

The Treasury

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

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TŪWHARETOA MĀORI TRUST BOARD

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Submission to the Crown on the "Shares Plus" concept

1. This submission is made on behalf of the Tūwharetoa Māori Trust Board (the **Trust Board**) 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 Board was established pursuant to the Māori Land Amendment Act 1924 and the Māori Land Claims Adjustment Act 1926 and acts for the benefit of Ngāti Tūwharetoa.¹ Ngāti Tūwharetoa is located in the Central North Island and, importantly, the area of interest of Ngāti Tūwharetoa includes Lake Taupō. The Trust Board holds legal title to the bed of Lake Taupō, a number of tributaries flowing into Lake Taupō and the bed of the Waikato River from the outlet of Lake Taupō to the Rock of Tia. These titles are collectively known as the Taupō Waters. The Trust Board also has entered into a Deed of Co-Governance and Co-Management with Crown in relation to the Upper Waikato River which is provided for in statute in the Ngāti Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010
3. The Trust Board makes this submission on behalf of its beneficiaries – the descendants of Ngāti Tūwharetoa. Some of the submissions made by the Trust Board in this submission are generic. This is largely due to the generic nature of the Consultation Letter. However, the Trust Board's submission is unique to Ngāti Tūwharetoa.
4. The Trust Board can be contacted through Topia Rameka at topia@tuwharetoa.co.nz or by phone on (07) 386 8832.

Preliminary matters

5. Although the Waitangi Tribunal's Interim Report on the National Fresh Water and Geothermal Resource Claim (Wai 2358) (the **Interim Report**) refers to Māori rights and interests in freshwater, this submission refers to the rights and interests of *Iwi* and, in particular, the rights, interests and responsibilities of Ngāti Tūwharetoa.
6. The Trust Board's engagement with the Crown to date has focused on freshwater. At no stage has that discussion focused on the geothermal resource. Although the Tribunal's report discusses rights and interests in the water and geothermal resources, the Tribunal's discussion on the Shares Plus concept focuses on how the Crown could recognise rights and

¹ The Trust Board later became a Māori Trust Board pursuant to the Māori Trust Boards Act 1955 to administer Ngāti Tūwharetoa assets for the benefit of present and future generations of Ngāti Tūwharetoa.

interests in water. Accordingly, this submission addresses the Shares Plus concept with respect to rights and interests in freshwater only. Within Ngāti Tūwharetoa, the majority of the geothermal resource lies beneath Ngāti Tūwharetoa ahu whenua trust lands and is managed by those ahu whenua trusts. The Trust Board supports those ahu whenua trusts with respect to their position on the geothermal resource.

7. Ngāti Tūwharetoa, and the Trust Board in particular, has been actively engaging with the Crown about its concerns in relation to the Mixed Ownership Model proposal for sometime now. The Trust Board has made formal submissions on the initial consultation process and the Mixed Ownership Model Bill. In summary, the Trust Board has made the following submissions on the Mixed Ownership Model:
 - (a) The Government ought to consult directly with the Trust Board on the Mixed Ownership Model given that the Trust Board and Ngāti Tūwharetoa is directly affected by it and the Crown has undertaken to engage directly with the Trust Board in relation to matters such as this.
 - (b) Section 9 of the SOE Act must be included in any new regime to give effect to the Mixed Ownership Model.
 - (c) The Trust Board considers that 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 Board's satisfaction and the Mixed Ownership Model must not prejudice the associated discussions or outcomes.
 - (d) The Trust Board's current preference is to continue dialogue with the Crown at a leadership level in relation to how best recognise and protect Māori rights and interests that may be affected by the MOM. If necessary, the Trust Board will consider taking further action to preserve and protect its rights and interests in this regard.
 - (e) The Trust Board opposed the Mixed Ownership Model Bill because it privatises what has previously been considered a public utility (in the form of electricity generation). The Trust Board has previously not opposed the use of the Taupō Waters for electricity generation on the basis that it involves the use of the Taupō Waters for public good, primarily on a cost recovery basis.

