THE PRINCIPLES OF THE TREATY OF WAITANGI CLAUSE IN THE MIXED OWNERSHIP MODEL LEGISLATION

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A dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (Honours)

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October 2012

ACKNOWLEDGEMENTS

Thanks to:

My supervisor John Dawson, for his assistance and insight,

and

My family and friends, for their love and support.

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INTRODUCTION

Over its first four years in power, the Fifth National Government has focused on policy intended to improve New Zealand's economic outlook and situation in the face of global financial downturn. A key part of this economic policy is the part-privatisation of four state-owned energy companies and the establishment of a new Mixed Ownership Model (MOM) regime. While maintaining a minimum 51% of the shareholding of each company, the government views the share sale as a mechanism for raising money for government projects, reducing debt and providing investment opportunities for New Zealanders.

The controversial legislation was passed by Parliament on 26th June 2012, authorising the removal of four energy companies from the State-Owned Enterprises Act 1986 (SOE Act) and the transfer of these to the MOM scheme as set out in the new Part 5A of the Public Finance Act 1989. The government plans to proceed with the sale of shares in the first energy company, Mighty River Power, between March and June of 2013.

The government did not originally intend to include in the new framework any equivalent to s 9 of the SOE Act. This provision prohibits the Crown from acting contrary to the principles of the Treaty of Waitangi in its exercise of powers under the SOE Act, and has been the basis of much of the Treaty jurisprudence that has arisen since the late 1980s. After opposition from Māori and consultation around the country, the government decided to replicate s 9 with the new s 45Q of the Public Finance Act 1989.

This dissertation will analyse the legal effect of including this provision in the Mixed Ownership Model legislation, in order to assess why the controversy arose and what effect the provision will have on the ability of Māori to challenge the actions of the Crown and MOM companies.

Chapter 1 sets out the legal framework of the Mixed Ownership Model regime, the substantive nature of 'Treaty principles' as the Courts have found them, and establishes a scenario involving water usage rights that would likely be in breach of these Treaty principles and therefore subject to a challenge under either s 9 or s 45Q. Chapter 2 assesses the function of s 9 in the State-Owned Enterprises Act and the role the provision plays in constraining the actions of both the Crown and the State-Owned Enterprises themselves. Chapter 3 examines whether the new provision will constrain the actions of the Crown in relation to the MOM companies, and whether the MOM companies will themselves be bound by Treaty principles. Chapter 4 looks at what the effect would have been of not including a Treaty protection clause, in order to assess

the reasons behind the controversy and the role of the clause in challenging actions that may be contrary to Māori interests.

This dissertation concludes that the Treaty principles clause actually provides very little protection for Māori interests. While s 9 can potentially have a small degree of effect under the SOE Act, the provisions of the MOM regime do not give the Crown the type of powers that could be challenged under s 45Q, and Māori would likely be unsuccessful in using this clause to challenge Crown or MOM company actions.

CHAPTER 1: BACKGROUND

1.1. Treaty Principles

While early cases on the Treaty described it as a 'simple nullity'[1] and discounted its importance, the Court of Appeal in the *New Zealand Māori Council v Attorney-General* (*Lands*)[2] case of 1987 delivered a landmark decision that provided substantive meaning to the 'principles' of the Treaty of Waitangi.[3] Focusing on the spirit rather than the strict text of the Treaty, the Court found that the Treaty represented a partnership between the Crown and Māori and required both parties to act 'reasonably and in the utmost good faith' towards one another.[4] Cooperation, loyalty, consultation, good faith and, on the part of the Crown, the duties of active protection and redress for breaches, are all integral parts of this obligation.[5] These principles do not unreasonably restrict governmental freedom to follow its particular policy,[6] but create a requirement on the part of the Crown to address Māori and Treaty issues.[7]

The Court was able to consider the meaning of Treaty principles because of their statutory incorporation in the State-Owned Enterprises Act 1986.[8] Section 9 reads:

> **9 Treaty of Waitangi**
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> Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

This provision has enabled the judiciary to hold the Crown to account for failure to act in accordance with these principles in the *Lands* case, as well as subsequent cases where the Crown has exercised powers under this Act. Largely however, the Courts have been unwilling to make substantive decisions about what should be done to comply with the Treaty. Fault is instead found with the process and the Crown and Māori are required to consult with each other to reach a negotiated resolution.[9] However, this is not to diminish the importance of s 9 or the

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[1] *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.
[2] *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 [*Lands*].
[3] This judicial interpretation of the Treaty principles was based on the first four substantive Waitangi Tribunal reports, which the Court stated at 640 were of great value in helping it to reach its conclusions. These Waitangi Tribunal reports were the *Report on the Kaituna River Claim* (Wai 4, 1984); *Report on the Motunui-Waitara Claim* (Wai 6, 1983); *Report on the Manukau Claim* (Wai 8, 1985); and the *Report on the Te Reo Māori Claim* (Wai 11, 1986).
[4] *Lands*, above n 2 at 664.
[5] Matthew C R Palmer *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, Wellington, 2008) at 126-128.
[6] *Lands,* above n 2 at 665-666.
[7] Geoffrey Palmer "The Treaty of Waitangi – principles for Crown action" (1989) 19 VUWLR 335.
[8] *Hoani Te Heuheu Tukino v Aotea District Māori Land Board* [1941] AC 308 at 325 states that a claim cannot rest on the Treaty but must 'refer the court to some statutory recognition of the right claimed'.
[9] Matthew Palmer *Treaty of Waitangi in New Zealand's Law and Constitution,* above n 5 at 129.

court outcomes as these judicial findings have significantly advanced Māori and Treaty jurisprudence.

1.2. Water rights

Māori concern over the transfer of energy companies to the MOM scheme centres on the concern that the Crown will have less ability to prevent the MOM companies from acting in ways that are contrary to Treaty principles, and that Māori will have less ability to either prevent breaches or seek redress.[10] In particular, breaches concerning water usage rights have the potential to arise in situations where an energy company may, for example, pursue the damming of a river or the large scale diversion of a river's water, for the purpose of electricity generation.

In New Zealand rights to the use of water are determined by the Resource Management Act 1991 (RMA). Section 14 of the RMA sets out restrictions relating to water, requiring resource consent to be obtained before a person may 'take, use, dam, or divert' any water.[11] In the exercise of functions and powers under the Act, the 'relationship of Māori and their culture and traditions' with water,[12] and the principles of the Treaty, are required to be taken into account.[13] However, they must be balanced against other considerations, thereby weakening the force of Treaty principles which are often trumped by these other factors.[14]

Outside of the RMA, the decision of an energy company to pursue a river diversion scheme in the first place could be subject to judicial review by Māori who opposed the venture. The relevant question then, is whether the Treaty principles provision in the legislation governing the entities could be used to bring action in the courts to halt the decision to launch the project. Māori could base such a claim on a breach of customary use rights protected under the Treaty. The effect of such a diversion on river use, the free passage of water and customary freshwater fisheries could be raised in an attempt to stop the proposed action.[15]

Māori interests in waterways and rivers are also based on a strong cultural and spiritual attachment. Rivers have 'deep cultural significance' to Māori who regard themselves as kaitiaki

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[10] Treasury *Mixed Ownership Model for Crown Commercial Entities: Treasury Advice and Cabinet Material relating to Consultation with Māori Information Release* (5 April 2012).
[11] Resource Management Act 1991, s 14(1)(a).
[12] Ibid, s 6(e).
[13] Ibid, s 8.
[14] Jacinta Ruru *The Legal Voice of Māori in Freshwater Governance: A Literature Review* (Lincoln, Manaaki Whenua Landcare Research New Zealand, 2009) at 8.
[15] Waitangi Tribunal *The Interim Report on the National Freshwater and Geothermal Resources Claim* (Wai 2358, 2012) see 67-71 for a discussion of traditional Māori river uses.

over them.[16] Seen as the mauri or life force of Papatūānuku, rivers are integral to ancestral heritage and cultural identity,[17] and as taonga receive protection under Article II of the Treaty.[18] Therefore legal challenges to the actions of energy companies affecting water usage rights would rely on both customary usage and spiritual considerations.[19]

As well as the issue that these substantive claims could cause judicial review proceedings to be brought, there is the argument that there is a procedural obligation to take Māori interests into account in considering future courses of action, and if the company or the Crown failed to do so Treaty principles could potentially be breached.

This dissertation therefore operates on the assumption that there may be legitimate arguments raised by Māori litigants, that the decisions of energy companies concerning the use of freshwater resources breach Treaty principles. The question this dissertation is examining then is whether the inclusion of a Treaty principles clause in the MOM legislation will enable the courts to review such actions of the energy companies.

1.3. The Legislative Framework of the MOM Scheme

1.3.1. The State-Owned Enterprises Amendment Act 2012

The State-Owned Enterprises Amendment Act 2012 is the part of the legislation that removes the energy companies from the State-Owned Enterprises Act 1986.[20] This is done by Parliamentary provision in ss 4 and 5 of this Act which repeal the items relating to each power company listed in Schedules 1 and 2 of the SOE Act. These provisions deem the energy companies to no longer be part of the SOE regime, but do not vest any power in the Crown requiring them to take this action or to consent to it. Instead, the Governor-General brings these provisions into force by Order in Council under s 2 of the 2012 Act:

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[16] Nga Wai o Maniapoto (Waipa River) Act 2012, Preamble; Waitangi Tribunal *Whanganui River Report* (Wai 167, 1999); Waitangi Tribunal *Te Ika Whenua Energy Assets Report* (Wai 212, 1993).

[17] Ministry for the Environment *Wai Ora: Report of the Sustainable Water Programme of Action Consultation Hui* (2005), at 8; note that in Māori tradition, Papatūānuku is the personification of the land, or earth mother.

[18] For a discussion of Waitangi Tribunal reports on rivers as taonga see Nicola R. Wheen and Jacinta Ruru, "The Environment Reports" in Nicola R Wheen and Janine Hayward (eds) *The Waitangi Tribunal* (Bridget Williams Books, Wellington, 2004) at 97-102.

[19] For further discussion of the spiritual connection between Māori and rivers see Rachel Kennard "The Potential for Māori Customary Claims to Freshwater" (LLB (Hons) dissertation, University of Otago, 2006) at 10-13.

[20] The policy reasons behind the assets sales are described in a speech by the Deputy Prime Minister, see Bill English, Finance "A mixed ownership model for state assets" (Speech at Victoria University, 15 February 2012).

> **2 Commencement**
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> This Act comes into force on a date to be appointed by the Governor-General by Order in Council; and 1 or more Orders in Council may be made bringing different provisions into force on different dates.

This means that each company can be removed individually as the government decides to proceed with the sale.[21] It is important to note that the relevant clauses are not inserted into the SOE Act itself despite the title of the 2012 Act, and the removal of these companies from the SOE scheme and the power to bring these provisions into force are authorised by this separate 2012 Act. The bringing into force of these provisions does not involve an exercise of power under the SOE Act. It is therefore not subject to the s 9 Treaty clause, and cannot be judicially reviewed on the grounds that Treaty principles under s 9 are breached.

The State-Owned Enterprises Amendment Act 2012 also provides for the amendment of other legislation. Notable are provisions which would remove each energy company from the scope of the Ombudsman Act 1975 and the Official Information Act 1982 respectively.[22] Section 8 provides for amendments to the Public Finance Act 1989, through which the names of the energy companies will be inserted into Schedule 5 of that Act listing the Mixed Ownership Model Companies at the time that the Governor-General in Council brings the provisions into force.

The clear intention is that once a decision has been made to proceed with the sale of a particular company, all the provisions relating to that company will be brought into force in order to change the company from SOE to MOM status.[23] There is no legislative requirement that these happen at the same time. However, it appears that is the intended course of action.

