# The Treasury

## Release of Submissions:
## Consultation on the Waitangi Tribunal's
## "Shares Plus" Proposal

## Release Document

## November 2012

**www.treasury.govt.nz/publications/reviews-consultation/sharesplus/submissions**

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# Mixed Ownership Model Submission Form

The Government welcomes your feedback on this consultation document, particularly the questions set out below.

You can make a submission by using this form, which is also available electronically at www.treasury.govt.nz/mixed-ownership-consultation

## 1 Contact Details

*I am responding (please complete one):*

**As an individual**

| | |
|---|---|
| **Your name** | **Jennifer Takuta-Moses** |
| **Your Iwi affiliation** | **Tuhoe** |
| **Address** | [redacted] |
| **Email address** | [redacted] |

**On behalf of an organisation**

| | |
|---|---|
| **Your name** | **Jennifer Takuta-Moses** |
| **Organisation you represent** | **Te Kura, Raimona Whanau Trust** |
| **Address** | [redacted] |
| **Email address** | [redacted] |

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## 2 Submission

**Question 1:** What rights and interests, if any, do Māori have in the Mixed Ownership Model Companies that are not protected by the section 27A-D memorials regime, or by other legislation?

Te Kura Raimona Whanau Trust – Te Heuheu Na &Siblings Whanau Lands – Tuahuroa Cairns & Siblings Whanau Lands – Te Au Tahakawa=Hohapata Whanau Interests.These Tipuna are all original land owners in lands within the Waikaremoana Power Generation Scheme,

Tuai Power Station - Piripaua Power Station - and Kaitawa Power Station are Power Generation Schemes now called Genesis Power are all built on land called Te Kopani and Te Heiotahoka and owned by the above Tipuna and others.

These whanau have the right to express their interests in the MOM companies either at a representative level or at a ownership level in terms of the purchase of shares.

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

Genesis Power have been given resource management consent and tribal consent to continue to generate power whilst the Waikaremoana Power Generation stations are located on tribal lands (Te Heiotahoka and Te Kopani) in Waikaremoana.

We want these tribal rights and consents processes to continue with the descendants of the above Tipuna. It is important to us that section 9 of the SOE Act 1986 including the section 127A-D memorials are carried into the new legislation where the Genesis Power Company will end up as a result of the governments new mixed ownership model. Our Waikaremoana Whanau want these two sections entrenched for protection of our land ownership rights and the right of first refusal to negotiate shares or other interests that the new MOM creates.

For further protection of our rights and interests we would like to put a Board Member from our whanau trust the Raimona Tekura Whanau Trust onto the Genesis Power Company Board (newly established board within the new legislation) as of right.

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

Representative Voice:

In terms of representation from the Raimona Te Kura Whanau Trust onto the new Genesis Board, our lands can only be protected by having this representative voice. We want to formalise this more specific alternative protection as it is a Crown Obligation under the Treaty. This Crown Obligation extends to Whanau negotiations with respect to settlement for Raimona Tekura Whanau Trusts future descendants who will inherit the lands beneath the Waikaremoana Power Generation Scheme.

Raimona Tekura Whanau Trust is insisting on the first right of refusal when shares are generated and sold as we have an intrinsic right to know who is going to co-own the Genesis Power Assets.

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

My name is Jennifer Takuta-Moses a descendant of the Raimona Whanau Trust. It is my role and right as present ahikaaroa of lands beneath the Waikaremoana Power Generation Scheme to be engaged in this process at every level, rather than just be consulted at this level.

Minister I attended your presentation at the Emerald Hotel in Gisborne and found your korero interesting you want to make money for your government, I want to make money and grow a resource for my Waikaremoana Familie/s. We seem to have the same contributing goals.

I also shared with you that I am presently the Deputy Chair of the Tuhoe Waikaremoana Trust Board and more importantly a Waikaremoana Division Member on that Board and that we would be meeting in March 2012 this Kaupapa would be on our agenda for serious discussion. This submission is sent to meet your deadlines.

Naku na Jennifer.

If you do not wish your name in your submission to be released, please clearly state this in your submission or tick the option below:

☐ I request that my name be removed from my submission before it is released and that it is recorded as 'anonymous' in the summary of submissions.

If there is particular information in your submission that you wish to remain confidential, please clearly indicate this and explain your reasons for wanting the information kept confidential.

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Submissions can be sent by email to mixed-ownership-consultation@treasury.govt.nz or by post to:

FreePost Authority No.126395
Mixed Ownership Model: Consultation with Māori
Commercial Transactions Group
The Treasury
PO Box 3724
Wellington 6140

The deadline for receipt of submissions is **5pm on Wednesday 22 February 2012.** Late submissions will not be considered.

