Mixed Ownership Model Submission Form

1 Contact Details

I am responding on behalf of an organisation

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2 Submission

Introduction

This submission is provided in response to the

Mixed Ownership Model - A proposal to change legislation in relation to:

Genesis Power Ltd
Meridian Energy Ltd
Mighty River Power Ltd
Solid Energy New Zealand Ltd

This submission outlines the position of the Māori Party in relation to the proposed changes to legislation associated with the Crown's intention to sell part of its share in the aforementioned State Owned Assets.

This submission draws from a range of sources including oral submissions provided at the recent round of consultation hui and submissions made directly to the Māori Party from iwi, hapū, whānau and individuals.

The Māori Party regards itself as the strong and independent Māori voice in Parliament. As a coalition partner with the National Party for this and the previous parliamentary term, we have a special responsibility to exercise leadership at the highest level in government as representing the voice of our people. Our founding constitution is also driven by kaupapa tuku iho which inform our response, particularly rangatiratanga, kotahitanga, whanaungatanga, mana whenua and mana tupuna.

In saying this however, it is the right of iwi representatives and Māori people in general to establish their own views on this issue. The Māori Party does not in any way aim to usurp the authority of Māori or their iwi representatives. As a political party, the Māori Party wishes to articulate that it does not hold, or assume to hold, mana whenua or customary interests in land and/or natural resources. Throughout this process we have acted as an advocate for the rights and interests of our supporters and of Māori generally.

Background

Te Tiriti o Waitangi has been interpreted by the Courts, legal practitioners and the Waitangi Tribunal as establishing, at the highest level, a relationship between the Crown and Māori which is 'akin to a partnership'. The partnership reflects the natural tension between kawanatanga (article one) and rangatiratanga (article two); it also represents an opportunity for reconciliation based on the pursuit of common ground.

To arrive at a point whereby that partnership is beginning to be recognised by the Crown through its legislation has taken many years. This process has been as a direct consequence of the State Owned Enterprises Act 1986 (SOE Act) and in particular as a result of section 9 of that Act.

Section 9 of the State-Owned Enterprises Act declares that,

"Nothing in the Act permits the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi".

These words have been the genesis of far-reaching decisions in education, land, te reo Māori, in forestry, in radio, in television. They have helped define our nation, ensuring that Māori have the same right as others to the protection of the law, recognising their unique distinctiveness as tangata whenua and as one of two partners to the Treaty and vitally, it reminds us all of the constitutional significance of Te Tiriti o Waitangi as instructing us how to live together as partners.

While there have been subsequent iterations of a 'treaty clause' over the last 26 years since the SOE Act was passed, Section nine is generally considered as the strongest existing provision in legislation.

These words have given rise to the opportunity to test this partnership and our respective obligations including the following cases;

1. The Lands Case 1987 –where the principles of Te Tiriti o Waitangi were articulated and interpreted by the New Zealand Māori Council who opposed the Crown transferring land that was subject to Treaty claims to State-Owned Enterprises. The case paved the way for judges in other cases to test and further articulate the principles.

2. The Coal Case 1989– which determined whether the Crown had the right to transfer coal mining rights to State-Owned Enterprise Coalcorp while Tainui had an interest in the land in question and whether that action was inconsistent with the principles of Te Tiriti o Waitangi. Judge (who?) ruled that the Crown should take no further action until they had established an agreement on the extent and nature of protection over the rights and interests of Tainui in the land.

3. The Broadcasting Assets Case 1995 – The New Zealand Māori Council appealed to the Privy Council a decision by the High Court and Court of Appeal that the Crown was breaking the law under section 9 of the SOE Act by transferring broadcasting assets to Radio New Zealand and Television New Zealand under the Act. The Māori Council's argument was that the Crown had breached the principle of protection because they had not taken necessary steps to protect Māori language insofar as radio and television was concerned. At the Privy Council, Lord Woolf ruled that section 9 obliges the Crown to take

all reasonable steps to assist Māori in preserving their language and culture, akin to the principle of protection. Those steps did extend to the medium of media, via radio and television.

The findings in these cases and others forced Te Tiriti o Waitangi into the spotlight and born into that light was new jurisprudence and a new attitude toward the Treaty. What resulted was a whole new approach to the way the Crown dealt with Māori and the issues of importance to Māori. At the core of all these findings is section 9 of the SOE Act.

Mixed Ownership Model – The proposed changes to legislation

The Crown has signalled via its consultation document released in February 2012 that it proposes to remove the four State-owned Enterprises from the ambit of the SOE Act and insert it into the Public Finance Act In order to sell up to 49% of these assets. The Crown intends to draft new legislation which will guarantee that it will continue to own at least 51% of those four new State-owned Enterprises.

The Crown is also seeking submissions on whether section 9 should be transferred to the new legislation. It set out three options for consideration at a number of consultation hui held throughout the country.

The three options are:

1. include section 9 of the SOE Act in the new legislation in relation to the Crown's shareholding in these companies;

2. include a more specific Treaty clause describing how the Crown will meet its obligations;

3. no general Treaty clause.

The Māori Party is strongly opposed to the removal of the four State-owned Enterprises from the SOE act and to the proposal to sell 49% of these important Crown assets until historical treaty settlements are concluded with all claimants who may wish to include these assets into their redress packages.

