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

[2] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials

[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

[5] 9(2)(i) - to enable the Crown to carry out commercial activities without disadvantage or prejudice

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

ANNEX 1: MIXED OWNERSHIP CONSULTATION WITH MAORI

Summary of submissions and analysis of issues

Topic	Issues Raised in Submissions	Analysis of Issues Raised
1. Application of section 9 of SOE Act to Part 5A of the PFA	**Section 9 should continue to apply** • Most submissions support retaining section 9 in the SOE Act to ensure the Crown's legal obligations remain in relation to SOEs. • Most submissions support replicating section 9 in the new legislation (Part 5A of the PFA) on the basis put forward that it: o Is the appropriate mechanism to recognise the overarching Treaty relationship between iwi and the Crown; o Ensures the Crown's legal obligations to iwi remain in relation to the Crown's share of the MOMs; o Ensures the Crown continues to uphold Treaty obligations for the benefit of iwi and all New Zealanders; o Ensures the Crown does not act contrary to the spirit or intent of its undertakings to Maori; o Has wider application than sections 27A-27D (e.g. the duty to consult); o Imposes an overarching responsibility as opposed to a specific duty; o Is symbolic of the importance of the Treaty partnership between Maori and the Crown and the Crown's fiduciary duties to Maori; o Provides clarity – as under international law, the principles of the Treaty are not enforceable in the Courts unless specifically incorporated in legislation; o Retains the prospect and potential enforceability of any relief recommended by the Waitangi Tribunal; o Would provide, if excluded, an indication to the Courts that the principles of the Treaty do not apply to the implementation and continued operation of the MOM, likely removing this jurisdiction of courts; o Is a strong reference to the Crown's obligations in respect of the Treaty principles; o Is unambiguous in terms of the legal status it gives to Treaty principles; o Protects and retains Maori rights and interests by enabling companies to operate within a legislative environment based on NZ constitutional values and sovereignty; o Provides certainty of the Crown's obligations as a result of previous	**Continued application of section 9** Section 9 of the SOE Act provides that nothing in the SOE Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi. Removing section 9 from the SOE Act has never been proposed. On the basis of views expressed at the hui, this has been widely misunderstood. Section 9 will be retained in the SOE Act. It will be important to reinforce this message in communications. We recommend replicating section 9 in Part 5A of the PFA, for the reasons set out below. Generally, the submissions arguing for replication of section 9 in the relevant part of the PFA reflect views about: • 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; and • The overarching nature of the requirements section 9 places on the Crown. 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 significant new case law. Continuing the application of section 9 in the relevant part of the PFA will maintain the current status of the Treaty principles at law, to the extent possible in the context of the MOM. This will provide greater certainty for the MOM

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	litigation; ○ Future-proofs Treaty obligations if the Government were to ever sell more of the SOEs and become a minority shareholder; ○ Unlikely that section 9 would deter investment in SOE sales; and ○ Protects iwi's specific interests in the SOEs themselves including employment and environmental interests and business relationships. • One submitter argues that the purpose of section 9 is to provide a mechanism for asset sales to proceed with protective arrangements in place, including through court intervention if necessary. **Section 9 should not be reformulated** • Some submissions do not support a reformulation of section 9 or a new 'more specific treaty clause'. The rationale suggested is: ○ The benefits outlined above of section 9; ○ The risk that any new clause will impose less onerous obligations on the Crown; ○ The new clause would be subject to new consideration of the courts and therefore there is uncertainty of the interpretation and effect; and ○ The risk that cultural and Treaty rights cannot be protected. **Section 9 should be reformulated** • Some submissions support change to section 9 to further entrench the Treaty of Waitangi. Some submissions suggest including in section 9 an acknowledgement that Aotearoa is Maori land, with rights and duties over all activities around Maori land held in Trust by the Crown. Other submissions argue that the Treaty should be (in the interim) elevated and entrenched so that it has the same legal status as the NZ Bill Of Rights Act, and so that it applies to all public decisions. • Some submissions noted that if a reformulation of section 9 were to occur, it must recognise and provide for: ○ A wide range of scenarios that require Maori input, by **avoiding specificity**; ○ All land related to the generation or transmission of hydro-electricity or geothermal electricity that is memorialised under section 27B to be returned to Maori; ○ Compensation to Maori for past and future use of freshwater and	programme to proceed. 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. That said some of the submissions overstate the effect at law of section 9. For example, submissions that indicate section 9 ensures that the Crown continues to uphold Treaty obligations appear to suggest a requirement to take positive action. In that regard, the courts have held that the purpose of section 9 is not a lever which can be used to compel the Crown to take positive action to fulfil its obligations under the Treaty. **Reformulation of section 9** The submissions that section 9 should **not** be reformulated re-emphasise the points noted above. In addition, the submissions reflect that if a section 9 type clause is included in the MOM legislation, the least uncertainty will come from any restatement of section 9 that most closely reflects the current section 9. However, the MOM involves a different relationship between the Crown and the relevant companies, as well as the introduction of private and corporate shareholders, which changes the context for section 9. As a result, any restatement of section 9 needs to reflect the context of the MOM, not the SOE model. In particular, it needs to be very clear that the section applies only to the Crown. The submissions that section 9 should be reformulated to further entrench the Treaty of Waitangi and enhance the rights of Maori in relation to land, freshwater and geothermal resources go well beyond existing rights, and the intended scope of the MOM. Such matters are being considered in separate processes such as the Constitutional Review Panel, direct engagement between the Crown and iwi/Maori including through the Land and Water Forum and individual Treaty settlement negotiations. In our view, the MOM Policy does not prejudice these on-going processes. **Broadened application of section 9** Section 9 refers to the Crown, the SOE Act and the principles of the Treaty. Section 9 does not refer to the SOEs or any third party. The submissions that a

