Peace Movement Aotearoa

PO Box 9314, Wellington 6141, Aotearoa New Zealand. Tel +64 4 382 8129
Email pma@xtra.co.nz Web site www.converge.org.nz/pma

NGO information for the 82nd session of the Committee on the Elimination of Racial Discrimination, February 2013

Consolidated 18th, 19th and 20th Periodic Report of New Zealand under the International Convention on the Elimination of All Forms of Racial Discrimination

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1. Thank you for this opportunity to provide information to the Committee. We apologise for the lateness of this Report, but hope nevertheless that it will help to inform your consideration of the topics raised.

A. Information on Peace Movement Aotearoa

2. Peace Movement Aotearoa is the national networking peace organisation, registered as an incorporated society in 1982. Our purpose is networking and providing information and resources on peace, social justice and human rights issues. Our membership and networks mainly comprise Pakeha (non-indigenous) organisations and individuals; and our national mailing lists currently include representatives of one hundred and fifty national or local peace, human rights, social justice, faith-based and community organisations.

3. Promoting the realisation of human rights is an essential aspect of our work because of the crucial role this has in creating and maintaining peaceful societies. In the context of Aotearoa New Zealand, our main focus in this regard is on support for indigenous peoples' rights - in part as a matter of basic justice, as the rights of indigenous peoples are particularly vulnerable where they are outnumbered by a majority and often ill-informed non-indigenous population as in Aotearoa New Zealand, and because this is a crucial area where the performance of successive governments has been, and continues to be, particularly flawed. Thus the Treaty of Waitangi, domestic human rights legislation, and the international human rights treaties to which New Zealand is a state party, and the linkages among these, are important to our work; and any breach or violation of them is of particular concern to us.

4. Our Report covers issues that are currently, or have been in the past, a specific focus of our work. We wish to emphasise that the comments which follow are from our perspective and observations as a Pakeha organisation; we do not, nor would we, purport to be speaking for Maori in any sense.

5. We have previously provided NGO parallel reports to treaty monitoring bodies and Special Procedures as follows: to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in 2005[1]; to the Committee on the Elimination of Racial Discrimination (the Committee, CERD) in 2007[2]; jointly with the Aotearoa Indigenous Rights Trust and others, to the Human Rights Council for the Universal Periodic Review of New Zealand in 2008[3] and 2009[4]; to the Human Rights Committee in 2009[5] and 2010[6]; to the Committee on the Rights of the Child in 2010[7] and 2011[8]; and to the Committee on Economic, Social and Cultural Rights in 2011[9] and in 2012[10].

6. We are not in a position to send a representative to the 82nd Session, but are happy to clarify any information in this report if that would be helpful to Committee members.

B. Overview

7. This Report provides an outline of some issues of concern with regard to the state party's compliance with the provisions of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, the Convention). Its purpose is to assist the Committee with its consideration of New Zealand's Consolidated 18th, 19th and 20th Periodic Report[11] (the Periodic Report).

8. During the time covered by the Periodic Report, there have been a considerable number of developments which are of deep concern with regard to the government's compliance with the Convention, and in particular with the Committee's General Recommendation No. XXIII: Indigenous Peoples[12] (General Recommendation XXIII).

9. In this Report we cover some of those developments, referenced to the List of Themes[13], the Committee's 2007 Concluding Observations[14], or to relevant paragraphs in the Periodic Report as appropriate. It should be noted we have included some comment on developments since the time covered by the Periodic Report so that the Committee has up to date information on matters of concern.

C. The Convention in domestic law

i) Lack of constitutional protection for Convention rights

10. In this section, we briefly outline the continued lack of protection for human rights in relation to domestic legislation; the Treaty of Waitangi and related human rights are covered in section D below.

11. Since the state party last reported to the Committee, there has been no progress towards ensuring that Convention rights, as well as those elaborated in the other human rights treaties that New Zealand is a state party to, are fully protected. As stated in the Periodic Report:

> *As Parliament is supreme, the Bill of Rights Act, other human rights instruments and the Courts cannot directly limit Parliament's legislative powers.*[15]

12. The state party then refers to the role of the Attorney-General in reporting inconsistencies with the New Zealand Bill of Rights Act 1990 (NZBoRA) to parliament, but this is not an independent monitoring procedure because the Attorney-General is a government politician. As the Committee pointed out in 2007[16], that requirement is insufficient to guarantee full respect for human rights while the possibility remains that legislation can be enacted, and the Executive can act in a manner, which violates Convention and other human rights.

13. The state party comments that during the reporting period there was only one piece of legislation introduced that the Attorney-General found unjustifiably discriminated against Maori[17], but it should be noted that Bill was not introduced by the state party. During the reporting period, parliament was notified of only 10 government Bills[18] that contained one or more inconsistencies with the NZBoRA, and generally they were enacted anyway.

14. The low level of NZBoRA inconsistency notifications to parliament seems to have more to do with the standard of consistency assessments than whether or not proposed legislation is actually consistent with the rights elaborated in the NZBoRA. For example, the NZBoRA consistency assessment of the Immigration Amendment Bill[19] [at the time known as the Immigration (Mass Arrivals) Amendment Bill] and the brief three paragraph assessment of the Mixed Ownership Model Bill[20] [now the Public Finance (Mixed Ownership Model) Amendment Act 2012 and the State-Owned Enterprises Amendment Act 2012], both stated the proposed legislation "appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act".

