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Release of Submissions:
Consultation on the Waitangi Tribunal's
"Shares Plus" Proposal

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He tono nā

Ngāti Kahungunu Iwi
INCORPORATED

To the Hon Bill English, Deputy Prime Minister and Minister of Finance

And

Hon Christopher Finlayson, Attorney-General and Minister for Treaty of Waitangi Negotiations

On Shares Plus

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CONTENTS

INTRODUCTION

1 Ngāti Kahungunu have the second largest tribal rohe and third largest iwi population in Aotearoa.

2 In Stage One of Waitangi Tribunal's National Fresh Water and Geothermal Inquiry (**Wai 2358**), Crown expert witness, Lee Wilson stated that:[1]

> [w]ithout water, the power stations cannot operate and the shares in the MOM companies would have no value.

3 The Waitangi Tribunal found that Māori property rights and interests in freshwater were sufficiently linked to the shares in state owned power companies and that the nexus is formed not simply between shares and proprietary rights in water, but in "shares that give a significant element of control over the companies that use their waters, without paying."[2]

4 Ngāti Kahungunu agree with the Waitangi Tribunal's finding and as the mandated iwi organisation to act in the beneficial interests of **all** descendants of Kahungunu, Ngāti Kahungunu Iwi Incorporated have a constitutional duty and obligation to present our response to the Shares Plus consultation document.

EXECUTIVE SUMMARY

5 Freshwater is a taonga of the utmost significance to Ngāti Kahungunu, underpinning our local economy and providing the basis for our development. It is therefore incumbent on us to protect it.

6 The Shares Plus concept has been put forward as one means by which the rights and interests of hapū, iwi and Maori in freshwater can be protected; a means that will not be available following the proposed Initial Public Offering (**IPO**) of shares in current State owned hydro-power companies.

7 Ngāti Kahungunu express no representative view on the efficacy of the concept on its own, as it cannot be viewed in isolation from the complementary remedies that will be considered in Stage Two of the Wai 2358 inquiry. It is for this reason that the Tribunal

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[1] Lee Wilson, Crown expert witness, Energy Sector Consultant, Oral evidence, Wai 2358 inquiry, 16 July 2012, Draft Transcript at 893 – 894 and cited in the Waitangi Tribunal Interim Report on Freshwater at 152.

[2] Waitangi Tribunal Interim Report on Freshwater, Wai 2359, at 154.

recommended that a national hui be convened so that the Crown and Māori could determine an appropriate pathway forward in freshwater (and geothermal) resources.

8 Ngāti Kahungunu want to work directly with the Crown to achieve our mutual objectives in this area – in relation to industry development, job creation, and the environment.

9 We submit that mechanisms must be put in place to ensure that the rights and interests of Ngāti Kahungunu and other iwi and hapū in water are protected in the event the proposed IPOs commence, as set out below. But, equally importantly, the impetus around freshwater that has been generated by the asset sales programme must not be lost.

10 Ngāti Kahungunu therefore invite the Crown to come and talk with us, *kanohi ki te kanohi, pokohiwi ki te pokohiwi* and develop mutually beneficial pathways forward in freshwater, a taonga of national significance on the following agenda:

(a) Economic, environmental, social and cultural benefits from a strengthened Crown-Ngāti Kahungunu relationship including:

- **Enhanced relationships** between Ngāti Kahungunu and relevant Crown entities (including the Ministry of Business, Innovation and Employment, the Ministry of Science and Innovation, Department of Conservation and Local Authorities);
- **Potential joint ventures** between Ngāti Kahungunu and the Crown to undertake, and implement scientific, economic, environmental, social and cultural developments and research into waterways of significance;
- **Industry development** as a consequence of joint venture research into the best uses of the local environment; and
- **Job creation** as a consequence of industry development. This is particularly important in industries of significance in the Ngāti Kahungunu rohe including: horticulture, agriculture, seafood and food processing.

(b) Remedies that would protect Ngāti Kahungunu rights and interests in freshwater including:

- **Ngāti Kahungunu Water Authority** that would be recognised by the Crown as the responsible Treaty partner for water in the Ngāti Kahungunu rohe that could exercise aspects of ownership, including governance and management functions;

- **Commercial uses water levy** that could be introduced to commercial users of water; and
- **Water royalties scheme** that could provide a proportion of the profits of power-generation companies to be allocated to hapū and iwi.

