

The Treasury

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

Release Document

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LAKE ROTOAIRA TRUST

Submission to the Crown on the "Shares Plus" concept

1. This submission is made on behalf of the Lake Rotoaira Trust (the **Trust**) on the "Shares Plus" concept, as described in the consultation letter from Ministers English, Ryall and Finlayson dated 5 September 2012 (the **Consultation Letter**).
2. The Trust holds legal title to Lake Rotoaira in trust for the beneficial owners of Lake Rotoaira. Those owners affiliate to various hapū of Ngāti Tūwharetoa with historical and current associations with Lake Rotoaira. Lake Rotoaira is a taonga of immense significance to those hapū and Ngāti Tūwharetoa generally.
3. Lake Rotoaira is currently used as a hydro electricity generation lake for the purposes of the Tongariro Power Scheme (the **TPS**). The TPS is owned and operated by Genesis Energy Limited (**Genesis**). Genesis is proposed to be a Mixed Ownership Model (**MOM**) company. Currently, Genesis uses Lake Rotoaira for electricity generation purposes, including by altering the water levels of the Lake, without any compensation being paid to the Trust. In effect, Genesis uses Lake Rotoaira "for free" and derives significant commercial benefits from that use. It is in this context that the Trust makes this submission.
4. The Trust can be contacted through Maria Nepia at maria@tihia.co.nz or by phone on (021) 309 505.

Summary of submissions

5. The Trust did not participate in the Waitangi Tribunal hearing process. The Trust has supported Ngāti Tūwharetoa engaging in direct discussions with the Crown in relation to Māori rights, interests and responsibilities in freshwater through the Freshwater Iwi Leaders Group. The Trust prefers this direct dialogue to continue until a satisfactory outcome is reached.
6. Specifically in relation to Lake Rotoaira, the Shares Plus concept:
 - (a) *Does not recognise the unique position of the Trust as owner of Lake Rotoaira.* The Trust owns Lake Rotoaira. Lake Rotoaira is being used by Genesis as a hydro electricity generation lake. Genesis does not pay for that use. The Shares Plus concept does not address that current anomaly.
 - (b) *Does not address the issues associated with the use of Lake Rotoaira for hydro electricity generation since 1972.* Lake Rotoaira has been used by the Crown and State-owned Enterprises for hydro electricity generation since 1972 without any payment or compensation to the owners of that Lake. The Shares Plus concept does not address that historical anomaly.
7. The Shares Plus concept was developed by the Waitangi Tribunal in its consideration of the relatively narrow question of the effects of the MOM process on Māori rights and interests in freshwater and geothermal resources. Given the scope of the inquiry, and the stages in which the inquiry has been split, the Tribunal did not consider in detail the question of *how best* to recognise and provide for Māori rights and interests in freshwater. The Shares Plus

concept must be assessed in that light. "Shares Plus" does not represent the best and only method by which Māori rights and interests in freshwater ought to be recognised.

8. Generally, the Shares Plus concept:

- (a) *Fails to appropriately capture the full nature and extent of Māori rights and interests in freshwater.* In effect, it seeks to equate those rights and interests with a shareholding in large scale commercial users of freshwater. That approach seems to suggest that Māori rights and interests in freshwater are limited to commercial interests. That is clearly not the case.
- (b) *Is a poor substitute for the mechanisms that Ngāti Tūwharetoa and the Freshwater Iwi Leaders Group have sought to recognise Māori rights and interests in freshwater.* Shares and financial incentives alone do not realign Ngāti Tūwharetoa with the intrinsic responsibilities that naturally flow from a stewardship or kaitiaki role in relation to the freshwater taonga.
- (c) *Cannot adequately recognise and provide for the full range of Māori rights and interests in freshwater.* Those rights and interests must be properly recognised through a specific legislative and regulatory framework in relation to freshwater generally.

9. The Shares Plus concept may be an appropriate mechanism for partial (rather than complete) recognition of Maori rights and interests in freshwater in the context of the use of freshwater for commercial purposes by the MOM companies. However, the Shares Plus concept, in isolation, is not sufficient to recognise the Trust's interests in Lake Rotoaira and Ngāti Tūwharetoa rights and interests in freshwater generally.

