The Treasury

Shares Plus Consultation
Information Release

19 October 2012

Release Document

www.treasury.govt.nz/publications/reviews-consultation/sharesplus

Key to sections of the Official Information Act 1982 under which information has been withheld.

Certain information in this document has been withheld under one or more of the following sections of the Official Information Act, as applicable:

[1] **9(2)(a)** - to protect the privacy of natural persons, including deceased people

In some cases information has been withheld because it is out of scope or not relevant to an Official Information Act request.

Where information has been withheld, a numbered reference to the applicable section of the Official Information Act has been made, as listed above.

In preparing this Information Release, the Treasury has considered the public interest considerations in section 9(1) of the Official Information Act.

Office of the Minister of Finance

Office of the Minister for State Owned Enterprises

Chair
Cabinet

GOVERNMENT SHARE OFFERS – CONSULTATION ON SHARES PLUS

Proposal

1. This paper asks Cabinet to:

a. agree not to implement the Waitangi Tribunal's shares plus concept, or engage in negotiations in relation to that concept, before a sale of shares in the mixed ownership companies.

b. proceed to remove Mighty River Power from the State Owned Enterprises Act.

c. direct officials to continue to work towards a sale of up to 49% of the shares in Mighty River Power in March-June 2013.

Executive Summary

2. On 3 September 2012, Cabinet agreed to proceed with the planned 2012 Mighty River Power Initial Public Offering (MRP IPO) in March-June 2013 subject to undertaking consultation with affected parties on the Waitangi Tribunal's shares plus proposal and subject to market conditions.

3. Consultation took place between 5 September and 5 October 2012. The Government initiated this process with a letter to interested groups setting out the Government's preliminary views and inviting written submissions. Iwi with direct interests in the freshwater and geothermal resources used by Mighty River Power, Meridian and Genesis (the mixed ownership companies) were also subsequently invited to one of six hui, where the Government was represented by the Minister of Finance. Thirty-seven written submissions were received.

4. A number of submissions stated that the consultation process was inadequate. These groups would have preferred a wider discussion about Maori rights and interests in water. We consider however that, in light of the limited subject area for consultation, the process was consistent with principles guiding appropriate consultation.

5. Our analysis of the submissions confirms our preliminary view, which is that the redress outcomes available from shares plus are either replicable after sale by other mechanisms, or else not workable in practice. Some submissions went further to suggest that shares plus, rather than providing more meaningful recognition of Māori rights and interests, might have the effect of diluting or adversely affecting their interests.

6. Having considered the submissions, we have come to the view that the Crown's capacity to recognise rights and provide redress would not be impaired by proceeding to IPO without first preserving shares plus.

7. We therefore ask Cabinet to agree not to implement or negotiate in relation to shares plus; to proceed to remove Mighty River Power from the State Owned Enterprises Act; and to agree that the Government work towards a sale of up to 49% of the shares in Mighty River Power in March-June 2013.

Background

Relevant Treaty obligations

8. The Crown has a duty under the Treaty to actively protect Maori rights and interests to the fullest extent reasonably practicable[1], and a corresponding duty to provide remedy or redress for well-founded Treaty claims. In the present context, the Crown's Treaty obligations require (among other things) that the Crown not unreasonably impair its *capacity* to provide for the recognition of Maori rights and interests and to respond to well-founded Treaty claims. Provided that capacity is not affected by the partial share sale, the share sale is not inconsistent with this Treaty obligation. It is not necessary at this stage for the Crown to indicate that it intends to implement any particular form of recognition, remedy or redress: discussions with Māori interests can continue in relation to establishing the nature of rights and interests and appropriate forms of rights recognition and redress following the partial sale, and are not affected by the sale proceeding.

9. In addition, the Crown's duty to act in good faith obliges it to make informed decisions affecting Maori interests. Discharging that obligation requires the Crown to be sufficiently informed as to the relevant facts and law and to have had proper regard to the principles of the Treaty. This requirement means that, when making decisions concerning issues that have been the subject of inquiry by the Tribunal, and in respect of which the Tribunal has made recommendations, the Crown must have regard to those recommendations to the extent that they are relevant to the decision at hand.

