

IN THE WAITANGI TRIBUNAL

Wai 2358

CONCERNING

the Treaty of Waitangi Act 1975

AND

the National Fresh Water and
Geothermal Resources Inquiry

**MEMORANDUM-DIRECTIONS OF THE PRESIDING OFFICER REGARDING
JURISDICTIONAL ISSUES**

15 December 2021

Introduction

1. This memorandum-directions addresses whether it is possible to hold hearings and report on the proposed issue questions prior to the introduction of the Natural and Built Environments Bill (the NBE Bill), and how the inquiry could be framed and conducted so as to enable that to occur.
2. The Crown has submitted that the principles of parliamentary privilege and comity prevent the Tribunal inquiring into the current law in respect of geothermal resources and its consistency with the principles of the Treaty of Waitangi, and making recommendations relating to the NBE Bill. The Crown has suggested the safest course is for the Tribunal to defer its inquiry until enactment of the reforms proposed in the Bill (Wai 2358, #3.2.394).
3. The Crown's submissions are opposed by the claimants and interested parties.
4. This memorandum-directions addresses the Tribunal's jurisdiction in relation to the issues raised by the Crown.

Background

5. The background to this issue is outlined in my memorandum-directions dated 24 June 2021 (Wai 2358, #2.6.76) and is briefly summarised below.
6. In May 2021, counsel for the Crown, Liesle Theron and Tessa Didsbury, advised the Tribunal that the Government had decided to reform the resource management system in this parliamentary term, and that this reform will be based on the 'New Directions for Resource Management in New Zealand' report (the Randerson report) (Wai 2358, #3.2.392).
7. The Randerson report recommends that the Resource Management Act 1991 (RMA) be repealed and replaced by three new pieces of legislation, one of which is the Natural and Built Environments Act (NBE Act), to provide for land use and environmental regulation.
8. In order to pass the above legislation in the current parliamentary term, Cabinet agreed to use a special process for the NBE Act by developing an exposure draft by May 2021 for consideration by a select committee inquiry. A Bill was intended to be formally introduced into Parliament in late 2021 and passed by late 2022.
9. The Crown notes that the NBE exposure draft will only comprise part of the NBE Bill. It will be focused on the purpose and principles of the NBE Act, including the Te Tiriti o Waitangi clause and the provisions for national direction and plans. The Crown also advised that it was working towards 'the end of June' for decisions referring the exposure draft to the select committee and that the full Bill is not expected to be introduced until 2022.
10. The Crown suggested two options for how the inquiry could proceed from this point, being:
 - Adjourning the inquiry until the RMA reform package has been developed; or
 - Focussing on the first issue question identified by the Tribunal: 'is the current law in respect of geothermal resources consistent with the principles of the Treaty of Waitangi'.

11. In memorandum-directions dated 24 June 2021, I outlined that the Tribunal does not intend to adjourn stage 3 of this inquiry and suggested the following amended issue questions for the stage 3 inquiry (Wai 2358, #2.6.76):
- Issue question 1: What Māori rights and interests in geothermal resources are guaranteed and protected by the Treaty of Waitangi?
 - Issue question 2: Is the current law in respect of geothermal resources consistent with the principles of the Treaty of Waitangi?
 - Issue question 3: If the current law in respect of geothermal resources is not consistent with Treaty principles, what recommendations should be made for the reform of the Resource Management Act 1991? What other recommendations (if any) should be made?
12. I noted the proposed issue questions will not focus on the details of the Crown's proposed reforms, but would take into account the Crown's exposure Bill, other Crown documentation and evidence in respect of the RMA reforms, Iwi Leaders Group evidence in respect of the reforms, and any other evidence about the reforms, in determining what recommendations should be made for reforms to the RMA in Treaty terms.
13. I directed counsel for the Crown, claimants and interested parties to file submissions on a number of issues including whether it would be possible to hold hearings into and report on those issue questions prior to the introduction of the NBE Bill, and how the inquiry could be framed and conducted so as to enable that to occur, by 23 July 2021 (Wai 2358, #2.6.76).
14. Submissions were received from parties on 23 July 2021. In its submissions, the Crown raised certain jurisdictional issues and proposed that the Tribunal defer its stage 3 inquiry until after the resource management reforms were completed.
15. Whilst some parties responded to the Crown's submissions on this jurisdictional issue following their receipt, I noted that all parties needed to be provided with the opportunity to obtain instructions and file submissions in response. In memorandum-directions dated 5 August 2021 (Wai 2358, #2.6.78), I directed any further submissions in response were to be filed by Wednesday 25 August 2021.

