The Treasury

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

Release Document

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[3] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions

[4] 9(2)(h) - to maintain professional legal privilege

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Minister of Finance
Minister for State Owned Enterprises

28 February 2012

Chair
CABINET ECONOMIC GROWTH AND INFRASTRUCTURE COMMITTEE

MIXED OWNERSHIP MODEL BILL: RESULTS OF CONSULTATION WITH MAORI AND FINAL POLICY APPROVALS FOR LEGISLATION

Proposal

1. On 14 December 2011, Cabinet *inter alia:*

- agreed in principle to implement the mixed ownership model (**MOM**) programme, subject to the results of consultation with Maori;
- directed the Treasury to start consultation with Maori;
- agreed in principle the main features of the necessary legislation and authorised the Minister of Finance to issue drafting instructions;
- authorised the Minister of Finance and Minister for State Owned Enterprises to make minor policy decisions relating to the draft MOM legislation.

CAB Min (11) 43/2 refers.

2. This paper outlines the outcome of the consultation with Maori and makes consequential policy recommendations. It also seeks agreement to decisions previously agreed in principle by Cabinet, and agreement to minor policy decisions, including those made since 14 December under delegated authority.

Executive Summary

3. The Bill affects only Genesis Power Limited, Meridian Energy Limited, Mighty River Power Limited and Solid Energy New Zealand Limited (the **MOM companies**). The Bill (the **MOM Bill**) allows each of 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). The companies cannot be floated unless the Bill is passed, but the provisions of the Bill do not drive the timing of each IPO - the companies can be separately removed from the SOE Act and floated when market conditions are best.

4. In addition, the MOM Bill will restrict the Crown from holding less than 51% of the voting rights in each of the MOM companies and will restrict non-Crown persons from holding more than 10% of the voting rights in any MOM company.

5. We have consulted with Maori on how the Crown's obligations under the Treaty of Waitangi should be reflected in the MOM Bill. The consultation entailed the publication of a consultation document on 1 February followed by 10 hui around the country. We have received 208 written submissions in addition to oral submissions made at the hui. All submissions were considered. Annex 1 attaches a report which summarises and analyses the submissions.

6. The overarching question arising from the consultation is whether the MOM can proceed without prejudicing the rights of Maori or the Crown's ability to settle Treaty claims. We believe it can, for the following reasons:

a) the replication of sections 27A – 27D of the SOE Act in the new Part 5A of the Public Finance Act will continue to protect Maori interests in land owned by the MOM companies.

b) replication of section 9 of the SOE Act, as proposed in this paper, will ensure that the Crown's obligation not to act in a manner inconsistent with the principles of the Treaty of Waitangi will be retained in respect of the mixed ownership companies, and the courts will be able to review the Crown's actions.

c) the Crown and Maori are engaged through multiple channels in processes to negotiate or otherwise clarify Maori rights and interests in water, all of which are ongoing, particularly:

    i. the Fresh Start for Fresh Water process, which includes direct engagement with the Fresh Water Iwi Leaders Group (and iwi also participate in the development of broader water policy through the Land and Water Forum); and

    ii. Treaty settlements with individual iwi and hapu, dealing with the management of water.

d) the companies do not own the water or geothermal resources they use so the sale of a minority share in the companies is not a sale of water or geothermal resources. If the processes in c) result in changes to the regulatory regime, the mixed ownership companies will have to operate within the new regime, as will private sector businesses and state-owned enterprises.

e) a further channel for defining Maori rights and interests – litigation – is available if need be, as currently demonstrated by the NZMC claim to the Waitangi Tribunal, though the Crown is at pains to stress its preference for negotiated outcomes.

7. We also recommend that the constitutions of the MOM companies (rather than the MOM Bill) set out the detailed mechanisms required to ensure compliance with the 51% and 10% ownership caps in the MOM Bill. This is consistent with our desire to keep the MOM Bill as simple as possible.

