# The Treasury

## Mixed Ownership Model for Crown Commercial Entities: Shares Plus Proposal Information Release

## 21 December 2012

## Release Document

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9(2)(a) - to protect the privacy of natural persons, including deceased people

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9(2)(f)(ii) - to maintain the current constitutional conventions protecting collective and individual ministerial responsibility

9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials

9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions

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9(2)(i) - to enable the Crown to carry out commercial activities without disadvantage or prejudice, or

Not relevant.

Where information has been withheld a reference to the applicable section of the Official Information Act has been made, as listed above.

In preparing this Information Release, the Treasury has considered the public interest considerations in section 9(1) of the Official Information Act.

Acting Minister of Finance
Minister for State Owned Enterprises

Chair
Cabinet

**MIGHTY RIVER POWER INITIAL PUBLIC OFFERING: WAITANGI TRIBUNAL'S INTERIM REPORT (STAGE ONE, WAI 2358)**

## Proposal

1. This paper asks Cabinet to decide whether to proceed with the Mighty River Power initial public offering planned for 2012 or pause and consult with Māori on the "shares-plus" remedy as recommended by the Waitangi Tribunal.

## Executive Summary

2. The Waitangi Tribunal has issued its interim report on stage one of its inquiry into fresh water and geothermal rights. This paper focuses on the issues that arise from the report for the government share offers.

3. Broadly, the claimants asked the Tribunal to recommend the government halt the share offers until the government had put in place appropriate recognition of their underlying rights.

*[Withheld under s9(2)(h)]*

5. The Tribunal found that Māori have residual property rights in water that should be recognised where possible and compensated where not. The Tribunal dismissed all but one of the claimants' arguments for why the share offers should stop. This is a good outcome for the Crown. In particular, it has accepted that the Crown will still be able to recognise claimants' rights and to provide almost all forms of redress after a sale, and that shares are not an appropriate form of redress.

6. However, the Tribunal found that one form of redress – which it terms "shares-plus" – would not be available after sale.

7. “Shares-plus” is not well defined by the Tribunal but would involve a greater degree of control over the companies, through a combination of special shares, revised constitutions and shareholders agreements, than shares alone would provide. Because “shares-plus” would not be available after sale, the Tribunal finds that the Crown must consult with Māori on this form of redress before moving ahead with the sales. Not to do so would be a breach of the Treaty.

8. Analysis by the Crown of the “shares-plus” proposal indicates that it does not provide any form of redress that cannot be provided equally well in other ways. In addition, some aspects of “shares-plus” are not workable under company law, or would significantly devalue the companies and compromise their ability to operate efficiently. *[Withheld under s9(2)(h)]*

9. If Ministers chose not to consult, legal action, in the form of interim orders to stop the sales, would certainly follow a decision to proceed, probably within a matter of days of any announcement.

*[Withheld under s9(2)(h)]*

12. The Crown and the company are operationally ready to commence the sale of MRP. Postponing the first IPO is not costless. It would delay the achievement of the government’s debt objective and create additional direct programme costs of some $7m. In addition the government would give up one of only four slots available for floats ahead of November 2014. Thus there would only be one slot for each of the three electricity state owned enterprises, which reduces flexibility and leaves the programme as a whole more vulnerable to other risks, such as a downturn in markets or dip in performance by one company.

13. The Government has consistently maintained there is not a nexus between the share offers programme and the Crown’s ability to provide recognition of legitimate Maori rights and interests in freshwater. *[Withheld under s9(2)(g)(i) and s9(2)(f)(iv)]*

14. This paper seeks Cabinet's decision on whether to proceed now with no consultation, or to delay the MRP IPO until 2013 and consult on "shares-plus".

**Background**

15. Planning for the Mighty River Power initial public offering (MRP IPO) has been subject to Cabinet's final decision to proceed in light of the Waitangi Tribunal's report on stage one of the *National Fresh Water and Geothermal Resources Claim* (Wai 2358) [CAB Min (12) 29/8].

16. The Tribunal released its report on stage one on Friday 24 August. The report is framed as interim and truncated with a full version to be issued later this year. However, the Tribunal notes that the substance of its findings and recommendations for stage one will not be altered in the final version, meaning the content of this report is final.

17. The report deals with the following issues posed for stage one of its inquiry:

a. What rights and interests (if any) in water and geothermal resources were guaranteed and protected by the Treaty of Waitangi?

b. Does the sale of up to 49% of shares in power generating SOE companies affect the Crown's ability to recognise these rights and remedy their breach, where such breach is proven?

c. Is such a removal of recognition and/or remedy in breach of the Treaty?

d. If so, what recommendations should be made as to a Treaty-compliant approach?