1.3.2. The Public Finance (Mixed Ownership Model) Amendment Act 2012

This Act establishes the limits on ownership of the companies under the Mixed Ownership Model scheme. Section 9 inserts a new Part 5A into the Public Finance Act 1989 which is to govern MOM companies once they are transferred to Schedule 5. Two key features of the Act are s 45R which prevents the Crown from holding less than 51% of the issued shares and voting securities in each company, and ss 45S and 45T which limit holdings of shares and voting

[21] Mixed Ownership Model Bill 2012 (7-2) (explanatory note) at 3.
[22] State-Owned Enterprises Amendment Act 2012, ss 6,7. The rational for this is that as the companies will be operating in a competitive environment, the risk of losing customers or disappointing shareholders will be a better remedy than the Ombudsman, see Paul McBeth "Treasury hui notes: English flags more asset sales" *New Zealand Herald* (10 April 2012).
[23] MOM Bill Explanatory Note, above n 21 at 3.

securities by any particular person or entity other than the Crown to a maximum of 10%.[24] This ensures that the Crown retains majority control of the company, and that no other body is able to gain significant control. Setting the level of permissible ownership is a key feature of the legislation, which overall sets minimum standards but does not confer powers on the Crown comparable to Crown powers under the SOE Act. Crown decisions to sell shares in the companies or to exercise powers as shareholders are not included in the legislation.

There are two provisions that are particularly relevant to Māori concerns. Section 45X states that certain provisions, including ss 27-27D of the SOE Act, will continue to apply.[25] These provisions set out the claw-back regime established after the *Lands* case, and provide for the compulsory resumption of land on the recommendation of the Waitangi Tribunal that it be returned to Māori ownership.[26] The other is a provision that replicates s 9 of the SOE Act:

> **45Q Treaty of Waitangi (Te Tiriti o Waitangi)**
>
> (1) Nothing in this Part shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).
>
> (2) For the avoidance of doubt, subsection (1) does not apply to persons other than the Crown.

The central question of this dissertation is whether this section will constrain the Crown or the MOM companies with regards to actions that may be contrary to Treaty principles.

[24] The 10% cap for individual ownership was brought in due to concerns about the potential for high foreign ownership of the companies.
[25] Treasury *Aide Memoire: Protections for Maori under sections ss 27A-D of the SOE Act 1986* (16 March 2012).
[26] After negotiations between Māori and the Crown following the *Lands* Case, the Treaty of Waitangi (State Enterprises) Act 1988 was enacted and inserted the clawback regime into the SOE Act.

CHAPTER 2: SECTION 9 AND STATE-OWNED ENTERPRISES

To understand the effect the Treaty principles clause will have under the MOM scheme, it is necessary to compare its legal position before and after the enactment of the new regime. A comparison with s 9 under the SOE Act will show whether the new legal provisions have altered the potential impact of the Treaty principles on the operation of these companies. This chapter will therefore examine the effect of s 9 in the SOE framework, and establish how the Crown and the SOE companies are currently bound by the Treaty protection provision.

2.1. The meaning of s 9 SOE Act

2.1.1. Statutory interpretation of s 9

A close examination of the wording of s 9 reveals the scope and extent of the provision in constraining the Crown and the effect of the section within the whole SOE scheme. Determining the precise meaning of the words, "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi', is crucial to evaluating the effect of the provision.

First, the section states that 'nothing in this Act shall permit', which indicates that the only actions which may be constrained by this provision are those specifically permitted by the SOE Act, rather than actions taken under powers deriving from other sources. For example, the ability of the Crown to transfer Crown assets to SOEs is specifically permitted by the Act[27] and therefore the exercise of this power may be constrained by s 9. Conversely, powers that the shareholders may have under company law are not powers specifically permitted 'in this Act' and so would not be constrained by s 9.

Section 9 clearly states that it is only the 'Crown' who must not act inconsistently with Treaty principles. Therefore it is only the Crown that is bound by this section and other entities such as the SOE companies themselves are not constrained, unless they come within the meaning of the 'Crown'. The interpretation section of the Act states that the 'Crown means Her Majesty the Queen in right of New Zealand',[28] but this definition does not specify the precise meaning and scope of the term. Within the context of the SOE Act as a whole, however, it is unlikely that SOEs would fall within the meaning of the 'Crown'. The framework the Act establishes is clearly aimed at separating the Crown from the commercial operation of these bodies.[29] Section 9 is also

[27] State-Owned Enterprises Act 1986, s 23.
[28] Ibid, s 2.
[29] Ibid, Long Title.

the only provision where the 'Crown' specifically retains an obligation without reference to the SOEs themselves. Other sections establish clear roles and obligations for SOE companies and the Crown,[30] and the exclusion of the former from the constraints of s 9 is likely to be indicative of Parliament's intent to exclude SOEs from the ambit of the provision.

The level of constraint the provision exercises over the Crown is shown by the statement that nothing in the Act permits the Crown to use powers under the Act to act in a 'manner that is inconsistent' with Treaty principles. This negative phrasing has an impact on the meaning of the section, as a plain reading of this indicates that it is only when the Crown exercises a power under the SOE Act in a way that infringes Treaty principles that the clause will be invoked. This wording therefore means the section cannot be invoked in order to compel positive action on the part of the Crown to abide by Treaty principles.

Consequently, a successful claim under s 9 would need to show that the Crown (and only the Crown) had taken an action specifically permitted by the SOE Act, and that such an act was in breach of Treaty principles.

2.1.2. Judicial interpretation of s 9

Further aspects of the meaning of s 9 relevant to the context of this discussion are explicated in the limited case law on the subject. Section 9 is a unique provision, as no previous legislation had contained such a constraint on the exercise of statutory power with regard to Treaty principles.[31] Required to interpret the meaning and breadth of this new provision, the Court of Appeal found itself faced with a case that, as Cooke P noted, was 'as important for the future of our country as any that has come before a New Zealand court'.[32] The Court rejected the argument that s 9 must be read down due to the specific provision in s 27 and the intent of Parliament in enacting the legislation to permit asset transfer.[33] Section 27 provided for the resumption of transferred land to be used for Treaty settlement, provided that the claim was lodged prior to the date of assent to the SOE Act. The Court of Appeal held that to treat s 27 as a 'self-contained' code regarding land claims would give too little scope to s 9,[34] and would treat the Treaty as close to a 'dead

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[30] For example, the statutory objectives that the companies are obliged to operate under in s 4 refer only to SOE obligations and not the Crown.
[31] Jacinta Ruru, "Introduction" in Ruru (ed) "*In Good Faith" Symposium proceedings marking the 20th anniversary of the Lands case* (New Zealand Law Foundation, Wellington; Faculty of Law, University of Otago, Dunedin, 2008) at 2.
[32] *Lands*, above n 2 at 651.
[33] David Baragwanath "Arguing the case for the appellants" in Jacinta Ruru (ed) *"In Good Faith" Symposium proceedings marking the 20th anniversary of the Lands Case* (Wellington, New Zealand Law Foundation; Dunedin, Faculty of Law, University of Otago, 2008) at 30.
[34] *Lands*, above n 2 at 658, per Cooke P.

letter'.[35] The court instead held that s 9 had broad application over the powers granted in the Act, that to give a narrower meaning would make s 9 effectively meaningless, and that Parliament cannot have intended this.

An important element of s 9 is that the provision is negatively phrased, and judicial interpretation of the subject confirms that it can therefore not be used to compel positive action. This was discussed in the *New Zealand Māori Council v Attorney-General* (*Broadcasting Assets*) case,[36] which involved the New Zealand Māori Council trying to prevent the transfer of broadcasting assets from the Crown to SOEs. With regards to the role of s 9, the Privy Council stated that:[37]

> The purpose of s 9 is not, however, to provide a lever which can be used to compel the Crown to take positive action to fulfil its obligations under the Treaty…. It prevents the transfer of the assets when this would be inconsistent with the principles of the Treaty.

This may appear contrary to a statement made by Cooke P in the *Lands* case that 'the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.[38] However, at this time Cooke P was speaking about Treaty principles generally or the effect of Treaty principles once a Crown decision had been taken to exercise a power under the Act, rather than the precise force that s 9 has to compel new Crown action.[39] There is no judicial decision that, on the grounds of this section, puts a positive obligation on the Crown to take action under the SOE Act, and the *Broadcasting Assets* case provides strong support for the interpretation that such positive action, however ideal in the broader context of Māori-Crown relations, cannot be compelled on the basis of s 9.

2.2. The powers of the Crown over SOEs

State-Owned Enterprises are limited liability companies under and subject to the Companies Act 1993 as well as the State-Owned Enterprises Act.[40] The s 9 constraint, however, applies only to actions of the Crown taken under the SOE Act, and therefore it is necessary to determine what powers the Crown has under this Act and what levers the Crown may exercise with regard to SOEs. As all shares in the company are held by the Minister of Finance and the responsible

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[35] Ibid, at 660-661, per Cooke P.
[36] *New Zealand Maori Council v Attorney General* [1994] 1 NZLR 513 [*Broadcasting Assets*].
[37] Ibid, at 520.
[38] *Lands*, above n 2 at 664, per Cooke P.
[39] Once the Crown exercises a power under the SOE Act (such as the transfer of assets), s 9 may oblige that it take positive action to comply with Treaty principles e.g. by consulting with Māori on certain issues. The provision, however, cannot be used to compel the Crown to take action under the SOE Act, or under any other source, that it does not wish to take.
[40] SOE Act, s 30 states that SOEs may be registered under the Companies Act 1993. All four of the energy companies to be partially privatised are registered.

Minister (normally the Minister for SOEs),[41] the Crown is effectively represented by these two and it is their powers that are therefore at issue. These can be broadly described as powers relating to each SOE's Statement of Corporate Intent (SCI) which establishes the aims and direction of the entity, and powers relating to accountability mechanisms which enable the Crown to ensure SOEs act in accordance with their SCIs.

2.2.1. Statements of Corporate Intent

The primary feature of the SOE operating and monitoring regime is the SCI, which is required to be prepared annually under s 14(1) of the SOE Act.[42] This document must contain information relating to the current and following two year period, and is much more detailed and public than is usually found in the private sector.[43] The information that must be contained is listed in s 14(2), of which the most notable features are (a) the objectives of the SOE; (b) the nature and scope of activities; and (e) performance targets and measures by which performance will be judged in relation to objectives.

A draft SCI is required to be delivered by each SOE to its shareholding Ministers at least one month before the start of every financial year.[44] This gives time for Ministerial and Treasury assessment and comment, which the Board is required to consider before the final SCI is delivered to the shareholding Ministers[45] who then table it in the House of Representatives within 12 sitting days.[46] This final version is effectively an agreement between the Crown and SOEs on how the SOE will function,[47] and all operational decisions of the SOE must then be in accordance with this SCI.[48]

Section 13 also sets out the powers of the shareholding Ministers with respect to SCIs. A significant power is that stated in s 13(1)(a):

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[41] SOE Act, s 11 requires all shares to be held by Ministers of the Crown. See Crown Ownership Monitoring Unit *Owner's Expectations Manual* (July 2012) at 13 for an explanation of this and the Ministers' powers and responsibilities.
[42] R C Mascarenhas "State-Owned Enterprises" in Jonathan Boston and others *Reshaping the State* (Oxford University Press, Auckland, 1991) at 35.
[43] Controller and Auditor-General *Statements of corporate intent: Legislative compliance and performance reporting* (June 2007) at 9.
[44] SOE Act, s 14(1).
[45] Ibid, s 14(4).
[46] Ibid, s 17(2)(a).
[47] Mascarenhas, above n 42 at 36.
[48] SOE Act, s 5(2).