15. With regard to the legislation that replaced the Foreshore and Seabed Act 2004, the Marine and Coastal Area (Takutai Moana) Bill[21] [now the Marine and Coastal Area (Takutai Moana) Act], the Acting Attorney-General was of the opinion that any limitation of the right to freedom from racial discrimination could be justified under NZBoRA, Section 5 ("reasonable limits

prescribed by law as can be demonstrably justified in a free and democratic society") and that the proposed legislation was thus consistent with the NZBoRA.

16. The NZBoRA in any event does not cover all of the rights elaborated in the International Covenant on Civil and Political Rights, on which it is based, let alone the full range of human rights of all of the human rights treaties that New Zealand is a state party to - economic, social and cultural rights are noticeably absent from its provisions.

- ***Suggested recommendation****: We suggest the Committee recommends that the state party amends the NZBoRA to include all civil, political, economic, social and cultural rights; and establishes an independent procedure for ensuring that legislation is consistent with the NZBoRA so that all human rights, including the right to freedom from discrimination, are fully respected and protected in domestic law.*

ii) Article 14 Declaration

17. During September 2011, the Ministry of Justice invited comments on whether or not the state party should make a Declaration under Article 14 of the Convention. It should be noted that this was in response to one of the recommendations during New Zealand's Universal Periodic Review[22], rather than to the repeated recommendations of the Committee in this regard. Peace Movement Aotearoa, along with others, provided feedback to the effect that an Article 14 Declaration should be made as soon as possible.

18. According to information received from the Ministry of Justice in January 2013, the state party is "still considering this issue and will be in the position to give a final answer when the Universal Periodic Review materials are released later this year."[23]

- ***Suggested recommendation****: We suggest the Committee recommends that the state party makes a Declaration under Article 14 of the Convention without further delay.*

ii) Consideration of constitutional issues

19. As mentioned in the Periodic Report[24], the state party announced a consideration of constitutional issues in December 2010, which was part of the November 2008 Relationship and Confidence and Supply Agreement between the National Party and the Maori Party; and it appointed a 12 person Constitutional Advisory Panel to run the public engagement process in August 2011. However, it is not clear how effective this process will be for several reasons.

20. Firstly, the Terms of Reference are comparatively restrictive about what can be discussed; for example, the reference to the NZBoRA refers only to property rights and possible entrenchment[25], with no mention of economic, social and cultural rights being added to its provisions. While entrenchment may very well be one outcome of the public discussion, there is limited public understanding that only partial entrenchment would be possible given the current commitment to the notion of parliamentary supremacy because any entrenchment provision could be overturned by a simple majority.

21. Secondly, the Terms of References refer only to "the role of the Treaty of Waitangi within our constitutional arrangements", rather than to the key constitutional issue of Treaty-based

constitutional arrangements to ensure that the rights of Maori are fully protected.[26] It should be noted that the state party regularly refers to the Treaty of Waitangi as "a founding document of New Zealand", as for example in the Periodic Report[27], yet there is no reference to the Treaty in the Constitution Act 1986. The Treaty of Waitangi is seldom referred to in legislation, and even where there is a reference to it, the state party seldom gives effect to the Treaty, as the example of the Public Finance (Mixed Ownership Model) Amendment Act 2012 in Section D illustrates.

22. Even with that more limited question in the Terms of Reference, there are some hazards involved in public discussion of the role of the Treaty of Waitangi, and it is anyway a discussion that should more appropriately be taking place between the parties to it - that is, hapu and iwi, and the Crown.

23. Thirdly, the report of the Constitutional Advisory Panel will be submitted later this year to the Deputy Prime Minister and the Minister of Maori Affairs who will then submit a final report to Cabinet, including "any points of broad consensus where further work is recommended"[28]. Restricting any action to points of broad consensus is unlikely to result in increased, let alone full, protection for Maori and their collective and individual human rights.

- ***Suggested recommendation****: We suggest the Committee recommend that the state party begins a process of negotiation with hapu and iwi on Treaty-based constitutional arrangements to ensure the full protection of the collective and individual rights of Maori.*

D. Indigenous peoples' rights: The Treaty of Waitangi, the right of self-determination and related rights, and the requirement of free, prior and informed consent

24. As mentioned in section A above, our main focus with regard to human rights is on support for indigenous peoples' rights, an area where the performance of successive governments has been, and continues to be, particularly flawed. As the Committee is aware, there has been a persistent pattern of government actions, policies and practices which discriminate against Maori (collectively and individually), both historically and in the present day.

25. Underlying this persistent pattern of discrimination has been the denial of the inherent and inalienable right of self-determination. Tino rangatiratanga (somewhat analogous to self-determination) was exercised by Maori hapu (sub-tribes) and iwi (tribes) prior to the arrival of non-Maori, was proclaimed internationally in the 1835 Declaration of Independence, and its continuance was guaranteed in the 1840 Treaty of Waitangi.

26. In more recent years, self-determination was confirmed as a right for all peoples, particularly in the shared Article 1 of the two International Covenants - in its 2012 Concluding Observations on New Zealand, the Committee on Economic, Social and Cultural Rights specifically referred to Article 1 in its recommendations on the inalienable rights of Maori[29] - and in the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), which the state party announced partial support for in 2010, where it is explicitly re-affirmed as a right for all indigenous peoples.

27. Allied to this is the right of indigenous peoples to own, develop, control and use their communal lands, territories and resources, as articulated in General Recommendation XXIII and in the UN Declaration.

