thank you.

**MR GODDARD QC:**
Yes but none of that should be taken as a given in terms of the conversation that's going forward, that's the main thing that I want to emphasise on that score. Are there any other matters, before I turn to timing, on which I can assist the Court.

**ELIAS CJ:**
No, thank you.

**MR GODDARD QC:**
In that case, let me turn to timing. The Court granted leave for this appeal to come direct to it on the basis of the statutory test of exceptional circumstances, driven in large measure by the pressing need for a determination of these issues and the parties have co-operated in endeavouring to bring these matters before the Court and for trial rather than on an interim relief basis and the co-operation of the plaintiffs, the appellants, has certainly been much appreciated in that respect.

That co-operation has also meant that it hasn't been necessary to devote time to arguments about interim relief or anything like that, to that stage, the Crown has worked co-operatively with the appellants to try to bring this to a hearing, both at first instance and on appeal, within the timeframes described in Mr Crawford's affidavit and the Court has that affidavit in the submissions I made in relation to the leave stage on that.

What I should mention to the Court because I wouldn't want it to come as a surprise, is that, as I've indicated to my learned friend, the Crown doesn't propose to take any action in relation to these matters before any, in particular, steps to commence the Mighty River Power related legislation, before the 18th of February but that it's expected at this stage that Cabinet will discuss these matters and will consider timing going forward, on the 18th of February, that being the last date, for the reasons explained by Mr Crawford, that a decision to proceed could be made in time to enable an IPO to proceed at the beginning of the next available window.

So that's the timetable that the Crown is currently working towards and, consistent with that timetable, it's not expected that any steps would be taken or any questions of interim relief could arise before that date.

**ELIAS CJ:**
Well, if questions of interim relief need to arise, the Court will contact the parties.

**MR GODDARD QC:**
I'm grateful for that indication. I have also discussed with my learned friend and he may wish to address this at more length, the possibility which I think, the parties – which could be helpful if it's not possible to deliver a reasoned judgment within that very brief timeframe, of delivering a minute in relation to the result but –

**ELIAS CJ:**
I think we understand the constraints you're operating under and I think we're not in a position to give any indication at this stage but if there is to be a problem then the Court will take steps to draw it to the attention of counsel.

**MR GODDARD QC:**
I'm very grateful to your Honour. I just wanted to make sure – I wasn't seeking an indication, I was – I anticipated that that would not be possible. I just wanted to be

very transparent about what the Crown, for its part, is at this stage proposing in terms of its consideration of these issues.

**ELIAS CJ:**
Thank you Mr Goddard.

Yes, Mr Carruthers.

**MR CARRUTHERS QC:**
May it please your Honours, let me begin with the submission that the claim has been identified very clearly from an early stage. The position that the appellants take is that they had rights as at 1840. They had full, exclusive and undisturbed possession of water. That's recognised by the Waitangi Tribunal in its interim report as being as near as possible the equivalent of the English law concept of ownership. That is the right that is protected by Article 2; that is the Crown's obligation to protect. There has been no lawful extinguishing of that right. The Crown has used the resource in contravention of the right.

Now, the consequence of that, as recognised by the Waitangi Tribunal in its interim report, is that the Treaty and the principles derived from it both recognise that the remedy is restitution as far as possible, and if not possible, then compensation. So the issue, to answer my learned friend about what is lost by what has happened, what is lost is the actual involvement of Māori in the exploitation of the river in the way identified in the Waitangi Tribunal interim report. So it's idle for my learned friend to suggest that the claim, what Māori want, has not been identified. And as my – as the initial exchanges with your Honour the Chief Justice indicated – and your Honour led this exchange – that there will be different ways of redress because of the different nature of the various claims. And it's in relation to the proposal to issue shares in Mighty River Power to the public, it is difficult to formulate how that actual exploitation might take place. But that's not a matter on which the Crown has consulted in any substantive way and there obviously have been discussions about it. It's difficult to formulate methods by which the actual exploitation might be provided by the Crown in a way that meets the Treaty right.

