

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

Certain personal contact information in this document may have been withheld to protect the privacy of natural persons, including deceased people.

Where personal contact information has been withheld, a light grey box masks the content.



SUBMISSION: Shares Plus

To: The Ministers of Finance, State-owned Enterprises and Treaty of Waitangi Negotiations

This Submission is from:

Waikato-Tainui Te Kauhanganui Incorporated

Private Bag 3344

HAMILTON

2,461,499

'Waikato taniwharau, he piko he taniwha, he piko he taniwha'

(Waikato of a hundred chiefs, at every bend a chief, at every bend a chief).

EXECUTIVE SUMMARY

1. Waikato-Tainui does not support the Shares Plus concept in its current form for the following reasons:
 - (a) The Shares Plus concept on its own does not adequately recognise and provide for the full nature and extent of Waikato-Tainui rights and interests in freshwater.
 - (b) Waikato-Tainui rights and interests in freshwater must be addressed as a matter of priority, and separately from the Mixed Ownership Model (**MOM**) process.
 - (c) The Crown must honour the written undertakings first provided to Waikato-Tainui in 1999 (as part of the establishment of certain SOE companies) and subsequently reaffirmed in the 2008 Deed of Settlement relating to the Waikato River and written correspondence.
2. Waikato-Tainui notes that, in principle, the Shares Plus concept may be an option for some iwi that wish to have their rights and interests in freshwater partially recognised. Waikato-Tainui would need to discuss the wider range of options and mechanisms to address our rights and interests in freshwater. Accordingly:
 - (a) The Shares Plus concept should not be discounted at this stage as an option for iwi that wish to have their rights and interests in freshwater partially recognised through participating in, and benefiting from, the operations of Crown-controlled commercial enterprises that use freshwater.
 - (b) Shares Plus must not be the only mechanism to recognise Waikato-Tainui rights and interests in freshwater and the Crown should prioritise engagement with Waikato-Tainui to agree an appropriate framework to recognise and provide for those rights and interests.
 - (c) Final views on the Share Plus concept will be reached as part of the broader engagement on the framework to recognise and provide for Waikato-Tainui rights and interests in freshwater.
 - (d) In agreeing the final form of any Shares Plus concept the Crown and Waikato-Tainui will need to discuss:
 - (i) amending the constitutions of the MOM companies prior to each initial public offering (**IPO**) to enable directors of those companies to act in the best interests of the appointing shareholder;
 - (ii) the possibility of entering into voting agreements in respect of the Crown residual shareholding in the MOM companies; and

- (iii) the possibility of the Crown retaining sufficient shareholdings in the MOM companies to ensure that the Crown is not required to buy back MOM company shares following an IPO to give effect to the Shares Plus concept.

BACKGROUND

- 3. This submission is made on behalf of Waikato-Tainui on the "Shares Plus" proposal, as described in the consultation letter from Ministers English, Ryall and Finlayson dated 5 September 2012 (the **Consultation Letter**).

Waikato-Tainui Iwi

- 4. Waikato-Tainui Te Kauhanganui Incorporated is the principal constitutional and the legally mandated Iwi authority of Waikato-Tainui.
- 5. The 68 Waikato Raupatu Marae (Refer APPENDIX 1) affiliate to at least one of the 33 hapuu of Waikato-Tainui.
- 6. In 1995, Waikato-Tainui was the first iwi to settle a Treaty of Waitangi Settlement in New Zealand (Refer APPENDIX 2 1995 Waikato Raupatu Settlement Area). In 2008, Waikato-Tainui signed a deed of settlement settling their claim with the Waikato River.
- 7. Waikato-Tainui are tangata whenua of the Waikato and Auckland regions including West Coast Harbours (Manukau, Whaingaroa, Aotea and Kawhia).
- 8. Waikato-Tainui are recognised as kaitiaki of their environment and view the holistic integrated management of all elements of the environment such as flora and fauna, land, air and water as of utmost importance.

Waikato-Tainui specific interests in its resources

- 9. The Crown acknowledged in the 1995 Waikato Raupatu Land Settlement that the confiscations (Raupatu) of land and resources under the New Zealand Settlements Act 1863 were wrongful, have caused Waikato to the present time to have had a crippling impact on the welfare, economy and development of Waikato-Tainui.
- 10. The Deed of Settlement in relation to the Waikato River was signed by Waikato-Tainui and the Crown on 22 August 2008, with a revised Deed of Settlement signed on 17 December 2009. The arrangement under the Deed of Settlement enact a commitment by the Crown and Waikato-Tainui to enter into a new era of co-management over the Waikato River with an overarching purpose to restore and protect the health and wellbeing of the Waikato River for future generations.
- 11. On 7 May 2010, the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act was passed. The overarching purpose of the Settlement Act is to restore and protect the health and wellbeing of the Waikato River for future generations.

12. Waikato-Tainui is currently in discussions with the Crown regarding its outstanding Treaty of Waitangi claims in the greater Auckland area and to the West Coast Harbours.
13. The relationship between Waikato-Tainui and its resources, particularly those that are used by the MOM companies (for example, the Waikato River) has been recognised by the Crown on many occasions. The unique position of Waikato-Tainui in respect of their lands and the Waikato River must be acknowledged and recognised by the Crown.