28. In addition, both General Recommendation XXIII and the UN Declaration refer to the requirement that no decisions affecting the rights and interests of indigenous peoples are to be taken without their free, prior and informed consent - a minimum standard that the state party has yet to meet, as outlined in the three examples below. The provisions of the UN Declaration at Article 32 are particularly relevant to these examples:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

i) The foreshore and seabed legislation

29. Following the change of government in 2008, the state party announced a Ministerial Review of the Foreshore and Seabed Act, the discriminatory aspects of which the Committee expressed concern about in 2005[30] and 2007[31].

30. The Review Panel reported back in June 2009 and recommended repeal of the Act, and a longer conversation with Maori to find ways forward that respected the guarantees of the Treaty of Waitangi, as well as domestic human rights legislation and the international human rights instruments.

31. In response, in 2010, the state party issued a consultation document, 'Reviewing the Foreshore and Seabed Act 2004' and held public consultation meetings, including a limited number with Maori, on its proposals for replacement legislation.

32. It should be noted that despite hapu and iwi representatives clearly rejecting the government's proposals, on the grounds that the replacement legislation was not markedly different from the Act, the state party nevertheless introduced the legislation, the Marine and Coastal Area (Takutai Moana) Bill, in September 2010. The replacement legislation retains most of the discriminatory aspects of the Foreshore and Seabed Act as it treats Maori property differently from that of others, and limits Maori control and authority over their foreshore and seabed areas.

33. Of the 72 submissions to the Select Committee considering the Bill that came from marae, hapu, iwi and other Maori organisations, only one supported the Bill.[32] In addition, the Hokotehi Moriori Trust, on behalf of the Moriori people of Rekohu (Chatham Islands), supported the Bill only in so far as it repealed the Foreshore and Seabed Act and removed Te Whaanga lagoon from the common coastal marine area. Regardless of the fact that 71 out of 72 submissions from Maori did not support the Bill, it was enacted and entered into force in March 2011.

34. The Marine and Coastal Area (Takutai Moana) Act 2011 places a time limit on applications for recognition of Maori rights in foreshore and seabed areas, which must be lodged with the

Minister for Treaty of Waitangi Negotiations by 3 April 2017. According to the Ministry of Justice, there have only been five applications from hapu and iwi, and three from whanau (family groups) for recognition of "customary marine title" under the Act.[33]

35. In enacting the legislation, the state party breached both the right of freedom from discrimination and the right of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and ignored the requirement of free, prior and informed consent.

- ***Suggested recommendation**: We suggest the Committee recommend that the state party repeals the Marine and Coastal Area (Takutai Moana) Act and enters into proper negotiations with hapu and iwi about how their rights and interests in relation to the foreshore and seabed areas can best be protected.*

ii) Privatisation of state owned assets (Mixed Ownership Model) and water

36. In early 2012, the state party confirmed it was preparing to remove four state-owned enterprises (SOEs) from the State-Owned Enterprises Act 1986 (SOE Act) in order to partially privatise them as part of its "mixed-ownership model" (51% state-owned, 49% privatised) policy. The first SOEs to be partially privatised are the energy companies Genesis Power, Meridian Energy, Mighty River Power, and Solid Energy New Zealand.

37. While there has been a high level of public opposition to this, there was particular concern among Maori because the SOE Act is one of the few pieces of legislation that has a specific Treaty of Waitangi requirement (Section 9 "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi") and also provisions to protect existing and likely future claims relating to land currently in Crown ownership (Section 27A-D). The level of Maori concern greatly increased when it appeared that Section 9 of the SOE Act would not be included in the proposed new legislation.

38. In response, the state party announced a process of "consultation" with Maori on 27 January 2012, less than a fortnight before the first consultation hui (meeting) was held on 8 February. The consultation document was not available until 1 February, a week before the first hui. The deadline for written submissions was only twenty-one days after the consultation document was released. Ngati Kahungunu, the third largest iwi, was left off the initial consultation hui list.

39. The state party's original intention to keep the clause relating to the Treaty of Waitangi out of the SOE sales legislation was publicly revealed on 2 February 2012, following the accidental uploading of a draft document to the Treasury website.[34] When the final consultation document became available, it did not invite comment on the desirability of the SOE partial privatisation, but only put forward three options: that the new legislation include a clause similar to Section 9 of the SOE Act, that it should have a more specific Treaty of Waitangi clause, or that it should have no Treaty of Waitangi clause at all.

40. Our written submission on this issue, included the following comments on the consultation process, which we include here as a summary:

"The repeated statements from various government politicians indicating that the decision to go ahead with the SOE privatisation has apparently already been made regardless of what is said during the consultation, illustrate it is clearly not even a proper consultation, let alone the negotiation that the Treaty requires.

We note in this regard that Section 9 of the SOE Act requires the Crown to act consistently with the principles of the Treaty - such principles are said to include good faith and partnership, active protection, and a principle of redress. None of these have been met by this consultation process.

In addition, the government has not met its obligations under international law with regard to the minimum standards of behaviour expected of states in their relationship with indigenous peoples.