10. The Trust is concerned that the Crown will not retain the ability after an Initial Public Offering (IPO) of a MOM company to deliver every form of rights recognition and redress that could be delivered by the Shares Plus concept, unless appropriate mechanisms are established before the IPO process.

Recommendations

11. The Trust recommends:

- (a) The Crown prioritise direct engagement with the Trust in relation to the historical and current use of Lake Rotoaira for hydro electricity generation without compensation or payment to the Trust.
- (b) The Crown acknowledge the context in which Shares Plus was developed by the Waitangi Tribunal, namely that the Tribunal did not consider in detail the question of *how best* to recognise and provide for Māori rights and interests in freshwater.
- (c) The Crown prioritise engagement with Māori, through the Freshwater Iwi Leaders Group, on an appropriate legislative and regulatory framework to recognise and provide for Māori rights and interests in freshwater.
- (d) The Crown not form final views on the Share Plus concept until the legislative and regulatory framework to recognise and provide for Māori rights and interests in freshwater is reasonably certain.
- (e) The Crown provide further information on whether:

- (i) the constitutions of the MOM companies can be amended prior to each IPO to enable directors of those companies to act in the best interests of the appointing shareholder;
- (ii) the ability of the Crown to enter into voting agreements with iwi after an IPO will be prohibited or restricted under the New Zealand Stock Exchange Listing Rules (the **Listing Rules**); and
- (iii) the Crown may be restricted in any way from buying back MOM company shares following an IPO to give proper effect to the Shares Plus concept.

Preliminary matters

12. The beneficiaries of the Trust affiliate to the iwi of Ngāti Tūwharetoa. The Trust is aware that Ngāti Tūwharetoa have been engaging with the Crown on matters relating to freshwater. This submission supplements the submissions that may be made on behalf of Ngāti Tūwharetoa by focussing on matters that relate specifically to Lake Rotoaira.
13. Ngāti Tūwharetoa, and the Trust in particular, have been actively engaging with the Crown regarding the MOM proposal since June 2012. The Trust has made formal submissions on the initial MOM consultation process and the MOM Bill. In summary, the Trust has made the following submissions on the MOM:
 - (a) The Government ought to consult directly with the Trust on the MOM given that the Trust and Ngāti Tūwharetoa are directly affected by it.
 - (b) Section 9 of the SOE Act must be included in any new regime to give effect to the MOM.
 - (c) The current work streams, particularly concerning water (for example, the Freshwater Iwi Leaders Group and the Land and Water Forum) are positive steps to ensure continued Māori engagement with the Crown in relation to the proposed new freshwater regime. These processes must continue to the Trust's satisfaction and the MOM must not prejudice the associated discussions or outcomes.
 - (d) The Trust's current preference is to continue dialogue with the Crown at a leadership level in relation to how best to recognise and protect Māori rights and interests that may be affected by the MOM.
 - (e) The Trust opposed the MOM Bill because it privatised what has previously been considered a public utility (in the form of electricity generation) and results in private investors receiving the commercial benefits of the use of Lake Rotoaira, while the owners of that Lake receive nothing at all.
14. Although the Tribunal's report discusses rights and interests in water and geothermal resources, the Tribunal's discussion on the Shares Plus concept focuses on how the Crown could recognise rights and interests in water. Accordingly, this submission addresses the Shares Plus concept with respect to rights and interests in freshwater only. This submission does not address geothermal issues, which should be the subject of separate discussions with affected groups.

Context

15. The Trust holds legal title to Lake Rotoaira. In that context, the Trust has specific legal rights as landowner of Lake Rotoaira. The Trust is currently in discussions with the Crown and certain MOM companies regarding the nature and extent of those landowner rights.
16. The Shares Plus concept, on the other hand, has its genesis in rights and interests in freshwater. Ngāti Tūwharetoa claim rights and interests in freshwater, including the freshwater that is associated with the Trust's land title. However, those rights and interests are separate from, and in addition to, the Trust's landowner rights.
17. This submission, therefore, is made:
 - (a) on the basis of the rights and interests claimed by the beneficiaries of the Trust, and Ngāti Tūwharetoa generally, in relation to freshwater;
 - (b) having regard to the fact that the Trust also owns Lake Rotoaira; and
 - (c) without prejudice to the Trust's rights and interests as the owner of legal title to Lake Rotoaira.

