

**Te Hunga Roia Māori o Aotearoa
(New Zealand Māori Law Society Incorporated)**



**Submission on the Extension of the
Mixed Ownership Model**

22 FEBRUARY 2012

TE HUNGA ROIA MĀORI O AOTEAROA

SUBMISSION ON MIXED OWNERSHIP MODEL

1. INTRODUCTION AND SUMMARY

- 1.1 This submission is made for and on behalf of Te Hunga Roia Māori o Aotearoa (**THRMOA**), also known as the New Zealand Māori Law Society Incorporated.
- 1.2 THRMOA has a membership of approximately 350 Māori lawyers. In addition to these members, THRMOA also includes membership of Māori students studying towards a Bachelor of Laws or taking law related papers offered at wānanga throughout Aotearoa.
- 1.3 THRMOA encourages the effective networking of members, makes submissions on a range of proposed legislation, facilitates representation of its membership on selected committees, and organises regular national hui which provide opportunities for Māori to discuss and debate legal issues relevant to Māori.
- 1.4 When making submissions on law reform, THRMOA does not attempt to provide a unified voice for its members, or to usurp the authorities and responsibilities of whānau, hapū and iwi, but rather seeks to highlight areas of concern, and suggest further reform options where appropriate.
- 1.5 The current co-presidents of THRMOA are Liana Poutu and Tama Potaka.
- 1.6 This submission is made on the Government's extension of the Mixed Ownership Model (**MOM**) and in particular in relation to a proposal to change legislation concerning the State-Owned Enterprises being proposed for the MOM. The submission effectively responds to a document released by the Government on 1 February 2012 relating to "Consultation with Māori" (**Consultation Document**).¹
- 1.7 The structure of the submission is as follows:
- (a) Executive summary;
 - (b) Background;
 - (c) Context;
 - (d) Key areas of concern;
 - (e) Concluding remarks;
- 1.8 THRMOA notes that this submission is not in the Government's suggested template form, however, the specific questions posed in that template are addressed throughout the submission.

¹ Extension of the Mixed Ownership Model: A proposal to change legislation in relation to: Genesis Power Ltd; Meridian Energy Lt; Mighty River Power Ltd; and Solid Energy New Zealand Ltd - Consultation with Māori (February 2012) <<http://www.treasury.govt.nz/publications/reviews-consultation/mixed-ownership>> ["Consultation Document"].

2. EXECUTIVE SUMMARY

2.1 In summary, THRMOA's position on the MOM proposal is as follows:

- (a) The most effective option for the Crown to express its Treaty of Waitangi / Te Tiriti o Waitangi (**Treaty**) obligations for the proposed MOM is to retain section 9 of the State-Owned Enterprises Act 1986 (**Act**) in the proposed new legislation;
- (b) THRMOA does not consider that a "new" Treaty provision or an attempt to reformulate the wording of section 9 in the proposed new legislation, without widespread Māori and iwi consent, will effectively allow for the Crown to express its Treaty obligations for the proposed MOM; and
- (c) Prima facie, the current consultation process involving the Crown and Māori contravenes the principles of the Treaty as it does not satisfy the Treaty principles of good faith and partnership inherent in the relationships between the Crown and Māori.

3. BACKGROUND

3.1 On 27 January 2012, the Government announced its plan to hold a series of hui to consult with Māori on suggested legislative changes to implement the MOM.²

3.2 The current Government proposal is to introduce a MOM for four State-Owned Enterprises, being Genesis Power Limited, Meridian Energy Limited, Mighty River Power Limited, and Solid Energy New Zealand Limited. The Government also proposes to reduce its shareholding in publicly listed Air New Zealand Limited, which is already a "mixed ownership" company.

3.3 The Consultation Document outlines three options for consultation with Māori, in relation to the Crown expressing its Treaty obligations by way of the new MOM legislation. The three options for the new legislation are:³

- (a) to include section 9 of the Act in the new legislation in relation to the Crown's shareholding in these companies;
- (b) to include a more specific Treaty clause describing how the Crown will meet its obligations; and
- (c) no general Treaty clause.

