

Treasury Report: Mixed Ownership Model Bill - Cabinet Paper Seeking Introduction

Date:	29 February 2012	Report No:	T2012/336
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Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Bill English)	Note the contents of this report.	1 March 2012
Associate Minister of Finance (Hon Steven Joyce)	Note the contents of this report.	1 March 2012
Minister for State Owned Enterprises (Hon Tony Ryall)	Sign attached Cabinet paper; and Sign the attached CAB100.	Submit to Cabinet Office by 10am 1 March 2012

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st Contact
Chris White	Manager, Commercial Transactions Group	890 7256 (wk)	[Withheld under s9(2)(a)] ✓
Bridget Tyson	Senior Solicitor	917 6280 (wk)	

Minister of Finance's Office Actions (if required)

Lodge the attached Cabinet paper and CAB100 with the Cabinet Office by 10am, 1 March 2012 for the Cabinet meeting on 5 March 2012
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Enclosure: Yes

LEG Paper: [MOM Bill - Cabinet Paper for Introduction of the Bill \(Treasury:2270867\)](#)

CAB100: [CAB 100 - Mixed Ownership Model Bill - Introduction of the Bill \(Treasury:2274498\)](#)

Treasury Report: Mixed Ownership Model Bill - Cabinet Paper Seeking Introduction


Purpose of Report

1. To provide the attached Cabinet paper and CAB100 for your signature and submission to Cabinet Office by 10am, 1 March 2012.

Executive Summary

2. The Mixed Ownership Model Bill (the **Bill**) allows each of Genesis Power Limited, Meridian Energy Limited, Mighty River Power Limited and Solid Energy New Zealand Limited (the **MOM companies**) to be removed, at an appropriate time and via separate Orders in Council, from the State-Owned Enterprises Act 1986 (the **SOE Act**) (while retaining the application of some provisions of that Act) and added to a new Part 5A of the Public Finance Act 1989. This will enable the sale of up to 49% of the shares in the MOM companies by way of initial public offerings (IPO).
3. In addition, the Bill restricts the Crown from holding less than 51% of the voting rights in each of the MOM companies and non-Crown individuals from holding more than 10% of the voting rights in each of the MOM companies. The Bill also preserves Maori interests in that it includes a provision similar to section 9 of the State-Owned Enterprises Act 1986.

[Deleted - Not Relevant to Request]




5. In addition, please note that the enclosed Bill includes consequential amendments to the following settlement Acts to ensure that whenever the term 'Crown body' is used in those Acts, it includes the mixed ownership model companies as well as State enterprises:


- Ngāi Tahu Claims Settlement Act 1998;
- Ngāti Tūrangitukua Claims Settlement Act 1999;
- Waikato Raupatu Claims Settlement Act 1995;
- Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010,

The Bill also proposes an amendment to section 64 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 to ensure that the obligations it imposes on a State enterprise where there is a proposal to dispose of a property right or interest in the Waikato River continue to apply to the mixed ownership model companies.

6. The consequential amendments to the settlement Acts identified above are technical changes intended to preserve the existing rights of Māori. However, as settlement legislation is a negotiated outcome between the Crown and iwi, the Crown cannot make these changes without the agreement of the relevant iwi.

7. On 31 January 2012 you wrote to the iwi concerned advising them of the changes that were proposed to be made to their settlement Acts. Ngāi Tahu has confirmed that it is comfortable with the proposed changes to its settlement Act. [Withheld under s9(2)(f)(iv)]
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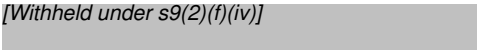
[Withheld under s9(2)(f)(iv)]



10. The attached paper seeks Cabinet's agreement to:

- note that priority 2 has been requested for the Mixed Ownership Model Bill on the 2012 legislative programme but that a decision is still to be made on this requested priority by Cabinet;
- note that the Bill will enable up to 49% of the MOM companies to be sold by way of an IPO but will place ownership restrictions which will not allow the Crown's voting rights in each of the MOM companies to drop below 51% and will restrict other persons from holding more than 10% of the voting rights in each of the MOM companies, it will also enable sections 22 to 30(1) of the State-Owned Enterprises Act 1986 to continue to apply to the MOM companies;
- approve for introduction the Mixed Ownership Model Bill;
- agree that the Bill be introduced on 5 March 2012; and
- agree that the government propose that the Bill be:
 - (a) referred to the Finance and Expenditure committee for consideration; and

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



Recommended Action

We recommend that you:

- a. **sign** the attached Cabinet paper and CAB100 and lodge with the Cabinet Office by 10am on 1 March 2012 for the Cabinet meeting on 5 March 2012.

