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.

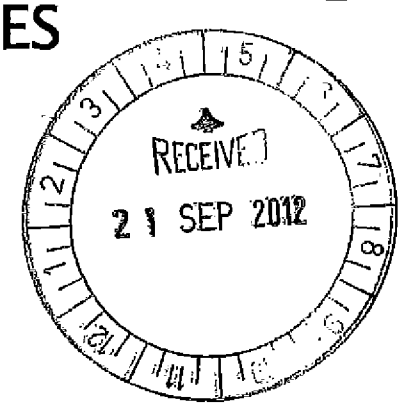
Where personal contact information has been withheld, a light grey box masks the content.

79

WOODWARD LAW OFFICES

Barristers & Solicitors

PRINCIPAL: Donna MTT Hall, BA/LLB



18 September 2012

Dear Ministers,

MIXED OWNERSHIP MODEL COMPANIES: CONSULTATION ON "SHARES PLUS" PROPOSAL

I refer to your letter of 5 September 2012 and respond on behalf of the Wai 2358 Claimants as follows:

The claimants are disappointed that the Crown is not going to consult or negotiate with them on the Waitangi Tribunal finding that Maori retain residual proprietary interests in water. We are also disappointed with your rejection of the Tribunal finding that a nexus exists between Maori proprietary rights in water and the proposed private ownership of shares in companies which use the water.

You are asking several groups, some of whom are extremely short on money, to expend significant resources on engaging with your process for no clear purpose. We have grave concerns about the terms of engagement being undertaken with individual Iwi and Hapu in these "consultation rounds" and fear that they will not in fact resolve the issues at the centre of this dispute. The current terms of engagement on shares plus are too narrow for the dialogue which is required. They are also inadequate in terms of good faith dialogue for the further reason that they invite a submission rather than discussion, and an adjudication by government rather than an agreement with claimants.

It is the Wai 2358 Claimants preference to resolve our differences through negotiation between Treaty partners, rather than reverting to the Courts. The resolutions of the Hui hosted by the Kingitangi at Turangawaewae on 13 September 2012 concurr with this approach.

The Wai 2358 Claimants consider it is unreasonable for the Crown to expect any Hapu or Iwi to meet individually to negotiate on proprietary interests in water, without prior agreement on a framework within which Maori proprietary interests can be fairly assessed. From our point of view the consultation on shares plus is not really the main issue; and the process of inviting submissions from several groups is well short of the necessary standard that a principled Treaty compliant approach requires.

We thank you for the opportunity to make our position clear and respond to the details of your letter in Attachment A.

Yours Sincerely

[redacted]

Donna Hall

2461545

19 Myrtle Street, Woburn, PO Box 30-411, Lower Hutt, NEW ZEALAND

Point by Point Response to Crown letter of 05 September 2012		
Crown Para and reference		**Response**
2	targeted consultation	The consultation proposed by the Crown is not in line with the national hui called for in the Tribunal report. Maori with directly affected interests are more extensive than those chosen by the Crown.
3	iwi and hapu with a specific connection	The claim is that the basis of the Maori proprietary interest in water resources should be determined first to provide a framework for dealing with Iwi and Hapu with specific connections to specific waterways. The consultation proposed by the Crown could extract concessions from Iwi and Hapu prior to the law being clarified.
8	the report did not discuss the detail	The shares plus is one means of providing *"a meaningful form of commercial rights recognition."* The Crown and all the parties were asked by the Tribunal to address this "framework" issue. The Tribunal then suggested "Shares Plus" concept to maintain the nexus between hapu and their water bodies used by the SOEs. The importance of Shares Plus is the recognition that there is no Treaty compliant solution which can be solely cash and/or shares.
9	rights recognition and redress outcomes	The Crown cannot consider this issue without first acknowledging the existence of a residual Maori proprietary interest. The extent of the residual interest is an open question.
10	special rights.	This Crown position flows from refusal to recognise that proprietary rights exist in water for Maori It is common practice internationally for companies to have different classes of shares, particularly natural resource companies. It is in the national interest that these companies have the owners (or partial owners) of the resource they use as shareholders with special conditions on the shares. This may include, as suggested by Claimants, that such shares can never be sold as they are "attached" to the water. This would be a positive outcome for the national interest. Even the biggest banks in the world are continuing to issue special shares. For example Bank of America has over twenty special classes of shares.
11	other ways	The Tribunal and Claimants agree *"... almost every form of rights recognition and redress... "* could be catered by other means. However, the Tribunal and Claimants agree the form of rights that cannot be delivered by other means is a meaningful expression of ownership in the entities that take their value from the water resources owned by the hapu or iwi. This is the essence of Shares Plus.
12	not work in practice	Crown says aspects of a special decision making mechanism cannot work yet the Crown speaks highly of co-management and shared decision making proposals in Fresh Water Forum. The proposed "Shares Plus" concept binds these types of shared decision making proposals through a shareholders agreement.