The expectation that states will obtain the free, prior and informed consent of indigenous communities in relation to decisions that affect their lands, resources, rights and interests has been outlined by, among others, the Committee on the Elimination of Racial Discrimination in General Recommendation XXIII (1997) when describing how state parties should meet their obligations in relation to the International Convention on the Elimination of all Forms of Racial Discrimination, and the Committee on Economic, Social and Cultural Rights in General Comment 21 (2009) in relation to state party obligations under the International Covenant on Economic, Social and Cultural Rights - New Zealand is a state party to both of those instruments.

Free, prior and informed consent requires the government to approach hapu and iwi with an open mind as to the possibilities on any decision that may affect their lands, resources, rights and interests - not with a pre-determined agenda where the underlying decision, privatisation of state owned assets, has already been made.

Furthermore, we draw your attention to the recommendation by the Committee on the Elimination of Racial Discrimination in 2007 that the government:

"should ensure that the Treaty of Waitangi is incorporated into domestic legislation where relevant, ***in a manner consistent with the letter and the spirit of that Treaty****.* ***It should also ensure that the way the Treaty is incorporated, in particular regarding the description of the Crown's obligations, enables a better implementation of the Treaty.****" (Concluding Observations of the Committee on the Elimination of Racial Discrimination: New Zealand, CERD/C/NZL/CO/17, para 14, our emphasis).*

We suggest that this recommendation is a good starting point for how the government should proceed - both the letter and the spirit of the Treaty require negotiation with the parties to it, not an over hasty process with a pre-determined outcome. Any new legislation must, as the Committee stated, enable better implementation of the Treaty."[35]

41. On 7 February 2012, while the "consultation" process was underway, the Maori Council and ten hapu lodged an urgent application with the Waitangi Tribunal[36] for a hearing into the SOE privatisation on the grounds that the Crown has breached the Treaty of Waitangi since 1840 by failing to recognise Maori control and rangatiratanga over fresh water and geothermal resources, and has expropriated these resources without Maori consent or compensation. In

response, the Prime Minister announced that *"the government is going to sell shares in state-owned energy companies regardless of Maori opposition"*.[37]

42. In early March, the state party tried to have the application dismissed[38], but on 28 March 2012, the Waitangi Tribunal agreed that the urgent hearing should go ahead.

43. In the interim, the state party introduced the new legislation - the Mixed Ownership Model Bill 2012 - on 5 March 2012, and following its first reading on 8 March, the Bill was referred to the Finance and Expenditure Select Committee. While the Mixed Ownership Model Bill did include the provisions of Sections 27A-D of the SOE Act, and the SOE Act Section 9 clause *"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)"*[39], the latter is followed by "For the avoidance of doubt, subsection (1) does not apply to persons other than the Crown."[40]

44. In the state party's information sheet on the new legislation, this addition was explained as follows:

> *"The Treaty is an agreement between the Crown and iwi. Therefore, it is not possible to bind non-Crown groups to Treaty provisions. Under the SOE Act, section 9 applies only to the Crown, and not to the SOEs themselves. Similarly, the Treaty clause in the Public Finance Act will apply to the Crown and not to the mixed ownership companies or minority shareholders."*[41]

45. This argument is based on faulty logic because if the state party is going to divest itself of responsibilities by giving up full control of state owned assets, then it needs to do so in a way that ensures Maori rights and interests under the Treaty of Waitangi are protected. Requiring third parties to act consistently with the Treaty of Waitangi would not make them parties to it.[42] Furthermore, if the state party is retaining 51% ownership of the companies created by the new legislation, then surely those companies must be subject to Treaty provisions.

46. Public submissions on the Bill were due on 13 April 2012 - only 9 of the 1,448 submissions received were in favour of it, while 98.1% were opposed.[43]

47. Before the Select Committee considering the Bill had even reported back to parliament, the state party was already setting in place the regulations for the new mixed ownership model companies, for example, gazetting the Securities Act (Mixed Ownership Model Companies, Crown Pre-Offer) Exemption Notice on 24 April 2012 with an entry into force date of 26 April 2012.

48. On 30 May 2012, after only one of hour of deliberation following a rushed process of oral submissions, during which most submitters were allocated a five minute time slot, the Chair of the Finance and Expenditure Select Committee (a government politician) announced that deliberations were complete, and the Bill was reported back to parliament on 11 June 2012 (five weeks before the Select Committee report was due).

49. The Mixed Ownership Model Bill was divided into two Bills on 21 June 2012 - the Public Finance (Mixed Ownership Model) Amendment Bill 2012 and the State-Owned Enterprises Amendment Bill 2012 - which were both passed by a 1 vote majority on 26 June 2012, and received Royal Assent three days later.

50. The Waitangi Tribunal (the Tribunal) held its Stage I hearings into the National Freshwater and Geothermal Resources Inquiry (WAI 2358) from 9 to 16 July and 19 to 20 July 2012. During the hearings, the Prime Minister continued to make public statements to the effect that the state party may ignore the Tribunal's finding and continue with the first sale, of Mighty River Power, in November as planned.[44] In addition, the state party put pressure on the Tribunal to issue its findings by 24 August 2012[45], presumably so it could proceed with the Mighty River Power sale.