The Tribunal's findings

10. The Waitangi Tribunal's interim report on stage one of the National Freshwater and Geothermal Resources Claim (WAI 2358), issued on 24 August 2012 made a number of findings and recommendations in relation to the claim to rights in respect of freshwater and geothermal resources. These were summarised in the Cabinet paper considered on 3 September 2012. The Tribunal's report put considerable emphasis on

[1] For example, see: *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 664, 702, 717 ("Lands"); *New Zealand Maori Council v Attorney-General* [1994] 1 NZLR 513 (PC) at 517 ("Broadcasting Assets"); *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 205-206.

the concept which it referred to as “shares plus”. The Tribunal said shares plus would be characterised by a shareholding in a MOM company coupled with enhanced financial rights and/or rights of control in relation to the company. This could include either the provision of shares or special classes of shares each of which would be coupled with amended company constitutions or shareholders agreements.

11. The Tribunal accepted the Crown’s arguments and assurances that:

- The sale of shares will not prevent the Crown from providing appropriate rights recognition post-sale or deter the Crown doing so (i.e. there is no “chilling effect” as alleged by the claimants). The Tribunal recorded its view that the honour of the Crown was engaged by the Crown’s assurances on these matters.

- The Crown retains the capacity, should it choose to do so, to provide almost all forms of commercial rights remedy/redress after the sale (save for their finding on shares plus). This would include modern water rights, a royalties regime, joint ventures, or some other form of commercial benefit.

- Shares are not a suitable proxy for the recognition of Māori rights and interests in water.

12. However, the Tribunal found that:

- The sale of up to 49% of shares in power generating SOE companies does affect the Crown’s ability to recognise Māori rights in freshwater and geothermal resources and remedy their breach (where such breach is proven) if the Crown fails to first preserve the shares plus remedy proposed by the Tribunal.

- The removal of shares plus would be a breach of the Crown’s Treaty duty to actively protect Māori rights to the fullest extent reasonably practicable (and its Treaty duty to provide remedy or redress for well-founded Treaty claims).

- Rights and interest in water are localized, not general.

- The recommended approach was an urgent national hui where the Treaty partners negotiate a solution with regard to Mighty River Power, Meridian Energy and Genesis Energy prior to the sale proceeding.

Cabinet decisions to date

13. Cabinet subsequently agreed, on 3 September 2012, to proceed with the planned 2012 Mighty River Power Initial Public Offering (MRP IPO) in March-June 2013 subject to undertaking consultation with affected parties on shares plus [CAB Min (12) 31/17 refers], and subject to market conditions. At the conclusion of the consultation process, Cabinet would need to decide whether or not to preserve shares plus as a possible means of rights recognition and of remedy or redress for well-founded Treaty claims.

14. Cabinet delegated authority to the Minister of Finance, Minister for State Owned Enterprises and the Attorney-General to determine the details of the consultation. Ministers did not accept the Waitangi Tribunal’s recommended approach of a using national hui to negotiate a solution. Instead we agreed that consultation on shares plus

should be targeted to those groups with a direct interest in water bodies or geothermal resources affected by the operations the mixed ownership companies, but with the ability for other Māori interests to make submissions in writing on the issue. Our view was that this was consistent with the Tribunal's finding that rights and interests in water are localised, not general.

Comment

The consultation process

15. Officials from the Office of Treaty Settlements, Te Puni Kokiri, the Treasury and Ministerial advisors identified the groups that have a direct interest in the freshwater and geothermal resources used by the mixed ownership companies. These groups were invited to a hui. The Government remained open to inviting any group that self-identified as having a direct interest. The Government also invited written submissions from anyone who considered they were affected by the shares plus proposal.

16. The government initiated this process via its letter dated 5 September 2012 (emailed and sent in hard copy to the identified groups, emailed to the interested parties in WAI 2358, and posted on the Treasury's website). This letter set out in detail the government's understanding of shares plus, its preliminary view as to why shares plus should not be preserved, as well as asking specific questions of the affected groups to inform the Crown's understanding and final decision.

17. The consultation process was widely reported by all the major media outlets, and the Minister of Finance and Prime Minister both made media releases on the consultation process including the proposed hui dates, locations and invitees.