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	geothermal resources and compensation for the loss of rights or ability to profit from such resources; o Amendments to the RMA and other relevant legislation to provide for future Maori rangatiratanga and control over freshwater and geothermal resources. **Application of section 9** • Some submitters argue that the continued application of section 9 should **only apply to the Crown's shareholding**. • A number of submitters propose section 9 should **apply to all shareholders** and must relate to the Crown obligations and individual or collective stakeholder obligations. One proposed method was to include in deeds or constitutions: "the (name of enterprise) must not prevent the Crown from acting in a manner that is inconsistent with the principles of the Treaty of Waitangi". Rationale provided for the application of section 9 to the MOM companies: o Section 9 is weaker because it would only apply to a 51% shareholding rather than 100% and therefore needs strengthening in other ways; o It is the private interests that are problematic; and o The MOM companies operate infrastructure that was developed and is operated in the national interest. **Other section 9 issues** • Other submissions argue for specific negotiations that relate to section 9, such as its protection should not be removed for the MOM companies unless an acceptable compromise is negotiated (for example with the New Zealand Maori Council). • Other submissions argue that the question is not about whether or not to keep section 9 but rather, how you give effect to section 9. This implies that simply taking the words of section 9 into new legislation will not provide effective protection of Maori rights. • Some submissions see the "removal of section 9" as "part of a wider debate that we are currently pursuing before the Tribunal relating to our constitutional aspirations for the status of Te Tiriti of Waitangi".	section 9 type clause in the MOM legislation should apply to other shareholders and the MOM companies suggest an expansion beyond the application of the current section 9. Some submitters argue this is to compensate for the reduction in Crown shareholding from 100% to 51%. Section 9 currently applies to the Crown, and only applies if and when the Crown acts under the auspices of the SOE Act. In this regard, extending obligations in relation to the Treaty to the MOM companies and private and corporate shareholders would not reflect the constitutional status of the Treaty as between the Crown and iwi rather than between individuals or firms and Maori. **Suggestion of including a specific Treaty provision in MOM company constitution** This has been proposed on the grounds that while section 9 does not apply to the companies but only to Ministers, Ministers can currently direct the companies as to the content of their statements of corporate intent (SCI). The suggestion is that Ministers could make, and should have made, the companies act in a manner that is not inconsistent with the principles of the Treaty. The proposal is to replicate this through the addition of a Treaty provision to the company constitutions. The SOE Act (sections 13 and 14) enables Ministers to give directions in respect of the following elements of an SCI: (a) The objectives of the group; (b) The nature and scope of the activities to be undertaken; (c) the ratio of consolidated shareholders' funds to total assets, and definitions of those terms; (d) The accounting policies; (e) The performance targets and other measures by which the performance of the group may be judged in relation to its objectives; (f) A statement of the principles adopted in determining the annual dividend together with an estimate of the amount or proportion of annual tax paid earnings (from both capital and revenue sources) that is intended to be distributed to the Crown; (g) The kind of information to be provided to the shareholding Ministers by the State enterprise during the course of those financial years, including the information to be included in each half-yearly report; and

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	• Other submitters argue that neither section 9 nor any new section can be used to protect a Treaty proprietary interest. Some suggest removing the four SOE's from the SOE Act is a transgression of the Treaty and in doing so infringes section 9 by its very definition. Therefore, submitters argued that the continuation of the MOM policy would be illegal. • Some submitters argue that section 9 should be incorporated into all New Zealand legislation.	(h) The procedures to be followed before any member of the group subscribes for purchases, or otherwise acquires shares in any company or other organisation. Section 13 also enables Ministers to give directions in respect of the amount of dividend. In doing so Ministers are required to have regard to part 1 of the Act, which includes section 9. Only (a), (b) and possibly (e) appear to be capable of being influenced by section 9. It is not clear how Ministers could be influenced by section 9 in any practical way. There does not appear to be any scope here to direct SOEs as to **how** to undertake their activities, only what broad activities they should or should not undertake. If this is correct, then it could be concluded that conversion of SOEs to MOMs that do not have a Treaty clause in their constitutions will not materially reduce the rights and interests of Maori compared with the status quo. If this is not correct and it is concluded that (a), (b) and possibly (e) could be influenced by section 9, then there is a question as to why Ministers have been reluctant to use their powers of direction and have only done so rarely, and whether it is realistic for them to do so in the manner suggested. The reasons why Ministers have only rarely used their powers of direction appear to be three-fold: • A direction may be difficult to reconcile with the principal objective of an SOE which is to operate as a successful business, which includes being as profitable and efficient as comparable businesses that are not owned by the Crown. • A direction could expose Ministers to the risk of being deemed to be directors of the company, and expose them to directors' liabilities. • A direction could put directors into a difficult position if they don't agree with the direction, and could cause them to resign. Additionally, to our knowledge, Maori have never sought to enforce use of Ministers' powers in this way.