One issue that emerges in the exchanges today, because of the way in which my learned friend puts his case, is the issue of whether in some way the water right may be provided to Māori so that they would exercise control over the whole of the water

right as really an intermediary between the water itself and Mighty River Power, for example. But in a sense it's idle for Māori to try and formulate how it might best meet the Crown's Treaty obligation. As far as possible that has been done in the submissions and there are other mechanisms, for example of the kind that I've just articulated. But what is clear is that the claim and the basis of claim and what Māori expect has always been made clear.

Now I'll come to the issue of what changes with this proposal in a moment, but I just want to put to rest the submission that my learned friend has consistently made through his address that the only issue of impairment that the Waitangi Tribunal found was in relation to 'shares plus'. That is simply not correct, and part of the reason that my friend is able to put it in that way is that the Crown's starting point before the Waitangi Tribunal on what the test was – is in fact wrong. The Crown put to the Tribunal, and in a sense partly persuaded the Tribunal, that the relevant test was not 'material impairment' but 'impossibility', and one can see from the way in which the Tribunal has reasoned that it has measured the various issues against impossibility. Now, what the –

**ELIAS CJ:**
Yes, that – we haven't in fact been taken to the –

**MR CARRUTHERS QC:**
No, I'm –

**ELIAS CJ:**
– Waitangi Tribunal, but in fact I had meant to raise that question of impossibility. Not that we're sitting on appeal from the Waitangi Tribunal of course.

**MR CARRUTHERS QC:**
No. No, and I'm not putting it that way for a moment.

**ELIAS CJ:**
But since Mr Goddard QC accepts that the test is the one formulated by the Privy Council and which was applied in the High Court we're certainly not bothered by the fact that the Waitangi Tribunal formulated a different test.

**MR CARRUTHERS QC:**

No. But, your Honour, I –

**ELIAS CJ:**

You say it drove their recommendation?

**MR CARRUTHERS QC:**

Yes. I am bothered by the suggestion or the submission that the only impairment found by the Tribunal was in relation to shares plus, and that is simply not correct. And, and I've taken you to some passages in the Tribunal report in relation to Crown policy, but I will quickly take you to the passages that give rise to the issue that I'm concerned with, because the submission, my submission in reply is driving to the issue of material impairment. And the Tribunal found material impairment and said in context that it would be – any form of redress, all forms of redress would be significantly more difficult following privatisation.

And if I can take you to volume 3 please, and –

**ELIAS CJ:**

Is it volume 3 of the bundle of authorities?

**MR CARRUTHERS QC:**

No, no. Volume 3 of the case on appeal, your Honour. And if I can take you to page 604, the bottom of the page going onto 604, "In our view the Crown is correct that it will still be able to provide many such options after the sale of shares in the MOM companies. We think that the claimants' evidence has shown that it will be significantly more difficult for the Crown to do so once it has introduced thousands of the Mum and Dad investors into the political mix." And I'll come back to that issue. "We suspect that the Crown's evidence underestimated the political obstacle that these interests will put in the way of a tax, levy, royalty or resource rental for the use of water to generate electricity," and that, if I can just invite you to continue to read on down to the middle of the paragraph where it concludes, "concern in a Treaty-compliant manner." If your Honours would just mark that too, so that I can move on through that.

So even with what was a higher test than ultimately the Court in the Court below recognised and that my learned friend and I agree is the proper test, even with this

high test the Waitangi Tribunal concluded that it would be impossible for, not just materially more difficult, for the Crown to offer appropriate redress after privatisation and the finding of impossibility related to the shares plus proposal but your Honours, my submission is that it's misleading to consider it merely in terms of a finding that shares plus was impossible after privatisation. What was found to be impossible after privatisation was more generally providing the Māori groups, whose waters being used by the power generating SOEs, genuine and meaningful involvement in the exploration of the resource.

Now the next passage I want to take you to is on page 605 and –

**ELIAS CJ:**
Just in terms of material impairment, perhaps page 403, where they're summarising things because that highlights the difference between impossibility and much more difficult, towards the bottom of the page.

