

The Treasury

Release of Submissions: Consultation on the Waitangi Tribunal's “Shares Plus” Proposal

Release Document

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Briefing Paper: Shares Plus Crown Consultation Hui with Ngāi Tahu – September 27th 2012

This paper has been prepared for Te Rūnanga o Ngāi Tahu Representatives and Ngāi Tahu whānui to provide background information for the Shares Plus Consultation Hui - Rehua Marae, 8pm – 10pm September 27th 2012

BACKGROUND

On 3 September 2012 the Prime Minister announced that the Government would undertake targeted consultation with Māori on the Waitangi Tribunal's "shares plus" proposal before proceeding with the Mighty River Power initial public offering (IPO).

The "shares plus" concept was raised in the Waitangi Tribunal's interim report on claims to freshwater and geothermal resources delivered on 24 August 2012. As Ngāi Tahu has a direct interest in the water resources used by Genesis Energy and Meridian Energy (two of the State Owned Assets which may be partially sold), the Crown has advised that they would like to facilitate a hui to explain their preliminary view of "shares plus", to answer any questions, and to receive direct feedback before any final decisions are made.

To that end, the Crown are inviting members of Ngāi Tahu to a hui on **Thursday 27 September** from **8.00pm to 10.00pm at Rehua Marae**, 79 Springfield Rd, St Albans, Christchurch.

CONTEXT

In February 2012 the Government consulted with Māori on legislative changes it considered necessary to proceed with its policy of mixed ownership for four State Owned Enterprises (SOEs): Genesis Power, Meridian Energy, Mighty River Power and Solid Energy New Zealand.

That consultation process focused on whether s.9 (or the Treaty Clause) of the original Act should be carried over into the new legislation which would create and govern the new Mixed Ownership model companies. As a result of that consultation the Government agreed to transfer the clause into the new legislation. It is noted that the clause only applies to the 51% of voting shares that are held by the Crown.

Since that time, and following an application by the New Zealand Māori Council for an urgent hearing, a number of iwi and hapū have made claims to the Waitangi Tribunal. The claims, amongst other things, stated that the sale of these assets would prejudice the claimants right to receive adequate redress for their claims, particularly their claims to rights and interests in water.

The Waitangi Tribunal issued an interim report in August 2012 which re-affirmed that Māori do have rights and interests in water which are protected by the Treaty of Waitangi, and that the Crown has an obligation to ensure that it is able to provide

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appropriate “rights recognition” and redress.

The Waitangi Tribunal agreed that the sale of 49% of the shares in these entities does not prevent the Crown from providing a full range of redress to the claimants, except in one particular instance – that is if the claimants were seeking to have their redress provided as a class of shareholding described as “shares plus”. Copies of the Interim Report can be found at

<http://www.waitangi-tribunal.govt.nz/doclibrary/public/reports/generic/Wai2358/Wai2358W.pdf> and a useful plain English summary of the Interim Report can found here <http://maorilawreview.co.nz/2012/09/maori-rights-in-water-the-waitangi-tribunals-interim-report/>

WHAT IS THE PURPOSE OF THE CONSULTATION DOCUMENT?

The consultation document essentially asks affected iwi to provide feedback on whether the sale of a 49% shareholding in three power companies would prevent the Crown from given full effect to the rights and interests in water of the iwi directly affected by the sale of these particular assets. The Waitangi Tribunal has accepted that even following the partial sale, all remedies except perhaps for elements of a “shares plus” option will still be available to iwi to settle their claims to freshwater (and presumably for other matters).

Thus the key question for affected iwi is whether shares plus – or even shares without the plus – will provide an enduring or a practical solution to the recognition of iwi rights and interests in all of the water bodies of importance to them?

WHAT IS MEANT BY “SHARES PLUS” ?

The Waitangi Tribunal did not explore exactly what “shares plus” means in this context or how it would work in practice. It is expected to involve creating a class of shares that would have different characteristics from ordinary shares which are held by non-Māori / iwi.

“In essence, shares plus refers to the idea certain Māori interests would be given particular rights and powers in relation to the company, above and beyond the rights of other shareholders.

Shares plus could be likened to preference shares in other companies, where the preference shareholders essentially get veto rights over the operation of an enterprise and are first in line for payouts - be they dividends or first call on remaining monies if companies fail.” (ODT 08/09/2012)

The appendix to the Consultation Documents suggests a range of options that might form

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part of a “shares plus” package and then discusses whether these will still be available after the partial sale of the assets – these include:

- a) Financial entitlements; **(still available)**
- b) Appointment of directors; **(still available)**
- c) Additional voting rights on shareholder decisions; **(still available)**
- d) Voting or decision rights on management / strategic decisions; and **(not available)**
- e) Shareholders agreements **(not practicable)**.

WHO WANTS SHARES PLUS?

Some individuals and groups are actively advocating for a pan – Māori or pan-iwi settlement of all freshwater claims. It is suggested that such a settlement would be negotiated in a similar fashion to the Fisheries Settlement or the Forestry Settlement and that the shares could be held by a newly created entity with the benefits being distributed by some yet to be agreed mechanism. The Prime Minister has ruled out a pan-Māori / iwi approach. This has been reinforced by the decision to consult with only those iwi who are likely to be directly affected by the sale of these particular assets.