51. On 30 July 2012, the Tribunal issued an Interim Direction to the Crown stating their initial conclusion:

> *" ... that the Crown ought not to commence the sale of shares in any of the Mixed Ownership Model companies until we have had the opportunity to complete our report on stage one of this inquiry and the Crown has had the opportunity to give this report, and any recommendations it contains, in-depth and considered examination."*[46]

52. The Tribunal then released the pre-publication edition of its Stage I Interim Report on 24 August 2012 (the final Stage I report was released on 10 December 2012). In the Letter of transmittal to the Prime Minister and other appropriate Ministers of the Crown, the Tribunal said, among other things:

> *"In our view, the recognition of the just rights of Maori in their water bodies can no longer be delayed. The Crown admitted in our hearing that it has known of these claims for many years, and has left them unresolved.*[47]*"* and that *"Although the claim was filed in February 2012, it is but the latest in a long series of Maori claims to legal recognition of their proprietary rights in water bodies, many of which date back to the nineteenth century."*

53. The Tribunal concluded that:

> *"If the Crown proceeds with its share sale without first creating an agreed mechanism to preserve its ability to recognise Maori rights and remedy their breach, the Crown will be unable to carry out its Treaty duty to actively protect Maori property rights to the fullest extent reasonably practicable. Its ability to remedy well-founded claims will also be compromised. We find in chapter 3 of this report that the Crown will be in breach of Treaty principles if it so proceeds."*[48]

54. The Tribunal recommended:

> *"that the Crown urgently convene a national hui, in conjunction with iwi leaders, the New Zealand Maori Council, and the parties who asserted an interest in this claim, to determine a way forward. In our view, such a hui could appropriately be held at Waiwhetu Marae. We recognise the Crown's view that pressing ahead with the sale is urgent. But to do so without first preserving its ability to recognise Maori rights or remedy their breach will be in breach of the Treaty. As Crown counsel submitted, where there is a nexus there should be a halt. We have found that nexus to exist. In the national interest and the interests of the Crown-Maori relationship, we recommend that the sale be delayed while the Treaty partners negotiate a solution to this dilemma."*[49]

55. The state party rejected the Tribunal's recommendation for a national hui, and instead embarked on a five week pseudo consultation process on the possibility of a "shares-plus" arrangement for hapu and iwi, one of the possible ways forward suggested by the Tribunal, even though the Tribunal had pointed out *"not all of the affected Maori groups want shares"*[50]. Prior to and during this process, the Prime Minister described the "shares-plus" concept as fundamentally flawed,[51] and made comments to the effect that the state party was only undertaking the "consultation" to demonstrate it was "acting in good faith" should the matter be taken to court.

56. On 13 September 2012, a hui organised by Maori, which was attended by more than 700 Maori representing hapu and iwi, as well as Maori urban authorities and other Maori organisations, passed a resolution calling on national negotiations to take place before the sale of shares in state-owned power companies, and resolved to fund a Maori Council court challenge if the issues of proprietary rights over water were not settled before the sale of Mighty River Power.[52] Following the hui, the Prime Minister said that there would be no national settlement of water rights[53], and subsequently commented that *"Maori had more positions on water than Lady Gaga had outfits"*.[54]

57. On 15 October 2012, the state party announced there would be no further consultation with hapu and iwi, and an Order in Council on 23 October would remove Mighty River Power from the SOE Act and bring it under the Public Finance Act (as amended by the Public Finance (Mixed Ownership Model) Amendment Bill 2012) to prepare it for sale. [55]

58. On 19 October 2012, the Maori Council sought a judicial review in the High Court of some of the state party's decisions around the partial sale of state-owned assets, and the Waikato River hapu Pouakani (which had won a Supreme Court decision clearing the way for them to claim ownership of parts of the Waikato River earlier in 2012) initiated legal action to block the Order in Council.[56] On 22 October, the High Court set a November date for the Maori Council hearing, and the state party put the Order in Council on hold.

59. During the three-day High Court hearing in November 2012, the Maori Council (joined by the Waikato River and Dams Claims Trust and the Pouakani Claims Trust) sought to challenge three key decisions made by the Crown*:*

(a) the direction by the Cabinet to the Governor-General to bring into force by Order in Council the State-Owned Enterprises Amendment Act 2012. This has the effect of changing the status of Mighty River Power ('MRP') from an State-Owned Enterprise (SOE') to a Mixed Ownership Model ('MOM') company;

(b) amending the constitution of MRP (and later the other SOE companies) which currently requires 100 per cent of the shares to be held by the Crown through the relevant Minister, to permit 49 per cent ownership by private persons; and

(c) offering for sale and selling up to 49 per cent of the shares in MRP.

The Maori Council contended that, with respect to each decision, the Crown must act in a manner that is not inconsistent with the principles of the Treaty of Waitangi. This argument was premised on the decisions being subject to the Treaty principles provision in either s 9 of the SOE Act or s 45Q of the Public Finance Amendment Act. According to this argument, ministerial action would be inconsistent with the Treaty if the Crown did

not first implement protective mechanisms to provide for redress and protect Maori proprietary rights to water and geothermal resources before making any of the three decisions.[57]

60. The Maori Council also argued that:

there was inadequate consultation in relation to these decisions, which was inconsistent with the principles of the Treaty; the Crown made an error of law by taking into account the idea that "no-one owns the water" when deciding whether its actions were consistent with Treaty principles; the Crown's failure to wait for the completion of both stages of the Waitangi Tribunal inquiry was unreasonable; it was an error of fact or law to conclude that a sale of 49 per cent of the shares of MRP would not be inconsistent with Treaty principles; the intention to proceed with the sale of shares was a breach of a legitimate expectation held by Maori that the Crown would act with utmost good faith and actively protect Maori interests; and that the Crown had breached the requirements of natural justice by proceeding with the sale of shares before Maori claims to the water and geothermal resources could be properly heard.