Crown submissions

16. The Crown filed its memorandum raising the jurisdictional issue on 23 July 2021 (Wai 2358, #3.2.394).
17. Counsel for the Crown submitted that the principles of comity and parliamentary privilege mean that while reforms to the resource management framework are being considered by the Crown, in particular through the exposure draft of the NBE Bill, this Tribunal cannot continue its inquiry into the geothermal issues raised by the claimants. The Crown's position is that while "the Tribunal will be able to examine the Treaty-consistency of any legislation that Parliament chooses to enact following the resource management reform... the principles of comity and parliamentary privilege prevent the Tribunal inquiring into the current law in respect of geothermal resources and its consistency with the principles of the Treaty of Waitangi, and making recommendations for the purposes of the NBE Bill".
18. The Crown submitted that under the principle of comity the legislative and judicial branches of government must be "astute to respect the sphere of action and the privileges of the other". Comity prevents conflict between branches of government by ensuring the

legislature and the courts do not intrude on each other's spheres, ensuring "mutual respect and restraint". The Crown submitted that this principle has been affirmed by Parliament in s 4 of the Parliamentary Privilege Act 2014, and is reflected in s 6(6) of the Treaty of Waitangi Act 1975 (Act), which precludes the Tribunal from inquiring into any Bill introduced to the House of Representatives unless the Bill has been referred to the Tribunal under s 8 of the Act.

19. The Crown outlined that parliamentary privilege is "a particular manifestation of the broader principle of comity" and is a fundamental constitutional principle. Counsel refers to the definition of parliamentary privilege in art 9 of the Bill of Rights 1688, which states that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament".
20. The Crown submitted that the principle of parliamentary privilege is designed to remove any impediments to, or restraints on, the legislature's function and "may override other generally accepted legal rights in certain circumstances".
21. Counsel further submitted that the Parliamentary Privilege Act has recently clarified the common law position in relation to parliamentary privilege in New Zealand, including defining the meaning of 'parliamentary proceedings' and 'impeaching or questioning'. The Crown recognised that the Parliamentary Privilege Act does not directly apply to the Wai 2358 claim, which was filed prior to the Act coming into force, but submits that the Act is a reaffirmation of the common law and is accordingly relevant.
22. The Crown submitted that the Parliamentary Privilege Act defines 'proceedings in Parliament' as "all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee"; and that s 11 of the Parliamentary Privilege Act clarifies that the bar on 'impeaching or questioning' such proceedings means that "evidence must not be offered or received, and questions must not be asked concerning proceedings of Parliament for the purpose of engaging with the truth, motive, intention, or good faith of any aspect of those proceedings; or with the credibility, motive, intention or good faith of any person connected with them; or to draw inferences or conclusions from them; or to prove or disprove any fact in order to establish liability; or to support or resist any judgment or relief."
23. The Crown submitted that the courts have found that matters covered by the comity and parliamentary privilege principles include:
 - legislation and the legislative process when the legislation is before the House;
 - introductory or preliminary matters going to the passing of legislation, including matters that are not currently before the House;
 - potential legislation "where parties are seeking a declaration of rights or where the only impact on rights is as a result of legislation"; and
 - select committee processes, opinions and decisions.
24. The Crown acknowledged that the courts had not previously considered the application of comity and parliamentary privilege to a select committee inquiry into a bill which has not been introduced to the House, as is the case with the exposure draft of the NBE Bill. However, counsel for the Crown submitted that "it is clear from the case law that matters before a select committee are matters that are subject to parliamentary privilege."

25. Applying these principles to the current Tribunal inquiry, and to the proposed issue questions, the Crown submitted that if the Tribunal's inquiry were to proceed as currently planned it "would necessarily intrude into the legislative sphere in ways that the principle of comity does not allow by considering the same or highly similar issues as are before the select committee for inquiry and report." Counsel for the Crown submitted that the Tribunal's proposed issue questions 2 and 3 'coincide' with the issues now before the select committee, and that "[i]t is also difficult to see how issue 1...could be considered by the Tribunal, consistent with comity." The Crown further noted that in its submission parliamentary privilege would continue to restrain the Tribunal from any inquiry once the select committee has completed its consideration of the NBE Bill, as the consideration of the Bill and the broader resource management reforms "will be preliminary matters going to the passing of legislation".
26. In sum, the Crown submitted that the Tribunal cannot undertake the planned inquiry into geothermal issues raised by the claimants until the resource management reforms currently under consideration have been completed and enacted into law. The Crown notes that it considered whether the Tribunal inquiry could focus on examining existing rights and interests in geothermal resources until the resource management reforms are enacted, but submitted that even this inquiry would raise issues of parliamentary privilege, because the select committee has been asked to report on whether the exposure draft of the NBE Bill will support the objective of giving effect to the principles of Te Tiriti o Waitangi. Consequently, the Crown submitted that "[t]he safest course is for the Tribunal to defer its inquiry until enactment of the reform."