Naku na

provide a vital and non-substitutable part of whatever ways the Government can now find to recognise Maori proprietary rights in water to the extent that that is still possible.[89]

#### (1) *Shares on their own could be a remedy or proxy for rights recognition*

The claimants' position is that shares on their own could be a partial remedy or proxy for rights recognition for certain categories of claim. In particular, they argued that the partial privatisation of the SOEs provides a fleeting opportunity for water-based companies to be used as a source of compensation for the Crown's breaches of Maori water rights (wherever those breaches happen to have occurred). This compensation could take three forms. First, for situations where tribes need a large injection of cash to help restore the health and mauri of their degraded water bodies, they could be allotted shares which they would then sell for money to help pay for 'remediation'. The Government's policy of partial privatisation would thus enable a tidy correspondence between water-based grievances and water-sourced solutions. And the money for this type of remediation does not appear to be available from other sources, hence the unique nature of the opportunity for Maori kaitiaki.[90] Mr Galloway cautioned that this kind of compensation must be insured against any kind of dilution by taxes or duties, if Maori sell shares to pay for remediation of their water bodies.[91] In his view, assigning shares that could be 'monetised' for this purpose was the most appropriate way of using shares in the rights recognition framework.[92]

Secondly, the claimants put to us situations where Maori are unable to benefit from their residual proprietary rights because of the priority accorded other users, but those users' activities do not generate an 'income stream' from their use of the water. In other words, where water-users cannot pay or should not reasonably be expected to pay for their use of Maori property, a readily available solution at the present time would be shares in the power-generating SOEs. With the expectation that there will be dividends and at least semi-regular income from owning shares in a power-generating company, the shares thus serve as a proxy for Maori groups who cannot develop or profit from their own water bodies.[93] Counsel concluded: 'the role of the power generating SOEs is not, in the Claimants' submission, limited to payment for the water they use.'[94]

The question of how much real benefit might come from shares was hotly debated by witnesses and counsel. Ultimately, the claimants' witness, Mr Cox, accepted that dividends are not an automatic benefit. There may be years in which the company elects not to pay a

89. Claimant counsel, opening submissions (paper 3.3.1), pp 2-4, 22, 24-25

90. Claimant counsel, opening submissions (paper 3.3.1), pp 22-25; claimant counsel (Geiringer), oral submissions, 19 July 2012; Draft Transcript, pp 1182-1183, 1199-1202

91. Philip Galloway, oral evidence, Draft Transcript, pp 239-240

92. Philip Galloway, oral evidence, Draft Transcript, p 248

93. Claimant counsel, opening submission (paper 3.3.1), pp 23-25; see also counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7); Steven Michener, oral evidence, 11 July 2012, Draft Transcript, p 368

94. Claimant counsel, opening submission (paper 3.3.1), p 27

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94. Claimant counsel, opening submission (paper 3.3.1), p 27

dividend because profits do not permit it or because the funds need to be injected back into the company for its development.[95] There was a lengthy exchange between claimant counsel and Mr Crawford, the Treasury witness, as to whether shareholders could compel the directors to authorise a dividend.[96] In the evidence before us, it may be possible for shareholders agreements to require regular dividends but this may not be in the best interests of the companies concerned. We return to this issue below.

The third scenario was put to us by counsel for Ngati Haka Patuheuheu (see above). In this scenario, hapu are unable to benefit from or develop their water bodies because privately-owned companies are already doing so. Although the activity, such as the generation of electricity by Trust Power, does generate income directly from the use of the water, there is no way *at present* for Maori to benefit from this use of their taonga. In Ngati Haka Patuheuheu's view, an allocation of shares in the three power-generating SOEs is the only possibility that is actually practicable at the moment. It could be done fairly immediately whereas no other remedy is on the table. Thus, they seek an allocation of shares for themselves and all hapu in like circumstances; and, indeed, for all Maori.[97]

#### (2) *Shares plus a shareholders agreement*

The situation of hapu who have proprietary interests in the water and geothermal resources being used by Mighty River Power and the other SOEs is seen to be different from those outlined in the previous section. In response to questions from the Tribunal, Mr Geiringer told us:

> Shares by themselves, I would submit, can't be a solution. Not even a simple pragmatic one. Shares and some control of the companies is beginning to be a potential solution in relation to some of the issues because, as Mr Crawford pointed out, shares are a very disjoint, distant from the assets in question. Shares and control is much less so. So if, you know, just hypothetical, ... in particular let's focus on the Māori groups whose water resources are used by say Mighty River Power and if you're able to give them shares that give them the economic interest and an active role in determining the future of that company through appointment of directors, for example, then you are beginning to give those groups some continued direct involvement with their water resources.[98]

The claimants thus accepted that shares on their own would not suffice as even proxy recognition of Maori rights *in their particular water bodies*. A shareholding, however, in conjunction with a real and meaningful stake in the company, appeared to the claimants to be a much closer approximation to recognising Maori rights. This resulted in another lengthy

95. Brian Cox, oral evidence, 10 July 2012, Draft Transcript, p 171
96. John Crawford, oral evidence, 13 July 2012, Draft Transcript, pp 654-656, 658, 676, 687-693
97. Counsel for interested parties (Williams, Arapere and Fong), opening submissions (paper 3.3.7)
98. Claimant counsel (Geiringer), oral submissions, 19 July 2012, Draft Transcript, pp 1230-1231

exchange between claimant counsel and Mr Crawford about company law and the capacity of Crown-Maori shareholders agreements, in conjunction with control of the companies' constitutions, to provide Maori with real power in the companies and over the water assets that they use. Because this issue is of critical importance in our inquiry, we will discuss it at some length later in the chapter.