Statutory bar on sale of shares

8. The State-Owned Enterprises Act 1986 (**SOE Act**) provides that shareholding Ministers in state-owned enterprises (**SOEs**) cannot sell or otherwise dispose of any

shares in the company or permit shares in the company to be allotted or issued to any person other than a shareholding Minister. The MOM Bill is necessary, as it removes the MOM companies from the shareholding restrictions in the SOE Act 1986, so that shares can be sold to non-Crown shareholders.

Consultation with Maori

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

10. Maori expressed a range of views about the MOM policy itself, and raised a number of concerns that the policy might prejudice their rights and interests. The major themes were the application of sections 9 and 27A – 27D in the MOM legislation; the impact on Maori rights and interests in water, geothermal and other natural resources; Maori participation in MOM company floats; the impact on Treaty settlements; the consultation process; opposition to the MOM process; and corporate social responsibility. All submissions, whether oral or written, were considered, and the major issues analysed in detail. That analysis is set out in the annex. The issues are considered below under these major themes.

Application of sections 9 and 27A – 27D of the SOE Act to Part 5A of the Public Finance Act

11. The Government has already decided that sections 27A – 27D (the land memorial regime) will have continued application in the MOM legislation. Those provisions allow for the Waitangi Tribunal to recommend that land transferred by the Crown to SOEs be returned to Maori ownership. This was broadly supported by Maori.

12. Many Maori, however, considered sections 27A – 27D would not be sufficient without the inclusion of section 9 of the SOE Act as well. Section 9 states that "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi". Reasons put forward by submitters for this view include:

- the historical and constitutional importance that Maori attach to section 9;
- the impact that section 9 has had on the Crown/Maori relationship;
- the implications section 9 has had in relation to the Crown's duties to act honourably, reasonably and in good faith towards its Treaty partner, preserve its capacity to provide redress for well-founded Treaty claims, and actively protect taonga;
- the status of section 9 as an important statutory reference to the Crown's obligations in relation to Treaty principles;
- the overarching nature of the requirements section 9 places on the Crown; and
- that not all Maori rights and interests are covered by sections 27A – 27D.

13. We accept that section 9 gives statutory force to the Crown's Treaty obligations, and that its general nature may provide for future claims that have not yet been articulated. We also recognise that changing section 9 could lead to more litigation as the parties attempt to define what the new provisions mean.

14. Continuing the application of section 9 in the new Part 5A of the Public Finance Act will maintain the current status and understanding of the Treaty principles, to the extent possible in the context of the MOM programme. This will provide greater certainty for the MOM programme to proceed.

15. Some uncertainty may remain for private shareholders as to how the Crown might exercise its Treaty obligations, but this is likely to be considerably less than the uncertainty created by reformulating section 9.

16. The practical effect of a Treaty clause such as section 9 on the manner in which the Crown acts in relation to the SOEs on a day to day basis has been limited and is likely to continue to be limited, in both the SOE Act and the new legislation. The main practical effect of including a Treaty clause in the new legislation is that it makes Crown actions under that legislation justiciable in Treaty terms, where Maori believe those actions may prejudice their interests.

17. The more specific rights and interests of Maori, for example in natural resources or environmental outcomes, are addressed through existing legal processes such as the retained sections 27A-27D (for interests in land), other statutes including the Resource Management Act, and existing policy processes such as Fresh Start for Fresh Water.

18. We also considered and rejected:

- a reformulation of the current section 9. A number of submissions argued against a reformulation on the grounds that it might derogate from its overarching nature. We consider reformulating the provision will create further uncertainty as to its meaning.
- a broadened application of section 9, e.g. so that it should apply to other shareholders and the MOM companies. This would suggest a significant expansion beyond the application of the current section 9. It would no longer reflect the status of the Treaty as between the Crown and Maori rather than between individuals or firms and Maori.
- a specific Treaty provision in MOM company constitutions. As with the suggestion above, this would make third parties responsible for the Crown's obligations under the Treaty. It would also introduce significant new obligations on the MOM companies, which currently SOEs do not have, and therefore create uncertainty for private sector investors.

