

# Maori Development Corporation Report

## Appendix 4

### 4.1 - Establishment of the MDC

Appendix 4

The Crown's Response

The Crown's submissions were made under three major headings, which will be summarised in turn below: Establishment of the MDC, Nature of the Asset, and The Sales Process.

#### 4.1 Establishment of the MDC

Referring to a chronological list of events and documents (A30:appendix) covering the period during whg which it was decided to establish the MDC through to the filing of the prt claims, Ms France first emphasised that the Crown's investment in the MDC was a commercial one. She highlighted the fact that in February 1987, when Cabinet approved the establishment of a Maori Resource Development Corporation in conjunction with the Maori Trustee, it was agreed that the Corporation should have a fully commercial orientation except in the role of packaging and managing selected commercial projects, which role was to be separately funded by an annual appropriation from Vote: Maori Affairs. It was also agreed at that time that additional shareholding from other sources should be further considered and, in March 1987, Cabinet endorsed the canvassing of investment support from private sector corporations. (A30:3-4; A1:109-112)

By June 1987, when Cabinet again considered the matter, there had been significant changes, apparently due to discussions with private sector individuals and organisations, in the way in which the MDC was to be established and as to its funding. Crown counsel drew attention to three significant changes which Cabinet agreed to in June. First, it agreed that the government's contribution was to be \$13 million cash rather than \$8 million cash and \$5 million in the form of business lending debt transferred into equity. Secondly, it agreed that any private sector participation could be additional to the government/Maori Trustee contributions, thus increasing the size of the organisation. Thirdly, the concept emerged of a trust with a cash grant of \$10 million, replacing the original proposal to fund the non-commercial aspects of the Corporation's activities by means of annual subsidies. (A30:4; A1:119,115)

Citing the views of officials advising the government at the time, the conditions upon which Cabinet agreed to lend \$13 million to the MDC until such time as the Crown

was able to become a shareholder, the terms of the Deed of Agreement which recorded those conditions, and the priority accorded to the legislation which enabled the Crown to hold MDC shares, Crown counsel submitted that the commercial approach of the Crown was evident throughout. (A30:5-7; A1:129-130) Acknowledging the backdrop to the government's decision to invest in the MDC, provided by the Hui Taumata and the views of the Maori Economic Development Commission and people such as Professor Winiata, Crown counsel stressed the wealth of other advice received by the government and stated:

However, after taking into account all of the advice received, Executive government in making its decisions on the matter agreed to make an investment on a commercial basis in a commercial organisation. (A30:8)

Five key features of the establishment of the MDC, it was said, reflect the commercial nature of the Crown's investment and reveal that the facts do not support the claim that the Crown is, by withdrawing from the company, failing to honour the terms of understanding on which its investment was made. (A30:8,9)

First, the contribution to the MDC was in cash, not as a grant but as a loan, a situation which is to be contrasted with the Crown's grant of \$10 million to the Poutama Trust. Describing the Poutama Trust as a social vehicle, Crown counsel said it:

... can be seen as the means by which the Crown achieved what may be termed its social objectives. (A30:8)

Acknowledging that the Crown loan of \$13 million was unsecured, Ms France drew attention to the manner in which the deed of agreement ensured protection for the Crown's interest, such as requiring the provision of information about the MDC and the payment of interest equivalent to any dividends. (A30:8)

Secondly, the Crown's intention from the outset was that its investment would be by way of shares and there was concern from the outset to ensure that the Crown had the protections of a shareholder. The significance of this, Crown counsel stated, is that the Crown expected a return and, she noted, the MDC paid dividends to the Crown in the last financial year. Again, Crown counsel contrasted this situation with the grant made to establish the Poutama Trust. (A30:8-9)