#### (3) *Modern water rights*

In Mr Galloway's evidence, 'modern water rights' are one of three possible framework solutions for the recognition of Maori rights in water. His evidence was based in part on a 2006 United Nations study, *Modern Water Rights*, which detailed the manner in which rights comparable to our RMA water permits have been created in recent times and treated as property rights around the world.[99] In response to a question from the Tribunal, Mr Wilson agreed that water permits are commonly understood as property rights in New Zealand's electricity industry.[100] Mr Enright for the interested parties argued that the permits confer property rights at law, a point denied by the Crown. The meaning and effect of the *Aoraki* case in this respect was debated between the parties but in our view it is not necessary to decide the point at stage one. The material point for the Tribunal is that the water permits allow the use and control of water and therefore are analogous to the claimants' residual proprietary rights in the respective water bodies. They have been imposed over the top of those rights in disregard for them.

As we observed in chapter 1, New Zealand may be heading towards a water management regime in which these water permits are tradeable (in whole or in part), may be traded for money (with or without having been purchased in the first place), and new ones may need to be purchased in the first instance from now on. These propositions are among the 2010 recommendations of the Land and Water Forum for consideration by the Crown.[101] Water permits may thus become more property-like in the future, not less.

The 'modern water rights' proposition is that Maori should either have the power to allocate these water permits (that is, to become the consenting authorities) or be allocated them for leasing to the power-generating companies.[102] In Mr Enright's submission, the Crown should transfer Mighty River Power's permit to Maori before partial privatisation takes place.[103] As we see it, this part of the claimants' proposed framework would allow them to impose conditions on water use (such as the manner in which that use affects customary

99. Stephen Hodgson, *Modern Water Rights: Theory and Practice, FAO Legislative Study 92* (Rome: Food and Agriculture Organisation of the United Nations, 2006)

100. Lee Wilson, oral evidence, 16 July 2012, Draft Transcript, pp 888-889

101. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, 2010, pp xii, 31, 36-39

102. Galloway, 'Potential Remedies: Commercial and Regulatory Approaches', June 2012 (doc A69(g)), p 7

103. Counsel for interested parties (Enright), 20 July 2012 (paper 3.3.14), pp 1-6, 8-10

fishing) and to lease the right in return for a resource rental. But the details have not been explored at this stage; for stage one, we only have information in a very summary form.

#### (4) *Royalties*

In essence, a royalties regime would involve the power-generating MOM companies paying for the water that they use. In Mr Galloway's evidence, energy companies overseas have developed a variety of ways to value resources as they are used and to pay those who own or have an economic interest in the resource. Legal ownership of the resource is not necessary for a royalty to be required. These overseas regimes include payment for geothermal fluids in the United States and Australia, where the resource is treated as a mineral instead of a water resource. Royalties can be imposed by statute (as in Australia) or negotiated between the developer and the resource-owner on a case by case basis. Depending on the circumstances, the royalty can be a percentage of revenue or of net profit. It can involve the owner contracting the developer and splitting the profit. There are a number of possibilities.[104]

According to the evidence of Mr Cox, joint ventures involving Maori have been limited to the geothermal resource, where Maori landowners control access to the geothermal field under their lands.[105] But royalties are contemplated by power companies in a number of circumstances – such as, Mr Cox told us, the desire to enter into a positive relationship with local people and prevent isolated power stations from being the target of hostility and vandalism.[106] In his view, developers have much to gain from that type of arrangement in terms of the 'durability' of their projects, to be balanced against the cost of a royalty.[107] Also, Mr Galloway suggested that it is practical to quantify the use of fresh water and geothermal fluids for royalty purposes; there are no insuperable difficulties.[108]

In the Crown's view, the impact of a royalty regime on the electricity industry would be uncertain. A 'modest' levy might be absorbed by the power-generating MOM companies without affecting their bottom line. Alternatively, a higher royalty or levy might result in a price increase for consumers and a concentration of investment away from new freshwater and geothermal power stations.[109] In Mr Cox's evidence, however, there are not a great number of plausible alternatives. Hydro generation will always be dominant because of the nature of New Zealand's natural resources, and there has already been a move away from coal as a result of the Emissions Trading Scheme. Water, he told us, will continue to be important in new electricity generation schemes. The industry will not suffer although the

104. Galloway, 'Potential Remedies: Commercial and Regulatory Approaches' (doc A69(g)), pp 9-13; Philip Galloway, responses to written questions, 10 July 2012 (doc B6), pp 1-5
105. Brian Cox, 'The Link Between Maori and Electricity Generation by State Owned Enterprises', 15 June 2012 (doc A69(f)), p [7]
106. Brian Cox, oral evidence, 10 July 2012, Draft Transcript, p 178
107. Brian Cox, oral evidence, 10 July 2012, Draft Transcript, p 189
108. Galloway, responses to written questions (doc B6), pp 2-3
109. Crown counsel, closing submissions (paper 3.3.15), pp 55-56

cost might be passed on to consumers.[110] Further, in response to a question from claimant counsel, Mr Crawford agreed that if a fixed resource rental or royalty posed a risk to the profitability of a company, and so risked the bottom line, the arrangement could be one for a share of a profit instead, thus avoiding the problem.[111]

### 3.6.2 The Crown's suggestions for possible rights recognition

The Crown's evidence focused on mechanisms for the recognition of Maori rights and interests in water outside of the 'ownership' paradigm.