Point by Point Response to Crown letter of 05 September 2012		
Crown Para and reference		**Response**
		The Crown is keeping a 51% control of the companies – there is no reason these companies cannot have a special place reserved alongside that position for the resource owner shareholder.
13	less attractive to investors	Clean and green renewable energy companies attract local and international "Ethical Investors", but these companies will not qualify for ethical investments while the indigenous owners of the water and geothermal that drives the turbines protest that their rightful residual proprietary interests are not recognised. A settlement achieved through negotiation between Treaty partners firstly at a national level and subsequently at hapu level within a national framework will stabilise these companies and make them attractive for raising capital for equity, loans or joint venture finance on favourable terms without recourse to a government guarantee. NZMC experts are available to explore this area with the Crown. It is in the national interest that all opportunities are considered.
14	consultation with iwi... ... vehicles for achieving redress	The 10 day road show undertaken in March 2012 and discussions with Iwi leaders have not dealt with proprietary interests and at no point have such consultations resulted in a fully informed willing extinguishment of any Maori proprietary rights. It is the Crown that carries the Treaty obligation, not private shareholders. That is why the obligation rests with the Crown to achieve an enduring solution with Maori BEFORE the companies are privatised, and why the Shares Plus solution was put forward as one means by which the Crown can achieve its goals in a Treaty compliant manner.
15	Treaty breach	The breach of the Treaty is in not reaching "... *a meaningful form of commercial rights recognition...*". Shares Plus is one means – there may be others but only when the legal basis of the proprietary interest in water resources have been determined first to provide a framework for dealing with iwi and hapu with a specific connection.
17	Consultation process	The Crown has publicly indicated that it will continue with work on privatisation, and continue to expend funds, and aims to take the next major step in mid October. This leaves only a few weeks for the consultation process and on Stage 1 Report the urgency hearings is still to appear. The Crown offer of consultation does not include recognise any legal basis for residual Maori proprietary interests in water resources. Crown engagement with Hapu on "no one owns water" basis. Without consultation on, and a resolution of, the national framework for proprietary rights, none of the Hapu will have a legal basis on which they can consult meaningfully with the Crown.
18	groups that it has identified	It is unclear how the Crown will discern which "groups" have a direct interest. Whanau, hapu and iwi? There are a multitude of projects which the SOEs have under consideration

Point by Point Response to Crown letter of 05 September 2012		
Crown Para and reference		**Response**
		where they will be wishing to tap into geothermal water or water for macro and micro hydro schemes. There are also other water uses. Some future projects are already disclosed to the public – others are not. How can affected Hapu with direct interests in these water bodies know of their interests? The Crown has a duty to direct companies to release the details of all possible projects including maps of the areas they may cover and water resources that may be tapped into now.
19	5 October 2012	Date is very short
22.1	other potential outcomes	Shares Plus provides a formal recognition of the status of the owner of the water, and in many cases the original owner of the land on which the companies depend. The shares under Shares Plus are special shares. The Crown will also hold special shares and a special place as a founding owner of the companies. The Crown through legislation is required to retain 51% ownership, or at least 51% of the voting shares in the company. Through this mechanism the Crown retains a special or preferred position. It controls the majority of any shareholders meeting and only the Crown, if it changes its legislation, can obtain a control premium if it were to sell its shares at a later date. No other shareholder can do that. The Crown shareholder also controls the regulatory environment in which the companies operate. Not all shareholders are equal.

In summary NZMC and the claimants feel the Crown has put the cart before the horse.