The Treasury

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

Release Document

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Submission in relation to "Shares Plus" Consultation with Directly Affected Iwi

Dated 5 October 2012

1. These submissions are filed on behalf of Mokau ki Runga as a Third Party interest who we represent in this inquiry (Wai 2358) in relation to the Crown letter dated 05 September 2012.

2. Mokau ki Runga represent Wai 691 and Wai 788 and are engaged in the Waitangi Tribunal's Te Rohe Potae Inquiry District (Wai 898).

3. The named claimants of Wai 691 are Muiora Barry, Tohe Raupatu, Ngamuringa Raupatu, Oriwia Woolf, Katherine Barry and Lenny Turner.

4. The named claimants of Wai 788 are Barbara Ngawai Taite Marsh, Jacob Hiriaki, Patrick Louis Taylor, Margaret Drummond, Lenny Turner, Atiria Rora Ormsby Takiari (deceased) and Wareriana Ngauru (deceased).

5. We advise that Muiora Barry is now an active member of the Maniapoto Trust Board and we therefore endorse and support their principle submission that the Crowns consultation process is completely inadequate.

6. We further support the submissions tendered by New Zealand Maori Council dated 13 September 2012, on behalf of the Claimants' to the Wai 2358 Inquiry.

7. To further inform these submissions, we attach the Statement of Evidence of Barbara Marsh dated 18 May 2012 (Wai 2358, #A50) filed in the Wai 2358 Inquiry and appendices referred within:

   a) Wai 2358 #A50(a) – Awakino and Mokau Native Reserves 1;

   b) Wai 2358 #A50(b) – Awakino and Mokau Native Reserves 16;

   c) Wai 2358 #A50(c) – Mouth of the Mokau River;

   d) Wai 2358 #A50(d) – Te Rohe Potae Inquiry District with River Catchments;

   e) Wai 2358 #A50(e) – Wairere Dam and Aorangi 3A, 3C1 and 3C2 Blocks;

f) Wai 2358 #A50(f) – HTTP://WWW.GREENS.ORG.NZ/NODE/25865 Mokau River March 29, 2011; and

g) Wai 2358 #A50(g) – Suburban Sections Village of Aria; Block X Totoro S. Dist;

Background

8. The Waitangi Tribunal released its interim report on the National freshwater and Geothermal Resources claim (Wai 2358) on 24 August 2012. Although the report is interim, the Tribunal has stated that the substance of its findings and recommendations will not change.

9. The Tribunal agreed with what we have always maintained, that Maori had rights and interests in our water bodies for which the closest English equivalent in 1840 was ownership rights, and that such rights were confirmed, guaranteed, and protected by the Treaty of Waitangi.[1]

10. The release of the Tribunal's interim findings has formed the basis of the Crown's consultation process that commenced on 5 September 2012. The timeframe of four weeks to properly consult is simply inadequate for such a significant issue.

11. It is extremely alarming that the Crown has been mischievous in its interpretation of the Tribunal's findings when presenting to Maori. In the consultation presentation document dated 9 September 2012, the Crown states that "*the Tribunal largely agreed with us that there was no link between ownership of ordinary shares and ownership of water.*" This is blatantly incorrect, as the Tribunal found that that there is a sufficient nexus between shares in the power-generating SOEs and Maori rights in water.[2]

Shares Plus

12. The Tribunal found that the Crown cannot ignore the option of using shares in the power-generating MOM companies in partial recognition of these rights, where that is what Maori want.[3] Shares on their own are not an adequate remedy to recognise our interests in our bodies of water. As recognised by the

[1] Waitangi Tribunal *Interim Report on the National Freshwater and Geothermal Resources Claim* Wai 2358
[2] Ibid at 161
[3] Ibid at 166

Tribunal, shares in the MOM companies could only ever be one component of rights recognition.[4]

13. The Crown has expressed its view during the consultation process that it does not believe that the 'shares plus' concept should be progressed. The Crown's view is formed on five main reasons:

a) Not in the national interest for any given group among the 49% minority shareholders in these companies to be given special rights.

b) Almost every form of rights recognition and redress for Maori that could be delivered by "shares plus" can be achieved in other ways.

c) The remaining elements of "shares plus" in relation to decision rights over management or strategic decisions would not work in practice as an effective for of rights recognition or redress.

d) 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.

e) 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.

14. Our submissions in relation to the obstacles cited by the Crown are outlined below.

15. **National interest:** It is fundamental to the Tribunal's findings that Maori rights and interests in water be recognised. To dismiss these rights in favour of the "national interest" is essentially a refusal by the Crown to recognise Maori proprietary rights. It is common practice for companies to have different classes of shares, and a special class of shares should not be denied to Maori.