11 Ngāti Kahungunu have investment capital, people capital and significant natural resources. Ngāti Kahungunu also have high unemployment issues and increasing negative socio-economic statistics. Freshwater underpins the local economy and is a precious resource. Ngāti Kahungunu invite the Government to directly engage with us to construct effective and mutually beneficial pathways forward.

NGĀTI KAHUNGUNU IN CONTEXT

12 Ngāti Kahungunu has the third largest iwi population (55,946 at 2006 census) and the second largest tribal rohe (area) of all iwi in New Zealand. Ngāti Kahungunu Iwi Incorporated is an incorporated society, and was incorporated under the Incorporated Societies Act 1908 on 19 December 1988. Ngāti Kahungunu Iwi Incorporated has a constitutional duty to act in the beneficial interests of all the descendants of Ngāti Kahungunu.

13 Ngāti Kahungunu Iwi Incorporated has an obligation to ngā hapū o Ngāti Kahungunu to act to promote, protect and assert the mana, rangatiratanga and kaitakitanga of ngā hapū o Ngāti Kahungunu to freshwater.

14 Ngāti Kahungunu:

(a) Submit that our rangatiratanga over our water bodies has never been relinquished and that the assumption by the Crown of exclusive rights of control, without the consent of Ngāti Kahungunu, constitutes a breach of the Treaty of Waitangi;

(b) Seek direct engagement with the Crown and to establish a working group, comprised of representatives from ngā hapū o Ngāti Kahungunu and Crown officials, to determine a way forward that protects and promotes the freshwater resource within the Ngāti Kahungunu rohe; and

(c) Submit that for the Crown to proceed with the intended IPO, without providing mechanisms to protect the full range of remedial options available to the Crown, would be a failure to actively protect Ngāti Kahungunu interests and in breach of the Treaty.

Ngāti Kahungunu and freshwater

15 Ngāti Kahungunu have never relinquished ownership over our water bodies. In 1992, the Waitangi Tribunal made specific findings that the rangatiratanga over the Mohaka River has never been relinquished and that the assumption by the Crown of exclusive rights of control, without the consent of Ngāti Pāhauwera, a hapū of Ngāti Kahungunu, constitutes a Treaty breach.[3]

16 These findings are equally applicable to all water bodies within the Ngāti Kahungunu rohe - Ngāti Kahungunu have never relinquished mana, rangatiratanga or kaitiakitanga over Ngā wai a te ao Māori, a Ngāti Kahungunu (all of the waterbodies within the Ngāti Kahungunu rohe).

17 Ngā wai a te ao Māori, a Ngāti Kahungunu is a Ngāti Kahungunu framework for understanding our relationship with Ngā wai a te ao Māori, a Ngāti Kahungunu. Ngāti Kahungunu has an obligation to protect, promote and assert the key elements of Ngā wai a te ao Māori, a Ngāti Kahungunu for ngā hapū o Ngāti Kahungunu to freshwater. Ngā wai a te ao Māori, a Ngāti Kahungunu has five key elements:

(a) Atuatanga – Mana Atua;

(b) Kaitiakitanga – Mana kaitiaki;

(c) Rangatiratanga – Mana Tangata;

(d) Manaakitanga – Mana whenua; and

(e) Pūkenga.

18 Ngāti Kahungunu have numerous water bodies of significance in the rohe. Included in these are:

- Two aquifers: Te Haukūnui o Heretaunga and Ruataniwha; and
- Six rivers and streams: Mohaka, Wairoa, Ngāruroro, Tukituki, Manawatu, Ruamahanga;

19 Shea Pita and Associates and Sapere Research Group have conducted an economic analysis of the water bodies noted above in Ngāti Kahungunu.[4] Their report finds that a

[3] Wai 119 *The Mohaka River Report* 1992 at 5.5.3.