4. CONTEXT

4.1 The Act came into effect in 1987 and enabled the Crown to privatise assets that had previously been state-owned. Section 9 of the Act provided:

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

² Hon Bill English and Hon Tony Ryall, "Iwi consultation for partial SOE share floats" (press release, 27 January 2012) < <http://www.beehive.govt.nz/release/iwi-consultation-partial-soe-share-floats>>.

³ All of these options would retain the memorials regime for land, contained in sections 27A-D of the State-Owned Enterprises Act.

- 4.2 The Court of Appeal considered the appropriate interpretation of section 9 in the seminal case of *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (**Lands case**). The New Zealand Māori Council had applied for a determination that the Crown transferring lands subject to claims in the Waitangi Tribunal was contrary to the principles of the Treaty. The Court of Appeal held that the principles of the Treaty included: the acquisition of sovereignty in exchange for the protection of rangatiratanga; partnership; to act in good faith; freedom of the Crown to govern; a Crown duty of active protection; a Crown duty to remedy past breaches; that Māori were to retain rangatiratanga over resources and taonga; and a duty on the Crown to consult with Māori.
- 4.3 Section 9 has subsequently been considered and developed in the context of Treaty based litigation in a number of important judicial decisions.⁴
- 4.4 The purpose of section 9 is far broader than specific rights protection. Section 9 elevates the importance of the Treaty relationship in the overarching governance of commercial assets and has been paramount to the evolution of contemporary constitutional and legal relations between the Crown and Māori (and to the extent that they are not considered the Crown, State-Owned Enterprises and Māori).

5. KEY AREAS OF CONCERN

The Importance of section 9

- 5.1 The Treaty and other obligations of the Crown, currently recognised by way of section 9, should be either retained or enhanced in any new legislation for the MOM.
- 5.2 THRMOA recommends the inclusion of the wording in section 9 in new legislation for the MOM companies. The governance of these commercial assets needs to retain the obligations that go with that governance – notwithstanding who the owner(s) may be – until such time as Māori are comfortable with the satisfaction and/or release of those obligations. At the very least, any new legislation should recognise the Crown’s Treaty responsibilities as expressed in section 9.
- 5.3 In the event that the new legislation does not recognise the Treaty responsibilities that are associated with governance of commercial assets, it is apparent that the Crown will rely on sections 27A-D of the Act to express its Treaty obligations for these assets. This is an unhelpful and minimalist expression of the partnership and good faith inherent in Treaty relationships. It is likely to do more harm than good in terms of building enduring relationships. It will undermine 25 years of thoughtful and constructive Treaty jurisprudence and evolving constitutional norms.
- 5.4 THRMOA’s position is that section 9 of the Act is the most effective option for the Crown to express its Treaty obligations for the proposed MOM and should be included in any new legislation to give effect to the MOM.

A “new” Treaty provision

- 5.5 One option set out in the Consultation Document is the inclusion in any new legislation of a “new provision relating to the Crown’s obligations under the Treaty.”⁵ The Consultation Document does not set out the possible wording for that provision but

⁴ Examples include: *Tainui Māori Trust Board v Attorney-General* [1989] 2 NZLR 513, *New Zealand Māori Council v Attorney-General* [1989] 2 NZLR 142, *New Zealand Māori Council v Attorney General* [1991] 2 NZLR 129 (CA), *New Zealand Māori Council v Attorney General* [1994] 1 NZLR 513, *Ngai Tahu Māori Trust Board v Director-General of Conservation* [1995] 3 NZLR 534, *Te Heu Heu v Attorney-General* [1999] 1 NZLR 98.