19. We therefore recommend that a provision similar to section 9 of the SOE Act should continue to apply to the Crown in respect of the MOM companies. This clause would be included in the new Part 5A of the Public Finance Act, and would apply to the Crown as shareholder in the MOM companies under Part 5A, once they have been brought into Part 5A of the Public Finance Act. It would provide that nothing in that Part of the Public Finance Act permits the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.

20. The definition of "Crown" in the SOE Act is different from that used in the Public Finance Act [4] The Public Finance Act definition expressly excludes state-owned enterprises but not MOM companies. The definition could be amended to also expressly exclude MOM companies, but doing so may raise unnecessary concerns from iwi. To avoid those concerns, we recommend redefining "Crown" for the new Part 5A of the Public Finance Act, using the same definition found in the SOE Act ("Crown means Her Majesty the Queen in right of New Zealand"). That definition, of course,

applies to s 9 of that Act, and iwi may gain some comfort from its continued use. The remainder of the Public Finance Act will be unaffected.

21. Given that section 9 has never been considered in the context of private shareholders having an ownership right in SOEs, we recommend that further clarification be included by specifying that, for the avoidance of doubt, the section 9 clause does not apply to persons other than the Crown. This clarification may be useful in giving non-Crown shareholders comfort about the Treaty clause's breadth.

22. The MOM Bill will enable separate commencement Orders in Council to be made in respect of each MOM company leading up to its IPO. The technical provisions regarding the commencement Orders will remain separate from the new part 5A of the Public Finance Act, which will provide for the 10% and 51% ownership limits and the continued application of the land memorial regime. The technical provisions regarding commencement Orders will enable each company to be moved from the coverage of the SOE Act to the new Part 5A of the Public Finance Act when market conditions are best. As we recommend the section 9 clause apply to the new Part 5A, the technical provisions regarding commencement Orders will not be subject to the section 9 clause.

Maori rights and interests in water, geothermal and other natural resources

23. Some submissions have claimed that Maori own water and geothermal resources through rangatiratanga rights, and that sale of shares in generator SOEs would prejudice these rights. Some seek compensation for past and future use of water and geothermal resources, and return of all related land. For those submitters, the issue of water cannot be separated from the sale of shares in those companies.

24. New Zealand law does not generally currently recognise ownership in fresh water, because water is, under common law, a common resource (publici juris). SOEs access consents to dam, divert, discharge to or otherwise use water and geothermal resources through the Resource Management Act 1991 like any other user, publicly or privately owned. SOEs do not own water; they do hold resource consents to use water. These consents are time-limited and subject to conditions. This will not change under the MOM, and to this extent Maori rights and interests in water are unaffected by the sale of shares in generator SOEs.

25. The Crown is aware, however, that water is especially significant to Maori. The RMA identifies the relationship of Maori to water, amongst other things, as a matter of national significance and makes a number of provisions for Maori to participate in decision-making about water. The Government is also aware, that many Maori are dissatisfied with the way the RMA works in practice, and that the RMA does not cover all Maori interests in water. Further, growing scarcity of water for development, and water quality problems, are highlighting issues of allocation and control for Maori and others.

26. There are a number of avenues to resolve these issues, both general and iwi or hapu specific. Generally, the RMII work programme is considering wider issues around Maori participation in RMA processes. The Crown is engaging directly on Maori rights and interests in water with the Freshwater Iwi Leaders under the Fresh Start for Fresh Water programme, under which iwi are also participating in wider water policy development through the Land and Water Forum. There will be opportunities for wider Maori input into the resulting water reform proposals before final decisions

are made. More specifically, some rights and interests of individual iwi and hapu are being resolved through historical Treaty settlements such as the Waikato River settlement, particularly around the management of waterways of particular significance to those iwi or hapu. None of these processes to clarify Maori rights and interests in water will be affected by the MOM programme.

27. Maori have the option of turning to the Waitangi Tribunal or other court processes if they are not satisfied with the outcome of these processes. That said, the Crown's strong preference, which was supported by a significant number of submissions, is to maintain current processes.