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		These would appear to be fairly strong reasons, which imply that the suggestion that section 9 could have influenced the companies via ministerial directions is more theoretical than realistic. The suggestion that the absence of a Treaty provision in company constitutions would reduce the current rights and interests of Maori therefore appears to have little basis in a practical sense. A Treaty provision in company constitutions would in practice greatly extend Maori rights and interests. It appears, therefore, that it can be concluded that under any interpretation, • The absence of a Treaty clause in company constitutions would not reduce the current rights and interests of Maori, but • Including a Treaty clause is very likely to put requirements on the companies that their competitors would not have, and at the very least would create a great deal of uncertainty as to what impact it would have in practice. **Other section 9 matters** The submissions suggesting that removal of the MOM companies from the SOE Act is itself a breach of section 9 do not recognise that passage of legislation is not within the scope of section 9 (it is actions under statute that are covered not the making of statute). In addition, the courts have found that the Treaty does **not** authorise unreasonable restrictions on the right of a duly elected Government to follow its chosen policy and that to try to shackle the Government unreasonably would itself be contrary to Treaty principles.
2. Application of sections 27A-27D of SOE Act in Part 5A of the PFA	• Where submissions address sections 27A-27D, they in general note that the sections should continue to apply in existing and new legislation as it protects specific Maori interests in land transferred by the Crown to SOEs. • A number of submissions do not consider sections 27 A-27D as sufficient mechanisms without the inclusion of Section 9; therefore sections 27A-27D of the SOE Act are not viable as an alternative to section 9 and/or as a guarantee of the obligation on the Crown to consult if the Crown proposes to sell further shares in any MOM. • A number of submissions propose that the MOM makes the prospect of activating memorials much less realistic. That is, they suggest the partial sale	The submissions supporting the retention of sections 27A-27D reflect the Government's views that these should be retained. The submissions that the MOM will make the prospect of activating sections 27A-27D memorials much less realistic do not reflect judicial comment in the *1999 "Landcorp" case (Te Heu Heu v Attorney General)* that in all but the rarest cases, sections 27A-27D were sufficient. In addition, section 27A(1) expressly contemplates third parties owning land which is the subject of memorials.

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	of the power generating SOEs will make the prospect of securing section 27B resumption of any of the assets of the power generating companies unlikely. Some submissions argued that this will mean that Maori will have little or no adequate redress for their freshwater, geothermal and other Treaty settlement claims. • Other submissions argue that sections 27 A-27D are inadequate because they: o Do not provide practical and suitable remedies for redress as they only attach to land and have only been progressed substantially in one case; o Have no applicability to water and/or interests in the use or management of water; and o Are not effective because the Crown does not allow memorialised land to be the subject of settlements without the SOEs' consent.	
3. Water, geothermal resources and minerals	• A large body of submissions assert the Treaty of Waitangi reaffirms the right of Maori communities to exercise their tino rangatiratanga and kaitiakitanga obligations over particular resources, including their freshwater and geothermal resources. Some of these rights and obligations are to protect, control, regulate, use and develop those resources. The Crown has a corresponding duty of active protection, to ensure Maori can use their lands and waters to the fullest extent possible. • Many submissions claim Maori have sole right to exclusive possession and ownership over water and its attributes within their rohe, based on Article 2 of the Treaty. • Some submissions claim the right to grant consents equates to the Crown asserting sole ownership rights to own and manage water. As some submitters believe that the right to take and use water cannot be separated out from the ownership of the water, they believe MOM amounts to an effective transfer of these rights from the Crown to private investors who purchase shares. • One submission suggested the right of Maori to the development of their natural resources may pit them as competitors of MOM generators, which raises issues about how finite resources should be allocated.	Three broad themes run through the submissions on water and geothermal resources: 1. A claim that Maori have ownership rights and kaitiakitanga obligations to water that will be compromised by partial privatisation of generator SOEs. 2. A view that water (and geothermal and other natural resources) and Maori rights and interests in those resources cannot be separated from partial privatisation of generator companies in particular, because of the integral nature of water and geothermal energy to their operations; and that MOM should not proceed until all Maori rights and interests in water and other natural resources have been resolved. 3. Maori are also concerned about the way the RMA (and SOEs) operate in practice, and in particular with regard to water quality and other environmental impacts. **Ownership of water** New Zealand law does not generally recognise ownership of water because water is, under common law, publici juris and not subject to ownership (although this does not prevent claims being made to ownership, proprietary rights or customary rights in fresh water). The right to use water, however, is vested in the Crown, which must balance the obligation to protect Maori rights with the right and duty under Article 1 to manage water on behalf of all New Zealanders. Most management responsibilities are passed to local government through the RMA, which also makes some provision for Maori interests in the management of

