

# The Treasury

## Mixed Ownership Model for Crown Commercial Entities: Treasury Advice and Cabinet Material relating to Consultation with Māori Information Release

### Release Document

5 April 2012

[www.treasury.govt.nz/publications/reviews-consultation/mixed-ownership/advice](http://www.treasury.govt.nz/publications/reviews-consultation/mixed-ownership/advice)

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

Kaitohutohu Kaupapa Rawa

Date: 4 February 2012

To: Minister of Finance

## **Aide Memoire: Speaking Points and Q&A for ILG Meeting at Waitangi**

We understand that you will be speaking to the mixed ownership model policy and consultation process (amongst other issues) at the iwi leaders group meeting at Waitangi. We attach some suggested speaking points and Q&As.

In relation to the consultation you should be aware of a number of issues:

- Sir Graham Latimer, on behalf of the New Zealand Māori Council, will be releasing a statement (also attached), which indicates the Council is preparing to take a claim to the Waitangi Tribunal on Māori interests in geothermal and cold water. You are meeting with Sir Graham and Maanu Paul on Sunday evening. [3]

We suggest that the key message is to indicate that the council should engage in the MOM consultation process, alongside all other parties that have an interest in the outcome.

[2] [3]

Not Relevant to OIA Request

[3] [5]

**Chris White**, Manager, Commercial Transactions Group, [1]

## **Speaking points for Waitangi (and for the mixed ownership hui)**

### ***The Crown Māori relationship***

- The Crown recognises, and honours, its obligations under the Treaty.
- We recognise the historical significance of section 9 of the SOE Act.
- We are not stepping back from our Treaty obligations.

### ***The mixed ownership programme***

- The Government is keen to press ahead with its mixed ownership programme now that it has a mandate from the general election.
- We have announced that Mighty River Power will be the first company prepared for IPO around the third quarter of this year.
- We will welcome Māori investment in the mixed ownership companies.

### ***Consultation with Māori***

- We are consulting on the legislation necessary to give effect to the mixed ownership policy.
- We propose to remove Genesis Power, Meridian Energy, Mighty River Power and Solid Energy from the State Owned Enterprises Act 1986 and put them under new legislation that ensures the Government retains at least 51% and other individual shareholdings are limited to 10%.
- The regime for memorials on land titles contained in section 27 of the SOE Act will be retained in its entirety to protect Māori interests in land.
- We are consulting on whether or not to retain section 9, to include a more specific section 9-like provision that will clarify the Crown's obligations, or to have no general Treaty clause in the new legislation.
- We want to understand what rights and interests may be protected by section 9 that are not protected by the section 27 memorials regime and other statutory process and provisions such as the RMA.
- This is a consultation:
  - We have an open mind
  - We are at the start of a process and a dialogue
  - We wish to be properly informed of Māori views (on the treatment of your rights and interests in the new legislation) before we make decisions.

### ***How the policy, and consultation, fits with other policy areas and processes***

- The direct interests of hapu and iwi in land and assets owned by the mixed ownership companies are protected by:
  - The section 27 memorials regime for land, and
  - Direct, commercial relationships between Māori and the companies (where these exist).
- The broader interests of Māori in the operations of the companies are protected by:
  - Company engagement with the communities in which they operate, built up over many years
  - Statutory processes under the Resource Management Act.
- Māori interests in resources, particularly in water, are protected by:
  - The fact that the companies do not own the water (or other resources) they use.
  - The Crown's collaborative approach to policy development for water and for resource management, including through the Land and Water Forum.
- In the widest sense, Māori interests in economic and social development are protected by the well established collaborative, good faith relationship between the Crown and Māori, as evidenced in many areas, such as:
  - the ETS
  - local government
  - whanau ora.
- None of these protections are diminished by the mixed ownership model.

### ***Investment opportunities***

- We expect that many Māori will be interested in the investment opportunity provided by the mixed ownership model.
- We welcome Māori investment, both as individuals and institutions.
- While investment is not the subject of the consultation as it will not be covered by the legislation, we will consider any issues raised as we develop up the sales programme itself.

## **Q&As – mixed ownership consultation with Māori**

These Q&As only cover issues directly related to the consultation. If you want a wider set of Q&As about the programme as a whole, we will dig out the set released when the Government announced it was going ahead in December.