Ms Tania Ott, Deputy Director of the Office of Treaty Settlements, described the Crown's approach to redress for historical Treaty breaches in respect of natural resources, including freshwater and geothermal resources. In her evidence, ownership of these resources is not open for negotiation although there are a number of mechanisms to provide cultural redress to iwi, and sometimes to provide commercial redress tailored to the resource in question.[112] The Crown's other main witness on this subject, Mr Guy Beatson, Deputy Secretary (Policy) at the Ministry for the Environment, provided evidence as to how Maori interests will be protected and enhanced in water management through the outcomes of the Fresh Start for Fresh Water programme.[113] The other Crown witnesses did not address possible forms of rights recognition in their written evidence, but Mr Crawford proposed joint ventures as a better form of rights recognition during his cross-examination by claimant counsel.[114] We deal with each of these possibilities in turn.

#### (1) *Possibilities that are currently available or in development*

In the evidence of Mr Beatson for the Crown, options are currently in development for the better recognition of Maori rights and interests in water. None of those options, he said, would be affected by the partial privatisation of the power-generating companies.[115] Specifically, Mr Beatson referred us to the Fresh Start for Fresh Water (FSFW) programme, which is being conducted by the Land and Water Forum, and to the dialogue between senior Ministers and the Iwi Leaders Group. The forum is a non-government body of stakeholders, including Mighty River Power, Genesis, Meridian, and the five iwi organisations listed in chapter 1. We set out some of the background to the FSFW programme and the forum in that chapter. Here, we note the proposals that have been made so far for the enhancement of Maori authority in water governance and management.

110. Cox, 'The Link Between Maori and Electricity Generation by State Owned Enterprises' (doc A69(f)), p [10]; Brian Cox, oral evidence, 10 July 2012, Draft Transcript, pp 144, 159-161, 163-166
111. John Crawford, oral evidence, 13 July 2012, Draft Transcript, p 712
112. Tania Ott, brief of evidence, 20 June 2012 (doc A92)
113. Guy Beatson, brief of evidence, 29 June 2012 (doc A93)
114. John Crawford, oral evidence, 13 July 2012, Draft Transcript, pp 699-700
115. Beatson, brief of evidence (doc A93), pp 1-2, 10-12

In its first report (2010), the forum identified water governance as a key issue: iwi, who have a Treaty relationship with the Crown, do not have 'a clear path to engage as a partner' with either regional councils or central government on freshwater issues.[116] The forum made two recommendations of relevance to our report: first, the establishment of a National Land and Water Commission 'on a co-governance basis with iwi' to develop and oversee the implementation of a national land and water management strategy, and to advise Ministers on water management; and secondly, that iwi must have 'adequate representation' in the water-related committees of the regional councils.[117] The forum concluded that the Crown had delegated water management to regional councils without resolving how the councils were to work in partnership with iwi or giving the councils clear direction on how they were to discharge 'their role on behalf of the Crown partner'.[118] The suggestions for new governance arrangements were designed to plug this gap, although the report contains no specific suggestions as to how the national commission might be constituted in terms of Maori membership or what degree of representation on regional council committees would be 'adequate'. It does, however, note an iwi view that governance must include direct Crown-iwi dialogue and a much stronger role for central government, if water problems are to be solved effectively and water bodies to be restored to health.[119]

The forum also acknowledged that there were Crown-iwi discussions happening outside its purview. It suggested that a new system of water allocation needs to be designed – which might include tradeable water permits and payment for water permits – and that the transition to any new system of water allocation should proceed 'hand in hand with Crown-iwi discussions on iwi rights and interests in water management'.[120] It noted:

> Iwi assert foundation rights to freshwater based on the Treaty, customary, and aboriginal rights and that these rights continue to hold relevance in the wider legal framework of water management. Iwi are keen to see resolutions emerge from their conversations with the Crown that improve the clarity and certainty of iwi rights to freshwater. A robust system recognising iwi in its design is needed.[121]

But Crown-iwi discussions about rights were happening in parallel, so the forum observed:

> A particular point which needs to be borne in mind is the relationship between changes in allocative mechanisms for water and the discussions on water between iwi and the Crown. We think that any transition to more effective allocation should proceed hand in

116. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, 2010, p viii
117. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 4
118. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 13
119. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 17
120. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 3
121. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 9

hand with those discussions, to avoid the risk that it will need to be revisited later, with disruptive consequences.[122]

Nonetheless, the forum acknowledged that iwi concerns included the need for their rights and interests to be recognised, their role in governance enhanced, their degraded water taonga to be cleaned up, and 'the capability to satisfy iwi development aspirations, including by ensuring future access to water for commercial business'.[123] In general, iwi also supported the development of more collaborative, cheaper consent processes and greater incorporation of Maori knowledge and science into decision making.

In April 2012, the Land and Water Forum published its second report.[124] This report did not expand a great deal on what had already been proposed for the enhanced recognition of Maori in water management. It reiterated that fundamental issues 'between the Crown and iwi concerning iwi rights and interests are not on the table in this Forum'.[125] The forum's second report focused on collaborative processes for freshwater planning and limit-setting.