*[Withheld under s9(2)(h)]*

**The Waitangi Tribunal's report (Crown Law's analysis follows)**

19. In relation to the issues for stage one, the Tribunal said that Māori have residual proprietary interests in particular water bodies:

a. These are localised, not generalised interests (i.e. the rights belong to those particular iwi/hapū who have water bodies in their rohe)

b. These interests include commercial/development rights, and

c. Where the recognition of these rights is not possible, or where these rights have been breached in the past, compensation/redress for the loss of those rights including their commercial value is appropriate.

20. The Tribunal accepted the Crown's arguments and assurances that:

a. The sale of shares will not prevent the Crown from providing appropriate rights recognition post-sale or deter the Crown doing so (i.e. there is no "chilling effect" as alleged by the claimants). The Tribunal recorded its view that the honour of the Crown was engaged by the Crown's assurances on these matters

b. The Crown will be able to provide almost all forms of commercial rights remedy/redress after the sale (save for their finding on "shares-plus") whether it be modern water rights (where Māori grant or own water permits for hydro and geothermal power), a royalties regime, joint ventures, or some other form of commercial benefit, and

c. Shares are not a suitable proxy for the recognition of Māori rights and interests in water.

21. However, the Tribunal found that:

a. The sale of up to 49% of shares in power generating SOE companies does affect the Crown's ability to recognise these rights and remedy their breach (where such breach is proven) if the Crown fails to first preserve the "shares-plus" remedy proposed by the Tribunal. ("shares-plus" is discussed extensively later in this report.)

b. The removal of "shares-plus" would be a breach of the Crown's Treaty duty to actively protect Māori rights to the fullest extent reasonably practicable (and its Treaty duty to provide remedy or redress for well-founded Treaty claims), and

c. The recommended Treaty-compliant approach was an urgent national hui where the Treaty partners negotiate a solution with regard to MRP, Meridian Energy and Genesis Energy prior to the sale proceeding.

22. The Tribunal did not provide any detail as to what "shares-plus" is, rather 'matters of detail for the framework of rights recognition' would be addressed in stage two, but it did say "shares-plus" would be characterised by a shareholding in a MOM company coupled with enhanced financial rights and/or rights of control in relation to the company. This could include either the provision of shares or special classes of shares each of which would be coupled with amended company constitutions or shareholders agreements.

23. In reaching this view, the Tribunal recognised the claimants' acceptance that shares would not suffice "as even proxy recognition" of their rights in waterways within their rohe:

> *A shareholding, however, in conjunction with a real and meaningful stake in the company, appeared to the claimants to be a much closer approximation to recognising Māori rights*.

24. The Crown's position, accepted by claimants, was that shares are an unsuitable form of redress/rights recognition for many reasons and that there is no single remedy for recognising Māori rights and interests in water. The Crown's view is that the preferred focus should instead be on integrating recognition of Māori interests into the appropriate places in the overall water management system (such as regional decision-

making processes, water quality measures, and allocation models). The government has processes in train for this through the Fresh Start for Fresh Water programme but Ministers have not yet considered detailed options for the recognition of Māori interests. These discussions with the Freshwater Iwi Leaders will unfold over the next several months [Withheld under s9(2)(f)(iv) & s9(2)(g)(i) One critical issue to work through in this process will be how to accommodate Māori aspirations with regard to direct access to the water resource and/or obtaining a less direct economic interest in and benefit from the use of water.

25. Although the Tribunal accepted the Crown's assurances that commercial rights could form part of a future package to recognise or redress Māori rights and interests in freshwater at some point in the future, it took the view that in the absence of certainty that "any other commercial rights recognition will actually come to pass" and that the opportunity for a "shares-plus" remedy is only available pre-sale, the Crown must delay the sale while an 'accommodation' is reached with Māori:

> *The Crown's Treaty duty in this case is the active protection of the Māori rights* [which includes commercial and development rights in freshwater] *to the fullest extent reasonably practicable, and to provide remedy or redress for well-founded Treaty claims.*
> *…*
> *If the Crown proceeds with its share sale without first creating an agreed mechanism to preserve its ability to recognise Māori rights and remedy their breach, the Crown will be unable to carry out its Treaty duty to actively protect Māori property rights to the fullest extent reasonably practicable. Its ability to remedy well-founded claims will also be compromised.*
> *…*
> *We recognise the Crown's view that pressing ahead with the sale is urgent. But to do so without first preserving* [this] *ability will be in breach of the Treaty.*

26. In putting forward this form of rights recognition/redress, the Tribunal did note the concept had some limitations, being:

a. It only goes "some way" to meeting the Crown's obligations (i.e. in and of itself it would not meet the Crown's Treaty obligations, more is needed)

b. Not all affected Māori would take it up (and even if they did, they may only accept it in so far as it is tied to other commercial forms of rights recognition or redress), and

c. Not all affected Māori participated in the inquiry (meaning not all affected Māori would accept the Tribunal's findings and recommendations. For example, Ngāi Tahu explicitly asked the Tribunal "not make any findings or recommendations extending to, or affecting resources within, the Ngāi Tahu Takiwā as part of [its] inquiry").