### **Section 9**

#### **Q. What does section 9 say?**

A. “Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

#### **Q. Will you keep section 9 of the SOE Act**

A. We have an open mind on that question. Before deciding, we would like to understand what rights and interests may be protected by section 9 that are not protected by the section 27 memorials regime and other statutory process and provisions such as the Resource Management Act.

#### **Q. Has section 9 ever been used?**

A. Yes. Section 9 was the basis for the Lands case in 1987, which led to the articulation by the Court of Appeal of the principles of the Treaty. The court also ordered the Crown and Māori to devise a way of protecting SOE land that was subject to Treaty claims: the solution was the section 27 memorials regime (sections 27A-D of the SOE Act). [We will flesh out the story in respect of other SOE litigation – forests, coal, broadcasting – next week.]

#### **Q. Why do you want to drop section 9?**

A. We haven’t made a decision on section 9. We want to be sure that when we sell shares in the companies, minority investors are able to clearly understand the Crown’s obligations under the Treaty and what these might mean in practice.

### **Section 27**

#### **Q. Will you keep the section 27 memorials regime that is in the SOE Act?**

A. Yes. It will be retained in the new legislation in its current form.

#### **Q. What does section 27 do?**

A. Section 27 provides a mechanism for the Crown to take back ownership of some land from SOEs and mixed ownership companies for use in Treaty settlements. It gives the Waitangi Tribunal power to order the Crown to take back land.

#### **Q. What if the mixed ownership company sells that land?**

A. The Crown’s rights to take the land are unchanged.

#### **Q. What land does section 27 apply to?**

A. Section 27 applies to land that has been identified as possibly subject to a Treaty claim. This land has had a memorial placed on its title.

**Q. What is a memorial?**

A. A memorial is a notice placed on the title which alerts the owner to the rights the Crown has to take back the land.

**Q. Will the company be compensated for the land?**

A. Yes. The land will be taken back under the provisions of the Public Works Act. The Crown will pay a market price for the land.

**Q. Has section 27 ever been used?**

A. Yes and no. The Tribunal has once made an interim order for the resumption of land by the Crown, but the Crown and iwi settled the claim by negotiation before the order became binding. The settlement involved the return of some memorialised land.

**Q. What happens to memorials once Treaty claims are settled?**

A. If there is no further claim over the land, the memorial is removed as part of the settlement legislation.

***Appointment of the board***

**Q. How will the Government appoint directors?**

A. The directors on the board at the time of sale will have been appointed by the Government. After sale, the Government will use its majority voting rights to vote on the appointment of directors [2]

**Q. Will the Government appoint the Chair?**

A. We have not decided this yet. The Government appointed the Chair of Air New Zealand after its recapitalisation. Best practice for listed companies suggests that the board should elect the Chair. The Government will likely choose one of these two options.

**Q. Will Māori still be able to appoint a director to each of the companies?**

A. Māori do not currently appoint directors, the Crown does. In considering who to appoint, the Crown considers a wide range of candidates to ensure boards have the necessary mix of skills, which includes the ability to understand, and operate in, Māori communities. These skills will still be valuable for the companies once they are partially sold.

***Investment opportunities***

**Q. How do we invest?**

A. Individuals will be able to invest directly through a public pool, or through a share broker. Institutions will be able to invest as part of the book build.

**Q. Will shares be reserved for iwi?**

A. The government has promised that New Zealand investors will be at the front of the queue. This includes Māori investors. The government has yet to decide the detail of how to structure each sale to achieve this outcome.

**Q. Will iwi receive a discounted price?**

A. Iwi will not receive a special discount. The Government has yet to decide whether or not it will offer a discount to all retail investors, including Māori. This will be decided for each company in the run up to its sale.

**Q. Will iwi receive a quota?**

A. No. The Crown has no obligation to provide shares to iwi for free.

***Resource and regulatory issues***

**Q. Why are you selling our land/water/steam/coal?**

A. We are not selling land/water/steam/coal. We are selling a minority share in the companies. With the exception of land (which is protected by section 27) the companies do not own these resources. They have various rights to use them under contractual agreements and/or statutory allocations. These will continue.

**Q. How will you ensure the companies continue to operate within the RMA and other statutory obligations once they are sold?**

A. We do not use our ownership of SOEs to ensure they observe the law. They are obliged to operate within the law just like any other companies, and fall within the jurisdiction of the courts if they do not. This will not change.