The Waikato River and Dams Claims Trust also argued that the Crown's decision to proceed with the sale of shares in MRP is a breach of s64(3) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.[58]

61. While the High Court hearing was underway, the Prime Minister said in parliament that there would be no negotiations, even if the Maori Council action was successful.[59]

62. The High Court decision, released on 11 December 2012, found in favour of the state party, ruling that none of the decisions taken by the Crown to advance the sale of those shares were reviewable, that is, those decisions could not be reviewed by the courts; and that even if the decisions were reviewable, none of the grounds for review that were argued by the Maori Council would succeed.[60] Rather a contrast to the findings of the Waitangi Tribunal, which is, after all, the specialist Permanent Commission of Inquiry charged with making recommendations on claims brought by Maori relating to actions or omissions of the Crown, which breach Treaty of Waitangi.

63. On 18 December 2012, the Maori Council was given leave to appeal the decision in the Supreme Court, and the case was considered at on 31 January and 1 February 2013. Although the state party demanded the Supreme Court decision by 18 February, the Court has resisted such unseemly political interference, and on 14 February 2013 issued a Minute saying it expects to deliver its judgement by the end of this month.[61]

64. To conclude this sorry saga, in keeping with its clear determination to go ahead with the asset sales regardless of opposition from hapu and iwi, to undermine rather than to respect and protect their rights and interests, and in an apparent attempt to discredit the decision of the Supreme Court before it had even heard the appeal, there were reports in December 2012 that the state party had asked Crown Law to look into the possibilities of challenging the Chief Justice being on the full-court panel that would consider the appeal, or requesting her to recuse herself from it, on the grounds that prior to her appointment she had acted for the Maori Council in several cases in the late 1980s through to the mid-1990s.[62] There was no similar suggestion that other Supreme Court judges might recuse themselves on the grounds that they

have acted for the Crown in the past, not even in the case of one who was Solicitor-General for 11 years before he became a judge in 2000.

- ***Suggested recommendation****: We suggest the Committee recommend that the state party suspend any sale of state owned assets immediately, and that such sales do not proceed until a process of full and proper negotiation with hapu and iwi has been held, and all pending claims before the Waitangi Tribunal or subject to direct negotiation covering land and resources that will be affected by the mixed ownership model are resolved to the satisfaction of the hapu and iwi involved.*

65. It should be noted that there are other issues with the Mixed Ownership Model legislation - for example, the SOE Act included a social responsibility clause requiring every SOE to be: "*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."* There is no social responsibility clause in the new legislation.

66. In addition, the new companies created by the Act have been removed from the ambit of the Ombudsmen Act 1975 (which provides a mechanism for the investigation of complaints about administrative acts, decisions, recommendations and omissions of central and local government agencies, including SOEs, by an Ombudsman) and the Official Information Act 1982.

67. According to some reports, the Minister of Finance has acknowledged that the profits the government will lose as a result of the SOE partial privatisation will exceed the savings from the resulting reduction in debt[63] - this calls into question the purpose of this exercise, as the state party has described it from the outset as a way of reducing debt.

iii) Deep-sea oil seismic exploration and drilling, and hydraulic fracturing

68. Another example of the failure of the state party to obtain the free, prior and informed consent of indigenous peoples relates to the state party awarding the Brazilian oil company Petrobras a five-year exploration permit for oil and gas in the Raukumara Basin in June 2010.

69. The Raukumara Basin is a marine plain that extends 4 and 110 kilometres to the north-northeast of the East Coast of the North Island, located between the volcanically active Havre Trough to the west and the active boundary of the Pacific and Australian tectonic plates to the east. The permit covers 12,330 square kilometres.

70. The Orient Express, a deep-sea oil survey ship, conducted seismic testing in the Raukumara Basin on behalf of Petrobras in 2011. The first two stages of exploration involved seismic surveying - firing compressed air from the surface to the seabed, and measuring the acoustic waves bouncing back to the sonar array trailing 10 kilometres behind the Orient Express. Seismic surveying can have an adverse impact on marine life, especially marine mammals, and the surveying took place during the season of whale migration along the East Coast.

71. Local iwi, Te Whanau a Apanui, did not give their consent to the exploration permit being issued or to the seismic survey[64] which they are strongly opposed to:

"This activity is being permitted in the rohe of Te Whanau a Apanui and Ngati Porou:

- *Without our agreement or consent,*

- *In the face of strong opposition,*
- *Contrary to the acknowledged mana of our hapu,*
- *Contrary to agreements either entered into or being concluded with the Crown,*
- *Without assurances regarding environmental standards and protection,*
- *In breach of the Treaty of Waitangi, and the Declaration of the Rights of Indigenous Peoples, and*
- *Which detrimentally affects the lives, livelihoods and survival of the communities of Te Whanau a Apanui and Ngati Porou."*[65]

72. The permit included permission for Petrobras to drill an exploratory well and the local iwi were also strongly opposed to the possibility of an exploration well being drilled off their coast. The Deepwater Horizon oil and gas spill in the Gulf of Mexico in 2010 - which has threatened the economic and cultural survival of local indigenous communities[66] - was from an exploratory well at a depth of 1500 metres, whereas the proposed depth for drilling an exploratory well in the Raukumara Basin ranges from 1500 to 3000 metres. In addition, the Raukumara Basin sits on a major and active fault line, and there are frequent earthquakes in the area. It is therefore a particularly hazardous area in which to undertake any drilling activities.