**MR CARRUTHERS QC:**
In the summary on page 405 your Honour?

**ELIAS CJ:**
Yes.

**MR CARRUTHERS QC:**
Yes, yes.

**ELIAS CJ:**
And further up the page there's some too indicating, as you say, that they do think there is some impairment.

**MR CARRUTHERS QC:**
Yes, yes and your Honour, the summary obviously draws on the narrative. Perhaps your Honour, I adopt what you have put to me as being a proper summary. The only other passage is at page 606 of the report and it's the first substantive paragraph, "The Crown's Treaty duty," down to, "if it so proceeds."

So where that leads me is to the submission that the Waitangi Tribunal recognised a much wider impairment than my learned friend has given credit for and the argument

is that the impairment arises because of the involvement of significant minority issue – significant third party rights in the minority shareholders who themselves derive rights from the time that they purchase shares.

So that brings me to what changes in this? And what does change is the introduction of the third party – of the shareholders, the new shareholders and third party rights and my submission is that there has to be a political reality in looking at the issue of impairment. It is as well for the current ministers, the Deputy Prime Minister and the Attorney-General, to express their views about what they are trying to do and say that this is the current policy and I'll come back to that issue in a moment too but, what has to be faced up to, are what the Tribunal described as the thousands of mums and dads that buy the shares that are involved in that minority holding third-party rights and the prospect that the Crown can, after sale of the shares, in some way impose on those shareholders a regime that recognises an actual involvement of Māori in the exploitation of the river. So my submission is that that is an obvious and significant impairment that the Crown simply cannot meet.

There's another issue on this question of Government policy. My learned friend has –

**CHAMBERS J:**
That's like saying though Mr Carruthers that the Fresh Start programme has absolutely no chance of success because almost inevitably any conclusion to which the parties to it may come will affect in some way thousands of private rights in existing resource consents.

**MR CARRUTHERS QC:**
Well let me – your Honour, I accept that but let's recall what the Fresh Start for Freshwater policy said about Māori interests and, in opening the appeal, I took your Honours to each of those three propositions that my friend describes as his toolbox and the Fresh Start for Freshwater derives from the Land and Water Forum and the passage I took you to said that it was no part of that Land and Water Forum's role to deal with the issues between Crown and Māori. So how can it be a constructive policy, as part of the Crown's toolbox, to say that this is the way in which we're going to address water resource rights when the very body that's supposed to be addressing them is saying it's no part of our role?

**CHAMBERS J:**
Ms Cook doesn't appear to think that.

**MR CARRUTHERS QC:**
Now let me deal with Ms Cook then. In paragraphs 20 and 21 of her affidavit and I'll just give you the reference to the volume and page number, it's volume 4 at page 380. She deliberately recognises that there are different issues for different iwi and that she is only speaking for Ngāi Tahu. Now your Honour, this is why it's actually quite difficult to derive – for Māori to derive comfort from what the Deputy Prime Minister and the Attorney-General say in their affidavits, when on each of those issues, each of the three items in the toolbox, the evidence, the other evidence simply doesn't support that view.

The red book that I took you to in the papers is said to represent Government policy on redress. Well, a different policy is actually said to exist, that the Crown will look at rights in the way in which Māori say they exist but currently, still on the website, in the red book, the same Government policy is recorded. On the question on Government policy in relation to historical Treaty claims, Ms Ott in her evidence stated because the Waitangi Tribunal made it clear that the Crown will not recognise Māori rights in the way in which Māori advance them and –

**WILLIAM YOUNG J:**
But is it going to be any different though, I mean, it may be a difficult argument to make in the future but it doesn't make much difference if it's a very difficult argument to make now, does it? A claim to say – what you're saying is that the Government will not accept Māori claims to hydro electricity generating assets, right?

**MR CARRUTHERS QC:**
Yes, I am.

**WILLIAM YOUNG J:**
So it's a very difficult claim to make now?

**MR CARRUTHERS QC:**
Yes.

**WILLIAM YOUNG J:**

It can't be much more difficult, if it's really difficult now, if you've got the mum and pop investors interposed into 49% of the power companies?

