

# **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](http://www.treasury.govt.nz/publications/reviews-consultation/sharesplus/submissions)**

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**WACKROW WILLIAMS & DAVIES LIMITED**  
**BARRISTERS AND SOLICITORS**

**MEMORANDUM**

**DATE:** 26 September 2012  
**TO:** Wai 726: The Ngāti Haka Patuheuheu Trust / Robert Pouwhare / Kapi Tupe  
**FROM:** Te Kani Williams and James Fong  
**RE:** A Ngāti Haka Patuheuheu position on the shares plus concept  
**No. OF PAGES:** 6

**1. Introduction**

As advised we understand that you have a meeting with the Minister of Finance, Bill English tomorrow (Thursday 27 September 2012). We are unsure of that the full extent and purpose of that meeting is, however you have asked us to prepare a Ngāti Haka Patuheuheu position paper on the 'shares plus' concept ahead of this meeting.

On 6 September 2012 you received a letter from the Hon Bill English (which you subsequently forwarded onto us) regarding consultation on the 'shares plus' proposal. Specifically, the Minister's letter stated that:

*"over the next five weeks [the Government] would be undertaking a targeted consultation with directly affected Māori interests about the 'shares plus' concept discussed in the Waitangi Tribunal's interim report on claims to freshwater and geothermal resources delivered on 24 August 2012."*

The purpose of the letter was to seek Ngāti Haka Patuheuheu's input into the consultation exercise and we suggest that this face to face meeting with the Minister is part of the "targeted consultation with directly affected Māori interests" as the Minister indicated in his letter.

**2. The Ngāti Haka Patuheuheu starting point**

We provide this starting point as the broad and general basis for Ngāti Haka Patuheuheu to consider any discussions with the Crown generally. It is useful to keep in mind as Ngāti Haka Patuheuheu Ika Whenua Rivers claims are have already been found to be well-founded by the Ika Whenua Rivers Tribunal.

While this starting point is provided, the applicability of it to the discussions tomorrow with the Minister will be for Ngāti Haka Patuheuheu to judge as the purpose of the discussion, as we understand it, is to undertake consultation and seek Ngāti Haka Patuheuheu's views on the 'shares plus' concept. How and if the below information becomes relevant to this discussion will be for you to judge.

*i The Ika Whenua Rivers claim*

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Ngāti Haka Patuheuheu participated in the Ika Whenua Rivers Inquiry in its own right and as a hapū with interests distinct and separate from those of Ngāi Tūhoe. As the Crown will know, the Ika Whenua Rivers Tribunal found in favour of the Ika Whenua Claimants and Ngāti Haka Patuheuheu. In its report, the Ika Whenua Rivers Tribunal found that:

*The Tribunal still has not addressed the extent and nature of ongoing rights of hapū in respect of water and geothermal resources. Although it may not be appropriate to reach a final settlement prior to that claim being finalised, **some interim relief is urgently needed to provide Te Ika Whenua with an economic resource that they can utilise to develop and protect their interest in the rivers and to assist them to break away from welfare dependency. To delay such relief would constitute a breach of the Treaty principle of redress.***  
[Emphasis added]

Despite this finding, and despite the Tribunal's finding that Ngāti Haka Patuheuheu's claims were well founded, Ngāti Haka Patuheuheu remain the only claimant from the Ika Whenua Rivers Inquiry who remain without any settlement redress in any form whatsoever, let alone in relation to the settlement of its Ika Whenua Rivers claim.

ii *The sale of Crown assets to TrustPower Limited*

The Ngāti Haka Patuheuheu experience is illustrative of an example where the Crown has already sold off assets within the rohe of a claimant and has not recognised the rights of that claimant to water and geothermal resources within that claimant's rohe, nor provided that claimant with any compensation or relief for that loss.

TrustPower Limited, New Zealand's fifth largest electricity generator and retailer currently own and run two generation schemes – The Wheao and Flaxy Scheme and the Matahina Hydroelectric Power Scheme. The Wheao Flaxy Scheme uses water from the Rangitaiki River supplemented with water from the Wheao River and Flaxy Creek to generate electricity. The Matahina Power Scheme is situated on the Matahina River and consists of an 86 meter high dam on the river.

In 1999, TrustPower became owners of the Wheao Flaxy Scheme and the Matahina Hydroelectric Power Scheme by virtue of purchasing its interests from the Crown / Electricity Corporation of New Zealand ("ECNZ"). The Electricity Corporation of New Zealand Limited (ECNZ) was set up as a company under the State-Owned Enterprises Act 1986 to own and operate the generation and transmission assets of the Ministry of Energy.