73. When the seismic survey began, a flotilla of small boats travelled to the area to observe the Orient Explorer and to protest its presence; in response, the state party sent two navy warships and an air-force plane. On 23 April 2011, the skipper of the Te Whanau a Apanui tribal fishing boat San Pietro, was arrested at sea and detained on a navy vessel while fishing in Te Whanau a Apanui customary fishing grounds approximately 1.5 nautical miles away from the Orient Explorer. The arrest came the day after Maritime NZ withdrew the exclusion orders that police officers, assisted by the navy, had issued to boats in the vicinity of the Orient Explorer the previous week. (The charges against the skipper of the Te Whanau a Apanui fishing boat were dismissed on 26 July 2012, on the grounds that there was no jurisdiction to arrest or charge him as the alleged offences had taken place beyond the 12 mile nautical limit, beyond the state party's jurisdiction.[67])

74. On 4 May 2011, the Acting Minister of Energy and Resources was asked in parliament if the free, prior and informed consent of Te Whanau a Apanui had been obtained in relation to the Petrobras permit, and she answered "No".[68]

75. In September 2011, Te Whanau a Apanui applied to the High Court for a judicial review of the Petrobras permit on the grounds that the state party:

- failed to properly consider the environmental impact of Petrobras' activities, as required by New Zealand's obligations under customary international law, the United Nations Convention on the Law of the Sea 1982, and the Convention for the Protection of Natural Resources and Environment of the South Pacific Region 1986;
- failed to properly consider the potential effects on marine wildlife;
- failed to factor in the requirements of the Treaty of Waitangi, which should have included consulting with Te Whanau a Apanui; and
- failed to consider the iwi's fishing rights and customary title claims to the area.

76. Concern about the Petrobras permit heightened in early October 2011 when the container ship MV Rena ran aground on the Astrolabe Reef, 22 kilometres from the entrance to the port of Tauranga in the Bay of Plenty on the East Coast of the North Island. The resulting environmental disaster from leaking oil and the contents of containers washed off the ship[69] not

only heightened awareness of the costs of oil contamination, but also of the state party's unpreparedness for even a comparatively small marine oil spill - salvage vessels and equipment had to be brought from overseas.

77. The coastline, estuaries and seafood gathering areas of hapu and iwi in the Bay of Plenty, including Te Whanau a Apanui, were seriously affected by the oil spill in particular. The threat to Ngati Porou's coastline prompted one of their leaders to describe the state party's assurances that the country is prepared to respond to marine oil spills as "fictitious myths"[70], and in January 2012, 16 coastal iwi affected by the Rena disaster called for a Royal Commission of Inquiry into the grounding.[71]

78. Meanwhile, in December 2011, the High Court approved Te Whanau a Apanui's application for a judicial review; and in the same month, Radio New Zealand reported that:

> *"Court documents obtained by Te Manu Korihi show the Government denies it unlawfully granted the permit. The papers show the legal team for the Minister of Energy and Resources say* ***there was no obligation to consult*** *with the iwi about the granting of the permit to the Brazilian company, Petrobras."*[72] [our emphasis]

79. The judicial review was held in the High Court in Wellington on 5 and 6 June 2012, and it emerged during the court hearing that Te Whanau a Apanui had asked for the permit to be put on hold pending foreshore and seabed negotiations, but the then Minister of Energy and Resources, Gerry Brownlee, said there was no connection between the negotiations and the permit and issued it.

80. In a ruling 22 June 2012, the application for judicial review was dismissed. Te Whanau a Apanui lodged an appeal on 19 July 2012 on the grounds that the Minerals Programme for Petroleum - which the Minister of Energy was legally required to follow - required consideration to be given to any international obligations that were relevant in managing the petroleum resource; this must include environmental considerations, and the Minister told the High Court that he did not consider these before granting the permit. They are also appealing the finding that the Crown did not breach its Treaty of Waitangi obligations, including duties of active protection and proper consultation with iwi before awarding the permit.

81. On 4 December 2012, Petrobras withdrew from the Raukumara Basin permit[73]. The Court of Appeal has not yet heard Te Whanau a Apanui's appeal.

82. It should be noted that the Raukumara Basin is not the only area where hapu and iwi are concerned about off-shore and on-shore oil exploration and drilling - in its enthusiastic support for the exploration industry and its aim to make New Zealand a net exporter of oil by 2030[74], the state party has issued permits similar to that awarded to Petrobras for areas covering most of New Zealand's coastline. According to the Parliamentary Commissioner for the Environment, licences and permits granted in the last 10 years in relation only to petroleum deposits on and beneath the ocean floor include two permits for mining petroleum and 21 permits for exploring for petroleum.[75] In December 2012, the Ministry of Economic Development announced the ten most recent permits had been awarded for the 2012 block offers, covering:

> *"... 40,198.53 km2 of offshore seabed and 3305.45 km2 of land in Waikato, Taranaki, Tasman, the West Coast and Southland".*[76]

83. Last year, the Texas-based oil company Anadarko undertook exploratory drilling at depths of 1400 and 1600 metres off the Taranaki coast[77], and Andarko will undertake further drilling towards the end of this year.[78] It was announced today that an additional two offshore rigs will undertake an extensive work programme in the latter half of this year around New Zealand's coastline.[79]

- ***Suggested recommendation****: We suggest the Committee expresses concern about the state party's oil exploration and drilling programme and recommends that the state party put all oil and gas exploration and drilling on hold until the affected hapu and iwi have been fully consulted and have expressed their free, prior and informed consent for such activities to take place in their respective lands and coastal areas.*

84. It should further be noted that hapu and iwi are similarly concerned about the impacts of proposed hydraulic fracturing (fracking) in their respective areas - for example, Te Whanau a Apanui has indicated their opposition to fracking in their territory[80], other East Coast iwi have expressed concern[81], as have Taranaki hapu[82].