[4] Preston Davies, Morris Pita, Kieran Murray (2012) *Economic Value of Selected Water Bodies*, prepared by Shea Pita & Associates and Sapere Research Group for Ngāti Kahungunu Iwi Incorporated, 25 September 2012.

conservative estimate of the economic value of the eight water bodies to the regional economy is **$311 million** per annum. Te Haukūnui o Heretaunga (the Heretaunga aquifer) is the primary contributor to this value at an estimated total value of **$137 million** per annum.

20 Ngāti Kahungunu are in a unique position with regards to this Shares Plus consultation. In contrast to other hapū and iwi, Ngāti Kahungunu have rights and interests in waterbodies that are utilised by Mighty River Power Limited and Genesis Energy Limited. In addition, Ngāti Kahungunu have a potential interest in water bodies that may be utilised by Meridian Energy Limited. These three companies are each scheduled to be the subject of an Initial Public Offering (**IPO**) in 2013.

21 Ngāti Kahungunu have engaged in the Iwi Leaders Forum and have endorsed the working brief of the Freshwater Iwi Leaders Group to engage with the Crown on freshwater issues. In 2009, the Prime Minister made a commitment to engage with the Freshwater Iwi Leaders Group on the proprietary interests of Māori to freshwater. To date, this commitment is yet to be fulfilled and public comments indicate that the Crown does not recognise any such interests.

22 Ngāti Kahungunu are now dismayed that the Government proposes to implement the partial privatisation of state owned hydro-power companies prior to engaging and implementing a regime that addresses the concerns of hapū, iwi and Māori to the freshwater resource.

23 Ngāti Kahungunu are further disappointed that the Crown may proceed with the proposed IPO in March 2013, despite the fact that the Waitangi Tribunal is mid-way through an inquiry process into the nature and extent of the remedial options available to the Crown, hapū and iwi.

SHARES PLUS: CROWN TOPICS FOR SUBMISSIONS

24 The Crown has sought submissions on Shares Plus, and in particular, the Crown has sought specific submissions on:

- The rights recognition and redress outcomes that Shares Plus might deliver;
- The capacity of the Crown to replicate by other means, post-IPO, the rights recognition and redress that Shares Plus can provide;

- The capacity of the Crown to provide, post-IPO, more effective and more direct mechanisms for providing Maori with voice in relation to water;
- The reasons for and against Shares Plus; and
- If we consider the Government should proceed with Shares Plus:
    - What specific rights and powers in relation to the MOMs can be delivered by this mechanism; and
    - Why we consider that this approach is preferable to other options.

25 Ngāti Kahungunu have answered the relevant Crown inquiries in the substance of this submission, and more specifically under the following sub-headings.

Rights recognition that Shares Plus might deliver and Crown capacity post-IPO

26 The Crown has identified four types of rights or redress that could be delivered by Shares Plus:[5]

- Financial entitlements (e.g. a guaranteed dividend every year);
- Power to appoint some of the company directors;
- Enhanced voting rights on shareholder decisions (e.g. approving major transactions); and
- Decision rights over the operations of the company (e.g. in relation to the company's use of water).

27 Ngāti Kahungunu agree that these are the primary entitlements that Shares Plus could provide, although it will be necessary to consider Shares Plus in conjunction with other remedies to determine a true position on the viability of Shares Plus.

28 Ngāti Kahungunu submit that there are a range of remedies that the Crown could implement, alongside Shares Plus, to recognise the residual property rights of Ngāti Kahungunu, and Māori more generally, to freshwater. These include:

- A Kahungunu Water Authority – a Ngāti Kahungunu specific remedy;
- A commercial uses water levy; and
- A water royalties regime.

[5] Treasury, Power Points presentation, delivered at the Iwi Leaders Forum 14 September 2012.

29 Ngāti Kahungunu believes that these remedies should be considered in conjunction with Shares Plus, before any IPO takes place – after which they will become significantly more difficult to implement.

30 Ngāti Kahungunu submit that the Government must adhere to the Waitangi Tribunal's recommendation and clearly set out how the Crown will preserve its ability to introduce a further remedy at a later date (post an IPO) if the Crown intends to continue with the IPO.

