
BEFORE THE WAITANGI TRIBUNAL

WAI 2357
WAI 2358

IN THE MATTER OF

The Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

Claim by SIR GRAHAM LATIMER AND
OTHERS in respect of Māori proprietary
interests and rights to access and use of
water and geothermal resources

CROWN MEMORANDUM

16 July 2012

RECEIVED
Waitangi Tribunal
16 Jul 2012
Ministry of Justice WELLINGTON

CROWN LAW

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MAY IT PLEASE THE TRIBUNAL

TRIBUNAL REQUESTS

1. On 10 July 2012, in the course of hearing, the Tribunal made two requests of Crown Counsel in response to allegations by Ms Ertel for Wai 144 that the Crown was acting in bad faith:

1.1 Comment on media reports. The reports were of the Prime Minister's statements relating to the potential Crown response to any Tribunal recommendations on the Wai 2358 claim.

1.2 Comment on the Financial Markets Authority Exemption Notice of 26 April 2012. In her memorandum of 10 July 2012 Ms Ertel said the Crown had misled the Tribunal about the Notice.

THE FIRST REQUEST

Media reports generally

2. The Crown has reservations about the utility of debating media coverage in the Tribunal. There has been extensive coverage, with interviews of the Prime Minister, other Ministers, and a range of claimants, counsel and commentators. However, given the Tribunal's request of the Crown, a response is set out below.

The Prime Minister's comment

3. It appears counsel have focussed in their criticism of the Crown on an interview with the Prime Minister on 9 July 2012. The comment has starkly portrayed the Prime Minister as indicating Government will "ignore" the Tribunal's report on the Wai 2358 claim.
4. Counsel for the Crown immediately made the point that the Prime Minister's comment, as portrayed by counsel, had been quoted out of context.
5. The tenor of the Prime Minister's comment is apparent from the transcript. **Attached** for the Tribunal's information is that transcript¹. This includes:

¹ There are a range of other media coverage but for the readings referred to at paragraph 3 above, I do not rehearse all of that material.

Interviewer: Do you expect to come out of this Waitangi Tribunal a delay in this whole asset sale process?

Prime Minister: I hope not. So the Māori Council have taken a case to the Waitangi Tribunal. The Waitangi Tribunal's rulings are not binding on the Government so we could choose to ignore whatever findings they might have – I'm not saying we would but we could. But I think there's a next legal step that could be taken. So they could potentially go the High Court I think and try and hear a case.

Interviewer: How will you decide on that if this Tribunal comes back and yes they do think they've got a genuine claim, how will you decide then whether to ignore it or take it on board?

Prime Minister: Well yes in the first instance we'll get a legal opinion on what the Waitangi Tribunal actually come out and say, so we'll obviously go back and look through that. But our lawyers are arguing the case and so will argue the case very strongly.

6. In a further interview on 11 July 2012² the Prime Minister said:

We are going through a process. We will be interested to see what the Waitangi Tribunal says. We're acting in good faith. We take the process seriously, but that doesn't mean we are bound by it and that's the law in New Zealand.

7. That correctly reflects the legal position. The Prime Minister made a matter of fact comment. The elaboration which the Prime Minister made in the interview on 9 July 2012 was not put to the Tribunal by the interested parties raising this issue.
8. The Crown has been consistently clear that a timely report from the Tribunal will be welcome.

Context

9. The Crown has throughout the Tribunal inquiry made its position clear. The Crown considers there is no sufficient relation between the claimants' property rights claim to water and the Crown's plan to sell minority shareholdings in Mighty River Power and other State-owned energy companies. This stance has been made plain in various Crown memoranda, from February 2012 (#3.1.3).

² Radio New Zealand <http://www.radionz.co.nz/national/programmes>.

10. That first substantive memorandum (#3.1.3) appended a letter dated 21 February 2012 from Ministers to the Presiding Officer of the Tribunal and Chief Judge of the Māori Land Court. The letter set out the Crown's decision to include a clause in the then Mixed Ownership Model Bill which reflected the concepts of section 9 of the State-owned Enterprises Act, which decision followed consultation with iwi/Māori. The letter also expressed Government's intention that the planned share sale not prejudice Māori claims to natural resources. That was a considered engagement by Government, respecting the Tribunal's role and jurisdiction in these matters.
11. The Tribunal declined the claimants' request that there be an immediate recommendation to halt steps towards the share sales (Tribunal decision on urgency dated 28 March 2012, #2.5.13).
12. In that context the Crown is both making preparation for share sales and engaging in good faith (with significant resource put into both evidence and submission) to explain the Crown stance to the Tribunal and claimants.
13. The Crown has been clear that a timely report is necessary from the Tribunal in order to be considered by Government before final steps to share sale. This was expressed by the Crown again in its Memorandum of 8 May 2012 (#3.1.99).
14. All of the engagement above has of course been in the context that the Tribunal has in this instance a non-binding recommendatory power. All participants in this process appreciate that the Tribunal's role is to advise Government and it is for Government to make the final decision, following consideration of the Tribunal's recommendations and the reasons for them, on accepting or declining to follow recommendations.

