The Treasury

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

Release Document

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Shares Plus Consultation
Commercial transaction Group
The Treasury
PO Box 3724
WELLINGTON 6140

sharesplusconsultation@treasury.govt.nz

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

1. My name is Angeline Greensill and I have prepared a submission on behalf of the whanau and hapu of Whaingaroa.

2. While I was not an interested party in the Wai 2358 National Freshwater and Geothermal Inquiry, I will be seeking to be joined as an interested party for Stage Two of the Inquiry, in relation to the water sources and water ways within Whaingaroa.

3. I have had an opportunity to review the Crown's consultation documents, and now make submissions on the Shares Plus Consultation.

Background

4. 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.

5. It is important to note that the Tribunal upheld the claims of Maori and agreed that tangata whenua have rights and interests in water bodies. The Tribunal found that the closest English equivalent of these rights and interests in 1840 was ownership and that such rights were confirmed, guaranteed, and protected by the Treaty of Waitangi.[1]

6. The release of the Tribunal's interim findings has formed the basis of the Crown's consultation process that commenced on 5 September 2012.

7. I am concerned that the Crown is now misrepresenting the findings of the Tribunal within its consultation process stating that "*the Tribunal largely agreed with* [the Crown] *that there was no link between ownership of ordinary shares and ownership of water.*" This is a blatant lie. The Tribunal found that that

[1] Wai 2358 at 110.

2461 489

there is a sufficient nexus between shares in the power-generating SOEs and Maori rights in water.[2]

8. I hold serious concerns about the manner in which the Crown has conducted their consultation process. In addition to the wilful misrepresentations, the timeframe of four weeks to properly consult is simply inadequate for such a significant issue.

9. I am concerned at the limited nature of consultation and the decision of the Crown to not engage with our whanau and hapu of Whaingaroa when designing frameworks for water recognition within a context of privatisation.

10. Furthermore, the Crown have set the parameters of the discussion and invited submissions, as opposed to entering into a meaningful dialogue with Maori.

11. In this regard, I support the resolutions that were passed at Turangawaewae Marae which have expressed a way forward. These proposed that a framework of proprietary rights be settled:

    a. Before the sale of shares; and

    b. Before the Government enters into negotiations with hapu and iwi.

Shares Plus

12. The Tribunal found that the Crown cannot ignore the option of using shares in the power-generating MOM companies to partially recognise tangata whenua rights where this is an expressed desire by Maori.[3] In making this finding, the Tribunal was clear that shares on their own are not an adequate remedy to recognise interests in fresh water, however the option must be made available for those who want it.

13. The view expressed by the Crown during the consultation process was that it did 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 form 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

[2] Wai 2358 at 161.
[3] Wai 2358 at 166

rest with the Crown, not with companies. They are not themselves appropriate vehicles for achieving redress.

14. The Crown position is critiqued 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, and suggests that Maori human rights are less important than the rights that will be asserted by potential shareholders.

16. It is common practice for companies to have different classes of shares, and a special class of shares should not be denied to Maori.

17. **Interests recognised in other ways:** While the Tribunal acknowledges that rights recognition and redress could be effected through other means, it recognises that the Crown's ability to provide redress with shares will be greatly reduced:[4]

> *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.*

18. **Decisions rights would not work in practice:** the essence of the Tribunal's analysis of "shares plus" is that a share holders 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.[5] There is no reason for the Crown not to 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: [6]

> *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*

[4] Wai 2358 at 198
[5] Wai 2358 at 160.
[6] Wai 2358 at 169

potentially transfer shares to Maori and negotiate a shareholders' agreement with them.

19. **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 our ability to exercise mana over our taonga, our waterways. That being said, surely certainty is the best means of 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.

20. **Consultation with iwi:** consultation with the Iwi Leaders Forum and a 10 day road show undertaken in March are less then 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

21. 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.

22. Any system would therefore need to provide for the requirements of relevant hapu while protecting against their being subsumed under super iwi bodies that deny participation by dint of their representation. It is my 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.

23. This suggestion has parallels with 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.

24. In addition to looking at mechanisms such as the shares plus options to ensure that Maori interests within the MOMs are considered, it is also necessary to consider the development of a regulatory framework external to the MOM's which will guide the environment in which they exist to ensure against the prejudicing of future Maori claims.

25. In this context we direct attention to the regulatory framework that 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.

26. 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

27. Part of the Tribunal's rational in suggesting the "shares plus" concept, was the ability to develop a shareholders agreement that reserve special positions for the Maori, in recognising the unique relationships and the proprietary interest that we have with our waterway.

28. My suggestion outlined above, supports the sentiments of the Tribunal through an external regulatory framework that would set the standard's for all relevant MOMs and their shareholders agreements.

29. While I am not opposed to the "shares plus" approach, my preference is for external regulation whereby a national framework will be developed to protect all Maori interests. My proposal, like the "shares plus, must be undertaken now rather than after privatisation.

30. From a wider perspective, contemporary arguments over water illustrates the discrimination that prevails which suggests that Maori human rights are less important than the property rights that will be asserted potential shareholders. The fact that this position received the support required to amend the law is damning of the constitutional arrangements that exist in this country.

31. It is apparent that constitutional change is essential if we are to avoid these kinds of incident in the future.