Agree/disagree.

- b. **note** that the Bill that will be provided to Cabinet on 5 March 2012 to approve for introduction will only include consequential amendments to settlement Acts where the relevant iwi has agreed that they are happy with the amendment being made.

Chris White
Manager, Commercial Transactions Group

Hon Tony Ryall
Minister for State Owned Enterprises

Office of the Minister for State Owned Enterprises

Chair

CABINET

Mixed Ownership Model Bill: Approval for Introduction

Proposal

1. I propose that Cabinet approve the Mixed Ownership Model Bill (the **Bill**) for introduction on 5 March 2012.

Policy


2. The Bill allows each of Genesis Power Limited, Meridian Energy Limited, Mighty River Power Limited and Solid Energy New Zealand Limited (the **MOM companies**) to be removed, at an appropriate time and via separate Orders in Council, from the State-Owned Enterprises Act 1986 (the **SOE Act**) (while retaining the application of some provisions of that Act) and added to a new Part 5A of the Public Finance Act 1989. This will enable the sale of up to 49% of the shares in the MOM companies by way of initial public offerings (IPO).

3. In addition, the Bill restricts the Crown from holding less than 51% of the voting rights in each of the MOM companies and non-Crown persons from holding more than 10% of the voting rights in each of the MOM companies. The Bill also preserves Maori interests in that it includes a provision similar to section 9 of the State-Owned Enterprises Act 1986.

4. Cabinet initially made in principle decisions relating to implementing the MOM programme through legislation on 14 December 2011 (CAB Min (11) 43/2 refers). On 29 February 2012 the Cabinet Economic Growth and Infrastructure Committee (with power to act) confirmed the initial in principle decisions and made final policy decisions relating to the legislation required to implement the MOM programme (EGI Min (12) 2/9 refers).

5. The Bill is required because legislation is necessary to remove each company from the ambit of the SOE Act, which prevents shares in state-owned enterprises being allotted or issued to any person other than a shareholding Minister.

[Withheld under s9(2)(g)(i)]



7. There are no outstanding policy issues.

Regulatory impact analysis

8. A Regulatory Impact Statement (RIS) was prepared in accordance with the necessary requirements, and was submitted at the time that Cabinet conditional approval of the policy relating to the Bill was sought. CAB (11) 234 refers.

Compliance

9. The Bill complies with all of the following:
- principles of the Treaty of Waitangi;
 - rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - principles and guidelines set out in the Privacy Act 1993;
 - relevant international standards and obligations; and
 - LAC Guidelines: Guidelines on Process and Content of Legislation, a publication by the Legislation Advisory Committee.

Consultation

10. Consultation has taken place with the following government departments and public bodies:

- Department of Internal Affairs;
- Department of Labour;
- Department of the Prime Minister and Cabinet;
- Inland Revenue;
- Land Information New Zealand;
- Ministry of Economic Development;
- Ministry of Foreign Affairs and Trade;
- Ministry of Justice;
- Te Puni Kokiri;
- Financial Markets Authority;
- Office of the Auditor-General;
- Genesis Power Limited;
- Meridian Energy Limited;
- Mighty River Power Limited;
- Solid Energy New Zealand Limited; and

- Office of the Ombudsman.

11. In addition, on 1 February the Minister of Finance and I issued a consultation document, and since then have met with Māori in 10 hui around the country. We also received 208 written submissions. The purpose of the consultation was to gather Māori views on how the Crown's obligations under the Treaty of Waitangi should be reflected in the MOM legislation.