**MR CARRUTHERS QC:**

The issue though is that the Crown is advancing this argument about policy as an argument that they have complied with their Treaty obligations and that they still remain able to comply with their Treaty obligations. In my submission –

**ELIAS CJ:**

I think it's that they have the capacity to comply?

**MR CARRUTHERS QC:**

Yes, yes. And my –

**WILLIAM YOUNG J:**

But if they have to do it they will, but they don't want to.

**ELIAS CJ:**

I don't think they say they will. That's the –

**MR CARRUTHERS QC:**

No, well that's –

**ELIAS CJ:**

– the deletion of the agreement.

**WILLIAM YOUNG J:**

What they have to they – okay. If they have to, if they have the capacity to do so, if they in the end come to the conclusion they should.

**MR CARRUTHERS QC:**

The position, in my submission, is unsatisfactory and the evidence points to the fact that the transfer of these shares will result in an impairment for the Crown to perform to the fullest extent. At the moment the Crown has complete control of the SOE and can perform to the fullest extent. The moment that the shares are transferred the

Crown loses that ability. That is the impairment and that is why the protective mechanism should be put in place.

Well, on the issue of impairment and the ability in relation to, to water rights, the difficulty for the appellants is that there is a statement that the resource management review will somehow deal with this issue. And my learned friend was at pains to say that even now all of these consents are time bound and everything is, as he put it, "up for grabs". Well, with respect, that simply is not correct, and if I can just take you to the relevant provisions of the Resource Management Act on these consents.

**CHAMBERS J:**
I don't think it is correct either when put in that balanced way you've just put it Mr Carruthers, because the reality is the dams are going to continue to operate. It's extremely unlikely that the infrastructure is going to be closed unless we give up hydroelectric power. But the sole relevance of the resource consent regime and the fact that it's a term seems to me to be that it might make more easily implemented a new regime, say with royalties, which can come in over time, because you wouldn't be interfering with existing rights as soon as the current term of a resource consent ends. So that seems to me at the moment to be the only relevance of the time restriction. Because I think everybody accepts, don't they, that use of the dams is likely to continue in some form or other?

**MR CARRUTHERS QC:**
Well it's much more plain than that, with respect, your Honour. The statutory provisions make it clear as to the priority on consideration of an application. Although the, the whole point is those statutory provisions may not remain.

**ELIAS CJ:**
But is not the point that the Resource Management Act is concerned with management of the resource and the, some of the underlying claims are for proprietorship or possession of the resource, not just for its management?

**MR CARRUTHERS QC:**
Yes, your Honour, that is exactly the position.

**ELIAS CJ:**

And did not the Waitangi Tribunal actually in its nexus argument indicate that, I think its argument was that because the generating capacity is there and is going to continue and is an impediment, that is why participation in the generating capacity is an appropriate Treaty response. It's the fact that they can't get restitution unencumbered that makes the ownership of the generating capacity important.

**MR CARRUTHERS QC:**

Yes.

**ELIAS CJ:**

I think that's the way they put it.

**MR CARRUTHERS QC:**

Yes it is. That's so. That's exactly the way they put it.

**ELIAS CJ:**

I mean I'm not saying that that's right –

**MR CARRUTHERS QC:**

No.

**ELIAS CJ:**

– but that's the difference, it seems to me, between the Crown's position and the appellants' submissions, that the Crown is talking, essentially, controls and management, and the appellants are saying that that's not sufficient.

**MR CARRUTHERS QC:**

Yes. That's right. Going back to the Treaty right.

**WILLIAM YOUNG J:**

But then you do have a, as you were, a sledgehammer there, and that is the memorial claims to the assets.

**MR CARRUTHERS QC:**

I think that brings me to Lord Woolf's practical reality in relation to the way in which assets are treated. We do have a sledgehammer, yes. But...

**ELIAS CJ:**

There's – I noticed when you were just referring to the Waitangi Tribunal that they say the Crown gave information and that seven of the eight dams are subject to memorials. I don't know why the eighth doesn't have any, but...

**MR CARRUTHERS QC:**

I don't know either, really.

**ELIAS CJ:**

And that's really why I drew attention to the Crown memorandum acknowledging that – yes. That the water resource is integral to the use, which is obvious anyway.