The Crown's witness Dr Robert Mahuta, Chairman of the MDC, also drew a distinction between the grant made to establish the Poutama Trust and the loan made to establish the MDC. In response to questions from the tribunal, Dr Mahuta confirmed that the Poutama Trust money is non-returnable so that, in his words, it belongs to Maori yet to be identified. (A35:11-12) When questioned about his evidence of two hui in April and May 1993 (after the Crown had announced its decision to sell its MDC shares) and the decision taken by the eleven Maori authorities present at the latter hui to support a consortium to purchase the Crown's MDC shares, Dr Mahuta implied that just as he did not question the commercial nature of the proposed sale, neither did those authorities. He stated that the argument that the shares might belong

to Maori, while being raised before the tribunal, is not part of the commercial aspects of the transaction. (A35:11-12)

When asked for his view of the notion that the Crown's shares should, by some other mechanism than the proposed sale process, become the non-returnable property of Maori, Dr Mahuta replied:

No, I don't think that would find credibility in the commercial world. With respect, there is bigger fish in the sea than MDC that we should be trying to hook. MDC what it does it gives a vehicle to operate successfully in the commercial world without having all those other fish hooks besides it. .... All I'm saying is that my understanding is that is the way the government wanted to get rid of its shares and I accept that and am in support of it. .... My short answer is that it should be sold because I don't think that's where the argument is, with MDC. (A35:13)

In response to further questions from the tribunal, Dr Mahuta stated that the income from the Poutama Trust derived from the interest on its \$10 million grant and that he thought that its income would be improved if the Trust bought out the government's shares in the MDC. (A35:13-14)

In her closing submissions, Crown counsel challenged the evidential value of a statement relevant to this matter that was reported to have been made by a former Maori Trustee, Bruce Robinson, to tribunal-commissioned researchers Graham Butterworth and Susan Butterworth. The evidence of Mr and Mrs Butterworth stated that Mr Robinson had expected the Crown to withdraw from the MDC at an "appropriate time" and had hoped there would be some "element of gift" about its withdrawal. (A16:20) Crown counsel observed that there was no evidence to suggest that Mr Robinson's hope was any more than the view of one official at the time yet the Crown makes decisions taking into account the advice of a wide range of persons. She also drew attention to the limited document base available to Mr and Mrs Butterworth in compiling their report and the limited time in which they had completed it, reiterating the request she had made at the hearing that the tribunal give the evidence of

Mr and Mrs Butterworth appropriate weight in light of those factors. Crown counsel also challenged the value of the opinion of Mr Butterworth, given in response to a question by counsel for Te Ika Whenua, that it was not an appropriate time for the Crown to withdraw from the MDC. Crown counsel submitted that the witness did not have the expertise to comment on that matter. (2.16:2-3)

Thirdly, the MDC was set up as a public limited liability company and not, for example, an SOE. (A30:9 citing A1:146-147)

Fourthly, the investment by way of shares, which are tradeable commodities, also reflects the fact that it was not necessarily to be permanent. Dr Mahuta stated in evidence that he understood that the Crown had not intended to be a longterm shareholder and the Crown restated that in its March 1993 announcement offering its shares for sale. (A30:9)

Fifthly, the commerciality of the MDC is highlighted by the initial participation of private sector shareholders Fletcher Challenge and Brierley Investments. (A30:9)

Crown counsel then made three points in reply to Professor Winiata's submissions and evidence relating to the source of funding for the Crown's investment in the MDC.

First, she said that the \$13 million contribution was new money, as is apparent from the appropriation to Vote: Maori Affairs of \$15,500,000 in the supplementary estimates for the year ended 31 March 1988. (A30:9,7)

Secondly, Crown counsel argued that, in any event, it is not correct in terms of the Crown's accounting practices and conventions to refer to money being "diverted" from one area to another because decisions about funding are taken on an individual basis. Noting that the \$807,000 allocated to business lending in Vote: Maori Affairs for the year ended 31 March 1987 was funds used to provide loans for Maori businesses, Ms France stated that that was an annual appropriation and there was no guarantee of the same amount being appropriated in any other year. (A30:10) In her closing submissions, Crown counsel made an additional comment on the point made by the claimants that the capitalisation of the \$807,000 over ten years reflected a commitment by the Crown to ongoing investment for Maori commercial activities:

It is also relevant that ultimately the contribution was by way of cash which may indicate that the capitalisation approach was not ultimately used. The establishment of the Poutama Trust is also relevant to this. [emphasis in original] (2.16:3)