27. The Tribunal recommended "shares-plus" should be the subject of discussion between the Crown and Māori and that it was for the Treaty partners to reach agreement on precisely what it might involve and how it would fit into a package of rights recognition and redress:

*We recommend that the Crown urgently convene a national hui, in conjunction with iwi leaders, the New Zealand Māori Council, and the parties who asserted an interest in this claim, to determine a way forward.*

*...*

*In the national interest and in the interests of the Crown-Māori relationship, we recommend that the sale be delayed while the Treaty partners negotiate a solution to this dilemma.*

*In our view, the scope of such negotiations will need to be limited if a timely solution is to be found. It would not be possible to devise a comprehensive scheme for the recognition of Māori rights in water in the time available. But it should be possible, with good faith endeavours on both sides, to negotiate with all due speed an appropriate scheme in respect of these three power-generating companies* [Mighty River Power, Meridian Energy and Genesis]. *In the narrowest view, the subject for discussion is shares and shareholders' agreements in Mighty River Power. That could include discussion of the use of shares for a number of settlement or rights recognition purposes, where there is not a nexus to rivers utilised by Mighty River Power...As we see it, it would be preferable to take a broader approach in this way, and also to consider other commercial options such as royalties at the same time, and perhaps the opportunity to write such matters into the company constitutions...Undertakings could perhaps be negotiated about future forms of rights recognition.*

28. The Tribunal concluded their report by allowing leave for any parties to return for more detailed recommendations or assistance with discussions if required.

*[Withheld under s9(2)(h)]*

*[Pages 7-12 withheld under s9(2)(h)]*

[Withheld under s9(2)(h)]

**Commercial considerations**

74. Delaying the initial IPO in the programme from 2012 to the first half of 2013 would have several commercial implications:

*The government's debt objectives*

a. When the government was elected in 2008, the full scale of the global financial crisis was only just becoming apparent. At that point, the core Crown net debt was roughly $10 billion. Today it is just over $50 billion, and it is forecast to reach $71 billion in 2015/16; just under 30% of GDP. One of the government's main objectives is to try to contain that debt, to increase savings, and get the country through what is arguably the worst economic crisis in 100 years. The mixed ownership model programme is part of a suite of policies directed at controlling debt.

*Opportunity cost of delay in receiving proceedings*

b. A delay of six months for the first IPO in the programme would effectively delay the whole programme by at least six months, and more if future events delay the programme further. This will defer receipt of the proceeds from the programme, thus delaying achievement of the government's debt reduction objective.

*Costs of sale*

c. Once a decision to delay is made, most of the remaining costs of sale (in particular, advertising, printing, etc.) can be put on hold and re-activated at the appropriate time next year. However, there there will inevitably be some rework required, including the need to prepare new forecasts, refresh the due diligence and offer document detail, undertake an audit of the half-year financial statements, and retainers for some of the advisors. Quantifiable cost could amount to some seven million dollars.

*Fewer IPO "slots" available in this term of Government*

d. Market capacity dictates that it is only practical to complete one sale of the size of these companies per half year. Delaying the first IPO to 2013 would mean that there would be one fewer slot available for IPO transactions prior to the next election – two in 2013 and one in 2014. This makes the programme less flexible and therefore more vulnerable to a market downturn or a dip in a company's performance.

*[Withheld under s9(2)(b)(ii), 9(2)(i) & 9(2)(g)(i)]*

**Other policy processes**

*75.* The Government has consistently maintained there is not a nexus between the share offers programme and the Crown's ability to provide recognition of legitimate Maori rights and interests in freshwater.

*[Withheld under s9(2)(g)(i) & 9(2)(f)(iv)]*

[Withheld under s9(2)(g)(i) & 9(2)(f)(iv)]

## Operational readiness

76. Treasury and its advisors will be operationally ready to implement the pre-registration from 17 September if required. A substantial volume of work has been completed and tested with regulatory authorities as well as focus groups. There are only a small number of decisions for the delegated group of ministers to take before the IPO can proceed.