Despite having its mana and tino rangatiratanga confirmed over the Rangitaiki, Wheao, and Whirinaki Rivers and their tributaries, Ngāti Haka Patuheuheu have received nothing from the Crown in return for the sale of the Wheao Flaxy Scheme or the Matahina Scheme. Despite findings in their favour, Ngāti Haka Patuheuheu continue to be precluded by the Crown from settlement negotiations and discussions.

For Ngāti Haka Patuheuheu is a prejudice that is accentuated by the fact that Ngāti Haka Patuheuheu still remain without a settlement.

The approval of the sale of the Wheao Flaxy and Matahina Schemes by the Crown was a breach of the rangatiratanga of Ngāti Haka Patuheuheu and as a result, Ngāti Haka Patuheuheu are entitled to seek remedy for this breach and the prejudice to Ngāti Haka Patuheuheu by way of remedy or recourse to one or more of the Power generating State-Owned Enterprises that the Crown intends to sell 49% of shares in.

There is no other remedy available to Ngāti Haka Patuheuheu in the circumstances detailed above. The Wheao Flaxy Scheme and the Matahina Scheme are now 100% owned by TrustPower Limited and Ngāti Haka Patuheuheu no longer have recourse to these assets. Finally, to conclude we note the comments of the Ika Whenua Rivers Tribunal – *"It seems quite unacceptable that commercial profit can be made from Te Ika Whenua's interest in the rivers without any form of compensation or payment"*.

**3. The findings of the Freshwater and Geothermal Resources Tribunal in respect of Ngāti Haka Patuheuheu**

Given the above, it is important to note the recent findings of the Tribunal in its recent Stage One "Water" report. In particular, we note the Tribunal's comments in reference to discussions between Crown and Ngāti Haka Patuheuheu as to the use of shares for a number of settlement or rights recognition purposes where there is not a nexus to rivers utilised by Mighty River Power and Ngāti Haka Patuheuheu remains without settlement. More particularly, in its letter of transmittal:

*"In the narrowest view, the subject for discussion is shares and shareholders' agreements in Mighty River Power. **That could include discussion of the use of shares for a number of settlement or rights recognition purposes, where there is not a nexus to rivers utilised by Mighty River Power, such as was raised by Ngati Haka Patuheuheu.** As we see it, it would be preferable to take a broader approach in this way, and also to consider other commercial options such as royalties at the same time, and perhaps the opportunity to write such matters into the company constitutions. Undertakings could perhaps be negotiated about future forms of rights recognition."*  
[Emphasis added]

As counsel for Ngāti Haka Patuheuheu argued in the "Water" Inquiry – and as the Tribunal in the above passage appear to have accepted – the Ngāti Haka Patuheuheu view is that there is no impediment to the Government being able to provide Ngāti Haka Patuheuheu with settlement redress for its well-founded Ika Whenua Rivers claims from the sale of shares in Mighty River Power.

Given that Ngāti Haka Patuheuheu:

- still remain without redress for its well-founded Ika Whenua claims,

- the fact that Ngāti Haka Patuheuheu did not – as contemplated by the Ika Whenua Rivers Tribunal – receive any form of compensation or payment for the Crown's sale of assets to TrustPower Limited; and
- the current "Water" Tribunal suggest that MRP shares could be used for settlement or rights recognition purposes *"such as was raised by Ngāti Haka Patuheuheu"*

Ngāti Haka Patuheuheu expect that the Crown in meeting its good faith duties owed to Ngāti Haka Patuheuheu; will provide Ngāti Haka Patuheuheu with its long awaited Ika Whenua Rivers redress from the sale of shares in MRP.

Given that the Government was clear to state that consultation would involve ***"a series of hui for those with a direct interest in the water and geothermal resources used by Mighty River Power, Genesis Energy and Meridian Energy"*** it is hoped that in Ngāti Haka Patuheuheu's presence at this hui the Government is recognising that Ngāti Haka Patuheuheu have a direct interest upon the basis of the arguments made for Ngāti Haka Patuheuheu.

#### **4. What is the 'shares plus' concept?**

The "Water" Tribunal found that the Crown will not be able to provide appropriate rights recognition or redress after the partial privatisation of the three SOEs in the area of what the Tribunal termed "share plus".

The Tribunal defined 'shares plus' as the provision of shares or special classes of shares which, in conjunction with amended company constitutions and shareholders' agreements, could provide Māori with a meaningful form of commercial rights recognition.