Thirdly, it was submitted that the Maori Trustee's involvement in the MDC is irrelevant to the issues at stake because the claim does not relate to the sale of his shares and he is, in any event, an independent statutory officer. Observing that the claimants had not suggested that the sale of the Crown's shares would impact on any other shareholder, nor that the earlier sales of MDC shares, by Brierley Investments for example, had affected the Maori Trustee, Crown counsel stated that it was difficult to see why the sale of the Crown's shares should impact on the shareholding of a completely independent shareholder. (A30:10)

Concluding this section of her submissions, Ms France focused on the fact that the Crown, with 49.9% of MDC's shares, is not a majority shareholder who can dictate the company's actions. She argued that it is unimportant who owns shares in the MDC because it is the results achieved by the company which are at issue. The claim, however, in assuming that the MDC would not continue to provide the funding that it does now, appeared to pre-empt subsequent actions by the company, which was at best an exercise in speculation. Summarising the Crown's position, Ms France stated:

The Crown's investment can be seen as providing a "kick start" to Maori development. Now that the MDC is in the position that it is, it can operate without that investment. The sale can be seen as providing Maori with the

opportunity to have greater control over the MDC and of moving from a "do it for us" mentality to a "do it for ourselves" mentality. (A30:11)

In closing submissions, Crown counsel elaborated this point in response to Professor Winiata's focus on the MDC's operations and upon how its approach might be altered. Ms France submitted that this is not a matter within the jurisdiction of the Waitangi Tribunal because its jurisdiction relates to actions of the Crown and culminates, in a successful claim, in recommendations to the Crown. She emphasised that the MDC is a limited liability company under the Companies Act 1955 and that the Crown is simply one shareholder and not even a majority shareholder. In other words, she stated,

Professor Winiata's concern is not a matter which the Crown can do anything about.

In

the words of Ms France:

It is submitted that it would be outside of the Tribunal's jurisdiction to make any recommendations on the direction of the MDC and it would certainly be unwise to do that on the basis of the evidence provided. A commercial study would need to be undertaken by the Board of the MDC - not by the Crown. (2.16:4)

The Crown's witness Dr Mahuta, while stressing throughout his evidence the commercial nature of the Crown's investment in the MDC and the sale of its shares, nevertheless acknowledged that he understood the Crown's decision to invest in the Corporation to be based on its Treaty obligations. Having explained his view that, from the outset, the various Ministers of Maori Affairs did not see themselves as long term shareholders, Dr Mahuta suggested that just as the private corporate shareholders had left the MDC when they felt they had done as much as they could, so too the Crown now wanted to leave. He also indicated, however, that the Crown was nervous of the direction that the MDC had been taking in recent years, explaining that the decisions taken by the company may have been too commercial and insufficiently conservative for the Crown. (A35:9)

As Dr Mahuta had drawn an analogy between the private corporate shareholders' reasons for leaving the MDC and the Crown's reasons, the tribunal asked whether it was his understanding that the Crown's involvement in the Corporation was not based on the Treaty. Dr Mahuta responded:

No, I'm not saying that. I think in this aspect of it, initially it was based on the Treaty obligation but as people grow up then you can cut the apron strings so that they can grow up and make their own decisions. But there are still other functions that need to be performed by the Crown in order to fulfil its Treaty obligations. One of those is of course still this huge development gap that I have referred to. The view, and if I could be so bold as to say, what I think the Crown is thinking, is that to some, MDC has grown up in the commercial world and therefore did not need the Crown's presence there. (A35:9-10)

When questioned further by the tribunal as to whether the Crown wanted to leave the MDC because it thought the company had grown up or because the company was doing things which the Crown did not want it to, Dr Mahuta replied:

Well that's normally part of the process of growing up - you do things that your parents don't normally like you to do. With respect, a bit of both probably but I think growing up was the critical factor and I believe that too I think we'd acquired enough expertise. Certainly it requires still much more support within the Maori world but I think the expertise and the track record is there to move forward. (A35:10)

