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**BEFORE THE WAITANGI TRIBUNAL****WAI 2358**

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**IN THE MATTER OF**                      **the Treaty of Waitangi Act 1975****AND****IN THE MATTER OF**                      **the National Fresh Water and Geothermal  
Resources Inquiry**

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**MEMORANDUM FOR THE CROWN****20 July 2012**

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<b>RECEIVED</b> Waitangi Tribunal
<b>20 Jul 2012</b>
Ministry of Justice WELLINGTON

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**MAY IT PLEASE THE TRIBUNAL:**

1. This memorandum is filed in response to memorandum-directions of the Presiding Officer (Wai 2358, #2.6.2) directing that by 5 pm, Friday 20 July 2012, the Crown provide:
  - 1.1 any examples of New Zealand case law or legislation setting out the Crown's position that there can be no ownership of water;
  - 1.2 Crown submissions in *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 (specifically submissions concerning the ownership of water);
  - 1.3 any policy documents which illustrate the formation of the Crown's Treaty settlement policy that ownership of natural resources cannot be transferred to Māori, with the exception in some cases of land above a resource or containing a surface feature of a resource;
  - 1.4 any policy documents relating to the consideration of Māori interests in the formation of the Mixed Ownership Model policy;
  - 1.5 any other examples, in addition to the Raukawa (North) Settlement, of settlements in which commercial redress is explicitly tied to natural resources;
  - 1.6 information about any discussion or consultation with the Iwi Leaders Group relating to the ownership of or proprietary rights in water since the Prime Minister's May 2009 letter (during cross-examination, Mr Beatson advised that he would consult with MfE officials on this point);
  - 1.7 a list of the members of the Iwi Leaders Forum; and
  - 1.8 the Ministry of Foreign Affairs and Trade's analysis for the select committee on the Mixed Ownership Model Bill (referred to by Dr Ridings in her evidence).

**Examples of New Zealand case law or legislation setting out the Crown's position that there can be no ownership of water**

2. That flowing water is incapable of ownership has been recognised by the New Zealand courts in *Campbell v MacDonald* (1902) 22 NZLR 65 (see **Tab 1**)<sup>1</sup> and *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71 (see **Tab 2**).<sup>2</sup>

**Crown submissions in *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268**

3. The Crown submissions in *Aoraki Water Trust v Meridian Energy Ltd* [2005] 2 NZLR 268 are provided in **Tab 3**.

**Policy documents which illustrate the formation of the Crown's Treaty settlement policy**

4. The following policy documents illustrate the formation of the Crown's Treaty settlement policy about transfer of natural resources:
- 4.1 CAB (93) M 3/11, Cabinet, "Additional item: Treaty of Waitangi: General Issues; Minor Claims";
  - 4.2 TOW (93) M 4, Cabinet Committee on Treaty of Waitangi Issues, "Minutes of a meeting of the Committee held on 25 May 1993 at 8.00";
  - 4.3 CSC (93) M 27/2, Cabinet Strategy Committee, "Minutes of a meeting of the Committee held on 30 June 1993 at 9.00";
  - 4.4 CSC (93) M 31/1, Cabinet Strategy Committee, "Minutes of a meeting of the Committee held on 22 July 1993 at 4.00 pm";
  - 4.5 CSC (93) M 35/1, Cabinet Strategy Committee, "Minutes of a meeting of the Committee held on 5 August 1993 at 10.15 am";
  - 4.6 CSC (94) M 4/3, Cabinet Strategy Committee, "Minutes of a meeting of the Committee held on 9 March 1994 at 9.15 am";

<sup>1</sup> See *Campbell v MacDonald* (1902) 22 NZLR 65, per Williams J at 68, and Conolly J at 71-72.

<sup>2</sup> *Glenmark Homestead Ltd v North Canterbury Catchment Board* [1975] 2 NZLR 71, per Macarthur, at p 81.

- 4.7 CSC (94) 24, letter of Simon Murdoch to Chair of the Cabinet Strategy Committee, “Crown Policy on Natural Resource Claims: revised Recommendations”;
- 4.8 CAB (94) 147, Memorandum for Cabinet, “Crown Policy on Natural Resource Claims Under the Treaty of Waitangi: revised Recommendation on Determining a Well-founded Grievance”;
- 4.9 CSC (93) 132, Chairman Cabinet Strategy Committee, “Overarching policy on Treaty claims affecting natural resources – revised recommendations” (3 August 1993);
- 4.10 CAB (94) M 9/6, Cabinet, “Crown Policy on Treaty of Waitangi Claims to Natural Resources” (In Confidence) (see **Tab 4**);
- 4.11 The document “Cultural Redress Instruments” outlines cultural redress instruments and how they have been applied in specific Treaty settlements (see **Tab 5**); and
- 4.12 Office of Treaty Settlements, *Healing the past, building a future*, at pages 96-126 details the use of cultural redress in Treaty settlements (see **Tab 6**).