16. **Interests recognised in other ways:** While the Tribunal acknowledges that rights recognition and redress could be effected through other means, it

[4] Ibid at 162

recognises that the Crown's ability to provide redress with shares will be greatly reduced:[5]

> *We have found that company law will in practical terms prevent the Crown from providing or recovering the asset sought – 'shares plus' – after partial privatisation of the companies. The Crown will therefore be unable to carry out its Treaty duty to actively protect Maori property rights and to remedy well-founded claims if it proceeds with its share sale without first creating an agreed mechanism to preserve its ability to recognise Maori rights and remedy their breach.*

17. **Decisions rights would not work in practice:** the essence of the Tribunal's analysis of "shares plus" is that a shareholders agreement would give Maori a meaningful connection to their water. As recognised by the Tribunal, the intent of the legislature to ensure that a company's constitution, or the terms upon which shares are issued, can allow for and permit a wide range of shareholder arrangements.[6] There is no reason for the Crown not require the provision of a shareholders agreement from the MOM companies that reserve special positions for the Maori, being the owners of the resource fundamental to the operation of the company. As found by the Tribunal: [7]

> *In a practical sense, the Crown could negotiate with Maori now and ensure that any requisite changes were made to the companies' constitutions. These might include, for example, provisions in respect of a possible future settlement of this Treaty claim or for the companies to enter into joint ventures with Maori in respect of water. Then, after partial privatisation, and having regard to its section 45Q obligations, the Crown could use its 51 per cent shareholding to prevent such provisions being altered or removed. The Crown could also make the policy decision now to reserve a proportion of shares for Maori, rather than to sell the full 49 per cent or to retain what is not sold. For entering into a shareholders' agreement, however, it would need to change the status of the companies from SOEs to MOMs by issuing an order in council to bring the relevant legislative provisions into effect. Then, before selling shares in Mighty River Power to private shareholders, the Crown could potentially transfer shares to Maori and negotiate a shareholders' agreement with them.*

18. **Less attractive to investors:** It appears that the Crown places greater importance on generating finance, than providing redress to its Treaty partner who has long suffered at the hands of the Crown for continually denying Maori their ability to act in accordance with our long standings interests in our taonga, our waterways. That being said, surely certainty is the best means of

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[5] Ibid at 198
[6] Ibid at 160.
[7] Ibid at 169

providing an attractive investment option to investors. A settlement achieved between the Crown and hapu will stabilise these MOM companies and make them more attractive for raising capital.

19. **Consultation with iwi:** consultation with the Iwi Leaders Forum and a 10 day road show undertaken in March are less than sufficient to meet the Crown's obligations under the Treaty, which cements the relationship between the Crown, Rangatira, and hapu. Furthermore, the consultation that did take place did not deal with proprietary interests. It is agreed that the Crown carries the Treaty obligation and not the companies. Therefore the obligation rests with the Crown to ensure that a solution is achieved before the companies are privatised.

Recognition of our interests: a way forward

20. It is fundamental that the exercise of kaitiakitanga and rangatiratanga carries with it the ability to create, develop and enforce regulatory frameworks. It is also widely accepted that there are nuanced differences in the way that varying hapu exercise kaitiakitanga and rangatiratanga. Any system would therefore need to provide for the requirements of relevant hapu while protecting against their subsumation beneath super iwi bodies that deny participation by dint of their representation.

21. It is our submission that the framework for recognising our rights and interests:

    a) meaningfully empower them to create regulations over water allocation in their region;

    b) enable them to enforce these regulations;

    c) enable them to work together while protecting the integrity of the respective hapu.

22. This suggestion we believe parallels the 'share plus' option raised by the Tribunal. Instead of providing for it within the creation of a privatized company, we believe there is also room for the protection to sit alongside as a regulatory framework that the company must sit within and with which its constitution must be consistent.

23. A regulatory framework such as this was proposed by the Crown to regulate therapeutic products in this country. In an effort to bring consistency to the regulation of therapeutic products throughout Australasia, the government decided to pursue a joint regulating agency with Australia. This is not the only example of joint regulating agencies, as The Food Standards Australia New Zealand is another bi-national government agency in which the authority to jointly develop and administer a 'code' has been vested.

24. These examples suggest that there is no reason why a similar authority cannot be established with the ability to develop systems of regulation for water. Within such a system, the longer conversation that was recommended by the Waitangi Tribunal could take place within a discussion that is meaningful and respectful and forward focussed. A regulatory framework will result as a direct result of these discussions which is developed and enforced from the ground up.

Concluding remarks

25. We are of the view that "shares plus" provides an option of redress which must be made available to those who want it. We support a "shares plus" approach, as long as a regulatory framework is first developed to provide for the requirements of relevant hapu.

26. Fundamental to the "shares plus" concept, is the ability to develop a shareholders agreement that reserve special positions for the Maori. However, it is our view that the development of a regulatory framework should take place in the first instance, and this would guide what the provisions for Maori are to be met in the shareholder's agreement. As provided by the Tribunal, it is more practical of this is done now, rather than after privatisation.[8]

Dated this 05th day of October 2012

Muiora Barry on behalf of Mokau ki Runga
(Wai 691 and Wai 788)

[8] Ibid at 198.