Also relevant is Dr Mahuta's answers to questions put by counsel for Te Ika Whenua, Ms Ertel, about his view of the Crown's obligation to deliver development funding to Maori. Having explained that his own iwi, Tainui, did not accept Mana funding because the manner of its delivery was thought to be inappropriate, Dr Mahuta agreed with Ms Ertel's proposition that the Crown still has an obligation to try to find an appropriate way to deliver funds to Tainui. He then added:

But to Maoridom generally too. That's a big gap that was left there after the Hui Taumata and with the establishment of the Maori Development Corporation - was the development funding. (A35:9)

In response to Ms Ertel's next question, Dr Mahuta stated that he thought the Crown's obligation, to provide development funding to Maori generally, arises from the Treaty of Waitangi. (A35:9)

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*Waitangi Tribunal, Department of Justice, Wellington.*

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### 4.2 - Nature of the Asset

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Under this head the Crown submitted that, because it is a commercial transaction, there is no justification for looking at the Crown's conduct in connection with the MDC in terms of the principles of the Treaty. But even if it were assumed, for the sake of argument, that Treaty principles were relevant, Crown counsel argued that the claimants could not establish any prejudice resulting from the Crown's actions.

One reason that there was no such prejudice to the claimants, it was stated, was that the asset at stake is money which, unlike land, is substitutable. Because the Crown is always solvent and can use other money to meet any of its obligations, no question arises of the need to use the particular \$13 million invested in the MDC to redress any Treaty breaches. Further, it was submitted that there is no Treaty principle requiring the Crown to provide cash for Maori business: any obligations which the Crown may have in relation to Maori economic development can be met in a variety of ways, such as the provision of expertise or advice or by making particular facilities available. Accordingly, Crown counsel submitted that the present situation is more akin to that which arose in the broadcasting assets case, *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576.

Attention was drawn to a passage in the judgment of Justice McKay in the broadcasting case where a distinction was drawn between the situation before the Court and the earlier lands case between the same parties, where the asset which the Crown was proposing to transfer was itself subject to Treaty claims. After noting that the Crown was committed, prior to transferring its broadcasting assets, to entering contractual arrangements with the transferees that would guarantee access for Maori broadcasters to the transmission and production facilities, Justice McKay said:

Even apart from such contractual arrangements, the particular assets are not essential for Maori broadcasts. They are substitutable, at least to the extent that funds are made available (A30:11)<sup>1</sup>

Further, Crown counsel submitted that it is up to the Crown how it meets Treaty obligations where the decision involves the allocation of resources. Referring to a

suggestion by counsel for Te Ika Whenua that redress of relevant Treaty breaches requires the Crown to make equity finance available to Maori, Ms France stated that it is unacceptable to the Crown that the claimants should seek recommendations from the tribunal as to how the Crown should spend its money.

The Crown also disagreed with those claimants' proposition that, because of the Crown's Treaty obligations, the basis on which the MDC was established was irrelevant. Recalling Dr Mahuta's statement that the tribunal cannot do everything, Crown counsel said that it was not for the tribunal to determine the way in which the Crown allocates funds between taxpayers. Moreover, it was said, the claimants would not suffer or be likely to suffer prejudice before two decisions had been made: the Crown's decision to accept a particular offer and its decision as to how to utilise the proceeds of the sale. Crown counsel observed that it was open to the Crown to consult with Maori over either of those two decisions. (A30:12)

In further support of the submission that, even if Treaty principles were relevant, the claimants could not establish any prejudice caused to them, Crown counsel relied on the Crown's Article 1 right of kawanatanga. She argued that the Crown's decision to offer its shares for sale is a valid exercise of kawanatanga and noted that it is established government policy to avoid devoting taxpayer resources to commercial enterprise. (A30:12)

The Crown's witness Richard Shallcrass, Advisor on Commercial Relations for the Industries Branch of the Treasury, confirmed this latter point in reply to a question from Ms Ertel as to why the Crown had decided to sell its MDC shares. He stated:

The governments in recent years have followed a policy of selling investments in commercial businesses because of the risks which result for the Crown's balance sheet. In investing in commercial businesses government has a policy of focusing its resources in areas of core activity, welfare, education, training and such matters and it has sought to dispose of its shares in commercial businesses. (A35:35)

Mr Shallcrass stated further, in response to Ms Ertel, that meeting its obligations under

the Treaty is a core activity of the Crown. (A35:37)

Before concluding this section of her submissions, Crown counsel quoted from the President of the Court of Appeal Sir Robin Cooke's judgment in the lands case:

The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy. Indeed to try to shackle the Government unreasonably would itself be inconsistent with those principles.<sup>2</sup>

Ms France submitted that if the Crown were not able to make the decision that it should no longer be investing in the MDC, it would have far reaching implications on the ability of governments to make decisions in the best interests of all New Zealanders. (A30:13)

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## Appendix 4

### 4.3 - The Sales Process

#### 4.3 The Sales Process

In a memorandum which the tribunal directed the Crown to file prior to the 3 June chambers conference, Crown counsel supplied a summary of events leading up to the Crown's decision to offer its MDC shares for sale. She stated that since February 1992 there has been correspondence from parties interested in purchasing the Crown's shares. Specifically, the National Maori Congress wrote to the Minister of Finance on 11 February 1992 and 2 October 1992 advising of its interest in acquiring the Crown's shareholding. Further, on 22 July 1992 an expression of interest was received from the Tainui Maori Trust Board and the Proprietors of Taharoa C Block. Those last mentioned bodies then submitted an offer on 26 August 1992.

Crown counsel said that the Minister's consistent response was to note that no decisions had been made as to the future objectives, if any, that the Crown considered it should achieve through its MDC shareholding but that the Crown was always open to questioning whether or not its shareholding in organisations such as the MDC continued to meet its objectives.

In March 1993, she continued, a second offer for the Crown's shares was received from the Tainui Maori Trust Board and the Proprietors of Taharoa C Block. In response, the Crown advised that Ministers were considering the matter but had yet to make a decision. Towards the end of March 1993, the Ministers of Finance and Maori Affairs took the issue of their MDC shareholding to Cabinet. It was Crown counsel's understanding that the Ministers had four options: not to sell, accept the current offer, negotiate with the offerors or offer the Crown's shareholding for sale in an open and contestable manner.

On 29 March 1993, Cabinet agreed to proceed with the last option and announced its decision on 31 March. The Treasury, which was directed to manage the sale on behalf of the government, then appointed Southpac as its commercial advisor in the sales process. The press release announcing that appointment was distributed to, amongst others, some 26 Maori media organisations. (2.5:2-3)

Crown counsel said that the Board of the MDC has been consulted on the sales process and on the manner of the sale and that discussions with the Board are ongoing.

The sales process, she advised, commenced with an advertisement inviting expressions of interest by 28 May 1993. It may be noted that it was the claimants who pointed out

that the advertisement was first published on 21 May, one week before the advertised closing date for expressions of interest. (A24:3) The Crown, however, explained that the closing date had been extended and that, as at the date of hearing, it remained possible for parties who had not registered an expression of interest by 28 May to do so and become involved in the process. (2.5:4)3

It was explained that following the receipt of expressions of interest, an information memorandum will be sent to those parties who have expressed an interest in the sale. They will be required to first satisfy the Crown that they have the financial capacity to complete the transaction and, it was said, in this regard the sales process has been designed to encourage and facilitate Maori involvement. In particular, the Crown has agreed to consider offers for parcels of its shares as small as 5%, a figure which has been reached taking cognisance of the average size of Maori entities.4

Following the despatch of the information memorandum, due diligence will be carried out and any information requests from bidders dealt with. Then any necessary supplementary information will be circulated before the submission of binding bids. Once parties have submitted their final bids, a report will be prepared for Cabinet's consideration and Cabinet will make the final sale decision. (2.5:4-5)

Crown counsel added that she understands that the Treasury and Southpac have been cognisant that the most logical purchasers of the Crown's shares are Maori parties and that part of the sales process will involve a letter, informing of the opportunity to purchase the shares, being sent to all of the 350 entities listed on the current database held by the Federation of Maori Authorities. She noted that as at 26 May 1993, 6 expressions of interest had been received, including one from the National Maori Congress. (2.5:5)

Ms France gave two reasons for her submission that it was reasonable for the Crown to follow the sales process it has adopted. First, because of the commercial nature of the investment, the sales process would be compromised if the Crown had consulted with Maori about its decision to offer the shares res for sale. Noting that some of those who may have been consulted would prospective bidders, Crown counsel said that the process adopted removed the potential for conflict of interest.