18. Six hui were held between 18 September and 27 September 2012. Hon Bill English represented the government at each hui where he gave a presentation summarising the government's preliminary views, answered any questions and listened to the views of the attendees. Copies of the presentation, and of Ministers' letter of 5 September, were made available at each hui.

19. The number of attendees as recorded by Te Puni Kokiri is set out in the table below. Some attendees spoke on behalf of iwi or affiliated groups, while others spoke as individuals.

	Iwi invited	**Attendees (excl. Government officials)**
Hamilton, Tuesday 18 September 2012	**Tainui waka:** Waikato-Tainui, Pouakani, Raukawa, Hauraki, Ngāti Koroki Kahukara	Approx 15
Taupo, Wednesday 19 September 2012	**Te Arawa, Ngāti Tūwharetoa:** Te Arawa, Ngāti Tūwharetoa	Approx 90
Whanganui, Wednesday 19 September 2012	**Whanganui iwi:** Whanganui iwi	Approx 50

Te Kuiti, Wednesday 26 August 2012	**Tainui waka:** Ngāti Maniapoto, Raukawa. **Ngāti Rangitihi**	Approx 15
Tuai, Thursday 27 August 2012	**Waikaremoana:** Ngāi Tūhoe, Ngāti Ruapani, Ngāti Kahungunu ki Wairoa	Approx 46
Christchurch, Thursday 27 August 2012	**Ngāi Tahu:** Ngāi Tahu	Approx 30

20. On 13 September 2012, prior to the first hui, King Tuheitia facilitated a national hui at Turangawaewae marae at which a proposal was put forward to set up a new pan-Māori group to step in and negotiate iwi freshwater rights and interests with the Crown. The Government was not invited nor did it seek to attend, because our preference was not to engage in a pan-Maori process, but rather to engage directly with groups that had a direct interest (mana whenua) in the freshwater and geothermal resources used by mixed ownership companies. A consequence of that hui, however, was that some potential participants in the Government's consultation process chose to boycott that process. We are satisfied that the process for identifying and inviting directly affected iwi was thorough, but iwi decisions on whether or not to attend were outside our control. Neither was it always clear whether attendees were representing particular groups. We understand that Waikato-Tainui, Hauraki and Ngati Koroki Kahukura were not represented at any hui. Otherwise our understanding is that attendance at the other five hui included representatives of most of the directly affected iwi in each region. Waikato-Tainui did ultimately make a written submission.

21. The hui proceedings have been recorded and analysed alongside written submissions. They have not been included in submission totals, largely because there is considerable overlap between the individuals and organisations who were represented at the hui, and those who made written submissions.

22. Fourteen written submissions or other pieces of correspondence were handed directly to officials during the consultation hui. A further twenty-three formal written submissions were received at shareplusconsultation@treasury.govt.nz prior to the closing date for submissions of 5 October 2012. Of the thirty-seven written submissions, we identified sixteen that addressed some or all of the questions asked by the Crown in its letter of 5 September. Included in the written submissions were two communications from the New Zealand Māori Council.

23. A number of submitters said the consultation process was inadequate, for one or more of the following reasons:

- The Crown had a predetermined view.
- The consultation period was too short.
- The scope of the consultation was too narrow, and disconnected from wider issues.
- Not enough information was provided to enable iwi to form a view.
- The consultation addressed iwi rather than hapu.
- Individuals did not feel they had the resources to engage (or in some cases wanted to rationalise their resources/time and effort into their engagement with the Crown on other matters such as the historical Treaty settlement process).

24. Submitters would clearly have preferred a wider discussion about Maori rights and interests in water. Our view, which was communicated at the six hui, is that this discussion is already happening, through the Fresh Start for Freshwater process which includes the Land and Water Forum and engagement with the Iwi Leaders Group.

25. The Government's shares plus consultation process should be viewed in light of the limited subject area for consultation. The consultation process was designed to comply with the following principles:

- Consultation includes listening to what others have to say and considering the responses.
- The consultative process must be genuine and not a sham.
- Sufficient time for consultation must be allowed.
- The party obliged to consult must provide enough information to enable the person consulted to be adequately informed so as to be able to make intelligent and useful responses.
- The party obliged to consult must keep an open mind, and be ready to change and even start afresh, although that party is entitled to have a work plan already in mind.