KiWA – Kahungunu Water Authority

31 Ngāti Kahungunu propose that the Crown recognise Ngāti Kahungunu property rights and interests in water ways within our rohe by the establishment of a Ngāti Kahungunu Water Authority (**KiWA**).

32 KiWA would be distinct from the Hawke's Bay Regional Planning Committee (**HBR Planning Committee**), although the functions of this committee could be subsumed within the functions of the Water Authority. KiWA is distinguishable from the HBR Planning Committee because the remedies that Ngāti Kahungunu seek are outside the parameters of the Office of Treaty Settlements (**OTS**) and the Land and Water Forum (**LAWF**) frameworks and terms of reference.

33 OTS is not mandated to recognise Māori ownership interests in freshwater. The co-governance and co-management bodies that can be established under the OTS frameworks are limited in application and do not go far enough to adequately provide the remedies that Ngāti Kahungunu seek. The HBR Planning Committee is a consequence of the OTS processes and structure.

34 KiWA would be recognised by the Crown as the responsible Treaty partner for water in the Ngāti Kahungunu rohe that could exercise aspects of ownership, including governance and management functions.

35 The Crown would recognise that Ngāti Kahungunu:

- Have proprietary rights and interests in freshwater; and
- Have a relationship of reciprocity to water embodied in duties of kaitiakitanga; and
- Have never relinquished our mana and rangatiratanga to freshwater within the Ngāti Kahungunu rohe.

36 The principles of KiWA would include that:

- Water is an Atua and a taonga to be protected for future generations;
- Ngāti Kahungunu will act as a responsible owner and Treaty partner, recognise the governing role of the Treaty Partner and endeavour to act in the interests of the greater public.

37 KiWA would be comprised of:

- Hapū representatives;
- Crown representatives; and
- Local authority representatives from Hawkes Bay Regional Council, Horizons Regional Council and Greater Wellington Regional Council.

38 The purposes of KiWA would be:

- To develop the vision, policies and strategies for the water bodies in the Ngāti Kahungunu rohe;
- To recognise the full range of social, environmental, economic, spiritual and cultural relationships that Ngāti Kahungunu and all New Zealanders have to the water ways within the Ngāti Kahungunu rohe;
- To advise local authorities on their regional plans as they impact water;
- To administer a fund for the restoration of the waterways within the Ngāti Kahungunu rohe;
- To promote the objectives of kaitiakitanga and ensure the objective of sustainable resources for future generations is protected and promoted;
- To monitor compliance of local authorities and commercial water users with the principles and objectives of the Water Authority;
- To report to hapū, local authorities and the Crown on the overall objectives of the Water Authority ;
- To receive commercial use water levies, water royalties, and other charges imposed on water use consents; and
- To employ any income generated from water use allocations to various purposes including waterway restoration.

39 KiWA would engage in joint agreements for the management, allocation, use, protection or any other purposes with relevant bodies that have a sufficient interest in the water resources within Ngāti Kahungunu including, but not limited to:

- Local Authorities;
- Environmental Protection Authority;
- Ministry for the Environment;
- Department of Conservation; and
- Key industry and commercial users within the region.

Commercial Use Water Levies

40 Ngāti Kahungunu endorses a water levy being introduced to commercial users of water on the proviso that Ngāti Kahungunu proprietary interests are adequately catered for in any water levies model. Ngāti Kahungunu would expect, as a Treaty partner, to be engaged in the development, implementation and enforcement of any form of commercial use water levy that would be developed.

41 A commercial use water levy would require new legislation to impose a levy on the commercial use of water. Commercial operators would be required to pay for their water consents. These water permits could be recognised as a tradable commodity. Payments for water permits through a process of tendering, auction, or regular retendering have been proposed by the Land and Water Forum; an option that would:[6]

> [e]stablish a payment and value for water, recognising its relative scarcity and the extent to which different users might be prepared to pay for it... It might be a significant source of revenue and would provide clear signals for technical and allocative efficiency.