12. The following government caucus(es) and other parties represented in Parliament have been consulted:

- National Party caucus
- United Future
- ACT
- Maori Party

Binding on the Crown

13. This Bill makes several amendments to a number of existing Acts, and therefore no separate decision from Cabinet was sought as those amendments will follow the position of the principal Acts on whether they will be binding on the Crown.

Principal Act:

- State-Owned Enterprises Act 1986
- Ombudsmen Act 1975
- Official Information Act 1982
- Public Finance Act 1989
- Income Tax Act 2007
- Electricity Act 1992
- Employment Relations Act 2000
- Finance Act (No 2) 1988
- Land Act 1948
- Manapouri-Te Anau Development Act 1963
- Maori Purposes Act 1959
- Ngāi Tahu Claims Settlement Act 1998
- Ngāti Tūrangitukua Claims Settlement Act 1999
- Public Records Act 2005
- Public Works Act 1981
- Waikato Raupatu Claims Settlement Act 1995
- Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010

Position:

Binds the Crown
 Act does not expressly bind the Crown
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Creating new agencies or amending law relating to existing agencies

14. The legislation will not create a new agency but it will remove the MOM companies from the ambit of the State-Owned Enterprises Act 1986.

15. The legislation will remove the MOM companies from the existing coverage of the Ombudsmen Act 1975 (OA) and the Official Information Act 1982 (OIA).

16. The Ombudsmen consider that the MOM companies should remain subject to the OA and OIA for the following reasons:

- The Crown will retain majority shareholding on behalf of the public, which demonstrates the importance of the MOM companies to New Zealand's interests and their role in the state sector. The sale of a minority shareholding does not affect the reasoning for their being currently subject to the OA and OIA.
- The companies will carry on the same operations as they do presently, which have significant scope to impact on individuals, communities and the environment.
- Continued coverage will ensure a measure of accountability in a context where existing control and accountability measures are proposed to be reduced or removed.
- There is a precedent for continued coverage in that "*council-controlled organisations*" (defined in terms of over 50 per cent local authority ownership) are, with some specified exceptions, subject to the OA and the Local Government Official Information and Meetings Act.
- Competition of itself is insufficient to provide adequate protection to consumers. Nor can the competitive environment provide a remedy for non-consumers who may nevertheless be affected by the operations of the MOM companies.
- There is no evidence that continued coverage would place the MOM companies at a competitive disadvantage. The establishment of industry Ombudsmen here and overseas demonstrates that the advantages of having an independent review mechanism are recognised by the private sector to outweigh the costs. The cost of Ombudsmen oversight is, in any event, likely to be low given the small number of complaints that have been received about the MOM companies.
- The fact that Air NZ is not presently subject to the OA and OIA is not a reason to remove companies that are so subject. Air NZ was excluded when it was wholly privatised. It should arguably have been made subject to the OA and OIA again once the Crown regained majority ownership.

17. We have considered the Ombudsmen's arguments and conclude as follows:

- Our view is that the Ombudsmen play an important role in relation to the public's dealings with Government agencies where people may have less choice or no easy remedies if they face poor service from those Government agencies. However, in our view whether the OA and the OIA should apply to an entity should be based on whether it is appropriate for the entity to be subject to the OA and OIA rather than whether the Crown owns a majority share in the entity.
- In the case of commercial entities, like the MOM companies which operate in a competitive environment, the best and ultimate remedy people have is to shift their business to another provider. This is true for people both as consumers of services and as investors/owners. The risk of losing customers provides strong incentives for the companies to be client-focused, and the risk of losing or disappointing shareholders and facing a falling share price incentivises the companies to operate efficiently.

- Other arguments for taking the companies out of the ambit of the OA and OIA include:
 - Ministers of the Crown and officials will themselves continue to be subject to the OIA, and officials will continue to be subject to the OA
 - application of the OA and OIA would place the MOM companies at a competitive disadvantage
 - Air New Zealand is not subject to the OA or OIA, and
 - the companies will be subject to the Stock Exchange's continuous disclosure regime.

