

The Treasury

Mixed Ownership Model for Crown Commercial Entities: Shares Plus Proposal Information Release

21 December 2012

Release Document

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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:

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

9(2)(b)(i) - to protect trade secrets

9(2)(b)(ii) - to protect the commercial position of the person who supplied the information, or who is the subject of the information

9(2)(f)(ii) - to maintain the current constitutional conventions protecting collective and individual ministerial responsibility

9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials

9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions

9(2)(h) - to maintain professional legal privilege

9(2)(i) - to enable the Crown to carry out commercial activities without disadvantage or prejudice, or

Not relevant.

Where information has been withheld a 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.



Hon Steven Joyce
ORIGINAL



Treasury Report: WAI 2358: Waitangi Tribunal's Report and Ministerial Decision-Making

Date:	26 August 2012	Report No:	T2012/2124
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Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Bill English)	Note this report, and Crown Law's advice, and discuss with Ministers and officials	8:30am, Monday 27 August 2012
Associate Minister of Finance (Hon Steven Joyce)		
Minister for State Owned Enterprises (Hon Tony Ryall)		
Attorney-General (Hon Christopher Finlayson)		
Minister for the Environment (Hon Amy Adams)		

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Chris White	Manager, Commercial Transactions Group	[Withheld under s9(2)(a)]	✓
Kirsten Price	Solicitor, Commercial Transactions Group		
Virginia Hardy	Team Leader, Treaty Of Waitangi and International Law, Crown Law Office		✓
Jason Gough	Crown Counsel, Crown Law Office		

Actions for the Minister's Office Staff (if required)

Return the signed report to Treasury.

Enclosure: Yes (Crown Law's advice

[Withheld under s9(2)(h)]

Treasury Report: WAI 2358: Waitangi Tribunal's Report and Ministerial Decision-Making

Purpose of Report

1. This report:

- [Withheld under s9(2)(h)]
- Notes the key findings in the Waitangi Tribunal's *Interim Report on the National Fresh Water and Geothermal Resources Claim* (released on Friday 24 August 2012)
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- Proposes officials provide further advice on the "shares plus" option suggested by the Tribunal for discussion at a national hui.

The Tribunal's Interim Report

2. The Tribunal's interim report has been issued in order to allow the Crown to consider its findings ahead of making a decision to proceed with the MRP IPO planned for 2012. The report is framed as interim and truncated and a full version will be issued later this year. However, the Tribunal notes that the substance of their findings and recommendations will not be altered in the final version, which means the content of the report is final. The report deals with the following issues posed for stage one of its inquiry:
- What rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi?
 - Does the sale of up to 49% of shares in power generating SOE companies affect the Crown's ability to recognise these rights and remedy their breach, where such breach is proven?
 - Is such a removal of recognition and/or remedy in breach of the Treaty?
 - If so, what recommendations should be made as to a Treaty-compliant approach?
3. The essence of the Tribunal's findings and recommendations is that:
- At 1840 Māori had customary rights to waterways and that the closest "English" equivalent was ownership:
 - Māori now have "residuary proprietary interests in particular water bodies"
 - Where recognition of those residual proprietary rights is not possible compensation for loss of rights is appropriate
 - Māori rights in waters were not generalised, but were localised, the rights are those of particular iwi/hapū to particular waterways in particular rōhe, and

- The Crown would be in breach of Treaty principles if it were to proceed with the MRP IPO without a mechanism agreed with Māori to recognise their rights in freshwater and remedy their breach:
 - Proceeding with the MRP IPO would preclude redress in the form of a “shares-plus” arrangement (briefly described below), and
 - The recommended vehicle for the Crown’s engagement with Māori is a negotiation kicked off at a national hui called by the Crown, iwi leaders, New Zealand Māori Council and parties to the Wai 2358 claim.
4. Importantly, the Tribunal has:
- Accepted the Crown’s assurances that nothing which arises from the sale of shares will prevent the Crown from providing appropriate rights recognition post-sale sale, and recorded its view that the honour of the Crown is engaged by these assurances
 - Accepted the Crown’s view that it will be able to provide almost all forms of commercial rights remedy/redress after the sale, save for their finding on shares-plus as a form of rights remedy/redress
 - Accepted that it is ‘not impossible’ for the Crown to provide some form of commercial rights recognition post-MOM, whether it be modern water rights (where Māori grant or own water permits for hydro and geothermal power), a royalties regime, joint ventures, or some other form of commercial benefit, and
 - Agreed with the Crown (and claimants) that shares alone are not a suitable proxy for the recognition of Māori rights and interests in water, but added that a more nuanced approach is also required that incorporates other forms of tangible influence over the control and management of water.