26. The shares plus consultation process as implemented was consistent with these principles: the government had a preliminary view on shares plus and a working plan based on that preliminary view, but had an open mind and was willing to change its mind if the submissions/consultation revealed persuasive arguments.

27. The government invited participation of directly affected groups (including anyone who self identified as directly affected, be they iwi, hapu or other groupings), explained its preliminary view in a detailed letter, and invited written responses. We consider that the consultation process outlined above was appropriate in light of the narrow subject matter at issue, and the timetable to which the government is working in order to make decisions on the mixed ownership programme.

Analysis of Submissions

28. The themes appearing most commonly in the submissions could be summarised as follows:

- Shares plus alone does not address the totality of Maori rights and interests in water.
- Maori rights and interests in water need to be determined before shares in mixed ownership companies are sold.
- Shares plus could form part of a comprehensive package recognising or redressing Maori rights and interests.
- Submitters are unable to form a view on shares plus without assessing it against the other forms of redress that the Government may make available.
- Few of the submissions addressed the specific questions asked by the Crown, aimed at determining whether potential outcomes from shares plus could be replicated after sale by other means.

29. These themes are explored in more detail below.

30. Many responses contained a statement noting that Maori claim a wide range of rights and interests in water, and that shares plus would address only a small part of those rights and interests.

> *We don't see shares plus as reflecting or addressing our relationship with the Whanganui river as a whole.*[1] *transcript of Whanganui hui]*

> *The shares plus arrangement is one potential option, we are interested in others*[1] *Letter to Ministers of 26 September]*

31. Some submissions expressed a clear preference to continue to pursue existing paths towards a more comprehensive settlement rather than to pursue shares plus.[2] That is, shares plus *alone* is considered insufficient. Some submissions rejected the notion that shares plus might form the basis of a political compromise.

> *...Although not explicitly explored by the Waitangi Tribunal, there has been a suggestion that "shares plus" could form part of a pan-iwi settlement with the shares being dealt with by some form of pan- tribal enterprise akin to the Fisheries Commission.* [1] *rejects such a proposal as being over-simplistic and as turning iwi rights and interests into a mere commodity.* [1] *written submission of 5 October 2012]*

32. A number of the submissions opposing shares plus as a solution by itself went on to argue that the option should be maintained as part of a wider package.

> *The Shares Plus concept on its own does not adequately recognise and provide for the full nature and extent o*[1] *ights and interests in freshwater..... The Shares Plus concept should not be discounted at this stage as an option for iwi that wish to have their rights and interests in freshwater partially recognised through participating in, and benefiting from, the operations of Crown-controlled commercial enterprises that use freshwate*[1] *written submission of 5 October 2012]*

33. Those who thought shares plus should be preserved made the following points:

- They had no confidence that the alternative mechanisms proposed by the Crown will in fact be made available.
- Shares plus would formalise and preserve the relationship between iwi and mixed ownership companies.
- In the absence of information on shares plus, it is difficult to prove whether or not redress can be made available through other mechanisms.
- Iwi were unwilling to dismiss any option that might prove effective.

> *The essence of the Tribunal's analysis of "shares plus" is that a shareholders agreement would give Maori a meaningful connection to their water.*[1] *written submission of 5 October 2012]*

---

[2] Priorities differ widely from iwi to iwi, depending on the what stage they are at in their engagement with the Crown. Some groups are focused on the historical Treaty settlement process; some are looking for recognition of customary or other contemporary rights, and looking to the process led by the Freshwater Iwi Leaders Group; some are primarily focused on water quality and allocation issues, and participation in the resource management process.