⁵ Consultation Document, above n 1, at 10.

refers to recent legislation that "has specified the manner in which the Crown must meet its Treaty duties and linked any reference to Treaty principles to the relevant, operative provisions of the legislation."⁶

- 5.6 The introduction of a new Treaty provision in relation to the overarching governance of commercial assets within the companies proposed for the MOM, will enable the Crown to unilaterally determine what its Treaty obligations would be at the outset of the new legislative regime. This approach, without Māori and iwi involvement and approval in determining the final wording of the relevant legislative provision, is plainly in contravention of the Treaty principles of partnership and good faith.
- 5.7 THRMOA considers that section 9 of the Act is the most effective reference in New Zealand legislation to the Crown's obligations in respect of the principles of the Treaty. It is unambiguous in terms of the legal status it gives to those principles. For example, it requires the Crown to do more than "take into account"⁷ or "have regard to"⁸ Treaty principles. It renders inappropriate and effectively unlawful any act of the Crown that is not consistent with those principles. Accordingly, any reformulation of section 9 runs the real and catastrophic risk of "watering down" its current import and creating even greater uncertainty. That risk is highlighted by the reference in the Consultation Document to recent legislative Treaty provisions. It is clear that recent Treaty clauses have sought to limit the application of Treaty principles to procedural matters.
- 5.8 Section 9 encourages both Māori and the Crown to continue to engage in a robust manner consistent with Treaty principles. THRMOA's position is that a new provision is unlikely to enhance that engagement and may contribute to its degradation. THRMOA does not consider that a "new" Treaty provision or an attempt to reformulate the wording of section 9 in the proposed new legislation, without widespread Māori and iwi consent, will effectively allow for the Crown to express its Treaty obligations for the proposed MOM.

The retention of only sections 27A-D is inadequate

- 5.9 The Consultation Document indicates that the Government intends to continue the application of sections 27A-D of the Act in their entirety in the new legislation for each of the companies proposed for the MOM. It is stated that this is "in order to protect the specific rights they confer on Māori".⁹
- 5.10 Sections 27A-D set out a specific regime for memorials to be placed on the titles of land transferred by the Crown to State-Owned Enterprises. This land must be resumed by the Crown in the event that the Waitangi Tribunal makes a recommendation for its return to Māori ownership or in the event that the Governor-General, by Order-in-Council, requires the Crown to resume ownership of specific land under circumstances outlined therein.
- 5.11 Section 9 and sections 27A-D of the Act do not impose identical obligations on the Crown. Sections 27A-D give practical effect and implementation to some, but not all, of the Treaty obligations recognised by section 9. Sections 27A-D do not, for example, affirm the obligation on the Crown to consult with Māori if the Crown proposes to sell any shares in any State-Owned Enterprise. That obligation is affirmed by section 9.
- 5.12 The Treaty rights that are not effectively protected by sections 27A-D include but are not limited to water, minerals, airspace, and geothermal energy.

⁶ Ibid.

⁷ Resource Management Act 1991, section 8.

⁸ Crown Minerals Act 1991, section 4.

⁹ Consultation Document, above n 1, at 6.

- 5.13 By retaining sections 27A-D specific Treaty rights in land, including wāhi tapu, are protected. By retaining section 9, the Government will affirm the Crown's obligations to protect resources beyond land and those rights and interests that may arise in the future that the Crown, in good faith as a Treaty partner, should protect. In the *Lands* case President Cooke held:¹⁰

[T]he duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and their waters to the fullest extent practicable.

- 5.14 The retention of sections 27A-D alone however is inadequate for affirming and optimising the Crown's expression of Treaty obligations.

Section 9 and third parties

- 5.15 The notion that partial privatisation increases ambiguity with regard to the Crown's ability to discharge its obligations under the Treaty, in circumstances where the Crown retains a 51 percent shareholding in the proposed MOM companies, is misinformed. Section 9 does not affirm obligations on any party other than the Crown. With a 51 percent shareholding the Crown is implored to effectively discharge its Treaty obligations under the MOM proposal.

