

The Treasury

Release of Submissions: Mixed Ownership Model Consultation with Māori

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LAKE ROTOAIRA TRUST

Submission on the extension of the Mixed Ownership Model

Introduction

1. This submission is made by the trustees of the Lake Rotoaira Trust (the **Lake Trust**) on the Government's proposal with respect to the Mixed Ownership Model (the **MOM**) proposal relating to Mighty River Power Limited, Genesis Energy Limited (**Genesis Energy**), Meridian Energy Limited and Solid Energy New Zealand Limited (the **SOEs**).
2. The trustees of the Lake Trust (the **Trustees**) support and endorse the submissions made on the MOM by the Tūwharetoa Māori Trust Board and Te Ariki Tumu te Heuheu.

Background

3. The Trustees hold Lake Rotoaira on trust for over 11,000 beneficial owners of Ngāti Tūwharetoa descent, in accordance with the terms of a Māori Land Court trust order. Lake Rotoaira is a taonga of Ngāti Tūwharetoa and is of great spiritual and cultural significance to the iwi.
4. The Lake Trust has a particular interest in the Government's MOM both because of its wider implications and specifically because of the inclusion of Genesis Energy. Genesis Energy owns and operates the Tongariro Power Development Scheme (the **TPD**). Lake Rotoaira is critical to the TPD.
5. Various aspects of the creation and operation of the TPD were the subject of a number of Treaty claims in the National Park Inquiry.¹ A particularly important aspect of those claims was that relating to Lake Rotoaira, Wai 178, regarding the 1972 agreement whereby Ngāti Tūwharetoa had no other option but to agree to the use of Lake Rotoaira in the TPD scheme in order to retain ownership of the lake.
6. The Trustees are very concerned about the potential impact of the proposed MOM on the Lake Trust's on-going relationship with Genesis Energy and the ability for its beneficial owners to seek meaningful redress in relation to historical breaches of the Treaty by the Crown in relation to Lake Rotoaira and the TPD.
7. We set out our specific concerns with, and suggestions in relation to, the MOM further in this submission.

¹ Refer, for example, to the Wai 575 Fourth Amended Statement of Claim, 32nd - 36th and 43rd causes of action, as well as the claim to customary interests in the waters in the 50th cause of action.

Summary of submissions

<i>Submission 1</i>	Lake Rotoaira is integral to the Tongariro Power Development scheme (the TPD) and is privately owned through the Lake Trust. Our claims regarding the TPD are extant and the Crown ought not to take any action that would be prejudicial to the outcome of those claims.
<i>Submission 2</i>	The MOM is contrary in principle to an acknowledgement and confirmation provided to us by the Crown when certain of the SOEs were established in 1999. The Crown must engage directly with us to agree how the Crown is to honour that acknowledgement and confirmation and to ensure that agreements between us and the Crown are honoured.
<i>Submission 3</i>	Any new legislation to give effect to the MOM (the New Legislation) must retain section 9 of the State-Owned Enterprises Act 1986 (the SOE Act) in its current form.
<i>Submission 4</i>	The Crown must consult directly with the Lake Rotoaira Trust on the wider issues associated with the MOM.
<i>Submission 5</i>	<p>Our position on the wider issues associated with the MOM is as follows:</p> <ul style="list-style-type: none">➤ We support continued dialogue between us and the Crown on the issue of water rights.➤ The New Legislation should include provisions that ensure our extant claims, and our rights and interests in the resources and assets employed by the SOEs, are not prejudiced.➤ We must be provided with an opportunity to discuss with the Government the management and governance of water within our rohe.➤ We support the position that Māori should be provided with a specific opportunity to participate directly in the sale of the shares in the SOEs.