[1] *not convinced by the reasoning put forward by the Crown on its ability to provide equivalent redress after an IPO.* [1] *written submission of 5 October 2012]*

34. None of these submissions, however, went on to identify any unique aspects of shares plus that meant it must necessarily form part of a settlement package. Some said that this was too difficult due to the lack of information about the broader context:

> *Until the wider suite of mechanisms are developed with a reasonable degree of certainty, it is difficult to properly assess the Shares Plus concept. For example, some of the benefits of the Shares Plus concept (such as decision-making rights in relation to the management of freshwater resources used by the MOM companies) may be more appropriately provided for in other proposed mechanisms (such as a new regulatory framework regarding freshwater). On that basis,* [1] *considers that the Crown should not form final views on the Shares Plus concept at this early stage* [1] *written submission of 5 October 2012]*

35. Not all submissions agreed that shares plus had value as a potential redress option. A number were supportive of points made by the Crown in its preliminary view, including:

- Financial redress can be provided in many different ways.
- Input to water management decisions would be more effective if made through the resource management process than at company level.
- Shares plus has the potential to adversely affect or downgrade the status of existing relationships with mixed ownership companies.
- Some submissions expressed concerns about the management and strategic decision-making elements of shares plus, agreeing with the Crown's view that these aspects of the proposal were unlikely to work in practice. These concerns are outlined in more detail below.

36. A small number of submissions focused on the potential conflict between different iwi groups as a result of participating in shares plus, if it should allow one iwi group to exercise rights over water bodies in another iwi's rohe:

> *...provision of enhanced shareholding rights to other Maori claimants, in Mighty River Power in particular, carries with it a serious potential for interference in [our] existing rights and interests".* [1] *written submission of 2 October 2012]*

37. Submissions also highlighted concerns around the particular difficulties that might arise if shares plus were to extend into voting or veto rights over company governance and operations.

> *... we have some significant discomfort with the idea that a part ownership right in MRP would enable us to have greater operational engagement with MRP on a day to day basis. Not only does this appear to conflict with a separation between governance and management of the company itself (which is likely to create difficulties for MRP) it risks creating conflict with other shareholders* [1] *written submission of 5 October 2012]*

38. One submission noted the risk that their existing relationship might be weakened rather than strengthened.

> *... the relationship that would be created b*[1] *.. being issued with some form of "shares plus" is not the equivalent of our current relationship with MRP, and therefore is not a replacement for this. Our rights and relationships as a shareholder (via shares plus or otherwise) would be very different from the current working relationship we have with MRP. Effectively via "shares plus" we would become part owners of MRP whereas the relationship we are seeking to protect is a reciprocal one as strategic partners with MRP working towards achieving common goals.*[1] *written submission of 5 October 2012]*

39. These observations are particularly important, because input into the company's management and strategic decisions is a potential outcome of shares plus that officials considered would not be possible to replicate after a float. The Government's preliminary view was that this aspect of shares plus would not be workable in practice, and is therefore not available as a potential redress option either before or after a partial sale of shares. A number of submissions supported this position. Risks that were highlighted in submissions include the following:

- Potential for diminution of existing rights (for example, by introducing a compulsion to buy shares in order to have a relationship with the company).
- Potential for conflict between iwi exercising interests under shares plus and iwi interests in joint ventures with mixed ownership companies.
- Potential loss of value to the companies, affecting the interests of those iwi who are interested in participating in the share offers. This conflict is inherent in the model: one submission made the point that Maori will have to own shares to participate in shares plus, but exercising rights under shares plus is likely to devalue the income stream from the shares.

40. Relatively few submissions (around sixteen) addressed one or more of the specific questions asked by the Crown in its letter of 5 September. A number of submissions asked clarifying questions in relation to the restrictions that company law might place on the way that rights and interests can be exercised through special shares. Ministers will respond to submitters on these points.

41. Attached to this paper as Appendix 1 is a table that sets out the six questions asked by the Crown, the relevant points made in submissions, and the Crown's response to those points. In summary:

- Submissions did identify redress outcomes not identified by the Crown, and not already available to claimants – specifically the transfer of powers exercised under the RMA and industry development and job creation schemes. Our response is that these are not potential outcomes that could be delivered using shares plus even before a sale.
- Submissions did not identify any outcomes of shares plus that would be workable, but not replicable after a sale. In respect of those outcomes that the Crown had itself identified as difficult to replicate – i.e. decision rights over management or strategic decisions – there was support for the Crown's view that such arrangements would not be workable in practice.