THE SECOND REQUEST

15. In her memorandum of 10 July 2012 Ms Ertel said the Crown had misled the Tribunal about the Exemption Notice because of its alleged relevance in permitting the Crown to promote the sale of shares without producing a prospectus and hence avoiding the requirement to disclose information to investors about "pending proceedings".

16. That is not correct. The exemption does not allow the Crown to promote an investment in the company, or avoid the obligation to disclose material information in the offer document.
17. Ms Ertel was advised of the purpose and effect of the notice before making her allegations of bad faith against the Crown and has elected to pursue the allegation nevertheless.
18. The purpose and effect is, in addition, set out in the “statement of reasons” set out at the end of the exemption.
19. Ms Ertel also claims that the Crown failed to disclose the exemption to the Tribunal in bad faith. However, I note that the Exemption Notice is publicly available on the FMA’s website.³ The notice was not presented by the Crown because it had not been judged material.
20. The notice provides exemptions in respect of certain advertising requirements of the Securities Act (the Act) in relation to the offer of shares in the MOM companies to the public.
21. It is important for the Crown to be able to provide information to the public on the MOM programme, and the terms of the offers of shares in the MOM companies at the appropriate time. In addition, given one of the objectives of the programme is widespread New Zealand participation, it is important for the Crown to be able to provide information of a general educational nature about investments in securities. Many of these communications will be considered “advertisements” for the purpose of the Act because they will contain a reference to an offer of securities.
22. In the absence of an exemption, the Crown can make only limited statements that refer to a proposed offer of shares in the MOM companies. The purposes of these restrictions in the Act is to reduce the risk that investors may be influenced by incomplete or unbalanced promotional material at a time when the full information required in an investment statement is not available to investors. It is, however, in the public interest that information about the MOM programme (involving as it does, five different companies) be made

³ The Financial Markets Authority is an independent Crown entity which operates independently from government policy.

available as early as possible, including some limited information about the MOM companies.

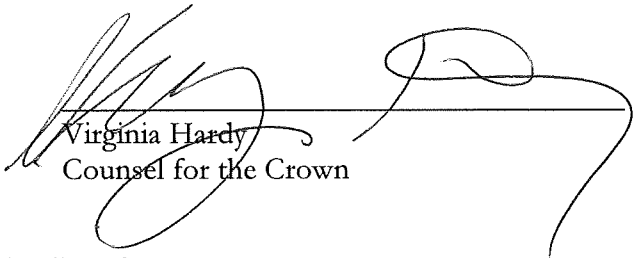
23. The exemption allows the Crown to provide this limited information, while at the same time limiting the availability of general promotional material prior to the registration of an offer document.
24. The exemption is no broader than reasonably necessary and is subject to appropriate conditions. Importantly, under clauses 9 and 11 and the schedule to the exemption, a person authorised by the Crown must certify, or have previously certified, that the advertisement is not broader than the usual legislative requirements, as extended by the exemption, including certification under paragraph 10 of the schedule, that the advertisement does not include any matter that is likely to deceive, mislead or confuse.
25. The exemption is generally consistent with previous exemptions granted by the FMA, including for Fonterra (over 30 have been given by the FMA and the Securities Commission before it).
26. The FMA considers that the exemptions are in the public interest, and has noted that they do not relieve any person from liability for misleading, deceptive, or confusing statements in an offer document.
27. Ms Ertel's memorandum of 10 July suggests that the exemption from Regulation 39 of the Securities Regulations 2009 is of moment for the Tribunal. The Crown disagrees.
28. Regulation 39, by way of summary, provides that a prospectus or an advertisement must not say that the securities will be tradeable on a securities market unless that is the case or an application has been made for that and, in either case, where if the statement about trading on the market has been approved by the market operator. The notice simply exempts the Crown from the requirements of Regulation 39 on the condition that any written advertisements that refer to the proposed listing of a MOM company include the following:
 - 28.1 if an application has not been made to list the MOM company on the NZX, the advertisement must include a statement to the effect

that it is intended that an application will be made, and that an application has not yet been made, and

28.2 if an application has been made, the advertisement must contain any other statement that is approved by NZX Limited.

29. Ms Ertel in paragraph 6 of her memorandum suggests that the Notice enables the Crown to promote the sale of the shares in the energy companies without first producing a prospectus. For the reasons above, that is not correct.

16 July 2012



Virginia Hardy
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel