

The Treasury

Release of Submissions: Mixed Ownership Model Consultation with Māori

Release Document

March 2012

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TE ARAWA RIVER IWI TRUST

Submission on the extension of the Mixed Ownership Model – a proposal to change legislation in relation to certain State Owned Enterprises

Introduction

1. This submission is made on behalf of Te Arawa River Iwi Trust (**TARIT**) on the Government's proposal with respect to the Mixed Ownership Model (the **MOM**) relating to Mighty River Power Limited, Genesis Power Limited, Meridian Energy Limited and Solid Energy Limited (the **SOEs**).
2. TARIT was established by Trust Deed on 20 May 2009. TARIT works on behalf of three iwi affiliates that have connections to, and interests in, the Waikato River: Ngati Tahu-Ngati Whaoa, Ngati Kea-Ngati Tuara and Tuhourangi-Ngati Wahiao. TARIT was established to represent the iwi affiliates in the Co-management framework for the Waikato River, assist the iwi affiliates to exercise their kaitiakitanga and act as a forum for iwi affiliates to work together on issues relating to the Waikato River.
3. In making this submission, TARIT endorses the submission of Te Arawa Group Holdings Limited (**TAGH**).

Summary of position

4. TARIT respectfully submits that:
 - (a) The Government ought to consult directly with TARIT on the MOM given that TARIT and the Te Arawa River Iwi are directly affected by it.
 - (b) The Crown has previously recognised TARIT's interests in resources used by the SOEs currently subject to the MOM. TARIT's rights cannot be prejudiced by the MOM and TARIT wishes to work with the Government to ensure that its rights and interests continue to be protected.
 - (c) Section 9 of the SOE Act must be included in any New Legislation (the **New Legislation**) to give effect to the MOM.
 - (d) TARIT is not supportive of a reformulation of section 9 or a new "more specific"¹ Treaty clause.
 - (e) The consultation process followed by the Government has been rushed and Māori have had insufficient information on which to make an informed decision.
 - (f) The consultation on the MOM should have been extended to discussions about a broader range of issues that are of interest to TARIT.
 - (g) Section 4(1)(c) of the SOE Act must be included in the New Legislation so that it continues to apply to the SOEs that will be subject to the MOM.

¹ Extension of MOM Consultation Document, p.5.

TARIT's particular interests in the Waikato River

5. TARIT notes the Government's preference to exclude discussions about rights to fresh water and geothermal resources from the MOM consultation process.
6. TARIT and the Te Arawa River Iwi have rights and interests in the Waikato River. The Crown has recognised those interests:
 - (a) Under the Te Pumautanga Settlement Deed, dated 11 June 2008, the Crown recognised the interests of the Te Arawa River Iwi in the Waikato River and its environs, from Huka Falls to Pohaturua. The Crown undertook to provide co-management arrangements in recognition of their interests.
 - (b) On 9 March 2010 a Deed in relation to a Co-Management Framework for the Waikato River was signed (the **Co-Management Deed**) and on 26 October 2010 the Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 (the **Waikato River Act**) was enacted to provide legislative recognition of the Co-Management Deed. The purpose of the Waikato River Act is to restore and protect the health and wellbeing of the Waikato River for present and future generations.
 - (c) Importantly, the Co-Management Deed and the Waikato River Act recognise the significance of the Waikato River to the Te Arawa River Iwi.
7. Both Mighty River Power Limited and Genesis Power Limited enjoy the use of Te Arawa River Iwi resources, particularly water and geothermal resources.
8. TARIT currently engages with Mighty River Power Limited and Genesis Power Limited in relation to their use of resources within the Te Arawa rohe. Many other Te Arawa organisations also have strong connections and relationships to those SOEs. There is no certainty that the MOM will preserve and strengthen those existing and potential future relationships. That is a risk to TARIT and, perhaps more pertinently, the SOEs themselves.
9. TARIT submits that, due to its recognised rights and interests in the Waikato River, TARIT has particular interests in the resources used by the SOEs and in MOM itself. The Government must consult with the Te Arawa River Iwi on those interests with a view to providing appropriate assurances that the rights and interests of the Te Arawa River Iwi in their resources will be preserved and protected.

Inclusion of section 9

10. Section 9 must be included in any New Legislation to give effect to the MOM.
11. The inclusion of section 9 in the New Legislation is important in order to ensure that:
 - (a) the Crown's current legal obligations to Māori in respect of State-owned Enterprises continue to apply to the Crown's shareholding in the SOEs; and
 - (b) the Crown continues to uphold those Treaty obligations for the benefit of Māori and all New Zealanders.
12. The purpose of section 9 is much broader than simply protecting Māori rights over particular assets. Section 9 symbolises the importance of the Crown – Māori Treaty partnership and the Crown's fiduciary duties to Māori. Section 9 was included in the SOE Act to impose an overarching responsibility, rather than a specific duty in respect of certain rights and interests.