Claimant and Interested Party submissions

27. The following submissions were received from claimant groups and interested parties in response to the Crown's submissions.

New Zealand Māori Council

28. Counsel for the New Zealand Māori Council, Richard Fowler QC and Matthew Smith, submitted that any alleged barrier to the Tribunal inquiring into issue questions 1 and 2 would be "constitutionally surprising", and inconsistent with appellate case law on comity and the separation of powers (Wai 2358, #3.2.396). Counsel noted that the proper approach to the issue of comity can be seen in past Tribunal inquiries, including the Reform of Te Ture Whenua Māori Act 1993 Inquiry, where the Tribunal heard claims concerning an exposure draft of a proposed Bill, and the Foreshore and Seabed Inquiry, where the Tribunal heard claims about proposed Crown policy "within a similar timeframe to the present inquiry".
29. With regards to issue question 3, counsel submitted that in the absence of a referral under s 8 of the Act "it is not appropriate for the Tribunal to assess the consistency of the [NBE Bill] with the principles of Te Tiriti", but that issue question 3 can be inquired into without such direct consideration of the Bill. In counsel's submission, the Tribunal's focus on this question could be restricted to Crown policies antecedent to the NBE Bill, which would remove any issue of comity and would be consistent with the reasoning of the Court of Appeal in *Ngāti Mutunga o Wharekauri Asset Holding Company v Attorney-General* [2020] NZCA 2, and with the approach taken by the Tribunal in the Foreshore and Seabed Inquiry.

Tuaropaki Trust and Tauhara North No.2 Trust

30. Counsel for the Tuaropaki Trust and Tauhara North No.2 Trust, Kiri Tahana and Tyler Paki, submitted that there is no barrier to the Tribunal inquiring into the proposed issue questions (Wai 2358, #3.2.397 & #3.2.398). They noted that the Tribunal is precluded

under s 6(6) of the Act from inquiring into any Bill that has been introduced to the House of Representatives, but that as the NBE Bill has at present not been introduced, this legislative prohibition does not arise. The Trust acknowledged that a jurisdictional barrier would arise when and if the Bill was introduced to the House, but that this barrier “is limited to the contents of [the NBE Bill] and not consideration of reforms specific to geothermal resources which are not the subject of [the NBE Bill].”

Ngai Moewhare, Te Tai Tokerau District Māori Council and others

31. Janet Mason, counsel for claims by Ngai Moewhare, the Te Tai Tokerau District Māori Council and others, submitted that the provisions of the Parliamentary Privilege Act referred to by the Crown were not applicable in the circumstances of a Tribunal inquiry, as the comity principle is already fully provided for by s 6(6) of the Act (Wai 2358, #3.2.401). Counsel submitted that the approach to comity prescribed by s 6(6) can be read consistently with the Parliamentary Privilege Act, and if there is any clash between the two acts then, following the statutory interpretation principle of *generalia specialibus non derogant*, the general provisions of the Parliamentary Privilege Act could not override the specific constraint put in place by s 6(6).
32. Counsel noted that the referral of the exposure draft of the NBE Bill to a select committee was explicitly an action prior to its introduction to the House of Representatives, and was a novel action by the Executive that had never previously been used in New Zealand. Ms Mason further submitted that even if the principle of comity could be seen as constraining other courts from inquiring into a ‘pre-introduction bill’, the Tribunal has a constitutional role that is distinct from the general courts. Counsel submitted that this status affects “how comity and parliamentary privilege apply to Tribunal proceedings”, both because of the Tribunal’s role in ensuring that Māori claims in relation to breaches of Te Tiriti can be heard, and because its recommendatory jurisdiction means that “[t]he Executive and Parliament retain complete autonomy as to whether or not the Tribunal’s recommendations are given effect.”
33. Ms Mason referred to multiple recent instances where the Tribunal has inquired into whether proposed legislation was consistent with Te Tiriti, including the Foreshore and Seabed Inquiry, the Trans-Pacific Partnership Agreement Inquiry, the Reform of Te Ture Whenua Māori Act 1993 Inquiry, the Maniapoto Mandate Urgent Inquiry, and Stage 1 of this inquiry, where we considered proposed reforms to partially privatise certain state-owned enterprises. Counsel submits that these inquiries demonstrate that the Tribunal can clearly inquire into legislative proposals prior to the introduction of a bill, and that the Crown submission that the Parliamentary Privilege Act (and, prior to its enactment, common law principles relating to comity) constrain the Tribunal from inquiring into proposed legislation is clearly incorrect.