Lake Rotoaira – A special case

18. Lake Rotoaira has been used as a hydro electricity generation lake since 1972. It is the source of the water used to generate electricity at the 240MW Tokaanu Power Station. It is also the reservoir into which water diverted through the TPS is discharged. It is an integral component of the TPS, which, together with the Rangipo and Mangaio Power Stations, typically contributes 4% of New Zealand's total electricity generation per annum.
19. The Crown purportedly acquired the right to use Lake Rotoaira for hydro electricity generation purposes pursuant to an agreement entered into with the Trust in 1972. The Trust maintains that:
 - (a) the bases on which the 1972 agreement was entered into are questionable as a matter of law;
 - (b) the Crown's acts and omissions in negotiating the 1972 agreement represent clear breaches of the principles of the Treaty of Waitangi; and
 - (c) the terms of the 1972 agreement, and the manner in which that agreement has been transferred to Genesis, do not provide Genesis with the necessary legal rights to use Lake Rotoaira for hydro electricity generation purposes.
20. Importantly, there is no easement registered against the title to Lake Rotoaira that permits the use of the Lake for hydro electricity generation. In that regard, Lake Rotoaira is relatively anomalous, in that it is only one of two privately owned hydro electricity generation lakes in New Zealand that are not subject to easements permitting such use. The only other lake in a similar position to Lake Rotoaira is Lake Taupō.
21. Genesis' ability to use Lake Rotoaira, particularly in the absence of an appropriate easement, is the subject of discussion between the Trust and Genesis. The Trust has engaged in those discussions in good faith and prefers for those discussions to continue.
22. The Trust has also been engaging with Treasury officials on the use of Lake Rotoaira by Genesis. The Trust considers it important that the Crown prioritises this engagement.

23. It is clear that the Shares Plus concept does not recognise the Trust's unique position as owner of Lake Rotoaira. Nor could the Shares Plus concept be amended to recognise that unique position.
24. Further, the Shares Plus concept cannot recognise the historical use of Lake Rotoaira by the Crown, Electricity Corporation New Zealand and Genesis without payment to the owners of that Lake.

The Trust **recommends** that the Crown prioritise direct engagement with the Trust in relation to the historical and current use of Lake Rotoaira for hydro electricity generation without compensation or payment to the Trust.

A legislative and regulatory regime in relation to freshwater

25. The Shares Plus concept is discussed in the interim report of the Waitangi Tribunal on the national freshwater and geothermal resources claim (Wai 2358) dated 24 August 2012. That claim focussed on whether the sale by the Crown of MOM company shares would affect the ability of the Crown to recognise Māori rights and interests in freshwater and geothermal resources, and provide redress for past Treaty of Waitangi breaches. The Waitangi Tribunal did not consider in detail the question of *how best* to recognise and provide for Māori rights and interests in freshwater and geothermal resources. Rather, the Tribunal focussed on the relatively narrow question of the effects of the MOM process on those rights and interests.
26. The Tribunal's focus is relevant for two primary reasons:
 - (a) First, the Shares Plus concept must be assessed in light of the Tribunal's focus. "Shares Plus" is not intended to represent the best and only method by which Māori rights and interests in freshwater ought to be recognised.
 - (b) Second, the Shares Plus concept represents a response to the likely impact of the MOM process on Māori rights and interests in freshwater. It is a specific suggested response to a particular circumstance.
27. Given the focus of the Tribunal and the targeted nature of the Shares Plus concept, it is clear that the concept cannot (and was not intended to) adequately recognise and provide for the full range of Māori rights and interests in freshwater. For example the Shares Plus concept would not provide Māori with a voice on:
 - (a) *Issues such as freshwater quality and associated habitat.* Those matters are central to Māori rights and interests in freshwater.
 - (b) *Allocation issues.* The manner in which freshwater is allocated, and to whom, are important matters for Māori.
 - (c) *The management of the freshwater resource generally.* It would only provide a partial voice on how the resource is used by the particular MOM company. That role (to the extent it may be provided through the Shares Plus concept) is necessarily limited in scope and application.
28. It is clear that the full nature and extent of Māori rights and interests in freshwater cannot be recognised and provided for through the Shares Plus concept. Instead, those rights and interests must be properly recognised through a specific legislative and regulatory framework in relation to freshwater.