Summary of submissions

8. The Trust Board did not participate in the Waitangi Tribunal hearing process. The Trust Board has been engaging, on behalf of Ngāti Tūwharetoa, through the Freshwater Iwi Leaders Group, in direct discussions with the Crown in relation to Iwi rights, interests and responsibilities in freshwater. The Trust Board prefers this direct dialogue between the Trust Board and the Crown continue until a satisfactory outcome is reached.
9. Specifically in relation to the Taupō Waters, the Shares Plus concept:
 - (a) *Does not recognise the unique position of the Trust Board as freehold owner of the Taupō Waters.* The Trust Board owns the Taupō Waters, including Lake Taupō. Lake Taupō is being used by MOM companies as a hydro electricity generation lake. Those MOM companies do not pay for that use. The Shares Plus concept does not address that current anomaly.

- (b) *Does not address the issues associated with the historical use of Taupō Waters for hydro electricity generation.* Lake Taupō has been used by the Crown and State-owned Enterprises for hydro electricity generation for a number of decades without any payment or compensation to the owners of that Lake. The Shares Plus concept does not address that historical anomaly.
10. Putting aside the complexities of the Shares Plus concept, the proposal is akin to iwi making a decision of 'te mana o te wai' on the basis of financial considerations only. To this end, it would be inconsistent with all previous statements and discussions as part of the consistent messages and statements made by Ngāti Tūwharetoa to support such a notion in isolation. The Shares Plus concept, on its own, is a poor substitute for all the things that Ngāti Tūwharetoa and the Freshwater Iwi Leaders Group have been historically seeking for iwi. 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.
 11. 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 *iwi* rights and interests in freshwater and geothermal resources. The Shares Plus concept must be assessed in that light. "Shares Plus" is not, in our submission, intended to represent the best and only method by which iwi rights and interests in freshwater ought to be recognised.
 12. The Shares Plus concept fails to appropriately capture the full nature and extent of iwi 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 iwi rights and interests in freshwater are limited to commercial interests. That is clearly not the case.
 13. The Shares Plus concept cannot adequately recognise and provide for the full range of iwi rights and interests in freshwater. Those rights and interests must be properly recognised through a specific legislative and regulatory framework in relation to freshwater. The Shares Plus concept is one, but must not be the only, method by which iwi rights and interests in freshwater are recognised.
 14. The Shares Plus concept may be an appropriate mechanism for partial (rather than complete) recognition of iwi 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 Ngāti Tūwharetoa rights and interests in freshwater.
 15. 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.
 16. The Trust Board's position is as follows:
 - (a) The Crown and the MOM companies that use the Taupō Waters must resolve the anomalies concerning the current and historical use of the Taupō Waters for hydro electricity generation without compensation or payment to the Trust Board before any IPO involving those companies.

- (b) The Crown must acknowledge the context in which Shares Plus was developed by the Waitangi Tribunal, namely that the Tribunal has not yet considered in detail the question of *how best* to recognise and provide for Iwi rights and interests in freshwater.
- (c) The Crown must prioritise engagement with Iwi on an appropriate legislative and regulatory framework to recognise and provide for Iwi rights and interests in freshwater and continue its engagement with the Freshwater Iwi Leaders Group.
- (d) The Crown must not form final views on the Share Plus concept until the legislative and regulatory framework to recognise and provide for Iwi rights and interests in freshwater is reasonably certain.
- (e) The Crown should 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 anyway from buying back MOM company shares following an IPO to give proper effect to the Shares Plus concept.

Context

17. The Trust Board holds legal title to the Taupō Waters. In that context, the Trust Board has specific legal rights as landowner of Taupō Waters. The Trust Board is currently in discussions with the Crown and certain MOM companies regarding the nature and extent of those landowner rights.
18. 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 Board's land titles. However, those rights and interests are separate from, and additional to, the Trust Board's landowner rights.
19. This submission, therefore, is made on the basis of the rights and interests claimed by Ngāti Tūwharetoa in relation to freshwater only and without prejudice to the Trust Board's rights and interests as the owner of legal title to the Taupō Waters.

The Taupō Waters – A special case

20. Lake Taupō has been used as a hydro electricity generation lake for a number of decades, with the Taupō Control Gates being installed in the 1940s. Lake Taupō is an integral component of two major hydro electricity generation schemes, being the Tongariro Power Scheme (the **TPS**) and the Waikato River hydro scheme (the **Waikato Scheme**). In summary:
 - (a) All of the water that flows through the TPS is discharged into Lake Taupō. The TPS would not be viable without Lake Taupō. The TPS typically contributes approximately 4% of New Zealand's total electricity generation per annum.