42 If this form of remedy were to be introduced, the Crown must introduce a protective mechanism prior to an IPO. The imposition of a commercial levy on water permits would affect the value of share prices. Prospective shareholders are entitled to be informed if there are impending policy plans to introduce a value to water as this would impact the value of returns to the Shareholder. If the Crown was to consider this remedy, in good

[6] Land and Water Forum (2010) *Report of the Land and Water Forum: A Fresh Start for Fresh Water* at 36.

faith, the Crown must place protective measures around it to ensure that it is safeguarded and signalled at the outset, prior to an IPO.

Water Royalties

43 Ngāti Kahungunu also endorses a water royalty scheme being introduced to commercial users of water. Again, Ngāti Kahungunu would expect, as a Treaty partner, to be engaged in the development, implementation and enforcement of any form of a royalty scheme that would be developed.

44 A royalty based scheme would provide a proportion of the profits of power-generation companies to be allocated to Māori. The Resource Management Act 1991 (RMA) already authorises the Government to require royalty payments in respect of geothermal energy (refer to sections 112(2), 360(1)(c) RMA). These powers have never been used, although draft regulations have been prepared.

45 As above, if this form of remedy were to be introduced, the Crown must introduce a protective mechanism prior to an IPO as the imposition of a royalty based allocation will affect the net revenue of the MOM company, which in turn will impact the shareholders projected investment returns.

Recommendations

- The Crown engage in a direct dialogue with Ngāti Kahungunu to establish KiWA prior to December 2012.
- The Crown engage in urgent direct dialogues with hapū and iwi, at a nationally convened hui (to include those hapū and iwi that have not concluded settlement negotiations with the Crown), to determine a pathway forward on any pan-iwi remedies, including commercial use water levies. The hui will:
    - Enable the Treaty partners to put in place protective mechanisms for Ngāti Kahungunu and other hapū and iwi rights and interests in freshwater;
    - Enable the Treaty partners to set out a time schedule that would enable the Crown to pursue its fiscal policy objectives; and
    - Ensure the Crown does not proceed with any IPO in a current state owned hydro-power company until Stage Two of Wai 2358 has been heard and reported on unless a national hui is convened to establish set timeframes,

protective mechanisms and terms of reference for an agreed pathway forward.

Shares Plus: Most effective and efficient mechanisms for providing Māori with voice in relation to relevant resources

46 Shares Plus is the provision of shares or special classes of shares which, in conjunction with amended company constitutions and shareholders' agreement, may provide Māori with a meaningful form of commercial rights recognition in the MOM hydro-power companies.

Shares Plus: Implications

47 Shares Plus potentially provides a remedy that can partially recognise Māori residual property rights in freshwater prior to an IPO, particularly in combination with a water royalties scheme, a commercial water use levy and KiWA.

48 However, Shares Plus is an untested, and therefore unpredictable remedy. In the absence of further information, Ngāti Kahungunu cannot properly undertake a comprehensive risk analysis.

Shares Plus: Further considerations

49 Ngāti Kahungunu are concerned that the IPO will proceed without any protective mechanisms for Ngāti Kahungunu rights and interests, and hapū and iwi more generally, being established and introduced prior to the IPO.

50 In 1988, the Treaty of Waitangi (State Enterprises) Act 1988 was enacted to protect "existing and likely future claims before the Waitangi Tribunal relating to the land presently in Crown ownership". This Act was a direct consequence of proceedings filed in the High Court that the proposed transfer of state owned lands, subject to claim before the Waitangi Tribunal, was a breach of section 9 of the State Owned Enterprises Act 1986 and the principles of the Treaty of Waitangi.

51 There is clear precedent that where a natural resource is in the Crown's control, and is to be transferred to a non-Treaty partner, Parliament will intervene to uphold the principles of the Treaty of Waitangi.

52 Ngāti Kahungunu submit that there is legislative scope to impose a protective mechanism for water that SOE companies utilise for commercial revenue to be imposed

prior to the introduction of the MOM policy. Ngāti Kahungunu would be happy to work with the Crown to devise such a mechanism.

53 Ngāti Kahungunu express further concerns that hapū and iwi that are yet to settle their historic grievances will be disadvantaged by the restrictions that will be placed on the the entitlements the Crown has identified.

Shares Plus: Specific Rights and Power in relation to the MOM companies

54 Ngāti Kahungunu acknowledges the Waitangi Tribunal's findings that Shares Plus provides a tangible form of rights recognition that potentially could not be achieved through any other means.