**MR CARRUTHERS QC:**

Yes.

**ELIAS CJ:**

Sorry, I've cut across your response to Justice Chambers and it may be that it wasn't sufficiently answered.

**CHAMBERS J:**

No it was fine, thank you.

**MR CARRUTHERS QC:**

No, I think that I'm content with that from my point of view, your Honour.

Can I deal with three other issues quite quickly? The first concerns the commencement issue and the way in which that was developed in argument by my learned friend and particularly the exchange with Justice McGrath, and I'm referring to the considerations that were identified that may be taken into account in the decision to exercise the power to commence the legislation. And what – where that exchange led to was that it was to recognise a series of criteria that might be taken into account. Your Honour Justice McGrath said the price might not be acceptable to Government and it might stay as an SOE; that is, that the power would not be exercised because of a consideration about price. My learned friend then gave the example that if market conditions were to move adversely, that may be a consideration that the executive would look at and take into account as to whether

the power was to be exercised. Another example that my learned friend gave was if the electricity market changes that would make the sale imprudent.

Now, none of those considerations are listed, are anywhere in the statutory scheme, and they are read in, and in the way in which the exchange has gone this is because they are relevant to the executive's decision to bring in, the Act into force.

**ELIAS CJ:**
Well it's a bit more than that though, isn't it? I mean it's – part of the purpose of the Act is to obtain funding for all sorts of state endeavours, so obviously getting the largest amount of money is to the forefront.

**MR CARRUTHERS QC:**
Yes, but if one is reading in these practical considerations, why isn't the issue of consistency with the Treaty equally important? Because we're talking about practical considerations, financial considerations and what the executive, what the Crown responsibility is, is to ensure compliance with the Treaty principles. So surely the founding document is more important than the price you're going to get, where the market is, than any other consideration on whether the legislation ought to be brought into effect and –

**CHAMBERS J:**
Wouldn't that mean though that the executive was second-guessing the exercise that Parliament has presumably gone through and indeed, we know from the Cabinet manual that all legislation has to be tested in advance against Treaty principles. That doesn't mean Parliament gets it right but would you, for instance, envisage a full round of consultation by the executive after the Act had been passed but before deciding on a commencement date?

**ELIAS CJ:**
Well that was undertaken, wasn't it?

**MR CARRUTHERS QC:**
To answer your question –

**ELIAS CJ:**
No, no, it is actually a genuine question –

**MR CARRUTHERS QC:**

No, no, no – yes, I understand that –

**ELIAS CJ:**

– that one wonders –

**MR CARRUTHERS QC:**

– I wanted to deal with them in turn your Honour, that's all.

**ELIAS CJ:**

Yes.

**MR CARRUTHERS QC:**

The answer is well no, no, I wouldn't expect another round of consultation because the executive would have had the advantage of knowing what the legislative process was, so would have the advantage of seeing what was done up to that point. That presupposes that consultation had taken place and to answer your Honour the Chief Justice, yes, there was consultation and the detail of it, I probably don't need to turn to but –

**ELIAS CJ:**

Well I'm not asking you to comment on its adequacy or anything like that, it just – if the executive was required by the legislation to bring the legislation into effect as soon as practicalities concerning the timing, you know, the commercial dimensions were in place, it is a little curious that there would be consultation about Treaty compliance. In other words, they do seem to have accepted a responsibility to consider, in the timing of when they brought things into effect, whether there was a Treaty dimension which should be considered because why do that, why undertake that exercise?

**MR CARRUTHERS QC:**

Is your Honour asking me in relation to the consultation over the section 9 issue essentially because that's probably –

**ELIAS CJ:**

No, that's later, that's before the legislation is enacted. I'm talking about, really, the consultation on the shares plus.

**MR CARRUTHERS QC:**

Oh, I see.

**ELIAS CJ:**

Yes. I don't think it's necessarily a point adverse to your position.

**MR CARRUTHERS QC:**

No, no.

