The Treasury

Release of Submissions:
Mixed Ownership Model Consultation with Māori

Release Document

March 2012

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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 the following section of the Official Information Act, as applicable:

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

Where information has been withheld, a numbered reference to the applicable section of the Official Information Act has been made, as listed above. For example, an [1] appearing where information has been withheld in a release document refers to section 9(2)(a).

In preparing this Information Release, the Treasury has considered the public interest considerations in section 9(1) of the Official Information Act.

Mixed Ownership Model Submission

Your name	**Miss Chris Webster**
Email address	[1]
Affiliation	**New Zealand citizen [Waikato & Australia].**

2 Submission
Summary of position:

There must not be:

- a partial privatisation of any power generating State Owned Enterprises (**SOEs**); or
- the passing of any new legislation for such a purpose; or
- an exclusion of section 9 from any such future & new legislation.
- no loss of Crown majority shareholding but that it is retained until such time as an acceptable alternative has been resolved between Maori citizens.

Section 9 gives paramountcy to the Treaty relationship in a key piece of New Zealand legislation. It symbolises the importance of the Crown – Māori Treaty partnership & the Crown's fiduciary duties to Māori.

Section 9 is much broader than specific rights protection & must be retained in any new legislation governing these SOEs currently ear-marked for privatisation.

Question 1: *What rights & interests if any do Māori have in MOM companies that are not protected by the section 27A-D memorials regime or by other legislation?*
This question is framed specifically at Māori identifying specific rights & interests in particular resources other than land. The purpose of section 9 is far broader than specific rights protection. Section 9 gives paramountcy to the Treaty relationship in a key piece of New Zealand legislation & symbolises the importance of the Crown – Māori Treaty partnership & the Crown's fiduciary duties to Māori. This is the purpose of section 9. The fact that it protects specific Treaty rights (for example over specific resources & assets) & has done so in the past is a natural incident of its primary purpose. Sections 27A-D give practical effect to some but not all of the obligations imposed by section 9. And it must be pointed out that these sections were additional following decisions from the Court of Appeal. In that regard the section 27A-D obligations can be viewed as a 'subset' of the wider obligations imposed by section 9. By framing question 1 in this way skews the debate away from the principles of the Treaty & Māori & the Crown's obligations to each other under the Treaty relationship to a focus on specific rights protection which unduly narrows the purpose of section 9 for the benefit of the Crown's position that the memorial regime (sections 27A-D) will provide adequate protection for Māori. The Treaty of Waitangi reaffirms the right of Māori communities to exercise tino rangatiratanga over their freshwater & geothermal resources. This includes rights & corresponding obligations to protect, preserve, control, regulate use & develop those resources. In addition Māori citizens have not willingly sold either their tino rangatiratanga or control over freshwater & geothermal resources. Māori citizens as individuals have not consented to the sale of the nominated SOEs. No meaningful discussion about how Māori rights & interests in the SOEs have been held & the MOM fails to provide adequate information as to how those interests should or are to recognised & protected.

Question 2: *How would any rights & interests identified in question 1 be protected by continued application of section 9 of the State-Owned Enterprises Act 1986?*

Section 9 of the SOE Act imposes specific obligations of good faith active protection & the provision of redress. Sections 27A-D specify how those obligations can be satisfied in relation to land only. They do not specify how those obligations are to be satisfied for any other function under the SOE Act. Those obligations are not entrenched.

The orthodox position at law is that international treaties (of which the Treaty is considered one) are unenforceable in the courts unless specifically incorporated into New Zealand law through an Act of Parliament. On that basis the principles of the Treaty are not enforceable in the courts unless they have been incorporated into relevant legislation.

Excluding section 9 of the SOE Act from the new legislation will remove the jurisdiction of the Courts to consider whether Crown conduct regarding the mixed ownership model & the SOEs in question is Treaty compliant. The Crown would no longer have a statutory duty to act in a manner consistent with the principles of the Treaty. In the absence of such a duty the Courts will have limited jurisdiction to interpret & review Crown conduct.

Therefore the rights & interests identified in question 1 will be protected by the retention of section 9 given its purpose & wide-reaching application to protect interests other than land.

Excluding from any new legislation governing the 51 per cent of state-owned assets limits or hinders the protection that section 9 of the SOE Act brings & is prejudicial to Māori. Prejudice is not a principle as defined by Court of Appeal.

At para [10]: 'The principles of the Treaty do not authorise unreasonable restrictions on the right of a duly elected government to follow its chosen policy. Indeed to try and shackle the government unreasonably would itself be inconsistent with those principles. The test of reasonableness is necessarily a broad one and necessarily has to be applied by the Court in the end in a realistic way. The parties owe each other cooperation.'

By not including a section 9 clause/section in the proposed legislation directly removes the legislative requirement for the Crown to act in a manner that is consistent with the principles of the Treaty of Waitangi in respect of that remaining shareholding & consequently reduces the prospects & the potential enforceability of any relief recommended by the Waitangi Tribunal or other courts in present or future cases. Further any suggestions that section 9 if retained would apply to private sector assets is misleading. Section 9 if retained would only apply to the Crown's shareholding which is not a private sector asset.

Question 3: *Could any rights & interests identified in question 1 be protected by an alternative more specific formulation of the Crown's obligations under the Treaty?*

Section 9 should be retained & included in any new legislation governing the partial sale of not only those the SOEs ear-marked for partial privatisation but remain in place for any future potential SOE sales. Section 9 is a current legal obligation that is enforceable in the Courts & is the strongest reference in New Zealand's statute books to the Crown's obligations in respect of the Treaty principles. It is unambiguous in terms of the legal status it gives to those principles as it renders unlawful any act of the Crown that is not consistent with those principles.