Proprietors of Taheke 8C & Adjoining Blocks Incorporation

34. Counsel for the Taheke 8C Incorporation, Andrew Irwin, submitted that it is incorrect “that the effect of the principle of comity, as expressed through the Parliamentary Privilege Act, is that the Waitangi Tribunal is now prevented from any inquiry into any ‘proposal to legislate’” (Wai 2358, #3.2.395). Counsel noted that there is a clear statutory prohibition relating to comity contained in s 6(6), and that the Crown had previously been open to an inquiry by this Tribunal into geothermal issues, knowing that the draft exposure NBE Bill would be released during this period. Counsel submitted that the Crown’s new submissions on comity were a change in its position, and “could, and should, have been raised earlier.”

Law

35. The Treaty of Waitangi Act 1975 established the Tribunal and outlines the scope and limitations of its jurisdiction. The Long Title states that the Tribunal's purpose is to make "recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty." Section 6 of the Act outlines the Tribunal's jurisdiction to consider these claims and to make recommendation to the Crown.

36. Section 6 also limits the Tribunal's jurisdiction in several ways, specifically at s 6(6):

(6) Nothing in this section shall confer any jurisdiction on the Tribunal in respect of any Bill that has been introduced into the House of Representatives unless the Bill has been referred to the Tribunal pursuant to section 8.

37. Section 8 of the Act is also relevant:

8 Jurisdiction of Tribunal to consider proposed legislation

- (1) The Tribunal shall examine any proposed legislation referred to it under subsection (2) and shall report whether, in its opinion, the provisions of the proposed legislation or any of them are contrary to the principles of the Treaty.
- (2) Proposed legislation may be referred to the Tribunal—
 - (a) in the case of a Bill before the House of Representatives, by resolution of the House:
 - (b) in the case of any proposed regulations or Order in Council, by any Minister of the Crown.
- (3) The Tribunal's report shall be given—
 - (a) in the case of a Bill, to the Speaker of the House:
 - (b) in every other case, to the person or body who referred the proposed regulations or Order in Council to the Tribunal.
- (4) A copy of every report made by the Tribunal under this section shall be given by the Tribunal to the Minister of Maori Affairs and shall be laid before the House of Representatives as soon as practicable.

Discussion

38. The Waitangi Tribunal is a body established to hear claims concerning both past and contemporary Crown actions that claimants allege to be in breach of the Treaty of Waitangi. It is worth noting that, when it was first created in 1975, the Tribunal was intended to *only* consider contemporary Crown actions, with its historical jurisdiction being enacted in 1985.

39. Section 6 clearly sets out the Tribunal's jurisdiction. It is empowered to hear claims concerning a range of Crown actions, including (at s 6(1)(c)) "any policy or practice proposed to be adopted by or on behalf of the Crown" and (at s 6(1)(d)) "any act done or omitted... or proposed to be done or omitted, by or on behalf of the Crown."