- Submissions did not challenge the Crown's ability to provide a commercial interest in the relevant resource after sale. Some were sceptical as to whether the Crown would be willing to provide equivalent redress after the sale, but this is not relevant to whether the Crown met its obligation to preserve its capacity to provide such redress.
- Submissions did not identify additional factors for the Crown to take into account, other than noting that they needed more time and information before coming to a view.
- Submissions identified directorships and financial entitlements as the outcomes they considered should be delivered via shares plus. These had already been identified by the Crown.
- Submissions did not give any reasons for preferring shares plus to other equivalent redress options.

Conclusion – should shares plus be preserved as a redress option?

42. The Government's preliminary view was that the outcomes and entitlements available from shares plus are either replicable after a partial sale by other mechanisms, or else not workable in practice [CAB Min (12) 31/17 refers].

43. Following analysis of the oral submissions made at the hui as well as the written submissions, our view is that no new information has come to light which substantively changes our preliminary view. In fact, new information has been provided to us which suggests that shares plus, rather than providing more meaningful recognition of Māori rights and interests, could have the effect of diluting those interests or bringing them into conflict with other interests.

44. In response to the argument that there is no guarantee that effective redress will be provided through the Government's existing redress mechanisms, we note that to be consistent with its Treaty obligations, the Crown must preserve its capacity to provide for the recognition of Maori rights and interests and to respond to well-founded Treaty claims. Provided that capacity is not affected by the partial share sale, the share sale is not inconsistent with the Crown's Treaty obligations: discussions with Māori interests can continue in relation to appropriate forms of rights recognition and redress following the partial sale, and are not affected by the sale proceeding.

45. We note that, if the Crown were to decide to confer special rights on iwi via some sort of voting agreement, there is some risk that this arrangement would breach the 10% limit on shareholdings contained in the recently passed MOM legislation. Such an arrangement might therefore require the Crown to consider amending the legislation to ensure that any rights conferred are consistent with the policy settings of that legislation. We note however that the shares plus proposal would itself require a change to the MOM legislation which currently requires the Crown to hold at least 51% of any special class of shares. On balance we think it would be less likely that legislation would be needed if an alternative approach to shares plus were to be adopted.

46. Our recommendation to Cabinet is that shares plus should not be preserved for future rights recognition, or redress for well-founded Treaty claims, because:

- Redress in the form of financial entitlements and input into resource management decisions can be provided, if considered appropriate, in other and in some cases better ways.
- The appointment of directors and exercise of shareholder voting rights can be achieved, if considered appropriate, by separate agreement with the Crown, who has majority voting rights.
- A majority of submitters who considered the potential for special voting and decision rights on management or strategic decisions agreed with the Crown that this would be unlikely to work well in practice.
- Shares plus creates a potential conflict of interest within and between different iwi groups, and potentially weakens the existing relationships between iwi groups and mixed ownership companies.

Consultation

47. The following departments were consulted in the preparation of this paper: Te Puni Kokiri, Office of Treaty Settlements, Department of Prime Minister and Cabinet, the Crown Law Office and the Ministry for the Environment.

Publicity

48. We recommend that the Prime Minister announce Cabinet's decision with respect to shares plus at the post-Cabinet press conference today. We also recommend that he announce that the Minister of Finance is preparing drafting instructions for the Order in Council that will take Mighty River Power out of the State Owned Enterprises Act, for a decision by Cabinet on Tuesday 23 October and submission to Executive Council the same day.

49. Appropriate communications material will be prepared for release following the announcement at the post-Cabinet conference.

Recommendations

50. We recommend that Cabinet:

1 **note** the Tribunal's recommendations that:

- the sale of up to 49% of shares in power generating SOE companies does affect the Crown's ability to recognise Māori rights in freshwater and geothermal resources and remedy their breach (where such breach is proven) if the Crown fails to first preserve the "shares-plus" remedy proposed by the Tribunal

- the removal of "shares-plus" would be a breach of the Crown's Treaty duty to actively protect Māori rights to the fullest extent reasonably practicable (and its Treaty duty to provide remedy or redress for well-founded Treaty claims), and

- the recommended Treaty-compliant approach was an urgent national hui where the Treaty partners negotiate a solution with regard to MRP, Meridian Energy and Genesis Energy prior to the sale proceeding [CAB Min (12) 31/17 refers].