Submission 1 – Importance of Lake Rotoaira

8. Lake Rotoaira is integral to the TPD and is privately owned through the Lake Trust. Our claims regarding the TPD are extant and the Crown ought not to take any action that would be prejudicial to the outcome of those claims.
9. In 1972, after negotiations with the Government in the context of the TPD, the Government agreed not to compulsorily acquire Lake Rotoaira. However, in return, the Government required that the Trustees relinquish, forfeit and absolutely surrender their rights to compensation for the use of their Lake Rotoaira title for the generation of electricity. Under duress, and with great reluctance, the Trustees were forced to sign a deed which, although left the Lake title in their ownership, surrendered their rights to fair and reasonable compensation for the use of Lake Rotoaira.
10. In 1991 the Trustees filed a claim with the Waitangi Tribunal relating to, among other things, the Crown's actions regarding the 1972 agreement. This claim has been heard by the Tribunal as a part of the National Park Inquiry under the Ngāti Tūwharetoa comprehensive claim (Wai 575). A report on this claim is imminent.
11. In addition, the Wai 575 comprehensive claim raised issues regarding the rights and interests of Ngāti Tūwharetoa in water. Particularly relevant to this inquiry is the fact that title to Te Moana a Taupō-nui-a-Tia and its tributaries has been vested in Ngāti Tūwharetoa. Claims to water will, therefore, be addressed in the imminent Waitangi Tribunal report.
12. The claims bought on behalf of the beneficial owners of Lake Rotoaira, including those wider Ngāti Tūwharetoa claims, remain extant. We are concerned that the MOM, and in particular the proposal that Genesis Energy as the owner of the TPD, will no longer be wholly-owned by the Crown, may be prejudicial to the beneficial owners of Lake Rotoaira and, more specifically, may affect the ability of the Crown to provide redress to remedy historic breaches.
13. It is the Trustees position that nothing should be done now in relation to Genesis Energy that could prejudice the rights of the beneficial owners of Lake Rotoaira. The New Legislation should include provisions to this effect.

Submission 2 – Previous undertakings by, and agreements with, the Crown

14. In 1999, the Crown proposed to split the SOE, the Electricity Corporation of New Zealand (ECNZ), into three new SOEs. Ngāti Tūwharetoa and the Tūwharetoa Maori Trust Board (the **Trust Board**) opposed the proposed split without appropriate recognition of Ngāti Tūwharetoa interests. The split was due to occur on 1 April 1999.
15. After discussions with the Trust Board, the Crown gave the following undertaking to the Trust Board on 23 March 1999:

The Crown by her Ministers is implementing a decision to split the SOE, ECNZ, into three new SOEs and the Crown wishes to acknowledge and confirm to the Tuwharetoa Maori Trust Board (the Board) that **the split of ECNZ into three new SOEs is not intended to prejudice the existing rights of either the Board, or the Tuwharetoa tribe (the tribe) or the Crown.** Accordingly the split will not of itself affect any rights or interests or the ability to claim rights or interests that the Board or the tribe may have in respect of the natural resources used by ECNZ for the generation of electricity or affected by such use, namely lakes, rivers, their waters, beds and other parts or geothermal resources.

The Crown acknowledges the right of the Board to assert interests and rights in land, rivers, lakes or geothermal resources and records the right of the Crown to challenge such claims.

[emphasis added]

16. The creation of Mighty River Power, Genesis Energy and Meridian Energy Limited only proceeded, and was entirely dependant, on the Crown's confirmation in 1999 that the split of ECNZ was not intended to prejudice Ngāti Tūwharetoa's rights. These SOEs would not exist if the Crown had not provided that assurance to the Trust Board and Ngāti Tūwharetoa.
17. The Trust Board and Ngāti Tūwharetoa accepted the Crown's assurance in 1999 because the Crown would retain 100% ownership of the new SOEs, and could therefore give practical effect to its commitment. The Trust Board was confident that, should prejudice arise from the split of ECNZ, the Crown could remedy that prejudice as 100% owner of the resultant SOEs. That confidence disappears if the SOEs are no longer wholly owned and controlled by the Crown.
18. Ngāti Tūwharetoa has been consistent in asserting its rights in relation to the resources used by these SOEs. It is more important now, than ever before, that the Crown engage meaningfully with Ngāti Tūwharetoa (including representatives of the Lake Trust) to ensure that the status quo is maintained such that the implementation of the MOM will not prejudice Ngāti Tūwharetoa's rights and interests. We should be pleased to work through with Crown officials the nature and form of that commitment.
19. Further, despite the Trustees' view that the 1972 agreement was entered into under duress, in good faith the Trustees have complied with the obligations imposed on them under that agreement. The MOM, and the associated proposed actions by the Crown, impinge on that agreement and directly affect the Trustees and the Lake Trust. The Crown must engage directly with the Trustees on the MOM as a result.