**ELIAS CJ:**

I just think it is curious if it's thought that it's comparable to the Queen, or the Governor-General signing legislation into effect, what the executive thought it was doing? It must have considered that it had some responsibility in exercising the timing obligation it had to work – and one can, yes.

**McGRATH J:**

Just for my part Mr Carruthers, that if the purpose of the 2012 amendment to the State-Owned Enterprises Act is, as I see it, to facilitate a sale by taking the Mighty River Power out of the State-Owned Enterprises Act, you can readily see that the purpose for which the power might not be exercised, is if Cabinet decides arrangements for the sale are not to proceed for the sort of reasons Mr Goddard was saying. Now, in this connection, the state-owned enterprises exercise in Parliament, I don't see how that means that, as well as that administrative consideration, the Treaty should be brought to bear in looking at the matter.

**MR CARRUTHERS QC:**

The issue though your Honour is at what point does the Crown exercise its obligation, that is the Crown's obligation, not the legislature's obligation but at what point does the Crown exercise its obligation to satisfy itself that its Treaty obligation has been fulfilled?

**CHAMBERS J:**

Well it's before the introduction of the Bill into the House pursuant to the Cabinet manual which requires, correct me if I'm wrong, which requires an analysis to be given as to whether or not the proposed Bill does comply with the Treaty.

**MR CARRUTHERS QC:**

Well that really overlooks the whole of the legislative process that may result in the Bill being in an entirely different form by the time it comes to get the assent and before it's brought into force. It could – well I suppose, the MOM Bill is an example of something that came out in a different form but otherwise – but legislation is introduced as a Bill, it can go to a select committee, it has a report, it can be changed, the legislation can look quite different by the time it comes to the end of the process. So you may well be in a position where there's a different inquiry required of the Crown by the time you get to a decision as to whether the legislation should be brought into force or not.

**McGRATH J:**

Mr Carruthers, I think if the question you were putting was along the lines of, if you don't take the Treaty into account when you're deciding whether or not to commence the State-Owned Enterprises Amendment Act, when do you take it into account? I would say you don't have to take it into account in deciding whether to commence legislation, you have to find something else in this pattern of statutory powers and arrangements which requires the Crown to take it into account and you've put up a fairly strong argument in that respect in relation to another statute.

**MR CARRUTHERS QC:**

Yes, yes, I'm very conscious that you and I have had this –

**McGRATH J:**

I don't think the rhetorical question is going to help though.

**MR CARRUTHERS QC:**

No.

**CHAMBERS J:**

Might the answer to the Chief Justice's question of you, be that where the obligation came, in this case to reconsider the legislation, not only to consider the commencement date but to reconsider the legislation before it was effectively implemented, came from the Crown's obligations to treat seriously reports of the Tribunal?

**MR CARRUTHERS QC:**

Yes, I accept that and if I can come back to Justice McGrath's proposition put to me. Your Honour, we'd already had that exchange about how the section 2 argument will not necessarily help Treaty jurisprudence for the future and I think I conceded that that was so but my submission was simply directed to the recognition by my learned friend for the Crown that there were considerations that would be taken into account on whether to introduce it and my submission was just directed to query whether those considerations were more important than the Treaty consideration. Now I'm content to leave the submission at that point because my argument is that there is a much stronger case that I have made in other parts of my argument, at least in my submission.

The next submission I want to make concerns the way in which my learned friend has narrowly tried to interpret the scope of section 9 and section 45Q by saying that Parliament turned its mind to the regime that it should protect Māori interests after the sale when section 9 had no further effect. Now that, the limited way in which he put his narrow argument about acts of the Crown is very much the argument that was run in *Lands* with respect to section 27 and, rightly, the Court in *Lands* said, "No, section 9 has a wide ranging and overriding effect." Now, my submission is that section 45Q is in exactly the same position. It's an overriding position and it applies to everything that the Crown does. It simply, in my submission, it's derisory to describe either section 9 or section 45Q as loose ends provisions. It is designed – section 45Q is designed to ensure that all acts of the Crown are consistent with the principles of the Treaty.