40. Section 6(6) provides a clear limitation on this jurisdiction, stating that the Tribunal cannot inquire into a Bill that is before the House of Representatives, unless it is referred to the Tribunal by the House under s 8. On a plain reading of the legislation, if no Bill is before the House, the Tribunal can conduct an inquiry into whether a proposed Crown policy may be in breach of the Treaty.
41. Our legislation makes it clear that the Waitangi Tribunal is a forum to give Māori an opportunity to question whether the Crown, by their actions and omissions, were or are in breach of the Treaty. We are a creature of statute, established to provide such a forum for Māori. We must follow the jurisdiction set out in our empowering legislation. Any additional fetter on that jurisdiction, such as is now proposed by the Crown, must have a clear basis in law if it is to be adopted. To take any other approach would be to unreasonably limit the ability of Māori, as Treaty partners, to question and challenge Crown actions in front of the Tribunal.
42. It is worth noting the comments of Baragwanath J in *Attorney-General v Mair* [2009] NZCA 625 in relation to s 6(6) and comity:
- [155] Section 5 of the Interpretation Act 1999 requires the court to consider text and purpose. Section 6(6) of the Treaty of Waitangi Act does not say it may be used to stop the agreed statutory process [relating to the Tribunal's binding powers]. It does no more than its text states: it concerns freedom of parliamentary speech and prevents the Tribunal from examining *a bill*; not the conduct that preceded it.
- [156] Since the text supports the respondents, if the Crown's argument is to be accepted the text must be read up, according to some inconsistent purpose, to capture what its plain language does not cover.
- [157] The argument for doing so is that the courts of New Zealand would infringe principles of comity with Parliament by presuming to examine conduct that preceded a bill with overlapping content.
- [158] But art 9 of the Bill of Rights has no greater application here than is provided by s 6(6). It is the very purpose of the Treaty of Waitangi Act to subject to the jurisdiction of the Tribunal all conduct of the Crown both as Executive and as Legislature, even including Acts of Parliament, other than what falls within the language of the s 6(6) exception. What matters is New Zealand's own legislation, read in the light of ss 5 and 6 of the Interpretation Act and the constitutional evolution of this country.
- ...
- [161] It is contrary to settled principles of Crown dealing with indigenous peoples for legislation to be read up against them and their interests. Parliament has chosen to limit the constraint on the Tribunal's jurisdiction only to specific interference with its own processes; apart from that the Tribunal is empowered to examine all prior conduct. There is no reason to make any assumption to the contrary.
- [162] Since Parliament has authorised the Tribunal to review statutes it must a fortiori countenance review of all Legislative and Executive conduct short of the bills referred to in s 6(6).
43. These observations were made in the context of judicial review proceedings concerning the Tribunal's binding powers, and were made by Baragwanath J solely, with the remaining judges of the Court of Appeal declining to express a view on the issue of s 6(6) and comity. However, Justice Baragwanath's observations are applicable to the arguments before me in this instance, and I agree with and adopt his reasoning.

44. I note that until recently, the Crown has not advanced arguments that comity limits the Tribunal's jurisdiction to inquire into proposed Crown policy prior to a Bill being introduced to the House. In fact, in situations where parties were aware of a proposed Bill or forthcoming Crown policy, the Tribunal has in many instances commenced or continued inquiry into relevant matters without any issues of jurisdiction being raised by the Crown or any other party.
45. For example, in the recent Oranga Tamariki Urgent Inquiry (Wai 2915), the Crown in its submissions to the Tribunal cited proposed legislation as a means of implementing relevant changes (refer to the Tribunal's report *He Pāharakeke, he Rito Whakakīkinga Whāruarua* at 118, 128, 129 and 153). No argument was advanced regarding lack of Tribunal jurisdiction to hear the claims before it by reason of this proposed legislation.
46. Similarly, as noted by the claimants and interested parties, in the Foreshore and Seabed Urgent Inquiry (Wai 1071) the Tribunal heard claims concerning the Crown's proposed policy and legislation in response to the Court of Appeal's decision in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643. The Tribunal notes in its introduction to the report for this inquiry (at page xi) that "[t]he Crown supported the claimants' application for an urgent inquiry, and the timeframes were all tailored to the Crown's requests... [w]e tried to balance the need on the one hand for claimants to have sufficient time to prepare for a very significant hearing, and the need on the other for our report to be available to Ministers before planned legislation is introduced." At no point in this inquiry were the questions of comity that the Crown now says are an established part of the common law raised.
47. A further example raised by the claimants is the Reform of Te Ture Whenua Māori Act 1993 Inquiry (Wai 2478). In that instance, the Tribunal heard claims relating to proposed reforms to the relevant Act, in circumstances where an exposure draft of the Bill which would implement these reforms had been released for public consultation, but no final Bill had been introduced to the House. This would seem to be on a par with the present circumstances, with the sole difference being that in this case the exposure draft of the NBE Bill is being consulted on through a select committee process, rather than being the subject of direct public consultation, as was the case with the Ture Whenua Māori Bill. The Crown did not raise any issues of comity in that instance.
48. The Crown's argument that the principles of comity and parliamentary privilege, both at common law and as now described in the Parliamentary Privilege Act, bar the Tribunal from inquiring into a range of Crown actions prior to the introduction of legislation, have however recently been raised in a number of current inquiries.
49. In an application for an urgent inquiry into claims concerning a pending settlement between the Crown and Ngāti Kahungunu ki Wairarapa Tamaki nui-ā-Rua (Wai 3058 & 429), the Crown submitted to the Tribunal that it would be barred by the principle of comity from its inquiry once a Deed of Settlement was signed between the Crown and Ngāti Kahungunu, as this Deed anticipated the introduction of legislation to the House. Considering this argument, the Tribunal in its October 2021 decision found that (Wai 3058, #2.5.4):
 20. The Crown's position articulated in its memorandum is indeed novel. If it is correct, the Tribunal would have to rethink its approach to many of its settlement-related inquiries.
 21. We do not consider that the Crown's interpretation of the Treaty of Waitangi Act 1975 coloured by the principle of comity is correct. Quite simply, the Waitangi Tribunal is a creature of statute. We can do what the Treaty of Waitangi Act 1975 says we can do; we cannot do what it says we cannot do. It says that we cannot inquire into bills unless specifically requested to do so (ss 6(6) and 8). Thus, we cannot and do not look into bills.