> **13 Powers of shareholding Ministers in respect of new State enterprises**
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> (1) Notwithstanding any other provision of this Act or the rules of any company-
>
> (a) the shareholding Ministers may from time to time, by written notice to the board, direct the board of a company named in Schedule 2 to include in, or omit from, a statement of corporate intent for that company any provision or provisions of a kind referred to in paragraphs (a) to (h) of section 14(2)…
>
> and any board to whom such a notice is given shall comply with the notice.

This is a substantial power that allows shareholding Ministers to directly influence what goes into a SCI and hence the direction a SOE takes and the commercial activities it pursues. In considering the directions to give, the Crown must have regard to Part 1 of the SOE Act which includes s 9 Treaty principles.[49]

2.2.2. Accountability mechanisms

(a) SOE Act accountability mechanisms

The State-Owned Enterprises Act sets out extensive monitoring provisions for the operation of SOEs. These are necessary as commercial companies ensure effectiveness through market mechanisms and the ability of the shareholders to transfer their equity in the company if it is not performing satisfactorily.[50] Unable to do this or to judge performance on the basis of share-price, monitoring provisions for SOEs are intended to overcome the 'agency problem' and ensure that SOEs are performing in accordance with their SCIs and in the best interests of their shareholding Ministers.[51]

Ministerial responsibility is an important accountability feature, as shareholding Ministers are responsible to the House of Representatives for the performance of the functions given to them by this Act.[52] Annual reports to shareholding Ministers must be tabled before the House[53] and SOEs are obliged to supply information on their affairs if requested by the shareholding Ministers.[54]

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[49] Ibid, s 13(2).
[50] *Owner's Expectations Manual*, above n 41 at15.
[51] Barry Spicer, D M Emanuel and Michael J Powell *Transforming Government Enterprises* (Centre for Independent Studies, 1996) at 13-14.
[52] SOE Act, s 6.
[53] Ibid, s 15.
[54] Ibid, s 18.

(b) Companies Act 1993 accountability mechanisms

A key power the Crown has is the ability to appoint and remove the board and Chairperson of an SOE.[55] This power does not directly arise from the SOE Act, but from the Companies Act 1993[56] and each SOE's company constitution.[57] This accountability function ensures that the shareholding Ministers can appoint directors who will act in their interest and in accordance with the SCI and remove those who are unsatisfactory. While this may appear to be a significant lever, it does not however derive from the SOE Act and therefore the Crown would not be bound by s 9 when exercising this power.

(c) Other accountability mechanisms

Further accountability features that are not specific Crown powers but are important to the overall SOE framework are the application of the Ombudsmen Act 1975 and the Official Information Act 1982.[58] These Acts allow for the public to both gain information about the companies, and gain redress for individual grievances against them.[59] They provide a way of supervising public administration, and their application shows that despite the distance created between the Crown and SOEs by the SOE Act, the companies retain this significant attachment to the Crown.

2.3. How does s 9 constrain the Crown in exercising its powers over SOEs?

To see the constraints on the Crown imposed by Treaty principles under this regime it is necessary to examine cases that have arisen either in the context of s 9 of the SOE Act, or under other grounds of judicial review of SOEs. The earliest cases in the history of s 9 litigation focus on the decision of the Crown to transfer assets to SOEs, with the *Lands* case leading the way in elucidating the principles of the Treaty and leading to Māori-Crown negotiations resulting in the enactment of the ss27-27D[60] claw-back provisions.[61] While this dissertation does not focus on asset transfer issues (because asset transfers do not take place under the SOE or the MOM

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[55] Mai Chen *Public Law Toolbox: Solving Problems with Government* (LexisNexis, Wellington, 2012) at 107.
[56] Companies Act 1993, s 156 establishes the procedure for the removal of company directors by ordinary resolution of shareholders.
[57] Each of the energy companies' constitutions contains an identical provision (cl 17) giving the shareholders the right to appoint or reappoint directors by written notice.
[58] Matthew Palmer "The State-Owned Enterprises Act 1986: Accountability?" (1988) 18 VUWLR 169 at 178. All four energy companies are listed in the Ombudsmen Act 1975, Schedule 1 Part 2, which lists all the organisations to which the Act applies. These organisations are also covered by the Official Information Act 1982 by virtue of their listing in that schedule.
[59] Mai Chen *Public Law Toolbox,* above n 55 at 682.
[60] Treaty of Waitangi (State Enterprises) Act 1988 introduced these provisions into the SOE Act.
[61] Geoffrey Palmer, "A Māori Constitutional Review" *New Zealand's Constitution in Crisis: Reforming our Political System*, (McIndoe, Dunedin, 1992) at 89-90 describes how the case led to this change.

legislation) the interpretation of s 9 stated in these cases aids the analysis of how s 9 could be interpreted and used in the type of water rights situations envisaged.

2.3.1. Judicial review of water usage

A potential scenario where s 9 could allow for an SOE's decision to be judicially reviewed is where the Crown, through the shareholding Ministers, issues a directive to an SOE that it should include in its SCI the intent to promote a large new hydro-electric power scheme. The courts' judicial review jurisdiction is discretionary and they may refuse to intervene if other avenues of redress are available, so the first question to be answered is whether the Resource Management Act would be a better alternative mechanism for the resolution of such issues than the courts entertaining a challenge on the basis of s 9.

The case of *Te Heu Heu v Attorney-General*[62] provides some analysis on this point. In this case the Māori plaintiffs attempted to prevent the transfer of land from an SOE to a third party on the basis of a pending Treaty claim over that land. The plaintiffs argued that notwithstanding the existence of the ss 27-27D remedial 'clawback' provisions, the transfer should not proceed as the Crown had breached their s 9 duty. These remedial provisions meant that land subject to Treaty claims could be transferred or sold, but could be clawed back from third parties and returned to Māori to be used in Treaty settlements, upon the recommendation of the Waitangi Tribunal.[63] The plaintiffs sought an order requiring the shareholding Ministers to issue a directive under s 13 that the sale should not proceed and that its future conduct with regard to such issues should be altered accordingly, in order to prevent breaches of Treaty principles.[64]

The relevance of this is that the Court had to decide whether there already existed a specific statutory regime for resolving these types of land transfer issues that precluded the Court from going beyond it and directly reviewing Crown action against s 9. In this case the pre-existing regime was the clawback scheme in ss 27-27D. The Court held that the operation of this alternative regime would be sufficient to discharge the Crown's obligation in all but the most exceptional cases, 'usually only where there is evidence that the Crown was acting in bad faith'.[65] The existence of a system designed to deal with such a scenario therefore prevented the Court from examining the claim under s 9.

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[62] *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98 (HC).
[63] The Waitangi Tribunal administers the clawback regime through its remedial powers under the Treaty of Waitangi Act 1975.
[64] *Te Heu Heu v Attorney-General,* above n 62 at 104.
[65] Ibid, at 116.

It is unlikely that a similar approach would be taken in the water usage scenario envisaged in this dissertation. While the RMA is designed to take Māori considerations into account in determining resource use, the framework established is not analogous to the clawback regime as it does not derive from negotiations and resolution with Māori. Moreover, the RMA focuses on whether a company can get consent to use water or interfere with river flow. It does not focus on a company's decision or the Ministerial direction to proceed with such action in the first place and there would still be a place for the Court to examine this issue on judicial review.

Nevertheless, it is possible that in such a case a court could decline to exercise its review jurisdiction, or decline to issue remedies, until the RMA process was complete. For instance, the Waitangi Tribunal[66] rejected an application for urgency concerning a proposed transmission line by the SOE Transpower on the basis that the opportunity to consider Treaty principles existed in the RMA and the process had yet to play out.[67] Other than this potential delay, however, the RMA does not preclude judicial consideration of the SOE's or Crown's decisions. Therefore the water usage issue might still be brought before the courts if the required grounds for judicial review could be made out.

2.3.2. Ministerial Directives under s 13

In looking at how s 9 may constrain the Crown in the exercise of its powers under the SOE Act, it is important to examine how Treaty principles affect the ability of the Crown to issue Ministerial Directives under s 13. This is the most significant power the legislation gives to the Crown, as it enables it to influence the objectives and direction of the energy companies. As issuing a directive is the exercise of a power permitted by the Act, to be lawful under s 9 it must not be inconsistent with Treaty principles. The importance of this Crown power to issue directives is shown in *Lumber Specialties v Hodgson.*[68]

This case concerns judicial review of one of these ministerial directives. This case did not concern Treaty principles or section 9, but it has significant implications for the subject as it discusses the justiciability of s 13 directives and shows how far a Minister can control an SOE. This case involved a directive issued by the Labour government upon coming into office in December 1999. This directive to the SOE Timberlands stated that the government's policy was

[66]Waitangi Tribunal *Decision of the Chairperson in respect of an Application for Urgency – Ngati Koroki Kahukura* (Wai 1294, 2005).
[67] Linda Te Aho "Update on State-Owned Enterprises and the Treaty of Waitangi" in Ruru (ed) "*In Good Faith" Symposium proceedings marking the 20th anniversary of the Lands case* (Wellington, New Zealand Law Foundation; Dunedin, Faculty of Law, University of Otago, 2008) at 117.
[68] *Lumber Specialties v Hodgson* [2000] 2 NZLR 347 (HC).

to end the 'harvesting of any species of beech owned by the Crown in its West Coast indigenous forest estate'[69] and that Timberlands was to exclude such harvesting from the nature and scope of its activities in its 1999/00 Statement of Corporate Intent.[70] The plaintiffs had entered into contracts with Timberlands for the supply of beech which would be cancelled by this directive. Unable to claim against Timberlands for a breach of contract due to a force majeure clause, the plaintiffs brought judicial review proceedings against the Minister challenging the lawfulness of the directive.[71]

The Crown conceded that a directive under s 13 was an exercise of a statutory power and reviewable under the Judicature Amendment Act 1972.[72] The Court rejected the argument of the plaintiffs that directives 'are intended to have force as subordinate legislation'.[73] The requirement that the Board act in accordance with these directives and the fact they must be tabled in the House of Representatives were not enough to suggest that this was anything other than the exercise of a statutory power.[74] This meant it was not possible to argue that a directive issued was repugnant to primary legislation and therefore invalid.[75]

The plaintiffs then argued that the Crown had an improper purpose in issuing the directive, although the court found there was no purpose in the SOE Act by which it can be shown that the Minister's purpose was improper.[76] The last ground of review covered various arguments to support the claim that the Minister failed to reach the actual decision taken in a lawful manner. The Court found the plaintiffs' arguments unsuccessful on all grounds and rejected the notion that the plaintiffs had any legitimate expectation of consultation.[77]

It therefore is apparent that the shareholding Minister can lawfully give a directive that binds the SOE's future conduct in relation to a core aspect of its business plan, and it is clear that the issuing of such a directive is an exercise of a statutory power that is subject to judicial review. Although the issue did not arise in this case, it is also evidence that as an exercise of a statutory

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[69] Ibid, at 356 [34].
[70] Ibid, at 353 [31].
[71] Janet McLean "Government to State: Globalization, Regulation, and Governments as Legal Persons" (2003) Indiana Journal of Global Legal Studies 173 at 187 points out that this finding relied on the acceptance of the separate, arms-length identity of the SOE from the Crown. A perhaps surprising consequence of this is that the government as regulator of SOEs is able to interfere with the contractual obligations of them more easily than it would be able to invoke an equivalent 'terminate at will' clause in its own favour if the SOE was still considered to be part of the Crown.
[72] *Lumber Specialties v Hodgson,* above n 64 at 361 [54].
[73] Ibid, at 364 [87].
[74] Ibid, at 364 [87]-[88].
[75] Nicola R. Wheen "Desperate remedies and the West Coast Sawmillers" (2001) 19 New Zealand Universities Law Review 239.
[76] *Lumber Specialties v Hodgson*, above n 64 at 362 [64].
[77] Ibid, at 369 [134].

power under the SOE Act, such directives must not be inconsistent with Treaty principles or they would breach the Crown's obligation under s 9.