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	• Several submissions were concerned iwi rights and obligations might be adversely impacted by the MOM policy because of a view that, amongst other things: o Privately held companies may have a lower duty of care to the environment; o MOM companies may have an incentive to pressure Government for greater water security since much of the value to prospective investors is derived from their right to use water; o MOM companies may have fewer incentives to engage with local iwi on their interests; o While iwi were comfortable with water being used for national and public purposes, they were uncomfortable with private investors profiting from their taonga; o MOM will reduce negotiating power of iwi in subsequent Treaty settlements; and o MOM may constrain redress options for settlements involving water. • Some submissions considered that the clarification of Maori rights and interests in water can proceed separately from the MOM process. These submissions are generally supportive of current work-streams particularly concerning water (for example, the Iwi Chairs Forum and the Land and Water Forum). • A large number of submissions, however, state that the MOM should not proceed until water and geothermal issues (including the right to compensation for past water or geothermal use) are properly addressed by the Crown by either judicial determination or agreement with the Crown. Most submissions note the preference is to continue direct dialogue with the Crown regarding water rights, however, if necessary organisations will consider further action to preserve and protect respective rights. • A number of submissions supported the New Zealand Maori Council (on behalf of all Maori) claim in respect of water where its claim to the Tribunal seeks the practical return of substantial commercial rights in water (and geothermal energy) whether by: o Resumption of memorialised property; or o Provision of a shareholding in power-generating SOEs.	water and other natural resources. Authorising the use of water under the RMA neither confers ownership of the water, nor creates a permanent right to use that water. Crown negotiators have also been consistent in communicating to claimants that historical Treaty settlements cannot provide for ownership of water or geothermal energy. The Government recognises, however, the profound importance of water and other natural resources to Maori; and that the RMA does not cover all Maori rights and interests. Further, it understands the value of resource consents is becoming clearer as New Zealand approaches water limits and that this is sharpening concerns about control and allocation of water rights. Currently there are two main avenues to clarify Maori rights and interests in water: • National policy processes such as the Fresh Start for Fresh Water programme where the Crown is directly engaging with the Freshwater Iwi Leaders Group on iwi rights and interests in water; and where iwi are also involved in wider water policy development through the Land and Water Forum (there will also be wider consultation with Maori before final policy decisions are taken). The Minister for the Environment is looking at options for stepping up engagement with the Freshwater Iwi Leaders Group. • Historical Treaty settlements with individual iwi and hapu, such as the Waikato River settlement (such settlements deal with water management issues rather than Article 2 or common law rights, generally within existing regulatory frameworks). Maori also have the option of going to the Waitangi Tribunal or other courts, and the NZ Maori Council and some iwi have chosen to do so. The majority of iwi with substantial water interests have, however, supported the current policy processes (while reserving the option to resort to the courts if unsatisfied with such engagements). **Separation of water and MOM** SOEs that use fresh water (or geothermal resources) to generate electricity do not own water but rather the resource consents or water permits that allow them to take, dam, divert or use that water under the RMA. This is exactly the same as for private generator companies or other water users such as irrigators. Resource consents are time-limited and do not grant a proprietary right in water. Selling a non-controlling interest in SOEs does not change the terms of those consents, nor

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	• A number of submissions state the Resource Management Act 1991 and any other relevant legislation is ineffectual for the administration of resources and should be amended to provide for future Maori rangatiratanga and control over freshwater and geothermal resources. • A number of submissions raise concerns about the risks to water quality from fracking and other oil and gas exploration techniques and urge the Government to retain section 9 so that particular iwi interests in water are heard. • Some submissions propose legislative wording to protect water and other resources rights and interests for Maori in the MOM process, for example, "Any physical asset (including any right, permission or entitlement to utilise a physical asset or resource) held by the MOM company at the date of commencement of the new legislation must be transferred to the Crown if required by the Crown in order to redress past breaches of the Treaty or recognise rights or interests guaranteed by the Treaty." • Some submissions note that the Crown has previously recognised the interests in resources used by particular power generating SOEs and request that these interests must be acknowledged, recognised and not prejudiced by the Government in the formulation of the MOM policy. • Other submissions ask the Crown to confirm no rights will be given to MOM relating to their use of natural resources other than through the existing resource consent regime.	will it change the process to be followed if companies apply to renew their consents. If the processes above result in changes to the regulatory frameworks governing water or geothermal resources, then MOM companies will need to operate within the new frameworks in the same way as any other resource user. In this way the ownership make-up of the generator companies has little impact on their current or future rights to take or use water, and creates no additional pressure when consents expire for new consents to be granted. For the same reason, MOM will not impact on processes to resolve Maori rights and interests in water (or geothermal resources). With regard to incentives to engage with local iwi on their interests, all generator SOEs currently have relationships with local communities where they have major assets, including with iwi. These relationships range from the informal to formal arrangements such as protocols and relationship agreements, through to joint ventures. Incentives to continue such relationships will be at least as strong under MOM as under the SOE model, if only because resource consent applications and renewals are generally publicly notified or to access land where the resources are located. The Government has already given assurances in the MOM discussion document and in a letter to the Waitangi Tribunal that processes to clarify Maori rights and interests will not be impacted by the MOM process. If further assurances are needed by Maori, it is unclear why amending the legislation would be the best way of making those assurances. If at the end of the Fresh Start for Fresh Water process Maori think there are outstanding issues that have not been dealt with, the process does not foreclose pursuing other options.
4.Treaty settlement issues or implications	**Impact of MOM on Treaty Settlements** • Many submissions suggested that MOM policy could be deemed as a betrayal of the Treaty and the spirit of partnership and that the Crown's actions are in breach of the Treaty and section 9 of the SOE Act. • A number of submissions note a concern that MOM policy might impact past and/or future Treaty settlements, including some currently under negotiation; and that asset sales will reduce the negotiating positions of iwi, and reduce the pool of assets and the range of potential remedies available	**Claim that partial privatisation reduces options for Crown redress** One submission suggests a clause in the MOM legislation to facilitate redress that would read: "Nothing in the new legislation is to be interpreted as in any way prejudicing or diminishing the ability of the Crown to provide redress for past breaches of the Treaty or to effectively recognise extant rights and interests guaranteed by the Treaty;" The main concern with such a clause would be its potentially far-reaching effect.

