

The Treasury

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

Release Document

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21 September 2012

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Dear Ministers and Treasury

Thank you Ministers for your letter of 6 September inviting New Zealand Maori Council to make submissions, by 5 October, on the Tribunal's consideration of "shares plus". Our response incorporates our submission on the Shares Plus Consultation while raising with you, the Council's plea for a much wider discussion on issues relating to the water claims.

Introduction: background

Before replying to your letter, we awaited the Council's ordinary meeting, at Henderson, on 15-16 September. The Council's Executive considered that consultations on the water claim required the attention of the full Council, and at a regular meeting because special meetings are impracticable in view of the widespread membership and the attendant costs in gathering. However, the delay has allowed the Council to take account as well of the resolutions of the King's national hui at Turangawaewae on 13 September.

We were also party to the letter to you, on 18 September, from the claim lawyers on behalf of the claimants as a whole. Claimants were concerned about rumours at the national hui that consultations were about to begin, with little or no notice. They proposed a common submission through the claim lawyers. The lawyers circulated a draft response late on 13

September and it was sent to you on 18 September. We learnt soon after on 18 September, that the consultations were starting that evening. We learnt that from a Maori Party bulletin despatched 11.30pm the previous evening. Because of the number of claimants and supporters associated with the Council we feel we should have been informed much earlier. For some of our people there was very little time to prepare especially given their desire to await the outcome of the national hui.

We write now to affirm our willingness and desire to engage with you, and we accept that this be done through the process settled at Turangawaewae. We seek a fair and prompt resolution in the interests of Maori and of the country. We write also to submit on Shares Plus, to express our concerns about the consultation process, to urge a wider dialogue which addresses the more pertinent issues, to advise of and explain our support for the Turangawaewae resolutions, to confirm the opinions given to you on behalf of claimants on 18 September, to elaborate on matters following the full Council hui, and to express our sincerity in seeking a fair solution.

Council willingness to engage

The Maori Council remains steadfast in its desire to support good faith negotiations with you on all matters relating to the water claims. We believe that in the spirit of goodwill which is the hallmark of the Treaty, a just and prompt resolution, with minimum delay to the share sales, and with good outcomes for both Maori and the country, is achievable.

It follows that we do not see Court proceedings as the best outcome but as something that we must strive to avoid. We feel that a Court outcome does not fit with the national image built up over many years, largely as a consequence of Maori Council activity, where Maori and the Crown work together to find mutually satisfactory solutions.

We understand you are reluctant to engage with the Council because you prefer to work with Iwi Leaders alone. We do not wish to compromise the quality of the relationship between government and Iwi Leaders but the Council and the several co-claimants and other hapu and iwi who support the Council's involvement, have come to the Council because they feel that either they are not represented, or their concerns for property rights are not represented, in those discussions. While they do not seek a national settlement they seek a national framework by which their proprietary interests may be equitably and consistently resolved at a local level.

The Council is also of the view that it has a right to speak with you on the water claim. The authority is from three sources:

- **Tikanga a Ture:** The Council has the authority of a statute enabling it to so engage, there are judicial determinations supporting that view, and there is now a current finding of the Tribunal that the Council should be engaged along with Iwi Leaders.
- **Tikanga Maori:** The Council has the authority of particular claimants and now of two national hui which presume that both Iwi Leaders and the Council will be involved. The first is the Government-arranged hui at Kilbirnie on 6 August, of which you are informed, involving about 200. The second, as summonsed by King Tuheitia at Turangawaewae, is said to have involved about 1000. Both hui recognised that the Council should be engaged. However, the process has been refined by the larger, Turangawaewae hui. The negotiators are to be appointed by national figures from both Council and Iwi Leaders (as well as others).

- Tikanga a te Ao: The Council relies also on the UN Declaration on the Rights of Indigenous Peoples by which indigenous peoples are entitled to be dealt with through institutions and representatives of their own choosing.

If you think there are impediments to these views we would be pleased to consider them with you.

Shares Plus process and outcome

Introduction

On the Shares Plus programme we will comment in turn on the scheme and your perceptions of it, on the process and our perception of the need, with respect, for a better one, and finally, our opinion that a government finding that Shares Plus won't work, as government has intimated, does not resolve the problem but highlights the need to find another scheme which will provide the necessary protection for hapu and iwi.

The scheme

We think there could be good prospects in the Shares Plus scheme. If a framework for proprietary interests cannot be sooner resolved we must try to make Shares Plus work because it may not be easy to find another that allows for early sales while preserving rights and providing commercial redress.

You consider that special classes of shares are contrary to the national interest but we think they are quite common overseas, especially for companies utilising natural resources, and that a special class of inalienable share for indigenous peoples with customary, resource interests, holds promise as a means of recognising indigenous peoples' interests in ancestral waters as a matter of national significance.