Submission 3 – Section 9 of the SOE Act

20. Section 9 must be included in any New Legislation to give effect to the MOM.
21. The retention 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 (particularly in relation to the Lake Trust's relationship with Genesis Energy); and
 - (b) the Crown continues to uphold those Treaty obligations for the benefit of Māori and all New Zealanders.
22. 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.² The retention of sections 27A-D of the SOE Act alone is not an appropriate mechanism to protect Māori interests without the corresponding inclusion of section 9. Those obligations arise under section 9 and should remain.

² 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.

Importance of section 9 to the Lake Trust

23. 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.
24. 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.³ On that basis, the principles of the Treaty are not enforceable in the Courts unless they have been incorporated into relevant legislation.⁴
25. Although there is some suggestion that the Crown is bound by Treaty principles irrespective of whether those principles have been incorporated into statute,⁵ that position is by no means clear. Further, 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.
26. 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.

The Lake Trust's unique relationship with Genesis Energy

27. The Trustees consider section 9 to be especially important in relation to the Lake Trust's unique relationship with Genesis Energy.
28. Because of the importance of Lake Rotoaira to Genesis Energy's operations in the TPD, the Lake Trust and Energy now have a unique working relationship. This relationship has been developed over the past 11 years and the Trustees are currently pleased with the level of engagement between Genesis Energy and the Lake Rotoaira Trust (although the Trustees acknowledge that there is always room for improvement).
29. A specific example of the relationship between Genesis Energy and the Lake Trust is reflected in an agreement between the Trustees and Genesis Energy (the **Agreement**) in relation to the TPD. The Agreement was entered into in 2000 and subsequently varied in 2011. The broad purpose of the Agreement is to avoid, remedy and mitigate the environmental effects of the TPD during the term of the resource consents which permit the operation and maintenance of the TPD. An additional purpose of the Agreement is to acknowledge each party's interests in Lake Rotoaira but, importantly, to recognise the special relationship between the beneficial owners and Lake Rotoaira such that Genesis Energy is required to mitigate the effects of the TPD on that relationship. The Agreement provides for a joint relationship group to ensure that the parties continue to work together to protect and preserve the health and well-being of Lake Rotoaira.
30. In the Trustees opinion, section 9 is of critical importance to the relationship between the Lake Trust and Genesis Energy. Section 9 has enabled the Lake Trust to advance positions

³ *Ashby v Minister of Immigration* [1981] 1 NZLR 222 (CA).

⁴ *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* 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.

⁵ *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188, 210. See also *New Zealand Māori Council v Attorney General* [1991] 2 NZLR 129 (CA).

with Genesis Energy on the basis of the Treaty partnership including finalising the Agreement. Without section 9, the Trustees ability to advance positions with Genesis Energy on the basis of the Crown's Treaty obligations will arguably no longer be available.

A "New" Treaty clause

31. 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.
32. 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.
33. Based on public comment there appears to be a real risk that any "new Treaty clause" will impose less onerous obligations on the Crown than the current section 9. The Lake Trust is not supportive of a reformulation of section 9 or a new, "more specific"⁶ Treaty clause. In the Lake Trust'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 regarding the interpretation and effect of the new clause. Such uncertainty is in neither the interests of the Crown or Māori.

Submission 4 – Scope too narrow

34. The Crown must consult with the Trustees on the wider issues associated with the MOM.
35. The Crown's consultation process is unnecessarily narrow in its scope. That process focuses on one issue (being the manner in which section 9 of the SOE Act should be dealt with) and fails to address other significant matters on which a reasonable Treaty partner should be informed.
36. The Crown should be informed on the nature and extent of any rights or interests of Māori in the assets employed by the SOEs. If the Crown is unaware of those interests it will not be able to assess whether any prejudice will be suffered by Māori under the MOM. Section 9 of the SOE Act provides that the Crown must not act in a manner that is inconsistent with the principles of the Treaty. It is a widely accepted principle of the Treaty that the Crown must make informed decisions. A failure to consult Māori to be informed of potential prejudice relating to the MOM is inconsistent with those principles.
37. It is also difficult to engage properly in the consultation process in the absence of detailed information regarding the MOM. For example, the Consultation Document focuses almost exclusively on whether section 9 of the SOE Act should be retained in the New Legislation and does not address any of the other issues regarding the model that may be relevant to Māori. In fact, the Consultation Document attempts to explicitly exclude comments on other matters such as Māori rights to water and Māori participation as investors.
38. As the Government will appreciate, the Lake Trust is especially concerned with the effect of the MOM on the rights to water in Lake Rotoaira. Although we note at the conclusion of this submission that we are of the view the discussions about the MOM and Māori rights to resources are able to be separated given the work currently being undertaken (particularly in relation to water), the Trustees do not accept the Government's insistence on a piecemeal approach to consultation in relation to the MOM. The Trustees are supportive of the current work-streams in relation to freshwater (particularly those being advanced by the Iwi Leaders