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	to claimants. • Some submissions suggest the MOM process could justify a future claim of misappropriation as MOM essentially transforms these SOEs into private property – outside the Tribunal's jurisdiction for which compensation will become an issue (with consequent financial implications for the Crown). • Some submissions seek additional clauses in legislation to protect their Treaty settlement rights and provide for option of having Crown land returned to iwi or to receive shares in MOM companies. Examples include: o "Nothing in the new legislation is to be interpreted as in any way prejudicing or diminishing the ability of the Crown to provide redress for past breaches of the Treaty or to effectively recognise extant rights and interests guaranteed by the Treaty." o "Nothing in the new legislation is to be interpreted as preventing the Crown from transferring any portion of its shares in a MOM company to iwi in order to provide redress for past breaches of the Treaty or to recognize rights and interests guaranteed by the Treaty." • A number of submissions also proposed that further discussion is needed around how to best recognise and protect Maori rights and interests that may be affected by MOM. **Treaty resolution surrounding water and geothermal resources** • A number of submissions suggest that the Crown's settlement policy on water and geothermal energy (and the proposed MOM sales which it is suggested would pre-empt these decisions by allocating rights to companies) prejudices: o Claimants who are yet to reach a Treaty settlement; and o Maori who have settled under existing policy and accordingly received inadequate redress. • A number of submissions state that there should be no sale of shares in the energy companies without first hearing the New Zealand Maori Council's claim that Maori have certain interests in water regimes used for the generation of power. • A number of submissions represent that there should be compensation for	It is unclear what its impact might be on either the company or the Crown. The Crown has to set limits on what and how much redress is available to settle historical claims. Redress must be fair, affordable and practicable in today's circumstances, bearing in mind settlements already reached, other matters for which the Government must provide, and existing legal frameworks. Such a clause appears unnecessary with regard to land. Generally inclusion of sections 27 A-D in the legislation governing MOM companies will maintain the status quo and will not prejudice the Crown's ability to provide existing forms of property redress in historical Treaty settlements. One submission also proposes a legislated provision that would require companies to transfer to the Crown (at market prices) any physical asset as well as rights, permissions and entitlements to use physical assets or resources if they are required by the Crown for redress. It is not clear what "required" means in this context – only if the Waitangi Tribunal makes a recommendation, or also if the Crown merely desires it? Either way, this would appear to go beyond the current law. As in the former case it would effectively extend sections 27A-27D type actions to water, and in the latter case assets could be taken from MOM companies even if there is no Waitangi Tribunal recommendation. It would also create a great deal of uncertainty as to the MOM companies' ability to conduct their core business. **Claim that unsettled claimant groups will be disadvantaged** All iwi, to a greater or lesser degree, will have different commercial opportunities depending amongst other things upon the timing of their settlement. In some cases this has prompted the Crown to provide financial redress on-account of comprehensive settlement to enable claimant groups to capitalise on immediate commercial opportunities. The Crown has also recognised in relation to property-based redress that claimant groups should not be disadvantaged by their relative progress through negotiations - landbanking of surplus Crown property is for example intended to remove potential prejudice to the interests of unsettled iwi. From a technical perspective there may be nothing preventing the Crown using a similar model in relation to a different class of assets, in this case shares in the MOM companies. This is not Government policy and would require work. To date Ministers have indicated that in principle there is no reason why the Crown could not stand in the market and acquire shares for the purpose of a Treaty

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	past and future use of water and geothermal resources. These submissions also argue that available land or interests in land which are used or have been used in the generation or transmission of hydro- or geothermal electricity and are memorialised under s 27B should be returned to Maori.	settlement, if this were determined to be appropriate. To provide for this in the MOM legislation seems unnecessary. **Deficiencies in current Treaty settlement policy in relation to water and geothermal resources** Historical Treaty settlements to date have acknowledged the profound relationships of Maori with natural resources and the lasting sense of grievance caused by alienation from and an inability to develop or utilise these resources. The Crown has also recognised grievances associated with environmental degradation and sought to enhance Maori participation in the management of natural resources to the maximum extent compatible with regulatory frameworks. Water and geothermal energy are not, however, provided as redress because they are not considered property under common law. For this reason where settlements have resulted in transfer of the ownership of lake or river beds to iwi, the Crown has retained rights over the water column itself. In some cases however (including the Waikato River settlement and the Ngati Whare and Ngati Manawa settlements in relation to the Rangitaiki River), co-management arrangements have been accompanied by provisions expressly acknowledging the parties have different conceptions of the ownership of the relevant resource, and that the parties have not sought to resolve these differences in the context of the historical Treaty settlement. All settlements to date also include general "rights unaffected" clauses. These clauses have taken various forms but essentially state that settlements do not extinguish or prevent future claims based on assertions of aboriginal title or customary rights. They are qualified by a statement to the effect that this does not constitute or imply any acknowledgement or acceptance by the Crown that such title or rights exist either generally or in any particular case. The Crown also preserves its right to contest the existence of such rights. These clauses provide for full and final settlement of historical claims, while leaving other extant rights and interests claimants may possess unaffected. These potential extant rights or interests could form the basis of contemporary claims, including claims to water or geothermal energy. For these reasons non-provision of proprietary rights and interests in water and geothermal energy through historical Treaty settlements has not and will not prejudice claimant groups,