13. The orthodox position at law is that international treaties (of which the Treaty is considered one) are unenforceable in the courts unless specifically incorporated into New Zealand law through an Act of Parliament.² On that basis, the principles of the Treaty are not enforceable in the Courts unless they have been incorporated into relevant legislation.³ TARIT does not necessarily accept that orthodox position, but acknowledges that it can only be overturned by a court of competent jurisdiction.
14. Although there is some suggestion that the Crown is bound by Treaty principles irrespective of whether those principles have been incorporated into statute,⁴ that position is by no means clear. In particular, any court that may be required to interpret the New Legislation in the future will see that Parliament would have expressly excluded section 9 from the New Legislation. That would indicate a clear intention that Treaty principles should not apply to the New Legislation or the implementation and continued operation of the MOM.
15. Excluding section 9 will likely remove the jurisdiction of the Courts to consider whether Crown conduct regarding the MOM and the SOEs is Treaty compliant.

Inclusion of sections 27A-D is inadequate

16. Section 9 and sections 27A-D of the SOE Act do not impose identical obligations on the Crown. Sections 27A-D give practical effect to some, but not all, of the obligations imposed by section 9. Sections 27A-D do not, for example, impose an obligation on the Crown to consult if the Crown proposes to sell shares in any SOE nor do they protect Māori interests in any other Crown assets that may be proposed for transfer to the four SOEs in the future.⁵ Those obligations arise under section 9 and should remain.
17. The retention of sections 27A-D of the SOE Act alone is not an appropriate mechanism to protect Māori interests.

A “New” Treaty clause

18. One of the options set out in the Consultation Document is the inclusion in the New Legislation of a “new provision relating to the Crown’s obligations under the Treaty.”
19. We consider that section 9 of the SOE Act is the strongest reference in New Zealand’s statute books to the Crown’s obligations in respect of the Treaty principles. It is unambiguous in terms of the legal status it gives to those principles.
20. There is a real risk that any “new Treaty clause” will impose less onerous obligations on the Crown than the current section 9. TARIT is not supportive of a reformulation of section 9 or a new, “more specific”⁶ Treaty clause. In TARIT’s view there is certainty regarding the meaning and obligations on the Crown under section 9 as a result of the previous litigation regarding that section. A new Treaty clause would be subject to new consideration by the courts in the event that any issue arose in the future and there would be uncertainty

² *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

³ *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590; [1941] AC 308; [1941] 2 All ER 93 (PC). We note the impact of *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 which stands for the proposition that, although legislation may be silent as to the application of Treaty principles, the context may nevertheless import them as mandatory relevant considerations.

⁴ *Huakina* at 210. See also *New Zealand Māori Council v Attorney General* [1991] 2 NZLR 129 (CA).

⁵ The Consultation Document (at p 8) expressly notes that the power presently contained in ss 23-29 of the SOE Act will be retained under the New Legislation.

⁶ Extension of MOM Consultation Document, p.5.

regarding the interpretation and effect of the new clause. In TARIT's view such uncertainty is unnecessary and unwarranted.

21. TARIT would also oppose any "new" Treaty clause that reflected Treaty clauses in other pieces of legislation that requires the Government to "take into account" or "have regard to" the principles of the Treaty. TARIT's opinion is that section 9 provides the appropriate level of protection of Māori rights.

The Government's consultation process

22. The Consultation Document sets out a consultation process of nine regional hui over 5 working days with a submission process running concurrently and expiring on 22 February 2012. The Government notes in the Consultation Document that it intends to introduce legislation to give effect to the MOM in early March 2012. This provides approximately one month to undertake national hui, receive and consider submissions and determine whether to reflect the submissions or any other agreements in the New Legislation.
23. In TARIT's opinion, the proposed consultation process raises issues as to whether the Government is consulting adequately with Māori especially given the limited timeframe to grapple with substantive issues, the tight timeframe for the Government to draft any New Legislation after the period for submissions closes and the brevity of the matters in the Consultation Document itself.
24. TARIT also notes that there are significant information gaps in the process. For example, the Government has not disclosed the form of the proposed legislation to give effect to the MOM including how a "re-formulated" section 9 may be drafted. It is difficult to form an informed view on the matters set out in the Consultation Document without that information.
25. TARIT urges the Government to engage in further direct dialogue with TARIT on these issues.

Responsibility of SOEs

26. The current principle objective of every state-owned enterprise is to operate as a successful business and, to this end, 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.⁷
27. TARIT understands this same social responsibility focus is not currently proposed to be carried into any New Legislation. It is TARIT's position that the New Legislation should include an equivalent social responsibility element to ensure that the SOEs remain both commercially profitable **and** socially responsible.
28. However, TARIT reserves its right to reassess its position on these mechanisms if the Government does not adopt an appropriate approach in its development of the MOM and other related policies. TARIT is currently providing support for these Government led initiatives but must be assured that they will continue and will not be undermined by the MOM.

⁷ SOE Act, section 4(1)(c).

Conclusion

29. TARIT is committed to the Treaty relationship between the Te Arawa River Iwi and the Crown and looks forward to continued and meaningful discussion about these issues, particularly in relation to the retention of section 9 in the New Legislation and an assurance from the Government that our rights and interests in our taonga, our natural resources, will continue to be protected.
30. As noted throughout this submission, the Crown needs to engage directly with TARIT on these matters. Representatives from TARIT would welcome the opportunity to discuss these submissions with the responsible Ministers and Crown Officials.

Roger Pikia

Chairman
Te Arawa River Iwi Trust