The Māori Party strongly supports option 1 as long as section 9 relates to **all** shareholdings in the companies not just the Crown's. The Māori Party opposes any change to the wording of section 9. We do not want to see a codification process that may cause a 'watering down' of the obligations of the Crown.

The Māori Party supports option 2 as long as section 9 is included in the new legislation and applies to all shareholdings and as long as additional clauses provide better protections for Māori. Furthermore, Section 4 of the SOE Act sets out the principles required of the shareholders for the new business to run successfully. As well as retaining section 9, the Māori Party would like the government to consider amending section 4 of the SOE Act to reflect an obligation on the shareholders to Te Tiriti o Waitangi which is similar in nature to the Crown's obligation set out in section 9.

The Māori Party is strongly opposed, to option 3. We consider that the idea that this be a viable option for consideration and consultation indicates a level of contempt for the place that section 9 has had in defining our modern day partnership. The removal of the

Treaty clause divests the Crown of all obligations to Māori under thepPrinciples of the Treaty. This, in our opinion, is a breach of Te Tiriti o Waitangi.

Further Issues

Customary interests in natural resources

In its consultation document, the Government recognised that Māori have interests that are closely connected to the four State-owned Enterprises; those interests include but are not limited to water and geothermal. However, their view is that these interests are taken into account and recognised in other legislation.

"…these interests are provided for in other ways, principally by the Resource Management Act 1991 and other legislation. Other well-developed, collaborative processes are in train to develop policy and legislation in respect of water and resource management more generally. Further, the historic claims of specific iwi in natural resources are subject to Treaty settlements both in negotiation and completed. This suggests that the continued application of section 27A-D of the SOE Act with their core resumptive protections, irrespective of section 9 of the SOE Act, means that Māori rights and interests can be adequately protected." (page reference)

The Māori Party rejects these suggestions. Neither the RMA Act, nor S27 of the SOE Act address Māori rights and interests with regard to ownership of land and natural resources. The RMA is not sufficiently broad enough to encapsulate traditional Māori understandings of tikanga and kaitiakitanga in relation to land and water. Section 27 of the SOE Act is too narrow. It was created to be an exclusive mechanism of protection for land which is subject to a Treaty claim. Contrary to the statement above, our view is that it does not in any way protect the rights and interests of Māori with regard to natural resources.

The Māori Party supports the Waitangi Tribunal claim Wai 2357 on the Sale of the Power Generating State-Owned Enterprises Claim and Wai 2358, the National Freshwater and Geothermal Resources Claim, filed by the New Zealand Māori Council on behalf of all Māori.

Consultation

The Māori Party would like to commend the Crown on their willingness to consult on this issue however we would like to raise a number of concerns to ensure that any further engagement is to be effective. A formal announcement was made about the proposed changes to the SOE legislation at the end of January 2012. The Māori Party was highly concerned at the speed at which the Crown was moving. In response we issued a publicly accessible Primer document which aimed to inform our supporters as quickly as possible about the changes to the Act, the likely impacts on Māori and the preliminary substantive

views of the Party at that time. During the course of the consultation rounds Māori in large numbers expressed the view that the consultation round has been inadequate for a number of reasons;

- Consultation locations have been chosen arbitrarily by the Crown and as a result Māori have not been able to engage appropriately.
- The short timeframe available for submissions has meant that Māori have had little time to consult effectively with their people.
- Consultation has been very narrow in its focus and has not allowed for kanohi ki te kanohi engagement on related issues such as water
- The consultation question was framed as whether to retain or remove section nine. The real issue for consultation should have been how to give practical effect to section nine.
- Media have not been able to record the entire hui and in particular the question and answer sessions during the consultation rounds leading to concerns about balance in terms of the public reporting of issues raised; and as a consequence concerns of transparency.

The Māori Party supports an extension of time for the consultation process to ensure that each of the issues concerning the process of consultation has been addressed.

Conclusion

The Māori Party is committed to ensuring that its constituents are represented by a strong and independent Maori voice in parliament. The following recommendations are a collation of thoughts expressed in a number of fora relating to the Mixed Ownership Model proposal. We submit these recommendations for your urgent consideration.

The Māori Party is strongly opposed to the removal of the four State Owned Enterprises from the SOE act and to the proposal to sell 49% of these important Crown assets until historical treaty settlements are concluded with all claimants who may wish to include these assets into their redress packages.

The Māori Party strongly supports option 1 as long as section 9 relates to **all** shareholdings in the companies not just the Crown's. The Māori Party opposes any change to the wording of section 9. We do not want to see a codification process that may cause a 'watering down' of the obligations of the Crown.

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The Māori Party is strongly opposed, to option 3. We consider that the idea that this be a viable option for consideration and consultation indicates a level of contempt for the place that section 9 has had in defining our modern day partnership. The removal of the Treaty clause divests the Crown of all obligations to Māori under the Principles of the Treaty. This, in our opinion, is a breach of Te Tiriti o Waitangi.

The Māori Party supports the Waitangi Tribunal claims Wai 2357 on the Sale of the Power Generating State-Owned Enterprises Claim and Wai 2358, the National Freshwater and Geothermal Resources Claim, filed by the New Zealand Māori Council on behalf of all Māori.

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