29. The Trust did not participate in the Waitangi Tribunal hearing process. The Trust has supported Ngāti Tūwharetoa engaging in direct discussions with the Crown in relation to Māori rights, interests and responsibilities in freshwater through the Freshwater Iwi Leaders Group. The Freshwater Iwi Leaders Group engagement with the Crown has the potential to become a tangible expression of the partnership that the Treaty of Waitangi originally sought to encompass. The Freshwater Iwi Leaders Group has also been involved with the Land & Water Forum (**LaWF**) which has made significant progress over the past 2 years to understand, appreciate and provide for Māori rights, interests and aspirations regarding freshwater. The next report from LaWF covering water quality and allocation is scheduled to be presented to the Government in November 2012.
30. The Trust prefers that direct dialogue with the Crown through the Freshwater Iwi Leaders Group continue.
31. Fundamentally, in order to recognise Ngāti Tūwharetoa rights and interests in freshwater, such a framework must include the following components (which have been advanced by Ngāti Tūwharetoa in its involvement in the Freshwater Iwi Leaders Group):
 - (a) Governance - being able to express Ngāti Tūwharetoa mana and meet our obligations as kaitiaki by making decisions around how our freshwater is used.
 - (b) Freshwater quality and limit setting - knowing we have set rules and limits to ensure the quality and quantity of the freshwater is sufficiently high to protect the mauri of the water and enable us to undertake our cultural practices.
 - (c) Iwi equitable allocation - being able to fairly share in the economic benefits of the use of our freshwater on a catchment basis.
32. It is clear that the Shares Plus concept cannot reflect these components. Therefore, the existing processes for the development of a legislative and regulatory regime that properly recognises Māori rights and interests in freshwater must now be given priority.

The Trust **recommends** that the Crown:

- (a) acknowledge the context in which Shares Plus was developed by the Waitangi Tribunal, namely that the Tribunal did not consider in detail the question of how best to recognise and provide for Māori rights and interests in freshwater; and
- (b) prioritise engagement with Māori on an appropriate legislative and regulatory framework to recognise and provide for Māori rights and interests in freshwater.

Difficult to assess Shares Plus concept in absence of wider framework

33. If the Shares Plus concept is adopted, it must form part of a wider suite of mechanisms that collectively recognise and provide for the broad range of Māori rights and interests in freshwater.
34. Until the wider suite of mechanisms are developed with a reasonable degree of certainty, it is difficult to properly assess the Shares Plus concept. For example, some of the benefits of the Shares Plus concept (such as decision-making rights in relation to the management of freshwater resources used by the MOM companies) may be more appropriately provided for in other proposed mechanisms (such as a new regulatory framework regarding freshwater). On that basis, the Trust considers that the Crown should not form final views on the Shares Plus concept at this early stage.

35. The Trust acknowledges that it may take some time to develop a wider suite of mechanisms to address Māori rights and interests in freshwater and it may be challenging to do so prior to the planned IPO for Mighty River Power (during March to June 2013). However, the Trust considers it is premature at this stage to discount completely any option, including the Shares Plus concept. In good faith, the reasonable course of action at this point is to keep all options open for discussion.

The Trust **recommends** that the Crown not form final views on the Share Plus concept until the legislative and regulatory framework to recognise and provide for Māori rights and interests in freshwater is reasonably certain.

