

## Treasury Report: MOM Legislation: Issues

<b>Date:</b>	20 January 2012	<b>Report No:</b>	T2012/84
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### Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Bill English)	<b>Agree</b> to recommendations	Tuesday 24 January 2012
Minister for State Owned Enterprises (Hon Tony Ryall)	<b>Agree</b> to recommendations	Tuesday 24 January 2012

### Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Dieter Katz	Principal Advisor, Commercial Transactions Group	471 5264 (wk)	<i>[Withheld under s9(2)(a)]</i> ✓
Chris White	Manager, Commercial Transactions Group	890 7256 (wk)	

### Minister of Finance's Office Actions (if required)

None.
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**Enclosure: No**

## **Treasury Report: MOM Legislation: Issues**

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### **Purpose of Report**

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1. This report seeks ministerial decisions on a number of issues that have arisen in the course of drafting the mixed ownership model bill. Cabinet has delegated to you the authority to “make minor policy decisions relating to the draft MOM legislation” (CAB Min (11) 43/2 refers).

### **Issues**

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#### **10% Limit on Individual Shareholdings and 51% Minimum Crown Shareholding**

2. Cabinet agreed in principle on 14 December that legislation include a maximum size limit on non-Crown individual entity shareholdings of 10%, and a restriction on reducing the Crown’s shareholding below 51% (CAB Min (11) 43/2 refers).
3. We need to clarify whether the 10% maximum size limit on non-Crown individual entity shareholdings should be a restriction on non-Crown individual entities holding securities that confer more than 10% of the voting rights, rather than the total percentage of all securities held (including those with non-voting rights).
4. Similarly we need to clarify whether the restriction regarding reducing the Crown’s shareholding in the MOM companies below 51% should be a restriction on the Crown reducing its shareholding so it has less than 51% of the voting rights, rather than the total percentage of all securities held (including those with non-voting rights).
5. Only securities which confer voting rights affect the ability to control the company, whereas it could be possible for all securities (including those with non-voting rights) to determine the economic share of the company owned by each shareholder (being different to the ‘control’ of the company). The two rights are not always coincident – they are in the case of ordinary shares, but the company may in future wish to issue other securities that do not attach voting rights (e.g. preference shares). The legislation needs to be clear on whether these should also be caught by the restriction.
6. A restriction based on control (i.e. voting rights) is much more straight-forward to draft and enforce.
7. On the assumption that the Cabinet decision is based on a concern about the control over the company, we recommend that you agree that both the 10% and the 51% restrictions should relate to security interests which attach voting rights only.
8. Note that we will propose in a later report that the 10% restriction should also be put into the companies’ constitutions, in order to put the onus to police this restriction on them. To further ensure that the 10% restriction is adhered to, we recommend that the Mixed Ownership Model Bill should make provision for the disposal of shareholdings that are held by any person in excess of the 10% restriction and should provide that the voting rights attaching to any shareholding which exceeds that 10% restriction are not exercisable.

### **Consultation with MOM Companies**

13. Given the potential impact of the Mixed Ownership Model Bill on Genesis Power Limited, Mighty River Power Limited, Meridian Energy Limited, Solid Energy New Zealand Limited and Air New Zealand Limited (if the provisions in the bill are to apply to it), we consider it would be beneficial to be able to share exposure drafts of the bill with these companies prior to the introduction of the bill. We also wish to share the draft bill with the Ombudsman given the Ombudsman's interests in the removal of Genesis Power Limited, Mighty River Power Limited, Meridian Energy Limited and Solid Energy New Zealand Limited from the Official Information Act 1982 or Ombudsmen Act 1975, and the Financial Markets Authority given the role they will have in relation to trustee corporations and nominee companies if you agree to recommendation (d). Releasing an exposure draft of the bill outside government requires your approval.

### **Exemptions for Trustee Corporations and Nominee Companies and Other Persons**

16. Trustee corporations and nominee companies often hold shares on behalf of different persons who have no association with each other. It is proposed to exempt the trustee corporations and nominee companies from the 10% restriction on individual shareholdings, noting that the beneficial owners of the shares are still subject to the 10% restriction.
17. There is a risk that this exemption could be used to circumvent the 10% restriction without further protections being established in legislation. We recommend that provisions similar to those contained in the Securities Market Act 1988 be used as a precedent for these protections. Those provisions require trustee corporations and nominee companies to monitor the transactions of any persons whom they hold such securities for and report to the MOM company when any such person has breached the 10% maximum. The provisions would also enable the Financial Markets Authority to designate persons as not exempt from the restriction. This function will expand the scope of the Financial Markets Authority's existing duties and as such the Financial Markets Authority will need to be consulted on the application of new provisions to it.
18. We do not recommend that the legislation should provide you with the ability to exempt persons other than as set out above from the 10% restrictions. Our view is that the greater flexibility is provided in relation to exemptions from the 10% restriction, the more the policy intent will be undermined.

## Recommended Action

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We recommend that you:

- a **agree** that the 10% maximum size limit on non-Crown individual entity shareholdings should be a restriction on holding securities that confer more than 10% of the voting rights , rather than the total percentage of all securities held (including those with non-voting rights)

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister for State Owned Enterprises

- b **agree** that the restriction on reducing the Crown's shareholding in the MOM companies below 51% should be a restriction on the Crown reducing its shareholding so that it has less than 51% of the voting rights, rather than the total percentage of all securities held (including those with non-voting rights)

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister for State Owned Enterprises

- c **agree** that the Mixed Ownership Model Bill should make provision for the disposal of shareholdings that are held by any person in excess of the 10% restriction set out in (a) above and should provide that the voting rights attaching to any shareholding which exceeds that 10% restriction are not exercisable

*Agree/disagree*  
Minister of Finance


*Agree/disagree.*  
Minister for State Owned Enterprises

- d **agree** that provision should be made in the Mixed Ownership Model Bill for trustee corporations and nominee companies to be exempt from the 10% restriction set out in (a) above but that they should be required to monitor the transactions of any persons for whom they hold such securities for and report to the MOM company when any such person has breached the 10% maximum and otherwise be subject to similar restrictions as those set out in the Securities Market Act 1988

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister for State Owned Enterprises

[Withheld under s9(2)(f)(iv)]



[Withheld under s9(2)(f)(iv)]

- f **agree** that exposure drafts of the Mixed Ownership Model Bill may be shared with Genesis Power Limited, Meridian Energy Limited, Mighty River Power Limited, Solid Energy New Zealand Limited, Air New Zealand Limited [Withheld under s9(2)(f)(iv)] [Withheld under s9(2)(f)(iv)] the Ombudsman and the Financial Markets Authority

*Agree/disagree.*  
Minister of Finance

*Agree/disagree.*  
Minister for State Owned Enterprises

[Withheld under s9(2)(f)(iv)]

Chris White  
**Manager, Commercial Transactions Group**

Hon Bill English  
**Minister of Finance**

Hon Tony Ryall  
**Minister for State Owned Enterprises**