- (b) Lake Taupō is used as a storage facility for the Waikato Scheme. Although the Waikato Scheme includes a number of dams along the Waikato River from Aratiatia to Karapiro, Lake Taupō represents approximately 92% of the storage capacity of the Waikato Scheme. The Waikato Scheme typically contributes approximately 13% of New Zealand's total electricity generation per annum.
21. The Crown transferred title to the Taupō Waters (including Lake Taupō) to the Trust Board pursuant to a deed dated 28 August 1992. That deed was renegotiated and replaced by a deed dated 10 September 2007. The 2007 Deed does not expressly authorise any MOM company to operate commercially on the Taupō Waters without the consent of the Trust Board. To date, the Trust Board has not granted its consent to those MOM companies to use the Taupō Waters to generate electricity for commercial purposes.
22. Importantly, there is no easement registered against the title to Lake Taupō or the Taupō Waters that permits the use of the Taupō Waters for hydro electricity generation. In that regard, Lake Taupō 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 Taupō is Lake Rotoaira.
23. The ability of the MOM companies to use the Taupō Waters for commercial purposes, particularly in the absence of an appropriate easement, is the subject of discussion between the Trust Board and the relevant MOM companies. It is clear that the Shares Plus concept does not recognise the Trust Board's unique position as owner of the Taupō Waters. 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 the Taupō Waters by the Crown, Electricity Corporation New Zealand and the MOM companies without payment to the Trust Board.

The Crown and the MOM companies that use the Taupō Waters must resolve the anomalies concerning the current and historical use of the Taupō Waters for hydro electricity generation without compensation or payment to the Trust Board before any IPO involving those companies.

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 Iwi rights and interests in freshwater and geothermal resources, and provide redress for past Treaty of Waitangi breaches.
26. The Trust Board acknowledges and respects the views of the Tribunal. However, the Trust Board is mindful that the Tribunal's interim report was necessarily shaped by the application before it and the time constraints within which it was required to operate. The Tribunal properly focussed its interim report on the relatively narrow question of the effects of the MOM process on Iwi rights and interests in freshwater. It has not yet considered in detail the question of *how best* to recognise and provide for Iwi rights and interests in freshwater and geothermal resources. That question will likely be addressed in the next stages of the Tribunal's process.

27. 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, in our submission, intended to represent the best and only method by which Iwi 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 Iwi rights and interests in freshwater. It is a specific suggested response to a particular circumstance.
28. Given the proper focus of the Tribunal and the necessarily 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 Iwi rights and interests in freshwater. For example the Shares Plus concept would not provide Ngāti Tūwharetoa with a voice on:
- (a) Issues such as freshwater quality and associated habitat. Those matters are central to Iwi rights and interests in freshwater.
 - (b) Allocation issues. The manner in which freshwater is allocated, and to whom, shall be important matters for Iwi.
 - (c) The management of the freshwater resource generally. It would only provide a 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.
29. It is clear that the full nature and extent of Iwi 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.
30. 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.
31. The Trust Board did not participate in the Waitangi Tribunal hearing process. The Trust Board has been engaging, on behalf of Ngāti Tūwharetoa, through the Freshwater Iwi Leaders Group, in direct discussions with the Crown in relation to iwi rights and interests in freshwater. 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 iwi 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.

32. The Trust Board prefers that direct dialogue on Iwi rights and interests in freshwater between the Trust Board and the Crown continue.

The Trust Board **recommends** that the Crown:

- (a) acknowledge the context in which Shares Plus was developed by the Waitangi Tribunal namely that the Tribunal has not yet considered in detail the question of how best to recognise and provide for Iwi rights and interests in freshwater; and
- (b) prioritise engagement with Iwi on an appropriate legislative and regulatory framework to recognise and provide for Iwi 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 Iwi 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) would be more appropriately provided for in other proposed mechanisms (such as a new regulatory framework regarding freshwater). On that basis, the Trust Board considers that the Crown should not form final views on the Shares Plus concept at this early stage.
35. The Trust Board acknowledges that it may take some time to develop a wider suite of mechanisms to address Iwi 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 Board 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 Board **recommends** that the Crown not form final views on the Share Plus concept until the legislative and regulatory framework to recognise and provide for Iwi 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 Board'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 Iwi 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 Board 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 Board 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 Iwi 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 Iwi 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 retain 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 Board 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 Board 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 Board 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 Board 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 Board 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 Board **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 Board would welcome the opportunity to discuss this submission directly with relevant Ministers and Crown officials.



Tamarapa Lloyd
Chief Executive Officer