The reasons for not progressing the Shares Plus concept

36. The Government's current view is that the Shares Plus concept should not be progressed for five main reasons. Those reasons, and the Trust's responses, are as follows:

- (a) *Not in national interest:* The Consultation Letter does not provide reasons for the Government's view that it is not in the national interest for any minority shareholders in the MOM companies to be given special rights. It is therefore difficult to respond to this reason.
- (b) *Almost every form of rights recognition and redress for Māori could be achieved in other ways:* The Appendix to the Consultation Letter sets out the bases on which the Government considers it can deliver the "Shares Plus" benefits other than through the Shares Plus concept. The Trust considers that there is insufficient information in the Consultation Letter to determine whether the Crown can, in fact, deliver those benefits without the Shares Plus concept.
- (c) *Remaining elements of Shares Plus concept would not work in practice:* The Trust concurs that it would be practically difficult to provide decision rights over management or strategic decisions through the Shares Plus concept. This highlights the need for a wider legislative and regulatory framework to address the full range of Māori rights and interests in freshwater.
- (d) *Lower sale price:* The Consultation Letter does not provide any supporting analysis or information for the assertion that the Shares Plus concept will lower the sale price for the shares in the MOM companies. It could be argued, for example, that the Shares Plus concept would remove a significant degree of uncertainty for investors, and could provide greater alignment of incentives between Māori and the MOM companies for mutual strategic advantage, such that it could have a positive effect on price. In the absence of specific analysis on this point, the Government's rationale is based on assertion, rather than fact.
- (e) *MOM companies not appropriate vehicles for achieving redress:* The Government considers that the Crown's obligations under the Treaty should rest with the Crown, not the MOM companies. However, the Shares Plus concept does not appear to release the Crown from those obligations, nor transfer them to the MOM companies. Under the Shares Plus concept, the Crown retains the responsibility and ability to honour its Treaty obligations directly. The Shares Plus concept simply will enable the Crown to use the MOM companies as a mechanism to honour those obligations. There is nothing novel in that approach. Indeed, the section 27B memorial regime under the State-owned Enterprises Act 1986 is based predominantly on the concept that the MOM companies and their assets are mechanisms that can be used to honour the Crown's Treaty obligations.

37. The Trust therefore disagrees with the Government's rationale as set out in the Consultation Letter for not progressing the Shares Plus concept.

Can the Crown provide the "Shares Plus" benefits after an IPO?


38. The Trust considers that there is insufficient information in the Consultation Letter to determine whether the Crown can provide the Shares Plus benefits through alternative mechanisms after an IPO. For example:
- (a) It is unclear whether the constitutions of the MOM companies could be amended prior to an IPO to allow directors to act in the best interests of the appointing shareholder.
 - (b) The Trust seeks further information from the Government on the ability of the Crown to "buy back" MOM company shares in the market, particularly in relation to the Listing Rules and the Takeovers Code.
 - (c) The Trust seeks further information from the Government on the market effects of the Crown "buying back" MOM company shares, and the potential for such an approach to distort the market.
 - (d) The Trust seeks further information from the Government on the ability of the Crown to enter into voting agreements after a MOM company IPO, particularly in relation to the Listing Rules.
39. If there are likely to be difficulties for the Crown to "buy back" MOM company shares, or doing so will distort the market, the Crown ought to consider retaining sufficient shareholdings in the MOM companies to give effect to the Shares Plus concept. Those shares can be sold at a later date, if they are not required.

The Trust recommends that the Crown provide further information on whether:

- (a) the constitutions of the MOM companies can be amended prior to each IPO to enable directors of those companies to act in the best interests of the appointing shareholder;
- (b) the ability of the Crown to enter into voting agreements with iwi after an IPO will be prohibited or restricted under the New Zealand Stock Exchange Listing Rules (the Listing Rules); and
- (c) the Crown may be restricted in anyway from buying back MOM company shares following an IPO to give proper effect to the Shares Plus concept.

Conclusion

40. The Trust would welcome the opportunity to discuss this submission directly with relevant Ministers and Crown officials.



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Lake Rotoaira Trust