2 **note** that in response to the Tribunal's recommendations, the Government carried out a consultation process which closed on 5 October 2012

3 **note** that our analysis of oral and written submissions does not change our preliminary view that any outcomes from shares plus are either replicable after sale, or not workable in practice

4 **agree** that the Government will not implement the Waitangi Tribunal's shares plus concept, or engage in negotiations in relation to that concept, before a sale of shares in the mixed ownership companies

5 **agree** that the Minister of Finance issue drafting instructions to PCO for the Order in Council that will remove Mighty River Power from the State Owned Enterprises Act, and that these be considered by Cabinet on Tuesday 23 October for submission to Executive Council that day

6 **direct** officials to continue to work towards a sale of up to 49% of the shares in Mighty River Power in March-June 2013, and

7 **agree** that the decisions in (4), (5) and (6) above be announced by the Prime Minister at the post-Cabinet press conference later today.

Hon Steven Joyce
Acting Minister of Finance

Hon Tony Ryall
Minister for State Owned Enterprises

Date:

Appendix 1

Question	Points made in submissions	Crown response
Question 1: Are there any potential outcomes/entitlements that you consider could be achieved via "shares plus" that are not identified in the appendix to this letter?	• Formal recognition of Treaty partner status/original ownership (2 submissions). • Royalty schemes. • Commercial water use levies. • Transfer of powers from the RMA. • Enhanced relationships including joint ventures, industry development and job creation.	• Formal recognition of Treaty partner status or of ownership is available currently, for example under the Treaty settlement framework. • Royalty schemes and commercial water use levies are capable of being implemented before or after partial sale, should the Government choose,and are unrelated to shares plus. • The shares plus proposal cannot provide for the transfer of powers currently exercised under the Resource Management Act either before or after sale. • It is not clear how shares plus might enable special shareholders to direct the company to enter into joint ventures or job creation schemes. As noted in the Crown's preliminary views and in a number of submissions, this type of arrangement is unlikely to be workable in practice.
Question 2: Do you agree with the assessment in the appendix to this letter that almost all of these possible outcomes can be replicated after an IPO by other means?	• The Government's requirement for commercial certainty after an IPO will in practice mean it is unwilling to provide recognition of Maori rights in freshwater.	This point challenges the Crown's willingness to provide redress, rather than its capacity to do so. We note that the Tribunal largely accepted the Crown's argument that the existence of Contact and Trustpower, together with thousands of other commercial users of water, negates the argument that sale of shares in mixed ownership companies would have a chilling effect on the Government's ability to recognise and provide remedy for well founded claims.

Question	Points made in submissions	Crown response
Question 3: Do you agree with the assessment in the appendix to this letter that after an IPO the Crown will retain the capacity to provide more effective and more direct mechanisms for providing Māori with voice and/or commercial interests in the relevant resources?	• Clarification is sought as to the how the Government would implement its suggestions that redress could be made available via the Government to buy back shares and enter into voting agreements. • The Crown's willingness to pay was questioned (see response above). • Special shares are not available after sale.	• Our analysis confirms that there is no material difference in the Crown's ability to deliver outcomes via these mechanisms after sale. There are a number of second-order legal issues (for example, relating to the Listing Rules and the Takeover Code) that would potentially need to be addressed under either shares plus or alternative mechanisms. A response to the specific questions asked is included in Crown's proposed letter to submitters. • Special shares is not an outcome in itself, but a mechanism for delivering outcomes. The Crown argues that that potential outcomes delivered by special shares can also be delivered by other mechanisms.
Question 4: Are there any additional factors the Government should take into account in making a final decision on whether to implement the "shares plus" concept?	We need more time to consider the proposal.	The process was consistent with the principles for consultation laid down by the courts.
Question 5: If you consider that the Government should proceed with "shares plus", what are the specific rights and powers in relation to the MOM companies that you consider should be delivered using this mechanism?	• Directorships (2 submissions). • Financial entitlements.	These are among the potential outcomes already identified by the Crown..

Question	Points made in submissions	Crown response
Question 6: If you consider that the Government should proceed with "shares plus", why do you consider that this approach is preferable to other options for providing rights recognition and redress?	No submissions were received on this point.	