2.3.3. Scenarios

This analysis of s 13 directives allows several scenarios to be posited concerning action or inaction on the part of the Crown with regards to water usage and river diversion. These scenarios can then be assessed against s 9 to see how the provision may constrain the Crown in issuing such directives.

(a) Ministerial directive to include Treaty principles in SCI

Firstly, it is feasible that a Minister on behalf of the Crown could direct an SOE to include in its SCI a requirement that, in its operation and decision making, it act in accordance with Treaty principles.[78] In fact, however, few mentions are made in the various energy companies' SCIs of Treaty principles (none since the 2008-2009 period), with the strongest wording appearing in Genesis Energy SCIs for the periods 2007/2008 and 2008/2009. This stated that "Genesis Energy will continue to develop its relationships with Maori and will be sensitive to the principles and intent of the Treaty of Waitangi".[79] If the Minister was to issue a directive requiring the deletion of such a clause from an SCI, that may be a positive action contrary to Treaty principles that would be unlawful under s 9.

Section 9 does not put a positive obligation on the Crown to issue a directive that Treaty principles be included in an SOE's SCI. Given the finding mentioned earlier in the *Broadcasting Assets* case that the Crown cannot be forced to take positive action under the SOE Act to fulfil its Treaty obligations, Māori would not be able to compel the Crown to ensure that SCIs included Treaty principles. If they had been able to do so Māori would doubtless have utilised this to further their interests.

[78] In issuing a directive s 13(2)(a) requires the Crown to have regard to Part 1 of the SOE Act which includes not only s 9 but also the SOE objectives as stated in s 4. Alongside commercial objectives, s 4 requires SOEs to exhibit a 'sense of social responsibility'. Therefore it would likely be reconcilable with this objective to issue a directive to include Treaty principles in SCIs without breaching the principle objectives of SOEs under s 4 or overstepping the Crown's power under s 13; see James Carruthers "Deleting Statutory References to the Principles of the Treaty of Waitangi" (LLB (Hons) dissertation, University of Otago, 2005).

[79] Genesis Energy Statement of Corporate Intent 2007/2008 at 4. This provision does not impart onto SOEs the same level of obligation to Māori which the Crown has under s 9, but may give rise to obligations such as the duty to consult with local iwi concerning company actions.

(b) Ministerial obligation to prevent an SOE acting contrary to Treaty principles

An energy company may, of its own accord and under its own authority, make a decision to pursue a project such as river diversion that could be contrary to Treaty principles. This raises the question of whether the Crown could be required to issue a directive to halt this. This was effectively what the plaintiffs in *Te Heu Heu v Attorney-General* wanted the Crown to do in order to prevent the sale of land from an SOE to a third party which they said was contrary to Treaty principles. [80] It is clear from s 13 and *Lumber Specialties v Hodgson* that the Crown is able to lawfully issue a directive to prevent such action. But it is also apparent that the Crown cannot be compelled to take such positive action to protect Treaty principles. Therefore even if the SOE itself made decisions that breached the Treaty, the Crown is not in breach of its own obligations under s 9 by not taking action to stop the SOE, and therefore it cannot be compelled to do so.

(c) Ministerial directive that breached Treaty principles

There is one scenario which would likely be found to involve the Crown breaching its duty under s 9. This would be in the case where a directive was given to an SOE, under s 13, that it include something in its SCI that would breach Treaty principles. If, for example, the directive stated that the SCI should include an intention for the SOE to pursue river diversion and the establishment of a hydroelectric scheme without regard to potential Māori interests, then there may be a potential challenge to the lawfulness of this directive based on s 9. That would be positive action of the Crown that could be constrained, provided that a breach of Treaty principles could be shown.

This singular scenario illustrates the extent to which the Crown's action can be constrained by s 9. In applying only to positive actions of the Crown taken under the SOE Act without being able to compel action, the scope of s 9 is markedly limited in its binding effect on the Crown. Consequently it is only in these very limited circumstances that Māori would be able to successfully challenge the actions of the Crown on the basis of Treaty principles.

2.4. How does s 9 constrain the actions of SOEs themselves?

Having established that the Crown is constrained by s 9 only in very limited circumstances, this dissertation will now examine whether SOE companies can themselves be bound by Treaty principles. If so, this is a significant constraint that would allow Māori to directly challenge the

[80] *Te Heu Heu v Attorney-General*, above n 62 at 104.

decision of an SOE to pursue river diversion, without having to rely on the positive exercise of a statutory power of the Crown.

2.4.1. Are SOEs the 'Crown' for the purpose of s 9?

The first question that must be asked is whether SOE companies themselves fit within the meaning of the 'Crown' for the purpose of s 9.[81] In *Te Heu Heu v Attorney-General* the plaintiffs argued that, in carrying out their business, SOEs (and their subsidiaries) were directly bound by s 9 of the SOE Act as SOEs were part of the 'Crown' and had the same obligations.[82] The plaintiffs drew on the argument that 'section 9 qualifies the corporations' commercial objectives by giving pre-eminence to Treaty principles'[83] and that the 'concept of the Crown must be widely interpreted so as to ensure s 9 can operate with full force'.[84]

There is no single rule that can be used to determine whether an entity is part of the Crown. An assessment must be made in each case on the basis of the words of the legislation and the factual circumstances.[85] The court should look at whether the functions of the entity 'belong within the province of government', as well as the nature and degree of control that Ministers exercise over the entity.[86] In an examination of SOEs the Court found that, despite the Ministerial controls, the exercise of public functions, and the application of the Ombudsman and Official Information Acts to SOEs, other considerations carried more weight. The structure, framework and philosophy of the SOE Act reflected a move to distance the Crown from the commercial activities and day-to-day operations of the companies.[87] On the basis of this analysis, the High Court found that:[88]

> …to treat SOEs and their subsidiaries as being part of the Crown for the general purposes of s 9 would not accord with the philosophy of the Act.

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[81] Unlike s 2(1)(c)(iii) of the Public Finance Act 1989 (which also has application to SOEs) the definition of 'Crown' in s 2 of the SOE Act does not explicitly exclude SOEs. Therefore the court had to decide whether in these circumstances, an SOE can come within the meaning of the 'Crown' for the purpose of s 9.
[82] *Te Heu Heu v Attorney-General*, above n 62 at 116.
[83] The plaintiffs derived this wording from commentary in Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (Law Book Co., Sydney, 1993) at 60.
[84] *Te Heu Heu v Attorney-General*, above n 62 at 117.
[85] *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297; *Waitakere City Council v Housing Corporation* [1992] 3 NZLR 591.
[86] *Commissioner of Inland Revenue v Medical Council of New Zealand,* above n 85 at 326-327; also see Law Commission *Crown Liability and Judicial Immunity* (NZLC R37, 1997) at 30, para 89. This states that in apportioning liability the courts are likely to consider "the nature and extent of the Crown's powers of supervision and control in relation to the public body, and the way in which those powers have been exercised leading up to the breach".
[87] *Te Heu Heu v Attorney-General,* above n 62 at 119; Scott Gallacher "Crown liability in the 21st Century" [2003] NZLJ 242.
[88] *Te Heu Heu v Attorney-General*, above n 62 at 117.

The Court pointed out that if SOEs were part of the Crown under s 9, then this would make another provision in the statute superfluous which Parliament would not have intended.[89] The Court also observed that if an SOE was the 'Crown', then the *Lands* case would never have arisen, as the SOE would itself be bound by Treaty principles and just as obligated to protect Māori interests as the Crown.[90] Therefore, the answer to the question of whether s 9 can directly bind an SOE in its decision making, is clearly that it cannot. So, alternative arguments must be raised to argue that Treaty principles constrain SOE actions.

2.4.2. Judicial Review of SOEs under s 4

There is one other provision of the SOE regime that might be relied upon to argue that Treaty principles constrain the actions of SOEs. It may be argued that Treaty principles are incorporated into the statutory objectives of SOEs, as set out in s 4 of the SOE Act.

> **4 Principal objective to be successful business**
>
> (1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be—
>
> (a) as profitable and efficient as comparable businesses that are not owned by the Crown; and
>
> (b) a good employer; and
>
> (c) an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

Most notable in this section is the requirement in s 4(1)(c) that the SOE exhibit 'a sense of social responsibility'. This is not defined, but there is a potential argument that regardless of s 9, Treaty principles should come within this concept and SOEs should adhere to them, or at the very least give them consideration when making commercial decisions. In order to successfully make this case, several stages of argument need to be addressed. Firstly, it needs to be shown that s 4(1)(c) is not overruled by or subordinate to the commercial objectives of s 4. Secondly, to get a remedy SOE decisions must be amenable to judicial review under s 4 and subsection (1)(c) in particular. And thirdly, Treaty principles need to be incorporated into the meaning of 'social responsibility' which could then give rise to a judicial review claim.

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[89] SOE Act s 24(4) states that after transfer certain provisions of the Public Works Act 1981 will continue to apply as if the SOE were the Crown and the land had not been transferred. If the SOE was already considered to be the Crown there would be no need for this.

[90] *Te Heu Heu v Attorney-General,* above n 62 at 120.

(a) The status of s 4(1)(c) and the 'social responsibility' objective

A question raised in the *Broadcasting Assets* case was the status of subsection (c) and whether it was subordinate to the overall aim of operating as a successful and profitable business. Early writing on the subject indicated this commercial aim was to be the primary and predominant objective of SOEs.[91] Social responsibility on the other hand was seen as a vague term with no statutory guidance on its meaning or any formal requirement for its monitoring.[92] In addition, social objectives can be achieved through the mechanism set out in s 7 by which the Crown could contract with the SOE for the performance of non-commercial activities.[93] This provision was thought to reflect the SOE regime's aim of putting SOE companies at an arms-length from the Crown, and to preclude them from embarking on social objectives outside of this contractual relationship.[94]

The Privy Council in *Broadcasting Assets,* however, disagreed with this analysis and held that the social responsibility objective was not subordinate to the commercial aim:[95]

> There is nothing to suggest that those subparagraphs are not to be treated as being of the same weight. The creation of profit is of no greater importance than the other objectives identified in the subsection. The language of (c) makes it clear that, as long as the State enterprise has the necessary financial resources, it is perfectly entitled to be involved in a loss or non-profit making activity.

Due to this finding, the Court allowed the transfer of broadcasting assets from the Crown to the SOE to proceed, as it viewed it as compatible with the SOEs' objectives that, of its own accord, an SOE company could provide non-profit Māori language broadcasting.

(b) Justiciability of SOE decisions under s 4

After concluding that 'social responsibility' is an objective of SOEs that is of the same weight as commercial aims, it must be shown that it is possible to challenge an SOE decision that does not exhibit a sense of social responsibility. Early High Court precedents had found it to be 'strongly arguable' that even the contractual powers of SOEs were actually statutory powers under the

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[91] Early case law also supported this position; see *Wellington Regional Council v Post Office Bank Ltd* HC Wellington, CP 720/887, 22 December 1987 at 14-15 which stated that 'It is plain… that the overriding consideration is commercial'.
[92] Spicer, above n 51 at 15-16; Mascarenhas , above n 42 at 38.
[93] Jane Kelsey *Rolling Back the State: privatisation of power in Aotearoa/New* Zealand (Bridget Williams Books, Wellington, 1993) at 30.
[94] Spicer, above n 51 at 16.
[95] *Broadcasting Assets*, above n 36 at 519.

Judicature Amendment Act 1972 and were amenable to judicial review under s 4 of the SOE Act.[96] In *New Zealand Optical Ltd v Telecom Corporation of New Zealand* the court said that:[97]

> Unless the provisions of sec 4 are to be perceived as no more than precatory (an unlikely concept) the decision has to have regard to their requirements.