77. In terms of the high state of readiness, the offer documents, comprising the prospectus and investment statement is substantially complete. The FMA has already reviewed a draft and provided feedback.

78. The due diligence processes within the company and the Crown have been comprehensive and will continue until the shares are transferred to the new shareholders. Extensive advisory capability has been part of the processes to ensure that the risks of an IPO in relation to Mighty River Power are identified, assessed and disclosed.

79. The sales syndicate has been selected and is meeting on a weekly basis to prepare itself for marketing the IPO. In many instances they are already preparing the market for IPOs through their own advertising and broking networks.

80. The marketing programme has been developed over the past six months and includes television commercials which will be ready by 17 September as well as material for digital and print media. Pamphlets for the 500 or so locations throughout New Zealand from where information will be available are in the final stages of completion.

81. The website and data management system for pre-registration is complete. It is a proven technology solution and has been used in over 40 transactions. The technology is integrated with the call centre operations and the management of a call centre is in place.

82. As a company, Mighty River Power is in a high state of readiness for the IPO. Its board and management have placed considerable effort into reviewing the operations of the company and preparing the business for IPO. Shareholding ministers have met with the chair and chief executive throughout the year to ensure the company is ready.

83. The timelines in this paper show pre-registration commencing from 3 October, the fact that the implementation is will be ready to go 3 weeks prior if required demonstrates the extent to which the implementation processes are in place for an IPO in 2012.

## *Consultation*

A CAB 100 is attached to this paper setting out the consultation that has occurred in relation to this paper.

84. Crown Law and David Goddard QC provided the legal advice contained in this paper. The Ministry for the Environment and the Office of Treaty Settlements have been consulted in the development of this paper. The Department of Prime Minister and Cabinet has been informed.

**Financial and other implications**

85. A deferral of the IPO would have a number of financial implications as set out in paragraph 74. Minor costs would also be incurred if the government undertakes a consultation process. We note however that deferral or consultation (or both) may be required under either of the options proposed in this paper.

86. The proposals in this paper have no, gender, disability, human rights, or legislative implications. A regulatory impact statement is not required.

**Publicity**

87. The Prime Minister, along with Ministers Ryall and Finlayson, will address media at the Post-Cabinet briefing today and outline the decisions made.

88. If Cabinet decides to proceed with the Mighty River Power IPO in 2012:

a. The Prime Minister will outline the rationale for the decision, taking care to explain how the Tribunal findings have been thoroughly reviewed, that legal advice has been sought, and that Cabinet has had due regard for its obligations as a Treaty partner when making these decisions

b. The Prime Minister will confirm that the next step in the process is to remove MRP from the SOE Act, and this will be undertaken on Monday 10 Sept (after approval from Cabinet and via the Order-in-Council process)

c. *[Not relevant to request]*

89. If Cabinet decides to undertake consultation with Māori and commence the IPO in 2013:

a. The Prime Minister will announce the government's decision to execute the MRP IPO in March-June 2013, subject to market conditions

b. The Prime Minister will indicate the government's view that "shares-plus" does not provide unique or practical rights recognition or redress of Māori rights and interests in water but will announce a consultation process to seek Māori views on this position

c. *[Not relevant to request]*

90. Communications material has been drafted for both scenarios, including media statements and Q&As. *[Not relevant to request]*

91. We do not recommend the public release of this Cabinet paper.

## Recommendations

92. We recommend that Cabinet:

1 **Note** planning for the Mighty River Power initial public offering (MRP IPO) has been subject to Cabinet's response to the Waitangi Tribunal's report on stage one of the National Fresh Water and Geothermal Resources Claim (Wai 2358) [CAB Min (12) 29/8];

2 **Note** the Tribunal provided its interim report on 24 August 2012, and that it found that Māori do have residual proprietary interests in particular water bodies:

2.1 These are localised, not generalised interests (i.e. the rights belong to those particular iwi/hapū who have water bodies in their rohe)

2.2 These interests include commercial/development rights, and

2.3 Where the recognition of these rights is not possible, or where these rights have been breached in the past, compensation/redress for the loss of those rights including their commercial value is appropriate.