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		however. The Government considers further deliberation on the assertion of customary rights in water and geothermal energy is better suited to a broader programme of work such as the Fresh Start for Fresh Water processes (see above).

5. Maori participation in MOM	**Maori priority to participate**
	• Where submissions address Maori participation in the MOM share float, most of those submissions propose that the Crown has obligations in respect of Maori participation including:
	  ○ Maori should be allocated a portion of the 49%, with many submissions supporting the New Zealand Maori Council position that 20% of the 49% should be allocated to Maori (citing the fisheries settlement as a precedent);
	  ○ Maori should be provided with preferential access to the 49% (for example, a First Right of Refusal), with one submission noting that the *Whalewatch* case has set a precedent for preferential access;
	  ○ Maori should become co-owners with the Crown of the Crown's 51%, with most submissions suggesting a 50/50 ratio;
	  ○ Treaty settlement claimants should be granted shares as part of their settlements.
	
	• Some submissions suggest that providing Maori priority participation in the power generating SOEs is the best proxy for return to Maori of commercial and economic interests in water.
	
	Other issues with Maori participation
	• Other submissions express concern that the option of a return of shares to Maori is likely to be diminished by privatisation.
	
	• Other submissions propose that there should be a combined iwi purchase of assets.
	
	• Some submissions claim that Maori participation in the MOM would encourage power generating companies to operate to higher standards of care (for example, in relation to the environment).
	
	• One submission suggests that it would not be ethical for one iwi to take
		Overall comment
		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 the Government during each IPO. Therefore opportunities for Maori participation in the floats are in no way curtailed or foreclosed by passage of the legislation.
		
		Preferential access to shares
		Two main arguments are advanced to support claims that the Crown has an obligation to provide some form of preference to Maori in the allocation of shares:
		
		• The New Zealand Maori Council argues that preferential access, in this case a 20% allocation of shares, would be, by negotiation, an appropriate proxy for Maori proprietary rights to water and geothermal resources. However, the Crown does not accept that these rights have been established. Nor does it accept that if they were established a share in the MOM companies would be critical to providing compensation. Further, even if it were, the Crown could repurchase the necessary share on the open market.
		• *Whalewatch Case*. We do not think that the Whalewatch case means that the Crown has an obligation to provide Maori with preferential access to shares as this dealt with access to taonga. The Treaty right does not extend to assets relating to, or the activity of, power generation and it would logically follow not to a shareholding that reflects that activity. The Court of Appeal, which expressed this view, also said that such limitation of Treaty rights does not preclude Maori making direct claim to rights in water. And as discussed extensively in this analysis, issues of access to water are not driven by, or affected by, mixed ownership, and are being dealt with through other processes.
		
		Process design

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	ownership of another iwi's water by virtue of investing in a MOM in another iwi's rohe. • Submissions express that the consultation process was not sufficient to effectively cover the issue of Maori participation as investors (including the strategic value to the Government and the long term benefits for the nation) and propose to continue discussions with the Crown in relation to a preferential right to purchase shares. Some submissions suggest a joint working group be formed to analyse Maori participation. • A number of submissions expressed concern about the inequality between those who have settled their Treaty claims and those who have not. The argument was that not having the access to capital initially will be prejudicial because of the likely increase in the value of those shares. • Many submissions express the need for further dialogue with the Crown on the issue of Maori participation in MOM. **Maori representation on MOM Boards** • Some submissions seek for provision for certain percentages of directors on MOM boards to be appointed by agreement between the Crown and Maori as Treaty partners. Some submitters argue this is for the protection of their land and interests.	As acknowledged by Ministers, the standard IPO process may not cater for collective Maori organisations such as iwi incorporations or Maori land trusts which are neither retail investors nor financial market institutions. This issue has been identified and is being addressed as part of the work programme through discussions with iwi and the Crown's commercial advisors. This will help to ensure that the IPO process identifies iwi demand and gives the Government the flexibility to make allocation decisions that respond to this demand, in the context of overall demand. This outcome could be facilitated if iwi themselves act on the suggestion that they organise themselves to purchase shares on a combined basis. **Shares in Treaty settlements** If the Crown were to decide to use shares in Treaty settlements, there would be restrictions on how much the Crown could purchase as the majority shareholder. Under the "creep" provisions of the takeovers code, the Crown would be able to increase its shareholding by up to 5% of total shares in any one year. If it needed to increase its shareholding by more than this, it would be required to make a partial takeover offer or seek the agreement of minority shareholders. **Maori representation on MOM Boards** We are of the view that if the Crown is perceived to exercise inappropriate (that is, non-commercial) influence over the companies in the area of board appointments it will undermine markets' confidence in the respective MOM company's ability to act without undue influence (in this issue and in other decisions), notwithstanding whether the appointee is a strong candidate. An alternative to Crown/Maori board appointees would be for iwi to directly engage with the boards of the MOM companies, noting the benefits to companies of the relationships and insights that suitably qualified iwi board members would bring to the respective companies.
6.Consultation process	**Overall** • Many submitters suggest that the MOM consultation process is problematic: structurally, culturally and spiritually. • A number of submissions claim the process is unfair, or is breach of Treaty as the consultation process undertaken by the Crown does not meet obligations inherent in section 9 of the SOE Act and the process to determine the MOM	**The consultation approach** The Government consulted with Maori to ensure that, before it makes final decisions on legislation concerning the MOM, and specifically on options for section 9, it fully understood Maori views on how Maori rights and interests under the Treaty of Waitangi would be impacted by those proposals. Formal consultation for this process included: 1. Announcing its intention to consult with Maori in mid-December 2011;