SUBMISSIONS

Shares Plus concept a limited proxy for the Waikato-Tainui relationship with freshwater

14. In its Interim Report on the National Freshwater and Geothermal Claim (Wai 2358), the Waitangi Tribunal found that Maori have residual proprietary rights in freshwater and that it would be a breach of the principles of the Treaty of Waitangi if the Crown were to proceed with the sale of shares in the MOM companies.
15. The Tribunal's Interim Report focuses principally on how rights recognition might be facilitated or provided for through the provision of shares in the MOM companies. In discussing the Shares Plus concept the Tribunal has taken a relatively narrow approach to the issue of rights and interests in freshwater (and geothermal). Similarly, the Tribunal's discussion of royalty or levy arrangements has a necessarily narrow economic focus.
16. The Shares Plus concept developed by the Tribunal does not address issues such as freshwater governance, the setting of limits, the recognition of values and an equitable share of allocable water within each catchment to iwi. These options provide much more broader, sophisticated and meaningful options for addressing iwi rights and interests and enshrining an ongoing and active relationship between iwi and the fresh water within our rohe.
17. Waikato-Tainui do not consider that the Shares Plus concept or royalty systems on their own meet the Crown's Treaty obligations or adequately provide for the relationship (including rights and responsibilities) of iwi in relation to fresh water. Shares Plus could only ever be a partial and limited – that is, economically (not culturally) focused and compensatory in nature – proxy for that relationship.
18. Therefore, Shares Plus must not be the only mechanism to recognise Waikato-Tainui rights and interests in freshwater and the Crown should prioritise engagement with Waikato-Tainui to agree an appropriate framework to recognise and provide for those rights and interests.

Freshwater rights and interests must be addressed separately from MOM

19. The Shares Plus concept can, at best, only be part of the broader framework for dealing with Waikato-Tainui rights and interests in freshwater. 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 Waikato-Tainui rights and interests in freshwater.

20. In order to properly assess the Shares Plus concept it would be necessary to understand how it fits into the broader framework for dealing with Waikato-Tainui rights and interests in freshwater. Therefore, development of that broader framework must be prioritised.
21. The broader framework must also be developed separately from the MOM process. Although the MOM companies will likely be affected by that broader framework, the framework will have implications beyond the MOM companies.
22. Until the wider suite of mechanisms that form part of the broader framework 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) could be provided for in other proposed mechanisms (such as a new regulatory framework regarding freshwater).
23. Waikato-Tainui acknowledge that it may take some time to develop the broader framework, incorporating a wider suite of mechanisms, to address Waikato-Tainui rights and interests in freshwater and it may be challenging to do so prior to the planned IPO for Mighty River Power Limited (during March to June 2013). However, 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.
24. Therefore, the Shares Plus concept should not be discounted at this stage as an option for iwi that wish to have their rights and interests in freshwater partially recognised through participating in, and benefiting from, the operations of Crown-controlled commercial enterprises that use freshwater.

The Crown must honour its previous undertakings to Waikato-Tainui

25. By letter dated 23 March 1999, the Crown, through the Minister in Charge of Treaty of Waitangi Negotiations, provided the following undertaking to Waikato-Tainui:

"The Crown wishes to acknowledge and confirm to [Waikato-Tainui] that the split of ECNZ into three new SOEs is not intended to prejudice the existing rights of the [Waikato-Tainui] tribe or the Crown. Accordingly, the split will not of itself affect any rights or interests or the ability to claim rights or interests that the tribe may have in respect of the natural resources used by ECNZ for the generation of electricity or affected by such use, namely lakes, rivers and their waters, beds and other parts or geothermal resources."

26. The Crown must honour this undertaking in the context of the MOM process. It must also honour the premise on which the undertaking was provided in the context of developing a broader framework to recognise and provide for Waikato-Tainui rights and interests in freshwater.

Uncertainties regarding the Shares Plus concept

27. The Government has suggested that the Crown could provide many of the aspects of the Shares Plus concept after an IPO. This may be correct to a point, although the Government is not specific about how this might occur.
28. Waikato-Tainui therefore seek further information from the Government on the:

- (a) ability of the Crown to “buy back” MOM company shares in the market, particularly in light of the Stock Exchange Listing Rules and the Takeovers Code; and
 - (b) ability of the Crown to enter into voting agreements after a MOM company IPO, particularly in relation to the Listing Rules.
29. If there are likely to be difficulties for the Crown to “buy back” MOM company shares 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.

Conclusion

30. Waikato-Tainui currently engages with the Government on a range of issues, primarily at a leadership level through the Freshwater Iwi Leaders Group, but also at a technical level through various working groups and other engagement. Waikato-Tainui believes this is a positive working relationship and desires to continue with this engagement.
31. Issues concerning Iwi rights to freshwater and the geothermal resource should be separated from the current MOM debate. It is the position of Waikato-Tainui that the current commitments concerning water at a leadership level (through the Freshwater Iwi Leaders Group) and associated technical work streams (for example, the Land and Water Forum) represent a positive engagement between Waikato-Tainui and the Crown in relation to rights and interests in freshwater. These mechanisms must continue and should be expanded in due course to encompass similar issues relating to the geothermal rights and interests of Iwi.
32. Waikato-Tainui would welcome the opportunity to discuss these submissions directly with responsible Ministers and Crown officials.

DATED:

5th October 2012

WAIKATO TAINUI TE KAUHANGANUI INC
By its Group Manager, Waikato Raupatu River Trust



Donna Flavell

And by its **Implementation Manager;**



Taipu Paki

Contact person: C/- Taipu Paki
Waikato-Tainui Te Kauhanganui Inc
Private Bag 3344
HAMILTON

Telephone: 07-858 0400
Fax: 07-839 4576
Email: taipup@tainui.co.nz

[illegible]

APPENDIX 2 – WAIKATO RAUPATU SETTLEMENT AREA