Mr Beatson's evidence also referred to the direct dialogue between Ministers and the Freshwater Iwi Leaders Group, which is considering – in part – the issues 'not on the table' in the forum. But Mr Beatson told us that officials are not privy to this dialogue and he was not able to give us any information as to how it has developed since 2009.[126] As we know from correspondence in 2009, the question of property rights and interests in water was raised for discussion but we have no evidence as to where those discussions have gone, if anywhere.[127] According to Mr Beatson, we should understand the 2009 Protocol (described in chapter 1) as involving a commitment on the part of the Crown to discuss the issue of Maori proprietary rights and interests in water. In response to questions from the Tribunal, he clarified that the possibility of full ownership is not on the table but that the Crown intends to discuss with iwi whether or not Maori have 'property rights and interests' that amount to something other than full ownership of water.[128] The key exchange was as follows:

**Tribunal:** So is the Crown, through you, in a policy sense, saying that property rights of Māori are on the table?

**Mr Beatson:** Yes and the reference [in the protocol] to rights and interests encompasses that ...[129]

122. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p xiii
123. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p 16
124. Land and Water Forum, *Second Report of the Land and Water Forum: Setting Limits for Water Quality and Quantity Freshwater Policy- and Plan-Making Through Collaboration*, April 2012 (supporting papers to Guy Beatson, brief of evidence, 29 June 2012 (doc A93(a)))
125. Land and Water Forum, *Second Report of the Land and Water Forum* (supporting papers to Guy Beatson, brief of evidence (doc A93(a)), p 31)
126. Guy Beatson, oral evidence, 16 July 2012, Draft Transcript, pp 1059-1086
127. Rt Hon John Key to Sir Tumu Te Heuheu, 9 May 2009 (Beatson, affidavit, annex GB-2 (doc A3))
128. Guy Beatson, oral evidence, 16 July 2012, Draft Transcript, pp 1066-1086, esp pp 1081-1083
129. Guy Beatson, oral evidence, 16 July 2012, Draft Transcript, p 1082

We asked Crown counsel to supply us with further information about the post-2009 dialogue, in particular any documentation of it, and received the following response:

> Meetings of Iwi Leaders and Ministers are high-level and no formal minutes are kept. Officials are unable to confirm exactly what meetings involve discussion of rights and interests ... In summary, the Crown has structured the water reform process in such a way that Iwi Leaders and Advisers can bring their views straight to the Crown and to the LAWF [Land and Water Forum]. Initial discussions on rights and interests have occurred, and will continue. It is likely that discussions on rights and interests will accelerate significantly in 2012 as the LAWF has now reported on limit setting and governance, and will submit its final report in September.[130]

We take it, therefore, that the official position is that 'property rights and interests' have, in the evidence of Mr Beatson, been on the table for ministerial discussions with the Iwi Leaders Group since 2009 without any conclusion as yet. We were told that discussions 'will accelerate significantly' later this year. We were also told that the Crown is simply informing itself in discussions with the Iwi Leaders Group, not negotiating arrangements that will affect Maori people whom that group do not represent, and that all matters in the land and water forum process will eventually be taken to Maori for full consultation. Nonetheless, the Crown's position in our inquiry (as we discussed in chapter 2) is that property rights are not an appropriate paradigm for the modern expression of Maori rights, and that the analysis and recommendations of the Wai 262 Tribunal in respect of kaitiakitanga are to be preferred. That submission is in keeping with the Crown's emphasis on water management in Mr Beatson's evidence and in the Fresh Start for Fresh Water programme. It is also in keeping with the Treaty settlement policies of the Office of Treaty Settlements, to which we turn next.

In its 2010 report, the Land and Water Forum recommended general changes to governance of water management at the central and regional levels. It also noted that what it called 'ad hoc policy making' about the Maori role in governance was being made through a series of individual iwi Treaty settlements. General governance arrangements would have to 'complement' these local particularities.[131] In her evidence for the Crown, Ms Ott referred us to examples of these 'ad hoc' Treaty settlements, some of which we described briefly in chapter 1. These include the co-governance of the Waikato River through the Waikato River Authority and the co-management of the Rangitaiki River through the Rangitaiki River Forum. In the evidence of Ms Ott, it is neither possible nor desirable to draw a strict line between the settlement of historical claims and the creation of such mechanisms for the

130. Crown counsel, memorandum, 23 July (paper 3.4.1), pp1-2
131. Land and Water Forum, *Report of the Land and Water Forum: a Fresh Start for Freshwater*, p16, 43

operation of the Treaty partnership in the present. Rights recognition can be an inextricable part of redressing past (sometimes ongoing) Treaty breaches.[132]

At our request for more information, we received documentary evidence about the evolution of the Crown's settlement policies in respect of natural resources. Ms Ott made two key points in respect of the policies. The first is that a return of title is only contemplated in respect of land. Surface geothermal features located on (or in) Crown land, for example, may be returned to the ownership of iwi as part of the title to the surrounding land.[133] Such geothermal features may be developable for power generation or tourism.[134] Otherwise, 'ownership' of natural resources is not something which the Crown will agree to in historical claim settlements.[135] This point is perhaps most pointed in the Te Arawa lakes settlement, to which Mr Paul Harman, counsel for the Savage Whanau, referred us: the Crown returned the title of the lakebeds (land) to Te Arawa but asserted its ownership of the 'Crown stratum', which was the space above the lakebeds occupied by water and air. In the legislation, this stratum is defined as 'land'.[136] The Crown is sometimes prepared to go as far as recognising rights in solid natural resources, such as rights to pounamu (vested in Ngai Tahu), and the right to manage the extraction of hangi stones from the Mohaka River (for Ngati Pahauwera).[137] But ownership (or even co-ownership) of natural resources is otherwise something to which the Crown will not agree in Treaty settlements.