Now the next submission I want to make concerns the interpretation of section 22 of the SOE Act. My friend again tried to dismiss that as being a machinery provision just to identify the shareholders and to deal with a company law issue. That's certainly dealt with in subsection (1). But it doesn't – his argument just doesn't meet subsection (3) at all. And the question which arises in relation to subsection (3): is the right to sell, a right attaching to the shares? And plainly it is.

**ELIAS CJ:**

It's a funny use of – "rights attaching to shares" are normally, I would've thought, those that you get by virtue of being a holder of shares under the company constitution or under the Companies Act. It's hard to see that the, that the sale – it's another sitting on the branch and sawing it off thing, isn't it?

**MR CARRUTHERS QC:**

Oh, I haven't done that again, your Honour, have I?

**ELIAS CJ:**

No, no, no. But you didn't do it the first time because it was a sprouting branch, as Mr Goddard pointed out.

**MR CARRUTHERS QC:**

Well, in both of these submissions I've just made, first in relation to section 9 and section 45Q and in relation to 22(3) and the way in which the Crown's obligations arise, I'll just remind you of the two passages that I cited from Justice Cooke when I opened the appeal. The first was from *Lands* about the approach that ought to be adopted and the other was from, I think, *Broadcasting Assets*, but I gave your Honour the references. One is about the nature of the argument and how it ought not to be –

**ELIAS CJ:**

Quibbling.

**MR CARRUTHERS QC:**

– quibbling, and then the other expression from Lord Wilberforce that his Honour used. So my submission is that my learned friend's argument in this respect really does run foul or fall foul of those two dicta of Justice Cooke.

Your Honours, I've got one more matter to deal with but I just need to confer with my learned friends on that.

Your Honour Justice Young raised with me the sledgehammer that we had in relation to memorials but in relation to the Waikato claim area, that memorial isn't available and that is part of the Waikato raupatu claims settlement legislation. Under tab 13 at section 14 there's a removal of the resumptive memorials from land within the Waikato claim area, which, in the way it's put to me by those on my team that know more about it than me, would mean that we might've lost our sledgehammer.

**WILLIAM YOUNG J:**

Sorry, is this the 1995 Act?

**McGRATH J:**

Well the claims, having been settled, the resumptions there only for the purpose of protecting pending settlement, it goes.

**MR CARRUTHERS QC:**

Yes.

**McGRATH J:**

I can understand the concept.

**MR CARRUTHERS QC:**

Yes.

**McGRATH J:**

And you're saying it, and what you're saying is that that's what the legislation does?

**MR CARRUTHERS QC:**

Does. So what we have available to us is what remedy we get out of this litigation.

**McGRATH J:**

Yes.

**WILLIAM YOUNG J:**

So how many of the Mighty River dams does this cover?

**MR CARRUTHERS QC:**

Well there are eight dams, and as the Chief Justice observed, there somewhere in the materials there are seven memorials.

**ELIAS CJ:**

Well the Tribunal says that there are memorials over seven of the eight.

**MR CARRUTHERS QC:**

Yes.

**WILLIAM YOUNG J:**

But was that right in relation to this 1995 statute?

**ELIAS CJ:**

Depends on the boundary of the raupatu I guess.

**MR CARRUTHERS QC:**

Well I thought that was actually defined and I thought that...

**WILLIAM YOUNG J:**

The Waikato claim area.

**ELIAS CJ:**

It may be below – there's an indication of how the River is defined for some purposes and it's below Karapiro. The raupatu...

**MR CARRUTHERS QC:**

Yes.

**WILLIAM YOUNG J:**

The Waikato claim area is the defined area.

**MR CARRUTHERS QC:**

Yes.

**WILLIAM YOUNG J:**

But it's defined by reference to – in a way that's not that easy to follow.

**MR CARRUTHERS QC:**

Is your Honour looking at page 19 in the definition section?

**WILLIAM YOUNG J:**

Yes. Yes. The Waikato claim area.

**MR CARRUTHERS QC:**

There is another gloss on this. Somewhere there is a definition that identifies the area from – is it Lake Karapiro to the –

**ELIAS CJ:**

That's what I was referring to, Karapiro to the mouth.

**MR CARRUTHERS QC:**

Yes. To the mouth, yes.