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	must involve an agreement with iwi consistent with the principles of the Treaty of Waitangi. **Timing and Process** • The concerns of submitters regarding the consultation process include: o Too limited a timeframe to grapple with substantive issues and to consult with whanau and hapu; o It did not provide sufficient information to permit informed decision making by Maori, including the ability to scrutinize the proposed form of new legislation; o The scope of consultation is too narrow; o More discussion was required around broader issues (i.e. preferential option regime for Maori); o The questions in the template are not broad enough to capture wider issues such as water rights; o The limitation of the hui locations only to certain regions was unacceptable; o In some hui, the venues were not large enough; o A number of hui have not been advertised effectively; o Expectation of direct engagement and dialogue because: - The Crown has engaged directly in the past; - For some, there is direct impact on particular iwi where rights/ interests in resources used by the SOEs cannot be prejudiced; and - To discuss the opportunity to invest in the MOM. • Other submissions argue that: o Claims currently under investigation should be settled before further consultation. o Consultation should not be about the issue of keeping Section 9 but how to give effect to section 9. o The process is unlikely to meet the standards for consultation set out in the UN Declaration on the Rights of Indigenous Peoples. o The consultation process concluded just 2 days after the final hui, preventing meaningful discussion amongst the New Zealand population regarding MOM. o Introduction of legislation should be deferred to give Waitangi Tribunal the ability to consider if the Government proposals are Treaty compliant.	2. Distributing a consultation document on 1 February 2012 that framed the consultation process and outlined the Crown's proposed changes to legislation; 3. Providing for verbal feedback on the consultation issues through a series of 10 consultation hui from 8 February to 20 February 2012; and 4. Providing for written feedback on the consultation issues with a deadline of 22 February 2012. In addition, Ministers began high level informal engagement with iwi and other Maori groups from August 2011. Despite the consultation process outlined above, there is a risk that the Waitangi Tribunal could conclude that the consultation timeframe was compressed. **Principles of consultation** The Environment Court has 'synthesised' a statement of principles for consultation from many earlier decisions (*Horahora Marae v Minister of Corrections* A085/2004 and *Land Air Water Association and Others v Waikato Regional Council* A110/2001). The Environment Court's statement of principles for consultation includes: i. The nature and object of consultation must be related to the circumstances. ii. Adequate information of the proposals is to be given in a timely manner so that those consulted know what is proposed. iii. Those consulted must be given a reasonable opportunity to state their views. iv. While those consulted cannot be forced to state their views, they cannot complain, if having had both time and opportunity, they for any reason fail to avail themselves of the opportunity. v. Consultation is never to be treated perfunctorily or as a mere formality. vi. The parties are to approach consultation with an open mind. vii. Consultation is an intermediate situation involving meaningful discussions and does not necessarily involve resolution by agreement. viii. Neither party is entitled to make demands. ix. There is no universal requirement as to form or duration. x. The whole process is to be underlain by fairness.

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		Adequate consultation 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 to retain section 9 following the consultation process), 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.
7.Oppose overall MOM Policy	**Oppose MOM Policy** • A substantial number of verbal and written submissions, but not all, disagree with the partial sale of state assets. However, some submitters suggest that that their constituencies do not all necessarily hold the same views on MOM policy. • Many submissions oppose the partial sale of any New Zealand state owned assets because they suggest the sale of assets will result in loss of revenue and lead to foreign ownership (and outflow of profits). • A number of submissions express concerns regarding electricity as a key infrastructure resource that is they suggest largely a monopolistic supplier, meaning that if they are removed from the SOE Act, they suggest there may be impacts on electricity pricing for New Zealanders (and in particular, a number of submissions suggest that increasing electricity pricing may have a disproportionate impact on Maori). • A number of submissions question the mandate of Government to proceed with the MOM Policy. • Some submissions claim that legislation to allow asset sales sets a precedent for modifying legislation in the future to allow further asset sales when another financial crisis occurs. • Some submissions have concerns about the equity of MOM for public utilities suggesting only a select few can afford to buy them (and, according to these submissions, these are not Maori).	The Government considers that it has a mandate from the general election for the MOM policy overall and was not consulting on this issue. In the context 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.