It is worth noting that the Waitangi Tribunal has conceded that shares, or even shares plus, are unlikely to be seen as a satisfactory remedy for many of the claimants who have presented to the Tribunal so far. Most claimants want things to change to ensure their mana over their particular wai is recognised and that they can protect that wai from further degradation or abuse.

DOES TE RŪNANGA HAVE A POSITION ON SHARES PLUS?

At this time shares plus is a concept being considered for the three power generating companies, Mighty River Power (which has no South Island assets), Genesis Energy (operates Tekapo A and B in addition to North Island assets) and Meridian Energy which currently has all of its New Zealand hydro assets within the Ngāi Tahu takiwā.

Te Rūnanga has no formal position on “shares plus” other than to say that we do not believe that the sale of shares in any of these assets will preclude the Crown from giving full effect to Ngāi Tahu’s rights and interests in water within our takiwā.

The use of shares as a proxy for Ngāi Tahu’s rights and interests in water is, as a general proposition, not consistent with our aspirations as an iwi and the pathway we have been following to date to advance and protect our rights and interests in our wai.

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What Te Rūnanga can say for certain is that there is no justification for giving other iwi or a pan-Māori body a say over decisions affecting water within the Ngāi Tahu takiwā. For this reason, it would not be acceptable for the “shares plus” option to be offered to anyone other than Ngāi Tahu for those assets which are operated within our takiwā.

HOW WILL THE RIGHTS AND INTERESTS OF IWI IN WATER BE RECOGNISED?

As you will be aware, Ngāi Tahu has received redress for our historical claims and this included compensation for any wrongs done by the Crown prior to 1992 in relation to freshwater as well as other matters. However, the settlement did not extinguish our customary rights which were specifically preserved. This includes our rights and interests in water. Te Rūnanga is actively working with other iwi to establish a national framework that gives meaningful recognition of our rights, interests and responsibilities.

As set out in the recent report of the Kaiwhakahaere after Te Rūnanga o Ngāi Tahu met at Rāpaki earlier this month; Te Rūnanga supports the pursuit of our rights and interests through direct engagement with the Crown via the Iwi Leaders Group and the Land and Water Forum. These discussions are not about historical breaches of the Treaty, they are about establishing the platform for the future.

Key issues for Ngai Tahu continue to be:

- Water quality
- Sustainable use
- Sensible regime for allocation
- Retention/restoration of customary waterways
- Fair and equitable consideration for iwi when it comes to economic benefits
- Appropriate Treaty partner influence over management/governance of freshwater.

It is hard to see how these objectives will be met through a shareholding in one or two power companies even if the shares do give more say over how those companies operate. All of our water bodies within the Ngāi Tahu Takiwā are important to us, not just those where the power companies are situated.

How the residual rights and interests of all iwi should be recognised is part of an on-going dialogue between the Crown and the Iwi Leaders Group. As was stated by Sir Tumu Heuheu at the recent hui at Turangawaewae,

“... the engagement we are having with the Crown is not just about our rights, it is

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also about our responsibilities, and it is about the mechanisms by which we can give effect to our responsibilities – to exercise kaitiakitanga – now and into the future.

The solutions we are seeking must be capable of being meaningful to the people of every marae and for waters of importance to them. This means that there must be a range of mechanisms which are capable of being applied to every water body whether it is a spring, aquifer, river, lake swamp – whether that water body is in Te Tai Tokerau or in Murihiku.

What the iwi leaders group have been advocating for is the tools which our people need to give effect to the concepts of Mana Atua – Mana Tangata – first we look after the water and then the well-being of the people will follow.”

DOES TE RŪNANGA HAVE A POSITION ON THE SALE OF SOE'S?

Te Rūnanga has no formal position on the sale of State Owned Enterprises. However, the Kaiwhakahaere, along with other iwi leaders, have long advocated that shares in these companies should be available to iwi as part of Treaty Settlements if iwi want to take up these shares as form of redress.

In the event that the Crown does sell shares Ngāi Tahu has advocated that provision should be made to ensure iwi, particularly those iwi who are yet to settle, are able to participate in the new ownership model by buying shares as part of an “on account” settlement.

SOME IWI HAVE BOYCOTTED THESE HUI – WHY IS TE RŪNANGA ATTENDING?

On the matter of rights and interests in Freshwater the Crown has committed to a constructive engagement with the Iwi Leaders Group on these very challenging issues. That work was progressing slowly but surely long before the sale of these assets were announced or the Waitangi Tribunal issued its report.

The decision on whether to attend these hui or not is up to each iwi and each will have a range of reasons for their decision to attend or not to attend. Te Rūnanga has a policy of seeking constructive engagement with the Crown across the full range of issues of the day and the Share Plus issue is no different.

The key question for Ngāi Tahu is whether shares plus – or even shares without the plus – will provide an enduring or a practical solution to the recognition of the rights and interests of Ngāi Tahu in all of the water bodies of importance to them? This is the feedback we need to provide to the Crown at the hui.