Secondly, Ms France highlighted the Crown's acknowledgement that the likely purchaser will be a Maori party or parties and the efforts made to ensure Maori participation in the sales process. These included the efforts made to communicate the Crown's decision to sell to Maori, the Crown's agreement to consider offers for parcels of its shares as small as 5% and the more relaxed than usual time frame that has been adopted. (A30:13-14)

Defending the decision to offer the shares for sale under an open competitive process, it was said that this reflected the realities of the commercial world in which the MDC operates and conforms to the government's policies. Further:

It would be difficult to justify selecting a buyer for the Crown's shares where there was not an equal opportunity for all parties to participate in the process.

The price finally achieved would be discounted and therefore difficult for the government to defend. (A30:14)

Rejecting the claimants' arguments about the need for consultation, the Crown maintained that this situation was of the type envisaged by Justice Richardson in the lands case ([1987] 1 NZLR 641, 683) where consultation was not necessary before the Crown can be informed of the relevant facts so as to make an informed decision. It was observed that the sales process involves discussions with any interested party and, if requested, officials would explain to any such party the commercial nature of the process and the framework in which the shares are being offered for sale. (A30:14-15)

Also rejecting the claimants' suggestion that it is a Treaty breach to treat with one iwi before another, the Crown replied that it will have to do this on a number of occasions for practical reasons. (A30:14-15)

Dr Mahuta elaborated upon the proposed sale process both in his brief of evidence and in response to questions from counsel. He first stated that he is not only Chairman of the MDC but also of the Tainui Maori Trust Board and Taharoa C Block management committee. Accordingly, he had declared those other positions to the Crown and had stood aside from the process regarding the Tainui/Taharoa interest in the Crown's shares so as not to influence the outcome of a sale. (A23:2) Dr Mahuta also stated that he had advised the other directors, and management, of the MDC, to declare any conflicts they may have and to refrain from any course of action which would cause a conflict of interest. (A23:5)

Commenting upon the proposed sale process, Dr Mahuta said that as the Crown is a shareholder in the MDC and he is its Chairman, he has a duty to the Crown and the company to ensure that the Crown receives the best price for its shares. In his view, the sale being by public tender means that all Maori can participate and that there is no possibility of settling with some tribes ahead of others. (A23:3)

Professor Winiata challenged Dr Mahuta's view in cross-examination. In reply to earlier questions put by Professor Winiata, Dr Mahuta had stated that in the course of the MDC's efforts to attract investment by consortia, the company canvassed all potential Maori investors, who he defined as those who had both the authority and the capacity to participate. Dr Mahuta then said that, in the market place, investors select themselves by their ability to make quick decisions and to "front" with their contribution. He added:

But I guess the sad thing about it is that in the main, it seems to be the same groups selecting themselves. Those who are disadvantaged tend to remain disadvantaged and that's something that we have to address. (A35:4)

Professor Winiata took up this point when he asked Dr Mahuta to comment on whether the Crown needs to look at how to reduce the disadvantage to those who are unable to participate in the purchase of its MDC shares. Specifically, Professor Winiata

asked for Dr Mahuta's comment on whether the Crown should suggest some process of distribution of its shares other than by price. (A35:5) Dr Mahuta's reply emphasised the availability of Mana funding to all iwi, with the exception of his own which would not sign the requisite contract for its receipt. He said that he understood \$15 to \$20 million had gone from the Crown to iwi by means of Mana funding and that, therefore, they had the capacity to put some capital together in the form of a consortium to purchase MDC shares if they chose and if that was their priority. (A35:6)