Any reformulation of section 9 by the Crown would risk limiting the Crown's responsibilities & oversight with respect to the SOEs to specific situations framed by the Crown.

In the event that the Crown attempts to reformulate section 9 in any new legislation in order to effectively protect Māori rights & interests any such alternative formulation of the Crown's obligations would need to recognise & provide for the following:

- It is not possible to articulate every incident that may require Māori input. Any reformulation that is example specific needs to be avoided. This is why section 9 was drafted as it was – to capture a broad range of circumstances that could not be predicted at the time it was drafted. In other

words it is not entrenched.

- All available land or interests in land which are used or have been used for or in connection with the generation or transmission of hydro-electricity or geothermal electricity & are memorialised under section 27B of the SOE Act 1986 should be returned in full to Māori citizens & their communities. And not to a collective body such as the Iwi leaders forum, or any national collective that assumes to speak for Maori, or any other Maori organisation that professes or purports to represent 'its people', & in particular no transfer of assets should occur unless the mandate has been confirmed from no less than 75 per cent from ALL registered members of the collective.

- Māori also require compensation for past use of freshwater & geothermal resources compensation for loss or rights or the ability to profit from economic use of those freshwater & geothermal resources (for example power production) & payment for future use of the proprietary interest in those freshwater & geothermal resources.

- Amendments need to be made to the Resource Management Act 1991 & any other relevant legislation required to provide for future Māori rangatiratanga & control over freshwater & geothermal resources.

Additional comments: *Please insert any other comments you wish to make on this consultation document.*

The partial sale of the power generating SOEs will:

- make the prospect of securing section 27B resumption of any of the assets of the power generating companies highly unlikely;
- create further barriers for Māori resulting in Māori continuing to have no or no adequate redress for their freshwater & geothermal claims; &
- the sales will significantly reduce the pool of assets & range of potential remedies practically available to the claimants will be reduced.

Power generating SOEs should be retained in 100% Crown ownership & should not be sold/privatised until such time as Māori claims are resolved or Māori otherwise agree & are satisfied with the protections offered by the Crown.

The consultation paper for Maori contains no reference to Government ministers' widely touted pre-election expectation that between 85 & 90 per cent of the shares sold will be in NZ ownership.

There is cynicism of the ownership expectations which appear in a vacuous statement about a 'test' requiring that NZers will be 'at the front of the queue for shareholdings & that the government is confident of widespread & substantial NZ share ownership'.

Government is to retain a 51 per cent majority share. The investment bankers managing the sale (at huge costs to NZ taxpayers) will offer shares directly to investors (PostBank KiwiSaver & other secured managed funds (perhaps the Super Fund during the 'book build process. This is a pre-auction vetting to determine what prices all investors will pay.

No discussions occur in the Maori document about 'what if' demand exceeds the supply of shares available. Will the government 'scale' allocations to interested investors & if so how & to whom & what is the as yet unknown median price? There will be a big-brother analysis of the groups of investors & will be they scaled down by the size of their purse & if so by how much. The oft-stated claim of 'widespread & substantial NZ share ownership' is anyone's guess. For the government o use such a ploy does this mean 55-65%; or 750-85% or 90%. Only the government knows.

See this question can only be determined once the bids come in. The government needs $33 billion to spend in the next 5 years. Last November government's accounts valued those SOEs ear-marked for sale at $14billion. Earlier this year PM Key said the government needed $7-5-8 billion. Now this month Finance minister English is saying his NZ$6billion is a 'guess-ti-mate'. So what is the figure?

Government objectives include 'optimizing the value for the Crown of MOM companies & freeing up capital for other uses. Treasury states 'significant participation by foreign investors will be essential to achieving Governments overall objectives.'

So does that mean foreign investors will get a larger share of the pie than NZ Maori & 'Moms & Dads?' If so will the price be jacked up due to competition? How then is the desired 85-90 per cent NZ ownership argument stack up? After all the crown will be looking for a larger ROS given the prices it is paying to law firms to broker these deals.

What is absent in the consultation paper for Maori makes no statement at all about any specific limit being placed on foreign investment in MOM companies. It also says nothing about limiting share buyers – domestic or foreign - as to the number of MOM energy companies in which they can hold shares.

The paper also contains a major contradiction about the cap on individual shareholdings. Early in the piece it says the Crown will bind itself to hold 51% of the shares in MOM companies & 'no other investor will be able to hold more than 10 per cent of the shares with voting rights in each company.'

That statement is contradicted a few pages later. Under an innocuous heading (page 8para b): 'Placing the companies under new legislation' – it says 'trustee corporations or nominee companies that hold shares on behalf of other persons may be exempt from the 10 per cent limit'.

Now why is that?

Further in the consultation document for Maori & under the terms outlined in it one could argue that a single trustee corporation or nominee company could acquire a very powerful position by investing in all MOM companies in the strategically important energy sector. Danger stranger? Or confident cocky?

And that the Crown 'will not reserve any special rights to itself except that it is still to decide whether it will have any special power to approve the chair of the board as it has for Air NZ.'

But remember the Crown has no special powers beyond those of a 51 per cent shareholder in an ordinary listed company then the question must be asked. It says so. It also says that new legislation will confirm the 51 per cent shareholding. What then its ability to ensure its Treaty obligations and any wider community social & economic obligations are met?

Section 9 must be retained in the current SOE Act 1986. Section 9 and Sections 27A-D must also be inserted into all proposed legislation relating to the sale of any state-owned asset.

Submissions: e: [1]

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DEADLINE: **Wed 22 Feb 2012 @ 17:00. No l**ate submissions considered.