The matter was then directly addressed in *Mercury Energy v Electricity Corporation of New Zealand (ECNZ),*[98] the leading case which went to the Privy Council on the issue of judicial review of SOEs.[99]

Mercury Energy involved the decision of the SOE Electricity Corporation of New Zealand to terminate an interim agreement to provide electricity, and one of the claims in the judicial review proceedings brought against it was that s 4(1)(c) was breached and the termination was therefore invalid.[100] The case before the Privy Council was an appeal against the decision of the Court of Appeal to strike out the application for judicial review.

The first issue the court had to decide was whether the decisions of SOEs were amenable to judicial review. The argument that the commercial decisions of SOEs can be no more subject to judicial review than the commercial decisions of private companies was rejected,[101] and the Privy Council found that SOEs may be judicially reviewed under the Judicature Amendment Act 1972[102] as well as the common law:[103]

> A state-owned enterprise is a public body; its shares are held by ministers who are responsible to the House of Representatives and accountable to the electorate. The corporation carries on its business in the interests of the public. Decisions made in the public interest by the Corporation, a body established by statute, may adversely affect the rights and liabilities of private individuals without affording them any redress.

For these reasons, the court found that the decisions and actions of SOEs are generally subject to judicial review under s 4 on the basis of *Wednesbury*[104] principles, in the same way as other

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[96] Mai Chen "Accountability of SOEs and Crown-Owned companies: Judicial review, the New Zealand Bill of Rights Act and the impact of MMP" (1994) NZLJ 296 at 297.
[97] New Zealand Optical Ltd (in receivership) v Telecom Corporation of New Zealand Ltd (1990) 5 NZCLC 66,457 at 643.
[98] *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd (ECNZ)* [1994] 2 NZLR 385 (PC)
[99] This case was an appeal from the Court of Appeal's decision in *Auckland Electric Power Board v Electricity Corporation of New Zealand* [1994] 1 NZLR 551 (CA). In that case the Court held at 560 that the balancing of profitability and social responsibility is 'inherently unsuitable for judicial decision' and that individual acts of SOEs cannot be reviewed on such a basis.
[100] *Mercury v ECNZ,* above n 98 at 390.
[101] This argument was based on the previous law which held that commercial decisions were non-justiciable, and that the particular power at issue had to be specifically conferred by statute, see *New Zealand Stock Exchange v Listed Companies Assn* Inc [1984] 1 NZLR 699.
[102] Judicature Amendment Act, s 4.
[103] *Mercury v ECNZ*, above n 98 at 388.
[104] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233.

entities are subject to judicial review.[105] In deciding this, the Privy Council appears to be taking a broad approach that opens the door to judicial review of SOEs' commercial decisions notwithstanding the lack of a specific statutory power under the SOE Act.[106] However the court also places a significant limitation on this in the latter part of its judgment. It states that:[107]

> It does not seem likely that a decision by a state-owned enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of *fraud, corruption or bad faith*. [emphasis added]

This raises the bar for bringing judicial review proceedings against SOEs, as fraud and bad faith are very difficult grounds to prove.[108] Corruption rarely occurs and when it does it brings criminal proceedings, meaning judicial review is only one option that in the circumstances may not be the best course of action.[109] Part of the rationale behind the Privy Council's view appears to be that SOEs should be accountable politically rather than judicially, and that genuine commercial decisions should not be interfered with by the courts.[110] However, this limitation on the available grounds for judicial review was placed on decisions about contracts to 'supply goods or services', but it is less clear whether this restriction applies to other areas of SOE decision making.

The recent case of *NZ Climate Science v NIWA*[111] discusses the *Mercury* case, stating that whether this limitation applies depends on 'the nature of the decision under challenge'.[112] In this case the Court also held that the Privy Council in *Mercury* placed the limitation on judicial review because of the presence of alternate private remedies under contract.[113] In the scenario concerning water usage and river diversion posited by this dissertation, the nature of the decision is a commercial one, yet the only alternative remedy is that the decision may be challenged through the RMA

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[105] *Mercury v ECNZ*, above n 98 at 389; G D S Taylor and J K Gorman *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at 15. Reaching this conclusion on the basis of 'public function' is in line with the *Webster v Auckland Harbour Board* [1987] 2 NZLR 129 line of judicial review cases.

[106] Since *Mercury v ECNZ* the courts now are less concerned with the source of the power and 'more ready to treat as reviewable the exercise of any power having public consequences', see *White v Wilson* [2005] 1 NZLR 189 (CA) at 196; *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 at 11; *O'Leary v Health Funding Authority* [2001] NZAR 717 at 723; and James Palmer and Kate Wevers "Judicial review in a commercial context" [2009] NZLJ 14.

[107] *Mercury v ECNZ*, above n 98 at 391.

[108] Mai Chen "Accountability of SOEs and Crown-owned companies", above n 96 at 298.

[109] Additionally, these would all normally give rise to a claim in tort that may be a better option for plaintiffs to pursue, see Taylor at 17.

[110] Kent N Phillips "*Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521. Privy Council. Lords Templeton, Goff, Mustill, Slynn and Woolf" (1992-1995) 7 Auckland U L Rev 750 at 753; James Palmer, above n 106.

[111] *New Zealand Climate Science Education Trust v National Institute of Water and Atmospheric Research Ltd* [2012] NZHC 2297. The subject of judicial review in this case is not an SOE but a Crown Research Institute. However the court found that the similarities in the legislation governing these entities and the types of powers given to Ministers indicate that decisions are justiciable on the same basis.

[112] Ibid, at [29].

[113] Ibid, at [34].

scheme, which as discussed is weakened by its multiple objectives and not analogous to private, contractual liability. This situation differs from *Mercury* as the prospective plaintiffs have had no opportunity to place themselves in a relationship with the SOE that gives them an alternative remedy, yet they may be adversely affected by the public effects of the commercial decisions of the SOE. Consequently, the court may find that the rationale in *Mercury* does not apply to this situation, and the decisions of SOEs would therefore be subject to judicial review on grounds not limited to 'fraud, corruption or bad faith'.

(c) Can Treaty principles be incorporated into the meaning of 'social responsibility'?

This does not mean, however, that because SOE decisions can be reviewed they may be reviewed on the basis of Treaty principles. In order for Māori to be successful in their claim they would still need to show that Treaty principles are part of an SOE's 'social responsibility'. There is little guidance given in any cases as to the meaning of 'social responsibility', and unlike the subsection (b) requirement that SOEs be good employers, there is no definition in the legislation as to the meaning of this term. The notion itself is vague and the closest that courts have come to discussing its meaning was in *Lawson v Housing New Zealand*.[114]

This case dealt with legislation that set up Housing New Zealand (HNZ) as a rental SOE with very similar statutory provisions to the SOE Act.[115] The principle objectives in s 4 of the SOE Act are largely replicated with s 4(1)(b) stating that the HNZ is to be "an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates". Williams J notes that social responsibility is an elusive concept, and finds that Parliament likely intended 'social' as 'societal': pertaining to society and social conditions. [116] He also found that the reference to 'community' in the singular in the SOE and HNZ legislation means that these organisations should have regard to community interests on a national rather than local level.[117]

This provides some assistance in interpreting the meaning of 'social responsibility', but the definition of the term remains vague. A key argument against including Treaty principles in this definition is that Parliament has chosen to specifically deal with this separately in s 9 and to bind the Crown (and, as discussed earlier, only the Crown) to these principles. This seems a clear indication of the legislature's intent that Treaty principles do not form part of the 'social

[114] *Lawson v Housing New Zealand* [1997] 2 NZLR 474.
[115] Housing Restructuring Act 1992.
[116] *Lawson v Housing New Zealand,* above n 114 at 483.
[117] Ibid.

responsibility' objective, although a case could still be made that Treaty principles could be included on the basis of their general relevance to New Zealand society at a national level.

Even so, there are numerous considerations pertaining to the non-Māori majority that could qualify as 'interests of the community' that Treaty principles would have to be balanced against. If 'social responsibility' refers to the singular 'national' community as *Lawson* implies, the argument that Treaty principles are predominant over other considerations is less likely to stand. Faced with an energy company pursuing river diversion, the national community interest in power generation will likely have more influence that the community interests of Māori in a particular river.

Further, even if Treaty principles were included within the meaning of 'social responsibility' to the degree that Māori could bring action on that basis, the Court must balance this against the other objectives of s 4, which includes its commercial aims to act as a successful business, and to be profitable and efficient. The fact that it is possible to review decisions on the basis of 'social responsibility' does not mean that s 4(1)(c) acts as a veto over SOE decisions that breach it', and this balancing will still need to occur. No cases have arisen where the court has, on the basis of the 'social responsibility' objective, interfered with a SOE's commercial decisions. It is unlikely that the ground of Treaty principles, even if it could be included within that objective, would induce the Courts to overcome this reluctance.

The argument that Treaty principles can be included within the definition of 'social responsibility' in s 4(1)(c), and that commercial decisions can be reviewed on this ground is not likely to be successful. Despite the Court's finding that s 4(1)(c) has equal authority to the other objectives, and that the decision of an SOE to pursue the diversion of a river may be justiciable, it is unlikely that including Treaty principles within the broad concept of 'social responsibility' would be sufficient to generate successful judicial review of such a decision.

This therefore leads to the conclusion that the actions of SOEs themselves cannot be constrained by s 9 and that it is only the Crown that is bound by Treaty principles. The overall effect of s 9 is minimal with regard to the water usage issue envisaged in this dissertation, as it is only in the very limited circumstances where the Crown takes positive action that breaches Treaty principles that s 9 can have any force. This essentially provides a minimum standard of Crown behaviour, and acts as a backstop to prevent truly egregious conduct on the part of the Crown. However, attempts to use s 9 to bring action against the Crown or SOES beyond this are unlikely to be successful.

CHAPTER 3: SECTION 45Q AND MOM COMPANIES

Having completed an analysis of how s 9 and Treaty principles operate within the State-Owned Enterprises regime, this dissertation now analyses s 45Q within the Mixed Ownership Model system. This chapter examines the effect s 45Q will have in constraining the actions of the Crown and the MOM companies. A comparison with s 9 and the SOE scheme will show that, despite s 45Q having almost identical wording to s 9, the legislative framework of the MOM regime provides no scope for s 45Q to have any practical effect.

3.1. The meaning of s 45Q in the Public Finance Act

Section 45Q(1) is almost identical in wording to the s 9 provision in the SOE Act. It reads:

> **45Q Treaty of Waitangi (Te Tiriti o Waitangi)**
>
> (1) Nothing in this Part shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

The main difference is that this section has the wording 'Nothing in this Part' instead of 'Nothing in this Act'. The 'Part' referred to is Part 5A of the Public Finance Act, and it is therefore only powers deriving from this Part which permit certain Crown actions, that are bound by s 45Q. Apart from this the wording is identical except for the adding of the reference to the Māori text of the Treaty. The rest of the meaning is likely to be the same as under s 9, and the *Broadcasting Assets* finding that the negative phrasing does not put a positive obligation on the Crown will still apply. Therefore, the provision only applies to the Crown, and Treaty principles cannot be used to compel the Crown to take positive action.

3.2. What powers does the Crown have over MOM companies?

In order to assess whether the Crown can be bound by s 45Q it must first be established what kinds of power the Crown has with regards to MOM companies. Broadly, these can be categorised as: powers under the MOM legislation (namely under Part 5A), powers under the Companies Act 1993, and powers deriving from the constitutions of the MOM companies.