- ***Suggested recommendation****: We suggest the Committee recommends that proposals for hydraulic fracturing should be put on hold until the affected hapu and iwi have been fully consulted and have expressed their free, prior and informed consent for such activities to take place in their respective areas.*

E. Rights of refugees and asylum seekers

i) Immigration Amendment Bill

85. The Immigration Amendment Bill, initially known as the Immigration (Mass Arrivals) Amendment Bill, was brought to the Committee's attention under its early warning and urgent action procedure in July 2012 by the Refugee Council of New Zealand, and has been the subject of a submission by the Office of the United Nations High Commissioner on Refugees[83] (UNHCR) so we will not go into the details here except to provide a brief update.

86. The Transport and Industrial Relations Select Committee provided a majority report (with minority opinions from the Labour Party and Green Party who oppose the Bill) to parliament on 28 August 2012, recommending only minor amendments to the proposed legislation. According to the Hansard record of a debate in parliament on 12 February 2013, the second reading of the Bill will be "soon".[84]

- ***Suggested recommendation****: We suggest the Committee recommends that the state party does not enact the Immigration Amendment Bill.*

ii) Australia / New Zealand agreement on refugees, February 2013

87. During a recent visit of the Australian Prime Minister, the state party announced it *"has agreed to resettle 150 refugees who are subject to Australia's offshore processing legislation"*, and that:

"These 150 refugees will form part of the quota of 750 refugees New Zealand already takes as part of its commitment to the United Nations High Commission for Refugees (UNHCR). They will not be in addition to the quota."[85]

88. Subsequently, the Prime Minister said:

" ... the offer also opened the way for New Zealand to send refugees that arrived here to Australia's offshore processing camps, which would be a strong deterrent to them coming to this country."[86]

89. As the Committee will be aware, the conditions at Australia's offshore processing camps are of serious concern to the Australian Human Rights Commission[87] and the UNHCR[88].

- ***Suggested recommendation****: We suggest the Committee recommends that the number of refugees admitted to New Zealand from Australian detention centres are additional to, rather than deducted from, the numbers admitted under the UNHCR quota; and that no refugees or asylum seekers wishing to enter New Zealand are processed at Australian detention facilities.*

90. Thank you for your consideration of the issues raised in this Report.

F. List of suggested recommendations

C. The Convention in domestic law:

i) Lack of constitutional protection for Convention rights: *We suggest the Committee recommends that the state party amends the NZBoRA to include all civil, political, economic, social and cultural rights; and establishes an independent procedure for ensuring that legislation is consistent with the NZBoRA so that all human rights, including the right to freedom from discrimination, are fully respected and protected in domestic law.*

ii) Article 14 Declaration: *We suggest the Committee recommends that the state party makes a Declaration under Article 14 of the Convention without further delay.*

iii) Consideration of Constitutional Issues: *We suggest the Committee recommend that the state party begins a process of negotiation with hapu and iwi on Treaty-based constitutional arrangements to ensure the full protection of the collective and individual rights of Maori.*

D. Indigenous peoples' rights: The Treaty of Waitangi, the right of self-determination and related rights, and the requirement of free, prior and informed consent:

i) The foreshore and seabed legislation: *We suggest the Committee recommend that the state party repeals the Marine and Coastal Area (Takutai Moana) Act and enters into proper negotiations with hapu and iwi about how their rights and interests in relation to the foreshore and seabed areas can best be protected.*

ii) Privatisation of state owned assets (Mixed Ownership Model) and water: *We suggest the Committee recommend that the state party suspend any sale of state owned assets immediately, and that such sales do not proceed until a process of full and proper*

negotiation with hapu and iwi has been held, and all pending claims before the Waitangi Tribunal or subject to direct negotiation covering land and resources that will be affected by the mixed ownership model are resolved to the satisfaction of the hapu and iwi involved.

iii) Deep-sea oil seismic exploration and drilling, and hydraulic fracturing: *We suggest the Committee expresses concern about the state party's oil exploration and drilling programme and recommends that the state party put all oil and gas exploration and drilling on hold until the affected hapu and iwi have been fully consulted and have expressed their free, prior and informed consent for such activities to take place in their respective lands and coastal areas.*

We suggest the Committee recommends that proposals for hydraulic fracturing should be put on hold until the affected hapu and iwi have been fully consulted and have expressed their free, prior and informed consent for such activities to take place in their respective areas.

E. Rights of refugees and asylum seekers

i) Immigration Amendment Bill: *We suggest the Committee recommends that the state party does not enact the Immigration Amendment Bill.*

ii) Australia / New Zealand agreement on refugees, February 2013: *We suggest the Committee recommends that the number of refugees admitted to New Zealand from Australian detention centres are additional to, rather than deducted from, the numbers admitted under the UNHCR quota; and that no refugees or asylum seekers wishing to enter New Zealand are processed at Australian detention facilities.*

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