3 **Note** the Tribunal accepted the Crown's arguments and assurances that:

3.1 The sale of shares will not prevent the Crown from providing appropriate rights recognition post-sale or deter the Crown doing so (i.e. there is no "chilling effect" as alleged by the claimants). The Tribunal recorded its view that the honour of the Crown was engaged by the Crown's assurances on these matters,

3.2 The Crown will be able to provide almost all forms of commercial rights remedy/redress after the sale (save for their finding on "shares-plus") whether it be modern water rights (where Māori grant or own water permits for hydro and geothermal power), a royalties regime, joint ventures, or some other form of commercial benefit, and

3.3 Shares are not a suitable proxy for the recognition of Māori rights and interests in water.

4 **Note**, however, that the Tribunal also found that:

4.1 The sale of up to 49% of shares in power generating SOE companies does affect the Crown's ability to recognise these rights and remedy their breach (where such breach is proven) if the Crown fails to first preserve the "shares-plus" remedy proposed by the Tribunal

4.2 The removal of "shares-plus" would be a breach of the Crown's Treaty duty to actively protect Māori rights to the fullest extent reasonably practicable (and its Treaty duty to provide remedy or redress for well-founded Treaty claims), and

4.3 The recommended Treaty-compliant approach was an urgent national hui where the Treaty partners negotiate a solution with regard to MRP, Meridian Energy and Genesis Energy prior to the sale proceeding.

5 *[Withheld under s9(2)(h)]*

6

7

8

9 **Note** that the "shares-plus" recommendation is neither unique nor practical as a form of redress and that its benefits can be provided post IPO;

10 *[Withheld under s9(2)(h)]*

11 **Note** that the Crown and the MRP are operationally ready to commence the sale of MRP on 17 September;

12 *[Withheld under s9(2)(h)]*

13

14 **Note** that undertaking consultation (of a four to six week period) prior to the MRP IPO would preclude an IPO in 2012;

15 **Note** that delaying the MRP IPO carries commercial and fiscal consequences including:

15.1 a delay of six months to the whole programme with increased risk to the Crown from reducing the available slots from four to three, and delay to the government reaching its debt objectives, and

15.2 associated cost to the Crown in the region of an additional seven million dollars in preparation costs;

16 **Either:**

16.1 **Agree** to proceed with the MRP IPO as planned in 2012 and communicate the government's view that "shares-plus" does not provide a unique or practical form of rights recognition or redress; and

16.2 **Instruct** PCO to draft the commencement order necessary to remove MRP from the State Owned Enterprises Act and add it to the Public Finance Act;

**Or:**

16.3 **Agree** to proceed with the MRP IPO in March-June 2013, and undertake a consultation with Māori on "shares-plus" concluding on 5 October 2012; and

16.4 **Delegate** authority to the Minister of Finance, Minister of SOEs, and Attorney-General to determine the details of the consultation.

Hon Steven Joyce
**Acting Minister of Finance**

_____/_____/2012

Hon Tony Ryall
**Minister for State Owned Enterprises**

_____/_____/2012

Consultation on Cabinet and Cabinet Committee Submissions

| **Certification by Department:** | |
|---|---|
| Guidance on consultation requirements for Cabinet/Cabinet committee papers is provided in the CabGuide (see Procedures: Consultation): http://www.cabguide.cabinetoffice.govt.nz/procedures/consultation | |
| **Departments/agencies consulted:** The attached submission has implications for the following departments/agencies whose views have been sought and are accurately reflected in the submission:<br>The legal advice in this paper was prepared by Crown Law and David Goddard QC. Ministry for the Environment and the Office of Treaty Settlements have been consulted. | |
| **Departments/agencies informed:** In addition to those listed above, the following departments/agencies have an interest in the submission and have been informed:<br>DPMC | |
| **Others consulted:** Other interested groups have been consulted as follows: | |
| ***Name, Title, Department:*** Chris White, Manager, Commercial Transactions, Treasury | |
| **Date:**<br>/ / | **Signature** |

| **Certification by Minister:** | |
|---|---|
| Ministers should be prepared to update and amplify the advice below when the submission is discussed at Cabinet/Cabinet committee. | |
| **The attached proposal:** | |
| *Consultation at Ministerial level* | ☐ **has been** consulted with the Minister of Finance *[required for all submissions seeking new funding]*<br>☐ **has been** consulted with the following portfolio Ministers:<br>☐ **did not need** consultation with other Ministers |
| *Discussion with National caucus* | ☐ **has been** or ☐ **will be** discussed with the government caucus<br>☐ **does not need** discussion with the government caucus |
| *Discussion with other parties* | ☐ **has been** discussed with the following other parties represented in Parliament:<br>☐ Act Party ☐ Māori Party ☐ United Future Party<br>☐ Other [specify]<br>☐ **will be** discussed with the following other parties represented in Parliament:<br>☐ Act Party ☐ Māori Party ☐ United Future Party<br>☐ Other [specify]<br>☐ **does not need** discussion with other parties represented in Parliament |

| **Portfolio** | **Date**<br>/ / | **Signature** |
|---|---|---|

If this form covers two pages ensure that both certification sections are completed and attached at the back of the Cabinet/committee submission