3.2.1. Powers under the MOM legislation

Unlike the SOE Act, the Public Finance (Mixed Ownership Model) Amendment Act 2012 does not give any significant powers to the Crown regarding control over the MOM companies. Instead the role of the Crown and the powers of the shareholding Ministers are greatly

diminished in the MOM legislation, and public accountability mechanisms are decreased. The operation of the companies will no longer come under the responsibility of the shareholding Minister, there will be no requirement to form Statements of Corporate Intent on the subjects stated in s 14 of the SOE Act, and there is no ability of the Minister to influence what that corporate intent is by issuing directives to the companies. Tabling SCIs and annual reports in the House will not be required, and the companies will be removed from the jurisdiction of the Official Information Act 1982 and the Ombudsmen Act 1975.[118]

An overview of the MOM legislation therefore reveals that the two Acts involved are really designed to do two things. One is to facilitate the transfer of energy companies from the SOE to the MOM scheme. This transfer is achieved by the legislation itself. The second sets out the additional legal prohibitions under which the MOM companies must operate, namely the minimum level of Crown ownership at 51%, and the maximum level of private ownership by any one investor of 10%. However, the Act does not grant any specific power to the Crown with respect to the actions of MOMs, and without these powers, the role of the Crown and shareholding Minister is reduced to those of a majority shareholder under the Companies Act 1993.

The sale of the shares would then take place as an exercise of a shareholder power derived from the Companies Act 1993,[119] but not from either the SOE Act or the MOM legislation. Nothing in the SOE Act or Part 5A of the Public Finance Act 1989 'permits' the Crown to sell its shares, and both s 9 and s 45Q state that it is only actions permitted under these that must not be 'inconsistent with Treaty principles'. Unlike the SOE Act, which states that Ministers of the Crown must hold all the shares,[120] the MOM legislation only states that they must hold 51% and consequently allows Ministers to use their powers as shareholders to sell the remaining 49%. This means that the Treaty protection clauses in the two regimes could not be used to challenge the power of the Crown to sell shares in the energy companies, because that sale is not 'permitted' by either piece of legislation.

3.2.2. Powers as majority shareholder under the Companies Act 1993

Each SOE energy company is a limited liability company under the Companies Act 1993, as will be the MOM companies. Under company law the Crown will be able to sell its shares in the

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[118] Treasury *Comparison of powers of shareholding Ministers in the SOE and mixed ownership model regimes* (8 March 2012).
[119] Companies Act 1993, s 39 states that shares in companies are transferrable subject to any limitation in the constitution of the company; see Matthew Berkahn and Lindsay Trotman "Equity Finance" in John Farrar (ed) *Company and Securities Law in New Zealand* (Thomas Brookers, Wellington, 2008).
[120] SOE Act, s 11.

energy companies, and will be able to appoint or remove directors by ordinary resolution (using its majority share of the voting rights).[121] The Crown will also have a significant voting right which effectively equates to at least a veto vote, on issues that require a special resolution of shareholders.[122] This is required when a company is adopting, altering or revoking its constitution, approving a major transaction,[123] approving an amalgamation of the company, or putting the company into liquidation.[124]

3.2.3. MOM company constitutions

Currently all the power companies have constitutions that set out how they operate, although these will have to be altered or new constitutions adopted as their content shows that the companies are clearly designed to operate as part of the SOE regime.[125] These constitutions currently do not give any additional significant powers to the Crown, but there is the possibility that in amending (or revoking and adopting a new constitution) the Crown could choose to give itself additional rights, such as consultation rights.[126] While an initial report by Treasury indicated that the Crown would be able to protect its interests through ordinary resolution of shareholders, further work was to take place to determine if additional levers would be required.[127]

As the MOM companies are to be modelled on Air New Zealand, any additional rights could model those given to the Crown shareholding by the Air New Zealand constitution.[128] Those rights are that the Crown's consent is required before the constitution can be changed relating to the company's powers, before the sale of over 10% of the shares to a foreign nation over 10%, and before a shareholder affiliated with another airline can own shares.[129] These are not hugely significant, but should any clauses of this type be included in the constitutions of the energy companies, then these would be additional powers of the Crown over the control of MOM companies.[130]

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[121] Companies Act 1993, ss 153, 156.
[122] Ibid, s 2 states that a special resolution means 'a resolution approved by a majority of 75%' of the shareholders.
[123] Ibid, s 129(2) states that major transactions are those that involve the acquisition, disposition or transaction of more than half the value of the company's assets.
[124] Ibid, s 106.
[125] For example, the Constitution of Mighty River Power states in cl 8.1 that every share in the company must be held on behalf of the Crown by a Minister of the Crown.
[126] Mai Chen, *Public Law Toolbox*, above n 55 at 111.
[127] Ibid, at 109.
[128] Mai Chen *Public Law Toolbox*, above n 55 at 108.
[129] Air New Zealand Constitution 2005, cl 3.5.
[130] Any additional rights would need to be included in the constitutions before the Crown had lowered its shareholding to below 75%, which is the percentage of the shareholder vote needed to amend the constitution under s 32 of the Companies Act 1993.

3.3. How does s 45Q constrain the Crown with regards to MOM companies?

3.3.1. Constraint on exercise of the Crown's shareholder power

Whilst the powers of the Crown are significantly reduced, Māori may yet wish to try and apply s 45Q or equivalent principles to challenge Crown actions when exercising its shareholder powers. The main action that could be challenged is the sale of shares, and in terms of influencing operational decisions of MOM companies the ability of the Crown to appoint or remove directors entirely on the basis of its own majority vote is one of its more significant powers. Any additional consultation rights deriving from the constitution may also have an impact, and the ability to use s 45Q to require the Crown to apply Treaty principles in exercising these powers would be a significant boost to Māori.[131]

However, the wording of s 45Q is negatively phrased and only applies when the Crown exercises a power 'permitted' by Part 5A in a manner that is inconsistent with Treaty principles. But Part 5A does not confer any powers to take action on the Crown. As previously stated, the power to sell shares is an exercise of shareholder power derived from the Companies Act, and not from the MOM legislation. The Crown also has no powers permitted by Part 5A to influence company decisions, such as the decision to pursue hydroelectric power generation by diverting a river. Therefore, shareholder powers are not actions permitted by Part 5A that could be constrained by the Treaty principles provision in s 45Q.

Given that the Crown cannot be constrained directly by the provision this dissertation will now briefly examine two alternative arguments that Māori could use in an attempt to make Treaty principles relevant to powers of the Crown that do not derive from the MOM legislation itself.

3.3.2. Public law duties of the Crown

First is the argument that the public law duties of the Crown require that it consider Treaty principles in exercising its powers when Māori will be affected, despite the fact that s 45 has no direct application. This is because, if it can be shown that the Crown is exercising a power which is public in substance or has important public consequences,[132] this may be reviewable under the

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[131] The Government has said that "In practice, Ministers will look to best commercial practice in how they exercise those powers. This is a necessary pre-requisite where the decisions of the Crown as majority shareholder could affect the property rights of minority shareholders" in New Zealand *Government Extension of the Mixed Ownership Model: A proposal to change legislation in relation to: Genesis Power Ltd, Meridian Energy Ltd, Mighty River Power Ltd, Solid Energy New Zealand Ltd: Consultation with Māori* (February 2012) at 10. As they are therefore unlikely to willingly take Treaty principles into account in the exercise of their powers, to have these taken into account Māori would have to show there was an obligation on the Crown under s 45Q.

[132] *Royal Australasian College of Surgeons v Phipps*, above n 106.

Judicature Amendment Act 1972[133] or the common law judicial review procedure.[134] If Crown decisions are reviewable on public law grounds and Māori are able to bring Treaty principles within the scope of this review, then they may be able to prevent action or require the Crown to take customary interests in water resources into account in decision making, without relying on the direct application of s 45Q.

(a) The Crown's decision to sell shares

It is possible that Treaty principles could be used to try and prevent the sale of shares by the Crown in the first place. This sale would be undertaken on the basis of the Crown's shareholder powers under the Companies Act.[135] However, even without relying on the idea that this is the exercise of a statutory power, the decision to sell may be reviewable on the grounds of the public function exercised in making the decision, and its public effects.[136]

The effects on Māori plaintiffs who claim customary interests in freshwater resources may be enough for a court to find that they have standing to bring a judicial review claim against the government, on the basis of public interests being detrimentally affected by the decision to sell. This argument however, is countered by the reluctance of the Courts to interfere with decisions that involve policy or political judgement.[137] The Court has held that the larger the policy content and the more the decision is within the 'customary sphere of elected representatives,' the less likely courts will be inclined to intervene.[138]

If it was held that the decision to sell shares was judicially reviewable, then Māori would likely still be unable to make out the substantive grounds of review necessary to prevent sale of the shares. In *Love v Attorney-General,*[139] Māori plaintiffs sought to have the Crown's decision to sell its shares in the former SOE Petrocorp halted on the basis of Treaty principles.[140] This partially privatised company was not subject to any direct Treaty clause, but Māori alleged that the

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[133] Judicature Amendment Act 1972. Under s 4 review can be brought of bodies exercising a 'statutory power', defined in s 3. This definition includes powers or rights conferred by or under a constitution, as well as an Act.
[134] High Court Rules, r 30 allow for common law judicial review.
[135] Companies Act 1993, s 39. This section on the transferability of shares merely affirms the power, which exists as a proprietary right derived from share ownership.
[136] *R v Panel on Take-Overs and Mergers, ex parte Datafin* plc [1987] QB 815 held a body that was not exercising statutory, prerogative or common law powers could nonetheless be judicially reviewed on the basis of its public function. New Zealand cases of *White v Wilson,* above n 106 , and *Royal Australasian College of Surgeons v Phipps,* above n 106 affirm this position.
[137] In *Lands*, above n 2 at 665 Cooke P stated that "The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy".
[138] *CREEDNZ v Governor-General* [1981] 1 NZLR 172 at 198.
[139] *Love v Attorney-General* HC Wellington, CP No 135/88, 17 March 1988.
[140] Māori argued that their claim before the Waitangi Tribunal would likely lead to a settlement which would include Crown shares in Petrocorp as well as assets of the company.

obligations of the Crown under the Treaty required that the sale not take place until after settlement of their claim.

This argument was unsuccessful, as the Court rejected the argument that the Treaty could be considered by the courts without statutory incorporation.[141] The statutes under which the Crown was exercising its powers did not have Treaty principles provisions, and hence the exercise of those powers could not be reviewed on Treaty grounds.[142] While the legislation governing MOM companies has a Treaty principles provision, the lack of one in the legislation that gives the shareholders the power to sell means that this rule would still apply. It would require a court willing to enter novel terrain to rule that the decision to sell assets could be prevented on the grounds of Treaty principles.

More likely is a judicial finding that Treaty principles are a mandatory relevant consideration that the Crown must take into account when making its decision to sell. Despite its lack of legal enforceability, the Treaty is nevertheless an instrument that permeates New Zealand law[143] and therefore can be an implicit mandatory consideration with regard to certain actions,[144] and can require consultation with Māori to be undertaken. In *New Zealand Māori Council v Attorney-General* [*Radio Frequencies*][145] case the Court required the Crown to postpone its tender process for radio frequencies until a Waitangi Tribunal report on the issue was completed, and a similar finding could be made if the Crown acted without taking Māori interests into account in the share sale. However, the fact that the Crown may have to take certain considerations into account or that it must consult with Māori does not mean that this will change the outcome of the decision.[146] Ultimately the government is still empowered to exercise certain powers and as long as it can be shown that its mind was turned to Treaty issues, then it is unlikely that a court will interfere with the right of the Crown to exercise its powers of sale in the companies.

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[141] Carrie Wainwright "The SOE Cases" (paper presented to New Zealand Law Society Treaty of Waitangi Seminar, August 2002) 2 at 12-13; Jane Kelsey *A Question of Honour? Labour and the Treaty 1984-1989* (Alley & Unwin, Wellington, 1990) at 146-147.