The Tribunal found that shares themselves would not be a solution for Māori and considered that other forms of solution i.e 'shares plus' in the form of recognition in company constitutions, shareholders agreements, possible governance presence etc could form part of the recognition of Māori rights.

#### **5. The Government's position on 'shares plus'**

The Government's view is that the 'shares plus' idea should not be progressed. It also does not believe that to continue with the share offer without 'shares plus' would be a Treaty breach. The Government gives five main reasons for this view.

- i It does not believe it is in the national interest for any group among the 49 per cent minority shareholders in these companies to be given special rights;
- ii Almost every form of rights recognition and redress for Māori that could be delivered by 'shares plus' can also be achieved in other ways;
- iii The remaining elements of 'shares plus' in relation to decision rights over management or strategic decisions would not work in practice as an effective form of rights recognition or redress;

- iv If the 'shares plus' concept was put in place, it would be likely to make the company less attractive to investors, which in turn could be reflected in a lower sale price and therefore be to the detriment of all taxpayers; and
- v Following consultation with iwi, a careful and deliberate decision was made to ensure that the Crown's obligations under the Treaty continue to rest with the Crown, not with companies. They are not themselves appropriate vehicles for achieving redress.

**6. A Ngāti Haka Patuheuheu position on 'shares plus'**

One of the possible redress outcomes of the 'shares plus' concept is a form of governing power or board / regulatory presence / shareholder's agreement / re-drafting of constitutions for Māori. For Ngāti Haka Patuheuheu, such recognition in MRP, Genesis Energy and/or Meridian is not what is sought. Accordingly, while the Government will be in a position to compensate for the outstanding Ngāti Haka Patuheuheu Ika Whenua Rivers claims from its sale of its 49% share in power generating SOEs, Ngāti Haka Patuheuheu consider that the 'shares plus' (governance/directorship/shareholders agreement) type of scenario as contemplated by the "Water" Tribunal will be something that the Government will need to address for Ngāti Haka Patuheuheu outside of the sale of the shares in MRP, Genesis and Meridian.

What is sought by Ngāti Haka Patuheuheu from the Government's sale of its 49% share is redress in the form of compensation or payment as contemplated and suggested by the Ika Whenua Rivers Tribunal. At this juncture, the compensation or payment is something that Ngāti Haka Patuheuheu could necessarily derive from receipt of either shares or monetary compensation from the sale of shares that the Government receives in for instance, MRP. At this juncture, and given that much is still to be developed in terms of the 'shares plus' concept, Ngāti Haka Patuheuheu can receive such redress without recourse to the receipt of redress via a 'shares plus' route.

Given that much is still to be developed in terms of the 'shares plus' concept, and in indeed the provision for settlement with Māori in the sale of the Crown's 49% share; Ngāti Haka Patuheuheu reserves the right to re-consider its position if and when the full extent of any redress to be received under a 'shares plus' concept is developed.

Ngāti Haka Patuheuheu's current position is informed by the above and given the fact that Ngāti Haka Patuheuheu's well-founded Ika Whenua Rivers claims are yet to be settled or compensated for; Ngāti Haka Patuheuheu looks forward to hearing from the Government as to how it intends to compensate for and address Ngāti Haka Patuheuheu's outstanding and unsettled claims from the Government's intended sale of its 49% share in power generating SOEs.

**7. What do Ngāti Haka Patuheuheu wish to receive from the sale of the Crown's 49% interest in power generating SOEs?**

- Full and final settlement of Ngāti Haka Patuheuheu's Ika Whenua Rivers claims.
- Receipt of compensation from the Crown in an amount as contemplated by the Ika Whenua Rivers Tribunal. The basis for methodology of the calculation of this amount would be as per Schedule 1 (Compensation payable to Maori) of the Crown Forests Assets Act 1989 which takes into account the value that the Crown received when it sold the assets to TrustPower. This could be a direct result of the sale.
- The opportunity to obtain ongoing income from the utilisation of their river resource by TrustPower. This would be something done outside of the sale, but in conjunction with the receipt of any compensation from the sale.
- Governance and management roles in respect of Ngāti Haka Patuheuheu's river resources. Recognition and provision for Ngāti Haka Patuheuheu representation on the bodies that undertake the substantive decision making in respect of the Wheao Flaxy and Matahina Schemes. This would be something done outside of the sale, but in conjunction with the receipt of any compensation from the sale.
- Crown support (in terms of financial support and facilitation role) for a formal memorandum of understanding between TrustPower and Ngāti Haka Patuheuheu. This would be something done outside of the sale, but in conjunction with the receipt of any compensation from the sale.