Professor Winiata then stated that there is at least one other iwi, represented before the tribunal, which did not sign the contract entitling receipt of Mana funds and which is disadvantaged. He asked again whether price is a sufficient mechanism to allocate surplus value when there were iwi unable to participate. Dr Mahuta replied that, although that was not his understanding of the funds held within Maoridom:

... there might be a special case for that one but I don't think it applies generally across the board. (A35:6)

Earlier, Dr Mahuta had accepted the proposition, put to him by Professor Winiata, that he would expect there to be a number of competitors rather than a monopoly on the tendering side if the market is to be relied on to set the true price of the Crown's MDC shares. (A35:5) Professor Winiata later asked whether Dr Mahuta would say that, given that there is surplus value and that the MDC is a pan-iwi Maori organisation, some provision ought to be made for that. Dr Mahuta's reply and the following exchange between Professor Winiata and Dr Mahuta was:

Mahuta: As a commercial transaction, the provision has been made, you have to put some cash up. It's not a commercial transaction if you get it for nothing.

Winiata: I think that's a pretty good commercial transaction. All I'm saying is that where there is an iwi and let's say there was only one and that where there is not a competitive market, the sale of the shares and the surplus value then is present. Does the market mechanism cope with that?

Mahuta: The competitive market we are talking about, I hope, is essentially between Maori bidders. I believe that it should go to Maori. It is a Maori Development Corporation, it should remain so and the only competitiveness is going to remain amongst the Maori bidders themselves who should get together and make one collective bid. (A35:6-7)

In his evidence, Dr Mahuta had referred to the support given by eleven Maori authorities, at a hui in May 1993, for a bid for the Crown's MDC shares by a consortium of Maori authorities.<sup>5</sup> He stated that the objective of those authorities, who believe it is timely for the Crown to sell its shares, is to enable widespread participation by Maori based organisations in the consortium. He added that the opportunity for such participation is still available. (A23:5)

Ms Ertel, counsel for Te Ika Whenua, asked Dr Mahuta in cross-examination whether, in his view, it is inconsistent with the principles of the Treaty for a consortium to purchase the Crown's MDC shares. Dr Mahuta replied:

No, it's a commercial proposition. The Treaty has nothing to do with it in my view. (A35:3)

In the course of re-examination by Crown counsel, Ms France, Dr Mahuta stated that he saw the sale of the Crown's MDC shares as providing a tremendous commercial opportunity for Maori, an opportunity that would not recur for several years. When asked whether he foresaw any difficulties in Maori participating in an open commercial process, for example with due diligence requirements, Dr Mahuta responded:

Well, some ground rules I guess need to be established by the seller in that I am assuming for example that whoever the successful tenderer is it will be one of our people, one of our groups, Maori. I know that there has been talk of some corporates getting behind some Maori faces and making bids and I would be opposed to that. I think it's time that control moved more into the hands of Maori people. The due diligence in all that we are producing them by the hundreds now, these bright young sparks who can help us with that. (A35:14)

Ms France then asked whether, with reference to a commercial transaction, Dr Mahuta thought the open competitive tender process was necessary to ensure its integrity. Dr Mahuta replied that he did not necessarily think so but that it was a Treasury requirement. Nor did he agree with Crown counsel's suggestion that the open competitive tender process necessarily gives transparency. He stressed that the outcome of the process was what was important and that, while he was not suggesting what the Crown intended, it may not want the highest tenderer. (A35:14-15)

Dr Mahuta also stated, in response to further questions from counsel for Te Ika Whenua, that if an iwi purchased shares in the MDC that would not, in itself, break the "dependency bond" between the iwi and the Crown but it would be part of that process in providing the iwi with the opportunity:

... to see how a commercial decision is made with no excuses to the Treaty any way. It's a straight commercial decision: you put your money up, you do your assessment and you take a risk. (A35:15)

Also relevant in this context is evidence given by Mr Shallcrass (Advisor on Commercial Relations for the Industries branch of the Treasury). Mr Shallcrass did not make a statement in evidence but was called by the Crown to answer any questions put by the tribunal and counsel. Professor Winiata asked Mr Shallcrass to describe the market which is going to be operative in responding to the Crown's invitation to bid for its MDC shares. Mr Shallcrass's reply and Professor Winiata's next questions were:

Shallcrass: One of the essential features of the sales process is to give any party that has an interest in buying the shares an opportunity to put in an offer for those shares. This is the established procedure for ensuring that maximum value is realised through any sales process.