The second point is that the Crown considers redress in terms of natural resources to be 'cultural redress' and not of a commercial nature. Cultural redress can include, for example, official recognition of Maori relationships with taonga, protocols with the Minister of Conservation, access to aquatic resources on conservation land, and changes to place names. Such forms of recognition are important, and they will be explored further as part of the framework in stage two. But 'land and cash', we were told, are the only reliable forms of commercial redress. In response to a question from the Tribunal, Ms Ott agreed that shares in the power companies might be considered a form of commercial redress that related to a natural resource. But, in the view of the Office of Treaty Settlements, shares are not usually considered as a component of commercial redress because of their 'volatility': 'We tend to look for types of redress which will hold their value, so land or money, and warm less to the idea of more sort of volatile types of arrangements. It goes to the durability of the settlement'.[138]

132. Ott, brief of evidence (doc A92); Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 910, 913-914
133. Ott, brief of evidence (doc A92), pp 4-8; Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 897
134. Crown counsel, memorandum, 20 July 2012 (paper 3.2.8), p 4
135. Ott, brief of evidence (doc A92)
136. Counsel for interested parties (Harman), memorandum, 8 August 2012 (paper 3.4.11), pp 4-6; Te Arawa Lakes Settlement Act 2006, ss 11, 23(2)
137. Crown counsel, memorandum, 20 July 2012 (paper 3.2.8), p 4
138. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, p 965

Also, Ms Ott told us that Treaty settlements do not provide for a Maori right of development in natural resources, including water. When asked by the Tribunal what Maori rights and interests in water are recognised by the Crown, Ms Ott replied that the 'Crown recognises the cultural relationship that iwi have with those resources'.[139] In particular, the structures created by the Crown for Treaty settlements, such as the Rangitaiki River Forum, are designed to provide for the exercise of kaitiakitanga in local authority decision-making.[140] Nonetheless, commercial redress specifically related to natural resources is possible (even if shares are not considered suitable). Ms Ott mentioned the recent settlement of the historical claims of Raukawa (North) as an example of such an arrangement. Through this settlement, and in recognition of the effects of the establishment of hydro dams on the Waikato River, an $8 million fund was established to assist any joint venture arrangements that Raukawa and Mighty River Power might wish to enter into post-settlement.[141] Counsel for Raukawa, however, submitted that this money was a settlement of historical grievances and does not recognise their rights in their rivers. Raukawa understands that their existing aboriginal title and Treaty rights are not affected by their historical settlement and that they will be developing how best to give effect to and protect those rights in lakes and rivers in future discussions with the Crown.[142]

We are not concerned in this stage of our inquiry with the criticisms that have been made of these arrangements. According to the claimants, nothing more is on offer than a 'consultative right'. While not 'implacably opposed' to co-management, they argued that a necessary first step is to clarify the proprietary rights so that management systems meet the needs of owners (and not the other way around).[143] The Wai 262 report, too, queried why only some groups could get such one-off arrangements and had to do so in their historical claims settlements, when mechanisms for kaitiaki control or partnership should be available to all through the operations of the ordinary law.[144]

These criticisms are a matter that will have to be revisited at stage two when we consider the framework in its entirety. The Crown acknowledged that concerns have been raised but submitted:

> There has been some criticism of the use of a mere co-management approach. While this could be the subject of ongoing debate, it can certainly be said that:
>
> ▸ Rights and interests *are* acknowledged and provided for within current frameworks;

139. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 942, 949-950
140. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 949-951
141. Tania Ott, oral evidence, 16 July 2012, Draft Transcript, pp 966-967
142. Counsel for the Raukawa Settlement Trust, memorandum, 27 July 2012 (paper 3.4.5)
143. Claimant counsel, opening submissions (paper 3.3.1), pp 6, 9
144. Waitangi Tribunal, *Ko Aotearoa Tenei: a Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity*, 3 vols (Wellington: Legislation Direct, 2011), Te Taumata Tuarua, vol 1, p 279

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Te Kaunihera Māori o Aotearoa
New Zealand Māori Council

21 September 2012

Hon Bill English
Minister of Finance
Parliament Buildings
Wellington
By email: Bill.English@parliament.govt.nz

Hon Tony Ryall
Minister of State Owned Enterprises
Parliament Buildings
Wellington
By email: Tony.Ryall@parliament.govt.nz

Hon Chris Finlayson
Attorney-General
Parliament Buildings
Wellington
By email: Chris.Finalyson@parliament.govt.nz

Freepost Authority No 126395
Shares Plus Consultation
Commercial Transactions Group
The Treasury
PO Box 3724
Wellington 6140
sharesplusconsultation@treasury.govt.nz

Dear Ministers and Treasury

Thank you Ministers for your letter of 6 September inviting New Zealand Maori Council to make submissions, by 5 October, on the Tribunal's consideration of "shares plus". Our response incorporates our submission on the Shares Plus Consultation while raising with you, the Council's plea for a much wider discussion on issues relating to the water claims.