**ELIAS CJ:**

Which may well be – that may well be the area of the raupatu because it was from, "Mount Pirongia, thence in a straight line the Firth of Thames" and other ample descriptions.

I don't think it need hold us up.

**MR CARRUTHERS QC:**

No.

**ELIAS CJ:**

I just wonder really, Mr Goddard, whether it's apparently a Crown memorandum that went into the Waitangi Tribunal identifying which of the – it may not be material at all, but...

**MR GODDARD QC:**

Shall I chase it down your Honour and provide a copy to the Court?

**ELIAS CJ:**

I think it might be useful to see. Show it to Mr Carruthers and –

**MR GODDARD QC:**

Yes, I'll do that.

**ELIAS CJ:**

– if you both agree it's irrelevant, don't give it to us.

**MR GODDARD QC:**

Subject to that very sensible caveat, I'll ask Crown Law to dig that out and consult with my learned friend and if it's at all helpful, we'll provide it by consent.

**MR CARRUTHERS QC:**

Let me backtrack on what I've done. I think that with that definition of the Waikato claim area, there wouldn't be a dam that would be affected by that, that's one –

**ELIAS CJ:**

Yes, Meremere, is it?

**MR CARRUTHERS QC:**

Yes. Well that's –

**ELIAS CJ:**

Which might be the eighth?

**MR CARRUTHERS QC:**

Yes. The other issue, if this legislation does affect any of the dams, then some care needs to be exercised because there are some of the Waikato tribes that are not part of the settlement and it wouldn't affect those, so they would be within the claim that we make.

Your Honours, there's one issue only that I want to draw attention to. The actual consents, the resource consents are in volume 6 of the case on appeal, under tab 106 and there are three consents that are relevant. One is for the dam, one is for the discharge from the dam and one is for the underwater damage caused by the existence of the dam. So there are three of them –

**ELIAS CJ:**

Is this the consent that was issued in 2006?

**MR CARRUTHERS QC:**

Yes, yes it is.

**ELIAS CJ:**

So what we don't have are the consents that Mighty River has in relation to geothermal, is that right?

**MR CARRUTHERS QC:**

That's –

**ELIAS CJ:**

Apart from these consents for the Waikato scheme, there's only some geothermal, isn't there because it doesn't have –

**MR CARRUTHERS QC:**

That's right –

**ELIAS CJ:**

– or it doesn't have Waikaremoana, that was what you said?

**MR CARRUTHERS QC:**

No, it doesn't, no.

**ELIAS CJ:**

Yes.

**MR CARRUTHERS QC:**

And just in the way in which the consents work, the entitlement – this is really under the regional plan and it's under variation 6 of the regional plan, is that those private holders of resource consents have their consents for their take that's regulated under the Resource Management Act by the issue of the resource consent and then the balance of the river flow is available to Mighty River Power, subject to some control of levels so –

**ELIAS CJ:**

You mean they can –

**MR CARRUTHERS QC:**

They take it all except those consent, those permit holders who take out of the river for other permitted purposes. So when directed to your Honour Justice Glazebrook, when my learned friend said well, it's only 1%, you immediately picked him up on that may well be a number but, in terms of quantity of water that is actually taken and used, it's a much more significant figure.

**ELIAS CJ:**

Well it's used but I suppose Mr Goddard's point was that some use rights permit you to consume and it doesn't go back into the river but one would have thought that the generation water rights largely did not affect the flow, is that – I don't know enough about –

**MR CARRUTHERS QC:**

No, I'm not – I know there is a scientific debate about some of that. The more relevant consideration for Māori is actually the damage that is done by the existence of the dams. For example, to just the state of the river, to the fishery, to issues of that kind but there's no need for me to deal with that, other than to just draw attention to the extent to which the water resource is used.

I'm being told that the evidence concerning damage is in Mr Minhinnick's affidavit in the evidence.

Unless your Honours have any questions of me, those are my submissions in reply.

**ELIAS CJ:**

Thank you Mr Carruthers. Thank you counsel. We'll reserve our decision.

**COURT ADJOURNS: 3.46 PM**