Winiata: And does that require any minimum number of participants?

Shallcrass: Any number above one could be seen as constituting a competitive sales process.

Winiata: Is there any idea of the size of this market?

Shallcrass: The government has advertised through the media as well as through direct communication to maximise the likelihood of all possible participants in the market to be aware of the opportunity to buy.

Winiata: I notice that the decision on the final buyer if we get to that, is to be by Cabinet. Are you able to comment on what criteria Cabinet will use?

Shallcrass: The stated criteria are the price per share.

Winiata: The highest price will be the winning price.

Shallcrass: That is the standard assumption in this situation. (A35:34-35)

Ms Ertel, for Te Ika Whenua, then asked Mr Shallcrass to explain why the decision had been taken to advise Maori authorities about the sale of the Crown's MDC shares. Mr Shallcrass replied that it was recognised, given the nature of the MDC business and the characteristics of the other shareholders, that it was most likely that the greatest interest would come from the Maori community. When asked to shed light on why the Crown had decided to sell its MDC shares, Mr Shallcrass emphasised the Crown's recent policy of selling investments in commercial businesses, because of the risks involved, and focusing its resources in areas of core activity such as welfare, education and training. (A35:35) He later stated that he was sure that meeting Treaty obligations was a core activity of the Crown. (A35:37)

Professor Winiata's next questions sought to elicit the degree of commercial analysis done by the Crown both before it invested in the MDC, in terms of the expected rate of return compared to other possible investments, and prior to its decision to sell its MDC shares. Mr Shallcrass was unable to answer these questions, having not been involved in any such analysis that may have been conducted. He was aware, however, that before the Crown decided to sell, there had been a review of its MDC experiences. (A35:35-36) In response to Professor Winiata's statement that one would expect there to be such a commercial analysis where there is a strictly commercial approach to a commitment of funds, Mr Shallcrass made the following point:

The government's policies with regard to the sale of investments was really a divestment process. The Crown has not been selling its businesses with a view to reinvesting those funds in other businesses, and therefore its approach is somewhat different from the standard private sector norm which has just been put forward. (A35:36)

Ms Ertel then asked whether, to Mr Shallcrass's knowledge, an analysis had been done, prior to the Cabinet decision to sell the MDC shares, of the implications of the sale for the Crown's Treaty obligations. When Mr Shallcrass replied that the Crown proceeded on the basis that it was selling an investment and that Treaty obligations would not be a primary concern, counsel for the Crown reminded the tribunal of her submission that it was the Crown's position that it made a commercial investment, that the decision to sell was a commercial one and that Treaty principles were not raised. (A35:37)

#### References

1. Cited in *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 603
2. *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 665-6
3. By letter to the tribunal dated 24 August 1993, Crown counsel advised that the period for the receipt of expressions of interest had still not expired. (2.19)
4. By letter dated 24 August 1993, Crown counsel declined the tribunal's request for a copy of the Information Memorandum, advising that it is only being released to interested parties who have signed a confidentiality agreement between the Crown, the MDC and Southpac and who have satisfied the Crown that they have the financial capacity to transact with the Crown. (2.19)
5. The eleven named authorities were Tainui Maori Trust Board, Ngati Raukawa Maori Trust Board, Taranaki Maori Trust Board, Whanganui River Maori Trust Board, Taitokerau Maori Trust Board, Te Arawa Maori Trust Board, Ngati Awa Maori Trust Board, Tuhoe Maori Trust Board, Te Runanga o Ngati Whatua, Ngai Tahu Maori Trust Board, Paraninihi Ki Waitotara Incorporation. (A23:4)