Appointment of Directors

55 The Crown states that an entitlement of Shares Plus would be the ability to appoint one or more directors to the MOM company. The Crown states that this entitlement could otherwise be provided by the Crown, as the majority shareholder, after an IPO. The Crown goes on to note:

> [c]ompany law principles would place significant limits on the extent to which the power to appoint one or more directors could operate as a meaningful form of rights recognition or redress. A director appointed by Māori interests would be required to act in the best interests of the company, not in the interests of their appointor or to protect the relevant resource.

56 This logic is flawed as currently Mighty River Power Limited, Genesis Energy Limited and Meridian Energy Limited each have Directors that are appointed to represent particular iwi interests.

57 The Crown's proposition further assumes that:

(a) hapū and iwi interests will diverge from the company interests; and

(b) that the protection of the natural resource (water), could be in conflict with hydro-power company's interests.

79 The presumption that hapū and iwi interests could diverge from the company interests is an unsupported proposition. Ngāti Kahungunu understand from the Deputy Prime Minister's statements at the Tūai consultation hui that date there have been no conflicts of interests between the iwi directors on the SOE companies and the direction of these companies.

80 Further, the presumption that the protection of water, and the water bodies, could be in conflict with the hydro-power company's interest is also problematic. The hydro-power water companies are dependent on the water resource for revenue, and therefore any mechanisms to protect and preserve the water resource will be in the best interests of the company.

81 By creating a pathway for representation at a Director's level, Shares Plus is a potential partial and tangible remedy that Ngāti Kahungunu wish to be preserved until all remedial avenues have been explored.

82 However, Ngāti Kahungunu observe that hapū and iwi that are yet to settle will be further disadvantaged by the partial privatisation of these SOE companies. Any additional hapū and iwi, yet to go through the settlement processes, are not going to be able to access Directorship positions in the same way that the iwi organisations that have been in the 'post-settlement era' for the longest periods of time have had the opportunity to, while these companies are SOE companies.

Financial Entitlements

83 The Crown submits that financial entitlements through enhanced rights to dividends and/or distribution of capital could be made by way of an allocation of shares or through a contract with relevant iwi interests for the distribution of a proportion of the profit (royalties).

84 Ngāti Kahungunu submit that this form of entitlement is likely to require amendments to the company constitution, or constitute a major transaction. Once the companies become MOMs, the Crown's ability to guarantee that the same form of financial entitlements will be available is undermined.

85 The Crown's ability to impose a rights recognitions framework that recognises financial entitlements will be politically inhibited.

86 Ngāti Kahungunu express our deep concern that Crown's statements of the proposed to ensure that financial entitlements will remain is significantly hindered by the MOM policy.

Additional voting rights on shareholder decisions

87 The Crown submits that it has the ability to provide additional voting rights on shareholder decisions to hapū and iwi as a majority shareholder in the MOM companies;

and, as majority shareholder, the Crown could enter into agreements that would enable the Crown to make provision for these types of arrangements.

88 As submitted above, it is important to note that the power of a majority shareholder will depend on the company's constitution. The Crown's ability to allocate shares or provide additional voting rights on shareholders decisions will likely require amendments to the company constitution. Section 106 of the Companies Act requires that any amendments to the company constitution will require a 75 per cent majority. As a consequence, these amendments will not be easily achieved.

89 Ngāti Kahungunu do not dispute that this is possible post an IPO. However, Ngāti Kahungunu express concern about whether this form of financial redress is **probable**.

Shares Plus: the preferable option

90 Ngāti Kahungunu are unable to express an informed opinion as to whether or not Shares Plus is the preferred form of redress for Ngāti Kahungunu as there is simply inadequate information, and too many unknowns.

91 Ngāti Kahungunu welcome stage two of Wai 2358 to provide a full examination of the Shares Plus concept, and other remedial proposals.

