

A PRIMER ON SECTION 9 OF THE STATE OWNED ENTERPRISES ACT AND THE CROWN CONSULTATION ON “MIXED MODEL OWNERSHIP”.

“I have learned these last few years that behind every word the government says there are others ... and it is those other words we never hear that explain what they are doing”.

- Peeti Te Rangi, 1904.

“What the government is doing is not just setting up a new State Owned Enterprise or some other commercial thing ... not anything new at all but an old State taking of what is ours”.

- John Scott, Ngāti Kahungunu, at 1987 hui on the SOE Bill.

Introduction:

This Primer sets out Ngāti Kahungunu concerns about the Crown proposal to replace four of the energy “State Owned Enterprises” with “Mixed Ownership Model Companies” (MOMC’s).

The establishment of SOE’s in the 1980’s caused real unease among our people and the new MOMC’s sadly raise similar concerns. The three main areas of concern are –

- 1. That the “Mixed Ownership Model” is itself a further “taking” which poses new risks to the recognition of Iwi and Hapū rights under Te Tiriti.**
- 2. That the Crown Consultation Document’s discussion of “Treaty obligations” (and in particular the proposals relating to Section 9 of the State Owned Enterprises Act) pose added risks to Iwi and Hapū rights.**
- 3. That water is excluded from discussion about MOMC’s.**

These concerns arise within a historical and economic context for Māori that goes beyond a debate about “selling off assets” or private versus public ownership. This Primer raises questions and seeks to address the concerns we have within that context.

- Moana Jackson.

The Questions:

What are State Owned Enterprises?

SOE's were established to "corporatise" various government agencies into profit making businesses in which the government held all the shares.

What concerns did Iwi have about the SOE model in the 1980's?

The main concern was that Iwi would be prevented from taking claims to the Waitangi Tribunal over the land and water that SOE's were to have because they essentially became "private assets" outside the Tribunal's jurisdiction.

Were those concerns addressed by the Crown at that time?

Not really.

However Section 9 of the SOE Act did say "nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty".

Section 27 also attached a "memorial" to SOE land if it was subject to a claim and enabled the Tribunal to issue binding orders returning that land for settlement.

What was the effect of Section 9?

Under Pākehā law the Treaty has no legal status in Court unless Parliament says so and Section 9 provided a hook that our people could use to argue the Treaty in Court.

Has Section 9 been used in Court?

Yes.

It was used most famously in the SOE case in 1987 in which the Court of Appeal decided that in establishing an SOE the Crown had to abide by the Treaty principle of partnership and act in good faith by having reasonable consultation with Māori.

However the Court also decided that as partners Māori were bound to accept government policy provided there had been reasonable consultation, although "wide-ranging consultations" that might hold up a government policy were in themselves "contrary to the principles of the Treaty".

How successful has Section 9 been then?

Not very.

In terms of providing the "hook" for our people to go to Court it has been crucial. It has in a sense been a necessary key for access to the Courts.

Unfortunately its practical effect has been limited because the Courts saw Section 9 as merely a Ministerial reminder and that “the principles of the Treaty do not authorise unreasonable restrictions on the right of a...government to pursue its chosen policy”.

What effect has Section 27 of the SOE Act had?

Very little.

In the one instance that the Tribunal issued a binding order the Crown threatened to “restructure” the Tribunal and the Section has never been used since.

Is all this relevant to the Mixed Ownership Model argument?

Yes.

The Mixed Ownership Model involves an even greater “corporatisation” than SOE’s since although it requires the Crown to keep 51% of the shares it frees the other 49% for private investment which further entrenches land and water as “private assets”.

It therefore raises continuing concerns about our rights under Te Tiriti.

Are There Treaty Provisions In The MOMC Consultation Document?

The Crown states that it is “committed to maintaining” its Treaty obligations but wants to exempt MOMC’s from Section 9 of the SOE Act. It gives three options -

1. Include Section 9 of the SOE Act in any MOMC legislation but only as it relates to the Crown’s 51% shareholding.
2. Include a more specific Treaty clause.
3. Have no general Treaty clause.

Do these offer any effective protection?

Limiting Section 9 to the Crown’s 51% shareholding at least enshrines the capacity of our people to use it as a hook to hold the Crown accountable in Court but exempting the private investors may have the effect of negating even that limited capacity.

The effectiveness of “a more specific Treaty clause” will of course depend on what the clause says and history shows that it will more likely protect Crown interests rather than those of Iwi and Hapū.

Having no general Treaty clause (the original Treasury suggestion) of course removes any possibility of protection.

Why is the Crown making these proposals?

The Mixed Ownership Model itself is best seen as simply an ideological extension of the 1980’s “corporatisation” policy.

The Crown's Treaty proposals are similarly best seen as an attempt to profess an obligation to the Treaty while upholding the view that it cannot be used to "authorise unreasonable restrictions on the right of a...government to pursue its chosen policy".

Is there a broader context to the proposals?

Yes.

As our tipuna said there are usually "words we never hear that explain what they are doing" and overseas investment and free trade agreements are important words in the Mixed Ownership debate.

Many free trade agreements that the Government has signed with other countries prohibit any restraints on investment and treaty protection may be seen as a restraint.

Some free trade agreements have a general Treaty article but a more specific clause in the MOMC legislation may make the government liable for compensation if the other Party thinks it might have negatively affected the value of its investment. That would be the case for example in the China Free Trade Agreement.

It may also be an issue in the Trans Pacific Partnership Agreement (TPP) that is currently being negotiated by the Government. However part of that Agreement requires that its terms will be kept secret for four years so it is hard to know.

Are water issues relevant to this discussion?

Yes.

The four energy SOE's that are being targeted as Mixed Ownership Models necessarily use or rely on water for power generation.

Does the Crown acknowledge the relevance of water?

No.

In fact in its Consultation Document it simply says "The Government considers interests in water to be beyond the scope of this consultation".

Is this logical?

No.

However it is consistent with the Crown's equally illogical claim that no-one owns the water when in fact it then claims for itself the rights of an owner by regulating and controlling water, and in the case of MOMC's, deciding who can buy or use it.

Are there precedents for this approach?

Yes.

In the debate over the foreshore and seabed the Crown also claimed that no one owned it while reserving to itself an owner's right to grant deep-sea drilling licences in the seabed for example.

But isn't it true that Māori don't have a concept of ownership anyway?

Yes, we never had "ownership" in the Pākehā legal sense of exclusive individual title.

However we certainly have rangatiratanga which necessarily entails absolute, exclusive and undisturbed authority in relation to it. Indeed that idea might properly be called a tikanga concept of ownership.

What are Iwi doing about the MOMC issue?

In the inadequate and short time available Iwi have unanimously argued that in spite of its limitations Section 9 should be retained for the new MOMC's.

Others are also drafting new clauses that more properly give effect to Te Tiriti.

What else can be done?

Some Iwi are also encouraging the broader context debate around the whole issue of "asset sales" as well as their link to the often secret process of free trade agreements.

Finally many people now see the need to participate in the upcoming work of the Constitutional Transformation Working Group set up by Iwi (as distinct from the Crown Institutional Group) because changing the way government decisions are made is the only way that that these issues can be prevented in the future.

Available online at www.converge.org.nz/pma/moana.htm