Access to shares in mixed ownership companies

28. Aside from requiring the Crown to retain at least 51% of the shares, and restricting any other shareholder to a maximum of 10% of the shares, the legislation does not deal with the allocation of shares to classes of investor. Allocation decisions will be made by Government during each IPO. Therefore opportunities for Maori participation in the floats are in no way curtailed or foreclosed by the passage of the legislation.

29. There have been a range of suggestions that Maori should receive preferential treatment, for example through free allocations, reserve allocations, rights of first refusal or special price discounts. In some instances these suggestions are framed in the context of historical Treaty settlements.

30. Ministers have been clear that Maori will not be given access to shares at a concessional price. Ministers recognise that Maori collective entities such as iwi incorporations and Maori land trusts are not typical investors immediately catered for in the standard IPO process. We recommend that officials and iwi work together to ensure Maori that wish to invest through collective entities are able to access the process.

31. The sale of a minority shareholding may also make it technically possible for shares to be used in Treaty settlements. If so, shares could be provided at market price at the time of settlement and within quantum, and from the non-Crown 49%. This would, however, be a change in policy, and several issues would need to be worked through. This issue does not need to be resolved for the legislation and will require further consideration. Alternatively, iwi could purchase shares directly on market with settlement proceeds.

Impact on Treaty settlements

32. A significant number of submissions expressed concern that the MOM might impact past or future Treaty settlements, including those currently under negotiation. Our view, however, is that retention of sections 9 and 27A – 27D, together with the common law, existing legislation such as the RMA and existing processes such as the Fresh Start for Fresh Water, will ensure that the rights and interests of Maori will be or can be fully protected when the MOM is adopted, and that the MOM will not prejudice any rights and interests that may be more fully defined in the future. The rationale for this view, together with a more extensive analysis of themes that came out of the consultation, is set out in detail in the annex.

The consultation process

33. Many submissions stated that the consultation period was too short to enable Maori to consider the issues raised and make a meaningful submission.

34. We are of the view that principles of consultation have been upheld, as the process was undertaken with an open mind (as demonstrated by proposing, following consultation, to replicate section 9), with a clearly articulated purpose (the consultation document) and with a number of opportunities (10 hui and a written submission phase) to input views and perspectives to Ministers prior to them making the necessary Ministerial decisions.

Opposition to the MOM process

35. Some submissions argue that the MOM programme should be halted on a number of grounds, including that it will reduce the ability of Maori to obtain compensation for breaches of the Treaty.

36. The recent election gave the Government the necessary mandate – not to proceed would be breaking a manifesto commitment. In the context of section 9, the Courts have emphasised that the Treaty does not impose unreasonable restrictions on the ability of the Crown to follow its chosen policy. We do not accept that the MOM programme will reduce the ability of Maori to obtain compensation for breaches of the Treaty, for the reasons summarised in paragraph 6.

Corporate social responsibility

37. A number of submissions recommend the social responsibility objectives from section 4(1)(c) of the SOE Act should be in the new legislation. Section 4 states:

> "Principal objective to be a successful business - (1) The principal objective of every State enterprise shall be to operate as a successful business and, to this end, to be:
> a) As profitable and efficient as comparable businesses that are not owned by the Crown; and
> b) A good employer; and
> c) An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so."

38. The December 2011 Cabinet paper noted that Cabinet had the option of including section 4 of the SOE Act (as well as other discretionary provisions) but did not recommend including it in the Bill. The consultation has not led us to change our views. The MOM companies are competitive commercial entities; like most large commercial entities, they will seek to build stakeholder trust and public support for their activities in a number of ways, one of which may be a statement of corporate social responsibility.

Other Policy decisions

39. On 14 December 2011, as well as the matters set out in paragraph 1, Cabinet agreed in principle that legislation implementing the MOM programme include (CAB Min (11) 43/2 refers):

- the removal of the MOM companies from schedules 1 and 2 of the State-Owned Enterprises Act 1986;
- the continued application of sections 22 to 30 of the State-Owned Enterprises Act 1986, which sets out the process for the transfer of assets and land by the Crown to State enterprises;
- the removal of Solid Energy New Zealand Limited from schedule 1 of the Official Information Act 1982 and potentially the removal of all the MOM companies from the Ombudsmen Act 1975;

- consequential or related amendments to other legislation, including the continued application of the Public Records Act 2005 in respect of old records;
- a restriction on reducing the Crown's shareholding in the MOM companies below 51%; and
- a maximum size limit on non-Crown individual entity shareholdings of 10%.