18. We anticipate that the Ombudsmen may make a submission to the select committee outlining their views.

Allocation of decision making powers

19. The draft legislation does not involve an allocation of decision making powers between the executive, the courts and tribunals.

Associated regulations

20. A number of provisions in Part 1 of the Bill will be brought into force by Order in Council. Those provisions will enable the MOM companies to be removed from Schedules 1 and 2 of the State-Owned Enterprises Act 1986, removed from the Official Information Act 1982 and the Ombudsmen Act 1975, re-categorised as a 'mixed-ownership enterprise' rather than a Government enterprise for the purpose of the Income Tax Act 2007, and added to Schedule 5 of the Public Finance Act 1989 as a mixed ownership model company, which will therefore apply the 51% and 10% ownership restrictions to each company.

21. The Order in Council in relation to Mighty River Power Limited will, at the latest, be required to be in force before the allotment of the shares^[Withheld under s9(2)(f)(iv)] Orders in Council relating to the other MOM companies will be required if shares in those companies are to be sold by way of an initial public offering and would, at the latest, be required before the allotment of shares in each of those companies if initial public offerings go ahead for each of the other MOM companies. Each Order in Council will be not be complex to draft.

22. In relation to each Order in Council a waiver of the 28-day rule is unlikely to be sought, however, final decisions on whether to seek a waiver will be sought in line with commercial advice closer to the float.

Deemed regulations

23. The Bill does not include any provision empowering the making of deemed regulations.

Definition of Minister/department

24. The Bill does not contain a definition of Minister, department (or equivalent government agency) or chief executive (or equivalent government agency). As this Bill simply

amends existing legislation, any definition of Minister, department or chief executive in the legislation being amended will apply as applicable.

Commencement of legislation

25. The Bill will come into force:

- the day after the date of assent in respect of Part 2 and Schedules 1 and 2;
- on dates to be appointed by Order in Council in respect of the provisions in Part 1, noting that the various provisions in Part 1 can be brought into force on different dates by different Orders in Council.

26. It is appropriate for the provisions in Part 1 to come into force by Order in Council. This will allow for the MOM companies to remain state-owned enterprises until (i) a decision is made in relation to each MOM company to proceed with a partial sale of each company by way of an initial public offering, and (ii) a critical stage is reached in each initial public offering which requires the MOM company to be removed from the SOE Act and categorised as a 'mixed ownership model company' under the PFA.

27. It is expected that Part 2 and Schedules 1 and 2 will commence once the Act receives royal assent on or before mid August 2012. It is expected that those provisions in Part 1 that relate to Mighty River Power Limited will be brought into force by Order in Council [Withheld under s9(2)(f)(iv)] just before the allotment of shares in Mighty River Power Limited (at the latest). Timing in relation to the other MOM companies in Part 1 of the Bill is not known at this stage, and will depend on a number of factors, including market conditions.

28. The explanatory note to the bill sets out the reasons for commencement by Order in Council.

Parliamentary stages

29. This Bill should be introduced on 5 March 2012 and should be passed by mid August 2012.

30. The Bill should be referred to the Finance and Expenditure committee.

Recommendations

31. The Minister for State Owned Enterprises recommends that Cabinet:

1. note that priority 2 has been requested for the Mixed Ownership Model Bill on the 2012 legislative programme but that a decision is still to be made on this requested priority by Cabinet;
2. note that the Bill will enable up to 49% of the MOM companies to be sold by way of an IPO but will place ownership restrictions which will not allow the Crown's voting rights in each of the MOM companies to drop below 51% and will restrict other persons from holding more than 10% of the voting rights in each of the MOM companies. It will also enable sections 22 to 30(1) of the

State-Owned Enterprises Act 1986 to continue to apply to the MOM companies;

3. approve for introduction the Mixed Ownership Model Bill;
4. agree that the Bill be introduced on 5 March 2012;
5. agree that the government propose that the Bill be:
 - 5.1 referred to the Finance and Expenditure committee for consideration;

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

Hon Tony Ryall
Minister for State Owned Enterprises

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