**Q. Will the companies behaviour to Māori change?**

A. The companies already operate under a commercial model. Within this model, the companies have a wide range of engagements with Māori including business relationships such as leasehold arrangements for land or joint ventures, and memoranda of understanding with communities which set out modes of engagement, measures for mitigating the impacts of company activities, and community initiatives the companies will support. We do not expect these arrangements to change.

***Treaty settlements***

**Q. Will shares be held back for use in Treaty settlements?**

A. The Government does not need to hold back shares for them to be used in Treaty settlements. If unsettled iwi want shares they can buy them on the market with any cash portion of their settlement. Alternatively, the Crown could buy them on the market and give them to iwi at market value as part of their quantum. The government will decide what percentage of the companies to sell, up to a maximum of 49%, as part of the sale of each company. This decision will take into account demand for the shares as well as other issues such as the company's likely requirements for new capital in the future. If the government does sell less than 49%, the balance could in theory be available for Treaty settlements at market value.

**Q. Why won't the Crown hold back shares for use in Treaty settlements at the issue price?**

A. The Crown has no obligation to provide shares in Treaty settlements. Holding back shares at the issue price would provide iwi with a financial option which has an additional value to iwi over and above the issue price and a corresponding cost to the Crown.

***The legislation***

**Q. Why will you be removing the companies from the SOE Act by order in council?**

A. The mixed ownership companies will be removed from the SOE Act by order in council so that the Government has flexibility over the timing of each sale.

**Q. What changes are you proposing to make to settlement legislation?**

A. The changes proposed to four settlement Acts (Ngai Tahu, Ngati Turangitukua, Waikato-Tainui, and Waikato River) are technical. They simply amend the definition of the term "state enterprise" or "Crown body" to make it clear that these terms continue to apply to the companies once they become mixed ownership companies. This is necessary to preserve existing property rights. We are consulting directly with affected iwi on these changes.

**Q. Why are you changing the Treaty of Waitangi Act?**

A. The changes to the Treaty of Waitangi Act are technical. They will ensure that the Act will continue to apply to mixed ownership companies as if the companies were still SOEs. This is necessary to preserve existing property rights.

***Consultation process***

**Q. Why are you consulting?**

A. We have an obligation to consult under section 9 of the SOE Act before taking the companies out of that Act.

**Q. Why are you not consulting on Air New Zealand?**

A. Air New Zealand is already a mixed ownership company and does not fall under the SOE Act. It is therefore outside the scope of this consultation.

**Q. What specific Māori groups are you consulting with outside of the hui?**

A. Ministers have met with iwi leaders, the New Zealand Māori Council and the Federation of Māori Authorities.

**Q. Where do I get a consultation document?**

A. Consultation documents are available at the hui and on the Treasury's website [www.treasury.govt.nz/mixed-ownership-consultation](http://www.treasury.govt.nz/mixed-ownership-consultation).

**Q. How do I make a submission?**

A. At a hui or in writing. Written submissions should be sent to the Treasury by email or freepost. Details are available in the consultation document and on Treasury's website.

**Q. What is the deadline for submissions?**

A. 5pm on Wednesday 22 February 2012. Late submissions will not be considered.

**Q. Where are the hui being held?**

Date	Time	Venue	Location
8 February	10.00am-1.00pm	Distinction Rotorua	Rotorua
8 February	3.00pm-6.00pm	Waikato Stadium	Hamilton
9 February	3.00pm-6.30pm	Whanganui Racecourse	Whanganui
10 February	9.30am-12.30pm	Toll Stadium	Whangarei
10 February	5.00pm-8.00pm	Novotel Auckland Airport	Auckland
14 February	10.00am-1.00pm	Waihopai Runaka Murihiku Marae	Invercargill
14 February	4.00pm-7.00pm	Chateau on the Park	Christchurch
15 February	10.00am-1.00pm	Emerald Hotel	Gisborne
15 February	3.30pm-6.30pm	Te Puni Kōkiri	Wellington

**Q. What specific questions are you consulting on?**

A. The consultation document poses the following questions:

- 1 What rights and interests, if any, do Māori have in the Mixed Ownership Model Companies that are not protected by the section 27A-D memorials regime, or by other legislation?
- 2 How would any rights and interests identified in question 1 be protected by continued application of section 9 of the State-Owned Enterprises Act 1986?
- 3 Could any rights and interests identified in question 1 be protected by an alternative, more specific, formulation of the Crown's obligations under the Treaty?