We now seek Cabinet agreement to these matters.

40. Since December 2011, the Minister of Finance and the Minister for State Owned Enterprises have made the following minor policy decisions relating to the draft MOM legislation, on which Cabinet agreement is now sought:

- agreed that the 10% and 51% restrictions should be calculated on the basis of voting rights rather than the total percentage of all securities held (including those with non-voting rights);
- agreed that the MOM Bill should make provision for the disposal of shareholdings that are held by any person in excess of the 10% restriction and that voting rights attaching to any shareholding which exceed the 10% are not exercisable;
- agreed that the MOM Bill should make provision for trustee corporations and nominee companies to be exempt from the 10% restriction, but that those companies should be required to monitor transactions and report to the MOM company when an individual shareholder has breached the 10% restriction;
- agreed that the MOM Bill should not provide that a Minister may dispose of shares as part of a reconstruction or merger of a MOM company even if the Crown's voting rights in the MOM company are not diluted below 51%; and
- agreed that the MOM companies should be removed from the ambit of the Official Information Act 1982 and the Ombudsmen Act 1975.

[2]

43. We have identified that the following clarifications are needed in relation to consequential amendments in the Bill, and seek Cabinet's agreement:

a. the Public Records Act 2005 continues to apply to each company, but only in respect of records that relate to the company's affairs before it ceased to be a state-owned enterprise, (regardless of when the records of those affairs are created);

b. that amendments be made to the Income Tax Act 2007 to reflect that specific tax rules for State enterprises and special corporate entities no longer apply, and to ensure that loss grouping is not permitted among companies whose common ownership is determined by a significant Crown interest in them (i.e. State-owned enterprises, MOM companies, and companies in an equivalent position (currently Air New Zealand)); and

c. that an additional paragraph be added in subsection 1A(2) of the Public Finance Act 1989 (the purpose section for that Act) which provides that an additional purpose of the Public Finance Act 1989 is to regulate the ownership of companies named in Schedule 5.

44. In addition to the minor policy decisions above, we have also given further consideration to the provisions that should be included in the MOM company constitutions to support the 51% and 10% ownership cap restrictions in the MOM Bill.

45. We have already agreed that the MOM Bill should make provision for the disposal of shareholdings that are held by any person in excess of the 10% restriction and that voting rights attaching to any shareholding which exceed the 10% are not exercisable. We also propose that the MOM Bill provide that the constitution of a MOM company is not prevented from also providing for the consequences of a person exceeding the 10% limit, either to implement, or in addition to, the consequences set out in the MOM Bill.

[2]

Consultation

49. In addition to consultation with Maori, 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;
- Ministry for the Environment;
- Te Puni Kokiri;
- Financial Markets Authority;
- Office of the Auditor-General;
- Genesis Power Limited;
- Meridian Energy Limited;
- Mighty River Power Limited; and
- Solid Energy New Zealand Limited
- Office of the Ombudsman

50. 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 Ombudsman 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.

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

- Our interpretation of the Ombudsmen's position is that they are focused on legal ownership of the companies and the signals that sends regarding accountability. Our views are based on drawing a distinction between the functions that are unique to Government, and the competitive role of commercial entities.
- In other words, in their dealings with Government agencies, people have little choice and no easy remedies if they face poor service. The Ombudsmen therefore play an important role.
- But in the case of commercial entities operating 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.

52. We anticipate that the Ombudsmen may make a submission to the select committee outlining these views.

Financial Implications

53. There are no financial implications beyond those already considered by Cabinet at its meeting of 14 December (CAB Min (11) 43/2 refers).

Human Rights

54. There are no human rights implications.

Legislative Implications

55. The need for legislation has been described above.

Regulatory Impact Analysis

56. 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.