**Policy documents relating to the consideration of Māori interests in the formation of the Mixed Ownership Model policy**

5. The policy of the Mixed Ownership Model programme and in particular the legislation necessary to give effect to the programme was consulted widely at a national level and specifically with Māori at a series of consultative hui led by the Minister of Finance the Hon Bill English and the Minister for State Owned Enterprises the Hon Tony Ryall.
6. This process produced many documents, a large number of which are available on the Treasury’s website at: <http://www.treasury.govt.nz/publications/reviews-consultation/mixed-ownership/advice>
7. The Minister of Finance’s 28 February 2012 submission to Cabinet’s Economic Growth and Infrastructure Committee presents a synthesis of the material, the consultation process, and the Government’s policy

decisions following the consultation. A copy of this paper as released to the public is attached (see **Tab 7**). Please note that while certain portions of the paper were withheld from public release under the Official Information Act, these sections are not relevant to the Tribunal's request.

**Other examples, in addition to the Raukawa (North) Settlement, of settlements in which commercial redress is explicitly tied to natural resources**

8. Examples in which commercial redress is explicitly tied to natural resources include:
  - 8.1 In the Ngati Tuwharetoa (Bay of Plenty) settlement, commercial redress including an RFR over K A 30 Bore (geothermal asset) and associated land was given. The RFR has been triggered.
  - 8.2 The Crown has provided Te Roroa an RFR for a period of 50 years over specific toheroa (shellfish) quota if it is included in the Quota Management System in the future. (Te Roroa Claims Settlement Act 2008.)
  - 8.3 The Crown vested rights to pounamu in the Takiwa of Ngai Tahu to Te Runanga o Ngai Tahu (Ngai Tahu (Pounamu Vesting) Act 1997). This was done as cultural, not commercial redress.
  - 8.4 The Crown gave Ngati Pahauwera the right to manage the extraction of relevant hangi stones (Ngati Pahauwera Treaty Claims Settlement Act 2012). This was done as cultural, not commercial redress.
  - 8.5 Te Puia Local Purpose Reserve was vested in Ngati Porou as cultural redress. The local purpose reserve status for Te Puia means that the Ngāti Porou PSGE can potentially utilise the geothermal springs for power generation or tourism opportunities.
  - 8.6 Crown Forest Land (CFL) is a common component of settlements where CFL is in the role of the claimant.

**Information about any discussion or consultation with the Iwi Leaders Group relating to the ownership of or proprietary rights in water since the Prime Minister's May 2009 letter**

9. The Crown notes that:
  - 9.1 The Iwi Leaders Group have met 11 times with Ministers after the 2009 letter from John Key.
  - 9.2 As far as officials are aware, rights and interests were a topic of discussion at these meetings.
  - 9.3 Officials are, however, generally not present at the meetings and so cannot confirm exactly what topics were discussed at specific meetings.
10. A diagram ("Relationship between the Crown and Iwi Leaders") and text ("Engagement on freshwater reform") that clarifies the process and structures for iwi and Iwi Leaders engagement with the Crown on water issues is also provided at **Tab 8**.

**List of the members of the Iwi Leaders Forum**

11. The Crown notes that the membership of the Iwi Leaders Group is currently:
  - 11.1 Sir Tumu te Heuheu - Tūwharetoa Māori Trust Board;
  - 11.2 Brendon Puketapu - Waikato-Tainui Te Kauhanganui Incorporated;
  - 11.3 Tom Roa - Whanganui River Māori Trust Board;
  - 11.4 Mark Solomon - Te Runanga o Ngāi Tahu;
  - 11.5 Toby Curtis - Te Arawa Lakes Trust;
  - 11.6 Herewini (Selwyn) Parata - Ngati Porou; and
  - 11.7 Rikirangi Gage - Te Whanau a Apanui.

**Ministry of Foreign Affairs and Trade's analysis for the select committee on the Mixed Ownership Model Bill**

12. The Ministry of Foreign Affairs and Trade's analysis for the select committee on the Mixed Ownership Model Bill consists of the:
- 12.1 "Departmental Report on the Mixed Ownership Model Bill (Confidential until the Bill is reported back to Parliament)" prepared by The Treasury (see specifically "Trans-Pacific Partnership" at pp 20-21) (see **Tab 9**); and
- 12.2 Letter from The Treasury to Todd McClay, Chair Finance and Expenditure Committee, "Mixed Ownership Model Bill: response to question raised on 23 May 2012" (28 May 2012) (see **Tab 10**).
13. As Treasury was the departmental adviser to the Select Committee, the Ministry of Foreign Affairs and Trade provided its advice to Treasury, and this was included in Treasury's response to the Committee.

20 July 2012




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Virginia Hardy  
Counsel for the Crown

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