**Introduction: background**

Before replying to your letter, we awaited the Council's ordinary meeting, at Henderson, on 15-16 September. The Council's Executive considered that consultations on the water claim required the attention of the full Council, and at a regular meeting because special meetings are impracticable in view of the widespread membership and the attendant costs in gathering. However, the delay has allowed the Council to take account as well of the resolutions of the King's national hui at Turangawaewae on 13 September.

We were also party to the letter to you, on 18 September, from the claim lawyers on behalf of the claimants as a whole. Claimants were concerned about rumours at the national hui that consultations were about to begin, with little or no notice. They proposed a common submission through the claim lawyers. The lawyers circulated a draft response late on 13

56 Heretaunga Street, Petone, Lower Hutt
email: karen@maoricouncil.maori.nz
Mobile: (021) 934-906
web: www.maoricouncil.maori.nz

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September and it was sent to you on 18 September. We learnt soon after on 18 September, that the consultations were starting that evening. We learnt that from a Maori Party bulletin despatched 11.30pm the previous evening. Because of the number of claimants and supporters associated with the Council we feel we should have been informed much earlier. For some of our people there was very little time to prepare especially given their desire to await the outcome of the national hui.

We write now to affirm our willingness and desire to engage with you, and we accept that this be done through the process settled at Turangawaewae. We seek a fair and prompt resolution in the interests of Maori and of the country. We write also to submit on Shares Plus, to express our concerns about the consultation process, to urge a wider dialogue which addresses the more pertinent issues, to advise of and explain our support for the Turangawaewae resolutions, to confirm the opinions given to you on behalf of claimants on 18 September, to elaborate on matters following the full Council hui, and to express our sincerity in seeking a fair solution.

**Council willingness to engage**

The Maori Council remains steadfast in its desire to support good faith negotiations with you on all matters relating to the water claims. We believe that in the spirit of goodwill which is the hallmark of the Treaty, a just and prompt resolution, with minimum delay to the share sales, and with good outcomes for both Maori and the country, is achievable.

It follows that we do not see Court proceedings as the best outcome but as something that we must strive to avoid. We feel that a Court outcome does not fit with the national image built up over many years, largely as a consequence of Maori Council activity, where Maori and the Crown work together to find mutually satisfactory solutions.

We understand you are reluctant to engage with the Council because you prefer to work with Iwi Leaders alone. We do not wish to compromise the quality of the relationship between government and Iwi Leaders but the Council and the several co-claimants and other hapu and iwi who support the Council's involvement, have come to the Council because they feel that either they are not represented, or their concerns for property rights are not represented, in those discussions. While they do not seek a national settlement they seek a national framework by which their proprietary interests may be equitably and consistently resolved at a local level.

The Council is also of the view that it has a right to speak with you on the water claim. The authority is from three sources:

- Tikanga a Ture: The Council has the authority of a statute enabling it to so engage, there are judicial determinations supporting that view, and there is now a current finding of the Tribunal that the Council should be engaged along with Iwi Leaders.

- Tikanga Maori: The Council has the authority of particular claimants and now of two national hui which presume that both Iwi Leaders and the Council will be involved. The first is the Government-arranged hui at Kilbirnie on 6 August, of which you are informed, involving about 200. The second, as summonsed by King Tuheitia at Turangawaewae, is said to have involved about 1000. Both hui recognised that the Council should be engaged. However, the process has been refined by the larger, Turangawaewae hui. The negotiators are to be appointed by national figures from both Council and Iwi Leaders (as well as others).

56 Heretaunga Street, Petone, Lower Hutt
email: karen@maoricouncil.maori.nz
Mobile: (021) 934-906
web: www.maoricouncil.maori.nz

- Tikanga a te Ao: The Council relies also on the UN Declaration on the Rights of Indigenous Peoples by which indigenous peoples are entitled to be dealt with through institutions and representatives of their own choosing.

If you think there are impediments to these views we would be pleased to consider them with you.

**Shares Plus process and outcome**
**Introduction**
On the Shares Plus programme we will comment in turn on the scheme and your perceptions of it, on the process and our perception of the need, with respect, for a better one, and finally, our opinion that a government finding that Shares Plus won't work, as government has intimated, does not resolve the problem but highlights the need to find another scheme which will provide the necessary protection for hapu and iwi.

**The scheme**
We think there could be good prospects in the Shares Plus scheme. If a framework for proprietary interests cannot be sooner resolved we must try to make Shares Plus work because it may not be easy to find another that allows for early sales while preserving rights and providing commercial redress.

You consider that special classes of shares are contrary to the national interest but we think they are quite common overseas, especially for companies utilising natural resources, and that a special class of inalienable share for indigenous peoples with customary, resource interests, holds promise as a means of recognising indigenous peoples' interests in ancestral waters as a matter of national significance.