Gender Implications and Disability Perspective

57. There are no gender implications nor is there a disability perspective.

Publicity

58. We anticipate intense media and Maori interest in these decisions.

Recommendations

59. We recommend that the Committee:

1. Note that Cabinet agreed in principle to the main policy parameters for the MOM programme at its meeting on 14 December 2011 (CAB Min (11) 43/2 refers).
2. Note the results of the consultation with Maori which are summarised in paragraphs 10 – 34 of this paper, and set out in greater detail in the annex to this paper.
3. Agree that a clause similar to section 9 of the SOE Act should be included in the new Part of the Public Finance Act, which will apply to the MOM companies once they have been removed from the SOE Act.
4. Agree that this clause should provide that nothing in that Part of the Public Finance Act permits the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.
5. Agree that the definition of the Crown in Part 5A of the Public Finance Act be that used in the SOE Act.
6. Agree that further clarification be included with the section 9 type clause by confirming in a sub-clause that for the avoidance of doubt, the section 9 type clause does not apply to persons other than the Crown.
7. Note that Maori rights and interests in MOM companies and the resources used by those companies can be protected through, *inter alia*, the proposed Treaty clause, the continuation of sections 27A – 27D of the State-Owned Enterprises Act, Treaty settlements, the application of existing legislation such as the Resource Management Act and other existing policy development processes such as the Fresh Start for Fresh Water programme.
8. Agree the in principle policy decisions previously made by Cabinet on 14 December 2011, namely:
    - the removal of the MOM companies from schedules 1 and 2 of the State-Owned Enterprises Act 1986;
    - the continued application of sections 22 to 30 of the State-Owned Enterprises Act 1986, which sets out the process for the transfer of assets and land by the Crown to State enterprises;
    - the removal of Solid Energy New Zealand Limited from schedule 1 of the Official Information Act 1982 and potentially the removal of all the MOM companies from the Ombudsmen Act 1975;

- consequential or related amendments to other legislation, including the continued application of the Public Records Act 2005 in respect of old records;
- a restriction on reducing the Crown's shareholding in the MOM companies below 51%; and
- a maximum size limit on non-Crown individual entity shareholdings of 10%.

9. Agree the following minor policy decisions made by Ministers under delegated authority from Cabinet:

    a. that the 10% and 51% restrictions should be calculated on the basis of voting rights rather than the total percentage of all securities held (including those with non-voting rights);
    b. that the MOM Bill should make provision for the disposal of shareholdings that are held by any person in excess of the 10% restriction and that voting rights attaching to any shareholding which exceed the 10% are not exercisable;
    c. that the MOM Bill should make provision for trustee corporations and nominee companies to be exempt from the 10% restriction, but should be required to monitor transactions and report to the MOM company when a person has breached the 10% restriction;
    d. that the MOM Bill should not provide that a Minister may dispose of shares in a MOM company as part of a reconstruction or merger even if the Crown's voting rights in the MOM company are not diluted below 51%; and
    e. that the MOM companies should be removed from the ambit of the Official Information Act 1982 and the Ombudsmen Act 1975.

[2]

12. Agree the following consequential amendments to other enactments in the MOM Bill:

    a. the continued application of the Public Records Act 2005 in respect of records that relate to the company's affairs before it ceased to be a state-owned enterprise, (regardless of when the records of those affairs are created);

    b. amendments to the Income Tax Act 2007 to reflect that specific tax rules for State enterprises and special corporate entities no longer apply and to ensure that loss grouping is not permitted among companies whose common ownership is determined by a significant Crown interest in them (i.e. State-owned enterprises, MOM companies, and companies in an equivalent position (currently Air New Zealand)); and

c. an additional paragraph in subsection 1A(2) of the Public Finance Act 1989 which provides that a purpose of the Public Finance Act is to regulate the ownership of companies named in Schedule 5.

13. Agree that the MOM Bill should provide that the constitution of a MOM company is not prevented from also providing for the consequences of a person exceeding the 10% limit (either to implement, or in addition to, the consequences set out in the MOM Bill).

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Hon Bill English
Minister of Finance

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Hon Tony Ryall
Minister for State Owned Enterprises

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