- 5.16 Furthermore, the comments of the Waitangi Tribunal with reference to Crown delegation of decision-making authority to local authorities under the Resource Management Act 1991, provide guidance in this area. In its Ngawha Geothermal Resource Report the Waitangi Tribunal stated that:¹¹

It should be emphasised at this point that the Treaty was between Māori and the Crown. In return for the powers ceded to [the Crown by Māori] in Article 1, the Crown, in Article 2, guaranteed to protect Māori rangatiratanga over their taonga. This obligation is a continuing one and cannot be avoided or modified by the Crown delegating its powers or Treaty obligations to the discretion of local authorities ... [I]f the Crown chooses to so delegate, it must do so in terms which ensure its Treaty duty of protection is fulfilled.

- 5.17 THRMOA's position is that the new MOM legislation should continue to recognise the Crown's Treaty obligations in their entirety.

Responsibility of State-Owned Enterprises

- 5.18 The current principal 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 those interests when able to do so.¹²

- 5.19 THRMOA understands this same social responsibility focus is not currently proposed to be carried into any new legislation. It is THRMOA's position that any new legislation should include an equivalent social responsibility element to ensure that the State-Owned Enterprises remain both commercially profitable and socially responsible. This is in the benefit of all New Zealanders.

¹⁰ New Zealand Māori Council v Attorney General [1987] 1 NZLR 641 at 37.

¹¹ Waitangi Tribunal Ngawha Geothermal Resource Report (Brooker and Friend: Wellington, 1993) at [7.7.9].

¹² State-Owned Enterprises Act 1986, section 4(1)(c).

The Government's consultation process

- 5.20 The Consultation Document sets out a process of nine regional hui over five working days, with a submission process running concurrently and expiring on 22 February 2012.¹³ (This process initially failed to provide for consultation with Ngāti Kahungunu - the third most populous iwi in Aotearoa - with a hui subsequently scheduled on 20 February 2012, two days before the final deadline for receipt of submissions.)
- 5.21 The Government notes in the Consultation Document that it intends to introduce legislation to give effect to the MOM proposal 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 proposed legislative regime.
- 5.22 The Crown states that the purpose of consulting with Māori is to “ensure that, before it makes final decisions on legislation, and specifically on options on section 9, it fully understands Māori views on how Māori rights and interests under the Treaty are affected by the proposals.”¹⁴
- 5.23 In THRMOA's opinion, the proposed consultation process raises issues as to whether the Government is consulting adequately with Māori, especially given the:
- (a) limited timeframe offered to grapple with substantive issues;
 - (b) tight timeframe for the Government to draft any legislative regime following the close of the submission period; and
 - (c) brevity of the matters in the Consultation Document.
- 5.24 Moreover, it is striking that the Government is consulting on options that include having no reference in legislation to Treaty principles, in a manner that clearly undermines the Treaty principles themselves. A possible scenario for the Crown and Māori is brewing – with ongoing multi-year litigation around a core government policy that seeks to provide financial ballast to the economy, but instead contravenes established Treaty principles and contributes to investor disincentive to participate.
- 5.25 Prima facie, the current consultation process involving the Crown and Māori contravenes the principles of the Treaty as it does not satisfy the Treaty principles of good faith and partnership inherent in the relationships between the Crown and Māori. Furthermore, it has elevated the risk profile and mitigation measures now required to alleviate the disincentive impact of (yet another) flawed engagement with Māori and iwi.

6. CONCLUDING REMARKS

- 6.1 In summary, THRMOA's position on the MOM proposal is as follows:
- (a) The most effective option for the Crown to express its Treaty obligations for the proposed MOM is to retain section 9 of the Act in the proposed new legislation;
 - (b) THRMOA does not consider that a “new” Treaty provision or an attempt to reformulate the wording of section 9 in the proposed new legislation, without widespread Māori and iwi consent, will effectively allow for the Crown to express its Treaty obligations for the proposed MOM; and

¹³ Consultation Document, above n 1, at 4.

¹⁴ Ibid at 6.

(c) Prima facie, the current consultation process involving the Crown and Māori contravenes the principles of the Treaty as it does not satisfy the Treaty principles of good faith and partnership inherent in the relationships between the Crown and Māori.

6.2 THRMOA is comfortable with providing a verbal submission on this matter as the legislative process continues.

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