We understand you to say that every form of rights recognition can be met without Shares Plus but we think special shares may provide a form of recognition in a way which no other form of relief can do in the case of those entities that take their value from Maori water resources.

You say the right for a special class of shares to make management and strategic direction decisions would not work in practice but that does not seem to us to align with your support for co-management regimes affecting resource use controls. We consider also that through its continued ownership of 51% of the shares the Crown can provide valuable support for the special class shareholders.

You are concerned that share plus arrangements will lower the share price but equally the arrangements may attract ethical investors who would not otherwise be interested.

You say the Crown should bear the obligations of the Treaty rather than the companies and we agree, but that highlights the need for solutions to be put in place before the sales.

You say that selling shares without Shares Plus is not a Treaty breach but that is not the problem in our view. The problem is that, as the Tribunal has found, there is a Treaty breach if there is not some form of commercial rights recognition in place before the sales proceed.

You say the matter can be dealt with by submissions from hapu and iwi, selected by you, but we consider that they must first have the capacity to address this complex issue with you. For that they need legal and commercial advice. Also, in determining the hapu and iwi to

deal with, there can be no determination of those likely to be affected without prior disclosure of likely future projects. There are hapu and iwi associated with the Council who are likely to be affected by future projects, as power companies have already spoken with them.

We do not claim to have the answers and do not relish engaging in point scoring. We make these submissions purely to highlight the need for a fairer approach to dealing with the matter. For an even playing field we suggest that you fund our advisors to work with yours to search for practical outcomes based upon the shares plus approach. Perhaps solutions will not be found but we think we must try.

For now, the Council agrees with your observations of 6 September that the Council does not itself have a direct interest in the water resources as the interest lies with hapu and iwi. We also do not envisage a national settlement (but a national framework for local settlements). However, in terms of its statutory authority the Council has an interest in maintaining a consistent policy approach that is fair and beneficial as between Maori and as between Maori and the Crown.

**Terms of engagement**

The Council has serious concerns about the conduct of the consultations. The Council's view is that the terms of engagement should not be set unilaterally but should be agreed. The government consultation, in our view, has disturbing elements of pre-determination, invites submissions rather than dialogue, and government adjudication rather than a search for an agreed outcome. There are other issues as well over which hapu have direct interests and the extent to which other hapu are prospectively affected. These were set out in the lawyer's letter of 18 September. However, the primary issue on process is the structural one considered above.

Having regard to these concerns we are in sympathy with the Tainui leaders and others who are reported to have boycotted the opening consultation meeting on 18 September. As we see it they are not saying 'no' to dialogue and co-operation, but 'no' to the lack of dialogue and co-operation in the government's process. We must also advise that our co-claimants take the same view. In the spirit of co-operation they may choose to attend the consultation hui but on their behalf we make it clear that they do so not to acquiesce in the process but to protest it.

**If Shares Plus does not work another solution is needed**

Finally, after a careful analysis of the issues, of your letter of 6 September, and the Tribunal's report, the Council considers that the government's perceived shortcomings in the Shares Plus scheme, if correct, highlight the need for an alternative arrangement to protect the commercial interests of the affected hapu and iwi before sales proceed. We do not read the Tribunal interim report as saying that all is well if Shares Plus does not work, but as saying that in that event, some other protective scheme is needed. However, we acknowledge that the Tribunal's report is an interim report and consider therefore that the complete report may need to be reviewed before a final conclusion is drawn.

Most of all however, Shares Plus is a palliative to enable the sales to proceed while a framework for recognising residuary proprietary rights is worked out. There is more to be had, in our view, in an early determination of a framework for the recognition of Maori proprietary interests prior to sales, and prior to individual iwi negotiations.

56 Heretaunga Street, Petone, Lower Hutt
email: karen@maoricouncil.maori.nz
Mobile: (021) 934-906
web: www.maoricouncil.maori.nz

**The recognition of proprietary interests**

We therefore ask for your earnest consideration of the resolutions at Turangawaewae which we think, expressed a helpful view on the way forward. These proposed that a framework of proprietary rights be settled:

a) before the sale of shares; and
b) before Government enters into negotiations with hapū and iwi.

Turangawaewae also proposed a process by which the Maori representatives could be settled.

We think that with goodwill and mutual respect, a broad framework can be agreed within a reasonable timeframe, perhaps equivalent to the time needed to work out a temporary, protective scheme, by Shares Plus or otherwise. We also think it is necessary. The sale of shares before Maori rights have been settled creates a body of shareholders opposed to any settlement with Maori in the future because it could affect the value of their shares. In addition, hapu and iwi are entitled to know what their rights are before they enter negotiations with regard to them.

Our reply to you is not made in a spirit of confrontation but out of a sincere concern, which we trust you share, for a just and early resolution of the issues.

Noho ora mai

pp Maanu Paul and Hon Sir Edward Durie
Co-chairs New Zealand Maori Council.

56 Heretaunga Street, Petone, Lower Hutt
email: karen@maoricouncil.maori.nz
Mobile: (021) 934-906
web: www.maoricouncil.maori.nz