CONCERNS WITH PROCESS

92 The Treaty provides for a partnership between the Crown and Māori that requires each to act reasonably and in good faith. Cooke P found that the "good faith owed to each other by the parties to the Treaty must extend to consultation on truly major issues."[7]

93 In order for "consultation" to be meaningful, it requires that there must be sufficient information available to the parties to enable them to be adequately informed so as to be able to make intelligent and useful responses.[8]

94 Stage two of the Waitangi Tribunal inquiry will provide the requisite robust examination of the Shares Plus remedy, in addition to, and alongside other proposed remedial options.

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[7] *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142 (CA) at 152.

[8] *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 (CA) at 676.

95 Until stage two of Wai 2358 has been completed and reported on, Ngāti Kahungunu consider that the Crown has failed, in the course of these consultation rounds, to act as a responsible Treaty partner and in good faith on three grounds:

(a) The consultation process is premised on a pre-determined outcome;

(b) The consultation timeframes have been insufficient and do not allow the Crown to take relevant considerations into account; and

(c) The scope of the consultation is inadequate.

Pre-determination

96 On 3 September 2012 the Prime Minister stated that "no one owns the water" and that Shares Plus "should not be progressed". The Prime Minister released a press release entitled "Mighty River Power IPO to go ahead early next year" and announced that:

> The Government will proceed with an initial public offering of up to 49 per cent of Mighty River Power in the period of March to June 2013.

97 The Government "decided to undertake a short period of consultation with iwi on the 'shares plus' concept raised in the Waitangi Tribunal's interim report."

98 The Prime Minister provided five reasons why the Government opposed Shares Plus as a tenable concept:

- It is not in the national interest for any group within Mighty River Power's potential 49 per cent minority shareholding to be given such rights.
- Almost every form of redress to Māori that could be covered by 'shares plus' can be achieved in other ways.
- The remaining elements of 'shares plus' in relation to decision rights over management or strategic decisions would not be able to work in practice. To take one example, if some Māori shareholders had the ability to make decisions on strategic issues, under well-established law, those shareholders must act in the interests of the whole company and not simply as a representative of Māori.
- If the 'shares plus' concept existed it was likely to make the company less attractive to investors, which could be reflected in a lower sale price and therefore be to the detriment of taxpayers.

- Following consultation with iwi earlier this year, a careful and deliberate decision was made to ensure that the Crown's obligations under the Treaty continue to rest with the Crown, not with the companies.

99 These statements were made despite the fact that the freshwater resource that the MOM companies would depend on for revenue are the subject of a current inquiry in the Waitangi Tribunal - in which the Tribunal has already made specific findings that Māori do have residual proprietary rights in water.

100 Ngāti Kahungunu believe the statements set out above indicate an unequivocal position by the Government that:

- Māori do not own water;
- Māori do not have ownership interests in water;
- Māori do not have residual property rights in water;
- Māori holding Shares Plus rights in a MOM company would be contrary to the 'national interest'; and Māori shareholders and/or Directors of a MOM company would not be able to fulfil their duties and obligations under well-established company law principles to act in the best interests of the whole company.

101 Ngāti Kahungunu submits that these statements indicate that the Government has engaged in the consultation process with a pre-determined view that Shares Plus is an untenable option.

Timeframes and Relevant Considerations

102 Ngāti Kahungunu received notification that we would be consulted on the Shares Plus concept on 10 September 2012. This consultation hui with Ngāti Kahungunu occurred on 27 September 2012. Written submissions on the Shares Plus consultation were to be received 5 October 2012.

103 Ngāti Kahungunu are dismayed that there has been insufficient time to conduct a full and robust examination into the implications of the Shares Plus concept within the Ngāti Kahungunu rohe.

104 Stage Two of the Wai 2358 hearing will consider the nature and extent of any residual rights of hapū and iwi to freshwater. This will be the substantive inquiry into the nature and extent of the rights Māori have to freshwater. In addition, the Waitangi Tribunal will

consider a national framework for how Māori rights and interests in freshwater can be reconciled with the legitimate rights and interests of others.

105 Ngāti Kahungunu submit that the Government cannot act in conformity with the Treaty of Waitangi or its principles without taking into account any relevant recommendations and that Stage Two of Wai 2358 is directly relevant to the Government's MOM policy.