⁶ Extension of MOM Consultation Document, p.5.

Forum) but the Trustees need to be satisfied that these work-streams will continue to advance Māori interests such that the MOM, when finalised, will not prejudicially affect our beneficial owners.

Responsibility of SOEs

39. 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
40. The Lake Trust understands this same social responsibility focus is not currently proposed to be carried into any New Legislation. The New Legislation should include an equivalent social responsibility element to ensure that the SOEs remain both commercially profitable **and** socially responsible.

Submission 5 – The Lake Trust’s position on the wider issues

41. Although the Consultation Document does not call for submissions on the wider issues associated with the MOM, in good faith and as a responsible Treaty partner, we wish to set out our position on those issues.
42. In summary:
 - (a) The Lake Rotoaira Trust expect dialogue directly between the Lake Rotoaira Trust and the Crown on the issue of water rights.
 - (b) The New Legislation should include provisions that ensure our extant claims, and our rights and interests in the resources and assets employed by the SOEs, are not prejudiced.
 - (c) We must be provided with an opportunity to discuss directly with the Government the management and governance of water within our rohe.
 - (d) We support the position that Māori should be provided with a specific opportunity to participate directly in the sale of the shares in the SOEs.

Continued dialogue over water rights

43. We understand that water rights are currently the subject of high level discussions between iwi and the Crown. We acknowledge that Ngāti Tūwharetoa is participating in those discussions and we support those discussions. We also expect the Crown to engage with us directly on issues that affect us directly.
44. We support continued dialogue between Māori and the Crown on the issue of water rights. Our preference is to engage in direct dialogue with the Crown on these matters. We acknowledge and respect the right of Māori to pursue their claims to water through litigation but note that we are not currently a party to the water related claim to the Waitangi Tribunal.

The form of the New Legislation

45. We have interests in the extent to which the TPD affects Lake Rotoaira. Those interests include historical and current associations with the locations in which these assets are

⁷ SOE Act, section 4(1)(c).

situated and an interest in the water resource used by those assets. The MOM should not prejudicially affect those interests. The New Legislation should include provisions to this effect.

46. The Consultation Document plainly states that the MOM will have no effect on the processes that are underway to review and improve the operation of the Resource Management Act 1991 insofar as they relate to water. The New Legislation should make that explicit.
47. It is possible (if not probable) that some of the assets employed by the SOEs were originally acquired or constructed by the Crown in breach of Treaty principles. The Crown has unfairly benefited from those breaches over time. The Crown must retain its ability to remedy those breaches in the future. It is questionable whether the existing protections in sections 27A-D of the SOE Act are sufficient in that regard. The New Legislation should remove any doubt.

Management and governance of water

48. The arrangements in recent Treaty Settlements to the management and governance of waterways are directly relevant to the Lake Trust and Lake Rotoaira. As owner of Lake Rotoaira, the Trustees would expect that the government will enter into dialogue with the Trustees in that regard.

Opportunity to participate

49. We understand that some Māori groups consider that Māori should be offered an opportunity to participate directly in the sale of shares in the SOEs, including (but not limited to) a specific right to acquire shares in the SOEs. We support that position.

Conclusion

50. The Lake Trust is committed to the Treaty relationship between Ngāti Tūwharetoa 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 a guarantee by the Government that the current work-streams in relation to freshwater will continue to benefit Māori.
51. The Trustees of the Lake Trust would welcome the opportunity to discuss these submissions directly with the responsible Ministers and Crown officials.

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Dr Charlotte Severne
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