[142] The statutory powers identified that gave the shareholding Ministers the power to sell shares in Petrocorp were the Ministry of Energy Act 1977, s 15 and the Finance Act 1982, s 2.

[143] While not directly enforceable, it has been held that the Treaty is a part of New Zealand's social fabric, that it can be used as an aid to interpretation, and that the Courts will be reluctant to hold that Parliament intended to legislate inconsistently with the Treaty, see *Lands,* above n 2 at 665-666; *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188.

[144] Matthew Smith *New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011).

[145] *New Zealand Māori Council v Attorney-General* [1991] 2 NZLR 129 [*Radio Frequencies*]; Baragawanath, David J "The Harkness Henry Lecture: The Evolution of Treaty Jurisprudence" (2007) 15 Waikato L. Rev 1 at 10 states that "The Treaty should… be a mandatory consideration relevant to decision-making including adjudication".

[146] On the current political issue of Māori customary water ownership, this is precisely what the Crown is trying to avoid by delaying share sales while they embark on a consultative process with Māori that takes Treaty principles into consideration. Their likely aim in doing so is that they will be seen to have complied with these requirements should the matter come before the courts.

(b) Crown exercises of shareholder power

In seeking to prevent an energy company from embarking on a river diversion scheme contrary to Māori customary water usage, Māori are unlikely to be successful in using public law to require the Crown to act consistently with the principles of the Treaty. To do so they would again have to show that the decision is reviewable on the grounds of Treaty principles. Given the limited range of powers the Crown exercises as a shareholder, this would be substantially more challenging. For example, showing that the appointment or removal of a company director is a decision which is public in function or effect would be reasonably difficul given the now partially-privatised nature of the company. Even if Māori could show that this impacted on their water interests, as shown by the discussion above, Treaty principles could neither force nor prevent the Crown exercising its powers in a particular way. The public law arguments of mandatory relevant considerations or the right of consultation may in this scenario have some application if a court took the novel step of applying judicial review to these decisions, but are overall unlikely to have any significant impact on the actions and decisions of the Crown.

3.3.3. Fiduciary duties of the Crown

If the above argument is unsuccessful, plaintiffs seeking to protect Māori interests could pursue a claim in the courts based on the fiduciary duty of the Crown to adhere to Treaty principles.[147] In equity, a fiduciary relationship arises where 'one party is entitled to expect that the other would act in his or her interests in and for the purposes of the relationship'.[148] A key feature is the difference in relative legal position between the parties that leaves one at the 'mercy of the other's discretion', which fiduciary obligations aim to control.[149] If Māori could successfully argue that the Crown owed them fiduciary duties under the Treaty, they could challenge the Crown to exercise its shareholder powers to exert influence over a MOM company.

(a) A fiduciary duty based on the Treaty

Several cases refer to and discuss the doctrine as a possible source of Crown obligation in contexts where there is a legislative reference to the Treaty.[150] This was first raised in the *Lands* case, as Cooke P expressed that "the relationship between the Treaty partners creates

[147] A three-stage formulation of the elements of a general fiduciary relationship was adopted by the Court of Appeal in *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 at 22. This states that there must be scope for the exercise of some discretion/power, that the fiduciary can act unilaterally so as to affect the beneficiary's interests, and that the beneficiary is particularly vulnerable.
[148] *Laws of New Zealand* Equity (online ed) at [97].
[149] E. Weinrib "The Fiduciary Obligation" (1975) University of Toronto Law Journal 1 at 7.
[150] Te Puni Kōkiri *He Tirohanga o Kawa Ki Te Tiriti o Waitangi: A guide to the principles of the Treaty of Waitangi as expressed by the courts and the Waitangi Tribunal* (Wellington, 2001).

responsibilities analogous to fiduciary duties".[151] In the same case Richardson J stated that "no less than under the settled principles of equity as under our partnership laws, the obligation of good faith is necessarily inherent in such a basic compact as the Treaty".[152] However this was kept within the realm of statutory interpretation and it was not suggested that a fiduciary like relationship would be capable of giving rise to an independent action if a breach occurred.[153]

Several obiter comments of Cooke P in following cases indicated that Canadian fiduciary doctrine could provide guidance,[154] and that the Treaty gives major support for such a fiduciary duty.[155] The Court of Appeal also held that if the Crown had assumed control of rivers from Māori without consent, a remedy might be sought on the basis of a breach of fiduciary duty.[156] However, despite these dicta, the courts have not accepted that the Treaty, or legislative references to its principles, can create a binding fiduciary relationship that can form the basis of Crown liability under the law of equity.[157] This judicial attitude was shown most recently in the *Te Arawa Cross Claim* case,[158] where the Court of Appeal rejected the argument that a fiduciary duty was owed by the Crown on the basis of the Treaty. It instead favoured the idea that the Crown's obligations are no more than 'analogous' to fiduciary duties, and said that Canadian jurisprudence reflected the different 'statutory and constitutional context in Canada,' which did not necessarily apply in New Zealand.[159] The Court also pointed to the practical difficulty in applying a binding fiduciary duty to the Crown, as it would be impossible to avoid conflicts of interest due to the Crown's obligations to the population as a whole, and its obligations to Māori groups with conflicting interests.[160]

These comments are obiter,[161] but reflective of the overall judicial attitude that enforceable fiduciary obligations do not arise from the Treaty itself. Rather the concept is used as a tool of statutory interpretation or as 'judicial shorthand' for expected Crown conduct in relations with

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151 *Lands*, above 2 at 664, per Cooke P.
152 *Lands,* above 2 at 682, per Richardson J.
153 R P Boast "New Zealand Maori Council v Attorney-General" [1987] NZLJ 240, at 245.
154 *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641 at 155, per Cooke P, citing as guidance the Canadian case of *Guerin v The Queen* (1984) 13 DLR (4th) 321.
155 *Te Runanga o Wharekauri Rehohu Inc v Attorney-General* [1993] 2 NZLR 301 at 304.
156 *Te Runanganui o Te Ika Whenua v Attorney-General* [1994] 2 NZLR 20 at 24, per Cooke P.
157 Kendal Luskie "The Relationship between the New Zealand Crown and Māori: A future for fiduciary obligations?" (LLB (Hons) dissertation, University of Otago, 2010) at 27.
158 *New Zealand Maori Council v Attorney-General* [2008] 1 NZLR 318 [*Te Arawa Cross Claim* (CA)].
159 Ibid, [81].
160 For a discussion of how a Crown-Māori fiduciary relationship could exist and operate see Gerald Lanning "The Crown-Maori Relationship: The Spectre of a Fiduciary Relationship" (1996-1999) 8 Auckland U L Rev 445.
161 Leave to appeal the *Te Arawa* case to the Supreme Court was granted and later withdrawn *New Zealand Maori Council v Attorney-General* [2007] NZSC 87. The Supreme Court did however issue a short minute noting that the comments of the Court of Appeal as well as the High Court regarding the Crown's fiduciary obligations to Māori were obiter dicta; see *Supreme Court of New Zealand SC 49/00,* Chief Justice Elias with Justices Tipping, McGrath and Wilson, 4 November 2007.

Māori under public law when the Treaty principles are incorporated into statute, without giving rise to an enforceable cause of action in equity.[162]

In the context of Crown decisions concerning MOMs, therefore, the existence of the Treaty and the reference to its principles would not be enough to create a fiduciary obligation on the part of the Crown. A particularly activist judiciary would be required before such a development could occur, and it is unlikely that if the issue came before New Zealand courts at the moment the fiduciary obligations argument would be accepted.

(b) A common law fiduciary duty or a relational duty of good faith

The issue of a common law fiduciary duty has been raised although not decided before the courts. Leading North American cases hold that a fiduciary duty to indigenous people may arise without a specific legislative basis[163] and that treaties and legislation declare the pre-existing fiduciary duty rather than operate as the source of it.[164] This has not yet been applied within a New Zealand context by the courts. Discussing the issue in *Paki v Attorney-General*[165] the Court preferred the notion of a 'relational duty of good faith' over fiduciary duties as a better vehicle for Crown-Māori obligations.[166] Arising from the overall history of Māori-Crown relations (including the Treaty) this would be a more flexible doctrine that provides for obligations without recognising the absolute nature of a duty of good faith that is required of fiduciaries.[167] It would also reflect the equal status and 'partnership' principles of the Treaty better than the traditional fiduciary notion. Despite these obiter comments positing the notion, however, courts have not accepted this doctrine as existing in New Zealand law.[168] This could yet be recognised, but as with judicial recognition of Treaty based fiduciary duties, it would require an extension of the current jurisprudence to impose a common law fiduciary or relational duty or good faith obligation to Māori on the Crown.

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[162] Kendal Luskie, above n 157 at 27.
[163] Matthew Palmer *The Treaty of Waitangi in NZ's Law and Constitution*, above n 5 at 199.
[164] P McHugh *The Māori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford University Press, Auckland, 1991) at 249.
[165] *Paki v Attorney-General* [2011] 1 NZLR 125; (2009) 10 NZCPR 812 (CA).
[166] Ling Yan Pang "A Relational Duty of Good Faith: Reconceptualising the Crown-Māori Relationship" (2011) 17 Auckland U L Rev 249 at 259.
[167] *Proprietors of Wakatū Inc v Attorney-General* [2012] NZHC 1461 at [266].
[168] Ibid

3.4. Does s 45Q constrain MOM companies directly?

The next question to be examined is whether s 45Q can constrain the operation of MOM companies themselves by requiring them not to act inconsistently with the principles of the Treaty of Waitangi.

3.4.1. Effect of s 45Q(2) and the meaning of 'the Crown'

The most direct answer to this question is given by subsection (2) of s 45Q, which states that:

> (2) For the avoidance of doubt, subsection (1) does not apply to persons other than the Crown.

This subsection makes it clear that the government wishes to exclude private investors and the MOM companies themselves from the constraint of Treaty principles.[169] However, this is not actually very different to the situation under the SOE Act. Rather than altering the application of the provision, ss (2) was added when the Treaty clause was inserted into the Bill,[170] to quell concerns that private investors would be bound by Treaty principles.[171] No case law existed to show that entities other than the Crown could be directly bound by the wording of ss (1), but to prevent the possibility and reassure potential investors the provision was included.

The issue that arose in cases under the SOE Act was not whether parties other than the Crown could be directly bound by Treaty principles, but whether an SOE itself fits within the definition of the 'Crown' for the purposes of s 9. As this legislation makes clear that only the Crown may be bound, the issue then becomes whether a MOM company can fall within the definition of the 'Crown'.

As previously discussed, case law on whether an entity is the 'Crown' states that an assessment must be made on the circumstances of each case, considering the degree of Ministerial control and the functions of the entity.[172] On this basis the High Court in *Te Heu Heu v Attorney-General* held that an SOE was not part of the Crown, because the SOE scheme was intended to distance the Crown from commercial activities, and it would 'not accord with the philosophy of the Act' to find that an SOE was part of the 'Crown'.

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[169] MOM Bill, above n 21 at 5.
[170] Cabinet Minute, "Mixed Ownership Model: Results of Consultation with Māori and Final Policy Approvals for Legislation" (5th March 2012) CAB (12) 56.
[171] During discussions over the inclusion of Treaty principles the Māori Party wanted the clause to apply to private investors as well, but later acknowledged that it could not as they were not party to the Treaty. Subsection 2 clarifies this position. See Adam Bennet "SOE sales: Treaty provisions survive" *New Zealand Herald* (online ed, 5 March 2012).
[172] *Commissioner of Inland Revenue v Medical Council of New Zealand*, above n 85.