106 The key inquiries for Stage Two of the Waitangi Tribunal inquiry are:[9]

- Where the Tribunal has found in stage one that Māori rights and interests in freshwater or geothermal resources were guaranteed and protected by the Treaty, are these rights and interests adequately recognised and provided for today? If not, why not?
- In particular, is the current situation an on-going or continuing consequence of past Treaty breaches that have already been identified in Waitangi Tribunal findings in relation to water resources, geothermal resources, or other natural resources (including Crown acquisitions of land in breach of the Treaty)?
- In particular, has the Crown asserted rights amounting to de facto or de jure ownership of water and/or geothermal resources? What is the basis of any such assertion, and is it consistent with Treaty principles?
- If, having considered issues (e) and (f), we find there is a failure to recognise fully the rights and interests identified in issue (a) in stage one of this inquiry, is it causing continuing prejudice to Māori in relation to matters to which the Fresh Start for Fresh Water and/or geothermal resource reforms relate but which those reforms fail to address? If so, is this failure to address such issues itself a breach of principles of the Treaty of Waitangi?
- Alternatively, could implementation of the Government's proposals under the Fresh Start for Fresh Water and/or geothermal resource reforms, without ascertaining and providing appropriate recognition of the rights and interests identified in issue (a) in stage one of this inquiry, cause prejudice to Māori in breach of principles of the Treaty of Waitangi?

[9] Wai 2358, Memorandum-Directions of the Waitangi Tribunal, 30 July 2012.

- If either of these breaches and/or other breaches have been established, what recommendations should be made to protect such rights and interests from such prejudice either by:
    - Taking steps to fully recognise those rights and interests prior to the design or implementation of the reforms; or
    - Reworking the reforms so that the reforms themselves take cognisance of, and protect, those rights and interests in such a manner that they are reconciled with other legitimate interests in a fair, practicable, and Treaty-compliant manner.

107 Ngāti Kahungunu submit that the Shares Plus consultation is inadequate for hapū and iwi to make determinative submissions on the efficacy of the concept in the absence of the substantive inquiry of Stage Two.

Scope of the consultation

108 The Waitangi Tribunal found that the "the Crown will be in breach of Treaty principles if it proceeds to sell shares without first providing Māori with a remedy or rights recognition, or at least preserving its ability to do so."[10]

109 Ngāti Kahungunu considers the scope of this consultation to be inadequate. The current 'shares plus' consultation process is the only form of consultation the Government have indicated that they intend to have with Ngāti Kahungunu on our current concerns to freshwater, including proprietary rights and interests in freshwater prior to the impending IPO.

110 Ngāti Kahungunu consider that the Government's consultation would have been in good faith if the Government had of followed the Waitangi Tribunal's recommendation to convene "a national hui, in conjunction with iwi leaders, the New Zealand Maori Council, and the parties who asserted as interest in this claim, to determine a way forward".[11] The Crown would then have been able to assess all of the remedial options, as opposed to the Shares Plus remedy in isolation.

[10] Chief Judge Wilson Isaac, Letter to the Prime Minister and Ministers Sharples, Finlayson, English, Ryall and Adams re: Waitangi Tribunal Interim Report on the National Freshwater and Geothermal Resources claim, 24 August 2012.

[11] Ibid.

111 Ngāti Kahungunu submit that the Government's failure to engage in robust consultation undermines the principle of good faith.

CONCLUSION

112 We invite the Government to sit and talk with us, *kanohi ki te kanohi, pokohiwi ki te pokohiwi*. Freshwater is a fundamental taonga, critical to our identity, and comprises the backbone of the economy within the Ngāti Kahungunu rohe.

113 For these reasons, Ngāti Kahungunu want to engage in direct dialogue with the Crown as a responsible Treaty partner, outside of this Shares Plus proposal, and outside of any legal or other environments to discuss constructive pathways forward for the Crown and Ngāti Kahungunu in freshwater.

Nā māua,

Ngahiwi Tomoana
Tumuaki/Chairman
Ngāti Kahungunu Iwi Incorporated

Meka Whaitiri
Kaiwhakahaere Matua/Chief Executive
Ngāti Kahungunu Iwi Incorporated