

BEFORE THE WAITANGI TRIBUNAL

WAI-2358

IN THE MATTER OF the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF the National Fresh Water and Geothermal
Resources Inquiry

**MEMORANDUM OF COUNSEL FOR THE CLAIMANTS SEEKING A
DIRECTION FROM THE TRIBUNAL THAT THE CROWN GIVE AN
UNDERTAKING NOT TO FRUSTRATE THE TRIBUNAL'S STAGE 2
INQUIRY BY THE ENACTMENT OF LEGISLATION**

Dated: 12 September 2014

Presiding officer: Chief Judge Isaac
Next event date: none scheduled

Solicitor: Donna Hall
Woodward Law
Address: PO Box 30-411
Lower Hutt
New Zealand 5040
Telephone: (64 4) 560-3680
Email: info@mokoia.co.nz

Counsel acting: Richard Fowler QC
Capital Chambers
Address: PO Box 10 048
Wellington
New Zealand
Telephone: (64 4) 471 1084
Email: email@richardfowler.co.nz

MAY IT PLEASE THE TRIBUNAL:

1. The Crown on 9 September filed a report (#3.1.234(a)) setting out the status of the Crown's current freshwater reform programme.
2. The Crown's report is disappointing.
3. In the 19 months that have passed between the publication of the Stage One report on 7 December 2012 and the filing of the Crown's report on 9 September 2014, the topic of most acute interest to Māori – what proprietary rights and interests do Māori have in freshwater – remains ambiguous at best.
4. The Crown report refers to Crown-ILG/IAG workstreams intended to define Māori rights and interests in freshwater and to report to Ministers on that on 5 February 2014 (see paras 34, 42-45). Absent from the Crown's report is any indication of what those rights and interests are likely to be. This omission is surprising in light of the 19 months the Crown has had the Stage One report.
5. One would have thought that the 'rights definition' exercise would be well advanced by now, that grassroots Māori communities and their representative bodies (including the New Zealand Māori Council, given its Māori Community Development Act 1962 s 18 statutory responsibilities), would have been consulted on well-progressed statements of rights and interests. But that has not happened. And according to the Crown's report, that is not to happen until Ministers have had an opportunity to consider any ILG/IAG statement on what proprietary rights and interests Māori have in freshwater.
6. The lack of transparency in this process is concerning.
7. Timing is also now a matter of concern. The country is on the eve of a national election, and there is an apprehension that if the present government is returned to office legislative changes affecting Māori rights and interests in freshwater may be imminent. Legislative change could, in practical terms, oust the Tribunal's jurisdiction to conduct Stage Two of the present Inquiry. That would in turn make the statement of rights and interests developed

through the political process referred to in para 5 above, the only statement on this important topic. That would be problematical in terms of the Treaty.

8. Against this background, the Claimants respectfully request that the Tribunal by memorandum-directions direct that the Crown, within 5 working days, is to file a memorandum of counsel in which it formally undertakes that it will:
 - 8.1 not propose legislation that will or may adversely affect Māori rights or interests in freshwater pending the Tribunal's Stage Two report; or that
 - 8.2 if any such legislation is considered to be necessary, then the Crown will ensure that the proposed legislation is referred to the Tribunal for consideration in accordance with the Treaty of Waitangi Act 1975 s 8.
9. In the event that the Crown refuses to give this undertaking, the Claimants respectfully request that the Tribunal timetables an urgent half day fixture to determine whether it is appropriate to make an interim finding for the purposes of Stage Two that it would be inconsistent with the principles of the Treaty for the Crown to pass any legislation that will or may adversely affect Māori rights and interests in freshwater pending publication of the Stage Two report.

Dated: 12 September 2014.



Richard Fowler QC
Counsel for the Claimants