All the reasons given in *Te Heu Heu v Attorney General* that distinguish the SOE as a separate entity from the Crown apply to the MOM scheme, but to a greater extent. The whole framework and structure of MOM companies under the Public Finance Act 1989 increases the distance between the Crown and the companies. Ministerial controls are minimised, as powers to influence SCIs and issue directives have been removed, and the Crown is considerably more distanced from the day-to-day operations of the companies. The companies are also no longer subject to the Ombudsman and Official Information Acts and the s 4 'social responsibility' objective has been removed. When examining whether the functions properly belong to the Crown, the fact that these companies have significant private ownership would deter such a finding, as it is clear they are now intended to be purely commercial operations. Overall it is clear from this that MOM companies are not the Crown, so any argument that Treaty principles apply to MOM company decision making would need a different legal basis.

3.4.2. Judicial Review of MOM company decisions

Whilst the courts have held that SOEs are not the Crown for the purpose of s 9, they also held that the decisions of SOE companies could be subject to judicial review in *Mercury Energy v ECNZ*. It is now important to discuss whether MOM companies could likewise be judicially reviewed and, if so, whether a breach of Treaty principles could be a ground for such review. If so, then the decision of a MOM company to pursue the type of river diversion this dissertation envisages might be challenged on this basis.

The *Mercury Energy* case holding that SOE companies can be judicially reviewed focused on the fact that the energy company was considered a public entity. However in looking at the MOM scheme, it is unlikely that such an argument would hold. *Mercury* focused on the fact that shares were held by Ministers who were accountable to the House, and that decisions of the SOEs would be made in the public interest. In the MOM context neither of these reasons stand. The Minister is removed from control, and a MOM company is a partially privatised one that depends on the market as its primary accountability mechanism.

The removal of the objectives stated in s 4 of the SOE Act also significantly changes the position of MOM companies, and weakens the argument that a MOM company could be construed as a public body. Its objectives are no longer determined by statute and the legal obligation to 'exhibit a sense of social responsibility' no longer exists. Objectives for the companies will be determined in the same way as for ordinary private companies operating under the Companies Act. This not only weakens the claim that MOM companies are public entities, but also makes it most unlikely

that a court would consider MOM company objectives to be constrained by Treaty principles. There is no equivalent provision establishing objectives that could be raised to challenge MOM company actions, and consequently no alternate avenue for arguing that Treaty principles bind the energy companies as a part of this social objective.

This leads to the conclusion that, despite the inclusion of s 45Q in the MOM framework, the provision is devoid of legal effect and cannot constrain either the Crown or the energy companies. The ability to sell shares, exercise shareholder powers, and make decisions on issues such as whether to pursue a new hydro-electric dam cannot be constrained by Treaty principles. While in the *Lands Case* part of the Court's reasoning was that Parliament would not have enacted a provision intended to be meaningless,[173] this is nevertheless the conclusion that must be reached after analysing s 45Q. The legislative framework of the MOM regime simply does not allow for that section to have any meaningful effect.

[173] *Lands Case*, above n 2 at 660-661, per Cooke P.

CHAPTER 4: WHAT IF S 45Q WAS NOT IN THE MOM LEGISLATION?

4.1. What would be the legal difference if the provision was not included?

The core argument of this dissertation, arising from the detailed analysis of the legislation given above, is that s 45Q in the MOM legislation could not form the basis of successful legal action in the type of water usage rights situation envisaged. The lack of provisions in the legislation conferring powers on the Crown, and the shortage of other viable routes for challenging actions, mean that in practical terms there would be no legal difference if s 45Q had not been included.

4.2. What significance does its inclusion have?

Despite this finding, however, the original decision of the government not to include the provision caused a controversy in early 2012.[174] A political backlash occurred which led the government to embark on a series of consultation hui around the country, and, ultimately, to include a replica of the provision in the new law. The provision, then, despite lacking legal effect, must have some significance beyond its possible use to challenge Crown and company action in the type of water rights situation this dissertation has discussed. Additional reasons for its inclusion can be broadly divided into three categories: symbolic significance, political significance and constitutional significance. It was for these reasons that proponents of s 45Q sought to ensure it was included in the final legislation.

4.2.1. Symbolic significance

Since the 1970s there has been a resurgence of Māori culture, language and activism that largely contributed to the rise of Treaty based jurisprudence over the past decades.[175] The original inclusion of s 9 in the SOE Act was as a result of this renaissance, and the advances that came with the Courts' interpretation of the provision have been far-reaching in their decisions on subjects such as land, te reo Māori, forestry and television.[176] The core importance of s 9 in defining the 'partnership' between the Crown and Māori gives the provision a symbolic status in New Zealand law as the most significant provision on which Treaty jurisprudence has been based.[177]

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[174] Claire Trevett "Treaty clause complicates asset sales *New Zealand Herald* (31 January 2012).
[175] Richard S. Hill *Maori and the State: Crown-Maori Relations in New Zealand/Aotearoa, 1950-2000* (Victoria University Press, Wellington, 2009) at 149-153 describes the growth of Māori political consciousness and activism in this era.
[176] Māori Party "Submission to the Finance and Expenditure Committee on the Mixed Ownership Model Bill 2012" at 2.
[177] Geoffrey Palmer *New Zealand's Constitution in Crisis*, above n 61 at 87 describes this case as 'the most dramatic case on Maori issues ever decided by a New Zealand court'.

4.2.2. Political significance

The greatest significance that the inclusion of the Treaty principles clause has is a political one, as it was the political context of the time that led to the provisions being included. The Fifth National government when elected in 2008 entered into a Confidence and Supply agreement with the Māori Party, which was renewed after the 2011 general election.[178] The Māori Party made clear that it did not support partial asset sales and therefore the issue was not one of confidence and supply,[179] but at this stage the question of whether a Treaty clause should be added to the legislation had not been raised.

When the proposed MOM legislation was revealed not to include an equivalent to s 9 the Māori Party came out in strong opposition and called on the government to honour its commitments to both the Treaty and Māori by replicating the provision in the new legislation.[180] To the Māori Party, having entered once more into a much criticised relationship with National, it was politically important that despite their inability to prevent the asset sale-legislation going through (the Māori Party voted against its passage) they received some concession for the benefit of Māori and their voters. This seems to be the main political impetus behind the Māori Party's advocacy for such a clause, despite the fact the Party must have privately been aware of the lack of effect this provision would have within the new MOM framework. As s 45Q will not be able to be used against the Crown or the MOM companies, there was little risk to the National Party of including the Treaty principles clause in the legislation. For the sake of the political coalition therefore, the provision was included and passed into law.

4.2.3. Constitutional significance

Section 45Q can also be seen as indicative of the importance of the role of Treaty principles within New Zealand's broader constitutional context. New Zealand has an unwritten constitution that is found not in one document but in a variety of sources such as Acts of Parliament, the common law, constitutional conventions, legal commentaries and customary international law.[181] The Treaty of Waitangi is also a part of this constitutional arrangement, but the exact nature and extent of its position is unclear.[182] It has no overriding effect and cannot be

[178] National Party, *Relationship Accord and Confidence and Supply Agreement with the Māori Party* (11 December 2011).
[179] Ibid, cl 15.
[180] The Māori Party went as far as threatening to split with National over the removal of the clause: Kate Chapman and Danya Lecy "PM confident Maori Party won't quit deal" *Stuff News* (31 January 2012).
[181] Phillip A Joseph, *Constitutional & Administrative Law in New Zealand* (3rd Ed, Brookers, Wellington, 2007) at 1.
[182] Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand Government under MMP* (3rd ed, Oxford University Press, Auckland, 1997) at 287.

depended on legally unless it has been explicitly incorporated into legislation,[183] yet it is a moral source of the Crown's claim to legitimacy in this country, and has an important role in contemporary politics.[184] As New Zealand's constitution evolves the question of the exact role to be played by the Treaty and its principles in the long-term future of the country is sure to be raised.[185]

Many see the Treaty as a core part of that future, and have argued that, as s 9 has been so crucial in giving substantive meaning to the Treaty principles, the inclusion of s 45Q also represents broader Māori constitutional aspirations for the Treaty.[186] Calls from Māori for the Treaty to be applied to all Crown action regardless of legislative incorporation have been made in recent years,[187] and should New Zealand move to a written constitution in the future the issue of whether the Treaty should be entrenched will undoubtedly arise.[188] As part of the 2008 Confidence and Supply Agreement between National and the Māori Party, a three year constitutional review has begun.[189] One of the key issues to be examined is the status of the Treaty in New Zealand's legal and political system.[190]

Those wishing to see a stronger Constitutional role for the Treaty would view the removal of the provision as a step backwards in New Zealand's Treaty development. The reference in statutes to Treaty principles helps to develop the idea that the Treaty is a core part of the legal framework, and, despite the lack of legal effect in the case of the MOM legislation, the symbolic inclusion of the wording would emphasise the role of Treaty principles as a core component of such legislation. For this reason, the inclusion of s 45Q in the MOM legislation has a prospective significance for those wishing to see a strong future for the Treaty of Waitangi in New Zealand's constitution.

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183 *Hoani Te Heuheu Tukino*, above n 8 at 325.
184 G Palmer and M Palmer *Bridled Power*, above n 182 at 187.
185 Geoffrey Palmer "The Treaty of Waitangi – Where to from here?" (2005-2008) 11 Otago L. Rev. 381 at 387.
186 Mai Chen "Section 9: Why it matters for asset sales" *New Zealand Herald* (2 February 2012).
187 Ibid.
188 David V Williams "Indigenous Customary Rights and the Constitution of Aotearoa New Zealand" (2006) 14 Waikato Law Review 120 at 129-130; B V Harris "The Treaty of Waitangi and the Constitutional Future of New Zealand" (2005) 2 New Zealand Law Review 189 at 200-201; Mai Chen *Public Law Toolbox*, above n 55 at 1007.
189 National Party *Relationship and Confidence and Supply Agreement between the National Party and the Maori Party*, (16 November 2008) at 2.
190 "A review of New Zealand's constitutional arrangements" (2011) 34:1 Public Sector 6 at 6-8.

CONCLUSION

When the National government backed down on its decision to exclude a Treaty principles clause from the Mixed Ownership Model legislation, iwi leaders and the Māori Party claimed a victory in gaining this concession. The provision to be retained, s 9, had been at the forefront of Treaty based jurisprudence since the late 1980s and was symbolic of the political and legal advances made by Māori in that era. While having little application in terms of its ability to affect the actions taken by SOEs themselves, it acts as a backstop to prevent the Crown actively exercising its powers in a way that would breach Treaty principles. The retention of this clause in the form of s 45Q, however, will not give the same legal protection or provide a basis for challenging either the actions of the Crown or the actions of the MOM companies themselves.

The inclusion has greater political significance than practical legal effect, a fact that would have been known to the political actors at the time. The inclusion of this section ensured that the Māori Party had an apparent victory whilst at the same time showing that the National Party was ostensibly listening to and respecting Māori voices. It did not change the attitudes of either party to the asset sale plans, nor did it alter opposition by Māori on other grounds. It did however ensure the survival of the political coalition, and for the main political actors, this was most likely the more pressing issue at the time. For those looking further ahead however, the long-term implications of including Treaty references in legislation may be more pertinent. Given the Treaty of Waitangi's still unclear status, the ability to keep it relevant and current to political matters may have a significant implication on the long-term status of the Treaty in New Zealand's constitutional future.

Nevertheless, this dissertation has shown that there will be no practical, legal effect of including s 45Q in the legislation. Treaty principles can only act as a constraint on powers permitted by Part 5A of the Public Finance Act 1989, and this Part does not confer any such powers to the Crown, to which Treaty principles can apply. Whilst appearing to gain a victory in ensuring that the Treaty principles clause was retained, attempts by Māori to use the provision to challenge Crown or MOM company actions concerning water resource issues are unlikely to be successful. Bereft of legal effectiveness, the provision represents political expediency rather than a genuine attempt to ensure the principles of the Treaty of Waitangi have relevance in the Mixed Ownership Model legislation.

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