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	• Other submissions propose alternative options for generating additional Crown revenue, such as higher taxation. • Other submissions disagree with MOM policy objectives such as lessening public debt and spending asset sale proceeds on what some submitters deem as "non-productive" assets such as schools and hospitals. In contrast, other submitters propose asset sale proceeds be tagged for Maori health and education. • A number of submissions express concern that sale to New Zealand investors would subsequently be widened to overseas investors as there is no way to halt the sale of publicly traded shares. • Some submissions suggested a mandatory legislative requirement to ensure that the Crown remains the majority shareholder. • Some submissions suggest that MOM is contrary in principle to prior acknowledgement and confirmation provided by the Crown when certain SOEs were established in 1999. One particular submission seeks the Crown's assurance that the implementation of the MOM policy will not prejudice iwi's existing rights.	
8. Other Issues	• A number of submissions suggest that social responsibility objectives from section 4(1) of the SOE Act should be in the new legislation. Some submitters note their experience of problems protecting rights and interests when dealing with private commercial operators who must act in their shareholders' interests. • A number of submissions suggest that moving the companies from the SOE Act puts the focus solely onto profit, and also removes the political aspect in that all decisions made are accountable to the Government; in particular it removes the SOE from being covered by the OIA and the Ombudsmen Act 1975. • Other submissions comment that should the Government proceed with the MOM process, the Crown should value the Maori interest in the SOEs to be sold and that a proportion of that estimated value (possibly 20%) should be	**Corporate social responsibility** Section 4 of the SOE Act states that the: "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." There have been several legal cases considering the meaning of this section of the Act. We have drawn the following conclusions from these: • What can amount to operating "as a successful business" has to be

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	reserved for Maori Economic Development, as lack of access to financial resources and equity affect Maori commercial success and social conditions. • Some submissions, which deem MOM policy unconstitutional, refer to a precedent in American case law supporting the claim that any unconstitutional statute is void and therefore the Crown has no jurisdiction or sovereign authority. • Some submissions requested a cost benefit analysis be undertaken of the MOM policy. • Other submissions urge the Government to uphold its development of political alliances with Maori and to hold fast to its commitment to social justice for Maori. • Some submissions cite the International Covenant on Civil and Political Rights in the right of all people to the enjoyment and utilization of their resources and threaten to sue the Crown in common law for interference with those and their intellectual property. • Some submissions argue that the current SOE legislation should be strengthened to include a public referendum of these assets so that no Government can sell these economically vital assets without the consent of all New Zealanders. • Some submissions favour the establishment of a joint Crown/Maori working group to consider and make Treaty based decisions on all present and future international agreements (i.e. the China Free Trade Agreement and possibly the Trans Pacific Partnership Agreement).	determined in the context of the three requirements of s 4(1) , and there is nothing to suggest that they should not be treated as being of the same weight; • When considering whether an SOE is an organisation that exhibits a sense of social responsibility, courts will most likely assess this over a period of time and not in relation to a particular act or transaction in the course of the SOE's business; and • Courts will be reluctant to second guess subjective decisions of SOEs which involve a "balancing act" between the requirements of s 4(1). The December Cabinet paper on MOM 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. Corporate social responsibility (CSR) is typically defined as the voluntary integration of social and environmental concerns into a business' operations, and interactions with stakeholders. Organisations choose to pursue CSR because it can be good for business through building stakeholder trust in an organisation's ability to balance vested interests and the public good, sometimes termed an organisation's 'licence to operate'. We would argue that all businesses need to do this as a matter of course. If Ministers were to consider the inclusion of CSR obligations or enhancements the options appear to be: • Replicating section 4 in the PFA. The Government would need to consider retaining the whole of section 4, not just subsection 1c to ensure a balance of objectives. This would mirror the thinking of the drafters of the SOE Act. • Including a CSR provision into the companies' constitutions where it may be clearer the provision is nested inside the obligations derived from the Companies Act. An initial scan of the constitutions of Air NZ and other major listed companies indicates there is no precedent for this, however. • Working with the MOM companies to enhance their CSR policies prior to sale. The first two options would create the potential for legal leverage over the companies from stakeholder groups. This may create significant difficulties for directors in the execution of their duties and uncertainty for investors. These

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		issues could bear further investigation and analysis.
		
		We recommend that you do not include CSR obligations in the legislation at this stage.
		
		Removal of OIA and the Ombudsmen Act 1976
		Notwithstanding advice from the Ombudsmen to the contrary, we consider that the MOM companies should not remain subject to the OA and OIA for the following reasons:
		
		• In our view it is important to draw 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.
		
		Maori Economic Development
		MOM policy and MOM related legislative change neither preclude the Government from, nor require it to, make investment and/or funding decisions

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		regarding Maori economic development. **Constitutional Implications** While we consider that Government policies, such as MOM, are not unconstitutional, debate on this issue can take place in the review of New Zealand's constitutional arrangements which is currently underway. **Overall other issues** Other issues, which have been noted in this section of the submission summary, have no direct bearing on MOM policy or MOM related legislative changes. The Government considers that it has a mandate from the general election for the MOM policy overall. We consider that the Crown was not consulting with Maori on issues, amongst other issues raises, such as cost benefit analysis of MOM policy, public referendum for asset sales processes, political alliances and international agreements.