We understand you to say that every form of rights recognition can be met without Shares Plus but we think special shares may provide a form of recognition in a way which no other form of relief can do in the case of those entities that take their value from Maori water resources.

You say the right for a special class of shares to make management and strategic direction decisions would not work in practice but that does not seem to us to align with your support for co-management regimes affecting resource use controls. We consider also that through its continued ownership of 51% of the shares the Crown can provide valuable support for the special class shareholders.

You are concerned that share plus arrangements will lower the share price but equally the arrangements may attract ethical investors who would not otherwise be interested.

You say the Crown should bear the obligations of the Treaty rather than the companies and we agree, but that highlights the need for solutions to be put in place before the sales.

You say that selling shares without Shares Plus is not a Treaty breach but that is not the problem in our view. The problem is that, as the Tribunal has found, there is a Treaty breach if there is not some form of commercial rights recognition in place before the sales proceed.

You say the matter can be dealt with by submissions from hapu and iwi, selected by you, but we consider that they must first have the capacity to address this complex issue with you. For that they need legal and commercial advice. Also, in determining the hapu and iwi to

deal with, there can be no determination of those likely to be affected without prior disclosure of likely future projects. There are hapu and iwi associated with the Council who are likely to be affected by future projects, as power companies have already spoken with them.

We do not claim to have the answers and do not relish engaging in point scoring. We make these submissions purely to highlight the need for a fairer approach to dealing with the matter. For an even playing field we suggest that you fund our advisors to work with yours to search for practical outcomes based upon the shares plus approach. Perhaps solutions will not be found but we think we must try.

For now, the Council agrees with your observations of 6 September that the Council does not itself have a direct interest in the water resources as the interest lies with hapu and iwi. We also do not envisage a national settlement (but a national framework for local settlements). However, in terms of its statutory authority the Council has an interest in maintaining a consistent policy approach that is fair and beneficial as between Maori and as between Maori and the Crown.

Terms of engagement

The Council has serious concerns about the conduct of the consultations. The Council's view is that the terms of engagement should not be set unilaterally but should be agreed. The government consultation, in our view, has disturbing elements of pre-determination, invites submissions rather than dialogue, and government adjudication rather than a search for an agreed outcome. There are other issues as well over which hapu have direct interests and the extent to which other hapu are prospectively affected. These were set out in the lawyer's letter of 18 September. However, the primary issue on process is the structural one considered above.

Having regard to these concerns we are in sympathy with the Tainui leaders and others who are reported to have boycotted the opening consultation meeting on 18 September. As we see it they are not saying 'no' to dialogue and co-operation, but 'no' to the lack of dialogue and co-operation in the government's process. We must also advise that our co-claimants take the same view. In the spirit of co-operation they may choose to attend the consultation hui but on their behalf we make it clear that they do so not to acquiesce in the process but to protest it.

If Shares Plus does not work another solution is needed

Finally, after a careful analysis of the issues, of your letter of 6 September, and the Tribunal's report, the Council considers that the government's perceived shortcomings in the Shares Plus scheme, if correct, highlight the need for an alternative arrangement to protect the commercial interests of the affected hapu and iwi before sales proceed. We do not read the Tribunal interim report as saying that all is well if Shares Plus does not work, but as saying that in that event, some other protective scheme is needed. However, we acknowledge that the Tribunal's report is an interim report and consider therefore that the complete report may need to be reviewed before a final conclusion is drawn.

Most of all however, Shares Plus is a palliative to enable the sales to proceed while a framework for recognising residuary proprietary rights is worked out. There is more to be had, in our view, in an early determination of a framework for the recognition of Maori proprietary interests prior to sales, and prior to individual iwi negotiations.

The recognition of proprietary interests

We therefore ask for your earnest consideration of the resolutions at Turangawaewae which we think, expressed a helpful view on the way forward. These proposed that a framework of proprietary rights be settled:

- a) before the sale of shares; and
- b) before Government enters into negotiations with hapū and iwi.

Turangawaewae also proposed a process by which the Maori representatives could be settled.

We think that with goodwill and mutual respect, a broad framework can be agreed within a reasonable timeframe, perhaps equivalent to the time needed to work out a temporary, protective scheme, by Shares Plus or otherwise. We also think it is necessary. The sale of shares before Maori rights have been settled creates a body of shareholders opposed to any settlement with Maori in the future because it could affect the value of their shares. In addition, hapu and iwi are entitled to know what their rights are before they enter negotiations with regard to them.

Our reply to you is not made in a spirit of confrontation but out of a sincere concern, which we trust you share, for a just and early resolution of the issues.

Noho ora mai



pp Maanu Paul and Hon Sir Edward Durie
Co-chairs New Zealand Maori Council.