The process for Ministerial decision-making

5. The task for Ministers is to carefully assess the findings and recommendations (and reasoning) of the Tribunal, and the Treaty obligations identified by the Tribunal.

6.

[Withheld under s9(2)(h)]

“Shares-plus”

7. The Tribunal’s recommendation that the Crown must halt the programme is premised on its finding that one form of redress – which it terms shares-plus – is available now but would be unavailable after a sale. The Tribunal has not specified exactly what shares-plus is, but has indicated that it is a shareholding in the company with enhanced rights of control of the companies. These rights would be achieved through any or all of a special class of shares, a shareholders agreement between the Crown and Māori

and revised company constitutions. In the Tribunal's view, a shareholding with enhanced rights could create a more meaningful connection for the claimants to the underlying resource in which they have a proprietary interest.

8. We note here that the Tribunal did point out some initial limitations of shares-plus, being:
- This option only goes "some way" to meeting the Crown's obligations (i.e. in and of itself it would not meet the Crown's Treaty obligations, more is needed)
 - Not all affected Māori would take up this option (and even if they did, it may be only a part of wider commercial package)
 - Not all affected Māori participated in the inquiry (indicating that not all Māori would even accept the Tribunal's suggestion; Ngāi Tahu explicitly asked the Tribunal "not make any findings or recommendations extending to, or affecting resources within, the Ngāi Tahu Takiwā as part of [its] inquiry"¹)
9. The Crown needs to analyse and assess the shares-plus proposition in some detail. Treasury and Crown Law are working with David Goddard QC, Bell Gully and Deutsche Bank to provide Ministers with advice on legal and policy advice which we aim to complete by Tuesday evening for consideration by Ministers.
10. Given that the Tribunal has only illustrated rather than specified what the enhanced rights might look like, the first step in the analysis will be to envisage the possible suite of rights. The analysis will then assess whether the enhanced rights that could be provided through shares plus are able to be provided by some other alternative means, i.e. they are substitutable, and/or whether the shares plus proposal is possible either on legal or practical grounds.

Consultation

11. The Ministry for the Environment has been consulted. The Department of Prime Minister and Cabinet has been informed.

Recommended Action

We recommend that you:

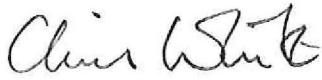
- a **note** the Waitangi Tribunal has released its *Interim Report on the National Fresh Water and Geothermal Resources Claim* (and it will not change in substance when issued in its final form later this year)

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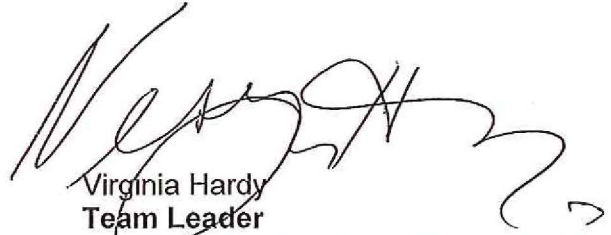
[Withheld under s9(2)(h)]

¹ Memorandum of Counsel for Te Rūnanga o Ngāi Tahu, 8 May 2012, paragraph 4 (Wai 2357, #3.1.98 Wai 2358, # 3.1.98).

c note that officials will provide advice on the Tribunal's "shares-plus" suggestion.



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Hon Bill English
Minister of Finance



Hon Steven Joyce
Associate Minister of Finance

Hon Tony Ryall
Minister for State Owned Enterprises

Hon Christopher Finlayson
Attorney-General

Hon Amy Adams
Minister for the Environment

[Balance of document (pages 7-10) withheld under s9(2)(h)]