We do not characterise inquiry into a deed of settlement as an inquiry into a bill, even though the deed may form the basis for an Act of Parliament. We do not consider that our inquiry into a deed of settlement crosses the line set by the principle of comity.

50. Similarly, in the recent inquiry into the Whakatōhea Settlement Process (Wai 1750), the Crown again raised issues of comity, in this instance submitting that the introduction of a settlement bill to the House would require the suspension of the ongoing Tribunal inquiry into historical Whakatōhea claims. The Tribunal found in its report, released on 10 December 2021, that this interpretation of the principle of comity was not correct (*Priority Report on the Whakatōhea Settlement Process*, pp 28-39). While the Crown argument in that inquiry was for a different limitation on the Tribunal's jurisdiction, it is another example of the recent submissions the Crown has made asserting that comity should limit the Tribunal's ability to inquire into claims in a manner not previously proposed by the Crown (or any other party).
51. I agree with the points articulated by Baragwanath J and the Tribunal above. The Waitangi Tribunal is a creature of statute. The ambit of its jurisdiction, and the limitations imposed on it, have been clearly set out in the Treaty of Waitangi Act 1975. These statutory provisions, in particular s 6(6), account for and incorporate the principles of comity and parliamentary privilege, specifying that the Tribunal may not inquire into a Bill before the House of Parliament – as to do so would, in the language of Article 9 of the Bill of Rights, risk impeaching or questioning the freedom of speech and debates or proceedings in Parliament.
52. The Parliamentary Privilege Act, in affirming and incorporating into legislation Article 9, does not add any additional restrictions on the Tribunal's jurisdiction that are not compatible with the clear and specific language of the Treaty of Waitangi Act. In any event, as has been acknowledged by the Crown, the Parliamentary Privilege Act does not apply to these proceedings, as s 32 of that Act excludes existing court or tribunal proceedings from falling under the Act's provisions.
53. The Crown's arguments are not only novel but could and should have been raised earlier. Our jurisdiction, and the exercise of it as set out above, has been clearly established. To impose additional fetters to that jurisdiction, as is now proposed by the Crown, goes against the reasons for the establishment of the Tribunal in 1975, and in my view raises a question of whether the Crown is acting as a true Treaty partner or is attempting by their submissions to place controls on the Treaty relationship and prevent Māori from being heard by the Tribunal on contemporary Crown actions and omissions which may breach their rights as Treaty partners.
54. In summary, the Crown's arguments that the Tribunal should adopt new and novel restrictions on its ability to hear the claims submitted to it by Māori have no foundation. The foundation of our jurisdiction in this matter is ss 6 and 8 of the Treaty of Waitangi Act 1975.

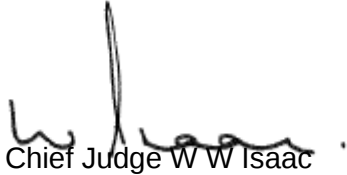
Decision

55. For these reasons, I do not agree with the Crown that the current proposed reforms bar this Tribunal from any inquiry into the claims before it, and specifically into the issue questions as proposed.
56. Once a bill is introduced to Parliament concerning the proposed reforms, that will of course be different, and further consideration will be given as to any limitations placed on the Tribunal's ability to inquire into the present claims while that bill is before the House.

57. I will issue separate memorandum-directions setting out the next steps for this inquiry in early 2022.

The Registrar is to send this direction to all those on the notification list for Wai 2358, the National Fresh Water and Geothermal Resources Inquiry

DATED at Gisborne this 15th day of December 2021

A handwritten signature in black ink, appearing to read 'W W Isaac', with a small dot at the end.

Chief Judge W W Isaac
Presiding Officer

WAITANGI TRIBUNAL